HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Public Safety and National Security

SECU • NUMBER 095 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Tuesday, February 6, 2018

Chair

The Honourable John McKay

Standing Committee on Public Safety and National Security

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● (1100)

[*English*]

The Chair (Hon. John McKay (Scarborough—Guildwood, Lib.)): I call this meeting to order. I see we have quorum. Time is always the enemy of a really interesting discussion and presentation.

This is the 95th meeting of the Standing Committee on Public Safety and National Security. We, of course, have the reference of dealing with Bill C-59.

We have two very well-known and experienced witnesses before us. I'll simply go in the order you're presented on the order paper. From the the Security Intelligence Review Committee, we have Pierre Blais, chair, accompanied by Chantelle Bowers, acting executive director. As well, we have Richard Fadden, who is appearing as an individual.

[*Translation*]

Please go ahead, Mr. Blais.

[*English*]

Hon. Pierre Blais (Chair, Security Intelligence Review Committee): Is it up to me to start?

[*Translation*]

The Chair: Yes.

Hon. Pierre Blais: Thank you very much, Mr. Chair.

[*English*]

Good morning, everybody.

Thank you for the opportunity to appear before you today to discuss Bill C-59. I will focus my presentation on two main areas. The first part will lay out SIRC's high-level response to the bill. In the second, I will offer a few suggestions for improvements to the language of the bill based on SIRC's experience in this area.

This is a positive time to be working in the area of review and accountability for intelligence in Canada. Not long ago, I was here to discuss the creation of a committee of parliamentarians in the context of Bill C-22. I'm here again, this time to discuss the government's proposal to create the National Security and Intelligence Review Agency, or NSIRA. I will use this abbreviation. I hate using those acronyms of NSIRA, NSICOP, SIRC, CSARS, etc., but we have to. I will go on with NSIRA, which will be responsible for reviewing intelligence and national security activities across government.

Indeed, as included in the bill before you, NSIRA is to review any activity of CSIS or CSE carried out in any other department or agency that relates to national security or intelligence and any other matter related to national security referred to it by the minister. This will bring a dedicated national security review of the type that SIRC has been doing for more than 30 years to a large number of other departments and agencies, including in particular the CBSA and the RCMP. This will answer the gap that so many, including SIRC, have commented on over the years.

[*Translation*]

The recently created National Security and Intelligence Committee of Parliamentarians, or NSICOP, has been added to the proposals respecting the new intelligence commissioner. Together the three entities will represent a substantial change in the accountability system for intelligence in Canada.

I will just take a minute to describe for the committee the mandate and responsibilities of the Security Intelligence Review Committee, or SIRC. I will stress that SIRC is an independent external review body that reports to Parliament on CSIS's activities.

[*English*]

SIRC has three core responsibilities: to carry out in-depth reviews of CSIS's activities, to conduct investigations into complaints, and to certify the CSIS director's annual report to the Minister of Public Safety and Emergency Preparedness. In essence, SIRC was created to provide assurance to Parliament, and by extension to Canadians, that CSIS investigates and reports on threats to national security in a manner that respects the law and the rights of Canadians.

SIRC has discharged its mandate faithfully over its history, and it has had an impact. This was demonstrated most recently by the Federal Court of Canada decision of October 2016 that confirmed SIRC's long-standing practice of assessing the lawfulness of CSIS activities, including how CSIS applies the “strictly necessary” threshold to its collection and retention of information, which is one element that is all over the place now. Through its review work, SIRC contributed to high-level discussions on the type of intelligence that CSIS can collect and retain, as we see in the dataset provision of Bill C-59.

● (1105)

[*Translation*]

But the legislation makes clear that the National Security and Intelligence Review Agency, or NSIRA, is an entirely new entity, to be created—not from SIRC or the Office of the CSE Commissioner—but from a desire to push the accountability agenda forward in Canada. SIRC and the Office of the CSE Commissioner will be dissolved when NSIRA is created.

SIRC, along with its partners and counterparts in the review community, have long called for change of this nature that will break down the silos that have hampered review for so long.

When the decision was made in Canada more than 30 years ago to create SIRC, it represented some of the best, most forward thinking at the time on accountability for intelligence. But this is a new era, with new challenges for accountability. Canada has an opportunity to again fashion itself after the best of thinking on accountability, taking into account the important experience of others.

The parliamentary element of accountability means designing a committee of parliamentarians, which, I imagine, you already know. I am pleased that the government did not stop at the creation of NSICOP and has included equal attention to expert review.

[*English*]

Internationally, we can see our allies similarly adding substance to the review and oversight structures responsible for national security. In the U.K., there is the new Investigatory Powers Commissioner's Office. In New Zealand, there has been a doubling of the size of its inspector-general. In Australia, expanding the size and remit of its inspector-general for intelligence is actively being discussed as we speak.

Canada's deliberations on accountability are happening at a time when there has been a shift in thinking on accountability for intelligence agencies, translating into expectations among the public of greater transparency. To that end, one of the great strengths of the bill is the provision that allows for the agency to issue special reports when it decides that it is in the public interest to report on any matter related to its mandate. The new agency will issue these reports to the appropriate minister, who must then cause them to be tabled before each House of Parliament.

This will allow the new agency to signal a significant issue to the minister and the public in a timely way. SIRC is not currently able to do this, and it has been a limitation for SIRC in its ability to present the results of its work in a timelier manner. In light of the government's recent statements regarding transparency, this is an important provision. At the same time, we note that there are no provisions in the bill requiring CSIS to issue a public report to match the requirement of CSE in this regard. In the interests of transparency, SIRC views this as an important gap that SIRC puts to the committee to consider in its deliberations.

[*Translation*]

The proposed legislation makes clear that SIRC and its experience will be central to what is coming. The transitional provisions clarify that, at the coming into force of part 1, SIRC members, of whom I am one, are to be continued as NSIRA members for the remainder of their term. In the majority of—

[*English*]

The Chair: We're down to a minute and a half.

Hon. Pierre Blais: Okay, well, I will run now.

The Chair: Run.

[*Translation*]

Hon. Pierre Blais: What do these proposed changes mean for SIRC in the immediate? We have proposed some amendments that are not major. You have them in writing, and I encourage committee members to look at them. I will answer any questions you may have on that subject.

We will of course continue to review the activities of CSIS to ensure those activities are compliant with Canadian law and Ministerial Direction. As soon as we become NSIRA, we will promptly put the necessary mechanisms in place with the 17 or 18 new organizations that are under review.

● (1110)

[*English*]

All those organizations will be called upon to have MOUs with NSIRA to address the issue of how the review will be done; it's obviously a little early to address this.

In closing, we are very happy with this new bill that will cover...I wouldn't say “requests”, which is too strong, but what was discussed many times in the past over the last few years. Personally, having been involved for many years in national security, I will say that it will be very good to have all organizations and institutions in the Canadian government together being able to share their information and, I would say, to have better service for Canadians regarding national security.

I will stop at that and be available for questions.

The Chair: Thank you, Mr. Blais. I think I'd be remiss if I didn't thank you on behalf of the committee for your service to Canada over an immense number of years. I think you're well recognized for what you've done in the past.

Similarly, Mr. Fadden, who is now retired, has also provided great service to Canada.

You have 10 minutes, please, Mr. Fadden.

Mr. Richard Fadden (As an Individual): I'm going to take less than 10 minutes. If I could, I'd just like to make five points.

First, if I were a member of the House—and I'm well aware that I'm not—I would have quite happily voted yea at second reading. I think this bill goes a long way toward simultaneously dealing with security issues and concerns as well as charter and legal rights concerns.

I do say “dealing simultaneously”. People talk about balancing the two. I don't think they need to be balanced. Each is so important that they have to be dealt with as stand-alones and then adjusted as necessary.

I think this is the case because the bill endeavours to respond to one central issue that it should address, and that's the level of threat faced by Canada and its allies. Otherwise, there's no reason to make changes. The only reason we have these agencies and their review capacity is that we're facing a variety of threats in the areas of terrorism, espionage, foreign interference, and cyber-activities.

In these areas, I think it's fair to say that our adversaries remain committed to pursuing their activities against Canada and our allies here and elsewhere. It does not take a great deal of effort, I think, to see how a rebalancing of the world's power relationships is adding considerable instability to the world and offering opportunity to our adversaries, states and non-states alike, and I think we're only beginning to get a grip on cyber-threats. I think the additional authorities proposed in the bill, along with the new arrangements for review, reflect this not-so-brave new world.

I only have one specific concern that I wanted to raise concerning the provisions in the bill that relate to the proposed intelligence commissioner. My concern is not really about the security and rights balance, if I can contradict myself; rather, it's a machinery-of-government or accountability issue. The bill proposes to give the commissioner final say about a number of CSEC and CSIS activities, which in my view should be the responsibility of ministers of the crown and not that of an appointed official. Giving a former judge, however eminent, responsibility for the legality of some activities is one thing—and a good thing—but surely "reasonableness" should be the domain of ministers and of the officials for whom they are responsible.

In practical terms, if something goes wrong in the future, and whether this House or the Senate or a royal commission looks at this issue, it seems to me that the veto proposed to be given to an appointed official will make it too easy for the minister of the day to escape accountability. I say again that this is not a security issue, and I raise this issue because as a concerned Canadian I think we should have considerable respect for the fundamental principle of our unwritten constitution, which is that ministers, not appointed officials, are accountable for delicate and sensitive things.

Under the current arrangements being proposed, you will have the agencies, the public safety department, the Department of Justice, the minister, and then an appointed official, who may or may not know anything about national security, determine in the final analysis whether in these variety of activities they can move forward. Having a former judge as a commissioner to determine legality is fair ball. While it's entirely lawful for Parliament to do this, it seems to me that it is fundamentally changing one of the principles underlying our system of government to give such a fundamental veto to an appointed official.

I'm going to stop there. I have a variety of views on some other parts of the bill. Should you have any questions, I'd be happy to try to answer them.

Thank you, Chairman.

● (1115)

The Chair: Thank you, Mr. Fadden.

As the first questioner, it's Mr. Fragiskatos for seven minutes.

As colleagues get towards the end of their time, since I don't wish to cut people off, I can give some indication of how much time is left in their minute.

Mr. Fragiskatos, you have seven minutes.

Mr. Peter Fragiskatos (London North Centre, Lib.): Not to worry, Chair; I have the stopwatch going on the iPhone.

The Chair: Good.

Mr. Peter Fragiskatos: Thank you to all of you for being here today.

Mr. Fadden, most of my questions will go to you.

You're here as an individual today and you have so much expertise in the realm of national security. I do want to ask you first about CSE and the proposal to allow CSE to carry out offensive cyber capabilities.

Last week we heard from Ray Boisvert, who, as you well know, is the former assistant director of CSIS, who told us that "the best defence always begins with a good offence." In his view, when more than five dozen countries are rumoured to be developing active cyber capabilities, that means we must develop capabilities to respond, and in some cases that includes outside our borders.

You're nodding, so I take it that you agree with this position. In his commentary to the committee last week, Mr. Boisvert went even further and made the point that we're actually behind, that this should in fact already have happened. Can you delve into this?

Mr. Richard Fadden: Yes. Thank you, Chairman.

I generally agree that the authorities that are being proposed for CSEC are a good thing. I would put it somewhat differently. Monsieur Boisvert said that a good defence involves an offence. I would say that in the area of cyber, it's actually difficult to distinguish offence from defence and that, for example, you can sit in Canada and build up firewalls. That's purely defensive, and we're doing that now. Is it actually offensive, when you know somebody's about to come in and do you damage, to try to do something about it? I would say that's still in the realm of defensive, although it's in a grey area. "Offensive" would mean actually going out with a plan and a strategy and trying to do damage to somebody else.

At an absolute minimum—and I agree with the bill—you need to give CSEC the capacity to move outside Canada and to take some positive steps. I'd also note that I agree with Mr. Boisvert. All of our close allies have been doing this for some time, and we've been subject to some under-the-radar criticism for not being able to do it. I would also note that because the authority exists doesn't mean that it will be used blithely.

However, I think one of the great challenges of the day is cyber operations and cyber-activities, and we need to have this, I think, to defend ourselves, using the word "defence" in the broadest sense.

Mr. Peter Fragiskatos: With that in mind, what do you make of the criticism that groups such as the BC Civil Liberties Association have put forward, suggesting that giving CSE an offensive capability would "normalize" state-sponsored hacking? What do you make of that kind of critique?

Mr. Richard Fadden: I don't agree with that. I think that under international law, states are restricted in what they can do to other states, but there's a big exemption to that. One of those exemptions is self-defence, which is defined very broadly. I think most of what would be envisaged under the provisions that we're talking about would fall under the exemption in international law relating to self-defence. Technically speaking, it may be hacking, but it's hacking that's necessary, I would argue, for national security.

● (1120)

Mr. Peter Fragiskatos: You've also made the observation that our democracy, in effect, is under threat. You were quoted as saying "I believe that it is likely a couple countries might have tried to influence our elections."

I'm thinking about CSE and I'm thinking about this offensive capability. Is it possible for CSE to act in ways to protect, for example, the integrity of elections in Canada?

Mr. Richard Fadden: I think that's rather more difficult. I was about to say that they could use existing powers, which enable them to try to protect federal institutions. The big difficulty in dealing with cyber, of course, is identifying where the problem is coming from. It may seem simple, but it is in fact very difficult, and in most cases anybody trying to affect elections uses cut-outs.

You will have read as well, as I have, what is believed to have happened in respect of the last U.S. presidential election, and it took about a year before they had some reasonable assurance that it was the Russians.

I'm not sure I would use the offensive capability to protect our elections, but I would use that grey area of defensive moving into offensive if we can identify where it's coming from.

Mr. Peter Fragiskatos: I have a final question for you.

In a *Toronto Star* piece written shortly after your retirement, you were asked if Canadians needed to readjust their thinking about what makes a terrorist. You replied by saying that most young recruits are those who:

> feel that the Muslim world is under attack and that somehow Canada is contributing to that.

With that in mind, would you suggest that the nature of radicalization is not religious in nature and that those who are going abroad and taking up arms are inspired by a political message, in the same way that young recruits were inspired by the Spanish Civil War or something along those lines?

Mr. Richard Fadden: Broadly speaking, I would, although we have to acknowledge that it's often done under the cover of religion. A lot of people use the tenets of Islam to justify what they want to do. I fundamentally believe that a large chunk of the Muslim world believes that they're under attack by the west.

I had some research done once to find out the last time a non-Muslim country was attacked by the west. Do you what country it was? Grenada. Every other significant military effort undertaken by the west—read: often the United States—has been against a Muslim or a quasi-Muslim country. You can understand why I argue that they do feel under attack. If you add that basic sort of gut-level reaction to everything that's on the Internet, in the cyberworld, and whatnot, they do feel threatened.

That said, religion is often used as a cover.

The Chair: Thank you, Mr. Fragiskatos. You still have 30 seconds.

Mr. Peter Fragiskatos: Oh, I do? My goodness.

The Chair: Mr. Paul-Hus is next.

[*Translation*]

Mr. Paul-Hus, you have seven minutes.

Mr. Pierre Paul-Hus (Charlesbourg—Haute-Saint-Charles, CPC): Thank you, Mr. Chair.

Thank you for being here today, ladies and gentlemen. Your assistance is very important.

I will begin with you, Mr. Fadden.

You said at the outset that you would have voted for Bill C-59 at second reading. However, in accordance with the procedure that was used, the bill was not considered at second reading and was referred to the committee with the recommendation from theHon. Ralph Goodale (Minister of Public Safety and Emergency Preparedness) that the parliamentarians around this table propose serious and worthwhile amendments.

You more specifically reviewed part 4, but, if you had any changes to suggest to the bill as a whole today, what would they be?

Mr. Richard Fadden: Thank you, Mr. Chair.

As I said in my preliminary remarks, I would change the powers granted to the commissioner. I think those powers are more than what is necessary and are too similar to the powers or basic responsibility of a minister. Let me be very clear: Mr. Goodale is not in question here. I am speaking from an institutional standpoint.

I would give CSE the very clear and unambiguous power to assist the provinces. The current wording of the act generally limits what CSE can do to federal government institutions. Everything is connected these days. Failure to give CSE the power to intervene in the provinces and the private sector—something it currently does—sends a somewhat unclear message.

I am not necessarily suggesting a change to the bill. As I said, it is generally speaking a good bill. Having worked at CSIS and been a national security advisor, I am starting to be concerned about what is being asked of the institutions subject to review by Mr. Blais and his colleagues, as well as the Federal Court. Taken together, the new committee of parliamentarians, the new SIRC, the commissioner, and the Federal Court place a significant weight on government institutions.

When I went to CSIS, I was really surprised to see that most applications made to the Federal Court ran to some 150 pages, even the shortest ones. I'm not saying that too much is demanded in any particular case, but rather that this requires a lot of resources. I am not convinced the government provides its institutions with enough resources to conduct the effective review for which Mr. Blais is responsible.

● (1125)

Mr. Pierre Paul-Hus: Thank you for your answer.

Part 4 of Bill C-59, which concerns CSIS more specifically, contains a point respecting the thresholds of what is authorized. It concerns new measures and ways of making applications. Do you think these changes proposed in Bill C-59 can reduce CSIS's ability to disrupt threats?

Mr. Richard Fadden: It's hard to answer that question.

Ultimately, only experience will show whether that's the case. On the whole, I would say no. I agree we should slightly raise the basic level required to enable the agency to act, but I think it gives us enough room to manoeuvre.

Mr. Pierre Paul-Hus: Mr. Fadden, you mentioned the various threats that Canada faces. What three countries currently represent the greatest threat.

Mr. Richard Fadden: That's hard to say. In espionage and foreign interference—this won't surprise you—I would say it's China and Russia. Those two countries are not really comfortable in the current international equilibrium, which they want to change. They also employ tools that we would never consider using. The third country is—

Mr. Pierre Paul-Hus: What kind of tools you mean?

Mr. Richard Fadden: For example, they use their cyber capabilities without any control, as we discussed with your colleague. We assume that China has more than 200,000 persons operating in cyberspace in one way or another. Some are in government or in the armed forces, while others are in the private sector. This reveals a frame of mind that is entirely different from our own.

I find it hard to say what the third country would be. I prefer to say the third entity consists of groups that focus on terrorism.

Mr. Pierre Paul-Hus: Thank you very much.

Mr. Blais, each of your statements revealed a communication problem that might arise.

Many agencies and sub-agencies must cooperate, such as the National Security and Intelligence Committee of Parliamentarians, the national security review agencies, the intelligence commissioner, and the national security advisor to the Prime Minister. All these groups must intervene in decision-making on measures that must be taken with respect to national security. Since so many people are involved, aren't you afraid that leaks might occur or that information might not be protected? We are so eager to establish protections that we are creating a problem.

Hon. Pierre Blais: I might look at the problem the other way round. The entity that has been added to the limited group is the committee of parliamentarians. I hope you're not suggesting that it's parliamentarians who present a threat.

This new committee of parliamentarians will take a more direct approach to the facts. CSIS has been around for 30 years, and I believe in all modesty that our experience has shown that we haven't been in the news for the wrong reasons. We have managed to maintain confidentiality.

Confidentiality is still a very important factor, but trust is as well. We need to establish that trust and a sense of responsibility among the organizations not here contemplated.

Consider this example. The Department of Finance is not used to seeing someone come in to determine whether something isn't right from a national security standpoint. If that department, or the Department of Agriculture and Agri-food or Transport or any other federal government entity, is concerned by a national security issue, it should be glad that independent organizations are verifying whether its work is being done right and that it isn't making any mistakes in its national-security-related actions.

You must have noticed that Canadians would like to know more about what is going on. They also want to be certain the law is obeyed. I think Bill C-59 meets that demand.

● (1130)

The Chair: Thank you, Mr. Paul-Hus.

Mr. Dubé, you have seven minutes.

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

Ladies and gentlemen, thank you for being here.

Mr. Blais, I would like to ask you a question about the presence, or rather absence, of various review mechanisms for the Canada Border Services Agency. Several witnesses have said it would be important to have some kind of committee or organization that would review that agency's activities, considering that it plays an increasingly important national security role.

Do you agree with that view?

Hon. Pierre Blais: The minister also raised that point. Correct me if you think I'm wrong, but I believe Minister Goodale, the Minister of Public Safety and Emergency Preparedness, previously stated clearly that he wanted an organization to review the activities of the Canada Border Services Agency. The only question we consider will be the activities of the National Security Agency. I think that meets a need.

Previously, when we researched a national security issue at CSIS, the secret services, and we needed to go and see the Canada Border Services Agency, we couldn't do it. Now we're allowed.

You can confirm this with the minister, but I think he has already committed to creating an organization that will oversee the Canada Border Services Agency for all matters not pertaining to a national security issue.

Mr. Matthew Dubé: You mentioned national-security-related issues. How do you make that distinction?

You could say that border security is always and inevitably a national security issue.

Hon. Pierre Blais: I don't know how many hundreds of thousands of people fly every day, but the number is astounding.

Not all those who leave or enter Canada present a national security threat.

Mr. Matthew Dubé: I agree.

In the circumstances, should we follow the indicators? You usually conduct a review because you believe that information could have been shared with CSIS, for example. That is why you are reviewing the actions the agency has taken. Is that an appropriate conclusion?

Hon. Pierre Blais: I find it hard to answer your question because that's a hypothetical situation.

If someone shows up at the border who, according to the agency of another country, presents a threat, an alarm is sounded somewhere. Border Services generally then communicates with the secret services or the RCMP to check and see whether the individual should be arrested, investigated, and so on. Measures are taken, but the law must be complied with. We can't just detain anyone at any time. Border Services will therefore take action.

Our role is not to intervene at that point. However, once measures have been taken, we will determine whether the act has been complied with. The departments currently have mechanisms designed to help them report national security threats. It is up to the organization to make that determination. Then we can figure out whether the organization was right or wrong. First and foremost, though, I think it is for the organization to determine.

Mr. Matthew Dubé: So that's another reason for an organization to examine the agency's activities specifically.

Hon. Pierre Blais: Some agencies are more likely than others to experience situations involving national security. The risks are greater given the number of people who arrive at the border every day.

● (1135)

Mr. Matthew Dubé: I understand. I also think our discussion clearly shows how difficult it is to determine when that's important and when it is not.

Now I would like to talk about Global Affairs Canada, which is exempted from review by the new committee that has been established. Isn't that a problem considering the role that–

Hon. Pierre Blais: I don't think Global Affairs Canada is entirely exempt.

Mr. Matthew Dubé: It is with respect to information-sharing.

Hon. Pierre Blais: Global Affairs Canada is dealing with certain issues, but I'm not familiar with them.

Global Affairs Canada's will have to get involved when risks arise that directly concern national security, and it will have to report to the review agencies. Global Affairs Canada has been part of the system for more than 30 years. It maintains very close relations with the secret services. However, I can't go into the details.

Mr. Matthew Dubé: I understand because that includes consular affairs.

Do you think that what is proposed in the bill is enough to fill the gap that has been shown to exist on numerous occasions, particularly in cases such as that of Mr. Arar?

Hon. Pierre Blais: That's a special case.

I think that the bill, as drafted, covers all the angles for Global Affairs Canada and all the other organizations. As far as I'm concerned, I don't really see any risk. The work done by Global Affairs Canada and the other agencies should be reviewed on a case-by-case basis.

I worked in this field for many years and have dealt with this kind of case, as you may suspect, and I have no fears in that regard.

Mr. Matthew Dubé: Thank you.

[*English*]

The Chair: We still have a minute left, and you have raised an interesting issue with respect to the exemption for Global Affairs. For the benefit of our analysts here, could you could point to the section that you're relying on for that view?

Mr. Matthew Dubé: That's what I'm trying to do. It's a 130-page bill. I can't quite get it quickly enough in a minute. You'll forgive me, Chair.

The Chair: I'll leave it open while I go to Ms. Dabrusin for seven minutes, please.

Ms. Julie Dabrusin (Toronto—Danforth, Lib.): Thank you to all of you for coming to talk with us today.

One of the issues that I'm particularly interested in when I look at all of this is the question of oversight and accountability in the bill and how that's been arranged.

We've heard a number of people come to talk about—and I know we said we were going to try to avoid acronyms—NSIRA, and how that's great because it gets past all the silos that we've had in the past, which have been a problem. Last week we had a witness from the Canadian Bar Association. He presented an interesting quandary about whether it is too broad now.

Is the way “national security” is defined for the NSIRA review too broad? Given your own experience and the transitional role that gets played, how do you see that? Do you see any concerns about the definition of “national security” for the NSIRA review?

Hon. Pierre Blais: Before, we had only two or three organizations to review national security. Now we have 19 altogether, and you're saying maybe that's too many. I don't think so.

NSIRA will be created. It will be new when the bill is adopted. We will see, case by case. I would say that when we start as NSIRA, we will probably not have a dozen investigations in finance or transport or whatever. We're going to go where the real threat is. This is where we will look into the situation.

We were complaining that we should have access to other departments and institutions that have national security matters, but we could not have that access. Now we have. That doesn't mean we will spend all of our time there.

Usually we make a plan when we start the year. We sit down with the organization, with CSIS, or with.... Mr. Fadden knows that. We don't arrive in the morning, knocking on the door and saying, “Look, we want to see this and that.” We don't do that. We cannot do that. We cannot intervene in their operations. We prepare a plan. We say we'll look into this and this, and we report on it to the minister and to Parliament. This is what we do. It will not change. We will have more flexibility to extend and to look into areas that we were not able to look into. It will be better for Canadians, I would say, because the accountability will be better.

● (1140)

Ms. Julie Dabrusin: The breadth isn't a concern for you in the definition of “national security” in the statute for NSIRA?

Hon. Pierre Blais: Excuse me...?

Ms. Julie Dabrusin: It's not a concern for you, the way that it's been—

Hon. Pierre Blais: No, not really. It will be case by case. We will see how it works.

Ms. Julie Dabrusin: I was looking at your suggestions. In your proposed amendments, you have proposal 2 on page 2. It refers to proposed subsection 9(1) and proposed section 10 of the NSIRA act, asking that they mirror the language of subsections 39(1) and 39(2) of the CSIS Act regarding the access to information by adding to proposed subsection 9(1) the following: “Despite any other Act of Parliament or any privilege under the law of evidence.”

Hon. Pierre Blais: Sorry; which number are you referring to?

Ms. Julie Dabrusin: It's proposal 2 on page 2, under “General”.

The reason I'm raising that—

Hon. Pierre Blais: It's referring to section 39?

Ms. Julie Dabrusin: Yes.

Hon. Pierre Blais: Are you talking about the quorum?

Ms. Julie Dabrusin: No, it's proposal 2. The numbering is funny, but it's the last proposal on that page. It refers to granting access to information and to privilege....

Hon. Pierre Blais: Yes.

Ms. Julie Dabrusin: I was drawing your attention to that because when the Canadian Bar Association came to speak with us last week, they raised concerns about the waiver of privilege and how this could have a chilling effect on the type of legal opinions that are given. There may be a broad range of options contained in any legal opinion. Having that privilege pierced could create a chilling effect on legal opinions. Have you thought about that as a possibility? What do you think about that concern?

Hon. Pierre Blais: We try to have a level playing field so that the level will be the same for everybody. It's important that people who are going through national security issues in the context of being a witness.... We had problems in the past. There were a couple of cases that went to court regarding those points, and it was always a problem to deal with those matters, to decide who is entitled to some privilege and who is not. We have to be careful with that. Canadians are not always happy with having differences on this matter.

As for the access to information aspect, which is the objective here, we usually have access to everything but cabinet documents. This is where we are, and it should be this way.

Ms. Julie Dabrusin: On the flip side, you say that in your experience, not having access to privileged materials has been a problem in the past.

Hon. Pierre Blais: I cannot remember any case in which we were worried more about not having access to other departments than about having confidential documents. It's not really a problem. I think it's accepted that this is the law of the land.

Ms. Chantelle Bowers (Acting Executive Director, Security Intelligence Review Committee): Maybe I could just add something.

The Chair: Yes, but please be brief.

Ms. Chantelle Bowers: With respect to complaints before the organization, the access to information in that regard is more narrow. Up until now, we've had access to everything, including solicitor-client privilege documentation. Now we notice that in Bill C-59, that access to information is limited. It specifically removes solicitor-client privileged information, for instance. That's the problem we were highlighting.

● (1145)

The Chair: Thank you, Ms. Dabrusin.

Thank you, Ms. Bowers.

Mr. Dubé, are you able to point to the specific section that you're relying on?

Mr. Matthew Dubé: Yes, I can.

[*Translation*]

I will be brief.

I was referring specifically to the complaints mechanisms.

Clause 8(1)(d) of the bill states:

> The mandate of the Review Agency is to
>
> ...
>
> (d) investigate
>
> (i) any complaint made under subsection 16(1), 17(1) or 18(3),...

The bill then refers to the Citizenship Act, the Royal Canadian Mounted Police Act, and the Canadian Human Rights Act.

The provisions in this part of the bill concern CSIS, CSE, and people who are unable to obtain security clearances in connection with federal government contracts. As no reference is made to Global Affairs Canada, it would be impossible for someone to file a complaint concerning consular matters in a case such as that of Mr. Arar.

[*English*]

The Chair: That's a clarification and I appreciate it—

Mr. Matthew Dubé: Thank you.

The Chair: —because you were asking a question that somewhat puzzled the analysts. We have very sharp analysts.

Mr. Motz is next.

Mr. Glen Motz (Medicine Hat—Cardston—Warner, CPC): Thank you, Mr. Chair, and thank you for being here, panel.

Mr. Fadden, as with policing, the successes of CSIS and CSE are primarily unknown and their failures are very public. You mentioned your biggest fear at CSIS was having an attack occur in Canada and then finding out that another part of our government knew of the threat and didn't share that information.

As someone who has dealt with these challenges for real and not just theoretically, what is this committee missing with respect to that aspect?

Mr. Richard Fadden: Thank you for the question. It's the traditional answer, but this time I mean it.

I didn't say it in my initial remarks, but one part of this quasi-omnibus bill that I think is overly complex is the one dealing with information sharing within the federal government. I would argue that there should be a positive obligation on any institution of the federal government to share with a listed number of institutions any information or concerns they might have about national security.

The way the bill is drafted now, you need to have worked in the Department of Justice for 15 years to understand the standards and whether there's a positive obligation or not. I think this is better than was the case when I was at CSIS, where there was no legal protection at all, but I don't think it makes clear to all and sundry that the overarching objective here is to share information relating to national security to avoid a crisis.

If you read that part of the bill, I don't think that comes through. There are so many conditions and thresholds and whatnot that I don't think it meets the standard, so if there is one part of the bill that I would argue you should strive to clarify and make very much clearer, that is the part. It would have made me more relaxed, when I was at CSIS, about the thing that you mentioned, but I would still worry that somebody in HRSDC or Heritage Canada who might have tripped over information would still not feel comfortable calling up and saying, "We have an issue."

Mr. Glen Motz: Thank you for that. I appreciate that piece of information, and for us as a committee, I think it's something we certainly need to focus on.

I have one last question for you, sir. My time is limited.

With this new bill, are we giving our security agencies the tools they need, or are we placing additional burdens on them?

Mr. Richard Fadden: That's a pretty big question. I think, generally speaking, you're giving them the tools. It's like a lot of other areas: until they're actually out there in the field trying them out, it's hard to say.

I haven't counted, but the number of times that the words "protection of privacy" are mentioned in this bill is really quite astounding. I'm as much in favour of privacy as everybody else, but I sometimes wonder whether we're placing so much emphasis on it that it's going to scare some people out of dealing with information relating to national security. Generally speaking, though, I think they do have the tools.

What does worry me a bit—and I say this with great deference to Monsieur Blais and his colleagues—is that I think the review capacity, the review effectiveness, at least initially, is going to impose a considerable burden. Departments that have never had to deal with SIRC all of a sudden are going to have to develop a practical definition.

I think, to call a spade a shovel, the definition of national security is going to be hard. I understand what Monsieur Blais was saying. It's not that clear when someone is in Heritage Canada or the Department of Agriculture or CFIA that what they're doing could possibly affect national security. There's one stream that's easy to follow, and that's if they use information provided by CSE, but more broadly.... I'll give you an example.

A deputy minister once called me when I was at CSIS and said, "My department has responsibility across the country for doing a variety of things relating to individuals, and we think there's a pattern here that suggests that there's some foreign interference, and you ought to do something about it." Four months later, our lawyers sort of concluded they weren't sure it was national security, and they were pretty sure they couldn't do it, given the Privacy Act.

Now, with great deference to lawyers—I was one earlier, and I'm now no longer one—I think we need to find a way to simplify some of these concepts. I know that once the bill is passed, if it's passed, there will be operational instructions, but my hope would be that in some respects, on some aspects of the bill, we could be a little bit less legal and a little bit clearer.

● (1150)

Mr. Glen Motz: Thank you.

The Chair: Let's hear it for recovering lawyers.

Go ahead, Mr. Spengemann.

Mr. Sven Spengemann (Mississauga—Lakeshore, Lib.): Thank you very much, Mr. Chair.

Mr. Fadden, I have a quick follow-up question on your comments and your recommendation regarding the intelligence commissioner. Is it your view that decisions of the intelligence commissioner would be subject to a judicial review?

Mr. Richard Fadden: I don't have an answer to that, and I think if the answer is yes, then I'm even more frightened by what the range of his authorities could be.

Technically speaking, from what I remember of the Federal Courts Act, I think the short answer would be yes, and if that's the case, I think one of the things that the bill misses a little bit, although there are provisions for exigent circumstances, is that this intelligence commissioner in some circumstances is going to have to be alert and readily accessible, even though he or she will be holding a part-time position.

Therefore, I worry that there's a little bit lost about the world of national security, which requires rapid movement.

Mr. Sven Spengemann: Thanks very much for that.

I have a question to follow up on the comments of my colleague, Mr. Motz.

We're in a time of tremendous transition. In fact, we've had rapid blurring of state and non-state boundaries, and equal blurring of public and private domains with respect to data, as well as other issues. Have we put our eyes far enough toward the horizon in this bill to address potential unknowns? I'm looking to issues like AI and quantum computing, issues that, when intersected with security, especially cybersecurity, raise questions that we haven't even begun to wrap our heads around.

Is this framework nimble enough and comprehensive enough, in your view, to address those issues that may come at us very quickly and unexpectedly out of corners that we haven't fully contemplated yet?

Mr. Richard Fadden: That's a very good question.

I would argue most likely “yes”, because most of the definitions that attach to the World Wide Web, the international digital infrastructure, are so broad that you could probably link in most aspects of AI and most aspects of the cloud. I think it would be better if there were some precision, to be honest, but if I were still working and you passed the bill, I would argue that the two things you mentioned could be included in the definitions. However, I would also worry that a bunch of people could also argue the opposite. I do think the definitions now are pretty flexible. As long as you can link them in any way to the World Wide Web, I think you can include them.

Mr. Sven Spengemann: That's very helpful. Thank you for that.

Mr. Blais, you spoke about the importance of transparency and public trust. In your written submissions, you've also addressed the work that we do very closely with our allies, especially our Five Eyes allies. How important will relationships with our allies be, not only in actually doing the security work, but also in reviewing the security work? Do you anticipate that NSIRA is going to be in close contact with its counterparts in other jurisdictions?

Hon. Pierre Blais: As you know, we have already been in contact for decades with our five particular allies, the Five Eyes. As you may remember, we welcomed those partners earlier, in late September. They came over here. We have regular meetings with them to adapt our approach and to be more efficient.

Obviously, the organizations that we're looking at are also having meetings and are remaining in touch with their allies as well, the Five Eyes and others. It remains important.

We have already discussed what was going on here in Canada. We met with the British, the Americans, all of them, and we go on with that. Obviously, the way we are developing our approach, particularly with almost 20 organizations, is a little new in the area, and we will probably share our views on that. For the time being, we're not yet there, because NSIRA will probably be in place later this year at best.

● (1155)

Mr. Sven Spengemann: Thank you.

The Chair: Thank you, Mr. Spengemann.

For the final three minutes, we have Mr. Motz.

Mr. Glen Motz: Thank you, Mr. Chair.

I have one question for each of you. I'll start with Mr. Fadden.

With the issues of cyber-attacks and espionage and the interference that China has had with Canada and the proposed sale of Aecon and its sensitive national assets to China, is Canada really understanding and prepared to deal with the threat that China represents?

Mr. Richard Fadden: You won't be surprised by my answer. I think that the answer is no. I don't think that we're oblivious to the threat, but I would argue—and I make no distinction between governments here—that we are schizophrenic on China. There are people who see real trade and economic advantages and see some security problems. Other people see security problems with some small economic and trade advantages. I think that because of this, it's been very difficult to have a national debate on China. The good news is that we're not the only ones who have this problem.

I would argue that we do not really understand, in all of its complexity, how much China is different from Canada and how it aggressively uses all of the resources of the state against not just Canada but against any number of other countries in pursuit of its objectives.

Mr. Glen Motz: Thank you very much, Mr. Fadden.

Mr. Blais, I have one last question for you.

In your role as the SIRC chair, would you say that there is a reason and justification for Canada to have preventative arrest rules to stop threats before they occur?

Hon. Pierre Blais: Do you mean the threat reduction measures?

Mr. Glen Motz: Yes.

Hon. Pierre Blais: Oh, yes. As you know, we have the responsibility to review those threat reduction measures every year. I would say it's so far a success. It shows an issue that was raised earlier in the discussion about being proactive, because I think it was new, and it's successful. So far, so good. We have the mandate to look into that, and we will go on with that in the future as well.

Mr. Glen Motz: Thank you. I have one last question.

As a former judge, you would have seen applications on recognition orders and warrant applications for monitoring criminal and terrorist entities. Would you say that in this bill we have everything we need to protect Canadians?

Hon. Pierre Blais: Well, I will be careful—

The Chair: You have 25 seconds or less.

Hon. Pierre Blais: —with my answer. What I would say is we have a charter. The charter has—and people forget that from time to time—section 1, which allows somehow going against the charter or excuses going against the charter. What is most important is that when the service or anybody has to act in any way, they should do that legally. If they are not allowed, pursuant to the charter, to make some interception, they go to a judge, and the judge will look into everything to make sure that it can be authorized because there are valid reasons. This is the basis of everything. We've heard everything over the last few years, but we should remember that. When a judge is looking at this to make sure that the law is respected, this says we should be okay with that.

● (1200)

Mr. Glen Motz: Thank you.

Hon. Pierre Blais: I strongly believe that.

The Chair: Thank you, Mr. Motz.

Go ahead, Mr. Fadden.

Mr. Richard Fadden: Thank you.

I just wanted to say that I think it's a good bill overall. I mean, I think a lot of people spent a lot of time working on this. However, it is beginning to rival the Income Tax Act for complexity. There are sub-sub-subsections that are excluded, that are exempted. If there is anything the committee can do to make it a bit more straightforward, it will probably facilitate the work of Mr. Blais and his colleagues, but truly, because of legitimate concerns about rights security, some of the sections are almost incomprehensible.

I've spent most of my life working on federal legislation. This is not the simplest one, so I would urge any kind of simplification, to the extent you can.

Thank you for allowing me to say that.

The Chair: Thank you, Mr. Fadden. It appears that your recovery from your previous profession is well under way.

Again, on behalf of the committee, I want to thank both of you for this very interesting discussion, which I regret to suspend.

We'll suspend for a minute or two while we re-empanel.

Again, thank you.

● (1200)

(Pause)

● (1205)

The Chair: Let's bring this meeting back to order. We have our witnesses in place.

Representing the Canadian Muslim Lawyers Association, we have Faisal Mirza, who is joining us from beautiful downtown Mississauga, the entertainment capital of the nation. Not many people know that, but I'm sure Mr. Spengemann would be happy to spread the word.

Mr. Sven Spengemann: Wholeheartedly.

The Chair: Yes.

[*Translation*]

Thanks to the representatives of the Ligue des droits et libertés: Mr. Denis Barrette

[*English*]

and Dominique Peschard are both here. Thank you for your presence.

Colleagues, I'm going to call the meeting five minutes early because we do have to deal with the subcommittee's report, so I'll call it, as I say, five minutes early and ask that the room be cleared because it is an in camera discussion.

With that, I'll call on Mr. Mirza for his 10-minute presentation, please.

Thank you.

Mr. Faisal Mirza (Chair, Board of Directors, Canadian Muslim Lawyers Association): Thank you. Good afternoon, Mr. Chair and members of the committee. On behalf of the Canadian Muslim Lawyers Association, thank you for the invitation to provide submissions about Bill C-59.

I will start with our background. This year will be our 20th anniversary. We are based in Toronto, with approximately 200 members across Canada who work in all areas of the legal field, including private practice and government.

In terms of advocacy, we have consistently appeared at the Supreme Court of Canada dealing with balancing individual rights with state interests. We also assist the legal community and the general public with legal education.

Our underlying goal is to promote a justice system that is fair. Since 2001, we have had the privilege of providing testimony to parliamentary and senate committees responsible for considering national security policy and law.

In terms of my background, I am a criminal defence lawyer with 16 years of experience mitigating cases at all levels of court. I have acted as counsel on several national security cases. I am also an instructor on national security at the University of Toronto. Today I am speaking to you in my role as the chair of the Canadian Muslim Lawyers Association.

In terms of my contribution, I wish to discuss two fundamental areas.

The first is the positive. We see the national security intelligence review agency as having great potential, especially if it's staffed properly.

Second, I will raise our sources of concern. In particular, this bill does not address a key area of security, the legal threshold for searches of digital devices at the border. Further, there are real concerns about a lack of fairness and charter compliance regarding listed entities, which are noted at part 7 of the bill.

I'll deal first with the national security intelligence review agency. This is at part 1. For simplicity, I'll refer to it as NSIRA. This institution has the potential to be a strong pillar of our democracy by providing robust review of national security agencies and their related partners. With more powers being granted to intelligence agencies to deal with evolving threats, this agency reflects the greater need for effective review and oversight. It certainly has a broad mandate, which we think is positive, including to review the activities of CSIS, the CSE, and the RCMP; to investigate complaints against those services; to direct studies and to prepare annual reports; and to report to the Minister of Public Safety.

This strong mandate is a reflection of the expanding powers that are being provided to different agencies in order to effectively conduct national security operations. Clearly there is more power to collect data, more power to share information, more power to conduct surveillance, greater protection of informants, and more powers to engage in preventive measures.

All of this is primarily done either *ex parte* or behind closed doors. As a result, it is critical to have a very strong review agency to try to prevent mistakes before they happen.

Therefore, how do we ensure that a robust review agency is able to address its role in a fair manner? This government has indicated that it is committed to representative institution, and NSIRA will handle the review of security activities and investigate complaints. It is our submission to this committee that for it to be effective, it is essential that it be composed of a diverse group of persons. It should not fall into the trappings of ineffective oversight bodies that are staffed by people who lack independence and impartiality.

In the 2006 response to the Arar tragedy, recommendations 19 and 20 specifically advised that the RCMP, CBSA, and CSIS improve composition and training of their staff to prevent mistakes based on racial and religious profiling. The same logic must apply to NSIRA. Our concerns are that, as evidenced by the recent lawsuit brought by several CSIS employees alleging that some CSIS managers discriminate and stereotype against Muslims, there is little accountability when this misconduct is reported, and as a result, there needs to be stronger training, better oversight, and diverse composition.

In addition to NSIRA's members, which are statutorily governed to be no fewer than three persons and no more than six persons, there will obviously be a significant staff that's going to assist with investigations and provide assistance to those members. There will be an executive director, who will assist with staffing the agency.

● (1210)

It is our view that individuals in those qualified high-level positions must be aware of the community's perspective. The nature of the information to be drawn and the review of decisions would benefit from having a diversity of perspective.

Our friends in law enforcement have confirmed that working with the Muslim community is key to identifying threats and solving major cases. There are numerous instances where that has happened, but there are also instances of things going wrong and members of the community being mistreated by those very same agencies. For NSIRA to have legitimacy, it must recognize that perspective.

It would be helpful if there were some statutory guidance with respect to the required qualifications and composition of the agency members and from where people are going to be drawn in order to staff it. For instance, having one from the judiciary, one person from academia, and one person from the community with knowledge of these issues would be an important addition to the legislation.

Moving ahead, my concern about what's missing from Bill C-59 is that there needs to be some statutory guidance on when the CBSA may search digital devices at the border. We can debate and go over at length the fact that the bill has made progress with respect to balancing individual rights with state interests, but the reality on the ground is all of that can be circumvented by searches of individuals' digital devices at the border. The Customs Act needs to be revisited and reviewed. It is legislation from the 1980s, when digital devices were not the norm, and it contemplated searches of people's luggage.

The use of data collection is the future of national security and the devices that people carry with them obviously are integral in terms of preserving a balance between individual interests and state interests and in protecting our security. In today's era, most people travel. Returning Canadians can easily have their digital devices searched without restriction. A better legal threshold that reflects the nature of the technology needs to be established. Currently it's the position of customs and the government that there is no legal threshold to search individuals' cellphones, laptops, etc., when returning at the border. Even with a reduced expectation of privacy in that context, it becomes critical that there at least be some legal threshold; otherwise, the provisions in the Criminal Code or amendments to the Immigration and Refugee Protection Act or amendments to try to protect information sharing become easily circumvented when individuals are coming back through the border with no protections whatsoever.

The last point I'll touch on very briefly is with respect to part 7 of the bill, regarding listed entities. There is a fundamental omission in the Criminal Code legislation that needs to be addressed and fixed.

Listed entities, as you are aware, are currently listed by process of an administrative regime whereby the Minister of Public Safety and Emergency Preparedness, based on a balance of probabilities, determines whether an entity should be listed or not.

The difficulty is that organizations whose assets have then been stripped and frozen have no ability to hire counsel in order to engage in submissions with the minister or to engage in the statutory judicial review. In fact, it's our understanding that this omission results in a constitutional violation. There's a section 7 breach tied in with a section 10 breach, in that these entities are not given an opportunity to hire and retain counsel in order to defend themselves. That constitutional frailty could be a significant problem for this legislation in the future.

Thank you for the opportunity. That's my submission at this time, subject to your questions.

● (1215)

The Chair: Thank you, Mr. Mirza.

[*Translation*]

Messrs. Barrette and Peschard, you have 10 minutes.

Mr. Dominique Peschard (Spokesperson, Ligue des droits et libertés): I will be giving the presentation on the Ligue's behalf. Both of us will then answer questions.

The Ligue des droits et libertés, the LDL, wishes to thank the members of the Standing Committee on Public Safety and National Security for inviting it to testify regarding Bill C-59. Since September 11, 2011, the LDL has made regular representations to defend the rights and freedoms established in international instruments and our charters, and to prevent their violation in the "war on terror."

In the fall of 2016, during public consultations and the hearings of this Committee, the LDL called for the complete withdrawal of Bill C-51, which we considered dangerous and unnecessary. The LDL also called for the introduction of an oversight mechanism for national security activities, similar to the recommendations of the Arar Commission. Bill C-59 addresses these issues only to a certain degree.

First, we welcome the establishment of the National Security and Intelligence Review Agency. However, some conditions must be met before the Agency can fulfil its mandate as watchdog. The size of the task awaiting the Agency should not be underestimated. It should not simply receive public complaints and reports from the organizations it oversees. It should have the authority to initiate investigations itself.

In addition, the Agency must be specifically mandated to verify that organizations are carrying out their national security activities in compliance with the rights and freedoms established in the Constitution. This mandate must also include the review of ministerial directions to ensure compliance with the Charter of Rights and Freedoms. On this point, we would like to note that ministerial directions concerning information sharing must be amended to be consistent with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

A significant number of organizations are involved in intelligence sharing. The Arar Commission counted 24 in 2005. The oversight mechanism will have a considerable task, and it will be an empty shell if it lacks the material, human and financial resources needed to do its job. We would also like to note that provisions in C-59 concerning the Agency's public accountability do not go far enough, and an annual report is insufficient. The minister as well as the public and Parliament should be informed when the Agency discovers practices that are non-compliant with the Charter.

The fact that the Agency's recommendations are non-binding is also a concern. If the recommendations remain non-binding, the organizations concerned should be required to report publicly on the steps they have taken to implement the recommendations.

Lastly, the Agency should have the authority and resources to work with similar organizations from other countries. National security and intelligence organizations cooperate internationally, and the agencies that monitor them should be able to do likewise.

The next issue is the authority given to the CSE. The CSE can intercept anything in the international information infrastructure, regardless of any federal or foreign law. For example, the CSE can intercept communications from U.S. citizens, and the National Security Agency can do the same regarding Canadian citizens, for the purpose of sharing this information. Bill C-59 must prohibit Canadian agencies from receiving information on Canadians from other agencies that they would not have been able to obtain under Canadian law.

While Bill C-59 provides better guidance for the more worrisome provisions of C-51, some fundamental problems remain. The repeal of judicial investigations is a positive move. However, an individual could still be placed in preventive detention for seven days without being charged, even though C-59 raised the threshold for this detention. We urge that this measure and any previous provisions concerning this measure be removed.

There is major concern over the powers given to CSIS, as set out in Bill C-51 and amended by C-59. It is unacceptable for CSIS to be authorized to compile datasets on Canadians. There are no limits on the data that CSIS can compile, provided that the data is considered "public." Judges may approve the compilation of other datasets based on a very weak threshold. The only requirement is that the data "is likely to assist" CSIS.

● (1220)

These provisions make it legal for CSIS to continue to spy and compile dossiers on protest groups, environmental protection groups, Indigenous groups and any other organization that is simply exercising its democratic rights. CSIS can count on the support of the CSE, which is also authorized to collect, use, analyze, retain, and disclose publicly available information, and whose mandate includes providing technical and operational assistance to agencies responsible for law enforcement and security. These datasets also pave the way for *big data* and data mining, which in turn leads to the compilation of lists of individuals based on their risk profile. We are opposed to this approach to security, which places thousands of innocent people on suspect lists and targets Muslims disproportionately.

Bill C-59 allows CSIS to continue to address threats through take active measures such as disruption. These measures can limit a right or freedom guaranteed under the Canadian Charter of Rights and Freedoms if so authorized by a judge. It is important to note that this judicial authorization is granted in secret and *ex parte*, so that the persons whose rights are being attacked cannot appear before the judge to plead their "innocence" or argue that the measures are unreasonable. They may also be unaware that CSIS is behind their problems, which would make it impossible for them to lodge a complaint after the fact. These powers recall the abuses uncovered by the Macdonald Commission, such as the RCMP stealing the list of PQ members, burning down a barn, and issuing fake FLQ news releases to fight the separatist threat. We are therefore strongly opposed to granting these powers to CSIS.

We are extremely disappointed to see that the Secure Air Travel Act preserves the no-fly list. Persons are not told why their names have been placed on the list and, if they appeal, the judge hears the case *ex parte* based on evidence that the individuals cannot challenge and that may even be inadmissible in a court of law.

The Human Rights Committee condemned this lack of effective recourse in its 2015 comments to Canada. It has never been proven that this list increases the safety of air travel, making the situation even more unacceptable. England, France, and other countries that are targeted by terrorists far more than Canada have no such lists, and the safety of their aircraft is not affected. We ask that the Secure Air Travel Act be repealed and any no-fly list be destroyed.

The Security of Canada Information Sharing Act allows 17 government agencies to share among themselves information that is in the possession of the Canadian government. While C-59 amends the preamble to the Act to state that information must be disclosed in a manner that respects privacy, the Act's provisions contradict this very principle. As the Privacy Commissioner told the Committee on December 7, 2017, the Act does not comply with privacy requirements. The threshold for disclosing and receiving information must be strict necessity. We also support the Commissioner's request regarding the role he should play in enforcing this Act.

In conclusion, we would like to submit the following list of recommendations regarding Bill C-59. While some of the bill's provisions are beneficial, a number of other provisions should be amended or deleted to truly protect Canadians' rights and freedoms.

Our recommendations are as follows: that the National Security and Intelligence Review Agency have the material, human and financial resources needed to carry out its mandate; that the National Security and Intelligence Review Agency be mandated to ensure that national security organizations carry out their activities in a manner consistent with the rights and freedoms established in our constitution; that the Agency report publicly on any rights violations that it has found and on its recommendations; that the organizations concerned be required to report publicly on the way in which they have carried out the Agency's recommendations; that, in the course of its mandate, the Agency be authorized to share information with equivalent agencies in other countries; that Canadian organizations not be allowed to obtain information on Canadians from other international organizations that they would not have been able to obtain themselves under Canadian law; that Bill C-59 repeal section 83.3(4) of the Criminal Code authorizing individuals to be placed in preventive detention for seven days without being charged; that "strict necessity" be the threshold for disclosing and receiving information under the Security of Canada Information Sharing Act; that the Office of the Privacy Commissioner of Canada be mandated to ensure that Canadians' privacy is respected under the Security of Canada Information Sharing Act; that CSIS be stripped of the power to address threats through active measures such as disruption; that the Secure Air Travel Act be repealed and any no-fly list be destroyed.

● (1225)

Thank you.

The Chair: Thank you, Mr. Peschard.

[*English*]

Congratulations. You finished at 10 minutes exactly.

[*Translation*]

Welcome to the Committee, Mr. Robillard.

You have seven minutes.

Mr. Yves Robillard (Marc-Aurèle-Fortin, Lib.): Thank you, Mr. Chair.

Mr. Peschard, when you last appeared before the Standing Committee on Public Safety and National Security, you also criticized the new offence of advocating or promoting the commission of terrorism offences. Several individuals have said that this new offence would be unconstitutional because it is vague and too broad and would unreasonably limit freedom of expression.

The new section 83.221 that we are proposing concerns the counselling of another person to commit a terrorism offence. What do you think of this new wording?

Mr. Dominique Peschard: We feel it is a distinct improvement and does not pose the same threat to freedom of expression. That much is clear. However, counselling a person to commit an indictable offence is, in itself, already an indictable offence. Consequently, we fail to understand why this provision was not simply repealed, since this amendment has been made. Someone who counsels another person to commit an indictable offence, which includes a terrorist act, may already be prosecuted under the Criminal Code.

Mr. Yves Robillard: Mr. Barrette, when you appeared before the Committee, you said that the use of investigative measures in the Air India affair had caused a fiasco and that thought should be given to the necessity of the powers conferred on police officers.

I note that, in clauses 145 and 147 of Bill C-59, we would repeal the investigative measures that have not been used since the Air India affair. I would like you to enlighten us on the fiasco caused by the use of those investigative measures.

Mr. Denis Barrette (Spokesperson, Ligue des droits et libertés): First of all, the fact that we are abandoning judicial inquiries is one of the welcome aspects of Bill C-59.

Furthermore, it was a fiasco because it was the only time, following the very sad Air India incident, that those provisions were used. However, they were completely ineffective in the Air India trial. We know they did not produce the results desired by the police departments.

In addition, there was a problem with the way it was done: the accused and the media were not informed. The media accidentally learned at the time that a judicial inquiry was under way. If you read the summary of facts in the Air India affair judgment, you will see that this was not a glorious chapter in the history of Canadian law, particularly since it was a tragedy.

● (1230)

[*English*]

Mr. Yves Robillard: I will share the rest of my time with MP Damoff.

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

Thanks to all the witnesses for being here.

My first question is actually for both of you. Currently in Bill C-59 there's no necessity threshold to retain personal information that is disclosed under SCISA. I'm just wondering if you think that an amendment introducing a necessity threshold for the retention of personal information as well as a destruction obligation for information that does not meet the necessity threshold would be helpful to increase transparency and also to protect individuals' privacy.

Maybe I'll first turn to the Canadian Muslim Lawyers Association.

Mr. Faisal Mirza: Thank you for the question.

My understanding from the CSE director with respect to the collection and retention of data is that if the data is innocuous, they are obliged by law to terminate or destroy it. Only if it has an intelligence value are they permitted to then take the next steps with respect to considering whether to share it in the retention period.

A necessity component would obviously be helpful in terms of delineating and making more clear to the agencies the circumstances under which the data should be retained.

I think that when we use words like “necessity” in the national security context, they're not viewed in the same way as they are, for instance, in criminal statutes or otherwise. In fact, it's easier for the government to be able to satisfy that threshold in the national security context.

For those critics of using a necessity-type threshold, as you proposed, it's probably not going to be as onerous as it would be in other contexts, and since it provides some degree of protection, it makes sense to ensure that guidance of this type is provided to the agency.

One of the big dangers that we have is that data collection becomes normalized in the current society. When we have all these different sources of data available to intelligence agencies, exactly what's going to happen with the information? How is it going to be stored, and how long is it going to be retained?

If you start on January 1 with a type of information that may be of some intelligence value but is later determined to have no value, in the sense that the person is no longer a suspect, that is the type of situation in which I'd like to see that information destroyed. In other words, just because it seemed to have some value at one point in time doesn't mean that infinite retention of that material is somehow permitted.

Ms. Pam Damoff: I only have a minute left, and I want ask the other witnesses if they have anything they would like to add.

Mr. Dominique Peschard: I agree with what the representative from the Muslim Lawyers Association just said. I think a necessity requirement would be a definite improvement, and it would provide some standard to evaluate data retention, because, of course, as mentioned, one of the threats we see in what's proposed is the fact that there would be data banks built on Canadians.

Ms. Pam Damoff: I only have 10 seconds left.

Is “necessity” the right word?

Mr. Dominique Peschard: Yes. I'm not a lawyer, but he's a lawyer, and he thinks so.

Ms. Pam Damoff: Okay.

The Chair: Thank you for that. You're going to have to work it in at some other point.

Who's next? Mr. Motz is first.

You have seven minutes, please.

Mr. Glen Motz: Thank you, Chair.

Mr. Mirza, let me begin with you and your group. Thank you to both groups for being here today. It's appreciated by the committee.

Mr. Mirza, what would you add to Bill C-59 that you think is absolutely critical for public safety, balancing the need for privacy and rights?

Mr. Faisal Mirza: Thank you, Mr. Motz.

As I indicated in my initial submission, I think that the government and the opposition should start to take a look at redoing the Customs Act. It is a piece of legislation that is significantly outdated with respect to the ability to review digital technology.

When you speak about balancing individual rights versus state interests, obviously we support measures that are going to protect Canada and provide us with a sense of greater security and safety. That said, all of us carry digital devices, including everybody who's in this committee. You all carry laptops. They contain the most sensitive information that you can imagine, and the Supreme Court has said that there can be no greater invasion of privacy than going through someone's digital device or laptop. Customs officers and CBSA officers who are there trying to protect the border need some guidance with respect to how far they can go in terms of searching someone's digital device. Right now, they have no guidance.

The legislation, particularly under section 99, essentially speaks to an era when we would have our luggage searched. Second, we would have our personal effects searched, and third, we would have our body searched as the suspicion level rose. Digital devices, however, are a whole different world, and we need the legislation to start catching up with the technology.

If you don't do that, I guarantee that there are going to be constitutional challenges to that legislation when individuals coming back have their devices searched. I suspect that the Supreme Court is going to say that there has to be a legal threshold there, and in the absence of that, you have a constitutional violation.

What's the appropriate threshold? You could start with as low as a reasonable suspicion, which is not very hard for a CBSA officer to satisfy. Essentially, they just have to articulate some grounds as to why they think the person is suspicious. A reasonable grounds threshold would be better, and even that's not very hard to satisfy. I know, sir, that from your policing background, you would be familiar with both of those thresholds.

● (1235)

Mr. Glen Motz: Thank you very much for your comments.

I have one last question before I pass it over to my colleague Mr. Paul-Hus to continue with my time. I'll ask it of the groups that are here in person.

We've been hearing that free elections in Canada and in other democratic countries are under threat from foreign influences. It is a concern to many that others can undermine our democratic institutions. The letter that you sent us was co-signed by Leadnow, and it has been reported that they received tens of millions of dollars in foreign funding to influence the 2015 Canadian election.

Do you feel that having them as a co-signatory undermines the message you have here for us today?

Mr. Dominique Peschard: Pardon me; who received tens of million of dollars?

Mr. Glen Motz: Leadnow.

Mr. Dominique Peschard: What does Leadnow have to do with this?

Mr. Glen Motz: They co-signed the letter you sent to the committee.

Mr. Dominique Peschard: The letter to what effect? Sorry, I'm a bit misled by the....

Mr. Glen Motz: I'm sure you are.

The information you sent to the committee had 29 signatories on it, yes?

Mr. Dominique Peschard: I'm sorry; I don't...

Mr. Glen Motz: I'll talk offline with you afterwards about that, then.

Mr. Dominique Peschard: Okay. I'm sorry I haven't—

Mr. Glen Motz: It's this letter you sent, and it has all the organizations that support the comments you're making. It was sent, not to the committee, but to Minister Goodale, Minister Wilson-Raybould, and Minister Hussen in September of 2017. That's the letter I'm referring to.

The Chair: To be fair to the witnesses, we'll suspend that question. I'll come back to you, but we'll have to take off some time.

Mr. Glen Motz: Thank you.

The Chair: Maybe the clerk could circulate the letter to the committee. Obviously the witnesses are confused by it. Meanwhile, we'll go with Mr. Paul-Hus.

Ms. Pam Damoff: Is the letter in French and English?

[*Translation*]

Mr. Pierre Paul-Hus: Thank you, Mr. Chair.

Gentlemen, thank you for being here with us today.

Mr. Peschard, you mentioned in the introduction to your brief that changes obviously occurred after September 11, 2001. You also put the words "war on terror" in quotation marks. Do you feel there is no terrorism now, that we have no reason to fear terrorism?

Mr. Dominique Peschard: That's not at all what that means. We acknowledge that terrorism does exist. We acknowledge that terrorism is a problem. However, we do not feel this is a war in the sense in which the word "war" is used in international law. We feel that terrorism is fundamentally a criminal activity in the same way as the activities of international drug trafficking networks and other similar groups and that the term "war" was used to dramatize the situation in the public's eyes, to arouse fear, and thus to permit the adoption of provisions that we think do not enhance our security but undermine our rights and freedoms.

Consequently, it was in that context and for that purpose that we put the word in quotation marks.

● (1240)

Mr. Pierre Paul-Hus: So you basically think there is a scheme afoot to scare people and that potential terrorist actions do not exist?

However, there are examples of actions that have been taken and that have prevented terrorist acts in Canada and France. Do you think that was a fantasy?

Mr. Dominique Peschard: No, terrorism is not a fantasy, but if you consider the tragic events in which two Canadian soldiers were assassinated in separate events in Canada in fall 2014, and if you recall the way those events were described, you would have thought all of Canada was under attack, whereas that assessment was largely exaggerated.

In fact, it was used to promote the Anti-terrorism Act of 2015, on which Canadians agreed immediately after the attacks and on which they agreed less and less through the spring of 2015 as they increasingly became aware of what was in that statute.

[*English*]

The Chair: Thank you, Mr. Paul-Hus.

Mr. Dubé, you have seven minutes, please.

[*Translation*]

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

Thanks to all our witnesses for being here today.

I would like to ask you a question about information that is acquired incidentally. This issue comes up in two areas, particularly in connection with data collection by CSIS, but also by the CSE.

Does this concern you? Even though the need to justify retention of information acquired incidentally is addressed further on in the bill, my impression is that, during an investigation, one could justify it quite easily and start creating a fairly broad range of data.

Do you share this concern? Could you discuss it with us?

Mr. Dominique Peschard: Yes, the gathering of incidental information is a major problem. We now know that agencies gather an enormous amount of information. We are aware of all of Edward Snowden's revelations.

Information retention is indeed a major problem. It should be clear that information incidentally acquired on persons who are not the target of an investigation or are not suspects should be purged as soon and as effectively as possible.

Mr. Matthew Dubé: That's perfect. Thank you.

I would like to discuss the new commissioner position. Part 3 contains a section that concerns the possibility that the minister may renew authorizations of work done by the CSE without obtaining the commissioner's authorization. Do you think this is a problem?

Mr. Dominique Peschard: It would be desirable for the commissioner to review that because the conditions prevailing at the time he provided his initial authorization may no longer be applicable.

I have to say we aren't convinced about the commissioner's role. I would say the commissioner position gives the impression that there will be a kind of quasi-judicial review of the minister's decisions to determine whether they are consistent with the charter. That's what's understood. It's a kind of security, but it must be understood that the information the commissioner receives to validate or not validate an authorization depends entirely on what the intelligence services provide to the commissioner for the purpose of establishing an assessment of the situation that warrants the authorization.

The minister issues the authorization, and there is an enormous amount of pressure on the commissioner to approve it since no one wants to be held responsible for having denied something that might result in a subsequent security breach. There is no counterparty to advise the commissioner to oppose the file submitted by the intelligence services.

Our great fear is that the commissioner may play somewhat the same role as the United States Foreign Intelligence Surveillance Court, which is widely known to grant authorize authorizations almost automatically.

We are not opposed to this commissioner position, but it must provide adequate protection from rights abuses. We feel that remains to be proven.

● (1245)

Mr. Matthew Dubé: Thank you.

Your answer raises two questions. First, the post created is described as a part-time position. Considering the workload and all the complexities you have just cited, is that appropriate, or should it be a full-time position? I think it is entirely possible that a retired judge could occupy the position on a full-time basis.

Mr. Dominique Peschard: We did not review that specifically, but the fact that it is a part-time position definitely left us somewhat perplexed, given the extent of the work involved. In view of the fact that the commissioner must seriously review the authorizations and various proposals submitted to him or her, we feel it would be reasonable for that person to occupy the position on a full-time basis.

Mr. Matthew Dubé: I have a final question on the subject. You may find it hard to answer in what little time we have left because it is fairly broad question.

You discussed automatic authorizations and said that might be difficult for the commissioner. It must also be acknowledged that there is no real-time oversight in this instance. What we can acknowledge as positive is that the commissioner position contemplated would approach that.

If this is not the perfect model, do you have any suggestions or recommendations regarding what we might explore in future to establish an entity that conducts real-time oversight, which is not currently the case in Canada?

Mr. Dominique Peschard: Our hope is that the National Security and Intelligence Review Agency can verify that the agencies respect Canadians' rights in the course of their work. That is why we think the agency must first have the necessary resources, as Mr. Mirza previously mentioned. Second, the agency must also be seen and act somewhat as the Privacy Commissioner of Canada does with respect to privacy. In other words, the agency must be clearly seen as an independent organization that also has expertise and whose mandate is to be accountable to the public.

We think that what's wrong about Bill C-59 is that, under it, the agency would report much more to the department and the government than to the people on the way the agencies conduct their business. Bill C-59 could be amended to make the agency operate more as a watchdog reports to the public on the way the agencies respect rights in carrying out their mandates.

Mr. Matthew Dubé: Thank you.

The Vice-Chair (Mr. Pierre Paul-Hus (Charlesbourg—Haute-Saint-Charles, CPC)): Thank you, Mr. Dubé.

Please go ahead, Ms. Dubrusin.

Ms. Julie Dabrusin: Thank you, Mr. Chair.

[*English*]

My questions are for Mr. Mirza from the Canadian Muslim Lawyers Association.

I also participate in the Canadian heritage committee, which recently tabled a study on systemic racism and religious discrimination, and I believe some of your colleagues appeared before that committee to talk about some issues we were looking at there. I see a bit of an intersection when I hear some of the issues you're raising here, so I was wondering if perhaps you could help.

One recommendation from that study was that, much in the same way that we apply a gender-based analysis as a lens to legislation, we should be applying an equity lens when approaching legislation. Given some of the issues you've raised, I'm wondering if you have any thoughts about how we might properly apply such a lens to this national security legislation to take account of some of the issues that may impact the Muslim community—as you've pointed out in a few instances—in a differential way.

Mr. Faisal Mirza: Yes, there is a tie-in. Let me try to take it back to first principles.

If you're looking at legislation that has a disproportionate impact on the treatment of women, for instance, I think everybody would agree that it's appropriate to have the female perspective with respect to that, and to have some diversity of female opinion on the committee that reviews it. If you were looking at an issue that disproportionately impacts the indigenous community, it would only make sense that you'd try your best to have the indigenous perspective accounted for. We ask for no less with respect to national security.

It's straightforward and well recognized that in today's era, for reasons that were provided to you by the previous panel—by the former director of CSIS and by the intelligence agencies—that there is still a significant focus on radicalization within the Muslim community. At the same time, there is a significant degree of co-operation, and what gets lost in the politicization of these issues is that it's actually the Muslim community that works very closely with CSIS and the RCMP in helping to identify threats to security and providing input with respect to what's appropriate to look at and what is not. Then they're also on the receiving end of this treatment, unfortunately, because that's the nature of what happens. When you have large organizations trying to review the conduct of an entire community, there are inevitably going to be some transgressions.

We'd like to see the national security and intelligence review agency include that perspective. We're not looking for affirmative action here, in saying that you have to have, for instance, *x* number of Muslim people on staff in that organization. What you need to have is a diversity of perspectives—people who understand those issues and people who have the qualifications to do that. Philosophical diversity is important, number one.

Number two, having some sense of what it's like on the ground for people in that community is important, and yes, you are likely to get people who have a better understanding of that if they're from the community. There are many qualified people today who can be chosen from academia and from the legal field who could be of significant assistance in fulfilling that function. That's why I think it's important that this committee take that under advisement, and perhaps even consider putting into some statutory language how that review agency should be composed.

There is also another significant omission, which is somewhat startling. There is currently nobody serving on the special advocate roster who has that degree of expertise. Now, don't get me wrong. There are very distinguished lawyers on that roster, lawyers I know and respect, but if you're talking about going into the secret hearing and providing a perspective for the reviewing judge about what type of expert evidence should be heard or what other type of information should be heard, you should have someone who has familiarity with those types of issues.

● (1250)

Ms. Julie Dabrusin: All right. Thank you. That was very helpful.

I just want to make sure I have it clear, because I'm trying to look for some concrete things that I can apply when we're looking at this legislation.

In taking into account, for example, NSIRA composition, there have been all sorts of suggestions and recommendations made by others as to how that should look. You said we should ensure there's a proper diversity, a philosophical diversity, and that it should be part of the lens that's approached.

If I were going to give any other concrete solution that I might try to put in here, do you have anything else you would like to see us do, specifically?

Mr. Faisal Mirza: Yes. I'd like to see it legislated that.... NSIRA will have a minimum of three of what we'll call the highest-level officials, and up to six, and they're renewable for a five-year term. I'd like to see some understanding as to how that's going to be composed so that it doesn't fall into the same scenarios that you see in other ineffective oversight bodies, a lack of independence and lack of impartiality.

Pick one person from the judiciary and pick one person from academia who has an understanding of the sociological issues and has expertise in those fields. Also, pick somebody who is in touch with the community, subject, of course, to the security clearances, etc., that they have to go through. I think it's important that you turn your mind to that, whether it's by codifying it or by at least providing a strong policy directive.

The Chair: Thank you.

Thank you, Ms. Dabrusin.

In order for us to have sufficient time to consider the subcommittee's report...but Mr. Yurdiga, I know, wants to ask a question or two. If you can do it in two minutes, that would be helpful.

● (1255)

Mr. David Yurdiga (Fort McMurray—Cold Lake, CPC): Thank you.

Mr. Peschard, I believe you indicated in your testimony that Canadian security agencies, including the Canada Border Services Agency, shouldn't accept intelligence information regarding an individual if it contravenes the Canadian Charter of Rights.

Do you believe this would require Canada to renegotiate information-sharing treaties? This has to be done on a global level, because if we're not going to accept information, there are going to be consequences. Do you believe that should be the case?

Mr. Dominique Peschard: Yes, but we mentioned in our presentation the obligation on Canada. Canada can act on that, but obviously it has to be reciprocal. What we're objecting to is what was revealed by Snowden and others, the fact that you can obtain information from a foreign agency that came from spying on Canadians, which the Canadian agency itself could not have done legally under Canadian laws.

In other words, the fact is that by working together, agencies can circumvent national laws of different countries. Ideally, of course, especially considering the close alliance of the Five Eyes, there should be an agreement to the effect that they won't circumvent their national laws by having an agency of another country do what they cannot do with respect to their own citizens.

Mr. David Yurdiga: Thank you.

Do you have time for one more question, or am I done?

The Chair: You have 14 seconds.

Mr. David Yurdiga: Then I'm done. Thank you.

The Chair: On behalf of the committee, I want to thank Mr. Mirza, Mr. Barrette, and Mr. Peschard for their contributions to the deliberations.

Time is the enemy at all of these committee meetings, but your thoughtfulness and your contributions are very much appreciated by the committee.

With that, we'll suspend and ask the room to clear so we can consider the subcommittee's report.

I appreciate the co-operation. Could those who are not supposed to be here please leave the room? Thank you very much.

[*Proceedings continue in camera*]