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THE SPECIAL SENATE COMMITTEE ON BILL C-36

EVIDENCE

OTTAWA, Monday, December 10, 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 10:00 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, I see a quorum. We are in our final committee phase today on Bill C-36, which is the government response to the actions that took place in the United States on September 11. Two months ago, we were asked by the government to do a pre-study of Bill C-36 and to give some opinions and suggestions on the subject matter. We did that. We put forward a report that was studied by the government and the House of Commons. A number of our suggestions were reflected in amendments to Bill C-36. This past week, for the first time, we have actually had the bill before us.

Today, we will complete our process by reviewing Bill C-36 clause by clause. Committee members will also make any suggestions for change and amendment that they wish.

This is a very long bill. Although the committee may, if it wishes, vote separately on each clause, members have given us an indication of amendments they propose to move and, in order to facilitate the process, if honourable senators agree, we could group the clauses up to those for which there are proposed amendments, thereby reducing the time required for this stage of dealing with the bill.

Senator Murray: Madam Chairman, I will not stand in the way of the committee if it wishes to proceed in this way. Indeed, and alas, this is the way that committees, including, I regret to say, committees that I have chaired, have been proceeding for some years now.

I wish to draw to your attention the fact that clause-by-clause consideration is really what the committee stage is about. As you know, once Parliament approves a bill at second reading, the bill then passes into committee stage. We have spent the last week hearing witnesses from the general public, and that was a very helpful exercise. However, hearing witnesses from the general public is a relatively recent parliamentary innovation. Committee is precisely about clause-by-clause consideration.

Our old friend, former senator John Stewart, always argued that the proper form is not the one that you and I have observed of asking, "Shall clause 2 carry?" but, rather, "Shall clause 2 form part of the bill?" At committee stage, the committee is supposed to decide whether the particular clauses will go into the bill and form part of it.

In former times, the committee, in those days Committee of the Whole, went over the bill literally clause by clause. "Clause by clause" meant what it said. The committee demanded explanations, if necessary, from the minister, or even officials, as to what was intended, made changes where changes were necessary, and certainly got a lot of clarification about the clauses.

I confess that this is time consuming and somewhat tedious, but it was a very important part of the parliamentary process. My arguments apply with even more force in a situation such as this where we have a bill that is 200 pages long that affects the security of the country and the rights of individual citizens.

As I have said, I will not stand in the way of the committee doing what committees have been doing, unfortunately, with legislation, and with the result that we pass a lot of hastily drafted and poor legislation into the statute books.

I do not think your request requires unanimous consent. I once argued that it did, but I was overruled by the Speaker of the day on that point. Again, I will go along with the wish of the committee if that is the committee's wish, but I do so with a heavy heart.

The Chairman: Senator Murray, I would like to make it quite clear to every member of the committee that my preliminary remarks were indeed meant to facilitate the process of the committee so that there can be full debate on those areas that are contentious and on which people have very strong views and wish to amend the bill. However, I am quite prepared to entertain a desire of the committee to go through every one of the 148 clauses and two schedules. I am quite prepared to do that in adherence to the original and true meaning of clause-by-clause consideration.

(Take 1020 follows -- I would accept comment on that…)

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(Take 1020 Begins -- continuing with The Chairman)

I would accept comment on that because I do understand both sides. I understand very well the tradition of the phrase "clause-by-clause study."

Senator Murray: We are both old enough to remember how it used to be done, Madam Chair.

The Chairman: Indeed we are, Senator Murray, and I do respect that tradition. I also understand that there are important issues that probably will be debated and that if senators wish to facilitate the process on this particular day, then we can do some grouping of clauses. However, I am more than willing to go back to the old tradition, if you will, and go one by one. I would like some guidance from the committee on that.

Senator Fraser: I bow in deference to the experience of the chairman and Senator Murray. However, as a newcomer listening to this debate, it occurs to me that something almost as mechanistic as going through the bill literally clause by clause would be perhaps useful for something like an omnibus bill amending the Income Tax Act. In a case like this, however, where this committee has spent hours and hours hearing specific testimony about many of the specific clauses in contention, it seems to me that it would be appropriate to group the clauses in

order, as you point out, to leave time for discussion of those clauses where people wish to propose amendments or have further debate.

Senator Lynch-Staunton: The problem is that none of us, starting with me, have been able to read the entire bill, or if one has read the entire bill, to understand it all. That is the problem with this bill and the haste that the government intends to see that it is passed by that we will not really any of us here in good conscience have a proper appreciation of all its implications. I agree that clause by clause will not illuminate us any more, but I wish we had had more time. Every time I go through this bill I find something new, which I had not caught before. Even the bar association, which has spent many more hours and had much more personnel at its disposal, admitted that they, too, had difficulty in understanding the bill, not only as a whole but various parts of the bill. I agree that in this case going clause by clause would not be beneficial to get a better understanding of the bill. I just wish we had had more time for that to happen.

The Chairman: Thank you, Senator Lynch-Staunton. I also would tell our committee members that as we proceed, we have with us, from the Department of Justice, the Assistant Deputy Minister, Mr. Richard Mosley. Mr. Mosley has been with us a great deal of the way. His colleague, Mr. Don Piragoff, who also has appeared before our committee, joins him. They will be here either together or one at a time throughout our hearings to assist.

Senator Murray: They should take the seats at the table in the event of questions.

The Chairman: Very well. They are modestly at the back of the room, Senator Murray, but they would, I am sure, be willing to come forward and take part in our discussions.

Senator Murray: In case there are questions. We are not asking them to join the debate necessarily.

The Chairman: Mr. Mosley and Mr. Piragoff, please sit back away from the table so that you do not have to get caught up in the debate, but be there for you us to call you forward for your advice.

If that is satisfactory to members of the committee, perhaps we could agree, then, to begin the process of our study of the bill and its clauses today.

To begin, honourable senators, I would ask: Is it agreed that the long title stand postponed?

Senator Fraser: I so move.

Hon. Senators: Agreed.

The Chairman: Is it agreed that the preamble stand postponed?

Hon. Senators: Agreed.

The Chairman: Is it agreed that clause 1, which contains the short title, stand postponed?

Hon. Senators: Agreed.

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The Chairman: Honourable senators, if we could proceed, then, with our first grouping, which would be clauses 2 and 3.

Senator Lynch-Staunton: Could we get the page numbers too? That would be easier to follow.

The Chairman: Clause 2, page 2 to 11. Is it agreed?

Hon. Senators: Agreed.

Senator Lynch-Staunton: On division.

The Chairman: Shall clause 4 carry?

Senator Andreychuk: No. With respect to clause 4, I wish to move that Bill C-36 be amended in clause 4, on page 14, by replacing line 46 on page 13, and lines 1 to 4 on page 14, with the following:

(1) That is committed in whole or in part with the.

I believe the clerk has copies of the amendment in both official languages, and I so move.

We have heard many witnesses. I not intend to go into great detail, as I think all honourable senators have been with us, at least I am looking at some who have been with us from the pre-study on. The greatest concern is how this bill will affect certain minorities and certain people in Canada. The mere fact that one belongs to a minority or a grouping of people who have the same religion or political affiliation makes one a target, even if the government did not intend to trap all people of that religion or of that political ideology. The government has made it clear, and we all know who we are targeting – terrorists -- but they are terrorists who at the moment seem to come from one particular religion, ideology or political persuasion. Anyone who shares that ideology or that religion is in fear that they may be tainted. The spillover effect, the chilling effect into that minority community is grave.

We heard from the Muslim lawyers, the Arab federation and many other groups who fear this kind of spotlight. They do so with some justification. In the First World War, when Canada went to war under Britain's declaration to fight the Austro-Hungarian Empire, anyone who came from there, whether they were Canadian citizens or landed immigrants, were the subject of suspicion.

(Take 1030 Follows -- continuing with Senator Andreychuk: We have the legacy of...)

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(Sen. Andreychuk continues)

We have the legacy of the internment of Ukrainians who were Canadian citizens and the internment of Austrians who were Canadian citizens or landed immigrants, simply because they were identified with those who seemed to be against us. We still live with the consequences of that in Canada. Decades later, many of these people could not get Canadian citizenship if they had landed immigrant status. We have the more recent history of the Japanese internment. Much has been said about that.

Despite the best efforts of our government, when authorities are given without sufficient scrutiny and oversight the consequences can be horrific for minorities. There is no need for the clause that I am proposing be deleted. Also, there is no need, in a definitional section, to have motive as well as intent. We have criminal law that has served us well over the years in the rule of law where intent is the issue, not motive.

Also, while we heard from witnesses who said that this would have horrific consequences in their communities, other witnesses said that this was an unnecessary impediment for prosecutors, that it would be very difficult to prove and, therefore, should not be in the law if, in fact, we are attempting to get at terrorism.

This proposed section would make certain segments of our community more vulnerable. If we were trying to achieve better and more targeted prosecutions, it might be helpful. However, we were told that it would have the unintended consequence of making prosecution of known terrorists more difficult.

Madam Chair and honourable senators, if we are to allay the fears of certain parts of our community and live up to the values and traditions that we hold so dear in Canada, and if we are to profit from our past mistakes, I believe that we do not need this proposed section. It serves no purpose. The unintended consequences for minorities, and perhaps the unintended consequences for prosecutions, far outweighs the value of leaving this in the definition of terrorist activity.

In fact, we know that the Americans, with whom we seem to be in lockstep, do not have this type of provision in their law. I could, in fact, find it in the law of no other country but England. With regard to the British legislation, we must bear in mind that it is stalled in the House of Lords as well as that it was introduced in the year 2000, before the September 11 terrorist attacks. They spent more than 20 years formulating a definition of terrorism before they even attempted to put it into law, after studying the experiences of their particular terrorist situation with Northern Ireland. For their legislation, there is some need for this. In Canada, we have no known terrorist situations that would require this type of wording, and we know that it may even be detrimental to getting at the kind of terrorist activity that September 11 brought upon us.

If we are seriously trying to deal with terrorism rather than attempting to have something flexible in our hip pocket that might be used at a later time, this does not help us. Therefore, as a signal to our multicultural society, to the values of the rule of law and the human rights and individual rights that we hold so dear, I suggest that we take this proposed section out. It in no way inhibits furtherance of actions we wish to take with regard to terrorism. As prosecutors told us, it might help us not to have this section.

Senator Bryden: I believe that the proposed section that Senator Andreychuk has proposed be deleted is useful. As I read the draft bill, I believe that it is probably necessary and that to delete it could cause significant problems.

Senator Andreychuk referred to the concerns of certain communities. She said that the Arab community and other Muslim communities indicated concern when they appeared before us that this provision would enable identifiable minorities to be singled out.

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When I pressed one panel of lawyers from whom we heard be specific about what the problem was, they said that in order to fix it we could take out the words "political, religious or ideological purpose". That was a significant suggestion. However, the next morning, we heard from the Canadian Arab Federation, who was concerned about the definition of terrorism. The definition that was suggested by that federation was much shorter than the definition of terrorist activity currently in the bill, but specifically included the words "political, religious or ideological purposes". Therefore, there was certainly not unanimity in the evidence we heard.

Another aspect is that the words are clearly limiting. They are intended to be limiting, and they are. The minister was asked about this and she said:

> The words are limiting words that help to distinguish terrorist activities from other forms of criminality that are intended to intimidate people, for example, organized crime where the motivation is one of profit. These words are important to appropriately define and limit the scope of Bill C-36 from other forms of criminality.

Professor Mendes suggested in his brief that someone could argue that the application of pesticides causes a serious risk to the health or safety of the public or any segment of the public and therefore could be included as a terrorist activity. However, it could not under this definition because it would have to have been committed for a political, religious or ideological purpose. Similarly, allegations have been made that this definition of terrorist activity could catch situations such as the nurses' strike in Alberta. Questions have arisen as to whether a blockade put up by the native community could be considered a terrorist activity.

(Take 1040 follows -- This provision makes that impossible....)

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(continuing with Senator Bryden)

This provision makes that impossible. It is not being done for political, religious or ideological reasons with the intent to create either human fear or suffering.

Finally, the minister is not the only one who takes this as a limiting provision. Professor Monahan, who testified before us, stated that:

> …it is an additional element of the offence that must be proven by the Crown. If that were not there, it would be easier to obtain a conviction…

I think that comment does not particularly disagree with what Senator Andreychuk had to say.

However, Professor Monahan did indicate that he found it rather strange that our panels of defence lawyers were concerned about eliminating a provision that will be very helpful in the defence of people who are charged with a terrorist offence. Presumably, that is one of the concerns -- the opportunity for anyone to have the maximum amount of defence provisions available to them. Along with all of the other provisions in the definition, it is part of what narrows the scope of terrorist activity and allows the government zero in on people who are engaged in terrorist activity and not other forms of protest or even other forms of criminality

that are done for other motives. Therefore, I think the proposed section needs to stay.

Senator Lynch-Staunton: This covers an area much broader than the way Senator Bryden has explained it. Why is it that we should include in the Criminal Code the proof of a motive for one particular activity, while elsewhere in the Criminal Code motive need not be assessed before a charge is laid? Motivation is something that a judge and jury will look into. Murder is murder, according to the Criminal Code. Whether it follows mercy killing or a cold-blooded gangland murder, the Criminal Code does not differentiate. Here we are saying that before we lay a charge of terrorist activity, we must prove that the activity was committed for political, religious or ideological purposes. What is the point of putting that into the bill? It impedes prosecution and it supports the argument of various minorities that they are being singled out. If it is a terrorist activity, which is described in great detail, it is a terrorist activity. Why prove that the person who committed that terrorist activity did so for political, religious or ideological purposes? That is the point. Why motivation here when motivation does not appear anywhere else in the Criminal Code?

Senator Bryden: Under this definition and under this bill, without that provision it is not a terrorist activity.

Senator Lynch-Staunton: It is with the amendment and it continues to be. All the amendment does is to take out motivation and keep the rest: intimidation of public, death, bodily harm, the endangering life, et cetera.

Senator Fraser: I strongly support Senator Bryden's comments on the need for a limiting clause. It is wholly appropriate to limit this sweeping bill to the real bad guys. That is who we are talking about, the real terrorists. We are not talking about common garden-variety organized criminals, no matter how nasty they may be.

I wanted to make the point in response to the earlier portion of Senator Andreychuk's remarks that nothing in this bill could lead to the internment of groups of people as was done in Canada during the First and Second World Wars. Nothing could lead to internment of whole communities, as was done then.

I wish to comment on something that of course Senator Andreychuk knows as well. In those years, we did not have the Charter of Rights and we do now. Under our Charter, it is inconceivable that people could be rounded up and held just because of who they are.

Preventive detention under this bill, Senator Lynch-Staunton, is a completely different thing.

Senator Lynch-Staunton: It is a roundup.

Senator Fraser: It must be done in specific circumstances for specific individuals and for a very limited period of time, not for whole groups or communities -- never again.

Senator Andreychuk: We should correct the record. Whole communities were not rounded up, but significant numbers of individuals were. It was done very lawfully.

Senator Fraser: Under the laws of the day, not the laws of today.

Senator Andreychuk: Those memories stay with us. We are a much more mature society with the Charter. We must look at whether we need this kind of chilling effect on a community when we may not get the terrorists. We are adding a limit by putting another element into the criminal process, and that is motive, which will make it more difficult to target the terrorists. However, that makes a whole group more vulnerable, particularly when we start to think of the facilitation sections of the bill and the association in and around terrorists with the manoeuvres they have at their disposal. You have all heard that evidence. Why is that community so ill at east with this legislation? Why do so many members of the Canadian bar come forward to talk? It is because of the unintended consequences of this bill.

In studying each proposed section we can argue about what the intent is, but when we put the package together and give it to all of the administrative authorities, that is when there can be unintended consequences and different interpretations. The cumulative effect is to create a great unease in society. There is no question that members of our society feel vulnerable and feel that they are being profiled already. We heard evidence of that. Consequently, this is a signal to them that we will go after nefarious activity, not because someone has a political, religious or an ideological belief. This is unnecessary to further terrorism enforcement.

Senator Beaudoin: The Canadian Bar Association, in their brief, at page 3, paragraph 5, suggested that the proposed section be removed. They said that the requirement that terrorist activity be motivated by ideology, politics or religion should be removed from the definition. They indicated that the requirement makes the prosecution task more difficult, as a terrorist should be seen in light of the result of their action rather than in the motivation behind it. It also pushes enforcement authorities to conduct unseemly investigations into accused associations and religious beliefs. Furthermore, they said that investigation and the eventual proof of the religious or ideological motivation could encourage certain members of the public to see religious or national affiliation as justifying the prejudices we have long sought to erase.

I remember well the position of the Canadian Bar Association. They put forth an argument of great interest, one that favours of Senator Andreychuk's amendment.

The Chairman: Is there further comment on this amendment?

If not, it is moved by Senator Andreychuk:

> That clause 4 be amended on page 14 by replacing line 46 on page 13 and lines 1 to 4 on page 14 with the following:
>
> (i) that is committed in whole or in part with the

All those in favour of the amendment?

(take 1050 follows -- Senator Lynch-Staunton: Could we have a roll call on each amendment?)

Senator Lynch-Staunton: Could we have a roll call on each amendment?

The Chairman: Certainly, Senator Lynch-Staunton, I will ask that question, if that is the preference.

All those in favour of the amendment?

Dr. Lank: The Honourable Senator Fairbairn, P.C.

The Chairman: Abstain.

Dr. Lank: The Honourable Senator Andreychuk.

Senator Andreychuk: Agreed.

Dr. Lank: The Honourable Senator Beaudoin.

Senator Beaudoin: Agreed.

Dr. Lank: The Honourable Senator Bryden.

Senator Bryden: Opposed.

Dr. Lank: The Honourable Senator Robichaud.

Senator Robichaud: Abstain.

Dr. Lank: The Honourable Senator Fraser.

Senator Fraser: Opposed.

Dr. Lank: The Honourable Senator Furey.

Senator Furey: Opposed.

Dr. Lank: The Honourable Senator Jaffer.

Senator Jaffer: Opposed.

Dr. Lank: The Honourable Senator Kelleher, P.C.

Senator Kelleher: Agreed.

Dr. Lank: The Honourable Senator Lynch-Staunton.

Senator Lynch-Staunton: Agreed.

Dr. Lank: The Honourable Senator Murray.

Senator Murray: Agreed.

Dr. Lank: The Honourable Senator Phalen.

Senator Phalen: Opposed.

Dr. Lank: The Honourable Senator Poulin.

Senator Poulin: Opposed.

Dr. Lank: Yeas, five; nays, six; abstentions, two.

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The Chairman: I declare the amendment defeated.

Senators, shall clause 4 carry?

Senator Lynch-Staunton: What pages?

I am wondering what pages your call covers. You went from 1 to 13 or 15 before.

The Chairman: We will go from page 11 to 42.

Senator Lynch-Staunton: Thank you.

(French follows--Senator Poulin: Puisque nous avons voté sur...)

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(après anglais)

Le sénateur Poulin: Puisque nous avons voté sur l’amendement, est-ce que nous pourrions maintenant voter sur l’article original?

(The Chair: For the clarity of the record…)

(anglais suit)

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(Following French)

The Chairman: For the clarity of the record, after the first amendment, I have gone back to the question: Shall clause 4 carry? I believe the answer is that Senator Beaudoin has a further amendment.

Senator Murray: Senator Poulin's point is that after Senator Andreychuk's amendment was lost, the Chair should have put the question on the clause.

Senator Fraser: She did.

Senator Poulin: I did not hear the Chair.

The Chairman: I did.

Senator Murray: It is on division, then.

Senator Fraser: It has not carried yet.

The Chairman: No. Because Senator Beaudoin has a further amendment to clause 4, I believe.

Senator Lynch-Staunton: Yes, he does.

(French follows--Sen. Beaudoin: L'amendement est à la page 29, substitution...; la terms "knowingly"...)

(après anglais)

Le sénateur Beaudoin: L'amendement est à la page 29, par substitution, à la ligne 40, de ce qui suit:

83.19 Est coupable d'un acte criminel et passible d'emprisonnement

deviendrait :

83.19 Est coupable d'un acte criminel

et on enlève tout le reste. À la page 30, on supprime les lignes 1 à 11.

Le problème est le suivant, c'est qu'il y a une contradiction entre le premier paragraphe de la première sous-section et le deuxième paragraphe. C'est autour du terme «knowingly» et, en français : «est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans quiconque sciemment facilite une activité terroriste.»

On voit aussi :

> (2) Pour l'application de la présente partie, il n'est pas nécessaire pour faciliter une activité terroriste : […]

Il y a ensuite *a)*, *b)* et *c)*. Il y a une contradiction entre ces deux paragraphes.

(Sen. Beaudoin : We discussed that with the Canadian……)

(anglais suit)

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(Following French--Senator Beaudoin continuing)

We discussed that with the Canadian Bar Association. I remember Senator Bryden intervened on the matter. The purpose of the amendment is to remove that contradiction from the bill.

(French follows--Sen. Beaudoin continuing: Comme je l'ai dit, il y a une

(après anglais)(Sén. Beaudoin)

Comme je l'ai dit, il y a une contradiction. On dit :

> (2) Pour l’application de la présente partie, il n’est pas nécessaire pour faciliter une activité terroriste : […] que l'intéressé sache […] qu'une activité terroriste en particulier ait été envisagée […] qu’une activité terroriste soit effectivement mise à exécution.

Alors le but de cet amendement est de substituer ce qui suit à la ligne 40, à la page 29 de l’article 4:

> **83.19** Est coupable d’un acte criminel

et, à la page 30, de supprimer les lignes 1 à 11.

(Sen. Lynch-Staunton : If I might point out,…)

(anglais suit)

contradiction...)

(Following French)

Senator Lynch-Staunton: If I might point out, all that changes at the bottom of page 29 is that the (1) in brackets is removed. The whole paragraph remains, although in the amendment it reads as if only one sentence remains. It should have been pointed out in the explanatory note that only the (1) in brackets is removed to be consistent with the numbering system.

The Chairman: If that were to happen, we would then go where?

Senator Lynch-Staunton: You take out the (1) in brackets after 83.19, and then you go to the top of page 30, and 2(*a*), (*b*) and (*c*) are removed.

Senator Beaudoin: The result is the following: There is only one point and there is no contradiction. If we leave (1) and (2) as they are, there is a contradiction. We remove lines 1 to 11 on page 30. There is only one crime, and I quote:

(French follows--Sen. Beaudoin continuing: (citation) Est coupable d'un acte

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(après anglais)(Sén. Beaudoin)

83.19 (1) Est coupable d’un acte criminel passible d’un emprisonnement maximal de quatorze ans quiconque sciemment facilite une activité terroriste.

(Sen. Beaudoin : It is somewhat technical. The fact is that…)

(anglais suit)

criminelle...)

(Following French--Senator Beaudoin continuing)

It is somewhat technical. The fact is that Senator Bryden will remember that we discussed the question. The differences between the two crimes is, in my opinion, contradictory, and it is better to have only one.

Senator Bryden: It will not surprise you that I do not necessarily agree with that. We had this discussion. The pre-study report recommended in relation to this provision "for facilitation by individuals to occur, the requirement of knowledge, though not necessarily of a specifically planned act, should be clear in this section and throughout the bill."

(take 1100 follows: Sen. Bryden continuing: I believe that the government has attempted....)

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(Sen. Bryden continues)

I believe that the government has attempted to accommodate that recommendation by putting the provision in proposed subsection 83.19(2), "everyone who knowingly facilitates a terrorist activity". We heard considerable evidence on this. Mr. Mosley, who accompanied the minister, said:

> In the particular context of terrorism, we know that we are increasingly gaining more understanding of the cellular nature of these organizations. ... The difficulty is that the people who are part of the network may have no knowledge of the specific plan that the network or the leaders wish to have carried out. However, they do know that they are contributing, that what they are doing, however small the part may be, is for the purpose of facilitating the larger plan. To get all of the tentacles of the network, you have to have an offence that captures people who are not privy to the larger scheme but are part of the conspiracy.

It is my interpretation that the person must have knowledge that they are doing something that is intended to contribute to a terrorist activity. If they supply the fertilizer to make a bomb for terrorist activity, they do not need to know that the bomb is ultimately to be used to hit a nuclear power plant.

Senator Beaudoin: There is a contradiction. "Everyone who knowingly facilitates a terrorist activity is guilty" -- I have no problem with that. However, it goes on :

> (2) For the purposes of this Part, a terrorist activity is facilitated whether or not
>
> *(a)* the facilitator knows..."

That is unbelievable. It applies even if he does not know.

Senator Bryden: Senator Beaudoin, we both know that you cannot stop reading a sentence after you get the word that you want. It says "the facilitator knows that a particular terrorist activity is facilitated" and the knowledge in this

instance goes with "any particular terrorist activity". It does not at all detract from the person's knowledge that a terrorist activity of some sort is being facilitated by what he does, but he does not know the particular facility. This is specifically designed to catch the cell and conspiratorial nature whereby you proceed, as some political parties want you to, on a need-to-know basis, that is, letting the person know only what he needs to know. He knows that he is facilitating a terrorist act but he does not know the specifics of it. That does not exempt him, if he knows he is part of the group contributing to this.

Senator Beaudoin: The least that we can say is that it is not very clear cut. Where is the *mens rea*? In a crime of that nature, that is fundamental. Is it your argument that if he has general knowledge that is sufficient?

Senator Bryden: It is very clear: "Everyone who knowingly facilitates a terrorist activity", so he knows that the activity in which he is engaged is facilitating a terrorist activity. The Crown must prove that first. However, the defence then is not that he did not know that they were going to blow up a particular nuclear plant, that they could have blown up a dam or an office building. It is not like in the normal situation of other types of crimes where you prove the specific incident. If he knows he is facilitating a terrorist activity, he cannot answer that he only knew that he was helping to facilitate a terrorist act, that he did not know where they would put the bomb, who they were going to shoot or what plane they were going to fly into a building.

That exculpatory defence is eliminated by proposed subsection (2). That is the best case I can make.

Senator Beaudoin: I do not think that we need such a way. The drafting, in my opinion, is not what we normally see in criminal law. I believe it is better to have the amendment. The word "knows" appears twice and prima facie there is something that is not very well drafted here. That is why we propose an amendment. That is our argument.

Senator Andreychuk: Senator Bryden is trying to liken terrorism to other crimes. This is a facilitating section. If I know that you are going to commit a murder, that implies I know something about the murder you are going to commit. Therefore, I would be a facilitator if I did anything to knowingly assist in that murder. Here the brush is unnecessarily broad. It needs to go to the crime. Surely someone who has only a partial understanding of the criminal activity should not be taken to know everything that the terrorist group is doing, which is where this seems to lead. The Canadian Bar Association is saying that to be consistent with the need for intent in the criminal law the amendment is warranted.

Senator Beaudoin: The Barreau du Québec took the same attitude.

Senator Andreychuk: The entire Canadian bar took that position.

Senator Bryden: Clearly, the bar needs to do what it can in order not to eliminate defences that they are used to using.

I do not know whether Senator Andreychuk's point really is valid. If someone comes to my house and asks me to give them my licensed gun in order to commit a murder, and I give him my gun, although I have no idea who he is going to shoot or when, I believe that I am implicated in that crime.

Senator Andreychuk: However, if he came over and asked for your gun, and you knew that he sometimes had erratic behaviour, that could also implicate you as a facilitator. To take the example further, you might give him money or something else rather than a gun to assist in the commission of a crime.

The case where he tells you that he is going to commit a terrorist activity and you give him some tool to help him is clear cut and we need not worry about that. However, this will cover anyone who conceivably has an association with a terrorist.

I think that the Canadian bar is used to something that has great merit. We do not convict people under the criminal law unless there is *mens rea*, and we do not deviate from that unless there is some very compelling and justifiable reason. The harm that would be done is greater than the gain that would be realized by having this proposed section as is.

Bearing in mind that the Canadian bar represents both prosecutors and defence and this was not coming only from Canadian defence lawyers, I think this a good addition to this bill. It would follow the criminal law practice that we spent many years putting into place, with reason. I do not think you and I need to go back through law school to understand what that means.

(Take 1110 follows -- **Senator Beaudoin:** Do not forget that we are...)

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Senator Beaudoin: Do not forget that we are dealing here with criminal law. It is a crime. Fourteen years is something. In criminal law, we must be precise. The way the bill is drafted I am not sure that the courts will not come to the conclusion that the intention of the legislators is not very clear. They start with the principle, which seems to me very clear, at the bottom of page 29, but when we come to page 13, and you read the first 10 lines, you cannot but come to the conclusion that, at least prima facie, it is a reduction, if not a contradiction. That is my argument.

Senator Bryden: It is different from what we in the criminal bar have been used to. However, I believe the import of the bill is to address a different situation. Normally, to deter a criminal act, the penalty of life imprisonment or death would act as a deterrent. This bill is directed to people who, to use someone's quotation, love death as much as others love life. We are talking about situations where the person who is going to drop the bomb or spread the chemical does not mind if he dies. As a matter of fact, he is part of the weapon. In some instances, he is the weapon. To deter that person, the normal course that we have used does not work.

As someone else said, once the terrorist is on the plane, it is too late. That is a broad statement. Normally, what is being prepared is that they kill the terrorist once he is on the plane to prevent that happening. The import of this bill is an attempt to prevent terrorist acts, not to punish people for acts once they are committed and use that as a deterrent on future acts. The most horrendous punishment we could think of is not a deterrent for some of the people who will actually do the act. In order to prevent the act, we must be able to do things to disrupt the network that allows these acts to occur, that allows to get this part from here, this individual to unlock a gate. They must know that the purpose of the action they are taking is to facilitate a terrorist act. That is absolutely clear. They

have to know that what they are doing is facilitating terrorism. However, they do not need to know which gate they will be asked to do unlock. They do not need to know what nuclear station. They do not even know that that is what it is supposed to be.

Someone used the word "paradigm". If we are to attempt to prevent terrorism in Canada, to secure our freedom, then we need provisions like this to be able to disrupt the activities of the cells that have tentacles in various places. The person who buys the fertilizer may want to facilitate the cause. He may realize he is facilitating terrorism, but he really does not want 14 years in prison. He is not suicidal and, thus, not prepared to be part of the bomb. Therefore, if he has enough knowledge that he knows he is facilitating that type of an act, potentially in what he is doing, then he does not need to know which facility or persons, the person who is the weapon or the bomb carrier is going to hit. That is what this says.

Senator Beaudoin: The *mens rea* is there. It must be there.

Senator Bryden: I am saying it is there.

Senator Fraser: I want to observe that while it is extremely instructive to have testimony and expert exchange about the criminal law as it currently exists and is applied in the courts, the key reason we have this bill is because the criminal law, as it presently exists, is not adequate to deal with a circumstance that is very different from anything that the Criminal Code was designed to apply to. If we go back in Canada's own history and look at previous terrorist or apparent terrorist acts, and we did not have this bill and we were in trouble with the FLQ, Lord knows we ended up using the War Measures Act, which we all agree was absolutely awful. We have the police trying to accomplish things by committing crimes. We did not have a legal framework with which to tackle what was a terrorist network.

I do not know the details of the Air India case; but I find it at least conceivable that had this law been in place 15 years ago, that case would not have had to drag on as it has dragged on. I would not want us to be confronting only the events of September as we look at this bill because it is for a longer time. The whole point is that we have not been able to deal with it before.

Honourable senators have heard me a number of times on the facilitation clause. I think that, as drafted, with both paragraphs, it is very useful and appropriate.

(French follows--Sen. Poulin: Je voulais justement un peu reagir a notre colleague Sen. Beaudoin...)

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10-12-01

(après anglais)

Le sénateur Poulin: Il est évident que l'étude du projet de loi C-36 a été faite dans le contexte des événements si récents. L'esprit de cette législation, comme le disait le sénateur Bryden, c'est la prévention. Vue la nature même d'un acte terroriste, on ne peut pas éliminer les mots à l'article 83.19(1). Si on le fait, on nie la nature même du terrorisme.

Premièrement, un acte de terrorisme exige la collaboration de plusieurs individus. Deuxièmement, le terroriste fonctionne de façon compartimentée, à savoir une cellule de terroristes ne sait pas ce que l'autre fait et ce pour s'assurer de la réussite de l'acte final. Il me semble que si l'on élimine les mots que vous voulez éliminer, sénateur Beaudoin, on enlève une des parties fortes de cette législation pour prévenir les actes de terrorismes et pour identifier ceux qui font partie de l'esprit terroriste avant que l'acte final soit posé.

Le sénateur Beaudoin: Ce n'est pas usuel, c'est tout ce que je peux dire.

(Sen. Andreychuk: Perhaps it is Monday morning. Senator Bryden and I…)

(anglais suit)

(Following French)

Senator Andreychuk: Perhaps it is Monday morning. Senator Bryden and I have tried to reach for examples. I think they were, with respect, not the right, which is the dilemma. The dilemma is not catching someone who may have facilitated with some knowledge or should have known. If it is a case of giving a gun or money and we know the man is involved in terrorist activity, then I do not have much sympathy for that facilitator. However, it is the kind of facilitator who could be trapped under the second part, you may be legitimately helping someone who you think is, as the old phrase goes, the freedom fighter, or someone who has an honest belief for a liberation movement or for a humanitarian reason.

(take 1120 follows: Sen. Andreychuk continuing: If a terrorist came and said, "My mother needs money," you might be swayed to believe that it was to...)

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(tk 1110 ends--Andreychuk cont. a humanitarian reason.)

If a terrorist came and said, "My mother needs money," you might be swayed to believe that it was to help out a dying mother as opposed to his ongoing terrorist activity. That is the difficulty; you put "knowingly" at the start. If you just left that and if there was any way that you could a draw long bow, insisting that the person should have known where his actions would lead, then you would have all that you need.

Bear in mind the criticism that this bill is too broad and too sweeping, that we have blanketed everyone instead of targeting. First of all, it is incumbent upon the government to prove that the existing criminal law would not be sufficient.

I would respectfully disagree with you, Senator Fraser. We now know that we acted under the War Measures Act because of a fear of the unknown, not about the adequacy of the criminal law to deal with the FLQ. That is why we amended the War Measures Act.

Second, we do not want to trap anyone who finds themselves accidentally associated with these people. Fertile minds will be on both the prosecution and defence and investigation. We do not want to trap innocent people with too long a bow. It is too far to go to say this apprehension of terrorism must be dealt with.

Bear in mind that terrorism was a significant act on September 11. Is this a measured approach? I think it is more than we need.

Second, we knew about terrorism before. I would have been more persuaded that we need these powers, if they had been requested before September 11, rather than after September 11. I do not see why we must go that far. The first clause goes farther than we have ever gone in our law. I wonder, who else do we need to trap? Anyone who facilitates in any way, under any circumstance, who can be logically linked to a terrorist, will be trapped under the part, with the deletion. That is the Canadian Bar Association's point. You have all the power you need and more.

Senator Kelleher: I have a small point, not necessarily germane to what we initially were arguing. With respect to Senator Fraser's comments, you did give a disclaimer that you did not know too much about the Air India case.

Senator Fraser: It is still before the courts.

Senator Kelleher: Parts of it are. We actually caught the man who made the bomb and sentenced him to 12 years. He has now been charged with murder for the Air India bomb.

I spent about two and a half years on that case. In my opinion, having had this law in place at that time would not have helped. The problem was a question of evidence, not the law. I wanted to make that clear. The case is presently still before the courts. For example, they cannot even prove yet that it was an explosion that occurred on the plane.

The Chairman: If there are no further interventions, honourable senators, it is moved:.

> That Bill C-36 be amended in clause 4(a) on page 29 by replacing line 40 with the following: "83.19 everyone who knowingly facili-";
>
> and (*b*) on page 30, by deleting lines 1 to 9.

In the French version, it is lines 1 to 11.

The clerk will record the vote.

The Clerk: The Honourable Senator Fairbairn?

The Chairman: Abstain.

Senator Andreychuk: Agreed.

Senator Beaudoin: Agreed.

Senator Bryden: Opposed.

(French follows--Robichaud, abstention)

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DQ/10-12-01

(après anglais)

Le sénateur Robichaud: Abstention.

(Sén. Fraser: Opposed…)

(anglais suit)

(Following French)

Senator Fraser: Opposed.

Senator Furey: Opposed.

Senator Jaffer: Opposed.

Senator Kelleher: Agreed.

Senator Lynch-Staunton: Agreed.

Senator Murray: Agreed.

Senator Phalen: Opposed.

Senator Poulin: Opposed.

The Clerk: Yeas, 5; nays, 6; abstentions, 2.

The Chairman: I declare the amendment defeated.

Honourable senators, I shall ask again: Shall clause 4 carry?

Senator Kelleher: I would offer an amendment.

The Chairman: I would note that we all have copies of Senator Kelleher's proposed amendment but, due to a typographical error, it is identified as clause 3, rather than clause 4. It should read clause 4.

Senator Kelleher: Honourable senators, this amendment deals with proposed section 83.28 on investigative hearing. It begins at page 32 of the bill, carrying on to page 34 and subclause (8).

When you get through the legalese, I am proposing that we amend proposed section (8) by adding the words, "any solicitor-client communications." So the person subject to the investigative hearing would not be required to disclose any solicitor-client communication. That is all there is to the amendment.

This change was strongly urged upon us by both the Canadian Bar Association and the Federation of Law Societies. As honourable senators are aware, it is not found anywhere in a statute but non-disclosure of solicitor-client communications has always been a sacred part of the common law. To force one to do otherwise would not only create difficulty for the accused but would also offend and create difficulty for the lawyer who has been called for the investigative hearing.

On Thursday we heard the representations of the Canadian bar and the Federation of Law Societies. I need not go through the arguments again. It is a simple argument and a simple amendment. I leave it at that. I am sure there will be some responses.

(tk 1130 follows--Senator Bryden**:** Senator Kelleher has been succinct)

Senator Bryden: Senator Kelleher has been succinct in his description of the amendment and the reason for it. My principal reason for not being prepared to support this amendment --

Senator Kelleher: That does not come as a great surprise to me.

Senator Bryden: -- is that if you read all of the proposed subsection (8), you will see it states:

> A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

It is certainly my opinion that that would cover solicitor-client privilege. Indeed, Senator Kelleher knows criminal law better than I do. There are provisions in criminal law that deal with issues of solicitor-client privilege and the right to instruct counsel. There is a provision in this bill that indicates that if money or property is frozen, an application can be made to make an exception to pay your counsel, to engage counsel, and so on.

Senator Kelleher: For that limited purpose.

Senator Bryden: For that purpose.

Senator Kelleher: I concede for that purpose.

Senator Bryden: It covers the instruction of counsel. I believe that was taken into account and is covered. That is my position on this proposed amendment.

Senator Kelleher: I do not wish to get into a long discussion on this. We had a full discussion the other day. All I can say is, for what it is worth and this does not happen to me very often, but both the Canadian Bar Association and the Federation of Law Societies agreed with my concern over this particular wording. Both organizations feel, along with myself, that it should be included as an exception.

Senator Furey: Senator Kelleher, I am not exactly sure what your concern is. Is your concern that the word "privilege" does not encompass solicitor-client privilege?

Senator Kelleher: Yes.

Senator Andreychuk: It does not.

Senator Kelleher: It is very simple.

Senator Furey: I tend to disagree with you. A question of privilege is a question of privilege.

The Chairman: The question is Senator Kelleher's amendment to clause 4.

All those in favour of the motion in amendment?

Dr. Lank: The Honourable Senator Fairbairn, P.C.

The Chairman: I shall abstain.

Dr. Lank: The Honourable Senator Andreychuk.

Senator Andreychuk: Agreed.

Dr. Lank: The Honourable Senator Beaudoin.

Senator Beaudoin: Agreed.

Dr. Lank: The Honourable Senator Bryden.

Senator Bryden: Opposed.

Dr. Lank: The Honourable Senator Robichaud.

Senator Robichaud: Abstain.

Dr. Lank: The Honourable Senator Fraser.

Senator Fraser: Opposed.

Dr. Lank: The Honourable Senator Furey.

Senator Furey: Opposed.

Dr. Lank: The Honourable Senator Jaffer.

Senator Jaffer: Opposed.

Dr. Lank: The Honourable Senator Kelleher, P.C.

Senator Kelleher: Agreed.

Dr. Lank: The Honourable Senator Lynch-Staunton.

Senator Lynch-Staunton: Agreed.

Dr. Lank: The Honourable Senator Murray.

Senator Murray: Agreed.

Dr. Lank: The Honourable Senator Phalen.

Senator Phalen: Opposed.

Dr. Lank: The Honourable Senator Poulin.

Senator Poulin: Opposed.

Dr. Lank: Yeas five; nays, six, abstentions, two.

The Chairman: I declare the amendment defeated.

Honourable senators, I ask again: Shall clause 4 carry?

Hon. Senators: Agreed.

Senator Lynch-Staunton: On division.

The Chairman: On division.

Honourable senators, I would then propose the question: Are clauses 5 to 42 carried?

Some Hon. Senators: On division.

Some Hon. Senators: Agreed.

The Chairman: Shall clause 43 carry?

Senator Lynch-Staunton: I have an amendment which I believe has been circulated. It is on page 78. It would replace line 3 with the following:

> other person interested may object to the disclosure of

You may recall we had quite a discussion on the change the government is proposing to the Canada Evidence Act to the effect that while at the moment it does say, "a Minister of the Crown in right of Canada or other person interested may object to the disclosure of information," the government would like to change the words "or other person interested" to "official".

We asked the question why they were broadening the list of interveners to have this particular right, whereas under the present section of the Canada Evidence Act "other person interested" is, by definition, someone who has a direct interest in a particular case other than a minister of the Crown.

We did get from the Department of Justice an explanatory note on this, which makes me even more anxious to see that the change it made because the word "official", as described, includes much more than suspected at first.

The Department of Justice says, and I quote:

> The definition of official in section 118 is quite broad and includes anyone who holds an office such as an office or appointment under the government or a position or an employment in a public department whether federal, provincial or municipal.

There are obviously hundreds of thousands of Canadians who qualify as "official" under this proposed section as presently worded which qualifies them to go before a court, whether they have an interest in the case or not, to object to the disclosure of information.

The Department of Justice says that the amendment contemplates that the person objecting must be an official acting in his or her official capacity when making the objection. That is not the way the wording goes. The wording simply says "official". It does not say "interested official". It does not qualify the type or the kind or the location of the official as presently worded. If that were in there, then perhaps the objection would be less soundly based.

In order to avoid excesses, delays and frivolous interventions, which the government wording will certainly allow, the amendment which we are proposing is that we revert to the original wording of section 37.1 of the Canada Evidence Act so that it would read "a Minister of the Crown in right of Canada, or other persons interested," rather than leave as it is now, "official". Again, any official can be anyone in this country employed at any level of government, federal,

provincial or municipal, who may or may not have an interest in the case. I am sure that is the intent. I am convinced it is the intent of the government to have the word "official" mean someone who is acting in his or her official capacity when making the objection. The wording presently does not specify that. The original wording does, and the courts have interpreted "interested party" as someone who has a direct interest in the case in their official capacity. In this wording, as the government is presenting it, "other official" simply means just about anyone else, as long as they hold an official title, whether elected or nominated at whatever level, no matter where they may be living in Canada.

(take 1140 follows: **Senator Bryden:** In reply, Senator Lynch-Staunton,...)

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Senator Bryden: In reply to Senator Lynch-Staunton, we had an exchange on this issue earlier, so I will not repeat that.

A judge interpreting a provision like this does not come to such an interpretation without a context that he would have seen or looked at in relation to the law on such matters. There is common law in *R. v. Lyons* where the interpretation was of the phrase "interested person." The court held that a person in that instance had to be operating in an official capacity.

The reference in proposed section 37(1) on page 78 of the bill is the following:

> …a Minister of the Crown in right of Canada or other official may object…

In looking not only at the normal way in which a series of words is interpreted by the court, but in looking at the interpretation in a similar circumstance with a slightly different word in *R. v. Lyons*, it is my view that the court would, in those circumstances, require that the official be acting in an official capacity.

Senator Lynch-Staunton said that the person could be a senator. That could be, but he or she would have to be acting in an official capacity under the direction of the appropriate minister.

Senator Lynch-Staunton: Why is that not put in the wording?

Senator Bryden: I did not draft the bill.

Senator Lynch-Staunton: But we have a chance here to correct the drafting.

I am sure that is the intent. The official must have an official interest in the case. That being said, that argument is diluted by the fact that the bill also specifies that the definition of "official" is as stated in section 118 of the Criminal Code, which, as interpreted by the Department of Justice, means just about anyone who has an official capacity with any department, any legislature. Had they not referred to section 118, I might have accepted your argument that "official" means someone who has a direct interest. The fact that they refer to the definition of "official" in its broadest definition only serves to make one quite anxious that they will have frivolous and delaying interventions. A friend of a terrorist can come in and say, "I am a dog catcher," or "I have a position in the government." That person can ask that there be no disclosure of information.

If you are trying to reassure us by saying that "official" means the same as "interested party," why bother changing it? Why not leave it as "interested party"?

Senator Bryden: I will make one further point. You and I will not persuade each other on this matter.

Reference to the definition of “official,” I believe, would indicate a universe from which an official could be drawn depending on the minister and the department. The official who would appear in this instance would need to be acting in an official capacity in order, in my opinion, to be entertained by the court and to be representing whichever minister of the Crown in the right of Canada he is purporting to act for.

Senator Lynch-Staunton: Again, that is what the act says at the moment and what this says is the contrary. I do not know why the government did not just leave it alone. If it works so well now, why change it? Have there been problems where the wording "interested party" has limited interventions?

Senator Bryden: I do not know the answer to that question. I am saying that in the circumstances we have here, a court does not act in a vacuum. I have no concern at all that the official would be listened to by the judge and would be acting in an official capacity to represent the department.

Senator Lynch-Staunton: The clause does not say that. That is the weakness of the change.

(French follows -- Senator Poulin)

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10-12-01

(après anglais)

Le sénateur Poulin: Les mots utilisés par la ministre, en réponse à une question posée par le sénateur Bryden, étaient: «tout ministre fédéral ou tout fonctionnaire». Ces mots veulent dire que c'est quelqu'un délégué par le ou la ministre. Ce n'est donc pas une intention frivole. Cela veut dire que le délégué du ministre agit avec son autorisation.

Le sénateur Lynch-Staunton: Ce n’est pas ce que demande le gouvernement. Telle que la loi est maintenant rédigée, il faut que la personne soit intéressée, et, on présume, déléguée par le ministre. On dit présentement: «tout fonctionnaire». On ne dit pas «délégué par le ministre». On ne dit pas: «un fonctionnaire intéressé». On dit: «un fonctionnaire». On peut, par implication, dire que c'est la continuation de la politique actuelle. Toutefois, on enlève délibérément à l’expression «interested person», le mot « interested». Si on avait dit: « interested official, interested person», parfait. Mais le mot «intéressé» est enlevé. Donc, cela veut dire que la personne n’est pas obligée d’être intéressée dans la cause.

(Sen. Lynch-Staunton: Do we want officials to come back to discuss this amendment…)

(anglais suit)

(Following French -- Senator Lynch-Staunton continuing)

Do we want officials to come back to discuss this amendment? It is up to the committee. I think the argument -- not because I am presenting it -- is very strong. There is a radical change in the identification of an individual who can go before the courts by removing the word "interested." Senator Bryden and Senator Poulin have tried to convince us that it remains the same -- the person must be interested. The question is: Why remove the adjective "interested" when the intent of having an interested person remains?

Senator Bryden: Senator Lynch-Staunton is indicating that for some reason the word "official" is much broader than an interested person. With all due respect, I am not sure that is the case. If we start with just the two words "interested person," virtually any Canadian citizen or anyone could be interested in keeping information out. It is my understanding that this is what *R. v. Lyons* really talked about. Yes, there is a restriction in that even an interested person must have an official character. I believe what may have happened is that if the interpretation is an official character of the person appearing under the interest provision, then the drafters simply used the more restrictive term "official."

With respect to an official person, my view is that the requirement is more targeted for the purposes of this bill than the reference to an interested person. However, "interested person" is circumscribed somewhat by the decision in *R. v. Lyons*. It may be that with *R. v. Lyons* already in the book, the use of the word "official" was to pick up some or all of the decision made in *R. v. Lyons*.

Senator Lynch-Staunton: The case you mention offers an interpretation of "interested person." We have yet to have one on the word "official."

Any person who goes to court under the present act must prove an interest or demonstrate an interest before the judge will hear his argument. That is fine. That is only normal. As amended by the government, that interest need not be shown. Otherwise, if the government had insisted that an interest be shown, it would have kept the word.

Senator Bryden: But it must be shown that the person is acting as a minister of the Crown in the right of Canada.

Senator Lynch-Staunton: It does not say that. It says a minister of the Crown or any official, not any official of that department or at that level or of the federal government, but any official as contemplated by section 118 of the Criminal Code, which includes everyone who has an official capacity.

(take 1150 follows -- Senator Bryden: The court will read the whole section...)

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(Take 1150 follows, Sen. Brydon, new speaker)

Senator Bryden: The court will read the whole section and do the same as it did in *R. v. Lines* and say, "Yes, but that is someone who is speaking on behalf of the minister."

The Chairman: Are we ready for the question, senators?

UNREVISED / NON RÉVISÉ

The question is on the amendment to clause 43 moved by Senator Lynch-Staunton:

> THAT Bill C-36 be amended, in clause 43, on page 78, by replacing line 3 with the following:
>
> Other person interested may object to the disclosure of.

Ms Lank: Honourable Senator Fairbairn, P.C.

The Chairman: Abstain.

Senator Andreychuk: Agreed.

Senator Beaudoin: Agreed.

Senator Bryden: Opposed.

Senator Robichaud: Opposed.

Senator Fraser: Opposed.

Senator Furey: Opposed.

Senator Jaffer: Opposed.

Senator Kelleher: Agreed.

Senator Lynch-Staunton: Agreed.

Senator Murray: Agreed.

Senator Phalen: Opposed.

Senator Poulin: Opposed.

Ms Lank: Yeas 5, nays 6, abstentions, 2.

The Chairman: I declare the motion defeated.

I would ask honourable senators: Shall clause 43 carry?

Some Hon. Senators: Agreed.

Some Hon. Senators: On division.

The Chairman: Carried on division.

I would ask in the next section that we carry from clause 44 to 101.

Senator Lynch-Staunton: There will be two more amendments, one to 146 and one to 102, in that order.

Senator Murray: If necessary. If my proposed amendment to clause 146 does not carry, by some mischance, then I will propose an alternative, which would be an amendment to clause 102.

The Chairman: My question remains, honourable senators. Does the committee approve clause 44 to 101?

Some Hon. Senators: On division.

The Chairman: Carried on division.

We will then move to the clause 102 on page 128.

Senator Murray: Madam Chair, could we leave that for the moment, and group clauses 103 to 146 and come back to 102 later, perhaps?

The Chairman: Is that satisfactory to the committee? Honourable senators, we will postpone consideration of clause 102 and I will ask whether clauses 103 to 146 carry.

Senator Murray: Excuse me. I have a new clause 146 to propose. I think what you are doing, Madam Chairman, is asking the committee to approve clauses 103 to 145.

The Chairman: You are correct, senator, Clauses 103 to 145. Agreed?

Some Hon. Senators: Agreed.

Some Hon. Senators: On division.

The Chairman: Motion carried on division.

We will then move, honourable senators, to clause 146.

Senator Murray: Madam Chairman, I have a new clause 146 to propose. I move that Bill C-36 be amended, on page 183, (*a*) by adding, after line 19, the following:

> Oversight and report.
>
> 146(1) Within 90 days after this act receives Royal Assent, Parliament shall appoint an officer of Parliament to monitor, as appropriate, the exercise of the duties and functions provided in this act, excluding the duties and functions of the Information Commissioner under section 69.1 of the Access to Information Act, as enacted by section 87 of this act, and the powers and duties of the Privacy Commissioner under section 70.1 of the Privacy Act, as enacted by section 104 of this act, and of the security and intelligence review committee.
>
> (2) The officer referred to in subsection (1) shall table in both Houses of Parliament, annually or more frequently, as appropriate, a report on the exercise of the powers and duties provided in this act, except those excluded under subsection (1), and (*b*) by renumbering 146 as clause 147, and any cross-references thereto accordingly.

Madam Chairman, I want to speak to my proposed amendment. Some honourable senators may recall that when the Minister of Justice, Minister McLellan, was here during the pre-study phase of our work, we had a discussion of the desirability of appointing an oversight officer of some kind to monitor the exercise of the powers proposed in this bill.

I thought that Minister McLellan did not disagree in principle. I thought she agreed in principle with the idea of an oversight officer. The only reservation that

I recall her expressing was whether one oversight officer would be appropriate for all the powers in the bill, or whether there ought to be different provisions made for different powers, for the exercise of different powers in the bill.

In any case, we then turned as a committee to a discussion of what would be appropriate for oversight and monitoring of the exercise of the powers in this bill. Honourable senators may recall, again, that we engaged with the Honourable Paul Gauthier and other members of the Security and Intelligence Review Committee, whether they already had sufficiently broad mandate to oversee and monitor the exercise of powers in this bill, or whether it would be necessary to broaden their mandate legislatively to enable them to do this. There was a consensus, eventually, that if we were to use SIRC, we would have to take steps legislatively to broaden its mandate.

There was also some talk of a parliamentary committee, a joint committee, to oversee the exercise of these powers. Finally, at the suggestion of Senator Grafstein, as I recall, we agreed that a single commissioner appointed by Parliament with sufficient powers would do the job very nicely.

(Take 1200 follows, Sen. Murray continuing: Accordingly, we recommended…)

38497/C-36/December 10, 2001/DM

(Senator Murray continuing)

Accordingly, we recommended in our pre-study report that, within 90 days of Royal Assent to Bill C-36, Parliament appoint an officer of Parliament to monitor, as appropriate, the exercise of powers provided in the bill. This officer shall table a report annually, or more frequently, as appropriate, in both houses.

Let me make it very clear what we had in mind -- certainly what I had in mind, and I think all of us on this side, and I think all of the members of the committee -- when we talked about a parliamentary commissioner. We talked about someone who would look over the shoulders of the authorities as they exercised the extraordinary powers that are given to them in this bill and blow the whistle when necessary on any abuses of those powers, and do so at the time, not long after the fact.

The government ignored our recommendation for an oversight mechanism in this bill. That is unfortunate, and I think we should move to amend this bill along the lines that we suggested in our pre-study report, a report which Senator Lynch-Staunton and others never tire of reminding us the entire Senate approved by vote not long after we sent the report, but after the government and the House of Commons had decided on the amendments that they were prepared to accept.

I anticipate, because I have heard them at least twice in this committee, the objections that will be raised to my proposal. The first objection is that there already exist certain monitoring agencies and that we would simply be duplicating their work by appointing a commissioner to oversee the exercise of these powers. That is true only insofar as the Security and Intelligence Review Committee monitors the activities of CSIS, the Canadian Intelligence and Security Agency. It is true only insofar as other amendments have reinstated the role of the Privacy Commissioner and to some extent the Information Commissioner and have

provided for a judicial review there. It is certainly not true for most of the rest of the bill.

I have heard honourable senators at this table mention the RCMP Public Complaints Commission. This is a commission with its own mandate and its own procedures, but essentially it requires that a citizen come forward with a complaint, and then the whole process is put in train, including public hearings and all the rest of it, as we have seen. In no sense can the RCMP Public Complaints Commission be considered an oversight body or a monitoring body, nor can the RCMP External Review Committee, which, as I understand it, and I have the statute here, is really concerned with grievances by members. It is a personnel or labour relations agency, as I understand it.

Likewise, the Human Rights Commission has a process all its own for dealing with complaints. This also is after the fact. To accept that the Human Rights Commission simply has all the authority that is needed to monitor all the powers in this bill would be to suggest that any excessive use of authority is a human rights issue. It may or may not be. In any case, the Human Rights Commission is not the appropriate body for this purpose.

What we have now in the laws of Canada is a series of review and complaint commissions. These are not oversight commissions. These are not monitoring agencies useful to us to keep an eye on the exercise of the powers in an extraordinary piece of legislation such as this.

The second objection that is raised from time to time is that really there is a constitutional problem here. We could not, it is argued, appoint a parliamentary commissioner to oversee the exercise of powers in this act because quite a number of these powers may well be exercised by provincial or even municipal authorities.

Let me begin by saying that even if that were true, I would be happy with a parliamentary overseer or parliamentary commissioner to monitor and oversee the exercise of the powers by the various federal authorities, ministers and their agents and agencies.

I do not think the argument holds true in any case. It is a near certainty that while there will be provincial and municipal authorities on the frontlines here, it is a virtual certainty that one or other or all of the various federal agencies will be involved themselves, not just CSIS, but the police and security authority, the federal police and security authorities acting within our own jurisdiction, the Customs and Immigration people and National Revenue. Many others will be involved in almost every file. The commissioner will be able to have a full oversight of what is going on.

Second, I do remind honourable senators that even when the RCMP is acting as a provincial or municipal police force, as it does in eight of our ten provinces, they are still under the supervision and discipline of the top brass in Ottawa, including their own commissioner and ultimately the Solicitor General of Canada.

Finally, various witnesses who have been before us have suggested ways around the problem, including the invocation of the Inquiries Act, for example, in any given case.

I conclude that we obviously we need an oversight commissioner. We need monitoring by an officer who reports to Parliament, and we need that such an

office can work effectively. I say it is necessary. It is necessary, first, in order to ensure against abuse of these powers and, second, in order to create the level of confidence that is needed for Canadians that our values will be protected even while these extraordinary powers are being exercised.

I have here the testimony of a number of witnesses who have come before this committee in the past week urging us to amend this bill in order to provide for a really effective oversight function, a monitoring function. I will not read their testimony into the record unless provoked, but they include the Canadian Council of Defence Lawyers, the Barreau du Québec, Professor Stuart from the Faculty of Law at Queen's University, the Coalition of Muslim Organizations and some of the bar associations. They all recognize the need for a proper, effective monitoring office in terms of the extraordinary powers that are accorded to the authorities in this bill.

(1210 follows, Senator Murray continuing, Madam Chair, honourable senators, let us be consistent)

LP/December 10, 2001

(Sen. Murray continues)

Madam Chair, honourable senators, let us be consistent, let us be principled, let us have the courage of our convictions as expressed in our pre-study report and accept this amendment to provide the assurance that I think Canadians want and need that, while these powers are being exercised, some officer of their Parliament is overseeing the entire project.

Senator Furey: I certainly do not agree with Senator Murray's dismissal of the accountability mechanisms that are already established, but I am more intrigued and concerned about his second point, that is, the one transversing provincial jurisdiction. I am not so sure that it is enough to say that it will not be a problem. If the federal government were to create such a commission and encroach on provincial government jurisdiction, I am sure there would be a problem.

Senator Murray, are you proposing that we get the consent of all the provinces before we do this?

Senator Murray: No, I am not, senator. My view is that, even if there were a problem in that way, I would be happy to have an oversight commissioner to oversee the exercise of the powers that various federal authorities -- ministers and agencies -- can exercise in our own jurisdiction, and they are extensive enough.

Senator Andreychuk: Senator Murray has laid out the foundation for why this is necessary. In the newspapers, and certainly in this committee, we keep talking about the powers the federal government is asking for. We keep forgetting that it will be Parliament that will grant these powers. It will be an act of Parliament that will set this whole procedure this motion.

With the War Measures Act, we give absolute discretion to the executive to do what is necessary to ensure that the threats imposed by the emergency situation are dealt with. However, those powers are taken away after the emergency is over.

The government has made the compelling case here that this is an ongoing threat and, with that, they are asking for some very new and dramatic intrusions

into fundamental principles of criminal law. We would be turning over powers to the police and others in a way that we have never done before. An act of Parliament will do that. We cannot then say that the government used these powers, because the government will in fact receive these powers from Parliament.

We owe it to the public of Canada to ensure that there is proper oversight. The existing oversight mechanisms are helpful and the officers that Parliament currently has in place are helpful, but they are specific to areas of concern.

I have yet to meet anyone on the street in Canada who believes this is just another piece of legislation. Canadians see this as something very significant. Surely Parliament must have an oversight. That is what is behind this amendment. I think we have a duty to put that in place if we are to take rights away from citizens and empower the government with these new measures that have never before been tested.

(French follows -- Sen. Poulin: Je ne faisais pas partie de ce comité…)

UNREVISED / NON RÉVISÉ

DQ/10-12-01

(après anglais)

Le sénateur Poulin: Je ne faisais pas fait partie de ce comité lors de la préétude, sénateur Murray. J'en fais partie seulement depuis que le projet de loi a été renvoyé au Sénat, amendé par la Chambre des communes. Lors de la préétude, les sénateurs ont proposé le poste d'officier du Parlement. J'ai porté particulièrement attention à cette question lorsqu'elle était posée au témoin. Je suis convaincue qu'un officier du Parlement responsable de faire rapport au Parlement sur les différents articles du projet de loi C-36 n'aurait pas été approprié, et ce pour plusieurs raisons.

Premièrement, le projet de loi C-36 n'a pas été conçu seul. On n'a qu'à lire le préambule pour le constater: Loi modifiant le Code criminel, la Loi sur les secrets officiels, la Loi sur la preuve au Canada, la Loi sur le recyclage des produits de la criminalité et d'autres lois édictant des mesures à l'égard de l'enregistrement des organismes de bienfaisance en vue de combattre le terrorisme. Deuxièmement, cela veut dire que le projet de loi C-36 aura un impact sur un grand nombre de lois, donc sur diverses agences canadiennes déjà responsables de la sécurité publique, de la cueillette de l'information, de l'accès à l'information, de la Charte des droits et libertés. Quel avantage aurions-nous à créer le poste d'officier du Parlement? Cela ne ferait qu'ajouter un autre niveau de gestion, une nouvelle agence, parce qu'un officier ne peut travailler seul, qu'il a besoin d'une équipe de soutien. Il faudrait donc engager des fonds publics additionnels pour que les agences qui existent fassent rapport à ce nouvel officier du Parlement.

J'étais d'accord avec le professeur Monahan quand il a fourni un argument supplémentaire, en parlant des compétences provinciales, et je cite:

(Sen. Poulin: "First, the administration of justice…")

(anglais suit)

(Following French -- Sen. Poulin continues)

> First, the administration of justice is a provincial jurisdiction. Most of the police forces are under the control of the attorneys general or the solicitors general of the provinces. Therefore, I am not certain how the officer of Parliament would effectively review those bodies. It may be that it could be worked out through agreement.
>
> Second, there already exist review mechanisms for federal police forces. The RCMP and CSIS already have mechanisms to review their activities. Again, they will be the primary persons enforcing the bill.
>
> The other question that arises in my mind is how would this new officer of Parliament work in conjunction with these other mechanisms that we have?

That is what I am referring to, that additional layer of management.

Professor Monahan continued:

> An alternative might be to see whether the mechanisms that already exist could not be used. I do not know whether the Canadian Human Rights Commissioner really has the expertise to deal with this. Perhaps the intelligence review committee or other bodies that already exist could, within their mandate, review some of these matters. I like to be practical about things and not set up a new a commission or body every time we pass a new statute, if possible, but rather try to see what we already have.

That is what I meant by saying a new agency, more public funds.

Professor Monahan further said:

> I do think that it is important that there be effective oversight. The provisions for annual reporting are quite useful. It will be important. The three-year review of the entire bill will be important as well. As senators know, when there are parliamentary reviews of that type, they are often quite significant and generate useful analyses.

(French follows by Sen. Murray)

UNREVISED / NON RÉVISÉ

(après anglais)

Le sénateur Murray: Premièrement, vous ne contesterez pas le fait que la plupart des témoins ayant comparu devant ce comité étaient en faveur d'une agence de surveillance pour contrôler l'exercice des pouvoirs donnés dans ce projet de loi. J'en ai la preuve ici devant moi.

Deuxièmement, sauf tout le respect que je vous dois, j'ai déjà traité les arguments que vous avez avancés sur la question des agences existantes. J'ai exclu explicitement dans mon projet de modification les agences de surveillance qui s'occupent des services de sécurité et également de l'accès à l'information et à la vie privée. Ils ont un mandat suffisant pour surveiller les activités qui touchent à ce mandat.

(Sen. Murray – Take 1220: The Human Rights Commission and the Security Intelligence…)

(anglais suit)

GM/December 10, 2001

(Take 1220 Begins with Senator Murray in French)

(Following French)

The Human Rights Commission and the Security Intelligence Review Committee could act, but we would have to enlarge their mandate legislatively to permit them to supervise the plenitude of powers that are in this bill. Senator Poulin enumerated some of them when she began her intervention. This would even include the powers that relate strictly to the federal departments, agencies and statutes that are being amended here.

Senator Poulin: I am afraid we will have to agree to disagree.

Senator Fraser: When this committee, in its pre-study phase, recommended an officer of Parliament, we must recall that at that time we were looking at a very different bill. Legally speaking we were not looking at the bill. We were looking at the substance of the original version of this bill. Since that time this bill has been dramatically improved. In our recommendations we were very concerned about oversight, about protection for due process, about bolstering the rights of individuals when they are confronted with the state. We recommended essentially many belts and many sets of suspenders in order to ensure that things would be properly done as we move forward. One of those belts or sets of suspenders was the parliamentary officer.

The bill itself has been so dramatically changed in every part. There is so much more provision now for judicial review, for other review, for reporting to Parliament, for sunset clauses, for tightened definitions and for improved protections for individuals that I think it is fair to say that most of the specific topics of our concern have been addressed. To the extent that is true, the need for one overarching oversight body is diminished accordingly.

The second point I would like to make is that we did not in pre-study phase examine the federal-provincial aspect at all and we should have done so, in my view.

I would just draw honourable senators' attention -- if this is proper procedurally -- to something that occurred in another committee, if memory serves, after our pre-study report in the Standing Senate Committee on Legal and Constitutional Affairs. As Senator Andreychuk and Senator Beaudoin are aware, when we were looking at the anti-gang bill, whose number I believe is Bill C-24, we were also concerned with oversight and protection of the rule of law. We got a sharp message from the provincial attorneys general basically saying to not come with your federal oversight mechanisms into our provincial jurisdictions of the administration of justice and the conduct of police matters.

I do not want to talk about whether it was appropriate for the ministers to send that message to us. That is a separate question. I just wish to draw attention to the fact that it was a matter of substantial controversy.

In this bill, we have already one federal-provincial agreement on the reporting of data. We have been assured that discussions continue about the reporting of qualitative analyses of the way this bill is implemented. In other words, we have in this bill engaged on a process of cooperation. I would far rather see it continue in that vein than get into the kind of situation where we in Parliament say that you have to do this and the provinces say that you cannot tell us to do that, and we end up fighting over technicalities instead of trying to protect the rights of Canadians.

Senator Bryden: Most of the issues have been covered quite well. We have discussed them in detail during the course of the hearings. I, of course, do oppose the creation of another officer of Parliament. Indeed, one of the witnesses, and I know there are a number, particularly from law societies and so on, who are happy to have another jurisdiction to work in, but Professor Mendes did not propose the creation of a new office. I think he was from the law faculty of the University of Ottawa. Rather, he was looking at beefing up existing offices.

Senator Murray: Human rights.

Senator Bryden: He was indicating human rights. I do not wish to repeat what Senator Poulin has covered, and that is I think Professor Monahan was also saying that before we create a new officer let us see what can be done with the many that we have now.

There was at least one witness who was not supportive of another officer of Parliament, and that was the Privacy Commissioner. He volunteered this information and no one asked him this question. He said that there is one other matter I would want to raise with the committee. I wish to ensure that I do not fail to address it. With regard to the matters that are under the jurisdiction of the Privacy Commissioner, I must tell you that I would be as vehemently opposed to the creation of an overseer officer of Parliament as I was to these amendments that I had to take issue with. The reason is that there is oversight of privacy matters by an officer of Parliament. It is by an officer of Parliament, who has a long-established office with an expert staff, including the best privacy expert lawyers, trained investigators, some of whom have been at this for 20 years and policy analysts who have been at it for 20 years. To give part of that oversight to a new officer of Parliament, with presumably other duties as well, would create either a fragmentation of oversight roles, which would weaken oversight, or it would create a hierarchy of officers of Parliament, which, in my view, would be untenable.

I say that just to give you a little bit of context to say that since the amendments that were made after the pre-study, there is a clear series of reporting functions that are done. There is oversight that is done by SIRC, by the RCMP oversight committee, by any number, and we must remember that provincially police commissions deal with those oversights and report to either their city councils and/or the provincial attorneys general.

In addition to that, we have a right to review that will occur in three years. I think it was Professor Monahan who said that as senators know, when there are parliamentary reviews of that type, they are often quite significant and generate useful analysis.

(Take 1230 Follows -- continuing with Senator Bryden: The fact is, as a House of Parliament...)

RC/Anti-terrorism 38497/Dec10/01.

(Senator Bryden continuing)

**The fact is, as a House of Parliament, we can be as thorough and as far-ranging on that review as we wish to be, at least in the areas that do not deal with the amendments coming up last, that is, the complete sunset. However, there is a provision for crucial changes in the criminal law, such as investigative

hearings and preventive detention, to cease to operate at the end of five years unless it is changed by resolution.

I know, Senator Murray, you are saying, "Look, let the provinces look after themselves. I just want another agency or commissioner to look after what is within the federal jurisdiction." I believe there is a point at which our security officials, our police officials, all of the people who are charged with the investigations, the procedures and the enforcements under this legislation, should have an opportunity to do their jobs. It is under the purview of those agencies that are already there and looking forward to being reviewed totally in three years. We may not be doing the people of Canada a great service by inserting another officer to whom they have to provide additional reports, send their top people into hearings at any time as an officer of Parliament.

As to the question of the emergency powers that were under the Emergencies Act, there was some question of using that. Professor Monahan --

Senator Murray: There is no point answering an argument that has not been made, senator, although I recognize the temptation.

Senator Bryden: I am just making the point for the interested Canadians who are listening. We want to ensure that they -- many of whom would be aware of the Emergencies Act -- realize that we have canvassed that and that, indeed, it has not been proposed either by yourself and certainly not by us.

For those reasons, along with some of the ones that have already been expressed, I will not be supporting that amendment.

Senator Beaudoin: This bill is permanent and is of the nature of criminal law. We all agree on this. It is not an emergencies act. When we say, perhaps, and I heard that argument a moment ago, that we are encroaching on the powers of the attorneys general of the provinces. It is stated in the Constitution, 1867 -- that is a long time ago -- that criminal law is federal, while its administration falls to the Crown attorneys, who are provincial. That is my knowledge, unless I missed something on this, but it worked very well.

Our system works very well in spite of the fact that the two powers are involved in the application of the criminal law. Canada is not the only country like that. There are many countries like that.

I want to say that because I do not think it would be true to say that we cannot do this and that because the power is divided between Ottawa and the provinces. It is divided. Criminal law is federal. Its administration is provincial. It works, and it works very well.

I do not think that the amendments contemplated are against that principle. I want to say that because I want to make sure that there is a division of power here. It is fundamental and I am sensitive to this. To me, it is not a problem at all in this particular bill.

Senator Murray: Finally, there will be some kind of annual report that is provided for in the bill now. The witnesses we have had here have been at pains to point out that the annual report will really be a statistical exercise, numbers. Others have claimed, however, that it will also be "qualitative". I am not sure what that means. To suggest that the authorities in their annual report will own up to

any abuses of the powers in this bill would really be to expect heroic virtue of them, and I do not expect heroic virtue of them. I expect, rather, a statistical report. If there is any suggestion of abuse, I expect a whitewash in the course of those annual reports.

Absent a proper oversight and monitoring mechanism, I would not trust any government with the powers that are in this bill. I will not take honourable senators through relatively recent and disagreeable history that members of my party have good reason to recall in terms of subverting the legal and justice processes for political purposes. That was done, supposedly, within the existing powers that the authorities have. I certainly would not trust them with these powers, absent the kind of oversight provisions that I am recommending here.

The Chairman: It is moved by Honourable Senator Murray that clause 146 --

Senator Lynch-Staunton: Dispense.

The Chairman: I need not read the clause. Is it your pleasure, honourable senators, to adopt the motion?

Dr. Lank: The Honourable Senator Fairbairn, P.C.

The Chairman: Abstain.

Dr. Lank: The Honourable Senator Andreychuk.

Senator Andreychuk: Agreed.

Dr. Lank: The Honourable Senator Beaudoin.

Senator Beaudoin: Agreed.

Dr. Lank: The Honourable Senator Bryden.

Senator Bryden: Opposed.

Dr. Lank: The Honourable Senator Fraser.

Senator Fraser: Opposed.

Dr. Lank: The Honourable Senator Furey.

Senator Furey: Opposed.

Dr. Lank: The Honourable Senator Jaffer.

Senator Jaffer: Opposed.

Dr. Lank: The Honourable Senator Kelleher, P.C.

Senator Kelleher: Agreed.

Dr. Lank: The Honourable Senator Lynch-Staunton.

Senator Lynch-Staunton: Agreed.

Dr. Lank: The Honourable Senator Murray.

Senator Murray: Agreed.

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Dr. Lank: The Honourable Senator Phalen.

Senator Phalen: Opposed.

Dr. Lank: The Honourable Senator Poulin.

Senator Poulin: Opposed.

Dr. Lank: Yeas, five; nays, six; abstentions, one.

The Chairman: I declare the amendment defeated.

Senator Murray: Madam Chair, let me see if I have better luck in French.

(French follows--Senator Murray continuing: Je propose que le projet de loi)

UNREVISED / NON RÉVISÉ

10-12-01

(après anglais)(Sen. Murray)

Je propose:

Que le projet de loi C-36 soit modifié, à l’article 102, à la page 128, par substitution, à la ligne 20, de ce qui suit:

(The Chair: You have now reverted to clause 102…)

(anglais suit)

C-36, soi modifie..)

(Following French)

The Chairman: You have now reverted to clause 102.

Senator Murray: That I have.

The Chairman: We will come back to the end. Please proceed.

(French follows--Senator Murray: Dans substitution a la ligne 20....)

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(après anglais)

Le sénateur Murray:

> […] par substitution, à la ligne 20, de ce qui suit:
>
> « autre loi fédérale, il doit en outre surveiller les activités -- sauf les activités du Commissaire à l'information et du Commissaire à la protection de la vie privée -- exercées en application des lois modifiées par la Loi antiterroriste, ainsi que ce livrer à »

(12h40--Sen. Murray : Rappelons que nous avons déjà dans ce projet de loi…)

(français suit)

mcl -- 10-12-01

(après anglais) (Sen. Murray)

Rappelons que ce projet de loi renferme déjà, aux pages 127 et 128, une disposition par laquelle le gouverneur en conseil pourrait nommer un commissaire du Centre de la sécurité des télécommunications. Le mandat de ce futur commissaire est défini aux pages 127 et 128.

Mon projet de modification a pour but d'élargir le mandat de ce commissaire afin qu'il exerce tous les pouvoirs, sauf les activités du commissaire à l'information et du commissaire à la protection de la vie privée.

(Sen. Murray : So there it is, Madam Chairman…)

(anglais suit)

UNREVISED / NON RÉVISÉ

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(Following French--Sen. Murray... vie privée)

There it is, Madam Chairman. If you do not wish to appoint another parliamentary officer, you can enlarge the mandate of the future commissioner of the Communications Security Establishment, who, I note, by this bill, would also have all the duties and powers of a commissioner under Part 2 of the Inquiries Act. That would be extremely helpful in monitoring the exercise of the powers under this bill.

Senator Bryden: The position being taken is simply another way to get an oversight person. I do not know, for example, that it would answer the concerns of other commissioners who have oversight over certain areas.

Senator Murray: They are excluded in my amendment.

Senator Bryden: You have excluded them?

Senator Murray: Oh, yes.

Senator Bryden: If it were to be judged useful at some point in the future to give CSIS or the oversight committee of SIRC further empowerment, presumably amendments could be made to the CSIS act. That may not be warranted with the number of checks that are there now. The appropriate time to consider that would be at the time of the three-year review.

Senator Murray: You are not saying no, senator. You are just saying perhaps later.

Senator Bryden: It is time for a charitable interpretation.

Senator Murray: It is the season for it, I agree.

The Chairman: It is moved by Honourable Senator Murray:

> That Bill C-36 be amended in clause 102, on page 128, by replacing line 22 with the following:
>
> > Parliament shall oversee all the activities, except the activities of the Information Commissioner and of the Privacy Commissioner and SIRC carried out under the acts amended by the Anti-Terrorism Act, and may carry out and engage in ...

The clerk will record the vote.

The Clerk: Honourable Senator Fairbairn, P.C.

The Chairman: Abstain.

Senator Andreychuk: Agreed.

Senator Beaudoin: Agreed.

Senator Bryden: Opposed.

Senator Fraser: Opposed.

Senator Furey: Opposed.

Senator Jaffer: Opposed.

Senator Kelleher: Agreed.

Senator Lynch-Staunton: Agreed.

Senator Murray: Agreed.

Senator Phalen: Opposed.

Senator Poulin: Opposed.

The Clerk: For, 5; nays, 6; abstentions, 1.

The Chairman: I declare the amendment defeated.

Shall clause 102 carry?

Some Honourable Senators: Agreed.

Some Honourable Senators: On division.

The Chairman: I committed a mistake that always irritates me. For the record, I used the acronym SIRC when I was reading out the amendment and that stands for Security and Intelligence Review Committee.

Honourable senators, we will now go back to clause 146, on page 183. Shall clause 146 carry?

Some Honourable Senators: On division.

Some Honourable Senators: Agreed.

The Chairman: Carried, on division.

Honourable senators, are there any motions for new clauses?

Senator Beaudoin: I move that we add a new clause 147. In French it is “cessation de"; in English, it is "expiration."

In our pre-study we suggested a five-year sunset clause which we now propose. The reason behind the proposal has not changed. As I said time and time again, this bill is permanent. It has no notwithstanding clause. This clause 147 would allow the bill to be in force for five years.

The government always has a choice between an emergency measures bill and a permanent bill. We have always thought, from the beginning, that we need an expiration date because it is important to uphold our values, to respect the Charter of Rights, to be aware of the discussions before the Supreme Court and the interpretations of section 1 of the Charter. We are convinced that we need a sunset clause.

The Canadian Bar Association has suggested this sunset clause that would cause the provisions of this bill, except those referred to in subsection (2), to cease to be in force five years after the day on which this act receives Royal Assent or on any earlier day fixed by the Order of the Governor in Council.

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(tk 1250 follows--Sen. Beaudoin cont--This five-year expiration clause)

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(Sen. Beaudoin continues)

This five-year expiration clause, which is an ordinary sunset clause, is necessary because of the choice made by the government, and we do not complain that the government exercised that choice.

This sunset clause would apply with four exceptions. It will not apply to hate activities covered in the Criminal Code; the Criminal Code offence of mischief against religious property; hate propaganda over the Internet with regard to the Canadian Human Rights Act and, finally, the last, but very important exception, United Nations operations that are defined in this bill.

This was suggested by many lawyers and many associations that appeared before us. Although they are entirely in favour of security, they want to ensure that we defend our values at home. We say that this is a balance between security and human rights. We have concluded that a sunset clause is necessity.

It is not total. There are four exceptions, and they are very important. As I said, they are hate activities, mischief against religious property, hate propaganda over the Internet and the international obligations of United Nations operations. There is a list of ten conventions at the external level.

That is basically what this amendment is about. The form of sunset clause that is already in the bill will be subject to clause 147 that we are proposing. This does not contradict in any way what we said in our report on pre-study. We have retained the same time period of five years. The bar suggested three years but I think the logic would be in favour of five years, and with all the exceptions I have outlined.

Senator Bryden: Senator Beaudoin, a number of witnesses testified that a sunset clause was not necessary at all. For example, Minister McLellan said:

> We do not usually sunset the criminal law. We do not sunset our fight against organized crime. We do not sunset our fight against child pornography.

She is saying that the bill sunsets those provisions that are somewhat exceptional to our normal criminal law.

Also, Professor Mendes, from the University of Ottawa, indicated that sunset clauses are not really useful to our parliamentary system.

Professor Monahan asked why we would sunset the definition of terrorism. If the definition of terrorism is wrong, amend it. If it is right, it is a continuing part of the criminal law.

I believe that what Senator Beaudoin is proposing would be caught as part of the sunset provision. There is considerable concern about what a correct balance would be. There are some who wanted a sunset clause after one year, and some people who appeared before us do not want the bill at all. Therefore, it would be sunsetted today and it simply would not happen.

I believe that the government has tried as best it can to sunset those provisions that raise most concern of being at variance with our normal criminal law procedure, those being the investigative proceedings and preventive arrest, and to rely on the reporting mechanisms and the review for Parliament to monitor the rest.

There was some concern expressed that the sunset clause in the bill is not real because it can be continued by resolution of both Houses of Parliament and there is something less than substantial about a resolution of the Houses of Parliament as compared to an act.

It has been my experience that by resolution Parliament can enter into debate, in both the chamber and committees -- both special committees and Committee of the Whole -- to deal with very significant issues. For example, a committee of the Senate travelled to Newfoundland to hear evidence on the Term 17 resolution.

The provision in the bill that the two clauses would be continued except by resolution of Parliament gives parliamentarians fair opportunity to totally review those two provisions.

(Take 1300 follows -- Sen. Bryden continues -- The Minister of Justice has said...)

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(continuing with Senator Bryden)

The Minister of Justice has said and you have said, Senator Beaudoin, that this is not temporary legislation and that it is not intended to be temporary legislation. This bill will amend our Criminal Code. Given that terrorism appears to be a continuing threat, it should be amended if required. At a time when the threat is either diminished or totally gone, these exceptional powers that we have not used before in this country would be sunsetted to ensure that the decision must be made whether to continue them or not. For that reason, I will not be able to support your amendment, Senator Beaudoin.

Senator Beaudoin: We are not sunsetting the Criminal Code. I would never do that. The philosophy behind this amendment is that if there is an emergency measure, we can act differently. I have no problem saying that the bill is permanent. There is no “notwithstanding clause,” but there is additional power. We must admit that there are some additional powers. Since we have values, we want to say that a sunset clause may be justified in our system. The government has said that it is not satisfied with that and that the sunset provision will apply to only two points. We want more than that because the bill is comprehensive. Our philosophy is that if we give additional powers, we must keep an equilibrium. The equilibrium for the Charter of Rights of Freedoms is to have a sunset clause of five years. Whether it is another number of years, we agreed to that at first. This is the only thing that I say. The rest, the entire Criminal Code, is still there. All of our principles are there. There must be checks and balances within the additional power and the Charter of Rights because, in my opinion, the Supreme Court is more severe with respect to permanent acts than with respect to emergency acts. This is what I think and that is why we suggest an enlarged sunset clause.

Senator Bryden: I wish to clarify something. I misspoke myself. I should have been referring to the criminal law, not the Criminal Code. The Criminal Code is not the issue.

Senator Beaudoin: This is criminal law.

Senator Bryden: This is part of the criminal law.

Senator Beaudoin: It is criminal law, but it is not Criminal Code. I do not touch codes, the Quebec Civil Code or the Criminal Code.

Senator Bryden: I do not want some old law professor of mine thinking that I did not learn anything.

Senator Andreychuk: I want to go on the record that I think Mr. Borovoy made a good point to this committee when he suggested that there be a sunset clause of one year. I do not think he said that with any cynicism. What he was saying was that there are many fundamental changes and impacts on our criminal law and that there has not been time for people to digest and analyse this bill sufficiently. Therefore, there is some onus on the government to come back and indicate why we should veer off of the rules that we have taken more than a century to put into place. Bill C-3 will wipe them out. I think that we need thoughtful study of them.

We have been studying the bill to determine what the impact will be on terrorism and society. However, six weeks is not a long time to change laws and concepts that have been in place for over 100 years. As the Canadian Bar Association has said, and I am quoting from page 1 of their executive summary:

> The bill creates extraordinary and wide-ranging powers. The necessary accompaniment to quick passage of such exceptional measures is a sunset clause. When governments seek to impose such restraints on fundamental rights and freedoms, particularly with limited time available for study and debate, those restraints must be limited in duration.

It is a question of the extraordinary, wide-ranging powers that the government is requesting. In the compressed time that we have been given for a full debate, I am mindful that there was closure in the House of Commons, and I am now mindful of how long the hours were on this side.

The amendments that the government has recommended, while very helpful, do not alleviate the majority of the fears. A sunset clause on two of the issues is not sufficient because there are many more issues. I would not want to mislead the public into thinking that where there is a sunset clause, those are the only places where an extraordinary power is also used. As we found out from witnesses, there are more. As Senator Lynch-Staunton says, the more we look at the bill, the more we see in it. I think that is very true.

We are intruding into fundamental human rights and values that we have deliberately and consistently fought to gain. It took a long time to get certain rights into our law so that we have one of the most admirable criminal law systems in the world. To take rights away under what we say is not emergency power but ongoing, long-term power, we need to know what the impact will be on our criminal law system. We also need to know what impact that will have on our fundamental human rights. How do we know that we have struck anywhere near an appropriate balance? Each and every Canadian citizen will be losing some of those hard-fought, fundamental rights. Surely, Canadians should get a signal from the government and from this Parliament that we will not take rights away because we have given it our best shot in six weeks. We should be saying that we think so

highly of these powers that we will put ourselves into a sunset position so that we can come back to the people and tell them why we need to continue to remove these powers from them.

I do not accept any suggestion from any witness here or any member of Parliament that security trumps all human rights. In our discussion with Professor Monahan, he started out saying that security means that we must lessen our rights. However, he also agreed that at some point, if we give up all of our other rights, security can be meaningless. We must be mindful of that. It is a question not of one right trumping another. It is not a question of security trumping human rights. It is a question of whether, at this time, we have the right balance and that we have intruded -- and this is important -- in the least way into the fundamental human rights of Canadians. It is not a question of proportionality. If the government had two or three methods of curtailing our rights, did they take the least intrusive in proposing to give us some of our security back? No government anywhere can guarantee security, not in Canada or elsewhere. What governments can do is get certain tools in place that will be helpful. As the Canadian Bar Association said, we should analyse whether, with proper resources and proper training, some of the existing tools could have done the job.

There are many issues that we must look at before we so quickly go down the road of taking away fundamental human rights.

(take 1310 follows -- continuing with Senator Andreychuk --I agree that there is some imperative of necessity at the moment...)

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(Take 1310 Begins -- continuing with Senator Andreychuk)

I agree that there is some imperative of necessity at the moment, but that necessity is ill-defined at this time and it demands a sunset clause. I would have gone for three years or less. I am with Senator Bacon. Three years would be the minimum. However, since this committee in the pre-study was about compromise and dialogue and debate, I compromised to five years and I feel that my colleagues have persuaded me that we should maintain that for the reasons that the committee came to that compromise and it was not all our best wishes, it was the bottom line for all of us. Therefore, I am accepting, again, a bottom line here of five years.

Senator Fraser: I have a gentle reminder to Senator Andreychuk that it was not the bottom line for all of us.

I would simply observe that it is indeed essential that this bill be thoroughly reviewed and that it will be. Along with the sunset clauses, we also have an absolute requirement for a parliamentary review to begin within three years, not five. That is the point at which Parliament leans in to say, "Here is what is good and bad." I do not think you need a sunset clause to enable a thorough parliamentary review.

(French follows -- Senator Poulin)

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(après anglais)

Le sénateur Poulin: Sénateur Andreychuck, je trouve intéressant de voir – à la suite de vos commentaires – comment la même législation peut donner deux perceptions différentes. D'après moi, le projet de loi C-36 augmente la protection des droits de la personne en augmentant la sécurité. J'ai discuté avec beaucoup de gens cette fin de semaine parce que je voulais connaître leur réaction face à, non seulement la substance du projet de loi, mais à la façon dont nous avions procédé. À plusieurs reprises, les gens ont dit être content que la Chambre des communes ait limité le temps du débat, étant donné que le comité de la Chambre des communes avait entendu entre 70 et 80 témoins, presque jour et nuit, trois semaines durant. J'ai constaté que le public a une faim de voir cette législation adoptée afin de se sentir plus en sécurité et plus libre – et comme vous le disiez tout à l'heure, selon notre grande tradition de valeurs canadiennes – de pouvoir continuer à vivre aisément partout au pays.

(Chairman : I will now move to the amedment, colleagues : It is moved by Senator Beaudoin…)

(anglais suit)

(Following French)

The Chairman: I will now move to the amendment, colleagues: It is moved by Senator Beaudoin that Bill C-36 be amended, on page 183, by adding a new clause after line 28:

Expiration;

147 (1) the provisions of this act, except those referred to in subsection 2, cease to be in force five years after the day on which the act receives Royal Assent, or on any earlier day fixed by order of the Governor in Council.

(2) subsection 1 does not apply to section 320.1 of the Criminal Code, as enacted by section 10 to subsection 430(4).1 of the Criminal Code as enacted by section 12, to subsection 13(2) of the Canadian Human Rights Act, as enacted by section 88, or to the provisions of this act that enable Canada to fulfil its commitments under the conventions referred to in the definition "United Nations operation" in subsection 2(2), and in the definition "terrorist activity" in subsection 83.01(1) of the Criminal Code, as enacted by section 4.

Honourable senators, the question is: Is clause 127 carried? Will you read the roll, please?

Dr. Lank: Honourable Senator Fairbairn, P.C.

The Chairman: Abstain.

Dr. Lank: Honourable Senator Andreychuk.

Senator Andreychuk: Agreed.

Dr. Lank: Honourable Senator Beaudoin.

Senator Beaudoin: Agreed.

Dr. Lank: Honourable Senator Bryden.

Senator Bryden: Opposed.

Dr. Lank: Honourable Senator Fraser.

Senator Fraser: Opposed.

Dr. Lank: Honourable Senator Furey.

Senator Furey: Opposed.

Dr. Lank: Honourable Senator Jaffer.

Senator Jaffer: Opposed.

Dr. Lank: Honourable Senator Kelleher, P.C.

Senator Kelleher: Agreed.

Dr. Lank: Honourable Senator Lynch-Staunton.

Senator Lynch-Staunton: Agreed.

Dr. Lank: Honourable Senator Murray.

Senator Murray: Agreed.

Dr. Lank: Honourable Senator Phalen.

Senator Phalen: Opposed.

Dr. Lank: Honourable Senator Poulin.

Senator Poulin: Opposed.

Dr. Lank: Yeas 5, nays 6 and abstentions 1.

The Chairman: I declare the amendment defeated.

Returning to the beginning, shall schedule 1 carry?

Some Honourable Senators: Agreed.

Some Honourable Senators: On division.

The Chairman: Shall Schedule 2 carry?

Some Honourable Senators: Agreed.

Some Honourable Senators: On division.

The Chairman: Shall clause 1, which contains the short title, carry?

Some Honourable Senators: On division.

Some Honourable Senators: Agreed.

The Chairman: Shall the preamble carry?

Some Honourable Senators: Agreed.

Some Honourable Senators: On division.

The Chairman: Shall the title carry?

Some Honourable Senators: Agreed.

Some Honourable Senators: On division.

The Chairman: Is it agreed that this bill will be adopted without amendment?

Some Honourable Senators: Agreed.

Some Honourable Senators: On division.

The Chairman: Thank you, honourable senators. At this point, we probably need a break, but before I get there I should just note that the Rules of the Senate require only that committees report a bill with or without amendment. The question of observations are a practice, and Senator Murray is sort of glaring at me here and I think he is going back to old tradition again where this was not a

practice and not very enthusiastically approved. However, it has developed in some committees that Senate committee reports on bills without amendment are automatically declared adopted by the Senate and, therefore, since the Senate has no opportunity to debate the observations as such before the report is adopted observations have no procedural weight. However, on occasion they can be useful tools and there has been, in the last few days, some discussion as to the possibility or whether it would be helpful to have observations. I would like to have a discussion on that.

There were some suggestions provided over the weekend and they were put down on paper. I can circulate them through the clerk if people are not already aware of them. If these have any merit whatsoever, or other suggestions are available, I would certainly entertain a motion to have observations.

(Take 1320 Follows -- continuing with The Chairman: I personally sought some guidance...)

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(tk 1310 ends—Chair cont--have observations.)

I personally sought some guidance on this as our hearings were coming down to the end last week. Observations act as a vehicle, if nothing else, to express to the chamber and beyond the concerns that we have heard from those who fear that they will be most adversely affected by the bill. Those who spoke to us representing other communities in this country, ethnic and cultural communities, had strong concerns indeed about the bill itself but also the implementation of the bill.

There has been suggestion that, at the very least, we might provide observations on the necessity of government creating a mechanism to seek out the ongoing advice and experience of these minority communities in the country to guide them in how this bill is implemented.

Senators, I am in your hands on this. We can certainly deal with these questions in speeches that we will all be giving in the Senate. However, if there is any narrow consensus for drawing attention to the concerns of these communities, I am prepared to receive those suggestions.

Senator Murray: Madam Chairman, as you must know after all these years, I would never glare at you; I was simply following you intently so as not to miss any nuance.

The vehicle for taking on the concerns expressed by the witnesses was before the committee this morning. The vehicle was in the form of amendments. The committee chose not to accept those amendments. In my humble opinion, you have stated the rule of the Senate quite correctly. We are authorized by the rules to report the bill with amendment or without amendment. Unfortunately, the practice has grown up for many years to the point where it is almost a convention that committees attach editorial comment to their report.

I have always deplored the practice. I do not think it is necessary typically and I do not want to offend anyone here, but, typically, committees find this way of expressing their concern when they know full well that they should not be reporting an unamended bill to the Senate, that they should have amended the bill.

They try to have some balm for their consciences or perhaps there is some public relations effort involved in attaching editorial comment.

The place for observations is in third-reading debate, in my humble opinion. I am opposed to this practice. I always have been, as a matter of principle and as a matter of parliamentary practice. I am opposed to it in substance in this case.

Senator Fraser: Though I have great respect for Senator Murray's understanding of Senate traditions and rules and for his dedication to their pure application, I believe there are occasions when observations can be extremely appropriate and that this is one of them.

We heard witnesses express serious concerns which, in a fair number of cases, were not related to the substance of the bill. Those concerns could not have been addressed by amendments to the bill. They addressed something far broader -- the general climate and context and understanding with which public authorities move forward in uncertain times.

We are the only senators who have heard those witnesses. Those witnesses were saying things that were important even if not directly related to the bill. I can think of no better way to respond to those concerns than to say, as part of our report to the Senate: Yes, we heard you and here is what we think; we think your concerns do need to be addressed.

Senator Lynch-Staunton: It is remarkable, even pathetic, that after spending hours worrying about the concern over implementation, suddenly those who voted against the amendments which would have reflected concern over the bill's implementation now feel they can do so by writing some rather flowery language. Will that reassure those who are deeply concerned about the abuses which we are now all admitting could be in this bill? We are concerned suddenly with its implementation. Will those concerns now be taken care of by directives to unknown officials in the government to attend to making sure that the minorities are consulted, to making sure that the police forces are trained?

This is an immediate problem, we are told. Are we now to recommend, according to the suggestions that we will have in these observations, a long-term program to implement the bill? I will not support such an approach. Either we take this bill seriously and recognize its flaws and amend it accordingly, or we vote at third reading where we will make similar attempts to amend.

We cannot dismiss the problem with flowery phrases addressed to those who have expressed concerns. Those concerns come not just from minorities; I am getting e-mails, as I am sure every senator is, from across the country. . I cannot believe these e-mails were manipulated because each is worded differently, expressing different concerns. They come from various groups and individuals. It is not just one or two communities that we must satisfy with so-called reassurances; it is the entire country. The best way to do that is to amend the bill.

We will continue to present amendments. We will present amendments at third reading, these and perhaps others.

As for observations, if it is the intention of the majority to adduce them, certainly we will not support the context or the meaning which I understand they will have. It is a fallback position, which I find gives satisfaction to no one, to be told, "Do not worry. We will tell the government to train the police forces. We

will tell the government to talk to you before they do anything." We are fighting terrorism by consultation and by advice and by long-term training? Let us be serious.

Senator Andreychuk: Both Senator Murray and Senator Lynch-Staunton have made important points about observations. Generally, the observations in which I have participated go to future issues. It is not so much that we did not want to pass an amendment nor that there was some need to address the problem which the amendment could have addressed. Rather it was to identify a trend or a drafting problem. I do not think this is the same situation. This situation is basically as described by Senator Murray and Senator Lynch-Staunton.

(tk 1330 follows--Sen. Andreychuk -- I want to say one other thing. The reason I put the amendment)

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(Senator Andreychuk continuing)

I want to say one other thing about why I put the amendment in about the definition of "terrorist activity". All those other things that Senator Fraser indicated minorities are worried about are as a result of this bill. They flow from this bill giving the power to government to act in a way that they cannot rely on. If a minority feels attacked in any way or wrongly treated, we have measures that they can reach for, and they know what those are. We have carefully honed those. Now we are introducing new elements, with no recourse or places to go if they feel they are improperly dealt with. It is a new area we are opening up.

The majority does not give an observation; the majority makes an amendment. There is a responsibility for the majority to ensure that our laws encompass the rights and the needs of minorities. That is what the Charter of Rights was doing. That is what our human rights was doing. To the extent now that we must intrude and limit these, the amendments are limiting them with caution, not taking them away, not put us any more vulnerable in security. In that sweep of trying to assure us of security, we are taking away rights, and we should do it very cautiously. The unease that comes from the minority community is not that their rights are being limited or that they are being targeted, it is that sometimes they feel they are unfairly targeted and that they are unnecessarily having rights taken away from them. Those are the fears that cannot be alleviated by observations or education. They go to the heart of the bill.

Senator Bryden: Much of what is in the bill, as it relates to any citizen or resident of Canada, is fully protected by the Charter of Rights and Freedoms, by the procedures that have been made available to all residents and citizens of Canada, and for the most part, except in very limited areas, have those been either truncated or suspended. There are careful checks to make sure that those situations, such as preventive detention or investigative hearings, are done in a manner which interferes with the freedom of any individual as little as possible and provides as much protection of legal counsel and protection of the judiciary as we would normally expect. It is an immediate problem. Therefore, I will not talk about the fact that those things will be sunsetted five years from now.

What we are concerned about, and the reason some of us thought that it would be helpful to provide observations which would impact and I believe have some

force on government without amending the bill, is that the events that have triggered the fear and the concerns of many people in Canada of all groups occurred on the North American continent without precedent but without really any prior warning, without any indication, and indeed I think even the perpetrators probably created more havoc and caused more damage than they anticipated it was possible to do in, since 3,000 or so people who died contained all groups, ethnic and cultural groups. There was no discrimination one way or the other by the people who decided to blow up the World Trade Center and cause the murder of over 3,000 people.

The issue is not whether the bill responds to the general fear and the general concern, because it is at least a good attempt to try to do that. The issue that we would try to address in making observations to this chamber and, therefore, to the government, because they would be aware of this, is to alert government and agencies who are responsible for implementing the provisions in this bill that the Senate of Canada, one objective or one purpose of which is to represent, to the best of our ability, the interests of minorities in our parliamentary system, that steps be taken to do a number of things, because the proof will ultimately be in how are people impacted, that is, to ensure that the police officers and the security personnel have the very best training and are sensitive to the concerns of any minority group that is there. One of the areas of implementation that would help would be the education and careful training of these people on the frontline.

To do this, we would want to ask in our observations that government provide the necessary resources to ensure that this is done and that the resources be provided, whether by conferences, by consultation, or by whatever meansis appropriate and to have the leadership, the individuals of groups who may run the risk of being targeted, who are being targeted or who may be targeted at some point in the future, have significant input, so that the people who are trying to administer the bill will know that they must be cognizant and they must be sensitive to those situations where some people perhaps from certain locations or from certain ethnic groups or with language difficulties, if arrested or detained, would be treated in a manner that would allow them, as Senator Andreychuk indicated, to ensure that those people were aware of their rights and had access to them.

To a large extent, that cannot be done by legislation. Often what we do when people require an answer to the difficult situation they may find themselves in is to pass bills, and that is what we are about to do here. However, what is really required is to change the lives of people who are disadvantaged for whatever reason, either because of poverty or because of ethnic origin or because of colour or whatever. What is needed is the will to find out what the issues are and to be able to implement solutions, because we have the resources at the disposal of the agencies. It really comes down to money, personnel and training and the opportunity to consult on a first-line basis in order to try to administer this very significant part of our criminal justice system that will allow, in our free and democratic society, interference that has not been allowed before.

That is why, when I thought about it and was asked about it, I believe it is not simply some sort of window dressing, to use someone else's term, or a useless thing to do. It may not gibe with some of our purer approaches as to how we should act in the committee, but at this stage it would be useful, in my opinion, if the Senate of Canada expressed an opinion that we want to see how this will be

implemented sensitively and, what is more, that we will be watching what the results of that would be. Thank you.

(1340 follows, Senator Murray: Senator Bryden has addressed)

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(Take 1340, Sen. Murray, new speaker).

Senator Murray: Senator Bryden has addressed the substance of the proposed report, if that is what it is, or appendix to our report, and the desirability of the committee and, ultimately, the Senate expressing various editorial comments. On that point, I wish to leave you with the words of Mr. Khalid Baksh of the Coalition of Muslim Organizations, who on Wednesday, December 5, testified before this committee. Our colleague, Senator Jaffer, wanted to know, as she put it, how parliamentarians can work with the coalition to "allay that fear." She said:

> We are all Canadians. If part of our group is in fear and is infected, we all get infected. We need to talk about how do we work together to alleviate the fear.

The reply of Mr. Baksh was:

> How can we work together? First and foremost, the bill has many flaws. If the bill is to be passed, let us start talking about what needs to be done. At page 11 of our Senate brief you will see the recommendations there. First, an annual review of the exercise of power under the bill should be tabled by Parliament by an independent officer. Again, we return to the point of review of accountability, of having independence so that the citizens of Canada can be protected.

He goes on in that general vein.

I make the point that Mr. Baksh and many others like him who came here, expressing their concerns backed up their concerns with recommendations for various amendments to this bill. The committee has accepted none of those amendments. Now, to attach a narrative to our report expressing concerns or pious intentions, or whatever they are, is of no force or effect whatsoever and will certainly not be of any reassurance to those like Mr. Baksh and the Coalition of Muslim Organizations who sought amendments to this bill.

We missed an opportunity today to address those concerns in the most practical manner possible, that is, by amending the bill. Perhaps we will have another opportunity at third reading.

Senator Beaudoin: -- in French --

(French follows, Sen. Beaudoin: Je déplore qu'on n’ait pas réussi à être aussi bon...)

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(après anglais)

Le sénateur Beaudoin: Je déplore qu'on n’ait pas réussi à être aussi bon. On a réussi une pré-étude qui m'a beaucoup impressionné. J'étais très content que le consentement pour cette pré-étude ait été donné unanimement par le Sénat. Je me suis dit: «Enfin! le Sénat est ce qu'il doit être».

Je suis le premier à admettre que ce n'est pas toujours facile de s'entendre. Ce n'est pas toujours facile d'avoir les mêmes vues, les mêmes idées. Ce n'est pas une excuse pour moi car j'ai toujours défendu mes valeurs. J'ai toujours défendu la Charte des droits et libertés qui est notre plus bel héritage. Ce n'est pas la fin du monde de faire une loi qui respecte entièrement la Charte des droits et libertés. Cela est peut-être encore possible. On avait une belle occasion pour le faire, une occasion difficile d'ailleurs. Il y a des problèmes à la Chambre des Lords et ici c'est différent. Je regrette qu'on n'ait pas eu la chance d'inscrire davantage nos valeurs dans la Constitution.

On peut toujours améliorer les lois. On peut toujours dire ce qu'on pense, ce qu'on observe, mais quand on a la chance de faire une loi, quand on a la chance d'amender une loi, je pense qu'il ne faut pas la manquer. Oui, je me suis réjoui beaucoup de la pré-étude. Toutefois, je me réjouis un peu moins de ce qui arrive à ce stade-ci. Je vais continuer à penser comme j'ai toujours pensé sur ce plan. Pour moi c'est l'équilibre entre les valeurs qu’on défend chez nous et qu'on défend à l'étranger. Je trouve que cela est fondamental.

(Senator Fraser: To a very great extent, the concerns that were expressed…)

(anglais suit)

(Following French, Sen. Fraser, new speaker)

Senator Fraser: To a very great extent, the concerns that were expressed by some of the witnesses before us had very little to do with the substance of this bill. We heard about people who were being insulted in the streets, about people who were losing their jobs. We heard distressing stories, none of which is affected that much by this bill. The story that distressed me most is one that a witness told me, just after the formal hearing, about a member of a minority community whose life was repeatedly endangered on a highway by someone who was attacking him saying, "You are all filthy terrorists," and what not. This person went to the local police to complain, and the aggressor was given some minor charge under the highway code that did not address the substance of the issue at all. Nothing in this bill has anything to do with that.

However, educating law enforcement authorities would have a great deal to do with that. Giving more resources to human rights commissions would have a great deal to do with that. Getting qualitative reports with input from minority communities would also help. The nature of the qualitative work that we are discussing does not lend itself to codification and legislation. We are talking about the kind of thing that should not be codified in legislation. We are talking about the kind of thing that emerges out of discussion and the creation of a relationship of trust. These observations are entirely appropriate and wholly desirable in the light of what we heard.

Senator Furey: I understand where my colleagues on the other side are coming from. I understand their desire not to have recommendations or suggestions or amendments attached where none of their amendments were passed. I feel we on this side have a reason for doing it. We have done our best in difficult circumstances to get this bill to the stage it is at now. I have no problem with adding any suggestions such as the ones put forward by members on this side.

Senator Lynch-Staunton: Many witnesses would be quite offended to have been told that they did not address substance of the bill. I cannot think of one who did not. Most of them showed a great deal of anxiety over the bill, one aspect of which is the list of entities. Many of them were concerned about innocent people being put on that list. You do not dismiss that by an observation. You dismiss that well-founded fear by an amendment, which was rejected.

The recommendations to improve this bill have been rejected, all except the ones that the minister herself suggested in the House of Commons.

Senator Furey: That is not to say that there are no protections in the bill.

Senator Lynch-Staunton: We have been through that. The fact that you want to put observations in is an admission that this bill can lend itself to abuses.

Senator Fraser: It is not. I do not agree with that.

Senator Lynch-Staunton: In the words of the chairman, there is concern with implementation.

(Take 1350 follows, Sen. Lynch-Staunton continuing: I have never heard that expression...)

(Sen. Lynch-Staunton continues)

I have never heard that expression used in any legislation that I have been involved with in this house before. If that is not a concern with the misuse of implementation, what is?

I have also heard, by implication, that the authorities responsible for the implementation of this bill may not be adequately trained to do that, may not have the resources to do that and, in effect, are not ready to do that, particularly when it affects minorities, to the point that we are asking minority groups to join with them to ensure that abuses do not take place. We are now hearing that this bill, flawed as it is, passed in its present form, will be put in the hands of authorities -- local, provincial, urban and rural all across the country, in addition to federal -- hands which may not be intellectually and professionally equipped to apply it. It is not by a two-page reassurance addressed to one part of our community that this conclusion will be changed. The Canadian Bar Association does not represent a particular community. It represents the best legal minds in the country, and it said exactly what minorities are saying. This is not just a minority problem or minority concern. It is a concern shared across the country.

I do not think it very appreciative of minorities to address observations to minorities. It sets them apart. They came to us as Canadians, proud to be Canadians and proud of the protection this country was giving them. Now we say that, because you are a visible minority, this is what we will do for you. But to those who are not visible, or not as vocal, we will not address observations. If these observations are to have any meaning, they should be addressed to all Canadians. It is a political tract that I will not support.

The Chairman: We have had a debate, senators, and the views are clear on both sides.

I am in the hands of honourable senators. If there is a strong feeling that some type of observation is desirable, rather than leaving it to debate I am open to a motion. If the feeling is that this is not appropriate, then the issue dies.

Senator Lynch-Staunton: Madam Chair, anticipating that this would create a division in the committee, while I have expressed my feelings, I will not stand in the way of majority observations. On the other hand, perhaps minority observations could also be included. We have something to say about this bill. We prepared a one-page document in the event that observations were to be included. I could have it circulated or I could read it. If both sets of observations go in, that would resolve the issue. We would object strongly to only one set of observations as representing the views of the committee.

Senator Bryden: Madam Chair, the other side has a draft of proposed observations. Hope springing eternal in my breast, I would like to see a copy of those observations before proposing our observations because we may be able to come up with a compromise.

Senator Lynch-Staunton: It does not touch on your remarks at all.

The Chairman: Honourable senators, as we get into this phase, would it be appropriate to proceed *in camera?*

Senator Lynch-Staunton: I do not think so.

The Chairman: Has everyone had access to the document that the other side has put forward?

There is precedent in the Senate for majority and minority observations. That has been most recently done on Bill C-32, the Environmental Protection Act. These are not minority and majority reports, but merely observations.

Senator Beaudoin: There are some precedents. Logically, we may always take a vote, but in my opinion that would be a bad thing. I think that if we are looking for observations, we must have them from for both sides. There is precedent for that.

Senator Fraser: They do not even have to be presented as majority and minority. The can be run together noting who has said what.

Senator Bryden: Madam Chair, since there is no consensus between the two sides, I suggest that the observations of the Liberal side that have been circulated be entitled "Liberal Majority Observations". I would leave it to the other side to decide whether they wish to make observations as well.

Senator Lynch-Staunton: We do wish to make observations.

Therefore, I move that there be observations from the Liberal majority side and observations from the Conservative minority side to be appended when the bill is reported without amendment.

The Chairman: If that is agreeable, honourable senators, we will proceed in that way.

Is it agreed that I report this bill, with observations, at the next sitting of the Senate?

Some Honourable Senators: Agreed.

Some Honourable Senators: On division.

The Chairman: I thank all senators for their cooperation and goodwill.

The committee adjourned.