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DV/December 6, 2001 – Anti-Terrorism - 38485

THE SPECIAL SENATE COMMITTEE ON BILL C-36

EVIDENCE

OTTAWA, Thursday, December 6, 2001

The Special Senate Committee on 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, met this day at 2:00 p.m. to give consideration to the bill.

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

The Chairman: Honourable senators, we are beginning our first witnesses this afternoon on Bill C-36 at this our Special Senate Committee, which was set up for the purpose of studying this bill. We sent an advance report to the government and the House of Commons several weeks ago. Some of our recommendations were reflected in the amendments that were put into the bill that we now have before us, some of them were not. We have been discussing those in particular this week.

This afternoon we are pleased to have a repeat performance from the Canadian Bar Association, which was good enough to be here with us during our pre-study. We have with us this afternoon, the president of the Canadian Bar Association, Mr. Rice and the first vice-president, Mr. Potter. Thank you for coming back. Mr. Rice, please proceed with your presentation, and senators will pose questions to you following that.

Mr. Eric Rice, Q.C. President, Canadian Bar Association: Honourable senators, it is a great pleasure to be here again, especially with the Christmas appointments around Parliament. It is nice to come from British Columbia and see that sign of cheer.

Mr. Potter and I welcome this opportunity to address you on Bill C-36.

(French follows - Mr. Rice continuing: De nombreux événements sont survenus…

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(après anglais)(M. Rice)

De nombreux événements sont survenus depuis ma dernière comparution devant votre comité, le 24 octobre 2001, et depuis celle de M^{e} Potter devant le comité de la Chambre des communes, le 31 octobre 2001. Plusieurs modifications ont été apportées au projet de loi. Nous sommes reconnaissants au gouvernement d'avoir pris ces mesures en vue de l'améliorer. Il est cependant impératif d'apporter des améliorations additionnelles dans diverses parties du projet de loi.

(Mr. Rice: When Bill C-36 was introduced...)

(anglais suit)

(Following French - Mr. Rice continuing:)

When Bill C-36 was introduced, the CBA assembled a team of experts to review this legislation. They included senior lawyers in a wide variety of disciplines including criminal justice, constitutional and human rights law, immigration law, charities, international and business law to name a few. The team consulted widely with other lawyers, over 200. The result is the bound submission before you. It was approved by our national board of directors, which includes representatives from all of our provincial and territorial branches across the country.

You should also have the letter we wrote to the Minister of Justice after she proposed amendments to the bill. It outlines our outstanding concerns.

Significantly our briefs reflect a wide range of views within our organization. There were differences in points of view, but no difference of opinion on the commitment to deal with the provisions of the bill and to help the government find the right balance between national security and the rule of law. Our briefs represent a consensus and considered view of lawyers from a spectrum of opinion on these issues. Our board of directors approved it unanimously.

Other witnesses have spoken about the potential successes of the bill. The legal community hopes that this bill will succeed so as to provide a more secure future for Canadians. It will mean accepting risks but, where we can minimize the risk to cherished values, we must. No one wants a regime where wrongful arrest or detention are unchecked, or where the right to remain silent, the right to privacy or freedom from discrimination is damaged beyond repair. The 20th century has left a legacy of many states where freedoms were removed temporarily at first and then lost permanently. It is not enough to say that it could not happen here; we must ensure that it will not happen.

In our brief, we have identified certain parts of the bill that need to be changed. I will highlight two: the need for a true sunset clause and those provisions that undermine the operation of the justice system.

On the subject of the sunset clause, we say that it must apply to more than just the investigative hearings and preventive arrests. Although these two provisions have received much public attention, many other portions of the bill are also extraordinary in nature. For instance, the government has the power to create a list

of alleged terrorist entities, which is subject to very few procedural protections. The bill criminalizes involvement or support of entities on the list and allows their property to be seized and forfeited.

Second, the Minister of National Defence has the power to authorize interception of foreign communications without requiring any judicial authorization. This bill creates a legislative hamstringing of judges by, among other things, mandatory, cumulative sentencing for terrorist offences, which are still defined quite broadly.

Third, the Attorney General has the power to block the operation of access to information and privacy legislation. These are only some examples of the provisions that we say should also be sunsetted.

(French follows - Mr. Rice continuing: Ce n'est pas que nous croyons...)

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(après anglais)(M. Rice)

Ce n'est pas que nous croyons que le terrorisme aura disparu d'ici trois ans. Le terrorisme existe depuis longtemps. En revanche, les pouvoirs extraordinaires proposés par le projet de loi sont totalement inédits et doivent le demeurer.

(Mr. Rice: These measures have been taken in response...)

(anglais suit)

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(Following French - Mr. Rice continuing)

These measures have been taken in response by the government to an apprehended emergency. In the name of urgency, Canadians are being asked to accept swift passage of the bill. We think Canadians may be willing to accept that, as long as they can be assured that these powers will end.

The government may well decide in three years that a continuance of these extraordinary powers is needed. The important thing is that the onus should then be upon the government again to establish the case to the satisfaction of Parliament. The powers must not simply linger. They should have to convince Canadians through the legislative process.

In three years we may decide that some of the provisions are not working. We may find out that some have not been used in the way they were intended. We may decide that they have out lived their usefulness. We may determine that they are too much of a burden on our citizens as compared to the benefit they have created. We may find that they have disproportionately impacted certain groups. A sunset clause addressing all the extraordinary powers will ensure that they will continue only if and how Canadians want them to continue.

We have said that the bill undermines the right to legal representation and a client's right to confidentiality. You have heard about this, this morning from another witness. We are now supported strongly on this point by that witness, the Federation of Law Societies. We are grateful for their support on this issue. It is a grave issue. It is a constitutional issue involving the basic right of people in Canada.

We can all I agree, I believe, that everyone subject to legal proceedings, whether under this or any other legislation, is entitled to representation before the law by a lawyer. The government should not put roadblocks in the way of this fundamental principle, which is protected by section 7 and 10 of our Charter of Rights and Freedoms.

Under proposed section 83.18 of the Criminal Code, it would be a criminal offence to participate in or contribute to a terrorist activity. This includes providing skills or expertise for the benefit of terrorist groups or receiving any benefits from terrorist groups. It is obvious that this law could apply to lawyers

who provide representation to people in proceedings under the bill. It is equally obvious that it should not, and a clear exception should be added.

(Take 1410 Follows - Mr. Rice continuing: Similarly, proposed section 83.08...)
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(1410 -- Mr. Rice continuing)

Similarly, proposed section 83.08 prohibits a person from dealing in property controlled by a terrorist group. This proposed section would seem to apply to lawyers' legitimate and necessary financial transactions with clients, including the payment of fees or the posting of bail. The federal government has exempted such transactions under the Proceeds of Crime (Money Laundering) Act. It should also be exempted here.

On the question of confidentiality, it is important to stress three things: First, the traditional protection of solicitor-client confidence is not for the benefit of lawyers, but it is for the benefit of the client. Second, this right to solicitor-client confidentiality does not provide a cloak for lawyers to commit offences; there is no loophole here. The lawyers are as liable as everyone else to criminal charges if they engage in money laundering, and they will not be lawyers very long if they do. Third, there is a growing amount of case law which suggests that solicitor-client confidentiality is protected under the Constitution. Honourable senators have already heard about the injunction recently granted in British Columbia that exempts lawyers from having to disclose confidential information under the Proceeds of Crime (Money Laundering) Act, pending trial of this issue.

(French follows -- Mr. Rice continuing: Le principe de la confidentialité...)

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(après anglais)(M. Rice)

Le principe de la confidentialité des communications entre l'avocat et son client est un des fondements de notre système de justice. S'ils sont certains que les renseignements donnés à leur avocat demeurent confidentiels, les clients pourront recevoir les conseils juridiques vraiment adaptés à leur situation.

(M. Rice: Various provisions of the bill…)

(anglais suit)

(Following French -- Mr. rice continuing)

Various provisions of the bill offend this important principle. Proposed section 83.1 of the Criminal Code requires disclosure of information concerning terrorist property and transactions involving terrorist property. Proposed section 273.65 of the National Defence Act authorizes the interception of foreign communications, including solicitor-client communications. Although proposed section 83.28 (8) protects disclosure of privileged information in an investigative hearing, privileged information is not the same thing as confidential information. These provisions should be clarified to specifically exempt solicitor-client confidential information.

I repeat that we are not saying that lawyers are above the law. On the contrary, lawyers who participate in terrorist activity must be subject to the same penalties as anyone else. What we are saying is that every person has a right to legal representation and has a right to confidentiality. Lawyers should not face the threat of criminal charges for choosing to protect their clients' confidences and their clients' rights.

Honourable senators, it has taken centuries to build the guarantees and freedoms that we sometimes take too much for granted. They are easy to defend in normal times, and they need defending during the difficult times. The Senate was right to call for a true sunset clause for Bill C-36. Please consider the amendments that we have suggested in our written briefs.

I would be pleased to answer any of your questions and so would Mr. Potter, who was our executive liaison to the team of experts that worked on and prepared our submission. Thank you.

Senator Lynch-Staunton: I read the brief that you presented to the House of Commons and the follow-up letter to the Minister of Justice. I believe we are as one on this. It reminds me of the last time the CBA made a major brief to the Senate, on the Pearson bill, which was also a unanimous presentation from your executive. I hope that this one will have the same impact as the previous one had.

In any event, there are some items that I would like to review with you, following what we have heard and read. I agree that the sunset clause should not apply to the entire bill. There are certain aspects that should be immune from it. In our recommendation, we also included the United Nations conventions. How would you word that? Can you give us some help in drafting such a sunset clause?

We will present an amendment to that effect on Monday when we go through clause-by-clause consideration of the bill. I must admit to you that we are having difficulty wording it in such a way that it is a real sunset clause. If you can give us some help along those lines, to follow through on your recommendations, it would help us tremendously in developing our final wording.

Mr. Rice: We would be glad to do so. It depends on some changes of various parts of the bill, and we recognize that it is not a simple task. Mr. Potter was actually involved in some of the process of re-drafting, and he would agree with me. We would certainly be prepared to work with you on that.

Senator Lynch-Staunton: Some of us would appreciate that.

On page 19 of the bill, we spent some time on the knowledge aspect of the bill. As Senator Beaudoin pointed out this morning, proposed section 83.19, on page 29 states: "Everyone who knowingly facilitates a terrorist activity is guilty of ..."

That is clear. You must have knowledge to be guilty of something. Then, proposed section 83.19 (2) states: "For the purpose of this part, a terrorist activity is facilitated whether or not the facilitator knows any terrorist activity was foreseen or planned, any terrorist activity was carried out. "

Some of us are interpreting (2) as contradicting (1), and I would like to have your opinion on that.

Mr. Rice: We have identified that problem. What does "knowingly" mean? "Knowingly" can go to what we think it should mean -- mens rea, an appreciation of what you are doing -- and not just knowledge of some part of a factor that something has happened. You must have a guilty mind. As to how we would correct that, perhaps Mr. Potter can comment..

Mr. Potter: (*Please put up in full!*) Senator, you have identified a real problem: the apparent contradiction between these two proposed subsections. There is a way to read the second one as not taking away all of the first one. It appears that the second one leaves in place knowledge having to do with a general awareness of the terrorist type of organization that the person is dealing with, thereby leaving the Crown free not to have to prove specific knowledge of actual events or actual activities, or actual enhancement of those activities. Nevertheless, it is extremely difficult to come to grips with those two subsections, as you have said.

Bearing in mind the really Draconian consequences of being found to facilitate, our recommendation is that this requirement of knowledge must be made much more explicit and clear, and a defendant must be able to rely on the fact that the Crown will prove that the defendant really did know that the defendant was facilitating something dramatic, because this statute is after something dramatic.

Our recommendation is to make that a full mens rea offence. To my mind, that would mean withdrawing the second sub-paragraph to which you refer.

Senator Lynch-Staunton: I would also to raise a point that was raised a couple of days ago with a representative of the Minister of justice and her officials from the Department of Justice. We are waiting for their reply. Under the Canada Evidence Act, section 37 (1) now reads: "A minister of the Crown or other person interested may object to the disclosure of information." Are you with me on this one?

Mr. Rice: Yes.

Senator Lynch-Staunton: In Bill C-36, that is being amended to read: "A minister of the Crown or any official may object to the disclosure "

(1420 follows -- Sen. Lynch-Staunton continuing: The bill refers you to the Criminal Code...)

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(Senator Lynch-Staunton continuing)

The bill refers you to the Criminal Code definition of official, which means "a person who holds an office or is appointed to discharge a public duty." In effect, if this is passed as written, it will mean that there are hundreds of thousands of people in Canada who can go into court and object to divulging information, whether they have an interest in the case.

Mr. Potter: We did not catch that, and that is not in our submission. We did catch it in relation to the bill's proposals regarding the Access to Information Act and the Privacy Act, the original intent to have secret certificates and so on. We propose to attack those provisions by recommending the sunset.

I think that you quite rightly point out that it is not just expanding the power of government, it is expanding section the power of functionaries, as well, to block

what we consider to be a tool of freedom in this country and of individual fulfilment. That is access to information from the state. We think that should sunset away.

We did not get into, in our submission, the details of the grounds on which those objections could be made, or who should bring them forward. We took the position that to the extent something as extraordinary as this is necessary at all, it should sunset away.

That is why we are here today saying we are glad to see sunset on two provisions but we would like to see sunset on many more including this one.

Senator Lynch-Staunton: Sunsetted or not, do you accept that an official as described by the Criminal Code be allowed to interfere in a criminal proceeding in which he or she has no interest? Would my interpretation of that be incorrect?

Mr. Potter: I think your interpretation is correct. I think it is unfortunate that the government wants to give that power to functionaries.

Senator Lynch-Staunton: We have in our pre-study report made a number of recommendations that have been supported by unanimous order of the Senate two weeks ago today. One of the key ones is to have a parliamentary oversight of this bill in the form of an officer of Parliament along the lines of the legislation setting up the Information Commissioner or the Privacy Commissioner where there can be an ongoing monitoring of the application of the more contentious clauses of this bill. Do you see any constitutional problems with that? One of the senior officials of the Department of Justice said that such oversight would trespass on the jurisdiction of a province, which is also asked to apply certain clauses of this bill and, therefore, be interfering into the jurisdiction of a province. That was a major reason for not approving, on the government side anyway, an officer of Parliament to monitor the bill. Do you accept that argument?

Mr. Rice: That is an issue that arises in any situation where the federal government chooses to appoint an ombudsman or a supervisor of some kind where provincial interests are at hand. It is not something that is surprisingly different or unworkable to have someone in that position.

From our standpoint, with the sunset clause being a true sunset clause, there was the kind of measure of protection that we thought was acceptable. However, with the situation being restricted as much as it is, we should look with some

serious consideration at an ombudsperson or someone in a supervisory role to report on the management of the system with this in force.

Senator Jaffer: I welcome you again, Mr. Rice and Mr. Potter. It is good to see you here again.

Mr. Rice: It is pleasure to be here.

Senator Jaffer: When you were the president of the British Columbia Bar, you were the one who introduced the multicultural and diversity committees into your committee structures. You are familiar with issues regarding diversity, especially in our province with the multicultural community. I have a number of questions regarding that.

I know you have been very busy since the House of Commons has passed this bill. I am wondering if you have thought about the next steps if the Senate passes this bill. Have you thought about working with the community? As you know there is much fear in the multicultural community.

There has been much talk against the Muslim community. Sadly, we have not heard from the Sikh community with whom you work. As you know, in Surrey, a number of young Sikh men have been beaten since the September 11 incidents. I am wondering how you will work with the community?

Mr. Rice: As you know, we took the position that the added protection of minorities within the bill itself was worthwhile. We supported that very strongly.

In other aspects of the bill, we do raise the concern that when alarm is raised, it is heightened with emergency powers being given. On the provisions dealing with ideological and religious grounds for terrorist activity, we must be vigilant to ensure that that does not encourage a focus on certain individual groups as opposed to actual terrorist activity.

There is a risk of that. The media is very focused on individuals who are accused and this can lead to the kind of problems about which you are talking.

The Canadian Bar Association is on record for a long time being very much in support of multi-culturalism and equality before the law and will continue to do that. If and when this bill passes, there may well be issues that arise, and we will be there to say what we think.

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Senator Jaffer: During the Charter challenge I remember clearly that we had a fund for Charter challenges. Have you thought about asking for a fund when these issues are raised to take some of these issues to court?

Mr. Rice: We have an ongoing policy of intervention in cases involving the administration of justice. Equality is one of those principles that we take with us when we appraise cases that warrant our interventions. We have four cases at this time going. They all involve equality issues. We do fund these through our national and provincial organizations. We are very pleased that senior lawyers across the country give their time to handle these cases for us.

As I say, I can assure you that we will keep our hearts and minds focused on the interests of people who will be adversely affected by this legislation.

Mr. Potter: Perhaps I can add to that that it is clear that people who are caught up in the jaws of this new legislation will require knowledgeable, trained and committed representation. Some of those cases will be difficult cases, raising Charter questions. They will need proper representation. Those will not be cheap and easy cases. In that regard, the Canadian Bar Association is on the record for a long time as encouraging all governments to ensure that there is appropriate and sufficient Legal Aid to cover those cases.

Senator Beaudoin: I will follow on the questions raised by Senator Lynch-Staunton.

When we are talking about an officer of Parliament whom is a person responding to Parliament instead of the executive branch of the state, there was some reticence from the other side because they say it may invade the provincial field.

(Take 1430 Follows - Senator Beaudoin continuing; However, this is already the case...)

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(1430 -- Sen. Beaudoin continuing)

However, this is already the case, and I would like to have your opinion. Criminal law is a federal matter and it has been liberally interpreted by the Supreme Court. The administration of justice within a province is a provincial

matter. In practice, I believe, it is not a big problem. We have the Crown Attorney and the Criminal Code, which was drafted and adopted the Parliament of Canada.

I do not envision any possibility of invasion, but I would like to check with you, since you are involved with the Charter of Rights and the Criminal Code every day by nature of your profession. What is your reaction to that?

Mr. Rice: The person you speak of is to take on a supervisory role and the reporting on the effect of the bill.

Senator Beaudoin: Yes.

Mr. Rice: Watching and reporting does not seem to me to offend any provincial boundary. I am not aware of an example where it would cross swords with the jurisdiction that we are talking about.

Senator Lynch-Staunton: If an Attorney General applies a clause in the bill contrary to the intent and there was a reprimand, would that be interference in the jurisdiction of the province? I think that would be an appropriate one because it is a federal law.

Mr. Potter: If it is an oversight provision, and we take for granted that the statute itself is within the federal sphere, as it surely is, then in my opinion, certainly it cannot be beyond the power of Parliament to name an officer to report to Parliament on how Parliament's law is being applied and put into effect.

If it turns out that a province believes that its own turf is being intruded upon by this federal official who is being too nosey, and the province refuses to disclose information to that official, it would be relevant for Parliament to know and for the public to know.

The Canadian Bar Association's position has been that you achieve that oversight by the sunset clause, as well. The sunset clause forces a level of transparency on the government. If the government must come back and persuade Parliament to renew in five years, whether in the current form or a different form, presumably Parliament will then have to report on what has happened in the intervening time.

To the extent that there is no true sunset clause, the oversight of which you speak becomes essential.

Senator Beaudoin: That is my opinion of the problem. I do not see any constitutional problem, because it concerns a federal statute. Some people may challenge the bill on the basis of the Charter of Rights, but not, in my opinion, on the division of power between the federal government and the provincial governments.

The sunset clause applies to three issues in the bill, on page 41, arrest, detention and investigation. We are inclined to think that it should be more than that. Perhaps it should not apply to the entire bill, but certainly there are other aspects in this proposed legislation, for example communication and certificates, that a sunset clause should logically extended to apply.

Bill C-36 is permanent; it is not an emergency bill. Because it is permanent, the Supreme Court will apply the Charter of Rights, as is the case now. However, if there is abuse, then we may always correct the situation and consider the sunset clause with greater extension as the appropriate way to preserve the protection of the public. What is your opinion on this point?

Mr. Rice: You put it as we would have put it. The very far reaching import of the legislation dealing, for instance, with the creations of lists of entities is so strong and risky to freedoms that it makes the sunset clause so sensible.

Senator Beaudoin: Which one are you referring to?

Mr. Rice: I use the example of the list of entities that can have their property frozen, et cetera, once they are on the list. That is Draconian legislation. It may need to be reworked. It may be abused. The best way is to have the sunset clause.

Senator Beaudoin: Obviously, we both agree on the same issue.

Mr. Rice: I agree entirely with what you said.

Mr. Potter: You stated our position better than we have.

Senator Beaudoin: In the pre-study, that was the position of the Senate.

Mr. Potter: Yes.

Senator Beaudoin: Perhaps the first idea did come from the bar.

Mr. Potter: Yes.

Senator Beaudoin: If that is a fact, we recognize it.

Mr. Potter: We are glad to have the Senate's support on this question.

Senator Kelleher: Following along with the sunset clause issue, as you know, the Senate, in its pre-study, unanimously recommended a total sunset clause. The government responded to that in two, small, specific areas with sunset clause recommendations that are not true sunset clauses in that the bill does not come back, but merely a motion comes back.

In any event, assuming the government, in its wisdom, decides not to go along with our earlier recommendation in the hope that they might see fit to at least add a few additional areas for their form of sunset, could you prioritize for us what the additional areas might be?

Mr. Rice: First, we would not be setting any minimum-maximum amounts. Every concession is gratefully accepted.

Senator Kelleher: That is what I am saying. Every little crumb from the government table would be accepted. Could you give us some priority in respect of these crumbs?

Mr. Rice: First, the more the better, but I will let Mr. Potter speak to this. He has had the benefit of dealing specifically with about 16 of our experts who worked on this bill. There were diverse views, but these issues came up -- which one were the most important. He could give you three areas, pretty quickly, that were deemed very important.

Senator Kelleher: Could you give us more? I am hoping that the spirit of Christmas might fill the government's minds, so if you could give us more than three, that would be nice.

Mr. Potter: We have already accepted the invitation to help with some drafting problems on the sunset, and we will certainly send you something in time for your meeting on Monday. Perhaps we can, in the same letter, set out the kind of priorities that you are asking for. In the meantime, the way to answer your question is that our experts from across the country, who worked on this really quite long and hard, and the directors, who were unanimous, did not say that some of these things ought to be “sunsetted” but others are rather less important to sunset with the sole exception of the hate crimes provisions.

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(1440 follows -- Mr. Potter continuing: There are three of them.

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(Mr. Potter continuing)

There are three of them. Our position is that those need not be sunsetted. Those are valuable and can stay, particularly considering the climate in which this very bill is likely to create. Within the board of directors and even the executive officers, we see the non-hate crime provisions, all of them, as being quite Draconian, being quite foreign to the fabric that we know in Canada and have worked over a hundred years to build up and create. We think they must all be sunsetted, except for those hate crime provisions.

That said, in the letter which we will send you in time for your Monday morning meeting, we will try to set out which of the remaining provisions, besides the preventive arrest and the investigative hearing, rise to the top of that list.

Senator Kelleher: For my second question, there has been a certain amount of discussion, although not addressed in your brief, on the oversight provisions of the bill. Again, in our pre-study report we recommended an officer of Parliament perform oversight. The government, in its wisdom, decided to not to accept that. They dolled out another crumb to us. They said that the Minister of Justice and the Solicitor General, once a year, would give us a written statistical report on the number of preventive detentions.

It grabbed some of us that the people they will be reporting on are themselves. They will report on their own activities. Human nature being what it is, if you if you have blown a few during the year, you are not likely to want to report that.

I was wondering what you thought about the adequacy of their provisions, and how effective it will be in lieu of an oversight officer?

Mr. Rice: That reminds me of when I was in grade 7. We got a new teacher who said we would let you mark your own essays this week on the honour system. It was amazing how much better the students did.

Senator Kelleher: Did your marks go up?

Mr. Rice: All of our marks went up, somewhat. You tend to give yourself the benefit of the doubt, if you are marking yourself. That is not all good. The answer

to your question is obvious. If the regime is to have a thorough inspection system, it must be an independent inspector.

Mr. Potter: We can add that a mere statistical report will necessarily miss the point. The danger in these provisions is that they create such broad powers that it is a legitimate fear that they will be used when they ought not to be used. Statistics will not capture that, nor would statistics capture the question raised by Senator Jaffer: Was such and such a person adequately represented at a particular time? Does justice appear to have been done in such and such a case? Might there have been another way of approaching the problem in such and such a case? A mere statistical report will necessarily miss those points.

Senator Fraser: Since I was one of the people who were keenest on getting much data I would observe that a careful reading of the volume of data that we are promised in this bill would be very revealing. Also, since everyone is always entitled to counsel throughout this bill, I would expect you to be doing a fair amount of monitoring.

Mr. Potter: You may rely on it, senator.

Senator Fraser: Splendid. The data will help you, as it will help us.

The pre-study report did recommend a parliamentary officer. You undoubtedly will understand that there were very heated discussions, and indeed split votes, on some of the elements of that report. It is also true that since we raised it for the first time in our report, we had not previously heard testimony about a parliamentary officer. We have heard some interesting testimony about it since then.

In particular, my attention has been caught by the federal-provincial element, which you in particular, Mr. Potter were quite scathing about. As I was listening, I recalled that we pass laws all the time that are in whole or in part implemented by the provinces, and we do not lean in and say we will send enforcers after you.

The Criminal Code is a first-class example. The police across the country deal with the Criminal Code every day. With the exception of the RCMP, civilian oversight of the police, civilian reporting, all that is a matter for provincial governments not federal governments. I have reason to believe that provincial governments react very strongly against any suggestion of federal oversight. You know of which I speak, Senator Beaudoin.

Senator Beaudoin: I listen very carefully.

Senator Fraser: Similarly, if we send money to any of the provinces under any of the many programs, we do not send into the Auditor General to make sure it has been well spent. There are just some ways that you go about things in a federation. That has struck me.

This has to do with the point that Senator Lynch-Staunton raised today, and also the other day when the minister was here about the proposed section 37 where a minister or other official may object "to the production of information before a court by certifying orally or in writing to the court…that the information should not be disclosed or the grounds of a after specified public interest." If it stopped there, I would agree. However, that is pretty sweeping.

This proposed section goes on at some length. All that it says in that particular paragraph is that an official may object. It does not say an official can block the disclosure of information. It is the judge who decides whether the information is blocked. The criterion does have to be a specified public interest.

Senator Lynch-Staunton pointed out the other day that we are, as senators, officials. I cannot march into court and say that it is against the public interest for you to disclose anything about the inner workings of the Senate.

Senator Lynch-Staunton: You can intervene.

Senator Fraser: I can intervene. I do not have any difficulty with intervention. Why would it be so dangerous to allow someone intervene and say, "there is a specific public interest here that I argue would be affected by the disclosure of this information." Why is that inherently dangerous?

Mr. Potter: Senator Fraser, first of all, this is not in our submission.

Senator Fraser: I thought you were intrigued by and relatively supportive of Senator Lynch-Staunton's position, and I was asking for your views.

Mr. Potter: I just wanted to make it clear for the record that I am not here giving a considered CBA view, but I will give you my view. It is a serious matter for Parliament to open the doors very wide to new grounds of intervention in any case in Canada.

Our courts are already quite burdened with the cases they already have. Some courts do not have enough judges. Some courts are struggling under delays. Our courts are already dealing with interventions that come before them. Our courts already have to deal with claims made from time to time under Section 37 of the Canada Evidence Act to prevent the release, use or disclosure of certain kinds of information, including on grounds of national interest.

(Take 1450 -- Mr. Potter continuing: To make it even broader...)

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(1450 -- Mr. Potter continuing)

To make it even broader, not only the kinds of information that can be withheld from the courts, but also the kinds of people who can advance those arguments to the courts, I think is a serious matter.

Senator Fraser: If I read you correctly, you think it is a serious matter in terms of potential delay and potential encumbrance rather than in terms of inherent legal principle.

Mr. Potter: No, I am sorry, it is a serious matter on that ground. However, we also have a principle of courts getting the information that the courts think they should have, and of parties getting the information they think they should have so that their case is properly heard. It is a serious concern to have it in the bill and to have the bill pushed through quickly with limited debate, with no sunset clause, but with a provision that appears to multiply the times on which relevant information will not actually come before the court or see the light of day.

That is another reason why the sunset clause that you have properly recommended is necessary.

Senator Fraser: It is the court that decides.

Mr. Potter: That is true. The court decides this and many other things.

Senator Fraser: On the matter of the CSE's ability to capture conversations between foreign targets and Canadian counterparts, you seem perturbed that this would be done by ministerial authorization rather than by judicial authorization. A difficulty that has been raised several times before this committee, is that in every case, the target of the interception would be the foreign person and the Canadian

would be ancillary, but Canadian courts have no jurisdiction to authorize surveillance of a foreign target. How would you get around that?

Mr. Potter: I simply do not agree with that position. Canadian courts should have the jurisdiction to determine what Canadian authorities do or do not do with the normal privacy of communications. I also do not think it is realistic, with all respect, senator, to say that some parties on a conversation that is intercepted are only and purely targets, and everyone else on those conversations are only and purely ancillary. I might be on one end of that conversation, and I do not think I should be unless a judge has said I should be. That is the position of the CBA.

Senator Fraser: I understand that, but suppose I am a citizen of Germany; I reside in Germany; I am part of a terrorist cell; I plot the crash of an airplane into the World Trade Center; one of my contacts is passing through Montreal; and, as part of my keeping in touch with my network, I place a call to him while he happens to be staying in a boarding house in Montreal. Would that apply in such a case?

Mr. Potter: Based on those facts, you would certainly get the judicial warrant to intercept that communication.

Senator Fraser: If you knew ahead of time that the call was going to be made, that would be fine.

Mr. Potter: I expect that you would get the warrant if you knew that the entity was a terrorist and that an affiliate of that group was coming through Montreal. I expect you might get the warrant.

Senator Fraser: If you knew.

Mr. Potter: The Canadian Bar Association's position is that the warrant should be issued by a judge and should not be issued by a member of the executive, rather than the judicial branch.

Senator Fraser: There we have a difference between the bar and the Minister of Justice.

Mr. Potter: That is one of a few remaining differences.

Senator Fraser: Just a few.

Mr. Potter: On that point, we should reiterate that the CBA is not here to blame or criticize the Minister of Justice. The fact is, the Minister of Justice has responded to many of the Senate's concerns and to many of the Canadian Bar Association's concerns. It is simply that we believe that the job is not entirely done, yet.

Senator Lynch-Staunton: Hear, hear.

Senator Tkachuk: Outside of the fact that we have a democracy, we also have a free press in this country. How will these powers affect the operation of a free press? For example, the government would have the power to create a list of alleged terrorist entities, which is subject to few procedural protections, and you raise that issue on page 4 of your submission. The bill criminalizes involvement or supports. How does this apply for a reporter who has an interview with a terrorist and reports on their terrorist activity in India or other foreign country? Some reporters have actually had interviews with Osama bin Laden. How does that work? What would happen if a reporter were to have an interview with a person who committed a terrorist act, but the interview was performed prior to the terrorist act, about which the reporter knew nothing?

Mr. Rice: That comes back to the definition of "knowingly."

Mr. Potter: We cover the issue of the freedom of the press in several parts of our submission, senator. It comes in frequently and not just in the areas that you have mentioned, in which the bill gives no guidance to the protection of journalistic integrity or the protection of the ability of journalists to collect information to feed this free press. There are other areas as well: the way in which the investigative hearing is drafted would apply such that journalists would be required to testify and to disclose what they are learning during their interviews, with no right to refuse to answer those questions. That would occur during the investigative phase, not during a prosecutorial phase. The provisions that allow for closed hearings in court, or for publication bans on even the participants in the court process, go to freedom of the press. I think you will agree with me that is a pillar of the kind of society that we want to have. It is another reason for which there must be a generally applicable sunset clause, as you recommended.

Senator Tkachuk: They could obtain information from a government department that the Information Commissioner could not obtain, such that the minister signed a certificate, which could be quite broad reaching, even though the

information had nothing to do with national security, at least in the public's definition. However, the government thought that this was a bad thing because the information went on the front page of *The Globe and Mail* and they did not know the source of the information, because the broad definition of "certificate" covered it all. Could the police haul that reporter into an investigative hearing to question him or her about the source?

Mr. Potter: The short answer is, yes. The way this is drafted now, that could happen.

Senator Tkachuk: They could keep him there.

Mr. Potter: That's right, because there is no time limit.

Senator Tkachuk: They can keep asking to hold the reporter for a longer time --

Mr. Potter: -- and sending the reporter back to go through his computers for more information, yes.

(1500 follows -- Sen. Joyal: I want to come back to this issue of "problem"...)

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Senator Joyal: I want to come back to this issue of the "problem" of the involvement of provincial government or provincial authority in providing the Parliament of Canada with capacity to review the implementation of that legislation. To my mind, it is a problem that can be addressed.

Look at proposed section 83.31 of the bill as amended on page 40. I will read it. It is about the report that the Attorney General of Canada is to table in Parliament. It reads:

> The Attorney General of Canada shall prepare and cause to be laid before Parliament and the Attorney General of every province shall publish or otherwise make available to the public an annual report for the previous year on the operation of sections 83.28 and 83.29 that includes

In other words, the bill already provides for the availability of quantitative information from two sources: the Attorney General of Canada and the Attorney General of a province. The bill does not say that the Attorney General of every

province shall table the report in their legislature. It says that they shall publish or otherwise make available to the public. They can table it in their legislature or just release it through a normal press release.

The proposed sections of 83.31, especially paragraph 2, list the kind of statistical data that should be made available. There could have been added quantitative data and qualitative data. There is nothing in the Constitution to prevent this proposed section from adding qualification or description in the general form, provided that you meet the test of paragraph (4) later on:

(*d*) otherwise contrary to the public interest.

They could have requested provincial Attorney Generals to do that. I do not think that there is a major obstacle to the fact that information could be made available to the public, and of course, being made available to the public, any committee of the Parliament of Canada, this house or the other house, or a joint committee, can study that information made available by provincial Attorneys General. The bill already provides that Attorneys General of a province will make public statistical data as described in proposed subsection (2).

I think that can be addressed in respect of the jurisdiction, even though the administration of justice, as you have said, is under provincial authority. We all recognize that. Nevertheless, the bill specifically provides that they are requested to give information in relation with two elements of this bill.

Mr. Rice: This is the point. We would agree that there is a workable solution to the question. We do not see it as insurmountable.

(French follows, Mr. Potter, **M. Potter:** Nous devons également ajouter)

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(après anglais)

M. Potter: Nous devons également ajouter que dans la mesure où une province décidait qu'il y avait des obstacles constitutionnels, des problèmes ou de l'ingérence fédérale dans un domaine provincial, et que la province refusait de donner les renseignements, ce refus deviendrait pertinent à la question du renouvellement de ce projet de loi dans cinq ans. Le public a le droit de savoir qu'on refuse de lui donner des renseignements lorsqu'il aura à décider, à travers son Parlement, s'il faut renouveler ou non ce projet de loi. C'est la raison pour laquelle nous disons, comme vous, qu'il faudrait une clause de temporarisation.

(Sen. Joyal : If I can continue on an other issue, the Parlementary overside mecanisme…)

(anglais suit)

(Following French)

Senator Joyal: I will continue on another issue, the parliamentary oversight mechanism that we have been talking about in this committee and the fact that some commissioners of Parliament, such as the Privacy Commissioner or The access to Information Commissioner, have their own authority and their own capacity to report to Parliament.

It is not an insurmountable obstacle to have a commissioner review some sections of this bill in a deeper manner than just the statistical basis provided by 83.31(2). Look at proposed section 273.63, which you find at page 127, with the appointment of the commissioners who review the Communications Security Establishment. I will read proposed clause 273.65(8) on page 131:

> The Commissioner of the Communications Security Establishment shall review activities carried out under an authorization issued under this section …

This is the Minister of National Defence's authorization to issue a wiretap for a communication between a Canadian and a foreigner.

> … to ensure that they are authorized and report annually to the Minister on the review.

The commissioner who is established to review the activity under Part V.1, the Communications Security Establishment, receives in the same bill the responsibility to review the authorization that the minister gives. In other words, we already have a commissioner in this bill, and it would be possible to maintain the proper balance that we try to achieve in the bill by having the commissioner reporting to Parliament instead of reporting to the same minister that he is supposed to monitor. I would not say this is incestuous, but he reports to the person under whom he is dependent. There is something there that offends the arm's length capacity.

Senator Lynch-Staunton: Like an ethics councillor.

Senator Joyal: If this commissioner would review the use of the certificate by the Solicitor General and the Attorney General and the Minister of National Revenue and review the authorization given by the Minister of National Defence,

the pivotal institution of Parliament could ensure that when any committee of either house receives those annual reports, there is substantial information from someone who is in the key role between the activities of intelligence and the activity of policing the objective of this bill. We can exercise a meaningful role of balance between what you say must be achieved between the extraordinary powers that are granted in this bill to various ministers and the public interest that must be protected somewhere. I do not find in your brief, at least from what you have read or in the various headings that you have provided, anything that could help us to try to strike the proper balance that we are concerned that this bill should have.

Mr. Potter: We have tried to help you in two ways, senator. First, here, today, we are giving the opinion, I think, which is yours, that there is no impediment to Parliament, first, naming an officer to report to Parliament about how this bill is applied or, second, asking that officer to collect more than simply statistical information. There are many examples of that being done already.

We have also helped by saying that the kind of transparency that we should all be after, knowing how this bill is being used in practice and what is happening with this, is assured by a full sunset clause. Our written position has been that the sunset clause guarantees the government's transparency as they come and argue for the renewal.

We have also said that, to the extent that the government does not agree to a full sunset clause, that the kind of oversight that we are talking about here becomes essential, and there should be no obstacle to that oversight being more than simply statistical.

Senator Joyal: Do you have any other comments, Mr. Rice?

Mr. Rice: No, that is what we think.

Senator Joyal: When you studied the bill in terms of a parliamentary review mechanism, which institution of Parliament, to your knowledge, should model the role of the parliamentary oversight to be established as a mechanism to monitor the use of those extraordinary powers that are in there? Did you have a suggestion for us to look into that would, in your opinion, would meet the criteria or essential elements that we would have to take into account in establishing such a mechanism?

(Mr. Rice follows, there are many models)

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(1510)

Mr. Rice: There are many models that you could follow. I had a discussion with Mr. Steve Owen, MP, former ombudsman and former Core Commissioner in British Columbia. There are many independent models to follow. You could consider an ethics counsellor and any of a number of regimes. They are all worth discussing. As Mr. Potter says, this is the alternative, I suppose, if there is not to be a full, true, sunset clause. We agree with you that it is essential that something be done to oversee this. There are many options we could discuss.

Mr. Potter: The Auditor General is a model.

Senator Lynch-Staunton: A number of witnesses have interpreted the definition of "terrorist activity", which starts on page 12. I refer you to page 14, 83.01(1)(*b*): "an act or omission, in or outside Canada (i) that is committed (A) in whole or in part for a political, religious, or ideological purpose, objective or cause."

Many people felt that that places an impediment in the way of charging a person with a crime, because you must prove motive first. Nowhere in the Criminal Code, in my understanding, is there a question of motive. It is a question of, if a crime is committed you are charged with the crime, and the Crown is not obligated to prove the motive before the charge is laid. Is that accurate?

Mr. Potter: We think that is accurate. Our recommendation and explicitly in our report --

Senator Lynch-Staunton: I missed that in your report.

Mr. Potter: It should come out. It is true that it does make the Crown's job more difficult in proving the case. To that extent, it narrows the ambit of this extraordinary bill. On the other hand, it brings into play something that is normally irrelevant in the definition of a "crime," motive. It also brings into play something that we consider logically irrelevant to a terrorist act. The terrorist act is a terrorist act because of its consequence, not because of what you had in mind when you did it or the reason for which you did it.

Another overriding reason for which we recommend taking out that part of the definition is that it puts the police into the unseemly position of having to investigate people's religious affiliations and associations, and then actually coming into court and proving what that person's religion was or was not. We think Canada has spent decades trying to remove that from the equation. We recommend that it should be removed.

Senator Lynch-Staunton: The Canadian Arab Federation, this morning, made an emotional plea against this bill. I did not agree with everything they said, but I certainly sympathize with what motivates them to say what they said. They feel strongly, and it is in the written brief, that this bill targets the Arab and Muslim community. When asked to show anywhere in the bill where that interpretation may be found, they went to page 29, proposed section 83.18(4): "In determining whether an accused participates in or contribute to any activity of a terrorist group, the court may consider, among other factors whether (*a*) the accused uses a name, word, symbol or other representation. "

The representative of the league said that in their culture, Muslims and Arabs have words and symbols. My argument was that they are not exclusive, because Christians, Jews, Hindus and others also have words and symbols. However, they feel strongly that this is aimed at them directly. What is your interpretation? First of all, is this necessary, and is this helpful in defining whether a terrorist group or activity has taken place? Or is it put in there for a specific purpose, as was more than suggested this morning?

Mr. Potter: I do not know whether this proposed subsection (4) is necessary, senator. It simply identifies, for a judge, various things among other unnamed things that the judge might take into account in determining the question not of the terrorist group itself or the terrorist activity, but on the participation in or the contribution to that terrorist group. Parenthetically, I will add that this is an indication to us of the worry that we should all have in respect of the participating offences, the contributing offences and the facilitating offences. If you are to be convicted of contributing on the basis that you happen to have used a particular insignia on your jacket or on the basis of a letterhead, that is a worrying thing and it ought to be sunsetted.

To get to your specific question: Are particular ethnic groups correct, to see in that sub-paragraph a threat that they will be targeted, the answer is, respectfully to

them, no. This is an indication of affiliation with a terrorist group. It is not an indication of affiliation with a particular ethnic group.

However, the proposed subsection of the definition section, which we discussed a question ago, does legitimately raise the fear that people will be targeted because of their ethnic or religious affiliation. It also raises the fear that the public, generally, when they see the police snooping around outside particular kinds of churches, shrines, temples, mosques or synagogues, or when they see the Crown actually setting out to prove a particular religious affiliation, will come to some prejudicial conclusions, as well. That is another reason that we believe that that particular proposed subsection in the definition should go.

Senator Lynch-Staunton: Where do you find that?

Mr. Potter: The definition clause that speaks to religious or ideological purposes.

Senator Lynch-Staunton: That is the one you want dropped.

Mr. Potter: Yes.

Senator Lynch-Staunton: I agree with that.

Mr. Potter: For that very reason.

Mr. Rice: When you do remove that, you have effectively an expanded scope for the charge and conviction. It is one area where we are helping them out.

Senator Lynch-Staunton: Many of us agree with that.

In your brief, you gave many examples of where the government already has powers to combat terrorism. You go on for quite a few pages. You state: "The government currently has many legal tools to combat terrorist threat. " You even quote from the press release of the government that states: "terrorists can already be prosecuted for hijacking, murder and other acts of violence. " We have done, on our side, a similar summary, though it is not as extensive. Both lead to the same question: What is there in this bill that adds significantly to the tools that the government already has to combat terrorism?

Mr. Rice: Our report speaks for itself. There are many existing tools.

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Senator Lynch-Staunton: Currently.

Mr. Rice: We did not approach this --

Senator Lynch-Staunton: I am taking you by surprise with this question.

Mr. Rice: We anticipated it. There are a great number of tools to deal with the same problems. We have a large legal community of many diverse opinions. We did not approach it from the standpoint of saying that we do or do not need this legislation; we just took it as we received it. We probably would be dealing with some of the same issues if the proposed legislation were not here. We have not included, in our brief, whether it is necessary or unnecessary.

We are dealing with the reality that September 11 did happen. It is a great concern, and there is no doubt about it. Canadians are very traumatized by that event.

(1520 follows -- Mr. Rice continuing: The government has...)

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(1520 -- Mr. Rice continuing)

The government has felt that legislation is necessary. The question is how to address it, and that is what we have done.

Mr. Potter: To help you along the lines of your specific question, senator, some of the things that are in the bill that are not in the long list of tools that Canada already has, include: preventive arrest on mere suspicion -- we currently have preventive arrests, but we do not have preventive arrests on mere suspicion; investigative hearings, in which there is the loss of the right to silence; judicial participation in the investigation phase; easily issued certificates to block access to information; the addition of the grounds on which and the people who might go to court to block a court's access to information; vastly expanded use of summaries of evidence, rather than evidence; the use of hearsay evidence with a directive to the judge to draw no undue inference from the fact that the Crown does not bring the firsthand evidence; the cumulative sentencing imposed on judges for certain crimes; making a life sentence available on a variety of Criminal Code violations, which currently do not carry life sentences. There are many things in this bill that go much further than the tools that we already have.

That is because of the wonderment about just how much more necessary they are than the tools that we have today, and the wonderment about how they will be used in practice. We can come to no other conclusion, but there must be a meaningful debate in three or five years as to whether those things are doing the job they were intended to do.

Senator Lynch-Staunton: Picking up on where Senator Beaudoin left off -- that this is a permanent bill and not declared under an emergency -- how many of those additional new powers do you think will be found to be not charter-proof?

Mr. Potter: We prefer not to predict the outcome of a case, senator.

Senator Lynch-Staunton: I know my question is unfair.

Mr. Potter: We will say that many of these provisions would definitely not be. If the people caught in the jaws of this thing have appropriate Legal Aid so that they can actually raise and invoke their own rights, they would definitely be subject to a charter challenge. What would happen with them in the end, we prefer not to say. However, I will say that Senator Beaudoin has a very strong point, when he says that a sunset clause will likely heighten the deference of courts to Parliament. If the courts know that the matter is really coming back to Parliament, they are much more likely to be deferential rather than conduct a full hearing into the justification under proposed section 1.

Senator Fraser: Arising out of your exchange with Senator Joyal in connection with the CSE, I would just draw your attention to page 128, proposed section 273.63 (3):

> 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.

I am not sure that this is as full a parliamentary role as Senator Joyal had in mind, but it does mean that there will be a report brought to Parliament about what the commissioner has been up to.

Second, I want to raise the matter of reports from provincial governments, and I do not have the *Blues* with me but we could look this up. When we heard from the

ministers and officials the other day, we were told that the provision for data -- quantitative reports -- from the provincial governments had been agreed to. The provincial governments had signed on to this requirement. We were further told that discussions were continuing about the possibility of having some qualitative addition to the quantitative work. Hence, my suggestion: that gentle suggestion from the Canadian Bar Association to provincial governments that qualitative analyses be included.

Mr. Potter: That is a suggestion we will take to heart and we will certainly consider, senator, once we see the final form of this bill.

Senator Beaudoin: In respect of the certificate issue, at page 93, in the proposed section 38.131 the government has accepted the suggestion that we may apply to the Federal Court of Appeal for an order varying on cancelling a certificate issued under that proposed section on the grounds referred to in subsection (8) or (9), as the case may be.

I am pleased by that, because it is a good thing. I have always maintained that the judicial branch, by definition and in practice, is impartial. I am pleased with our system.

Mr. Reid, the Information Commissioner, appeared before the committee earlier today. His assistant said: "Yes, but perhaps it is so narrow that it is not worth it."

The mere fact that there is the possibility of appeal to a court, or to a judge of a court, is certainly a good thing. I doubt that it will go too far, because our judicial branch has its limits. What is your opinion of this proposed appeal to the Federal Court of Appeal?

Mr. Potter: Senator, it is better than it was.

Senator Beaudoin: It is better than it was.

Mr. Potter: It is better than it was, but it is not yet good enough. It used to be that the certificate would be secret -- not even published; it used to be that it was not subject to judicial review; and it used to be that the certificate would live forever. The minister has agreed with suggestions, including ours, that that be changed. The minister has, first of all, made the certificate live only 15 years, rather than forever. Our view is that 15 years is, nevertheless, a very long time for blocking information from Parliament. The minister has agreed to bring in some

judicial review. We agree with you, senator, that that is a good thing. We agree with the judicial review, and we agree with the judicial review at the hands of the federal court, in the case of these certificates. We find it somewhat difficult, though, that the judicial review will cover only the question whether the certificate relates to confidential information received from abroad. That is a very narrow judicial review.

Senator Beaudoin: The commissioner also said that it is good, but somewhat too narrow.

Mr. Potter: Additionally, senator, at proposed section 38.13 (1), at the same time as making these changes, the minister has also made another change to the grounds on which the certificate can issue in the first place.

(1530 follows -- Mr. Potter continuing: The grounds now have to do with...)

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(Mr. Potter continuing)

The grounds now have to do with protecting information obtained in confidence from or in relation to a foreign entity. That will cover a lot. It will probably cover everything in anyone's immigration file.

The amendments are good in the sense that the provision is better than it used to be, but they do not, in our view, go far enough. It is for that reason that we continue to say that the sunset clause must apply to this provision as well as the others.

Senator Kelleher: I want to return to the investigative hearings under proposed section 83.28. If the peace officer makes an application under (2), assuming he has obtained the consent of the Attorney General, he can make an application before a judge. That is correct, is it not?

Mr. Potter: Yes.

Senator Kelleher: The judge, under (8) of proposed section 83.28 can make an order to come and answer questions put to him by the Attorney General or the Attorney General's agent. I am concerned. If I found myself in that very awkward position, and God knows who the Attorney General's agent may be at that point,

what if they ask me to disclose information that I feel comes under the general purview of solicitor-client privilege? What do I do in a situation like that?

Mr. Potter: The only objection, which can be made to delivering up any kind of information, whatever is requested, is privilege. However, the objection must be made. There is no provision that directs the judge to raise this question of privilege. There is no provision allowing the judge to require that an attorney represent the witness or to name an attorney to help you invoke that right of yours. The objection is limited only to what is explicitly privileged. It does not cover, as Mr. Rice said a few minutes ago, the gamut of confidence that exists between a client and his or her attorney.

You have identified a real problem with this investigative hearing. Once again that is why we think it should come back as a true sunset, not just as a resolution, but come back to be voted by Parliament in the normal way.

Senator Kelleher: I do not have much choice when I am caught in one of these hearings; I pretty well have to answer the questions.

Mr. Potter: Oddly, the proposed section is silent as to what happens to you if you do not. We presume it is contempt, but we do not know.

Mr. Rice: You are put in a position of choosing to obey this law and to obey your ethical obligation to your client. That is a very tough choice.

Senator Kelleher: It would not be a great position in which to be.

Mr. Rice: No, that issue is before the Supreme Court of British Columbia. As you know, an injunction has been granted. There will be a good question whether that will survive.

Senator Kelleher: It turns up particularly in the investigative hearing process.

Mr. Potter: It is correctly labelled "investigative", this has nothing to do with prosecuting a case. This happens before anyone is accused of anything. It happens before you know you are a suspect or if anyone is. It happens without you knowing what the context of your testimony is. It is a very odd animal in the Canadian fabric, there is no doubt.

Senator Lynch-Staunton: I want to talk about the list of entities previously known as the list of terrorists. You are put on, and then you can appeal it. In the

60-day period where you can give a view on your listing, the Solicitor General need not give a view. Once the 60 days expire, you remain on the list, and then you have the right to go to court to challenge your listing.

Do you not think that it should be up to the Solicitor General to justify your having been put on the list if you appealed his original decision rather than introduce this clause, which really is meaningless? He just has to sit back for 60 days and then the listing is confirmed. I am talking about proposed section 83.05, page 17.

Mr. Potter: We are with you, senator. We have said in the Canadian Bar Association submission that the Solicitor General in putting people on the list or in renewing the list, ought to be required to rely on facts meeting particular criteria, rather than just being able to make a list, as this provision reads.

Your question goes to what happens after the list comes out and what is it the Solicitor General must do. You are quite right, the Solicitor General need do nothing. That is another problem that we identify. If you find yourself on this list, you must do everything. You must get the matter to court. You must get a lawyer. You must issue the notices. You must take on the state, and the state comes and presents evidence that might be secret and might be in summary form. You may not see it, and you may not see the firsthand evidence. This is another very dramatic change in the Canadian fabric. There is just no way around that.

The consequences are dire. The minute that you appear on that list, and we already have one, you are shunned by all commercial society in Canada. Presumably, there is some damage to reputation, as well, by being on that list. Not only that, but by the same fact of you being on the list, everyone associated with you is a terrorist entity. There are consequences to mere association. It is a very dire situation. It is another one that must, in our view, obviously be subject to sunset.

Senator Lynch-Staunton: That leads me to my final question and that has to do with the validity or help that judicial review will bring to one who appeals to it. I was in favour of the recommendation of judicial review, and still am. I am beginning to doubt its efficacy one or two opinions to the effect that judges are reluctant to pronounce themselves against ministerial decisions unless they are based on bad faith or misinterpretation of procedure leading to that decision. They do not want to get involved in deciding political decisions, and many of the

decisions being taken that will be taken under this bill, if it becomes law are naturally political decisions. Would that interpretation after judicial review be accurate?

Mr. Potter: If you will forgive me, senator, I will not get into the business of saying whether judges are unduly deferential. I will say that the reason for which the Canadian Bar Association wants the Solicitor General to be required to rely on actual factual evidence, meeting particular criteria is to respond to exactly the concern that you have mentioned. It ought to be a factual question, rather than a political or argumentative question.

Senator Lynch-Staunton: Are you answering my question by saying if it is a political question, the judges would be reluctant to overturn the ministerial decision?

Mr. Potter: Do judges hesitate to get into politics? Yes, they do, but does that mean that they hesitate intervene when they see that there has been an abuse or a frivolous or an arbitrary use of ministerial discretion in my experience no. When judges see arbitrariness and unfair use of discretion, they intervene. As Senator Beaudoin, I do have confidence in our courts and in our judges to do the right thing if there is a mechanism provided to bring the right question before them. We want the right question to come before the judge.

Senator Lynch-Staunton: I share your confidence, I am just showing anxiety as to whether this bill is imposing responsibilities on the judge that they will be hesitant to undertake.

(Take 1540 Follows - Mr. Potter: We fully agree with that...)

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(1540)

Mr. Potter: We fully agree with that. We would like the judge to have a factual question to decide and to decide whether the Solicitor General properly considered the appropriate facts. That is what we would like to recommend.

Senator Joyal: I would like to return to the issue of cumulative sentencing, which your main brief referred to. Was there not a federal judgment about the principles that should be followed in cumulative sentencing?

Mr. Rice: There has been more than one case.

Senator Joyal: Could you help us to understand the implications of cumulative sentencing and the way in which they are defined in this bill in respect of those judgments of the court? Am I too pointed in my question?

Mr. Potter: The problem is that this bill is antithetical with the judgments that set out the factors judges must consider in coming to their conclusions about imposing a cumulative sentence. Bill C-36 tells the judge what to do.

Senator Joyal: That is my point. I wanted you to elaborate for the benefit of the members of this committee.

Mr. Potter: The CBA's position, not only in respect of the bill but with other bills that have attempted to do the same thing, is that there should be legislatively imposed cumulative sentencing. This is a matter for a judge to decide in the circumstances of each case. There is no criminal offence that just comes off a shelf with a predetermined appropriate sentence. There are certainly no two concurrent cases that, necessarily and in every case, justify the requirement of Parliament that the judge impose two sentences, one after the other, rather than one within the other. The matter should be left to the judge.

Mr. Rice: That is especially true when you have such a broad definition for "terrorist activities" and "terrorist activity" to begin with. You know that there will be a wide range of culpable conduct, which makes it important to have judicial discretion.

Senator Joyal: My understanding of the previous cases that have involved the issue of cumulative sentences is that they have been circumscribed by the court under which circumstances cumulative sentences could be considered. The court never set aside the principle -- the frame -- of the cumulative sentences to very specific circumstances.

Could you provide us with examples of those circumstances where the court has defined such that, if there is cumulative sentencing, it must be used in a very circumscribed context. Bill C-36 does not provide any of those circumstances.

Mr. Potter: In fact, it states that there is no context and no circumstance that justifies not giving cumulative sentencing. This bill imposes cumulative sentencing. To answer your question, senator, we will provide you with the law, as

we understand it, in respect of the criteria that the courts have set to guide the judges in their consideration of the issue as to whether they should impose cumulative sentences.

Senator Joyal: I wish to draw your attention to page 30 of the bill. It seems that there is a parchment error at 83.2. The previous figure is 83.19 and the subsequent figure is 83.21. It seems that there is an omission of a zero after 83.2, which should read 83.20.

It is important that we have accurate figures when we are discussing these proposed sections. In respect of the cumulative sentencing, it could be argued in court that 83.2 is not open to cumulative sentencing. We are dealing with criminal sentencing, so it is important that the parchment error be corrected.

Senator Fraser: I am not sure it is a parchment error. They follow the same pattern on page 35: there is 83.29, then 83.3, followed by 83.31. It is like that throughout the bill.

Senator Beaudoin: The precedent is 83.19 and on page 30 it should be 83.20.

Senator Fraser: If you go to page 35, you will see that 83.29 is followed by 83.3. I think this is just the convention they have used throughout the bill: 83.1 is followed by 83.11 and moving on to 83.2, it is followed by 83.21.

Senator Beaudoin: It is a strange system.

Senator Fraser: I do not know if those numbers exist, but for the purpose of what we want to say --

Senator Joyal: The sequence in referring to bills is odd when the list of paragraphs is not numbered in a similar way. Consider paragraph 83.26 which clearly states 83.18 to 83.23. The normal understanding is that there they are sequential, whereas 83.2 is a different sequence. I understand it when the reference is for the entire bill, but when the reference is only to those particular elements, it may raise an issue of interpretation. The issue is that it could be open to argument in a court.

Senator Beaudoin: Did you refer to a cumulative sentence system?

Senator Joyal: Yes.

Senator Beaudoin: This bill authorizes that.

Mr. Potter: It imposes that.

Senator Joyal: It imposes cumulative sentencing in proposed section 83.26.

Senator Beaudoin: Which page is that?

Senator Fraser: It's on page 32.

Senator Joyal: In the brief of the Canadian Bar Association, it indicates that it is found on pages 28-29. That is the discussion we were having.

Senator Beaudoin: We do not see that often.

Senator Joyal: The point is that my interpretation of case law in Canada in respect of cumulative sentences is that it is imposed in a specific context, and it is left to the discretion of the judge. We had a bill before us at the Standing Senate Committee on Legal and Constitutional Affairs some time ago in which the cumulative sentencing was mandatory. The representation that we received from the Department of Justice was that the reference was not proper according to Canadian law and the way in which the courts have interpreted it.

In this bill, we can remove those circumstances, and it is the sentence that the judge must impose, there is no more discretion left to the court. That is the very point that we debated then on that committee.

The Chairman: I thank the witnesses for appearing before us again.

Senator Lynch-Staunton: The Department of Justice was to give a reply to the question raised about substituting "official" for "any uninterested party". Have we received a reply from them?

The Chairman: I will inquire, senator.

(1600 follows -- The Chairman continuing: Before I introduce the witnesses...)

(The Chairman continuing)

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Before I introduce the witnesses, Senator Lynch-Staunton asked me to determine if the Minister of Justice's office was ready with some material they had indicated they were preparing. I checked and the answer is that it will be delivered to my office first thing tomorrow morning and it will be disseminated to all members of the committee.

To round out our hearings, we have witnesses from the National Organization of Immigrant and Visible Minority Women of Canada and also from the National Association of Women and the Law with whom we are very familiar. We are delighted that they were able to come today.

I would like to introduce to honourable senators, Dr. Bose and Ms Côté. Please proceed with your brief statements and we will proceed to questioning.

Ms Andrée Côté, Director, Legislation and Law Reform, National Association of Women and the Law: Honourable senators, given the short time-frame, our experts at NAWL were not able to be here and assist me. I hope I will be able to answer your questions in a satisfactory manner. I may have some limits as to the answers.

The Chairman: We consider you to be our expert from NAWL.

Ms Côté: Thank you.

The National Association of Women and the Law is extremely concerned about the impact of the proposed Bill C-36, on civil and political rights as well as the equality rights of persons living in Canada. We share the concerns of the National Organization of Immigrant and Visible Minority Women of Canada and we support their recommendations.

We applaud the amendments that were introduced to the bill at third reading, but we remain convinced that this proposed legislation has fundamental flaws and represents a threat to human rights in Canada.

While we agree that it is important to take necessary steps to ensure the protection of the population against acts of terrorism, we consider that the proposed bill does not strike the necessary balance between collective security and individual liberties. We fear that the limitations on the rights and freedoms that are being proposed will have a disparate impact on groups of persons belonging to racialized minorities, on immigrants and other historically disadvantaged

communities in Canada. We are also concerned that these provisions will restrict legitimate political protest in Canada and will have a chilling effect that will limit free speech, freedom of association and political participation.

The bill creates extraordinary and wide-ranging powers. We consider that the proposed review mechanisms will not be sufficient to ensure the respect of fundamental freedoms. These powers, if abused, could have severe implications for democracy in Canada. We agree with the Barreau du Québec that the basic approach used here of having an omnibus bill that integrates anti-terrorist provisions in the Criminal Code, the Canada Evidence Act, the National Defence Act, the Access to Information Act, the Privacy Act and other legislation is fundamentally flawed and risks contaminating our basic rules and legal safeguards.

Simply adopting a sunset clause, even if it were to apply to the entire bill, would not be sufficient, since much harm will be done in the first years of the operation of this bill. For this reason, we urge honourable senators to defeat the bill, and to ask the House of Commons to redesign stand-alone legislation that will actually conform to the human rights obligations to which our government is obliged under the Canadian Charter of Rights and Freedoms as well as the international human rights law.

While we are greatly relieved that the Minister of Justice has amended the definition of terrorist activities that was initially proposed, we remain concerned that the current definition is too vague and will allow for the arrest and detention of persons who are not terrorists.

This bill would allow for the inclusion on a government list of terrorist groups or for any entity the Solicitor General has reasonable grounds to believe carried out, participated or facilitated in a terrorist activity. While being on such a list will no doubt have drastic consequences for any organization, there are no procedural safeguards to challenge such a decision. In addition, the judge may receive any evidence, even if it would not otherwise be admissible under Canadian law and may base his or her decision on that evidence. There is no mechanism provided to appeal such a decision when contesting the appearance on a list of terrorist groups. This type of procedure is totally inconsistent with basic principles of fundamental justice and is reminiscent of Star Chamber principles.

We agree with the Barreau du Québec that the presumption that the Solicitor General is deemed to have decided to recommend that the applicant remain a listed

entity should be removed, and we agree with the Canadian Bar Association that procedural protections are clearly insufficient for those who have been identified on the list of entities.

This bill also provides for aggravated punishment in the form of consecutive sentences for a person found guilty of an offence relating to terrorist activities. This offends the basic principle of individualization of sentences. It needlessly interferes with a determination that should be judicial and that should be based on the different circumstances of each case.

We are also concerned with the preventive arrest and detention provisions of the bill, as well as with the investigative procedures that are being introduced that clearly violate basic charter protections such as the right to silence.

A peace officer may arrest and detain a person if he or she suspects that detention is necessary to prevent a terrorist activity. We are dismayed that this bill allows for arrest on mere suspicion and this is a highly subjective criterion that will allow for uncontrolled abuse. Given the current climate, it may also give rise to a wave of discriminatory arrests against racialized persons and groups.

We are also extremely concerned about the possible discriminatory application of the investigative procedures that is being introduced. Persons under investigation are presently not compelled to answer questions outside the framework of a trial and the proposed changes would represent a major expansion of investigative powers to law enforcement agencies. The right to silence is a hallmark of fundamental justice under common law, and the bill's provisions will effectively abrogate that right, forcing persons to speak and provide evidence against their will.

The increasing secrecy of criminal trials, with an expanded list of reasons why the public may be barred from aspects of a trial and bans on publication of proceedings, along with the proposed power to exclude the application of access to information and privacy legislation in the interest of national security and of protecting international relations is also of great concern. In addition, we consider that the provisions concerning disclosure of information about terrorist property will offend the rights of clients to confidentiality and to solicitor-client privilege.

We are concerned that the bill will facilitate spying on Canadians, by providing the Canadian Security Establishment with increased powers without any provision for independent review or judicial scrutiny.

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The deleterious impacts of Bill C-36 must also be considered in conjunction with the proposed provisions of Bill C-35, to amend foreign missions and international organizations, and Bill C-42, the proposed Public Safety Act.

(Take 1610 begins, Ms Côté continuing: While understanding the need to protect Canadians...)

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(Ms Côté continuing)

While understanding the need to protect Canadians from acts of terrorism, we urge the Senate to send a clear message to the House of Commons that the Draconian measures adopted in haste, without time for a democratic debate, and considered analysis, is unacceptable. This bill will profoundly alter Canadian law in many different domains, yet the government has not even established that we are faced with a real threat of terrorism.

As women and as feminists, we certainly understand the need to take action against terrorism. Indeed, we have been fighting, as a movement, against domestic sexual terrorism that forces approximately 100,000 abused women and children to flee from their home and seek refuge in shelters every year. Women know what terror feels like, and we have been urging our governments to take effective measures against violence against women for over 30 years. Yet we have never recommended that government infringe upon basic civil liberty to do so. Even though it is frustrating to see that abusers always benefit from the presumption of innocence, that guilty abusers are often freed on procedural issues, and that it can be very difficult to obtain legal sanctions that effectively guarantee a woman's security or that validate her experience as a victim, feminists have never called for the kind of measures that we now see in Bill C-36.

This bill will create a climate where dissent is not tolerated, where racialized minorities live in a climate of insecurity and where the gradual erosion of our civil liberties and other human rights will be trivialized. For these reasons, we urge that you oppose this bill and vote it down.

Dr. Anuradha Bose, Executive Director, National Organization of Immigrant and Visible Minority Women of Canada: Honourable senators, thank you for making it possible for the National Organization of Immigrant and Visible Minority Women of Canada to come here today. We did appear before the

House committee on this matter. We have some comments that we would wish to add to the NAWL submission.

First, we wish to express to the special committee the depth of our concern about the impact of the proposed Bill C-36, the anti-terrorism bill, and the impact that it has on the civil and political rights, as well as the equality rights of members of the visible minorities living in our country.

We maintain that Bill C-36 was not introduced under normal circumstances. However, it was cobbled together in the wake of the horrifying events of September 11 when Canada was still in shock. Government's response has been to produce an omnibus bill that may, in the short-run, create a false sense of security, but in the long run, threatens to erode our hard won rights and freedoms enshrined in the Charter.

The National Organization of Immigrant and Visible Minority Women of Canada realizes the need for government to ensure public security but nowhere has government seen fit to explain the clear and present danger to its citizenry. We are forced to look for explanations in the media, parts of which are guilty of promoting a fear psychosis and xenophobia.

The introduction of a sweeping piece of legislation, according to James Traverse in the *Toronto Star* dated November 22, 2001 is "worrisome." In Canada today, the tendency is to concentrate power at the centre. The government also has a large majority in Parliament. Bill C-36 only accelerates the centralizing tendency and further marginalizes the role of Parliament and the judiciary in the affairs of the state.

We agree that it is important to take necessary steps to ensure the protection of the population against acts of terrorism, but we believe that this bill does not strike the necessary balance between collective security and individual liberties.

NOIVMWC is concerned about the potential for disparate impact in the enforcement of much of Bill C-36. David Harris, professor of law and values at the University of Toledo Law School and an authority on racial profiling, has warned that we can overdo it. Racial profiling, he maintains, often sweeps innocents into the mix. According to him, awareness in the key to successful interdiction. I know that Senator Jaffer has expressed her wariness of racial profiling, too.

At the same time, we have heard a retired senior member of the Canadian defence forces, and presently security adviser to a provincial government, declare that racial profiling it needed to fight terrorism. Nine days after the World Trade Center tragedy, the *Ottawa Citizen* reported that a former RCMP commissioner and former head of CSIS had in separate interviews identified a problem. They called for more security screening for potential civil servants that were born in Third World countries. NOIVMWC would ask members of this committee to be mindful of the relevance of disparate impact theory when voting on Bill C-36.

The bill creates extraordinary and wide-ranging powers, and we consider that the proposed review mechanisms will not be sufficient to ensure the respect of fundamental freedoms. These powers, if abused, could have severe implications for democracy in Canada.

We are concerned that the bill, by providing the Canadian security establishment with increased powers without any provision for independent review or judicial scrutiny, will facilitate the surveillance of Canadians, especially those from racialized minorities. The promises of good behaviour by the representatives of the municipal police forces appearing before you do very little to reassure the visible minority community whose relationship with police even prior to September 11 has been fraught.

We are even more distressed when we see two other pieces of legislation, Bill C-35 and Bill C-42 being introduced simultaneously with Bill C-36.

We are concerned that this unholy trio of bills will between them restrict if not stifle legitimate political protest and limit political participation. We are concerned about this novel concept introduced into the Criminal Code facilitating a terrorist activity.

We share the concerns of NAWL, the Coalition of Muslim Organizations and the Barreau du Québec that this new concept is an unfortunate departure from the accepted and understood notions of aiding and abetting that are to be found in section 21 of the Criminal Code. We agree with the Barreau du Québec that this notion of facilitation is not clear and that its introduction might incriminate innocent citizens as accomplices.

Many of the NOIVMWC membership come from countries where extending hospitality to kin groups and friends of friends is a time-honoured tradition. Many have provided in-kind support such as transportation and lodging to members of

groups or their representatives who are engaged in various kinds of causes and struggles their countries of origin. This bill could implicate people like these NOIVMWC member who have no criminal intent. Are they to be construed as facilitators of terrorism when they acted in good faith? Are they to be subjected to severe criminal and civil penalties without ever having committed a criminal act?

NOIVMWC is concerned about the sections prohibiting the financing of terrorist activities would prevent fundraising on behalf of groups resisting oppressive regimes, or more simply providing funds for community survival. The scope of clause 4, which pertains to the financing and facilitation of terrorist groups, is too broad, too imprecise and based on the controversial definition of terrorist activity.

NOIVMWC agrees with the Canadian Arab Foundation when it states that the gesture is tantamount to black listing an organization. It has the effect of criminalizing fundraising activities and donation to humanitarian and educational causes. Members of NOIVMWC are raising funds for the Afghan women's mission. I have been working for the release of a human rights activist in Uzbekistan. Are we then all terrorists or facilitators of terrorist activities?

The bill before you, senators, is a flawed bill. If will do little except create a climate of fear and insecurity for the visible minorities, many of whom have fled state-inspired or state-directed terrorism in their lands of origin. It will erode our hard-won rights and freedoms. It will diminish Canada in the eyes of the world.

Even if the sunset clause were to apply to the entire bill, which it does not, much harm will have been done in the first years of the life of the bill that will not be undone by any sunset clause. It will leave behind a trail of ruined reputations, shattered lives and fearful people.

(Take 1620 Follows - Dr. Bose continuing: NOIVMWC, along with NAWL and many other organizations...)

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(Dr. Bose continuing)

NOIVMWC, along with NAWL and many other organizations, in particular the Canadian Bar Association, the Canadian Labour Congress, the Ligue des droits et

libertés, the Barreau du Québec, the B.C. Civil Liberties Association and the Coalition of Muslim Organizations look upon the Senate as their last hope.

In *The Globe and Mail* on December 1, 2001, Michael Valpy said that he was sceptical of the Senate's ability to see off this unfortunate piece of legislation. We urge you to prove him wrong by defeating Bill C-36.

Senator Beaudoin: We have heard many witnesses in the past four days. Most of them have suggested some amendments and we have suggested amendments in our pre-study. Some of those amendments were accepted and others were not. I understand that you are not contemplating the possibility that we may reach a certain compromise on certain amendments. You seem to say that changes cannot be safeguarded; is that your point?

Ms Côté: Speaking for NAWL, we do not think the bill can be saved. We had studied with great interest the amendments that you have proposed to the House of Commons. We have seen that they have accepted some of them. However, we are very concerned about the entire structure of this bill at this point.

Sunsetting certain of the worst aspects of the bill, as has been done, is clearly not enough. We are convinced by the arguments that were developed in the Barreau du Québec's brief about the fact that what is being proposed here will contaminate our criminal law and other law, such as the Canada Evidence Act, where there are drastic changes being proposed with very little discussion. We are afraid that the response that has been developed in the urgency of the situation will have long-term effects on our law.

At this point, since there seems to be no possibility of negotiating something more acceptable with the House of Commons, the solution would be to block this bill so as to force the House of Commons to reconsider a new piece of legislation that would actually respond to the human rights concerns that we have.

Senator Beaudoin: This afternoon, the Canadian Bar made an impressive presentation. They said that the sunset clause that has been accepted by the House and that is before us, is related to two or three points, but let us say two big points.

The bar suggested at least three or four points where the sunset clause might be extended. I agree with their suggestion that we have some other points that should be sunsetted. They say the totality of the bill is not necessary to sunset. The government accepts the sunset clause, but for two or three points. The bar

suggested more than that. There is some possibility. The question of the officer of Parliament is probably more difficult, but we never know.

You say that it is no use to bring amendments forward, that the bill is a waste of time and that we should vote against the bill. My impression is that we should try to bring amendments of two kinds, first, to the sunset clause and, second, in the area of the officers of Parliament. We succeeded the first time to have a report that was unanimous. Perhaps it is possible to have another report that would be have the unanimous consent of the Senate, I do not know. By nature, I am more optimistic. I always try to do something before saying, "We vote against and that is the end of it." I do not feel that we have the support of your two associations.

Ms Côté: It is certain that sunsetting more clauses is better than doing nothing at this point.

Senator Beaudoin: That is what I said.

Ms Côté: The problem with the solution of sunsetting those clauses is that we are simply saying that we will accept that we will have violation of basic human rights for three or five years and then we will revise the situation. That proposition does not address the fact that there will be preventive arrests on the basis of suspicions, or that we will be allowing our courts to take decisions on the basis of evidence that is overtly inadmissible under Canadian law. What is worrisome is that we are introducing in our Criminal Code provisions that allow for illegal evidence to be used. That is scary in terms of the harm it will cause to our democratic tradition and the respect of our civil liberties.

The sunset clause that was adopted in the amended Bill C-36 is not quite the type of sunset clause that honourable senators suggested; it is a weaker type of sunset mechanism. Even if we say that these clauses will be sunsetted, that is just saying that we will tolerate violations of human rights and look at the question again in five years. The problem remains in terms of how we are changing our legal practice and the powers we are giving to police officers and judges.

Senator Beaudoin: I am in favour of perfection, but we do not see that very often. What is the alternative? On one side we are told that some powers become necessary and there is public support for that. Our problem is to adopt a bill that would respond to the needs that we have and that would respect the Charter of Rights and Freedoms. I am strongly in favour of the Charter of Rights. The Charter is our heritage, probably the best heritage that we ever had. That is why

we say, "Well, do something and if we have made a mistake, we may always correct the mistake." What is the alternative, to do nothing at all?

Ms Côté: No, there is a need to have anti-terrorist legislation and to address the risk that we are dealing with. The alternative would be to do a separate, stand-alone piece of legislation that is what they have done in the United States by adopting the Patriot Act. I am not saying that there are no problems with the Patriot Act, but it is a stand-alone piece of legislation that will not enter and contaminate our entire criminal law and the Canada Evidence Act. That is the risk we are running.

If you look at the amendments that are proposed under the Canada Evidence Act, they are abolishing sections 37 and 38 that were the result of extensive work in the Canadian legal community, replacing it with a complex series of provisions that no one has really had the time to study and evaluate.

(Take 1630 begins, Ms Côté continuing: That will change Canadian...)

ES/Dec. 6/01

(Take 1630, Ms Coté continuing)

**That will change Canadian evidence law in the long term. What is worrisome is the risk that it will have a long-term impact and diffuse itself in other areas of sanction or criminal activity that is not just terrorist activity, but other kinds of criminal activity. We are concerned that it will fundamentally seep into our criminal law system and change many other things.

Senator Beaudoin: We have two solutions at the start. We proclaim a state of emergency for a few months, and by its nature, an emergency measure is transitory. That is one possibility. The government said, "We better have a bill that will be permanent." “Permanent" is a big word. We say if the government does that, we need a sunset clause that will be strong, and we need an officer of Parliament. Then we would accept the bill. That is the choice. In the days to come, we should try to find some compromise.

Senator Furey: Yesterday, Ms Côté, we heard from Professor Monahan, and I would like to get your reaction to a comment he made in light of Senator Beaudoin's comments. He said there is no necessary opposition between the interests of security and liberty. Security is a prerequisite to liberty because we can

only enjoy our liberties in a free and democratic society if we have security from a terrorist threat such as the type that we saw on September 11.

Some measures must be taken with respect to security that necessarily infringe on rights.

Ms Côté: Whose rights, is the question.

Senator Furey: Essentially, the rights of all Canadians.

Ms Côté: What you must think of is that we will introduce law reform where people of colour and immigrants will suffer infringement of rights. We must balance seriously what is the real threat of terrorism that we are dealing with. To my knowledge, there has not been a concrete evaluation of an imminence of threat to Canada in terms of a terrorist attack. We are responding with a heavy-handed approach in the face of an as yet unevaluated threat, and we are responding with measures that will have an impact on people who are already suffering under our criminal law system.

We have had many studies in Canada about the racist application of criminal law, either by police powers or by the courts. There was a big study in systemic discrimination in the criminal law system in Ontario about ten years ago. There have been many studies on racist treatment of Aboriginal people, and I am concerned that when we say we must ensure security in order to have liberty, it is true in the abstract. However, whose security are we thinking of, and are we really thinking of the security of the people who will be threatened by this bill? This is what I think is a real concern for many human rights activists, and Dr. Bose may elaborate more on that. We are seriously concerned about the racist impact of this bill, not because we have, necessarily, intentional racism at every level of our criminal justice system. I am not saying that. How do we interpret threat? How do suspicions become formed? I am concerned that we have not thought this out properly and that some people's security will be threatened by this bill because they will be the targets of criminal prosecutions.

Senator Furey: You are not saying that we should not implement measures to deal with terrorism.

Ms Côté: We are not saying we should not. We are not saying that at all. However, we need to take the time to ensure that the measures we take to promote

safety will promote safety in a universal, egalitarian way and not have adverse effects against groups in our society that are already disadvantaged.

(French follows: Senator Poulin: Merci, madam la presidente... il est un peu ironique...)

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(après anglais)

Le sénateur Poulin: Il est un peu ironique que nous sommes en train d'étudier un projet de loi pour prévenir le terrorisme quand on se rappelle que, le 6 décembre 1989, des femmes ont été tuées brutalement et inutilement à l'École Polytechnique de Montréal. Aujourd'hui, le projet de loi C-36 se situe dans un contexte qu'on ose appeler «extraordinaire».

Les événements du 11 septembre ont changé notre façon de se voir individuellement et collectivement, et a changé aussi notre impression de sécurité de vivre au Canada. New York et Washington sont tout près du Canada, mais nous sommes conscients que les catastrophes additionnelles du terrorisme se poursuivent dans le monde entier. Je viens d'apprendre qu'un nouvel incident s'est produit aux États-Unis, à Indiana, où 35 personnes ont été blessées.

Le climat de peur et d'anxiété n'est pas créé par le projet de loi C-36, mais par le terrorisme. Ce climat affecte toutes les personnes, non seulement les hommes et les femmes de race blanche, mais les gens de toutes cultures et de toutes religions.

Nous avons discuté de la portée du projet de loi C-36 avec les ministres impliqués et les hauts fonctionnaires pour offrir au Canada des outils de prévention, c'est-à-dire pour rassurer les Canadiens et les Canadiennes que nos agences de sécurité ont maintenant les moyens de prévenir des actes de terrorisme au pays, et ce, avec l'aide d'autres agences internationales.

Une attention toute spéciale a été portée à la Charte des droits et libertés, à la vie privée et à l'accès à l'information pour maintenir cet équilibre qui n'est pas facile à conserver dans le contexte actuel. Il faut absolument rassurer la population avec des outils de sécurité. À ce propos, j'aime beaucoup ce que la ministre de la Justice a dit : «We want C-36 to be effective and fair».

Nous avons été très reconnaissants que les ministres et le comité de la Chambre des communes portent attention aux recommandations du comité spécial du Sénat, et qu'ils apportent des amendements majeurs à la législation lors de sa première ébauche. Ces amendements sont nés à partir d'interventions comme les vôtres. Nous sommes tous concernés par l'implantation d'une législation aussi importante et par toute sa portée.

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J'aime beaucoup l'expression «new waters». Nous ne sommes pas le seul pays dans cette situation. C'est une nouvelle expérience pour tout le monde. Le sénateur Beaudoin a dit qu'il était impossible de faire quelque chose.

(Sén. Poulin : Cela n'est pas acceptable.)

(français suit)

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(après français)(Sén. Poulin)

Ce n'est pas acceptable. Nous ne pourrons pas être parfaits, mais nous sommes obligés de faire des choix.

Ce matin, les représentants de la Fédération canado-arabe a partagé avec nous le fait que depuis le 11 septembre, ils ont des membres qui souffrent de harcèlement. Nous avons énormément sympathisé avec eux. Ce n'est pas à cause du projet de loi C- 36, mais à cause des événements du 11 septembre. Si les Canadiens et les Canadiennes sentent que les agences de sécurité ont les outils pour prévenir le terrorisme, nous croyons sincèrement que ce harcèlement va diminuer. Ces outils vont permettre d'identifier les extrémistes, hommes et femmes, de toutes les couleurs et de toutes les religions, qui ont de mauvaises intentions. Nous y voyons un élément de sécurisation. À ce moment-ci, ne serait-il pas mieux d'aller de l'avant avec le projet de loi C-36 pour s'assurer que les agences aient les outils nécessaires?

Mme Côté: Je crois qu'on dispose déjà de beaucoup d'outils dans notre droit criminel et dans d'autres types de législation pour contrôler l'activité terroriste. On peut compléter la législation pour répondre à de nouvelles situations qui se sont développées et pour apporter de nouvelles façons de fonctionner.

Cependant, je ne suis pas certaine qu'il soit bon de nourrir la psychose du terrorisme qui existe à l'heure actuelle. Je ne suis pas sûre que la menace qui existe en ce moment sera présente pour les 10 ou 15 prochaines années. Il y a eu une attaque très grave, mais ce n'est pas un État qui l'a menée, c'est un groupe terroriste qui est en train d'être circonscrit. J'ai peur qu'on ait une réaction disproportionnée à la menace et à la façon dont elle est organisée. Les gens se sentiront peut-être plus en sécurité, mais ils pourraient dès maintenant se sentir très en sécurité si le

gouvernement leur présentait les mesures qu'il peut prendre en vertu de la législation déjà existante.

(Ms. Bose: With all due respect...)

(anglais suit)

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(Following French - Dr. Bose continuing)

With all due respect from where I sit within the visible minority community, I must say that most people would disagree with you when you say it was not September 11. That it was always there.

We have gone from suspicion to outright accusation now.

Senator Poulin: Dr. Bose, I do not know how the translation was done, but I said that it was because of September 11.

Dr. Bose: I said it was magnified by September 11. The suspicion was always there, but people have been emboldened now to be xenophobic because we are all being tarred with the same brush. People have been emboldened. Somehow we have lost credibility because some of us happen to have coalitions with the alleged terrorists. Some of us may come from the same country of origin.

As for giving the security services the tools to do their job, I would agree with Ms Côté that they have the tools with which to do the job, except that the police forces of this country, whether federal, provincial or municipal, do not enjoy the whole-hearted support of the very community that they are asked to protect.

I return to the point of disparate impact. This legislation has a very strong and negative impact on people who happen to have my colour of skin and who do not have this British accent to protect them.

Senator Poulin: I do not disagree with you, Dr. Bose, far from it. Being a French Canadian, raised in an English environment, I was called "frog" 25 times a day starting at the age of two years. I can certainly empathize with a feeling of being discriminated against.

We are talking here of extraordinary circumstances. After hearing so many witnesses and after listening also to so many individuals who have taken the time to speak with me individually, I believe that the spirit of Bill C-36 is to give the tools to certain security agencies to target those terrorists in all the groups if they do exist in Canada. That would diminish discrimination against any visible minority or any woman or any man of any colour or religion. It is the other side of the coin.

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Dr. Bose: Would that it were so, senator. Unfortunately, there is a great gulf between theory and practice. A great deal of the community has come from countries where they look upon the police forces with horror. They have a horror of any legislation that is so Draconian.

I do not purport to speak for all of them, but we have had to change our position from recommending sunset clause to asking you to defeat this bill within the space of weeks because there has been a feeling within the community that sunset will not serve the purpose. People have already been targeted at work. I am talking about the case of Mr. Attiah in the AECL who was picked up and questioned. This is the reality in which we live. Unfortunately, it is interposing itself here.

I can only say, with great respect, senator, that we will call for the bill to be defeated.

Senator Jaffer: I want to thank both of you for coming. I know, because I belong to both your organizations, the limited resources you have. To come at such a short notice means you must move mountains. I can tell you that all my colleagues really appreciate you being here, thank you very much.

I wish that you had heard the very heart rendering statement that the chair made in the Senate about December 6. You talk about the terrorism of women every day. I recommend that you obtain the chair's statement. We understand and we are very much with you on that issue. We will work with you as long as we have breath.

(Take 1650 follows -- Senator Jaffer continuing: Terrorism has existed...)

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(Senator Jaffer continuing)

Terrorism has existed, as you said, with women every day. The Air India bombing happened 10 years ago and now they cannot build a courtroom to hold the trial, so it will be delayed again. It is interesting that when resources are needed they are used. Anyway, that is another day's topic.

The reality is that the House of Commons have passed this bill. I am sometimes blamed for being too practical. I would like to ask this of both of you: how can we as parliamentarians work with organizations like yours to help deal

with the fear and to help people have access to the parliamentarians to ensure that at least there is a lessening of harassment? I would like ideas from you on that.

Ms Côté: We will do some creative thinking together. Thank you for that very interesting question. Perhaps we should have a special committee on racism and the application of the anti-terrorist bill, if it is applied, where people, individuals and organizations can signal to you or to the House incidents of racism that will be noted. Perhaps we could think of having special persons appointed to investigate them and to report on them so that we can have a concrete assessment of how this bill will be applied and interpreted -- not just by police but also by Crown agents and by our courts.

I am sure that a mechanism to track this down would be very useful. It would inform the population that there is deep concern on the part of the Senate that this not be used as a pretext to allow discriminatory practices in our legal system. That is not the intention. I am sure that sending a strong message that way would be very helpful for people. I do not know whether you agree, Dr. Bose, since I am just extemporizing.

Dr. Bose: I would agree, Ms Côté. I, too, am improvizing as I go. The entire question of access to MPs is an important one, possibly one that is not exercised enough by members of the visible minority communities. There is also a tendency of government, in almost all developed countries, to relate to the visible minority communities either as a homogenous whole or through a series of power brokers. If you do not have access to these interlocutors, you do not get in.

I think the entire question of citizenship will have to be revised in the light of Bill C-36 and what it means to be black, brown or yellow -- and Canadian. There is a large job of education to be done. We would love to do it, but I think that some seed money must come forth.

Another point of concern for NOIVMWC is: who will pay the bill for the anti-terrorist measures? Will it be on the backs of social spending? Will it be on the backs of education? Will we be less competitive as a nation because we have spent so much on securing our borders and having security measures? It is a question of citizenship that must be brought back to the people but I have no idea how that can be achieved.

Senator Jaffer: I know I had you consider the issue on another level, but the chair has been proactive in looking at these issues. The justice department is also

working very seriously to look at ways to lessen people's fears and to continue with the values we have. If I can invite you to look at ways and get back to us, we can then have a discussion at another time.

The Chairman: Thank you very much. We listened to you with understanding and we hear your cry. This is a difficult piece of legislation. Someone asked me the other day whether I was comfortable with it because of the amendments, assuming, I guess, that I would say yes. I said that I was not comfortable with it because I am horribly uncomfortable with why we are now in a position in this country of having to look at legislation of this nature and try to find the balance.

Noting some of the comments just made, we may find that we must accelerate many other ways of finding that balance outside this legislation or other legislation that may come. You certainly will have a sympathetic ear from many of us in this chamber and certainly in this particular group.

Thank you so much for coming. I know it has been a struggle to get here. It says a great deal for your commitment that you wished to come. We are fortunate to have been able to hear you. Thank you.

The committee adjourned.