



Canada2020

Once More into the Breach

**Strengthening Canadian Intelligence and Security
Accountability**

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Introduction

The tabling of new, omnibus anti-terrorism legislation, Bill C-51, in the Canadian Parliament in January 2015, has re-energized calls for greater “oversight” of Canadian intelligence and security practices. Many voices have weighed in, from former Canadian Prime Ministers, to the NSA whistleblower, Edward Snowden, who called out Canada for having one of the “weakest oversight” frameworks for intelligence gathering in the Western world. ¹ The concern is understandable. Not only are there significant legacy problems with our existing system of accountability, but the various new powers proposed in Bill C-51 are bound to impact greatly on security and intelligence practices. If the Bill is passed in its present form, a new information sharing regime within the Canadian government will be established; Canada’s ‘no fly’ list will be re-tooled; the Canadian Security and Intelligence Service [CSIS] will acquire a new “disruption” mandate; criminal offenses for the advocacy and promotion of terrorism will be added to the Criminal Code, expanding the national security law enforcement mandate of the Royal Canadian Mounted Police. Additional provisions for dismantling web sites deemed to support terrorism “propaganda” will inevitably involve the Communications Security Establishment, Canada’s signals intelligence and cyber security agency. Higher secrecy walls will be built around the use of security certificates under the Immigration and Refugee Protection Act. How all these measures will impact exactly is hard to determine without experience, but it is precisely in this unknown space, moving forward, that strong accountability needs to operate.

These new legislative powers, for which the Government aims to acquire Parliamentary approval before the summer recess, build on more than a decade of significant increases in the power, resources and capabilities of Canadian intelligence and security agencies. Major changes, post 9/11, to the agencies and departments that comprise the Canadian security and intelligence community have not been matched, to date, by any increased ability to scrutinize their activities. Indeed there has been some rollback, notably in the decision of the Harper government to abolish the function of the Inspector General of CSIS in 2012.

Now we are into a further expansion of powers, with a growing demand that a concomitant increase in accountability finally be afforded. Unusually, this demand has not been fueled by scandal, as has been the case in the past. Scandal was the root cause of the creation of Canada’s two principal review bodies, the Security Intelligence Review Committee (SIRC), twinned at birth with CSIS in 1984, and the Commissioner for the Communications Security Establishment, created in 1996, and charged with a watchdog function over Canada’s electronic spy agency. It was the scandal of the Maher Arar affair that led to recommendations for reform of Canada’s accountability system in 2006 (recommendations which were not acted on). ² The current demand for greater accountability stems instead from legitimate concerns that Canada has reached a point of imbalance between measures to protect our security and measures to protect our basic rights. Because finding the right balance is so difficult in a world of changing threats and increased security powers conducted in an environment of secrecy, we look to systems of accountability as a check on abuses, as a restorative mechanism, and as a vital form of public reassurance.



Finally, and importantly, the public and political environment has changed. Canadians have experienced more than a decade of persistent terrorism-related security threats, culminating in two unfortunately successful, if small scale, terrorist attacks in October 2014. Current concerns about terrorism threats may now be at their highest level since the 9/11 attacks, stoked by a succession of terrorist attacks around the world, by concerns that Canada may truly be a target, as the Islamic State group has publicly proclaimed, and by the heated political debate around new anti-terrorism legislation. In the period since 9/11, Canadians have learned more about Canadian security and intelligence practices than has ever been the case in any previous era of Canadian history. Attention is being paid, including in unprecedented ways by both the traditional and new media, and with that attention has come an appetite for more—more knowledge, more information from government, more explanation, more transparency. The secret world now confronts a public demand for more openness, and into that breach stronger accountability must rush. There is no more ominous recipe for failure, both for operational performance and the maintenance of civil liberties, than if security and intelligence institutions lose public trust and legitimacy.

For all of these reasons: concerns about the potential loss of our ability to balance security needs and rights protections, fears of new powers and their unknowable usage, a fast changing security environment, heightened public awareness, and new demands for knowledge of state practices, we face an unusual moment of a crisis of confidence in the existing mechanisms of security and intelligence accountability. The crisis might pass, but the opportunity to fix an antiquated and wholly inadequate system of accountability should not be let slip.

The Canadian accountability system for intelligence and security was once widely touted as pioneering and impressive—once being in the 1980s and early 1990s. We even engaged in some quiet, behind-the-scenes, efforts to export our model of accountability to newly emerging democracies in places like Eastern Europe after the fall of the Soviet Union. It is not far-fetched to imagine that we could return Canada to being a world leader among democracies when it comes to holding a burgeoning spy and security system to proper account, while letting them get on with doing their needful, lawful work to protect national security and contribute to international security.

To push in this hopeful direction, three things need to be established:

- 1) What purpose does accountability serve (or who benefits)?
- 2) What is wrong with the current system of accountability?
- 3) What changes are needed?

But first, a word about words. As many other commentators have noted (and political points have even been scored on this front), there is a great confusion around the terms used in this debate. “Oversight,” “review,” “accountability” are the major phrases of the art, sometimes used interchangeably in ways that are bound to create confusion. The most over-arching concept, and to my mind the preferable one, is “accountability.”



Striving for accountability best represents what Canadians need from a system that scrutinizes the activities of our security and intelligence agencies from multiple perspectives and vantage points. Accountability contains elements of both oversight and review, an idea embraced by Justice O'Connor in his study of a new mechanism for scrutiny of the RCMP's national security activities (Arar Inquiry, Part 2). Oversight in the professional lexicon means engagement with current and on-going intelligence and security activities. This professional definition (which captures how the intelligence committees of the US House and Senate operate) is at odds with a common sense one that takes oversight to mean a capacity to scrutinize a security and intelligence system as a whole, from a strategic perspective. We can avoid this confusion by agreeing to talk about accountability instead. Accountability incorporates elements of "oversight" conducted in the Canadian, Westminster system by the executive branch, and of retrospective "review" conducted by external, independent agencies. It embraces internal measures within agencies, and external judicial controls. There is a place for an important role by Parliament in a system of accountability. Accountability represents the big picture objective of a system operating at numerous points of contact with, and scrutiny of, security and intelligence agencies.

Accountability for security and intelligence: Who Benefits?

In their public letter arguing for strengthening the accountability regime for Canada's security and intelligence agencies, four former Canadian Prime Ministers, offered this succinct statement of purpose:

"A strong and robust accountability regime mitigates the risk of abuse, stops abuse when it is detected and provides a mechanism for remedying abuses that have taken place." ³

While this statement accords with Canadian practice and reflects the scandal driven context in which we have created elements of our accountability system in the past, I would argue that it is too narrowly constructed. The focus on abuses is an important part of the role of any democratic accountability system, and must remain a perennial feature. But to erect an elaborate system of accountability solely to catch abuses, while it might mirror public concerns, is insufficient. Accountability plays other, important roles both within the secret space of security and intelligence agencies, and in the public domain. Accountability systems are meant to provide support to internal cultures of lawfulness generated by leadership directives and training programs. It is in this internal cultural space that any abuses of law or government direction are best nipped in the bud. Accountability is also meant to assist in improved operational performance, in a wide variety of ways, including learning lessons from past operational or policy errors.

Accountability systems have to be acknowledged as a burden to security and intelligence agencies: they take time, attention, personnel resources away from purely operational matters. But they must not be seen as an unnecessary, unproductive burden. Too singular attention to abuses magnifies this problem. An understanding of the role of accountability



in internal cultural and policy support and in performance improvements is vital. Most security and intelligence agencies know this, however reluctantly; but the public needs to know it as well.

The other important function of accountability operates in the public, political space. Here accountability offers more than a check on abuses. It also has the power to provide for public reassurance and public education. In an age when publics are rightly concerned both about threats to national security and about the enlarged, intrusive powers of security and intelligence agencies, accountability can offer an authoritative, independent source of information about the nature of threats, the nature of responses undertaken by security and intelligence agencies, about lawfulness issues and, on occasion, about the ultimate question of how well (or badly) our security and intelligence agencies are doing to provide for public security—what is sometimes referred to as the efficacy question. It can be a major contributor to sustaining public legitimacy around secret intelligence and security functions.

Accountability thus has multiple purposes and multiple audiences. It is meant to sustain lawfulness and contribute to successful performance. It is meant to speak in secret internally and to speak loudly in public. It has to manage these multiple audiences, and to find the right balance between internally directed messaging and messaging for public consumption.

Who benefits? In theory, everyone. Intelligence and security agencies benefit; government benefits; the public benefits. In practice, a major impediment to strengthening Canadian accountability is precisely the absence of recognition that everyone benefits. The root causes of this are a reluctance on the part of security and intelligence agencies to openly embrace accountability; a reluctance on the part of Government to see the benefits in contrast to seeing the costs of exposure and loss of informational control; an inability on the part of the public to truly grasp the value of accountability, largely because national security accountability mechanisms in Canada, particularly our existing review agencies, SIRC and the CSE Commissioner, have been so bad at addressing the public audience.

What is Wrong with the Current (Canadian) system of accountability?

The current Canadian system of accountability can be measured against many variables, but two in particular are on offer in the joint letter from our former Prime Ministers: robustness and integration. As their letter states:

“we all also share the view that the lack of a robust and integrated accountability regime for Canada’s national security agencies makes it difficult to meaningfully assess the efficacy and legality of Canada’s national security activities.”⁴

Robustness refers to the general capacity of the accountability system to see into those dark spaces of security and intelligence where it needs to peer (access) and to report appropriately. Integration refers to the ability of the different moving parts of an



accountability system to work together--to be, in fact, a system. It has another meaning that looks outward to the scanning capacity of accountability.

To explore these problems further, it is helpful to distinguish between internal mechanisms for oversight, generally in the hands of agency heads, deputy ministers and Ministers, and external review mechanisms.

It is, admittedly, extremely difficult to pronounce on the adequacy of internal oversight in the Canadian system, as this is conducted largely out of sight. It would appear to be the case that internal cultures of lawfulness within security and intelligence agencies are currently sound and that agency leadership is strong. Deputy Ministers have a clear mandate to ensure lawfulness and efficacy of their portfolio agencies and “serve at pleasure.” Greater problems may exist at the Ministerial level, the pinnacle of internal oversight, in terms of the capacity of Ministers to perform their accountability function. This requires knowledge, engagement and clear direction and can sit uncomfortably with notions of the complexity and secrecy of national security operations, their necessary degrees of independence, the desire to avoid overt politicization and even the desire to have some degree of plausible deniability. Ministers engage too closely with national security agencies at their peril; they remain too distant and removed from national security agencies also at their peril. It's a fine balancing act that needs constant adjustment and cannot stand alone.

There are documented hints that not all is well, including a recent 2013 study commissioned by the Department of National Defence on the review of Defence Intelligence activities, that argued:

“While the Minister of National Defence provides Ministerial direction to DND/CAF on the Government’s intelligence priorities each year, strategic direction for DI [Defence Intelligence] activities is otherwise weak, outdated or ad hoc.”⁵

Included in the Defence intelligence portfolio are the Communications Security Establishment and the Chief of Defence Intelligence, whose remit includes elements of counter-intelligence, security, threat assessment and overseas operational support.

Controversial Ministerial directives, from the Minister of Public Safety to CSIS, the RCMP and CBSA, on the handling of information and intelligence possibly derived from torture suggest that the Minister of Public Safety has been content to push decision-making authority on such matters down to the level of agency heads, or even managers within agencies.⁶

The most recent annual report (2013-14) from the Security and Intelligence Review Committee (SIRC) argued that with respect to one (unnamed) CSIS “sensitive” activity that “The Minister of Public Safety is not always systematically advised of such activities, nor is he informed of them in a consistent manner.”⁷

These are worrying straws in the wind that suggest that Ministerial accountability may not be as robust as desired. This problem is compounded by the fact that Ministers do not have to account for national security activities to any dedicated, security cleared



Parliamentary body and that substantial public Ministerial statements on national security matters are rare.

Ministerial accountability in the Canadian system also goes unexercised in the sense that Ministers do not currently have a Cabinet level forum for discussions on national security; a brief experiment in creating a Cabinet committee on National Security chaired by the Prime Minister was abandoned. Canada also lacks any mechanism for bringing key portfolio Ministers together with Deputies and agency heads to deal with national security emergencies or major policy discussions—a role played, for example, by the COBRA committee in the UK system.

Internal oversight in the Canadian system thus appears dependent on bureaucratic leadership and internal cultures, which can always be subject to change. Top-level oversight, conducted by Ministers, may be the weakest link.

The robustness of external review is another matter. The key external review bodies are the Security Intelligence Review Committee, with a mandate to scrutinize the activities of CSIS; and the CSE Commissioner, with a similar mandate to scrutinize the lawfulness of the Communications Security Establishment. SIRC was established in 1984 in the CSIS Act; the CSE Commissioner's Office was first created by Order in Council in 1996. There are important differences in their construction, and some similarities. SIRC consists of a steering committee of part-time Privy Councillors (up to 5) appointed by the Prime Minister after consultation (which may be limited) with the Opposition parties. SIRC is supported by a small, full-time staff. The CSE Commissioner is a part-time retired judge, also supported by a small, full-time staff. There are currently no mandated requirements for knowledge of national security issues as a qualification for being a member of SIRC or being appointed as CSE Commissioner. Staff appointments to both bodies are non-transparent as are any appointments of persons on contract.

Access (to classified documents and officials) on the part of the review agencies is, in theory, guaranteed, short only of access to Cabinet confidences. In practice, access depends on a good working relationships between the review agency and the service being scrutinized. It depends on the expertise and persistence of the review body staff.⁸ Struggles over access compound resource scarcities on the part of review bodies, leading to delays in reporting.

In any case, the existing review bodies are only capable of doing partial audits of national security activities on the basis of pre-approved review plans that are multi-year in nature and can sometimes fail to catch breaking issues or developing trends. Review agencies, it has to be accepted, will always be restricted to a partial audit function; the questions become how partial and how timely. Stickiness in relations between review agencies and their subjects, alongside significant resource constraints and possible expertise deficiencies, can tip partial audit away from its intended goal of producing meaningful national security scans, to mere unfinished 'pointillism'—imagine canvases of scattered painted dots and brush strokes where no meaningful image ever coalesces.



The robustness of external review bodies is also affected by the fact that they are torn between two desired audiences for their reporting. One audience is the agency being scrutinized. Review agencies want their reports to be treated with respect, their recommendations (and they can only make recommendations), listened to and followed so as to improve lawfulness and even raise efficiency. This requires a close working relationship—a kind of closed loop of reporting, protected and shrouded by official secrecy. Such desired closeness can distort the critical faculties and independence of a review body. It can also lead to an over-valuing of the relationship between reviewer and reviewed at the expense of the review body's public function.

The second audience for an external review agency is Parliament and the Canadian public. But in order to serve that audience, the review body has to step outside the ring of secrets, learn how to report declassified findings, and learn how to contribute to a public debate. This is more challenging than it might seem, and both of our external review agencies, SIRC and the CSE Commissioner, have struggled mightily over the years with public reporting, an especial problem for the CSE Commissioner. This on-going struggle to find ways to tell important national security stories in public without the deadweight of euphemistic language, the screen of obscurity, the excessive obeisance to official secrecy, has lowered the public legitimacy of these bodies to a dangerous extent.

In sum, the robustness of internal oversight may be compromised by weak Ministerial accountability and is subject to the vagaries of bureaucratic leadership and agency cultures. The robustness of external review is compromised by lack of resources and expertise, conflicts between reviewer and reviewed, by tensions pulling review bodies in different directions as they try to address different audiences for their reporting, and ultimately by lack of public standing.

If the current Canadian system clearly lacks robustness, as I have defined it; there is little to save it in terms of its integration. The meaning of integration cuts in two directions. One refers to the ability of elements of the accountability system to work together. Internal oversight is department and agency specific, with little overall coordination, especially in the absence of a Cabinet level standing committee or emergency body. The National Security Adviser can play a limited oversight role over the Canadian security and intelligence community as a whole but has to avoid delving into the details of individual agency and departmental issues. Justice Major's Air India Inquiry report called for the strengthening of the powers of the National Security Adviser, but these recommendations were not accepted and would have required a significant re-engineering of the Canadian system with unclear payoffs.

The existing external review bodies, SIRC and the CSE Commissioner, represent siloed entities, with little capacity to coordinate their work, even in the face of increasingly integrated operations by national security agencies themselves. Their mandates limit them to the study of CSIS and CSE respectively, and nothing further. Beyond informal and limited exchanges between their professional staffs they cannot conduct joint inquiries. Justice O'Connor proposed in his Part 2 Arar Inquiry Study of national security review that statutory gateways should be constructed to allow for such coordination and joint inquiries, but the Government chose not to act on this recommendation.



Other external review agencies operate on the periphery of national security review, with only an occasional or tenuous foothold, owing to specialized mandates and sometimes lack of expertise and sufficient security-cleared staff. This is the case for the federal Privacy Commissioner, the Auditor General, and even the re-named Civilian Review and Complaints Commission for the RCMP.

Even more striking than the lack of integration between existing external review bodies, is that fact that they are wholly inadequate to confront the reality of integrated and multi-faceted national security operations conducted by a wide range of agencies, many of which are not subject to any form of external review. The basic explanation for this is historical. The external review system was first created to deal with the then limited number of intelligence agencies with an operational capacity that included intrusive surveillance powers, and hence where abuse and scandal might lie—CSIS and CSE being the prime candidates. But the review system has not kept pace with the expansion of intelligence and security activities conducted by a wider range of agencies, some with intrusive operational mandates and powers.

One illustration of the gap between reviewed and non-reviewed government bodies can be found in the listing of entities to be included in the proposed national security information-sharing regime under Bill C-51. The list includes 17 entities, of which only 3 (CSIS, CSE, and the RCMP) are subject to some form of independent, external review. The list of non-reviewed entities includes the Canada Border Services Agency, the Department of National Defence/Canadian Armed Forces, the Department of Foreign Affairs, Trade and Development, the Department of Public Safety, and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). All have important intelligence and national security mandates and functions.

External review, to be effective, has to have the capacity to scrutinise the operations of the Canadian security and intelligence community as a whole, or if that is too ambitious, at least its key components. Our external review system is founded on an antiquated idea of what ‘key components’ means, and has been completely outstripped by the pace of change in the Canadian security and intelligence system since the 9/11 attacks and the many organisational changes that have followed in the Canadian governmental context. Since the 9/11 attacks we have seen the creation of the Department of Public Safety, the establishment of CBSA and FINTRAC, the growth of defence intelligence within DND/CAF, and the establishment of new security and information gathering functions, including the Global Security Reporting Program (GSRP), by the Department of Foreign Affairs, Trade and Development. Too much of the Canadian security and intelligence system goes un-reviewed and this undermines confidence in the review of those few government agencies currently watched by external agencies. The review system is Swiss-cheese in nature.

Arguably the greatest gap in the Canadian system of accountability, when it comes to the ability to scrutinise the Canadian security and intelligence system as a whole, concerns Parliament. The size of this gap is far greater than many Canadians understand. There are currently standing committees of both the House of Commons (the Standing Committee of Public Safety and National Defence) and the Senate (Senate Standing Committee on



National Security and Defence) whose mandates include issues of security and intelligence. But several things are worthy of note about the current committee system. One is that the mandates of both existing committees are very broad (including Defence) and not just focused on intelligence and security matters. The second is that the membership of these committees is chosen in the usual and obscure manner of jockeying among the parties and does not involve considerations of expertise on the part of MPs and Senators, which may help explain their frequent descent into partisanship. The third is that these committees have only minimal research expertise at hand, relying on assistance from the staff of the Library of Parliament. Their budgets are constrained. And if this list was not long enough, the biggest problem they face is that the MPs and Senators who sit on these committees are not security cleared, so they have no access to classified briefings and classified documents. These are committees seeking to understand the secret world without having access to the secret world.

As has often been pointed out, Canada stands apart from the practice of many of our close allies and partners, especially in the Five Eyes intelligence community, by not having any dedicated, security cleared Parliamentary body to engage in review of security and intelligence and intelligence community. Among Westminster style legislative bodies, The United Kingdom has its Intelligence and Security Committee, with a recently expanded mandate; Australia has its Joint Committee on Intelligence and Security; and tiny New Zealand punches above its weight with a Parliamentary Intelligence and Security Committee. The United States has the mother of all legislative branch review systems, dating back to the 1970s, with separate committees of the House and Senate devoted exclusively to intelligence issues. There are many models out there to choose from and best practices to adapt to Canadian needs, but we have done none of this, despite sincere attempts including proposed Government legislation in the dying days of the Martin Liberals, which had all-party support, and despite subsequent private members bills and Senate motions to create such a body. The most recent effort, voted down at second reading by a Government majority in the House of Commons in September 2014 and not sent for Committee study, was the private member's bill, C-622, by Joyce Murray, the Liberal defence critic. The Murray bill, which was two-part in nature, aimed at improving the accountability and transparency of CSE, as well as creating a committee of Parliament to scrutinise intelligence and security matters more broadly.

In Ms. Murray's private members bill, the mandate of a proposed committee of Parliamentarians was described as three-fold:

1. review the legislative, regulatory, policy and administrative framework for intelligence and national security in Canada
2. review the activities of federal departments and agencies in relation to intelligence and national security; and
3. report publicly on its activities, findings and recommendations



This mandate would have provided for what Craig Forcese and Kent Roach aptly describe as “pinnacle” review, of the sort missing not just in Parliament, but in all the external review mechanisms of the current accountability system.⁹

To the extent that the value of Parliamentary review has not completely penetrated the Canadian Parliament, it is illustrative to turn to Australian commentary. Perhaps the most succinct argument for true Parliamentary accountability was provided recently by Australian Senator John Faulkner, a former Cabinet Minister who serves on the Australian Parliamentary Joint Committee on Intelligence and Security. Like Canada, Australia is trying to come to grips with new national security threats from terrorism and other sources and is expanding the legal powers of its security and intelligence agencies. Faulkner stated:

“The Australian Parliament’s responsibility is clear. It must ensure our intelligence and security agencies have the necessary powers and resources to protect Australian citizens and Australian interests. But these powers can impinge on the values and freedoms on which our democracy is founded—qualities which Australian citizens rightly expect Parliament to protect. So Parliament must strike a balance between our security imperatives and our liberties and freedoms. Key to achieving this balance is strong and effective accountability.”¹⁰

Would a new Parliamentary capacity be a magic solution to Canadian accountability gaps? The reasonable answer would have to be no. It would be part, an important part, of a broad based system of internal oversight and external review. But it could command the strategic heights. It would take time for the Committee to mature and gain the trust of both the security and intelligence community and the Canadian public. Qualifications for membership on the committee would have to be carefully considered. It would be a challenge for Parliament to set aside partisanship, as any such committee must. Its reporting would inevitably be hampered by official secrecy constraints. But should we worry that such a committee would simply disappear down the rabbit hole of secrecy, leading as Philippe Lagasse opined, simply to “a select group of parliamentarians knowing more about national security affairs, but the public knowing, and perhaps caring, less”?¹¹ The answer is no—based on both the experience of other established Parliamentary or legislative bodies among our close allies, and on the self-interest of Parliamentarians, and Parliament, itself.

The best that can be said, and it is something, is that accountability exists in the Canadian system. But it is wholly inadequate to the task of watching over a greatly enlarged sphere of security and intelligence operations conducted by a wider range of Canadian federal agencies, and fails to meet enhanced public fears around national security and expectations of transparency and debate and the guarding of public interest about such important issues.

What Needs to be Done?

The argument of this paper is that if we have a clear understanding of the purpose of accountability, a grasp of the current context of accountability in Canada, and of its



historical roots, and a clear appreciation of the current and sizeable gaps in the system, then we have a roadmap for change. The new Rome of strengthened accountability won't be built in a day, but we need to make a start. In fact a start has been made in terms of the heightened public and political debate around these issues.

The roadmap suggests that we need to focus our attention on four areas of change:

1. improved Ministerial accountability (internal oversight)
2. strengthened and broadened external review so as to capture under its watchful lens the full range of intelligence and security operations that are now being conducted by the Canadian government
3. the creation of a true Parliamentary capacity to review intelligence and security matters
4. Better public reporting by all components of the internal oversight and external review system

There are some solutions at hand to satisfy many of these requirements for change. The argument can be made that we just need the political will and sense of urgency to implement them, starting with a more strategically focused and more wide-ranging expert external review body, often referred to as the “super SIRC” model, and with the establishment of a Parliamentary review capacity.

But we have to accept that the current Government believes that existing accountability mechanisms are adequate and has rejected arguments for change. In the context of the debate around C-51 the Government has, in particular, expressed a reliance on the Security and Intelligence Review Committee to police new CSIS powers, and on judicial “oversight” to ensure that Canadians’ rights are protected and the balance between security and rights are ensured. Judicial oversight exercised, for example, through scrutiny of warrant applications, the conditions imposed on peace bonds, controls on the use of preventative detention measures, and through the trial process (or judicial proceedings in the case of security certificates), is clearly very important to a system of accountability. But I would also, without going into the details here, second the concerns of legal experts such as Craig Forcese and Kent Roach that judicial oversight can never be complete, obviously does not reach the exercise of intelligence and law enforcement powers that fall beneath thresholds for judicial engagement, and contains no built-in requirements for on-going monitoring (or feedback loops).¹² Judicial oversight, like SIRC review, is part of a system; if the overall system of accountability is weak, it cannot be saved by exaggerated reliance on individual components.

But if we are faced by political stalemate at the moment, as we appear to be, the question of what can be done slips ahead of what needs to be done. What can be done might take the form of minor and unsatisfactory changes, such as statutory gateways and more resources for existing external review bodies, to the overall accountability system. In that



way what can be done might fool us into thinking we have solved the problem, or solved enough of it to allow it to be safely punted into the future.

My own preference would be to substitute further (purposeful) study for inaction or incomplete action, so as not to let slip the opportunities that currently exist to make headway on a problem that has (unusually) seized the political agenda and public imagination. I would argue for further, purposeful study, on two grounds. One would be that there exist a multiplicity of possible solutions to Canada's accountability problems that warrant careful examination. There are best practices abroad that need careful scrutiny; there is a Canadian context and history that similarly needs careful attention. The other ground for further study is to avoid missing some important additions to accountability while in hot pursuit of the obvious changes (in which basket I would put a super SIRG and a Parliamentary capacity). As we consider changes to our accountability system, maybe with the idea of returning us to a leadership role among democracies, we need to consider such things as changes to the machinery of government for dealing with security and intelligence, greater application of outside expert knowledge on complex security threats and responses, (possibly though the re-constitution of the Prime Minister's Advisory Council on National Security). We need to consider the requirement for greater transparency, without which accountability is hobbled. One measure would be a return to the practice of issuing a National Security Strategy on a regular basis. We need to consider adopting the practice of some of our close partners in terms of establishing an independent senior judicial authority to scrutinise the ever more complex and layered nature of national security legislation.

What would constitute purposeful study? Here are two suggestions. One would be a dedicated Parliamentary review of the matter, conducted by one or both of the House and Senate. The other would be the creation of an independent external body of experts to study the accountability waterfront. Both endeavours would have as their purpose the collection and analysis of evidence about accountability gaps and the practices of our close partners; both would reflect on public requirements for accountability; both would be charged with offering, within a reasonable time frame, concrete recommendations for change, to be presented as public reports to the Prime Minister and Parliament.

Further study is needed, further study would be beneficial, further study would capitalize on the opportunity of public attention. Further study can bridge, hopefully, the gap between the necessity for change and the current political stalemate. Even if our political system chose to consider further study as a form of punting a problem over the horizon that, too, would be OK. The issues aren't going away. And an election is coming up, and, no doubt, another one after that.



Appendix

¹ “A Close Eye on Security Makes Canadians Safer,” Jean Chretien, Joe Clark, Paul Martin, John Turner, published in the Globe and Mail, February 19, 2015. Online at www.tgam.ca/globe-debate; “Edward Snowden says Canadian Spying has weakest oversight in Western World,” CBC News, March 4, 2015

² “A New Review Mechanism for the RCMP’s National Security Activities, Part 2 report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [Arar Inquiry], December 2006

³ “A Close Eye on Security Makes Canadians Safer”

⁴ *ibid.*

⁵ “Independent Review of Defence Intelligence Activities,” November 29, 2013, declassified ATIP record, ATIP file A2014-00133-0001. Kindly provided to me by Murray Brewster, Canadian Press.

⁶ Minister of Public Safety [identical] directives to CSIS, RCMP and CBSA; Minister of Public Safety Directive to CSIS, dated December 7, 2010, declassified ATIP file A-2011-00249/TH; kindly provided to me by Jim Bronskill, Canadian Press; updated Ministerial Directive to CSIS, “Information Sharing with Foreign Entities,” July 28, 2011, available at: <http://cips.uottawa.ca/wp-content/uploads/2012/04/PS-ATIP-A-2011-00297-March-2012-InformationSharing.pdf>

⁷ Security Intelligence Review Committee, Annual Report 2013-2014, “Lifting the Shroud of Secrecy,” summarising SIRC classified Study, “A Sensitive CSIS Activity,” at p. 19-20

⁸ See the comments of the SIRC Executive Director, Michael Doucet, in the most recent SIRC annual review (2013-2014): “In some instances, I had to personally intervene to ensure that staff received complete information.”

⁹ Craig Forcese and Kent Roach, with Leah Sheriff, Bill C51 Backgrounder #5: “Oversight and Review: Turning Accountability Gaps into Canyons,” Executive Summary, p. 3

¹⁰ John Faulkner, “Surveillance, Intelligence and Accountability: an Australian story,” The Australian Financial Review, October 24, 2014. See also Senator Faulkner’s longer report, of the same title.

¹¹ Philippe Lagasse, “Should Parliament ‘Oversee’ National Security Affairs,” Institute for Research on Public Policy (IRPP), Policy Options, Blog post, February 25, 2015 Online at <http://policyoptions.irpp.org/2015/02/25/should-parliament-oversee-national-security-affairs/>

¹² Craig Forcese and Kent Roach, with Leah Sheriff, Bill C-51 Backgrounder #5, “Oversight and Review: Turning Accountability Gaps into Canyons”