

FOR EDUCATIONAL USE ONLY

P.L. 1992, AUT, 377-385

Public Law

1992

Article

OVERSIGHT OF CANADIAN INTELLIGENCE: A REVISIONARY NOTE

Stuart Farson.

Copyright (c) Sweet & Maxwell Limited and Contributors

Subject: CONSTITUTIONAL LAW

Keywords: Canada; State security

Abstract: In response to article on Security Commission by Ian Leigh and Laurence Lustgarten in P.L. 1991, Sum, 215-232.

***377** IAN Leigh and Laurence Lustgarten have recently provided a timely appraisal of the Security Commission in the United Kingdom. [FN1] Their analysis makes comparisons with other parliamentary democracies that were not correct when they wrote their article and which have been subsequently overtaken by events. They suggest that the Security Commission has a wider purview than comparable Australian and Canadian mechanisms. This is posited on its capacity to study security breaches wherever they occur. By contrast, they argue that oversight bodies elsewhere are restricted to specific agencies covered by enabling statutes. In Canada's case, the Inspector General of the ***378** Canadian Security Intelligence Service (CSIS) and the Security Intelligence Review Committee (SIRC) are said to be the only bodies authorised to examine the intelligence community. They state that there is "no direct parliamentary involvement in overseeing CSIS." [FN2] Later they suggest that Canadian oversight bodies are primarily

concerned with the protection of political and personal liberty, not efficiency. In particular, they claim that SIRC has not considered security breaches. They claim that such matters are "simply outside its remit and are left to the government or particular department to deal with as and when it chooses." [FN3] These conclusions belie Canadian statute and practice.

This note makes three points. First, the Ottawa Parliament is directly involved in overseeing Canada's intelligence community. Initially, participation was governed by Canadian parliamentary traditions. After the CSIS Act was enacted in 1984, however, more formalised arrangements were required. Recently, Parliament extended its role without the government's endorsement. Secondly, SIRC plays an important efficacy role. It has also examined security breaches and questions of administrative security. Thirdly, several bodies, other than SIRC and the Inspector General, have reviewed security and intelligence practices.

1. The McDonald Commission

In 1981, the McDonald Commission made two crucial recommendations about parliamentary oversight. One concerned the establishment of an Advisory Council on Security and Intelligence independent of government. It was to review the legality and propriety of all intelligence agencies (except criminal) and have access to relevant files. In addition, the Advisory Council was to report to the Solicitor General and directly to Parliament.

The other recommendation concerned the establishment of a joint parliamentary committee. It would have reviewed the activities, annual reports and estimates of all agencies collecting intelligence by covert means (except criminal). [FN4] The Commission believed it should be concerned with both the effectiveness and propriety of security and intelligence arrangements. [FN5]

***379** 2. Legislative responses

In 1983, a special Senate committee considered the government's initial attempt at establishing CSIS by statute. Bill C-157 made no mention of a parliamentary committee and limited the

independent review committee (now called SIRC) to reviewing CSIS's operations. Though the committee recommended neither an increased role for SIRC nor the establishment of a parliamentary committee, it did make two important points. [FN6] First, the Bill required the minister to table SIRC's annual reports in Parliament. This meant their immediate reference to the relevant standing committee. Secondly, the committee recommended a "sunset clause" empowering Parliament to review the legislation after a set period. [FN7] The government then introduced revised legislation (Bill C-9), which specifically obliged a parliamentary committee to conduct "a comprehensive review of the provisions and operation" of the Act after five years had elapsed. [FN8]

3. The period since 1984

Since the CSIS Act's adoption, Canada's intelligence community has been reviewed in four different ways. Some have concentrated on a single organisation; others on particular functions.

(i) Traditional modes of accountability

The minister, the Director of CSIS, and the RCMP Commissioner have all given testimony to the Standing Committee on Justice and the Solicitor General (the Justice committee) regarding the Solicitor General's estimates and annual reports. Likewise, they have each appeared before special joint standing committee hearings to provide a briefing on the Gulf War. [FN9] In addition, the minister has tabled SIRC's annual reports in Parliament and SIRC has testified before the Justice committee on them and its estimates.

The Review committee's reports--both annual and those released under access legislation--indicate that SIRC has been concerned with efficacy as well as propriety. From the start, SIRC monitored the "civilianization" process and CSIS's recruitment and training practices. [FN10] Its motive was to ensure that CSIS could fulfil its mandate ***380** effectively. [FN11] It also recommended extending Canada's foreign intelligence capacity and improving intelligence assessment. [FN12]

Testimony to parliamentary committees further substantiates SIRC's concern for efficacy. In 1989, SIRC confirmed that it had

reviewed CSIS's multi-year operational plan and that the Service had "allocated its resources efficiently, effectively, and wisely." [FN13] In 1990, the Justice committee asked SIRC about CSIS's "efficacy, efficiency and effectiveness." The Review committee replied: "That is our mandate now. We do not need any changes in the law." [FN14] Recently, SIRC stated: "We seek to ensure an appropriate balance between an effective Service and a responsive Service." [FN15]

Though Canada's security breaches have drawn less attention than Britain's, SIRC has investigated such matters. The Review committee has reported on: security screening for federal employees (1986), the Ottawa airport security alert (1987), and immigration screening (1988, 1989). [FN16] In 1989, SIRC's secret report to the minister proposed improved protection for scientific and technological assets. [FN17] In 1991, SIRC revealed it had reviewed the case of an ex-RCMP officer suspected of being a Soviet agent. Though its findings were inconclusive, SIRC has since decided to investigate CSIS's internal security. [FN18]

The Auditor General, who reports directly to Parliament, has also examined questions of administrative security and security breaches. In 1990, the office completed a comprehensive audit of information security. Its report is a damning indictment of the effectiveness of existing practices. [FN19] Besides concluding that departments were negligent in their lack of contingency planning, it found that few had even assessed threats to their computer systems and that government-wide monitoring was weak. The RCMP had recorded 11 illegal penetrations of government computer systems. Such problems could have been avoided if standard security procedures had been followed. [FN20] These conclusions were reviewed at some length by the Public Accounts Committee in 1991. [FN21]

***381** (ii) The Independent Advisory Team's role

Leigh and Lustgarten omit the role of non-statutory bodies in reviewing CSIS's activities. In 1987, the Cabinet established an independent advisory team (IAT) of former senior civil servants to conduct a review. This also covered matters of efficacy and propriety. [FN22] While the IAT was crucial in eliminating the

Service's counter-subversion branch, it gave impetus to broader changes within the intelligence community, particularly concerning the effectiveness of the security intelligence framework and the intelligence community's corporate culture. In fact, the government has adopted the IAT's public report almost entirely.

(iii) The Senate's reviews of terrorism

In 1986, following several terrorist incidents, the Senate established a special committee to consider the effectiveness of response measures. To minimise political partisanship and to ensure the candour of witnesses, this committee held in camera meetings. It covered all departments charged with protecting the public or responding to terrorist incidents, and recommended several improvements to counter- and anti-terrorist programs. [FN23] The government responded by establishing an interdepartmental task force that reviewed counter-terrorism arrangements, particularly those concerning contingency planning and crisis management. The National Counter-Terrorism Plan, which resulted, subsequently defined counter-terrorism roles and responsibilities for the Canadian government and police across the country. [FN24]

In 1989, a further incident on Parliament Hill caused the Senate to establish another special committee. Its objective was to assess whether counter-terrorist measures had improved. It concluded that the "lead minister concept" still did not function properly, and expressed little faith in federal-provincial agreements, especially concerning police co-operation. [FN25]

(iv) The five-year review

In accordance with the statutory requirement, Parliament formed a special committee in 1989 to review the CSIS Act and the Security Offences Act. It adopted a broad mandate, examining both issues ***382** that were central to CSIS and others that were peripheral. Many recommendations concerned improvements to the effectiveness of Canada's intelligence community. [FN26] Like the McDonald Commission, the special committee advocated expanding SIRC's mandate. [FN27] It proposed legislative controls and accountability mechanisms for the Communications Security

Establishment, Canada's signals intelligence agency. [FN28] It suggested enshrining counter- and anti-terrorism functions in law. [FN29] It recommended putting the government's security policy, covering personal vetting and asset protection, in a regulatory form, thus giving it a statutory basis. [FN30] The special committee also encouraged the minister to follow Australian practice and table an expurgated version of the CSIS Director's annual report in Parliament. [FN31] It also urged Parliament to establish a sub-committee on national security and noted issues that it had not adequately pursued. [FN32] One of these concerned the effectiveness of the intelligence assessment system. The IAT's earlier success in forcing government action had impressed the special committee. It therefore recommended establishing a similar independent team to address this problem.

4. The government's response

The government must now respond to parliamentary committee reports within 120 days. In its reply to the special committee, the government declined to make statutory changes. It did, however, commit itself in several ways. Additional mechanisms for reviewing the CSE are being considered. [FN33] Parliament will be given more information about security and intelligence matters. In this regard, a statement on national security issues facing Canada will now be prepared annually to accompany the main estimates. [FN34] The first such document has already been tabled and has provided opposition parties with the first opportunity to debate national security issues in many years. It incorporated CSIS's first public annual report, including a commentary on the security threat, and identified a key ministerial direction. This requires the Director to establish "future security intelligence needs" in light of radical shifts in global politics. [FN35] While the response ***383** also discouraged the establishment of a permanent sub-committee on the ground that it might diminish legislators' independence, it promised a further parliamentary review in 1998. [FN36]

5. The permanent sub-committee on national security

Parliament did not heed the government's advice about a permanent security and intelligence oversight committee. In 1991, the Justice committee formally established a sub-committee on national security. It plans to review the budgets and functions of CSIS and elements of the RCMP, as well as agencies having working arrangements with them. It will consider SIRC's annual reports, reports issued under section 54 of the CSIS Act, the minister's annual statement on national security and CSIS's annual reports, and it will hold hearings into Order-in-Council appointments. It will pursue issues identified by the special committee particularly: the CSE's accountability; the Inspector General's role; the efficacy of the assessment process; and the feasibility of comprehensive security and intelligence charter legislation. [FN37]

6. Conclusions

Canada has employed several techniques for overseeing security and intelligence practices. Besides commissions of inquiry, these have included investigative units (Inspector General, counter-terrorism task force) within the bureaucracy, independent or quasi-independent bodies (IAT, SIRC, Auditor General) external to government departments and agencies, and also Parliament itself. In the last case, both special and standing committees have been used.

Outsiders have found it difficult to assess investigative units. [FN38] Inspectors General, for example, rarely appear in public and seldom talk about their findings. Furthermore, reports so far released by the Solicitor General or through access legislation are inadequate for establishing the office's capability.

The capacity of independent and quasi-independent bodies is easier to assess. The IAT, for example, probably has had a greater impact on CSIS than SIRC or Parliament, certainly regarding CSIS's budget. [FN39] Also, while the IAT centred on CSIS, it made recommendations of wider compass. The review committee has concentrated on CSIS but its recommendations have extended to other elements of Canada's intelligence community. Clearly, SIRC has not focused on ***384** matters of propriety alone. It has consistently played a role in ensuring CSIS's efficacy. Consecutive

chairmen have continued to profess SIRC's responsibility to Parliament. Ron Atkey referred to SIRC as "the watchdog over CSIS for Parliament and the public." [FN40] The present incumbent, John Bassett, assured the Justice committee: "We will continue to examine CSIS activities thoroughly and to try both to ask CSIS the questions you would want us to ask and to answer the questions you put to us as completely and openly as possible." [FN41] The record shows, however, that the SIRC has not always asked the most appropriate questions and that it believes that the law restrains it from releasing critical information to Parliament. [FN42]

In 1978, C.E.S. Franks evaluated Parliament's capacity to oversee security matters. He showed that it had demonstrated concern for the rights and liberties of Canadians and had influenced the establishment of official inquiries. He concluded, however, that "secrecy remain[ed] an obstacle to effective Parliamentary control." [FN43] A review of recent Justice committee testimony suggests that significant obstacles remain. The committee has achieved a reasonable understanding of how the CSIS Act works, but it has often failed to obtain the fullest answers to probing questions or to follow up on pending issues.

The Senate's reports on terrorism indicate that its investigations extended beyond the federal experience to provincial and municipal countering programs. Though their testimony remains unpublished, persons involved believe it was full and candid. [FN44] Their reports were also influential in several respects.

The special committee did not confront the government or the review bodies when it considered the CSIS Act. There were sound reasons for this. Battling with the executive over access might have jeopardised the entire project, given the limited time available to complete a report. Also Mr. Thacker, the committee's chair, considered that confrontational tactics had contributed little to the earlier five-year review of the Access to Information Act and the Privacy Act. Though the special committee probably obtained better information from in camera briefings than Parliament had before, and reviewed more than CSIS and the RCMP, it was still thwarted in its attempt to provide the comprehensive review demanded by statute.

Recently, the Justice committee has employed Parliament's seldomused powers to call for "people, papers and records." Parliamentarians were initially denied unexpurgated copies of reports covering the escapes of Daniel Gingras and Allan Légère from federal penitentiaries, both of whom committed murder while at large. Not deterred, members raised a question of privilege and had the matter referred to the standing committee on privileges and elections. Parliament subsequently gave an order to the Solicitor General to provide the Justice committee with the full reports at an in camera meeting, with which the minister has since complied. Such precedents, coupled with the permanent Sub-Committee on National Security, and the government's recent willingness to permit officials to be called directly to account as evidenced by the Al-Mashat affair, suggest that Parliament may be more confrontational in the future. [FN45]

For the time being, at least, the central question facing Canada's Parliament is whether it gets the information it needs to ensure that the "delicate balance" is maintained between the needs of security and the principles of democracy. With SIRC unable to go beyond CSIS in its review and believing that it cannot be totally forthcoming, Parliament has had to become more proactive. Generally, special committees have had greater success than standing committees. This may be due to the perception that they are fact-finding bodies, not partisan endeavours. Their primary disadvantage is that they do not, like the IAT, have the same permanency as standing committees or SIRC. The notion of the permanent sub-committee is, therefore, a typical Canadian compromise. It has the image of a special committee in being interested in fact-finding. Yet it has the permanency of a standing committee without its immediate appearance of partisanship. It remains to be seen, however, whether the sub-committee will accomplish the objectives of its architects and whether parliamentarians will use their newly tested powers to effect.

STUART FARSON [FN4]

FN1. I. Leigh and L. Lustgarten, "The Security Commission: Constitutional Achievement or Curiosity?" [1991] P.L. 215

FN2. Ibid., p. 218, n. 18.

FN3. Ibid., p. 232.

FN4. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, Volume 2. Freedom and Security under the Law, (Ottawa, 1981), pp. 904-905 (hereafter: the McDonald Commission).

FN5. The McDonald Commission paid considerable attention to matters of impropriety, but quickly realised efficacy issues had to be addressed. See: S. Farson, "Restructuring Control in Canada: The McDonald Commission of Inquiry and its Legacy" in G. Hastedt (ed.), *Controlling Intelligence* (London, 1991) pp. 157-188; and P. Gill, "The Evolution of the Security Intelligence Debate in Canada since 1976" in S. Farson, D. Stafford and W. Wark (eds.), *Security and Intelligence in a Changing World: New Perspectives for the 1990s* (1991), pp. 75-94.

FN6. Senate, Special Committee on CSIS, *Delicate Balance: A Security Intelligence Service in a Democratic Society* (Ottawa, 1983), p. 32.

FN7. *Ibid.*, p. 35.

FN8. House of Commons (H.C.), Bill C-9, An Act to establish CSIS. 2nd Session. 32nd Parliament. 1983-84, s.69.

FN9. H.C., External Affairs and International Trade; and National Defence and Veterans Affairs, Minutes of Proceedings and Evidence, Nos. 91 and 49 respectively (February 14, 1991).

FN10. SIRC, *Eighteen Months after Separation; An Assessment of CSIS' Approach to Recruitment, Training and Related Issues* (Ottawa; 1986). See also SIRC's comments in its annual reports for 1984-85, 1985-1986, 1986-87.

FN11. See S. Farson, "Old Wine, New Bottles and Fancy Labels: The Rediscovery of Organizational Culture in the Control of Intelligence" in G. Barek (ed.), *Crimes against the Capitalist State: An Introduction to State Criminality* (Albany, 1991), pp. 184-217.

FN12. See SIRC, *Annual Report: 1988-89* (Ottawa, 1989), pp. 71-73.

FN13. H.C., Special Committee on the Review of the CSIS Act and the Security Offences Act, Minutes of Proceedings and Evidence, No. 4 (November 23, 1989), p. 31.

FN14. H.C., Standing Committee on Justice and the Solicitor General, Minutes of Proceedings and Evidence, No. 29 (April 10, 1990), p. 24.

FN15. SIRC, *Annual Report: 1990-1991* (Ottawa, 1991).

- FN16. For a comprehensive list of SIRC reports see *ibid.*, pp. 55-56.
- FN17. SIRC, *Annual Report; 1989-1990* (Ottawa, 1990), p. 22.
- FN18. SIRC (*supra*, n. 15), p. 24.
- FN19. Auditor General, *Report for the Fiscal Year Ending 31 March 1990* (Ottawa, 1990), Chap. 9.
- FN20. *Ibid.*, p. 231.
- FN21. H.C., Public Accounts Committee. *Minutes of Proceedings and Evidence*, No. 7 (October 10, 1991).
- FN22. Solicitor General, *Independent Advisory Team on CSIS. People and Process in Transition* (Ottawa, 1987), App. A.
- FN23. Senate, *Special Committee on Terrorism and Public Safety, Terrorism* (Ottawa, 1987), pp. 57-70.
- FN24. Solicitor General, *Counter-Terrorism Task Force, National Counter-terrorism Plan* (Ottawa, 1988), p. 3.
- FN25. Senate, *Second Special Committee on Terrorism and Public Safety, Terrorism* (Ottawa, 1989), pp. 12-26.
- FN26. H.C., *Special Committee on the Review of the CSIS Act and the Security Offences Act. In Flux but not in Crisis* (Ottawa, 1991).
- FN27. *Ibid.*, pp. 152-154.
- FN28. *Ibid.*, pp. 130 and 152-153.
- FN29. *Ibid.*, Chap. 8.
- FN30. *Ibid.*, pp. 127-135 and 153-154.
- FN31. *Ibid.*, pp. 89-91.
- FN32. *Ibid.*, pp. 193-195 and 199-202.
- FN33. Solicitor General, *On Course: National Security for the 1990s* (Ottawa, 1991), p. 55.
- FN34. *Ibid.*, pp. 78-79.
- FN35. G. York, "CSIS cites security threats: Spy agency releases 1st public report." *The Globe and Mail* (March 20, 1992), A1.
- FN36. Solicitor-General (*supra*, n. 33), p. 79.
- FN37. H.C., Sub-Committee on Justice and the Solicitor General on *National Security*, News Release (Ottawa, September 25, 1991).
- FN38. S. Farson, "Problems of Political Oversight: Difficulties Encountered by the Special Committee During Parliament's Five-Year Review of the CSIS Act," paper to the annual conference of the Canadian Association of Security and Intelligence Studies. Kingston, Ontario, June 1-2, 1991.
- FN39. SIRC (*supra*, n. 15), p. 50.
- FN40. R. Atkey, "Accountability for Security Intelligence Activity in

Canada: The New Structure." in P. Hanks and J. McCamus (eds.), National Security: Surveillance and Accountability in a Democratic Society (Cowansville, 1989), pp. 37-42 at 39.

FN41. H.C., Standing Committee on Justice and the Solicitor General, Minutes of Proceedings and Evidence, Issue No. 29 (Ottawa, April 10, 1990), p. 5.

FN42. See S. Farson, "Parliament's Capacity to Conduct a Comprehensive Review: Weak Link in the Chain of Accountability," paper for SIRC's Vancouver seminar (February 14, 1991).

FN43. C.E.S. Franks, Parliament and Security Matters (Ottawa, 1978), p. 65.

FN44. Confidential interviews.

FN45. See S.L. Sutherland, "The Al-Mashat affair: Administrative accountability in parliamentary institutions," (1991) 34 Canadian Public Administration, pp. 573-603.

FNa1. Department of Political Science, Simon Fraser University. UKPL 1992, Aut, 377-385

END OF DOCUMENT

Adobe Reader is required to view PDF images.



(c) 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.