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Chair

Mr. Kevin Sorenson

Standing Committee on Public Safety and National Security

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● (1535)

[*English*]

The Chair (Mr. Kevin Sorenson (Crowfoot, CPC)): I call the meeting to order.

Good afternoon, everyone. Welcome to the 47th meeting of the Standing Committee on Public Safety and National Security. This is Monday, December 13, 2010.

In our first hour we will have six witnesses before us. Actually, they are going to be here for an hour and three-quarters, if I'm not mistaken. We will hold the last 15 minutes for committee business, as we decided last week.

We will begin our study of Bill C-17, an act to amend the Criminal Code (investigative hearing and recognizance with conditions). The Minister of Justice and his officials will be here on Wednesday. In the lead-up to that, today we will hear from a panel of witnesses who will bring some concerns to our attention. We can ask the minister about those concerns when he appears.

Today we have with us, from the International Civil Liberties Monitoring Group, Denis Barrette. Welcome.

From the Canadian Council on American-Islamic Relations, we have Ihsaan Gardee, executive director, and Khalid Elgazzar, member of the board of directors. Welcome.

From the University of Ottawa, we have Craig Forcese, associate professor, faculty of law. Welcome.

From the Law Union of Ontario, we have Paul Copeland, lawyer, and from the Canadian Islamic Congress, we have James Kafieh, counsel.

Each of the organizations appearing before us today has prepared an opening statement. Before we go to questions from our committee, I would welcome those opening statements. Perhaps we'll begin with Monsieur Barrette.

Monsieur Barrette, welcome.

[*Translation*]

Mr. Denis Barrette (spokesperson, International Civil Liberties Monitoring Group): Good afternoon. My name is Denis Barrette. I am here today representing the Quebec Chapter of the Ligue des droits et libertés, but also as spokesperson for the International Civil Liberties Monitoring Group. I have distributed a paper with some quotations in it. I will be discussing them in my presentation.

The International Civil Liberties Monitoring Group, or ICLMG, is a Canada-wide coalition of civil society organizations established in the wake of terrorist attacks in the United States on September 11, 2001. The coalition is made up of 40 NGOs, unions, professional associations, religious groups, environmental protection groups, human rights and civil liberties associations, as well as groups representing the immigrant and refugee communities in Canada

To begin with, I would like to say that we have already appeared a number of times before the House of Commons and Senate committees. Our position has not changed with respect to the anti-terrorism law, particularly in relation to the two provisions under discussion today.

The coalition believes that the provisions dealing with investigative hearings and preventive arrests, which are intended to impose recognizances with conditions, are both dangerous and misleading. Debate in Parliament on these issues must draw on a rational and enlightened review of the anti-terrorism law. As we know, that legislation was rushed through Parliament after 9/11 in a climate of fear and under very considerable pressure from the United States.

Nine years later, in 2010, the terrorist threat still exists, but it is not the only threat facing humanity. However, the two provisions under discussion here rely on the very broad definition of terrorist activity and participation in terrorist activities. They enable law-enforcement authorities to carry out preventive arrests and to compel individuals to testify for challenging authority and engaging in dissent, when such activities have nothing to do with what is normally considered to be terrorism.

Furthermore, the current provisions encourage racial profiling and profiling on religious, political and ideological grounds. In its report on Canada in November of 2005, the U.N. Human Rights Committee noted its serious concerns with respect to the excessively broad definition of terrorist activity in the Anti-terrorism Act. The committee stated the following in paragraph 12:

> The State party should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation and detention.

In 2007-08, when reviewing Bill S-3, the Senate recommended that the legislation be amended to restrict the scope of that definition. I would refer you in that regard to recommendations 2 and 3 made by the Senate. Yet C-17, An Act to amend the Criminal Code (investigative hearing and recognizance with conditions) makes no change whatsoever to the definition, something which will certainly have an impact on the application of these two provisions.

At this point in time, what is the real objective need for these two provisions? From the time of their introduction in 2001 until their repeal in 2007, the only time they were used was in relation to the Air India case which, as you all know turned out, sadly, to be a total fiasco.

Since 2007, police investigations have succeeded in dismantling terrorist conspiracies using neither one of the provisions we are talking about today. Furthermore, since 2001—in other words, in the last 10 years—none of the investigations that resulted in charges or convictions required the use of these extraordinary powers, whether we're talking about the Khawaja affair, the Toronto 18 or, more recently, the four individuals in the Toronto region.

● (1540)

The first provision makes it possible to bring individuals before a judge in order to provide information, when the judge is of the view that there are reasonable grounds to believe that the individual has information about a terrorism offence that has or will be committed. A refusal to cooperate may result in arrest and imprisonment for up to one year. Furthermore, the provision dealing with investigating hearings gives the state a new power of search. Not enough is being said about this. The fact is that this provision can compel an individual to produce an object before a judge or tribunal, which will then pass it on to the police.

What is even more significant and pernicious is the concept of inquisitorial justice introduced by this provision. Under the criminal law in Canada, inquisitorial justice is a new concept. It's a new paradigm between the state, the police, the judiciary and citizens. As we all know, in Canada, as is the case in all common law countries, the criminal law is founded on the adversarial system. That is not the case in France, where there is an inquisitorial process. Our concern is that this new concept could be introduced at a later date into other Criminal Code provisions and applied to other crimes or minor offences. That means that in the medium or long terms, the presumption of innocence could be threatened.

We also believe that the investigative hearing provision may bring the principle of judicial independence, and therefore, the justice system itself, into disrepute. With judicial investigation, the entire concept of adversarial debate disappears. I invite you to carefully read the dissenting opinion of Supreme Court Justices Fish and LeBel in a case by the name of *Application under s. 83.28 of the Criminal Code*. The two Supreme Court justices concluded as follows in paragraph 191:

> The implementation of s. 83.28, which is the source of this perception that there is no separation of powers, could therefore lead to a loss of public confidence in Canada's justice system. The tension and fears resulting from the rise in terrorist activity do not justify such an alliance. It is important that the criminal law be enforced firmly and that the necessary investigative and punitive measures be taken, but this must be done in accordance with the fundamental values of our political system. The preservation of our courts' institutional independence belongs to those fundamental values.

I also note that throughout these two provisions, the notion of suspicion as warranting retaliation against citizens is reinforced. With respect to the provision relating to the concern that a person might commit a terrorist act, section 810.2 of the Criminal Code is already in force. It already allows authorities to impose fairly broad conditions on an individual who poses a serious danger to the public. Furthermore, section 810.01 deals specifically with the risk of terrorist activities and allows a judge to impose conditions to prevent a terrorist act from being carried out. These provisions are already in the Criminal Code, and yet the second provision under discussion—clause 83.3—allows for an additional 72-hour period of detention, as well as the right to collect and record the information of innocent people under the Identification of Criminals Act, which specifically includes section 83.3 as grounds for bertillonnage.

You may also recall the need to establish some means of monitoring the activities of both the RCMP and CSIS with respect to national security, something that was raised by the Maher Arar commission. I would just point again to the lack of such a mechanism and the dangerous nature of these two provisions.

Finally, we believe it is extremely important to highlight the fact that these two provisions, even though they are not being used in our judicial system, will always pose a risk because of their ability to become a formidable and worrisome tool of intimidation. Such a tool will be highly injurious to the individuals concerned. Even though they may not be compelled to appear before a court of law, the impact of these provisions will not be trivial. If they're used, they will result in people being labelled, even though they have never been charged with any crime.

● (1545)

As occurred with McCartyism, the fear of seeing one's reputation tarnished through such a process, being detained for 72 hours and then brought before a judge to answer questions masterminded by police, amounts to a formidable process of denunciation. And, when you're talking about informations secured through coercion, without the free and voluntary process which is part and parcel of the criminal law, you are automatically talking about unreliable, biased and misleading informations. Every lawyer knows how unreliable reluctant witnesses can be. And we also know, particularly since the Maher Arar commission of inquiry, that even a simple investigation can be enough to destroy a reputation, a career and even the future of an innocent person never charged with any crime.

We know as well that these provisions could, as we see it, be abused. I am thinking here of the Air India case. We believe that Canadians will be better served and better protected under the usual provisions of the Criminal Code, rather than others that are completely unnecessary. Reliance on arbitrary powers and a lower standard of evidence can never replace good, effective police work. On the contrary, these powers open the door to a denial of justice and a greater probability that the reputation of innocent individuals, as occurred with Mr. Arar, Mr. Abou-Elmaati, Mr. Almalki and Mr. Nureddin, will be tarnished.

Thank you.

[*English*]

The Chair: Thank you very much, Mr. Barrette.

We'll now move to Mr. Gardee and Mr. Elgazzar.

Mr. Ihsaan Gardee (Executive Director, Canadian Council on American-Islamic Relations): Thank you for the invitation to appear before you today to share our views on Bill C-17, an act to amend the Criminal Code (investigative hearing and recognizance with conditions). My name is Ihsaan Gardee, and I am the executive director of the Canadian Council on American-Islamic Relations, or CAIR-CAN. I am joined today by Khalid Elgazzar, a member of CAIR-CAN's board of directors. He is with me to endeavour to address questions of a legal nature.

CAIR-CAN is a national, not-for-profit, grassroots organization that for the past 10 years has worked to empower Canadian Muslims in the fields of human rights and civil liberties, anti-discrimination and outreach, and public advocacy.

We are mindful of the increased emphasis on public safety and national security in response to the threat of terrorism during the last decade. For the record, Canadian Muslims, like our fellow citizens, are unequivocally committed to their nation's security. We are also cognizant of the real risks to our free and democratic society posed by overreaction and fear when they are used as the basis of public policy and legislation. At the end of the day we risk eroding the foundational values upon which Canada rests, while not making us any safer from terrorism. In short, it would be a lose-lose situation.

We strongly disagree with those who would suggest that attaining a balance between human rights and security is an insurmountable task. In addition to sharing many of the concerns others have raised regarding the proposed legislation, Canadian Muslims have particular misgivings regarding how security regimes such as Bill C-17 have a disproportionate impact on members of our communities that may be considered discriminatory.

In our view, Bill C-17 raises a number of serious concerns that we hope this committee and Parliament will address by not making this bill into law. Chief among our concerns is how the proposed legislation may impact human rights and civil liberties in Canada. We also have concerns about the danger posed by the gathering of information that could be shared with foreign governments whose record on human rights is questionable. The lack of caveats or controls on information sharing has already had a devastating impact on the lives of a number of Canadian Muslims. Finally, we are also concerned about the efficacy of and the need for the proposed legislation, and we are concerned about the potential for abuse, despite measures proposed by others to mitigate this potential.

With regard to the impact on individual freedom and liberty, after 9/11 every major criminal terrorism-related incident, from the Toronto 18 to the case of Momin Khawaja, has been disrupted and prevented without the need for preventive detention or investigative hearings. Some legal commentators have argued that there is a narrow gap within the Canadian context in which preventive detention has utility. However, there are significant risks associated with overreaching state powers, such as the ability to detain someone for up to 72 hours. To jeopardize civil liberties for a potential yet unrealized circumstance pushes the boundaries between civil rights and concrete national security concerns.

It is CAIR-CAN's position that our Criminal Code has existing provisions that are more than sufficient to enable our courts and law enforcement agencies to disrupt and prevent terrorism-related offences before they occur. Under section 495, a detained individual arrested on reasonable grounds must be brought before a judge, who may impose the same conditions as those available under the proposed anti-terrorism measures. The judge may even refuse bail if he or she believes that the person's release might jeopardize public safety. We feel that the experience of the last 10 years has demonstrated that the burden of surrendering civil liberties will be disproportionately borne by Canadian Muslim communities.

It remains unclear how terrorism-related acts are distinguished from other criminal acts in their practical application. For example, the recent firebombing of an RBC branch in Ottawa prior to the G-20 summit was treated as an act of arson, and no charges were laid under anti-terrorism provisions. We are not advocating a broadening of the definition of terrorism; we merely wish to draw attention to the fact that the application of anti-terrorism measures has not affected all groups in an equal manner.

With regard to the dangers of unrestricted information sharing, CAIR-CAN is also deeply concerned about how information gleaned during the proposed investigative hearings could be, and has been, used against Canadian Muslims. We know that in other jurisdictions, capital punishment or other cruel and inhumane treatment is acceptable and, in some cases, routine.

● (1550)

We need look no further than the case of Maher Arar to see how the unfettered sharing of information without any safeguards or adequate redress mechanisms has had a devastating and irreversible impact on both the individual in question and the community to which he belongs.

Not only does the proposed legislation not address issues of redress; even if redress mechanisms were adequately provided for, they would not account for the lingering and deeply personal impact on those who, while subsequently cleared of any involvement in terrorism, must still live with the real and destructive stigma of having been previously labelled a terrorist by the Canadian state and its security agencies.

As Justice Dennis O'Connor highlighted in the Arar inquiry report, and I quote: "The impact on an individual's reputation of being called a terrorist in the national media is obviously severe. As I have atated elsewhere, labels, even inaccurate ones, have a tendency to stick."

Even if one's story did not become the subject of national media attention, the label of “potential terror suspect” is one that has a chilling effect on both the individual concerned and also, by extension, on his community.

I will move on to consider the need for, and the effectiveness of, BillC-17. As has been pointed out in previous hearings of this committee on these provisions, police officers can already use existing Criminal Code provisions to arrest someone who it is believed is about to commit an indictable offence.

Section 495 of the Criminal Code states, and I quote:

> A peace officer may arrest without warrant a person...who, on reasonable grounds, he believes...is about to commit an indictable offense

Reid Morden, a former head of the Canadian Security Intelligence Service, or CSIS, expressed serious concern about the impact on our legal system of the provisions contained in BillC-17. Of particular note, Mr. Morden explained to the CBC, and I quote:

> Speaking strictly of those two particular provisions, I confess I never thought that they should have been introduced in the first place and that they slipped in, in the kind of scrambling around that the government did after 9/11...It seemed to me that it turned our judicial system somewhat on its head. I guess I'm sorry to hear that the government has decided to reintroduce them.

In summary, CAIR-CAN believes our existing criminal law regime and system of natural justice more than adequately addresses the need to prevent terrorism offences before they occur. BillC-17 is therefore unnecessary, and at the end of the day jeopardizes civil liberties and the rule of law.

To conclude, it is CAIR-CAN's considered and strong position from a rule-of-law perspective that our elected representatives must take a clear and unambiguous stand to ensure that the charter's fundamental rights are protected against the very real risk posed by extraordinary and unnecessary new police powers.

We would like reiterate our position that the proposed provisions would, in all likelihood, disproportionately impact upon members of the Canadian Muslim communities.

Our security agencies have already disrupted and prevented terrorism-related incidents using ordinary security and investigative techniques. It is CAIR-CAN's belief that our law enforcement agencies should continue to be given support in executing intelligent and efficient policing that is carried out within the bounds of the rule of law and the charter.

Thank you.

● (1555)

The Chair: Thank you very much, Mr. Gardee.

Now we'll move to Mr. Copeland, please.

Mr. Paul Copeland (Lawyer, Law Union of Ontario): Thank you, Mr. Chairman.

I apologize to the committee. I was hoping to get some written material together, but I've gotten virtually none done. I do have a handout here, unfortunately in English only, that outlines my background in dealing with national security matters over the last 40-odd years. Most recently, for the last two and a half years I've been a special advocate in the security certificate process for Hassan Almrei and Mohamed Harkat.

I wanted to comment first on the circumstances of the Air India case, because that is the only case in which this legislation that came in under the anti-terrorism bill was used, and it's a rather bizarre circumstance. It was described as a fiasco, and I think that's an appropriate description.

When this legislation came in, nobody, I think, contemplated that it would be used as it was in the Air India case. It was an application brought under the investigative hearing provision of the legislation. It was argued in the Supreme Court of Canada on December 10, 2003. Judgment was released in June 2004.

You have to understand a little of the circumstances of the case.

Inderjit Reyat had been extradited from England and pleaded guilty to manslaughter for the Narita bombing. He got 17 years in jail for that. He was then prosecuted, along with Bagri and Malik, for the Air India bombing, the one that killed all of the people over the Atlantic.

There was a person who worked with Mr. Malik at one of the Khalsa schools. She was an unnamed witness and was never named during the course of things. She had a confrontation with Mr. Malik at the school, and her testimony was basically that Mr. Malik had confessed to his involvement in the Air India bombing.

Mrs. Reyat had been hired at the school by Mr. Malik and worked there. The government wanted to know whether or not her testimony would confirm what the unnamed witness said. The government had preferred a direct indictment in that case, so there was no preliminary hearing, and they never got to know what Mrs. Reyat was going to say. They tried to use the investigative hearing process to figure out what went on. In effect, it was an attempt to have a discovery process in the criminal hearing.

Mr. Reyat, who, as I say, had been charged in the major Air India bombing, had negotiated a plea to manslaughter and gotten 5 additional years. As you know, he was ultimately convicted of perjury for the evidence he gave in the Air India bombing case.

Those are the circumstances, and the only circumstances in which one of these sections was used. The sections are unique in Canadian law. While the Supreme Court of Canada held it to be constitutional, it changes things dramatically: there is no right to remain silent, and you can be detained or released on onerous release conditions.

There have been many comments, including the comments made today, comments by MPs in the House, comments by witnesses before the Senate committee, and comments by Reid Morden. All say that this legislation shouldn't go through and is improper.

I may have missed something in my reading, because I've been a little bit tied up with the Harkat decision since last Thursday, but I have not seen, in any of the material I've read, any valid justification advanced for this drastic change in the Canadian legal process.

One of the things that I found was that the Senate committee, in January2008, was talking about the recommendations from the O'Connor commission—the Arar commission—for RCMP oversight. We still don't have RCMP oversight.

We have nothing on the oversight issue, and I would suggest to this committee that the reputation of the RCMP at the present time is poor in national security matters and in other matters.

Commissioner Elliott's dealings with the senior staff have been at issue. The departure of Commissioner Zaccardelli was at issue. The handling of the material they got from Abdullah Almalki, which they shipped down to the Americans with caveats, led to the torture of Mr. Arar. The Arar inquiry, the Iacobucci inquiry, and the Air India inquiry all dealt with issues relating to the RCMP and Project A-O Canada.

John Major has recommended the creation of a national security adviser to coordinate matters between CSIS and the RCMP. There was an announcement last week that government has not adopted that recommendation.

● (1600)

In December 2006 Dennis O'Connor recommended the creation of an independent complaints and national security review agency to oversee the national security functions of the RCMP, which presently are not the object of any oversight role or responsibility.

It's my respectful submission that this committee should not be worrying about these provisions; they should be worrying about whether or not CSIS is doing its job adequately, whether the RCMP is doing its job adequately, and whether there are oversight mechanisms to make sure that they do their job adequately.

I would ask you to consider whether anything useful would come out of an investigative hearing in regard to this type of matter. Assuming that you're dealing with somebody who's a real terrorist and is really involved in things, if you bring him before a judge and say, “Answer the questions”, whether he has counsel or not, he'll either politely or impolitely tell you he's not going to answer the questions or he'll lie about the answers. I can't see anything useful coming out of these hearings.

The question I would urge you to ask yourself is whether these provisions are worth the substantial changes in our legal regime.

Last September I was in England; some of the special advocates were meeting with special advocates in England. We ultimately had an opportunity of meeting with Lord Carlile, who is a sort of overseer of the anti-terrorism provisions in England. Sitting in his office, we talked about things. We talked about the five people who were on control orders in England, which are vastly worse than what we're talking about here. Lord Carlile told the story about visiting one of the people under control orders who was up in the Midlands. He was under virtual house arrest, except for fair employment. One of the things Lord Carlile said was that when he was talking to the guy, the guy said: “Actually, it's not so bad for me. The only thing it really interferes with is pubbing and pulling.” Then I had to ask for a translation of what “pulling” meant, and it had to do with chasing women.

The provisions you are looking at here, in my submission, change the Canadian legal landscape. They change it in a way that isn't useful. They should not be passed, and in my view they are not needed. There are other provisions of the code that allow for various ways of dealing with these people.

I'll just refer briefly to what Mr. Forcese has in his paper about what to do with the guy with the padded coat walking on Parliament Hill. One of the things you should do as an RCMP officer is walk up to him and say, “Hi, I'm an RCMP officer. I want to ask you some questions.” Depending on what the guy does, there may be consequences following from that.

I think there are ways of doing police investigations that avoid the necessity of these dramatic changes.

Thank you very much.

● (1605)

The Chair: Thank you very much, Mr. Copeland.

We will now move to Professor Forcese.

Prof. Craig Forcese (Associate Professor, Faculty of Law, University of Ottawa): Thank you, Mr. Chairman, and members of the committee.

In these submissions, I take no view on the desirability of Bill C-17 in its present form. As Mr. Copeland mentioned, I have written a lengthy paper setting out my support for a limited, carefully restricted form of short-term preventive detention in Canadian law as a last-gasp tool for law enforcement in confronting a reasonable fear of a serious act of terrorist violence, which does not include a fellow walking around with a padded coat on Parliament Hill.

That paper enumerates features designed to render such a system effective while at the same time remaining compliant with civil liberties expectations found in international and Canadian law. I believe the system of preventive detention that is part of Bill C-17's recognizance with conditions power is modest as compared with its closest international analogues. I have doubts that it would prove very useful to law enforcement in practice, but I also believe that efforts to render the provision more effective as a law enforcement tool would have to be buttressed by inclusion of more robust civil rights checks and balances. Such efforts would require reconsideration of the basic architecture of this bill, a task for which I suspect there is little appetite or time in this committee.

I have more acute concerns about the reach of the actual recognizance provisions—that is, the peace bond. Not least, there is very little clear guidance in the bill and in the constitutional jurisprudence on the reach of the conditions that can be imposed via such a peace bond. If the practice under the immigration security certificate regime is any indication, anti-terrorism-related conditions may be quite strict and may be intrusive on liberty.

I have in the past urged parliamentary consideration of the kinds of stricture that may be imposed via a peace bond in the context of both this and predecessor bills and in the parallel provisions in section 810.01 of the Criminal Code. Again, such a review would require sustained scrutiny by this committee. In the absence of such a time-intensive review, I believe there is at least one change that this committee should make to this bill, one related to the investigative hearing provisions.

Bill C-17 is in essence a reimplementation of the original provisions found in the 2001 Anti-terrorism Act. However, developments in constitutional law since 2001 mean that the provisions found both in that original statute and now also in Bill C-17 cannot be read literally. They must be read with an eye to the constitutional jurisprudence of the Supreme Court if they are to be applied in a constitutionally acceptable manner.

Put another way, Parliament is proposing enacting legislation that cannot be read alone. Those applying it must now be expected to have the legislation in one hand and the volumes of the Supreme Court reports in the other. This, in my view, is an invitation to confusion and is fundamentally inconsistent with what I see to be the role of legislation: to provide clear instruction on the applicable law.

Turning specifically to the amendment that seems necessary to satisfy this concern, as you know and as Paul mentioned, in 2004 the Supreme Court examined the 2001 investigative hearing provisions and ultimately concluded that they were constitutional. However, in doing so, the Supreme Court read in certain requirements in the use of investigative hearings, the most important being an expansion of what's known as “derivative use immunity”, guaranteed in the present bill by proposed subsection 82.28(10).

While that clause extends immunity to subsequent criminal proceedings, the Supreme Court said it must go further than that. It cannot be used in any kind of proceeding, including extradition and immigration proceedings. This is a constitutional requirement, and it should be codified right on the face of the bill.

I will stop there. I am happy to address this or any other issues and questions.

The Chair: Thank you very much, Professor Forcese.

Welcome, Mr. Kafieh. We look forward to what you have to say as well.

Mr. James Kafieh (Legal Counsel, Canadian Islamic Congress): Thank you.

My name is James Kafieh. I'm the legal counsel for the Canadian Islamic Congress. On behalf of the Canadian Islamic Congress, I wish to thank the members of the Standing Committee on Public Safety and National Security for the invitation to present to you today.

The CIC is Canada's largest national, non-profit, and wholly independent Islamic organization serving Canada's Muslim community, which numbers about 750,000. The CIC is an advocacy organization that offers Islamic-Canadian perspectives on political, social, cultural, and educational issues.

In 2001 the Canadian Islamic Congress raised its concerns about rushed anti-terrorism security legislation that was introduced to meet post-9/11 expectations.

● (1610)

The Chair: Mr. Kafieh, could we ask you to slow down a little bit? Our interpreters are acting like a bunch of auctioneers in there and talking fast, but could you slow it down for our interpretation, please?

Mr. James Kafieh: I will. Thank you.

The Chair: Thank you.

Mr. James Kafieh: Among the provisions of that legislation were the investigative hearing and recognizance with conditions powers that are now reintroduced in Bill C-17. This time the war-on-terror hysteria has largely dissipated.

With regard to investigative hearings, this provision bears strong resemblance to the Star Chamber of old. Although the present legislation conveys an air of protection from self-incrimination for individuals compelled to appear, this protection is easily lost when two or more persons are so rounded up. For example, two or more persons may find themselves prosecuted not on the basis of information they gave but on the basis of information they gave about each other.

To avoid an end run on the centuries-old right of persons to remain silent and to be protected from self-incrimination, the investigative hearing powers should include the granting of immunity from prosecution for compelled persons on matters about which they provide only truthful information. In short, persons would then be strongly motivated to tell the truth, the whole truth, and nothing but the truth. What more do we legitimately want?

We also need to bear in mind that not everyone who chooses to remain silent in such circumstances is guilty, and that choosing to remain silent is not an admission of guilt or a proof of guilt. People may, for example, have legitimate concerns for themselves, their families, and their communities.

Such an extraordinary measure as investigative hearings should only be used for the purpose of preventing an imminent act of terrorism. It should never be used as an investigative tool for past acts. The present text of Bill C-17 allows for investigative hearings for past events, for which the imperative of safeguarding of innocent life from imminent attack is wholly absent. This is, in itself, an escalation from the previous form of this provision. Such an escalation shows that we are already witnessing creep in the use of such provisions before the court.

In addition, the investigative hearing provision fundamentally alters and distorts our system of justice in that it places prosecutors in the role of investigators and places the judiciary in a position of presiding over a criminal investigation.

With regard to recognizance with conditions, Professor Craig Forcese's paper, entitled “Catch and Release”, quotes justice laws of the English Court of Appeal as stating that the most fundamental, and probably the oldest, most hardly won, and most universally recognized of human rights is freedom from executive detention, yet it is this very right that is being negated by Bill C-17. Recognizance with conditions allows a peace officer, with prior consent of the Attorney General, to lay an information before a provincial court judge if he or she believes that a terrorist act will be carried out and suspects that the imposition of a recognizance with conditions or the arrest of a person is required to prevent it.

This provision allows for the arrest and detention of people without ever proving any allegation against them. It could also make people subject to conditions on release with severe limitations on their personal freedom, even if they have never been convicted of any crime. Anyone refusing to accept and comply with the terms of the recognizance may be imprisoned for up to 12 months. The legislation does not limit the number of times this provision may be reapplied.

How is this consistent with our Canadian values and the principles upon which our system of justice is founded? Canadians have the example of security certificates to understand the impact that this kind of provision can have. The most recent cases of five men who were detained for up to eight years without ever being charged or convicted of a crime should give us all cause for concern.

Bill C-17 creates a legal regime in which all Canadians will be subject to measures indistinguishable from those of the now largely discredited security certificates that were limited for use only against immigrants and refugee applicants.

The Chair: Again, I looked around at our interpreters, and their eyes are like saucers. You're going to have to work at really slowing this down. We didn't get it in hard copy to translate it, so they are taking everything you say and trying to get it into French.

Mr. James Kafieh: I will slow down further.

The Chair: It's a tough thing to go from fast to slow, but just please—

Mr. James Kafieh: I apologize to the translators.

The Chair: Thank you.

Mr. James Kafieh: Thank you.

It is the position of the Canadian Islamic Congress that these provisions are not only damaging to Canadian values and fundamental legal principles but also unnecessary. In 2005 the Canadian Islamic Congress issued a position paper entitled “Security with Rights: Justice is the Ultimate Guarantor of Security”. In it, the CIC cited Muslim Canadian commitment to Canada and its security. The CIC further expressed its concern that the potential abuse of newly expanded security powers by CSIS and the RCMP would lead to abuse and the erosion of civil liberties. The CIC's concern remains unchanged. However, we have now nearly a decade of history that includes a narrative of how post-9/11 security concerns have led to a general undermining of our Canadian values and civil liberties.

The reliance of our international airports on measures now widely described as “security theatre” has alienated a growing segment of Canadians. No-fly lists, botched security certificates, and even indirect responsibility for the torture of Canadians overseas, as was found at the Iacobucci and other inquiries, have all taken their toll on public confidence, yet it must be noted that Muslim Canadians have played a critical role in supporting genuine Canadian security concerns. The Toronto 18 group, for example, was broken primarily because members of the Muslim community notified the authorities of their concerns. What is missing under the present security plan is a genuine partnership between Canadian security and the Muslim community.

An illustration of how strained things have become is the recent cancellation by the Minister of National Defence of a speaking engagement extended by the Canadian armed forces to the CIC's executive director, Imam Delic. The fundamental question is whether either draconian measure in this legislation is even necessary. Reid Morden, the former head of CSIS, believes that these measures are unnecessary and that they present significant dangers for civil liberties. The CIC agrees with him. Interestingly, the recognizance with conditions power has never been used during the five years of its existence, while the investigative hearings power was used only once, with no significant outcome.

Indeed there is no evidence that the Criminal Code, as currently composed, has failed to meet the demands of Canada's legitimate needs relating to security and justice. This prompts the question: why are these provisions being brought back?

If the committee decided to move ahead with this legislation, we would submit the following:

We don't agree with this bill, but we submit and recommend the following to minimize damage done to our legal system, Canadian values, and the fabric of our society: one, the revised investigative hearing provision should limit its scope to deal only with imminent terrorism offences.

Two, subsection 83.28(2) should be amended to make it clear that a peace officer must have reasonable grounds to believe that a terrorism offence will be committed before making an *ex parte* application.

Three, it should be clarified that anything done under sections 83.28 and 83.29 would be deemed proceedings under the Criminal Code.

Four, the investigative hearing powers should include the granting of full immunity from prosecution on all matters about which only truthful information is provided.

Five, access to a lawyer of the compelled person's choice should be facilitated without delay or interference and be funded at the cost of the crown before, during, and after the investigative hearing.

Six, the compelled person should also have unrestricted access to a special advocate having unfettered access to all information in the care, custody, or control of the crown in relation to the compelled individual.

Seven, the provision for detention without charge for a period greater than 24 hours should be removed entirely from Bill C-17.

Eight, the power set out in Bill C-17 should not be implemented until the accountability framework for the RCMP has been fully enacted and is fully operational.

Nine, compensation for the wrongful use of these powers must be provided to harmed persons.

Ten, an independent oversight mechanism answering directly to Parliament should be established to oversee the provisions in Bill C-17 for as long as these provisions remain part of the Criminal Code.

● (1615)

Eleven, a sunset clause with an evaluation framework must be included with the legislation.

I will close with a couple of thoughts.

We are often told during difficult times that what we need to do is find the correct balance between security and rights. I conclude with the words of Benjamin Franklin, who well over 200 years ago shared the wisdom that those who compromise their liberty for security soon find that they have neither. The recent example of the security measures at last summer's G-20 conference in Toronto and the devastating impact they had on the quality of our civil liberties provide a timely reminder that Mr. Franklin's wisdom remains relevant today in the discussion of this security legislation before this committee.

● (1620)

The Chair: Thank you very much.

I want to thank all of you for your opening statements. We'll move into the first round.

Madam Mendes, please go ahead. You have seven minutes, please.

[*Translation*]

Mrs. Alexandra Mendes (Brossard—La Prairie, Lib.): Thank you, Mr. Chairman.

Thank you all for being with us today.

[*English*]

Thank you very much for sharing your opinion with us. It appears pretty generalized.

[*Translation*]

It would seem that this bill is completely useless and unnecessary, and that there is a consensus on that. That is what I understood, and I agree.

[*English*]

It seems to us that this bill is reiterating several of the positions that were in the former Bill C-19. Am I correct in this, according to the legal minds? These were clauses that were integral elements of the Anti-terrorism Act, which we know expired in 2007.

Even the public safety minister's annual reports say that no investigative hearings have been held under these statutes and that there's no reported use of the provisions. Am I correct?

Mr. Paul Copeland: That's other than for Air India.

Mrs. Alexandra Mendes: That's other than Air India. Okay. Air India was not what this bill was created for in the beginning.

Mr. Paul Copeland: That's my view.

Mrs. Alexandra Mendes: I really struggle, and I think we all do a bit, with the reintroduction of this bill, especially when we consider that the provisions have never been used to combat terrorism. Perhaps they have been used to penalize or punish terrorists after something has happened, but not to combat or to prevent it.

If I may address the question to you, Mr. Forcese, through the chair, am I correct in understanding that you are an expert on anti-terrorism law? Is that your area of expertise?

Prof. Craig Forcese: I teach national security law.

Mrs. Alexandra Mendes: Thank you.

You note on page 1 that you have doubts that Bill C-17 would prove very useful to law enforcement in practice. Could you elaborate a bit on your doubts as to whether this bill would really change very much about how law enforcement operates?

Prof. Craig Forcese: My comments on that issue relate to the recognizance with conditions provision, known colloquially as preventive detention. My assessment of this provision, which I think has been more or less confirmed through conversations with law enforcement, is that if this provision were used—that is, to detain someone pending the imposition of a peace bond—then the investigation would have come to an end. You have alerted the terrorist cell you're investigating that they've been discovered, all for the benefit of up to 72 hours of preventive detention and a peace bond, which doesn't amount to full-out incarceration.

It would be unpopular in relation to an ongoing investigation and perhaps very damaging to an ongoing investigation to use this provision. At best it would be used as a last-gasp measure. The law enforcement community, when it appeared in front of the Senate on Bill S-3, which is a prior iteration of this bill, indicated that it can't anticipate and foresee every eventuality and that it is possible that there would be circumstances in which this bill and the preventive detention provision might actually be useful. I can't exclude that possibility; it may well arise, but I think it would be a very unusual circumstance.

The other consideration, of course, is that once this matter comes to court, as it inevitably will, this is an open court process, so law enforcement would have to be prepared to disclose the evidence or information upon which it depends to justify the standard for the detention to begin with. That means it would be unwilling to use security intelligence or intelligence sources of any sort. We're talking about a range of circumstances in which law enforcement has given up on an investigation and is prepared to use potentially confidential information in an open forum. Because of that, for those two reasons, I think that this provision would be used very infrequently.

Mrs. Alexandra Mendes: Would it even undermine our objective of combatting or preventing terrorism?

Prof. Craig Forcese: It would undermine the anti-terrorism investigation if it were used uncritically. Because law enforcement would not, I assume, generally wish to undermine their investigations, this would not be the first tool they would turn to. It would be a very uncommon tool, I would think.

● (1625)

Mrs. Alexandra Mendes: Do you think that law enforcement at the moment has enough appropriate tools to combat terrorism?

Prof. Craig Forcese: Yes and no. For the most part, I think some of the statements that have been made about the extent to which we need a pre-emptive mechanism discounts the extent to which our criminal law now actually encompasses, as terrorism offences, actions which are very far removed from acts of violence. There are mere acts of preparation that are now criminalized, so that broadens the scope of law enforcement activity and the prospects for arrest in conventional criminal prosecutions.

However, as Paul suggested and as was indicated before, I actually think there is a gap, a very narrow gap. In my paper I set out a series of hypotheticals in which this gap may arise. It's a very small gap, but I accept the argument made by law enforcement that such a gap exists.

Mrs. Alexandra Mendes: What would be the best tool that would close that gap?

Prof. Craig Forcese: Essentially, I accept that there are circumstances in which conventional criminal arrest would be unavailable, in which the conventional rules on search and seizure would not necessarily mitigate the security risk, and in which in which law enforcement may actually have a bona fide reason to want to do something. The law does not provide for any avenue at present for them to do anything. That's the gap in which I think a system of carefully tailored preventive attention might be usefully deployed.

I leave open the question as to whether Bill C-17 is the best way of filling that narrow gap. I've already outlined some of my concerns about the practical implications of using it. I do accept the argument, however, that there is a very narrow, slender gap that right now is not filled by conventional law enforcement tools.

Mrs. Alexandra Mendes: The recommendation made by the House of Commons subcommittee on the review of the Anti-terrorism Act was that this investigative hearing provision only be used when there's imminent peril. Would that be a way of circumscribing the use of this provision?

Prof. Craig Forcese: I was speaking about preventive detention. On investigative hearings, I don't have any difficulty with the idea of narrowing its scope. My understanding of the committee proceedings in the review of the Anti-terrorism Act was that they wanted it to be used prospectively rather than retrospectively; that is, they wanted it focused on upcoming events as opposed to being used as a tool to investigate what happened in the past.

I see some sense to that, in the sense that it is an extraordinary provision for retrospective investigations when conventional criminal investigation tools are available to you. Given the possible outcomes of mass-casualty terrorism events, prospective investigations seem to be the only type of circumstance in which the extraordinary powers of investigative hearings might be reasonable. I don't have any difficulty with that idea.

The Chair: Thank you very much, Mr. Forcese and Madam Mendes.

We'll move to Madame Mourani.

[*Translation*]

Mrs. Maria Mourani (Ahuntsic, BQ): Thank you, Mr. Chairman.

I would like to begin by thanking all the witnesses for being here today to give us the benefit of their expertise.

One question has intrigued me from the very beginning. Has this legislation been used since it was introduced? My question is addressed to all of you.

[*English*]

Mr. Paul Copeland: I will say that at the outset that the only time it's been used was to have an investigative hearing in regard to Mrs. Reyat to see what she would say in the Air India trial.

[*Translation*]

Mrs. Maria Mourani: And was it effective?

[*English*]

Mr. Paul Copeland: No, it was totally ineffective. They never got past going to the Supreme Court of Canada to determine whether it was constitutional. As far as I know, she never testified at an investigative hearing. They tried to do it in the middle of the trial, and that was one of the reasons. Not having had a preliminary hearing and a direct indictment, they didn't know what she was going to say. If they'd had a preliminary hearing, they could have called her as a witness and found out in advance what she was going to say at the trial.

[*Translation*]

Mrs. Maria Mourani: So, there have been attempts to use the legislation but, in the end, it proved to be useless. That is what I understood you to say.

[*English*]

Mr. Paul Copeland: It was useless and it was used in a manner that nobody contemplated it would be used. Nobody ever talked about being in the middle of a trial and not knowing what a witness was going to say, so they held an investigative hearing to find out what she was going to say.

● (1630)

[*Translation*]

Mrs. Maria Mourani: If I'm not mistaken, Mr. Copeland, according to what you and others have said, under the current code, authorities would be perfectly capable of controlling a potential terrorist attack or conspiracy. In fact, conspiracies are already covered under the Criminal Code; so, we don't need to reinvent the wheel and we don't really need a special provision to cover terrorism.

[*English*]

Mr. Paul Copeland: For me to answer that question, you'll have to tell me where you are in the process. If you're talking about a bunch of people who are charged with conspiracy to commit a terrorist act, I don't see why you're going to need it. Presumably you would have the evidence before you arrest them.

I haven't seen a circumstance in which the investigative hearing would help. As Professor Forcese says, you are revealing your investigation as soon as you grab somebody. Presumably, everybody who might have been involved is going to either take off or stop—probably both.

[*Translation*]

Mrs. Maria Mourani: It seems to me that there is already enough in the Criminal Code that we can use.

Mr. Forcese, earlier you talked about a gap in the law. Could you be more specific, please? What exactly do you mean by that?

[*English*]

Prof. Craig Forcese: This is the narrow gap that I was speaking about.

The way Bill C-17 is crafted for preventive detention allows law enforcement, when they have reasonable grounds to believe there is going to be a terrorist attack, to detain persons if they have reasonable suspicion to believe detaining them will forestall that terrorism attack. Conventional criminal law usually allows a person to be detained only when there are reasonable grounds, so the virtue from a law enforcement perspective is that it lowers the threshold for when someone can be detained for this finite period of time.

In my paper I speculate on when a situation may arise in which law enforcement believes there might be an imminent terrorist attack but may not have enough concrete evidence to single out an individual and to rise to the level of reasonable grounds to detain that person. They just have a suspicion about that person.

[*Translation*]

Mrs. Maria Mourani: A suspicion. Yes. Exactly.

[*English*]

Prof. Craig Forcese: In my view, that seems to fill a gap, and I gave some facts to imagine a scenario in which that situation that might arise.

Does that answer your question?

[*Translation*]

Mrs. Maria Mourani: Yes.

The Director of CSIS appeared before the committee to discuss other issues. He seemed to be saying that their analysis, their investigations related to potential risks—either terrorist risks, agents of influence, whatever it might be—relied on intelligence, on information. Yet we know—it's an open secret—that CSIS has used information obtained through torture from countries that engage in torture. As a criminologist, I consider information obtained under torture to be false, because people are prepared to say anything to have it stop. I think Maher Arar is a good example of that. Omar Khadr accused him, but we know now that he had been tortured.

The information and intelligence collected by CSIS ends up with the RCMP, because the RCMP is the organization that investigates CSIS reports. Based on your experience—and this question is addressed to all of you—is the RCMP in a situation where it's managing information that is not only false, in my opinion, but also the result of racial profiling?

[*English*]

Prof. Craig Forcese: Are you asking whether that evidence could end up in one of these proceedings?

[*Translation*]

Mrs. Maria Mourani: Yes, in particular.

[*English*]

Prof. Craig Forcese: That would be a violation of the Criminal Code. No evidence produced by torture can be used in any proceedings under a statute of Parliament. That's a provision right in the Criminal Code.

If law enforcement—let's say the RCMP—were to use evidence extracted perhaps by a foreign regime through torture to justify a preventive detention, a peace bond, or an investigative hearing, that would actually be prohibited by the Criminal Code. Incidentally, it would also be unconstitutional.

● (1635)

[*Translation*]

Mrs. Maria Mourani: Thank you.

Mr. Kafieh?

Mr. Denis Barrette: Ms. Mourani, could I answer that question?

Ms. Maria Mourani: Yes, of course; go ahead.

Mr. Denis Barrette: In a context where anti-terrorism provisions are being used, I doubt that counsel for such a person would be capable of showing that the information suggesting the supposedly imminent nature of a terrorist attack was secured through torture. A lawyer would not be able to produce that evidence. The Arar inquiry lasted months and made that demonstration to the public at large. We have fought hard and many lawyers have fought against the national security argument.

In the case of these two provisions, there will also be the cover of national security. That should not be forgotten. Mr. Forcese talks about public investigations. It is true that part of the investigation for recognizance with conditions will be public, but one part may remain secret. Because as soon as we're dealing with investigations or information from an outside source—as you pointed out, as occurred in the case of the Arar inquiry or information about Omar Khadr—we will come up against the national security argument.

I would challenge any lawyer, and I say good luck to anybody who tries to show that the information was obtained through torture. There is a high probability that such information was in fact obtained through torture. In my opinion, the problem is not so much the imminence factor as it is the probability or reasonability of the imminence factor. It is the lowering of the burden of proof which is important.

[*English*]

The Chair: Thank you very much, Mr. Barrette.

We'll now move to Madam Davies.

Ms. Libby Davies (Vancouver East, NDP): Thank you very much, Chairperson.

Thank you to the witnesses for coming today.

I think the key question before us at this committee is whether or not these provisions are actually needed. It is very interesting that since the motion was defeated in the House in February 2007, this has been a null and void issue because the provisions haven't even existed.

I remember very well when the Anti-terrorism Act first came through in 2001. I certainly concur that it was very much an environment and a climate of fear. It was rushed through the House. I don't know how many members of the committee here today were members of the House then, but I remember it very well.

I'm interested in looking at the impact of these two provisions on society generally if this legislation moves ahead. I think it's almost a moot point. We haven't had these provisions, and they haven't been used, so presumably one could come to the conclusion that these tools aren't necessary to combat terrorism and that the existing Criminal Code is satisfactory. A number of you have made that point.

If this legislation does go ahead, what will the impact be on broader society? A couple of you raised issues around racial profiling. I think Mr. Barrette said that legislation like this can be looked at as a tool of intimidation. The representative from the Canadian Islamic Congress talked about the disproportional impact on members of the Canadian Muslim community. I think that's a very key part of our assessment on this bill. Even if it's never used, what will be the impact on a democratic society of having such legislation?

I'd be very interested in your further comments about how you see that impact, particularly if the provisions are used—even threatened to be used—in a targeted way to intimidate people. Possibly people might be engaged in protest or dissent, but that doesn't come close to any reasonable definition of terrorism. Nevertheless, they could be subject to intimidation because these provisions exist.

I think that's a very important part of this discussion. I'd really appreciate it if you could address that aspect.

The Chair: Go ahead, Mr. Kafieh.

Mr. James Kafieh: I think you have to understand that it's going to put a profound chill in any community that's going to feel that it's going to be targeted under the legislation. It's important to note that these provisions begin with our Muslim Canadian community, but they don't stop with the Muslim Canadian community. It's not just Muslim Canadians who are being messed up by the no-fly list, for example. It's not just Muslim Canadians who are being shaken down at airport terminals. These things are going to ultimately affect everyone. It starts with the Islamic community, but it won't end with the Islamic community.

For the very narrow utility that Professor Forcese brought out in talking of lowering the bar in terms of being able to address more vague security threats, because we are talking about lowering the bar.... We've done this before. This isn't that new. Japanese Canadians experienced what it was to have the bar lowered. You ask people then. The Government of Canada of the time had no doubt in their minds that this was a very reasonable, pre-emptive act to safeguard Canadian security. Ukrainian Canadians had the same experience in the World War before that.

This isn't new. In one form or another, we're heading down a path. I think it's only a matter of time before this kind of provision is similarly abused. In the meantime, it is going to interfere with people who will find out that it's better not to have an opinion on anything. You'll be safer. You'll steer clear of everything if you have no opinion. Having an opinion can only get you in trouble.

How is fostering that culture in Canadian society consistent with the values you want to promote in a free and democratic society?

● (1640)

Ms. Libby Davies: Could Mr. Gardee also answer?

The Chair: Go ahead, Mr. Gardee.

Mr. Ihsaan Gardee: Certainly. Thank you.

I would concur with my colleague James Kafieh's comments in terms of the chilling effect it could potentially have on members of the Canadian Muslim community. Extraordinary powers are always open to abuse. We don't have to look back far in history to find examples. Just recently, federal security agencies unlawfully recorded 171 conversations between an accused and his lawyers, even after agreeing to halt the practice after a Federal Court order.

CAIR-CAN is concerned that the proposed powers of preventive detention, for example, may be similarly abused. If the Federal Court's orders against rights violations can be ignored, what else can happen? Where do we draw the line?

Ms. Libby Davies: I'll ask a follow-up question.

I'm interested to know if any of our witnesses today have information about whether other jurisdictions that brought in legislation similar to Canada's have sunsetted the provisions and have either let them go or repealed them. Is there any information about what's happening elsewhere on this type of legislation?

Certainly after 9/11 there was a huge stampede to bring in legislation like this. I wonder if the picture has changed anywhere else in terms of what happened to these laws. Does anybody have any information?

The Chair: Would anyone like to comment on that?

Mr. Paul Copeland: The only information I have, and I'm not sure it's totally accurate, is that Australia brought in some provisions —I think they're in Professor Forcese's paper—that provided some detention. I think theirs are still in effect. I don't know about their use at all.

The Chair: Does no one else have any information on that?

Prof. Craig Forcese: The question was whether they had sunsetted. There are lots of provisions like this. I'm not aware of any that have sunsetted. Australia has 14 days in preventive detention. They have two days federally, but they can graft it on to a state's, so it's 14 days. In the U.K. it is 28 days. In terms of other jurisdictions that have something roughly approximate, South Africa is two days, New Zealand is two days, and Germany is two days. It is three in Denmark and Norway, four in Italy, five in Spain, six in France, and so on.

Detention without trial—preventive detention—varies across jurisdictions. Other than the U.S.'s special experience, the U.K. is the most extreme at 28 days.

The Chair: Thank you.

Be very quick. We're out of time.

Mr. James Kafieh: Israel maintained British emergency laws after they became the sovereign government. They routinely detain people for six months at a time and extend one six-month period after another for years, with no charge and certainly with no trial and no conviction. It's under the same premise.

I think the idea that anyone is going to repeal this kind of legislation once it's in place is just not realistic.

The Chair: Thank you.

Madam Davies drew attention to the fact that this was done quickly after 9/11. I happened to serve on that committee back in 2000-2001, and one of the big concerns we heard back then was that this was going to be used constantly. It's good that we hear today that it's never been used. The fear back then was that it would be abused. Too many people would be using it. It is good for the public to be aware that it hasn't been. It hasn't been used, but it still is a tool that may be there if needed.

We'll go to Mr. Rathgeber, please.

● (1645)

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair, and my thanks to all the witnesses for your presentations and attendance.

As you can understand, this committee, and certainly the government, has an unenviable task as it attempts to balance civil liberties and security of its nation.

Professor Forcese, I have a couple of follow-up questions based on your dialogue with Ms. Mendes. You were referring to Bill C-19, the former anti-terrorism legislation that expired in 2006. I think it was her suggestion that it did more to punish terrorists than it did to prevent terrorism. I don't know if you were able to set her straight on that suggestion or if you agreed with Ms. Mendes when she made that suggestion.

Prof. Craig Forcese: I'm sorry if I misunderstood Ms. Mendes' question. Bill C-36 was the bill that implemented these provisions. Bill S-3 tried to re-establish it. Bill C-19 tried to restore it last time.

I'm not sure I have a view on whether it's based on a model of punishment or preemption. It's difficult for me to say, given that for the five years it was in place, it was never used, but I think I commented in the course of my presentation that in relation to the peace bond provision—

The Chair: Ms. Mendes, do you have a point of order?

Mrs. Alexandra Mendes: I have no trouble with our asking questions according to our convictions, but I object to your citing me wrongly when it's so easy to prove the contrary by checking in *Hansard*. Would you mind not using my name? Just stick to your convictions and do your question.

Thank you.

The Chair: Thank you, Madam Mendes.

Continue, sir.

Prof. Craig Forcese: The peace-bond provisions at the back end of the recognizance with conditions are the provisions I wonder about. The present bill doesn't enumerate the circumstances that can be imposed upon a person. There's no limit, necessarily, set in the statute.

If you look at the analogues in the U.K. and Australia, their legislation provides for what can be done to someone under a peace bond. One of the positions I took in front of the Senate on Bill S-3 was that it was actually worthy of Parliament to contemplate what can be done in Parliament's name, in essence, in imposing peace bonds, so that there would be a shared understanding of the outer limit. My personal view is that if it amounts to house arrest, it's unconstitutional.

Mr. Brent Rathgeber: At the risk of misquoting Ms. Mendes again, I recall her stating that all of the witnesses here today found this legislation useless. I need to take issue with her question, because, Professor Forcese, in your brief you are quite explicit that you take no position with respect to this bill. Is that correct?

Prof. Craig Forcese: To summarize my position, I accept that there's an argument for preventative detention. There's a narrow gap. I'm not sure that Bill C-17 is useful in filling that gap, because there's a strong disincentive for law enforcement to use it. If the gap were to be filled by legislation, the legislation would have to be more aggressive in empowering law enforcement, and I'd be unprepared to have those extra-aggressive provisions imposed via this legislation in the absence of very robust checks and balances to enhance the civil liberties content.

Mr. Brent Rathgeber: I think I'm quoting from your paper, although paraphrasing slightly, in stating that the recognizance and conditions power in Bill C-17is modest compared with its closest international analogies, and I think Mr. Copeland talked about a piece of legislation in Great Britain that he takes issue with because of its infringement on civil liberties. I imagine both of you will agree that in relation to other western democracies, Canada is not really out of line or going out on limb in Bill C-17, compared with the United States of America, Great Britain, and other western democracies. Is that a fair comment?

Prof. Craig Forcese: I agree with that statement.

Mr. Paul Copeland: Can I make two comments?

One is that the Americans have done more terrible things than probably any western democracy, given what they've done in waterboarding and in torture and in keeping people in Guantanamo.

In regard to Professor Forcese's paper, I noted three places—pages 12, 13, and 26—where he noted the question of whether there was any use for any of these provisions. I can show them to you afterwards; I don't want to take them to you.

● (1650)

Mr. Brent Rathgeber: You also said, Mr. Copeland, that this bill was changing the landscape of Canadian civil rights jurisprudence, or something to that effect. I'm a little confused by that, because this legislation essentially replicates what the former Liberal government introduced, which expired pursuant to a sunset clause.

Mr. Paul Copeland: Well, when I presented at the Canadian Institute for the Administration of Justice in a conference on the anti-terrorism legislation in 2002, I took the same position. I don't find that the Liberals were particularly good on these issues.

Mr. Brent Rathgeber: So it was that legislation that changed the landscape, and this legislation is just a continuation. Would that be—

Mr. Paul Copeland: Except that this legislation was sunsetted and died, and somebody's now trying to resurrect it, so it would change the landscape back to where we were immediately after September 11, 2001.

Mr. Brent Rathgeber: Mr. Gardee, thank you very much for your attendance. I really enjoyed your presentation, but I was curious when you called this proposed legislation “discriminatory”. That's a very strong adjective. It caused me concern when I heard it. I'm interested as to how you come to that conjecture, in light of the fact that the previous legislation was only used once, with respect to Air India, and that was in the 1980s. I'm curious as to why you think the legislation, on its face, is discriminatory.

Mr. Ihsaan Gardee: When I made that statement, I said that it “may” be considered discriminatory. I was bringing attention to the fact that security regimes have had a disproportionate impact on members of the Muslim community. I think that's the elephant in the room. Nobody wants to say it out loud, but the impact that's been felt in the last 10 years has been felt predominantly by members of the Canadian Muslim community.

Mr. Brent Rathgeber: Certainly, but it's self-evident that the previous legislation was never used against any member of your community. That's obvious. It just hasn't happened. Correct?

Mr. Ihsaan Gardee: That's correct, as I understand it.

[*Translation*]

Mr. Denis Barrette: Could I add something, Mr. Chairman?

[*English*]

The Chair: Please be very quick, Mr. Barrette.

[*Translation*]

Mr. Denis Barrette: It is important to remember, when we're talking about discrimination or racial profiling through these two provisions, that they cannot be separated from the definition of terrorist activity set out in section 83.01 of the Criminal Code.

That definition has been sharply criticized by the United Nations Human Rights Committee. The Senate committee, when considering Bill S-3, amended the definition and, in the Khawaja case, the judge stated that he considered the definition to be discriminatory with respect to motives arising from religious, political or ideological reasons.

It is along those lines that these two provisions will be interpreted, in connection with the definition of terrorist activity.

[*English*]

The Chair: Thank you very much, Mr. Barrette.

Your time is up, Mr. Rathgeber.

We'll now go back to Ms. Crombie, please. We'll have five minutes in the second round.

Mrs. Bonnie Crombie (Mississauga—Streetsville, Lib.): Thank you, Mr. Chairman.

I suppose even the Anti-terrorism Act was perhaps an overreaction to 9/11, and that's probably the reason we had a sunset clause.

I have so many concerns, especially hearing the testimony.

Mr. Barrette, you said that the provisions encourage racial profiling, that the presumption of innocence is at stake, that there is a sense of the era of McCarthyism, and that the reputations, lives, and careers of Canadians can be destroyed. Given your statement, I can see that these provisions aren't necessary and that the Criminal Code, in fact, could be used to help protect against terrorism. I think you've just about all stated that.

To summarize, from what I've heard—I'm new to this committee—the provisions are unnecessary, ineffective, and possibly unconstitutional. They ignore the rule of law and the presumption of innocence, disrespect civil liberties, are possibly undemocratic, jeopardize human rights, stigmatize individuals, and target groups. That said, has this legislation been helpful in any way, and if so, how? I suppose the question is, why would the government pursue it? I'm just trying to understand the rationale for these provisions and this legislation. Is there any evidence for supporting the provisions or any rationale for passing BillC-17?

Thank you.

The Chair: Thank you, Ms. Crombie.

Mr. Paul Copeland: Do you want a short answer? No.

I wouldn't agree with all of the preamble you put to it. There are some aspects of it.... If you pass the law, then the rule of law follows, but I don't see any value in these provisions and I don't see any need to resurrect them again. You're not in the climate that you were in 2001 when this legislation was first introduced and passed.

● (1655)

Mr. James Kafieh: If you ask any person who's on duty in security—for example, the head of CSIS—what he needs to make this country safe, invariably the response will be that he needs more power, more authority to do more things, a freer hand.

We've heard grumbling to that effect from the previous head of CSIS recently, but the important thing is, that's what you're going to hear, and it's very hard for politicians to have something happen on their watch and then have that same security official say, "Well, we asked for more power, but you didn't give it to us."

Who's going to carry the can if something happens? As a result, there's a great pressure to give in to this kind of pressure.

Mrs. Bonnie Crombie: Mr. Barrette, I know you want to get in here, but I'm going to ask one more question and then I'll ask you to respond to both. Then, in my last minute, I want to shift the line of questioning, so let me know on that quickly.

Is this legislation necessary for the protection of Canadians, and if the Conservatives want to violate human rights and civil liberties, how has this Anti-terrorism Act protected Canadians to date?

Thank you.

Mr. Dave MacKenzie (Oxford, CPC): That whole statement is way out of line. The original legislation was brought forward in 2002. When you talk about the current government taking away human rights, the question just doesn't make sense.

With all due respect—

Mrs. Bonnie Crombie: Thank you, Mr. Chairman. I'll rephrase my question.

Was it necessary for the—

The Chair: Madam Crombie—

Mrs. Bonnie Crombie: I'll take it into consideration.

The Chair: —I'll let it go, but he's making a point here as well.

Go ahead.

Mrs. Bonnie Crombie: Mr. Barrette, I would like you to respond to the previous questions, and is it necessary for the protection of Canadians?

[*Translation*]

Mr. Denis Barrette: As far as I'm concerned, it is quite clear that we don't need this bill. Since the legislation has not been in effect, conspiracies have been discovered, charges have been laid, and convictions have been secured. We don't need it. As I see it, the only time it could possibly be used would be where there is an attempt to lower the standard of evidence. Mr. Forcese talked about an imminent attack, or the risk of an imminent attack—the narrow "gap", as he put it—

[*English*]

Mrs. Bonnie Crombie: Mr. Barrette, I'm going to just cut you off quickly.

Mr. Denis Barrette: Yes, sure.

Mrs. Bonnie Crombie: I have to ask one more question, and perhaps we can get the answer in, but I have to get the question in very quickly.

Because I represent a large Pakistani Muslim community in my riding, I've heard over and over again about the devastating impact on people's lives after 9/11. Could you share any personal stories on how people have been targeted and personally stigmatized by this legislation, and what could possibly happen if Bill C-17 passes?

The Chair: Thank you very much, Ms. Crombie.

Unfortunately, if you have stories, you may want to send them in or you may want to tell them somewhere else. We have five minutes, which includes your question and their answer.

We'll now go to the government side and Mr. Lobb.

Mr. Ben Lobb (Huron—Bruce, CPC): Thank you, Mr. Chair.

I'd just like to say that it's nice to have two Davies at the committee today. Usually one is good, but we have two today, so that's great.

To Ms. Crombie's point there, maybe at the next Liberal convention she can talk with Anne McLellan or Irwin Cotler or maybe Allan Rock, and they can fill her in on some of the background on that bill.

Mr. Kafieh, in your statements you indicated you felt that this piece of legislation unfairly targeted the Muslim community. Did I hear that correctly?

Mr. James Kafieh: I'm sorry. Was it that this was...?

Mr. Ben Lobb: It was that this piece of legislation unfairly targeted the Muslim community?

Mr. James Kafieh: I did not say that it unfairly targeted the Muslim community. I said that based on a pattern of experience for the last 10 years and even before that, I feel it will disproportionately impact on the Muslim-Canadian community, but that although the derogatory impact, the negative impact, of this kind of legislation may begin with causing damage to the Muslim-Canadian community, it will not stop there. It will move on and continue and do damage to the fabric of Canadian society. We're all going to suffer from this.

Mr. Ben Lobb: Just for the average Canadian sitting at home who may be watching this or is listening in—and to Mr. Rathgeber's point—if the provisions have never really been used to date, how does it target anybody? How would the average Canadian watching at home come to that conclusion?

● (1700)

Mr. James Kafieh: Are you saying that if it just languished on the books, what harm would it do?

Mr. Ben Lobb: No, I'm saying it's never been used and it's never targeted anybody. How can one draw the conclusion that it targets any group? I'm just trying to—

Mr. James Kafieh: This particular legislation creates a chill because I think it undermines the civil liberties of all Canadians.

If you looked like a Japanese Canadian during the Second World War, with the broad proclamations from government—whether they named Japanese or not—you were going to feel that there was special scrutiny on you. That wasn't unreasonable, under the circumstances.

We also have seen, for example, security certificates. They were used almost exclusively on Muslim and Arab immigrants to this country. That's the history of it. If you say some legislation is not doing any harm because it hasn't been used, we have the example of the G-20. Second World War-type legislation was languishing on the books, and the chief of police asked for more power to make sure security was in place. We can see what kind of harm can be done when it is implemented.

Mr. Ben Lobb: In your presentation you spoke about an imminent threat. That was the piece with the restriction. If there was an attack on the country, do you feel as though the average Canadian at home would accept that? Do you feel that's reasonable? Where is the balance here? I'd say we should do whatever we can to protect Canada. If that includes asking questions about previous incidents, then so be it. What are your thoughts on that?

Mr. James Kafieh: These provisions are so intrusive that I'm concerned about the relationship they could create between the government, security agencies, and the community itself. It's so pernicious in its potential impact that I think you have to reserve it for the most extreme circumstances.

When you have time, you use all the tools that are available to you. I know I'm speaking on behalf of an Islamic organization, but these provisions, the investigative hearings, are a Hail Mary pass, to use a Catholic expression. In security terms, it's a Hail Mary pass. You believe something is going to happen and you have no idea of where it's going to come or how it's going to happen, but you have an idea that a group is involved, so you grab a person who belongs to that group.

Mr. Ben Lobb: Correct me if I'm wrong—

The Chair: Please be very quick, Mr. Lobb.

Mr. Ben Lobb: In the terrible incident that happened in Sweden, this gentleman was not on the radar at all, and this could have been a situation in which maybe a Hail Mary pass might have produced a better outcome. We'll never know, or maybe we will, but maybe a Hail Mary in this piece of legislation could protect us from a possible case like this.

The Chair: Thank you, Mr. Lobb.

We'll now move back to the Bloc. Madam Mourani, *vous disposez de cinq minutes*.

[*Translation*]

Mrs. Maria Mourani: Thank you, Mr. Chairman.

I'd like to come back to racial profiling. My colleagues do not seem to see the connection between this bill and the possibility and ability to engage in profiling, although they seem to admit that the bill has never been used. They seem to think it will be useful, but I question that.

Mr. Barrette, you talked about racial profiling. I also have questions in that regard for Mr. Kafieh, Mr. Elgazzar—forgive me if I mispronounced you name—and Mr. Gardee.

With respect to racial profiling, the Muslim communities, or simply Pakistani communities, people who are stereotyped or identified by their religion or even the colour of their skin… Nowadays, everyone is an Arab. Whether they're Pakistani, Lebanese or whatever they may be, they are considered to be Arab and Muslim. The average person doesn't know that there are Christian Arabs, Jewish Arabs—all kinds of Arabs. In any case, we're not going to give a lecture on Arabness today.

Tell me a little more about racial profiling. What will this kind of legislation which, legally…? There was an attempt to use it once. The Criminal Code could be used without any issue to ensure our security in relation to terrorist attacks, and yet the real impact in terms of people's perceptions and prejudice is fairly obvious.

According to what I've heard in other committees and what has been reported to me, CSIS has a tendency to pay visits to young students to question them without having any evidence, saying that they are not required to answer their questions. However, these individuals don't know what their rights are.

I have received a great many reports from young Muslims or Pakistanis who have been questioned by CSIS without any warrant or any charge against them, just questioned. The agents who visited them pointed out that they read the Koran or this or that book. A lot of these cases reflect practices that suggest racial profiling.

What do you think of the special work being carried out by CSIS in that regard and about racial profiling in general?

Have you received reports from young people who came to see you saying that CSIS paid them a visit?

One man even provided a phone number that CSIS had given him. I called the number and a person answered who refused to identify himself—imagine doing that a federal member of Parliament—and who in fact confirmed that he was a CSIS agent.

Could you please comment on that?

● (1705)

[*English*]

The Chair: Thank you, Madame Mourani.

I'll give you a little bit of leeway here on Bill C-17. You do draw in CSIS and a few others, so I'll accept that as a question.

Go ahead, whoever wants to take that one on.

Go ahead, Mr. Barrette.

[*Translation*]

Mr. Denis Barrette: I will make a quick comment, so that the others have time to answer as well.

This is what is going to happen in practice. Even though such individuals were not brought before a court, I am sure this has happened. CSIS agents go to people's houses, tell them that if they don't answer their questions about the next door neighbour, if they don't rat on their neighbour, that they have the power, with the police, to detain them for 72 hours and then compel them to come before a judge who will force them to answer all their questions.

This is a form of intimidation that will work, even if it yields only poor results in their investigations. Unfortunately, it will be used for profiling because of the definition of terrorist activity.

I'll stop now and let my colleagues answer.

Mrs. Maria Mourani: Yes.

Go ahead, Mr. Gardee.

[*English*]

Mr. Ihsaan Gardee: Thank you. Merci.

CAIR-CAN has received reports from members of the Muslim community who have complained about intimidation by CSIS, about being questioned concerning how many times a day they prayed, and so forth. This is something of deep concern to the Muslim community.

As one of the speakers pointed out previously, it's now four years after the O'Connor inquiry's report came out. In that report Justice O'Connor recommended that a comprehensive oversight body exist for our security agencies. That still has not been implemented, which doesn't engender a great deal of trust, not only in the Muslim community but also with many Canadians, I'm sure.

The Chair: Thank you

Go ahead, Mr. Kafieh, and then your time is just up.

Mr. James Kafieh: I think Mr. Barrette's example is extremely important, because it gives an illustration of how, without officially using the investigative hearing powers, you can use them as a threat over people who are not willing to be sufficiently forthcoming to a CSIS officer. The problem with this is that it alienates the community from its security forces.

To take the example that Mr. Lobb put forward, the information we have is that the bomber in Sweden was flagged by members of his own community in Britain. Had there perhaps been more competent or more effective communication among the security forces, the flagging in Britain should have carried over to Sweden. I think that's where the issue is.

I think the real lesson in all of this is that you need to protect and nurture positive relationships among the various communities in our society.

The Chair: Thank you very much, Mr. Kafieh.

Now we'll move to Mr. McColeman, please.

Mr. Phil McColeman (Brant, CPC): Thank you, Mr. Chair.

Thank you to all of your for coming here today and sharing your views.

Would there be a consensus among the witnesses here that terrorism is still a very real threat to our western democracy and our way of life? Is that true? You could just nod your heads if you agree.

I'm seeing all agree. Is that correct?

A Voice: No.

Mr. Phil McColeman: Did someone say no?

Are you saying no, sir?

● (1710)

Mr. James Kafieh: I say it exists and it's a problem, but to the extent the problem is real, I think it's greatly exaggerated for a whole range of reasons. It does exist as a threat and it's real, but I think the damage we're doing to ourselves since 2001 is far greater than the cumulative damage done to us.

I'll give you the obvious example that nobody, to my knowledge, has died in Canada from an act of terrorism since 2001, but many people have died from biker violence, for example, during the same period. Why aren't these powers being applied there? I'm suggesting that this kind of investigative hearing will eventually be applied in these areas, when it's politically convenient in the future.

Mr. Phil McColeman: It's an interesting perspective you just shared, because of all the witnesses, you're the only one who thinks that perhaps terrorism is an overblown phenomenon in the world today.

Mr. James Kafieh: I'm talking about in North America. It is real. It is a real problem.

Mr. Phil McColeman: Okay, I accept that.

As a follow-up, we've had witnesses on other issues, and countries that have experienced a terrorist attack have a world view that's vastly different from what you just shared.

Canada has fortunately been spared from a severe terrorist act. We obviously controlled one with the Toronto 18, and we've controlled several situations, but I take a little issue with your minimizing it, and I must say I take issue with something else you shared with us today, when you compared where we are today in 21st century Canada to the World War II war measures act that Japanese Canadians experienced. I can't imagine, nor could I imagine anyone on this panel or in our society today ever imagining, that a law like this could lead to an act like that at any point in our future.

Your comments specifically were that this path will be similarly abused in the future, and you compared it to the Japanese situation in World War II. That view of where terrorism is today and of how we control terrorism is something I don't think a lot of Canadians would accept.

I'm interested in the commentary that's gone on today over Professor Forcese's observation and analysis that there is a gap, albeit small, but that there is a gap. All of the witnesses have heard that today.

My number one question, for any or all of you, is this: do you agree with that analysis? That's my number one question.

For the sake of time, my number two question is this: if you do agree, how would you propose to fill that gap to make sure our country doesn't have the security risk this gap presents?

Mr. Paul Copeland: If I could answer that briefly, I don't agree with Professor Forcese that there is a gap. The most serious terrorist act that was ever committed in Canada was the Air India bombing. Recommendations came out of the major inquiry in relation to that bombing, and Canada should be dealing with those recommendations. They should make sure there is effective communication between CSIS and the RCMP.

With all due respect to the people here, you shouldn't be wasting your time looking at this legislation. You should be dealing with the problems of the security agencies and the enforcement of criminal law with regard to terrorist activity.

Mr. Phil McColeman: Okay. Are there other views?

Mr. Khalid Elgazzar (Member of the Board of Directors, Canadian Council on American-Islamic Relations): It's our view that current measures in the Criminal Code are sufficient and adequate to the task, so we also disagree that there is a gap that needs to be filled by legislation such as Bill C-17.

Mr. Phil McColeman: Okay.

[*Translation*]

Mr. Denis Barrette: I'd like to answer that, Mr. Chairman. I think it's a very important question.

[*English*]

The Chair: Go ahead, Mr. Barrette

[*Translation*]

Mr. Denis Barrette: First of all, the threat of terrorism in Canada has always existed, well before it was even created. The Fenians prompted the creation of Canada, so this is a crime like any other one.

As regards Mr. Forcese's opinion on this—with all due respect to him—and in terms of the imminence of a terrorist act, I see this as a non-issue. If a terrorist act is truly imminent, if that is what we are facing, police officers have to arrest people, detain them and charge them. It's not about whether the act of terrorism is imminent, but about evidence. In other words, are there suspicions that a terrorist act is going to be committed or are there reasonable grounds to believe that is the case? With these proposed provisions, there is actually an attempt to lower the standard of proof. If a terrorist act is imminent, then people should be arrested, brought before the courts, charged with a crime and convicted, if they are guilty.

● (1715)

[*English*]

The Chair: Thank you very much, Mr. Barrette.

A number of individuals have mentioned today that this legislation is not needed. They were even questioning why our committee is discussing this bill.

I'll close with a quote from the justice minister in 2001. Ms. Libby Davies will remember that the then Minister of Justice, Anne McLellan, said with regard to Bill C-36 and what we are discussing here today, "We believe that people everywhere are entitled to live in peace and security." Then they drafted Bill C-36, and these are part of the provisions for that.

We thank you for coming.

This is not a review; it's a new piece of legislation. We appreciate your input to find a balance in all we do here, and as Mr. Lobb and Mr. Rathgeber have suggested, to make sure we keep Canadians safe.

Thank you very much. We are going to suspend, and then we will move to committee business.

[*Proceedings continue in camera*]

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