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'Like the Fox Guarding the Henhouse': The Gradual Cession of Parliamentary Authority Over National Security Affairs in the Post-ATA Era

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Introduction

Maintaining essential security within an open society necessitates certain contradictions and uncomfortable compromises, which are at the root of navigating national security law. In Canada, the governance of national security matters implicates a wide range of constitutional and juridical concepts, not least of which include explorations of the Crown prerogative, Parliamentary supremacy, Parliamentary privilege, the confidence convention, and *Charter* values. In the 23 years since the deadly 9/11 terror attacks, Canada's national security infrastructure has witnessed a complete revolution and a radical expansion in form, function, and presence in the day-to-day lives of Canadians.

The rapid and somewhat haphazard drafting and passage of Bill C-36[1] in 2001, otherwise known as the *Anti-Terrorism Act*, set in motion a struggle between the executive and legislative branches of government that is still being actively fought today. At the time of the Act's passage, critics warned that

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[1] Bill-C-36, *An Act to amend the Criminal Code, The Official Secrets Act, the Canada Evidence Act, the Proceeds OF Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism*, 1st Sess, 37th Parl, 2001 (assented on December 18, 2001), online: < https://www.parl.ca/LegisInfo/en/bill/37-1/c-36 > .

Parliament's choice to cede authority in national security affairs would lead to executive encroachment and the over-centralization of power in the Prime Minister's Office (PMO) and among cabinet ministers writ large. Episodes such as the Afghanistan Detainees Speakers Ruling in 2010 and the ongoing fracas with regards to the procurement of documents related to the Winnipeg National Microbiology Laboratory demonstrate the continual erosion of Parliamentary sovereignty in national security matters, much to the detriment of the Canadian public. The creation of new national security bodies such as the National Security and Intelligence Committee of Parliamentarians (NSICOP) in 2017[2] and the National Security and Intelligence Review Agency (NSIRA) in 2019[3] have both strengthened and complicated Parliament's relationship with the governance of national security.

Unlike war-making powers, which have been exclusively recognized as residing under the Crown prerogative ('defence of the realm'), the prosecution and governance of national security involves a broader strata of permanent administrative and bureaucratic functions and should not be interpreted as the exclusive jurisdiction of the executive. Parliament is the duly elected representative voice of everyday Canadians. Parliamentarians derive their authority from the public will; they are tasked with the protection of rights, the safeguarding of liberties, and the examination of executive excess against hard-won constitutional freedoms. Canadians must always retain a say in the way they are being governed, extending to every area of the national interest including security matters. For the executive to defang or otherwise sideline sitting MPs is to deny the public a role in shaping norms, values, and expectations regarding the protection of their own rights and interests.

In the post-COVID era, it would behoove Parliament (particularly the House of Commons) to reject further state securitization by the executive branch and to instead reassert its jurisdiction and authority in the realm of national security matters. MPs should no longer absolve themselves of responsibility in overseeing national security matters. A muscular Parliament can in this fashion ensure holistic governance, better review of the executive, and stronger representative law-making for Canadian voters.

Legislating in an Emergency: The Anti-Terrorism Act (2001)

That the sitting government has a constitutional obligation to protect Canadians and provide for their essential security is not a question in dispute. However, it is necessary to remember that the powers bestowed to the government to collect intelligence, prosecute crimes, and investigate threats to the security of Canada derive from a parliamentary mandate supported by voters. These executive operations and activities must always conform to

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[2] Canada, National Security and Intelligence Committee of Parliamentarians (NSICOP), "About the NSICOP", online: < https://www.nsicop-cpsnr.ca/about-a-propos-de-nous-en.html > .

[3] Canada, National Security and Intelligence Review Agency (NSIRA), "Who we are - NSIRA", online: < https://nsira-ossnr.gc.ca/who-we-are > .

statute and abide by principles of constitutionalism. The Supreme Court of Canada (SCC) stated as such in its landmark 2007 *Charkaoui* ruling:

> One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.[4]

Over the past two decades, Parliament has chosen to cede its authority in national security matters to successive governments, regardless of their political stripes. The balance between accountability and security has been eroded to the extent where sitting cabinets and ministers have felt empowered to boldly disregard Parliament's sovereignty in national security matters. This disrespect for Parliament's authority has only worsened with time. In the Canadian constitution, national security issues engage both executive and legislative functions: though federal powers flow from the "Peace, Order, and good Government" power under section 91 of the *Constitution Act, 1867*, Parliament is also charged with the plenary jurisdiction to legislate in relation to criminal law and criminal procedures under subsection 91(27).[5]

The roots of the current disagreeable state can be traced to the rash manner in which the *Anti-Terrorism Act* (*ATA*, 2001) was passed in the aftermath of the devastating 9/11 terror attacks. Canadian decision-makers were pressured by both the United States and the United Nations to modernize its national security legislation and framework, with a deadline of two months for reporting under a resolution of the United Nations Security Council. What followed was an extraordinary Parliamentary process which invoked and accelerated the energies of both chambers. At the time, many critiques of the Bill from a civil liberties and constitutional perspective were hand-waved owing to the extreme exigency and uncertainty of the situation. In the eyes of many, the menace of "transitional terrorism" did not justify the specific law-enforcement mechanisms and measures provided for in the new statute, which carried the explicit goal of expanding the extraordinary powers of the security state.[6]

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4 *Charkaoui, Re*, (*sub nom.* Charkaoui v. Canada) [2007] 1 S.C.R. 350 (S.C.C.) at para. 1 [*Charkaoui*]. < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2345/index.do > .

5 Jacques Shore, Brian Crane & John Wilson, "Interjurisdictional Information Sharing and National Security: A Constitutional and Legislative Analysis" (2016) 62:1 *McGill LJ* 207, online: < https://lawjournal.mcgill.ca/article/interjurisdictional-information-sharing-and-national-security-a-constitutional-and-legislative-analysis/ > .

6 Alex Mazer, "Debating the Anti-Terrorism Legislation: Lessons Learned", (2003) 26-2 *Canadian Parliamentary Review* 21, online: < http://www.revparl.ca/english/issue.asp?art = 14&param = 58 > .

The *ATA* contained several problematic measures which sidelined the powers of Parliament to review and contain executive excess. One section of the bill permitted the Minister of Justice to prohibit the release of information pertaining to international relations, national security, or national defence interests. The Privacy Commissioner of the time, George Radwanski, noted that such provisions could "nullify the *Privacy Act* by ministerial fiat," therefore undermining the ability of the Commissioner to review information.[7] The ability of the government to determine which information to censor and redact in kind has been replicated in a number of statutes since the *ATA*, especially in those corresponding to national security governance. Though judicial reviews for information censure under the *ATA* were later introduced, one commentator has pointed out that emergency legislation can have a creeping effect on judicial precedents, "[making] courts less likely to rule the legislation unconstitutional".[8]

These judicial attitudes, combined with Parliament's hesitation to push back against the encroachment of executive powers, has in some ways produced a form of juridical capture. Traditionally, courts have chosen to defer to the executive's constitutional obligation to maintain order and provide for security given the costly consequences of operational failures. Accordingly, Parliament should assume a more adversarial role to ensure accountability and defend the civil liberties and privacy interests of Canadians which have been eroded under the guise of enhanced security over the past two decades. The shifting language on Parliament's responsibilities and privileges was best articulated nearly a decade after the passage of the *ATA*, during the Afghan detainees scandal and the House Speaker's 2010 ruling on the matter.

Flexing Parliamentary Privilege:

The Speaker's Ruling on Afghan Detainee Documents

In 2010, at the height of the Afghanistan War, constitutional conflict erupted when Prime Minister Stephen Harper's cabinet refused to furnish documents related to the treatment and torture of Afghan detainees to the House of Commons. At stake was the implication that Canadian Forces personnel had knowingly acquiesced to the ill treatment of war prisoners in contravention of Canada's treaty obligations under the Geneva Conventions. The government cited Crown prerogative in its defence, maintaining that the disclosure of documents would compromise Canada's national security interests and harm overseas military and reconnaissance operations. The three opposition parties in the House of Commons were united in their invocation of Parliament's ancient privileges.[9] The ensuing ruling produced by

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7 *Ibid.*

8 *Ibid.*

9 CBC News, "Afghan records denial is privilege breach: Speaker" (27 April 2010), online: < https://www.cbc.ca/news/politics/afghan-records-denial-is-privilege-breach-speaker-1.925268 > .

then-Speaker Peter Milliken elucidates the concept of Parliamentary privilege and asserts the legislature's powers: ones that are "inherent. . . which have been earned and must be safeguarded".[10] Regrettably, the ruling was not adhered to in full, and before the House took any meaningful steps Parliament was dissolved and Prime Minister Harper's government was able to escape scrutiny for its actions by winning a majority in the 2011 federal elections.

The history of the Westminster system can be traced through the centuries-long power struggles between the crown and the legislature, forming the constitutional tradition Canada has inherited today. The law of parliamentary privilege is older than Canadian confederation, expressed most clearly in Article 9 of the Bill of Rights of 1689. It maintains that "the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament".[11] Privilege protects Parliamentarians as individuals, as well as the House of Commons and Senate as collective entities. This immunity and independence is further enshrined in Canada's own constitutional order through the preamble to the Constitution Act of 1867, which ordains a "Constitution similar in Principle to that of the United Kingdom".[12] Beyond the common law, Parliamentary privilege is further entrenched in s. 18 of the *Constitution Act, 1867*, as well as the *Parliament of Canada Act*.[13]

The House of Commons, through its elaborated privileges, enjoys the exclusive right to "regulate its own affairs, the power to discipline and the right to punish persons guilty of breaches of privilege or contempt, and the right to call witnesses and demand papers".[14] All of these powers have been implicated in the post-9/11 debates on national security, and especially so throughout the Afghan detainees episode. Though Parliament attempted to assert its powers and jurisdiction, its lack of will in enforcing its decrees has contributed to the ongoing toothlessness of the body in regulating and reviewing national security affairs.

PMO and the government, in the Afghan detainee episode and more generally, has cast doubt on the ability of individual MPs to maintain the secrecy needed to protect national security interests. They have repeatedly communicated that parliamentarians cannot be entrusted with secure

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[10] House of Commons, *Selected Decisions of Speaker Peter Milliken* (2013) at 97, online: < https://www.ourcommons.ca/procedure/speakers-decisions/peter-milliken/pdf/MillikenDecisions-e.pdf > .

[11] Nicholas A MacDonald, "Parliamentarians and National Security" (2011) 34:4 *Canadian Parliamentary Review* 33 at 37, online: < http://www.revparl.ca/34/4/34n4_11e_MacDonald.pdf > [*MacDonald*].

[12] Heather MacIvor, "The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?" (2010) 19-1 *Constitutional Forum* 11 at 131, online: , < https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/17258/13723 > [*MacIvor*].

[13] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, online: < https://laws-lois.justice.gc.ca/eng/const/page-1.html > .

[14] *MacDonald*, *supra*, note 11.

information for fear of public disclosure for politicized and partisan purposes. As the argument goes, curtailing the executive's crown prerogative in national security affairs will turn Canada into an unreliable intelligence partner.[15] Eventually, foreign intelligence agencies will stop entrusting Canadian national security bodies with secure information. These arguments are, however, constitutionally specious. Crown prerogative is not absolute; it must respect Parliament's sovereign role in creating legislation or it must be derived from sources found in Westminsterial convention.

The House is empowered to govern itself and conduct itself in accordance with its own processes, as a function of its sovereign authority within the superstructure of the Canadian constitution. These processes include the procurement of documents and information it deems essential to carrying out its functions, including the holding of the government to account. Moreover, national security bodies such as CSIS, CSE, and the RCMP, while responsible to Cabinet, are ultimately creatures of statute and therefore accountable to the House. There is no "unilateral executive power to withhold or to black out 'potentially injurious' documents".[16] As argued by Speaker Milliken in his Afghan detainees ruling, such behaviour constitutes a *prima facie* breach of Parliament's ancient privileges. The House of Commons, not the courts system or the political executive, has the exclusive jurisdiction to consider whether reasons giving for refusing information are sufficient. The laws invoked by the government do not apply in the parliamentary context or against a request by Parliament. As the Law Clerk argued in 2010, the government may try to withhold the sharing of information to the House of Commons for political reasons, but not for reasons that stand under legal or constitutional scrutiny.

Concerns over breaches of information security are warranted, but exaggerated. It is irresponsible to suggest that the executive branch retain full and exclusive control over the collection of information, the processing of information, the use of information, the sharing of information, and the execution of action on the basis of said information that pertain to matters of national security in a democratic society. The enhancement of security cannot arrive at the expense of democratic accountability, from where the legitimacy of the sitting government is derived.

Though a member of the House of Commons is endowed with the interminable right to free expression in the course of their Parliamentary duties, they are not free to escape censure or reprimand from their colleagues in the case of serious security breaches. In camera committee hearings and sittings of Parliament are one method (albeit an extremely rare one) by which the House can balance democratic accountability with operational security in national security matters. As Nicholas Macdonald posits: "It is parliament's right to hold the government to account on matters of administration and

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[15] Greg Fyffe, "On the Consequences of Sharing Classified Material with the House of Commons", (6 August 2021), *Centre for International Governance Innovation*, online: < https://www.cigionline.org/articles/on-the-consequences-of-sharing-classified-material-with-the-house-of-commons/ > .

[16] *MacIvor*, *supra*, note 12.

expenditure, and though it must do this responsibly, the way that it fulfills this duty is a matter for parliament to determine".[17] What is missed in the debate is that Parliament and MPs also maintain a sense of shared responsibility in protecting Canada's national security interests. National security is an area where partisan interests can be set aside to legislate for the benefit of all Canadians. The outcome of the Afghan detainees ruling showcased the weakness of Parliament in enforcing its powers and the gradual chipping away of the body's collective ability to compel action from the sitting government.

Despite Speaker Milliken's eloquent assertion of Parliamentary privilege in his 2010 ruling, the events that followed did little to arrest the post-*ATA* trend of the House's declining jurisdiction in national security matters. The Speaker wrote that "procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents".[18] Despite a compromise agreement being reached between the Harper government and the Opposition Liberals and Bloc Quebecois, which allowed for certain documents to be seen by a select group of Parliamentarians, the actual substance of Parliament's privileges were again frustrated. The MPs were "not in fact given access to unredacted documents, but to documents first redacted by a panel of jurists", despite Speaker Milliken's ruling. With the 2011 election producing a Conservative majority, the House lost its capacity to push the issue as a cohesive constitutional entity, instead choosing to subordinate its collective interests to narrow partisan demands. Observers estimate that only about 10% of the 40,000 requested documents were ever released, with most of these containing extensive redactions.[19]

The patterns of the Afghan detainees case had widespread ramifications for the relationship between Parliament and the government in national security matters in the following decade. The government's sly circumvention of the House exposed Parliament's toothlessness and lack of unity in preserving its inherent jurisdiction, further marginalizing its role in the Canadian national security landscape. Despite the introduction of new national security review bodies in the form of NSICOP and NSIRA, the failures of 2010 would be repeated and exacerbated during the 2020-2021 Winnipeg Lab leak investigation, leading to today's state of ignominy.

Parliament Dethroned: The Winnipeg Lab Leak, NSICOP, and NSIRA

In investigating potential ties between the Winnipeg National Microbiology Laboratory and Chinese scientists in the lead-up to the COVID-19 pandemic, Parliament's tousle with the government of Prime Minister Trudeau to procure sensitive documents had echoes of the Afghan

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[17] *MacDonald*, *supra*, note 11, at 40.

[18] *MacIvor*, *supra,* note 12, at 135.

[19] Reg Whitaker, "The Post-9/11 National Security Regime in Canada: Strengthening Security, Diminishing Accountability" (2012) 16:2 *Rev Const Stud* 139, online: < https://heinonline.org/HOL/P?h = hein.journals/revicos16&i = 143 > [*Whitaker*].

detainees debacle. Dr. Xiangguo Qiu and her biologist husband, Dr. Keding Cheng, were stripped of their security clearances in July 2019 and dismissed from their positions at the only Level 4 laboratory in Canada equipped to work with the most serious and deadly human and animal pathogens.[20] Earlier that summer, the two had been involved with the sharing of information and samples of Ebola and Henipah viruses between the Winnipeg Lab and the Wuhan Institute of Virology, based in mainland China. The dismissal and eventual firing of the two scientists, along with their graduate students, remains shrouded in intrigue: though an RCMP investigation took place, no charges have been laid on national security grounds or otherwise.[21] In more recent reporting, CSIS has written that Dr. Qiu was using the Level 4 laboratory in Canada "as a base to assist China to improve its capability to fight highly-pathogenic pathogens" and has accused her of being associated with multiple talent programs administered and funded by Chinese entities.[22]

Concerned with the potential for espionage, Parliament passed a motion in 2021 demanding that the Public Health Agency of Canada (PHAC), a federal body overseeing the Winnipeg Lab, turn over uncensored documents relating to the dismissal of the Chinese scientists.[23] A dramatic confrontation between members of the Special Committee on Canada-China Relations and Health Minister Patty Hajdu on June 14, 2021 alludes to the similarities between the events which shaped both the Winnipeg Lab Leak and Afghan detainees episodes:[24]

> **Minister Hajdu:** "However, in this particular case, the information requested has both privacy and national security implications. Complying with the order without having proper safeguards in place would put sensitive information at risk of being released publicly. That's why I've referred this matter to the National Security and Intelligence Committee of Parliamentarians (NSICOP). This committee has the statutory mechanisms and protections needed to safely review sensitive information while maintaining its confidentiality."
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> **Hon. Michael Chong:** "So NSICOP is not a committee of Parliament. Its members give up the rights they have as parliamentarians. Its members and its chair are hired and fired by the Prime Minister. Any

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20 Karen Pauls, "'Wake-up call for Canada': Security experts say case of 2 fired scientists could point to espionage" (10 June 2021), *CBC News*, online: < https://www.cbc.ca/news/canada/manitoba/winnipeg-lab-security-experts-1.6059097 > [*Pauls*].

21 *Ibid*.

22 Catherine Tunney, "Scientist fired from Winnipeg disease lab intentionally worked to benefit China: CSIS report" (28 February 2024), *CBC News*, online: < https://www.cbc.ca/news/politics/winnipeg-lab-firing-documents-released-china-1.7128865 > .

23 *Pauls*, *supra*, note 20.

24 Canada, Special Committee on Canada-China Relations, Number 029 2nd Session 43rd Parliament, *Evidence proceeding* (14 June 2021) online: < https://www.ourcommons.ca/DocumentViewer/en/43-2/CACN/meeting-29/evidence > .

> minister has the right to refuse the committee information and block the committee's review, and the Prime Minister has the power to change committee reports before they are made public. It's clearly the wrong committee to hold the government accountable for national security breaches. *It's like the fox guarding the henhouse*, and more importantly, by sending these documents to NSICOP, you are in violation of two orders of this committee and an order of the House" [emphasis added].
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> **Mr. John Williamson:** "I know you weren't there, nor was I, but in the 40th Parliament, opposition members of Parliament ordered the Harper government to produce documents with respect to Afghan detainees. Were opposition members wrong to do that back then? I'll point out that those documents were then subsequently released by the government. Was it wrong for parliamentarians to push for those documents? Was it wrong for the government to release those documents?"

As was the case in the Afghan detainees situation, a committee of the House of Commons exercised its privileges to demand the release of information related to the hiring and firing of two Chinese scientists at the Winnipeg Lab. The government invoked the Crown prerogative over national security and ministerial discretion to at first deny and delay the transfer of these documents, before furnishing redacted versions of the requested documents to NSICOP. NSICOP is a creation of the Trudeau government, designed to resemble comparable institutions in the national security infrastructure of the United Kingdom.[25] In addition to NSIRA, it was meant to address gaps in Canadian national security review by taking a more holistic approach to intergovernmental activities in the national security space. Both bodies "may conduct reviews of any organization with a security and intelligence mandate; may follow the thread of information across organizations; and review issues from an interdepartmental lens".[26] NSICOP, though composed of a select group of MPs who have passed the security clearance process, is not a committee of Parliament. The problems that NSICOP and NSIRA were designed to solve therefore do not address the two-decades long issue of the erosion of Parliamentary supremacy in national security affairs.

NSICOP operates at an arm's length from the government and is bound by legislation rather than being governed as a Committee under the standing orders of the House. It is a creature of subordinate statute, and not a committee of Parliament to which privilege attaches. Most notably, Parliamentary privilege does not extend to MPs who are members of

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[25] CASIS Vancouver, "National Security and Parliamentary Review Four Years On: Is It Working?" (15 July 2021), online: <https://journals.lib.sfu.ca/index.php/jicw/article/view/3068/3014> [*CASIS*].

[26] Canada, Secretariat of the National Security and Intelligence Committee of Parliamentarians, "Departmental Plan - 2022-2023" (2022) at 16, online: <https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/2022-23-eng.pdf>.

NSICOP. Unlike their counterparts in other Commonwealth nations, such as New Zealand, members of NSICOP are bound to secrecy for life and can be prosecuted for breaches of information security including disclosure to Parliament.[27] NSICOP does not require a government response to its reports, "nor do they have the authority to seek information about how or when their recommendations have been implemented".[28] From an access-to-information perspective, NSICOP cannot impose deadlines or force compliance from the executive, and is structurally neutered in its ability to obtain necessary information pursuant to its challenge function.

Though the Trudeau government claims otherwise, NSICOP is not a suitable replacement for proper Parliamentary review of national security procedures. MPs and Senators on the Committee waive their Parliamentary rights to receive information that can ultimately be redacted at the discretion of the PMO before being made public. Cabinet ministers are able to refuse the committee information and block the committee's ability to review national security activities. By statutory design, NSICOP cannot be an adequate check on the expansion of arbitrary executive powers nor can it do much to combat the excessive powers of the security state. The Trudeau government's failure to furnish the requisite documents led to the House of Commons publicly admonishing the President of the Public Health Agency of Canada (PHAC), by issuing its first in person reprimand since 1913.[29]

The federal government responded by pointing to s. 38 of the *Canada Evidence Act* to prevent the release of the documents, as it empowers the Attorney General to prohibit the disclosure of information to protect national security.[30] It mirrors similar controversial powers granted to the Attorney General under the *ATA* (2001). However, defenders of parliamentary privilege made the same arguments iterated in the Afghan detainees ruling: that Parliament is sovereign over its own procedures and processes and that it retains a constitutional right to demand papers from the government — a right that trumps any individual statute. The government went so far as to file an application in the Federal Court against Speaker of the House Anthony Rota to protect its powers of non-disclosure, setting up a direct conflict with Article 9 of the *Bill of Rights, 1689* and with previous SCC rulings.[31] The calling of a

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[27] "Unique to the New Zealand model is the attention it provides to the protection of members' privileges under the Act, which assures that: No criminal or civil proceedings shall lie against any member of the Committee or person appointed to staff the Committee, for anything done or reported or failed to have been done, reported or said in the course of the exercise or intended exercise of the Committee's functions under the Act, unless it is shown that the member or person acted in bad faith." *MacDonald*, *supra*, note 11.

[28] *CASIS*, *supra*, note 25, at 83.

[29] Peter Zimonjic, "Federal government's move to take Speaker to court raises questions that divide experts" (02 July 2021), *CBC News*, online: < https://www.cbc.ca/news/politics/rota-lametti-parliament-federal-court-1.6086721 > .

[30] *Ibid.*

[31] Steven Chaplin, "Canadian conflict over contempt of Parliament and national

federal election in September 2021 obviated the Federal Court case, as the House was dissolved and no longer able to continue its pursuit of the unredacted Winnipeg Lab documents.

Although the Special Committee on Canada-China relations was resurrected in the 44th Parliament, the Trudeau government continued its stonewalling of the House of Commons. In protest, the Conservative party pulled its representatives from NSICOP, considerably impeding the committee's functions throughout 2022.[32] The handling of the issue reflected Parliament's long-standing inability to exercise its constitutional privileges in the face of an aggressive assertion of Crown prerogative. Parliament's standing in national security matters is, therefore, once again at an inflection point.

In November 2022, the Trudeau government reprised the process used in the Afghan detainees case to allow a select group of MPs to witness the Winnipeg Lab documents, subject to swearing an oath of secrecy and adjudication by a panel of three retired judges.[33] This ad hoc committee reviewed the documents in June 2023, referred their findings to the panel of jurists in November 2023, and met with the three judges in January 2024 to hear their findings.[34] The report was tabled before the House of Commons on February 27, 2024, with the ad hoc committee concluding that "the majority of the PHAC material should be lifted" as the redacted information "appears to be mostly about protecting the organization from embarrassment for failures in policy and implementation, not legitimate national security concerns, and its release is essential to hold the government to account".[35]

As the panel was not a committee of Parliament, with attendant powers of investigation and delegated authority, this seemingly diplomatic compromise represents a continued entrenchment of Parliament's genuflection to the executive and the judiciary in national security matters. The redacted series of documents tabled before the House of Commons will now form the evidentiary basis for future fact-finding in relation to the Winnipeg events as

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security creates constitutional conundrum" (9 July 2021) London: *Hansard Society*, online: < https://www.hansardsociety.org.uk/blog/canadian-conflict-over-contempt-of-parliament-and-national-security-creates > [Chaplin].

[32] Hugh Segal, Ann Fitz-Gerald, Kent Roach & Wesley Wark, "Canada's National Security and Intelligence Committee Must Get Back to Work," *Centre for International Governance Innovation*, online: < https://www.cigionline.org/articles/canadas-national-security-and-intelligence-committee-must-get-back-to-work/ > .

[33] Robert Fife & Steven Chase, "Special committee of MPs will see secret documents on firing of two Winnipeg infectious disease scientists" (1 November 2022) *The Globe & Mail*, online: < https://www.theglobeandmail.com/politics/article-winnipeg-scientists-special-committee/ > .

[34] Wesley Wark, "Security breaches at the NML: internal and public paths to truth-telling" (March 6, 2024), *Wesley Wark's National Security and Intelligence Newsletter,* online: < https://wesleywark.substack.com/p/security-breaches-at-the-nml-internal > .

[35] Report of the Ad Hoc Committee of Parliamentarians (February 27, 2024) at 2, online: < https://www.theglobeandmail.com/files/editorial/politics/nw-na-labs/winnipeg-scientists-doc.pdf > .

well as any Parliamentary inquiry regarding the government's use of over-classification as a means of denying access to information. In its capacity as the political executive, the Trudeau government may soon realize that the cover up is often worse than the crime.

Conclusion: A Permanent Curtailing of Privilege?

Parliament has options to reclaim its authority in national security affairs, should it choose to exercise them. As Parliamentary law expert Steven Chaplin has opined: "If the House believes that the issue is of fundamental importance, it has the power to censure Ministers, suspend Ministers from sitting, expel them from the House, or vote non-confidence in the government, thereby triggering a general election, where voters ultimately will decide the fate of a government".[36] In the context of the 44th Parliament, ruled by a minority government, a unified opposition could have explored the usage of one or several of these mechanisms to effect better governance of Canada's national security. Regrettably, they did not.

The current balance between Crown prerogative and Parliamentary privilege was not arrived at by an accident of history. Rather, successive Parliaments have made the repeated choice to curtail their inherent powers with regards to national security issues in favour of executive encroachment. This continual abdication of responsibility has done little to serve Canada's national security interests, maintain the delicate constitutional arrangement of powers, or safeguard the liberties and freedoms of everyday Canadians.

Three major developments have demonstrated the gradual cession of Parliament's authority over national security affairs in the decades since the accelerated debate over the passage of the *ATA* in 2001. After the handling of the Afghan detainees and Winnipeg Lab sagas, it appears that the House of Commons has become comfortable with its subordinate status *vis-a-vis* the sitting government of the day. More worrisome is the erosive trajectory these cases represent: reforms have typically been pursued after accountability scandals,[37] though few seem forthcoming in the wake of the Winnipeg Lab events. Parliament would do well to remember that its prostrate status in national security affairs has the potential to proliferate into a host of areas of executive interest, including privacy law. The House of Commons must especially do more to reassert its historic privileges, lest the current trend of temporary curtailment become a permanent one.

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[36] Chaplin, *supra*, note 31.

[37] Whitaker, *supra*, note 19.

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