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Chair

Mr. Robert Oliphant

Standing Committee on Public Safety and National Security

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● (1535)

[*English*]

The Chair (Mr. Robert Oliphant (Don Valley West, Lib.)): I call to order the 54th meeting of the Standing Committee on Public Safety and National Security. We are continuing our study of Canada's national security framework, a study that was begun last fall and has continued in our cross-country hearings in Ottawa as well.

We are very thankful to have the following witnesses before us: Ihsaan Gardee, executive director of the National Council of Canadian Muslims, and Ian Carter and Peter Edelmann from the Canadian Bar Association.

Each of the witness groups will have 10 minutes. I'm going to suggest we start with the Bar Association, because we have you on video, and the video gods don't always help us.

Mr. Carter.

Mr. Ian Carter (Treasurer, Criminal Justice Section, Canadian Bar Association): Thank you very much, and thank you for the invitation to come as witnesses today.

I'll begin with a very quick blurb about the Canadian Bar Association. We're a national association of over 36,000 members, including lawyers, law students, notaries, and academics, with a mandate that includes seeking improvements in the law and the administration of justice. Our work on national security and anti-terrorism issues has been a joint effort involving several CBA groups, and in particular the immigration law, criminal law, charities and not-for-profit law, and privacy law sections.

I'll pause to note that with respect to the criminal justice section, of which I'm a member, we're made up of equal parts, crown prosecutors and defence lawyers.

With me today is Peter Edelmann from Vancouver. He's an executive member of the immigration law section and a lawyer specializing in immigration law. I'm the vice-chair of the criminal justice section. I practice as criminal defence counsel here in Ottawa.

We're going to focus our comments with respect to those two areas in particular because they are our areas of expertise. I'm going to outline in broad strokes the CBA's position, and Peter will deal with the specific areas that we'll cover, and then we'll take questions afterwards if you have any.

We've included our response on the green paper, and we've made previous submissions on Bill C-51. The primary focus of our section in looking at this issue is to strike a balance between protecting the security and safety of Canadians, while at the same time stressing individual liberties and rights. That's our overarching concern, and when we look at the proposed legislation and potential changes, we look at it with a view to that particular issue, i.e., maintaining protection but at the same time looking for areas where perhaps the protection has gone too far and liberty interests may be infringed.

As a general comment about the green paper—and we made this comment in our submission as well—we found that the general approach was very laudable in the sense that it was looking at and asking the right kinds of questions. The one overall comment we would make with respect to the illustrations that were used is that they did tend to be a bit one-sided.

You had a scenario where all of the situations, or the potential scenarios that were described, tended to tilt toward an answer that would involve more protection and less liberty. In other words, there weren't scenarios put forward where there was a potential infringement on liberties, with the public being asked to comment on that. Rather you had a neat scenario: a potential terrorist threat, and what the proper response to that should be in terms of protections.

That said, there was a lot that we liked in the green paper, and we have a few suggestions. With those general comments in mind, I'll turn it over to Peter who will talk about some specific areas we'd like to address.

● (1540)

[*Translation*]

Mr. Peter Edelmann (Executive Member, Immigration Law Section, Canadian Bar Association): Thank you.

Thank you for inviting me to appear before you today.

The discussion focuses on many appropriate aspects of national security, including a number that have been raised in the government's Green Paper.

Three aspects are of specific concern to us.

The first, the most basic of the three, is the effective examination of Canada's national security and intelligence agencies. Like the Arar and Air India inquiries, the CBA agrees with the need to create specialized review bodies and to provide them with the resources and the mandate they need to examine all activities in the realm of national security.

[*English*]

As the CBA has set out in various submissions over the years, including our recent submission on the green paper and on Bill C-22, rigorous, independent oversight plays a crucial role in maintaining confidence in the national security apparatus.

I will emphasize three aspects of review that are of particular importance. First, each national security agency must have rigorous, independent review of its core activities. Some agencies like CSIS and the RCMP have these review mechanisms in place. Although there are criticisms of the functioning of these mechanisms in certain circumstances, at least the means for review exist. Other agencies, in particular the Canada Border Services Agency, have no review mechanism whatsoever outside of the agency and the minister in charge. This must be remedied and addressed.

Second, there must be effective review of the national security apparatus as a whole. This is all the more crucial as we see greater levels of information sharing and co-operation between the agencies. The reviewing agencies, if there are any at all, are siloed and not able to follow their investigations all the way through to where the information or the investigation is heading.

Of this aspect, there are two parts. One has to do with the proposal for a national security committee of parliamentarians. We expressed our support for this and made some suggestions for changes in the way this has been set out. We discussed these with you before in respect of Bill C-22. That's one aspect of it.

The second aspect would be the creation of what's being colloquially referred to a “super SIRC”, or an organization more independent of Parliament. Such an organization would be able to develop not only the required resources but also the institutional memory and the ability to engage in investigations beyond the scope and ability of parliamentarians, who have a lot of other responsibilities. Both of these mechanisms are important, particularly as investigations become more integrated within the national security apparatus.

The next issue raised in the green paper that I would like to address is information sharing. We raised a number of concerns during the hearings and review of Bill C-51 with respect to the information-sharing regime. This was significantly expanded by the Security of Canada Information Sharing Act.

As we pointed out at the time of the passage of Bill C-51, this expansion raised a number of concerns. First, there were concerns around the scope—in particular, the definition given of “national security” within the act. It is different from the definition in the CSIS Act and from the way things are framed in Bill C-22.

We are concerned about having different definitions of national security for different purposes. This needs to be remedied. It would be beneficial to have one definition for oversight, information sharing, and activities of national security agencies. The oversight and review ought to be of the same expanse as the activities and information sharing themselves. Currently that is not the case.

The second issue is information sharing with foreign entities and the ability to review these activities. This issue is becoming of particular concern in light of recent developments on the global stage with respect to the partners with whom we share information. It was at the core of the concerns raised in the Arar commission and with regard to what happened to Mr. Arar. This is an ongoing issue in terms of what kind of information sharing happens, who the information is shared with, and it's a growing concern with respect to expanding information sharing within Canadian agencies.

● (1545)

This has a domino effect in the sense that if you have further, and broader unrestricted and unreviewed information sharing within Canadian agencies, and those agencies are then co-operating in an unreviewable or unreviewed way with foreign agencies, the problems that faced Mr. Arar are likely to arise again in the future. This needs to be addressed in the information-sharing regime that we have.

Finally, the green paper raises once again the issue of lawful access, which was discussed in great detail under the previous government. At that time, it was framed by the previous government in the context of child pornography. I believe it was Minister Toews at the time who made comments in Parliament to the effect that you're either with us or with the child pornographers in regard to how the debate ought to happen with respect to lawful access. That's been reframed in the green paper in terms of terrorism. These are not helpful ways to engage in what are complex public policy discussions in balancing liberties against the interests of national security, or other interests of the community.

These are important issues that need to be addressed coherently and consistently across the board, and ought to be addressed in a way that's consistent, whether it's within the national security framework or outside of it.

We are happy to engage further in those discussions. I see that my time is up. I'm happy to address any questions. Thank you very much.

The Chair: Thank you very much.

Mr. Gardee.

Mr. Ihsaan Gardee (Executive Director, National Council of Canadian Muslims): Thank you very much for the invitation to appear today. Like my colleague here, I will start with a brief overview of the NCCM and what we do.

The National Council of Canadian Muslims is Canada's only full-time, professional, independent, non-partisan, and non-profit grass-roots Canadian Muslim advocacy organization. Its mandate is to protect human rights and civil liberties, challenge discrimination and Islamophobia, build mutual understanding between Canadians, and promote the public interests of Canadian Muslim communities. We strive to achieve this through our work in community education and outreach, media engagement, anti-discrimination action, public advocacy, and coalition building.

For over 16 years the NCCM has participated in major public inquiries, appeared before the Supreme Court of Canada on issues of national importance, and provided advice to security agencies on engaging communities and promoting safety.

Why does this debate matter? National security is important to all of us. Canadian Muslims are committed to national security because terrorism is harmful to everyone. In fact globally the overwhelming majority of victims of extremist violence have been Muslims. We support national security efforts to make our communities safer.

Canadian Muslims also expect their basic freedoms to be respected, a constitutional right. Our concern is that sometimes those freedoms are sacrificed at the expense of national security, and because of negative stereotypes, assumptions and overbroad powers, Muslim communities feel disproportionately affected, as if their rights and freedoms were lesser than those of other Canadians.

National security should not come at the expense of charter rights and freedoms; rather, they share a symbiotic relationship: the loss of one signals the loss of the other. We must acknowledge that some marginalized communities are stigmatized by overbroad laws and the rhetoric of fear and hate, making them feel less rather than more secure.

National security policy is particularly important for Muslim communities because of the current political climate. In recent years and months there has been a surge of hate crimes against Canadian Muslims and a growing climate of Islamophobia. Every time Islam or Muslims are associated with violence or threats to Canadian society, or the political discourse disparages or vilifies Muslims, the social impact of these negative associations is felt.

A devastating example of this is the hateful attack at the Islamic Cultural Centre of Quebec City that claimed the lives of six Canadian Muslims. Promoting security for all Canadians must include protecting Canadian Muslims and other targeted minorities against discrimination and hate crimes by some elements within society.

Canadian Muslims pay a higher cost for national security. Based on what is known in the last 15 years, it appears that the Canadian security establishment does not afford Canadian Muslims the same charter respect and protection as other Canadians. Through direct and indirect actions, Canadian security agencies have in many respects lost the trust and confidence of Canadian Muslim communities.

The disturbing and well-known cases of Canadians, such as Maher Arar, Abdullah Almalki, Ahmad El Maati, Muayyed Nureddin, Abousfian Abdelrazik, and Benamar Benatta, speak to the disproportionate cost and the extant pitfalls associated with administering a national security regime prone to error and abuse. The lack of effective oversight over security agencies failed to prevent or remedy the pain and suffering that these men and their families suffered unjustly.

Little has been done to address revelations about errors, lies, unreliability, and sloppiness in information gathering and information sharing within the security establishment. The principal recommendations of the Arar commission inquiry and others have been unheeded and are not adequately reflected in the Anti-Terrorism Act, 2015, or addressed in the government's green paper.

The Arar commission concluded that the “potential for infringement on the human rights of innocent [Muslim and Arab] Canadians” is higher in national security enforcement because of the stricter scrutiny to which the members of these groups are subjected; thus, any deficiencies in the act or its enforcement will disproportionately affect Canadian Muslims.

It is our submission that Bill C-51, as it was known, will marginalize Muslim communities. In March 2015 the NCCM testified before the House of Commons Standing Committee on Public Safety and National Security on Bill C-51—the Anti-terrorism Act, as it is known. NCCM has taken a principled opposition to the act from the beginning. We echo the view of the overwhelming majority of experts in the field that the act represents a greater danger to Canadians than is justified in the name of fighting terrorism. We agree with other witnesses that more power to security agencies does not necessarily mean more security for Canadians.

Further, the government's green paper does little to assure Canadian Muslims that our participation in any national security strategy will result in our members and communities being made more secure.

● (1550)

The green paper calls for the strengthening of the security establishment without providing any evidence or reasons to show why this is either necessary or wise. Canadian Muslims are looking for assurances that the government will keep the powers of the security establishment in check through proper review and oversight mechanisms, as well as rigorously applying charter standards. The risks of abuse are too great and the record of past abuse too extensive. Canadian Muslims must be treated as citizens, not as suspects.

National security errors not only put innocent people at risk of suspicion and stigma, they also divert resources from focusing on actual threats or engaging in other activities to promote safety and security within Canadian society.

The NCCM believes the Anti-terrorism Act 2015 is unnecessary to ensure the safety and security of Canadians, while the threat it poses to civil liberties and the equality rights of Canadian Muslims is disproportionate to any purported benefit. Therefore, we are in favour of its repeal. In the alternative, the NCCM has specific recommendations on amendments to the act.

I'll address some of the ways in which Bill C-51 undermines Canadian Muslims' basic rights and freedoms, starting with the no-fly regime.

The NCCM continues to oppose the no-fly regime implemented by Bill C-51 and the Secure Air Travel Act. No-fly lists have a devastating impact on those who are wrongly named, and yet this legislation does nothing to ensure the freedom to fly for wrongly designated Canadians. At NCCM we regularly hear from Canadians who are wrongly designated on no-fly lists without any possibility of meaningful appeal. It is impossible to know if you are on the no-fly list, and there is little to no redress to appeal your name's inclusion on the list. Although the government has established the Passenger Protect Inquiries Office, this is not an appeal mechanism. The application for recourse remains murky and unclear. As such, the NCCM supports the proposal requiring the government to fully review all appeals by Canadians on the no-fly list.

The NCCM maintains that no-fly lists have also not been demonstrated to achieve a greater benefit for security than harm to personal liberty and, as such, should be re-evaluated. The use of no-fly lists should be reduced only to cases where there are very strong grounds to know that an individual poses a danger. Any alternative results in racial profiling and the imposition of discriminatory limits on constitutional mobility rights that are not justifiable. If the no-fly list is to be maintained, at minimum a listed person should have a meaningful opportunity to appeal and contest their designation.

Regarding information sharing, the Security of Canada Information Sharing Act authorizes government agencies and institutions to disclose information to other government institutions that have jurisdictional responsibilities with respect to “activities that undermine the security of Canada”. This is broad and difficult to define and could result in constitutional violations against innocent Canadians, including innocent Canadian Muslims. We believe that the information sharing act should be repealed. The information sharing must be based on policies that respect personal information and human rights. We cannot normalize extraordinary powers without evidence of effective security enhancement and mitigation of harm to civil liberties. The NCCM urges the government to implement the recommendations made in the Arar commission report with respect to information sharing by the RCMP, which could also be adapted by other government departments.

With regard to strengthening review and oversight of CSIS, the NCCM is particularly concerned with the broad-reaching powers given to CSIS through vague language, for example, to take actions that are “reasonable and proportional”. While the act purports to enhance national security by strengthening the powers of national security agencies, it does so with minimal oversight and at a high cost to the Charter of Rights and Freedoms. This is of particular concern to Canadian Muslims, who are more likely than others to find themselves targeted by national security investigations. It is also problematic that CSIS gets to decide if it needs to apply for a warrant. Such overbroad powers are not demonstrably justified in a free and democratic society. We need meaningful accountability.

The NCCM welcomes the proposal for SIRC to review all, as opposed to some, of the operations performed by CSIS. To better coordinate national security agencies, the NCCM would also recommend that the government form a unified whole-of-government committee, or super SIRC, similar to the Five Eyes intelligence partners. A super SIRC could be mandated to review all national security activities in government, including information sharing.

Regarding mandatory legislative review, the act creates extraordinary powers that should be viewed, at best, as a necessary evil in a liberal democracy. The revelations from the Arar commission demonstrate the terrible impact of errors in the use of extraordinary powers. The risks are known; what is needed is robust oversight and review. The NCCM supports the government's proposal for a full statutory review of the act every three years, as well as instituting a sunset clause on certain provisions.

Regarding repeal of overbroad speech and thought crimes, the new crimes associated with terrorist propaganda are imprecise and overbroad. They create too much enforcement discretion, which puts perfectly lawful and non-violent conduct within the purview of the Criminal Code. This risks criminalizing dissent by chilling or punishing legitimate political and other speech, which attract high levels of charter protection. It is unclear why new crimes are necessary, given existing provisions regarding terrorism in the Criminal Code.

● (1555)

The NCCM also urges the government to repeal the over-broad crimes, including, “activities that undermine the security of Canada” in the Security of Canada Information Sharing Act, as well as the new offence in the Criminal Code, section 83.221. The language of this offence, as well as the definitions in the act, does not create new tools for enforcement. Rather, they create new risks for chilling legitimate speech and political activism. These provisions directly undermine the democratic goals that justify counterterrorism law and policy in the first place.

In conclusion, in the current climate, merely strengthening law enforcement powers is unlikely to yield effective community engagement. Genuine engagement with Canadian Muslims as partners in national security is a necessary prerequisite to any other aspect of counterterrorism or counter-radicalization activity.

To that end, the NCCM supports the green paper's acknowledgement of the utility of community outreach and counter-radicalization efforts, including the creation of an office of community outreach and a counter-radicalization coordinator.. By far the most effective and least costly approach to combatting radicalization to criminal violence is delivered at the grassroots level within communities.

We respectfully urge this committee to seriously reconsider policies that may in fact be counterproductive to and undermine the efforts of those working on the front lines to address this phenomenon of radicalization to criminal violence.

The NCCM is willing to partake in public consultations and work with the federal government at the grassroots partnership level to develop and implement a national coordinated strategy for community-based initiatives.

Subject to your questions, those are my submissions.

Thank you.

The Chair: Thank you very much.

[*Translation*]

For the first round of questions, we will start with Mr. Di Iorio.

Mr. Nicola Di Iorio (Saint-Léonard—Saint-Michel, Lib.): Thank you, Mr. Chair.

Gentlemen, thank you for your presentations and your remarks. We are very grateful for the assistance you are providing to the committee.

My first questions go to Mr. Gardee.

● (1600)

[*English*]

Mr. Gardee, you referenced the tragic events that occurred in Quebec City very recently. Based on your experience and the studies you've conducted, I would like your views, which would greatly help us, about legislative changes, either abrogating, amending, or introducing new legislation, on what could be done to help prevent or totally prevent the recurrence of such events.

Mr. Ihsaan Gardee: Thank you very much for the question.

In terms of implementing legislative improvements to prevent or mitigate the possibility of such future such horrific actions, I would argue that the existing provisions within the Criminal Code are sufficient. I think our organization has put forward some recommendations for governments at the municipal, provincial, and federal levels to take concrete actions to address the growing climate of Islamophobia and hate we have seen and our organization has documented, in addition to what has been documented by Statistics Canada. They have noted that, between 2012 and 2014, hate crimes in general against most communities—well, against Canadian Muslims—have, in fact, doubled, when hate crimes targeting other communities have either stayed the same or decreased.

Two of the proposals we have for the federal government would be for all members of Parliament to support Motion No. 103 put forward by member of Parliament Iqra Khalid, which would call for three things. One is to acknowledge that there is an environment of fear. The second is to condemn Islamophobia and other forms of systemic racism and discrimination; and finally, to strike a committee to study the issue from an evidence-based perspective, to do a analysis of community needs, and to look at context as well.

The other recommendation we have is to establish a national day of action and remembrance on January 29. To my knowledge, this is the first time in Canadian history anybody has gone into a house of worship and killed people. We've had other mass shootings such as the École Polytechnique, in which 14 women were horrifically killed. Other mass shootings have targeted people who were known to the perpetrator, or they had some affiliation, but this is the first time we've seen this.

Mr. Nicola Di Iorio: Thank you, Mr. Gardee.

I have one quick question; my time is limited.

You referred to the no-fly list. As you're probably aware, the reason that many Canadians are not allowed to board flights in Canada is not that they're on a Canadian no-fly list, but on U.S. no-fly lists, and their flight would happen to fly over U.S. territory.

Mr. Ihsaan Gardee: We're aware of that.

Mr. Nicola Di Iorio: So what solution do you see in those cases?

Mr. Ihsaan Gardee: In those cases, I would urge the government to ensure that it is doing its part in its communications with foreign governments who may be maintaining their own lists to ensure that anybody who has been erroneously listed on Canadian lists be removed from other lists that other countries may be keeping.

Mr. Nicola Di Iorio: Thank you.

My other question is for Maître Carter and Maître Edelmann.

We're talking about oversight. The first item you raised was balancing, obviously balancing security with ensuring the protection of fundamental rights. Then you moved on to reinforcing oversight.

Could you give us concrete examples of shortcomings in current oversight?

Mr. Peter Edelmann: I think the most concrete example we have for on-the-ground lack of oversight is with respect to the Canada Border Services Agency. That agency only had internal oversight mechanisms. If you look at the RCMP, for example, the RCMP has an independent complaints commission and a commissioner who can take complaints, and it can pursue those complaints outside the agency with civilian oversight.

The CBSA reports to its president. Its president reports to the Minister of Public Safety. That is the oversight. That is the review mechanism. So when a Canadian citizen or a foreign national engages with a border officer and has a negative interaction at the border, or the Canada Border Services Agency has policies that infringe on rights or create other problems, the entire review mechanism is not public. It is internal and is not seen as independent. That creates a significant problem in terms of public trust. That's true for our national security apparatus as a whole.

The confidence and trust of the public are crucial to our national security agencies being able to do their job. The CBSA is just a—

● (1605)

Mr. Nicola Di Iorio: I appreciate that. I took note of the CBSA.

Could you give us concrete examples of shortcomings in other areas?

Mr. Peter Edelmann: In part, we see shortcomings in transparency. A good example would be the decision by Justice Noël last year with respect to the definitions of metadata and associated data that were being used within CSIS. Although CSIS has it own review agency, that agency, as we've seen in recent times, hadn't looked at these issues even though these have been relevant problems for decades.

Mr. Nicola Di Iorio: My time is limited. I just want to ask you quickly the same question.

Do you see any legislative changes that could help prevent what happened in Quebec City?

Mr. Peter Edelmann: I'll pass that to Mr. Carter.

Mr. Ian Carter: We as the CBA do not have a position with respect to that particular issue. I think the comments of my colleague are particularly apt, that when you're looking at these issues, rather than having a knee-jerk reaction, you need to have an evidence-based needs analysis. In our experience, too often there can be a rush to make legislative changes, particularly at the federal level and in the Criminal Code, and then there's constitutional litigation afterwards that takes up time and resources in the courts.

I'm sure we're all aware that we have a problem right now with delays in the courts. More time spent drafting and having precise definitions is important. Before responding, I think the important point is to have a review that looks at the actual evidence to determine whether, for instance, there are Criminal Code provisions that could have applied. The problem with the Criminal Code is that it's retroactive in the sense that it's applied after the event has occurred.

What you really want to do is to have something in effect that's going to stop the problem from happening in the first place. You really need to look to avenues other than what's in the Criminal Code, short of making changes to things like wiretaps or some particular speech provisions. Again, the needs analysis is important to make sure you don't have unintended consequences in other offences.

Mr. Nicola Di Iorio: I thank all of you.

Thank you very much.

The Chair: Thank you.

Mr. Clement.

Hon. Tony Clement (Parry Sound—Muskoka, CPC): Thank you.

Thank you, gentlemen. I appreciate it.

Maybe I'll start with the Canadian Bar Association. I want to delve a bit more deeply into the issue of information sharing that was part of Bill C-51 and is now part of our law. I just want to drill down into the CBA position on this. Are you not in favour of information sharing? If there is a specific threat and a piece of information is held by one agency, shouldn't we share that? How far would you go?

Mr. Ian Carter: I'll leave that one to Mr. Edelmann.

Mr. Peter Edelmann: To be clear, CBA's position is not that information sharing in and of itself is a problem. In fact, one of the problems highlighted by the Air India commission was a lack of information sharing and coordination between agencies. The issue is with how that was implemented in C-51 in terms of information sharing. There are two or three problems that have arisen. One is in terms of the mechanisms for protecting the information. In other words, how do we know and what are the limits to how far the information goes once it has been shared from one agency to another? Those mechanisms are hazy at best. In other words, if the RCMP passes information on to CBSA, CBSA can then pass that information on to their counterparts in the U.S., who then use it for other purposes; or it gets passed on to another agency that's outside of the Security of Information Sharing Act.

Even within the information sharing act itself, one of the problems we have is that there is no agency that can oversee the information sharing as a whole. This is a two-part problem. One problem is not having any mechanism for oversight of the national security apparatus as a whole, even though the information sharing act treats the national security apparatus as if it were one whole-of-government approach. If you're going to have a whole-of-government approach, you need to have a whole-of-government approach to oversight and review.

The second problem—and this comes back to the definition issue I was raising earlier—is that the information sharing act created a new definition of national security that is staggeringly broad and does not just include what we would generally refer to as national security issues. When you drill down and look at the actual definition—and I'll rely on our written materials at the time with respect to that—you'll see that the act doesn't restrict the definition of national security in the way that, for example, the CSIS Act does. The scope is much broader than what would colloquially be referred to as national security.

Those are some of the concerns we have. The concern is not with information sharing in and of itself. Obviously, you share—

● (1610)

Hon. Tony Clement: We've had over a year of this new era with the bill's being law and being applied. Are there any concerns that you're aware of and that we should be aware of?

Mr. Peter Edelmann: My concern is what we're not aware of—in other words, what no one is aware of, because there is nobody, beyond perhaps the Minister of Public Safety.... But even the Minister of Public Safety doesn't necessarily have an overview of everything that's happening. Perhaps that's a question to ask Minister Goodale. Otherwise, there is no entity that would know, or that would necessarily have that information.

Hon. Tony Clement: What about the proposed parliamentary oversight?

Mr. Peter Edelmann: They would be able to look into it once they're up and running, presumably, if the scope of their mandate is broad enough to encompass.... Right now, the scope that is set out in Bill C-22 is a third definition of national security. In other words, it doesn't refer to either the CSIS Act or the Security of Canada Information Sharing Act's definition of national security, and that was one of our criticisms of Bill C-22. We need a coherent definition of what it is we're talking about when we talk about national security. Right now, we don't have one. We used to have one that was referred to in general by legislation, which was the definition in the CSIS Act. Now we have this other definition and potentially a third one. How they play together is unclear and, in our submission, not helpful.

Hon. Tony Clement: How much time do I have, Mr. Chair?

The Chair: You have two minutes.

Hon. Tony Clement: Dianne, do you want to speak?

Ms. Dianne L. Watts (South Surrey—White Rock, CPC): Maybe you can clarify this. This is regarding no-fly lists. When we were doing our hearings across the country, that topic was brought up on a fairly regular basis.

Because most of the references made were to the U.S. no-fly lists —and I'm pretty sure that the United Kingdom and Germany and other countries around the world would also have those no-fly lists— how do we come together and have a common-sense approach when we talk about people not being able to fly into different countries? I ask because we're typically talking about the U.S.

I don't know who wants to answer that.

If I got on a plane in Vancouver to fly to the U.K., I'm not going over U.S. air space, I'm not coming into contact with U.S. officials, but I would expect that they would have a no-fly list.

Mr. Peter Edelmann: If this is a practical question about how the no-fly lists work, each country implements its own no-fly list. The challenge that we have, and I think that was being addressed earlier, was that many flights in Canada that begin and end in Canada, fly over U.S. air space. That's one of the challenges. But if the flight doesn't go into U.S. air space, then the U.S. no-fly lists, in my understanding, are not relevant.

Ms. Dianne L. Watts: I understand that, but then you'll have other no-fly lists. As you're saying, every country has a no-fly list, so I would suggest that it wouldn't just be problematic going into the U. S. but into other countries as well—but we're focused on the U.S.

● (1615)

Mr. Peter Edelmann: I believe that that focus is for geographical reasons. It has to do with the flights that begin and end in Canada that go through U.S. air space, but otherwise the no-fly lists—

Ms. Dianne L. Watts: There are no problems anywhere else.

Mr. Peter Edelmann: There are problems, but those problems would arise anyway. If you want to get into the United States, you're going to need to adhere to their laws, whether their laws are reasonable or not. Whether we agree with their laws or not is somewhat irrelevant, in the sense that they're going to enforce their laws and deny people entry. As we've recently seen with the executive order, whether we agree or not, the people who are covered by the executive order aren't going to be getting on the planes.

The Chair: Thank you. I'm afraid we need to end it there.

Monsieur Dubé.

[*Translation*]

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

[*English*]

I apologize to the witnesses and my colleagues for my tardiness. I have no one else I can substitute for me here, so that's a reality I have to deal with.

[*Translation*]

I would like to ask a question about the border; it goes to both the Canadian Bar Association and the National Council of Canadian Muslims.

Obviously, this subject is very much in the news these days. In general, do you have concerns with the expansion of powers at the border or with the border becoming more integrated, as was mentioned this week? How should we proceed in this situation, particularly in terms of bills C-21 and C-23?

Mr. Peter Edelmann: The Canadian Bar Association is in the process of studying bills C-21 and C-23. We will have some proposals for you once they have been approved. Currently, they are at the revision stage.

We do indeed have concerns with how the measures proposed in those bills will work, as well as with the integration of the borders. Communicating information, co-operation and oversight of our national security agencies are also questions that I brought up previously.

That is precisely what the Arar Commission focused on. Mr. Arar's experience was actually the result of a complex co-operation problem, specifically with regard to the information that was communicated.

[*English*]

Mr. Ihsaan Gardee: Our organization is also looking at it and reviewing Bill C-23 and Bill C-21. We will be putting together submissions on that.

At the same time, we recognize that the U.S. is a sovereign nation that is able to determine who is or is not able to enter its jurisdiction. At the same time, some of the discriminatory and intrusive treatment that has been reported by Canadians is problematic. We're looking, really, for assurances that the government will go to bat for its citizens. We're calling on the public safety minister to reconsider proposed legislation that would grant further powers to American border officials in questioning and detaining Canadian travellers. This kind of pre-clearance law will erode the rights of travellers, including those of Canadian citizens and permanent residents. The agreement, which was negotiated during the previous American administration, takes on a whole new meaning in this new era.

Canadian Muslims in particular are deeply concerned and anxious about travelling to the U.S. This is troubling, as many Canadian residents have family and work commitments there. This climate threatens to unfairly infringe on their freedom of movement.

Mr. Matthew Dubé: Thank you for that.

To the Canadian Bar Association, the question of metadata was raised. In view of Justice Noël's recent decision on CSIS' bank of metadata, what do you see as the solution going forward?

I asked the minister about this, and there doesn't seem to be a commitment one way or another, whether to continue this program in some shape or to legalize it, if I can phrase it that way. There is also the issue of what needs to be done with the data that's already there, because they still have it. It hasn't been destroyed or anything.

I'm just looking for your thoughts on where they should be going, moving forward, and if it should be a legislative solution or otherwise.

● (1620)

Mr. Peter Edelmann: The first comment I would make with respect to the decision of Justice Noël is that the underlying problem —which we see across the board in our national security agencies— is a lack of transparency. What would be very helpful to a discussion about national security issues is transparency of the law as it is being applied within the agencies.

What we have right now is a body of what we would refer to as "secret law" that is being applied within the agencies in terms of how the law is being operationalized. What we have in Justice Noël's decision is an interpretation of metadata and associated data that was being applied by CSIS for many years but that nobody knew was happening. Nobody knew that's how they were interpreting the law. Justice Noël took the view that this was not an accurate or an appropriate way to interpret the law. These mechanisms and the way that the law is being applied ought to be made transparent so that these discussions can happen in a more open way.

With respect to the issue of metadata specifically, again we're in a bit of a difficult situation, because we have a limited understanding of exactly what is being done, how that metadata is being used, and why. That's understandable to a certain extent, but there is also very good reason for us to have a better understanding of the overall legal infrastructure as it is perceived and being applied by these agencies and how these things play out.

Our position would be along the lines of the Supreme Court decision in Spencer, that there is a privacy interest in metadata or a reasonable expectation of privacy in metadata, and those interests ought to be protected and ought to be given significant weight in decisions on balancing how that metadata is used and collected.

Mr. Matthew Dubé: Thanks for that.

Mr. Gardee, you talked a bit about the work to reach out to communities, and the government's talked about having this counter-radicalization coordinator. What would you be looking for in that person's role and in the kinds of projects they could work on going forward?

Mr. Ihsaan Gardee: I think it's important we recognize that efforts at community engagement to combat radicalization toward criminal violence do link with the effort to combat discrimination within mainstream society as well, along with the effort to promote integration of Muslim youth. We also have to recall that violent extremism is not the exclusive franchise of any one particular community, as we have so recently seen. It's important for that office, and for the adviser in that office, to have credibility, to look at radicalization to extremist violence of any kind.

It's also a concern that it's increasingly politically popular to demand that Canadian Muslims adapt and demonstrate fidelity to "Canadian values" without concomitant assurances of security, inclusion, and equality. One police officer who works at the Ottawa Police Service says something that I cite regularly, that inclusion is the key to public safety.

[*Translation*]

Mr. Matthew Dubé: Thank you.

[*English*]

The Chair: Thank you.

I'm going to ask a question. I don't usually do this as chair, but I want to follow up on something by Mr. Dubé and Mr. Di Iorio, particularly to Mr. Edelmann.

I have a little concern that you use "oversight" and "review" interchangeably. We're struggling a little with understanding whether there is a difference between those concepts. I don't want to get into that, except that you referred to a body that is more independent of Parliament, an expert body of review, though you didn't use the words "super SIRC". Noting that you're speaking to parliamentarians, to whom they would be accountable, why would there be a more important body than Parliament to report to, in terms of the oversight of our security agencies?

Mr. Peter Edelmann: I'm sorry. When I say "independent of Parliament", I should be clear that the suggestion isn't that they're not reporting to Parliament, or are somehow supreme with regard to Parliament, or more important than or separate from Parliament. The issue with the committee of parliamentarians is that the parliamentarians are not.... As much as this committee spends a great deal of time dealing with national security, for the most part the members have many other responsibilities and concerns, and are not subject matter experts in your careers and engagement with these issues.

When we're talking about dealing with SIRC or with other oversight agencies, these are full-time institutions that deal with these issues on an ongoing institutional basis. They can undertake long-term studies, have an institutional memory, and can engage with respect to oversight.

I use "oversight" and "review" interchangeably. I apologize for that. I should speak about review. What I'm talking about is review, in the sense that it's used, for example, by Professors Forcese and Roach. They make a specific distinction between those two.

With respect to review, having what's been colloquially referred to as a "super SIRC" serves a different purpose than a committee of parliamentarians. The committee of parliamentarians has a very important role, just as this committee does. This committee, although it could do a lot of the work that the RCMP complaints commissioner does, would be overwhelmed if it were to undertake the work that the RCMP commissioner does with respect to the RCMP. However, any of the things that it does presumably could be done by this committee.

● (1625)

The Chair: I guess I would be concerned that you could have, in a relatively small pool of experts.... For the committee of parliamentarians, the proposed budget is several million dollars larger than the U.K.'s budget for a similar body. They will hire experts.

I worry about a group of former CSIS directors or so-called experts who are bureaucrats actually doing this oversight. I would challenge the bar association to think that maybe parliamentarians are better—well served by a bureaucracy, a secretariat, but perhaps better at doing that.

That's just to get that off my chest, as a self-interested parliamentarian.

Mr. Peter Edelmann: To be clear, our suggestion is not for either one or the other. Our suggestion is for both. Our proposal is that both are necessary, much like this committee and the RCMP complaints commissioner both serve important purposes in the oversight of the RCMP.

The Chair: I just had to get it off my chest.

Ms. Damoff, for seven minutes.

Ms. Pam Damoff (Oakville North—Burlington, Lib.): I want to thank you all for being here.

Mr. Edelmann, it's nice to see you again.

My first question is about the disruptive powers of CSIS.

I think it was Professor Forcese who had suggested that, as opposed to saying what they can't do, it might be possible to specify specifically what CSIS could do, ensuring that it was within the Charter of Rights and Freedoms. I wonder if either of you have any comment on that.

Mr. Ian Carter: Yes, I can speak to that issue.

We have recommendations on that issue both in our original submissions on Bill C-51 and in the green paper. You'll notice, if you read them, that there's a slight change in tone. We've appeared before on this issue at the Senate, for instance, and the big concern that came out in particular was whether the threat disruption powers essentially were authorizing charter breaches, and is that how you read these provisions? There was debate about it, and certainly academics and the CBA felt that's how it could be read.

In response to that, we've repeatedly heard, “That's not our intention, and it's not what we intended to do.” When you look at our latest submission, I think you'll see that what we're suggesting is that if that's the case, make the language clearer. Part of the problem—and one that you've identified—is the positives versus the negatives. The way it's set out now, it's essentially saying they can't breach charter rights unless they go and get a warrant, but that's not the way the charter works.

For instance, warrants are typical for searching for items. It has to do with section 8 of the charter on protection against unreasonable search and seizure. The courts, when they issue a warrant, aren't issuing a charter breach. They issue the warrant so that there is no charter breach.

That's the problem with how it's drafted. I think the intent may very well be the same, in which case the CBA has no issue with it, but you should draft it so it's clear that you're not authorizing a charter breach. You're authorizing very specific activities to avoid a charter breach. That may be the intention. If you word it that way, those concerns are going to disappear.

On that note, this is another issue in regard to that. Making clear what you're issuing is also very helpful because academics, including Professor Forcese and others, are concerned right now that you're going to authorize, for instance, arbitrary detention. Again, we've been repeatedly told that's not the intention. Well, if it's not the intention, make it clear. Then the issue disappears.

Again, following up on that suggestion, the more that you make it clear what they need to go and get authorization for, the more it fits in with how the charter works within our legal system.

● (1630)

Ms. Pam Damoff: I want to move to both groups about the no-fly list again. I know that you've made suggestions.

I have a young man in my riding who's on the list, but the issue is that his name is the same as someone else's on the list. It's a situation where it's not necessarily that the name should not be on there but that he has the same name as someone who is on the list. He's quite young now. He had a fairly decent experience in the U.S. in getting certain paperwork.

He's not the only one in that situation. What can we do to help someone deal with this, and not just within Canada and the U.S.? What if he chooses to study internationally at some point? What kinds of safeguards can we put in for individuals who find themselves in that situation?

Mr. Ian Carter: I'll let Mr. Edelmann deal with it, because his area is the no-fly zone, but before going to him, there's an analogous situation that I see within the criminal law. You can end up with situations where someone's name is the same as someone else's, and when the police go through their CPIC program their name comes up and they're arrested, but it turns out that it's somebody else. I've seen that problem arise.

In terms of a practical element, the big issue is that there has to be a system in place where you can address your complaints. Now, within different police agencies, you can do that. There's somewhere to go where you can address it. If you have no recourse, if there is nothing set up to deal with the problem, then it's a matter of writing letters, of going to MPs, and going to.... It's a runaround that takes a lot of time. If you set up a system in advance with one spot to go to, you're going to be able to deal effectively with that problem. Hopefully, if they're sharing within jurisdictions, the problem can clear its way all the way through.

I'll leave it to Mr. Edelmann to discuss the no-fly zone in particular.

Mr. Peter Edelmann: Very quickly, I'll refer you to our written submissions on the green paper, which hopefully are before the committee. Basically, there are two aspects of our suggestions for the things that need to be changed if this program is going to continue. One is to provide an objectively discernible basis for additions and removals from the no-fly list, or how people are being added and removed.

The issue that you're suggesting with respect to the constituent is one of identification of the person. There needs to be more detailed information on the no-fly list. Right now it's just a name. If there were more detailed information there, then there would fewer false positives. That was an issue we had raised at the time the no-fly list was created, because it created a problem when there were less identifying features or factors.

The other aspect is to have effective safeguards for people who are wrongly placed on the list, or mechanisms for people like your constituent who can then say, I'm not that guy. I'm not the person who is on the list. Here's the mechanism by which I can get....

We have this in the Criminal Code, for example, with respect to the list of terrorist entities. One can get a certificate from the minister under a certain section of the code. I would have to look it up. When you're talking about people who are listed entities under the terrorism provisions, you should be able to apply to the minister for a certificate to say, “I'm not that guy. I'm not a listed entity even though I have the same name or our organization has the same name.” Some mechanism along those lines would be helpful in addressing the types of concerns you're raising.

The Chair: Mr. Miller, for five minutes.

Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC): Thank you very much, Mr. Chair. Gentlemen, thank you to all of you for being here.

I still have a no-fly list question. I want to move on to something else. Mr. Gardee, you talked about Islamophobia and Motion No. 103. What I'm trying to get my head around is the definition. By the way, a lot of people are opposed to Motion No. 103 because it doesn't have a definition of Islamophobia.

We had two witnesses here Monday from ISNA. With one of them, Ms. Chowdhury, we were trying to get to this and got talking about sharia law. She indicated with regard to sharia law that she was opposed to the oppression against women part of it, but in favour of the rest of it.

I talked to a Muslim woman this morning, because I'm trying to get an understanding of sharia law, which I thought I understood, but from listening to Ms. Chowdhury, I didn't. The Muslim woman I talked to this morning confirmed what I thought. She said, “That lady out and out lied to you, because every Muslim that I know is opposed to sharia law.” I tell you that not to bore you, but I need to put it in context.

Based on this chat I had this morning, which backs up what I thought sharia law was, if I came out and criticized sharia law, does that make me Islamophobic? If I come out and criticize radical Islam, or a terrorist act done by the radicalized side of Islam, does that make me Islamophobic?

I need you to enlighten me on what exactly Islamophobia is. It seems to me to be a word created by the media, and what have you.

You don't hear about the two most persecuted religions in the world, Christianity and Judaism. You don't hear about Christianophobia and Jewishophobia.

I'll turn it over to you.

● (1635)

Mr. Ihsaan Gardee: In terms of the definition of Islamophobia, the term itself came into popular use around 1997 when Runnymede put it out in a publication that they created. I would argue that the concept dates back to the beginning of the faith itself.

The Ontario Human Rights Commission defines Islamophobia as including “racism, stereotypes, prejudice, fear or acts of hostility directed towards individual Muslims”. It's not limited to individual acts of intolerance or racial profiling. It includes a normalized view of Muslims as threats to security, institutions, and society. It also includes one-sided, sweeping negative portrayals of Muslim people, which play a really key role in normalizing and reproducing contemporary forms of this type xenophobia.

Mr. Larry Miller: Would the two examples I used make me Islamophobic?

Mr. Ihsaan Gardee: Do you mean the example of being able to criticize radical extremists?

Mr. Larry Miller: Well, if sharia law is bad, like this Muslim woman told me this morning, and I criticized it and said we don't want that in Canada, or whatever—I'm just using that as an example —would that make me that? Would it also be the same if I criticized a terrorist act that was basically perpetrated and supported by radical Islam? I'll put it in that context.

Mr. Ihsaan Gardee: What I can tell you, Mr. Miller, is that the NCCM believes in and upholds the Charter of Rights and Freedoms every single day. As a Canadian civil liberties and advocacy organization, that is our focal point.

Mr. Larry Miller: Understood.

Mr. Ihsaan Gardee: Terms such as “sharia” are extremely loaded. Without even knowing what it means, it's actually offensive and does a disservice to building mutual understanding. I'm not quite sure how the question is relevant to the purpose of this committee, a hearing on Canada's national security framework.

Mr. Larry Miller: Well, you brought it up, sir, and I'm just trying to get a.... I think you mentioned it three times, if I go back and listen to the recording.... So I think I have a right to get an understanding of it. Anyway, you didn't answer my questions or two examples.

You mentioned the no-fly list and you mentioned racial profiling. Like Ms. Damoff, I've had some members of my constituency who went through this and had the same problem, and they have common names like Smith or Jones. Even one, who is no relation of mine, but, with the name Miller happened to be on there.

Some hon. members: Oh, oh!

Mr. Larry Miller: Yes, no relation.

I'm not saying that there isn't racial profiling. I would hope there isn't, because I like to trust the system that's out there. I'm just suggesting that it's a lot more than maybe what you perceived it to be or led us to believe. I don't mean that in a derogatory way, just that there are other examples.

● (1640)

The Chair: If you want to comment very briefly, we're at the end of time.

Mr. Ihsaan Gardee: In terms of the no-fly list, I would again echo what my colleagues at the Canadian Bar Association have said. I would also like to redirect part of my answer to the question raised earlier about another individual whose family member was listed. In our view, the act creates a mechanism to challenge a listing, but it's an ineffective tool. First, the problem is that people can never know with certainty that they're on the list. Second, listed people are not given any information about how or why they're placed on the list. Third, while a listed person may have asked to have their name removed, the minister is not bound to reply to the request. Fourth, the onus rests on the listed person to demonstrate not only that the minister was wrong to put their name on the list, but also that the minister acted unreasonably in doing so. Given the lack of access to information prescribed in the act, it is virtually impossible for a listed person to meet the onus.

The Chair: We have to end there.

I want to thank you all, Mr. Edelmann, Mr. Carter, and Mr. Gardee for your expertise, time, and insights.

We'll just take a brief moment as we stop, and then we'll go in camera for committee business.

Thank you.

[*Proceedings continue in camera*]

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