

GM/October 29, 2001

THE SPECIAL SENATE COMMITTEE ON THE
SUBJECT MATTER OF BILL C-36
EVIDENCE

OTTAWA, Monday, October 29, 2001

The Special Senate Committee on the Subject Matter of Bill C-36 met this day at 4:00 p.m. to examine the subject matter of Bill C-36, to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism and explore the protection of human rights and civil liberties in the application of this Act.

Senator Joyce Fairbairn (*Chairman*) in the Chair.

The Chairman: Honourable senators, this is a final meeting with the Minister of Justice who was our first witness when we began our pre-study hearing on Bill C-36, the anti-terrorist bill. Minister McLellan is present with her officials. They gave generously of their time at the beginning. We have spent a week and many hours of intensive hearings since you left, Minister. We thank you for coming back to review with us some of what we have heard. I know that there will be a number of questions from my colleagues on both sides.

To those who are watching on television, this is the Special Senate Committee on the Subject Matter of Bill C-36. We in the Senate are undertaking this special effort in order to be able to put our views, concerns and suggestions to the minister, the House of Commons, and to the commons justice and human rights committee, in advance of the passage of the legislation by the House of Commons in the hope that some of our ideas will find their way into the bill before it returns to the Senate for debate and clause-by-clause analysis.

Welcome, Madam Minister, and welcome to Mr. Mosley, Mr. Piragoff and Mr. Cohen. Please proceed.

Hon. Anne McLellan, Minister of Justice and Attorney General of Canada: Honourable senators, it is a pleasure for me to be back here this afternoon with my officials. I know that this committee has worked very hard in terms of its pre-study of Bill C-36. I speak for myself and for the entire government when I

say that I look forward to your advice and recommendations that will help inform the work of the House committee, as well as the work of the Government of Canada. I thank you very much for what I know have been very long hours in a short period of time.

The review and debate that has taken place in the House of Commons committee and before this committee has, it goes without saying, been thoughtful and insightful, raising many of the same issues the cabinet committee discussed in preparing this legislation.

Shortly after the horrific events of September 11, nations to which we regularly compare ourselves -- the United States, the United Kingdom, and many of our European allies -- took a second look at the legal framework and investigative tools available to them. We all recognize that the insidious nature of terrorism demanded an appropriate and measured but forceful response. Parliamentarians, academics, the media and individual Canadians called for stronger measures to ensure that Canada could deal effectively with the threat of terrorism.

We are now a number of weeks past the events of September 11. However, we should not let this passage of time diminish our memory of the events of that date, nor the call for action. Yes, we are part of a global community, however, this bill is not just about keeping up with our neighbours. Yes, we take very seriously our Charter of Rights and Freedoms, but this bill is not about choosing the fight against terrorism over our guarantee to civil liberties.

(Take 1610 Follows -- continuing with Ms McLellan: Yes, we need to have a process...)

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(Ms McLellan continuing)

** Yes, we need to have a process to deal effectively with the threat of terrorism, but this bill is not about power to any one person or organization. This bill is about what we need to do to protect our most basic human right -- the right to live our lives in peace and security. If we do not protect this right, then the rights to freedom of expression, association and all the other rights guaranteed by the Charter are at risk.

I remind you of the words used by Professor Bayefsky when she appeared before this committee last week. She said:

Terrorism is an extreme violation of human rights. That violation of human rights is our problem as Canadians. There is an apt saying that evil triumphs when good people do nothing. Our responsibility is to defend human rights, and to do so by taking the kinds of actions that are in this bill.

Bill C-36 includes much needed measures that will substantially increase this country's ability to fight the threat of terrorism. For those who suggest that this is comparable to the War Measures Act, their suggestion is simply wrong. The War Measures Act was invoked to deal with a specific threat to the security of Canada and was deemed necessary for a particular period of time. The fact is that we do not know when the threat of terrorism will disappear. We do not know how far reaching the support is for this particular enemy.

The new face of international terrorism is one that seeks to hold free and democratic nations hostage. So that this does not happen, it is our responsibility and our obligation to act in concert with other nations because, if we do not, if we choose to sit on the sidelines rather than change our laws and improve our investigative tools, we risk being part of the problem rather than part of the solution.

Currently we have laws that can be used and are being used against terrorism, including provisions in the Criminal Code and other statutes. These laws are not ineffective, but they are clearly not adequate. The commissioner of the RCMP has made observations on this in testimony before this committee. I quote from Commissioner Zaccardelli:

Some people say that Canada already has a strong legislative framework and enforcement capacity to deal with terrorist threats. It has been our experience, based on our investigation into the tragic events of September 11, that is not true. Notwithstanding our efforts, it has become evident that there are some significant obstacles preventing law enforcement organizations such as the RCMP from detecting, deterring and destabilizing terrorist groups. Traditional investigative tools are inadequate in some cases.

Yes, we can, under our current laws, convict terrorists who actually engage in various acts of violence if we are able to apprehend them after their acts. However, we must do much more than that. We need investigative tools that will help us to gather information on terrorist groups and operatives before they engage in their attacks. This bill provides those tools. We need a broader power of arrest and conditions on release that will enhance our preventive capabilities and allow us

to destabilize terrorist groups that are in the planning stages of an attack. This bill provides these powers.

We need new Criminal Code offences that allow us to convict those who facilitate, participate in and direct terrorist activity. As we have already recognized with respect to organized crime, current Canadian law in the area of conspiracy is not sufficient to go after sophisticated criminal networks. These networks rely on cells, multi-layered leadership and the assistance of those not directly involved. Current law does not always allow us to pursue those who, without being involved directly, enable such crime. This is true for terrorist groups as well as for criminal organizations. Therefore, Bill C-36, as we intend Bill C-24 to do for organized crime, would provide new offences targeting participation, leadership and similar activities. I would underline that these offences include a vital preventive element, because the terrorist enabling activities that they address are defined as offences regardless of whether the ultimate terrorist acts are actually carried out.

It has also been recognized that the enabling of terrorism includes financial assistance. Financial resources provide the necessary underpinning of the terrorist groups. That is why an entire category of the provisions in Bill C-36 take strong measures to address terrorist financing.

It is also worth mentioning that, in the area of terrorist financing and in other areas, notably with respect to terrorist bombings and the use of other lethal weapons, and with respect to the protection of UN and associated personnel, Canada has international obligations that it must fulfil. This bill does that as well.

All of these elements speak to national security and, as you know, protection of national security includes protection of vital national security information. Our current law includes a number of gaps through which there may be potential unwanted disclosure of such information. Such disclosure could jeopardize Canada and its allies. This bill seeks to close those gaps.

To sum up on this point, while we do have a legislative structure that can be used to fight terrorism, it is absolutely essential that this legislative structure be enhanced. If we are to effectively fight terrorism, we need tools specifically designed for this purpose. We cannot ask our law enforcement and security agencies to address the very real and very dangerous threat of terrorism without a full and effective legislative base. This has increasingly been recognized by other countries that have implemented specific anti-terrorism legislation. We must recognize this in Canada. The measures must be well designed and balanced, but we must have them in place.

This is an overview of why Bill C-36 is needed. I intend to discuss in more detail particular areas of the bill that have arisen repeatedly in the review and debate since the bill's introduction. Before I do so, however, I should like to make three points.

First, I have said before, and I wish to emphasize here, that we are open-minded about potential amendments to the bill. We realize that there have been concerns expressed about certain areas. We welcome examination of the bill from the perspective of the concerns that have been expressed.

Second, although I wish to review particular areas of the bill with this committee from the perspective of these concerns, I am not in a position to make definitive commitments to any particular amendments. I am certain that senators appreciate that this legislation is currently before the House of Commons and its standing committee on justice and human rights and that there will be a specific process with respect to amendments in that committee. That being said, we are extremely interested in the anticipated report from this committee and any specific recommendations for changes that are included in it.

Third, and this is a more substantive matter, my first two points being more of a process nature, I wish to address questions that have been raised about whether this is emergency legislation. Let me reiterate that I do not consider this to be emergency legislation. Rather, this legislation is a combination of our commitment to two UN conventions and our realization that we must do more to prevent acts of terrorism, acts on a scale that we are only just beginning to comprehend.

Bill C-36 is intended to deal with an ongoing and heightened threat of terrorism. This threat clearly existed prior to September 11, 2001, and we can expect that the threat will continue into the future. While we would like the threat to disappear in three years or five years, we must be prepared if it does not. What must remain is vigilance. Even as the current crisis diminishes in its intensity, as we hope and expect that it will, we must remain on our guard now and in the future.

Further, this is not a bill that changes Canadian law at large and across the board. Rather, it is a bill specifically directed at the threat of terrorism while making certain related changes with respect to national security and the protection of Canadians against acts of hatred. The measures in this bill are not so much extraordinary in themselves but are measures to respond to an extraordinary threat. In response to this threat, which I repeat is an ongoing threat, they are balanced and reasonable measures that include important and effective safeguards.

This is the perspective I have on this bill. With your help, we may be able to further refine some of these measures and their safeguards.

(1620 follows, Ms McLellan continuing, I would like to now briefly turn to discuss of some)

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(Following Take 1610, Ms McLellan, these measures and their safeguards. TAKE 1620 begins here, Ms McLellan continues)

I should now like to turn briefly to discussion of some of the key elements of the legislation, which you have heard a great deal about here before this committee in pre-study. As you are aware, Bill C-36 currently includes a provision calling for a review of the provisions and operation of the proposed anti-terrorism act by a committee of the Senate, the House of Commons or both houses. In our view, there will be a distinct benefit from reviewing the bill in light of its actual operation. Further, we may wish to adjust provisions of the bill in light of changed circumstances after three years. This is the purpose of the review clause.

There have been numerous suggestions, however, for a sunset clause in the bill, a clause under which some or all of the provisions of the bill would expire after a predetermined time, unless re-enacted by Parliament. We have, in the government, listened with interest to these suggestions. There are a number of considerations that must be taken into account in reviewing a possible sunset clause.

First, as I have indicated, the threat of terrorism may not disappear -- probably will not disappear -- after three or five years. We must consider whether the tools Parliament enacts in Bill C-36 will be appropriate tools well into the future. It may be that we can refine and adjust these tools after some years of experience. Nevertheless, we expect the basic need for the bill to remain.

Second, there has been some suggestion that a sunset clause would help to bolster the constitutionality of the provision of the bill. On this argument let me be absolutely firm and clear. I consider the provisions of this bill to be constitutional; otherwise, I would not have presented them to you and the House of Commons committee. I do not think that it is necessary to add a sunset clause to make them more constitutional. If, after careful consideration, it is felt that there is a need for a sunset clause, then that need would have to be based on some other ground than constitutionality.

Finally, with respect to the sunset clause, there has been some misunderstanding with its existence in the legislation of other countries, notably the United Kingdom and the United States. I wish to clarify that neither country has a broad-base sunset clause in its legislation. In the United Kingdom Terrorism Act 2000, no sunset clause applies with respect to the vast majority of the provisions of the act. A sunset clause does apply with respect to certain special provisions dealing with the situation in Northern Ireland. When the Terrorism Act 2000 was enacted, there was hope that the troubles in that area would finally be resolved within an immediately foreseeable time-frame. We see, then, a specific justification for a time limitation clause for those special provisions. Let me just acknowledge with some satisfaction that in recent days it seems that some of these expectations for peace in Northern Ireland may be realized.

It is important to recognize, however, that the entire remainder of the United Kingdom legislation dealing with the general and ongoing effort against terrorism in that country is not time limited. These provisions of the UK legislation are, as Professor Paul Wilkinson indicated to this committee, comparable to Bill C-36. I also observe that Professor Wilkinson expressed the view that Bill C-36 should not be time limited.

In the United States, meanwhile, the core anti-terrorism legislation that was enacted in 1996 also does not have a sunset clause. As proved to be the case, terrorism in the United States was not something that was about to disappear three years after the enactment of that law. It is true that the United States' legislation, which enhances their existing anti-terrorism law in certain areas, does include a sunset clause. The President of the United States signed this new legislation this past Friday. It is important to note, however, that the sunset clause only applies to one of the titles of the new act dealing with special powers of electronic surveillance. It does not apply a sunset clause to any of the other provisions of the new legislation.

Further, there was considerable controversy with respect to even this limited sunset clause with many in the United States doubting whether it was appropriate.

As honourable senators are well aware, the definition of "terrorist activity" is absolutely central to Bill C-36, a point I made when I first appeared here. Many of the other provisions of the bill relate directly to this definition. In view of this, we did spend a considerable amount of time crafting this provision. Nevertheless, improvements may be possible, and it is entirely appropriate that this definition has been the focus of considerable scrutiny.

An aspect of the definition that has drawn attention are the words that exclude "lawful advocacy, protest, dissent or stoppage of work" from its ambit. Some have questioned whether the definition inappropriately fails to recognize that even unlawful activities of this type normally do not amount to terrorism. This is an important question and one that I know that honourable senators are seized with.

I wish to emphasize that it has never been our intent to extend the scope of definition to activities of this type, that clearly do not belong within it. This aspect of the definition merits attention and we would be most interested in the recommendations of this Senate committee on that issue.

At this point, I should like to emphasize that we have been sensitive to the perception that the definition and the bill as a whole could be used to target ethnic and cultural communities. We have reached out to these community to explain that this is not the case. Our discussions with them will continue.

I note an idea that has been raised on the subject matter of discrimination and hatred. Clause 12 of the bill would add a new provision to the Criminal Code that would make it a special offence to commit mischief against a place of religious worship, when the mischief is motivated by bias, prejudice or hate. It has been noted that when the offence is of this nature, it is insufficient to give it the name "mischief" and that some other term would be more appropriate. This, too, is an interesting suggestion.

One of the provisions of Bill C-36 that has attracted considerable attention is that of providing for investigative hearings. We spoke at some length about this when I was before you a week ago. Questions have been raised about the provisions allowing the state to compel testimony under this proposed new clause. It has been suggested that this is contrary to fundamental traditions and rights under Canadian law.

It is true that these provisions would add a new obligation under Canadian law. It is important to emphasize, however, that the obligation is for the pressing and substantial purpose of fighting terrorism. We are not proposing that the power be enacted at large in the Criminal Code. It is also important to note that the power is not without precedent and includes important safeguards.

With regard to precedents for such power, as I mentioned last time I was here, there is an existing procedure under the Mutual Legal Assistance and Criminal Matters Act that already allows us to do this in Canada in order to gather evidence for other countries. Our review of the records would indicate this power has been

used fairly frequently for other countries. Evidence gathering of this nature is frequently used in Canada and, perhaps more importantly, it has withstood constitutional scrutiny by the courts.

Also, it is important to emphasize that while there are rights against self-incrimination under the Charter, there is no general privilege against giving testimony in Canada. Persons are regularly required to testify at trials other than trials for an offence charged against them and can be arrested if they refuse to testify.

In addition, a close analogy to the special power we are suggesting for Canadian law, with respect to terrorism, exists in the general criminal law of the United States with respect to investigative grand jury proceedings.

Numerous safeguards would apply to the new provisions on investigative hearings under Bill C-36. First, it should be remembered that the person obliged to testify in these hearings would not be doing so in the context of a trial for an offence. Further, the person obliged to testify is extended protection against self-incrimination, subsequent use and derivative use. Also, while the individual is compelled to testify, laws relating to the non-disclosure of information or privilege continue to apply. The right to counsel also continues to apply in this setting. Further, the prior consent of the Attorney General is required before an application for compulsory testing may be brought. The standard on which an order is obtained is based upon the Charter consistent reasonable grounds believed standard. There must also be reasonable grounds to believe that the person sought to be compelled has direct and material information that relates to the offence or that reveals the whereabouts of the person who the peace officer suspects may commit that offence.

Reasonable attempts must have been made to obtain the information from the person.

(TAKE 1630 follows, Ms McLellan continues: The legislation also provides the judge...)

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(Ms McLellan continues)

The legislation also provides the judge with the authority to order terms and conditions to protect the interests of the witness or third parties. Therefore, while we have extended Canadian law in Bill C-36 to provide for investigative hearings,

we have done so for a limited, important purpose and have ensured that the new power is appropriately circumscribed.

Another measure of the bill that is receiving close scrutiny, and rightly so, is that with respect to preventive arrest. Under this provision, if a police officer believes on reasonable grounds that a serious terrorist offence is about to take place, and suspects, again on reasonable grounds, that the arrest of a particular person would prevent it, that person can be arrested to be brought before a judge. The object of bringing the person before the court is for the court to consider whether restrictions should be imposed on the person's movements and associations.

Here again it is important to emphasize that the power is not without precedent and is subject to numerous safeguards. Canadian law currently provides for a power to arrest a person on the reasonable belief that he or she is about to commit an indictable offence, and numerous provisions of Canadian law already deal with conditions placed on release of persons.

The preventive arrest provisions of Bill C-36 build on these provisions, but only for the special purpose of our fight against terrorism.

With regard to safeguards, except for emergency circumstances, this substantial power can only be invoked with the consent of the Attorney General. This section contemplates a judicial hearing within 24 hours. Additional safeguards include judicial supervision of the recognizance process, the requirement for reasonable grounds for belief that terrorist activity will be carried out, the requirement that an arrest without warrant can only be made where it is necessary to prevent the commission of a terrorist activity and the ability of the person to seek to vary a recognizance.

I should like to turn briefly to concern about certain proposed changes under the Canada Evidence Act and the related changes under the Access to Information Act and the Privacy Act. The changes that have led to concerns are those that deal with the so-called Attorney General prohibition certificates that would prevent the court from disclosing information in court proceedings. Under Bill C-36, section 38 of the Canada Evidence Act would be amended to provide the Attorney General of Canada with the power to file a prohibition certificate in legal proceedings to prevent the disclosure of information injurious to international relations, national defence or security. The purpose of these certificates is to provide, where necessary, a method to absolutely prevent the disclosure of certain highly sensitive information. This guaranteed protection from disclosure is necessary, above all,

with respect to security and intelligence information shared with Canada by other countries.

In developing this amendment to the Canada Evidence Act, it became clear that we also had to provide a similar guarantee against disclosure in other pieces of federal legislation. In particular, if Bill C-36 had been limited to the Canada Evidence Act exclusively, individuals might still be able to use the back door to get this information by making requests under the Access to Information Act or the Privacy Act. Therefore, it was necessary to equally exclude access to this information through these routes.

However, comments from several quarters, and particularly from the Information and Privacy Commissioners, suggest that in safeguarding this highly sensitive information we may have gone too far. There is some concern that, without a check on this exercise, the power to issue a certificate could be used beyond what is necessary to protect international relations, national defence or security. With that in mind, we acknowledge the need to consider a review mechanism. We have made no decisions on such a mechanism and very much look forward to your input on this question.

As you complete your review of Bill C-36, I urge you to keep in mind something that our colleague Irwin Cotler has expressed. He said that the struggle against terrorism is part of the larger global struggle for the promotion and protection of human rights and human dignity. Terrorism must be seen as the ultimate assault, not only on human rights but also on democracies themselves and on the peace and security of humankind.

Accordingly, our anti-terrorism measures are a fundamental component of our nation's human rights agenda. With that, honourable senators, I look forward to your questions and comments.

Senator Lynch-Staunton: Thank you minister for a very strong presentation. I congratulate you and those who contributed to it.

At the same time, I will try to convince you to keep an open mind on the question of expiry date by bringing up the War Measures Act. I agree with you that the contents of that act should not be raised here, but the circumstances that led to it are similar to the circumstances that bring us together today. Briefly, war was declared on August 4; the War Measures Act was introduced in the House on August 19; it was passed in both the House of Commons and the Senate on August 21; and it was given Royal Assent on August 22.

It was, as you said, aimed at a specific threat. The debates, short as they were, both in the House and Senate, indicated directly and indirectly that the War Measures Act was to be used as long as the war was on. As it turned out, it stayed on the statute books for 74 years. It was applied for the last time in October 1970. As delighted as those of us who were there were to see the army come in, not many of us were delighted to see how the act was applied.

I want to quote, from the Queen's Law Journal of the spring of 1993, an article written on the War Measures Act by Patricia Peppin, who was identified as assistant professor at the Faculty of Law. She said:

P6 Immediately after the War Measures Act was invoked, the police conducted 1,624 raids and arrested 350 people. Under the regulations and the successor legislation, 465 were arrested and two rearrested for a total of 467 arrested as of March 15, 1971. Of these, 403 were released without charge. Against the 62 remaining people, 86 charges were laid under the War Measures Act and 19 under the Criminal Code. Forty-four pleaded not guilty and either were found not guilty or the Crown entered a noly pro sequi in the record. Thirteen people pleaded guilty. Five pleaded not guilty and were found guilty. A total of 18 people were found guilty. Eneene

I bring that out because I fear that if this bill becomes law and remains on the books indefinitely, your successors in 10, 30 or 50 years may take advantage of an interpretation to which we today would not agree to engage in the same kind of excesses. I think that alone justifies a sunset clause for the more contentious aspects that touch on individual liberties.

You said that the sunset clause in the law that the president of the United States signed the other day applies to only one aspect of their act. That is so. However, in the United States, they also have what they call congressional oversight, which we do not have to the same extent as they have. The president and the legislature are partners in developing laws and also in their application and supervision. The executive cannot get very far without Congress calling them in and asking for justification. We do not have that here, and the review does not give us that. A review within three years would not give us the kind of oversight that some of us here would like to have.

If you agree that that difference exists between our system and the American system, does that not justify a sunset clause and, in addition, some kind of parliamentary oversight, either direct or indirect, not to interfere in the application of this legislation but in order that the government, going into uncharted and

untested territory, which may infringe on individual rights, will know that it has the support of Parliament rather than doing this on its own.

(Take 1640 follows -- The government is giving certain ministers ...)

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(following take 1630--Lynch-Staunton continuing -- rather than do it on its own.)

The government is giving certain ministers extraordinary powers which I hope they will be very hesitant to use in many cases. I would think they would welcome the cooperation of some form of parliamentary authority to help them apply the law always within the bounds that we are hoping for here today.

That is my plea. It is not in the form of a question but I hope to draw some reply, first, on the sunset clause to avoid the excesses that the War Measures Act allowed in 1970 and, second, on some form of parliamentary supervision that would help the government to develop or apply the act in the way that we all hope to see it applied.

Ms McLellan: That was a very articulate statement of concerns. We are also engaged in addressing those issues. We believe we got the balance right, but refinements are also possible. We look forward to hearing from the committees on whether the review mechanism is sufficiently robust to meet the needs of the Canadian public. Perhaps the committees will suggest a review at the end of three years. Perhaps some of the more contentious proposals should be reviewed after a longer period of time.

You are absolutely right in your comment that we should not be discussing this legislation in the same breath as the War Measures Act, or even with our current emergency legislation. This legislation deals with an ongoing threat. If there is any comparison, our fight against terrorism should be compared more or less with our fight against organized crime. Both are pervasive and ongoing. Both have existed for a long time and are using globalization, technology and worldwide funding to fuel their heinous criminal activities. We need the necessary legal infrastructure in place to address that activity.

The most contentious provisions in this legislation are offset by safeguards, such as those surrounding investigative hearings and preventive arrest. I went through them in some detail. I understand the need for a review. A review at three years would be sufficient to reassure Canadians that those provisions were being

used fairly and wisely. I will be most interested to hear about any other potential review mechanisms in regard to those provisions.

Nothing would prevent Parliament from reviewing this bill before three years. Parliamentarians can take up the issue on behalf of Canadians at any time. The bill can require a review at the end of three years. Parliamentarians can make the review process sufficiently robust to question the application of the legislation, the experience under the legislation, and it can offer advice on improving the legislation at that point.

Any minister can be called before you to answer questions about the application of the proposed legislation at any time. You can issue any kind of report on any alleged misuse of any section or any area where you would like to see additional safeguards.

I understand your point, senator, and although our constitutional framework is slightly different from the American executive and Congress, I like to think that our executive is respectful of Parliamentarians. I cannot, as a member of government, achieve the objectives of my ministerial responsibilities, unless I work very closely with the House of Commons and the Senate, especially the two standing committees. Senator Joyal knows this well. Those committees review the work of my department.

We need not minimize the degree of oversight that is possible in our parliamentary democracy. Parliamentarians have enormous power to ensure discussion between the executive and Parliament.

Senator Lynch-Staunton: The Emergency Act which replaced the War Measures Act does include some form of parliamentary oversight. Would you entertain an introduction of similar procedures into this bill?

Ms McLellan: This is a different kind legislation to deal with an ongoing and pervasive threat. Let us keep it in that context.

I am open to your recommendations for ensuring that we have the appropriate oversight mechanisms.

Senator Stollery: Minister, I have no problem with most of your presentation. It is obvious that you and your assistants have been following the work of this committee.

I must respond to the comparison between the parliamentary system and the congressional system. They have nothing in common whatsoever. In my nearly 30 years of parliamentary experience, no parliamentary committee, on its own, has had any great effect on government, for reasons that I understand very well.

The Minister of Defence was here last week. This bill is set out to combat terrorism. Yet he said the Communications Security Establishment can use this legislation to assist in prosecuting big criminal activity in Canada, activity such as drug trafficking, activity that has nothing to do with terrorism.

(tk 1650 follows--Stollery continuing--Now, that is not my understanding of this bill.)

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(Following Take 1640, Sen. Stollery, that has nothing to do with terrorism. TAKE 1650 begins here, Sen. Stollery continues)

**That is not my understanding of this bill. My understanding of this bill is as you have described it. It is a bill to deal with terrorism and to respond to the public concerns about the events in New York. If one of your colleagues in the cabinet takes the view that it can be used for other things, then I ask to myself: "What other thing in this 200-page bill, which I cannot claim to have studied in the short time that we have been looking at it in detail, are there that some other minister may use to deal with something that is not in the intent of the bill?" What would you respond to that?

Ms McLellan: First, in relation to the specific issue, I wish to clarify that clause 273.65 (1) states that "The Minister may, for the sole purpose of obtaining foreign intelligence, ..." authorize certain things.

This is in regard to the clause you raised regarding Minister Eggleton and his comment this is relation to clause 273.65. When the minister was before the house standing committee, my parliamentary secretary clarified the record in relation to the intent of this clause and the power of the minister. However, your question is more general.

Senator Stollery: Minister, this is what I would have said after the exchange that took place at the House of Commons committee. That is why I am asking you. That is why I wish to pursue it for a moment.

Ms McLellan: As I understand it, your question is a more general concern in terms of a misunderstanding on the part of an individual minister in the application of a provision after enactment. I return to the point that, from my own point of view, I believe the legislation to be clear. If there are areas where you do not think it is clear, I would certainly seek your guidance in terms of how we can clarify this. The review process is there, obviously. In fact, I return to the point that you do not have to wait three years to review any of these provisions. The legislation speaks to a review within three years. If you felt that any minister was not operating appropriately under the scope of a power given to him or to her, you could commence a review at any time within the three years. You do not have to wait for three years.

I take your point that it will be important for all of us to understand the intent, the import and the scope of these provisions.

Senator Kelleher: When you were here last week, you and I engaged in somewhat of a discussion about the relationship, if any, between Bill C-11, the proposed immigration bill; and Bill C-36.

I expressed a concern to you that there could very well be gaps between them arising from the fact that Bill C-11 had been drafted in the spring, long before the terrorist attack of September 11. Furthermore, your new bill did not in any way contain any provisions save one technical provision dealing with refugees and immigration. You were kind enough to invite us to let you and your ministry people know if we had any thoughts in that area where things could be tough enough.

To fully assess the effectiveness of Bill C-36 to determine if any gaps did exist, it would have been helpful if we had been able to hear from your colleague, the Minister of Citizenship and Immigration. We could have then tested her and asked her: "Minister, what are you doing? These alleged gaps are here. How do you attempt to close them?"

I am advised that not once, but several times we asked your colleague to appear before our committee and she refused. I will not go into it and I do not expect you to make a comment on that. I am not asking for them. It sort of belies your remarks when we discussed the review mechanism in the sunset law. At that time, you said, "Do not forget there is nothing to stop the House from having a minister or the Senate from having a minister appear before them." That is great. We tried that and she flatly refused.

Frankly, as a former minister, I am quite disturbed by that sort of conduct, particularly in this case, where this entire question is front and centre with the people of Canada and with our newspapers. This leaves the committee and me in somewhat of a dilemma. We wanted to discuss things with you, but it would have been most helpful if we could have heard from the minister beforehand. We have not. Having said that, I am quite prepared to suggest to you, in her absence, some of the concerns and gaps that I see.

Ms McLellan: Certainly, senator. I would appreciate that, if you think that is appropriate. I will ensure not only that my colleague understands your concerns but also that the committee on National Security hears of your concerns, whether you want to put them in the report or provide them to me here today. I can assure you that this is an issue that the National Security Committee will take up on an ongoing basis as we review the application of legislation, new and otherwise. We all know the concerns, as does my colleague, the Minister of Citizenship and Immigration, around some of the issues to which you refer.

If you wish to provide me with those concerns today, I will willingly take them up. I will not only ensure that Minister Caplan receives them but also that the National Security Committee is made aware of them as well.

Senator Kelleher: I wish to be cooperative with our chairman. I am mindful that many people wish to ask you questions. You are in much demand today. Unfortunately, I have quite a list. I am wondering what might be the best way to do this. I am very concerned that during this period we do not appear to be doing too much to stop possible terrorists coming into Canada under the guise of refugee status. We appear to have a backlog of over 20,000 individuals who are currently subject to a deportation order. I am mindful, being a former minister in charge of CSIS, how far behind CSIS is in their security checks. I am fearful that what we have in place now will not always reach the concerns that we are expressing. I hate to say this, but the reality is that the United States appears that they are not very happy, either, about our efforts in that area. Approximately 85 per cent of our trade is with the United States. If we do not do something there, something will happen to that trade.

I can do this either way. I know what your thought would be, namely, to put this information in a letter to save time.

The Chairman: Perhaps you could take your most favourite question and put it to the minister.

(TAKE 1700 follows, The Chairman: The minister has undertaken...)

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(The Chairman continuing)

****The minister has undertaken to take whatever thoughts you have to the National Security Committee as well as to the other minister.**

We can talk about how we could deal with this as well in our report. Perhaps you could get a specific answer on your most urgent question. We could then make very sure that your other concerns are placed in front of the proper members of the ministry.

Senator Kelleher: Madam Chairman, that is difficult. First, why are we not detaining all refugee claimants who arrive without proper documentation until their identity has been clearly established?

In conjunction with that question, and it addresses directly a part of the bill, why are we allowing only 72 hours after a claim is made to establish that a claimant is a potential threat to Canada, after which time the individual is free to make a refugee claim and begin a process which is likely to take years to complete?

Having been associated with CSIS for several years, I know it is not possible to do the security checks that are required. These people come from countries where there is not even a system which can be checked. I am not trying to be critical of CSIS here. I am very worried that once people claim refugee status, we are into years of waiting. It is great for lawyers -- not that I engage in that kind of practice -- but it is along these lines that my concerns lie.

If we could, perhaps, get these questions in our report, then I would be happy because I think the report will be going to the minister or the committee.

The Chairman: Absolutely.

Senator Kelleher: The minister has kindly indicated her interest. I also appreciate the fact that she will have some discussion with her colleagues in cabinet.

Ms McLellan: It is inappropriate for me to speak on behalf of my colleague, the Minister for Citizenship and Immigration.

Senator Kelleher: That is why I did not ask you directly.

Ms McLellan: Let me just say that I think that, for example, the question that you have raised is an important one. It is one that I have every reason to believe the National Security Committee will take up and address in its ongoing review of the application of the laws of this country as they relate to immigration, both existing and anticipated.

If you can provide me with those questions, senator, then I will promise not only to take them to the committee, I will undertake to get you written responses to them. You can then take it from there in terms of how you would like to proceed.

Senator Kelleher: I appreciate your helpfulness. It is quite a contrast. I will leave it at that.

The Chairman: Understanding your concerns about this, Senator Kelleher, I do wish to thank you. Certainly, I am sure the committee will accommodate this issue as well as we get into working on our report.

(French follows--Sen. Bacon: Il est évident qu'il y a beaucoup de craintes...)

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(après anglais)

Le sénateur Bacon: Il est évident qu'il y a beaucoup de craintes qui sont plus fondées les unes que les autres mais il y a aussi des inquiétudes qui me paraissent importantes et qui méritent notre attention. Certaines personnes ont souligné le danger de l'interprétation que pouvait entraîner la définition de terrorisme telle qu'elle est libellée dans le projet de loi. L'Association du barreau canadien nous disait qu'il semble possible de considérer comme activité terroriste une grève illégale qui peut avoir pour effet de perturber le calme social au pays.

Par exemple, une grève de transport en commun ou une grève de camionneurs comme nous avons déjà connu. Le problème est que dans notre société, il y a plusieurs grèves illégales et elles peuvent mettre en danger ce que j'appellerais la sécurité économique du pays. Ces manifestations illégales seront-elles sujettes à des peines plus sévères par le projet de loi C-36 que par la peine habituelle en cas de grève illégale? Par les commentaires que vous avez faits, devons-nous comprendre qu'une telle grève illégale ne serait pas visée?

(Mme McLellan: Yes, that is what I am telling you. You are quite right...)

(anglais suit)

(Following French)

Ms McLellan: Yes, that is what I am telling you. You are quite right to identify the fact that there might be an illegal strike. In fact, we are all aware of illegal strikes where people take to the streets and where there may even be some property damage. That is not what is dealt with under the definition of terrorist activity. We have certainly tried to ensure that that kind of activity, even though illegal, would not be dealt with. It is not a terrorist activity. It is not something that utilizes terror or is done for the purpose of terror. However, I do know that there has been some considerable discussion around this subject.

Has professor Monahan appeared before your committee?

Senator Murray: No, not on this bill.

Ms McLellan: He appeared before the House committee. For example, he suggested that one could improve this definition by removing the word "lawful", thereby clarifying our intention that the example that you have just provided would not be caught by this legislation.

If you were to make a suggestion along that line, or perhaps some other suggestions for clarification, then I would be very interested in them. In reflecting on this, while we believe the intent is clear, if we could provide greater comfort to those who might be concerned as to whether they would be unwittingly swept up in this, there may be things we can do. Perhaps it could be something as simple as removing the word "lawful" in front of "advocacy, protest, dissent, or stoppage of work". The point you raise is important.

(French follows--Sen. Bacon: La confection de la liste des terroristes...)

(après anglais)

Le sénateur Bacon: La confection de la liste des terroristes est une autre des craintes soulevées. Je comprends que cela relève du solliciteur général et non pas du ministre de la Justice, mais j'ai lu, dans le rapport 1999-2000 du Comité de surveillance des activités du SCRS, que des individus se sont vus refuser le statut de réfugié parce qu'ils ont été qualifiés de terroristes. Après enquête par le comité de surveillance, on a conclu qu'il n'en était rien. Ce n'était pas des terroristes.

Il est intéressant de constater l'ouverture d'esprit que vous avez manifestée concernant le certificat d'interdiction de divulgation. Cela me semble particulièrement important pour une personne qui aurait besoin d'avoir accès à des informations pour se défendre d'avoir été inscrite sur la liste des terroristes. Ce mécanisme de revue serait-il disponible seulement pour le certificat qui interdit la divulgation d'informations qui relèvent de la protection de la vie privée?

Une personne peut-elle être qualifiée de terroriste et ne pas avoir accès à l'information qui le qualifie de terroriste?

(Ms. McLellan : You are talking about that list which...)

(anglais suit)

(Following French)

Ms McLellan: You are talking about that list which designates organizations as being terrorist. Organizations or individuals can be listed. They can only be listed after a process that involves direct political accountability on the part of the Solicitor General and on the part of the Governor in Council. Those lists are also made public. There is an opportunity, obviously, for one to make application to be removed from that list.

(take 1710 follows Ms McLellan continuing: There is the opportunity for review and...)

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(Ms McLellan continuing)

There is the opportunity for review, and there are obligations on the Solicitor General when one seeks a review of one's listing through that designation.

As I take your question, you are then relating that and the information on which the Solicitor General would operate to my ability to issue a certificate under a certain clause. Mr. Mosley thinks that you are probably referring to 83.5 (6)(b) on page 18, where the Solicitor General would "provide the applicant with a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person:"

Mr. Mosley tells me that it has been part of the law since 1992.

Senator Bacon: What if the wrong person gets on the list? How does he get off? Perhaps, he does not know the reason. The reasons are not given.

Ms McLellan: There is a process by which this person or organization can contest the listing.

Senator Bacon: A warrant could be issued saying that this person is a terrorist, without telling the supposed terrorist the reasons why he is considered a terrorist.

Ms McLellan: Mr. Mosley will explain further the workings of this clause.

Mr. Richard G. Mosley, Assistant Deputy Minister, Criminal Law Policy and Community Justice, Department of Justice: Certainly the procedure as contemplated in Bill C-36 does allow for the placement on the list of a particular entity, be it a group or an individual, to be questioned initially through the Solicitor General or subsequently through a judicial review.

I believe that the object of your question is the information that is made available to that person. That information could be limited and provided by way of a summary. That is similar to the procedure that has been used in the immigration context in relation to what is called the 40.1 procedure in which a person is deemed to be inadmissible to Canada by reason of being engaged in terrorism. That has been in our law since about 1992 and was upheld by the Supreme Court of Canada as a reasonable approach to dealing with very sensitive information, providing a summary is given to the person who is attempting to challenge or contest the executive's decision. That essentially is the procedure that is incorporated into the listing mechanism in this bill.

Senator Bacon: You refer to the certificate issued by the Solicitor General; is that correct?

Mr. Mosley: The Solicitor General would make a recommendation on the basis of reasonable grounds to believe that the entity is engaged in terrorism or supporting terrorism. That then goes to the Governor in Council who must make a determination as to whether or not the person or entity is engaged in these activities. That can be challenged directly to the Solicitor General by noting that a mistake has been made and the entity should be taken off the list. If the entity is not satisfied with that decision, the entity can then go to the federal court for a review.

The issue that you have identified goes to the question of the information that is made available to them. That is, under the bill, as in the immigration context, controlled to the extent that the court will look at it and make a decision as to what should be made available to the applicant in order to avoid injuring national security by way of a summary.

They can lead whatever evidence they wish. Any evidence that they may wish to bring before the court, they may advance. There are no restrictions on that.

Senator Beaudoin: I am glad to hear that, as you said the other day, this is not a piece of emergency legislation. There is no declaration of emergency, and there is no use of the notwithstanding clause. I am very glad to see all that.

My only concerns are on clause 103, clause 104 and clause 273.65. My guess is that the rule of law is implied there. The basic principle of our democracy is the Charter of Rights and the rule of law. In my opinion, the access to the court is included in the rule of law. It is part of the rule of law.

I do not object to increasing the power of the Attorney General, on the contrary. I do not object to increasing the power of the Minister of National Defence because, after all, there is a question of security involved here.

The use of the certificates, perhaps it is just a question of drafting, seems to block the way of access to the courts. If this is so, it means that an ordinary citizen is precluded from having access to the court.

Again, I do not object to giving more powers to the executive. It is necessary in cases such as that. I agree. However, if it has the effect of precluding the access to the federal court, this is going very far. That is my problem.

Ms McLellan: Senator Beaudoin, you started with a reference to clause 273.65, which deals with the security establishment. Last time I was here, we had a discussion around that clause. Clause 273.65 deals with the obtaining of foreign intelligence and the basis on which the minister would exercise his discretion. Keep in mind that that relates to a foreign target, and any interception of private communications involving a Canadian would require judicial oversight, seeking a warrant.

Senator Beaudoin: If it is on the international scene, or a foreign target, there is no access to the court. Is that correct?

Ms McLellan: If your target is a foreign entity or individual, the minister, under clause 273.65 may authorize the interception of private communications. However, the target is foreign. If the target is a Canadian, then you must apply and get a warrant, as you do at present. Is that correct, Mr. Mosley.

Mr. Mosley: That is correct.

Senator Beaudoin: That is true even for the international scene? It is related also.

Senator Lynch-Staunton: If a Canadian is living abroad, does he still get that protection?

Mr. Mosley: No.

Senator Lynch-Staunton: It is only for those resident in Canada?

Mr. Mosley: the Charter protects anyone resident in Canada.

Senator Beaudoin: If it is internal, the access to the court is respected, as it should be, of course, because it is part of the rule of law. When it is at the international level, there is no such protection if a certificate is issued. Is that the case?

Mr. Mosley: It is not the certificate that would provide for that; it is the minister's authorization under clause 273.65.

Senator Beaudoin: Is the access to the court blocked?

(Take 1720 Follows - Mr. Mosley: It is not blocked...)

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Mr. Mosley: It is not blocked, but the minister's authorization is a substitute for the judicial authorization that would be the norm if the interception were to be taking place in Canada.

Senator Beaudoin: Why is there a difference between internal and external? The principle of law is the same.

Mr. Mosley: It is not necessarily the same, if I may, with respect. It was recognized by the late Chief Justice Dickson in *Hunter v. Southam* back in 1984 that the standard of judicial authorization for the interception of communications may not always be required. That is the practice that has been followed in Canada since the Communications Security Establishment began operations in 1946 and is practised in the four other countries that are similarly products of the Anglo-American common law tradition: The U.K., the United States, Australia and New Zealand. They do not require judicial warrants for international interceptions.

The question is, where there is a Canadian connection, i.e, the target is foreign but the call has been received in Canada or is coming from Canada, does that require a judicial authorization?

In our view, quite clearly it does not. That is not necessary to meet the standard under section 8 of the Charter of protection against unreasonable search and seizure in these very limited circumstances.

Senator Beaudoin: This is at the external level.

Mr. Mosley: Yes.

Ms McLellan: That is right.

Senator Beaudoin: Perhaps it is a question of drafting. It is not too clear-cut. That is my concern. The rule of law is on both sides.

Senator Finestone: Minister, you have a big task. You have good-sized shoulders. I am sure you will come out doing well. However, we do have questions. I am not allowed to ask you questions about 72 hours retention and how you can do that with refugees, as I think it is very unrealistic. However, I will ask you about the amendments to the Access to Information Act and the Privacy Act, as well as the Personal Information Protection and Electronics Act.

All three have exactly the same wording on the prohibition. I am concerned about the implication of the statutory instruments. If you will not *Gazette* it, nobody will know what you are thinking anyway, and one does not know what one does not know. That was one point.

Second, I believe that we must start resisting the growing pressure to permit increased invasion of our privacy and measures that would erode our fundamental rights and freedoms. I do not think that that is a soft, Pollyanna view. There are very many areas of our privacy life that are being invaded daily, which have absolutely nothing to do with the issue of terrorism. It is important that we make that clarification. To what degree is it proportional? To what degree have we the right to suspend the question of access to information and the question of my privacy rights, your privacy rights, and Canadians' privacy rights under these circumstances?

I agree with you that collective security and personal privacy are important. I am not talking about the secrecy of informational documents, but the entire question of my right to privacy. Where do you draw the line? I suggest that you review that area and take a look at what was said by the two commissioners who appeared here. I will not quote them. They were quite articulate and outspoken themselves.

I do believe it is subject for a serious review. You would not want to have entrapment against the entire question of proportionality.

Ms McLellan: Senator Finestone, is your question directed specifically to the power given in this legislation to the Attorney General to issue a certificate, thereby preventing the disclosure of information under the access or privacy legislation, or is it a more general concern in terms of the review of privacy legislation?

Senator Finestone: You know that I would love review of privacy legislation. I thought you might ask me that.

Ms McLellan: It is a specific issue.

Senator Finestone: In the United Kingdom and the United States, the certificates are revocable. In Canada, it would seem the certificates are practically non-revocable. That creates an impression that you are going beyond the fray.

Ms McLellan: You raise an important point and one raised by Mr. Reid and Mr. Radwanski, which is why I said in my prepared comments to the committee that I would be very open to looking at the prospect of some form of review mechanism.

We have reviewed the laws of every other major jurisdiction to which we wish to compare ourselves. Although there are interesting -- dare I say almost unusual -- mechanisms in some countries, I do think it is fair to say that every country has some form of review mechanism as it relates to the Attorney General or an equivalent officer making or issuing this certificate.

In some cases, the review cannot override ultimately the decision of the Attorney General; it is simply for advice and recommendation.

I would say in response that I would be interested in your approach to this. My comments, I hope, flag for you the fact that we should look at some kind of review mechanism of the issuing of the certificate by the Attorney General.

Senator Finestone: I would agree with that. Senator Bacon has given you several options, first and foremost being the question of using SIRC to carry out that particular responsibility. Senator Kinsella has discussed the oversight by parliamentary committee. No one has dictated an answer to you. We have given you options.

Ms McLellan: One option that we could look at as well is judicial review by the federal court.

Senator Finestone: That would be wonderful.

Senator Andreychuk: Thank you, minister, particularly for the comments about privacy and access. I will not touch upon those subjects. It is reassuring that you are willing to look at advice and recommendations.

I would like to touch upon two areas rather quickly. One is this list. If one comes from an immigrant base in Canada, once one is on a list of the RCMP or CSIS, it is very difficult to clear one's name and to reinstitute oneself into society. I would say that would be true of all Canadians.

Would it not be preferable that there be some sort of SIRC-like review mechanism on the minister, on SIRC and on the RCMP when these lists are being compiled? SIRC has done a very valuable job of not disclosing to the public the contents, but reviewing the inner workings and to come out with reports that indicate clearly that some people should not have been on those lists. It is a salutary effect on the machinery. Would there not be some need to have that? I leave that for you to comment.

My second point is, while the Minister of Immigration is not here and you cannot speak for immigration, you are in charge of the administration of justice. I am concerned that it will fall into disrepute that if we have a very strong terrorist activity definition in the bill. We are being asked this week to pass Bill C-11, which leads to the bureaucratic machinery to recommend to the Minister of Immigration a definition of terrorism that can be gazetted in regulations but then could possibly be amended without further reference to gazetting.

(Take 1730 follows: Sen. Andreychuk continuing: It makes the administration of justice...)

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(1730 – Sen. Andreychuk continuing)

It makes the administration of justice fall into disrepute if we have a terrorism definition that is different "at port" for refugees and immigrants, from the one for the rest of us -- permanent nationals, permanent residents and Canadians.

If the terrorism we are trying to unearth is the one that we want to stop at our borders, surely Bill C-11 should have some links to Bill C-36. Otherwise, people will quickly be uncertain, worried and questioning of our system. Surely those two must be tied together in a meaningful way, and it should be through the Minister of Justice, where I believe would be the right way.

Ms McLellan: We have had discussions with officials in the Department of Immigration. My officials have had discussions with the minister's officials in relation to this point. The most I can say this evening is that this is also a matter, along with Senator Kelleher's concerns, that I will take up with the Minister of Immigration. I certainly understand and appreciate the point you have made and the concern that has been voiced.

Senator Andreychuk: Is the list a SIRC-type review?

Ms McLellan: I am less convinced that that is the right mechanism. The prospect exists for a review by the federal court.

Senator Andreychuk: That would happen after the reputation is gone.

Ms McLellan: Not only can a person exercise that right, but in the legislation, there is a review every two years on an ongoing basis by the Solicitor General.

I believe that the process here is one that speaks to a high degree of political accountability. These are serious issues and I take your point. No one would ever be placed on a list lightly. In fact, if you look at the legislation, it speaks to the fact that the Solicitor General be satisfied that there are reasonable grounds to believe certain things.

No one would list an organization or an individual lightly. However, there are mechanisms of review set out in the legislation; there is the ultimate political accountability of any Solicitor General who would recommend to the Governor in Council; and there is the ultimate political accountability of the Governor in Council, if one were to put someone on that list and it became apparent that there were no reasonable grounds to be satisfied.

In some of these areas, that is the ultimate for me. Political accountability is key, is important and it provides restraint on the exercise of decision-making, as it should.

Having said that, I understand the concern.

Senator Fraser: One very quick observation and one quick question. I note that the review every two years will be conducted on the basis of information provided by the same people who put the person on the list to begin in the first place. It might be worth considering an outside review of that in the quality of that information.

My question has to do with a different certificate from the human rights and access to information certificates. This is the certificate mentioned on page 87 of my version of the bill. Clause 38.13 (1) states:

The Attorney General of Canada may at any time personally issue a certificate that prohibits the disclosure of information in connection with a proceeding.

Does that trump the accused's right to have a summary of the evidence being brought against him or her? Does the person on the list have the right to a summary of the information?

Ms McLellan: My advisers are telling me that information.

Senator Fraser: It deals with a proceeding.

Ms McLellan: I am looking at --

Senator Fraser: That is part of the Official Secrets Act amendments.

Ms McLellan: My advisers tell me that the court could review that. Is that correct, Mr. Mosley?

Mr. Mosley: The court could make any order that it deemed necessary to ensure fairness, which could include staying the proceedings against the accused.

Senator Fraser: A court could do this of its own accord. It would not require appeals and long, drawn-out procedures that would keep the accused detained. The judge could do that immediately. Defence counsel could stand up and request an order.

Ms McLellan: Mr. Piragoff suggests that we look at clause 38.14 in respect of protection of right to a fair trial, which states:

The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, --

Senator Fraser: Clause 38.14 continues:

-- as long as that order complies with the terms of any order ... any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.

Mr. Donald Piragoff, Assistant Senior General Counsel, Criminal Law Policy Section, Department of Justice: That means the information is not made available to the court, and the court then makes any order consistent with not having that information. It basically means the judge could say: "If the information is not made available to this accused and if in my opinion the accused could not get a fair trial, then I will dismiss the proceedings." If the situation is such that the accused is asserting the existence of fact X; the accused wants documents to prove fact X; the Attorney General says that he or she cannot give those documents because they are too highly sensitive; and the Attorney General issues a certificate, then the judge could say, "Well, the accused says fact X exists, the Attorney General cannot provide the documents, thus, for the purposes of this trial we will just assume that fact X exists. We will not prove it. We will just assume it and we will proceed to the next evidentiary point in the trial."

Thus, the accused gets the benefit. It comes down to the judge controlling his or her own proceedings. It is his or her courtroom and it is his or her trial. If the judge does not make a decision that the other side considers to be fair under the charter then, of course, that can be appealed. The judge's decision to not make an order can be appealed to a court of appeal, if that judge did not make an order to protect the accused.

Senator Fraser: I hope that section of the proceedings receives wide readership. Thank you.

Senator Kinsella: Minister, in my reflection on the subject matter of the bill, it seems to me that, whilst the case is being made, there is no derogation from the Charter rights. There seems to be an acceptance, or at least there is a little bit of an encroachment, therefore, special measures are designed. This is not emergency legislation. When we look at emergency legislation, we see a number of mechanisms to safeguard and limit the time, et cetera. It seems to me *mutatis mutandis* that this kind of legislation, which is unusual, requires all the more reason to ensure that whatever safeguard we can design in this new world, we should bring all our creativity to it. We should think outside the box.

The term "review" is used. I heard the term used quite often in our hearings. In the bill, there is one kind of review provided for -- the review after three years of the operation of the act. The term "review, " which is quite equivocal as we have heard it used here, is sometimes employed by people in discussion before us, in the sense of oversight or the monitoring of the exercise of powers under this bill.

(1740 -- Sen. Kinsella continuing: I am somewhat interested...)

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(Take 1740 Begins -- continuing with Senator Kinsella)

I am somewhat interested in whether we would have the creativity to come up with the kind of oversight mechanism or monitoring mechanism, that kind of review, either conducted by a panel of retired or sitting judges, or by a parliamentary commission, as an extra safeguard in the exercise of these unusual powers from day one. I wonder whether, as an idea, your officials have thrown around this model or different models of oversight of which this committee has been seized?

Ms McLellan: If you look, in relation to the exercise of powers by CSIS, the RCMP, for example, there are oversight bodies now. You have mentioned SIRC. SIRC will take up any enhanced obligations as a body of oversight as it relates to CSIS in this more concerted effort to root out and prevent terrorist activities.

I suppose, as well, one has a public complaints commission that deals with the RCMP. It is not oversight in the same way obviously. There you have a mechanism that permits individuals who feel that the RCMP has abused their power to make complaint to the public complaints commission and they will review the nature of that complaint and reach a conclusion. That conclusion is obviously made public.

I am not inclined to support some new oversight body. I believe there are oversight mechanisms now in existence that respond to our investigative agencies. There is the ultimate oversight in most cases, which is the court, and I honestly believe that in many situations there is no better or more effective oversight than when it is reviewed by a federal court in certain circumstances, or whether it is the ultimate review, as Senator Beaudoin has so eloquently commented, of the Supreme Court of Canada in terms of whether the balance that we believe we have struck here is the right one. There is much oversight available in terms of the operation of this legislation.

I have commented on the fact that I would be open to your recommendations involving increased oversight around the issuance of any certificate by myself. I would be disinclined to create new mechanisms as opposed to making sure that the mechanisms we have are functional and doing their job.

Senator Kinsella: As you said earlier this afternoon, you would see that there is nothing stopping Parliament, either House, from commencing an inquiry, if one were to blend those two, a special committee of Parliament of either House.

Ms McLellan: That you could do within clause 145(1). It is within three years after the bill receives Royal Assent that a comprehensive review of the provisions shall be undertaken.

If you are anticipating an ongoing review, then I go back to my point that we have ongoing oversight mechanisms that have proved effective, be that SIRC, be that the courts. Therefore, I would be disinclined to think about the creation of a new oversight mechanism that is separate and apart from those that exist -- the courts, plus the Parliament of Canada.

I take your point, Senator Kelleher, and I apologize for that, but I believe in most cases, when a minister is asked to come, we come, and we answer your questions as honestly, openly and fulsomely as we can.

The Chairman: I wish to thank the minister. She has been at the beginning, and now at the end, extremely generous with her time. I know that she cannot stay. However, her officials have agreed to stay to answer further questions.

Minister McLellan, thank you very much, and we will certainly ensure that you receive a copy of our report.

Ms McLellan: Let me thank all senators. I know you have worked very hard under short time constraints. This is important work. We all want to get the balance right. We all want to ensure that we are doing that which is right for Canadians and for the world in terms of fighting terrorism. I wish to thank you again for taking up this challenge so seriously. Also, you will not get rid of me so easily. I will be back when the legislation comes to the Senate after passage in the House.

The Chairman: Honourable senators, if it is your wish, our trusted officials will stay for a period of time to deal with other questions. I do have three here from those members who have been loyal attendees of this committee who are not

members of the committee. I mention Senator Prud'homme, Senator Joyal and Senator Wilson.

(French follows -- Senator Prud'homme: Très brièvement, j'aimerais demander...)

NR/29-10-01

(après anglais)

Le sénateur Prud'homme: Très brièvement, j'aimerais demander aux hauts fonctionnaires de m'expliquer, comme ils l'expliqueraient à la population canadienne, en terme simples, ce que veut dire exactement la définition de terrorisme à l'article 83.01(1)(b)(i), lorsqu'on dit:

(Sen. Prud'homme: (quotation)an act or omission ...)

(anglais suit)

(Following French -- Senator Prud'homme continuing)

An act or omission in or outside Canada that is committed.

(French follows -- Senator Prud'homme continuing: Expliquez-moi en termes simples...)

(après anglais)(Sén. Prud'homme)

Expliquez-moi en termes simples que veut dire le mot:

(Sen. Prud'homme: (quotation) in whole or in part for a political...)

(anglais suit)

(Following French -- Senator Prud'homme continuing)

In whole or in part for a political, religious, or ideological purpose, objective or cause.

(French follows -- Senator Prud'homme continuing: Que veut dire exactement cette...)

(après anglais)(Sén. Prud'homme)

Que veut dire exactement cette définition? Cela rejoint combien de gens? Jusqu'où on se rend avec cela? Nous sommes deux témoins vivants, autour de la table, de la Loi des mesures de guerre. Après agonie, je voulais voter contre, mais après des explications succinctes et très claires, m'avait-on dit, j'ai fini par faire mon devoir de parlementaire et j'ai voté pour cette loi. J'ai réalisé plus tard que ce qu'on m'avait dit pour que je vote en faveur de cette loi était assez éloigné de la vérité.

Ma deuxième question concerne la fameuse liste. Vous savez que nous avons récemment, avec honneur, nommé le deuxième citoyen canadien honoraire. Cela n'existait pas. C'est M. Mandela. Il y a quelques années, l'organisation de M. Mandela aurait été certainement sur la liste, et j'imagine même très haut sur la liste. C'est ce qui me fatigue, parce que je pense à d'autres causes. Je suis agacé par la définition. Quelle est la nuance à apporter entre les mouvements de libération légitimes, et cela existe, et des mouvements purement terroristes?

Je vous dis qu'il faut être très brillant pour faire la nuance entre cela et je vais vous écouter très attentivement.

(Mr. Mosley: The words "in whole or in part"... IN TAKE 1750) (anglais suit)

(Take 1750 Follows French -- next speaker Mr. Mosley: The words "in whole or in part"...)

38373/Bill C-36/October 29, 2001/DM

Mr. Mosley: The words "in whole or in part" are simply there in English and in the French version to convey the sense that the motivation may be mixed. It may not be entirely political. It may not entirely be religious or ideological.

It is important, in our view, to have a clause distinguishing the motivation of persons who engage in terrorism from those who engage in criminal activity purely for material gain. This conclusion was also reached in the U.K., and we freely acknowledge that we have drawn heavily on the United Kingdom model. They studied this issue at some length. They had the time, because they were in the process of reconsidering what had been temporary measures initially adopted in the U.K. and maintained over 20 years relating to terrorism. They appointed a royal commission that looked at the issue and made recommendations to the government under Lord Lloyd. His report was that it is not at all clear that modern terrorism, particularly that outside the scope of what they had been accustomed to dealing with in the United Kingdom and Northern Ireland, was motivated strictly for political reasons, ergo the references to religious and ideological purpose, objective or cause.

Clearly the entire clause is intended, as have I noted already, to distinguish this from other forms of criminal activity. The act or omission must be committed for this purpose or to achieve this objective or to further the cause within the context of those terms.

Mr. Piragoff: To answer the second half of the question about groups that might be involved in a war of national liberation, for example, the bill explicitly provides an exclusion for armed conflict that is in accordance with customary international law or conventional international law. At the end of the definition, it says, "but for greater certainty, does not include an act or omission as committed during an armed conflict and that is in accordance with customary international law or conventional international law." Clearly the charter of the United Nations recognizes that people have the right to struggle for independence and that that might at times involve armed conflict. Where that occurs and where that is in accordance with international law, and when that is recognized by international law, then it is not a terrorist activity. This bill protects the rights of people to engage in armed conflict for purposes that are recognized under international law.

Mr. Stanley Cohen, Senior General Counsel, Human Rights Law Section, Department of Justice: Honourable senators, the words on the religious, political

or ideological purpose are actually words of limitation. They are not meant to criminalize or single out people on the basis of their religion, their political beliefs or their ideologies; rather, they must be read against the rest of the clause in terms of the intention to intimidate the public or a segment of the public. Also, they must be read against the consequences that are supposed to be intended: causing death or serious bodily injury, endangering a life, causing a serious risk to the health or safety of the public. Those words should not be viewed as singling out any individual or group on the basis of their beliefs.

There have been questions put in the course of hearings in the other place with respect to this placing perhaps an extra duty upon the prosecution. In a sense, it can be regarded as a protection for people who might be accused under this legislation in that they would need to show this religious, political or ideological purpose and the other intentional aspects that are involved here. That is about as far as I go with that.

Senator Joyal: My question is in relation to the right balance that must be maintained in the provision of the bill, especially in relation to the power that is given to the Minister of National Defence to authorize wiretapping in relation to Canadians and outside calls. The definition at page 119, clause 273.61, says that “foreign intelligence” means:

information or intelligence about the capabilities, intentions or activities of a foreign individual, state, organization or terrorist group, as they relate to international affairs ...

In other words, international affairs is everything. It could not be broader than that.

... defence or security.

In other words, there is no doubt that the opening is there for international affairs. It seems to me that it is a very broad perspective. It is not related in any way to terrorist activity as such. It is essentially if I personally call anyone abroad and talk about international affairs, I am susceptible to having the Minister of National Defence issue an authorization.

That being said, I am concerned that the mechanism of protecting Canadians under this heading is given to the Commissioner of the Communications Security Establishment as mentioned in clause 273.65(8), and the Commissioner reports annually to the minister. In other words, the monitor of the use of that exceptional power that is as wide as one can imagine is the minister himself. He is monitoring

himself, according to what the Commissioner of the Communications Security Establishment might give him as a report. There are supposed to be two conditions before issuing that authorization as provided in clause 273.65(2).

Since we want a balance there, and since the minister has repeated it many times in her presentation, both in the opening and in the conclusion, would there not be a better way of maintaining the capacity without stretching it to its extreme limit? Would it not be better for the Commissioner to report to the Solicitor General or to the Prime Minister so that if the Minister of National Defence is, as one says commonly, pushing the pedal too close to the floor, or pushing the cork too deep in the bottle, that at least there is a mechanism to maintain the balance? That clause seems to be rather too broad and lacking the kind of oversight mechanism that would be needed to maintain the balance.

I am not saying that the Commissioner should not be there. The Commissioner is a good agent, but give him the mandate to report to someone else other than the minister himself.

(1800 follows, **Mr. Mosley:** Madam Chair, with all due respect)

LP/October 29, 2001

Mr. Mosley: Madam Chair, with all due respect, the honourable senator's question touches on matters of policy and machinery of government that I do not believe officials are well-suited to answer. One thing I can say with regard to this concern is that proposed subsection 273.63(3), dealing with the annual report, says:

The Commissioner shall, within 90 days, after the end of each fiscal year, submit an Annual Report to the Minister on the Commissioner's activities and findings, and the Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the Minister receives the report.

That does address, to some extent, the concern the honourable senator raised.

Another important provision, found immediately above that in proposed subsection 273.63(2)(c), requires the commissioner to inform the minister and the Attorney General of Canada of any activity of the establishment that the commissioner believes may not be in compliance with the law.

Senator Joyal: How should this paragraph be read in conjunction with paragraph (8)? When the commissioner reports to Parliament, we know that the

report contains no sensitive information, which is part of the decision parliamentarians take on the oversight mechanism. However, when the commissioner reports to the Prime Minister, the content of the report could be much broader. When there is report on the use that the Minister of National Defence makes of his or her extraordinary power in regard to that, there must be a balance between the two. That is a very important a decision. It involves the right of privacy of Canadians. That is fundamental in terms of the protection we must give to Canadians. They must know that there is somewhere someone who is concerned about the balanced use of those extraordinary powers, taking into account that the scope of the foreign intelligence is so broad.

I understand that you cannot answer because these are matters of policy. I just wish to bring that to your attention. It is a very important element with regard to the kinds of protections that should be given to individual Canadians at the same time as maintaining an intelligence capacity involving communications outside Canada.

Mr. Mosley: I would simply note that the requirement to review and report under proposed section 273.65(8) must be read in conjunction with that annual report requirement in 273.63(3). Thus, the review by the commissioner of the exercise by CSE of the authorization granted by the minister must form, albeit in very carefully chosen terms, part of the commissioner's annual report which must be tabled in both Houses of Parliament.

Senator Wilson: I support those who believe that the definition of terrorism is far too broad. That should be revisited. Every act of civil disobedience has an element of unlawfulness about it. Those acts may be very illegal, but they may not be terrorist. That is not clear in the bill.

Support for wars of liberation was brought up. There are currently 35 conflicts in the world and most of them are wars of liberation. Who defines that? When I was talking to the former primate of the Anglican Church of Canada about this, he said he would love to see the RCMP file on him because he was very active in interventions in South Africa during the apartheid regime. What are wars of liberation? Is the Sri Lankan conflict a war of liberation, or the Sudan conflict? Hardly any of those conflicts conform to international law. They are all outside international law, but we must deal with them. That entire definition is far too broad and not particularized enough.

Second, the matter of names on the list worries me a great deal. The minister assured us that no one is put on the list lightly. That is her assurance. However, the bill does not say that. I am not confident in that.

My understanding is that CSIS will take the names to the cabinet. I am not sure that there is any oversight there. How do we get at it, other than a court case that most people cannot afford?

My major objection is that it seems to be that the onus is on the individual to prove innocence. I thought the bill was meant to protect Canadians rather than putting them under suspicious.

That should be looked at far more seriously than it has been to date.

Mr. Piragoff: The minister indicated that she has undertaken a review of the definition, specifically with respect to whether it could be interpreted too broadly. She indicated that the intent was not to have a broad definition or to include within the ambit of the definition protest activity that we would consider to be legitimate but which might cross the line and involve criminal conduct. She said that that would not automatically be terrorist activity. Many protests do cross the line and involve minor property damage or even some minor assaults.

The minister indicated that one option she is looking at is the deletion of the adjective "lawful" before the phrase "advocacy, protest, dissent or stoppage of work", so that one would not distinguish between whether the advocacy, protest, dissent or stoppage of work was lawful or unlawful. What counts is whether that activity goes beyond legitimate protest that might involve some criminal activity, such as breaking windows, to the level of terrorist activity. That is the intent of the minister and the government. The minister indicated that we would review the language to ensure that that intent is clear.

I believe that the minister and the honourable senator share the same intent. It is a question of the language, which may need to be tightened up. The drafters will have to look at that again.

Senator Wilson: I did hear the minister's statement. I am just adding my voice in support of a more stringent review of the language.

(Take 1810 follows -- Mr. Piragoff: On the question with respect to international...)

Mr. Piragoff: On the question with respect to international law, at times international law may not be clear. If international law is not clear, the Parliament of Canada unfortunately cannot make international law clear because international law is developed by the community of nations and Canada is only one part of that community of nations. We can only try to influence other nations to change that international law.

Part of international law, especially customary international law, is also based on the customary practice of states or the position that many states may take with respect to a particular issue. With respect to the apartheid issue, an overwhelming number of states had a particular position with respect to the conduct in the former South Africa. In fact, not only did they have a position, but a convention was adopted contrary to apartheid. The conflict in that country had a particular international status.

Mr. Mosley: I would address the honourable senator's last point about whether the existing process requires a reverse onus on the part of an applicant to get off the list. The language in clause 83.05 is quite clear that there is no reverse onus as we understand that term in the law. The person does not have to prove anything.

To get off the list, all they need to do initially is to ask the Solicitor General in writing. Write him a letter: "My name is on the list, would you reconsider whether I should be on there?" They may set out the reasons why they think they do not belong on the list, but there is no obligation on them to prove anything.

If they are not happy with his or her decision, they can then apply to the federal court. Again, they do not have to prove anything. All they need to do is say, "I am on this list. The Solicitor General has declined to recommend that I should be taken off the list. Will you review this?"

The obligation is then on the court to conduct an expedited review and to determine whether or not it was reasonable for the person or the entity, the organization as named, to be on the list. The applicant need never prove anything but need only question whether it was reasonable that they are on there.

Senator Wilson: By then the public reputation of the entity has been put in question. I do not understand that. What is the possibility of a review of the judicial decision? What does the person do if the court says, "Yes, you are on it"?

Mr. Mosley: If there is a material change in circumstance, they can apply for a further review by the Solicitor General and the court.

Senator Wilson: There is no possibility of a parliamentary review or someone calling them to account?

Mr. Mosley: Not in this, no.

Senator Wilson: That is my problem with it.

Senator Jaffer: Perhaps I am confused. If someone is on the list, would one consider them to be a threat to our security?

Mr. Mosley: If they are on the list, the cabinet, the Governor in Council of Canada, has determined that there are reasonable grounds to believe that this person has carried out, attempted to carry out, participated in or facilitated a terrorist activity or is acting on behalf of, at the direction of or in association with an entity referred to in the paragraph 8. That is an inescapable conclusion.

Senator Jaffer: Please consider something that is bothering me then and it is not with this bill. I understand that. Rather, it is with the Immigration Act. A landed immigrant can be blocked by any of three implications -- war crime, substantial crime, or threat to security – and that person is out with no appeal.

I have a great problem with that. I accept that there is a review. My colleagues who are familiar with immigration may tell me I am wrong. I have really been struggling with that this weekend. I want you to consider this because if they have no appeal and they are out, then who will review the list that names that landed immigrant? I would like you to look at that.

Senator Andreychuk spoke about something of great concern to me and that is the definition of terrorism. I will not ask for anything else except to re-emphasize that.

Finally, do you know if there is racial profiling going on at this time in our country?

Mr. Mosley: I do not know whether there is racial profiling here. I believe the question was put to the Commissioner of the RCMP who indicated that it is not carried out by his force. I do not recall if the question was put directly to Mr. Elcock in relation to CSIS. I do not know what answer he may have given to that question.

I can tell you that there has been considerable discussion about this point, more so perhaps in the literature surrounding the U.S. legislation than with respect to this

bill. The issue has come up repeatedly in that context in Washington, as to whether those bills contributed to the use of racial profiling.

Senator Fraser: List of terrorists -- headline -- question: Would it not be more appropriate at the very outset of the passage dealing with the list of terrorists, where we talk about facilitating, to require that at least in the case of individuals -- organizations being a separate matter and I understand -- that they must knowingly have facilitated a terrorist activity?

Mr. Piragoff: The offence of facilitating requires "knowingly."

Senator Fraser: This is not the offence, though. This is the list of terrorists, if I may.

Mr. Mosley: We will take that point away with us and discuss it with the minister.

Senator Finestone: In the presentation from the charitable organizations, there is a concern about intention or knowledge. It is possible there is neither on the part of the contributor or on the part of the institution. I would ask you to look at the last paragraph at page 3 of the presentation of Patrick Johnson. It would be helpful if we looked at charities, charity costs and charity councils. They are very concerned.

Mr. Mosley: We will look at that.

The Chairman: Thank you, witnesses, for your help.

The committee adjourned.