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Chair

Mr. Robert Oliphant

Standing Committee on Public Safety and National Security

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● (1530)

[*English*]

The Chair (Mr. Robert Oliphant (Don Valley West, Lib.)): Welcome, everyone.

I call this meeting of the Standing Committee on Public Safety and National Security to order. This is our 41st meeting, and pursuant to the order of reference from October 4, we are considering Bill C-22, An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts.

We welcome our guests as witnesses today, Mr. Wark and Mr. Atkey.

I understand Mr. Miller has a point he'd like to raise first.

Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC): Yes, and I'll be very brief, Mr. Chair.

At the last meeting the chair said, “Thank you, Mr. Miller. I would have given you more time if you'd brought some international prizewinning ice cream from your riding”, so there it is.

Voices: Oh, oh!

Mr. Larry Miller: You must share this with the committee.

The Chair: This will be it.

Mr. Larry Miller: We can put it back on ice until the meeting's over.

The Chair: We'll put it on ice and we'll have it in the back. We will put the name “Chapman's” in the record.

Voices: Oh, oh!

Mr. Larry Miller: And I will be expecting more time.

Voices: Oh, oh!

The Chair: All right. I think that's worth a minute.

Mr. Marco Mendicino (Eglinton—Lawrence, Lib.): Is that pay for play, Larry?

Voices: Oh, oh!

A voice: It's not $1,500 worth.

Mr. Larry Miller: No, that's right.

The Chair: I'll taste the ice cream first.

Mr. Larry Miller: That's five dollars of the best ice cream there is.

The Chair: In the world.

Mr. Larry Miller: In the world. That's right.

The Chair: Welcome to the most effective and magnanimous and interesting committee on Parliament Hill.

We're going to begin with our witnesses. I'm going to suggest we start with Dr. Wark. You have 10 minutes, and then we'll have Professor Atkey.

Mr. Wesley Wark (Visiting Professor, Graduate School of Public and International Affairs, University of Ottawa, As an Individual): Chairman, members of the committee, it's a great pleasure to have the chance to give testimony on Bill C-22, An Act to establish the National Security and Intelligence Committee of Parliamentarians .

I'd like to begin by making some brief contextual remarks about the legislation. Genuine parliamentary capacity to scrutinize intelligence and security has been a long-time coming in Canada. Having such a body was first proposed by the McDonald commission over 30 years ago, but was rejected by a special Senate committee established to review the commission's report and recommendations. Instead, we got a different accountability mechanism back then, the Security Intelligence Review Committee, established with the CSIS Act in 1984.

Despite various efforts to bring forward legislation in subsequent years, including several attempts in recent years, Bill C-22 marks the first time that a legislative proposal supported by the government has come to a standing committee for hearings.

Much wasted time has passed and much has changed in the intervening years. The necessity for a committee of parliamentarians of the kind envisaged by Bill C-22 is irrefutable, in my view. We have been left behind by the efforts of our allies in legislative branch scrutiny. The Canadian security and intelligence community, which will be the subject of the reviews conducted by the proposed committee, has undergone tremendous change, in particular since the 9/11 attacks, and now benefits from much greater resources, capacity, and power than it has ever experienced in Canadian history.

With that increase in power comes a corresponding increase in the need for strategic level scrutiny of the activities of the security and intelligence community as a whole and a crying need for real parliamentary capacity. In addition, the Canadian public is much more attuned to security and intelligence issues than in the past and there is a much higher expectation in the public domain for the delivery of accountability, transparency, and adequate public knowledge.

I fully support Bill C-22. I think it represents a necessary and timely experiment in parliamentary democracy and activism. I give full credit to the Liberal government for seeing the importance of parliamentary scrutiny of security and intelligence and for making this a centrepiece of its response to the previous government's anti-terrorism legislation, Bill C-51, and for making it a promise in their election platform.

I don't think Bill C-22 is perfect, but Parliament will have to decide how significant the gaps might be between a perfect scheme and something good enough for a start-up. If we are honest, this is what Bill C-22 represents, a start-up. It's the beginning of a delayed experiment in parliamentary scrutiny, which requires, of course, robust legislation, but which will also be dependent on many other factors and will require a period of maturation before it can become fully effective.

This has been the experience of the U.K.'s Intelligence and Security Committee of Parliament, on which the Canadian legislation is clearly based. The U.K. committee was created in 1994, has over 20 years of experience, and was granted revised powers and procedures in legislation in 2013.

The success of the proposed national security and intelligence committee of parliamentarians will depend, beyond robust legislation, on many factors, including strong membership, reflecting the stature of the committee, which makes it a highly desirable place for MPs and senators to aspire to a seat around the table; a steep learning curve about the complex domestic and international dimensions of intelligence activities; the trust of key agencies in the security and intelligence community; earned legitimacy in Parliament; and last but not least, and perhaps most important of all, public legitimacy, twinned with an understanding that one of the key roles of the a national security and intelligence committee of parliamentarians is to build and sustain public understanding of the role and challenges of intelligence and security endeavours in a democracy.

It seems to me that these are the challenges ahead for the committee, but to meet them the committee will need the right legislative tools.

In terms of having the right legislative tools, Bill C-22 has to find what I would call a “sweet spot” between committee access to secrets and the protection of secrets. Finding this sweet spot is the challenge before you in your study of this legislation. That sweet spot can be examined under five headings, all of which are core elements of Bill C-22: membership, mandate, powers, resources, and protection against leaks.

In the time remaining, I propose to make some short remarks about the strengths and weaknesses of Bill C-22, as it currently stands, under those five headings.

First of all, I will discuss membership. My plea to the committee would be not to too hung up on membership, though I imagine you might well do that. The key thing is having good members and instilling a culture of non-partisanship. How you arrive at those members is something that you'll have to determine. It's certainly the case that the Canadian proposal in Bill C-22 falls a little behind the revised procedures currently being used by the U.K. Intelligence and Security Committee of Parliament, but I hope this doesn't become the overweening focus of the committee's deliberations.

● (1535)

Mandate is the second issue.

The mandate proposed for Bill C-22 is very broad, and that's good, but it comes with challenges. There are core agencies of the security and intelligence community that will preoccupy the committee and take up almost all of its time. I would prefer to see these core agencies named, as is the case with the legislation for the U.K. intelligence and security committee.

You can of course maintain the broad mandate while still naming the key agencies that are going to be the subject of your work, by adding an additional clause indicating that other government departments and agencies would be under the purview of the committee as required and as it pursues its mandate. I think, however, that it's critical to name those core agencies, in part to assist the committee in coming up with a useful work plan and in part to help the public understand what its expectations around the reporting of this committee will be.

I would also add under mandate that it would be important to include something that does not currently fall under the mandate, which is a direct reference to operations. By operations I mean past operations. This area should be listed as part of the mandate of the committee, as is the current U.K. practice.

I'm going to skip over powers for a minute and turn to resources. The Bill C-22 provisions for a secretariat are, I believe, excellent. I had the opportunity to talk to the visiting intelligence and security committee delegation that travelled to Ottawa recently, and this was one of the things they commented on. They clearly felt some degree of jealousy about the explicit provisions for resources for a secretariat and for the leadership of that secretariat. This is one of the strongest pieces of the Bill C-22 legislation. I hope it will be supported and sustained.

Protection against leaks is a question of finding the sweet spot between access to secrets and protection against the inadvertent or deliberate revealing of secrets. The measures that are provided in Bill C-22 to protect against leaks are clearly overwrought; they go beyond the kinds of measures that were proposed in previous versions of draft legislation.

They're overwrought in imposing a security clearance requirement on members. I say “overwrought” in that regard because it is very likely that members of the national security and intelligence committee of parliamentarians would not be cleared to the highest levels, in part because I can't quite imagine MPs and senators wishing to undergo polygraph examination.

I also think it's completely unnecessary. All it really needs is what was proposed in many versions of previous legislation, which is reliance on an oath of secrecy as the principal protection required, with an assumption of trust with regard to the behaviour of MPs and senators sitting on the committee. A properly administered oath of secrecy, surrounded by the kinds of protections you'll need with regard to documents and document handling that would be enforced by the secretariat is in my view sufficient. From my perspective, I think the government overplayed its hand here.

That leads me to the final point, which is about powers. I suspect this will be one of the most contentious issues you'll have to address in this committee. Again, I would urge you to think about these powers in the context of that sweet spot between access to secrets on the part of the committee and protecting legitimate secrets held by the government and provided to the government, possibly by many of our allied partners.

There are many complicated provisions contained in Bill C-22 with respect to access to records and in respect to reporting. I'm not going to run through these in detail. The point I would simply like to make is that in comparison with the U.K. legislation, which I think could usefully be our guide here, the legislation in Bill C-22 goes a little further than necessary. It's too complex and can be usefully simplified around the protection of intelligence sources and methods and around any kind of divulgence that might impact upon the proper working of intelligence and security agencies.

● (1540)

A lot of the other kinds of clauses and exemptions in terms of access to reports or the nature of reporting that could be done I think are frankly unnecessary. I think it could be very helpful in terms of the committee's work, Parliament's understanding of its work, the public's understanding of its work, and removing any suspicions about excessive executive control over this committee if all of those efforts to corral access and reporting could be vastly simplified.

One thing, in particular, that I want to draw the committee's attention to is to be careful about including in C-22 an exemption to access and reporting that refers directly to operational information. That is a reference to the Security of Information Act, and the definition of operational information in the Security of Information Act, which was passed as part of the Anti-terrorism Act in 2001, is extremely broad and, if it were read literally, could really bring the work of the committee to a halt. My main message is that this part of C-22 could be usefully and practically simplified.

Just by way of quick conclusion, there are two things I would encourage the committee to do as it scrutinizes C-22. First, seek genuine parliamentary consensus on an acceptable form of legislation, and practice bipartisanship as you do so. It seems there is a good amount of bipartisanship already, in terms of the sharing of ice cream going on, so this is a good sign.

I say this because consensus and bipartisanship are going to be the working ethic of the committee that is established. It would be a good place to start, to think about these things in this committee.

Second, keep in mind that the proposed national security and intelligence committee of parliamentarians is a start-up and will be reviewed after five years, and accept that there is no perfect formula for balancing secrecy requirements and access requirements. Pease don't spin your wheels too much on that.

I'll end with a quote. As General William “Wild Bill” Donovan was fond of saying during his leadership of the Office of Strategic Services in World War II, “Perfect is the enemy of the good.”

Thank you.

● (1545)

The Chair: Thank you very much.

Mr. Atkey, go ahead.

Hon. Ron Atkey (Adjunct Professor, Osgoode Hall Law School, York University, As an Individual): Thank you, Mr. Chairman, members of the committee. I thank all of you for the invitation to appear to assist your study of Bill C-22.

Like my friend Wesley Wark, I believe this represents a major and welcome change within our Canadian parliamentary system. I say this having been both a parliamentarian for two short terms under Liberal and Progressive Conservative governments, as well as the first chair of the Security Intelligence Review Committee in 1984-89.

It's a major change because it accepts the recommendation, as Wesley pointed out, of not only the Macdonald commission in the seventies, but also the of the Mackenzie commission in the sixties. It goes back to there, where they recommended some form of parliamentary oversight committee.

I recall that at the time Canadian governments and their security agencies were a bit hesitant at allowing elected MPs into the national security tent, because there was no assurance that they could keep security information a secret in the red-hot political environment in Ottawa. There was some concern among our allies at the time that elected members of Parliament should have access to the most secretive of all secrets, let alone have the time and inclination to monitor closely the vast array of departments and agencies with various security issues.

I must admit that when I was the first chair of SIRC, in 1984, our committee of privy councillors, and we were from different political parties, all went along with the notion that expert review of security intelligence was something that should be done only by independent persons of experience who could talk to MPs to get their views without necessarily giving them the secret information they might otherwise be interested in.

Bill C-22 represents a welcome change to that way of thinking—welcome in the sense that we saw Canada in the last three decades fall behind our parliamentary cousins in the United Kingdom and Australia in terms of accountability to Parliament, and we have now the chance to get caught up. It's welcome also in the sense that the important parliamentary debates in this century, particularly after 9/11 on Bill C-36, and after the 2014 attacks in Ottawa and Saint-Jean-sur-Richelieu on Bill C-51, were overly partisan, in my opinion, and not as well informed in the absence of a committee of parliamentarians such as the one being proposed.

I have some amendments. You asked me a couple of weeks ago what I would propose, and let me suggest just a couple. Let me say at the outset I emphasize that this is a good bill and it should be passed in this session of Parliament. It will help to ensure Canadians that their elected representatives will play a key overview role in accountability for the important but dangerous powers granted to some 17 departments and agencies that relate to national security.

Is it a perfect bill? No. Are there areas where amendments can be considered to improve the bill? Yes. Will this bill fix all the problems of BillC-51 and companion legislation that have concerned many Canadians over the last 18 months? Not at all. This bill is a first good step, but it should not be an excuse for government in action on fixing Bill C-51 during the remainder of this Parliament.

First of all, I suggest amendment on ministerial veto. Have a close look at this. The possibility of the proposed committee's work being frustrated by any minister determining that the review of his or her department would be injurious to national security is overly protected and should be removed or modified.

No such veto existed when I chaired SIRC between 1984 and 1989. And yes, there were tensions from time to time with CSIS, the body we were reviewing, but matters were worked out as they are in a reasonable context of being within the security tent. To my knowledge, no security operations were compromised at the time.

The language of BillC-22 in paragraph 8(b) reflects a reluctance to have the committee of parliamentarians act as a true watchdog.

Access to information is the second of my amendments. In order to do its work, the committee is rightly given access in clause 13 to any information that is under control of the department. This is a key for any watchdog to be effective, yet there are important exceptions in clause 14, which are well understood and accepted in the security intelligence community. I accept those for the most part.

● (1550)

However, then comes the discretionary refusal of information in clause 16, where the minister has decided that the provision of the information would be injurious to national security or would constitute special operational information. That's the nub. This is open-ended and dangerous in my opinion. Yes, the minister must tell the committee the reasons for the open-ended refusal, and this should be considered by way of amendment. But I think other investigative work of the committee may be frustrated if this is retained in its current form.

The third area of amendments relates to prime ministerial redactions.

A broad power is given in Bill C-22, in subclause 21(5), allowing the PM to direct the committee to submit a revised report to Parliament, one that has been censored for reasons of national security, national defence, or international relations.

This is a matter that was litigated between the Arar commission and the Harper government in 2007. Here I make full disclosure that I was participating in that case, as counsel on behalf of the Arar commission. The court had to consider, in that case, some 2,000 words in dispute in the commission's final report. Justice Noel found that a half of them should be disclosed in the public interest and a half of them should remain confidential.

The directed wording of Bill C-22 would preclude this court adjudication and would give full power to the PM and his officials to censor committee reports he doesn't like, with no explanation. At the very least, I think when he directs redactions, he should have to give the committee a detailed reason for his decision in camera, as in the case with ministerial refusals of information under subclause 16(2).

Finally, I recommend some form of dispute settlement system for some of these contentious matters, whether it's paragraph 8(b), or subclauses 16(1) or 21(5), the ones that I've just mentioned. They should be subject to in camera dispute settlement in the courts.

In my experience, the nine designated judges of the Federal Court have the proper structure and experience to adjudicate balancing the need for government secrecy against the public interest in disclosure in accordance with law.

In my concluding comments with respect to general structures and powers, let me offer three observations.

I do appreciate that Bill C-22, as it stands, is an initial step for Canada in letting parliamentarians into the national security tent, and that's good. But these observations of mine are not meant to deter Parliament from proceeding promptly in this parliamentary session.

First of all is the appointment of the chair. This was raised in the debate on second reading in the House. To ensure that the committee is truly a creature of Parliament, couldn't the chair be elected by Parliament, rather than appointed by the PM?

In a majority government situation, the PM's preference would likely proceed but, remember, this is permanent legislation and there may come a day when a minority Parliament might want to elect a member of the official opposition as chair. I think you might consider the long-term implications of that.

Second is the selection of members of the committee. Consultation on selections by the Prime Minister with leaders of the opposition parties, which is provided in Bill C-22, has worked in the past when there has been genuine consultation and not simply notification. But to ensure that the system is not abused for partisan purposes, there should be ratification of all members of the committee by Parliament itself. I think that would just be a good check that you might want to build into the system.

Finally, and I hesitate to sound like a lawyer on this, while you're not going to be establishing a committee that's a court of law or an administrative tribunal acting accordingly in the judicial context, the committee of parliamentarians, in carrying out its statutory review under clause 8 of Bill C-22, may require, and should require, subpoena power to summon witnesses, compel testimony on oath or affirmation, and require the production of all necessary documents.

This may be necessary where public servants are reluctant to respond to reasonable requests by the committee, or in situations where private sector individuals have particular knowledge about a security activity being carried out by a particular department. I think you might empower your committee of parliamentarians to have these particular powers.

In conclusion, Bill C-22, in its current or amended form, represents an historic opportunity for Canada to bring accountability for security intelligence into the 21st century.

My hope is that whatever form of bill emerges from these committee proceedings, it ultimately enjoys the complete support of Parliament as a whole, both here and in the other place.

Building trust, in my experience, is a two-way street. Parliamentarians have to be prepared to put in place a review system that has the respect and support of all members working co-operatively within the security tent to ensure there is a proper balance in the system that protects Canadians, yet respects rights and freedoms.

● (1555)

Similarly, government departments and agencies must recognize and respect that parliamentary security review operating within appropriate boundaries is not a nuisance, and that it means, ultimately, a stronger and more accountable form of government for the benefit of all Canadians.

I look forward to answering your questions. Thank you.

[*Translation*]

The Chair: Thank you.

You kept to the time you had perfectly.

We will start with Mr. Di Iorio for seven minutes.

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

Mr. Atkey, Mr. Wark, my thanks for your remarks. The views you have expressed about the content of the bill and the comments you made about the possibility of improving it are very well noted.

I would like you to clarify one point, but first I have a question for Mr. Atkey. I will ask it in French and in English.

Hon. Ron Atkey: One moment, please.

Mr. Nicola Di Iorio: Mr. Atkey, I will ask it in English as well.

Hon. Ron Atkey: Okay.

Mr. Nicola Di Iorio: What will the purpose of committees such as the Security Intelligence Review Committee be after Bill C-22 is implemented?

[*English*]

What will be the relevance of committees such as SIRC once Bill C-22 becomes law?

Hon. Ron Atkey: SIRC, with its staff and its established history of some 25 to 30 years, is an experienced review body that goes into the detailed monitoring and investigation of particular operations after the fact. It's the sort of detailed work that members of a parliamentary committee, even with the best staff in the world, will not have time to do. I think it's a recognition that in some cases where there is a problem—and there will always be problems—the committee of parliamentarians would be the first committee to which that problem would be referred.

It may well be that there will be a working relationship between the committee of parliamentarians and SIRC, and that the committee of parliamentarians might ask SIRC to undertake a particular investigation or conduct particular hearings. I don't believe a parliamentary committee, certainly from my experience appearing before them, has the sort of structure to hold individual hearings, where persons come with individual complaints, and the committee acts, in effect, as a court of law.

I think the purpose of the parliamentary committee will be to look at the efficiency of the operation, the efficacy of the operation, the productivity of the operation, and where there's alleged wrongdoing to at least highlight where the wrongdoing has occurred, and then to recommend, as an "overview committee"—a term I've used before—which body should be taking appropriate action, either in terms of reference to a minister or reference to one of the expert review bodies. If it involves CSEC, the Commissioner for CSEC would perhaps have the same expertise related to that organization.

There are other bodies in the Government of Canada, such as the CBSA, for which there is no review body. That is a problem in the makeup of the current security intelligence review mechanism in the Government of Canada. I'm not sure if Bill C-22 is going to fix that, but I think it could be highlighted by committee members of Parliament.

[*Translation*]

Mr. Nicola Di Iorio: Thank you.

Based on your experience as chair of the Security Intelligence Review Committee, could you tell us how you would have fulfilled your role as chair had Bill C-22 been in force?

[*English*]

Hon. Ron Atkey: I believe that the Security Intelligence Review Committee would have continued in its function. I don't think there's going to be an overlap or a duplication. Again, I use the term the "committee of parliamentarians" as being parliamentarians having responsibilities other than just full-time responsibilities for the security intelligence matters before them. It's a necessary system in a democracy, but it is not a substitute for the detailed expert review that is undertaken by some of the other mechanisms, such as SIRC. I think the 25 to 30 year history of SIRC has proven that with a variety of members and a very expanded staff, and the enhanced budgeting granted by the previous government, it has been able to undertake the necessary research, which would be complementary to the work of a committee of parliamentarians.

● (1600)

[*Translation*]

Mr. Nicola Di Iorio: Thank you.

My next question is for Mr. Wark.

How will Bill C-22 affect the operations of the Canada Border Services Agency?

[*English*]

You were on the board of advisers, so could you could enlighten us as to how Bill C-22 would impact the agency in collecting intelligence?

Mr. Wesley Wark: Certainly. I think it's the clear intention in the mandate provided to the committee of parliamentarians that CBSA, along with other security and intelligence departments and agencies, would fall under its purview. In fact, if the committee is tempted to follow my suggestion of actually listing as part of the mandate the core agencies that will be the primary preoccupation of the committee, CBSA would be there and named alongside CSIS, the Communications Security Establishment, the RCMP, and the Department of National Defence. I think that's the core set of security and intelligence agencies that will be the subject for study by the committee.

Certainly, CBSA will find itself under the scrutiny of the parliamentary body. It will be up to the government to decide, I suppose post-Bill C-22, what it's actually going to do—this comes back to your question to Mr. Atkey—about the existing mechanisms for independent review. Is it going to roll them all together to make the system more efficient rather than have them siloed and independent as they are currently?

If I may add to that, on the other question that you asked Mr. Atkey, I certainly agree with him that you are going to continue to need another layer of review, another and more detailed layer that can, in particular, dig into questions of propriety, that is, lawfulness and following the directions of ministers. The committee of parliamentarians, on the other hand, I think is going to take that higher level strategic look at the activities of the security intelligence community, with a particular focus on just how well they are performing their functions, and are they serving the national security as they are meant to do?

The Chair: Thank you, Mr. Wark.

Mr. Clement.

Hon. Tony Clement (Parry Sound—Muskoka, CPC): Thank you, gentlemen, for supplying your expertise and overview of the situation.

I want to start by turning to clause 16, "Refusal of information", because I believe both of you mentioned that.

Professor Wark, I believe you were referring to this section because it does reference subsection 8(1) of the Security of Information Act. I don't want to paraphrase you inaccurately, but I believe you were mentioning that you found this to be broad. Certainly, when I was made aware of subsection 8(1), it had a "kitchen sink" feel to it, again, depending upon whether the section is reasonably interpreted or interpreted in a very restrained or constrained way.

Mr. Atkey, I believe you keyed in on this section, as well, in calling it or the potential application of it "open-ended and dangerous". Again, we're into trying to predict future activity and whether there's going to be an issue there.

I want to make sure that I'm understanding properly what your critiques were, gentlemen. Could both of you expand on that?

Mr. Wesley Wark: Thank you, Mr. Clement. It's an excellent question.

I'll draw the attention of committee members to what section 8 of the Security of Information Act says under the heading of "Special Operational Information and Persons Permanently Bound to Secrecy". I think Mr. Clement is absolutely right in describing this as a kind of kitchen sink catch-all. The dimension of it that particularly concerns me, if it were literally applied to the work of the committee in terms of information that the committee would not have access to, is under paragraph (f) of subsection 8(1). I'll read it. It's a short paragraph, but this is what it says, to give you the flavour of it. Under the Security of Information Act, special operational information would include:

> the means that the Government of Canada used, uses or intends to use, or is capable of using, to protect or exploit any information or intelligence referred to in any of paragraphs (a) to (e), including, but not limited to, encryption and cryptographic systems, and any vulnerabilities or limitations of those means

It also refers to the analysis of information, collection of information, and handling reporting systems for all of this. It is everything under the sun.

You could rely perhaps on the discretion of the government in power not to abuse that exemption power, but on the other hand, there is no particular need to have this written into the legislation. I would encourage the committee to follow the U.K. practice, which is simpler in terms of exemptions. In a quite common sense form, it refers to exempting information from the committee in very limited circumstances, whereby the provision of information might be, in the intelligence security committee legislation, injurious or prejudicial to the practice of the intelligence and security agencies of the government. That can also be broadly interpreted, I suppose, but it seems to me a narrower exclusion and, in a way, easier to interpret by both the executive and legislative branches, than what you would have by reference to special operational information here.

● (1605)

Hon. Tony Clement: Thank you.

Mr. Atkey.

Hon. Ron Atkey: Based on experience, sometimes you can over-legislate, and you're looking for too many exceptions. In my experience in dealing with CSIS over five years and subsequently with the Arar commission and as a special advocate, CSIS wants to protect two things at all costs. I think this is true of other security agencies within the government as well. One is their human sources, which they call the holy grail, what we want to protect. The other is methods of operation. They don't like to disclose the particular methods of operation to anyone they don't have to do so.

We would have long meetings with CSIS and we'd ask where they got this information. They would reply, “From a source in Vancouver”. We'd ask who was the source. They would reply that they'd prefer not to tell us. They would acknowledge that we had the right to that source if it were fundamental to our investigation, but there would be discussion among top secret security cleared people back and forth as to what was appropriate. In many cases, CSIS would persuade us that we did not need to know the particular name or address of that source or the methods of operation, because some of them were quite sophisticated. Some of them were related to simpler surveillance under wiretap legislation. We did get to know that. Now most of that is in the public domain.

A healthy tension existed between the review body and the agency, and it worked. From time to time there might have been disputes. In our CSIS act, we had the power to get anything within the body of CSIS, except cabinet confidences. We honestly never felt that we were frustrated, except in one situation that I can explain to you. In 1989 we wanted to have an inquiry into Air India, because CSIS wasn't being totally forthcoming with us on what was going on with Air India. We had many meetings back and forth. CSIS had to remind us—and it was there in the legislation, as our lawyers told us—that our jurisdiction only related to CSIS and the trail related to security accountability, which led into the RCMP and other agencies like Transport Canada. It was a more complicated type of situation, which ultimately was not resolved until the appointment of John Major and the Major commission in the next century. That was the only time we came to a fundamental disagreement.

We were right in our hearts but wrong in law, because the CSIS act said we shouldn't go into that. Sometimes, as in Bill C-22, there is a tendency to over-legislate, because this is new and it's a fresh step. But to be bold, a committee of parliamentarians, if they're supposed to do their work, should all be top secret security cleared. Having gone through a top secret security clearance with fear and trepidation on three occasions, it's not that bad. That should be fundamental for a committee of parliamentarians, and they should have access to everything, except confidences of the Privy Council.

● (1610)

Hon. Tony Clement: That's it.

The Chair: Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): I'd like to say thanks to both of you. It's terrific to have such eminent experts in front of us. I have only seven minutes, so I'm going to jump right in, starting with Mr. Atkey.

I just wrote down very quickly what I thought were some of the amendments to the bill that you thought were appropriate. Based on your experience in cabinet, and as the chair of SIRC, and with the Arar commission, do you think the following would strengthen this bill? I have the following five recommendations from what I think was in your testimony.

First, remove paragraph 8(b) that allows a minister to block investigations injurious to national security.

Second, narrow or remove the discretionary power of ministers to withhold information from the oversight committee.

Third, amend subsection 21(5) to require that any use of the redaction powers of the Prime Minister be transparent; in other words, so Canadians can see how much information was removed or revised and for what specific reasons.

Hon. Ron Atkey: It's not Canadians, but the committee of parliamentarians.

Mr. Murray Rankin: That's right.

Fourth—and this I'm not entirely sure about—have an elected chair rather than one appointed by the Prime Minister. I think you said that you didn't like notification and thought that at the very least ratification by Parliament made sense.

Hon. Ron Atkey: Yes, I was perhaps being more symbolic than real in the current context of a majority government. I think a prime minister would propose a chair, but propose that to Parliament, and it would be in law and would inform the decision of Parliament. In a minority Parliament, it would be open such that, if Parliament agreed, a member of an opposition party could be the chair.

Mr. Murray Rankin: The last point I think I took from your testimony as a proposed amendment was about having a subpoena power to compel testimony and necessary documents.

Hon. Ron Atkey: That's correct.

Mr. Murray Rankin: Thank you for that. I just wanted to make sure I had that on the record.

Before I turn to Mr. Wark, I have another question for you. Given your experience with SIRC, is it your understanding that the proposed committee would have a lower level of access to information than SIRC does? I think you said that. If so, how might this affect its ability to co-operate with SIRC and other review bodies?

I'll give you an example. At a practical level, would your staff have had to manually redact documents from CSIS or classified SIRC reports for ministers before they could be shared with this oversight committee?

Hon. Ron Atkey: No, I think that's one of the difficulties. The proposed committee of parliamentarians would be under a different set of rules than would SIRC or the commissioner for CSEC, and that doesn't make sense.

Mr. Murray Rankin: So there would be a sort of misalignment of powers, and one might not be able to share with the other because of the practical concerns of classification.

Hon. Ron Atkey: That's correct.

Mr. Murray Rankin: All right.

Mr. Wark, I understand that you told this committee during a previous appearance that you had assisted a member of Parliament, Joyce Murray, in the design of an earlier private member's bill, Bill C-622, and that, compared to this bill, that bill granted the committee broader access to information and the power to compel testimony.

So in your view, do such powers enhance a committee's ability to undertake operational oversight?

Mr. Wesley Wark: If my memory serves me correctly, we also conducted a round table on Ms. Murray's bill, which you took part in.

Putting it in context, we were aware, at the time, those of us who assisted Ms. Murray in drawing up the private member's bill, that the private member's bill had no chance of passage, so we were trying to design an ideal scheme. Part of my advice to the committee today is that you may not need an ideal scheme in the current circumstances, because you're going to get, finally, a committee of parliamentarians. but there is some fine tuning that can be done.

Don't get hung up on membership. The key issue here for the committee, whatever you emerge with in terms of rules on the election of a chair and how members are appointed, is that as long as you're satisfied that this works for you as Parliament, in terms of the House and Senate, then I think you're probably good, as long as you get good people.

I would agree, in many respects, with my colleague, Ron, that there are ways the legislation could be fine-tuned in terms of both restriction to material and the refusal to allow the committee to publish. Without having to redesign the wheel on all that, my suggestion to the committee is to have a comparative look at the British legislation, which is a product of experience that we haven't had. The U.K. intelligence and security committee legislation, particularly the changes made in 2013, provide a good model for us. We don't have to follow it slavishly, but it is a simpler, clearer model of both restrictions on reporting and restrictions on access, which I think we could usefully borrow from.

If I could take a minute and beg to differ slightly with Ron Atkey on clause 14 of Bill C-22, I'm not sure that we should just let clause 14 entirely fly. In particular, it would remove from the purview of the committee, among some technical areas of information, such as FINTRAC and the Investment Canada Act, and this is under paragraph 14(b), “information respecting ongoing defence intelligence activities”, etc. I think you have to be careful about letting that stand as written, because the ability to review defence intelligence activities in a retrospective sense is going to be very important to the committee, because, in fact, the Department of National Defence's intelligence agency is the largest single agency in the Canadian government.

I'm going on and stealing Mr. Rankin's time, so I'll just end on that.

● (1615)

Mr. Murray Rankin: Thank you.

I'm going to continue a little bit on clause 14 with Mr. Atkey.

You talked about this earlier. Clause 14 has a number of those exceptions Professor Wark talked about, exceptions to the right to have access. They're pretty well understood by the security community. You talked about the identify of sources, as a great example. In most cases, the identity of sources would not be necessary to do the work, but in some cases, it may be crucial in assessing whether an agency was operating effectively and appropriately. For instance, it might matter a great deal whether a target was a journalist.

In your view, do you think we should carve out permanent exceptions, as Bill C-22 does, to the committee's access, or should we broaden access and let the committee work with the agencies on a case-by-case basis to determine whether operational details are required? I think that's what you said the experience of SIRC was.

The Chair: Be very brief, please.

Hon. Ron Atkey: I think those clause 14 areas are within the list that has always been operative in the security community in which I've operated for 30 years. I don't want to say that it's beyond debate, but it's generally accepted that this is the list. It came originally from CSIS. It was attempting to put into law, from various statutes, including the Privacy Act, the Access to Information Act, the Criminal Code, and other things, a list. Clause 14, in my opinion, captures those. I wouldn't waste too much parliamentary energy trying to fiddle with them.

The Chair: Thank you, Mr. Rankin.

Ms. Damoff.

Ms. Pam Damoff (Oakville North—Burlington, Lib.): First, I want to thank you both for appearing before the committee. Your experience and expertise, for all of us, is extremely helpful, so thank you.

Mr. Wark, I want to start with you. When you appeared before the committee on the national security framework, you talked about how we have a silo system of oversight. Do you see this security intelligence committee as being able to help build bridges between those silos?

Mr. Wesley Wark: Historically, we do have a siloed system. We've created independent external review bodies that are focused on a particular agency of the government, SIRC for CSIS, the CSE commissioner for CSE, and what is now the Civilian Review and Complaints Commission for aspects of the RCMP. Many other elements of the security intelligence community, as Mr. Atkey has pointed out, have not been subject to independent review. When we talk about a siloed system for review, or “oversight” as some people call it, that's really what we're referring to.

What Bill C-22 does is partly fix that problem by giving this proposed new committee of parliamentarians the opportunity, with the mandate written into Bill C-22, of taking a very broad look at all of the agencies of the security intelligence community. My only caveat about that is simply the cautionary reminder that while it can do that, it won't be doing that most of the time. There are going to be core agencies they need to look at, and maybe Parliament and the public of Canada need to understand that as it's written out legibly in the legislation, these are the key agencies that matter, but it will have that strategic level look.

The piece of work that remains—possibly for this committee, in the context of looking at the national security framework and the green paper, and possibly for the government down the road—is that it's one thing to create a committee of parliamentarians, but what are you going to do about the legacy review accountability mechanisms, including these siloed agencies and the relationships between the proposed committee of parliamentarians and other standing committees in terms of what they will look at? There is a lot of work that needs to be done. The Minister of Public Safety has referred to this a bit by suggesting he's open to the idea of creating something like a super-SIRC or bringing the siloed agencies together as a different layer of review.

I think the government has focused on Bill C-22 as it's first act in this field, but I think more work will have to be done.

● (1620)

Ms. Pam Damoff: My next question is for both of you, because you've already answered in terms of the restrictions that are in the bill, which you feel are too strong. Mr. Wark, in particular, has mentioned that the bill isn't perfect.

Do you think that's something we could leave in the bill now and then review it when it's up for review in five years, or is it important to change it now?

Mr. Wesley Wark: Do you want to go first?

Hon. Ron Atkey: I have a view on this, and I tipped my hand on this a couple of weeks ago when I appeared before you in Toronto. If you leave it for three or four years, you're into 2018 and, if I recall, there's probably going to be a federal election in 2019 and reviewing national security legislation in the year just prior to an election is not a good idea, in my experience. I think in the last period, 2015—

Ms. Pam Damoff: It would be 2021, though. Right?

Hon. Ron Atkey: It would be. Is it three years from when—

Ms. Pam Damoff: It's five years.

Hon. Ron Atkey: It's five years, that's correct, but some have suggested that some review be held in three years. Some have suggested in five years. My big concern is that Bill C-22 is all you're going to do and that everything else is too delicate and too difficult to fix. If you do Bill C-22, the government has fulfilled its mandate on its promises during the election—

Ms. Pam Damoff: And it will never get changed.

Hon. Ron Atkey: Nothing will happen. In my view, that would be a mistake.

Mr. Wesley Wark: I'm an optimistic academic and I'm convinced that the government will, indeed, move to fulfill its election promises to amend the problematic aspects of Bill C-51 that are now embedded in different forms of legislation.

With regard to your best path forward, I've said that this isn't perfect legislation. I've suggested, as Mr. Atkey has done, that elements of it can change. What I would really see, and I agree fully with Ron on this, is this legislation passed in some form in this parliamentary session to allow us to get on with the work. It will be reviewed in five years.

I would be more encouraged to see a genuine all-party consensus on revised legislation. That would be a big achievement. I'd care less about the exact details of how you're going to revise it. I think there are certain elements of it that you should focus on. I wouldn't focus on the membership questions. I would do some fine-tuning of the powers of the committee in terms of access to information and the exclusionary elements that it can't get into. Elements of that can be fine-tuned, but I don't think you need to go through the whole thing with a fine-toothed comb. Large elements would stand.

If, at the end of the day, you're happiest in an all-party sense to just pass the legislation as it is, I would still, in a way, cheer to the heavens. I've been waiting for a very long time to see this kind of parliamentary activism on national security, and the biggest benefit it will have in the long run will be to better educate Canadians about the realities and challenges of national security and intelligence work in Canada, where I think we have a profound democratic deficit.

Ms. Pam Damoff: That was actually a question I was going to ask you, whether you thought it would do that. You have said yes.

Mr. Atkey, you talked about the Prime Minister's ability to redact information and you compared it with the Arar case, in which half of it ended up being made public.

Can you tell us what changes you think we should make to this legislation, in particular to that section?

● (1625)

Hon. Ron Atkey: You can do one of two things: you can remove the section, which may not happen, or you can perhaps provide that, if the Prime Minister is going to redact it, he has to provide reasons to the committee—not to the public, but to the committee of parliamentarians—explaining why the redaction is taking place, just as a minister would have to provide reasons if he's going to deny information or deny—

Ms. Pam Damoff: I only have a few seconds left.

If he were to do that, you'd have to have a dispute mechanism; they'd have to be going together, wouldn't they? If the Prime Minister came and you weren't happy with the answer, how would you get around that?

Hon. Ron Atkey: Well, the dispute mechanism I recommended is —

Ms. Pam Damoff: You did.

Hon. Ron Atkey: —the Federal Court, the designated nine judges of the Federal Court.

Ms. Pam Damoff: You'd need both of those together, then, if he were doing it in camera?

Hon. Ron Atkey: Yes. In a perfect world, yes, you would, but you might not get it.

Ms. Pam Damoff: Okay. Thank you.

The Chair: Thank you, Ms. Damoff.

Mr. Miller, you have five, or maybe five and a half minutes, because of the ice cream.

Some hon. members: Oh, oh!

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

Gentlemen, thanks very much for being here. Your testimony has been very helpful.

I want to continue, Mr. Atkey, on what Ms. Damoff was talking about, the Prime Minister's having the ability to redact and what have you.

I guess my question is what reasons would be acceptable, in your opinion, for the Prime Minister of the day to use in order to redact? Could you enlarge on that a bit?

Hon. Ron Atkey: I think redaction would be acceptable if the information would jeopardize an operation of one of the security agencies, such as CSIS or the Canadian military.

Let me, Mr. Miller, give you the flip side of that. What information that has been redacted in the past should not have been redacted and was found by Justice Noel?

There were 2,000 words in the Arar commission case. About 1,000 were eventually released, and most of those released related to the fact that the words “a foreign agency” had been used, whereas in fact the foreign agency involved was the CIA. It was the identification of the CIA or the FBI that Justice O'Connor wanted the public to know about, and their involvement in this whole operation in Canada, which the Prime Minister's Office had sought to excise or redact because it would be embarrassing to Canada to embarrass our neighbours to the south, because the CIA said they never wanted to see their name appear in a Canadian public document.

Justice in this situation was served, because the information came out, and incidentally, our relationship with the United States and the CIA didn't change.

Mr. Larry Miller: Thanks for that example.

Mr. Wark, I think one thing you said in your testimony was to be careful about exempting operational procedure information.

Can you enlarge on what brings about that concern of yours and add a little more detail?

Mr. Wesley Wark: Mr. Miller, thanks for the question.

I was referring, though my mind was going a little foggy at that precise moment, to this element of the Security of Information Act, the special operational information that's written into Bill C-22, as an area that could be excluded from the committee's access.

The reason I say be careful about this is that, as Mr. Clement indicated, this really is a kitchen sink of potential exemptions—not that the government would always seek to use it, but the potential is there—and frankly I don't see the need for it. It rather overlaps with some things that are already excluded in section 14, and I think there could be a simpler formula for indicating the grounds on which a minister would exclude access to information; for example, the kinds of things Mr. Atkey is talking about, information that would be injurious or prejudicial to the operations of elements of the Canadian security and intelligence community. I think that's more clearly understood.

I should also say, just thinking back to the passage of the Anti-terrorism Act—I don't know how many members were around the table in this place back in 2001—that I tried to make a little bit of noise in 2001 when testifying on the Anti-terrorism Act saying that this special operational information and that whole Security of Information Act was not right, but my protestations did not get any attention. We're not going to go back to it now, but I don't think it's a good idea to import it into Bill C-22.

● (1630)

Mr. Larry Miller: You also commented on the U.K. model, and I think you said that it should be followed. We all know that the British model was reviewed and changes were made in 2013, and some of those changes definitely haven't been adopted in Bill C-22. Do you have a comment on that?

Mr. Wesley Wark: I'm puzzled why some of those changes weren't followed. I think perhaps it was the result of an excess of caution on the part of the government. They were wanting to start up this parliamentary exercise, particularly on control of membership and how membership would be appointed and the election of a chair, which were all new measures brought in in 2013.

What was also brought in in 2013 was a practice I think the committee somewhere down the road could usefully follow, which is creating a memorandum of understanding between the committee and the Prime Minister that would be tabled in Parliament. It would contain some of the more specific activities of the committee and what it would cover.

There are two things in particular about the changes to the British practice post-2013 that I think we could usefully follow. One is the specific listing of agencies that would be a primary concern to the Security Intelligence Review Committee, which was expanded in 2013. The other goes back to this question of the circumstances in which the Prime Minister could direct the committee not to release aspects of a report. The revised legislation in 2013 indicated that if that were going to be the circumstance and the Prime Minister felt strongly enough about it, then the Prime Minister would have to consult with the committee chair and explain the reasons. At the same time, the committee—and here I may slightly disagree with my colleague, Ron Atkey—would have the power to at least indicate where in the report released to Parliament the redactions occurred, and it would do so by a series of ellipses. That would be symbolic, but probably would be important as an exercise of committee power.

Mr. Larry Miller: Thank you, gentlemen.

The Chair: Your testimony has been very helpful to the committee. We passed a motion earlier in our committee that any testimony we received on Bill C-22 that could apply to broader oversight issues in our national security framework study would be transferred to that study. So you have gone beyond Bill C-22 appropriately, but don't despair, because it will be taken as evidence in our broader study on oversight.

The second thing is just a note. Don't underestimate the ability of this committee to do very effective work to improve this legislation —we can do it—and don't underestimate our ability to do it in a very good bipartisan, tripartisan way. I think this committee will work very hard on this legislation, so don't despair on that either.

Thank you very much for this. We're going to take a brief pause to get our next witness by teleconference, and I'm going to have ice cream.

Some hon. members: Oh, oh!

● (1630)

(Pause)

● (1635)

The Chair: I'd like to begin.

Thank you very much, Professor Forcese, for joining us today.

We also have Professor Roach, who is on teleconference. We won't see his face, but we will hear his voice.

Are you there?

Prof. Kent Roach (Professor, Faculty of Law, Munk School of Global Affairs, University of Toronto, As an Individual): Yes, I am.

The Chair: Actually, I think we're going to go with you first, Professor Roach, just in case something goes wrong, or do you want Dr. Forcese to go first?

Prof. Kent Roach: Yes.

The Chair: Okay.

Professor Craig Forcese (Associate Professor, Faculty of Law, University of Ottawa, As an Individual): We structured it so I went first.

The Chair: Okay.

The other thing I was going to mention to the committee is that professors Forcese and Roach have presented a paper to us. It will be available once it's been fully translated. That paper will come to us also as evidence, just so you know that our committee has not read it, but they have read everything else you have written, so we're looking forward to your testimony.

Prof. Craig Forcese: I'm pleased to hear that because that puts them ahead of my students.

The Chair: I'll begin with you, Professor Forcese.

Prof. Craig Forcese: Just by way of information, because I knew the comparative issues involving Five Eyes countries and their parliamentary review systems would come up, I prepared a table of comparison. I brought some copies. It's not yet translated, but if people want copies....

The Chair: We will have it translated to make it fully available. I believe you can't distribute it, but if someone walked by and picked it up, that could happen, I guess.

Prof. Craig Forcese: Okay. It's right there on the corner.

The Chair: We will have it translated, so it'll be available in both languages for the committee, but it's not being distributed.

Prof. Craig Forcese: Thanks very much.

Thank you for inviting me to appear before you. As noted, Professor Roach and I have coordinated our presentations.

I'm going to start off by focusing on why we support Bill C-22, and then outline a key concern, some of which you've heard in the prior presentations, namely the proposed committee's access to information.

Let me begin by looking across the Atlantic. In November 2014, the United Kingdom Intelligence and Security Committee of Parliamentarians published a 200-page report on the intelligence relating to the murder of Fusilier Lee Rigby by two terrorists on the streets of south London. That report concluded that seven different security agencies had flagged the two terrorists as persons of interest. Errors were made in these operations, although even without these mistakes, it was unlikely the services would have been able to predict and prevent the murder of Fusilier Rigby.

The report also considered, however, the wider policy implications of its findings. It drew lessons learned and recommendations on how interagency relations could be improved.

Juxtapose this with the situation in Canada. Just over two years ago, Corporal Nathan Cirillo and Warrant Officer Patrice Vincent were killed by terrorists in separate incidents, including the one that terminated in Parliament itself. We have no public accounting of any real sort of what happened. What did our services know? Why did they make the decisions they did? What are the lessons learned? At best, we have a heavily redacted accounting of the security systems on the Hill, as if the questions concerning national security started only when the terrorist entered the parliamentary precinct.

We do not, in other words, do lessons learned exercises well in Canada. Judicial commissions of inquiry such as that concerning the treatment of Maher Arar or the much delayed review of the Air India bombing investigation are episodic, and once they end, their recommendations usually die with them.

Our existing expert review bodies, meanwhile, are stovepiped to individual agencies and incapable of conducting seamless reviews of operational activities that cross agency boundaries. Their focus is usually on compliance with law and policy, what we call propriety review, and they rarely make recommendations on what we call efficacy questions, that is, how well our national security systems work, and especially work together.

That is why we support Bill C-22. It invests parliamentarians with a serious national security accountability function for the first time in Canadian history, and in that respect, aims to catch up to a role legislators now play in essentially all western democracies. Even more critically, it 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. This body will endure, and will be capable of follow-up in a manner impossible for ad hoc commissions of inquiry.

But we support Bill C-22 with serious caveats. The success of the proposed committee of parliamentarians will ultimately depend on three criteria.

First, the parliamentarians undertaking this role must be able to perform their functions in a serious-minded manner, in good faith, and without regulatory capture by the agencies. We need, in other words, the right people. Second, parliamentarians will, in practice, be part-time participants on the review committee, and turnover among parliamentarians will occur, especially between parliaments. A stable, well-resourced expert staff is required to ensure continuity and institutional knowledge, and to ensure that the committee can actually function. Third, the committee must have robust access to secret information.

In my remaining moments, I wish to emphasize this third axiomatic point. Unless the committee can access information allowing it to follow trails, it will give the appearance of accountability without the substance. On this point, unfortunately, if enacted in its present form, the proposed Bill C-22 committee will not be as robust a reviewer as are the existing expert bodies, at least on paper.

● (1640)

For one thing, its capacity in paragraph 8(b) to delve into the actual operational details that are a necessary focus of proprietary review is subject to a veto by the executive. Prior witnesses focused on this issue.

Also, the committee will have a much more limited access to information than at least two of the existing expert bodies. There are two principal reasons for this.

First, under clause 14, there are classes of information the government will automatically deny the committee. Take the example of paragraph 14(b) concerning military intelligence. Again, this was raised by the prior witnesses. I would hazard that this exclusion would mean that the parliamentary committee could not delve into the Afghan detainee affair in any full manner, meaning that we would still be left without any independent body able to get fully to the bottom of that matter.

Likewise, take the example in paragraph 14(e) concerning “ongoing” law enforcement investigations. These can endure essentially indefinitely. The RCMP, even now, decades later, still has an active law enforcement investigation into the 1985 Air India bombing. Even now, the new committee could be denied information concerning the disastrous security and intelligence community conduct in relation to Canada's most horrific terrorist incident.

Even the exception in paragraph 14(d) dealing with sources is potentially far-reaching. The reference to inferences opens the door to carving away considerable swaths of information, especially if the government applies its infamous “mosaic theory”; that is, it posits that individual units of information that are themselves innocuous should not be released since they could be stitched together by an omniscient observer to reveal sensitive information—in this case, informer-identifying information.

On top of that, there is an additional limit: clause 16. It gives every minister responsible for an agency whose information may be in play a limited veto power, allowing the minister to deny the committee something called “special operational information”. The items listed in this concept appear at first blush to be modest in scope, but again would have the effect of excluding information on things like Afghan detainees. There is also that open-ended word, infer, in the governing statute and cross-referenced by Bill C-22, that is, the Security of Information Act, which inevitably would have the effect of greatly broadening the universe of information that ministers can deny the committee.

There are three layers of constraint on the new committee of parliamentarians being an effective review body: clause 8 in paragraph (b), clause 14, and clause 16. It is this triple lock on parliamentary reviews that I feel could well make the committee of parliamentarians stumble.

In sum, Bill C-22 opts for a model that treats parliamentarians as less trustworthy than the often former politicians who sit on SIRC, or the judges who hear security cases, or ministers who sit at the apex of the security and intelligence services. It is not at all clear to me why security-cleared parliamentarians sworn to secrecy, subject to the criminal penalties of the Security of Information Act and stripped of their parliamentary privileges in terms of defending against those charges, are less trustworthy than their former colleagues who often staff review bodies.

I would strongly urge, therefore, amendments that would place the committee on the same footing in terms of access to information as these review bodies: full access to information except for cabinet confidences.

Thank you for your interest.

● (1645)

The Chair: Thank you very much.

Professor Roach.

Prof. Kent Roach: Picking up from my colleague who addressed the access to information issues, I want to stress the importance of making the committee as non-partisan as possible and ensure that it has as much expert assistance as it needs.

Starting with subclause 4(2) of Bill C-22, I think there needs to be attention paid to ensure that there is not government domination of the committee. I think subclause 4(2) is a good start, certainly something that we don't see with other parliamentary committees, but of course as members know, the representation in the Senate now is evolving. I think it would be important to make this as nonpartisan as possible.

That brings us to clause 6, which contemplates that the chair of the committee would effectively be a prime ministerial appointment, as opposed to what you heard about in the last testimony, whereby the U.K. allows the members of their committee to elect their own chair. It is a bit concerning that this provision is there, especially when the Prime Minister also plays such a key role with respect to possible redactions from reports. Those features are an area that perhaps should be looked at, in keeping with trying to make the committee as non-partisan as possible.

I would also add that I agree with Mr. Atkey's suggestion that, rather than have the Prime Minister, you would in an ideal world have a neutral third party make a decision about what can go in and what can go out of a committee's report. Like the Federal Court, that provision can balance the competing interests of national security and transparency. Given that such may not and is not likely to be the case, there is a concern about potential government domination of the committee, which could be one factor leading to increased partisanship.

Second, the committee rightly has a very broad mandate, which relates to activities carried out by all departments involving national security or intelligence. This is the sort of whole-of-government mandate that was given to the Arar, the Iacobucci, and the Air India inquiries. I think it is very appropriate, given that we have an all-of-government approach to security. That said, we should not underestimate the steep learning curve that any person would have in exercising an all-of-government mandate.

In this respect, I think it is positive that the proposed committee, unlike most other parliamentary committees, is going to have a dedicated secretariat. I would urge that the secretariat be composed in such a way that there would be the maximum of flexibility in hiring staff, that the secretariat be able to use independent legal advice, be able to use the cadre of security-cleared special advocates, who could pop in on an as-needed basis. Obviously this committee's mandate will evolve over time. At certain times it will need certain expertise, and at other times it will need other expertise. The secretariat, in my view, should be less based on a permanent civil service model than a hire-as-required model.

● (1650)

Those are two of my thoughts about how to create conditions for success for the committee. In addition to full access to information, I think those are critical criteria for success, but it is also critical that the right people be available to assist the committee, and that the committee be as non-partisan as possible.

Thank you very much.

The Chair: Thank you, both.

We will begin with Mr. Erskine-Smith.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): I'd like to start with the comment in your remarks that you would strongly urge “amendments that would place the committee on the same footing in terms of access to information as these review bodies...”. If we were to adopt that recommendation, what would that look like for the purposes of this act? We have clauses 8, 14 and 16, the triple lock, as you put it. What do we need to change specifically?

Prof. Craig Forcese: You would certainly take out clauses 14 and 16. Paragraph 8(b) doesn't go to access to information; it's about a veto on actual reviews, so close consideration should be given as to whether there should be a veto. Clauses 14 and 16 would be replaced with language you could take right out of the CSIS Act that relates to SIRC. The SIRC language guards access to information. It also contains some of the powers that Mr. Atkey was discussing in terms of capacity to compel information. The limit on SIRC access to information is confined strictly to cabinet confidences.

The language is already drafted and it would be, to a certain extent, a matter of carbon copying.

● (1655)

Mr. Nathaniel Erskine-Smith: Okay, so would you recommend removing paragraph 8(b) as well or, sorry, not all of paragraph 8(b), but the exception for the minister?

Prof. Craig Forcese: Yes. Paragraph 8(b) really relates to what I suppose we would call operational reviews. The concept is the capacity of the committee to review activities. "Activities" is the terminology used to describe what CSIS and CSE do. It is the term used in their statutes. We're talking about operations here.

I understand the concern on the part of the government that you could have circumstances in which a review of an operation could impede that operation, and so you want to leave the prospect of pulling the plug in the hands of the minister. I think you can accommodate that concern with more careful drafting, rather than an absolute veto.

For example, Professor Wark raised the example of the United Kingdom's ISC. Not so much in their statute, but in the memorandum of understanding between the ISC and the executive branch, there are some criteria that describe when it would be appropriate for the ISC to review operational matters and when it wouldn't.

Mr. Nathaniel Erskine-Smith: It would be much more specific with respect to—

Prof. Craig Forcese: It would be more specific and less open-ended.

Mr. Nathaniel Erskine-Smith: You mentioned the U.K., so I'd like to turn to access to information with respect to the U.K. committee. My understanding is that information can be excluded from the committee if it's sensitive information and it's information that, in the interests of national security, should not be disclosed to the ISC. Sensitive information is then specifically defined. In Bill C-22, we don't see any dual test; it's just "injurious to national security" and it's completely undefined.

Would you speak to how we might be able to improve it? Should we adopt language from the U.K. if we're to go down that road, or should we just leave it as "injurious to national security", without any definition whatsoever?

Prof. Craig Forcese: You avoid this issue if you pursue the course that I've suggested, which is to remove clauses 14 and 16 and go with the SIRC-style language about cabinet confidences. You don't have this issue anymore, because now you've moved beyond the dilemma posed by the U.K. language. If you were to persist with some kind of qualification on access to information, I'm not sure I would be as fully comfortable with the U.K. model as were some of the prior witnesses, in part because, if you look at the description, it's quite open-textured, and so the scope is potentially, in practice, broader than the enumerated list that you find in clauses 14 and 16.

In practice, though, the one distinguishing feature in the U.K., as I understand it, is that there's not an absolute bar, and so there's no equivalent to clause 14. Clause 14 in the current Bill C-22 says that you don't get this information ever, regardless of any exercise of discretion by the minister. In the U.K. context, the exclusion of information is discretionary, and the memorandum of understanding with the government and the ISC says that discretion will rarely be exercised. So, if you're going to retain a limitation on committee access to information, remove the idea of absolute bars; leave it as discretionary, and try to circumscribe the conditions under which that discretion would be exercised.

Mr. Nathaniel Erskine-Smith: To pick up on that, then, it might make sense, rather than having the broad term "injurious to national security", to tie it to something specific as the U.K. does. They have a defined term "sensitive information".

Prof. Craig Forcese: Again, yes, the defined term is "sensitive information", although that's roughly analogous to our special operational information.

Mr. Nathaniel Erskine-Smith: That's with respect to clause 16, though.

With respect to clause 14, which you were just mentioning, where it's an auto exclusion, if we are to cure that and not remove it entirely, one way might be to make reference to "injurious to national security" as well, the same as clause 16 does, and require some discretion to be imposed.

Prof. Craig Forcese: Yes. In other words, clause 14 is no longer an automatic bar to a whole class of information.

Mr. Nathaniel Erskine-Smith: Okay.

With respect to specific items in clause 14, I wanted to walk through paragraph 14(b). When we look at the definition of "special operational information", paragraph 8(b) seems to be completely unnecessary.

Prof. Craig Forcese: It's redundant.

Again, I call this the triple lock. Paragraph 8(b) is a lock. Clause 14 is a lock. Clause 16 is a lock. These are all means to deny access to the committee.

Moreover, incidentally, I would assume that the provisions in the Canada Evidence Act that allow a minister to issue a certificate and deny a disclosure of information could equally apply to this proceeding, as well as a court proceeding.

Mr. Nathaniel Erskine-Smith: It seems to me that once you have clause 16, with "special operational information", and you have the discretion imposed under clause 16, clause 14 then precludes that for certain items. So paragraph 14(b).... It's stated in paragraph 8(1)(b) of the act. We have paragraph 14(d). It is stated in paragraph 8(1)(a). At the very least, we have to remove those under clause 14.

● (1700)

Prof. Craig Forcese: I would say so.

I would also ask the committee to recognize what subsection 8(1), "special operational information" in the Security of Information Act is supposed to do. That's the class of information that if you reveal, you go to jail. That's disclosure in a matter that's quite prejudicial to national security. You go to jail.

They're using that definition of "special operational information" to control a closed-door access by a committee where everyone is security cleared and is also subject to the Security of Information Act. They're using an apple for purposes of an orange, if I can use that analogy.

Mr. Nathaniel Erskine-Smith: Thanks very much.

One last question is on paragraph 14(e). If we don't take out all of 14, it seems to me, based on your testimony, it would be incredibly important to remove paragraph 14(e).

Prof. Craig Forcese: Certainly, either remove it or qualify it.

Mr. Nathaniel Erskine-Smith: Okay.

Thanks very much.

The Chair: Thank you.

Ms. Watts.

Ms. Dianne L. Watts (South Surrey—White Rock, CPC): Most certainly, your testimony has been very relevant and has cleared up a lot of issues that I think we have struggled with and I think we've heard along our travels, as well. Then we had the minister on Tuesday, along with the staff who drafted this legislation.

It has been particularly worrisome when we look at some of these clauses, the limited access to information, the control of the membership, the control of the chair, the redaction capabilities, all of those things, because it seems in every way that the committee is supposed to function there's a barrier in the way so it can't function.

Most of my questions, actually, were along the same line that were just previously asked, but I would just say, because in listening to the minister—and we're sort of in a bit of a box because the Prime Minister has already appointed a chair, which doesn't instill that transparency and openness piece. So we need to deal with that. The minister is looking at going back to a quasi 2006 U.K. model, because in discussions we asked why we wouldn't use the model of 2013, and he wanted to take baby steps.

Can you give us your best advice in terms of how we proceed? I think everything that you've said here makes perfect sense, in terms of if you want the committee to function as it should function. Given what we have currently, it's impossible for it to function as it should function.

Is there something you can add to the conversation on how we deal with these elements that are already cemented in place?

Prof. Craig Forcese: I want to make sure that Professor Roach gets in on this.

There are the concrete amendments that we proposed, which I think will resolve some of the issues. On this idea of baby steps or small steps before you run, there's certainly a sense that this is a process in which the parliamentarians have to earn the trust of the security services and therefore it's needed to have this triple lock and security clearance and the like. That's an analog to the U.K. experience, but there's a cost to that. The cost is that the U.K. committee has had growing pains. If you talk to people in civil society in the United Kingdom, it hasn't always been viewed as the most credible body, in part because it's had these strictures that, over time, have meant that it hasn't necessarily performed as robust a function as people had hoped.

I also think that we don't need to start at the same point as the U.K. did, because we have a long tradition of review in this country. CSIS, from it's beginning, was subject to review. CSE has been reviewed for 20 years, so they are habituated to the idea of review in a way that wasn't true of the U.K. when the ISC started. I think we can start that much further ahead.

Ms. Dianne L. Watts: I would agree.

Prof. Kent Roach: Yes, if there was only one amendment, it would probably be to clause 14, that is, to take out paragraph (g), just to argue that the new parliamentary committee needs the same access as SIRC has, but also needs to work as closely as possible with SIRC, the CSE commissioner, and the RCMP review body. Indeed, I think there is some potential that the secretariat of the new committee, which I think will be critical to its success, could work with those existing review bodies that have the confidence of the agencies. Although the idea of having to win trust from the agencies is not a particularly palatable one for an affected parliamentarian, I think that reforming clause 14, which, as my colleague has said, is a very broadly defined no-go area, will undermine public expectations about what a parliamentary committee could do, say, with respect to something like the Afghan detainees, while working closely with the existing review bodies.

I guess one of my greatest fears about Bill C-22 is that it could lead people to think that this is somehow duplicative of the work of the existing review bodies. The Arar commission found that the review structure was inadequate in 2006, and it could be seen to be much more inadequate today after Bill C-51. 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.

● (1705)

Ms. Dianne L. Watts: That's great, thank you.

The Chair: Mr. Rankin.

Mr. Murray Rankin: My thanks to Professor Forcese and Professor Roach for their excellent testimony.

In answer to a question that my colleague Mr. Erskine-Smith asked you, Professor Forcese, in respect of paragraph 8(b), you said close consideration should be given to whether it was removed. Earlier today, Ron Atkey suggested it be removed or modified. There's no such veto, he pointed out, in SIRC and it hasn't been a problem in the real world. I would just like to pin you down, if I could, on your views on paragraph 8(b) and whether it should be removed.

Prof. Craig Forcese: The portion that follows the comma, the "unless" part and forward, is the ministerial veto, and this is the part that troubles. You wouldn't want to get rid of the portion before that. I would be very content, however, to see the veto go, in part because I don't understand why this committee of parliamentarians should be on a different footing than the expert review bodies.

Mr. Murray Rankin: Thank you very much.

I think you have been extremely clear on the issue of access to information. You said amendments would place the committee on the same footing in respect of access to information as those review bodies, namely, full access, except cabinet confidences. I think you've been very clear on that.

I'd like to ask you about redacting reports in clause 21. I just want to quote something you wrote before. You said that the "ability of the PM to redact final committee reports is broader than ideal—at the very least there should be a capacity for the committee to signal that redactions have been made".

Would your concern be resolved if this committee adopted an amendment to clause 21 to require that any revised reports are marked as such and show exactly how much information was redacted and for what reason?

Prof. Craig Forcese: Yes, I think those sorts of indicators would be important. I would also indicate that the practice with ISC, as I understand it, is that when redactions are made it's not just a series of asterisks, which gives you no indication as to the volume of redactions, but there's a blank space, which communicates exactly how much has been removed.

I would also flag for you the practice in, I believe it's Australia, where if a redaction is made, notice is given to Parliament.

● (1710)

Mr. Murray Rankin: Thank you.

Professor Roach, I'm not really sure if this is a question for you or for Professor Forcese, because Professor Forcese called the appointment of the chair by the Prime Minister "a controversial practice in the U.K., abandoned in reforms several years ago". I think you support it, but I didn't hear either of you specifically say that you supported the election of a chair. I wonder if I could ask you what your thoughts are. I'm starting with you Professor Roach because you addressed it in your remarks.

Prof. Kent Roach: I would support an election of the chair. It wouldn't be the first amendment on my priority list. One of the things I tried to point out is that the combination of prime ministerial appointment of the chair and then prime ministerial redaction, even subject to a designation, are things that could potentially undermine public confidence.

Mr. Murray Rankin: It's been 35 years ago already since the McDonald commission recommended that there be an election of a chair, that the chair be a member of the opposition party, and that the parties be represented on the committee roughly in proportion to their strength in the House. So it's not a new idea.

Professor Roach, you made a very intriguing point about the secretariat during your presentation. If I understood you, you said special advocates, who are security-cleared, private sector lawyers working on immigration matters, could be available on a case-by-case basis in a particular area, as required. I thought that was a really intriguing perspective, because it would not allow the secretariat to simply become a government agency, but would presumably enrich its expertise with people who've done this work before courts and boards. Is it already possible, or do we need an amendment? I note that clause 29 has the contracting power available to the secretariat anyway, so I wasn't sure if you were suggesting that if we wanted to take that excellent idea to heart whether we would need to change the statute to do so.

Prof. Kent Roach: Clause 29 does look as if it could accommodate that, but the other thing I was trying to get across was that the secretariat needs to be robust and it should not be based on a permanent civil service model. One of the lessons of public inquiries in Canada is, when you bring people from the outside to look at these matters they tend to have a somewhat more critical perspective.

You also mentioned immigration, and that is definitely an expertise of the special advocates, but they are now being used in a wide variety of section 38 CSIS disruption matters, so it's very important that the secretariat be flexible enough that you could get the expertise that you need for a certain time, because in reality, this committee is going to have to make difficult choices about where to focus its limited attention and resources.

Mr. Murray Rankin: I want to end on a question for either of you, but perhaps I can start with Professor Roach. It's on the issue of dispute settlement. There are a number of decision points where ministers appear to have a final say in the bill, in clauses 8, 16, and the like. Should those decisions be final, or should there be a mechanism to resolve disputes over access or redaction?

Minister Goodale has said that would be done simply by resorting to what he calls the bully pulpit, but I'm wondering if you think we need to have more robust dispute resolution mechanisms available.

Prof. Kent Roach: I agree with Mr. Atkey that in the best of worlds you would use this under section 38. Of course, section 38 itself has a ministerial veto, a controversial ministerial veto, one that has not been exercised to my knowledge, but it is there. Section 38 also calls for some light judicial review of the ministerial veto.

Mr. Murray Rankin: Just to be clear for the record, you mean section 38 of the Canada Evidence Act.

Prof. Kent Roach: Yes, exactly.

The Chair: Thank you very much.

I have one question of clarification from Professor Roach. To Mr. Rankin's question, you were agreeing to election of the chair. Mr. Atkey was referring to election of the chair by Parliament. Could you clarify whether you're talking about election by Parliament, which would be the House of Commons and the Senate, or by the committee, once struck?

● (1715)

Prof. Kent Roach: Of those, my preference would be for the committee, given the need for the committee to work as a collegial body.

The Chair: Thank you.

Mr. Mendicino.

Mr. Marco Mendicino: Professors Forcese and Roach thank you for your testimony today.

I want to start by thanking you both for your public support of Bill C-22, although I understand from your testimony that it comes with certain qualifications, and that's part of why we're here, to discuss those qualifications and to see how we might improve on this bill.

On any reading of Bill C-22, this new committee of parliamentarians will be bestowed with a rather broad mandate. You would agree with that sentiment, would you not?

Prof. Craig Forcese: Yes, I would.

Mr. Marco Mendicino: Looking at paragraph 8(b), we see that the mandate of the committee is to review any activity, and I'm paraphrasing here, that would relate to national security or intelligence. The parameters have been set to be just about as broad as you can imagine.

Would you agree with that?

Prof. Craig Forcese: Yes, I would. In fact, I find that the mandate of the committee, clause 8, subject to the conversation we just had about the ministerial veto, to be quite attractive.

Mr. Marco Mendicino: Let me turn to the limitations. We had the minister testify just a couple of days ago. He spoke about this committee's power to follow the evidence wherever it would lead, although he acknowledged in an exchange with me that there were limitations. We spent some time talking about those limitations, and they boil down to three categories: paragraph 8(b), which includes the restriction on any activity unless it would be injurious to national security; clause 14, which has the enumerated categories of automatic refusal; and subclause 16(1), which talks again about restricting access to information on the basis that it might be injurious to national security or it would fall under the definition of special operations.

You've described this as a triple lock. In fairness, though, in two of the three categories that we've discussed, there is an exercise of ministerial discretion involved. Do you see a scenario in which over time, the exercise of that ministerial discretion could evolve as public confidence in the committee is strengthened, as well as its relationship to the House of Commons, to Parliament, through its reporting?

Prof. Craig Forcese: Certainly, and the pattern in the United Kingdom is that this practice has been codified. What's unique about the 2013 amendments to the U.K. system is they provided that a lot of the details would be articulated in a memorandum between the ISC and the U.K. executive, and that's now been published. As I say, it specifies criteria that ease some of the concerns about the otherwise broadly textured language in the statute itself.

Mr. Marco Mendicino: Professor Roach, did you have a comment about that?

Prof. Kent Roach: Yes, I agree, and ministerial decisions, particularly those as under subclause16(2) that require reasons, I think are better than the categorical sorts of exceptions in clause 14.

Mr. Marco Mendicino: As you both have written, a committee has to walk before it runs, and I believe that's a verbatim phrase that you used in one of your recent op-ed pieces. Let's just assume for the moment that for the short term, there might indeed be a more narrow exercise of that discretion such that the committee of parliamentarians may feel as though it's not able to fulfill the broad parameters of its mandate.

I would submit, and I would be interested in hearing your responses, that there are least two options it can pursue. One would be to avail itself of certain statutory gateways in collaboration with pre-existing civilian oversight through SIRC and the commissioner of CSE, for example. I want to touch on that for a moment, because what we heard from the minister in his evidence before this committee was that rather than prescribing that collaboration and the way that parliamentarian oversight and civilian oversight will work together, he envisions the relationship will evolve organically.

Do you see that playing out in the same way, or do you think that is a discussion that needs to be had at this stage, either in the bill or through some other regulatory framework?

● (1720)

Prof. Craig Forcese: Things playing out organically is the Canadian way, otherwise known as muddling through. It's suboptimal because it creates unnecessary conundrums. Ron Atkey, in his prior testimony, raised concerns about the degree of interface that's now possible, given the current drafting of Bill C-22, between the expert review bodies and the committee.

While there are gateways anticipated, those gateways themselves would be subject to the constraints on access to information by the committee. You could imagine the awkward scenarios that might arise.

Mr. Marco Mendicino: Can I stop you right there? Can I take it just from those comments that you would suggest that we as a committee actually reflect in more detail about how parliamentarian oversight needs to collaborate and co-operate with civilian oversight?

Prof. Craig Forcese: I think you have to think that through, although I know you're constrained in these sorts of amendments that you can make to the bill in its present form. But at the very least, you're in a position to say that the expert review bodies and the parliamentary committee need to be on an even keel in order to interface well, and that means even keel in terms of access to information.

Mr. Marco Mendicino: I actually want to take you to task on that because one of the things that you're advocating for today is levelling the access playing field.

As I look at SIRC and its mandate in the CSIS Act, and I look at the committee of parliamentarians in Bill C-22, they actually do not share the same mandate. I think we could talk a bit about whether or not the parameters are more focused for SIRC, but the point is that they're not identical and that may offer a plausible explanation as to why access would not be the same. In other words, it may very well be that as the committee of parliamentarians gets its footing, in a scenario like the one I've just described, where it would find that it did not have access, it would rely on existing civilian oversight—and we've heard that from Professor Atkey, for example—as a way of referring a matter to that body for the purposes of investigation.

Let me hear your thoughts on that.

Prof. Craig Forcese: Let me put this more—

The Chair: Very briefly, please.

Prof. Craig Forcese: If we imagined a scenario where we wanted an Air India style of investigation, we'd see the committee would be blocked because of clause 14. It refers the matter to the RCMP civilian complaints and review committee and to SIRC. The RCMP body has its own restrictions on information. SIRC can see everything. But SIRC and the RCMP body can't collaborate. What we have then is the prospect of things falling between the cracks because of the uneven access to information.

The Chair: Thank you very much.

We have Mr. Clement for five minutes.

Hon. Tony Clement: I'd like to pursue this line of questioning from a bit of a different perspective from Mr. Mendicino.

From what you've been saying, we're in this situation where it's not as if we're a young infant on these matters because we've had a history in this country of oversight, Professor. You've said that. Yet we have in this bill this inclination to go back.

If we're somehow emulating what has happened in the U.K., as an an example, we're going back in time to the initial structure and accountability mechanisms and constraints and so forth of the U.K. experience rather than going to the 2013 experience, where they have learned all their lessons and they've had their collaborations and they're on the 2.0. We've decided to go all the way back to the 1.0.

Mr. Mendicino's point is that we have to walk before we run. I heard the minister say that, too, on Tuesday. But your point is, we actually have this experience already. Am I paraphrasing you correctly?

Prof. Craig Forcese: Yes, I think we have a substantial amount of experience that did not exist when the U.K. stood up its ISC. So if I were to use an analogy, I would say we should at least be able to conduct ourselves at a light jog.

Hon. Tony Clement: Sure. I think that's an important distinction if we're going to compare and contrast with the U.K. model.

Professor Roach, it's good to hear your voice, if not see your face. Did you want to elaborate on this point as well?

● (1725)

Prof. Kent Roach: Yes.

Also, to go back to your colleague's prior question, one of the reasons I think we can jog is that we have all this expertise with SIRC and the CSE commissioner.

One of my concerns is that if you make the interactions between the new committee and those existing review bodies more sticky than they have to be, you're actually going to, potentially, make both worse.

For example, I think a first task of the secretariat should be to make all of the classified reports—there are 100 classified reports by SIRC and the CSE commissioner—part of a library that parliamentarians and a security-cleared secretariat can access and can use to hold ministers to account for the way they respond to that.

One of my worries is that by making the triple lock very complicated, you're going to get into a situation where the lawyers are going to tell you, “It would be nice to have that study from SIRC, but we're not really sure.”

As you know, Mr. Clement, lawyers tend to be risk averse. They tend to be risk averse when they're looking at the Security of Information Act with its penalties and so forth.

I think you need to get it right now, because it is going to be more difficult to fix three or five years down the road.

Hon. Tony Clement: I'm becoming persuaded by that argument.

What I've learned today from your testimony and previous testimony is that it's not a choice without an impact. In other words, it's not an academic discussion about whether you're going back to the U.K. example of 12 years ago versus what's happening now. Your point, in particular—and I believe Mr. Atkey and the other gentleman also alluded to this—is that it could be a situation in which we're creating a knowledge gap, an information gap among all the stovepipes, and that could have an impact on our national security and intelligence.

I don't want to put words in your mouth, but am I on the right track, in your opinion?

Prof. Kent Roach: Exactly. Stovepipes and silos work to the detriment of both propriety and efficacy.

As Professor Forcese said, we started off with the efficacy picture. You need to have something that can break down those silos. There's a certain amount of stickiness in this legislation that perhaps needs to be eased through some amendments.

The Chair: Thank you.

Mr. Spengemann, we have time for a five-minute round, if people will indulge us to go a couple of minutes over.

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

Thank you both for being here.

I want to take advantage of the remaining few minutes to take you a little bit away from the mechanics of effective review, which is most of what we heard this afternoon both in this panel and in its predecessor, to look at the social and political environment in which this committee is going to operate, with a specific focus on and interest in the creation of a public value of trust in government.

I sit on the defence committee as well. That committee has received evidence that I will put to you. The single biggest threat against Canadian society is domestic terrorism. In fact, it is domestic terrorism that really has brought some very specific concerns by particular communities in Canada with respect to the former Bill C-51. When we talk about the creation of trust in governments specifically through that lens of domestic terrorism, I think it's a very salient topic. Public Safety's “2016 Public Report On The Terrorist Threat To Canada” outlines that in some detail.

Assuming, then, that a good chunk of the committee's work is taken up by a review of action, intelligence gathering, and other activities with respect to domestic terrorism, what will that mean for this committee, both with respect to the mechanics of effective review, as we've discussed it, and equally important, with respect to its role, as has been described by Professor Wark, as an educator and as an outreach mechanism to the Canadian public?

My hunch is that the Canadian public isn't at par even with the parliamentarians who will be appointed to this committee with respect to an understanding of national security, and this committee will face some constraints in terms of bridging that gap.

I wanted to hear from you what levers are reflected in the bill and what levers are at our disposal administratively or in terms of resourcing this committee to make sure it can play that role well and enhance public trust in government.

● (1730)

Prof. Craig Forcese: On that, I'd make two points, and this goes less to law than it does to culture.

Mr. Atkey, who appeared in front of you, was the first chair of SIRC. Mr. Atkey, in the course of being chair, established a culture at SIRC that was quite robust and probably made more of that body than many people feared it might, so the initial culture of this body, which means the initial staffing and the initial focus and resourcing, will have an impact in terms of how it's perceived. If it starts off on the wrong foot, with the wrong people, the wrong resourcing, and without credibility, it will find it very difficult to recover. That's my first point.

The second point is that one of the issues in national security is that expertise in this area tends to be monopolized within executive government, so conversations on national security issues can be quite rudimentary outside of government. One of the virtues, it seems to me, of investing parliamentarians with more competence in this area is that they will be better legislators and better able to communicate to the public, even without spilling any bean, that is, a national security secret, the dilemmas that are in play. That is another social value that this committee could serve.

Mr. Sven Spengemann: Thank you.

Professor Roach, do you have views on this as well?

Prof. Kent Roach: Yes. I would also go back to where Professor Forcese started. If this committee did a 200-page report on what went wrong on October 22, 2014, that would provide for more informed policy-making. The Canadian public would be extremely interested in it, and it would also help to educate the public both about risks that we can control and about some risks that it may not be possible to control.

Mr. Sven Spengemann: Thank you for that.

I have one brief follow-up on the issue of trust. We've heard both from you and from Professor Wark about the steep learning curve and the 17 departments and agencies that are part of this ball game. How do we guard against regulatory or bureaucratic capture of this committee? I think you've alluded to some levers already, but could you clarify that briefly in the remaining time?

Prof. Craig Forcese: I think staffing is going to be very important. I won't repeat what Professor Roach said about the need to staff robustly and perhaps staff outside of the traditional public service career pattern, in terms of bringing in special advocates who are the only non-governmental experts who have really seen the inside operations of the security services. I think that's important.

More generally, again, I think the culture of the members matters. There is a huge literature in the United States about who makes a good legislative oversight committee member: it means skepticism without partisanship, and an open mind and asking hard questions. The membership will matter.

Mr. Sven Spengemann: Then, presumably, there's also being able to communicate to the public, which I'm assuming is constrained in the field of counterterrorism because of classification levels. I think that's an additional challenge.

Prof. Craig Forcese: That's correct.

Mr. Sven Spengemann: Thank you very much, Mr. Chair.

The Chair: We've come to the end of our meeting.

Ms. Watts had 30 seconds remaining in her time. Would she be prepared to give it to Mr. Rankin? He has one quick question.

Mr. Murray Rankin: I'm very grateful.

Ms. Dianne Watts: You owe me.

Voices: Oh, oh!

Mr. Murray Rankin: I acknowledge my debt.

Mr. Forcese, *The Globe and Mail* just reported that a Federal Court ruling says CSIS has illegally retained sensitive data on Canadians over a 10-year period. This is the second time in three years the courts have found that CSIS has breached the duty of candour and hidden information from judges. Some of this stems from the powers in Bill C-51.

Professor Forcese, what does this ruling mean in terms of the need to repeal Bill C-51 and strengthen Bill C-22?

Prof. Craig Forcese: Well, it's hard for me to comment, because the decision is 137 pages long and it was issued just as I was walking over here for this committee hearing. I've only read the summary.

I think it's going to be an important decision. I think it relates to a long-standing question as to how you construe section 12 in terms of the competency of CSIS to retain data. It is going to have important knock-on effects, it seems to me, in terms of the information sharing provisions in Bill C-51, because it says something about the capacity of CSIS to become a sort of data dump location, that is, to derive a huge database of accrued information from across government. These new retention standards that the court articulates will presumably stand, in part at least, as a barrier to that, although again I need to read the case more carefully.

The Chair: Thank you, Mr. Forcese.

I suspect our committee will be dealing with that in our national security framework study. We may call you again.

We will reconvene on November 15.

The meeting is adjourned.