Parliamentarians and National Security in Canada

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The Parliament of Canada has traditionally deferred to the government on matters relating to national security although parliamentarians have, on occasion, vied for the task of being actively involved in holding the government to account on these matters. In 1991, parliament conducted a five-year review of the Canadian Security Intelligence Service Act where the Solicitor General of Canada and his officials presented classified summaries to parliamentarians to assist them in their review of the effectiveness of the legislation. In 2004, a National Security Committee of Parliamentarians was proposed in Securing an Open Society: Canada's National Security Policy. The Speaker's ruling on the provision of documents of April 27, 2010 also dealt with this issue. This paper examines a number of issues and concerns that have arisen in the past on this issue, and it examines parliamentary review of national security matters in the United Kingdom, Australia and New Zealand. It concludes that there are no reasonable barriers to the involvement of parliamentarians in reviewing matters of national security in Canada.

The notion of parliamentary review of national security matters is not unique to Canada. The United Kingdom, Australia, and New Zealand all have well developed systems to involve parliamentarians in holding the government to account on matters of national security; Canada does not.

In 1979, Professor C.E.S. Franks prepared a study for the McDonald Commission entitled *Parliament and National Security*. The study provided a comprehensive analysis of the role of parliament in matters of national security. Since that time, however, the landscape has shifted considerably both domestically and internationally, and there is a need for a thorough re-examination of the issue: the underlying assumption that governments hold majorities in the House of Commons shifted for some time, and the implications of minority governments on this issue merits analysis. Furthermore, the law of parliamentary privilege has since been the focus of two Supreme Court rulings, and a ruling by the Speaker of the House in April 2010.

Prior to the consideration of comparisons of other Commonwealth countries, the difference between "review" and "oversight" of government activities must be assessed. In the United States, Congress through various committees is charged with overseeing matters relating to national security conducted by the Executive branch of government. This can occur because in the American system, the Executive – the Office of the President – is constitutionally separate from Congress and, through its system of checks and balances, Congress is able to actively participate in and oversee these matters.

In Canada, as in all Westminster parliaments where the Executive is fused with the legislature, this degree of oversight and active involvement would be inappropriate. In the Canadian system, Cabinet is charged with the administration of government, and it possesses this authority because it holds the confidence (or majority support) of the House of Commons in parliament. In such a system of responsible government, parliament can only review and scrutinize matters conducted by the government.[1] In sum, review occurs after an action has been made whereas oversight necessitates ongoing involvement.

United Kingdom

The United Kingdom enacted the *Intelligence Services Act*[2] in 1994, thereby creating the Intelligence and Security Committee. This Committee is mandated to examine the expenditure, administration and policy of the Security Service, the Intelligence Service, and

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the Government Communications Headquarters. It consists of nine members of the House of Commons and the House of Lords, none of whom are ministers, appointed by the prime minister in consultation with the Leader of the Opposition. The Committee must report to the prime minister annually, and this report is then tabled in parliament. The prime minister may redact from the report any content, the release of which he or she deems would be contrary to the public interest. Cabinet may ask the Committee to examine certain issues of interest, but the Committee is generally free to set its own agenda, allowing it to pursue either detailed or wide-ranging inquiries. The Committee is given access to sensitive information, as long as the disclosure of the information is not deemed contrary to the public interest by the Director General of the Security Service, though the committee may appeal this decision to the Secretary of State. In its deliberations, the Committee has access to operational records, source reporting, and other sensitive information. Members of the committee are members of the Privy Council and cannot publicly disclose information made privy to them during deliberations.

The annual reports of the Intelligence and Security Committee are comparable to other parliamentary committee reports. In the 2009-2010 report, the Committee maintained that it is able to properly hold intelligence agencies to account, independent from the government. The report does, however, dedicate many pages to the necessity of defending the Committee's independence from the government and includes certain redactions, namely since in the United Kingdom budgetary figures remain classified, and so amounts are replaced by "***". The Committee can only indicate in the public record whether or not it is satisfied with the government's policies on and responses to any given issue.

A review of the annual reports from 2001-2002, 2002-2003, and 2009-2010 shows that the Committee's reports are generally amenable to the government's actions. In this regard, it seems that the government could use the Committee as a tool to politically legitimize the administration and expenditures of its security activities. Government responses to reports are respectful of the Committee's work, acknowledging agreeable points of interest.[3]

New Zealand

The Intelligence and Security Committee of New Zealand was created by the *Intelligence and Security Act 1996* and is mandated to: examine the policy, administration, and expenditures of each intelligence and security agency; consider any bill, petition, or other matter in relation to an intelligence and security agency referred to it by the House of Representatives; and consider the annual reports of intelligence agencies. This does not include any matter that is operationally sensitive or any complaint that originates from an individual against an intelligence agency. The Committee consists of the prime minister, the leader of the opposition, two members of the House of Representatives nominated by the prime minister, and one member nominated by the leader of the opposition – no substitutes are permitted. Proceedings are conducted in accordance with the *Standing Orders* of the House of Representatives and are held in private unless designated by unanimous consent to be conducted in public.

Unique to the New Zealand model is the attention it provides to the protection of members' privileges under the Act, which assures that:

> No criminal or civil proceedings shall lie against any member of the Committee or person appointed to staff the Committee, for anything done or reported or failed to have been done, reported or said in the course of the exercise or intended exercise of the Committee's functions under the Act, unless it is shown that the member or person acted in bad faith.[4]

Furthermore, the Act provides that proceedings of the Committee are deemed to be proceedings in Parliament for the purposes of Article 9 of the United Kingdom *Bill of Rights* of 1689, thereby specifically addressing, and protecting, parliamentary privilege.

Australia

The Australian Parliamentary Joint Committee on Intelligence and Security (PJCIS) was created pursuant to section 29 of the *Intelligence Services Act 2001*.[5] The Committee is mandated to conduct reviews of the administration and expenditure of the Australian intelligence community, in addition to preparing an annual report for parliament. It may also review the listing of terrorist organizations under the *Criminal Code of Australia*. The Committee consists of four Senators and five members of the House of Representatives, a majority of whom must be government members. The Committee receives both classified and unclassified submissions by officials from the intelligence agencies. Members of the committee cannot publicly disclose information made privy to them during deliberations.

The PJCIS has stressed the need for a single committee to review the entire Australian intelligence community. Without the whole picture, it argues, "it is inevitable that black spots in knowledge and supervision will dramatically impair the effectiveness

of Parliamentary oversight."[6] The Committee has acknowledged that the way it conducts its affairs diverges from the normal parliamentary practice of consulting a variety of community perspectives when examining issues a committee is studying. While it does not believe this has been a problem to date, it stresses that the normal procedures of public debate are not possible given the nature of intelligence organizations and restrictions in the *Intelligence Services Act*, which constrain the breadth of submissions the Committee may examine. The Committee has recommended that its mandate be expanded to include oversight of certain counter-terrorism functions, but this has been rejected by the government.

The PJCIS has developed strong ties with officials from the intelligence community, which has given it access to a substantial degree of classified information. The extent of the information that the government may give it is not a matter of statute, but the product of developed relations over time. The Committee has recommended codifying the type and extent of information it should expect to receive.

Canada

In Canada there has been a fair degree of consideration given to the involvement of parliamentarians in matters relating to national security, but little action. This has more recently taken form in the introduction in parliament of Bills C-81 (November 2005), C-447 (May 2007), and C-352 (March 2009), all entitled *An Act to Establish the National Security Committee of Parliamentarians*. Different publications have also been tabled in the House of Commons, including the *Report of the Interim Committee of Parliamentarians on National Security* (October 2004) and *A National Security Committee of Parliamentarians: A Consultation Paper to Help Inform the Creation of a Committee of Parliamentarians to Review National Security* (March 2004).

The model proposed in Bills C-81, C-447, and C-352 would have been mandated to review "the legislative, regulatory, policy and administrative framework for national security in Canada, and activities of federal departments and agencies in relation to national security," in addition to any matter referred to the Committee by an appropriate minister.[7] It would consist of not more than three Senators and six members of the House of Commons who cannot be ministers or parliamentary secretaries. The proposed legislation has special stipulations for security and confidentiality, requiring that members take a specific oath to keep information private, and that each member is considered a person permanently bound to secrecy for the purposes of the *Security of Information Act*. The Committee would be able to request a variety of information from an appropriate minister, including classified materials.

Notable is that the Committee proposed in the past would not have been a parliamentary committee, but an ambiguous "committee of parliamentarians", external to parliament – similar to the model which exists in the United Kingdom. However, the proposed legislation specified that "no member may claim immunity based on parliamentary privilege for the use or communication of information that comes into their possession or knowledge in their capacity as members of the Committee." This is a strong divergence from the New Zealand approach, which specifically maintains that the privileges of members are upheld and that committee proceedings are defined as "proceedings of parliament".

Following the Speaker's ruling of April 27, 2010 which is discussed in greater detail below, the prime minister and two opposition parties in the 40th Parliament signed a memorandum of understanding to create an *ad hoc* committee of parliamentarians, external to the House of Commons, to examine documents related to the treatment of Afghan detainees formerly in the custody of Canadian officials. The agreement stated that the desired end result is to "maximize disclosure and transparency" on the issue at hand.[8] The agreement stipulated that the Committee be composed of one member from each of the signatory parties and that one alternate be permitted for each member. These members must take an oath of confidentiality and sign a "binding undertaking of confidentiality." They must also acquire a "secret" level of security clearance and any violation of the confidentiality agreement would be grounds for expulsion from the Committee without replacement. The Committee would also survive a dissolution of parliament provided that all parties signed a similar agreement once parliament resumed.

Proceedings of this Committee followed those of an *in camera* session and were facilitated by the Government of Canada. Public servants familiar with the information were on hand to assist members in their deliberations, and members were provided with both classified and redacted versions of information in order to allow them to see the differences accorded to national security information. Since the Committee existed to provide for the disclosure of documents, documents that the Committee deemed should be disclosed to the public were submitted to a panel of "three eminent jurists", agreed upon by all signatories of the agreement, who would provide a final assessment on disclosure.

It is important to stress that this Committee is *ad hoc*, but it did provide an intriguing model for the involvement of parliamentarians in security matters. While the United Kingdom, Australia, and New Zealand turn to the prime minister as the final arbitrator on matters of disclosure, Canada turns to the judiciary.

Finally, the Cabinet Committee on National Security was created by the Prime Minister in May 2011. It is chaired by the Prime Minister and consists of senior ministers and is mandated to provide broad strategic direction for security and foreign policy related to Canada's national interest, and oversee Canada's national security response activities. It is important to keep in mind, however, that this is a Cabinet Committee, and not a parliamentary committee.

Conventions on Matters of National Security in Canada

Historically in Canada and the core Commonwealth, an indication by the government that a document is classified for reasons of national security has been enough to satisfy parliamentarians that its contents need not be made available to them.[9] For instance, it has been noted that:

> The House of Commons recognizes that it should not require the production of documents in all cases; considerations of public policy, including national security, foreign relations, and so forth, enter into the decision as to when it is appropriate to order the production of such documents.[10]

Professor Craig Forcese notes that this deference is comparable to that which the Courts have long afforded the Executive branch on matters of national security; in the United Kingdom, the justification for this has been illustrated in *Secretary of State For the Home Department v. Rehman*:

> [I]n matters of national security, the cost of failure can be high. This seems to […] underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether [an activity] constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[11]

Information tabled in the House of Commons, unless done *in camera*, forms part of the public record. By its nature, classified information is designated as such because its compromise could be reasonably expected to cause damage to the national interest and the government has a legitimate obligation to prevent any unauthorized disclosures.[12]

Complicating this issue further is that Members of Parliament are protected by parliamentary privilege – namely in this case, that of freedom of speech – and as a result, they could disclose in parliament any information given to them without fear of reprisal. This matter was raised by the Attorney General in response to another Member of Parliament's statement in the House in 1978:

> In the present situation, the hon. Member […] has made statements in the House which must clearly have been based upon highly classified national security information. In my opinion, the hon. member's use of the secret information he was not entitled to have was contrary to the national interest. However, by law, his statements cannot constitute the foundation for a prosecution under the *Official Secrets Act* since *it is well established that no charge in a court can be based on any statement made by an hon. member in this House*.[13] [emphasis added]

The United Kingdom courts have acknowledged that "as the executive, not the judiciary, is responsible for national security and public protection and safety [...], the judiciary defers to it on these issues, unless […] the court concludes that the claim by the government for public interest immunity is not justified."[14] In many ways, this situation is analogous to the relation between parliament and the executive in Canada where parliament has long deferred to the executive on matters of national security. The twin priorities of holding the government to account and protecting national secrets require careful consideration.

There are references to instances in which parliamentarians have been privy to classified information under extremely limited and controlled instances;[15] one instance was during the five-year review of the *Canadian Security Intelligence Service Act*, but these were classified summary presentations.[16] During World War I and World War II, secret sessions of the entire House of Commons were held to discuss the military situation during wartime.[17]

The Speaker's Ruling

In the 2nd session of the 40th Parliament, on February 10, 2009, the House of Commons reinstated the Special Committee on the Canadian Mission in Afghanistan. The Committee had, prior to a prorogation, been seeking information from the government on the

treatment of Afghan detainees formerly in the custody of Canadian officials. To that effect, the House adopted an order for the production of documents in question on December 10, 2009. The order stipulated that the government must table in the House a host of documents relating to Afghan detainees in their original and uncensored form.

The debate leading to the Speaker's ruling is best represented in an exchange of legal opinions between a senior official of the Department of Justice and the Law Clerk of the House of Commons:[18]

The government official argued that the government could not disclose information under legal obligations found in a variety of Acts of Parliament including the *Privacy Act*, the *Canada Evidence Act*, and the *Security of Information Act*, and noted furthermore that by convention, a parliamentary committee will respect Crown privilege when invoked, at least in relation to matters of national security.[19] The official maintained that "a parliamentary committee is not a body with jurisdiction to compel the production of information, so it is not in a position to oblige the release of this kind."[20]

The Law Clerk criticized the government official's opinion in its failure to recognize the constitutional function of the House of Commons to hold the government to account and to adequately address parliamentary privilege as part of the Constitution of Canada.[21] He further cited the Supreme Court of Canada in its affirmation that parliamentary privilege enjoys the *same* constitutional weight as the *Canadian Charter of Rights and Freedoms* itself. In response to the government's argument that it could not disclose information based on statutory requirements, he noted that it is for the House and its committees to determine how these provisions would apply; once again citing the Supreme Court, he highlighted that "the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of statute law which has relation to its own internal proceedings."[22] The Law Clerk argued that while the government may try to not disclose information to the House for political reasons, it cannot do so for legal reasons. He then dismissed the argument that parliamentary committees do not possess the inherent rights of the House, since the House could delegate such powers to parliamentary committees, but chooses not to.

The Speaker of the House of Commons concurred with the Law Clerk's opinion and ruled that the government's failure to produce the documents was *prima facie* a question of privilege. Steps were then taken to produce the documents to a limited number of parliamentarians in a controlled environment to prevent the documents from being made public. The details of the resulting Committee have been discussed above.

Parliamentary Privilege

Parliamentary privilege is recognized by statute in Canada in both the *Constitution Act, 1867* and the *Parliament of Canada Act*; however, its practice stems in large part from the preamble of the *Constitution Act, 1867*: "with a Constitution similar in principle to that of the United Kingdom." The law of parliamentary privilege is even older than Canada itself. Privilege is rooted in constitutional developments in the United Kingdom, most notably Article 9 of the *Bill of Rights* of 1689, which reads "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." House of Commons Clerk Audrey O'Brien and Deputy Clerk Marc Bosc summarize privilege as a guarantee of independence that parliament and its Members need to function unimpeded.[23]

The types of privilege that exist can be separated into two categories: those privileges afforded to Members individually and those afforded to the House as a collectivity. The privileges of Members include the freedom of speech, freedom from arrest in civil proceedings, exemption from being subpoenaed to attend court as a witness, and freedom from obstruction, interference, intimidation, and molestation. Those enjoyed by the House collectively include the exclusive right to regulate its own affairs, the power to discipline and the right to punish persons guilty of breaches of privileges or contempts, and the right to call witnesses and demand papers.

Being a separate branch of law, the *lex parliamenti* or law of parliament, which includes parliamentary privilege, is subject to some ambiguity because it has only a small body of rulings and case law upon which to draw. Furthermore, privilege only applies in the course a Member of Parliament's parliamentary duties while in office; it does not apply outside of the parliamentary precinct (and perhaps not even outside of the House of Commons and its committee rooms themselves), nor does it apply to constituency work. *Hansard*, the official record of parliament, which publishes all of the House's proceedings, is also protected by privilege.

Parliamentary authorities point to two landmark rulings of the Supreme Court of Canada when referencing parliamentary privilege. The first is *New Brunswick Broadcasting Co. v. Nova Scotia*[24] in which the Court ruled that a legislative assembly held the right to exclude video-recording cameras from its premises under its right to exclude strangers. The Court

recognized that the inherent privileges of legislative assemblies, from parliament, enjoy constitutional status and thus are not subject to the *Canadian Charter of Rights and Freedoms*.

The second Supreme Court ruling of note is *Canada (House of Commons) v. Vaid*,[25] which found that the *Canadian Human Rights Act* would not necessarily apply to employees of the House of Commons under all circumstances, particularly if an employee's tasks were vital to the work of parliament. The ruling was instrumental in establishing "necessity" as the threshold for finding cases of privilege: that is, privilege applies and can be invoked only when the activity in question is necessary to the execution of a member's or parliament's legislative duties. If, however, the Court determines that privilege does apply and meets the "necessary" threshold, the Court cannot inquire into its use. In *Vaid*, the Supreme Court ruled that "parliamentary privilege is as much a part of our fundamental constitutional arrangement as the *Charter* itself. One part of the Constitution cannot abrogate another part of the Constitution."[26] Furthermore, "parliamentary privilege enjoys the *same* weight and status as the *Charter* itself."[27]

The Law Clerk of the House of Commons has argued that even matters considered to be protected by the common law doctrine of solicitor-client privilege are not, at least in principle, off limits to parliamentarians. He has noted that it is "an important privilege," and "one [parliament] obviously should respect but not necessarily be governed by [...]". He has cautioned, however, that parliament "should not tread needlessly upon [this] principle".[28]

Previous proposals to involve parliamentarians in reviewing matters of national security would see Members of Parliament give up the privilege of the freedom of speech in order to participate in reviewing matters of national security. But the freedom of speech is perhaps the most important privilege that a member of parliament holds. The ability of legislators to deliberate in an open forum is perhaps the greatest safeguard of a democratic form of government and a fundamental right necessary to ensure the protection of minority opinions. The Supreme Court of Canada in the *Quebec Secession Reference* made very clear that democracy assures that the opinions of minorities are heard and, where possible, reflected in legislation.[29] The reasonable protection of minority opinion is particularly necessary in matters of national security where the conflict between individual rights and the collective good must be so carefully balanced. On the one hand, freedom of speech should not be taken away from members, and on the other, given the paramount importance of this privilege to their duties as legislators, members should not allow this to be taken away. This is not, however, to suggest in any fashion that members should ever disclose matters of national security, but to emphasize that the privilege of freedom of speech should not be surrendered. Indeed, the other Commonwealth parliaments demonstrate that the role of parliamentarians with respect to national security can conform to, and indeed uphold, this principle.

Looking Forward

The 1979 study on *Parliament and Security Matters* by Professor Franks, which examined the involvement of parliamentarians in matters of national security, found that parliamentarians from the Committee on Justice and Legal Affairs and the External Affairs and Defence Committee had received *in camera* security briefings from government officials on numerous occasions. These included discussions on the activities of the then-Royal Canadian Mounted Police Security Service, including the threat to security and overt and covert activities being conducted. At the time, that the committee hearings were conducted *in camera* was considered sufficient protection to ensure that members would not divulge information made privy to them. Indeed, as Professor Franks argued, "members who participate in […] *in camera* sessions are under the obligation not to use the information they acquire in public ways or in connection with any other program."[30]

This argument seems to support an additional dimension to parliamentary privilege: a member has the irrefutable right to speak freely in the House of Commons, but he or she can be reprimanded by that same House for breaking the secrecy of an *in camera* session. Indeed, breaching the confidentiality of an *in camera* session is considered *prima facie* a question of privilege.[31] Thus, as with the United Kingdom, New Zealand and Australia, committee members could not publicly disclose any information made privy to them in their deliberations.

Parliamentarians have consistently recognized the seriousness of security matters and addressed them in a non-partisan manner. An example of this is the establishment of the Canadian Security Intelligence Service (CSIS). Originally proposed as Bill C-157 in 1983 after the Trudeau government announced its intention to create the CSIS in 1981 following the release of the McDonald Commission Report, it was enacted as Bill C-9, the *Canadian Security Intelligence Service Act*, in 1984 by the government of Prime Minister Brian Mulroney.

It has been repeatedly suggested that it is the concept of security clearances for members of parliament, and

the impropriety of this act on a member's privileges that prevents the involvement of parliamentarians in matters of national security. Professor Franks highlighted that "Parliament would likely argue that a requirement for security clearance for MP's by a security service is an unacceptable intrusion into parliamentary privilege,"[32] and the Privy Council Office has emphasized the words of the MacKenzie Security Commission when it "thought it inappropriate to subject private Members of Parliament to [security clearances]" and foresaw "great complication if a Member nominated by a political party were ever deemed unacceptable on security grounds."[33] But given that this problem has been overcome in the United Kingdom, New Zealand, and Australia, the Canadian position might benefit from reconsideration.

There is fear that politicians might use classified or sensitive information disclosed to them for partisan gain – and government information is properly classified when its release could reasonably be expected to cause harm to the national interest. But in his ruling on the provision of documents to the Special Committee on Afganistan, the Speaker of the House of Commons dismissed the idea that parliamentarians could not be trusted to keep secret information secret. Underlying this logic was most certainly the same philosophy that underpins the leader of the official opposition's formal title of "the Leader of Her Majesty's Loyal Opposition." The title recognizes that the leader's allegiance, despite being in opposition to the Executive's approach to government, is still loyal to the Crown and its subjects – in other words, loyal to Canada. This is supported by the notion that Members of Parliament, before taking their seat in the House of Commons must swear an oath of allegiance to the sovereign. The assumption then becomes that if members are aware that disclosing information would be harmful to the national interest, they would only do so if they truly believed that the disclosure was absolutely crucial to holding the government to account – to do otherwise could be construed as a violation of their oath. This oath, however, is only relevant insofar as the member maintains an affiliation in parliament. In the United Kingdom, the members of the Intelligence and Security Committee are also members of the Privy Council for life, sworn to keep information secret – this was a proposal made in the 2004 Canadian National Security Policy, but never adopted.

In an evolving, fast-paced, and interconnected environment, the machinery of government involved in dealing with matters of national security is increasingly complex. In 2006, Commissioner O'Connor highlighted these intricacies in his recommendations pertaining to a new review mechanism for the Royal Canadian Mounted Police's national security activities and Commissioner Major reiterated them in the more recent Air India Inquiry in 2010. National security matters in Canada are handled by the Canadian Security Intelligence Service, the Communication Security Establishment and the Department of National Defence, the Royal Canadian Mounted Police, the Canada Border Services Agency, Public Safety Canada, and the Privy Council Office, as well as Transport Canada, the Canadian Revenue Agency, and the Financial Transactions and Reports Analysis Centre of Canada, among others. Understanding this machinery is a complicated feat – and this is only the machinery involved in national security matters; it excludes the very issues that drive the national security agenda. Consequently, as the McDonald Commission noted, parliamentarians "will need to possess or acquire a reasonable base of knowledge about Canada's security and intelligence system."[34]

In the context of parliament's constitutional obligation to hold the government to account, the House of Commons exercises this function largely through the work of its committees. In the same way that government spending on agriculture, defence, contracting, and aboriginal affairs, among others, is examined, in many ways excluding the confidentiality dimension, matters of security are no different. While parliament has historically deferred to the executive on these matters, it need not bind itself to this past deference. This function should, however, be limited to reviewing the administration and expenditures of security matters as in the United Kingdom, Australia and New Zealand since, unlike in the United States where the Congress can exercise a more active role, in Canada only Cabinet can oversee the administration of government.

Of particular concern in this situation is the recent political climate, which could at the least be described as extremely adversarial. The ruling of the Speaker on the provision of documents in April 2010 highlighted this clash. The robust system of party discipline that majority governments can exercise to avoid the disclosure of government documents and control the legislature was challenged by a series of minority governments in Canada. And, while in the United Kingdom the Intelligence and Security Committee has developed a trusting relationship with national security agencies over time, no such relations exist in Canada. But the United Kingdom, New Zealand, and Australia all presently experience minority or coalition governments, and these situations have not hindered their committees' abilities in fulfilling their respective mandates.

In this context, New Zealand and Australia have both taken the precaution of ensuring that at all times, regardless of the composition of parliament, the majority of the committee will consist of members from the government parties. In all countries, no substitutes are permitted to sit on the respective committees. This ensures that parties cannot circumvent the security principle and force the public disclosure of documents, but are able to work through a process of negotiation. Like other committees, with matters of security, committee meetings must be characterized by high standards of professionalism and mutual respect between parliamentarians. In the absence of these practices, parliament cannot be well served.

Conclusion

In Canada, three mechanisms for the review of matters of national security exist in addition to the work done by the Auditor General: they are the Security Intelligence Review Committee (SIRC), the Inspector General of the Canadian Security Intelligence Service, and the Commissioner of the Communications Security Establishment. SIRC and the Inspector General of CSIS were mechanisms created by the *Canadian Security Intelligence Service Act* of 1984, to review the work done by the CSIS to ensure that it conforms to its mandate, while the Commissioner of the Communications Security Establishment was created under the *National Defence Act* to review the work done by the Communications Security Establishment. All three bodies are respected for their independence from intelligence agencies. However, while their importance should not be understated, these mechanisms are not the same as parliamentary scrutiny. Nor is the creation of a Cabinet Committee on National Security.

When it is a principle function of parliament to hold the government to account, parliament and parliament alone can determine how it will do so – this is the essence of responsible government. While it would be ill advised to duplicate the work of existing mechanisms, the involvement of parliamentarians in matters of national security is indeed a separate parliamentary issue.

Professor Franks argued in 1979 that "there is little evidence in Canada that either Parliament or the public would accept Parliament as part of the inner circle of control, privy to many of the secrets of the state."[35] But given the evolution in this area that has been demonstrated in this area as seen in the rest of the core Commonwealth, this view might be updated.

Indeed, while there may be finer details that require diligence, there are no longer any insurmountable barriers to involving parliamentarians in matters of national security. The creation of an *ad hoc* committee of parliamentarians following the Speaker's ruling of 2010 was a testament to this. It is parliament's right to hold the government to account on matters of administration and expenditure, and though it must do this responsibly, the way that it fulfills this duty is a matter for parliament to determine.

To echo the United Kingdom Intelligence and Security Committee:

> It is a fundamental principle of our democracy that the Government and its agencies are held to account. The requirement to explain and justify actions encourages better thought out policy, better control of expenditure and adherence to accepted principles and practices.[36]

The parliaments of the United Kingdom, Australia, and New Zealand demonstrate that the Westminster system can successfully accommodate parliamentary review and scrutiny of matters of national security – even in minority parliaments. Certainly an ongoing balance on what to disclose will be required, but at least in the context of reviewing the administration and expenditures of intelligence agencies, this leads to heightened transparency and greater political legitimacy.

The involvement of parliamentarians in reviewing matters of national security would allow Canada to follow in the footsteps of the United Kingdom, Australia, and New Zealand, and could only serve to enhance Canadian parliamentary democracy.

Notes

1. William McKay and Charles W. Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century*, Oxford University Press, Oxford, 2010.
2. United Kingdom, *Intelligence Services Act 1994*, An Act to make provisions about the Secret Intelligence Service and Government Communications Headquarters, including provision for the issue of warrants and authorizations enabling certain actions to be taken and for the issue of such warrants and authorisations to be kept under review; to make further provision about warrants issued on applications by the Security Service; to establish a procedure for the investigation of complaints about the Secret Intelligence Service and the Government Communications Headquarters; to make provision for the establishment of an Intelligence and Security Committee to scrutinize all three of those bodies; and for connected purposes.
3. United Kingdom, Cabinet Office, *Government Response to the Intelligence and Security Committee's Annual Report 2002-2003*, tabled in Parliament, June 2003.
4. New Zealand, *Intelligence and Security Committee Act 1996*, An Act to increase the level of oversight and review of intelligence and security agencies by establishing an Intelligence and Security Committee, s. 15(1).

5. Australia, *Intelligence Services Act 2001*, An Act relating to the Australian intelligence services, and for related purposes.

6. Australia. Parliament of the Commonwealth of Australia. Parliamentary Joint Committee on Intelligence and Security. *Review of Administration and Expenditure No. 8 – Australian Intelligence Agencies*. June 2010, p. 6.

7. Canada, *An Act to Establish the National Security Committee of Parliamentarians*, Bill C-352, s. 13.

8. Canada, *Memorandum of Understanding to create an ad hoc Committee of Parliamentarians*, June 2010. http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/docs/362/2011_04_report-eng.pdf.

9. As early as 1877 there were efforts to establish a mechanism by which parliament might review or oversee the Executive's exercise of these matters. *Journals of the House of Commons*, Vol. XI, 1877 Session, Appendix (No. 2) from Third Report of the Select Committee on Public Accounts Relating to the Expenditure of Certain Secret Service Funds, p. 10 in *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, "Second Report: Freedom and Security Under the Law", Vol. 1: August 1981, p. 55.

10. Report of the Standing Committee on Privileges and Elections, *Journals*, May 29, 1991, p. 95 from *Speaker's Ruling on Matters of Privilege Respecting the Provision of Information to the Special Committee on the Canadian Mission in Afghanistan*, Debates of the House of Commons (Hansard), April 27, 2010, p. 2043.

11. Lord Hoffman's postscript from *Secretary of State For the Home Department v. Rehman (AP)*, [2001] 3 W.L.R. 877 (H.L.) from Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Inwin Law Inc., 2008), pp. 24-25.

12. Forcese, 2008, p. 506.

13. Canada, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*, "First Report: Security and Information." Ottawa: October 1979, p. 7.

14. England and Wales Court of Appeal between *The Queen on application of Binyam Mohamed and The Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

15. Interview of Derek Lee with CBC Radio 1, April 26, 2010.

16. *In Flux But Not in Crisis: Report of the Special Committee on the Review of the CSIS Act and the Security Offences Act*, Library of Parliament, September 1990, pp. 6-9.

17. Canada, Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. Ottawa: Her Majesty the Queen in Right of Canada, 1968, pp. 259-260.

18. *Letter from Ms. Carolyn Kobernick, Assistant Deputy Minister, Public Law Sector, Department of Justice regarding the Application of Acts of Parliament to Officials of the Government of Canada*, December 9, 2009 and *Letter from Mr. Robert Walsh, Law Clerk and Parliamentary Counsel, House of Commons regarding the Canada Evidence Act, ss 38 to 38.16 and the Government of Canada*, December 10, 2009. Tabled in the House of Commons March 18, 2010 as Sessional Paper 8530-403-1.

19. *Letter from Department of Justice: op. cit*, pp. 1-2.

20. *Ibid*., p. 3.

21. *Letter from the Law Clerk and Parliamentary Counsel: op. cit*, pp. 1-2.

22. *Ibid*., p. 3, from *Canada (House of Commons) v. Vaid*, 2005 SCC 30, para. 34 citing Bradlaugh v. Gossett (1884), 12 Q.B.D. 271.

23. Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2nd Edition, House of Commons and Editions Yvon Blais, Ottawaand Montreal, 2009, p. 59.

24. [1993] 1 S.C.R. 319

25. [2005] 1 S.C.R. 667, 2005 SCC 30.

26. V*aid, op. cit*, para. 33.

27. *Ibid*., para. 34 [emphasis in original].

28. Evidence, Standing Committee on Government Operations and Estimates, June 9, 2010, pp. 3-4.

29. *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 63.

30. C.E.S. Franks, *Parliament and Security Matters: A Study Prepared for the Commission of Inquiry Concerning Certain Activities* of the Royal Canadian Mounted Police, Ottawa: 1979, p. 35.

31. O'Brien and Bosc 2009, pp. 1077-1078.

32. Franks 1979, p. 21.

33. Canada, Privy Council Office, *A National Security Committee of Parliamentarians: op. cit.* p. 36.

34. *Ibid.* p. 29

35. Franks 1979, p. 21.

36. United Kingdom, Intelligence and Security Committee. Annual Report 2009-2010. Presented to Parliament March 2010, p. 4.