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Chair

Mr. Robert Oliphant

Standing Committee on Public Safety and National Security

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● (1400)

[*English*]

The Chair (Mr. Robert Oliphant (Don Valley West, Lib.)): I'm going to call this meeting to order, the 29th meeting of the Standing Committee on Public Safety and National Security, and welcome members of the public who are attending.

This is the first of 10 public meetings that we are going to be having over this coming week as we continue our study of the national security framework. There are two parts to the consultations that are happening right now regarding the national security framework. The government is undertaking its own consultations.

This parliamentary committee has decided to undertake a set of consultations to advise the government from a parliamentary standpoint with respect to changes, affirmations, or concerns about the national security framework as it exists right now in Canada.

This is the travelling version of the public safety and national security committee. We normally have 10 members on the committee; however, there are six who are travelling. I'm not going to say we're the best six, but that would be what I tend to think. We're representing the three parties that have standing in the House of Commons. For those of you who haven't come to Ottawa, this is exactly the same set-up as we would have in Ottawa for a committee.

In each of the cities we visit, Vancouver, Calgary, Toronto, Montreal, and Halifax, we will have an afternoon meeting where we bring in experts who are invited, who have either asked or members of the committee have requested that they testify in front of the committee to give us evidence as to their thoughts about the national security framework.

In each of the cities, we will also be having an open-mike session, where people from the public are invited to come and simply address the committee with their concerns. We're looking forward to that meeting happening tonight in this hall. Those of you who are in the public gallery for this meeting are invited to come back at 5:30 p.m., and the microphone will be yours. We will be listening to you tonight and engaging in that way.

I hope this is a robust discussion that we are beginning. We've had a couple of meetings already in Ottawa to start the committee on this study. We will be on the road for 10 meetings, and then we will continue in Ottawa with further meetings. Hopefully, we will have something to say to Parliament within a couple of months that the government can then use in its agenda in shaping Canada's national security framework.

I want to welcome our witness for the first hour, Stuart Farson, adjunct professor with the department of political science at Simon Fraser University. Thank you for coming.

We had another witness scheduled, who unfortunately had to cancel. We have Mr. Farson with us for the full hour, and we're looking forward to that. He may not be. Normally in these committee hearings, we hear from a witness for 10 minutes, but I'm giving him a little leeway with that, and then the committee members will ask questions.

Mr. Farson.

● (1405)

Professor Stuart Farson (Adjunct Professor, Department of Political Science, Simon Fraser University, As an Individual): Thank you, Mr. Chair. I'd like to thank you and the committee for the opportunity to come here today. Given that every member of the committee comes from either Quebec or Ontario, coming to the other side of the country, in this case, is an important thing for you.

I'd like to commend the Liberal government on two points. First is for making public the mandate letters issued to ministers. Hopefully, the metrics they contain will help reinstate the singular importance of ministerial responsibility in our system of governance, and make it easier for Canadians and their Parliament to hold them to account.

Second is for issuing this green paper on national security to prompt a public discussion and debate on Canada's so-called national security framework. Regardless of how one views the breadth of the discussion that the government appears to have in mind, or the cynicism that many will hold over whether talk leads to action, such a dialogue deserves our support and is long overdue.

I'd like to tackle three points in my presentation. I hope, in a way, that they'll connect to the speakers that you will hear after I finish. The first is to talk about the breadth of what the government has termed our national security framework. The second point is how one goes about learning and this largely takes into consideration my own personal experience of how difficult it is to learn about this area of governance. Finally, to talk about something that this committee, and others in Parliament, will be doing on a regular basis, which is, how to make oversight work effectively.

By way of preparing for this meeting, I looked for, and did not find, guidance on what parameters this committee had in mind for a national security framework. Yes, there's a green paper, but perhaps and hopefully, the committee will look much more broadly than is the case with the green paper.

What is it that the committee will examine to form conclusions about the framework? Two things are perhaps obvious. One is that there are a whole range of issues in the green paper that need to be addressed. Many of them stem from Bill C-51 and if so, what reforms are needed?

I'm going leave these—what I call the nitty-gritty—to the rest of the witnesses that you're going to hear from. I want to touch on some of the things that are immediately, to my mind, missing from this national security framework.

From an academic point of view, at least, we've gone through calling this thing a whole range of names from communities to systems to networks. Now we're talking about a framework, so we really need to figure out what this thing is.

Missing, I think, from the discussion on independent review is the Military Police Complaints Commission. Arguably, its mandate was inadequate for pursuing whether Canadian troops knowingly committed war crimes when transferring prisoners to Afghan authorities. In addition to the adequacy of mandates, the experiences of the MPCC pose questions about the degree to which bodies are truly independent and have adequate resources.

I raise this because if you look at the RCMP complaints commission, this is a body that has changed—under the Conservative government, I should say—its mandate. It has a review process in addition to dealing with complaints. The MPCC doesn't have that sort of mandate at all. Perhaps it should.

● (1410)

The green paper also omits the historically important commission of inquiry, i.e., the McDonald commission, and it is to be recalled. The McDonald commission led to the establishment of CSIS, the Canadian Security Intelligence Service, as an intelligence agency without a mandate to reduce threats. It's important to recognize that while commissions have a level of independence, they are still executive instruments where the government sets the terms of reference.

Why is this important? In the Arar inquiry, for example, Justice O'Connor could not be encouraged to consider how the various review bodies should relate to Parliament. I believe that this was a serious missed opportunity. Also, the executive, it should be noted, can close down commissions of inquiry when it chooses to do so. The example of the Somalia inquiry of the 1990s, which was also a national security issue, is a good example.

Now, to touch on what the green paper is and why I find it inadequate, I should say that I think we can agree that it is a product of the Department of Public Safety and the Department of Justice. Not surprisingly, the issues raised in it reflect those that are particularly of interest to their particular ministers. It focuses on the threat of terrorism, largely at the exclusion of other threats, how to respond to it, and the legal regime needed to confront it, while protecting the rights and freedoms of Canadians. It's not a bad thing. This is something that needs to be done, but it's not the entirety. Thus, it frames a particular notion, I would argue, of national security, and may in the process divert public attention from other threats, and particularly existential threats like climate change.

Arguably, a green paper produced by the national security adviser's unit within the Privy Council Office would look very different. It would be broader in concept, consider a wider array of departments and organizations—Global Affairs, Transport, Finance, and the Privy Council itself, particularly the intelligence assessment secretariat—reflect upon the activities they all perform, and detail the threats and the national interests they ponder. It would consider defence and foreign policy implications, and indicate concern about the effectiveness of organizations and the resources available.

Furthermore, it would likely cover the importance of intelligence analysis and the sharing of intelligence, not just within Canada, as I think this green paper does, but between Canada and foreign states. A review of these kinds of security intelligence organizations suggests that any such framework would likely reflect the following: structural and functional diversity among organizations; the existence of several policy and coordination centres; intelligence analysis being conducted within several organizations; national security law expanding and becoming more complex, particularly since 9/11 and because of technological innovation; and a rising level of public concern. I think it's not been since McDonald that we have seen a level of public concern about national security issues as we have today.

Finally, there is emergence of a diversified and, I would argue, uncoordinated review framework, something which I think this committee should pay particular attention to, and I'll come to later. Arguably, this suggests a greater focus on how policy is developed, who coordinates the various organizations of the framework, and how human resources are recruited, trained, developed, and retained.

I want to make a few observations about how you go about learning, because it took me several years, and I've been doing it I think since the early 1980s.

● (1415)

I want to touch on some of them, which I guess is informed by my own personal experience of having been on the other side of a committee in the 1990s when a special committee of Parliament reviewed the CSIS Act and the Security Offences Act. I was its director of research. The strengths and weakness of the process has led me, in my academic career, to pursue a number of what I think are key areas.

How does one go about learning about the framework or whatever you like to call it? Obviously commissions of inquiry need to be studied and the recommendations they have made pondered in detail. I don't think we do enough of that. We seem to finish off the commission and more often than not it disappears into history.

Secondly, I think working with independent review bodies is very important. At one point, SIRC, for example, used to hold conferences where there were discussions between academics and the review process. Obviously, going inside the institutions helps. Being a contractor is one that comes to mind. Working for Parliament is another, and I've indicated my experience. From my own experience, I know I went to Parliament in 1989 with a rather naive view that Parliament, or at least the parliamentarians on the committee, would have detailed knowledge of the CSIS Act. However, surprise, surprise, this was not the case. It was, over the course of the better part of a year, a tremendous learning experience for those MPs. Unfortunately, what was the case for many, or most of those MPs, was that only two of them survived the 1993 election, so that institutional memory was lost.

Working with non-governmental organizations such as the Geneva Centre for the Democratic Control of Armed Forces is another. It, for example, specializes in comparative security sector governance and reform, and it covers a broad array of countries.

Following, of course, the work of investigative journalists is another. Many of them have used the Access to Information Act to good effect. I would like to suggest to you from personal experience that there are enormous delays in this process. Anything I've asked for over the last few years automatically seems to get 120 days added onto the process. I would add that the complaints process isn't much better. In my view, there are not enough investigators, and the process, even when it's time sensitive, is far too long.

Finally, there's academia. There was an organization, the Canadian Association for Security and Intelligence Studies, that held multi-day conferences attracting considerable audiences from abroad. It now is a shadow of its former self. Its membership is dwindling and greying, like your witness today.

Maybe I should get on to what I really wanted to say about oversight, if I may.

The Chair: You have one minute.

Prof. Stuart Farson: I'm afraid it will take me five minutes. I think this is probably the essence of my presentation.

Arguably in a democratic society two things should occur when governments want additional powers for national security agencies. First, they should make a case for why they are necessary. Second, where they take the balance in favour of security over individual rights and freedoms, they should ensure that it has a robust and effective oversight system in place that can also ensure accountability. Bill C-51 was perhaps the most contentious bill of the last Parliament because it fulfilled neither of these points.

Do you wish me to stop now?

● (1420)

The Chair: I think I'm going to stop you there. I'm sure the questions from the committee will elicit your thoughts. Thank you very much for that presentation.

[*Translation*]

I should mention that our meetings are conducted in both official languages. Committee members may ask questions in French or in English.

[*English*]

I should also mention, from your opening remarks, that our committee's study will include the green paper that has been issued by the minister, but we're not limited to it. We will be considering a broad range.

We'll turn now to committee members for questioning. We'll begin with Mr. Mendicino.

Mr. Marco Mendicino (Eglinton—Lawrence, Lib.): Thank you very much, Mr. Chair.

Professor Farson, thank you for your testimony.

Let's begin where you left off. I got the sense that you had more to say about the subject of oversight. What I took down from your closing remarks was that, first, there was a need for a rationale, an explanation, as to why the oversight mechanism was necessary, but there was also a need to ensure that the oversight was robust and effective.

As you've seen, the government has recently tabled Bill C-22. That legislation will be studied by this committee. Perhaps you can take a moment to expand your thoughts on that piece of legislation.

Prof. Stuart Farson: Yes, indeed. Bill C-22 was in fact where I was going next.

This would establish a committee of parliamentarians. Recently a former director of CSIS said that we should pass it and think about amending it later. I happen to disagree with that. I think we need to really address it and get it right, right now.

Mr. Marco Mendicino: Can I just ask you to maybe focus on how we get it right and put some emphasis on the areas that you think could be revisited?

Prof. Stuart Farson: The central issue talks to something the minister said, that this is the British model. The bill was actually introduced pretty much in 2005, and that was, at the time, the British model. But the British have moved to a different form of legislation. As of 2013, and this is the central point, it is a committee of Parliament, albeit one established by statute.

I think that is an important, crucially important, thing to take into consideration. Why? Because, as I think Dominic Grieve has said publicly, one of the problems that existed with the old British system was that it didn't provide trust. It didn't provide trust between the committee and the public. More importantly, it didn't provide trust between the intelligence and security committee and the select committees of the British Parliament with overlapping responsibilities.

That's my central concern about it.

Mr. Marco Mendicino: If I understand you correctly, you're saying that the committee created by Bill C-22, which is not a committee that would report to Parliament but instead the Prime Minister, should in fact report to the House. Would that be your recommendation?

Prof. Stuart Farson: Absolutely. Why? There are two quintessential functions that Parliament provides that no other element of our system of government does—that is, the estimates, the passing of public funds to the workings of organizations; and the review of legislation and the introduction or adoption of new legislation. How can Parliament as a whole fulfill those functions if it's a committee of parliamentarians? I don't believe it can.

● (1425)

Mr. Marco Mendicino: Is one potential address to your concern that this committee will have the obligation to file at least one report per year, which will be submitted to the House, and outline any concerns it may have in its oversight function?

Prof. Stuart Farson: I don't think one report a year cuts it.

Mr. Marco Mendicino: That's just the minimum. I think the minister has said on more than one occasion that if it deemed necessary, it could report more frequently than that.

Prof. Stuart Farson: I think if you look at the system we have in place, "when" oversight bodies report is a crucial consideration. Take SIRC reports, for example. They actually come to the House six months after the last year. We could be talking about, in that report, something that happened 17 months or 18 months prior to that. By this time, any concerns have probably been in the public domain and have been resolved.

So the "when" is crucial.

Mr. Marco Mendicino: Let me take you to the second point, the broad beam in your remarks, which was how you go about learning about national security, and I appreciate that you put a lot of your life's work into it. You said we should study the recommendations from past inquiries.

Do you have any recommendations in particular that you think we should be looking at?

Prof. Stuart Farson: I think the Arar commission inquiry talked about the way in which oversight bodies talk to each other. It also talked about the need for additional review bodies. One of the questions I think you need to address is whether you go with what some people have called a "super SIRC" or with alternative and specific bodies that cover particular institutions. My preference is the latter. I think one needs to address the effectiveness of SIRC.

One of the things that came out of—and it's been a long-standing concern of mine—the five-year review process, was that we found that SIRC's basic investitures and reporting processes didn't satisfy basic standards. It wasn't adequate. There is a need, I think, to learn from past experience, to learn from comparative experience.

Mr. Marco Mendicino: Do you have any other recommendations that you want to quickly turn our attention to? You have about 15 seconds.

Prof. Stuart Farson: Yes, I'd like to suggest that there should be an ability of Parliament to ask for things to happen, i.e., to ask the Auditor General to carry out certain types of reviews.

The last one on accountability of intelligence and security organizations was done in 1996. It came as the result of discussions between the special committee and the Auditor General's staff. It took from 1990 to 1996 to actually get done. It had to be negotiated.

The Chair: Thank you very much.

We'll continue with Mr. Miller for seven minutes.

Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC): Thank you, Mr. Chair.

Mr. Farson, thank you very much for your testimony and presentation today. There's a whole bunch of areas here that I'd like to touch on, based on your comments. I'm not likely to have enough time.

One thing you mentioned was that the green paper was inadequate. You mentioned the threat of terrorism, but you seemed to imply that it was the only thing really mentioned in there. I'm not sure I agree with that. Maybe I was misunderstanding what it was saying. Could you expand on that?

Prof. Stuart Farson: It's not the only one, but it's the central emphasis. Reform of national security organizations happens very infrequently. Recommendations, in my experience, take a long time to surface. What I'm saying is that you need to be very careful in looking at this issue more broadly at this time, because there won't probably be another opportunity for several years.

● (1430)

Mr. Larry Miller: Sure.

I think I know where you're going on that. I think it's probably fair to say, Mr. Farson, and you may agree with me or not, that when most Canadians think of a threat out there to public safety and security, terrorism is top of mind. Would you agree with that?

Prof. Stuart Farson: I think that's the case. What is the purpose of terrorism? It it to make the public afraid. In that, Daesh has been effective.

Mr. Larry Miller: Certainly.

To move on to another one, you mentioned the protection of rights and freedoms, etc. Could you expand again on exactly where you were going with that comment?

Prof. Stuart Farson: In what sense?

Mr. Larry Miller: You mentioned that you wanted to make sure that rights and freedoms were protected. At least, I was sure that's what you said.

Prof. Stuart Farson: I'm trying to suggest that's a function of Parliament, to look out for Canadians' interests in that area. It's a shared responsibility with a lot of other elements of our government system, but it's a primary one for Parliament to do.

Mr. Larry Miller: Okay. I presume, although one should never presume, that you also meant privacy and what have you. In today's world we live in a different climate, with terrorism and other threats, than we did even 10 years ago. Should it be an expectation that Canadians or the public may have to accept small sacrifices to privacy in order to protect the greater freedom? What are your thoughts on that?

Prof. Stuart Farson: Let me put my view on the table here. I'm one of those people who believe that, providing government can make a case for powers and puts in place a robust and effective oversight system, that's fine. I want a security and intelligence system that is effective, and that is one of the functions of oversight. There are benefits—I was going to argue in the paper—of oversight, even for the national security organizations themselves.

Mr. Larry Miller: Sure, and I agree with you on that oversight.

You mentioned that C-22 should be amended. This is something that some of us have brought up before. It's been mentioned, as you did again, that C-22 is modelled after the British model. The one thing that hasn't come out is that the British model was amended, big time, in 2013.

Prof. Stuart Farson: Absolutely.

Mr. Larry Miller: I take it from your comments that you would agree that we shouldn't be reinventing the wheel on this. We should learn from other countries in cases like this. Is that correct?

Prof. Stuart Farson: Absolutely. You can also learn from their techniques. I think you can draw on American experiences particularly, on just the techniques that Congress uses.

Mr. Larry Miller: Okay.

You talked again about the committee reporting to Parliament and not to the Prime Minister. Again, that comes under the checks and balances, in my opinion. From your comments, it seems that you'd agree that it's just another one of those checks and balances that you cannot put too much power in one place. In terms of reporting back to Parliament, at the end of the day somebody has to make a final decision and I understand that is with the Prime Minister, but to report there and not to Parliament.... Other than what you mentioned, what other negativities could come out of having that approach?

Prof. Stuart Farson: By reporting to Parliament...?

Mr. Larry Miller: By not reporting to Parliament.

● (1435)

Prof. Stuart Farson: As I have said, I don't think Parliament can do its proper job when it comes to estimates and new legislation because it's absolutely crucial that you have the capacity to go into the tent in order to ask the right questions.

Mr. Larry Miller: Back at the start, you mentioned C-51, and you mentioned shortly after that things that you thought were missing from the framework. One of the things that you talked about was the military forces, and you did mention the Afghan prisoners thing. I'd like you to expand a little more on that.

Prof. Stuart Farson: There are lots of other parts of the framework. National Defence is one, not only in terms of Canada's forces but also in terms of the analytical capabilities that it has in the intelligence area, in addition to the Communications Security Establishment, which falls under the remittance of that minister.

Mr. Larry Miller: Staying with the military, you mentioned the Afghan situation. Are there other specific examples in the past that maybe wouldn't have happened or shouldn't have happened if a proper framework had been in place, military-wise?

Prof. Stuart Farson: Let me answer it in a slightly different way.

Within the last decade, there was a defence review of the intelligence sector. I don't think many people heard about that. What did it recommend? How did it change? It could have been, perhaps, made more effective. Given that the Canadian government is now pondering going into Africa, how good is that assessment area in Defence to prepare for the concerns that commanders might have in the field?

The Chair: I need you to end there.

[*Translation*]

We now continue with Mr. Dubé.

Mr. Matthew Dubé (Beloeil—Chambly, NDP): Thank you, Mr. Chair.

[*English*]

Mr. Farson, thanks for being here. I have a few questions. I don't want to get lost in the weeds on Bill C-22 because we will, as was mentioned, have the chance to study it at committee. Since it was brought up, there are a few points. There are some things we brought up as amendments that should be seen, and I perhaps wouldn't mind hearing your thoughts on those.

For example, there is election of the chair, which is something the British model does that the current legislation doesn't provide for. There's the question of oversight versus review. I'd also like to hear from you about it, because you did mention briefly the issue of SIRC when it comes to the fact that it's a review and not actual oversight. It's a very important distinction that doesn't come up often enough. The other thing is that the executive's discretionary power over what the committee actually gets to see has been a huge concern we have as well. I'd just start off on those three points and hear your thoughts on them.

Prof. Stuart Farson: If you have a committee that looks into this area of governance, I would hope that all political parties could agree on what our national interests are and what needs to be put in place. Is it necessary to have a chair? Could you survive with co-chairs and an equal balance between parties in opposition? Perhaps that sort of approach might be another way of looking at it.

In terms of the difference between review and oversight, traditionally we've looked at the whole bailiwick of oversight in terms of after-the-fact review. This isn't the way it actually happens. If you're looking for something, on the estimates, for example, you need to know what it's going to be used for so you need a form of scrutiny that actually informs you about that future event. If you're putting in place military equipment, for example, you need to know what the costs are ahead of time, and whether it's the best option.

You have one of the innovations of the last government, which was to introduce the parliamentary budget officer. I think that was a very promising development. There are avenues that do need to be done first or ahead of time, as well as after the fact.

● (1440)

Mr. Matthew Dubé: I appreciate that. Like I said, I'll get off Bill C-22. There's a lot more to be said, but we'll have that opportunity when we study the bill.

You talked about the wider array of departments when it comes to the green paper and the review that needs to happen of the national security framework. There's a very specific story that comes to mind that's come out in the last couple of week of information sharing under Bill C-51 with consular affairs, for example, and the risk that runs of creating another situation like we saw with Maher Arar.

I'm just wondering, because you mentioned the foreign policy implications, if perhaps you could elaborate on that and some of the concerns there are even within Bill C-51 that the legal dispositions that exist here at home aren't the same as what happens abroad when information sharing happens.

Prof. Stuart Farson: One reason that I think you need to look at the issue more broadly is that there are a lot of issues that perhaps aren't in the public forum right now. If you've been noticing the activities of Mr. Putin in recent years, they give cause for concern. Is he serious in what he wants to do and what he has done? What are his intentions? These are the sorts of issues for which one wants to know whether we have a competent intelligence community operating on our behalf.

Just by way of raising a problem, which comes back to my issue of learning, is that if you look at the intelligence and security area and the way it's presented in the media, it tends to be about what went wrong. There's good reason for that. It's because you can't tell publicly what your successes are. We have had successes, and they are on the record if you want to look hard enough for them.

Mr. Matthew Dubé: If I may, because my time is running low, I appreciate the answer but perhaps I didn't ask the question the right way. I'm wondering, just when it comes to Canadians, because that's the big issue, especially when you're talking about the example I used of consular services and so forth.... How we relate to foreign entities is important when it comes to intelligence sharing and so on, but when we look at the door that's been opened to the use of information obtained under torture, things like that, in terms of protecting Canadians' rights, is it something missing from the green paper that certainly should be more prominent?

Prof. Stuart Farson: I think it has been front and centre in Canada for a long time. I mentioned the inquiry the MPCC did. That was a decade ago.

Mr. Matthew Dubé: You also mentioned, though, how a lot of those things end up gathering dust on the shelves and being forgotten in the annals of history.

Staying on the green paper for a minute, the other question is the issue of privacy rights. The Privacy Commissioner has brought up some criticisms of that not having enough of a prominent role. We focus on the national security issues, and those are important. Fair enough. Once again, coming back to the protection of Canadians and their rights, is that something you would agree with? Perhaps you could comment further.

Prof. Stuart Farson: Absolutely, our privacy rights need to be considered. Again, what I was trying to do was open up the discussion beyond what is already present. The people who will be following me will be talking specifically about some of the nitty-gritty of the privacy issues.

Mr. Matthew Dubé: When you mention the effectiveness of SIRC, do you have any other points to raise, or is that solely related to the six-month, which ends up turning into an 18-month, after-the-fact delay? Are there other points worth mentioning?

Prof. Stuart Farson: If you look at the balance of oversight over the last decade, you will see that there are definite pluses and minuses. On the one hand, you could say the Conservative government introduced a number of important measures. It started with the Federal Accountability Act and the things that flowed from that. One that really hasn't been followed and analyzed is departmental auditors, the new forms of committees that came out.

Another is the change that went on within the RCMP public complaints system to allow that body to conduct reviews of all areas of policing in the country. When I last talked with them, in May, they intended to analyze the degree to which the RCMP had taken up the recommendations of the O'Connor commission.

● (1445)

The Chair: I'm afraid I'll have to interrupt you there.

We'll continue with Ms. Damoff, for seven minutes, please.

Ms. Pam Damoff (Oakville North—Burlington, Lib.): Thank you very much.

Thank you very much for your insight and the information you have given us thus far.

One of the things you started out with was the scope of what the national security framework entails. As the chair mentioned, we are not just looking at the green paper, but it's much broader. You also mentioned the difficulty of getting up to speed in gathering all the information.

Do you have a short version of how this committee can best take all of your concerns into account, both the breadth of the study and getting up to speed on the issues?

Prof. Stuart Farson: I think it depends on the types of activities you are going to perform.

Ms. Pam Damoff: We have been given a really broad mandate.

Prof. Stuart Farson: Yes, but I'm talking about the techniques.

Ms. Pam Damoff: Okay.

Prof. Stuart Farson: One of the things we did when the special committee that reviewed the CSIS Act came into being was to decide on the sorts of approaches we would take. I have to say my committee chair was very influential on two points.

One, he had just done two previous statutory reviews, so he was experienced in understanding the difficulties Parliament has in getting information from the executive branch. That was one.

Two, he was very protective indeed of parliamentary privileges. I'll give you an example. One of the issues that came up during this process was how warrants get approved by the Federal Court. When I suggested to the chair that we needed to do this and that we should have judges from the Federal Court appear on a committee, he said, "Oh, no. You can't possibly do that. It might establish a precedent. What would happen if they didn't come?"

It really depends on technique. What were the techniques we used that were different from what I think Parliament uses today? Well, our staff worked to do interviews behind the scenes. Every time we had a witness, we asked to follow up with written questions.

Ms. Pam Damoff: I'm going to cut you off because I have limited time. Could you provide me with some written comments on that?

Prof. Stuart Farson: I'd be happy to do that.

Ms. Pam Damoff: I know you've done a lot of writing on the various inquiries that we've had in the past. I want to read you a quote from the Supreme Court of Canada on Air India where it says:

> The danger in the "war on terrorism" lies not only in the actual damage the terrorists can do to us but what we can do to our own legal and political institutions by way of shock, anger, anticipation, opportunism or overreaction.

I'm wondering if you can perhaps provide us with some insights you've had from previous inquiries, taking just a few minutes. Could you provide something in writing, not lengthy because I know your time is very valuable as well, but I'm sure you have a lot of insight that you could provide to us on what has been learned from some of these previous inquiries.

Prof. Stuart Farson: Perhaps I could here and now say something about Air India. This inquiry was 20 years too late. Why was it too late and what were the obstructions that were put in place at the time?

We now know from Ron Atkey, who was chair of SIRC, that he was persuaded not to conduct an inquiry, or his committee would not do an inquiry. The parliamentary committee that I served was talked out of it as well, so there is the possibility of obstruction in this process.

If you look at the Americans and the way they looked at a terrorist attack, or Pan Am, a few years later, they conducted an inquiry, albeit it had to do with policy. It wasn't to do with the criminal investigation. In fact, it steered well clear of that. It examined the policy issues involved and made recommendations on the type of security that should be put in place. We could have done that a long time before we got around to it.

● (1450)

Ms. Pam Damoff: But we did do it.

Prof. Stuart Farson: We did do it, but as I said, it was 20 years too late.

Ms. Pam Damoff: You mentioned that the focus is on terror and not other threats such as climate change. There's certainly a correlation between climate change and terrorism as well.

Prof. Stuart Farson: Absolutely.

Ms. Pam Damoff: Are there any others besides climate change? What others are missing from the list?

Prof. Stuart Farson: There are the sorts of threats that CSIS itself looks at. Section 2 of the CSIS Act has four components to it. All those things need to be considered, and I think that one of the things....

Let me talk about the RCMP for the moment. If you look at the activities that the security element at the RCMP has done and what impact it has had, I'd point to two things.

In 2009, which is the last time I attended a briefing from the RCMP, Commissioner Paulson was then in charge of that branch of the RCMP. He clearly indicated that his resources were all taken up on national security investigations. You have this issue. What about all the FINTRAC inquiries that might have come down? There's this focus, and this is what I was trying to indicate with the broader look. It has implications when you put all your money, or so it seems, on terrorism. You've seen more recently the RCMP saying it has moved, it is not prosecuting, or it doesn't have enough investigators on the criminal side.

It has consequences.

The Chair: Thank you, Ms. Damoff.

We'll go to Ms. Watts for a five-minute round.

Ms. Dianne L. Watts (South Surrey—White Rock, CPC): Thank you very much.

I appreciate your being here, and the amount of research and work that Simon Fraser has done over the years on all these issues, such as cybersecurity, and the list goes on and on. I know you bring a great wealth of information.

I want to touch on a couple of things. You mentioned two things. Number one was making the case for additional powers and ensuring that oversight systems are in place.

I think the world has changed. We've seen the bombings in France and we're looking at what Putin is doing right now, and of course we can't forget about North Korea. It's very fluid. Things change from one day to the next. I hear about the length of time—whether it's an inquiry that's 20 years or all of these things—it takes to respond in a fashion that will really address these threats, and this is just one of the many threats, because we haven't even gotten into the cybersecurity piece of it. You have to be nimble in how you respond. We have never faced this before. It would seem to me that trying to make the case to the general public and to Parliament, and to all the rest of it, is going to take some time. You're not nimble, you're not fluid, and you're not addressing the issue in a timely fashion.

What would you say about that aspect of it?

● (1455)

Prof. Stuart Farson: I don't have all the answers. I'm sorry.

I think that maybe you need to divide the work up a bit more than we do in Parliament.

Ms. Dianne L. Watts: Unfortunately, we live in a political environment in the House of Commons. When you're saying things get in the way because one government comes in and they've done some good things and maybe some not so good things, and then it gets.... There's this back and forth that goes on. It doesn't really add to a good framework for oversight in dealing with these issues when things are changing all the time.

I understand that you don't have all the answers. I think step one is putting the oversight system in place. You're not changing the goalposts if that can be put in place in a measured way. If you go back to when it was changed in 2013, then having a standing committee of Parliament that reports to the House is something we should really be taking a look at. When bringing all the organizations together—and you'll know the systems and how entrenched they are—it's quite a daunting task.

How do you see that piece? If you have the oversight aspect of it as that gets fleshed out, how do you see all these agencies flowing into that oversight?

Prof. Stuart Farson: If you have individual agencies—and we have a number of them that are important, particularly within the Department of Public Safety—they need to be able to communicate what their findings are. They need to be able to do dual investigations where necessary. They need to inform whatever that parliamentary element is, so that Parliament has that capacity to see what the oversight bodies do and how competent they are. There needs to be also some capability to, as I've suggested, ask the Auditor General to do certain types of value for money audits. You need to have that capacity to ask the parliamentary budget officer to do certain types of things. You need to be able to ask and expect the Privacy Commissioner and the Information Commissioner to do certain things that relate specifically to the national security area.

The Chair: I'm afraid we need to end there. Five minutes is short.

Ms. Damoff.

Ms. Pam Damoff: Thank you.

Getting back to oversight, one of the recommendations from the Air India inquiry was a national security adviser. I just wondered what your thoughts are on that.

Prof. Stuart Farson: You should ask Reg Whitaker when he comes because he worked more intimately on it than I did; I was only an expert witness to that commission. The national security adviser essentially replaced a body that was responsible for the security and defence policy, as I understand it. It came under a number of different names. What the national security adviser was meant to do, at least in my understanding, or what I would have recommended, was to be a bridge between the assessment of intelligence and the Prime Minister, so that he was on a regular basis informed on what—

Ms. Pam Damoff: He or she.

Prof. Stuart Farson: —he or she needed to know.

Ms. Pam Damoff: You said that the Canadian public has not been so interested in security since the McDonald commission, and I'm just wondering why.

Prof. Stuart Farson: No, I didn't say that. What I said was that they hadn't been as interested to the same degree about their concerns over civil liberties.

● (1500)

Ms. Pam Damoff: Okay. Well, that's what I was going to ask you. Why do you think that is?

Prof. Stuart Farson: The issues that came up in the nineties, for example, I don't think were a major concern. It wasn't until after 9/11 that you started to see concerns emerging. It's not really until after 9/11 that you see technological innovation impacting on privacy in any way.

Ms. Pam Damoff: But it was a concern in the nineties, though. You said we had the concern in the nineties, and then we got—

Prof. Stuart Farson: No, I'm saying that we had, at the time of McDonald, which is from the seventies and early eighties, this concern about civil liberties. I was asking Micheal Vonn about this, whether she thought my interpretation was correct. That's another question I think you could ask her.

Ms. Pam Damoff: All right, thank you.

Do you have any comments on how we incorporate first nations into the whole security framework?

Prof. Stuart Farson: They do intrude from time to time. Certainly they have done it with various elements of first nations, in Quebec, for example. The first nations are concerned about things that impinge on their claimed property, and they have been concerned when things like pipelines, etc., have been a topic that they seem to be losing out on, or on environmental issues more broadly. There is a real concern there and that is something that needs to be considered.

Ms. Pam Damoff: Thank you.

The Chair: I think we'll end there, and then we can have a full second panel.

Thank you very much, Professor. Thank you for your public service up until this point, and in the future.

We're going to take a few minutes to bring our next guests in. We'll just take a two-minute break.

● (1500)

(Pause)

● (1505)

The Chair: Thank you.

We'll continue our second panel. We have two guests with us. We're going to begin with Micheal Vonn from the B.C. Civil Liberties Association and then go to Mr. Whitaker, a professor at the University of Victoria and also with York.

Ms. Vonn.

Ms. Micheal Vonn (Policy Director, British Columbia Civil Liberties Association): Thank you for this invitation.

The BCCLA is on record as calling for the complete repeal of Bill C-51 and we have views on almost every aspect of the national security framework, which I would be very pleased to share with you. However, for the duration of my prepared remarks, I wish to make a substantive contribution to your deliberations on a topic that is receiving surprisingly little airtime given it's importance, and that is the new Security of Canada Information Sharing Act.

The unprecedented expansion of the surveillance powers in this act, along with the controversial new CSIS threat disruption powers, were the main points of opposition heard by the thousands of citizens who took to the streets to protest the introduction of Bill C-51. My discussion on the Security of Canada Information Sharing Act will focus on our new understanding of what is happening with the collection of datasets of personal information in the security intelligence realm.

If time permits, or perhaps during questions, I would be very pleased to unpack the ramifications of the act in further detail, including how it intersects with issues of profiling, but it is critical, in our view, that we first squarely set this discussion within the recent findings of unlawful data collection within the Five Eyes.

You will doubtless have seen today's headlines from the U.K. that the investigatory powers tribunal has ruled that British security agencies have secretly and unlawfully collected massive volumes of personal data in breach of article 8 of the European Convention on Human Rights, and that this unlawful activity has been going on for years and years.

The illegal data holdings include bulk personal datasets, which might include medical and tax records, individual biographical details, commercial and financial details, communications, and travel data. The ruling confirms that for over a decade U.K. security services unlawfully concealed both the extent of their surveillance capacities and the fact that innocent people across the country had been spied upon. This is an eerie echo of what we here in Canada learned only a few weeks ago about our own comparable intelligence data holdings.

Granted, unlike the situation in the U.K., it was not front page news. The media coverage of SIRC's just-released annual report focused on the review of the new threat disruption powers, which is, by no means, a surprise. However, largely unexplored in the public discourse was the report of SIRC's first-ever examination into CSIS data acquisition programs, including bulk datasets, and that report was an extremely damning one, very much in keeping with the situation that was recently disclosed in the U.K.

SIRC advises that within CSIS's own data classifications there are two types of datasets. The first type they refer to as “referential”, which, on the argument that they are openly sourced and publicly available, CSIS says are not collected under the authority of section 12 of the CSIS Act and therefore have to meet no standard of collection. SIRC does not comment on the legal interpretation that underpins this theory of collection that is not collection.

The second type of dataset is the “unreferential” datasets, which CSIS does consider to be collected under the authority of the CSIS Act and must, therefore, meet the collection threshold of being strictly necessary. Despite its characteristic calm and measured tones, what SIRC has to report in this matter is extremely alarming. The bottom line is this. SIRC does not agree that all of the publicly available, openly sourced data is in fact publicly available and openly sourced, so there are definitely red flags in that category. Even more troubling, however, as regards the datasets that clearly fall under the requirement for strict necessity, “SIRC found no evidence to indicate that CSIS had appropriately considered the threshold as required in the CSIS Act.”

● (1510)

It found no evidence of appropriate consideration of the applicable legal standard to bulk data collection of Canadians' private information. It is simply impossible to read this as indicating anything other than contempt for the need to abide by the applicable laws in this arena. This is so serious a matter that SIRC called for the immediate halt to the acquisition of bulk datasets until there can be a system to confirm compliance with the law. This, then, is the situation, one completely unmoored from the legal requirements in the CSIS Act, to which we add the near free-for-all of the information sharing act's powers.

You will recall that the Security of Canada Information Sharing Act applies to national security concerns defined so broadly that the definition has never before been seen in Canadian law. It constitutes a bar so low that there is hardly anything that cannot be argued to be within its purview. It spans far beyond public safety into ordinary public life, encompassing everything from the administration of justice to the country's economic or financial well-being.

There's no need, under the legislation, for individualized suspicion as the basis for individual information sharing, and indeed no impediment to entire databases of personal information being disclosed on the grounds that they may be relevant to an institution's mandate to detect, identify, analyze, prevent, investigate, or disrupt an activity that undermines the security of Canada—again, as defined so broadly in the act as to encompass huge swaths of ordinary public life. It is difficult to imagine a database held by a federal agency that couldn't be argued for on such grounds. Perhaps it was thought that a possible mechanism to prevent the obvious threat of inappropriate data disclosure might be, by virtue of the CSIS Act, that CSIS would be unable to collect, retain, or use such vast categories of Canadians' private information because they would not fall under the legal standard that CSIS is to apply to its data holdings. However, we have just been told, in no uncertain terms, that those legal standards are being ignored. It is anyone's guess for how long that situation has existed. As I say, this is SIRC's first-ever review of these data holdings.

Further, we need to keep alive to the fact that there was never a compelling case for the legislation in the first place. In their recent response to the government's green paper, Professors Roach and Forcese cite a CSIS briefing note of 2014 that sets out some concerns about the lack of clarity with respect to information sharing for national security purposes. The briefing note did not call for the wholesale revisioning of information sharing to address this concern about clarity but rather suggested, “With appropriate direction and framework in place, significant improvements are possible to encourage information sharing for national security purposes, on the basis [of] existing legislative authorities.”

Instead of the careful and measured approach called for, legislation of monumental overbreadth was enacted, which compounded the lack of clarity and paved the way for a massive increase in already illegal data holdings by security intelligence. Ordinary citizens thus have every justification for concern that their personal information can be disclosed under the vast sweep of the act, which the Privacy Commissioner of Canada confirms is unprecedented. Meanwhile, the security benefits of this approach are, at best, entirely speculative and infinitely more likely to actually undermine rather than enhance effectiveness. The act is so far from hitting the mark of what is needful for national security that, as Roach and Forcese note, “The Act allows the government to share just about everything while it rejects the Air India commission’s recommendation that CSIS must share intelligence about terrorist offences, if not to the police than to someone who is in charge and who can take responsibility for the proper use of the information.”

● (1515)

It was ill advised when it was introduced, and it is even more so now that we have some insight into the shocking state of the current data holdings. The act should be repealed and replaced with the careful, measured approach that was called for in the first place to ensure that needed information sharing for national security purposes can occur within appropriate and meaningful protections for lawful Canadians' personal information. Thank you very much.

The Chair: Thank you very much.

We'll continue with Mr. Whitaker.

Professor Reg Whitaker (Professor, Department of Political Science, University of Victoria and Distinguished Research Professor (Emeritus), York University, As an Individual): I would certainly like to add my voice to applauding the initiative of opening up national security to wider public participation as with these committee hearings. It's certainly a contrast to the way in which Bill C-51 was carried through the last Parliament. A better-educated public is crucial to democratic decision-making, as is the enhanced role of Parliament as we see put forward in Bill C-22.

However, public consultation can be diffuse and unfocused, while the key agencies of government have their own sharply focused agendas, which are relentlessly pressed on governments of any political stripe. I see already evidence in the green paper and in Bill C-22 of this process at work. The agencies are acting as a kind of heavy anchor pulling in one direction, while counter-pressures from outside are much weaker.

I'm not saying there's anything inherently nefarious in this kind of bureaucratic behaviour. I'm assuming that the bureaucrats are trying to do the job they're assigned to the best of their abilities, but on the issue of the powers that they are granted and the protections in terms of privilege and secrecy for their operations, there is a clear public interest in limiting the agencies' capacity to act without accountability to the public and to Parliament, and as well, in limiting the scope of their powers to conform to the rule of law.

The agencies certainly have legitimate concerns about reforms. I think there have been some unrealistic concepts of accountability and oversight that have been put out there, such as the idea that there should be oversight of ongoing operations in real time, whether by a parliamentary committee or whatever, which would be unworkable and undesirable. However, the provision of extraordinary and unreasonable powers, even though the agencies have no apparent intention of actually using them at this time but might prefer to keep them in the back drawer, as it were, just in case, should not be tolerated, nor should excessive limitations on external oversight review just to make the bureaucrats' lives a little easier.

In the interest of time, I want to focus my remarks on one section of Bill C-51, what I consider to be the very worst part of what I would say is a very bad piece of legislation, generally badly conceived, badly drafted, and potentially pernicious in effect. I'm referring to the threat reduction or disruption powers awarded CSIS and the special warrants CSIS might seek for judicial authorization to break the law and violate charter rights. I will also try to touch on the closely related issue of the secret intelligence public evidence problem.

What is wrong with CSIS threat reduction powers? Well, I think, everything, literally. As someone who has co-authored a history of the security service from its late 19th century origins to its present post-9/11 era, from the RCMP to its present incarnation as CSIS, I would say unequivocally that threat reduction in Bill C-51 is dangerous to civil liberties and the rule of law, certainly, but it also threatens to undermine security and effective counter-terrorist law enforcement.

CSIS is a security intelligence agency empowered to collect intelligence on threats to security and advise governments. The RCMP, of course, is the law enforcement agency on national security matters. The security service was taken away from the RCMP in 1984 after the McDonald commission for good reason: the illegal activities in the 1970s, mainly in Quebec against Quebec separatists but also against various left-wing organizations in the rest of the country.

Violations of laws without accountability, no clear lines between violent versus legitimate political groups, the question of control by elected governments, and so on, was precisely what the McDonald commission reacted against, and CSIS was created apart from the RCMP, with no law enforcement powers and a mandate spelling out what it was authorized to do and what it was not authorized to do. All those things flowed from McDonald and we're seeing it threatened with a return back to that era, that scandal-filled era again.

● (1520)

I'll just skip over some of the credits and try to focus on each of the problems with this.

First of all, the special warrants allow law-breaking and charter violations, short only of murder, torture, and rape, to be authorized by a judge. They are not surveillance warrants, which are in effect judicial certifications that these acts are within the law and abide by the charter. Instead, they ask judges to enable law-breaking and unconstitutional acts. This is a radical revision of the role of the judiciary from protectors of the law and constitution to enablers of violations. This is a shocking assault on the rule of law and the independence of the judiciary, now turned into a tool of the executive. I expect most judges, if not all, would be quite appalled by this prospect.

The next point is that the warrant application is entirely secret, with no specified follow-up for the judge granting the warrant to determine if it has been carried out as promised, or what the results are. No reporting is required of warrants granted or turned down—no accountability of any kind.

The decision to seek a warrant—and this is an important point—is at the discretion of CSIS. If they decide that a disruption activity does not require a warrant, there appears to be no fallback accountability as to whether that decision is justified. That is unacceptable.

These threat reduction measures could involve detention, if you read this very carefully—not arrest but detention—and they could involve extraordinary rendition on the international stage. Of course, in the latter case, we could see the potential for somebody who is a Canadian perhaps being rendered to a country where torture is routinely practised.

All of these issues that I've been talking about are problems regarding the rule of law and the rights of citizens, and so on. However, it's also very important to realize that CSIS threat reduction efforts could impede rather than facilitate counterterrorism. This recreates the potential for conflict turf wars with the RCMP, as were tragically shown by the Air India commission. It opens up the possibility that CSIS, protecting its sources as a security and intelligence organization, could imperil convictions in court, and there's the distinct possibility that these activities could contaminate the evidentiary trail.

This brings us to the intelligence evidence conflict that the Air India commission addressed, in which the government did not take up any of the recommendations of the commission to deal with this problem. I can't go into this at any length, and certainly it's a topic best undertaken by lawyers, except to note that threat reduction or disruption activities can be useful, certainly. I'm not making the point that they should never be used. They can be very useful in counterterrorism, so long as they are undertaken with the goal always in mind of securing criminal convictions and putting dangerous terrorists behind bars.

The RCMP already does this, both in its criminal and national security investigations, if you look, for example, at the Toronto 18 case. CSIS does disruption as well, under pre-Bill C-51 law, and that's fine. I don't have any problem with that, so long as it does not interfere with the criminal law process and is rather supportive of the criminal law process.

A general point that I would like to make is that unlike the old Cold War era, the era of terrorism is one in which, given that the terrorist threat is against civilians, ordinary people, the priority must always be given to law enforcement and criminal convictions. CSIS has a role to play, but the notion that they have this role of slowly building a long-term picture of these networks like the old KGB in the Cold War has to be subordinated to law enforcement. The threat reduction powers and special warrants radically undermine this.

● (1525)

The last thing I want to say is that CSIS says it has not applied for any of these special warrants, and that presumably everything it has carried out, we can assume, has not required that kind of special warrant power, like the powers of preventive detention and investigative hearings in the 2001 Anti-terrorism Act, which were so controversial that time limits were put on them. They were actually allowed to lapse at one point and then were reinstituted by the former government, yet in all that process, they've never been used.

Are we seeing a repeat of the same kind of phenomenon?

In both cases, if they have never been used, why exactly are they needed? In the case of the threat reduction powers, perhaps CSIS had these foisted on them unwillingly by the government. In that case, then, we really ought to get rid of them. Or it may be another example of the unending pressure on governments to keep up powers that they might need “just in case”. That's a very bad case for keeping a bad law on the books to be potentially abused by less responsible people in the future.

● (1530)

The Chair: I'm going to need you to wrap up in about 20 seconds.

Prof. Reg Whitaker: My preference certainly would be that the entire section of Bill C-51 that deals with threat reduction powers be eliminated in its entirety.

The Chair: Thank you.

I should remind all witnesses that anything you want to submit in writing to the committee is always welcome. It will go into our deliberations.

Mr. Mendicino.

Mr. Marco Mendicino: Thank you, Mr. Chair.

Thanks to both of you for your testimony this afternoon.

You mentioned, Mr. Whitaker, the Toronto 18 case. I had the privilege of serving as prosecutor on that case, so I have some first-hand knowledge about some of the challenges the crown faced in taking on what at the time was I think the first post-9/11 domestic terrorism prosecution, or in any event, one of the first.

I want to focus on something you said, which is that you recognize that threat reduction can be useful so long as those measures will lead to criminal convictions. I'm wondering if you can elaborate on why it is you think that CSIS, in an era where threats are different than they were at the time of the McDonald commission, over time has not developed the skills and perhaps the aptitude to reduce threats in a way that takes into account the balance that is at the core of this discussion, namely, how to protect Canadians while at the same time safeguarding their individual liberties and their rights.

Prof. Reg Whitaker: It's a very complicated question, and I'm not a lawyer. I know that, for example, there's this kind of two-court system with regard to evidence and intelligence. You have one court hearing a case and then potentially another court determining whether non-disclosure can be imposed on certain evidence in there. That has not worked perhaps as well as it might have.

Mr. Marco Mendicino: Let me stop you right there, because that has to do more with how the prosecution can bifurcate when there may be a question involving privilege of national security. I appreciate that at times it can lead and has led to delay.

What I wanted you to talk a bit about was why you think CSIS, in collecting information that is useful to Parliament in understanding what threats to national security exist, has not over time developed the skills to reduce threats through interventions that may not require a full-blown conventional criminal investigation and prosecution.

Prof. Reg Whitaker: I'm not saying that they haven't, and I'm not privy to all the details of the various cases that would have arisen. My concern is not that CSIS, as they develop sources and penetrate different terrorist groups, may from time to time seize the opportunity to disrupt, which is in the public interest so long as it's not law-breaking or violating charter rights.

There's no problem with that except that we should always be keeping in mind that the goal with terrorist cases is to bring criminal convictions, and that real problems can come up with CSIS secret intelligence and CSIS activities in disruption, which may impede the effectiveness of achieving that.

● (1535)

Mr. Marco Mendicino: Thank you. I want to give Ms. Vonn an opportunity to respond.

Ms. Micheal Vonn: As I was alluding to, we have a situation with the Air India commission's recommendations that there should be a requirement that CSIS report the information it has. Bill C-51 ignores that recommendation, gives sweeping generalized powers of data collection, and then creates for CSIS a separate arm of disruption powers outside the regular law, and outside of any need to do anything other than vaguely co-operate with the RCMP.

Mr. Marco Mendicino: Can I stop you there for a moment? Do you accept that those new measures were not created in a complete factual vacuum? Since the days of the McDonald commission there have been evolutions in the threats to national security, and part of that evolution has driven a revisiting of the appropriate mandate for CSIS to undertake measures within the law as it exists, but also striking the balance between protection and the safeguarding of individual liberties?

Ms. Micheal Vonn: Why are they autonomists? Why are they working outside the regular law instead of putting them under the umbrella of working co-operatively with the RCMP and potentially having those powers? The point is that if we're going to talk about effectiveness how do we put these things together? Instead it was decided to make them separate and to exacerbate the turf war that Professor Whitaker was talking about. It is a mystery to me why that was decided.

Mr. Marco Mendicino: Since the creation and the passing of Bill C-51 agreements, memoranda, have been exchanged between CSIS and the RCMP—two mandates, one vision 2.0—to enhance co-operation, and we've heard from experts who say that this co-operation is robust and it's healthy. We've also heard from some of your colleagues in the profession as well as in academia who say, as Mr. Whitaker did, that they accept that reduction measures are required in the current national security landscape.

Ms. Micheal Vonn: I'm not in a position to say that they aren't. Why are we operating in the realm of secrecy here when we could be working with the police inside the regular law instead of creating this extraordinary, and as far as I know, unprecedented-in-the-world process for warrants for illegal activity? It simply is not the model used in Britain as I understand it, although Britain is cited as the model we are emulating.

Mr. Marco Mendicino: Mr. Chair, how much time do I have?

The Chair: You have half a minute. I'll be a little tighter on this round than I was on the last round.

Mr. Marco Mendicino: Thank you, Mr. Chair, I appreciate your indulgence.

Do you have any comments with regard to the warrant provisions in particular? How those provisions potentially could be enhanced or improved?

Ms. Micheal Vonn: It's a complete legal mystery to me how those are intended to function. The government says it will operate like section 1 of the charter where in an *ex parte* application CSIS will show up and make a claim for why somebody's charter rights should be violated and the law should be broken. No one is there to make the counter-argument or to speak to the activity in any way. It is not a section 1 analysis.

The Chair: Thank you.

Mr. Miller.

Mr. Larry Miller: Thank you, Mr. Chair.

Thank you, Ms. Vonn and Mr. Whitaker, for being here.

It's pretty obvious, the disdain and dislike that both of you have for Bill C-51, but I stand by the comment that no legislation is perfect but no legislation is all bad, either. Even Bill C-22 was mentioned by a previous witness here, who made some criticism of it. That's fair enough.

What I'm trying to get my head around is that a number of so-called experts in the law enforcement field have made comments that if some parts of Bill C-51 had been in place prior to October 22, two years ago, Private Vincent and Corporal Cirillo might still be alive. Also, some of those same ones have stated that the would-be terrorist in Strathroy just a few months ago wouldn't have ended up being apprehended and stopped.

I see, Mr. Whitaker, that you shrugged your shoulders on that, as if it doesn't matter. If that's not the case, that's fine, but what I need to know is in your worlds, both of you, where and when should it not be that law enforcement powers have the right to infringe on an individual's rights if that individual has a distinct, deliberate plan to basically commit domestic terrorism or otherwise?

● (1540)

Prof. Reg Whitaker: Perhaps I can just say a couple of things. You pointed to a problem. There is a problem, clearly, with peace bonds. I think that's clear, especially given the recent case in Ontario —which was, frankly, a bit ridiculous—that somebody had been put under a peace bond and yet had clearly broken the terms of it and all the rest of it, and then was only apprehended just in the nick of time from carrying out some serious damage.

It's not to say there aren't a whole lot of things that can't be looked at. Indeed, there may be individual rights that are...and I certainly wouldn't be suggesting that.

Again, to come back, I raised the question of the preventive arrest or preventive detention and investigative hearing powers that came up in 2001, which were lapsed for a while and then were brought back. They've been on the books, off and on, since 2001, yet they've never been used.

Mr. Larry Miller: Mr. Whitaker, is it the fault of legislators that they haven't been used?

Prof. Reg Whitaker: No.

Mr. Larry Miller: Okay. What is the main reason?

Prof. Reg Whitaker: Personally, I don't have a problem. The BCCLA may not agree with this, but I don't have a problem, in Bill C-51, where they actually expanded that somewhat, and the time, and also lowered the bar a bit. I don't have a particular problem with that because it in fact involves habeas corpus and legal representation at all stages, and so on, for the individuals. But I'm still puzzled by why it's never been used.

Mr. Larry Miller: Okay, fair enough.

I'm going to run out of time, so I'd like Ms. Vonn to comment here.

Ms. Micheal Vonn: I appreciate the opportunity to comment.

If, as you've perceived, there's a disdain for Bill C-51 from our association, I would not want that in any way to translate to there being a disdain for national security. Indeed, we consider national security very seriously.

Mr. Larry Miller: I wasn't implying that, Ms. Vonn. I know you do.

Ms. Micheal Vonn: The question is, what is the exact problems and what are the appropriate tools to address them? What I had hoped to do, in concentrating in such a focused manner on the information sharing act, was to point out what CSIS had identified as the problem, what they thought was the correct catchment for addressing it, and how Bill C-51 is none of those things. Again, to be very specific—and it must be grounded in specificity—it's to say, what exactly was the information that was unable to be appropriately shared or acquired, and what would be the mechanism of achieving it, as opposed to allowing an act that simply allows for wholesale importing of whole bulk datasets of personal information that are not to any benefit in the national security realm? That's the distinction I'm looking at.

Mr. Larry Miller: I agree with you on that. I certainly do not condone law agencies or any organization not following the law or breaking the law in any way.

Having said that, a lot of Canadians have said to me and I think a lot would think in this day and age of the different world that we live in since 9/11, and the last five to 10 years has really sped up the process, if I could use that term, in that I think people in general today.... For example, I'm a very private person. I don't want my personal rights or privacy invaded in any form. However, in this different world we live in, if I'm not doing anything wrong, I don't have anything to worry about.

That's why I ask the question about under what terms or situations law agencies should have the power to step in and do what they did to stop Mr. Driver in Strathroy and other would-be terrorists, whether they are infringing on their rights or not.

● (1545)

Ms. Micheal Vonn: If I could pick up on the idea that if you're not doing anything wrong you have nothing to worry about, in fact, in the national security context, that it is absolutely untrue. The purposes of acquiring the bulk datasets that the U.K. and Canada seem very keen on acquiring are for data analytics and profiling. Profiling is exactly the sort of scenario in which you find yourself enmeshed in a national security net and you have done nothing wrong. You simply meet the profile.

We need to appropriately understand what is happening with those datasets. We have had no means of doing that so we can constrain the cases in which we are impinging on the security of individuals in the name of national security. We have mislearned all of the lessons of Arar and Iacobucci and every other inquiry that has looked at that.

The Chair: I need to end there.

Go ahead, Mr. Dubé.

[*Translation*]

Mr. Matthew Dubé: Thank you, Mr. Chair.

[*English*]

I want to continue on the topic of data because the Privacy Commissioner, at the first meeting that we had on this topic in Ottawa, talked about metadata and how the idea that data is not.... Many people perceive it as being the Nixon-esque clicking on the phone, and it's actually much broader than that. It speaks to the point you just raised about profiling and how much can actually be gleaned from the collection of metadata and, with all due respect, the public's lack of awareness of how much that actually entails and what's being collected. Could you speak to that point and how it fits in with the points you made in your presentation?

Ms. Micheal Vonn: Thank you for the question.

It was some years ago, maybe up to five years ago, at the politics of surveillance conference where I heard experts on policing in Europe say that European police were telling them that they're really uninterested in wiretaps at this moment. It might be why we've seen a decline in applications for wiretaps in Canada, simply because metadata was so much richer in terms of what it could tell them.

Metadata, again, is very attractive in a national security realm because it maps networks. Networks are what we often look to in terms of security intelligence. That's the good side for security intelligence.

The bad news is what happens when that results in the kinds of profiles that put you on, for example, the no-fly list or the slow-fly list, on the basis of evidence that you can never counter. The notion that we have access to data streams, data exhaust, data about our data, that reveals all kinds of intimate aspects of our lives that we don't even conceive of, is very much top of mind for the OPC.

Mr. Matthew Dubé: Do you in some ways view the potential problems also have to do with some of the broad definitions that Bill C-51 had that became part of the law?

When we look at activities that undermine the security of Canada, it has that very broad definition, where it could be first nations protesting a pipeline or even the idea of promoting terrorist activities, which, again, is something that's been called far too broad. Do you consider that those two things are intrinsically linked, because not only are we making that profile, but we're also doing it with very broad definitions?

Ms. Micheal Vonn: Indeed, we're doing it with unprecedentedly broad definitions, allowing us to capture data that has very little to do with terrorism.

Let me just stress. There is no evidence that the kind of profiling that we're attempting to do in the national security realm is efficacious. It doesn't work.

If I could indulge you for just 30 seconds, I will explain why it doesn't work. If you are screening for something that is so vanishingly small in any given population, you will achieve a disproportionate number of false positives or false negatives. Adding data to the pile will not make the math work. It would be like screening for breast cancer from birth. You would simply get results that are not meaningful.

This is what it is to screen for terrorist activities in a country like Canada. It does not present enough of an affluent number in order to be effectively screened for. We know this because every single study that has been done has generated the same result. It doesn't work, yet we continue to compile this information in the hopes that somehow all of this math will bring us to some level of security. What it really does is increase the potential that you are going to be caught in a net that will imperil your own security.

Mr. Matthew Dubé: Thank you for that.

Professor Whitaker, you talked about the idea that we're actually hampering, in some ways, counterterrorism efforts. There is an editorial from Messrs. Roach and Forcese in *The Globe and Mail* this morning, where they talk about this idea that this broad definition of promoting terrorism and criminalizing it can actually hamper counter-radicalization efforts. We're talking a lot about wanting to emulate a bit what's going on in Montreal, with the centre that exists there. As a New Democrat, we've called for the repeal, but we have to propose alternatives and find a solution, and that's something we've talked about.

Would you agree that by criminalizing an activity...? If the government is so keen on putting forward this centre of excellence for counter-radicalization...if anyone that you're going to be working with in there is basically thrown in jail, you're not going to be able to actually rehabilitate or prevent anything from going wrong in the future. I'm paraphrasing, and if they were here they might want to correct some of that, but is that vaguely something that you would agree with?

● (1550)

Prof. Reg Whitaker: I would. I haven't seen that particular piece yet.

I think that certainly, in general, there is a real concern that the counter-radicalization strategies.... Frankly, I certainly don't call myself an expert in this area, but I have looked at all this. I'm not sure that anybody has a really good answer here about what to do. Certainly, criminalizing, in effect, a whole range of opinions is not the way to win the trust of particular groups that you want to win the trust of. I think that it is, certainly, a real danger that it becomes a we-they phenomenon as opposed to law enforcement and security intelligence working with the responsible members of that community against the less responsible.

That is something we have to worry about.

Mr. Matthew Dubé: I'd like hear, perhaps, from both of you on my last comment, which is about the importance of dealing with information sharing with foreign entities. I feel that hasn't been spoken enough about and there have been some stories lately that have come out, some ongoing issues with regard to the ministerial directives on information obtained under torture and so forth. Is this something we need to be focusing more on, and not only with what we're doing here Canada but also with Canadians abroad?

Ms. Micheal Vonn: Absolutely. I'm very concerned about the recent analysis that shows us that CSIS is relying very heavily on assurances when it comes their calculations about responsible information sharing and the concern that they are not doing a substantive analysis of the likelihood that those assurances will be honoured.

Prof. Reg Whitaker: I was actually an adviser on the Arar commission, through Justice O'Connor, and that was a pretty vivid example of what can go terribly wrong for an innocent Canadian citizen when data is shared indiscriminately and without the kinds of controls. There is, I think, a constant pressure to push against the constraints on that information sharing. I think, in all of these things, on the one hand, clearly, connecting the dots and putting information together and so on, we saw in 9/11, that the FBI and the CIA, etc., weren't talking to one another, and that trails had stopped and so on.

Information sharing is an important tool of counterterrorism. But you have to keep your eye all the time on information sharing that is carried out without the appropriate constraint and without an appropriate sense of what is actually sensible in terms of gathering data and what will actually contribute out of that data collection to effective counterterrorism.

The Chair: Thank you.

Ms. Damoff.

Ms. Pam Damoff: Thank you both for your presentations.

Ms. Vonn, you mentioned that we need a careful, measured approach to this review that we're doing right now. Our previous witness said that doing a thorough review of the national security framework is daunting due to the breadth of the issue and also being able to gather all the information we need.

I'm wondering, do you both share that opinion?

● (1555)

Ms. Micheal Vonn: That it is daunting, I certainly do. I very much appreciate that this is a very complex field, and part of what has happened is that the field has become more complex in part because of Bill C-51, which was a radical revisioning of our national security landscape.

Ms. Pam Damoff: But we're looking at more than just Bill C-51 —

Ms. Micheal Vonn: Yes.

Ms. Pam Damoff: —and at more than just what was in the green paper that was produced.

Professor Whitaker, what are your thoughts on that?

Prof. Reg Whitaker: That's a pretty big question.

Ms. Pam Damoff: It's a pretty big issue.

Prof. Reg Whitaker: Yes, it's a pretty big issue.

I think you have to look at the bigger picture. On Bill C-51, I want to re-emphasize that my objections—and I think the objections of a lot of the critics of Bill C-51—are not just on the civil liberties, personal privacy, and all of those kinds of perfectly valid issues, but on the concern that it may actually render counterterrorism less effective. That's an important part of it.

A more holistic approach to these issues is certainly very much called for. I think it is one of the problems in the green paper that there is a bit of the continuation of the silo kind of thinking. That was what the Arar commission tried to really break out of in saying that co-operation across agencies and across boundaries and in the war on terrorism is an increasingly important aspect of how the counterterrorism is carried out and that, therefore, accountability has to be without borders as well. Also, it said that having accountability focused on the silos while the actual operations were happening on a much more integrated basis was a really bad plan. I think your committee really should be emphasizing that broader holistic approach to the problem.

Ms. Pam Damoff: One of the things I've noticed when we have witnesses is that as you're appearing we don't have the opportunity to even touch on some of the issues that are in the security framework. One of them is cybersecurity, or as it is called in the green paper "Investigative Capabilities in a Digital World".

Regardless of what we call it, in terms of getting the data that's out there, whether it's metadata, which is a term I don't like because I don't think Canadians really understand what that is.... I've heard in my work on the status of women committee about the need for basic subscriber information to be shared with the police, in that in order to investigate crime they need basic subscriber information, which they can't get now. I'm wondering what your thoughts are on sharing that data.

Ms. Micheal Vonn: It's quite unfortunate, I think, that we're having a discussion about a regular criminal law matter within the context of national security, because it does compound the complexity of our discussion vis-à-vis the green paper very extensively.

I was disappointed to see basic subscriber information reintroduced as an issue. The Spencer case at the Supreme Court of Canada told us what we need to know on this. It is critically important that we understand that this is information over which we have a reasonable expectation of privacy, and the notion that the police can't get it when they need it has been alleged for over a decade.

Privacy advocates have asked for the evidence that there is a substantive problem and have been unable to receive it—evidence that you could not get it through the appropriate channels. We hear this habitually, but again, when we ask what is the precise problem, what did it look like, did they not understand there were exigent circumstances, and how did this come about that this happened—

Ms. Pam Damoff: That's the question we should be asking them.

Ms. Micheal Vonn: You should definitely be asking for the evidence, and not anecdotal. If something needs to be addressed, we need to have an evidence-based process.

Ms. Pam Damoff: We've heard it here, and I've heard it in other places. That's why I brought it up.

When we're talking about the Privacy Commissioner and his or her ability to conduct reviews, I'm wondering if you have any proposals that would allow privacy issues to be brought into the whole framework, and in a short amount of time.

● (1600)

Ms. Micheal Vonn: I'm sorry, I'm not prepared for that question on the pop quiz.

Ms. Pam Damoff: That's fine.

Ms. Micheal Vonn: I certainly would be very happy to turn my mind to it. The problem with Bill C-51 is that the two acts are chasing each other's tails. The Privacy Commissioner says that what happens in the information sharing act falls within the purview of the Privacy Act, but the information sharing act says that if you have lawful authority for the culling of that information, you have an exemption to the Privacy Act.

The government and the OPC currently do not agree on the operation of how these two acts match. That's part of the inherent complexity of addressing this issue and why I think we need to go back to the drawing board on how to put this together. There currently is not even consensus in the government as to how it works.

Ms. Pam Damoff: Do you have any comments on that, Professor Whitaker?

Prof. Reg Whitaker: No.

Ms. Pam Damoff: Okay.

In the CSIS Act, do you think subsection 12.1(3) should be amended so that CSIS warrants can never infringe on the charter, or do you have an alternative wording that should be used in that?

Ms. Micheal Vonn: We can't recommend how those CSIS warrants should work on the basis of their flying in the face of the rule of law, asking judges to condone the breaking of the law. Certainly it could be made better with special advocates, with somebody in there to argue for rights, someone in there to counter the notion that the story CSIS is telling us is the only one. You could certainly make it better. Would that make it constitutional? I'm not prepared to give an opinion on that, at this point.

The Chair: We're actually at the end of our meeting, but I'm wondering, Ms. Watts, if you have one question that you want to ask.

Ms. Dianne L. Watts: Just one?

The Chair: We're at our time, but I'll give you a couple of minutes.

Ms. Dianne L. Watts: Okay.

Thank you for coming. I will ask one question. There's been a mandate, as we've moved forward, in terms of the expansion of information, gathering intelligence, and sharing with our allies as part of the fight against ISIS in Syria and Iraq. That was a mandate that came out. We heard it from the minister in that regard. With the expansion of information-gathering intelligence, I think in most people's minds it is crucial that we do intelligence gathering, that we do share with our allies, that we work with other agencies globally.

If we're looking to expand that, I'd be interested to hear your opinion on that.

Ms. Micheal Vonn: It's absolutely citizens' regular expectations that information that is needful will be shared for the purposes of national security. It is the expectation of no citizen I've encountered that the government will be creating large dossiers, essentially, on all law-abiding citizens to enact that trade. That is the direction, as we see from the SIRC report, from the U.K.'s report, that Five Eyes is going. It is very clear, on the SIRC's data holdings review, that those bulk datasets are being used for that purpose. We need to understand, again, exactly what is needful, and we need to eliminate what is not.

Ms. Dianne L. Watts: Right, and I understand what you're saying. Intelligence gathering is big business all over the world. There are private contractors pulling all that information together and selling information on people. It's all out there. I think it's the context of what it is we need to do.

I guess it comes down to this point. Who determines what is necessary? Is it you, me? I think there has to be some very critical thinking around how we protect our country and the work we do abroad as well.

Ms. Micheal Vonn: To that, I would only say it is a matter of evidence, once again, and the evidence does not support the approach that's being undertaken.

● (1605)

The Chair: Prof. Whitaker, we'll give you the last word.

Prof. Reg Whitaker: I agree completely. I was also involved in the Air India commission. One of the things that we really came up with there was the lack of actionable intelligence around that particular flight when we recreated what was available to them.

I think it's important to distinguish intelligence in general, gathering data in general, and so on, and actionable intelligence that actually can be used in the real world. I think that does require—and this is something that perhaps you should be addressing—greater coordination at the government level. Again, contrary to the silo effect that we keep seeing, there has to be an integrative person or position at the top who can actually coordinate all that intelligence and sift out what is actionable from what is just interesting but perhaps not of immediate interest.

The Chair: Thank very much.

We're going to end the meeting there.

Just a reminder to everyone, we're back at 5:30 p.m. for anyone who would like to join us for our open-mike meeting.

The meeting is adjourned.