FEDERALISM-E

The Intelligence Accountability Framework in Canada: Outdated and Inadequate?

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Federalism-E is founded by the Royal Military College of Canada and the Institute of Intergovernmental Relations at Queen's University - ISSN 2562-3435

Federalism-E Vol. 21, No.2 (2020)
10.24908/fede.v21i1.13982

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Introduction

The international security context is rapidly evolving. The Second World War, the rise of the Soviet threat and the Cold War, as well as the September 11 terrorist attacks have all contributed to this rapidly changing security environment. With these changes came the rise of modern intelligence agencies. The traditional spy-craft has morphed into a broader community composed of human, signals, domestic, geospatial, defence, amongst other forms of intelligence. This intelligence community (IC) is common to almost every western democracy as well as other more autocratic power. However, democracies face an added challenge in the wake of the rise of the IC: it requires the respect of democratic values. Indeed, two of the fundamental principles of democracy are accountability and transparency. This raises the question: how can intelligence activities be reconciled with democratic principles such as those aforementioned. The answer rests in the creation of accountability structures which conduct oversight and review of intelligence and security agencies (ISAs) and their covert activities. These structures maintain the secrecy needed for intelligence operations all the while providing some sort of transparency and accountability to satisfy democratic norms.

The Canadian intelligence community is not immune to the need for accountability structures. Like other Western democracies, Canada requires intelligence oversight and review bodies in order to maintain public trust. With that being said, many scholars have complained about the speed at which Canadian intelligence accountability structures are evolving. Relative to the rapid widening of Canadian ISA's mandates, the evolution of intelligence oversight and review bodies is quasi static.

This paper aims to critically assess the accountability structures in the Canadian intelligence community. To achieve this aim, the paper will be divided into three parts. First, a sequential analysis of the Canadian intelligence community and its accountability structures will provide readers with an in-depth analysis of the historical and present state of Canada's intelligence apparatuses. Second, the paper will proceed with a comparative analysis of the Five Eye's Intelligence Alliance (FVEY) member's intelligence oversight and review processes. This will allow readers to understand the different types of accountability structures that exist and examine how each work in practical contexts. Lastly, the paper will propose changes to the current Canadian intelligence accountability framework using the critical assessment provided by the two previous parts.

Before diving into the critical assessment, it is necessary to introduce key concepts and agents crucial to understanding the remainder of the text.

Accountability, Oversight, and Review

In the intelligence community, accountability refers to the “process in which officials and organizations provide explanations and justifications for their conduct.”¹ There are two types of accountability: accountability for efficacy and accountability for propriety. The former concerns holding agencies accountable for their performance, whether it be poor or strong. This type of accountability is usually done through performance assessment reviews. The latter concerns the legality of intelligence activities. Accountability for propriety is in part interested in whether or not intelligence agencies abide to laws and human rights standards. The overall process of accountability can occur in two different forms: oversight and review. Table 1 presents the typology of accountability. Many use both terms interchangeably although each represents a different process and approach to accountability.

Table 1: *Typology of Accountability*

	Accountability	
	Oversight	Review
Role and responsibilities	Real-time accountability check for intelligence agencies. Can influence ongoing intelligence operations.	Retrospective review of operations and activities. Can lead to recommendations and reform of ISAs.
Type of accountability	Accountability for efficacy	Accountability for propriety

With information from Goldman et al., 2016; and Leigh et al., 2019.

Oversight refers to the ‘real-time’ accountability process which can influence the actions of ISA’s. Oversight bodies are used to evaluate the effectiveness and efficiency of intelligence activities rather than their legality. In other words, oversight bodies are mostly used in accountability for efficacy. Some examples of oversight agents in Canada include the Prime Minister’s National Security Advisor (PMNS Advisor) as well as ministers of departments with intelligence capabilities. Simply put, oversight is “advance authorization, coordination, and control of security and intelligence services.”²

Review refers to retrospective assessment of security and intelligence activities. Reviewing bodies, in the likes of the Security Intelligence Review Committee (SIRC) and the Office of the CSE Commissioner (OCSEC), mainly hold agencies accountable on a propriety basis. In other terms, reviewing authorities are mandated to ensure intelligence operations were

¹ Zachary K. Goldman and Samuel J. Rascoff, “Global Intelligence Oversight: Governing Security in the Twenty-First Century.” (New York: Oxford University Press, 2016), 181.

² Ian Leigh and Njord Wegge, *Intelligence Oversight in the Twenty-First Century: Accountability in a Changing World*. (New York: Routledge, 2019), 162.

done legally and within the bounds of human rights. In short, review is “retrospective scrutiny of agency activities to measure compliance, typically against legal or other standards.”³

Judicial, Legislative, Executive, and Independent

Now that the different types and roles of accountability structures have been defined, it is time to look at the different agents that can play a role in these structures. There are four possible accountability agents: judicial, legislative, executive, and independent. Each is different in its mechanisms and functioning, but all achieve the same goal of accountability.

In the context of accountability, judicial agents—for the most part sitting or retired judges—conduct oversight of ISAs. This oversight appears in the form of judicial warrants as well as ad hoc inquiries. Special cabinet-appointed judges serve as ‘permission-granting’ authorities with regards to intelligence operations. It should be noted that these judges grant permission on the basis of efficacy rather than legality. In other words, judges will grant ISAs permission to conduct intelligence operations if the-said operations satisfy the criteria of efficacy (if, in a way, they are to attain the intended objective). An added power to these judicial agents is that they can grant ISAs the authority to act against Canadian laws, including the Canadian Charter of Rights and Freedoms (henceforth referred to as ‘the Charter’). Indeed, although specially appointed oversight justices do not have the authority to review potential illegal actions done by ISAs, they have the authority to permit them to act against the law. This does not mean, however, that ISAs are not legally held accountable, as this power is given mostly to independent reviewers.

Independent reviewers are, for the most part, ad hoc institutions established by the executive branch of government. Their roles include, but are not limited to, the legal review of ISAs security-related activities, the review of existing accountability structures, and the proposal of policy recommendations to increase efficacy of ISAs. Examples of independent reviewers in Canada include the Security Intelligence Review Committee (SIRC), the Office of the Communications Security Establishment Commissioner (OCSEC), the Intelligence Commissioner (IC), and the National Security and Intelligence Review Agency (NSIRA). Independent reviewers are established—and dismissed—through legislation such as *Bill C-22* and *C-59*.

Another possible accountability agent is found in the legislative branch. Indeed, parliamentarians—from the House of Commons (HoC) and the Senate—can be appointed to special committees in charge of intelligence accountability. Special committees of parliamentarians include the National Security and Intelligence Committee of Parliamentarians (NSICOP), which is responsible for the overview of Canadian ISAs. Legislative accountability structures allow for a more transparent interaction between the legislature and the intelligence community.

³ Leigh and Wegge, 163.

The last accountability agent is the executive branch of government. ISAs are part of ministerial portfolios and as such, are headed by ministers. Some of these ministers can be given special oversight powers in the form of ministerial directives. For example, the Minister of Public Safety has ministerial authority over the Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP) while the Minister of National Defence has ministerial authority over the Canadian Forces Intelligence Command (CFINTCOM) as well as the Communications Security Establishment (CSE). Moreover, executive accountability can take place in a different form: advisory positions. Indeed, members of cabinet—especially the prime minister—can appoint subject-matter experts (SMEs) to advisory positions. These advisors can be granted executive oversight power similar to ministers. In the intelligence and security context, the principal advisor is the Prime Minister’s National Security Advisor (PMNS Advisor).

Canadian Intelligence Agencies and their Accountability Structures

In Canada, there are three main ISA’s: The Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), and the Communications Security Establishment (CSE). These three agencies are responsible for domestic security, foreign intelligence within Canada, and signals intelligence, respectively. These three agencies, along with the Department of National Defence and the Canadian Armed Forces (DND/CAF), account for most of the intelligence activity in the country. Nevertheless, there are over 16 departments who have some intelligence functions. Table 2 presents the main Canadian intelligence agencies and the type of intelligence each provides to the greater Canadian intelligence community. It is to be noted that the table does not include all Canadian ISAs. Most notably, it does not include agencies such as the Canadian Border Services Agency (CBSA) or the Prime Minister’s Office (PMO), who both conduct intelligence and security activities: the former mainly criminal intelligence as well as border threat assessment (surveillance) and the latter mainly in an intelligence and security coordination framework (also threat assessment for the security of the prime minister). The PMO, for instance, is home to the Integrated Terrorism Assessment Centre (ITAC), which is under the responsibility of the PMNS Advisor.

Table 2: Canadian Intelligence and Security Agencies

	Types of intelligence activities
Canadian Security Intelligence Service (CSIS)	Security Intelligence
Communications Security Establishment (CSE)	Signals Intelligence and Cyber Security
Royal Canadian Mounted Police (RCMP)	Domestic and Criminal Intelligence
Department of National Defence and the Canadian Armed Forces (DND/CAF)	Defence Intelligence, Geospatial Intelligence, Human Intelligence, Cyber Security, and Signals Intelligence

Global Affairs Canada (GAC)	Foreign Intelligence (relating to foreign affairs)
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With information from the Government of Canada; Leigh et al. (2019); Barker et al. (2017)

Critical Assessment of Canadian Intelligence Accountability Structures

Having gone over the notions, events, and agents most relevant to the topic, it is now time to turn to the critical assessment portion of this paper. This assessment will be completed in two phases. First, a sequential analysis of the evolution of the Canadian intelligence community will be conducted. This sequential analysis will focus on past⁴, as well as present, accountability structures in order to examine which structures have worked best in Canadian intelligence history. The second part will compare the intelligence oversight and review frameworks of FVEY members. This comparative analysis will allow the assessment of a greater number of accountability structures all the while conducting a cross-national comparison of similar intelligence communities. Lastly, the sequential and comparative analyses will be brought together to form the final critical assessment. This final assessment will in turn be used to propose recommendations as to how to improve the Canadian intelligence accountability structures.

Sequential Analysis of the Canadian Intelligence Community

The modern intelligence period begins with the end of the Second World War. In Canada, this is marked by the defection, in September 1945, of Soviet spy Igor Gouzenko. This was a turning point in Canadian national security policy and is characterized by the awakening of Canadian officials to the rising threat of foreign intelligence operations on home soil. The decades following the Gouzenko affair were dominated by two major intelligence agencies: the RCMP Security Service (previously known as the Directorate of Security and Intelligence) and the Communications Security Establishment (CSE). Until the 1969 Mackenzie Commission, intelligence oversight and review in Canada were inexistent. The CSE and RCMP Security Service were left unscrutinized and were, in many ways, not accountable to anyone other than the minister responsible of their department. This can be partially explained by the political context of the time. The fear of communism appeared to grant intelligence agencies ‘carte blanche.’ In teleological fashion, Canadians were strictly concerned with their security and did not seem to care for how that security was provided. The Mackenzie Commission was the first taste of intelligence accountability in Canada. The report produced by this Commission, however, does not consider the lack of accountability structures. Instead, it focuses on the organizational structure of the intelligence community and how to increase its efficacy. Topics such as the handling of protected information, structure of chain of command, and threat assessment are addressed in the Commission’s report. This report, however, falls short of introducing full accountability in the intelligence community. It rather introduces accountability for efficacy and foregoes accountability for propriety. The latter will come only 12 years later with the McDonald Commission.

⁴ For the purpose of this critical assessment, the sequential analysis will only cover the post-WWII period onwards (modern intelligence period). It is the author’s belief that examining periods before WWII will not enhance or complement the critical assessment.

The 1981 McDonald Commission was an important crossroads in Canadian intelligence. The Commission was established due to the growing amount of domestic intelligence gathering, especially in Quebec. It is the first Canadian commission to touch upon the legality of intelligence operations and recommend the creation of permanent accountability structures. The key propositions of the Commission's report are the creation of a parliamentary intelligence oversight committee, a new intelligence agency separate from the RCMP, and the establishment of a permanent review organization for this new agency. The Commission led to the 1984 *CSIS Act*, which created the Canadian Security Intelligence Service along with a review body named the Security Intelligence Review Committee (SIRC). The RCMP Security Service was simultaneously dissolved. The SIRC marks the beginning of permanent accountability for propriety in Canada. It is an independent executive-appointed review committee. The prime minister is responsible for the appointment of SIRC's three to five members, who are appointed for renewable five-year terms. Its responsibilities include the lawfulness review and complaint investigation. However, a 2017 report by the Library of Parliament's research team criticizes the SIRC's ability to effectively hold CSIS accountable due to lack of funding. Indeed, the annual budget of just under CAD1.9 million is said to be insufficient for the 14 full-time staffers of the SIRC. The SIRC's thin budget is considerably small for a committee responsible for the legal review of an intelligence agency running on a CAD577 million annual budget.

Since the McDonald Commission, there have been two other significant commissions tackling the issue of intelligence accountability structures. The first was the Commission investigating the 1985 Air India Bombing. This Commission yielded that Canadian intelligence agencies did not share information efficiently and lacked interagency communication, which were in part responsible for the failure to prevent the bombings. The second important commission came later in the Maher Arar Case. This Commission reported the lack of lawfulness review in many government agencies and departments. For instance, the Commission's report pointed out the inexistence of independent national review committees for the CBSA, Department of Global Affairs, and military. This Commission was a significant attempt at increasing accountability for propriety and increasing the respect for human rights and the Charter. These two commissions, although progressive in their recommendations, did not lead to many changes. Indeed, most of the recommendations were not adopted and the intelligence accountability status quo prevailed.

The status quo refers to the period between the late nineties until 2017. It is characterized by the lack of change in intelligence accountability structures. The Arar and Air India Bombing Commissions having been completed and their recommendations ignored, intelligence agencies carried on with their jobs with the few accountability structures they had. Among the structures in place were the SIRC and a newly created Office of the CSE Commissioner (OCSEC). This new role of CSE Commissioner, established in 1996, was responsible for reporting unlawful activities to the Minister of National Defence and the Attorney General. With CSIS having the SIRC, it was only a matter of time before the CSE was imposed its own independent review body. The status quo period in intelligence accountability corresponds to a period when the mandates and responsibilities of intelligence agencies increased. With events in the likes of the 'Toronto 18' and the 2014 lone wolf attacks, intelligence agencies were granted more and more

powers. For instance, CSIS was permitted to break Canadian laws and the Charter insofar as it obtained a judicial warrant. Relative to this increase in power of intelligence agencies, the status quo of intelligence accountability structures is perceived as a significant decrease. In other words, although accountability did not decrease per se, the increased powers of intelligence agencies made the accountability structures outdated and inadequate.

Figure 1: Roles and Interaction of NSIRA with Other Accountability Bodies

Retrieved from National Security and Intelligence Review Agency (2017)

The status quo ended in 2017 with Bills C-59 and C-22. After failed attempts in 2005, 2007, 2009, and 2014, the two laws officially created the National Security and Intelligence Committee of Parliamentarians (NSICOP), the National Security and Intelligence Review Agency (NSIRA), and the Office of the Intelligence Commissioner (OIC). Figure 1 presents a graphic that illustrates the creation of NSICOP and NSIRA. These accountability bodies were created in response to intelligence leaks like Snowden. NSICOP is the first legislative committee to review intelligence and security operations. For the first time in Canadian intelligence history, parliamentarians (from the HoC and Senate) were given access to classified intelligence files in order to facilitate the review process. Similarly, the NSIRA is Canada's first multi-agency accountability structure for intelligence and security. It replaces the OCSEC and the SIRC in holding the CSE and CSIS legally accountable. The OIC, on its end, is the overall body in charge of intelligence accountability in Canada. In a way, it can be said that the Intelligence Commissioner is the person held accountable for intelligence accountability. The issues and benefits of these new bodies will be examined in the last part of this critical assessment.

Now that the evolution of intelligence accountability has been examined and that the various review and oversight bodies have been presented, it is time to compare the current

Canadian framework to that of other FVEY members. How does Canada measure up to its allies with regards to holding intelligence agencies accountable?

Comparative Analysis: Oversight in the Five Eyes

This comparative analysis will examine and contrast the accountability structures of Canada, the United Kingdom, Australia, and New Zealand. The United States, although a member of the FVEY, will be excluded from this analysis for the reason that it does not share the parliamentary constitutional monarchy of the other members⁵. Table 3 presents the accountability structures of the Commonwealth members of the FVEY.

Australia's intelligence accountability structures are mainly located in the legislative and executive branches of government. Unlike Canada, Australia has had an intelligence parliamentary committee—known as the Parliamentary Joint Committee on Intelligence and Security (PJCIS)—for quite some time. First established in 1988, the PJCIS is responsible for reviewing the administration and expenditure of all of Australia's intelligence agencies. Complementary to the PJCIS is the Inspector-General of Intelligence and Security (IGIS), which was established in 1987. Its roles include both oversight and review of Australian intelligence agencies. Under the authority of the Prime Minister, the IGIS has the power to investigate any of Australia's intelligence units. It is mostly used for accountability of propriety but can be used to evaluate performance and efficacy. Other than the PJCIS and IGIS, Australia also has Senate Standing Committees. These committees are for the most part used to hold the executive branch accountable for its actions, especially ministers and directors of intelligence agencies. Senate committees can hold public hearings, but it is limited in its access to information. These are the main intelligence accountability structures of Australia. There is limited judicial oversight in the sense that special warrants are often not required to conduct surveillance. Instead, agencies need ministerial approval.

Table 3: Main Accountability Structures of the Commonwealth FVEY Members

	Canada	Australia	New Zealand	United Kingdom
Judicial	Judicial Warrants	Judicial Warrants	Commissioners of Intelligence Warrants	Investigatory Powers Tribunal and Judicial Commissioners
Legislative	National Security and Intelligence Committee of Parliamentarians	Parliamentary Joint Committee on Intelligence and Security	Intelligence and Security Committee	Intelligence and Security Committee

⁵ Oversight and Review in the US is extremely centred in the legislative. This is due in part to the unfused nature of its government. Since it is not helpful to compare apples and oranges, the comparative analysis will focus on the Commonwealth members of the FVEY who share similar structures of government.

Executive	Prime Minister's National Security Advisor	The Prime Minister and Cabinet	The Prime Minister and Cabinet	The Prime Minister and Cabinet
Independent	National Security and Intelligence Review Agency	Inspector-General of Intelligence and Security	Inspector-General of Intelligence and Security	Investigatory Powers Commissioner

With information from Barker et al., 2017; note that these are the structures as of 2019

In New Zealand, the intelligence accountability structures are divided among the executive, legislative, and judicial branches of government. Similar to Australia, New Zealand has an Inspector-General of Intelligence and Security (IGIS). The roles of the Kiwi IGIS are sensibly the same as those of the Australian IGIS. Instead of the PJCIS, New Zealand has the Intelligence and Security Committee (ISC). The ISC's role are to assess the efficacy of Kiwi intelligence agencies and to request the IGIS to conduct inquiries in legal matters pertaining to the intelligence community. Contrary to Australia, New Zealand has judicial oversight in the form of the Commissioners of Intelligence Warrants. The Commissioners' responsibilities are to approve or disapprove, jointly with ministers, the unlawful use of intelligence capabilities (when necessary). The Commissioners, much like in Canada, can issue warrants that allow intelligence agencies to act against New Zealand's laws.

In the United Kingdom, the accountability of intelligence agencies is centred on the executive and judicial. The UK does have an Intelligence and Security Committee composed of parliamentarians, but its access to classified information is limited. Consequently, legislative review is mainly a formality. Executive oversight and review, however, is considerable. The Investigatory Powers Commissioner (IPS), appointed by the Prime Minister, is required to review, audit, and investigate the UK's intelligence agencies. Another executive oversight mechanism is the use of warrants by responsible ministers to allow intelligence agencies to conduct certain surveillance actions that may be considered unlawful otherwise. This 'warrantry' is a dual executive-judicial mechanism, meaning that warrants must be reviewed and approved by judicial commissioners prior to coming into force. The judicial branch also has the Investigatory Powers Tribunal (IPT), which is used to investigate complaints of public bodies. The IPT, however, has been criticized due to its secretive nature. Many believe that the secretive process removes some of the tribunal's 'judicial effect'.

Now that the accountability structures of Australia, New Zealand, and the United Kingdom have been presented, the paper turns to the final critical assessment, which brings together the sequential and comparative analyses.

Final Critical Assessment and Recommendations

The information presented above shows that the Canadian intelligence accountability structures are reactive. Reactive in the sense that they change when a significant event occurs. For example, the latest changes in accountability (creation of NSIRA and NSICOP) came after

the Snowden leaks, which exposed the unlawful conduct of intelligence agencies to the public. In a reactive fashion, the Canadian government promised change in the intelligence accountability framework, and it delivered. However, the information above also shows that the government's efforts fall short of addressing the growing accountability gaps. The changes that took place from 2017 to 2019 should have taken place when the McDonald Commission's report recommended them. Moving on, without comprehensive annual reviews of the accountability structures, the government will not be able to maintain and update the newly created oversight and review bodies. Consequently, these bodies will soon be outdated and need to be replaced by new ones. This 'create-replace' loop is not the adequate way of dealing with accountability. Instead of replacing oversight and review bodies when they become obsolete, the government should aim to maintain and update them. This would be beneficial in the long term, as it would limit the amount of change and familiarization needed with the creation of new bodies.

When it comes to the comparative analysis, Canada's allies reveal that legislative oversight and review is not the ideal way to achieve accountability. As shown by the Kiwi example, there will always be a confidentiality and expertise dilemma when it comes to parliamentarians. Since members of parliament are elected and often replaced, they develop little intelligence expertise per se, and decisions taken by such legislative committees may not be in the best interest of the intelligence community. Furthermore, the confidential nature of information dealt with in intelligence oversight and review bodies does not encourage granting access to politicians. For many years now, the fear of politicians leaking classified information has limited their access to that information. Another takeaway from the comparative analysis is that judicial oversight is complicated. Here again, the confidential nature of intelligence affects the 'judicial' aspect of warrants. Australia and New Zealand have responded to this by using executive-issued warrants approved by judicial authorities. This mix of judicial and executive oversight allows for both expert and legal advice in oversight of ongoing intelligence operations. The comparative analysis also shows that there is a strong demand for executive-appointed independent accountability bodies, with all Commonwealth FVEY members having some kind of independent review body.

The Canadian intelligence accountability framework was, until 2017, agency-based. This made place for stove piping in many accountability bodies, especially the SIRC and OCSEC. The newly created NSICOP and NSIRA address this problem in the sense that they are both whole-of-government bodies replacing agency-based bodies. Having been established only recently, NSICOP and NSIRA have yet to be assessed as to whether they have met their expectations or not. The new accountability framework is certainly a step in the right direction, but this critical assessment still recommends that a continuous maintenance of these newly created bodies be conducted in order to erase the need to replace accountability bodies in the future. The implementation of this recommendation is crucial to keeping the current framework from becoming outdated and inadequate, as it has been many times before.

Conclusion

The intelligence accountability framework in Canada has changed a lot in recent years. Among these changes feature three new accountability bodies: the NSICOP, NSIRA, and OIC

(Leuprecht et al., 2018). These bodies are certainly a step in the right direction, but there is still familiarization ahead. Scholars are still unsure whether the new bodies are adequate or not and whether they fulfil the government's expectations. Nevertheless, if these new bodies are to remain relevant, a continuous review and maintenance of their structure and processes will be necessary. One thing is certain: insofar as democratic values and norms prevail in Canada, accountability structures will be necessary.

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