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Chair

Mr. Paul Zed

Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (1335)

[*English*]

The Chair (Mr. Paul Zed (Saint John, Lib.)): I call this meeting to order.

Good afternoon, ladies and gentlemen. Once again, thank you, colleagues, for coming to Ottawa a week early for these special two days of parliamentary hearings, which is the Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

This afternoon we are going to have two panels. The first presenter is Kathy Vandergrift, the director of policy for World Vision Canada. And from Imagine Canada we have Peter Broder, corporate counsel. Welcome.

I guess both of you have opening statements, and then we'll go to questions. Welcome.

Ms. Kathy Vandergrift (Director of Policy, World Vision Canada): First of all, on behalf of World Vision Canada, I would like to express our appreciation for this opportunity to contribute to the review of Canada's Anti-terrorism Act and make some suggestions for the future.

As one of the largest relief and development organizations in Canada, World Vision draws on more than 50 years of experience in humanitarian relief, starting with the orphans in the Korean War, and from work on every continent in the world. We respond to the suffering caused by acts of terrorism, and we support effective efforts to stop and prevent it.

At the same time, however, our experience confirms that promoting respect for the human rights of all people and fair treatment for all under the law are essential ingredients for long-term security. Security without justice is not true security.

In its humanitarian work, World Vision complies with several international standards of good practice, such as the International Red Cross code of conduct and the Sphere standards, which have been developed cooperatively between humanitarian agencies and donor governments.

We would submit that requiring charities to comply with recognized international standards of conduct is a more effective way to govern humanitarian action than through anti-terrorism legislation.

World Vision shares many of the concerns that have been raised by other NGOs about the impacts of Canada's law. In fact, we were part of starting the International Civil Liberties Monitoring Group because of those concerns. However, today I would like to just focus on three concerns and three recommendations that relate directly to our work as humanitarian actors.

The first concern is clarity in the definition and the criteria for compliance. This won't be new to you; you've heard this concern before. So I'm going to just quickly highlight five factors that cause huge concern in the area of the definition and criteria for compliance: one is the vagueness of the definition; two is the broad scope; three is the inclusion of indirect activities; four is the inclusion of unknowing activities in the definition; and five is no provision for due diligence to show that you are complying with the law. And we've spelled those out in the written submission.

Sometimes I wonder how many members of Parliament sat down with that definition when the legislation was passed and tried to decide for themselves what would be legitimate activity and what would be illegitimate. I can tell you, as an operating agency, World Vision has great difficulty in terms of what we do as due diligence to show that we are in compliance with this legislation.

I guess the second criticism there is that the legislation allows too much room for arbitrary judgment by Revenue Canada officials, who do not know the business of humanitarian action when they make these judgments. That's the first concern when the definition is so vague.

The second argument I would like to make this afternoon is that the impacts of the law are exactly contrary to what the objectives of the law are. If an agency like World Vision were to take the broadest possible definition of the law, we would stop doing many things we presently do in countries where there is terrorism. And we would submit to you that helping people and helping communities build their capacity for good government is exactly the kind of activity we need to prevent terrorism. So we believe that the law actually discourages good actions to fight terrorism. In that sense, I guess we're referring to what is called the chilling effect of this legislation for NGOs.

We would ask this committee to give very careful consideration to ways in which this legislation may in fact impede activity that would help in the fight against terrorism. Good legislation should provide enough clarity to encourage desirable activity as well as discourage activity that supports terrorism.

The second area we'd like to speak to is the due process provisions. World Vision accepts the need for accountability to ensure that resources are used to help people in need. We are accountable to more than 400,000 individual donors in Canada who support our work, and believe me, donors want to know that their money goes for the purpose for which they gave it. We are accountable to international agencies such as the World Food Programme when we distribute their food, and the UNHCR when we work in cooperation with them. We are accountable to donor agencies such as CIDA who choose to partner with us because we do know what's happening on the ground and we do know how to get assistance to people in need.

● (1340)

Accountability is a high priority in our work, and we fully accept that. But we are very concerned about provisions in the Anti-terrorism Act that allow for the charitable status of any agency to be revoked or denied on the basis of allegations made by others without reasonable opportunity to hear what those allegations are and to provide a defence in an impartial process. We would highlight for you that this is particularly true when those allegations can be made by parties engaged in the conflict in areas where we work.

So we ask that you look at those provisions for due process in the law. Revoking the licence of an agency is death for a charity, which relies on its good public reputation. In our view, due process would at least suggest that when allegations against a charity are made, an impartial body hear all sides and make a judgment about the validity of the charges before punitive action is taken that could quickly destroy the reputation of the agency. We suggest that this committee take steps to ensure that Canada's laws fully comply with the well-established principles of natural justice and procedural fairness.

The third area I would like to highlight is one that is probably spoken about by witnesses less often, and that is the policy coherence of this law and its consistency with the Voluntary Sector Accord. I don't know how many of you know that this government passed an accord on how it would deal with the voluntary sector. I would submit to you that this law violates the accord passed by this government.

The accord calls for mutual accountability and cooperation in developing policies for the sector. We believe, in keeping with that, that there is a possibility to work with development and humanitarian organizations to come up with an appropriate mutual framework for accountability. We're not opposed to accountability, but we are opposed to this approach to it.

Again, I want to repeat—and this is the most important point—that the provisions in the current legislation may discourage the very kind of activity that is essential in the fight against terrorism. Democracies that function well are recognized by the government as the best antidote to terrorism, and they are built through increasing the capacity of civil society to engage in public life and to seek change through peaceful means.

Canada just passed a new international policy statement that calls for greater coherence in its policies between departments. It calls for strengthening democracy and respect for human rights. I would submit to you that the anti-terrorism legislation as it now exists is not coherent with the main directions of the international policy statement of the government. If you want coherent international policy, then we would submit to you that the provisions to regulate charities need to reflect both encouragement and mutually agreed upon mechanisms for accountability.

I'll just finish then, quickly, with three recommendations. First, more precise definitions and criteria for compliance should be developed that could clearly distinguish between positive activity in zones where the risk of terrorism is high and activity that clearly supports terrorism. Right now I think the legislation is not clear on that point.

Second, the principles of natural justice such as due process and procedural fairness under the law should apply when allegations are made about a charity, especially when those allegations originate from other actors in zones of conflict.

Third, this committee should recommend the development of a strategy and legal provisions that would encourage voluntary sector activities that strengthen respect for human rights and develop robust democracies in situations where terrorism is a threat.

Thank you.

● (1345)

The Chair: Thank you very much.

Mr. Broder, please.

Mr. Peter Broder (Corporate Counsel and Director, Regulatory Affairs, Imagine Canada): Good afternoon, Mr. Chair, and committee members.

Thank you for the opportunity to appear before you today to discuss the Anti-terrorism Act and its impact on charities.

Imagine Canada, with 1,200 members, is the largest umbrella group in Canada mandated to advance the interests of charities and non-profit groups. It was founded by the Canadian Centre for Philanthropy and the Coalition of National Voluntary Organizations and integrates the functions of those two groups.

Our specific recommendations are contained in our brief, so I'll use my time today to give you an overview of our issues with the current legislation, which very much follow from Mrs. Vandergrift's comments.

Canada's charitable sector, 81,000 organizations strong, is heavily reliant on public trust and has a long history of making a valuable contribution to the nation's economic, social, cultural, and environmental well-being. But Canadian charities face an environment where demands often outstrip resources. Organizations, particularly more modest-size groups, typically depend greatly on volunteers and donations.

Operating in this context, laws affecting charities that undermine public confidence or place onerous regulatory burdens on organizations have the potential to do severe harm to the sector and constrain the effectiveness of groups. Owing to the breadth of the Anti-terrorism Act's provisions and lack of definition given to terms such as “support” and “facilitate”, we believe that all Canadian charities potentially come within the act, not just those operating or with ties overseas.

Imagine Canada, like World Vision, supports reasonable and proportionate legislation to preclude the use of charities to support terrorism and to prevent diversion of moneys intended for charitable purposes to illicit activity. The current legislation, in particular, part 6 of the Anti-terrorism Act, does not accomplish these objectives in a reasonably proportionate manner. We believe that the legislation discourages legitimate charitable work and imposes compliance obligations that are impossible to meet. It also promotes a misleading impression that charities are the locus of illegal activity, which is not borne out by evidence available to date.

The Canada Revenue Agency indicated in testimony earlier this year that no charity has yet been refused registration or had their registration revoked through the security certificate procedures contemplated in part 6 of the act. This raises the question of whether the standard regulatory regime is adequate in dealing with allegations of association with terrorism by charities. Under the income tax, any registered charity is subject to revocation if its activities are not exclusively charitable. As well, Criminal Code prosecution of terrorism financing activity is always available.

A comprehensive study of Canadian non-profit and voluntary organizations recently found that more than half of these groups have no paid staff and that more modest-size organizations are apt to depend on public donations to a much greater extent than big organizations, leaving these groups more vulnerable to erosions of public trust. A typical charity does not have the resources to cope with open-ended regulatory requirements and does not have the financial capacity to retain legal counsel to provide compliance advice on an ongoing basis.

Under the Anti-terrorism Act, there's no requirement for an organization to know that it is or to intend that it be associated with any support of terrorist groups or resourcing of terrorist activity before it is subject to the act's provisions. There are also no provisions for a due diligence defence for cases where an organization took reasonable steps to ensure that it was not or would not be used as a vehicle to support or resource terrorism.

Charities that voluntarily disclose that they have inadvertently breached the statute are afforded no protection within the act. A registered charity should be able to rely on having devoted reasonable efforts to ensuring against inadvertent or unwitting association with terrorist groups or activity. Charities face tremendous pressure to spend money on program activities rather than administration, so the resources available to fund overhead costs are usually quite limited.

The dilemma that the provisions of the current act place charities in was illustrated by the humanitarian assistance efforts that occurred after the tsunami disaster struck Asia. In both Sri Lanka and Indonesia, entities considered to be terrorist organizations operated in parts of those countries needing relief. Under the legislation, registered charities providing assistance in these areas could potentially be subject to deregistration if any part of the supplies provided by these groups ended up being used by the terrorist entities in the vicinity. This situation is a very concrete example of the drawback of the legislation's overly broad provisions.

● (1350)

Denying resources to terrorism and preventing moneys intended for charitable purposes from being used for illegal activity are extremely important public policy objectives. However, in meeting these objectives, the provisions of the Anti-terrorism Act impose unreasonable and disproportionate requirements on charities. The act should be redrafted to deal with the legitimate harms it is intended to address with greater precision and to mitigate the adverse impacts it currently has on the work of charities.

Thank you. I'd be happy to answer any questions.

The Chair: Thank you very much, Ms. Vandergrift and Mr. Broder.

Mr. Sorenson, please.

Mr. Kevin Sorenson (Crowfoot, CPC): Thank you, Mr. Chairman.

Thank you for being here today. Certainly we appreciate the work that your organizations do. I know over the last number of weeks, watching what has taken place in New Orleans and, as you've already drawn attention to, the tsunami that hit Asia...boy, I'll tell you, it's awfully good to have people saying, how can we help, how can we get there as soon as possible? Both of you represent organizations that I think are well respected and appreciated, not just here in our country but around the world.

You bring out an interesting point. When a disaster takes place, it's not only World Vision, Samaritan's Purse, or any other organization that rallies to get there; you have the forces of good and you undoubtedly have the other as well: terrorist entities. Even in New Orleans we've heard an awful lot about the looting and everything else that has taken place. So the wisdom of how to disburse these funds and to make sure that we aren't going to risk all the good we do because some money is put into the hands of people who perhaps shouldn't get it.... I can only imagine the frustration you have and the due diligence you attempt as you try to help the people who are in need.

How do we bring about more accountability to organizations to make sure they can show that they are not being used as an arm of some...not even a terrorist group, but some individual who may try to intentionally discredit either of your organizations by infiltration or perhaps by simply using it as a conduit to see that moneys are put in? That would be the first part of my question.

I realize it's not a charitable organization, but we have the Oil-for-Food Programme in the United Nations. It's a worthy ideal, where there's food and oil...and we see all this happening. We don't smear all of the United Nations because of one program that's gone astray, so to speak. I don't bring this up to impugn all charitable organizations; I bring it up to draw attention to the fact that charitable organizations doing humanitarian work do both intentionally and unintentionally get caught up or embroiled in corrupt behaviour, which has devastating effects for the persons the humanitarian efforts were aimed at. How do we then enhance our accountability?

I also agree with you that there may be too much room for arbitrary judgments from the CRA. More clarity is needed. Maybe you could just expand on the accountability and also the due process that you talked about. How do we ensure that due process, and that an impartial body hears all sides when an allegation against a charity is made? If they were to be stripped of their status, how do we guarantee that due process is there?

● (1355)

Ms. Kathy Vandergrift: In terms of accountability, I mentioned that one step is to comply with international standards that are established by best practices of humanitarian agencies working with donor governments. There are examples of those, and agencies can be asked to comply with them. Certainly we try to comply with those, and they do address reasonable measures to ensure that, for example, the assistance gets to those in need without discrimination. We don't discriminate when we deliver aid to people who are in desperate need.

Mr. Kevin Sorenson: Were those standards in effect prior to September 11?

Ms. Kathy Vandergrift: Yes.

Mr. Kevin Sorenson: When we look at what has transpired here with the anti-terrorism legislation, I think everyone has said there has to be more than what we have now. My question is, taking those international standards that were already in place and were already being met.... In Canada we're recognized—and even our Senate committees have come forward with reports saying this—as a place where people recruit terrorists but where they also raise funds for terrorism. So more than what we had prior to September 11, how do we make sure there's a greater degree of accountability?

Ms. Kathy Vandergrift: It's probably an ongoing debate whether there were already existing provisions under the law that could deal with the situations where people have used illegitimate funds. I think there's a good argument that the law was there; it has to do with the policing work to apply it and whether agencies are being monitored for compliance with those standards.

I'm not sure we needed this extra piece of legislation, but if in responding to the public concern parliamentarians feel they need an extra piece of legislation, then I would say that same public concern mandates that it be a good law. If it once comes under disrepute through an unfortunate incident, which could happen with this very vague law, the public is not going to have respect for the law either. So it is a matter of drafting the law well and implementing it well.

I think the errors before had to do with implementation more than with inadequacy in the existing legislation.

As was mentioned, the Revenue Canada officials themselves have not used this law, but what has happened that is of concern to us is that many applicants have not proceeded through the application process. There is a chilling effect with this additional burden. We find it impacts our ability to recruit board members. With this additional layer, It has a chilling effect on the activities of the organization without much evidence that it has actually added to accountability.

In terms of the arbitrary judgments, as we said, we think there should be due process provisions when an allegation is made against an agency, not a revoking of an agency's licence prior to a reasonable chance to hear that evidence and respond to it before an impartial body. That would go quite a long way in terms of the due process argument.

Mr. Peter Broder: I'll just pick up on that.

I very much concur with the idea of relying on international standards and using the wisdom of the groups that work in this area in bringing knowledge to the table.

We are dealing with grey areas, and one of the faults of the legislation is that if an organization finds it has inadvertently contravened the legislation, there's no incentive for it to come forward to CIDA or Canada Revenue Agency or any other government body and tell them that it did, because it's subject to deregistration. If an organization has inadvertently gone offside, there should be some provision, particularly where you're dealing with a grey area where you might not even know whether you've gone offside, so that there could be some discussion with government to see that how the aid is actually getting used is in keeping with Canadian government policy.

● (1400)

Mr. Kevin Sorenson: Just for my own interest here, if you, after sending funds to a certain area, became aware that perhaps some of the money may have fallen into the wrong type of hands and may have been used not for what it was intended for, are there huge consequences if you do not disclose? You say there is no incentive to disclose because you might be decertified; you might lose your charitable status. I'd have to read the act again, but is there anything in the act that would give you a greater penalty for non-disclosure?

Mr. Peter Broder: No.

Mr. Kevin Sorenson: There is no incentive to—

Ms. Kathy Vandergrift: The definition is so vague. Just pretend that you are in the shoes of one of the agencies. Try for yourself to use that definition and determine what activities are in contravention or not. It's a very difficult process—plus there is no defence, as I said, for due diligence. Even if we did try to put in place some system to show all those, there isn't a defence, so we still could be subject to an allegation brought by somebody else.

We think we are practising by the best practices we can. In those situations, when they are brought to our attention, certainly we take whatever action we can to stop it immediately, if we determine any ill practice. Of course, if we are with a donor, there will be lots of questions about what happened, but mostly it's a matter of prevention. We really work very hard not to allow that to happen.

Mr. Kevin Sorenson: We all know World Vision, we've all donated to World Vision. But there have been places and times in World Vision where you've said, stop right there.

Ms. Kathy Vandergrift: Certainly we're questioning our activities all the time. We also do, however, provide assistance without discrimination when people are in need. So when you are working in a situation like Sri Lanka, like Lebanon, where the Hezbollah was a listed group and is now part of the democracy overnight, who is a terrorist one day is not necessarily a terrorist the next day. I cite for you a report written by Rights & Democracy, which is an agency funded by the government almost entirely, saying that some of its activities could be considered criminal under this legislation because it is helping groups in situations where there is this activity. So that's what I am referring to.

The law does not make a sharp definition between what is constructive activity in an area and what is harmful activity, and therefore it is very difficult to work with it. And because it is so vague, it has a chilling effect. If we really wanted to comply we probably wouldn't work in any of the tough places in the world. Would that be an advantage for the fight against terrorism? I submit not. So our organization has said we will do our level best, we will follow the standards, we will try to prevent, but we are not going to stop doing what our mandate is, which is to provide help to people in need. And often those people are in places where terrorism is a risk.

The Chair: Thank you.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Have you ventured a definition?

[*English*]

Ms. Kathy Vandergrift: In terms of writing a definition, I would suggest that there be a process by which agencies and government together sit down and determine what would be the best regime for accountability if there is a feeling that the existing law is not adequate, so that we work at doing this together. That would be my suggestion.

[*Translation*]

Mr. Serge Ménard: I think that you are aware that some organizations that were set up as charitable organizations are used to collect money for terrorist movements. I believe that was even done for the IRA in Ireland. It seems to me that it must be quite easy to recognize organizations that were set up simply as a front to collect money. The problem is that there are organizations involved in both: terrorist activities and social activities. Following the tsunami, for example, there was a lot of talk about the Tamils.

● (1405)

[*English*]

Mr. Peter Broder: Even outside the scope of this legislation, a charitable organization in Canadian law, under the Income Tax Act, is expected to devote 100% of its resources to charitable activity. So it's not a question. Where it is an absolute front, it is clearly deregisterable. And even where it devotes a portion of its resources to political activity, charities are forbidden to engage in partisan political activity in Canada, and supporting political activity overseas is also not a recognized charitable purpose. So those organizations are deregisterable, even under the existing legislation, completely outside the Anti-terrorism Act, if they can be identified.

Ms. Kathy Vandergrift: I would just highlight that this to me, then, is a question of good monitoring, good police work, and enforcing of existing laws, and World Vision certainly is not opposed to that.

[*Translation*]

Mr. Serge Ménard: Could you give me some specific examples of situations where you have been forced to cooperate in the field with organizations that are illegal but that control part of the territory where, more often than not, people live in poverty?

[*English*]

Ms. Kathy Vandergrift: I can certainly name a couple of them, but we don't cooperate with them in the sense of supporting their activities. I don't know if you know what the situation is in northern Uganda, where the Lord's Resistance Army has taken many children captive and has forced the regular population to live in camps—1.6 million of them.

Most of the world has totally forgotten about the people in northern Uganda. We are one of the groups that take back some of the children who have been turned into child soldiers. We rehabilitate them and reintegrate them with their families. The LRA members have been labelled as terrorists. I suppose you could say that in taking back those children we are working with terrorists.

We deliver food in the camps, and in order to do that we need to know where the terrorists are, what they're doing, and what the movements are. We need to know who these people are. That's what allows us to deliver food to people who are in absolutely desperate situations.

Of course, we know the ground. That's what makes us able to be helpful to people in need. It is a grey area, and certainly we resort to all manner of means to try to make sure that food gets through and doesn't get taken along the roads, for example. In order to do that, yes, you have to know who's working there.

May I cite one other thing? I'll use a concrete example again. This law does not address state terrorism. World Vision worked in south Sudan, and we actually had an aid worker killed by a militia associated with the Government of Sudan. This law does not address that situation.

Yes, we work in difficult circumstances that require us to be astute and careful, but we need to find ways to get the help through.

[*Translation*]

Mr. Serge Ménard: I was not a member of this Parliament when the act was adopted. Did you have an opportunity at the time to give those examples so that they could be taken into account?

[*English*]

Ms. Kathy Vandergrift: No. We asked to appear at that time, but the hearings were very short and there wasn't much consultation. We would like to see the humanitarian agencies be invited to the table to talk through these issues together.

● (1410)

[*Translation*]

Mr. Serge Ménard: I understand the very difficult role that you play. After all, many governments in the world today were born of terrorist movements, including some that we now respect, and that went through times where people were in need in some areas.

I think that there is a greater sense of urgency in fighting terrorism than there is in establishing that a charitable organization is a front rather than a truly charitable organization that contributes to relieving misery in difficult circumstances where, for example, a dictatorship is at war with an illegal movement. Hearings may be held, people may be called to appear, you can come and provide explanations prior to a decision being made. That is what you want.

Am I to understand as well that you want this evidence to be heard in camera, since if you must provide explanations of that nature, it will affect the reputation you have vis-à-vis your donors? Is that what you're saying?

[*English*]

Ms. Kathy Vandergrift: Correct. I guess we are asking that there be some kind of impartial tribunal to hear the evidence, because as the law stands, allegations can be brought to the Government of Canada from parties in zones of conflict. Sometimes when we work in zones of conflict there are actors who would rather we not be there, but I don't think it's in the interest of the people's safety that we not be there. In fact, sometimes when World Vision considers leaving places because of the danger, the people plead that we stay there because we are part of what makes it more secure for them.

So when allegations are made, particularly in those circumstances, we feel due process should allow us an opportunity to hear what those allegations are, respond to them, and have an impartial body sort it out before our licence is taken away, not afterward. There is some provision to do it afterward, but once your licence is done as a charity, you're done.

Mr. Serge Ménard: I think I understand it, and I agree with this.

[*Translation*]

You said that the simple fact of being called in to respond to allegations like that may discourage donors from giving you money. Do you want these procedures to be kept secret?

[*English*]

Ms. Kathy Vandergrift: I think one could have an impartial process that is private, and at some stage there must be public accountability, for sure. But while the allegations are being investigated, we would lean on the impartiality of the process and have that in private. Then if they're substantiated, we will be accountable before the law. We're not afraid of accountability.

[*Translation*]

The Chair: Thank you, Mr. Ménard.

[*English*]

Mr. Comartin, please.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you both for being here.

I just want to be clear, because I'm not sure it's clear right now. If I understand both of your briefs, I think your preference would be for the legislation simply to be repealed. And in the alternative—I'm sounding like a lawyer here—you're pleading in the alternative for some of the other provisions, including a due process clause. Is that accurate?

Mr. Peter Broder: Yes.

Mr. Joe Comartin: Can I just ask you, Ms. Vandergrift, about the point you made about new applications not coming forward, that people simply are not incorporating new bodies? Is there any concrete data on that?

Ms. Kathy Vandergrift: I was disturbed to read the evidence that was brought before you by the Canada Revenue Agency. It highlighted that over a thousand applications did not finish the process.

We say in our submission that we think this committee would do well to explore why this is so. What was that really all about? I'm not sure it's advantageous for the purposes of fighting terrorism or for any other provisions that we have more organizations that don't bother to register. They can't give charitable receipts, but they can work in the country. I think that's a serious concern—and as I said, I think there's a chilling impact as a result of the kind of regime that's now in place. The officials indicated that they use it to ask questions of groups that come forward. Well, what's happening here when a thousand groups apply to be registered as charities and don't pursue the process? Is that in our best interests?

● (1415)

Mr. Joe Comartin: Is there any way of setting that in context? Those thousand—how would that number have compared to the same period of time in other years?

Ms. Kathy Vandergrift: Can you speak to that, Mr. Broder?

Mr. Peter Broder: Commonly, in terms of charitable registrations, there are numerous groups that apply annually. If they get an initial push back from Canada Revenue Agency, their redress...and this is subject to the provisions of Bill C-33, which was passed earlier this year, so there is an internal appeal process being established. But as it stands now, a group's first recourse is to the Federal Court of Appeal, and it's a matter of tens of thousands of dollars to bring an application there.

So if groups get an initial push back from the agencies, whether it's on anti-terrorism legislation issues or on whether they fall within the definition of a charity or not, many organizations just abandon the application. I don't know how many of that thousand would be because of anti-terrorism issues having been raised.

Mr. Joe Comartin: I guess my question was directed to doing a before-and-after comparison—if there were a thousand after that were not proceeded with, and if I looked at the thousand before 9/11 or before the legislation came into effect. Has anybody done that kind of comparison?

Ms. Kathy Vandergrift: I don't know if there are public statistics. You'd need to ask the Canada Revenue Agency, I think, because they don't necessarily give public statistics as to how many groups have applied.

Mr. Joe Comartin: They certainly gave us the impression that everything was hunky-dory and nothing was a problem.

Ms. Kathy Vandergrift: I can tell you there's hardly a single agency in this country that would tell you that this is the case in terms of dealing with them.

Mr. Joe Comartin: Has there been any concrete analysis done as to how much money is being spent on accountability here since the act versus money being spent on the charity work?

Ms. Kathy Vandergrift: I couldn't give you an exact figure. I could go back to the organization and ask if they could quantify that.

Certainly it's made the work more difficult, but as much as anything it's the uncertainty we now live in. There is no set, “You do this and you comply”. That isn't here. So it's the uncertainty that is of concern. The uncertainty has negative implications for your ongoing operations in work, but as I said, it also has negative implications for things like finding people on your boards, and so on, because it's uncertain. If we could have, “Do these five things, and if you do them diligently we would consider that you were complying with the law”, that would be a far cry from what we have now.

Mr. Peter Broder: Just to add to the context of that, I think it's quite clear that funders, whether they be government, foundations, or other organizations, would like to fund program activity. They don't want to fund an organization doing its due diligence. So there are tremendous pressures on organizations to channel the money to program activity.

Mr. Joe Comartin: On the due process argument—maybe a quick statement to see if you agree with me—it's back to the same issue of cost. If we don't repeal and insert a due process, isn't the reality that the vast majority of the agencies are not going to be able to afford the due process—the accountants and the lawyers to go in and challenge the government if there's a finding made? World Vision would be able to, but how many are there that would be able to?

Ms. Kathy Vandergrift: I'm not sure that an impartial due process needs to be overly expensive, at least at the early stages. I guess I would like to look at some options that meet some criteria of due process but aren't overly expensive, to make that room there. But at least it should be allowed.

Mr. Joe Comartin: Have you made any representations to the Canada Revenue Agency? We did not hear what you're telling us. We did not hear from them at all. I'm just wondering if there have been lobbying efforts or efficacy efforts.

● (1420)

Ms. Kathy Vandergrift: I don't mind indicating the first conversation after the law was passed. We went to speak with the Canada Revenue Agency about what we needed to do to comply with this law. One of the statements was, “Well, you're World Vision, you don't have to worry. It's others”. Is that fair under a law? Surely they should be looking at us in the same way as they're going to look at some small agency. But we could not get any clear answers in terms of, “Do this and we will consider that you are meeting your obligations under the law”. The first step we took after the law was passed was to meet with them and raise those questions.

Mr. Joe Comartin: Mr. Chair, those are my questions, but I just have a comment for the record. As a committee we would have to seriously consider recalling Canada Revenue Agency, in view of what we just heard.

The Chair: Thank you. Duly noted.

Mr. Lee, please.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you, Mr. Chairman.

Let's just keep discussing the charity registration revocation procedure.

Before we get there, I sympathize with the difficulty of trying to avoid facilitating terrorism when the Canadian charity is out in the field in a real mine field of politics, sociology, and demographics. You don't know what's up and what's down, except that you're trying to help people. I sympathize with that, but I don't think we could right a lot of that and deal with all of those scenarios around the world. So we're back dealing with principles.

On this issue of revocation of registration, as I understand it there haven't been any, but there could be, and you're talking about the “could be”. I understand the process involves signing of a certificate, notification, and referral to the Federal Court for review to determine that the certificate of revocation was reasonable. So there is a process built into the revocation. Whether or not that is a due process, you obviously take a different view.

I'm going to ask you then, even though there is a process and it's judicially oriented, what components of due process would either of you wish to see built into that process to ensure, from your point of view, a greater fairness, or whatever you think of when you hear of due process?

Ms. Kathy Vandergrift: One of the concerns with that process is that they do not have to make us aware of all the information they are using to take away our licence to operate, and that information, as I said, can come from other parties in that zone of conflict. When the—

Mr. Derek Lee: At this point you don't know what they will make you aware of, because there hasn't been a revocation yet, but you believe that will be the case.

Ms. Kathy Vandergrift: But the law says they do not need to make us aware of any information that they might judge to be important for security reasons.

And when the Revenue Canada Agency people were here at the committee—and I read their testimony—they said that one of the reasons they like this law versus existing law is that it allows them access to sources of information—CSIS and otherwise—that they don't otherwise have. And those are precisely some of the sources of information that might be quite dubious. Fine, but those sources of information, when used against us, should be open to our defence against them. And if that has to be under constrained circumstances for national security reasons, so be it, but we think we have a reasonable expectation to know on what claims. And that's what the legislation should be based on, on what are the allegations being made against us.

Mr. Derek Lee: A reasonable disclosure component. That's fair enough.

Mr. Broder.

Mr. Peter Broder: Yes, and not just for the organization in question. I think we have to appreciate that a great many organizations are out there working in these complex situations, and they need some guidance in terms of where you can go offside and what's acceptable. When you don't have any transparency in terms of the process, it's not encouraging voluntary compliance; it's just a closed door.

Mr. Derek Lee: Going back to the due process, do you both accept that there will be elements that could not and should not be disclosed? Just to take the standard ones—information that would jeopardize an operation or information that would reveal a source—do you accept the existence of those two constraints on disclosure?

● (1425)

Ms. Kathy Vandergrift: I would want to see them very narrowly subscribed, and if you had a hearing that was not public, I'm wondering if the allegations could not be disclosed so they could be answered. I have to reiterate that while, yes, there may be some risk on the security front there, think about the risk to an agency like ours if somebody who doesn't happen to like what we're doing in one of these zones of conflict can file a complaint with the Canadian government that can be acted upon without our knowing what the complaint against us is. That surely is not the way you want to be treating this side of the ledger.

Mr. Derek Lee: Fair enough.

Ms. Kathy Vandergrift: And isn't there some reasonable concern on our side that we can't operate that way?

Mr. Derek Lee: But just speaking hypothetically, what about the life of the source? What about the life of the intelligence source whose life will hang in the balance if full disclosure of the background circumstances is made to a charity registered in Canada? There is a balance to be sought, and it's not the kind of thing where you put it on the front page of the newspaper and then figure out what's broken later. In this case, the legislation provides that it goes to a judge who will make those great, wise decisions about what is disclosable or what isn't, either by negotiation with the government or maybe the Attorney General will use a certificate, again, to prevent further disclosure. We haven't even been down the road on one of these procedures yet.

I sympathize with the problem, but I suggest to you that the same difficulty exists when SIRC reviews a security clearance issue, when it reviews other security matters that are brought to it on complaint. Right now, the procedure in place generically has been accepted by our Supreme Court as reasonable or in compliance with the charter where there is not full and complete disclosure for the purpose of protecting sources and operations, but where there is enough information provided to allow the person at least to respond to the nature of the allegation.

So you may well have wisdom to be brought to bear here, but it needs to address the toolbox that exists inside these closed hearings that will allow greater disclosure but still protect the sensitive information. And I invite you to think about that in the context of Uganda or wherever the good works are ongoing.

Ms. Kathy Vandergrift: I appreciate that. I would tie the due process to the definition, though. I think if the definition were tightened up, that would also assist. When we can be accused of indirect, unknowing facilitation, that's pretty broad and pretty vague. I think if the definition were tightened—and I'm sure you're going to hear from others. When you talk about it for religious or political motivation, well, this is a pretty big scope definition here, that we may be accused of facilitating these kinds of activities.

The pieces go together. I think all in all, if the legislation was much tighter and the process more clear, it would be the next best step.

Mr. Derek Lee: Thank you.

The Chair: Thank you.

Are there any other comments?

Okay. Thank you very much, Ms. Vandergrift and Mr. Broder. We appreciate your presentation this afternoon. Thank you very much for sharing your thoughts and views with us.

We'll suspend for a few moments to get the next panel in.

● (1510)

The Chair: I'll call to order.

We are reconvening our review of the Anti-terrorism Act and the impact of the Anti-terrorism Act. We had charitable organizations on our earlier panel. Now I am pleased to welcome—

Mr. John Maloney (Welland, Lib.): Mr. Chair, before we get into the next panel, in the break I was reviewing the witness list for tomorrow morning, and there is a representation coming from the Justice for Mohamed Harkat Committee. That's a case that was out of the Federal Court. I wonder if we could have the clerk provide us with a copy of that decision well in advance of that hearing—hopefully even this evening—so that we can review it.

The Chair: Thank you, Mr. Maloney.

Can we get that decision circulated tonight, or this afternoon if possible?

Thank you.

Mr. John Maloney: Thank you, Mr. Chair. I appreciate it.

The Chair: No problem. While this is going on, we'll see if we can get that material. Thank you.

I want to welcome the Canadian Civil Liberties Association, the Canadian Newspaper Association, the Canadian Association for Security and Intelligence Studies, and also, as an individual, Dr. Forcese. Welcome, all of you.

Who is going to start? Have you decided amongst yourselves who is going to be the first presenter?

Just so you know, we're going to take a few moments of opening statements from those of you who wish to have an opening statement and then circulate among the group. We'll try to pro-rate some time here.

David, do you want to start?

Mr. Alan Borovoy (General Counsel, Canadian Civil Liberties Association): I guess I lost the toss, Mr. Chair.

Thank you. I appear here on behalf of the Canadian Civil Liberties Association, and with me, sitting close enough, I hope, to prompt me at certain points, is my colleague Alexi Wood, the director of our public safety project.

To launch directly into it, I have four issues that I hope to cover rather briefly, and first, the definition of terrorist activity in the bill.

The definition is the pivotal part of this bill. Everything flows from it and is dependent upon it. Unfortunately it is so broad that it is capable of catching within its net all kinds of behaviour that does not remotely resemble what most of us think of as terrorism when we engage the subject.

Let me just give you an example to make the point. I take you back to the end of 2004 to those demonstrations that occurred in Ukraine. They were protesting what they conceived to be a rigged election in Ukraine.

If, as the protest leaders had urged, there had been a nationwide political strike—I'm using the language attributed to them—it would in all likelihood have been accompanied by some serious disruption of essential facilities. If that had happened, the Canadians—and there were numbers of them who donated to and otherwise supported that protest—could very well have found themselves in violation of Canadian law against terrorist activity, and this even though the objective of the protest was democratic and even as, from all appearances, they were trying very hard to avoid any violence.

As a result, the first recommendation I would make to you by way of summarizing our brief is that though the definition should include numbers of other things, at the very least there should be something in it to ensure that it applies only against the deliberate targeting of innocent non-combatants for serious violence. That must be part of any fair definition, and it is not at this point. That's the first point.

The second deals with the duty and power to ostracize; that's the way I express it. I refer to the power the government has to put terrorist entities on a public list, and this even though those who are put on the list have been neither convicted of nor even charged with any crime. They can be put on the list, and it becomes an offence for the rest of us to have business dealings with those people. In short, as a result of a unilateral act by the government they are transformed into virtual pariahs.

We have serious questions as to how necessary this power is. Be that as it may, in any event it ought not to be applied, in our view, against individual citizens and permanent residents. It's one thing to put an organization on the list; they have limited institutional functions. But ordinary human beings have ordinary lives to lead, and the consequences are so much greater when they are put on the list.

● (1515)

So we say at the very least there should be an amendment ensuring that individual citizens and permanent residents are not subject to the listing power, and in that connection also, before anyone is put on the list there should be a requirement that a court vet it first—not two months later when much of the damage has been done, but before the list goes into effect. There's no reason why it can't be vetted by a court first.

Point number three refers to the power to exclude information and prohibit the dissemination of information partly because of section 38 of the Canada Evidence Act, partly because of the new...or should I say the old Security of Information Act, which is a new guise for the old and properly much discredited Official Secrets Act.

As far as the Canada Evidence Act is concerned, the definitions are again so broad. They talk about information “in relation to”. That can include a lot of trivia that is so broad, and as far as the Security of Information Act is concerned, it could nail.... We don't know what it nails, that's the problem. The language is so vague that nobody has yet discerned what “secret official” information is supposed to be.

The one way to cure that, at least in the security context, is to ensure that the material at least has to refer to that which the disclosure of can cause serious injury to the physical safety and defence of the country. Beyond that there's no valid security reason for it.

The final point is on safeguards. And here we have the problem that many decisions are made now as a result of this and other legislation badly affecting people, by which people can never get to look at the evidence against them. Whether it's security certificates, or the power to list, or the exclusion of information under the Canada Evidence Act, they can often be denied the opportunity to see the evidence against them. This is understandable at a time of security problems, but it is not beyond our wit to devise ways of reducing the obvious injustice. The suggestion that we and others have made is that there be security-cleared public interest advocates who can see everything.

I have one final point, and that's it, Mr. Chairman. My problem is I speak too slowly.

So we should provide for this, that they can look at everything even as they are obliged not to disclose it to those whose interests they would be representing.

Finally, an interesting thing developed at the Arar inquiry when Bill Graham was being cross-examined by counsel for the commission, and they were discussing the inability of the government in trying to protect the interests of Maher Arar to sit down on a level playing field with the Americans. They talked about the fact that the minister could not see the information that the RCMP would have had on Arar because of our law and custom precluding cabinet ministers from seeing this material.

In our view, this is no longer acceptable. There should be an amendment that would allow ministers to see everything, even the operational material, and even in writing direct the RCMP with respect to the national security aspect of what they do. And to ensure the integrity of this, because it does create some risks of its own, there should also be a system for independently auditing the RCMP's operations so that you could have reports made based on actual knowledge of what goes on.

● (1520)

There are all of those, Mr. Chair, and I thank you for your indulgence. It is, as always, respectfully submitted.

The Chair: Thank you, sir.

Mr. Campbell.

Mr. Tony Campbell (Acting Executive Director, Canadian Association for Security and Intelligence Studies): I'm Tony Campbell, the executive director of the Canadian Association for Security and Intelligence Studies. I suppose that's the basis on which I was invited to attend this session. But I should make it clear that I don't speak for CASIS. Nobody can speak for CASIS because it's an organization made up of academics and practitioners, which means there's no such thing as a single point of view on anything, and I would be loath to present myself in that way.

The reason I accepted the invitation was because I do have a point of view, and it's based more on my career than on my post-career activities. I spent 34 years in the Canadian government, first in the foreign service and then in nine departments and agencies over those years, finishing with seven years in the field of intelligence analysis. I would like to bring the perspective of a former practitioner who has had to be on both sides of the secrecy and the protection of information line, and offer it for what it's worth.

I know for sure that members of CASIS, especially the academic members, won't agree with my point of view, so I'd like to make that clear. I know for sure that the majority of public servants who are members of this organization would probably agree with what I have to say, so I'd like to bring out that maybe even societal divide on these kinds of questions.

The basic point I want to make is that I think Canada has traditionally done a bad job of protecting information. During the Cold War it didn't matter very much, and in that sense for various reasons it was probably appropriate that we tilted quite strongly the fact of there being few or no prosecutions under the Official Secrets Act when it existed, not because there weren't reasons to have those prosecutions, but because the act was so poor. As somebody who has observed the system, I feel that the protections the government had for the legitimate protection of sensitive information were not adequate to the task even in those years, but certainly more so in more recent years.

The most important point of my submission is that given the nature of the world we're in now, there's room to debate whether 9/11 changed anything all that much. Where I come down on that question is, yes, we're in a different world. We're associated with a war, such as it's called, on terrorism. Much more importantly, we're engaged in an extension, in a way, of the 20th century battle of ideology. We're on one side and we're a target. The weapon of choice—and it will continue to be the weapon of choice of the people who oppose Canada's interest—will be carefully planned, no advance notice, high-impact, high-civilian target events.

That's a different situation from what we faced and had to gear our information system around in the Cold War, or for that matter in the Second World War or the First World War. We're in a different type of international conflict situation. On that basis, if we're in a different environment it seems to me we have to look at the nature of protecting our information resources in government and in other respects in the private sector too, in different ways than we looked at it before.

We're struggling with that; everybody is struggling with that. There's the whole interface between criminal intelligence, security intelligence, and foreign intelligence. They are three different categories, and each has different dimensions of challenge in the world we're talking about now. In all three cases my feeling is that the existing provisions, even after the amendments of 2001, are probably inadequate and need to be tightened up.

If we take the nature of the world as being different now, you do have models in other countries to address, and I've thought about the broad models we face—for example, the United States. The United States does itself immense harm by its inability to protect its secrets. We're watching now a quite extraordinary play on the Valerie Plame issue, where there's one journalist in jail. It's an amazing thing that this particular issue is being prosecuted, whereas there are a thousand releases of information in the United States, almost as a habit, that undermine the interests of the United States.

● (1525)

It's not just the information that's released. At the point where you don't trust an ally by giving them your information, at that point the ally is a loser.

I look to the United States and I say that the United States model is not what we want by any means. I look to the British model, which is in many ways the opposite—extremely draconian and quite tough—and I ask whether Canada really has to go that far. I acknowledge the task you have in trying to find a balance in those trade-offs. The nature of the world, from my point of view, is calling on us to take a tougher stand.

Another issue I'd like to speak to, because I don't hear it being spoken to, is the immense importance for effective government, especially in the world we're in now, of the governors—the decision-makers—hearing what amounts to some form of truth. It sounds like a cliché, but truth-telling really does matter, and at the point where somebody feels they can't say what they think when they're giving advice, there are important public interests that are affected by that.

One reason I'm in favour of a tightening of the security of information provisions is that I believe right now a lot of people in the Canadian government don't tell their bosses the truth, and the bosses don't tell their views back, because they're afraid it's going to be leaked; it's going to come out. Somebody's going to write the note, and it's going to be in public. At the point where government can't be carried out in part...and in proper circumstances, in private, there is a very big public interest that is affected.

Broadly, the nature of the world and the nature of government are the reasons I'm in favour of a tightening. At the same time, while I'm in favour of a tightening very much of what the first speaker mentioned in terms of safeguards and protections I would support, I do not support the broad-based system of classification of documents that exists in the Canadian government right now. There's an abuse of classifications. It's an automatic process. I've thought about how you would deal with that in the context of tighter legislation, and the answer is some form of intermediary position of security-cleared public interest person, or possibly an information commissioner function, with some capacity to address documents that have been wrongly classified and are therefore subject to the law when they should not be so severely classified.

I would like you to consider the classification system at some point. The words of the classification system are not in themselves inappropriate. There are actually words to define the difference between “top secret” and “secret” and “confidential”. The problem is that the documents themselves will tend to have an escalation: what should be confidential will be called secret, and what should be called secret will be called top secret—that kind of situation. That would need to be addressed. Tighten the system for protecting your information, but have safeguards, and change some of the existing practices, which tend to abuse that particular protection.

Those are my broad arguments. There are other ways. There are some specific issues in the Minister of Justice's paper, which I've read. It's a very good paper, I think, for elucidating some of the issues. I'd be happy to throw my opinion in on a number of the specific issues. I just wanted to stand up for a tighter system, despite all the calls for, in fact, a looser system.

● (1530)

The Chair: Thank you, Mr. Campbell. We appreciate your opening comments. I'm sure colleagues are going to want to chat with you about that in a moment.

Professor Craig Forcese (Faculty of Law, University of Ottawa, As Individual): I'm one of the academic members of CASIS who might have a slightly different view.

I want to thank the subcommittee for your invitation to appear here today. I'm going to be commenting strictly on section 4 of the Security of Information Act. I should note that a fuller expression of my views is found in a *Law Review* article, a copy of which I've provided to the clerk, and also in a book that appeared in June called *The Laws of Government*.

The Security of Information Act was amended substantially and renamed by Bill C-36. It was originally enacted, as this committee knows, as the Official Secrets Act in 1939. The 1939 statute was condemned for its breadth and for its ambiguity. In 1986 the Law Reform Commission described the statute as one of the poorest examples of legislative drafting in the statute book. It called the act out of date, complex, repetitive, vague, inconsistent, lacking in principle, and over inclusive, as well as potentially unconstitutional under Canada's Charter of Rights and Freedoms.

In the leading case, Regina v. *Toronto Sun*—again called the leading case on the Official Secrets Act—the court noted that “a complete redrafting of the Canadian *Official Secrets Act* seems appropriate and necessary”. That redrafting was accomplished only in part by the Bill C-36 changes. As this subcommittee knows, among other things, Bill C-36 repealed the original espionage provisions in section 3 of the Official Secrets Act and replaced them with a more comprehensive anti-spying regime. Now the provisions are actually summarized in a table at the back of the brief.

Bill C-36 did not eliminate, however, the antiquated section 4, which criminalizes so-called leakage. Section 4 is a profoundly broad and ambiguous provision, and again, it's distilled in summary form in the table at the back of my brief. But let me make a few key points in the moments I have today.

First, under section 4, non-authorized possession of even non-secret but official government documents is a crime. Under section 4 the government could prosecute the almost daily leaks of written government information that fill newspaper pages. More than that, it seems likely that it could prosecute the journalist and the newspaper reporting those leaks. Most civil service whistle-blowing is a crime, a point made by the Law Reform Commission in 1986. Query the implications then of these observations for the proposed whistle-blower protection law currently before Parliament.

Now it is true that there have been few actual prosecutions brought under section 4, but it is important to remember that prosecutions are only one component of the criminal justice system; warrants are another. The presence of section 4 on the statute book allows police to obtain warrants for highly dubious reasons, as the Juliet O'Neill case demonstrates. Keep in mind also that the government is now proposing expanding police lawful access powers. Expanded lawful access powers coupled with ill-thought-out justifications for warrants like section 4 are a recipe for serious invasions of privacy.

Second, section 4 is inconsistent with the access to information, free speech, and press provisions found in section 2 of the charter. The various ambiguities and reverse onuses of proof found in section 4 are also inconsistent with section 7 and paragraph 11(d) of the charter.

Third, the presence of section 4 makes a mockery of the Bill C-36 amendments to the act. Bill C-36 created new offences under the Security of Information Act for persons permanently bound by secrecy who communicate certain sensitive information. These new offences are, however, subject to a carefully defined public interest defence justifying disclosure, which is found in section 15. But persons permanently bound by secrecy, like every other person, are also subject to section 4, which includes no public interest override. Section 4 makes new section 15 meaningless.

Fourth, the Security of Information Act compares unfavourably to its closest equivalent, the Official Secrets Act of 1989 from the United Kingdom, at least in relation to its provisions governing civil servants and members of the public. The U.K. act has important problems, but unlike section 4, the U.K. act at least carefully defines the sort of information captured by the criminalization of disclosure. Unlike the Canadian law, it also includes a requirement that disclosure of even the sensitive information be damaging before criminal culpability will attach. Again, the U.K. act is at the back of my brief.

● (1535)

Fifth and last, section 4 needs to be read in broader context with an eye to the Access to Information Act and the Canada Evidence Act, as amended by Bill C-36. The Bill C-36 amendments to the Evidence Act are troubling, for reasons I don't have time to discuss but which I believe have been relayed to you by the Information Commissioner. I'll simply say here that the longstanding national security exceptions to disclosure currently found in the access act, coupled with the new powers to exempt information from the access act by certificate issued under the Evidence Act, coupled with section 4, together create an incoherent information law regime deeply inconsistent with the very democratic society these provisions are supposed to protect. They are so ill-integrated, incoherent, and overbroad that they may allow government to side-step embarrassment and mask incompetence, all in the name of national security.

Let me conclude then with three quick fixes. First, Parliament should repeal section 4 of the Security of Information Act and replace it with a new provision that would define extremely carefully and narrowly the sorts of secrets covered by criminal provisions. It would also introduce a requirement that actual harm stem from disclosure. The amended act should also extend to this new leakage provision the existing public interest override currently applicable in the Security of Information Act to persons permanently bound by secrecy.

Second, Parliament should standardize the definition of national security secrets across the statute books. Current national security secrets are described by a confusing array of terms. The access act is a logical nexus point for a common understanding of national security secrets.

Third and last, Parliament should repeal the power to declare information exempted from the access act via government certificate issued under the Canada Evidence Act. An August 2001 study prepared for the government suggested that security and intelligence services at that time were content with the then existing access exceptions. The Evidence Act additions are overkill. These amendments would not put national security at risk, disclosure would still be circumscribed by the access act, and wrongful leakage of information that raises legitimate national security threats would still be penalized. On the other hand, these changes would simplify and standardize rules, eliminate much uncertainty, and leave good governance in Canada less dependent on benign executive branch interpretations of today's perplexing security laws.

Thank you.

● (1540)

The Chair: Thank you.

Now we'll ask Mr. Gollob to present.

[*Translation*]

Mr. David Gollob (Vice-President, Public Affairs, Canadian Newspaper Association): Thank you, Mr. Chairman.

My name is David Gollob and I am appearing on behalf of the publishers of Canada's daily newspapers. The Canadian Newspaper Association's 81 members publish from coast to coast in English, French and now, Chinese. Our mandate is to defend our industry. We respond vigorously to threats to press freedom and freedom of expression, freedoms guaranteed under the Charter.

[*English*]

My focus today is section 4 of the Security of Information Act, cut and pasted holus-bolus from the 1939 Official Secrets Act. I'm going to ask you to direct the Government of Canada to repeal this law, which explicitly criminalizes journalism and violates the charter rights of journalists and publishers.

It could well be that some Canadians think we ought to have a law to protect us in the event of an invasion of aliens from outer space. Let us imagine, because Canadians are prudent, that we had enacted such a law but that the only time it was used was to put innocent people in jail. We would all be horrified and would demand such a law be repealed. The history of section 4 of the Security of Information Act is as absurd as this scenario.

Instances of Canadian journalists putting national security at risk are as common as invasions by space aliens. In 66 years this law has only been used twice against journalists, and in neither case was national security any more than a pretext for abuse of power.

The *Toronto Sun*'s Peter Worthington has the dubious distinction of being the only Canadian journalist ever prosecuted under section 4. Worthington had come into possession of an allegedly secret RCMP document with alarming details of Soviet espionage in Canada. He wrote about it in the *Toronto Sun*, and he and his publisher were charged, whereas a television network that had previously aired information based on the same document was not; neither was an MP who referred to this document in this House. It was alleged at the time that the *Toronto Sun* was charged for political reasons.

Judge Carl Waisberg threw the charges out because the information had already been in the public domain and so was not secret. “The press must not be muzzled”, he wrote in his judgment. “The warning bark...is necessary to help in maintaining a free society.” As Professor Forcese explained, Judge Waisberg excoriated the law as ambiguous and unwieldy and demanded that it be completely redrafted.

There clearly was no issue of national security, but there was an issue of national embarrassment for the RCMP and for the government of the day, and there was a huge outcry. The Canadian Newspaper Association, among others, called for a national campaign to press for reform of the Official Secrets Act.

Fast forward 27 years and we're still waiting, Mr. Chairman. In the meantime, with 9/11 and, in response, legitimate concerns about national security and the new Security of Information Act, they updated the OSA, but no one thought to change the part that threatens journalists with jail terms for simply doing their jobs—the part now known as section 4.

Suddenly it's 2004 and we have charges pending against another journalist, the *Ottawa Citizen*'s Juliet O'Neill. Once again the focus is a leaked RCMP document, information from which has already been in the public domain for some months, and here is the RCMP rummaging through Ms. O'Neill's underwear drawer one January morning, ostensibly looking for the source of the leak.

During the raid on Ms. O'Neill's home, an RCMP officer took her aside:

> He told me he understood I was going to be charged and asked me to name the source for my story,” Ms. O’Neill reported. “He asked me to come to the RCMP offices to discuss it further. ... Whether or not I complied, the RCMP would find the truth and it was not going to be a pleasant experience.

So two cases in 66 years each show a bad law whose only application is to intimidate media and violate constitutional rights. As in the Worthington case 27 years ago, the O'Neill raid sparked a national outcry, dominating question period for a week. Prime Minister Martin defended Ms. O'Neill. Deputy Prime Minister McLellan promised a review of the act.

Well, committee members, today it's up to you. Let's not be repeating this debate 27 years hence. On behalf of Canada's newspapers, I'm asking you to direct the government clearly and unambiguously to repeal section 4, to ensure that in drafting something to replace it they narrow and reduce the scope of secrecy to what is strictly essential, erring on the side of openness.

This can be done only if it is recognized that the current law is not about national security. It criminalizes whistle-blowing and publication of any information the government of the day deems to be secret. Make this law consistent with the public interest rather than the interests of the government of the day by confining it to cases where national security is in fact jeopardized. Put the onus on the government to prove harm was done to national security if it is going to prosecute. Make the government justify its prosecution by showing that publication was not in the national interest. Decriminalize the act of receiving secret information. And finally, specifically exempt journalists, publishers, and all journalistic activity from sanction, at least where publication is not proved to have harmed national security.

● (1545)

In the discussion paper the justice department has sent you, the government worries that a journalist exemption could be abused by so-called front organizations. One would hope that if the RCMP and CSIS were doing their jobs we would not have front organizations masquerading as media in this country, and we would also hope that the RCMP would be able to tell the difference between the *Globe and Mail* and the *Bin Laden Beaver.*

Thank you.

The Chair: Thank you, Mr. Gollob.

Mr. McKay, we'll start with you.

Mr. Peter MacKay (Central Nova, CPC): Thank you, Mr. Chair, and all of you for your very forceful and articulate presentations here. They were very provocative.

Just picking up where you left off, Mr. Gollob, there is a focus on section 4 and the fact that in reality there was no change, as you pointed out and as others have stated, between the Official Secrets Act when Bill C-36, the anti-terrorism bill, came into effect and the section that Ms. O'Neill is currently being prosecuted under. The words in that section talk about foreign power and communication prejudicial to the safety of the interests of the state.

These words are defined at the beginning of the bill; however, where section 4 makes it an offence to communicate or use the information for the benefit of a foreign power, it goes on to talk of retaining any secret document if he or she is not supposed to have the information. There appears to be an anomaly in and of itself in the way that is worded, because how, in some cases, would an individual know the source? How would they know the nature? They clearly might have journalistic instincts that might indicate that this type of information might fall under that definition.

This is my first question, and I will direct this to you, Mr. Gollob. Is it your interpretation of the act that if a person permanently bound to secrecy revealed information to a reporter because a public servant believed it to be of public interest—that is to say, they might have been of the opinion that the government was acting irresponsibly or even criminally—and chose to pursue this by disclosing it, that the public servant would have a defence against charges but the reporter would not? That is to say, even if the reporter didn't communicate the information or act upon it, they would be subject to prosecution, whereas the source would not be subject to prosecution.

● (1550)

Mr. David Gollob: It's important to clarify that we're speaking from the perspective of the reporters, journalists, and operators of newspapers in this country in pursuit of the goal of informing the public. The difficulty I have with your question is that there clearly are cases where perhaps it would be legitimate to prosecute the public servant. What we would like to see is a public interest or harm test—generally, in a democratic society that's absolutely important—and that there be no blind alleys in which information disappears and is sealed for all eternity, with the effect that wrongdoing is never exposed where wrongdoing might have occurred.

In general, we would support the principle of a harm test for every person affected by this or other secrecy legislation. But in the specific case of the media, which is our focus, on the mere act of receiving information, as other people have said today on this panel, it has become routine in government to stamp things as secret, and this is something that has become abused. So how is a person supposed to know that the nature of the document reflects some kind of layer of secrecy that is criminal for you to possess?

The other interesting thing about the reverse onus in the legislation as currently written is that in order to defend themselves the journalists would have to prove that in fact they came into possession of the information against their will, which strikes me as another reason why this act is extremely ambiguous, and it is difficult to see it standing.

Mr. Peter MacKay: You argued quite forcefully—and I believe Mr. Forcese also made the point—that this test that is to be applied, this use of information, can also be used by the government to avoid embarrassment. That is to say, the test to be applied for national security is not very clear, and it could be more politically motivated as opposed to national security motivated. I believe Mr. Borovoy was speaking of it as well.

Mr. Alan Borovoy: I wonder if I could try to skip some of the legal niceties, because we could probably spend a long time trying to figure out just what this statute means. But I think that's part of the problem. It talks about secret official information and it doesn't contain a definition of it. If we skip ahead to the practical problem—what a newspaper reporter is supposed to do upon receipt of something coming from the government—whatever you think the government may ultimately do, abuse or not abuse the material, there has to be an awfully chilling effect to the person who receives it and is in the business of conveying relevant, vital information to the public. On that basis alone, this has to be changed quite substantially.

Mr. Peter MacKay: When it comes to what would be deemed a wrongful communication of government information in this classification—and I believe this point was made as well—sections 13 and 14 apply to people permanently bound to secrecy, and this public interest offence exists, whereas it doesn't exist for section 4.

Again, I would ask all of you as panellists, if section 4 is to be kept and the section isn't removed entirely, as has been suggested, would that public interest offence being broadened to apply to section 4 go part of the way to addressing the concerns you have? And does the broadening of the context also meet the higher standard you're referring to, sir, as far as the government then being required to justify that actual harm could result from the use and dissemination of this information is concerned?

Prof. Craig Forcese: The point I was making is that right now section 15 is meaningless, because if the government really wanted to pursue a person permanently bound by secrecy for leaking information, they needn't use sections 13 or 14; they could go under section 4, and there would never be a question of a public interest override, because the public interest override doesn't apply.

So in answer to your question, a bare minimum in terms of the coherence of the statute would be to extend the section 15 public interest override to section 4.

Would that then incorporate a harms test for section 4? I don't think so, because notwithstanding that in the course of determining whether there was a public interest there would be consideration of these issues, I don't know that the predicate offence, the offence in section 4, would have at its core a focus on harm.

We're still talking about the potential for a person to be prosecuted simply for having in their possession an official document. It doesn't even have to be secret. There are provisions of section 4 that don't modify "official" document with "secret". It just has to be official. So if it's written, which I presume would be the test for "document", and it's "official", whatever that means, and you have it in your possession and you're not supposed to, that's the crime. Then, if there were a public interest override, we could debate whether you should have had it, but....

● (1555)

Mr. Peter MacKay: All of you, or at least some of you, have made what I would describe as very provocative statements about the potential for abuse here by the government: intimidating media, violating the Charter of Rights and Freedoms. Those are very serious allegations.

I guess what I'm coming back to is whether it is going to be possible to meet this standard of deeming what is and is not sensitive for national security purposes, versus something that is politically damaging for a government. This appears to be the crux of the matter. If that standard or that definition can't be made, governments can use this legislation, and may use this legislation, to avoid political fallout as opposed to national security fallout.

Mr. David Gollob: Very quickly, we're very fortunate in Canada, in my opinion, that we don't have governments that routinely intimidate media. In fact, we have a very well-functioning democracy in which such occasions are—

Mr. Peter MacKay: [*Inaudible—Editor]*...in Canada in the Governor General's house, actually.

Mr. David Gollob: These instances are extremely rare.

We're saying that the law must be changed because the potential exists in this law for these abuses to occur. The evidence is that when this law has been applied against media, it has had every appearance of being an abusive application. That is why we're saying this law has to be changed.

The Chair: We're just starting to bump into a little bit of time...so if you folks could decide, one last intervention in answer to Mr. MacKay, and then we're going to move to Mr. Ménard.

Prof. Craig Forcese: You've raised two issues: first, should we narrow the scope of the act, and second, could we?

Should we narrow the scope of the act? Yes, we should, because you should always design statutes that accord substantial—and rather scary—powers to the government with the worst possible government in mind, not the best possible government in mind. If you are going to accord powers to the government, keep in mind the worst possible government.

Can we define national security more narrowly, or secrecy more narrowly? Look at what the U.K. has done in their statute. In their official secrets act they define what they mean by harming international relations or harming national security. They've spent some time defining that. We've not done that.

Mr. Peter MacKay: I'd like to invite Mr. Campbell to join the conversation as well.

The Chair: Yes, I'd like to hear from Mr. Campbell too.

Mr. Peter MacKay: First I have one last question, Mr. Chair, if you'll indulge me.

One of the subjects we're examining in the Parliament of Canada right now deals with a parliamentary oversight body, and I would invite all of you to comment as to what role a parliamentary oversight body might play in the examination of issues such as this, where official secrets are involved. It goes back to the point that I think Mr. Borovoy made about the capacity of a minister to be given operational details and whether that might extend to a parliamentary oversight body, given the proper restrictions placed on that body, as we have seen in the U.K., the United States, New Zealand, Australia, and other countries that have this type of parliamentary oversight. That doesn't exist in Canada, to many people's surprise and dismay.

Mr. Tony Campbell: On the previous and that question, I have just a summary comment. The public interest defence is one that is attractive in the situation where the information that is considered to have been an offence is debatably harmful to the public or not. But I'd like to make the point that the very fact that people cannot be trusted to retain the confidence of the people they're working for is itself a public harm. In that sense, if you did define a public interest defence, it should include the public interest in the ability of governors to have confidential dealings with and advice from their advisers.

That's an awfully important issue, and much of the flavour of this panel is in favour of what I consider the post-Vietnam approach. It's a different world they're talking about where you wait for a harm before you actually convict. We have to worry about a world where you need to be able to keep a secret.

So I would say to Mr. Gollob, yes, a couple of prosecutions; isn't it amazing that there are only a couple of prosecutions that can be pointed to? You could argue that's a very lenient law. I would say that in fact it's the opposite; it's a useless law, because it has not been capable of dealing with real abuses that have taken place. I can think of two right off the bat in the last five to seven years in which media have carried stories that were without any question against the public interest.

I will give you one example that was in the public domain: a "whistle-blower" in the communications signals business who identified countries that were targets. That could only be highly offensive to the public interest, but there was no prosecution. The newspapers carried it, and it's out there in the public domain.

So it's hard to find the balance, and certainly in terms of the media there should be some provision.

To come back to your final question, I think the answer is not to find the perfect words. The answer is not to find narrowly defined words that then go into courts that are pretty good at upsetting well-intended public policy. I think the objective may be some kind of intermediary mechanism—and it could well be a parliamentary committee—where there is a challenge. That it be put to parliamentarians would be a wonderful court to reflect the public interest dimension of it.

● (1600)

The Chair: Thank you very much.

Mr. Alan Borovoy: I think Mr. Campbell's argument is not so much with the statute but with the governments who have failed to prosecute in situations where he thinks abuses were being committed. There is little question that the statute has the capacity to sustain such prosecutions, and if people don't want to bring charges, your argument is with them, not with the terms of the statute.

The Chair: I'm sorry, I'm going to have to jump in. I have to respect the.... You'll get lots of chances to intervene, but I want to get the next questions coming from Mr. Ménard.

Just as a point of clarification, Mr. MacKay, I think you'll find that Ms. O'Neill has in fact not been charged. There is a warrant, and the constitutionality of the warrant is now before the Federal Court. I just wanted to clarify that information for everybody, that there is actually no prosecution currently. There is only one prosecution that has ever been made, and that's the Worthington case. I think I'm correct.

Mr. Alan Borovoy: Some people would say, Mr. Chair, that she has not yet been charged.

Mr. Peter MacKay: The word “prosecute” can be used broadly, as you know, Mr. Chair.

The Chair: That's fine; I well know.

I just wanted to say, for clarity, that there's an application at the Federal Court.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard: Thank you all for coming. You clearly have a lot of expertise; you have given us a lot to read and to reflect upon. We have a very short amount of time available to us for questions. We are forced to limit our comments and questions to topics that are not necessarily the most important. I think that the issues have been covered well, but I would like some clarification and I would like to hear opinions that you have not expressed.

Mr. Campbell, I was quite surprised when you compared our ability to protect secrets to that of the United States and Britain. If I understand correctly, you find that we are doing a very bad job, that the Americans are even worse, but that Britain is much more effective. Have I understood you correctly?

I did not fully grasp why Britain was doing a better job. Obviously, we have not been completely spared terrorism. The Air India attack was one of the worst in the world, and the aircraft left from here. As for terrorism and the FLQ, it seems almost trivial compared to what we are facing today. I would point out that the worst terrorist attacks have taken place in Britain, and then in the United States, whereas despite our weaknesses, we seem to be a bit more sheltered.

Why is Britain doing a better job, especially compared to the United States?

● (1605)

Mr. Tony Campbell: Thank you for your question. You have indeed understood the distinction I was making. I think that Canada, as it does in many areas, has a middle-of-the-road approach.

[*English*]

On one side is the tendency for openness and open decisions, openly arrived at, which is an American ideal. It's reflected in the fact that very few institutions in the United States are capable of keeping a secret. That's also partly because it's not thought necessary to do so. Some of this is a reflection of a fairly longstanding pattern. It is true that under the current administration in Washington there is quite a strong shift in another direction. But the basic point, I think, is that the difference between the British and the Americans is that the Americans have an inclination towards openness, whereas I think the British have a very longstanding historical inclination to closeness. There's a culture of secrecy in Britain, which works even if there's no law there.

I find it surprising that I'm sitting here defending the idea of Canada going in that direction, because I actually think it's gone too far in Britain. I see signs now of it coming out; there have been some quite extraordinary secrets revealed just in the last few months. During the run-up to the Iraq War, when one might have wanted to see more secrets being divulged, they weren't there. Finding the right balance is not easy.

The basic idea is that a secret is something that is in the public interest, and that the public interest needs to have a capacity to have secrets. That's an idea that's not well enough understood in Canada. If you lose the capacity for secrecy you lose the capacity for surprise and you lose the capacity for honest debate behind closed doors. It's for all of those reasons that I'm here in favour of a greater capacity for secrecy.

[*Translation*]

Mr. Serge Ménard: I have to move quickly, but I would like to ask you a fundamental question that I have been asking myself since the start of these hearings, a fundamental question for all of the reports that we write.

You are an expert on intelligence. I do not know if you have a legal background or not, perhaps you could clarify that. Clearly, after terrorist acts like 9/11, all government organizations feel the need to do something. As legislators, we are under pressure from our electorate. We must show that we are doing something. Since all that we can do is make laws, we are making laws.

Now, when we look at what we know about the people who participated in the events of 9/11, we see that one of the main lessons learned is that in the end, it was the intelligence services that came up short. It was not so much the laws that were lacking, but the way that the intelligence services reacted and the means they used.

Do you really think that if our current antiterrorist legislation had existed in the United States, for example, it would have prevented the most deadly terrorist attacks that we have seen, like 9/11, like Madrid, etc.? Do you believe that the acts themselves, the ability to keep people in prison without disclosing the evidence, make a difference? Or do you think that what makes a difference is the effectiveness of the secret services and the intelligence services?

● (1610)

[*English*]

Mr. Tony Campbell: I studied law. I'm not a lawyer, but I spent seven years in the field of regulatory and legislative reform. One of the notable things about understanding 9/11 and why it happened, and I would put this well ahead of intelligence, is the responsibility of the regulatory authorities in the United States: they failed to carry out regulatory measures that were already accepted internationally with regard to the locking of cabins of pilots. This was an exemption under American law delivered by a rich and powerful lobby of airline pilots who didn't want that limitation on their freedom. If you wanted to look at fundamental reasons for 9/11, there would be many candidates, but as an observer of both regulation and intelligence, regulation deserves to be far out. There were bad laws badly delivered by legislators who were too easily paid off.

Your underlying question, or your main question, was could more effective anti-terrorism laws have prevented 9/11? Again, because many factors contributed to it, I think it would be wrong to say that, yes, it would have prevented it. But one of the weaker links in the chain of causative factors included the anti-terrorism capacity in general in the United States, and that included the relationship between the FBI and the external intelligence agencies, which was legislatively imposed. In that sense, laws that encourage interaction between foreign intelligence, domestic intelligence, and police intelligence will make a difference in future anti-terrorism efforts.

I don't know if that answers your question.

[*Translation*]

Mr. Serge Ménard: We would like to propose a provision to mitigate the effects when evidence must be presented and the sources cannot be disclosed, because it would jeopardize the evidence or cause a complete failure.

I see that even Mr. Borovoy agrees that, exceptionally, certain procedures like that one should be used. However, he says, as others have, that those circumstances should be dealt with by designated lawyers with security clearances.

As an intelligence expert, how do you see that? Is that not one of the system's weak points, an Achille's heel? Do you think that it is worth taking the time to verify the security clearances of certain lawyers, who would have the confidence of the people they would be defending?

[*English*]

Mr. Tony Campbell: I think the idea of having security-cleared individuals whose role would be oversight of information-related issues with the government versus the public, the government versus the media, the government versus the academy, is the way to solve this problem, because there will never be perfect language that will get to the perfect definition in support of either of the two contending interests. But you might need to have people who are cleared and are able to address the information dimensions of the challenge.

Could I just inject a point here that I haven't made yet but is part of the general world view? Have we adapted to the information world we're in? Everyone knows that we're in an information world; it's changed a great deal, but we're still catching up with 20th century ideas. So an idea where you address information conflict—in this case between government and somebody who's released it or somebody who possesses it—with some kind of intermediary adjudication that is not law but judgment would be a sensible move, in my opinion.

[*Translation*]

Mr. Serge Ménard: Mr. Gollob, I must conclude by saying that we live in a country where politicians do not intimidate the press, by and large. After having provided the Quebec Federation of Professional Journalists with free legal advice for more than 20 years, and having now been in politics for 10 years, I would say that politicians feel intimidated by the media in Canada.

● (1615)

Mr. David Gollob: I would like to add a very brief comment on what you said earlier.

You will recall a memo sent by an FBI agent following 9/11 in which he revealed that authorities had received a warning that there would be an attack and that authorities ignored the warning. Would this memo have remained secret under Canadian legislation? That is a question I have for you.

[*English*]

The Chair: Thank you.

Mr. Comartin, you're next on my list.

Mr. Joe Comartin: Thank you, Mr. Chair.

Thank you all for being here.

I've got to say, Mr. Campbell, your assessment of history is significantly different from mine, in particular the period at the start of the last century as we moved into the 1900s and the role the anarchists—as they were classified then, but would now be classified as terrorists—played leading up to and in fact probably causing the single greatest incident that led to the First World War. From any number of other historical perspectives, I've never accepted the fact that the world has changed that dramatically as a result of September 11.

But I want to ask you.... I'm quite concerned that one of the justifications you're taking for a more rigid framework—and, I have to say, a much less democratic one, and certainly one that's concerned about civil rights and civil liberties—is some way to protect freedom of speech, the free flow of information, amongst the public servants. I would think that balancing the loss of civil rights and civil liberties with the concern we have for the roles that public servants play is not much of an issue. If that's the balancing act that we have to do, then I'll take civil liberties every time.

Do we not have a right to expect our public servants—especially in this field—to overcome their reluctance with sharing information when the alternative is a loss of civil liberties to the whole of the country?

Mr. Tony Campbell: In a way, both your points are connected. If, in your view, there hasn't been that much change after 9/11—and I would throw in the information revolution and a few other things—or if you're saying that it's not much different from 1914, when anarchists set off the First World War, then I think your logic follows, and it makes sense. That's why, when I've thought about it, that's been the dilemma for me. If the world has changed and it is a more insecure world, and it's calling for different behaviours by Canada, then I'm driven to the conclusion that we have to change some of our traditional inclinations and behaviours. I end up being less democratic and less civil liberties oriented. I don't like that outcome from an emotional point of view, but I just want you to know that's where I've come. Under all the hoopla and noise, I do believe we're in a different situation. The essential element of that difference is that we're in a world in which, I hate to say it, George Bush is right: it calls for pre-emptive action as opposed to the traditional wait for the offence and then react. So in that sense, we won't agree if we don't agree on our historical take.

But on the issue of civil liberties, I wouldn't want to detract from the protection of civil liberties. There should be full protection of civil liberties, including access to information. That's why I say that it shouldn't be a matter of protecting everything a government does or anything it decides to declare as a secret. I fully agree with the idea of a closer and tighter definition. At the bottom line, though, I'm saying that there are secrets, and you should be able to keep a secret. That's not about suiting the public servants; you're totally wrong about that. A public servant is not elected. At the point where a public servant starts to decide that they know better than the people who stand up in question period, you have a different form of government.

● (1620)

Mr. Joe Comartin: I suppose the risk is that this is what we're moving toward.

Mr. Borovoy, you raised the point about the amicus curiae. We're having trouble...one of our previous ones, and I believe this has been circulated. There was a letter to the editor, I think, or an article by Ian MacDonald, who in effect played that role in the U.K. for some seven years and resigned in January. He recently wrote this article explaining why he resigned, in effect saying that the role of the lawyer in that situation, going in and not being able to share information with the person who was the accused—in the broad sense of that word—really was just a prop to an unfair...and he used quite strong language, that the role of the amicus curiae really was not appropriate for those circumstances.

I don't know if you've seen the letter or the article, or if you have any comments.

Mr. Alan Borovoy: I have not seen the article, but what you say about the article appears to be in conflict with a judgment of I think the British court of appeal. Having heard such a case, they made special mention of the contribution made by the independent advocate, or amicus curiae as we're calling him. So I'm not sure there is complete consensus about the value of the office.

In any event, I don't think we should make the mistake of rejecting that notion because in numbers of ways it may not work adequately. I would almost assume that a lot of these things are not going to work adequately, but I would argue that this kind of approach is significantly less inadequate than any other alternatives you might come up with. And that, I think, is a better measure of the validity of a proposition—not that it's perfect, good, or even adequate, but compared to the alternatives, it's a hell of a lot less inadequate.

Mr. Joe Comartin: Just to pursue this quickly, because I want to ask Professor Forcese a question, the real problem, as I see the system in the amicus curiae, is that it still rests in the hands of the security service, not in the hands of the judge, as to what is national security and what can actually be disclosed.

I want to go back to the point Mr. Campbell made, because I know that a number of us sitting around the table are well aware of how over-classified documentation is. There are some suggestions coming out of both the U.S. and the U.K. that it's by as much as 80%. But that's the kind of information, when they go before the judge in these circumstances, with the presence of the amicus curiae, he doesn't get any access to, or he cannot share it, in any event, with anybody—the legal team for the accused, or the accused himself.

Would it not be better to redesign the system so that a judge would be making those decisions—a well-educated judge? And I know that's a problem, but....

Mr. Alan Borovoy: The way we have it, the judges make those decisions. But the judges go in there—and I have to feel sorry for them, especially in our system—and they are alone. They are used to an adversary process. There is no adversary process there, so to a great extent this would be of assistance to judges.

In addition to that we might consider, not some changes in the basic amicus curiae approach, but other devices that could make the system more viable. One such thing is to equip the judges with staff who can do some preliminary work in these files and acquire some expertise in the area. I'm told, for example, that the FISA court in the United States, which issues surreptitious surveillance warrants, has the benefit of some staff. I think that could be a great assistance also.

So I think it makes sense to look to this, recognize that it won't be ideal and will have its flaws, but try to find devices like that to reduce the difficulties.

● (1625)

Mr. Joe Comartin: Professor Forcese, I think the U.K. uses the definition “damaging to national interest”. In your assessment of their legislation in their system, has that been successful? What is “damaging to public interest”—that phraseology? Has it been interpreted properly, so it hasn't been overly used, to protect from incompetence or abuse within the system?

Prof. Craig Forcese: That's a difficult empirical question, and I'm not equipped to do an analysis of how it's been used in practice. I'm not aware of any cases that have interpreted the 1989 statute. There is substantial literature that critiques the 1989 act, and in particular the absence of a public interest override for the equivalent of our persons publicly bound by secrecy. There are some criticisms of the definitions of the various grounds for secrecy that they're not sufficiently refined. But I can't comment on empirical record as to how it's been applied in practice.

Mr. Joe Comartin: Have there been any charges under the legislation in the U.K.?

Prof. Craig Forcese: I'm not aware of any charges, but I'm not really in a position to evaluate that.

Mr. Joe Comartin: Thank you, Mr. Chair.

The Chair: Thank you very much.

Mr. Lee, please.

Mr. Derek Lee: Thank you.

I want to accept all of the evidence on the Security of Information Act. The task of rewriting that statute was in existence before 9/11; it was very much on the work-to-do list. I think it is fair to say that the events of 9/11 became an obstacle to that—that 9/11 actually required the agenda to be written and that the completion of that project was actually postponed. It was partially rewritten under Bill C-36. But your comments are helpful.

I want to go back to a nuts and bolts issue, just so we can have the benefit of Mr. Borovoy's nuts and bolts comments. It has to do with the definition of terrorist activity, which was always a difficult task and is still a really tough thing to define. I want to challenge his view —I know he'll have an answer, and perhaps some of you others will too—by suggesting that a public demonstration of the type that might occur...a big one in downtown Winnipeg or Toronto, or wherever, and the one in Ukraine, would constitute a terrorist activity. I refer to the portion of the definition that excepts from that type of activity. The wording is that "other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to", which is intentional death, intentional destruction, intentional endangering. There really was an attempt to exclude from "terrorist activity" public protest, advocacy, and dissent of the nature you described.

Mr. Alan Borovoy: I didn't have time, Mr. Lee, to be sufficiently gracious and to acknowledge that I knew the government did make an attempt to reduce the breadth of that definition, but in fact you left out a key word as you went through the definition just a moment ago, where it talks about "conduct or harm". What I'm suggesting to you is that if you engage in conduct that is some form of protest, not just a demonstration.... I said that if there is a nationwide political strike, there is likely to be some paralytic activity visited upon some vital or essential services. The protestors may not have intended the harm of the risk they had created to health or safety, but they had intended to engage in the conduct that may have caused the harm. On that basis, it might well be said that kind of activity is therefore caught by this definition.

● (1630)

Mr. Derek Lee: Okay. We could probably walk through a scenario where something like that might happen, but the definition clearly excepts conduct that is not intended to produce the harms referred to. I do accept that we could get into a scenario where all the interchangeable parts of a huge demonstration produce a very negative impact, where certain people—

Mr. Alan Borovoy: It's not just a demonstration, it's some of the other activities that likely would be connected with a nationwide political strike. I chose my words more carefully than that.

But let me make one point about this. I think there's a very good argument that some of those things would be caught by this definition, notwithstanding what you say about the government's intent.

Mr. Derek Lee: Parliament's intent.

Mr. Alan Borovoy: Parliament: forgive me, I must have lost my head there.

Yes, it may well be, but I'm suggesting to you that the words don't do it. I think a very critical decision needs to be made when you face the problem of how to define terrorism. Do you try to write a definition that encompasses everything conceivable that you know terrorists engage in, or would you be prepared to write a narrower one because you see that the wider you make it, the greater the likelihood that you're going to catch conduct you don't want to catch? Or would you then run the opposite risk, do a narrower one, as I say, and confine it at least to situations where there is a deliberate targeting of innocents for serious violence, recognizing that there will be some activity terrorists engage in that won't get caught by it? And to which I respond, but that conduct is illegal anyway; you don't need to include it within the terrorist mantle.

Mr. Derek Lee: Okay, but at the time...and still there is a desire on the part of government to be able to legally locate and intervene and pre-empt an activity that is leading to a terrorist act. So that means you've got to add more into the definition rather than less, unless you're going to fall back on conspiracy law or other things. In order to empower the government to take steps to pre-empt, it wouldn't be logical to narrow the ambit. That was where the government was coming from, knowing that our modern terrorists are insidious and never stop thinking about cruel and awful ways to harm the people they wish to harm.

I'll let you respond.

Mr. Alan Borovoy: Nothing I have mentioned would in any way disable the government from intervening, if you like, in those preliminary stages. Indeed, the dispute that has arisen between us about the definition does not even address that problem. The problem is what is ultimately caught by this definition of terrorism. You see, you're addressing all of the preliminary stuff: facilitating, participating, and doing all that. I didn't address that. I'm just talking about, in the final analysis, what you mean by "terrorist activity" anyway.

Mr. Derek Lee: Thank you.

The Chair: Mr. Maloney, please.

Mr. John Maloney: The war on terrorism is a global phenomenon. One country cannot really operate or function in isolation from others. It's the area of trust. If one country has a less restrictive regime than does another—Canada to the U.K., let's say—then will in fact that more restrictive country really trust us to release information to us? How are we going to function in that world?

● (1635)

Mr. Alan Borovoy: I think we have to be much more specific than that question allows for. Of course you're quite right; in the abstract or in general, I don't have any difficulty with the proposition that there have to be some controls over the dissemination of information. I suggested, for example, that the control could be material whose disclosure is likely to cause serious harm to the defence of the country. Well, what you're talking about would do that, so it could get caught by a narrow definition such as that.

They say that the devil is in the detail, but I'm now suggesting that so is the angel in the detail, that it is not beyond our wit to draft a tighter test of that kind. It likely would catch and protect the kind of information you're talking about, but it wouldn't encompass a lot of other things that democrats should not wish to imperil in any way.

Mr. John Maloney: Mr. Campbell, did you want to comment?

Mr. Tony Campbell: I wanted to suggest a statistic. I think this would be generally accepted by people who've seen the flows of information that come into government. You're right, terrorism is a global issue. Our relationship for economic purposes is also very global, and there's an interaction between the two. There are big stakes when something goes wrong. I would say that the information that is required by the Canadian government to conduct its foreign policy, its security policy, and its defence policy would be in the order of 90% dependent on outside sources.

Therefore, the question you asked is a very important one. At the point where you're seen as a weak link, then you are not likely to be trusted. I'm not saying that we are. In fact, there is a school of thought, and in some respects it's justified, in my experience, that Canada is so eager to protect its secrets that we go even further than other countries, and that produces a chilling and a reducing effect. It certainly does mean that you've got to arrive at a regime that is respectable to people who provide you with information.

Mr. John Maloney: I have another small point. If I look at the U. K. experience and their battles with terrorism and the IRA—before we got into the 9/11 phenomenon—they found that the IRA learned from its mistakes, by the information that flowed perhaps more freely. The British then became more restrictive, with less information flowing, and they became more effective in confronting the IRA and terrorism than they had been. Is it fair to say that you're better off keeping secrets—if there's less information flowing—in case the terrorists pick it up themselves and use it against you?

Mr. Tony Campbell: The free flow of information inside government was one of the key findings in the United States after 9/11. It wasn't happening, and they're trying to fix it. My impression is that they are doing a better job right now of pushing the internal exchange of information. It's a lesson they could have learned sooner if they had looked at the British experience. You're right. The British had fairly ineffective cross-organizational sharing, but they got better, and it was through, as I understand it, some entities that were created to encourage joint sharing.

We're watching the same thing in the Iraq War now, where the insurgent activity shows a remarkable ability to adapt and change its tactics. That's an information result and a being-able-to-keep-a-secret result, and the Americans are struggling to deal with it.

I support the point that free flows of information are really important inside government. What we're talking about here is should that free flow go out.

● (1640)

The Chair: Thank you, colleagues.

I have very little time left. For those of you who want to ask short questions, I'd caution the panel to be brief in their replies.

Mr. MacKay.

Mr. Peter MacKay: Thank you, Mr. Chair.

With regard to this chilling effect, or the fallout from an impression or a reality that Canada is not sharing information properly or perhaps keeping it too tight, I think there are in this current atmosphere, real, serious implications of that, which is why I get back to the basic premise of how we strike a balance. I think, Mr. Campbell, you used that word a number of times—this balance.

I'd like to get your impression as to the current state of play. Since the application of the Security of Information Act.... We heard from the Information Commissioner, who seemed to say that there's a stubborn persistence of a culture of secrecy. That was how he described it. Do you believe, based on your experience and how it has affected your various fields of expertise, that more and more information is currently being classified? Do you feel that this act has allowed for greater secrecy to apply and to attach to documents? That's really what it's about. It's about the classification of documents. Do you currently feel that this is happening? Has that impact already begun?

Mr. Alan Borovoy: It's hard to attribute particular phenomena to a statute. You just don't. One of the most difficult things to demonstrate in the real world is causation. But insofar as the culture of secrecy is concerned, look at the experience of the Arar commission and the number of complaints and conflicts that have arisen about being able to get critical information from the government. In many ways, that will help you appreciate the climate a little more.

Mr. David Gollob: If I could just make the point, the roadside of contemporary Canadian history is not littered with secrets endangering national security that have been spilled on the road by journalists. The roadside of Canadian history is littered with the debris of failed attempts to destroy or obstruct the truth—from Somalia, to sponsorship, via tainted blood.

The concern we have in the O'Neill case is that the mere investigation of a journalist under this act has already.... In the case of Peter Worthington, the *Toronto Sun* had to pay something...in 1978 it cost them $100,000. In today's dollars it would be an enormous amount of money. The *Ottawa Citizen* has spent an enormous amount of money, in the hundreds of thousands of dollars, defending Juliet O'Neill. The mere investigation of a journalist under this statute is a punitive action in and of itself, which is one of the reasons why we're asking for it to be repealed.

Mr. Peter MacKay: I would like to raise a supplemental question on the same point.

Are you concerned then with this legislation as the backdrop when you hear the current justice minister speculating about new legislation that would in fact expand warrant list searches for wireless communications and the implications therefore again on how information is collected and used, and potentially the attachment of this legislation to information that's been gained through a warrant list confiscation of information?

Mr. David Gollob: We haven't seen the legislation, so we wouldn't like to comment on it. However, the question that has to be asked is, what has happened here as a result of the RCMP action in the O'Neill case, for example? Has this helped increase public confidence in the necessity and the ability of police to use even greater powers of surveillance and so on? Or has the net impact of this been to diminish public confidence in our security institutions in terms of how they manage these important files?

● (1645)

The Chair: Thank you.

Mr. Lee and then Mr. Comartin, but your notice to me is not related to the panel.

So Mr. Lee, please.

Mr. Derek Lee: I just want to say that most of us look upon this review as perhaps a look back at the terrorist...the legislation and the events. I suggest we're actually in the middle of this thing. There may be actually a ratcheting up of other legislation in an attempt to deal with the evolving threat.

I wouldn't want to accept anyone suggesting that the threat isn't there anymore. In fact, I think it may be quite real.

A number of us around the table have maintained contact with our counterpart parliamentary committees in other allied jurisdictions, and I just received an indication today of the new British proposed legislation. They are looking at tightening the net involving things—acts preparatory to terrorism, terrorist training, incitement to terrorism, glorifying terrorism. These would all be new approaches to restricting the evolution of the terrorist threat. It raises all kinds of issues of definitions such as Mr. Borovoy and I were discussing earlier. So I suppose we're going to need you around perhaps again. I guess that's my point. It isn't necessary for there to be a response.

Mr. Alan Borovoy: If that is an invitation, even though I haven't consulted them, on their behalf, I accept.

Mr. Derek Lee: Sure, okay.

Thank you, Mr. Chairman.

The Chair: Thank you, Mr. Lee.

Okay, colleagues, I guess that concludes this panel. I want, on your behalf, to thank each of the gentlemen for appearing today.

We found your interventions very thought-provoking and stimulating. They are no doubt things we're going to have to chew on over the course of the next weeks and months as we deliberate on this important piece of legislation, that legislative review that's under way. On behalf of the committee, thank you for your appearance today.

Colleagues, before we adjourn, Mr. Comartin has asked to address the committee on a subject. So with your indulgence, Mr. Comartin.

Mr. Joe Comartin: I had prepared a motion to be brought up at this session, but had agreed to kick it over. However, there's been a bit of urgency. The motion was that the committee request travel expenses from the House so that it can actually attend upon three of the people presently incarcerated under the certificates. As I'm sure most of you are aware, two of them were engaged in a hunger strike, one of which ended a weekend ago. The other person is very close to death. My information as of today is that he has been removed from the correctional facility and has been placed in a medical setting. I'm only jumping to the conclusion, because I don't know this, that he has probably been placed on some type of intravenous feed to try to preserve his life.

The big issue we have here is whether the intervention of this committee might not bring enough pressure to bear on the provincial government, which is actually in control of that institution, to deal both with the medical treatment that his medical doctors say he requires and with visitation with his two young children, which has been denied to him up to this time. I'm just indicating to the committee now that I may need to bring this up tomorrow, in keeping with the original notice that I gave to the clerk on this issue. I may need to ask the committee tomorrow to consider taking some action to intervene at this time.

I just want to make one final point. I spoke to Mr. Lee about this during the break, and he had suggested that one of the possibilities for that intervention might be to summons one or two witnesses, both from the provincial corrections authorities and from CSIS, I believe, which is in charge of this file at the federal level. So that may be one of the positions that I would ask the committee to consider tomorrow, if it becomes necessary.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Comartin.

Just for your information and for full disclosure, I've recently learned that the Deputy Prime Minister and Mr. Kwinter, the Ontario minister, had a meeting about the Mahjoub case. I don't have any further information than that, but I wanted to share that information with you, colleagues.

Mr. Lee, did you want to say something?

● (1650)

Mr. Derek Lee: It was only to suggest that the clerk ascertain with relative precision which Canadian official would be most informed about this particular individual and, if necessary, which provincial official. Open the lines of communication. If we can't get enough information for purposes of our membership here to keep us content that we know what we need to know, then we should consider bringing one of those officials here and requiring answers.

I'm sure the clerk would be able to ferret out enough information for us, but in the event there's a problem, I suggest that we might want to firm up a little bit.

The Chair: Thank you, Mr. Lee.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard: I admit that I may perhaps appear somewhat naive, but I think it is very important for committee members to understand certain things.

We are having some difficulty understanding it, but perhaps some day we will accept the reason why we must send people to prison based on evidence that they do not know anything about. However, I understand that when they are sent to prison —that is the case of these people—they have not been charged nor convicted of anything at all. So why should the conditions of their imprisonment be worse than it is for people who are convicted?

On a question of principle, it seems to me that there would be agreement to say that their incarceration should be consistent with the presumption of innocence until proven guilty. I've taken that provision from the Quebec Charter of Human Rights and Freedoms, where that obligation exists, but it seems to me that it probably exists elsewhere as well. It seems to me that it is in the public interest for us to understand the reason, because it is one of the grounds and one of the requests.

I do not know if you share my opinion, or if any of you know the answer, if yes, I would like you to share it with me.

[*English*]

The Chair: Thank you, Mr. Ménard.

If you agree, as your chair I'll see what information we can ascertain this evening.

There's something else that one of you had asked for earlier, Mr. Maloney's request for the Harkat decision. Is that available or going to be available?

The Clerk of the Committee (Mr. Wayne Cole): I believe so.

The Chair: It's going to be available. So we'll get the information, and I'll let you know in the morning where we're at. Is that agreed? Okay.

The meeting is adjourned. Thank you.

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