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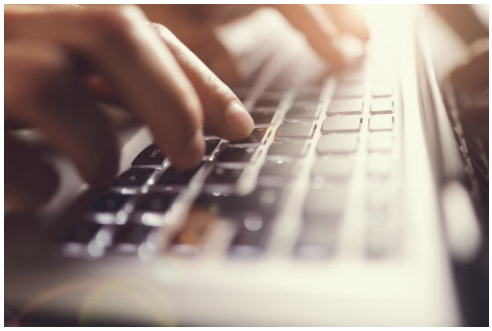
Report of the Standing Committee on Public Safety and National Security

Protecting Canadians and their Rights: A New Road Map for Canada's National Security



Robert Oliphant
Chair

May 2017

42nd PARLIAMENT, 1st SESSION

PROTECTING CANADIANS AND THEIR RIGHTS: A NEW ROAD MAP FOR CANADA'S NATIONAL SECURITY

Report of the Standing Committee on Public Safety and National Security

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MAY 2017

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THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

has the honour to present its

NINTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied Canada's National Security Framework and has agreed to report the following:

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PART 1: INTRODUCTION

> *Promising public safety as an exchange for sacrificing individual liberties and democratic safeguards is not, in our view, justifiable or realistic. Both are essential and complementary in a free and democratic society. (The Canadian Bar Association, brief, March 2015)*

National security is one of the most fundamental duties – if not the most fundamental duty – conferred upon a government. Equally important is the need to maintain public confidence in a fair and just legal system. National security agencies should be lawful, efficient and accountable. Canada's national security framework as a whole should provide adequate safeguards against abuse and respect the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act* and relevant international standards.

On 14 June 2016, the House of Commons Standing Committee on Public Safety and National Security (the Committee) agreed to undertake a study of Canada's national security framework; that the study should consist of at least five meetings held across the country; and that the Committee report its findings to the House of Commons (the House).[1] The Committee concluded its study on 15 February 2017.

This committee report is shaped by the testimony of Canadians, expert witnesses and the recommendations of the various commissions of inquiry, many of which remain valid today. It is by no means meant to be an exhaustive review of this highly complex and challenging issue.

It should be noted from the outset that this committee is not a government entity, as it is a permanent committee established by the *Standing Orders of the House of Commons*. It is a creature of the House comprised of a "small group of Members [of Parliament] created and empowered by the House to perform one or more specific tasks."[2] It is empowered to study and report on all matters relating to its mandate including the statutes, programs and policies relating to the departments and agencies falling within its portfolio. As such, the Committee is not bound by the subject matter contained in the parallel public consultation on national security launched in September 2016 by Public Safety Canada, in collaboration with the Department of Justice.[3]

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1 House of Commons, Standing Committee on Public Safety and National Security (SECU), *Minutes of Proceedings*, 1st Session, 42nd Parliament, 14 June 2016.

2 *House of Commons Procedure and Practice*, Second Edition, 2009, Edited by Audrey O'Brien and Marc Bosc at pp. 1048 and 949.

3 The Green Paper, *Our Security, Our Rights: National Security Green Paper, 2016,* was released in September 2016.

A. Review Process

The Committee held five public hearings in Ottawa, as well as five conventional public hearings across the country[4] during which the Committee heard from expert witnesses and welcomed members of the public who wished to observe the proceedings. During these stops across the country, the Committee also held a second type of meeting consisting of five two-hour sessions which were open to the public where they were welcomed to present their views on Canada's national security framework. While in Montreal, the Committee conducted a site visit to the Centre for the Prevention of Radicalization Leading to Violence. Canadians were also invited to contribute to the Committee's discussions by submitting briefs via the Committee's website.[5] The Committee heard from 138 witnesses and received 39 briefs.[6]

B. Terms of Reference

The breadth of the Committee's study and the testimony brought forth by the witnesses is wide-ranging. It brought to light various human rights issues, including profiling, criminalizing dissent and limiting freedom of speech. It also covered the risks and gaps in our national security framework that could lead to a terrorist attack and the loss of life.

While considering its study of the national security framework, Bill C-22, An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts (Bill C-22) was read a second time in the House and referred to the Committee. As the overall objective of this bill is linked to the Committee's study of Canada's national security framework, the following two motions were adopted by the Committee:

> It was agreed, – That the evidence received by the Committee as part of its study of Canada's National Security Framework be deemed adduced in relation to the Committee's study of Bill C-22.
>
> It was agreed, – That the evidence received by the Committee as part of its study of Bill C-22 be deemed adduced in relation to the Committee's study of Canada's National Security Framework.[7]

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4 Six of the ten members of the SECU committee, representing the political parties with standing in the House of Commons, travelled to Vancouver, Calgary, Toronto, Montreal and Halifax.

5 SECU, "House of Commons Standing Committee on Public Safety and National Security to Hold Public Consultations on Canada's National Security Framework in Vancouver, Calgary, Toronto, Montreal, and Halifax," News release, Ottawa, 7 October 2016.

6 A list of witnesses is included in Appendix A of this report while the list of briefs can be found in Appendix B.

7 SECU, *Minutes of Proceedings*, Meeting No. 39, 1st Session, 42nd Parliament, 25 October 2016.

The Committee considered Bill C-22 over the course of eight meetings, heard from 41 witnesses and received four briefs. The Committee agreed on 6 December 2016 to report it with amendments to the House.[8]

8 SECU, *Seventh Report*, Bill C-22, An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts, 1st Session, 42nd Parliament.

PART 2: CONTEXT

There exists a wide range of threats to the safety and security of Canadians. As the Committee heard from close to 140 witnesses, opinions not only differed on the nature of those threats but also as to their urgency and order of priority. Of those threats, some have tragically resulted in terrorist attacks carried out on Canadian soil.

The terrorist threat to Canada, currently set at medium, is also multifaceted, in that it comes in many ways.[9] Public Safety Canada's *2016 Public Report on the Terrorist Threat to Canada*, states that the principal threat remains that posed by individuals or small groups of lone wolves, like those that took place on Parliament Hill and in Saint-Jean-sur-Richelieu in 2014, and whose acts of violence are inspired by organizations such as al-Qaida and Daesh.[10] Moreover, on 29 January 2017, during this study, a shooting occurred at a mosque in Sainte-Foy, Quebec. Tragically, 6 men were killed and 19 others were wounded when an individual entered the mosque and opened fire. Witness testimony received thereafter has touched on the reality of "hate- and bias-motivated crime".[11]

Some witnesses argued that there is too much attention paid to the terrorism threat posed by individuals or small groups of lone wolves when in fact Canada is not threatened to the same extent as other countries.[12] According to Stuart Farson, adjunct professor for the Department of Political Science at Simon Fraser University, the focus on the threat of terrorism is largely at the exclusion of other threats such as climate change,[13] and threats against critical infrastructure. Stephen Randall, professor at the University of Calgary, enumerated, for the Committee, other existing threats to Canadian security including, "health pandemics, the impact of narcotics, narcotics trafficking, and natural disasters."[14] Threats, according to David Bercuson, Director of the Centre for Military Security and Strategic Studies at the University of Calgary, should be looked at as "an arc of issues that impact on the safety of society. You can start on one end with pandemics and on the other

9 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Ralph Goodale, Minister of Public Safety and Emergency Preparedness).

10 Public Safety Canada, *2016 Public Report On The Terrorist Threat To Canada*. About 60 individuals are said to have returned to Canada after having engaged in terrorism-related activities abroad. CSIS has ongoing investigations on some of them (SECU), *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Michel Coulombe, Director, Canadian Security Intelligence Service)).

11 SECU, *Evidence*, 1st Session, 42nd Parliament, 8 February 2017 (Noah Shack, Director of Policy, Centre for Israel and Jewish Affairs).

12 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Robert Huebert, associate professor, Centre for Military Security and Strategic Studies, University of Calgary).

13 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Stuart Farson, adjunct professor Department of Political Science, Simon Fraser University, as an individual).

14 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Stephen Randall, professor, University of Calgary, as an individual).

end with war. Somewhere in between you'll get criminal activity, narcoterrorism, and cybersecurity, and in many cases they're all linked."[15]

That being said, the absence of a physical threat or of an attack in the present should not be taken as an indicator for the future.[16] Robert Huebert, associate professor at the Centre for Military Security and Strategic Studies suggested that Canada should "have the ability to not only deal with the type of threats that we are facing today – they are real, and they are dangerous to Canadian security – but we also need to have the capability of anticipating the unanticipatable."[17]

Some witnesses also felt there was too much emphasis on radicalization to violence. As noted by Michael Zekulin, adjunct assistant professor at the University of Calgary, "cognitive radicalization, the adoption of radical ideas, does not necessarily lead to behavioural radicalization, the pursuit of violence on those ideas," and that as a matter of fact, "we know that the number of individuals who escalate from ideas to violence is actually very small."[18] However, he went on to explain the larger concern:

> Beneath the very small number of individuals who adopt these ideas and are willing to commit violence, there potentially exists a larger number of individuals who, while not yet willing to pursue violence and who may never arrive at that point, nonetheless support or assist others who might. Further beneath that group exists a possible third group of individuals we might label as sympathetic to the ideas, and while not violent or even supportive of these groups or individuals, they instead remain quiet.
>
> I should also be clear in stating that supporters and sympathizers do not need to be active or willing participants. For example, a group of individuals operating in a neighbourhood may be able to intimidate others to offer support or stay quiet. The result, nonetheless, is the same. It allows a safe space for these individuals to operate.[19]

Professor Zekulin added that, in spite of the fact that this larger concern is not an accurate representation of the immediate threat, the failure to take this type of latent threat seriously today could create conditions in which the above noted scenario could become a reality.[20]

The Committee heard the following comments with respect to community counter-radicalization efforts and strategies:

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15 Ibid., (David Bercuson, Director, Centre for Military Security and Strategic Studies, University of Calgary).

16 Ibid., (Michael Zekulin, adjunct assistant professor, University of Calgary, as an individual).

17 Ibid. (Robert Huebert).

18 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Michael Zekulin).

19 Ibid.

20 Ibid.

- Criminalizing a range of opinions (for instance the offence of promoting terrorism) may weaken counter-radicalization efforts and hamper efforts to gain the trust of certain community groups;[21]

- "[E]mpowering youth and women is a very constructive approach, but there are often cultural factors that make it more difficult for women to take the lead in certain communities";[22]

- With respect to ethnic and indigenous communities, "there is a need, clearly, to engage in educational activities that bring individuals more into the mainstream of the engagement with their communities";[23]

- Discussions sometimes focus "on poverty as major source of radicalization, when in fact we have to be very careful of that, because there is some evidence that certain types of terrorists will actually be coming from the middle- and upper-middle-class students. It's not so much about poverty but about marginalization."[24]

Witnesses also spoke of the need to promote alternative narratives to the radical vision. Professor Randall questioned who should be entrusted with creating and disseminating such alternative narratives. In his opinion, the solutions or strategies should not be legislative or come from a top-down manner. He commented:

> It comes out of police clubs. It comes out of the mosques. It comes out of church organizations. It comes out of social clubs. It comes out of general athletic clubs. It comes out of parents. Let's face it, parents are not entirely irrelevant in this process.[25]

Ron Levi, holder of the George Ignatieff Chair of Peace and Conflict Studies, Munk School of Global Affairs, University of Toronto, explained that different communities have different needs and priorities. One way of changing the narrative could therefore be to adopt an approach "that is not exclusively or even primarily lodged in a law enforcement model, but instead, taking a broad view of community safety and well-being that integrates local concerns, including the needs of youth."[26] He further added that "an evidence-based approach to national security should learn from local research, the experience of other countries, and evidence and experience in cognate fields, including crime and criminal justice."[27]

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21 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Reg Whitaker, professor, Department of Political Science, University of Victoria and distinguished research professor (Emeritus), York University, as an individual).

22 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Stephen Randall).

23 Ibid.

24 Ibid., (Robert Huebert).

25 Ibid., (Stephen Randall).

26 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Ron Levi, George Ignatieff Chair of Peace and Conflict Studies, Munk School of Global Affairs, University of Toronto, as an individual).

27 Ibid.

Noah Shack, Director of Policy, Centre for Israel and Jewish Affairs explained that much more can be accomplished when people work together as opposed to individually:

> Certainly the more that members of a faith group can see that the other who is often the target of hate isn't loathsome and isn't what they've been built up to be. That's important. That's the core of it. Sometimes that's difficult to do at the institutional level and it's easier to do people to people, individual to individual, clergy to clergy, but it's something that we prioritize in terms of our work. We have a team within our organization focused exclusively on building partnerships with other communities, not just faith communities, but all different segments of Canadian society because even in terms of advocacy we can accomplish way more working together than any of us can individually. It's important that we find those opportunities to work together on things of common cause, and to build bridges wherever possible across all levels.[28]

Federal government counter-radicalization efforts should therefore be based on partnerships. Care must be taken to avoid resorting to generalities[29] and instead, a multidisciplinary approach should be favoured, involving a variety of stakeholders. There is evidence that grassroots, community-based counter-radicalization efforts are the most effective.[30] As mentioned by Ihsaan Gardee, Executive Director, National Council of Canadian Muslims: "[i]nclusion is the key to public safety."[31]

Montreal's Centre for the Prevention of Radicalization Leading to Violence (the Centre) was created in March 2015. It is currently co-financed by the City of Montreal and the Quebec provincial government. It differs from other initiatives in the sense that it is not led by law enforcement.[32] Instead, the Centre takes a "multi-sectoral preventive approach [that] reflects a desire to offer the possibility of responding to violent radicalization in ways other than via the police or criminal justice system."[33]

> It is based on the assumption that if families, relatives and various stakeholders in the community have a better understanding of the warning signs of radicalization leading to violence, they would be better equipped to detect, intervene and disrupt the radicalization process. The Centre is therefore aimed at being a reference and expertise hub in this field.[34]

That being said, not all of the witnesses agreed with the effectiveness of the Centre and its approach within the community. During its study, the Committee heard that

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28 SECU, *Evidence*, 1st Session, 42nd Parliament, 8 February 2017 (Noah Shack).

29 See SHERPA, Institut universitaire en regard aux communautés culturelles du CIUSSS Centre-Ouest-de-l'Île-de-Montréal, *Le défi du vivre ensemble : Les déterminants individuels et sociaux du soutien à la radicalisation violente des collégiens et collégiennes au Québec*, Research Reports, October 2016 [AVAILABLE IN FRENCH ONLY].

30 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Malcolm Brown, Deputy Minister, Department of Public Safety and Emergency Preparedness).

31 SECU, *Evidence*, 1st Session, 42nd Parliament, 15 February 2017 (Ihsaan Gardee, Executive Director, National Council of Canadian Muslims).

32 Maxime Bérubé, Université de Montréal, *Implementing Montreal's Centre for the prevention of radicalization leading to violence: Insights from the 2015 TSAS Summer Academy*, October 2015.

33 Centre for the Prevention of Radicalization Leading to Violence, "Approach."

34 Maxime Bérubé, Université de Montréal, *Implementing Montreal's Centre for the prevention of radicalization leading to violence: Insights from the 2015 TSAS Summer Academy*, October 2015.

counter-radicalization efforts “whatever their effectiveness and structure, require and need trust. This trust is established by the type of intervention the government adopts.”[35] Lamine Foura, of the Congrès Maghrébin au Québec, spoke highly of the Royal Canadian Mounted Police (RCMP) prevention programs and explained that RCMP involvement with youth in Montreal was better accepted.[36]

> In our case, when the centre was launched, the ambiguity of its relation with the police did not allow it to establish proper links with the community.
>
> We are not saying that police involvement is a problem. Paradoxically, experience in Montreal has shown that RCMP involvement was much better accepted.The reason is that the community police, in its community role, when it is transparent – that is the second very important point in any attempt at radicalization prevention – is viewed in a more positive light. This has been the case with the RCMP since young Canadians who left the country to join terrorist groups were identified. The community involvement has to be open, and recognize that police officers have a role in fighting crime, but also play a role in the community. That role is not to impose programs, but simply to participate in programs and activities.[37]

35 SECU, *Evidence*, 1st Session, 42nd Parliament, 20 October 2016 (Lamine Foura, Spokesperson, Congrès Maghrébin au Québec).

36 Ibid.

37 Ibid.

PART 3: NATIONAL SECURITY REVIEW, OVERSIGHT AND ACCOUNTABILITY

Over the past number of years, serious deficiencies within Canada's national security framework, including concerns relating to intelligence gathering, investigations, and the sharing of information in the national security context have been brought to light in the findings and recommendations arising from various commissions of inquiry.[38] The inquiries consistently exposed, among other things, the lack of oversight of Canada's national security activities.

Some of the recommendations stemming from Justice O'Connor's Commission of Inquiry (Arar Inquiry), including those pertaining to effective oversight, have yet to be fully implemented despite the urgent need to restore a healthy equilibrium and to counterbalance important anti-terrorism measures which have been adopted in recent years. Over the years, numerous parliamentary committees (including this committee in 2009) have called for the establishment of a national security committee of Parliamentarians.[39] In December 2016, the Committee reported Bill C-22 to the House of Commons with amendments.[40] In March 2017, the federal government introduced amendments at Report Stage in the House of Commons.[41] Bill C-22 was at third reading on 24 March 2017.

A. Oversight versus Review

In the Arar Inquiry, Justice O'Connor gave a detailed explanation of the concepts of oversight, as opposed to review, of the work of national security agencies. He explained that review usually refers to a "mechanism that assesses an organization's activities

38 The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (1971) (McDonald Commission); the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006) (Arar Inquiry); and the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (2010) (Air India Inquiry). Justice Iacobucci Commissioner of the *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* released his report in 2008, but unlike the Arar Inquiry, it does not contain any recommendations. That being said, Justice Iacobucci does make findings with respect to the actions of Canadian officials in these cases and their potential role in the detention and mistreatment of these three individuals at the hands of Syrian and Egyptian authorities.

39 Recommendation 5 of the Report of the Standing Committee on Public Safety and National Security, *Review of the Findings and Recommendations Arising From the Iacobucci and O'Connor Inquiries*, 2nd Session, 40th Parliament, June 2009. See also Recommendations 58, 59 and 60 of the Final Report of the Standing Committee on Public Safety and National Security, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues*, 1st Session, 39th Parliament, March 2007; see also Recommendation 16 of the Interim Report of the Special Senate Committee on Anti-terrorism, *Security, Freedom and the Complex Terrorist Threat Positive Steps Ahead*, 3rd Session, 40th Parliament, March 2011. See also the *Report of the Interim Committee of Parliamentarians on National Security*, 1st Session, 38th Parliament, May 2004–October 2004.

40 SECU, *Seventh Report*, Bill C-22, An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts, 1st Session, 42nd Parliament.

41 LEGIS*info,* Bill C-22, An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts, 1st Session, 42nd Parliament.

against standards like lawfulness and/or propriety, and delivers a report of that assessment, with recommendations, to those in government politically responsible for the organization."[42] The review is conducted after the activities in question have occurred. He explained that the review mechanism is at arm's length from both the management of the organization and the government.[43]

An oversight mechanism, according to Justice O'Connor, is more directly involved in managing the organization in question and in the decision making. It can be a direct link in the chain of command or accountability. He noted that "[i]nvolvement can be through setting standards against which the organization's activities are evaluated, pre-approving operations, implementing and enforcing recommendations, and/or imposing discipline."[44] The activities are sometimes assessed in real time.

Justice O'Connor further explained that "review mechanisms are more appropriately seen as facilitating accountability: they ensure that the entities to which the organization under review is accountable, and the public, receive an independent assessment of that organization's activities."[45] He went on to explain that "a body that exercises nothing but review has greater independence and can maintain a critical distance from the activities being reviewed."[46]

B. Parliamentary Review

In general, witnesses viewed Bill C-22 as a first step to establishing a parliamentary review structure for our national security and intelligence operations. Craig Forcese, associate professor at the Faculty of Law of the University of Ottawa, noted that Bill C-22 "opens the door for the first time to all-of-government review by a standing body able to follow the thread of its inquiry across departments and to conduct efficacy review, as well as the more classic propriety review."[47] He further added: "This body will endure, and will be capable of follow-up in a manner impossible for ad hoc commissions of inquiry."[48] It was explained that the proposed committee of parliamentarians would have a different mandate than the existing expert review bodies and that it is important to recognize the relationship between them. Kent Roach, professor at the Faculty of Law, University of Toronto, explained to the Committee that one of his greatest fears about proposed Bill C-22 would be that it leads people to think that it duplicates the work of the existing review bodies.[49] He further explained that:

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42 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry), Ottawa, 2006, pp. 456–457.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid., p. 500.

47 SECU, *Evidence*, 1st Session, 42nd Parliament, 3 November 2016, (Craig Forcese, associate professor, Faculty of Law, University of Ottawa, as an individual).

48 Ibid.

49 Ibid., (Kent Roach, professor, Faculty of Law, University of Toronto, as an individual).

> There needs to be a very close relationship between the new committee and the existing review bodies. I think this will benefit the executive watchdog review and will help the new parliamentary committee to gain credibility while being educated about where they should be placing their limited resources and time.[50]

Moreover, according to the Hon. Hugh Segal, former Senator, the proposed committee of parliamentarians should, with time, be independent of the executive.[51]

However, witnesses reiterated that Bill C-22 is just one small part of the jigsaw puzzle of the national security framework and that "[i]ts anticipated achievement as a new structure in our system should not be used as an excuse for delaying necessary reforms to our national security framework generally."[52] Carmen Cheung, professor at the Munk School of Global Affairs at the University of Toronto, commented that the current national security consultation is an "important moment of opportunity towards creating an integrated and comprehensive accountability framework, one that can evaluate whether national security policy and practices are effective, legal, and rights-respecting."[53]

C. Expert Review Models

As noted by Professor Forcese, the "existing expert review bodies … are stovepiped to individual agencies and incapable of conducting seamless reviews of operational activities that cross agency boundaries."[54] If enacted, Bill C-22 would still leave Canada with a national security framework that "has fallen out of sync with contemporary national security activities."[55] Independent expert review in Canada therefore "exists as a patchwork."[56] As the national security activities are increasingly integrated, existing expert review bodies are also "ill-equipped" to conduct joint reviews.[57] Michael Doucet, Executive Director, Security Intelligence Review Committee (SIRC) told the Committee that "there remains an important gap in our accountability framework as it relates to the ability to carry out community-wide expert review"[58] and that for a number of years now, "SIRC has said publicly that it lacks the ability to carry out joint reviews with existing review bodies and to follow the thread of information."[59]

Although the Committee did not conduct a specific comparison of the mandate and powers of the existing review bodies (the Civilian Review and Complaints Commission for

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50 Ibid.

51 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016, (Hugh Segal, Chair, NATO Association of Canada, Massey College).

52 Ibid., (Ron Atkey, adjunct professor, Osgoode Hall Law School, York University, as an individual)

53 Ibid., (Carmen Cheung, professor, Munk School of Global Affairs, University of Toronto, as an individual).

54 SECU, *Evidence*, 1st Session, 42nd Parliament, 3 November 2016, (Craig Forcese).

55 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 November 2016 (Michael Doucet, Executive Director, Security Intelligence Review Committee).

56 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Carmen Cheung).

57 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 November 2016 (Michael Doucet).

58 Ibid.

59 Ibid.

the Royal Canadian Mounted Police, SIRC and the Office of the Communications Security Establishment Commissioner), we do know that there are differences among them; the rights of access to information being one very important distinction.

Most witnesses emphasized the need for strong independent expert reviews that would complement the committee of parliamentarians along with fully integrated and co-operative reviews. Professor Cheung explained that "[p]olitical accountability is critical, and the move towards formalizing legislative review is a very welcome development; but as you will have heard from others, a modernized system of national security accountability requires more".[60]

Although witnesses before the Committee strongly advocated for the implementation of the recommendations stemming from the Arar Inquiry, the details and features of what the final independent expert review model would look like were not discussed in detail. Suggestions included that a new body such as a "cross-government" or "all-of-government"[61] independent subject-matter expert review body should be established; or that enhanced review powers should be given to existing expert review bodies (e.g. access to information); or that statutory gateways[62] (e.g. for joint reviews) like those suggested by Justice O'Connor should be created.

Justice O'Connor proposed "that the government legislate statutory gateways to link the independent bodies responsible for reviewing Canada's national security activities."[63] The statutory gateways provide for the exchange of information, referral of investigations, conduct of joint investigations and coordination in the preparation of reports. The statutory gateways between the national security review bodies proposed in the Arar Inquiry would extend beyond statutory provisions allowing for the current sharing of information. Professor Reg Whitaker, professor at the Department of Political Science, University of Victoria and distinguished research professor (Emeritus) at York University, explained Justice O'Connor's reasoning in the Arar Inquiry, which was to break down the silos and increase efficacy.[64]

Some witnesses indicated that public confidence in expert review has diminished given a perceived lack of efficacy of the existing expert review bodies. The Hon. Hugh

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60 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Carmen Cheung).

61 As explained by Paul Cavalluzo this "super-SIRC" (Arar Inquiry) type model would conduct wide ranging reviews over SIRC, the CSEC and the RCMP except that "[i]t would be one body dealing with all the agencies, so they can effectively review what's going on, because all of these investigations are joint investigations. When you have CSIS, RCMP, CBSA, and Immigration Canada involved, you need a full-fledged – what's called a 'cross-government' or 'all-of-government' – review body." The independent experts would be appointed by government like judges, act independently, and make recommendations to Parliament. At the end of the year, it would make an annual report to the public and to Parliament. See SECU, *Evidence*, 1st Session, 42nd Parliament, 20 October 2016 (Paul Cavalluzzo, Representative, International Civil Liberties Monitoring Group).

62 A statutory gateway as defined by Justice O'Connor is "an express statutory power to share personal data whether permissive or mandatory."

63 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry), Ottawa, 2006 at p. 522.

64 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Reg Whitaker).

Segal recommended that the committee of parliamentarians proposed in Bill C-22 should stand alone.[65] Another witness, Professor Randall, explained to the Committee that, in his opinion, civilian oversight bodies do not work as well as those established through Parliament to which they are accountable:

> Five years ago, I did a review for Public Safety Canada of civilian oversight bodies in the Americas. Civilian oversight organizations may have looked good on paper, but their access to information was generally limited and their recommendations were often ignored. In the final analysis, I'm more comfortable in ensuring that accountability resides in an elected parliament responsible to society.[66]

He went on to explain that "the primacy should be on Parliament" and that there is "no reason to exclude civilian oversight committees, but if they're going to be established, they have to have clear guidelines and they have to have teeth."[67]

Witnesses like Professor Cheung underscored the importance of robust independent expert review within the national security framework in order to re-gain public confidence:

> Done right, a robust system of accountability enhances public trust. Also important for public trust is some measure of transparency in how government goes about protecting our national security.[68]

Her comments were echoed by Alex Neve, Secretary General, Amnesty International Canada, who told the Committee that "[r]eview bodies and processes play very important roles in boosting human rights protection in any context."[69] In his opinion:

> Authorities who are aware that their actions are subject to scrutiny may take greater care not to commit human rights violations. Lessons learned will help avoid human rights violations in the future. Public confidence and trust increases the odds that officials will respect human rights. There may be potential to curtail violations, even while they are occurring, and human rights violations amounting to criminal conduct may be exposed and lead to accountability.[70]

He also recommended that the federal government move towards "adopting a human rights based approach to national security". He explained that with this approach the "regard for human rights is recognized as a foundational pillar to our security framework", there would be "human rights safeguards adopted as part of the national

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65 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016, (Hugh Segal): "There would have to be a managed phase-out for what SIRC now does, there would have to be a managed phase-out for the civilian oversight of the RCMP, all of which could be part of a two- or three-year transition process, but in the end, there would be one committee of parliamentarians with substantial resources."

66 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Stephen Randall).

67 Ibid.

68 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Carmen Cheung).

69 SECU, Evidence, 1st Session, 42nd Parliament, 17 November 2016 (Alex Neve, Secretary General, Amnesty International Canada).

70 Ibid.

security framework" and that, as such, the "provisions in our laws and policies that fail to conform to either national or international human rights obligations must be reformed."[71]

1. Review of the National Security Activities of the Canada Border Services Agency

Currently, only the RCMP, the Canadian Security Intelligence Service (CSIS) and the Communications Security Establishment (CSE) are subject to having their activities reviewed by independent organizations: the Civilian Review and Complaints Commission for the RCMP, SIRC and the CSE Commissioner, respectively. Other organizations that have an important national security role, such as the Canada Border Services Agency (CBSA), are not subject to such an external review.

Justice O'Connor recommended that oversight of the CBSA be provided by the body tasked with reviewing the RCMP given its important law enforcement mandate and intelligence capability:

> When performing their enforcement duties under customs and immigration legislation, CBSA officers generally have the same powers as police officers, including powers of arrest, detention, search and seizure. Under the *Customs Act*, CBSA officers may also take breath and blood samples. Under immigration laws, in defined circumstances, CBSA officers may issue arrest warrants and may detain and arrest without warrant. The CBSA has legal responsibility for immigration detention facilities, including the conditions of detention therein, even though Correctional Service Canada staffs the facilities.
>
> The CBSA plays a significant role in the security certificate process**.** It evaluates classified national security information, which may not be available to the person who is the subject of the certificate or to that person's counsel, and makes recommendations to the Minister of Citizenship and Immigration regarding the individual's participation in activities that would result in inadmissibility on grounds of national security or other grounds set out in the *Immigration and Refugee Protection Act*. The Minister considers these recommendations before signing the security certificate.[72]

In Justice O'Connor's opinion, the CBSA often operates in a manner similar to a police force and there is "significant potential for the CBSA's activities to affect individual rights, dignity and well-being."[73] He also underscored that much of the national security activities undertaken by the CBSA are not disclosed to the public.[74]

On the issue of the independent review of CBSA, Luc Portelance, former President of the CBSA, noted that:

> I do believe there's a need to bring greater public confidence in terms of the activities of CBSA. … Oftentimes people mix the CBSA in the same conversation with CSIS, the RCMP, and CSEC. The first thing you have to recognize is that CBSA is not what I would

71 Ibid.

72 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities*, Ottawa, 2006, p. 562.

73 Ibid., p. 564.

74 Ibid., p. 560.

> call a tier 1 national security organization. It doesn't collect intelligence. It doesn't generate intelligence. It is a user of intelligence that is developed by, mostly, CSIS, and the RCMP, and so on. … I've always thought that an organization like the public complaints commission of the RCMP would likely be the right sort of review body, but I think the right way to do this is to look at everything the CBSA does and really focus on the one area.[75]

Similarly, the Hon. Ron Atkey, adjunct professor at Osgoode Hall Law School, York University, stated that the jurisdiction of the expert review bodies such as SIRC, CSEC or the Civilian Review and Complaints Commission for the RCMP should be extended to other federal agencies such as CBSA or Transport Canada and that "steps should be taken to allow these review bodies to share classified information with each other or to conduct joint reviews of national security and intelligence activities."[76]

2. Independent Reviewer and Coordinator

Witnesses suggested it was important for national security discussions to include the role of the National Security Advisor (NSA). That being said, witnesses did not elaborate on the specific duties of the NSA and whether or not the role and mandate of the NSA would follow the recommendations of Justice Major in the Air India Inquiry. In the Air India Inquiry, Justice Major suggested that the role of the NSA be enhanced in order to help coordinate the relationship between intelligence and evidence and address some of the challenges with respect to terrorism prosecutions. The following are excerpts of witness testimony to the Committee regarding the NSA:

> In this regard, parliamentary review of national security matters of the type that's now been proposed is a crucial first step and gets us in line with our Five Eyes allies, but it alone isn't sufficient. Internal review of national security operations that stretches government-wide is needed. Greater formalized central coordination – I'm talking about oversight here – or the possibility thereof, for example in the hands of the NSA, is also needed.[77]

> [W]hy not give the responsibility to someone with clout at the centre, the national security adviser to the Prime Minister? Of course, the mandate would have to change under this proposal, and so would the manner of appointment. Similar to the Auditor General or the Privacy Commissioner, this person should be appointed by Parliament on the recommendation of the Governor in Council. Presumably the committee of parliamentarians established by Bill C-22 would play a major role in the nomination and approval process, and the national security adviser would be required to table an annual report in Parliament subject to the usual redactions regarding security matters.[78]

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75 SECU, *Evidence*, 1st Session, 42nd Parliament, 22 November 2016, (Luc Portelance, as an individual).

76 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Ron Atkey).

77 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Michael Nesbitt, professor of Law, University of Calgary, as an individual).

78 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Ron Atkey).

> [E]stablish an office of the national security adviser 'to review all national security activity, and to ensure effective information sharing' from government agencies to CSIS and the RCMP.[79]

Another witness, David Fraser, suggested that an officer of Parliament would be needed with a mandate to oversee all the national security agencies.[80] In his opinion, it would be a model similar to the model of the Information Commissioner, the Privacy Commissioner, or the Auditor General, who report to Parliament directly. He explained that this body would need to be fully independent of the agencies and have unfettered access to information with the power to report to Parliament on its own initiative and to take any questions before any of the designated justices of the Federal Court on any question about lawful activities.

According to the International Civil Liberties Monitoring Group, the United Kingdom and Australia have strengthened national security accountability by appointing independent monitors of national security law.[81] Also, Professor Cheung suggested that the Office of the Inspector General could be brought back for the purpose of real-time oversight:

> It might be a good idea to bring something like that back, something that is more real-time oversight that provides the minister with more information about what's happening in the agency so it's not something that is covered after the fact. This is something that has come up in SIRC reports, that, if there had been an [Inspector General], maybe something that SIRC had concerns about would have been caught sooner. I think that's something that we should continue to think about.[82]

79 SECU, *Evidence*, 1st Session, 42nd Parliament, 21 October 2016 (Christina Szurlej, Director, Atlantic Human Rights Centre, St. Thomas University, as an individual).

80 Ibid., (David Fraser, Partner, McInnes Cooper, as an Individual).

81 International Civil Liberties Monitoring Group, brief, 28 October 2016.

82 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Carmen Cheung).

PART 4: NATIONAL SECURITY ACTIVITIES

In response to the attacks of 11 September 2001 in the United States, the Canadian government enacted the *Anti-terrorism Act*, 2001, *An Act to amend the Aeronautics Act*, 2001 and the *Public Safety Act, 2002*. Since then, other anti-terrorism measures have been included in a number of Acts, some of which include: the *Immigration and Refugee Protection Act*; the *Justice for Victims of Terrorism Act;* the *Combating Terrorism Act;* the *Nuclear Terrorism Act;* the *Strengthening Canadian Citizenship Act*; the *Protection of Canada from Terrorists Act; the Prevention of Terrorist Travel Act* and the *Anti-terrorism Act, 2015*.

Given new enforcement powers, intelligence gathering authorities and information sharing capabilities, witnesses expressed the need for an accountability framework, whether through parliamentary, judicial or ministerial oversight and review. Part 4 of this report touches upon aspects of these national security activities that are, or could be, subject to such accountability. The first section discusses the issues brought forth with respect to the disruption powers of the Canadian Security Intelligence Service (CSIS). The second section touches upon police enforcement powers. The third section brings to light the issues raised in respect of information sharing authorities under the *Security of Canada Information Sharing Act.* The last section examines the Passenger Protect Program.

A. Disruption Powers of the Canadian Security Intelligence Service

In 1971, the McDonald Commission specifically recommended the establishment of CSIS as an intelligence agency without a mandate to reduce threats.[83] Prior to the enactment of the *Anti-Terrorism Act, 2015* (ATA, 2015), CSIS had been engaging in disruption activities for some time inside Canada, although the *Canadian Security Intelligence Service Act* (CSIS Act) did not expressly authorize it.[84] In 2010, the Security Intelligence Review Committee (SIRC) expressed concern that CSIS disruption activities may overlap with police disruption operations.[85]

83 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Stuart Farson), speaking notes.

84 Security Intelligence Review Committee, *Annual Report 09/10 – Time for reflection: Taking the measure of security intelligence*, Ottawa, 30 September 2010, p. 16. Prior to the creation of CSIS in 1984, the Ministerial Directive (1975) authorized the RCMP Security Service to "maintain internal security by discerning, monitoring, investigating, *deterring, preventing and countering* individuals and groups in Canada when there are reasonable and probable grounds to believe that they may be engaged in or may be planning to engage in … the commission of terrorist acts in or against Canada" (*McDonald Commission*, Report 2, Volume 1, Part I, para. 96). [emphasis added]

85 Security Intelligence Review Committee, *Annual Report 09/10 – Time for reflection: Taking the measure of security intelligence*, Ottawa, 30 September 2010, p. 16.

The ATA, 2015 amended the CSIS Act to authorize CSIS, if there are reasonable grounds to believe[86] that a particular activity constitutes "a threat to the security of Canada," to "take measures, within or outside Canada, to reduce the threat."[87]

There is no such definition of a disruption activity in Canada[88] or in the legislation of other "Five Eyes" countries,[89] although Australia does authorize specific activities with respect to computer systems and anti-terrorism investigations.

CSIS Director Michel Coulombe said that CSIS has used its new power to engage in threat reduction measures about two dozen times since the ATA, 2015 came into force in June 2015.[90]

Mr. Coulombe told the Committee that disruption activities are warranted given the speed with which terrorists now move from planning to execution. He added that given its role, CSIS is in a good position to discover threats when they first emerge and take action to counter them.[91] According to Reg Whitaker, disruption activities "can be very useful in counterterrorism, so long as they are undertaken with the goal always in mind of securing criminal convictions and putting dangerous terrorists behind bars."[92]

1. Restrictions on Disruption Activities

When it created CSIS in 1984, Parliament decided to separate the intelligence and policing functions. Minister Goodale said that we are now seeing these functions merge back together to a certain extent.[93] During its consideration of Bill C-51 in the 41st Parliament, this committee added wording to section 12.1(4) of the CSIS Act to specify that the power of CSIS to take measures to reduce a threat does not confer any law enforcement power, such as the power to make arrests. However, it is unclear whether CSIS can detain[94] an individual. In his brief to the Committee, Ryan Alford,

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86 This requirement is more onerous than the conditions for CSIS to obtain authorization to collect security intelligence under s. 12 of the CSIS Act, that is, "reasonable grounds [to suspect]." In *R. v. Chehil*, the Supreme Court of Canada addressed the issue of reasonable grounds: "[W]hile reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime" ([2013] 3 S.C.R. 220, para. 27).

87 Section 12.1(1) of the CSIS Act.

88 The Canadian government's *Green Paper* provides examples of disruption activities in the chapter "Threat Reduction."

89 A group of allied countries made up of Australia, Canada, New Zealand, the United Kingdom and the United States.

90 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Michel Coulombe).

91 Ibid. The CSIS director gave as an example of such an activity advising social media that a user is breaching their rules.

92 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Reg Whitaker).

93 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Ralph Goodale).

94 According to the Supreme Court, detention refers to "a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply" (*R. v. Grant*, 2009 SCC 32, para. 44).

Assistant Professor, Bora Laskin Faculty of Law, Lakehead University, speculated that CSIS would probably not hesitate to carry out mass detentions in a crisis situation or in the days following a terrorist attack.[95]

The CSIS Act places additional restrictions on disruption activities. Before undertaking disruption activities or operations, CSIS must consider the reasonable availability of other means to reduce the threat. In all circumstances, these measures must be "reasonable and proportional to the circumstances" and they cannot obstruct the course of justice, violate the sexual integrity of an individual or cause bodily harm. Witnesses questioned whether this last term also included psychological injuries or even certain torture techniques by means of extraordinary rendition.[96]

According to a recent decision by the Federal Court concerning the retention of metadata, the mandate and functions of CSIS must be strictly defined and limited.[97] Some witnesses therefore suggested improving the language of the Act by making clear what CSIS can and cannot do in using its new disruption powers.[98]

In its brief to the Committee, the Canadian Civil Liberties Association stated that CSIS should simply be stripped of its disruption powers.[99]

> By giving CSIS police-like powers to "disrupt" perceived security threats, the CSIS amendments remove longstanding protections against a covert and largely unchecked security intelligence agency intervening in, and often interfering with, everyday policing matters.[100]

2. Disruption Warrants

Pursuant to section 12.1(3) of the CSIS Act, if measures to reduce a threat to the security of Canada contravenes a right or freedom guaranteed by the Charter or is contrary to other Canadian law, CSIS must obtain a warrant from the Federal Court issued under section 21.1. During the study of Bill C-51, Michael Duffy, Senior General Counsel, National Security Law, Department of Justice, explained:

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95 Ryan Alford, assistant professor, Bora Laskin Faculty of Law, Lakehead University, brief, 27 October 2016.

96 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Reg Whitaker). See Craig Forcese and Kent Roach, *Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper*, October 2016.

97 *In the Matter of an Application by (…) for Warrants pursuant to sections 12 and 21 of the* CSIS Act, 2016 FC 1105, para. 50 (Justice S. Noël).

98 SECU, Evidence, 1st Session, 42nd Parliament, 15 February 2017 (Ian Carter, Treasurer, Criminal Justice Section, Canadian Bar Association); Craig Forcese and Kent Roach, *Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper*, October 2016.

99 Canadian Civil Liberties Association, brief, 28 October 2016. This recommendation was also supported by Reg Whitaker, see SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Reg Whitaker).

100 Canadian Civil Liberties Association, brief, 28 October 2016. See also McDonald Commission, Second Report, Volume 1, Part III, Chapter 7, p. 274, par. 18.

> What it turns on is section 1 of the Charter, which provides that the rights referred to in the Charter are guaranteed only to the extent that they are not restricted by reasonable limits prescribed by law in a free and democratic society.[101]

As part of its review, SIRC found that CSIS's threat reduction activities that it examined all complied with the CSIS Act, ministerial direction and operational policies.[102] SIRC also reported that there were no warrants issued under section 21.1 of the CSIS Act in 2015-2016. However, Michel Coulombe, did say that such measures remain useful for fulfilling CSIS's new mandate to reduce threats to Canada's security.[103]

Michael Nesbitt, professor at the Faculty of Law, University of Calgary, argued that section 12.1(3) of the CSIS Act (disruption warrant) is too broad, since it allows for section 8 of the Charter[104] to be infringed (generally the case with electronic eavesdropping) as well as the full range of fundamental rights and freedoms.[105] Professor Alford stated that this provision would allow for the same type of abuses that were committed by the former RCMP Security Service that led to the McDonald Commission and the creation of CSIS as a civilian body independent of the police.[106]

As one witness pointed out, the McDonald Commission asserted that it was not necessary to allow the security service to break the law to perform its duties.[107] The Commission made the following statement:

> No unlawful countermeasures by the security intelligence agency should be permitted in the future. Nor do we see any need to recommend changes in the law which would make otherwise unlawful countering measures lawful.[108]

Tom Henheffer, Executive Director, Canadian Journalists for Free Expression, told the Committee that section 12.1(3) of the CSIS Act (disruption warrant) could have the

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101 See House of Commons Standing Committee on Public Safety and National Security, *Evidence*, 2nd Session, 41st Parliament, 31 March 2015. Mr. Duffy added that:

> The judge may determine that a particular right referred to in the Charter, be it mobility or something else, is violated, and that's in a sense the preliminary stage. The point that goes to the judge is, is that violation a reasonable one because the restriction is prescribed by law in a free and democratic society? That's the judicial inquiry that has to take place on the warrant process. … A right may appear to be infringed or be infringed and that's fine. The judge has to determine whether that infringement is a reasonable one or whether it's a reasonable restriction.

102 Security Intelligence Review Committee, *Annual Report 2015–2016 – Maintaining Momentum*, Ottawa, 19 September 2016, p. 18.

103 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Michel Coulombe).

104 Section 8 protects against unreasonable search or seizure.

105 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Michael Nesbitt), speaking notes. Specifically, the freedom of expression and mobility rights, guaranteed by sections 2(b) and 6 of the Charter, respectively.

106 Ryan Alford, brief, 27 October 2016. The witness referred to a failed bombing, arson, the theft of a political party's membership list and more than 400 warrantless break-ins.

107 SECU, *Evidence*, 1st Session, 42nd Parliament, 20 October 2016 (Alexandre Popovic, as an Individual).

108 McDonald Commission, Second Report, Volume 1, Part III, Chapter 7, p. 274, para. 19.

negative effect of jeopardizing all intelligence collected in contravention of the Charter and used as evidence. A trial judge would probably not hesitate to throw out this kind of evidence.[109]

Some witnesses told the Committee that this provision is clearly unconstitutional.[110] According to Alex Neve of Amnesty International Canada: "[t]here should be no consideration of activities by CSIS, or by any Canadian agency, that violate the [C]harter or international human rights obligations."[111]

B. Law Enforcement Powers

The RCMP noted the speed at which threats develop also explains why law enforcement measures in the *Criminal Code* focus more and more on stopping pre-attack preparations than on the later prosecution of terrorism offences.[112] Examples would be preventive arrests, the seizure of terrorist propaganda, and peace bonds without charges laid.

1. Peace Bonds and Preventive Arrests

The ATA, 2015 lowered the burden of proof required to obtain a peace bond with conditions as well as to arrest a person without a warrant if the person is likely to commit a terrorist activity. The requirement for belief that a terrorist activity *will be carried out* was replaced by *may be carried out*.[113] According to Katherine Bullock, Representative of the Islamic Society of North America, this is one of the key problems with the Act: "the whole Canadian counterterrorism approach in general, has been the move from what's called criminal space to the prevention space … In the move from *will* to *may*, we enter the realm of interpretation." [Authors' emphasis][114]

The ATA, 2015 also increased the maximum length of time the arrested person may be detained without charge from three days to seven.[115] Although the RCMP has not yet used these preventive arrest powers, the RCMP Commissioner believes that this is a useful tool:

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109 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Tom Henheffer, Executive Director, Canadian Journalists for Free Expression), speaking notes.

110 Ibid., (Ron Atkey); SECU, *Evidence*, 1st Session, 42nd Parliament, 20 October 2016 (Paul Cavaluzzo, Representative, International Civil Liberties Monitoring Group).

111 SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (Alex Neve).

112 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Bob Paulson, Commissioner, Royal Canadian Mounted Police). This preference to target activities prior to a terrorist attack through policing tools other than by laying charges could also be explained by the difficulty using intelligence as evidence in criminal court.

113 Sections 83.3 and 810.011 of the *Criminal Code*.

114 SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (Katherine Bullock, Representative, Islamic Society of North America).

115 Sections 83.3(7.1) and 83.3(7.2) of the *Criminal Code*.

> The difficulties we have in getting the information, as complex as it is, unpacked as it often needs to be, and presented coherently to a prosecutor to be able to make all the decisions takes a lot of time. That's the advantage, in my mind.[116]

However, Dominique Peschard, a spokesperson for the Ligue des droits et libertés, believes that detaining individuals for a week without charge based on mere suspicion is unacceptable in a free and democratic society.[117]

Denis Barrette, another spokesperson for the Ligue des droits et libertés, told the Committee that the use of investigative hearings during the Air India affair was a "fiasco".[118] According to him, the pre-2001 legislative tools were adequate to fight terrorism effectively and went on to say as follows:

> The more tools the police are given, the more they are likely to use them. One should not assume the police would be unable to do their work effectively without these tools. Naturally, they will always say they need more tools. But one must ask whether they're really necessary.[119]

2. Advocating or Promoting the Commission of Terrorism Offences

The ATA, 2015 created a new offence under section 83.221 of the *Criminal Code*: advocating or promoting the commission of terrorism offences *in general*. According to the previous government, this offence was created to fill a gap in that the counselling offence under section 22 of the Code must necessarily refer to a *specific* offence (e.g., blowing up a train station).[120] Before this new offence was created, actively encouraging others to commit terrorism offences *in general* was not an offence.

According to the Centre for Israel and Jewish Affairs, this new offence is helpful because:

> [T]errorist recruiters are often sophisticated. They can take note of the law's limitations and adjust their approach accordingly so that, while still instigating terrorist activity, their statements are general enough to remain beyond the reach of the law … This provision denies those seeking to radicalize or recruit Canadians the legal leeway to be clever, but dangerous, with their words.[121]

However, as suggested by David Matas, Senior Legal Counsel, B'nai Brith Canada, the advocating offence could be improved by defining the term "terrorism offences in

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116 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Bob Paulson).

117 SECU, *Evidence*, 1st Session, 42nd Parliament, 20 October 2016 (Dominique Peschard, Spokesperson, Ligue des droits et libertés), speaking notes. This view was echoed by Amnesty International (SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (Alex Neve).

118 SECU, *Evidence*, 1st Session, 42nd Parliament, 20 October 2016 (Denis Barrette, Spokesperson, Ligue des droits et libertés).

119 Ibid.

120 Senate, Standing Committee on National Security and Defence, *Evidence*, 2nd Session, 41st Parliament, 30 March 2015 (Peter MacKay, then-minister of Justice).

121 SECU, *Evidence*, 1st Session, 42nd Parliament, 8 February 2017 (Noah Shack).

general".[122] He also suggested that, in addition to the requirement of the Attorney General's consent for proceedings in respect of a terrorism offence, there be guidelines.[123]

Other witnesses believe that this new offence is unconstitutional as it is vague, too broad and an unreasonable restraint on the freedom of expression.[124] For such an offence to be legitimately prohibited, there must be a very close nexus between a statement and the risk of harm. That is not the case for this new offence, which, according to Tom Henheffer, could apply to legitimate communications such as a journalist reporting terrorist statements.[125]

As well, witnesses queried why the new offence does not include similar defences to the ones provided for the offence of promoting hatred[126] or, simply, why other offences – such as encouraging participation in an activity of a terrorist group or instructing a person to carry out an activity for a terrorist group[127] – are inadequate.[128]

3. Seizure of Terrorist Propaganda

The ATA, 2015 also provides for warrants to seize and confiscate publications or to delete all electronic data from a computer system if a police officer has reasonable grounds to believe that it is "terrorist propaganda," which section 83.222(8) of the *Criminal Code* defines as "any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general – other than an offence under subsection 83.221(1) – or counsels the commission of a terrorism offence."

According to Michael Karanicolas, Senior Legal Officer, Centre for Law and Democracy, this definition is overly broad since, like the new offence of advocating or promoting the commission of terrorism offences, the term "terrorism offences in general" is imprecise.[129]

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122 SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (David Matas, Senior Legal Counsel, B'nai Brith Canada).

123 Ibid.

124 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Tom Henheffer), speaking notes; SECU, *Evidence*, 1st Session, 42nd Parliament, 20 October 2016 (Dominique Peschard), speaking notes; and SECU, *Evidence*, 1st Session, 42nd Parliament, 21 October 2016 (Michael Karanicolas, Senior Legal Officer, Centre for Law and Democracy), speaking notes.

125 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Tom Henheffer), speaking notes. See also the brief submitted by Coalition Voices-Voix, 28 October 2016.

126 S. 319(3) of the *Criminal Code*. B'nai Brith Canada suggested adding such defence (SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (David Matas).

127 See ss. 83.18 and 83.21 of the *Criminal Code*, respectively. According to Amnesty International: "Existing criminal offences dealing with counselling, aiding and abetting and other similar offences are sufficient." (SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (Alex Neve).

128 See Craig Forcese and Kent Roach, *Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper*, October 2016, pp. 29–30.

129 SECU, *Evidence*, 1st Session, 42nd Parliament, 21 October 2016 (Michael Karanicolas), speaking notes.

On the other hand, Noah Shack of the Centre for Israel and Jewish Affairs believes that this provision places an acceptable limit on the freedom of expression and strikes an appropriate balance with the rights to life and security of the person.[130]

According to the Canadian Bar Association: "'[t]errorist propaganda' should be confined to material that counsels the commission of a terrorist offence or that instructs the commission of a terrorist offence."[131]

C. Information Sharing

1. Definition of "Activities that Undermine the Security of Canada"

The ATA, 2015 enacted a new law, the *Security of Canada Information Sharing Act* (SCISA). Section 5 of SCISA permits a Government of Canada institution to disclose information to the head of a recipient Government of Canada institution (listed in Schedule 3)[132] on its own initiative or on request, if the information is relevant to the recipient institution's jurisdiction or responsibilities under an Act of Parliament, or another lawful authority, "in respect of activities that undermine the security of Canada, including in respect of their detection, identification, analysis, prevention, investigation or disruption". The term "disruption" is not defined in SCISA. In fact, as previously noted, there is no definition of a disruption activity in Canada or within the legislation of other "Five Eyes" countries.

The information sharing authorities conferred on Government of Canada institutions deal specifically with "activities that undermine the security of Canada." Section 2 of SCISA defines what is covered by this expression more broadly than the existing definition of "threats to the security of Canada" in section 2 of the CSIS Act.

Witnesses commented that the over-breadth of the SCISA definition in section 2 casts a very wide net. Regina Crowchild, Councillor of the Tsuut'ina Nation, told the Committee that "[f]or most [Indigenous] communities, the only way to get the attention of the federal government is by way of demonstrations."[133] She expressed concern with respect to the broad list of activities provided for in the definition which, in her opinion, "can be used to suggest that just about anything could be deemed to be in contravention of this act."[134]

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130 SECU, *Evidence*, 1st Session, 42nd Parliament, 8 February 2017 (Noah Shack).

131 The Canadian Bar Association, Bill C-51, Anti-terrorism Act, 2015, March 2015, brief, 14 February 2017.

132 Schedule 3 specifically targets the following institutions: the Canada Border Services Agency; Canada Revenue Agency; Canadian Armed Forces; Canadian Food Inspection Agency; Canadian Nuclear Safety Commission; Canadian Security Intelligence Service; Communications Security Establishment; Department of Citizenship and Immigration; Department of Finance; Department of Foreign Affairs, Trade and Development; Department of Health; Department of National Defence; Department of Public Safety and Emergency Preparedness; Department of Transport; Financial Transactions and Reports Analysis Centre of Canada; Public Health Agency of Canada; Royal Canadian Mounted Police.

133 SECU, *Evidence*, 1st Session, 42nd Parliament, 18 October 2016 (Regena Crowchild, Councillor, Tsuut'ina Nation).

134 Ibid.

In its brief to the Committee, the Ligue des droits et libertés also expressed concern that the new information sharing powers could penalize citizens, Indigenous and environmental groups engaged in fighting pipelines and/or defending the "common good".[135]

In their brief to the Committee, Craig Forcese and Kent Roach suggested that not all protest and advocacy should be exempted from the information sharing regime.[136] Such examples would include protest and advocacy "intended to cause death or bodily harm, endanger life, or cause serious risk to health."[137]

Some witnesses recommended that section 2 of the SCISA be repealed and replaced with the definition of "threats to the security of Canada" provided for in section 2 of the CSIS Act.[138]

2. Information Sharing Threshold

Certain authorities related to the sharing of information already existed before SCISA came into effect. Evidence was provided to the Committee[139] about an internal CSIS briefing note (pre-dating the ATA, 2015) that highlights problems stemming from departmental information sharing between CSIS and the Communications Security Establishment (CSE):

> Currently, departments and agencies rely on a patchwork of legislative authorities to guide information sharing…. Generally, enabling legislation of most departments and agencies does not unambiguously permit the effective sharing of information for national security purposes…. Existing legislative authorities and information sharing arrangements often allow for the sharing of information for national security purposes. With appropriate direction and framework in place, significant improvements are possible to encourage information sharing for national security purposes, on the basis [of] existing legislative authorities.[140]

A privacy safeguard in section 5(1) of SCISA provides that the sharing of information is "subject to any provision of any other Act of Parliament, or of any regulation made under such an Act, that prohibits or restricts the disclosure of information." Section 6 deals with the use and further disclosure of information received pursuant to section 5(1), where the use and further disclosure are not governed by the information sharing framework of the Act. In its consideration of Bill C-51, this Committee amended section 6

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135 Ligue des droits et libertés *Putting Human Rights at the Centre of our Security Policy,* brief, 28 October 2016.

136 See Craig Forcese and Kent Roach, *Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper*, 16 October 2016.

137 Ibid.

138 Ibid.

139 See SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Micheal Vonn, Policy Director, British Columbia Civil Liberties Association) and Craig Forcese and Kent Roach, *Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper*, brief, 16 October 2016.

140 Craig Forcese and Kent Roach, *Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper*, brief, 16 October 2016.

to specify that the use and further disclosure of information obtained under section 5(1) that is not governed by the information sharing framework of the Act continues to be subject to other existing legal requirements, restrictions and prohibitions. The non-derogation clause in section 8 stipulates that nothing in the Act limits or affects any authority to disclose information under another Act of Parliament or a provincial statute. Thus, existing sharing authorities continue to apply to the information sharing framework.

That being said, Micheal Vonn, Policy Director, British Columbia Civil Liberties Association, explained to the Committee that the problem with SCISA and its interaction with the *Privacy Act* is the following:

> [T]he two acts are chasing each other's tails. The Privacy Commissioner says that what happens in the information sharing act falls within the purview of the Privacy Act, but the information sharing act says that if you have lawful authority for the culling of that information, you have an exemption to the Privacy Act.
>
> The government and the OPC [Office of the Privacy Commissioner] currently do not agree on the operation of how these two acts match. That's part of the inherent complexity of addressing this issue and why I think we need to go back to the drawing board on how to put this together. There currently is not even consensus in the government as to how it works.[141]

Furthermore, the information sharing power given to federal institutions in section 5 of SCISA requires that the information relate to the recipient institution's jurisdiction or responsibilities under an Act of Parliament or another lawful authority. The criterion for sharing is that of "relevance" rather than "necessity."

The Privacy Commissioner has stated that the relevance-based test for sharing information is an inadequate threshold that could expose the personal information of law-abiding Canadians who are not suspected of terrorist activities. He therefore recommends amending SCISA by changing the information sharing threshold to one of "necessity."[142] The Commissioner noted that CSIS already uses a similar test; under the CSIS Act, it may collect information on security threats only "to the extent that it is strictly necessary."[143]

In his written response to the Committee on 6 December 2016, the Privacy Commissioner invited the Committee to consider a dual threshold approach:

> As an alternative to adopting a "necessity and proportionality" standard for information sharing across the board, consideration could be given to adopting dual thresholds, one for the disclosing institutions, and another for the 17 recipient institutions. An important point raised by departmental officials during the current review of SCISA by the Standing Committee on Access to Information, Privacy and Ethics is that because front line staff in non-listed departments do not necessarily have the requisite expertise or experience to make real-time and nuanced decisions as to what is necessary and proportional for

141 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Micheal Vonn).

142 Office of the Privacy Commissioner of Canada, "Time to Modernize 20th Century Tools," *2015–2016 Annual Report to Parliament*, p. 16.

143 Daniel Therrien, Privacy Commissioner of Canada, Office of the Privacy Commissioner of Canada, letter to the Committee, 24 October 2016.

purposes of carrying out a national security mandate, the onus of the higher threshold would be shifted to the 17 recipient departments that do have the capacity to make such decisions in an informed manner. The Committee discussed the issue of a "dual threshold" and this would appear a reasonable solution under the following condition. In order to close the triage gap between these two different thresholds, the 17 recipient departments should be responsible for selectively receiving and retaining only information that meets the higher threshold of necessity and proportionality (subject to any further limits imposed by their enabling laws), and under a positive legal obligation to return or destroy information that does not.[144]

3. Oversight of Information Sharing Activities

The Office of the Privacy Commissioner noted that the SCISA provisions had been used approximately 50 times in the first six months after SCISA came into force. It also noted that only 3 (CSIS, CSE and the RCMP) of the 17 federal institutions receiving information are subject to independent external review. For example, the Canada Revenue Agency is not subject to such a review.

Certain witnesses expressed concerns about the new regime. Although SIRC said that CSIS has established a very rigorous structure in order to meet its obligations as to mistreatment,[145] witnesses fear that such information sharing – without implementing a rigorous review system for all institutions – would result in new cases of abuse similar to what Maher Arar was subjected to.[146] Amnesty International Canada recommended to the Committee that "ministerial directions on intelligence sharing and torture, which presently allow intelligence to be shared with other governments, even if it may lead to torture and which similarly allow intelligence to be received even if it may have been obtained under torture", should be withdrawn or reformed.[147] Béatrice Vaugrante, Executive Director, Francophone Section, Amnesty International Canada added that "when democratic countries start to undermine this principle, it also opens the door to many other countries that are less particular in this regard." [148] As stated in the brief submitted to the Committee by the Canadian Bar Association: "Safety cannot be won at the expense of Canada's constitutional rights and freedoms."[149]

Christina Szurlej, Director, Atlantic Human Rights Centre, St. Thomas University, recommended that the government create an office of the National Security Advisor to

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144 Privacy Commissioner of Canada, Consultation on Canada's National Security Framework, written response to the Committee, 6 December 2016.

145 SECU, *Evidence*, 1st Session, 42nd Parliament, 6 October 2016 (Michel Coulombe).

146 SECU, *Evidence*, 1st Session, 42nd Parliament, 4 October 2016 (Daniel Therrien, Privacy Commissioner of Canada, Office of the Privacy Commissioner of Canada); and SECU, *Evidence*, 1st Session, 42nd Parliament, 21 October 2016 (Christina Szurlej), speaking notes.

147 SECU, Evidence, 1st Session, 42nd Parliament, 17 November 2016 (Alex Neve).

148 SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (Béatrice Vaugrante, Executive Director, Francophone Section, Amnesty International Canada).

149 The Canadian Bar Association, Bill C-51, Anti-terrorism Act, 2015, March 2015, brief, 14 February 2017.

review all national security activity, and to ensure effective information sharing from government agencies to CSIS and the RCMP.[150]

D. Intelligence and Classified Information Used as Evidence

While the ATA, 2015 authorized CSIS to engage in disruption activities, its primary mandate is still to collect, analyze, produce and share intelligence in order to inform the government of threats to national security. CSIS frequently invokes the need for secrecy to protect human sources, ongoing investigations and the confidentiality of intelligence provided by foreign governments.[151] When discussing the new disruption powers, Reg Whitaker highlighted the growing risk that CSIS could "imperil convictions in court" by overprotecting its intelligence and encroaching on the work of the police.[152]

The mandate of the RCMP includes conducting investigations in order to collect evidence that is admissible in court.[153] The RCMP therefore generally expects that the information it collects will be disclosed to the accused and cited in public trials. As terrorism is both a crime and a threat to the security of Canada, both agencies exercise jurisdiction in this area. This overlap of mandates creates a constant tension between the desire to preserve the secrecy of security intelligence and the requirement to ensure that judicial proceedings are transparent. As Micheal Vonn pointed out, the Air India Commission recommended that the CSIS Act be amended to require CSIS to share intelligence with the police.[154] This recommendation has never been implemented.

Furthermore, Carmen Cheung raised the fact that the Arar and Air India inquiries, as well as the Supreme Court in *Harkat*, all stated that the government tends to exaggerate claims of national security confidentiality.[155]

1. The Two-Court System

Under sections 38 to 38.16 of the *Canada Evidence Act*, all applications for non-disclosure must be settled by the Federal Court *ex parte* (in the absence of the accused), even though the substantive issue of guilt or innocence of the person charged with a terrorism offence must be decided by the trial judge sitting, for example, in a provincial superior court. Trial judges must comply with the Federal Court's non-disclosure order, but may dismiss the charges if they find that non-disclosure infringes on the individual's right to a fair trial. However, trial judges must make decisions without access to the undisclosed confidential information, which puts them in a difficult position.

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150 SECU, *Evidence*, 1st Session, 42nd Parliament, 21 October 2016 (Christina Szurlej), speaking notes.

151 SECU, *Evidence*, 1st Session, 42nd Parliament, 4 October 2016 (Wesley Wark, visiting professor, Graduate School of Public and International, University of Ottawa).

152 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Reg Whitaker).

153 Section 18 of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.

154 SECU, *Evidence*, 1st Session, 42nd Parliament, 17 October 2016 (Micheal Vonn).

155 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Carmen Cheung), speaking notes. See also SECU, Evidence, 1st Session, 42nd Parliament, 24 November 2016 (Suzanne Legault, Information Commissioner of Canada).

Although the Supreme Court confirmed the validity of section 38, it expressed the view that it "raises numerous practical and legal difficulties."[156] The Air India Commission, which recommended that the two-court structure be abandoned, stated that it "has demonstrated unequivocally that it is a failure."[157] This system has been widely criticized. Specifically, Canada's two-court system, the only one of its kind in the Five Eyes alliance,[158] is said to cause unnecessary delays occasioned by fragmenting the criminal trial process and the duplicated effort involved in litigating the same issue before two separate courts.[159]

2. Security Certificates

On the subject of security certificates, the ATA, 2015 amended the provisions governing the protection of information to allow a Federal Court judge to exempt the Minister of Public Safety from having to provide the special advocate with information that does not enable the individual to be reasonably informed of the case made by the Minister when the certificate is not based on this information and this information is not filed with the Federal Court (sections 83(1)(c.1) and 85.4(1)(b) of the *Immigration and Refugee Protection Act*.

There are now two types of information: information filed with the Federal Court that is relevant – and that must be given to the special advocate – and information that can be exempted from this requirement by a Federal Court judge at the request of the Minister.

According to the Canadian Civil Liberties Association, since the special advocate no longer has access to the complete file, sections 83(1) and 85.4(1) may violate section 7 of the Charter, as interpreted by the Supreme Court in *Charkaoui*.[160]

E. Passenger Protect Program

1. Framework

The ATA, 2015 broadened the Passenger Protect Program by enacting the *Secure Air Travel Act* (SATA), which replaced the previous regime under which specified persons were listed. SATA established a legislative framework authorizing the Minister of Public Safety and Emergency Preparedness to establish a list of persons (the "Specified Persons List" commonly referred to as the "no-fly list") whom they have reasonable grounds to suspect:

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156 *R. v. Ahmad*, 2011 SCC 6, para. 3.

157 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (Air India Inquiry). *Air India Flight 182: A Canadian Tragedy*, Vol. 3, The Relationship between Intelligence and Evidence and the Challenges of Terrorism Prosecutions, 2010, p. 160 and Recommendation 19 (Air India Commission).

158 The norm in other jurisdictions is that the intelligence is disclosed to the trial judge alone for the sole purpose of determining the impact of non-disclosure on the fairness of the trial (See *R. v. Ahmad*, 2011 SCC 6, para. 45).

159 *R. v. Ahmad*, 2011 SCC 6, paras. 5 and 73–76.

160 Canadian Association of Civil Liberties, brief, 28 October 2016; *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9.

- will engage or attempt to engage in an act that would threaten transportation security; or

- will travel by air for the purpose of committing a specified terrorism offence (participation in the activities of a terrorist group, facilitating terrorist activity or the commission of an offence for a terrorist group) or an indictable offence where the act or omission involved also constitutes a terrorist activity, inside or outside of Canada.

Under SATA, a listed person may apply to the Minister of Public Safety and Emergency Preparedness to have their name removed from the list within 60 days after being denied transportation. The individual must be afforded a reasonable opportunity to make representations. The Minister must then decide whether reasonable grounds to maintain the applicant's name on the list continue to exist and, without delay, give the applicant notice of any decision (but not the reasons for it) made in respect of the application. If the Minister does not make a decision in respect of the application within 90 days, or within any further period that is agreed on by the Minister and the applicant, the Minister is deemed to have denied it.

SATA affords a listed person the right to appeal to the Federal Court in respect of a ministerial decision to add or retain the person's name on the list. In such appeals, the Federal Court must review whether the decision is reasonable on the basis of the information available. The usual rules of evidence do not apply to the appeal proceeding, as SATA allows for the admission of hearsay evidence: "the judge may receive into evidence anything that he or she considers to be reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence" (section 16(6)(e)).Upon hearing the appeal, the Federal Court justice, among other things must:

- ensure the confidentiality of information and other evidence provided by the Minister if its disclosure would be injurious to national security or endanger the safety of any person;

- hear information or other evidence in the absence of the public and of the appellant and their counsel if its disclosure could be injurious to national security or endanger the safety of any person;

- ensure that the appellant is provided with a summary of information and other evidence that enables him or her to be reasonably informed of the minister's case, but that does not include anything that would be injurious to national security or endanger the safety of any person if disclosed.

Ultimately, the judge may base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant.

2. Fairness, Openness and Transparency

Many judicial and administrative proceedings provide for the use of confidential information that is not fully accessible to the individual in question: proceedings under section 38 of the *Canada Evidence Act*; security certificates;[161] the listing of terrorist entities;[162] and passport revocation.[163] Although an individual on the "Specified Persons List" (SPL) may submit a delisting application to the Chief Justice of the Federal Court, that individual will not have access to confidential documents, and SATA – unlike the security certificates procedure in the *Immigration and Refugee Protection Act* – does not allow for special advocates.[164]

The appeal procedures in SATA are very similar to the pre-2008 *Immigration and Refugee Protection Act* (IRPA) process for the review of security certificates and detention orders, which was examined by the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*. The Court found that the IRPA scheme was in violation of the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice guaranteed under section 7 of the Charter.[165]

Despite the similarity of the SATA appeal provisions with those of the former (and unconstitutional) IRPA scheme, the extent of the intrusion on liberty and security resulting from the operation of the *Secure Air Travel Act* appeal provisions is central to the consideration of whether the new provisions would engage section 7 of the Charter. The section 7 analysis is context specific, the question to be answered being whether "the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation."[166]

Additional issues regarding the Passenger Protect Program were raised during the Committee's study. For instance, individuals are not being notified when they are put on the SPL, while others share the same or similar names as individuals already listed. As a result of false name matches (also known as "false positives") these individuals can be delayed in obtaining a boarding pass.

> A 'false positive' in the context of the [Passenger Protect] Program would be where a legitimate traveller is mistakenly matched to the List. Causes for false positives could include human error and/or the use of inaccurate information.[167]

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161 *Immigration and Refugee Protection Act*, section 83(1)(c.1).

162 *Criminal Code*, sections 83.05-83.07.

163 *Canadian Passport Order*, s. 10.1; *Prevention of Terrorist Travel Act*, sections 4–7.

164 SATA, section 16(6).

165 *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

166 Ibid., para. 22.

167 Office of the Privacy Commissioner of Canada, Audit Report of the Privacy Commissioner of Canada, *Passenger Protect Program Transport Canada,* 2009.

Christian Leuprecht, professor at the Department of Political Science at Royal Military College of Canada, commented that the Passenger Protect Program "works well on the whole and seems to be fair and effective"[168]:

> I think we need a program that meets Canadians' expectations. On the whole, I think this program does that because the problems are isolated cases. As some colleagues also mentioned, even one bad case or false case is too [*sic*] one too many. At the same time, however, there are not dozens of people who are barred from taking flights every day.
>
> Any government program will cause problems for certain individuals, give rise to isolated cases, and not always work properly. In short, we need to focus on these individuals rather than reviewing the entire program.

He added the following in respect of other no-fly lists:

> [T]he federal government can tell the people on the no fly list that their problems are not the result of Canada's list. The government cannot necessarily tell people which list is being used, but they could be told that the ban is not due to the passenger protect program. I think that could relieve some tension in this regard.[169]

Tom Henheffer stated that, in his opinion, "[t]here is no evidence that no-fly lists have ever prevented a terrorist attack, but there is clear evidence that they have a huge societal cost."[170] Safiah Chowdhury, appearing as a representative of the Islamic Society of North America, expressed concerns about "the very human impact anti-terror legislation has on our communities, our dignity, and our ability to thrive." This was echoed by Alex Neve who stated that the "refusal of being able to fly … can itself be very degrading and dehumanizing";[171] it is not just about being able to go on vacation, but it also touches upon being able to visit family and to earn a livelihood.[172]

To summarize, the witnesses spoke of a need for "fairness, openness and transparency of the appeal process."[173] Individuals are not notified when they are put on the list and there needs to be a meaningful way to appeal. David Matas also noted that there would need to be "the possibility of eradicating a completely mistaken record."[174]

A way of increasing ministerial accountability would be to adopt one of the recommendations made by Wesley Wark, Visiting Professor, Graduate School of Public and International Affairs at the University of Ottawa, who recommended that the Minister of

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168 SECU, *Evidence*, 1st Session, 42nd Parliament, 13 February 2017 (Christian Leuprecht, professor, Department of Political Science, Royal Military College of Canada, as an Individual).

169 Ibid.

170 SECU, *Evidence*, 1st Session, 42nd Parliament, 19 October 2016 (Tom Henheffer).

171 SECU, Evidence, 1st Session, 42nd Parliament, 13 February 2017 (Alex Neve).

172 Ibid.

173 Ibid.

174 Ibid. (David Matas).

Public Safety publish and table an annual report to Parliament indicating the number of individuals on the SPL.[175]

In their brief to the Committee, the Canadian Muslim Lawyers Association suggested that there should be a "complete audit of no-fly lists in Canada's national security toolkit to determine whether they are effective, the scale of adverse impacts through mistakes and the public safety rationale of preventing air travel to genuine national security threats".[176]

175 SECU, *Evidence*, 1st Session, 42nd Parliament, 4 October 2016 (Wesley Wark).

176 Canadian Muslim Lawyers Association, *Submission: Consultation on National Security (Our Security, Our Rights: National Security Green Paper, 2106)*, brief, 15 December 2016.

CONCLUSION AND RECOMMENDATIONS

The Committee recognizes that the responsibility bestowed upon a government to counter terrorism-threats and ensure the safety and security of individuals is a vital issue. The Committee is of the opinion that the measures taken to address these threats should respect the constitutionally protected rights and freedoms of Canadians. The "two responsibilities do not compete with each other, they are one and the same."[177] The enactment of additional national security measures should not lead to weaker human rights protections. To adhere to the *Charter of Rights and Freedoms* should not leave Canadians vulnerable to threats.

The decision to uphold human rights within Canada's national security framework should not be considered to hinder national security efforts, but should be recognized as a key component of it. As pointed out by some witnesses, to reject the false dichotomy that it has to be one or the other affirms that Canada's approach to national security is one grounded in full regard for human rights.[178]

In conclusion, the Committee recommends the following:

Recommendation 1

That the *Department of Public Safety and Emergency Preparedness Act* be amended to require the publication of the Public Report on the Terrorist Threat to Canada, and specifically include 1) performance indicators, 2), data on information sharing as it relates to the *Security of Canada Information Sharing Act*, and 3) the obligation that it be annually tabled in Parliament.

Recommendation 2

That building upon past experience, the Government of Canada increase funding for long-term research as well as the development of professional expertise, both within government and outside government, to understand and address new and evolving threats to national security.

Recommendation 3

That Public Safety Canada develop a community-based strategy for the prevention of radicalization to violence based on research data and focusing on best local practices. It should include programs for the empowering of youth and women, inclusion of marginalized persons and groups, and broad community and educational activities.

177 SECU, Evidence, 1st Session, 42nd Parliament, 13 February 2017 (Alex Neve).

178 Ibid.

Recommendation 4

That counter-radicalization programs continue to include and expand efforts to stop groups that promote radicalization from gaining a foothold to spread their message of violence, or the precursors to violence.

Recommendation 5

That the Government of Canada increase its contribution to and promote the Communities at Risk: Security Infrastructure Program to help communities at risk of hate-motivated crimes improve their security infrastructure.

Recommendation 6

That the Government of Canada recognize that establishing a national security and intelligence committee of parliamentarians is a first step toward increasing the transparency and accountability of the security agencies and that other mechanisms must be considered in order to restore Canadians' trust in those agencies.

Recommendation 7

That the Government of Canada create an independent and external review body for the operations of the Canada Border Service Agency.

Recommendation 8

That the Government of Canada establish statutory gateways among all national public safety and national security review bodies in order to provide for the appropriate exchange of information, referral of investigations, conduct of joint investigations and coordination in the preparation of reports.

Recommendation 9

That the Government of Canada increase the funding of all public safety and national security review bodies to enable them to carry out their mandates effectively, matching the increase in activities of the agencies they oversee and to ensure the protection of Canadians' rights and freedoms.

Recommendation 10

That the Government of Canada establish a national security review office as the integrated review body for the bodies inside the government that have a national security mandate that are currently without a review body and that the national security review office act as a coordinating committee for the existing national security review

bodies. The national security review office should have the following mandate:

- **to ensure that the statutory gateways among the independent review bodies operate effectively;**
- **to take steps to avoid duplicative reviews;**
- **to provide a centralized intake mechanism for complaints regarding the national security activities of federal entities;**
- **to report on accountability issues relating to practices and trends in the area of national security in Canada, including the effects of those practices and trends on human rights and freedoms;**
- **to conduct public information programs;**
- **to initiate discussion for co-operative review with independent review bodies for provincial and municipal police forces involved in national security activities.**

Recommendation 11

That the reference to the *Canadian Charter of Rights and Freedoms* in section 12.1(3) of the *Canadian Security Intelligence Service Act* be repealed in order to remove the ability to violate the Charter.

Recommendation 12

That before the Canadian Security Intelligence Service engage in disruptive powers, the agency exhaust all other non-disruptive means of reducing threats.

Recommendation 13

That the Government of Canada ensure that section 12.1 of the *Canadian Security Intelligence Service Act* (CSIS Act) requires that all disruption activities that violate Canadian law necessitate a warrant and that the Minister's approval be obtained prior to the activity under section 21.1 of the CSIS Act.

Recommendation 14

That the *Canadian Security Intelligence Service Act* be amended in order to include a quarterly report on disruption activities for the Committee of Parliamentarians.

Recommendation 15

That the Government of Canada ensure that the Canadian Security Intelligence Service respect the traditional distinction between intelligence gathering and police disruptive operations by working in concert with the Royal Canadian Mounted Police and other police forces to assist in their investigations and the exercise of their disruptive powers, and not duplicate such investigations or powers.

Recommendation 16

That the Government of Canada restrict preventive detention to only exceptional, narrowly defined circumstances, and ensure conditions of those detained comply with Canadian and international standards on detention and due process.

Recommendation 17

That the Government of Canada study other measures that could be used instead of preventive detention.

Recommendation 18

That sections 83.3(2) and 83.3(4) of the *Criminal Code* be amended in order to remove the wording "may be" and "is likely to" applicable to recognizance with conditions and to replace them with the "balance of probabilities" concept.

Recommendation 19

That section 83.221 of the *Criminal Code* be amended in order to clarify the concept of "terrorism offences in general" and to consider replacing it with "terrorism offences", as defined in section 2 of the *Criminal Code*. Furthermore, the Government of Canada should consider applicable defences modeled after those in section 319(3) of the *Criminal Code* that prohibit the wilful promotion of hatred and contain a number of truth and fair comment defences.

Recommendation 20

That the Government of Canada ensure no Canadian is restricted from the legitimate exercise of their right to freedom of expression and freedom of association, and that it remove any provisions in current legislation that may be in contravention to the *Charter of Rights and Freedoms* or restrict the legitimate exercise of rights, particularly those of journalists, protesters, non-governmental organizations and environmental and Indigenous activists.

Recommendation 21

That the definition of "terrorist propaganda" in section 83.222(8) of the *Criminal Code* be amended in order to be limited to material that counsels the commission of a terrorist offence or that instructs the commission of a terrorist offence.

Recommendation 22

That the scope of activities subject to information sharing under the *Security of Canada Information Sharing Act* be narrowed so as to be consistent with all other national security legislation.

Recommendation 23

That the Government of Canada change the definition of an "activity that undermines the security of Canada" and revise the list of activities enumerated in section 2 of the *Security of Canada Information Sharing Act* in order to ensure that basic civil liberties such as freedom of expression, freedom of association and freedom of peaceful assembly are upheld.

Recommendation 24

That the Government of Canada ensure that protections guaranteed under the *Privacy Act* are not abrogated by the *Security of Canada Information Sharing Act*, thus ensuring Canadians' privacy is protected.

Recommendation 25

That the proposed Committee of Parliamentarians conduct an immediate review of the operational evaluation of the information exchange process included in the *Security of Canada Information Sharing Act*.

Recommendation 26

That the *Security of Canada Information Sharing Act* be amended in order to adopt a model of dual thresholds, one threshold of relevance for the disclosing institutions and a threshold of necessity and proportionality for the recipient institutions currently numbered at 17.

Recommendation 27

That the Government of Canada create an office of the national security compliance commissioner to review all national security information sharing activity between and among government departments and agencies, including Canadian Security Intelligence Service and the Royal Canadian Mounted Police, to ensure compliance with the *Charter of Rights and Freedoms* and all Canadian law.

Recommendation 28

That the Minister of Public Safety and Emergency Preparedness review the ministerial directives concerning torture to ensure that they are consistent with international law.

Recommendation 29

That sections 38 to 38.16 of the *Canada Evidence Act* be amended in order to repeal the two-court system for criminal cases and enable trial judges to review secret information and decide on matters of confidentiality.

Recommendation 30

That the *Canada Evidence Act* be amended in order to allow the court to appoint, upon request or automatically, special advocates, with the necessary security clearance, who will be given access to confidential government information and will be tasked with protecting the interests of the accused and of the public in disclosure proceedings.

Recommendation 31

That sections 83(1) and 85.4(1) of the *Immigration and Refugee Protection Act* be amended in order to give special advocates full access to complete security certificate files.

Recommendation 32

That the *Secure Air Travel Act* be amended in order to allow an individual who has been denied air travel to confirm with the Passenger Protect Inquiries Office that they themselves are or are not on the Canadian Specified Persons List, and that they do or do not share a name with an individual on the Canadian list.

Recommendation 33

That the *Department of Public Safety and Emergency Preparedness Act* be amended to provide that Public Safety Canada's annual report to Parliament include the number of individuals on the Specified Persons List.

Recommendation 34

That the Government of Canada enhance the operations of the Passenger Protect Program in order to prevent false positive matches with individuals with the same or similar names.

Recommendation 35

That the Government of Canada create an expeditious redress system to assist travelers erroneously identified as a person on the Specified

Persons List (known as "false positives") and that it continue to work with foreign governments in order to assist Canadians whose names appear on these governments' lists.

Recommendation 36

That the *Secure Air Travel Act* be amended in order to require the Minister of Public Safety to respond to an administrative recourse under the Act within 90 days. If the Minister does not respond within the prescribed time period, the individual will be automatically removed from the Specified Persons List.

Recommendation 37

That the *Secure Air Travel Act* be amended in order to provide for the nomination of a special advocate to protect the interest of individuals who have appealed to have their name removed from Specified Persons List.

Recommendation 38

That the Government of Canada ensure effective safeguards in the Passenger Protect Program against any unfair infringements on individuals' legitimate right to liberty, freedom of movement, privacy and protections from discrimination on the basis of national or ethnic origin, religion, sexual orientation, or any other characteristic protected by law.

Recommendation 39

That at this time, and following the Supreme Court of Canada's decision in *R. v. Spencer*, no changes to the lawful access regime for subscriber information and encrypted information be made, but that the House of Commons Standing Committee on Public Safety and National Security continue to study such rapidly evolving technological issues related to cyber security.

Recommendation 40

That the Communications Security Establishment, in acting upon the requests of other national security agencies regarding the surveillance of private communications and the gathering and retention of metadata, work only with appropriate warrants from the agencies making such requests.

Recommendation 41

That cyber security strategies need to adopt a whole of government approach, such as the GCHQ (UK Government Communications Headquarters) approach.

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
As an individual	2016/10/04	27
Wesley Wark, Visiting Professor Graduate School of Public and International Affairs, University of Ottawa		
Office of the Privacy Commissioner of Canada		
Patricia Kosseim, Senior General Counsel and Director General Legal Services, Policy, Research and Technology Analysis Branch		
Daniel Therrien, Privacy Commissioner of Canada		
Canadian Security Intelligence Service	2016/10/06	28
Michel Coulombe, Director		
Department of Public Safety and Emergency Preparedness		
Hon. Ralph Goodale, Minister		
Monik Beauregard, Senior Assistant Deputy Minister National and Cyber Security Branch		
Malcolm Brown, Deputy Minister		
Royal Canadian Mounted Police		
Bob Paulson, Commissioner		
As individuals	2016/10/17	29
Stuart Farson, Adjunct Professor Department of Political Science, Simon Fraser University		
Reg Whitaker, Professor Department of Political Science, University of Victoria and Distinguished Research Professor (Emeritus), York University		
British Columbia Civil Liberties Association		
Micheal Vonn, Policy Director		
As individuals	2016/10/17	30
Kathryne Ayres		
Joey Robert Bowser		
Michael Graham Burnside		
Stephen Ellis		
Rukshana Homi Engineer		
Robert Feher		
Alnoor Gova		
Minah Lee		

Organizations and Individuals	Date	Meeting
Jamie May	2016/10/17	30
Letchumanapillai Pathmayohan		
Kathy Shimizu		
Brian Sproule		
John Rex Taylor		
Joseph Theriault		
John Allen West		
British Columbia Civil Liberties Association		
Joshua Paterson, Executive Director		
Greater Vancouver Japanese Canadian Citizen's Association		
Judy Kiyoko Hanazawa, Representative		
OpenMedia		
Maria Emilia Aspiazu Pazmino, Representative		
Jesse Johannes Schooff, Representative		
Laura Tribe, Executive Director		
Unifor		
Maurice Earl Mills, Second Vice-President Local 114 of New Westminister		
Vancouver Raging Grannies		
Barbara Taylor, Representative		
As individuals	2016/10/18	31
Michael Nesbitt, Professor of Law University of Calgary		
Stephen Randall, Professor University of Calgary		
Michael Zekulin, Adjunct Assistant Professor University of Calgary		
Centre for Military, Security and Strategic Studies		
David Bercuson, Director Centre for Military, Security and Strategic Studies, University of Calgary		
Robert Huebert, Associate Professor Centre for Military, Security and Strategic Studies, University of Calgary		
Tsuut'ina Nation		
Terry T. Braun, General Counsel		
Regena Crowchild, Councillor		

Organizations and Individuals	Date	Meeting
As individuals	2016/10/18	32
Tammy Rose Duncan		
Tavis John Ford		
Selene Granton		
James Lloyd		
Matthew McAdam		
Ian Vincent O'Sullivan		
As individuals	2016/10/19	33
Hon. Ron Atkey, Adjunct Professor Osgoode Hall Law School, York University		
Carmen Cheung, Professor Munk School of Global Affairs, University of Toronto		
Ron Levi, George Ignatieff Chair of Peace and Conflict Studies Munk School of Global Affairs, University of Toronto		
Hon. Hugh Segal, Chair NATO Association of Canada, Massey College		
Canadian Journalists for Free Expression		
Tom Henheffer, Executive Director		
Alice Klein, President		
As individuals	2016/10/19	34
Miguel Avila		
Steven Brooks		
Sharly Chan		
Rajib Dash		
Teri J Degler		
Paul Dutton		
Fred Joseph Ernst		
Peter Francis Glen		
David Henderson		
Sharon Howarth		
Ewa Infeld		
Arthur L Jefford		
Chaitanya Kalevar		
Evan Light		
Eric Mills		
Bernice Murray		

Organizations and Individuals	Date	Meeting
Dimitre Popov	2016/10/19	34
Jens Matthew Porup		
Steven D Poulos		
Semret Seyoum		
Mohamed Shukby		
Set Shuter		
Ben Silver		
Adam Smith		
Barrie Zwicker		
Canadian Civil Liberties Association		
Roberto De Luca, Staff Lawyer		
Brenda McPhail, Director Privacy, Technology and Surveillance		
Canadian Unitarians for Social Justice		
Jacks Dodds, Representative		
Margaret Rao, President		
National Council of Canadian Muslims		
Faisal Bhabha, Representative		
Queer Ontario		
Richard Hudler, Chair		
Stop C-51: Toronto		
Matthew Currie, Executive Coordinator		
Association des juristes progressistes	2016/10/20	35
Sibel Ataogul, President		
Congrès Maghrébin au Québec		
Lamine Foura, Spokesperson		
International Civil Liberties Monitoring Group		
Paul Cavalluzzo, Representative		
Roch Tassé, Acting National Coordinator		
Ligue des droits et libertés		
Denis Barrette, Spokesperson		
Dominique Peschard, Spokesperson		
As individuals	2016/10/20	36
Joaquin Barbera		
Jacques Marcel Bernier		
Julia Claire Bugiel		

Organizations and Individuals	Date	Meeting
Suzanne Chabot	2016/10/20	36
Robert Cox		
Fernand Deschamps		
Holly Jewel Dressel		
Sarah Evett		
Souhail Ftouh		
Francis Betty Goldberg		
Dorothy Henaut		
Edward Desire Hudson		
Shane Johnston		
Veronika Jolicoeur		
Bensalem Kamereddine		
George Kaoumi		
Lillian Kruzsely		
Brenda Linn		
Timothy McSorley		
Hernan Moreno		
Alexandre Popovic		
William Ray		
Rhoda Sollazzo		
Wendy Stevenson		
Aaron Thaler		
Communist Party of Canada		
Johan Boyden, Representative		
Ligue de la jeunesse communiste		
Adrien Welsh, Sponsor		
As individuals	2016/10/21	37
David Fraser, Partner, McInnes Cooper		
Christina Szurlej, Director Atlantic Human Rights Centre, St. Thomas University		
Centre for Law and Democracy		
Michael Karanicolas, Senior Legal Officer		
Centre for the Study of Security and Development		
Brian Bow, Director Dalhousie University		
Andrea Lane, Deputy Director, Dalhousie University		

Organizations and Individuals	Date	Meeting
As individuals	2016/10/21	38
Philon Jacob Aloni		
Scott Burbidge		
Hannah Dawson-Murphy		
Ray Silver		
Rana Zaman		
Centre for Israel and Jewish Affairs	2017/02/08	52
Noah Shack, Director of Policy		
Amnesty International Canada	2017/02/13	53
Alex Neve, Secretary General		
Béatrice Vaugrante, Executive Director Francophone Section		
As individual		
Christian Leuprecht, Professor Department of Political Science, Royal Military College of Canada		
B'nai Brith Canada		
David Matas, Senior Legal Counsel		
Michael Mostyn, Chief Executive Officer		
Islamic Society of North America		
Katherine Bullock, Representative		
Safiah Chowdhury, Representative		
Canadian Bar Association	2017/02/15	54
Ian Carter, Treasurer Criminal Justice Section		
Peter Edelmann, Executive Member Immigration Law Section		
National Council of Canadian Muslims		
Ihsaan Gardee, Executive Director		

APPENDIX B
LIST OF BRIEFS

Organizations and Individuals

Alford, Ryan

Amnesty International

Andrews, Susan

Ansari, Nadir

Assembly of First Nations

British Columbia Civil Liberties Association

British Columbia Library Association

Canadian Civil Liberties Association

Canadian Muslim Lawyers Association

Canadian Unitarians for Social Justice

Canning, Carolyn

Choquer, Allan

Fripp, Will

Gingerich, Denver

Green, Lorraine

Halliwell, Martin

Hanna, Roger

International Civil Liberties Monitoring Group

Johnson, Jim

Kirby, Peter

Lardner, William

Light, Evan

Organizations and Individuals

Ligue des droits et libertés

Luttmer, Krista

Lynch, Tim

MacQueen, Graeme

May, Elizabeth

National Council of Canadian Muslims

National Security Oversight Institute

O'Connor, Kathleen

Office of the Information and Privacy Commissioner of British Columbia

OpenMedia

Parsons, Leonard

Robinson, Bill

Segal, Hugh

Seyoum, Semret

Voices-Voix Coalition

Williams, Jane

Writers' Union of Canada

Zwicker, Barrie

APPENDIX C
LIST OF WITNESSES
Bill C-22

Organizations and Individuals	Date	Meeting
Hon. Bardish Chagger, Leader of the Government in the House of Commons	2016/11/01	40
Canada Border Services Agency		
Linda Lizotte-MacPherson, President		
Canadian Security Intelligence Service		
Michel Coulombe, Director		
Communications Security Establishment		
Dominic Rochon, Deputy Chief Policy and Communications		
Department of Public Safety and Emergency Preparedness		
Hon. Ralph Goodale, Minister of Public Safety and Emergency Preparedness		
Malcolm Brown, Deputy Minister		
John Davies, Director General National Security Policy		
Privy Council Office		
Ian McCowan, Deputy Secretary to the Cabinet (Governance)		
Heather Sheehy, Director of Operations Machinery of Government		
Royal Canadian Mounted Police		
Bob Paulson, Commissioner		
As individuals	2016/11/03	41
Ron Atkey, Adjunct Professor Osgoode Hall Law School, York University		
Craig Forcese, Associate Professor Faculty of Law, University of Ottawa		
Kent Roach, Professor Faculty of Law, University of Toronto		
Wesley Wark, Visiting Professor Graduate School of Public and International Affairs, University of Ottawa		
As individuals	2016/11/15	42
Stephanie Carvin, Assistant Professor Norman Paterson School of International Affairs		
John Major		

Organizations and Individuals	Date	Meeting
Civilian Review and Complaints Commission for the Royal Canadian Mounted Police	2016/11/15	42
Richard Evans, Senior Director Operations		
Ian McPhail, Chairperson		
Office of the Communications Security Establishment Commissioner		
J. William Galbraith, Executive Director		
Jean-Pierre Plouffe, Commissioner		
Amnesty International	2016/11/17	43
Alex Neve, Secretary General Amnesty International Canada		
As an individual		
Stéphane Leman-Langlois, Full Professor École de service social, Université Laval		
Office of the Privacy Commissioner of Canada		
Leslie Fournier-Dupelle, Strategic Policy and Research Analyst		
Daniel Therrien, Privacy Commissioner of Canada		
Security Intelligence Review Committee		
Michael Doucet, Executive Director		
Charles Fugère, Acting Senior Counsel and Director		
Marc Pilon, Counsel		
As individuals	2016/11/22	44
Richard B. Fadden		
Anil Kapoor, Special Advocate Kapoor Barristers		
Luc Portelance		
Canadian Bar Association		
Peter Edelmann, Executive Member Immigration Law Section		
Office of the Information Commissioner of Canada	2016/11/24	45
Nadine Gendron, Legal Counsel		
Suzanne Legault, Information Commissioner of Canada		
Department of Public Safety and Emergency Preparedness	2016/11/29	46
John Davies, Director General National Security Policy		
Privy Council Office		
Nancy Miles, Senior Legal Counsel		

Organizations and Individuals	Date	Meeting
Privy Council Office	2016/11/29	46
Heather Sheehy, Director of Operations Machinery of Government		
Allen Sutherland, Assistant Secretary Machinery of Government		
Department of Public Safety and Emergency Preparedness	2016/12/06	48
John Davies, Director General National Security Policy		
Privy Council Office		
Nancy Miles, Senior Legal Counsel		
Heather Sheehy, Director of Operations Machinery of Government		
Allen Sutherland, Assistant Secretary Machinery of Government		

APPENDIX D
LIST OF BRIEFS
Bill C-22

Organizations and Individuals

International Civil Liberties Monitoring Group

Canadian Unitarians for Social Justice

Canadian Bar Association

Wark, **Wesley**

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 26 to 38 and 52 to 54 and 56 to 60) is tabled.

Respectfully submitted,

Robert Oliphant
Chair

There Can Be No Liberty without Security: Conservative Party of Canada Dissenting Report

Terrorists, aware of the some of the shortcomings and limitations of our legal systems, often exploit these gaps to their advantage. – Canadian Coalition against Terror[1]

There is no more pressing concern for any government than the protection of the physical safety of its citizens. Yet, rather than work from this premise, the Liberal Government – and by extension the Liberal majority on this Committee – have taken an ill-advised path of attempting to water down our national security tools.

A cursory review of the "Terms of Reference" section of this report displays such a wrongheaded focus. The Terms of Reference are described with a focus on the perceived loss of rights, with a limited focus on serious problems like terrorist attacks, radicalization, lack of resources for security agencies, or legislative roadblocks.

One does not need to go far beyond the daily headlines to see the horrific effect that jihadi terrorism continues to have on the West. Solely during the period that the Committee was reviewing the text of this Report, we saw major terrorist attacks in London[2], Kabul[3], and Damascus[4]. There were also disruptions of planned attacks in Italy[5], Germany[6], and an arrest of a terrorist traveler right here in Canada[7].

Instead, the report has missed these issues in favour of addressing issues like false positives in the Passenger Protect Program. As Queens University Professor Christian Leuprecht said "I think we need a (Passenger Protect Program) that meets Canadians' expectations. On the whole, I think this program does that because the problems are isolated cases… There are not dozens of people who are barred from taking flights every day"[8]

While Parliamentarians obviously must be concerned about correcting problematic elements in our laws, Conservatives do not believe that these kinds of issues should have been the priority of this Committee. The Committee should have been focused on how to best keep Canadians safe from those who wish to do us harm. The *Anti-terrorism Act, 2015*, more commonly known as Bill C-51 was an appropriate response to the terrorist threat environment. The tools it created have been used responsibly by national security officials. Conservatives believe that this legislation ought to be maintained.

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[1] Press Release: Canadian Coalition Against Terror (C-CAT) Welcomes Government Anti-Terrorism Initiative http://www.wireservice.ca/index.php?module=News&func=display&sid=14608
[2] http://www.reuters.com/article/us-britain-security-photographer-idUSKBN16T1Y5
[3] http://www.reuters.com/article/us-britain-security-photographer-idUSKBN16T1Y5
[4] http://www.radionz.co.nz/news/world/326399/40-dead-in-syria-terrorist-attack
[5] http://www.telegraph.co.uk/news/2017/03/30/italian-police-break-alleged-jihadist-cell-planned-attack-venices/
[6] http://www.dw.com/en/german-police-carry-out-raids-on-islamists-in-hildesheim/a-37923597
[7] http://www.torontosun.com/2017/04/05/man-arrested-in-toronto-with-leaving-canada-to-join-isis
[8] SECU, Evidence, 1st Session, 42nd Parliament, 13 February, 2017

The CSIS Public Report, 2014-2016 lays it out very clearly - "The principal terrorist threat to Canada remains that posed by violent extremists who could be inspired to carry out an attack in Canada. Violent extremist ideologies espoused by terrorist groups like (ISIS) and Al Qaeda continue to appeal to certain individuals in Canada."[9] What's more, the Director of CSIS said that the new threat disruption powers had been used approximately 20 times.[10] Previously, CSIS had their hands tied behind their backs in terms of combating terrorist threats. As Professor Leuprecht said "In the case of the threat mitigation mandate, people didn't understand that CSIS couldn't technically talk to parents if they thought their kid was up to nothing good. There's good evidence that the mandate is working."[11] Given the continued successful use of these powers by CSIS, the Conservative Party recommends that the threat disruption mandate must be maintained.

In order to tackle radicalization via the internet, promotion and advocacy of terrorism "in general" needs to remain an offence under the Criminal Code. This was an important recommendation made by representatives of the Jewish community.[12] Concerns that this provision needlessly targets free speech are unfounded and have not been borne out in the time since the law passed. Conservatives recommend that the government maintain the criminal prohibition on advocacy and promotion of terrorism in general.

Additionally, during this study the Liberal Government used their majority to pass the flawed Bill C-22, the *National Security and Intelligence Committee of Parliamentarians Act*. Review of our security agencies was the focus of much testimony before this Committee. Former Parliamentarian and former Chair of the Security and Intelligence Review Committee Ron Atkey summarized the problem well when he said "The language of Bill C-22 reflects a reluctance to have the committee of parliamentarians act as a true watchdog."[13] That is why Conservatives recommend that the Government seek to amend Bill C-22 to reflect that review of national security activities should be done by a committee of Parliament, with access to all classified information required to review actions of all national security agencies and the ability to follow information between agencies. We further recommend that this committee should be supported by a Secretariat staffed with national security experts, including retired practitioners.

There are also elements of our national security framework that were not touched on by the majority report.

We have a serious gap in converting intelligence collected by our security services into evidence that can be used in a court case to put criminals behind bars. There is a

[9] https://www.csis-scrs.gc.ca/pblctns/nnlrprt/2014-2016/index-en.php
[10] SECU, Evidence, 1st Session, 42nd Parliament, 6 October, 2016
[11] SECU, Evidence, 1st Session, 42nd Parliament, 13 February 2017
[12] SECU, Evidence, 1st Session, 42nd Parliament, 8 February 2017
[13] SECU, Evidence, 1st Session, 42nd Parliament, 3 November 2016

problem here that is not well understood, even by the legal experts[14]. That is why Conservatives recommend that the Government study the intelligence to evidence problem and develop a method to ensure that terrorists are not able to walk free because intelligence sources cannot be disclosed to law enforcement. Paramount in this enquiry must be the preservation of relationships with key allies – particularly in the Five Eyes community of nations – from whom Canada receives the vast majority of its intelligence and with whom Canada has enjoyed decades of indispensable cooperation in the safeguarding of our national interests.

We also have a serious cyber security issue that has not been fully examined. The Government of Canada has several disparate departments coordinating the variety of facets that make up Canada's cyber posture. In the wake of allegations of Russian hacking in the US election, as well as allegations that they may have also been involved in the Canadian election, there are pressing reasons to be concerned. In fact, multiple Ministers even have reference to cyber security in their mandate letters. Professor Leuprecht recommended[15] adopting the approach that the United Kingdom has taken in having one agency charged with all cyber security matters. Conservatives agree. That is why we recommend that the Government adopt a Government Communications Headquarters (GCHQ) approach to cyber security, rather than having disparate organizations with different mandates responsible for its different aspects.

In closing, Conservatives are concerned that some of the recommendations adopted by the Liberal majority on this Committee will foreshadow dangerous changes to national security legislation. We will strenuously oppose any measures that weaken the ability of our national security agencies to counter the ongoing and dangerous activities of jihadi terrorists and keep Canadians safe.

[14] SECU, Evidence, 1st Session, 42nd Parliament, 13 February 2017
[15] SECU, Evidence, 1st Session, 42nd Parliament, 13 February 2017

Supplementary Opinion of the New Democratic Party

For New Democrats, a comprehensive national security framework has always been about protecting our rights, our freedoms and our safety. In the last number of years, we are of the opinion that safety has been the only one of those pillars that has been protected. With technology and threats evolving rapidly, it is critical the federal government protect Canadians' privacy and, of course, their fundamental rights and freedoms.

New Democrats agree with the findings of the report on the National Security Framework Review from the Standing Committee on Public Safety and Emergency Preparedness. However, we feel some critical recommendations were missing to fully reflect both expert witness testimonies and the position of Canadians expressed at the open microphone public meetings.
As such, New Democrats add the following recommendations to the report:

- That the federal government introduce a bill to repeal An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts (the Anti-terrorism Act, 2015).
- That the Minister of Public Safety and Emergency Preparedness repeal and replace the current ministerial directive on torture to ensure Canada stands for an absolute prohibition on torture and specifically that in no circumstances will Canada use information from foreign countries that could have been obtained using torture or share information that is likely to result in torture.
- That the federal government establish a national security and intelligence committee of parliamentarians and give it full access to classified information without exempting ministers from the obligation to disclose information protected by the national security privilege, the power to issue summonses to appear in the course of its reviews and the power to receive information about ongoing police investigations.
- That the federal government explicitly state that no warrant obtained by Canadian Security Intelligence Service or the Royal Canadian Mounted Police will authorize a breach of the Canadian Charter of Rights and Freedoms, other Canadian legislation, or international human rights law.
- That the federal government repeal section 83.221 of the Criminal Code, the offence of knowingly advocating or promoting the commission of terrorism offences in general, as this section infringes on freedom of expression and freedom of the press.