

INTRODUCTION

The introduction of Bill C-51 by the Conservative government in January of 2015 sparked several political, legislative, judicial, and academic critiques of the proposed legislation, and its potentially harmful impact on the livelihood of all Canadians. In February 2015, then Liberal Party Leader Justin Trudeau addressed some of these concerns - namely, the necessity of creating an oversight body that would conduct appropriate and vital monitoring of the newly expanded powers and exercise thereof of CSIS, provided for under the Bill - as well as exhibit desired transparency¹. While some scholars have held that the Security Intelligence Review Committee (SIRC), the body to which CSIS is accountable since 1984, effectively embodies this role - its lack of increase in power and resources complimenting the newly expanded powers of CSIS makes them ill-equipped to protect the interests of all Canadians, and moreover, to fulfill the role to which Trudeau so strongly bound himself to.

In 2012, the Office of the Inspector General (IG) was disbanded. The IG's previous function consisted in providing an annual classified report on CSIS' operational activities for the Minister of Public Safety². Bill C-51, fundamentally, would not create, nor reinstate, a like-position. As a result, my paper will speak to the necessity of implementing an effective oversight body, and moreover, the subtle but significant difference between "review" vs. "oversight" - which is increasingly necessary to identify, as well as implement.

To begin, I would like to offer an overview of the current Liberal government's proposal for an oversight body from the beginning of their campaign until now, as well as the state of this body as it presently stands. In this analysis, I seek to address some of the concerns raised

¹Liberal Party, "Remarks by Justin Trudeau on the Anti-terrorism Act", *Liberal Party of Canada* (February 2015), online: Liberal Party of Canada <<https://www.liberal.ca/remarks-by-justin-trudeau-on-anti-terrorism-act/>>.

² Mendes, Errol P., "Seminar on Privacy, Security, Human Rights and the Rule of Law", December 2015, *Materials prepared by Errol P. Mendes*, page 28.

amongst different political, academic, and rights-based groups with the current Bill - and how a coherent, and obvious outcry for an oversight body is prevalent.

Thereafter, I would like to address what could be considered to be the ‘spark’ of a recognizance of the difference between review and monitoring. Notably, in 2015, Justice Major called for the implementation of what he dubbed a “National Security Advisor” whose role would be to provide the much-needed oversight Bill C-51 presently lacks³. As will be explored in further detail below, this type of body could be effective in providing independent oversight over the actions of CSIS - with some minor modifications, and necessary scrutiny.

Finally, to aid in the pursuit of effectively identifying what a potential oversight body could look like, it is necessary to consider active and effective independent oversight bodies overseeing national security measures in other commonwealth countries today. Specifically, a comparative analysis of the current systems in Australia, as well as Great Britain, offer noteworthy lessons and pathways to what an effective body in Canada should, or could look possibly like.

Conclusively, in my personal view, I would like to propose the following amendment to Bill C-51: first, the creation and implementation of an oversight body consisting of a hybrid model, which combines both a **National Security Advisor**, who would embody a role similar to that of the previous IG, but moreover, coordinate with all heads of all intelligence agencies as is currently conducted in the United Kingdom. Second, the establishment of a Statutory Committee, as opposed to the present “Committee of Parliamentarians” Prime Minister Justin Trudeau has created. Taken together, these two bodies would provide for **collective decision-making**, and pave the way for **effective oversight**.

³ Judge Major on NS Advisor, online: <<https://www.youtube.com/watch?v=jJs0cYPXGeg&feature=youtu.be>>.

ANALYSIS

The difference between “review” and “oversight” has too often been overlooked and understated. Essentially, “oversight” consists of command and control over operations (in other words, “real-time/close to real-time” governance) whereas “review” concerns after-the fact, retroactive auditing of operations measured against specific, established criteria (for example, compliance with the law, policy or mandates)⁴. In Canada, SIRC is the body responsible for performing review of the activities of CSIS. Ultimately, SIRC provides findings and recommendations to Parliament regarding past CSIS conduct, and reports to the government. This reality is extremely problematic where CSIS’ powers have been expanded under Bill C-51, and contrastingly not the resources or powers of SIRC. At the present time, SIRC may only continue to examine past activities of CSIS - consequently, it does not conduct any “real-time monitoring” to ensure that those activities are in accordance with independent expectations, or fall within the parameters that have been set. In this light, there is no current mechanism in place for fully transparent oversight of what is done for Canadians or against Canadians, by intelligence and security agencies.

Part 4 of Bill C-51 is that which speaks to CSIS’ newly expanded powers. Notably, Part 4 amends the Canadian Security Intelligence Service Act (“the *CSIS Act*”) to permit CSIS to take measures to “reduce threats to the security of Canada”. With respect to review, Part 4 of the Bill creates novel reporting requirements for CSIS and requires SIRC to review the Service’s performance in taking such measures. The provisions applicable to review bodies arising under the Bill consist of:

C-51: Review Bodies

⁴ Forcese, Craig and Roach, Kent and Sherriff, Leah, Bill C-51 Backgrounder #5: Oversight and Review: Turning Accountability Gaps into Canyons? (February 27, 2015), online: <<http://ssrn.com/abstract=2571245>>.

12.1: Measures to reduce threats to the security of Canada:

- (1) If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.
- (2) The measures shall be reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures and the reasonable availability of other means to reduce the threat warrant.
- (3) The Service shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1.⁵

In comparison, a limited number of activities are excluded from the application of these new powers as identified in 12.1, and are identified thereafter, in 12.2:

12.2: Prohibited conduct⁶

- (1) In taking measures to reduce a threat to the security of Canada, the Service shall not cause, intentionally or by criminal negligence, death or bodily harm to an individual; (b) wilfully attempt in any manner to obstruct, pervert or defeat the course of justice; or (c) violate the sexual integrity of an individual.

The limited prohibitions set out in the above-noted provision enact CSIS with broad and unclear powers. Moreover, there is a distinct absence of new or improved oversight and review mechanisms for agencies other than CSIS.

With respect to SIRC, s. 50 of Bill C-51 would amend s. 38 of the *CSIS Act* by adding the following:

Review of measures

Section 38 of the Act [CSIS Act] is amended by adding the following after subsection (1)⁷:

⁵ Bill C-51, *Anti-terrorism Act, 2015*, 2nd Sess, 41st Parl, 2015, clause 42, proposing new s.12.1 to the *CSIS Act* [Bill C-51].

⁶ Bill C-51, clause 42, proposing s.12.2 to the *CSIS Act*.

⁷ Bill C-51, clause 50, amending s.38 to the *CSIS Act*.

(1.1) In reviewing the performance by the Service of its duties and functions the Review Committee shall, each fiscal year, review at least one aspect of the Service's performance in taking measures to reduce threats to the security of Canada.

This minor amendment is the only provision in C-51 that refers to any form of "review". In essence, it amends SIRC's reporting requirements by necessitating an annual review of CSIS' performance in "at least one aspect." This language is obviously problematic - where SIRC acts as the sole body charged with review, obliging them to be accountable for review in "at least one aspect" of the Service's performance has a great potential to yield partial audits of CSIS' newly enacted kinetic powers, as well as their activities as a whole.

The Liberal Government

The newly formed Liberal government on its website has stated that they would create an "all-party committee to monitor and **oversee** the operations of every government department and agency with national security responsibilities."⁸ In February 2015, then Liberal Party Leader candidate Prime Minister Justin Trudeau addressed the speaker, and in his submissions, held that his party would be bringing forward amendments to narrow and clarify the "overbroad" scope of the new powers that have been a "source of despair for many Canadians" under C-51⁹. In addressing the role of SIRC, Justin Trudeau brought clarity to the Conservative government's perception of the body, and stated, "SIRC is a review body and it does not fulfill an oversight role. The difference between the two is *not merely a quibble over language*. The two words are *not synonymous*. In fact, SIRC states so publicly itself" (and drew reference to SIRC's annual

⁸ Liberal Party, "National Security Oversight", *Liberal Party of Canada* (2015), online: Liberal Party of Canada <<http://www.liberal.ca/realchange/national-security-oversight/>>

⁹ *Supra* note 1.

report: “an oversight body looks on a continual basis at what is taking place inside an intelligence service and has the mandate to evaluate and guide current actions in “real time”).¹⁰

According to Trudeau, the solution could be found in examples from partners of the Five Eyes Allies (“Five Eyes”). Specifically, Trudeau referred to Great Britain, which has established a “working and viable oversight body that we can emulate here in Canada.”¹¹ This is the Intelligence and Security Committee (ISC) that will be explored in further detail below. Ultimately, the ISC consists of a committee of members of parliament (similar to the proposition on Justin Trudeau’s website) that has been tasked with direct oversight of intelligence and security matters in the U.K., including the “expenditure, administration, policy and operations” of things like MI-5, MI-6, and the Government Communication Headquarters (GCHQ). This committee is also able to scrutinize work carried out by other parts of the U.K. intelligence community, including Britain’s Joint Intelligence Organization and the National Security Secretariat in the Cabinet Office, Defence Intelligence in the Ministry of Defence, and the Office of Security and Counter-Terrorism in the Home Office¹². “This is exactly the kind of committee we should be establishing here in Canada.”

The Liberal government then made the (then) **promising** proposition: “a committee composed of parliamentarians to provide appropriate oversight—and not just review—of the activities of various agencies, including CSIS, the Communications Security Establishment (CSE), the RCMP, and the Department of National Defence.” The government proposed that: first, members of the committee would be sworn to a lifetime oath of secrecy; second, the members would be unable to claim immunity based on parliamentary privilege with regard to the

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Intelligence and Security Committee of Parliament, “About the Committee” *Intelligence and Security Committee of Parliament* (November 2015), online: <<http://isc.independent.gov.uk/>>.

use of the communication of information that comes into their possession or knowledge as members of this committee; and third, that this committee should “not be a parliamentary committee, but a committee of parliamentarians”. Finally, in his submissions, Justin Trudeau drew reference to the fact that the Liberal government had previously, and unsuccessfully attempted to establish a national security committee in 2004 following the introduction of their Bill C-81. This recommendation was made again in 2009; after the Standing Committee on Public Safety and National Security reviewed Justice O’Connor’s report. The Conservative government did not follow through with either recommendation.¹³

The Current Liberal Government

Prime Minister Justin Trudeau released the mandate of the newly elected Minister of Public Safety and Emergency Preparedness, Ralph Goodale in November 2015. Justin Trudeau addressed Mr. Goodale’s special role in the following way: “To assist the leader of the government of the House of Commons in the creation of a statutory committee of parliamentarians (members of the House of Commons and Senate) with special access to classified information to review government departments and agencies with national security responsibilities.”¹⁴

“As Minister of Public Safety and Emergency Preparedness, your overarching goal will be to lead our government’s work in ensuring that we are keeping Canadians safe. In particular, I will expect you to work with your colleagues and through established legislative, regulatory, and Cabinet processes to deliver on your top priorities:

¹³ *Supra* note 8.

¹⁴ Government of Canada, “Minister of Public Safety and Emergency Preparedness Mandate Letter” *Prime Minister of Canada Justin Trudeau* (November 2015), online: <http://pm.gc.ca/eng/minister-public-safety-and-emergency-preparedness-mandate-letter>.

- Assist the Leader of the Government in the House of Commons in the creation of a statutory committee of Parliamentarians with special access to classified information to **review** government departments and agencies with national security responsibilities.
- Work to repeal, in collaboration with the Minister of Justice, the problematic elements of Bill C-51 and introduce new legislation that strengthens accountability with respect to national security and better balances collective security with rights and freedoms.”¹⁵

Despite alluding to the obvious, Justin Trudeau did not maintain his promise of February 2015. As is stated in clear sight, the Minister of Public Safety and Emergency Preparedness and the newly formed Committee of Parliamentarians are to conduct review, and not oversight. It is after-the-fact, auditory action.

In Mr. Goodale’s mandate, it is additionally essential to note that in highlighting review as a first priority, it is telling of where the newly formed Liberal government’s priorities lay. While it is an incremental step in terms of an extremely necessary and vital “safeguard” to the Bill, it is nevertheless noticeably inadequate. Finally, “agencies” (as identified above) does not directly refer to CSIS; as such, these bodies could encompass or refer to others, such as the CBSA. Not only does this continue to expand the lack of power necessary to conduct appropriate review, but moreover, it is extremely ambiguous and ineffective.

In a final word, it is important to note that “to strengthen accountability and better balance collective security with rights and freedoms” would and should include **oversight**.

Political Critiques

1. Ron Atkey – Adjunct Professor, York University; First Chair of SIRC

On March 12, 2015, Ron Atkey delivered a testimonial on Bill C-51 during the opening round of the House of Commons Standing Committee on Public Safety and National Security (SECU).

¹⁵ *Ibid.*

Similar to those views expressed above, Atkey drew reference to the extreme disparity between the expansion of CSIS' powers to conduct international and national activities to fight terrorism, "while leaving the watchdog frozen in time."¹⁶ Noticeably, Atkey highlighted concerns regarding the extent of independent review of many other important Canadian intelligence agencies, extending his critique to the RCMP, CSEC, CBSA, Citizenship and Immigration Canada, the Department of Foreign Affairs, Transport Canada, and various others. While Atkey criticized the lack of review powers provided to all of these bodies under the Bill, in a final word, and perhaps the most important observation made by Atkey, was his proposal of the implementation of a parliamentary **oversight** committee, holding that, "Parliament is the ultimate watchdog and is directly accountable to the people."¹⁷

"Whether we need to adopt a federal security czar to supervise, **monitor** and coordinate security agencies, as is done in the U.S., or to develop a super SIRC, with expanded powers of review and accompanying budget, or to have statutory gateways to achieve accountability, **as recommended by the O'Connor report in 2006**, this is an issue that cannot be left aside as Parliament gallops ahead on Bill C-51."¹⁸

2. Amnesty International Canada

¹⁶ *Standing Committee on Public Safety and National Security*, 42st Parl, 2nd Sess, No 54 (12 March 2015) at 0915 (Ron Atkey) [*Atkey*].

¹⁷ *Supra* note 15.

¹⁸ *Ibid.*

As outlined in Amnesty's brief on Bill C-51, one of its recommendations is to establish a "**robust oversight and effective review**" of agencies and departments engaged in national security activities. In particular, it seeks to:

- a) Develop a model of integrated, expert and independent review as proposed by Justice Dennis O'Connor in his 2006 Arar Inquiry report;
- b) Ensure that all agencies and departments engaged in national security activities are **subject to review and oversight**;
- c) Ensure that all review and oversight bodies and processes have sufficient powers and resources to carry out their work effectively; and
- d) As part of an overall system of review.¹⁹

In the agency's view, the likelihood of human rights violations increases drastically where there is a lack of oversight on the actions of police, intelligence, military, penal and other security officials who have the ability to commit abuse²⁰. These risks are substantially increased in situations where secrecy is preferred; notably, in situations of national security. According to Amnesty International, "effective review and oversight is key in ensuring that human rights protections are not **undermined** by a government's national security laws, policies and practices."²¹

Amnesty drew reference to the fact that an "unevenness of review and oversight" is prevalent across various industries and departments in Canada. Specifically, the agency highlighted that the CBSA is not subject to any form of independent review, and furthermore, the dismantling of the office of the IG created even further gaps."

¹⁹ "Insecurity and Human Rights: Concerns and Recommendations with Respect to Bill C-51, *The Anti-Terrorism Act, 2015*," *Amnesty International*, 9 March 2015 at 3 [*Amnesty International*].

²⁰ *Supra* note 18.

²¹ *Ibid.*

Ultimately, Amnesty International contends that Canada's intelligence and security enterprise is extremely lacking in adequate controls. The agency stands strongly by the O'Connor report, referencing that such bodies were never implemented; and furthermore, that there continues to be a strong necessity for **parliamentary oversight** with respect to national security. From the perspective of Amnesty International, "Canada is alone among our closest national security allies – the United States, the United Kingdom, Australia and New Zealand – in not entrusting parliamentarians with that responsibility."²²

3. Ken Rubin

Ken Rubin proposed the following four amendments to Bill C-51²³:

- 1) That **greater and new oversight provisions** for monitoring security intelligence law enforcement and government agencies should be provided. But that this also include specific added **binding order and audit powers** for the Information and Privacy Commissioners to ensure there is a **duty to document actions and a mandate added to assess and report on the privacy and access implications of such information sharing and security intelligence agencies' activities**. And that the Auditor General be given new reinforced powers to investigate and report on the costs and value of such activities as proposed under bill C 51.
- 2) That sunset provisions be introduced as in earlier anti-terrorist legislation but with the twist that the sunset reviews parliament does, every three years, include an ability to drop certain provisions as well as a legal review mandate to investigate less invasive measures. This means examining better information sharing practices and restrictions, greater public transparency and privacy protection, and more international rules on information sharing.

²² *Ibid.*

²³ Rubin, Kevin. "Submissions to the Standing Committee on Public Safety and National Security," 16 March 2015, at 2.

- 3) That amendments include giving Canadians more pro-active disclosures on matters like security and intelligence and law enforcement agency costs, environmental, health and infrastructure safety, and on all information sharing agreements and arrangements.
- 4) That Canadians be given the right in most cases to be notified when their personal information is being accessed and shared by government or by the private sector.

4. Office of the Privacy Commissioner of Canada

Perhaps the most significant and telling critique comes from the Office of the Privacy Commissioner of Canada, notably Daniel Therrien. While Daniel Therrien, the Privacy Commissioner, was not invited to testify before the SECU on Bill C-51, he nonetheless provided a brief before the Parliamentary committee. According to Therrien, “Bill C-51 exacerbates serious gaps in existing oversight and review mechanisms, and does not facilitate sharing between review bodies.”²⁴

Therrien noted particular gaps in the review structure of Canada’s security agencies: firstly, the fact that 14 of the 17 agencies that will receive information for national security purposes are not subject to dedicated independent review or oversight: “To fill that gap, the jurisdiction of one or more of the existing review bodies should be extended to include the 14, or a new expert review body with horizontal jurisdiction should be created to review the lawfulness and reasonableness of national security activities.” Additionally, Therrien found that a subsequent obstacle to effective review is prevalent in that existing review bodies are presently unable to share information amongst themselves. Particularly, the confidentiality provisions in the *Privacy Act* explicitly prevent the Office of the Privacy Commissioner of Canada from sharing information with other review bodies such as the SIRC, the Office of the CSE or the

²⁴ Therrien, Daniel. “Bill C-51, *the Anti-Terrorism Act*, 2015: Submissions to the Standing Committee on Public Safety and National Security,” Office of the Privacy Commissioner, 5 March 2015 at 4 [*Privacy*].

Civilian Review and Complaints Commission for the RCMP concerning ongoing investigations into national security practices.²⁵

Therrien then concluded by making a proposal with respect to ensuring that such bodies, which are so noticeably lacking, are readily established:

RECOMMENDATION: a Hybrid model that incorporates both a Committee of Parliamentarians, and, review by an independent body of experts: “Such a model would offer clear advantages in terms of **democratic accountability**, and the mandates of the Committee of Parliamentarians and the committee of experts could be defined so as to avoid duplication.”²⁶

5. Canadian Bar Association

The Canadian Bar Association (CBA) has recommended several amendments to Bill C- 51. First, while there are restrictions on CSIS’ newly enacted kinetic powers as noted in s.12.2(1), the CBA believes that such prohibitions are too limited and are insufficient²⁷. Additionally, one of its twenty-three recommendations surrounds the creation of an **Office of the National Security Advisor**, as suggested by retired Supreme Court justice, John Major:

RECOMMENDATION #15:

The CBA recommends the creation of an Office of the National Security Advisor, to act as an expert review body with resources and a mandate to review all national security activity, and to ensure effective information sharing and cooperation between CSIS and other security agencies, including the RCMP.²⁸

With respect to SIRC’s powers, the CBA noted that review is again limited - due mostly to SIRC’s lack of resources and powers to effectively review CSIS’ direct actions.

6. Justice Major

²⁵ *Ibid* at 5.

²⁶ *Ibid* at 6.

²⁷ “Bill C-51, *The Anti-Terrorism Act*, 2015,” *The Canadian Bar Association*, March 2015 at 30 [CBA].

²⁸ *Ibid* at 32.

In 2015, Justice Major spoke to the SECU. When prompted to reveal more information about his proposal following the Air India Report on the establishment of a “National Security Advisor” (NSA), he stated the following:

“I am in favour of oversight. The purpose of NSA .. would be a form of oversight. We’re faced, in this world of terrorism, it’s very unclear what the risk is; we have to be prepared, to give authority to our government and enforcement officers to try and fight that very difficult war. So we have to in some respects rely on their good faith, and for lack of a better word, “take a chance”. The chance can be minimized if we have hindsight. The bill lacks highsight – I use the word National Security Advisor, only as a term to indicate **oversight**, some individual who can look at the activities of the various agencies and where there’s conflict resolve it, where there’s abuse stop it; as it stands I don’t see those safeguards in the bill, they would not interfere with the efficiency of the bill in any manner, and so I may sound like a one-trick pony, but I think that’s an essential part of what’s missing.”²⁹

The Issue

While Justice Major’s call for an oversight body and notably, one in the form of that similar to the previous IG, is a great advance into the inquiry and necessary scrutiny of “review vs. oversight” - it is important to note some of his inconsistencies. Primarily, the most significant disparity in Justice Major’s proposition, is that, in calling for an NSA to represent what would be “effective oversight”, Major dubs it “hindsight”. Ultimately, and obviously, hindsight is not oversight; but rather, review.

It could be said that one reason for such a particular mix-up in language may be due to the fact that Justice Major speaks from the Air India Commission, where the biggest fall-up was

²⁹ *Supra* note 2.

effectively that at one point, both the RCMP and CSIS were duplicating one another - and did not share information. Nevertheless, while Justice Major's proposition is an advance in the discussion, it requires more in order to be sufficiently effective.

Comparative Analysis

Having identified some of the live critiques surrounding Bill C-51 both by political, judicial, as well as legislative bodies - it is now necessary to review some of the current oversight mechanisms presently in place in commonwealth countries across the world, in order to effectively draw a (substantive) picture of what an oversight body may, or should look like in Canada today.

1) Australia

Australia is the sole nation with the most anti-terrorism legislation in place amongst any of the Five Eyes, surprisingly, including the United States. As in Canada, most laws surround criminal terrorist offences, including but not limited to criminalizing the promotion of terrorism; immunity to intelligence officers for certain most unlawful acts; increased powers of electronic surveillance; and preventive detention. What is the most telling of Australia is that it continues to be the only democratic country in the world lacking a binding national human rights law, yet has the widest range of oversight mechanisms than any other Partner.³⁰

Beyond ministerial responsibility, the country's chief watchdog over the security intelligence community is the Parliamentary Joint Committee on Intelligence and Security (PJCIS) which consists of 11 security-cleared members of the House and Representatives and the Senate³¹. The

³⁰ Ian Macleod, "Spy versus spy: Australian security oversight holds lessons for Canada", *Ottawa Citizen* (March 18, 2015), online: <<http://ottawacitizen.com/news/national/spy-versus-spy-australian-security-oversight-holds-lessons-for-canada>>.

³¹ Parliament of Australia, "Role of the Committee" *Commonwealth of Australia*, online: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Role_of_the_Committee.

body is ultimately charged with reviewing the administration and expenditure of the domestic Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence (foreign) Service, the Office of National Assessments (ONA) and three defence intelligence organizations³². The Committee is, however, privy to detailed and classified information about the administration and expenditure of such agencies. Moreover, it plays no role in determining *what* national security priorities should be, nor *how* such priorities should be met.

The Committee additionally does not possess any power of review with respect to sources of information, other operational assistances, operations that have been undertaken or are being proposed, nor the content or conclusions reached in assessments or reports made by the Defence Intelligence Organisation or ONA³³. While the body is fairly restricted in review mechanisms, Australia possesses **three additional direct** oversight and review mechanisms that effectively serve its otherwise ‘lacking’ roles:

First, as was abolished in Canada in 2012, Australia continues to elect an Inspector General of Intelligence and Security that provides “independent assurance that the intelligence community agencies conduct their activities within the law, behave with propriety and comply with ministerial guidelines and directives.”³⁴ The office can launch inquiries, receive complaints, and access agency records: however, it may only make **recommendations** as opposed to ordering incremental change.

Second, an Independent National Security Legislation Monitor, who is typically a retired judge, charged with monitoring national security and counter-terror legislation for effectiveness

³² *Ibid.*

³³ *Supra* note 30.

³⁴ Inspector-General of Intelligence and Security, “About IGIS”, online: <https://www.igis.gov.au/about>.

and whether laws contain appropriate safeguards for protecting individual rights. The Monitor has the power to gather documents, and hold public or private hearings, to assess laws³⁵.

The third and final oversight body is a Parliamentary Joint Committee on Human Rights that reviews proposed legislation for compatibility. Depending on which agency and powers are involved, additional but less direct methods of oversight and review include judicial review when authorities are seeking to obtain warrants, administrative tribunals and an independent reviewer of ASIO security assessment findings³⁶.

Comparison with respect to Canada

In comparison, Canada continues to have no federal direct role in oversight over national security agencies, and, as a result, is **alone** amongst its Five Eyes partners in not granting parliamentarians access to secret information concerning national security operations. What oversight and review does exist, is limited to SIRC and the CSE.

The CSE operates as a vast electronic spy agency - it is monitored by a single retired judge under the Office of the CSE Commissioner. This body is somewhat similar to Australia's Independent National Security Legislation Monitor, however, SIRC and the office of the CSE commissioner are not permitted to carry-out joint investigations; exchange information; nor co-ordinate the preparation of their annual reports.

2) **The United Kingdom**

The United Kingdom (U.K.) model is perhaps the most influential and telling of any of the Five Eyes, and offers great guidance for Canada. The Intelligence and Security Committee of Parliament (ISC) is a statutory committee of Parliament that has the responsibility of **oversight**

³⁵ Australian Government Department of the Prime Minister and Cabinet, "Independent National Security Legislation Monitor" *Freedom of Information*, online: <http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>.

³⁶ Parliament of Australia, "Parliamentary Joint Committee on Human Rights", *Commonwealth of Australia*, online: http://www.aph.gov.au/joint_humanrights/.

of the UK intelligence community. The Committee was originally established by the *Intelligence Services Act* in 1994, and has recently been reformed, and its powers reinforced, by the *Justice and Security Act* of 2013³⁷.

The Committee is responsible for **overseeing** the intelligence and security activities of the United Kingdom, including the operations, policies, expenditure, and administration of the Security Service (MI5), the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ). The Committee additionally possess the power to **scrutinize** the work of other parts of the U.K.'s intelligence community, including the Office for Security and Counter-Terrorism in the Home Office, the Joint Intelligence Organisation and the National Security Secretariat in the Cabinet Office, and the Defence Intelligence in the Ministry of Defence³⁸.

The ISC is comprised of nine members drawn from the House of Commons, and the Senate. The Chair of the Committee is elected by its members. The members are all subject to the *Official Secrets Act* 1989 and are routinely provided access to highly classified information in exercising their duties³⁹.

The Committee sets its **own** agenda as well as its **own responsibilities and duties**. It procures evidence from ministers, officials from the intelligence community, the Heads of intelligence and security agencies, and other witnesses where required. The Committee is supported in its work by an independent Secretariat and an Investigator. Finally, the Committee retains access to legal, technical and financial expertise if necessary⁴⁰.

³⁷ *Supra* note 11.

³⁸ *Supra* note 11.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

The Committee is responsible for producing an Annual Report on the discharge of its duties. It may, additionally, produce reports on investigations. Prior to publishing, sensitive material that would damage national security is redacted - however, the agencies who seek to request redactions are reviewed **carefully** by the ISC. Ultimately, intelligence and security agencies searching for redaction of material that would damage their work by revealing methods, sources, operational capabilities or targets are forced to demonstrate clearly how publication of the material would be damaging. The Committee ultimately seeks to ensure that only a **minimum** of text is redacted from a Report. As such, the Committee firmly believes that it is important that Parliament and the public be made aware of what they have chosen to include in their Annual Report. As a result, the published Report is the same as that provided to the Prime Minister⁴¹.

The Committee possesses greater powers than a select committee of Parliament in that, the Committee has the power to demand papers from former governments and official advice to ministers, both of which are **forbidden** to select committees⁴².

3) **United States**

It is worth offering a brief overview of the current oversight mechanisms in place in the United States, for reference and perhaps (minimal) guidance. The Homeland Security Advisory Council (HSAC) retains the experience, expertise, and national and global connections of the HSAC membership to provide the Secretary with **real-time, real-world** independent advice to support decision-making across the spectrum of homeland security operations. HSAC is ultimately charged with providing independent advice and recommendations to the Secretary, including the creation and implementation of policies for the security of the United States; conducting research and providing policy analysis and recommendations on a variety of security

⁴¹ *Supra* note 11.

⁴² *Ibid.*

issues; and evaluating the impact of security related public and private policies to create prospective security policies. The Council is comprised of leaders from states and local governments, first responder communities, the private sector, and academia⁴³.

The National Security Advisor serves as a chief advisor to the President of the United States on national security matters. The National Security Advisor serves on the National Security Council and is assisted by staff to produce research, briefings, and intelligence reports⁴⁴.

CONCLUSION

To conclude, it is incredibly telling to state that Parliamentary Committees are not suited to perform direct oversight of national security affairs. As Nicholas A. Macdonald highlighted in the *Canadian Parliamentary Review*, committees in Westminster parliaments are limited to reviewing and reporting on the activities, administration, expenditures and policies of the nation's national security **efforts**. This is true for the United Kingdom, Australia, and New Zealand⁴⁵. In all Westminster countries, no parliamentary committee conducts oversight. Notably, rather than being involved in political or operational decision-making, these committees review and report on the policies, administration, and activities of their respective government departments involved in national security.

Ultimately, Parliamentary Committees are unfit to conduct oversight for a myriad of reasons; one of them being, that while they may be able to serve the roles necessary for effective implementation, they are nonetheless inherently guilty of partisanship and undue influence. Within a Westminster system, parliament ministers are legally and constitutionally responsible for directing the operational activities of their own departments, agencies and security forces. As

⁴³ Official website of the Department of Homeland Security, "Homeland Security Advisory Council" (October 21, 2015), online: <http://www.dhs.gov/homeland-security-advisory-council>.

⁴⁴ *Supra* note 42.

⁴⁵ Nicholas A. MacDonald, "Parliamentarians and National Security" (2011) *Canadian Parliamentary Review*, online: <http://www.revparl.ca/english/issue.asp?param=208&art=1460>.

a result, they cannot complete oversight, because once involved in national decision-making, they are a party to the very affairs they are meant to be scrutinizing.

As can be evidenced above, SIRC is financially and legally barred from performing the necessary and vital oversight that the Bill, which continues to be heavily criticized, so strongly necessitates. While Prime Minister Justin Trudeau did make some reference to the possibility of implementation of an effective oversight body, his release of the mandate of Mr. Goodale directly contradicts and compromises any implementation of such a necessary and imperative agent. As a result, and in light of all information above, I make the following recommendation:

To ensure actual and effective oversight, in light of the extremely potentially harmful impacts of Bill C-51 on all Canadians, Canada requires: (1) a **clear** mandate to a **clear** body in order to provide the appropriate safeguards and solution we require. In this view, I propose the implementation of a hybrid model of oversight; (2) a **National Security Advisor**, who would embody a role similar to that of the abolished Inspector General, but moreso, coordinate with all heads of all intelligence agencies as is presently conducted in the United Kingdom; and (3) I call for the establishment of a Statutory Committee, as opposed to the current “Committee of Parliamentarians” created by Prime Minister Justin Trudeau. Taken together, these two bodies would provide for **collective decision-making**, and pave the way for effective oversight.

As has been witnessed by the U.K. model, such a body would provide for the oversight of operations, policies, expenditure and administration in real-time and real-world light. As the ISC, the “Committee” would have the power to **scrutinize** the work of all intelligence agencies, without the partisanship that is inherent to a Committee of Parliamentarians, as is the current situation in Australia. The members would be able to create and inform their own agenda, as well as play a key role in criticizing all of the actions of all intelligence agencies, in real-time.

Finally, a National Security Advisor, who would embody a role similar to that of the Inspector General, would be responsible for providing **independent** oversight of CSIS' activities, and coordinating with the Statutory Committee to ensure that all of the necessary safeguards to prevent abuse are effectively in place and revered.

This Hybrid model is necessary in a country where freedom and liberty are so necessarily valued. The introduction of Bill C-51 caused much scrutiny, both on an individual, as well as collective front - but its effects are able to mitigated with rationale, effective planning, and performance.