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THE SPECIAL SENATE COMMITTEE ON BILL C-36

EVIDENCE

OTTAWA, Wednesday, December 5, 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 9:30 a.m. to give consideration to the bill.

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

The Chairman: Good morning. For those who may be watching these proceedings, we are into our third day of hearings on Bill C-36, which is the legislation involving our anti-terrorist measures brought forward by the federal government pass a result of the events which occurred in the United States on September 11.

Our special committee of the Senate on anti-terrorism and on the bill was asked by the government to do an advance look and bring forward our suggestions and our concerns, which we did in a report which was sent to the government, the House of Commons, and the House of Commons Committee on Justice and Human Rights.

The bill we have before us, for the first time this week actually in its amended form, reflects some of our serious concerns. Other concerns were not addressed, and those are under discussion with a wide variety of witnesses this week.

We have heard from the Privacy Commissioner George Radwanski, from the bar of Quebec, from the Canadian Police Association and police chiefs' association. We heard yesterday from the Minister of Justice and the Attorney General of Canada, Anne McLellan, and from the Solicitor General of Canada, Lawrence MacAulay.

Today we begin with series of witnesses who will come from the academic perspective and from the legal perspective. We have two very distinguished gentlemen with us this morning, Dr. Errol P. Mendes, from the University of Ottawa, and Professor Don Fleming, from the University of New Brunswick.

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We are delighted that you are here, gentlemen. Please proceed.

(French follows--Mr. Mendes up in full--)

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(après anglais)

Professeur Errol P. Mendes, Faculté de droit, Université d'Ottawa: Je remercie les membres du comité de m'avoir invité à témoigner. Je ferai ma présentation en anglais mais une version française est disponible.

(M. Mendes: A full-length copy...)

(anglais suit)

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(following French)

A full-length copy of my presentation, roughly 20 pages, is available in both English and French. I will not read it here. I want to present to you instead part of what I presented on December 6, 2001, to the House of Commons Standing Committee on Justice and Human Rights. The major part of the amendments that I suggested to the original Bill C-36 has in fact been taken up, to my delight.

I wish to set my presentation today within the context of what could be considered a new framework for looking at Bill C-36 and other anti-terrorism legislation. This framework which I am suggesting is the new territory which has come to North America; that is the territory between crime and war. To look at Bill C-36 and other anti-terrorism legislation only through the lens of criminal law could mean that we are actually ignoring the fact that we have moved on to a new paradigm. That new paradigm is something which we are not used to in North America. People are more used to this territory in Europe and in the Middle East but not in North America. I refer to the territory between crime and war.

The events of September 11 unfolded in a format that the experts call asymmetrical warfare. Normal, everyday citizens, going about their lives on a legal basis suddenly, on September 11, became deadly weapons and they used deadly instruments to kill thousands of people.

How do we respond to this new territory in North America between crime and war.

I suggest in my paper that the overarching principle with which to look at this new paradigm is the law and justice of proportionality. I draw those principles from section 1 of our Charter of Rights and Freedoms, which basically states that most of the rights in the Charter of Rights is subject to such reasonable limits as can be demonstrably justified in a free and democratic society. The Supreme Court of Canada has elaborated on the meaning of that section and essentially laid down some fundamental principles of proportionality.

I want to focus on the last three sets of principles in the law and justice of proportionality. First, there must be a sufficient and pressing objective for the state to override fundamental rights in society. Second, there must be a rationale connection between the means chosen to meet that objective and the objective itself. Third, there must be proportionality between the effects and benefits of that limitation and the objective in question.

It is that last part that is absolutely critical in this new territory between crime and war because many of the most important provisions of Bill C-36 should be looked at through the lens of this proportionality principle as, ultimately, many of them may face the test of section 1 of the Charter in the Supreme Court of Canada.

I am very pleased that the government of Canada, despite the emergency nature of the situation, decided not to use the override provision of the Charter of Rights. That shows the commitment of this country to live up to the fundamental principles of justice entrenched in our Charter of Rights and Freedoms. Ultimately, while we may debate about the sunset clause or other forms of review in this legislation, the ultimate sunset clause may well be the Supreme Court of Canada.

I turn to the most important provisions of Bill C-36 with which you and the House Justice Committee, have dealt with in the pre-study period. Regarding the definition of terrorist activity, I advocated for the removal of the word "lawful" from that section. While I agreed with the argument that only the type of dissent that is aimed at endangering life or causing serious bodily harm would be caught by the original word, nevertheless, it raised a red flag and raised the spectre of protests such as we have seen at anti-globalization meetings. I approved of the removal of the worth "lawful"

I asked, however, for a greater clarification for the exemptions listed under international conventions because that has been a cause of some ambiguity. There needs to be clarification made to the fact that serious risk to health and the safety of the public will trigger this definition. The wording of that section, which is very critical in terms of legislative drafting, could relate to the probability of risk as opposed to the seriousness of the risk. This is a very technical issue at which perhaps the Justice Department in its drafters could look. The way in which the clause is drafted could trigger the definition if there were a high probability of a low-level danger to the public. Therefore, there should be some attention paid to the rewording of that section within the spirit of the amendments put forward by the government. I clearly lay out what the dangers are on page 8 of my presentation.

The amendment to Bill C-36 also did not remove the reference to the need for prosecutors to prove the activity was undertaken for political, religious and ideological causes. In my view, adding the interpretive clause, that the expression of political, religious and ideological beliefs is not terrorist activity unless it constitutes conduct that meets the definition does not remove the red flag of those words.

The international conventions do not require that wording. I suggest that the clearest path to the definition would be to remove that wording. We incorporated it from the British legislation, but I do not think that we need it to put it into our legislation. I do not think that it would violate the spirit of the amendments proposed by the Commons to remove that wording.

I will now speak about the two very contentious provisions, preventive arrest and investigative hearings. On preventive arrests, I focused in my presentation to the justice committee, and now to this committee, on the last part of the proportionality principle. That last part is the effects of such provisions on real life communities. As many others did, I worried about the possibility of segments of a community being targeted for racial profiling or in other ways.

Therefore, the annual reviews are far more important than any discussion of sunset clauses five years from now. It is that last part of the proportionality analysis regarding the effects of these provisions that are absolutely critical in any future challenge before the courts, and especially the Supreme Court of Canada. If we find out that the effects of these two provisions are to single out certain parts of community, those provisions could very well be struck down.

For those reasons, I suggested a greater emphasis on annual reviews rather than sunset clauses, which is not as effective a method of oversight as others make it out to be. A majority government could pass the legislation again with great ease. For that reason, I suggested in my presentation before the Justice Committee, and now before this committee, that those annual reviews need to be looked and beefed up.

On page 14 of my presentation, I suggest how those annual reviews could be beefed up within the spirit of the amendments put forward by the House of Commons. I suggest that the annual reviews could be extended to require the relevant oversight agencies, such as CSIS, the RCMP and the CSE, to report on the use of these and other provisions of the bill before Parliament. Likewise, this committee or committees of the Senate and the House could call on the Privacy Commissioner and the Access to Information Commissioner to prepare as part of their annual report to Parliament how they see the use of anti-terrorism legislation affecting the fundamental human rights and civil liberties of Canadians.

I suggest that the Chief Commissioned of the Canadian Human Rights Commission could be tasked as the key ombudsman for the citizens as regards the appropriate balancing between security and human rights. In fact, you may already have the type of ombudsman you called for in your pre-study in that office. If you

would propose for that type of role to be adopted by the Chief Commissioner of the Canadian Human Rights Commission, you could very well then have an additional strengthening of the oversight mechanisms.

Given the application of the proportionality principles, and especially as they may be applied to the provisions of this bill in a court challenge, that last part of the proportionality analysis must be looked at very carefully. That is why you need a very strong oversight mechanism.

Turning to the listing of terrorist groups on page 15 and following in presentation, I suggest that the effects of that provision have to be looked at very carefully to ensure that groups from particular minorities are not singled out without cause, thereby undermining the fundamental values of equality and multi-culturalism in our society. This argues again for the requirement for a strengthened annual review. I suggest on page 17 that the Privacy Commissioner and the Chief Commissioner of the Canadian Human Rights Commission could be tasked by Parliament to monitor the listing of terrorist groups to insure that the fundamental principles of equality, multiculturalism and other fundamental human rights are observed in the drawing up of the list.

In my submission to the House of Commons and this committee, I included some points on the Access to Information Act and the Privacy Act.

I agreed with the testimony of the two Commissioners before the Justice Committee, based on the proportionality analysis, which is in my paper. The government went far in its efforts to meet the concerns of the two Commissioners. The decision to only issue certificates after an order for disclosure has been made in the proceedings, will strengthen the accountability mechanisms. I suggest that, to give a greater comfort level to the public and both Commissioners and to meet some of the objections of the Access to Information Commissioner, you may want to consider an express provision that nothing in Bill C-36 detracts from the existing powers of the two Commissioners to fulfil their mandates under their enabling legislation up to and including the time when the minister issues the certificate, and it is upheld by judicial review.

In my conclusion, I return to this new territory between crime and war. I suggest that it is difficult for people in my position and for my colleagues like Professor Fleming, to deal with these issues. We have been raised, in some respects, on the Charter of Rights and Freedoms.

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Now, to be asked how you balance security with human rights gives us a tremendous burden. To always allude back to history, such as the Japanese-Canadians' internment, the October Crisis or the McCarthy Era in the U.S, is to torture a Buddhist saying: "…trying to step into the same history twice." This is not the same history, but rather this is a new paradigm, such that North America has never faced before. It is in this new paradigm that we have to use all our knowledge and all our wisdom to try to meet the challenge of this new paradigm, without allowing it to overwhelm our fundamental values of human rights, equality and multi- culturalism. Thank you.

The Chairman: Thank you, Dr. Mendes.

Mr. Don Fleming, Faculty of Law, University of New Brunswick: Honourable senators, thank you for this invitation to appear before your committee. Professor Mendes' observation about asymmetrical warfare and the new situation in which we find ourselves, is a point that should be well taken, and we should keep that this mind when we are reviewing this Bill C-36.

We should also keep in mind that other countries have experienced this over the years. For example, recently, several of my colleagues, who are permanent residents of Europe, returned after September 11. I asked them what they thought of the situation, and their response was that North America has finally joined the rest of the world. In other words, there are other countries that have had the experience that we are now facing. There are some that have dealt with it adequately, and some that have dealt with it quite inadequately. Some have dealt with it embarrassingly inadequately. We can do well to examine those examples.

On September 11, 2001, we witnessed the death of thousands of innocent people merely because committed groups of individuals sacrificed their lives to make it so. At most, those terrorists required only a few hundred thousand dollars of seed money, easily obtained nowadays; institutional training, common to many laypersons; and most importantly, a victim state that lacks adequate security measures at airports, industrial sites, power plants and other obvious terrorist targets.

Recall that the terrorists of September 11 did not rely on high technology. They did not employ combat training techniques, and they did not require secret information or restricted knowledge. They merely copied old-fashioned tactics of the common, armed thief.

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The terrorists noted security weaknesses at the initial crime site. They forcibly gained control over a few vehicles, and they did so by stabbing people with everyday utility knives. The September 11 terrorists departed from the thief only in one respect: they sought self-destruction and blind revenge, while the thief seeks only personal gain.

Following September 11, much remains unchanged: reporters and others moved through eight airport security checks with apparent ease; Canadians blundered into restricted areas around nuclear power plants, accidentally, without anybody even managing to find them for hours; and other terrorists, wrapped in explosives, happily videotaped their last goodbyes to family and calmly walked into public gatherings to blow themselves and others into oblivion.

North American governments could frustrate the majority of standard terrorist threats by committing more resources to the basics: they could improve security over objects that terrorists can transform into destructive weapons; they could increase the number of police; they could enhance the training of police forces; they could improve the expertise of our intelligence services; and they could extend their reach into every part of the diverse mosaic of Canadian society.

Bill C-36 does not focus on those elements. It ignores their elemental cost effectiveness and their relatively benign methods of protecting Canadians from the most obvious and likely terrorist threats. Instead, Bill C-36 creates new and invasive powers over the individual and bestows those powers on government ministers and their policing and security agencies. The bill goes even further: it revokes accountability over the exercise of those powers by diminishing judicial oversight and other independent objective review procedures.

Bill C-36 makes no provision to compensate for the inevitable injuries that the exercise of those powers will inflict on innocent victims. This leads me to observe what has changed since September 11 -- the spirit of North America. Once a confident and open society that derived great benefit from the innovative developments and wealth engendered by Western democratic freedoms, it is reverting to the impoverishment of paranoia and self-doubt. Our government fosters that reversion when it makes laws that circumscribe personal freedoms and, at the same time, remove the protection that accountability for the exercise of power provides.

More over, experience has proven that such laws just do not work. Witness the many long-delayed reversals of major terrorist convictions in the United Kingdom. Note, as well, the Bloody Sunday Inquiry.

My final comment deals with the implementation of treaty obligations. First, I remind the committee that, while Canada should implement its treaty obligations, frequently it does not. For example, the CRTC frustrated the U.S. for years by permitting Canadian cable television companies to pirate American television signals and to sell those signals for profit to the Canadian public. The CRTC added salt to that wound by permitting our cable company to displace U.S. advertising on those pirated TV signals with Canadian advertising. Thus revenues naturally went to our own cable companies. Only the negotiations over the Free Trade Agreement forced Canada to comply with obligations that our conflicting legislation had previously denied.

Two other examples arise from international human rights obligations. Canada ignored its first violation of the International Covenant on Civil and Political Rights for years -- I refer to the *Lovelace* case. It did so by refusing to amend the Indian Act. Only the threat of the upcoming Charter of Rights and Freedoms eventually prodded Canada to bring that legislation into line.

More recently, Canada has brazenly stated that it would ignore another obligation under the Civil and Political Rights Convention. That occurred after the UN Human Rights Committee held that Ontario's public funding of Catholic schools violated the freedom of other religious groups.

A final example of the Canadian government's reluctance to implement its treaty obligations has forced our Supreme Court of Canada to act. In 1999, the *Baker* case occurred, and the majority of the court held that Canada must adhere to the rule of the International Convention on the Rights of the Child, a treaty that Canada had ratified, but had not yet bothered to implement.

Suddenly, Canada is doing an about-face. Bill C-36 seeks to implement treaties that Canada has not yet ratified: Two anti-terrorist conventions and the Safety of the United Nations and Associated Personnel Convention.

I applaud the Canadian government for implementing those treaties and eventually, hopefully, for ratifying them. However, as others more competent in the minutiae of Bill C-36 have pointed out, Canada can implement those international anti-terrorism conventions without being so invasive of human rights norms. For example, you should read this bill, the *Security of Freedom*, which I

note some members of the Senate already have, and the chapters there by Professor Roche, Professor Martha Shaffer and Professor Don Stuart. Note also that Canada has already implemented many of its anti-terrorist treaty commitments without violating its human rights obligations. Again, articles in this text point that out as well.

Sadly, I am not certain that some sections of Bill C-36 can make that claim. For example, the wide definition of "terrorist activity" exceeds the definitions in the very treaties it seeks to implement. Let us compare the relevant parts of the definition of "terrorist activity" in clause 83(1) of the bill with article 2(*b*) of the suppression of the financing of terrorism convention. They do not match. Ours is wider. There is no reason for it.

That kind of thing could lead to a violation of article 2 of the civil and political rights convention, which obligates Canada, and I am quoting here, "to adopt such legislation or other measures as may be necessary to give effect to the rights of the covenant." Similarly, other contentious issues of Bill C-36 exist. These have already been mentioned: the listing of terrorist provisions, the investigative hearings provisions, the recognizance with conditions provisions, the proposed restrictions on disclosure of information provisions. These could violate specific rights set out in the civil and political rights convention: Article 9 on liberty and security of the person; Article 14 on the equality of all persons before courts and tribunals; and Article 17 on the freedom from arbitrary interference.

In conclusion, I reiterate my first point. The Canadian government does not appear willing to commit resources to the basic needs of combatting terrorism: improved security around terrorist targets, expanded and better trained police forces, and highly trained intelligence personnel extended into every community. I join others in congratulating the federal government for its eagerness to join in a much-needed international effort to eliminate terrorism. However, at the same time, I reflect the views of many in stating that Bill C-36 is a well-intentioned but rushed and flawed piece of complex legislation. As a result, it should constitute a temporary measure and not a permanent one.

I suggest therefore that the Senate and Parliament adopt the recommendations in the first report of the Special Committee on Bill C-36. In particular, I urge that the government re-examine that report and adopt objective and vigorous monitoring processes to review the exercise of powers provided in the bill, and that it also adopt the five-year sunset clause.

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In closing, I will give you an old law teacher's maxim. In cases shortly after the Second World War finished, there were some very irrational decisions by courts like the House of Lords. Those of us teaching those cases always warn our students that those were wartime decisions. They were decisions made in the heat of the moment, so to speak; they were not decisions that live for very long as relevant, as legal and as acceptable. The same provision applies with legislation. Thank you for your time.

The Chairman: Thank you very much, Professor Fleming. We will now go to questioning, and I should draw to the attention of senators that we have 55 minutes.

Senator Beaudoin: My first question is for Professor Fleming. Do you consider Bill C-36 as an implementation of the treaties -- I am told it is 12 treaties -- that we have signed in this field of terrorism?

Mr. Fleming: Yes, I do. The bill lists nine or 10 treaties that it specifically implements. Again, as others have pointed out, provisions of legislation already in existence have implemented those treaties. I would also point out that all of the anti-terrorism treaties are highly specific to certain activities. That is because the international community is not comfortable defining acts of terrorism or what terrorists are. As a result, when we go about implementing those pieces of treaty commitments, we have to be fairly specific in the way that we define "terrorism" and we have to define it in many different ways.

Senator Beaudoin: I am sure some of my colleagues will come back to that question.

(French follows, Senator Beaudoin - J'aime beaucoup les termes)

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(après anglais) (Sen. Beaudoin)

J'aime beaucoup les termes que vous avez utilisés «le test de la proportionnalité entre la guerre et la paix, entre le crime et la guerre». Cependant, je n'arrive pas à comprendre pourquoi vous êtes contre la clause d'extinction et la raison est la suivante. Tout est basé sur l'article 1 de la Charte.

Dans une société libre et démocratique, est-il raisonnable d'avoir des pouvoirs supplémentaires et comment ces pouvoirs sont-ils reliés à la Charte des droits? Je suis en faveur des pouvoirs supplémentaires, ils sont nécessaires et je ne conteste rien à ce sujet car c'est un choix que le gouvernement a fait et il a parfaitement le droit de le faire.

Mais comme la mesure est permanente et non transitoire, je me dis alors que la seule sécurité qu'il nous reste, c'est d'avoir une clause d'extinction et vous, de votre côté, vous dites que la révision annuelle suffit. Je dois avouer que j'ai un peu de mal avec cela.

Dans un pays comme le Canada, de type parlementaire comme l'Angleterre, un gouvernement majoritaire peut, évidemment, adopter des lois plus facilement. C'est notre système parlementaire et je l'aime bien. Toutefois, on accepte la clause d’extinction dans deux domaines et je me demande pour quelle raison on ne l'accepterait pas dans d’autres domaines tout aussi importants?

(M. Mendes: One of the reasons why I am not against...)

(anglais suit)

(Following French)

Mr. Mendes: I am not against sunset clauses and I am pleased that are two sunset clauses concerning the investigative hearings and preventative arrest provisions. However, the origins of sunset clauses in the United States come from their separation of powers. We do not have the type of separation of powers that they do in the United States because of our parliamentary system in essence, especially where you have a first past the post system with the tradition of majority governments.

The usefulness of sunset clauses has troubled me, to be frank, because with a majority government you can immediately pass it again. I actually think that there is a sunset clause for the entire bill, and it is called the Supreme Court of Canada. Once you have made the decision to subject the entire bill to judicial review, you then have the possibility that any or all of these provisions could be thrown out by the Supreme Court of Canada. For that reason, it is critical to have an informed basis for that type of decision making. That type of decision making by the Supreme Court of Canada will only come if there is sufficient evidence to suggest that the laws and justice of proportionality, as I call it, has been violated.

How will they get that? They can only get that by effective information gathering. The annual review proposed by the amendments is a great start, but it could be extended to requiring other oversight agencies to come before both Houses of Parliament to present their annual reports. Perhaps there should be one office to fulfil the original intention of the pre-study committee, such as the Commissioner of the Human Rights Commission, which can act as the ombudsman on behalf of all Canadians to ensure that the balance between security and human rights is observed. It is critical in terms of the courts being able to do their job for the information to come out, whereas the sunset clause may be five years too late. We are seeing that in some respects already in the United States.

Senator Beaudoin: Yes, I agree with you concerning the annual report. That is a good idea. It is not there. You suggest that it should be. That is fine. Professor Fleming suggested that we follow the lines of the pre-study, if I understood him correctly.

We have a big problem. It is new. We have to be quite sure of what we do. We know how the Supreme Court will react in the case of war, but not exactly what it is now because the measure is permanent. This is the fundamental fact. I

agree with you. I accept the idea of an annual report entirely. However, in my opinion the sunset clause is not a bad thing.

Mr. Mendes: I absolutely agree. Sunset clauses by themselves are not a bad thing, but if there can be a one for the whole bill that is fine. However, there may well be an existing sunset clause more potent than having one for the whole bill, and that is the Supreme Court of Canada. For that court to do its job, the proper evidence needs to be coming out on an annual basis.

Senator Beaudoin: I would like to have both the annual review and the sunset clause.

Mr. Mendes: I would be happy with both.

Mr. Fleming: Professor Mendes is right about the position of the sunset clause in the American legal system, but we have to look at it differently in our legal system. We have to look at a sunset clause in a different manner from a Supreme Court of Canada "sunset clause" because the bill is so very complex. Issues going to the Supreme Court of Canada will be issue specific. There will be parts of the bill that will be attacked and parts that will not be attacked.

The other aspect we have to recognize is that the Supreme Court of Canada is composed of nine persons, each with an entirely different view and perspective. It could be a tricky but successful method of legal finessing of legislation to permit a piece of legislation that violates human rights norms to get through the Supreme Court of Canada quite acceptably. The *Laval* and *Bedard* decisions, which came before the Canadian Charter of Rights and Freedoms, were good examples. In that case, the Supreme Court of Canada made the following rationale: If you take a group of people, in that case Indian women, and treat them exactly the same, however harshly, that is equality. The International Human Rights Commission said definitely no, that is not equality. The Charter of Rights that we later adopted, which took much of its impetus from the international human rights obligations, made that statement as well.

I use that as an example of a court being conscious of what it thinks the policy should be, divisive about the policy, and looking at a complex piece of legislation. It may not prove to be the necessary protection that has to exist. When we are dealing with a new situation with which we are not familiar, such as a situation of asymmetrical warfare, however permanent this legislation appears to be it should not be so. We should recognize that what we are doing now we are doing in the heat of the moment and there should be an automatic end to it because even the

same majority government may think quite differently if they are forced to replace the legislation in five years. They will have the benefit of experience; hopefully objective, vigorous annual reviews, and they will have the hindsight beside them to assist.

Senator Beaudoin: The chances of having a new level of decision, as the one we did, in my opinion are nil with the Charter of Rights and Freedoms.

Senator Bryden: I would like to express some disagreement with the statement made, in different words, by both witnesses. Professor Mendes said that suddenly people became deadly weapons. Professor Fleming's terminology was that people did not have to use high technology at all. They were simply bombs that were totally committed to their own self-destruction and revenge. I do not agree that the people who did this woke up the day before and decided suddenly to crash four airplanes, nor that no development of a weapon was involved. It may be easier and cheaper to develop a person into an effective bomb, but by some means these people were made into instruments of terrible destruction. Whether that was by brainwashing or because of the fact that they had such a significant reaction over a period of time, to use a colleague's terms, standing as kids at a candy store and only having the chance to look in and finally striking out. I do not know, but this did not happen suddenly by people getting up in the morning and saying it was time to take revenge and go out and kill themselves. I would ask you to address that.

On the question of the annual review, we have oversight in virtually every agency to which the public has access. CSIS, for example, has SIRC and the RCMP has its review board. To cut to the chase, we had the Privacy Commissioner here, and I believe the Information Commissioner will probably endorse this, that to create some sort of super overseer would be redundant in the first place and probably counterproductive from the Privacy Commissioner's and other people's points of view. The reports that will be made by the ministers and by the overseers of CSIS, the RCMP and the whole list of people, come before Parliament and the Houses of Parliament, which have absolute total jurisdiction to call these people before committees and ask them to go get more information. We have the right to do that. If we do no do so that is our fault, not the fault of the system.

On the subject of committing resources, I have made that argument in relation to virtually every piece of criminal or social legislation that has come before us for the past seven years. It seems to be the bent of people that if there is something

wrong, Parliament must pass a piece of legislation to fix it. The fact is that in many instances, legislation is not the crucial element. We need to provide the manpower and the facilities to implement good laws. It is always a matter of choices.

The argument that you make of putting in place more people to defend nuclear power plants applies to how to solve the child poverty problem, the drug problem, our urban difficulties and how to look after our aging population in a reducing health care environment. There are only so many dollars to be divided up. It is a matter of choices and the choices need to be made. They may be making the wrong choices, but the choices need to be made. There is not a limitless source of dollars to provide a means of blanketing every security-threatened place in Canada.

Could you address those points?

Mr. Mendes: You will be disappointed, I agree with everything you said. I do not think there is anything in my presentation that disagrees with you. I am not suggesting the creation of a new office; I am suggesting a beefed-up presence or mandate for existing officers on the points that you make. For example, I suggest giving a clear mandate to the Chief Commissioner of the Canadian Human Rights Commission to be the overall ombudsman for the balancing of security and human rights as part of an annual report to the Parliament of Canada.

I agree with your first point and that is one my problems with the sunset clause. The root of September 11 was actually partly in the Gulf War when the stationing of American troops on Saudi Arabian soil occurred. That was more than five years ago. The planning and networking that occurred from then on was manifested on September 11. That is why there is a need for beefed-up intelligence-gathering and security enforcement in different areas. That will not expire five years from now. What may happen five years from now may have its root in things which occur today. For that reason, I agree with everything you say.

Mr. Fleming: I agree as well, except that I was merely trying to say that the terrorists of September 11 would not be caught under the kind of bill that we have here unless we had committed the resources to intelligence-gathering and whatnot. There was clever planning, but it was planning at a low-level scale. It was planning that would quite likely go undetected unless you had intelligence sources within the various communities.

On the subject of committing of resources, that is a position that Parliament must consider. If Parliament will not commit the resources, that will leave various

parts of our country subject to easy terrorist attack. For example, I walked in here this morning and I was the first one in. Security might not have been set up as well as it could. First, they checked my bag. Then they gave my bag back to me and the security guard had to deal with three or four other matters. I could have put a gun in my bag that I had on my body. Then I put the bag down and went through the body check and I cleared. I picked up my bag. In that time, I could have had a bomb in my coat. I took my coat off and hung it up outside in the foyer. After walking through the personal body check, I could have put my coat back on, carried my bag in, I could have had a gun in the bag, I could have shot all of you. I could have had a bomb in my coat; I could have blown the place up.

The Chairman: That is a chilling comment that I hope will be noted around this precinct.

Mr. Fleming: I make no criticism of the security out there. I am just saying that we have not thought and adjusted ourselves to what security really is.

Senator Bryden: I would ask how many people and how many checks we would need to do to have kept you from blowing us up and what would the cost of that be? That is a significant factor. The point I really want to make is you are saying nothing in here would have any impact on preventing that. The fact is that one plane did not make the timing. One plane missed because it was delayed by 15 minutes. As a result of that, perhaps thousands of lives were saved.

If someone is detained for 24 hours because, as you say, intelligence has indicated that something may happen, and it must be done under this provision, then perhaps there are instances where thousands of lives may be saved because it threw off the timing just enough that the plan must be rethought. That is my point.

Senator Andreychuk: The sunset clause has concerned me not from a legal, technical, or consequential perspective, but just from the point of view of good public policy. We may have known about terrorism, but this matter erupted as a result of September 11. There is no question that we have Bill C-36 because of that incident. If we do not wish to say it is an emergency, we are saying that is the event that drove Bill C-36. Many things in the bill should have been done, like adopting treaties, but they were taking their time through the system.

We are intruding on our own rights that we have spent so many years to build. We are reducing and in some cases obliterating rights in favour of security. Would it not be a good signal for the government, with a sunset clause, to say, "We need these powers, this is the best we can do at this point. We will ensure that we come

back to Parliament, as the representative of the people, to look at this issue, to ensure that we have perhaps more, perhaps less, but the right powers"?

A sunset clause is a reassurance to those people who are uneasy about losing their powers in favour of security, but it is not a guarantee that we will be secure.

Mr. Mendes: I am in favour of sunset clauses. However, we overestimate how much they actually protect us. Frankly, if the provisions are overreaching, if they obliterate human rights, they will and should be struck down by the Supreme Court of Canada well before five years, perhaps next year or the year after.

I worry about whether they will have sufficient information to make the considered decision on that basis. I agree with my friend Don Fleming on many things, but I completely reject his assertion that our Supreme Court of Canada is not able to deal with the balancing of security and human rights. They have demonstrated their skill in the trickiest areas imaginable. The Quebec secession reference case was a major decision that has become known around world. If the court can handle issues of that complexity, they can handle issues of balancing security and human rights.

For that reason, I have more faith in an annual review system, which brings out information that will allow them to see whether there are overreaching provisions or obliteration. If there is, they can and should be struck down. That does not mean to say I am against sunset clauses, but perhaps we overestimate how much protection they will give us, especially in a majority system of parliamentary government.

Senator Andreychuk: I believe that we need all the mechanisms because there are situations that will not come before the Supreme Court. Going to the court costs a lot of money. There will be prejudices at the most disadvantaged level, and that is why we need a balancing.

My other question is about the definition of terrorism. The bill uses the words "in whole or in part for a political, religious or ideological purpose". I think it was you, Professor Mendes, who said that that definition does not correspond with some of our international treaties. It seems to have been lifted out of British terminology. I understand why the British would use the words "political, religious or ideological." That goes right back to Northern Ireland. Surely terrorism could come from sources other than that. In some ways, we are weakening the definition of "terrorism", but other ways we are targeting religion

and certain groups that espouse a certain religion. Therefore, that leads to more profiling, in my opinion.

Mr. Mendes: I agree. I think it is unnecessary in order to achieve the objectives of combating terrorism. As Irwin Cotler has said, it could create an extra burden on prosecutors.

For example, if the terrorism is motivated by hate, does that fall under ideological, political or religion? The terrorism may well be motivated by irrational hate. As you mentioned, some communities may fear being singled out. I do not think it adds much to the definition of "terrorism" and should have been completely removed.

Senator Jaffer: Thank you for appearing before us. Professor Mendes, I am very intrigued by what you have said about the paradigm of war and crime. What do you say is the definition of war?

Mr. Mendes: The experts are saying that what was familiar to Europe, the Middle East and countries like Sri Lanka, has now come to North America. We are now in a new territory between crime and war. Some military strategists call it asymmetrical warfare. You are not fighting an external enemy. You may be fighting an internal enemy liased with an external enemy and you have no idea where that internal enemy will hit next.

That takes it out of the regular crime paradigm and puts it closer to the war paradigm, but not quite in the war paradigm because there are not armies massed against each other ready to blow each other to bits. The potential enemy is sitting right in the middle of your society. This is the new territory we are now in between crime and war. It will require a rethinking of not only this area but also many other areas.

I did not cover the part of the bill that deals with economic security in either my presentation here or before the Justice Committee. How that is impacted requires a serious examination in and of itself because it will touch on banking, corporate governance and many other areas. We have not yet begun to think about how this new territory will affect us in the ordinary work that we do.

Senator Jaffer: I asked that question because I normally think of war as being external rather than internal. The people I am hearing are saying that war is being declared on our communities, that bin Laden`s work continues here.

As you said, we are a multi-cultural community. We value that very much and people have worked very hard to make our country the great and inclusive country that it is.

You spoke about the annual review. You are in favour of that. The annual review, as described in the act, will talk only about numbers. I do not believe that that will be enough oversight. We need some qualitative interpretation. Have you given any thought to that?

Mr. Mendes: Yes, I have, and that is the main reason I suggested a beefed up annual review process. The statistics will probably not be enough. We need to have an accounting for incidents that take place, such as the false arrest of the engineer who worked in a nuclear power plant. We need to examine such situations. Because they involve issues of equality and multiculturalism, that should belong to an office such as the Canadian Human Rights Commission. The commissioner should come before Parliament to discuss those issues to see whether qualitatively there could be an incursion on the fundamental principles of equality and human rights.

I am not arguing for new offices; I think we have enough. However, we need to give our present offices a beefed up mandate to ensure that those qualitative assessments of infringements of equality, multiculturalism and other fundamental values are not being infringed by this legislation, whilst we keep in mind the necessary security interests.

I wish to make another point that is not usually discussed in reference to the issue of racial profiling and diversity. As Timothy McVeigh has shown, the trouble may not come from the racial minorities. It may come from the "dominant population". Likewise, it may also come from sources that we cannot locate within our communities.

For that reason, we need the qualitative and beefed up processes of annual review that I am suggesting. That would be within the spirit of the amendments proposed by the House of Commons. I do not think it would require much debate in the House of Commons if you were to propose that.

Senator Kelleher: Professor Mendes, I am concerned when you tell us not to worry, that the Supreme Court of Canada can perform a type of sunset clause, that they are there to protect us. I am not a great believer that the Supreme Court of Canada should be looked upon as the entity to come to our rescue. I do not agree with a political body, such as Parliament, turning its back on difficult decisions in

hopes that the court come to the rescue and do the dirty work. I believe that the proper way to do this is to make a political decision, that Parliament should decide whether there should be a sunset clause in the bill. I do not think we should be relying on the court to rescue us at the last moment.

I would appreciate your comments on those thoughts, illogical as they may be.

Mr. Mendes: They are not illogical at all. I reiterate that I am not against sunset clauses. They add a level of accountability, but I think we overestimate their protection because a parliamentary system of government with the first-past-the-post system, which usually creates majority governments, does not provide the level of protection that you have in a separation of powers situation such as they have in the United States.

However, that being said, I completely agree with you that it provides a level of political accountability.

However, a sunset clause five years from now may be five years too late. I suggest that in addition to the sunset clause, greater attention must be paid to the accountability mechanisms that will happen a year from now at the very latest, i.e, the annual reviews, and the beefed up processes for gathering the qualitative evidence, as Senator Jaffer has suggested, in addition to the quantitative evidence, so that proper assessments may be made by the politicians and by the courts, if necessary.

Senator Kelleher: I would suggest that there is a misconception about what constitutes a sunset provision. What the government is offering is simply to be done by a motion. The bill is not brought back before Parliament and gone through the two stages, committee and then third reading, and then on to the second chamber. We do not even really have that protection at this point in this particular bill.

Mr. Mendes: Again, that brings up the point that I support sunset clauses and you are reinforcing my thesis.

Senator Kelleher: I am not really, because I am talking about having a sunset bill in the true sense of the word.

Mr. Mendes: I do not know what the details are of how the sunset clause will be triggered. If it is as you say it is, yes, it will provide less protection.

Senator Furey: Professor Mendes, if an individual or, indeed, a group were to find themselves in the middle of a criminal process, and following the act, a non-disclosure certificate were to be issued, given the climate of full disclosure that the Supreme Court of Canada has encouraged since the early 1990s through many judgments, what would be your best guess or best guesstimate as to the likelihood of that particular proceeding continuing?

Mr. Mendes: Again, until some clarifications from the Department of Justice and the minister who appeared before you yesterday, I was not quite sure myself as to the impact of the amendments. I take it from the testimony that the certificates will only be issued where there is a clear and present danger, to put it that way, of disclosure to the public, even though the words "to the public" have not been put into the amendments. That is the understanding.

If that is the case, that severely limits the number of cases in which those certificates will be issued, and then there is the possibility of judicial review by a Federal Court of Appeal judge. Therefore, there will be few instances in criminal cases where that will happen, I gather, if that is the intention. In his testimony before the Justice Committee, John Reid mentioned that he had searched 20 years and had never came across any instance where that provided a problem in the present legislation. That is why I am suggesting, if that is the case, we have a clarification, either adding the words "to the public" or stating up front that there will be no interference with the existing mandate of the Information Commissioner. Again, there is an ambiguity as to what exactly the amendments mean, because the words "to the public" are omitted.

Senator Furey: If a non-disclosure certificate were to be challenged in the Supreme Court of Canada in this climate of full disclosure, do you think it would survive, or would it be thrown out?

Mr. Mendes: Let us again follow the train of thought. If it is only limited to where there is a threat of disclosure to the public, that means the investigation has come to an end, and the order for disclosure has been made, but that is now threatened with a certificate. That certificate is potentially reviewed by a Federal Court of Appeal judge. I presume that it will get to the Supreme Court of Canada on appeal from the Federal Court of Appeal judge.

Given the limited instances where that may happen, there is a big likelihood it may be upheld by the Supreme Court of Canada.

Senator Furey: Professor Fleming, do you have any comments in regard to that issue?

Mr. Fleming: I do not have any on that particular point, no.

Senator Murray: I will simply make a comment. The witnesses or others may wish to reply.

It was our colleague Senator Grafstein who came up with the idea for a Parliamentary Commissioner to monitor the exercise of powers provided in this bill. This officer, according to our recommendation, would table a report annually or more frequently as appropriate in both Houses.

I disagree with Senator Bryden, and inferentially with you, that the existing oversight mechanisms are adequate for the purposes envisioned by Senator Grafstein and this committee.

The one that is adequate would be SIRC, the Security Intelligence Review Committee, which will oversee any involvement by CSIS under this bill. The others, however, create problems. The Communications Security Establishment over at National Defence has no oversight body monitoring it.

Mr. Radwanski was here the other day and said, "I can go in. I am the commissioner of privacy." So he can, but he has to act within the ambit of his own act and the processes that he is bound by. If it is a privacy issue, yes, he can go in, but there is no real monitoring of the Communications Security Establishment, for one.

The minister mentioned the RCMP Complaints Commission the other day. It has its own processes involving complaints and all that sort of thing.

I thank you for treating this review process very well and very seriously in your brief. I would welcome the Canadian Human Rights Commissioner taking the overall oversight role that Senator Grafstein suggested, but we would have to give her a legislated mandate to do that in respect of this entire act. Otherwise, she too would be constrained by her own act. Unless you believe that every excess of executive or even police power is a human rights issue, she would be limited, unless we amend the bill to give her a legislated mandate to do the oversight job that the committee had in mind when we reported on pre-study.

My overall approach to this bill from the beginning has been to trust the government and the authorities with these powers, provided there is an adequate monitoring and oversight function in the bill. Absent that, I for one would stand and vote against the bill.

Mr. Mendes: Senator, I am not in disagreement with you. It would be great if we could have an existing officer of Parliament given an extended mandate to review how the bill is used by the institutions you mentioned. However, I am suggesting that if we can take an immediate step. Given this bill may pass before Christmas, you could at least designate these institutions to have as part of their mandate to look at how the bill has been used in relation to its mandate. That could be the first step. You could push through at a later stage a requirement for an additional mandate, but if you have nothing now, it could defeat what Senator Jaffer has been asking for, which is a qualitative examination in addition to a quantitative examination.

As you well know, politics is the art of the possible. See what you can get through right now and then build on it.

Mr. Fleming: I agree with you, senator. You need to have a comprehensive legislative mandate for an adequate overview.

Senator Fraser: I have one other difficulty about the parliamentary officer. We did recommend a parliamentary officer, but one tries to keep an open mind and listen to testimony. One thing that has come forcefully home to me is that a great deal of this bill goes to the provinces for execution. No parliamentary officer can possibly oversee what the provinces do. We have, apparently, one agreement with the provinces for detailed reporting requirements, which I think are important, as I believe you do, Professor Mendes. I cannot conceive of the provinces agreeing to the establishment of a free-ranging parliamentary officer who would come marching into their jurisdiction and say, “Okay, my mandate is to pass judgment on how you are doing.”

Mr. Mendes: Senator, you are right. I was surprised that Senator Beaudoin, the reigning expert on division of powers, has not mentioned this issue before. It is a very complex, constitutional problem because there are clear divisions of powers between what the provinces and the federal government have jurisdiction over. One approach to that is a little used jurisdiction by Human Rights Commissions, in particular, which is the ability to have public hearings under the present jurisdiction of the Chief Commissioner of the Canadian Human Rights

Commission. They have the right to hold a public hearing on whatever issue they wish. I gather the oversight agency for the RCMP has the same ability to hold public hearings. A great way to overcome division of powers problems is to invite the qualitative evidence that will be needed in addition to the quantitative evidence. There are ways around that, but it will be non-constitutional ways.

Senator Joyal: I want to come back to page 15 of your brief, Professor Mendes, page 9 of the French version, about the status of the Human Rights Commissioner. The Human Rights Commissioner is one of the four officers of the Parliament of Canada. He or she has a parliamentary status. We heard her last week at the Human Rights Committee, chaired by Senator Andreychuk. We heard her last Monday, and we questioned her about her status in terms of helping Parliament to oversee its responsibilities in the implementation of human rights, be they international instruments or domestic legislation. The answer we got from her is on the record. You can check that. The commission and the Commissioner are so overwhelmed by individual complaints that, in fact, they do not have the time, the support or the resources to act fully as officers of Parliament. In fact, their role as ombudsman for Canadians who want to file complaints takes everything, and they have even been the object of the last Auditor General report last year, that they were overwhelmed with a backlog of complaints that makes his or her role as a parliamentary officer almost non-existent. It is an important point, because if the government refused to appoint a Parliamentary Commissioner to review this bill, then we would have to act with the present officers of Parliament and see how their powers and resources help them fulfil their role in relation to this bill. That is the alternative proposal.

I am concerned that what you are saying is that we increase the security budget by far. We will hear the Minister of Finance next week announcing, as already indicated, a substantial amount of money, but how are we maintaining the principle of proportionality? As you said in your brief, the overall crux of the decision is to maintain the principle that Parliament will have a capacity to act on those reports in an effective way. To act on those reports in an effective way, there is no doubt that Parliament needs the support of the parliamentary officers directly involved in the implementation of this bill: the Privacy Commissioner, the Access to Information Commissioner and the Human Rights Commissioner. In all our debate so far, we have concentrated on the privacy and access to information, but left on the side the Human Rights Commissioner, who, to me, in the context of what the government is proposing, is the most important person for Parliament. Our role is to maintain that principle of proportionality between what the

government thinks is proper to do to maintain security and what we as representatives of Canadians in Parliament want to maintain, the respect of the rights and freedoms. To do that arbitrage between the two, parliamentarians left alone cannot fulfil their role. Many of us have been sitting on both places, and we know the limits to our status. If we are not helped or beefed up by those officers whose main responsibility and whose task, as granted to them by Parliament, is to follow up on those issues.

Your brief is good, but it left me on my appetite, as we say this French. It was good in terms of lining up the principles, but in practical terms, what will it give us as a result? That is where I feel we have to go beyond the mere recommendations of what you propose.

Mr. Mendes: I agree. I think the doubling, if necessary, of the Canadian Human Rights Commission budget should be viewed as a part of the security budget because its present budget to fulfil it is domestic mandate, let alone its international mandate, is inadequate. It could become a dysfunctional institution if its present budget, just to meet its domestic mandate, is not sufficient. For that reason, I would strongly urge that the Canadian Human Rights Commission be regarded as part of the security budget next week. Whether there is enough time for you senators to promote that, I am not sure, but it is a cri de coeur from me.

Senator Joyal: Is the Commissioner part of the list of witnesses that we will hear this week?

The Chairman: No. Professor Fleming, do you have a final thought on this?

Mr. Fleming: I get back to what Senator Bryden has said. It is an allocation of resources problem. I would remind this committee, and Senator Joyal has already done so, that there are insufficient funds right now to allow Canadians who feel that the government is overriding their rights to have their case heard. This legislation will increase that kind of problem, inevitably. When it bleeds down from the best intentions to actual practice in the field, you will get abuses. As part of the infrastructure of our government and the confidence building of our citizens, we have to have sufficient resources allocated to the protections by way of review, by way of those sorts of activities. I agree with my colleague, Mr. Mendes, and many of you in that respect.

Senator Joyal: On the same point, since the Commissioner is on the record in another committee of the Senate on that very issue, would it not be appropriate, if this committee does not find it appropriate to hear that Commissioner, at least to

circulate her testimony on that very point of how she fulfils her role to help Parliament implement its responsibility in the field of human rights? It is the testimony she gave last week. Senators Andreychuk and Beaudoin were there when that happened.

The Chairman: Certainly, at the very least, Senator Joyal, we will ensure that it is circulated to all the committee members.

Senator Andreychuk: Madam chair, you will hear more about that from the committee in its upcoming report from the Human Rights Committee. That is a bit of an advertisement for the committee.

The Chairman: Senator Andreychuk is the Chair of our Human Rights Committee.

Thank you very much, Professor Fleming and Dr. Mendes. It is a pleasure to have you here. It has been a very good discussion. We wanted to have you during our pre-study, but both of you were in China at the time. As a result, we were unable to do it then. We are ever more delighted you were able to come today. Thank you very much.

We will now move to our second set of witnesses. We have with us two groups from whom we are anxious to hear. The first is from the Coalition of Muslim Organizations and the second is from the Urban Alliance on Race Relations.

Please begin.

Mr. Julian Falconer, Senior Counsel, Urban Alliance on Race Relations: Honourable senators, we are honoured to be before you today. The work you are engaged in is obviously of tremendous significance to Canadians across the country and is historic in its nature. Many will ask whether the horse has left the barn and whether all of us are staring, with great respect, at the rear end of the mare.

As the Senate, you are not ineffective in your work. You are not impotent to Canadian democracy. You have a role to play. That role comes to a head when legislation of this nature, legislation that is potentially more significant than any act passed in the past 50 years in this country, is being considered. I urge you to recommend to the Senate key amendments to this legislation in order to ensure that balance is its hallmark which, as we indicate at page 16 our submission, is governed by a schedule determined, in great respect, by murderers.

UNREVISED / NON RÉVISÉ

Unfortunately, you are in a climate that is rife with panic more than reason; rife with fear, more than any other climate we have faced in decades.

I ask you to consider that the Attorney General of Canada, the Honourable Anne McLellan, repeatedly noted that if we do not stop the terrorists getting on the planes, it is too late. With great respect to the Attorney General, these are not the words of rational, slow, and cautious legislative officers. These are words of panic.

She may well be right. Indeed, I think that she probably is right. However, tempering our legitimate security concerns with rational acts is key to this legislation.

You should have our materials before you. It is the submission to you with an attached submission to the House of Commons. I will be speaking for another two minutes or three minutes, and then Ms Goossen, President of the Urban Alliance on Race Relations, will be addressing you.

There are two key weaknesses in the legislation that we believe should be brought to your attention. Specifically, we refer to the definition of terrorist activity and the usage of the notion of political, religious and ideological motivations.

That which is most extraordinary about this definition is that it not only invites, it actually mandates any prosecution to engage into an inquiry into the religious, ideological, or political beliefs of Canadians. It does that not in a public trial, which we all envisage and may have seen. It does that in secret hearings. It smacks plainly of a form of McCarthyism that should cause as much fear as the people getting on the planes should cause.

I invite you to consider the following because it is precisely in the mandate of the legislation as presently drafted. People would be summons into a secret court. They would be brought in to give evidence because they have material information about terrorist activity. There would be no charge to confine the investigation. There would be no charge against a specific person outlining what that person has done.

There would be an investigation about activity. In the course of the investigative hearing, as part of his or her mandate, the prosecutor would be required to examine the witnesses on their religious beliefs as the targets of the investigation. Prosecutors would be required to do that.

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I ask, "why?" Why does it matter? We have an expert here, Professor Watkins. He has given generously of his time to attend Question Period in the House. I encourage you to rely upon him for information. There are true realities about the economic vulnerability of Canada today. The unique expertise of Professor Watkins enabled him to address that topic under tab B of our presentation.

Interestingly enough, while we remain tremendously vulnerable to the U.S., they have not seen fit to create the definition of importing religious ideological motivations. A review of the U.S. legislation makes it clear that they do not see it necessary to put their citizens' religious beliefs on trial, but we do.

The only model in which you will find that definition is the United Kingdom model. I do not say to you that that is irrelevant and that we should not seek to learn from all of our allies. However, I do find it striking that the reference to the need to fall in lockstep with the U.S. seems to have been lost on the issue of sunset clause, and now with the issue of putting peoples' values on trial. We do not have to it. It is not necessary.

Let me close with some comments for your consideration of this issue. People quite rightly say to you, that the kind of activity we kind of activity that causes fear for our families and ourselves is one that is motivated by religion or ideology. Is not the terrorist activity of which we speak motivated ideologically? Should we not be realistic and not artificial and say it like it is. That is the kind of activity that we are discussing, but the mere fact that there is a component of a particular crime that you are targeting, does not mean that you make the component an element of the offence.

Let me give you an example. On the charge of murder, over 90 per cent of murder cases are domestic. They involve a family member of one type or another. That does not mean that as an element of the offence we take that common component and inject that into murder so that the Crown is required as a matter of duty to inquire about family relationships. We do not do it because it does not make sense. It is not necessary. It is not essential.

I ask you to consider whether it is essential that religious beliefs be on trial. It was not essential for the U.S. Patriots Act. It is not essential for any of the investigation that is have occurred to date.

I ask you to re-consider this. As we get closer and closer to the abyss of this legislation becoming law, we must appreciate that it will be well night impossible to roll back mistakes that we make. I ask you as a committee, to take the steps

necessary to protect not only the security of the country, but also the key civil liberties under which we live.

I have a six-year-old son and a 19-month old son. When my six-year-old is 16 years or 17 years of age, I will be encouraging him to engage in democratic debate. He might ask me where was I when this law was passed that allows people to be summoned to a secret room to be asked about their religious beliefs, I want to be able to say proudly that I was trying to call the attention of the country to the problem.

I think that you, with great respect, ought to be saying the same things to yourselves. This is wrong. It is not necessary. If it is not necessary, it ought not to happen.

Ms Tam Goossen, Chair, Urban Alliance on Race Relations: Thank you, Madame Chair. Thank you senators for allowing us to appear before you.

I would like to point out again that in our submission there is material on the legislative oversight issue, as well as the role of the Senate. There is a quote in our submission from a book written by the Honourable Maryka Omatsu. The title of the book is entitled *Bittersweet Passage*. In that book, she gives great detail of the internment of Japanese Canadians in World War II, including the experience of her family and friends. She writes:

> In a cruel sort of way, the treatment of Japanese Canadians during the 1940s should not have come as any great surprise. For Japanese Canadians the legal losses had really begun as early as 1903, when the English Privy Council upheld the 1895 BC Elections Act, which had legitimized our second-class status and reinforced all the other discriminatory laws that followed against Asians. Over the decades, statutes maintaining racial apartheid were customarily passed without discussion or debate. The decision taken in 1942 to imprison only Canada's Asian ‘enemy aliens’ – and not the German and Italian communities – slipped by almost unnoticed.

I quote that because we are really upset that there has been very little public discussion of this bill leading up to its passage in the House of Commons. I do not know if any of the Members of Parliament had actively conducted discussions in their constituency.

The Urban Alliance on Race Relations tried to do our job of convening a public forum. We invited a MP in the downtown area to come. He did not show up.

A number of us in the community have raised a tremendous concern about the implications of this bill. We cannot forget nor underestimate the impact of that experienced by the Japanese Canadian community. It has taken that community and the government years to re-cover from the effects of a very bad law. The psychological impact is only beginning to be documented by the third generation of Japanese community as to the sufferings of their parents' generation. The parents absolutely refuse to talk about it. I would ask that we all bear that in mind.

I urge you to play your role. We consider the Senate to be a very important piece of the democratic system. You are the sober, second thinkers, and we need you to follow the great tradition that you have had in the past. We detail that in the submission. We want you to give this some very serious consideration and send it back to the House of Commons.

We are also concerned about the oversight mechanism. There was some discussion earlier about the Canadian Human Rights Commission. We are asking for a review committee that is modelled after the review committee overseeing CSIS. Rather than having the responsibility placed on one person, the review committee structure should be able to encompass some of the questions asked earlier by Senators in terms of jurisdiction with the provinces or responsibilities with human rights or the privacy agency. Also, it could allow membership by non-elected members, but credible third parties.

Mr. Ziyaad Mia, Muslin Lawyers Association, Member of the Coalition, Coalition of Muslim Organizations: In the name of God, the compassionate, the merciful.

Good morning, honourable senators. It is a pleasure to appear before this committee today to share our views on Bill C-36, the Anti-Terrorism Act. Appearing with me is Mr. Khalid Baksh. We are members of the Muslim Lawyers' Association, which is a member of a large coalition of Muslim organizations on whose behalf we appear today. We are also accompanied by Mr. Sayed, the chair of the Muslim Lawyer's Association.

This coalition consists of more than 140 Muslim organizations across this country, and we probably represent a significant majority of Canada's more than 600,000 Muslims. On November 8, we testified before the house committee on Bill C-36. Since then, Minister MacLellan has tabled amendments to the bill. Frankly, these amendments are mere window dressing because they do little to address the real and serious concerns about Bill C-36.

Justice is one of the Islam's fundamental and core values, so much so that the Koran directs Muslims to always stand for justice in any case. Muslim Canadians share the fear, anxiety and pain arising from the events of September 11, and we endorse prudent and wise steps taken to ensure the safety, security and peace of all Canadians. However, this bill, even as amended, does not serve justice. In many ways, this bill will become a tool of injustice against many innocent people.

Canada is a land of immigrants. I was born in South Africa while apartheid was still a going concern. Ultimately, my parents made the tough decision to leave their home and family and come to Canada, precisely because Canada offered to us the very basic human rights denied to us in the land of our birth. A similar story is echoed in the experiences of many Muslim Canadians. The principles of fairness, equality, tolerance, along with the values embodied in the Charter of Rights and Freedoms, are very precious to so many people who have come to make Canada their home. Muslim Canadians find it unbelievable that the government would introduce legislation that places our most precious values at risk.

Bill C-36 strikes the wrong balance between civil rights and security. Why are these amendments superficial and insufficient? The so-called sunset clause is nothing more than a vehicle for perpetual renewal, allowing the extraordinary powers contained in the bill to become a permanent artefact of our law. The annual reporting by Attorneys General and Solicitors General is merely an exercise in gathering statistics and then disclosing only the ones they want you to see. Self-reporting in this case is like putting the fox in charge of the hen house.

The definition of "terrorist activity" continues to be based on religion, politics and ideology. These criteria do nothing to further the government's objectives and will only result in targeting vulnerable communities and individuals. The definition of "facilitation" continues to create conditions where innocent people acting without any criminal intent can be punished as terrorists, and the interpretive clause provides nothing more than a false sense of security to vulnerable communities because it does nothing to ensure that the bill's powers are crafted and applied under the rule of law and the Charter.

Once again, these amendments do nothing to remedy the bill's flaws, which are patently apparent. "Terrorist activity" is so broadly and inappropriately defined that many innocent people will be caught in the bill's net. For example, a Canadian engaged in refugee or aid work abroad could be labelled as a terrorist, based simply on the accusation of a foreign government, and usually a foreign dictatorial government. Let me provide a more concrete example. As a teenager, I supported

the work of the African National Congress and advocated for the demise of South Africa's repugnant apartheid regime by any means. Under Bill C-36, I would be a terrorist.

If this is not troubling enough, consider that a group or individual may be labelled as a terrorist by the Solicitor General acting through a simple administrative process without any oversight and relying heavily on secret evidence. Again, that secret evidence comes from a dictatorial government. The people concerned are excluded from seeing the evidence or hearing the specific accusations against them. This process is blatantly contrary to the Charter's guarantee of fundamental justice, the presumption of innocence and the right to a fair trial. The bill gives repressive foreign governments one more tool to persecute their enemies abroad. The drafters of this bill have naively attempted to package the deep and historic complexities of geopolitics, economic disparities, culture, faith, and ideology into a neat little box. This miscalculation vividly illustrates this bill's fatal flaws.

Venturing further into unexplored legal territory, the bill's preventive arrest provisions fundamentally alter a cornerstone of our legal system by undermining a litany of the Charter's protections, including the right not to be arbitrarily detained or imprisoned, the right to due process, and the very basic principles of the rule of law. Preventive arrest is a hallmark of a paranoid police state, not a free and democratic society.

The bill also makes criminals of innocent Canadians through the invention of facilitation as an offence. The absurdity inherent in this is that people may be guilty of facilitation whether or not they are aware that they are facilitating an activity that is considered to be terrorist. This means that Canadians who act in good faith with charities or the charities themselves may be subject to severe criminal and civil penalties without ever having committed a criminal act.

Muslim Canadians are involved in charitable causes around the world, because, as I mentioned, our faith calls for justice and it also calls for charity. Under this bill, the charitable work of Canadians is at risk because simple acts of generosity may be punished by the bill's imprecision. The absurd reality is that these people, without committing a criminal act, could be defined as terrorists under this bill.

What are the consequences of being blacklisted by the government as a terrorist? You could be listed as a terrorist on the accusation of a foreign government in a secret process. Your property can be seized. You can be arrested

and detained without charge. You may be tried without you or your lawyer seeing the evidence against you, and you could be imprisoned for extraordinarily excessive terms.

The adverse impacts of this bill will not be remedied by judicial oversight or vindication after the fact. Stern judicial sanctions of the state's violations of civil rights make great case law and may even serve to assuage societal guilt for wrongs done against innocent individuals and communities.

Case law will not repair ruined families or regain lost livelihoods or rebuild friendships and trust, which were fractured by the suspicion innuendos and by the stigmatization sown by the overly zealous acts of the state. These very real consequences can only be avoided through prudent forethought, open debate and a genuine respect for civil rights and the rule of law.

The Coalition of Muslim Organizations is extremely concerned that not only will the application of the bill be focused on Muslim Canadians, but the impact will be amplified by the lack of procedural and charter safeguard in the listing of terrorists, in the investigative process, and in the criminal justice system, all of which serve to compound the discriminatory impact upon them. In short, the implementation of this bill will infringe on the quality guarantee of the Charter.

Wisdom advizes that we should use the existing tools at hand, because they are tested, familiar and reliable. Terrorism is a complex phenomenon, and it follows that solutions to terrorism will not be simplistic. Fear makes bad policy. A more comprehensive approach necessarily requires that the government uses existing powers, and that it calls upon and uses its many other tools to their fullest extent. Diplomacy, peacemaking, support for representative government, and an approach to international relations that is imbued with a vision of equity and justice, will go much further to eliminate the threat of terrorism than a bill that threatens the rights of Canadians.

Senator Beaudoin: I understand that, in your opinion, this bill does not relate only to the rule of law and human rights. We are involved in many other aspects in respect of the definition of "terrorism. " You are of the opinion that we should not speak to religion, but rather we should simply adhere to the question of pure legality.

I also understand that you have compared Bill C-36 with the American bill against terrorists, and that you prefer their approach, in a sense, and their definitions of "terrorist" and "terrorist activities." Is that correct?

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Mr. Falconer: The short answer, on the issue of including religious, ideological and political beliefs, is, yes. I would say, Senator Beaudoin, that much of our submission is devoted to making the point that we have to be careful about rushing to follow lockstep with the United States. There is a certain internal inconsistency to our position. On the question of definition, I say specifically what I consider to be a far more hawkish country next door, and for good reason. They lost thousands of lives in a shocking tragedy that shook the nation and the world. I do not say it in a deprecating way, but they are a far more hawkish country, historically as well.

The Canadian tradition, in respect of firearms, for example, as a peaceful country has stood us very well. It is in this context that it is striking that one would consider a more hawkish country, which has waged war on this issue, has not seen fit to put religious beliefs on trial.

In fact, we have had copies made for you, because a part of the act that was passed by the Americans under the Patriot Act, actually contains a lengthy caution on the avoidance of discrimination and a recognition of the cultural groups that are front and centre, which my colleagues represent.

We must be realistic about what is happening. In today's context, we have defined a group -- a class of persons -- that we fear. We have to be fair to the fact that we fear extreme fundamentalism on the part of Muslim people. That is what we are talking about, and we ought not to be afraid to say it. Because we have such a fear, it makes members of those communities, such as my colleagues, vulnerable to the worst kind of human rights abuses, in the interest of rooting out a tiny percentage. Hence, the questions follow: How do you do the job? How do you protect people on planes? How do you protect our populations?

The answer cannot be to violate the rights of hundreds of thousands of people to root out a few. Canada's reputation did not develop that way. I worry that we are talking about a rush to follow through on that comment by the Attorney General about them getting on the planes, and if they are on the planes, it is too late. Do you feel the rush about that? Do you feel the panic?

Senator Lynch-Staunton found the mistake: they made an error such that any official can invoke the secrecy provision. They do not usually make such errors, but it can happen when they are rushing and running to get something done.

We are talking about the most important legislation this country has looked at in over 50 years; they closed debate prematurely; and then the House of Commons

shut down because there was nothing else to do. Something is wrong. First and foremost, we say that sober second thought means take away religious, ideological and political values of Canadians and others, and figure out if they are committing a crime.

Senator Beaudoin: As a jurist, I cannot but agree with the principle that, when we deal with a crime, or a statute such as this, we should stick to the Charter of Rights and Freedoms, the principle of the rule of law and the definition of a "crime." I believe that you have stated that quite succinctly.

Obviously, when we define certain words in the bill, we should stick to the law and we should not include religion and other factors.

Mr. Falconer: I apologize for the long answer, but being a lawyer, I suffer from that affliction.

Senator Fraser: It is important that people who represent these perspectives come here to test us -- to push us and to make us reflect again and again what it is we are doing.

That said, if I thought that the bill described by your two groups was the same bill before us today, I do not think any one at this table would support it. In Bill C-36 I do not see many of the terrible dangers that you see. For example, the case of the African National Congress has been raised again and again, both before this group and before the House of Commons committee. I will read what the Minister of Justice said: “We recall that the definition of "terrorist activity" specifically excludes an act or omission that is committed during an armed conflict.”

The Attorney General said to the Commons committee:

> Under the 1977 protocols that are additional to Geneva Convention of 1949, an armed conflict includes people fighting against colonial domination, alien occupation or racist regimes in the exercise of their right of self-determination.

That is the definition with which we operate. It is the definition that is accepted globally, so Nelson Mandela and the African National Congress are explicitly not covered by these definitions. I profoundly sympathize with your concerns but I do see how you can square your position with this kind of statement.

Similarly, with the notion of Canadians being brought into secret hearings and put on trial for their religious beliefs, I do not find that mentioned here. I find that that the government has made the explicit decision to subject the whole bill to the Charter of Rights and Freedoms. In the investigative hearings, counsel can represent any witness at all times, at all stages and the right of appeal remains.

It also seems to me that where this bill refers to political, religious or ideological purposes, that is not the first, but the very last, element that would be examined. The first element that would be examined is: has there been an offence or is there about to be an offence involving death or serious risk to the public health or safety? If that initial test is being met, has it been committed with regard to intimidating the public or the government or compelling acts or omissions? Only after that is this element examined: was that for an ideological or political or possibly religious motive?

Maybe I am influenced by the fact that I am from Quebec, and the terrorist group that we have had most direct experience with was the Front de Libération du Québec, which was drawn from the oldest non-Aboriginal population in North America and was wholly political in nature. Maybe I am missing something here, but I do not follow you.

Mr. Falconer: I also remember, madam.

Senator Fraser: Can you both please speak first on the matter of the ANC and then on the matter of religion?

Mr. Mia: With all due respect, our colleagues believe that the bill is as we describe it. There is a chorus of opposition in the micro amount of time that this bill has been out there. I am doing this as a volunteer; I am away from my job; I am not doing this for fun. This bill is fundamentally flawed. If the government thinks it is not, the first question is: why has debate been rushed and crushed? Number two, these amendments do not address the flaws. To be frank, they are cynical amendments -- the sunset clause and the review process. They do not even meet your recommendations in the Senate report of a proper parliamentary oversight, which is what we are calling for. I encourage you to fully read our recommendations, because we cannot go through them here.

I take your point on the ANC and I heard the minister say that. It is a bit disingenuous for the minister to say, "Let us pull out the Geneva convention on these great laws." It is just like saying that the Charter of Rights and Freedoms is a great law, which is not worth the paper it is written on if we disregard it. South

Africa was trying to suppress the ANC when the ANC engaged in violent acts. I do not even object to some those acts, blowing up infrastructure and those sorts of things which had to happen there. You mentioned that there is an explicit exclusion for certain armed conflicts, which may catch the South African conflict. The problem is: who decides? This becomes a subjective, political question.

When we deal with liberation movements, today's terrorist is tomorrow's liberator. The American revolutionaries were probably seen as terrorists by the British government in London. With the ANC, while today Mandela is here getting honorary citizenship because he is a great guy and that sort of thing, but where does this evidence and secret listing come from? It is heavily influenced by those governments abroad -- that would include the South African government. Where our interests coincide with that government, that evidence will come to us and we may just disregard the Geneva Convention.

Mr. Falconer mentioned that Mr. Watkins is here to talk about the links between Canada and the United States economically. I remember vividly as a child watching Mr. Reagan say that Mr. Mandela is a terrorist and the apartheid regime must enforce law and order while children were being shot in the streets. That sort of evidence will come through the state department, through the CIA and through the South African defence forces and secret police. That is the evidence that will come here. No-one will say, "That one is on the list and this one is not."

Let us take hot political potatoes such as Muslim liberation movements in the world or the Chechens. I fully support their struggle against the Russian occupation. Does that fall under the Geneva Convention? It may or may not. We will not debate that fact. If we support those groups, you might call them terrorists you might call me a terrorist. Let us take an even hotter political issue, the Palestinian struggle. Ask a Palestinian and they will tell you that they are fighting against colonialism and racism. I will not debate whether that is the fact or not, but they seriously and in good faith believe that. Many Muslims believe that. There are others who believe it is not true. Those people may or may not be in government. What happens is that at the end of the day it is a political decision. In terms of the listing process, when the Solicitor General reviews it, he does not call his phalanx of international lawyers and say, "Let us look at the Geneva Convention and objectively look at this." I am only 36 years old and I am very cynical.

Senator Fraser: You are. That is what we do. We look at the body of laws.

Mr. Mia: To take the cynical view of it, people look at the politics of the day: The Contras were freedom fighters and the FSLN was a terrorist group -- which is it?

Senator Fraser: With respect, I think you are drawing a lot of analogies from American experience. Flawed though this country's history may be in many regards, with regard to a number of the examples that you have cited -- I will name only the ANC -- this country has taken a different tack on a sustained basis. You cannot assume that, because Ronald Reagan said something, Canadian courts and laws clicked their heels and said, "Yes, right."

Mr. Mia: The point here is to look at the context of the day. Bill C-36 is lockstep with the patriate act. We are following the U.S. line on this. There is a security threat there, valid or invalid -- we could debate that -- but they are at risk; they are scared. The U.S. passed this and they want their allies to pass this kind of law. The threat has been made, Mr. Falconer and Mr. Watkins can speak to that, that if you do not implement these kinds of measures, the border will tighten up a bit. In effect, we are creating a virtual perimeter through Bill C-36. We will clean up our house, according the dictates from Washington, and we will keep that border open.

This happens more and more because we are tied economically with the U.S. Economics and politics cannot be separated. We all rely on trade with the U.S., but it should not go so far as to violate rights. The Americans definitely have certain agenda that they wanted to push, and which we may or may not want to have implemented in this country. I do not want Bill C-36 to then become a tool of U.S. foreign policy.

Senator Fraser: I do not see that.

Mr. Falconer: Senator Fraser, I want to start off by saying that your reference to the Quebec scenario was very striking to me. Growing up in a small Quebec town where my father was manager of an explosives plant, I was very aware of the military presence both near our house and at my father's workplace. I was struck by the memories of that.

As striking and compelling as those memories are, a present analysis of the wisdom of invoking the War Measures Act at the time and whether on sober second thought that was the appropriate pleasure can inform and school your deliberations now. There are many who say that the invocation of the War Measures Act in the face of the threat that existed at the time may have been using

an oozy, when all that was necessary was a far more limited form of legislative action. I say to you that that is one consideration; others will say something different from that.

I will answer your point about religious beliefs this way. You said it would be the last element. I am struck by that because I do not see anywhere in the legislation where it says this is the last element. Nowhere is there any restriction on the prosecutor on how to prosecute his or her case.

On October 18, Peter MacKay, Member of Parliament, asked the following question to the Attorney General on the introduction of this bill:

> I have a couple of questions. First, with respect to necessity for these new tools, I do not doubt for a minute that this legislation is required. I have concerns, as do a number of people, about how, in a practical sense the pragmatic application of these new sections will work to our benefit. As a former small-town prosecutor, if I had the choice to charge somebody for an offence, particularly one that resulted in a murder, for example, I would question whether it would be beneficial to proceed under these new sections. It would fall upon the prosecutor to prove the requisite mental element relating to the ideological, religious or political intent behind the commission of the offence. I suspect that in the practical sense, the motivation, this new *mens rea* element would be very difficult to prove in some instances.

As a defence lawyer in both criminal and civil courts, who has published in the constitutional law area that is a typical way for a prosecutor to think. The prosecutor is a mechanic. He says, "Okay, tell me how I have to build my car, I will build it. What do I have to build? I have to build religious motivation, okay, I I will build it. No, you do not get to tell me I put the wheels on first or I put the steering wheel on first unless you put it in the code. I put it on how I want to build my case. That is how it works."

In the case of Guy Paul Morin, the prosecutor decided how to build his car, one of the most experienced prosecutors in the country. Prosecutors, if given the discretion and the breadth, will exercise it. They may do so in good faith; that is, they may believe they are doing their jobs. In the back of their minds will always be, "If they get on the plane, it is too late." Far from any assurance that it would be the last element to be proven, there is nothing in this bill that creates that protection.

In essence, and with great respect Senator Fraser, what you are saying is, "Trust them to do it right." That is not how we protect civil liberties. I emphasize that Canadians are different from the Americans; we sometimes forget that.

If you look at the introductory comments by the Attorney General, the Honourable Anne McLellan; and the Solicitor General, the Honourable Lawrence MacAulay, they regularly refer to our Constitution as the Charter of Rights and Freedoms. It is not. It is the Canadian Charter of Rights and Freedoms. I say that with some awkwardness, because the Attorney General is someone for whom I have a great deal of admission. She is a former professor of mine and helped me to publish my first constitutional law article. That aside, the student must remind the teacher that it is the Canadian Charter of Rights and Freedoms. Canada prides itself on having sober, second thought. There is nothing about the religious, political or ideological motivation that has any brakes or rules attached to it. I ask if someone can show me the brakes or the rules in the section so that I can be illuminated. I do not know where they are.

Senator Fraser: I would offer you the thought that the brakes consist of the requirement for all these other things to occur.

Mr. Falconer: If the prosecutor goes to the secret hearing, and at the secret hearing, the prosecutor decides --

Senator Fraser: What secret hearings?

Mr. Falconer: Investigative hearings that are provided for at --

Senator Fraser: I understand about investigative hearings.

Mr. Falconer: That is what I mean by "secret hearings." They are provided for at new section 83.28 of the proposed legislation.

Senator Fraser: That new section refers to an investigative inquiry and I do not think they are necessarily held in secret.

Mr. Falconer: An investigative hearing is intended to be held off the record, in an investigative fashion, so that the public and, in particular, the accused does not have access. They are in essence secret hearings; they are closed hearings. They are meant to be that way.

Senator Fraser: It is your belief that they will be closed.

Mr. Falconer: It is not my belief. That is the intent of the law. The spirit of this is an investigation. They will not be very successful investigations if the *The Globe and Mail* can publish them the next day. They must be closed. By their nature they must be. There is no point otherwise, with great respect. These investigative hearings have as their hallmark the bringing of people to court. They have a lawyer, but please understand, that the notion that they have counsel, having been one of the few lawyers who has conducted private prosecutions on a charge of manslaughter in this country. I acted for the family that charged the correctional officers in the death of an inmate. The judge found there was enough evidence and laid a charge. I conducted one of those prosecutions.

In camera hearings of this nature can spawn tremendous dangers. I do not say they will, if the rules are right, but here the rules are that one of the elements is religious belief. It is not done in public. It is not meant to be. They are trying to investigate to keep people off the planes. To be fair to the enforcement authorities, there is no reason they would not use this new section, and their right to investigative hearings to do their job.

If you give them the program and tell them to go ahead and do it, please expect them to do it. That is what we are telling them to do. We must decide, either we want the investigative hearings and we want this as an element of the offence, and therefore we want these questions, or we do not want this as an element of the offence and we do not want these questions. We must commit ourselves on this.

I ask again: If the United States did not feel the need to do it, why is it that we do?

Senator Fraser: I do not think the United States' model is the one to follow, with its secret military trials around the world.

Mr. Falconer: I am asking about the religious point. What is it about the religious point that makes it a good idea?

Mr. Khalid Baksh, Coalition of Muslim Organizations, Muslim Lawyers Association, Member: Honourable senators, I will try to keep this short.

Senator Fraser indicated that people are not on trial for their religious beliefs. People are on trial right now in Canada for their religious beliefs. We have had circumstances where we have had people charged on the basis of their religious affiliation.

Senator Fraser: Charged with what, Mr. Baksh?

Mr. Baksh: Charged with offences either under the Immigration Act or Criminal Code. We have had people pulled aside by peace officers and asked specifically about their religious observance, such as attendances at mosques. We have had people asked about their daily prayer routine. We have had people questioned about all of this. That is before Bill C-36, with the existing laws we have right now. With the greatest respect, it is happening now. It will happen much more often with the provisions of Bill C-36.

Senator Andreychuk: Mr. Falconer described the American law and we know that this was patterned on the British law. If memory serves me correctly, there was some confusion. The British terrorist act was fashioned in the year 2000, before September 11. It was really addressing internal matters of terrorism that have gone on for years. Therefore, knowing the debate between the Protestants and the Catholics in Northern Ireland, I understand why religion seemed to creep into that legislation, rightly or wrongly. Am I correct that that is the only definition in Britain to this date, or whether new initiatives have put in new definitions?

Mr. Falconer: The British legislation took advantage of the revival of an old bill. The definition was being used and is now brought back into force.

The problem is not so much that one country is doing it and another country is not. It makes the point that this is by no means an open-and-shut issue. Some felt comfortable proceeding without it.

I make the point simply to have you consider why, when certain countries thought there was reason to do without it, we need it. I encourage people to explain to me why we do need it. That is the core of the problem. I am not so concerned about what will happen if it is used, because that is crystal ball gazing, but why do we need it?

Senator Andreychuk: My first question about why Britain was using it was answered. They were using it for a specific purpose prior to that, a purpose unique to Great Britain and not applicable to Canada.

With regard to crystal ball gazing about how the act will be applied, as you have pointed out, a particular Canadian community feels that they are under unusual scrutiny and that this act might exacerbate that. Do you have evidence that

certain Canadians find themselves under surveillance now? Is there evidence that they are experiencing a kind of surveillance that I am not?

Mr. Mia: You have honed in on the precise point. Bill C-36 aside, the climate of fear that we have been living in since September 11 has been doubly imposed on Muslim Canadians. We are scared of being blown up in a plane as well, and now we are also scared of the police.

At a news conference just before this hearing we talked about things that have already happened. You are probably aware of the case of Mr. Mohammed Attiah who was questioned by CSIS in the parking lot of the nuclear power plant where he worked. No charges were laid. It is all done under the radar. They ask a few unseemly questions. We have heard that the American INS ask questions such as, "What are your feelings about September 11? What are you religious practices?"

CSIS went to the absurd point of asking Mr. Attiah whether he prays at work. I pray at work when I get a chance, but it is no one's business. I close my office door and I do that at a quiet time.

Those sorts of things are happening. People are being detained. Several Arab men were detained in Winnipeg, I believe, on some suspicion of terrorist links. Two days later it was said to be just an immigration mix up. However, their names are now in the media. If my friends saw the headline "Ziyaad hauled off to CSIS for interview", even though it was later found to be a mistake, the doubt would always remain, because that is human nature.

We recently heard that a young Palestinian man was held in solitary confinement for 51 days. He was not convicted of any crime but was held in immigration detention while his case was heard. It is ridiculous that it took 51 days to hear the case in the first place. The point is that he did nothing wrong. We do not even put Paul Bernardo in solitary confinement, a man who committed some hideous crimes.

Mr. Falconer addressed religious motivation. It adds nothing. I dealt with that point in my brief. Why is religious motivation included? If someone flies a plane into BCE Place in downtown Toronto simply because they are crazy, they will receive a lesser criminal sanction than if they do it in the name of God or Buddha. Why is that distinction made?

The patriate act says that if you commit violent acts to intimidate the public on a mass scale, that is a terrorist act. No one is arguing against that. Therefore, this inclusion does not advance the bill.

We do not want redundancy in legislative language. The principle is that every word matters. It is wrong to add something superfluous might lead to unseemly questions in a trial, rather than just in a parking lot, where the force of the state and criminal sanction are involved. That is why we want that excised.

Mr. Baksh: I wanted to respond to Senator Andreychuk's comment about the climate of fear. I run a law practice in Toronto. Much of my practice comes out of the Muslim community. Unfortunately, there are very few Muslim lawyers, although our number is growing.

Since September 11, my office has been inundated with calls about the questioning that is happening. If a police officer or a CSIS agent wants to question you, you will want the right to counsel. You will want the presumption of innocence until proven guilty.

Currently, the fear in our community is that we are guilty until we prove our innocence. You may say, "If you have nothing to hide, why not talk to them?" That is not required from Canadians. That is a real fear and a real problem being experienced by Canadian citizens in our community.

As well, people are afraid to send money overseas to their families. Many people in our community regularly do that. They are now afraid to do so because of the money laundering issue and fear that they will be arrested as a result.

As Mr. Mia indicated, charity is important in our religion. The charities are suffering. Innocent people in Somalia, Ethiopia, Afghanistan and Chechnya are not getting the funds to enable them to feed themselves and keep themselves warm this winter, because that money is not being sent overseas due to the palpable fear in the community.

We have issues with employment as well because of this climate of fear. Bill C-36 increases that fear to such an unbearable level that you can feel it every time you go into the community.

Senator Bryden: You were concerned about the minister saying that when they get on the plane it is too late. I have been involved in studying the security community and the concerns around terrorism for a number of years. I believe it is

fair to say that until September 11 her statement would have been absolutely incorrect, because the efforts that were directed toward the prevention of life-threatening situations in Canada and the United States were based on the preservation of the lives immediately at risk by an incident such as the hijacking of an aircraft. Evidence we heard on a study that we did not long ago on security and intelligence indicated that the efforts were directed at trying to defuse the situation and get the plane on the ground where it could be dealt with, where the passengers could be removed from the plane and we could negotiate with the hijackers in order to preserve life. In exchange for some of the hijackers' demands, we could deal with a terrorist situation.

I believe no one who is involved in this particular area would disagree with that as the basic tenet of the whole institutional approach -- police, government, airlines -- as to how one deals with hijacking or terrorist situations. That was the approach taken in North America.

The rules and the laws were to have sufficient deterrence once those people were taken into custody. It was believed that not many people would want to do that, because the jail term would be long and prisoners could not be taken in by other countries. The intention was to negotiate solutions and to preserve life.

In that situation, when the terrorist got on the plane, it was not too late. It was not too late at all. That is when the skills of negotiators and other recourses were brought to bear to keep alive all the people on the aircraft; indeed, to keep the hijacker alive.

What occurred in North America on September 11 made our approach to dealing with hijacking completely useless. The purpose of the 19 people – if that is the right number -- who had hijacked the aircraft was not at all to preserve their own lives. They were weapons.

Therefore, once those people were on the plane, it was too late to stop what happened, except for the one incident where passengers overpowered the terrorists and the plane landed in a field, and only 300 people were killed and not 3,000 or 1,000.

It is also interesting -- and I do not know whether it is valid or not because it is still being investigated -- that there was another plane, allegedly from Canada, that was supposed to go to Los Angeles. That could very well have been another weapon, but because, as is common on our airline, it was late taking off, the alert

had gone out and that aircraft was grounded. Allegedly, the terrorist who was supposed to use that plane as a missile was able to get off.

Whether that is true or not, I do not know. That information is in the public domain.

It is not the case, as many people have said, that the world has changed. The world has not changed for many, many people. For the vast majority of people, the world is no different than it was on September 10. They will wake up hungry, poor, in fear. In Africa, they will wake up with AIDS or whatever.

However, the world in the North America and the security of our citizens did change. The people are demanding that their governments react in order to take care of that changed situation to the best of their ability. That is one of the reasons why, under the rule of law, which includes the Charter, the criminal law and all of the other laws of this country, this provision is being passed as part of that rule of law. It may need to be amended as you are suggesting, but that is the reason. It is not at all that the Minister of Justice and Attorney General are in error, when she says, "When they get on the plane, it is too late." It is too late unless you kill them once they are on there. There is a lot of risk.

Mr. Falconer: My comments, and the position of the Urban Alliance on Race Relations, is not that the statement, "If we do not stop the terrorists getting on the planes, it is too late," is incorrect. It is simply inconsistent with sober second thought. The statement itself by a legislative officer in her circumstances, which is prevailing over the passions and the fears of the many, in that role the point must be made, but if it is made at a certain pitch, we risk simply acting like lemmings and going over the edge because we are worried that it is "too late."

Having said that, there is a vulnerability that Canada has, psychologically, emotionally and economically. I would ask that Professor Watkins be able to speak to this. We are making the point to this committee that we are vulnerable here and now to passing legislation not because it is the wisest thing to do, not because it is in Canadian public interests, but because of our vulnerabilities. If you will indulge us, I would ask that we go to Schedule B of the materials. Professor Watkins is an economist of tremendous prominence. I would ask him to speak to the vulnerability issue briefly, to answer Senator Bryden's question.

Senator Bryden: Perhaps he could include that in other answers, because I have further questions that I would like to put first.

A great deal of effort has gone into consideration of this bill by the Department of Justice, the Government, the cabinet, by this committee in pre-study, by the House of Commons committee, by the Parliament of Canada, and now by us in our second reading committee study, and we will be debating it on third reading. The bill would not have come this far had it not been considered to be reasonably in balance, responding to the new paradigm, as it was called by somebody this morning, that has occurred in North America, and to the Canadian system of values as reflected in our rule of law under the Charter of Rights and Freedoms.

You have shown nothing in this bill. You have not pointed to clauses in here. You have pointed to anecdotes. You have indicated that you have a general unease. It is right that you have a general unease. You have an unease with the law as it is now because it may be badly administered in relation to you. As we go through, there is no clause-by-clause.

For example, there is the reference to the fact that people can be found to facilitate terrorist activity, even though they do not know that they are involved in facilitating terrorist activity. If you look at that clause, you will find that is absolutely not the case. If that is not the case -- because I looked at that clause -- how many of the other categorical statements that are being made in here are not the case?

Mr. Falconer: That is why Professor Watkins is here.

Senator Bryden: The problem that I have with this is that it injures the significance and the impact of your presentation, in that it is based largely on anecdotal evidence.

We are at the stage where we will be examining on the basis of clause-by-clause on Monday. You need to point out to us which clause makes worse the bad situations you have been pointing out here. That is my problem.

The Chairman: I am more than happy to hear from Mr. Watkins. I have been around this building long enough that I well remember the Watkins report, and others may as well.

Welcome to you. For those of you who do not know Mr. Watkins, he is a Professor Emeritus of Economics and Political Science at the University of Toronto, and a campaigner on social issues over the years.

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Mr. Mel Watkins, Professor Emeritus of Economics and Political Science, University of Toronto: Part of the submission we are making today, honourable senators, includes notes that I prepared on Schedule B.

I accept the point the senator is making, that you want to look line-by-line at this legislation. However, I also plead that you put this into a context. I am sure the government puts it into a context. It would be derelict in its duty if it did not. That context is our extraordinary reliance on trade with the United States, where 87 per cent of all of our trade, outside of Canada, is with a single country, the United States. No other developed country in the world and very few underdeveloped countries are in that extraordinarily vulnerable situation.

I believe the question Mr. Falconer puts is a compelling one as to why this is happening, why there is legislation which seems to be more draconian than even the American legislation and runs contrary to the understanding of historic differences between our political cultures. We ask why this legislation is being pushed through in an extremely hasty way. I am unable to think of any answer. Perhaps I am biased as an economist, but I think we are panic stricken over what can happen if there are border delays.

The people who signed the free trade agreement and NAFTA never had in mind -- perhaps they should have -- the consequences of what they were doing in view of what has happened on September 11.

We brought in a joint agreement, announced on Monday of this week, between the United States and Canada, which some critics think has gone too far. Why do we have to go any further with this kind of legislation? Why do we feel the need? What worries me is that there will always be a trade-off between trade and sovereignty, but we should be careful when that trade-off risks being a trade-off between trade and civil liberties.

I have been around long enough to realize that governments are under considerable pressure from the business community and corporate interests. Whatever else corporations are about, they have very little interest in civil liberties or human rights. When we listen to them, when money drives, it drives down a very narrow road. We are here today pleading that you listen to a broader range of voices that are at the heart of what Canada is about as a pluralist. Society.

Senator Tkachuk: Are you saying that the government introduced this legislation because of American pressure?

Mr. Watkins: No, I do not think that the Americans have to pressure us. We are conscious of the extraordinary interdependence that we have. I hear Mr. Tom d' Aquino, head of the Coalition for Secure and Trade-Efficient Borders.

Senator Tkachuk: Are you saying that the government is doing this because of trade or because is it interested in protecting the security of Canadians?

Mr. Watkins: There is a trade-off that goes on here. Any government is properly concerned about trade issues, but my fear is that TV pictures of border tie-ups cause such panic that we risk doing things that we will regret doing.

Senator Tkachuk: I am lost.

Mr. Watkins: We are making legislative changes that will affect us for an indefinite period of time. I am not arguing that the government should not be concerned about the security of trade. However, it cannot be the single-minded priority that it appears to be.

Senator Jaffer: Mr. Baksh, you are much younger than I am. I worked at the ANC in England, and I was certainly detained. I have hoof marks on my back and was seen as a terrorist. It was much later that Canada got the image because Brian Mulroney stared down Margaret Thatcher and supported Nelson Mandela. There is a historical issue.

I am very proud here. I pray here in the Senate, and I break my fast everyday. Working people all over the country break their fast at work.

You represent the Coalition of Muslim Organizations. We know that the bill has gone through the House of Commons. I would like to hear from the voice of the coalition about how parliamentarians can work with the coalition to allay that fear. 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.

Mr. Baksh: How can we work together? First and foremost, the bill has many flaws. If the bill is going 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 get back to the point of review, of accountability, of having independence, so that the citizens of Canada can be protected.

In addition to having the independent review, that officer should have some teeth. He or she should be able to recommend changes. He or she should be able to give a list of breakdowns with regard to religion, ideology, political affiliation, nationality, country of origin. We put this in because that is exactly what the definition is saying.

If there is going to be a review, review it based on what the government is putting out. If those definitions are still in there, we should know who is being targeted. We should know about what investigations are being undertaken. The independent reviewer should be given sufficient resources and effective, timely access to data, so that we are not getting just a statistical review, but something that will matter to our constituents, to people from the coalition, to people from racialized minorities, and to people of Canada. In addition, they should have both a qualitative and a quantitative assessment of the impact on civil rights; that is, an assessment of the validity of the threat to terrorism in Canada.

I also wish to refer to what Mr. Ashcroft said on Monday, namely, that there is no threat.

In addition, these statistics by the Solicitors General and Attorneys General should be given on a timely basis and preferably not on a yearly basis. We are suggesting a monthly basis.

In addition, we need to work together – that is, we as a community; we as a coalition of organizations; and we as the Government of Canada. Things that we need to do include sensitization training for peace officers. We were quite disturbed to hear David Griffin indicate yesterday that there is little in terms of new police powers. We have the extraordinary, unprecedented ability for preventive arrest. This has never happened in Canada before. By any definition, this is extraordinary. This is not a little thing. We need the police to work with our community. We need to educate the police in terms of "racialized" minorities and in terms of our community. Some of this is happening already, but this must continue.

We also suggest that the Senate committee continue. If this Senate committee continues, it can also act as a watchdog in terms of minority rights. The government, or any committees or any independent review officers, must consult with the stakeholders. You must consult with communities, with the Urban Alliance on Race Relations, with the Coalition of Muslim Organizations, and with those groups that will be affected by this law.

There should be implementation of programs for community groups to help deal with the fallout that will occur. Right now, we are saying it will occur. You may say that it is speculation. It has already occurred in the wake of what will happen. The implementation of programs is very important to help the community, and a defence fund should be raised.

There is a real, palpable human impact in terms of the costs of proceeding. Basically, the government is saying, "Here is the bill. We will apply it." That means that individuals will have to assert their Charter rights. Those Charter rights will have to be asserted through the courts. That is an expensive process and many individuals will be hurt by it.

Currently in the provinces, the Legal Aid systems are in disarray. I do not think I am understating that fact. An unprecedented amount of litigation will arise from Bill C-36. Therefore, we need a separate fund to ensure that rights are being protected and are being allowed to breathe. In addition to that, there should also be a fund to help redress the wrongs caused by unwarranted prosecution under this bill. Those things should also be taken care of.

In terms of what else we will do with this and what else we can do, we also note that many things exist already, particularly with the Criminal Code. This is coming back to what Senator Bryden was talking about, namely, what do we have there? With regards to that, I would like to pass it over to Mr. Mia so that he can quickly explain what those provisions are out of the Criminal Code.

Mr. Mia: I will try to address all of your points, Senator Bryden. They are important points. First, I want to deal with the issue of whether or not there is a threat of terrorism from Canada to the United States. It is a bit disconcerting to see the Prime Minister and Mr. Manley go to New York and hear them say, "There is no trouble up there. You should have confidence in us," only to have the Minister of Justice sound the bell of alarm. You mentioned that there is some allegation that, perhaps, there was one more plane and that, thanks to Air Canada's late departure, we were all saved another horrible incident. Those sorts of allegations, if not proven, only add to the fear. We need to scale back and ask, "What is proven and what is not?"

Mr. Baksh mentioned this article by *The Toronto Star*, December 4, which stated in the headline "Canada No Terror Haven." The Attorney General of the United States says it is a myth that terrorists are coming from Canada into United States. That article deals with that point.

I want to deal now with the larger point. You addressed Mr. Falconer's point that it is too late when they get on the planes. I agree with you 100 per cent. If someone is that driven, and if they do not care if they die, what is the point? You must kill them to save other lives. We agree with that 100 per cent. However, there is a logic misstep there. We are saying that we need to do that to prevent that terrorist action. The core of this argument is that we need to prevent terrorist acts from taking place because these people will not been caught, so putting them in jail is not an option. There is no deterrence.

I encourage you to read our submission fully. I will try to walk you through some of this here, but we go through the bill clause by clause, as you asked, pointing out the technical flaws in the bill, legally speaking. We show why they do not fit the current standard of the rule of law in the Charter and we show how they can be changed to improve them if the bill does pass.

Let me ask you another question: Is the bill necessary? At page 5 in our brief, we discuss that. A lot of people in government say that you cannot put someone who is dead in jail, so it is ineffective. Furthermore, we cannot prevent terrorism, so we need new powers. I will go through the radical departures from our rule of law and the way of life here.

Part 13 of the Criminal Code deals with conspiracies. That is when two or more people conspire, either in Canada or outside, to commit an offence in the other country-- that is, an offence where they are conspiring in Canada to commit an offence elsewhere or an offence in Canada and they are conspiring abroad, say, in Afghanistan. We can catch them before they do the act. That is what part 13 deals with. It is to prevent crime.

Peace officers are given the power to arrest without warrant under section 495 of the Criminal Code. That is where a crime imminent. For example, if I know that you will blow that building up, I can arrest you without a warrant. Let us step back one level and see why the warrant is required. Our Charter and our British common law heritage requires a warrant. It is prior notification. If you are to intrude on someone's liberty, arrest them, investigate them and possibly imprison them after a charge and conviction, then you need prior notification if that is feasible. The preventative arrest provisions are euphemistically dropped under "recognizance with conditions." That section allows an officer to investigate on “reasonable suspicion.” "Reasonable suspicion" is different “imminent” and from “reasonable grounds.” It is an important distinction because it lowers the threshold of when an arrest can be made. It is done on a hunch. The officer sees someone

wearing a turban and he looks a bit suspicious at the airport, so the officer says, "Let us pick him up."

Senator Bryden: You are doing that something that everyone else did. You are giving Part II of that section and not Part I. Part I states that "where the officer has reasonable and probable grounds to believe that a terrorist act is about to be committed," and then subsection 2 applies.

The Chairman: I do not want to curtail you, Mr. Mia, but I am looking at Ms Goossen. She wants to respond to what Senator Jaffer had to say. I would like to make some progress.

As I indicated, I do know as well that is this is a fasting time. It is Ramadan. We would be more than happy to have some of the discussion continue in the few minutes that we have left beyond the table.

Mr. Mia: In a nutshell, you said imminent crime is the issue to arrest someone. We already have that in the code, so why put it in Bill C-36? We have the Emergencies Act, which allows, in exigent circumstances such as war, which is what we said we are in, extraordinary measures for very limited times. Reason prevails there, because we have the history of the War Measures Act and what happened in 1970, and that is precisely why the Emergencies Act was introduced.

Ms Goossen: I welcome the question from Senator Jaffer. As we came in on the plane this morning, we had a chance to look at the *Globe & Mail*. It struck us because it said the Senate offered very few questions to the minister when she appeared yesterday. I hope that is a bit of a journalistic take on the event and that there were a lot of questions asked of the minister.

The Chairman: May I intervene there? We certainly did ask many questions. One of the problems that we had yesterday that kept us in a box was that, on the one hand, the two ministers had to go and vote in the House of Commons at one point, and on the other hand, we had to go and vote in the Senate. We could have gone on for considerable length. We did ask a lot of questions, but we did have time constraints.

Ms Goossen: I know we cannot trust always the headlines, especially from some media. I hope I did not offend.

For myself, having been active in the community over the years, we usually go to our elected representatives for lobbying. We try often to get to the MPs. This

has afforded me a new perspective on what the senators do. On another occasion at the University of Toronto, I had opportunity to talk to Senator Poy about this. She asked me to send her our submission. She has been forthcoming in wanting to listen to us. I welcome that.

I mention this because, in terms of the Parliamentary review that was mentioned by the minister, there was an exchange in the House between the minister and the Honourable Joe Clark. Mr. Clark was asking why the minister was objecting to parliamentary committee oversights on the bill. She was listing the things that are already here for the review of this bill, which includes the committee in the House of Commons and in the Senate, and the privacy commission and all that.

I am concerned about the good work that you did earlier in your report on this bill. I did not have had time to go through it one by one. Has it been totally ignored by the minister?

The Chairman: No. There were significant responses to a number of the proposals that we made, which was a study, rather than a clause-by-clause examination, because we did not have the bill. This is our first formal look at the bill. A number of our suggestions were incorporated in the amendments. Some were not. That has been part of the discussions this week. Yes, they did respond.

Ms Goossen: I am glad to hear that, too. We want assurance that there is a monitoring mechanism. Some suggestions have been made that there should be one person in charge of overseeing all the measures and how things are enacted under the bill. If there is a chance to look at how that can be done, I would really urge that the Senate committee look seriously into that mechanism so that perhaps representatives from the Senate could also be part of that body. For the people in the community, when this becomes law, that is the crucial aspect. Going to lawyers and going through the court is a tremendous process for the ordinary citizen on the street. It is a barrier. It is lucky for us that we have a good focus group working with us. The Urban Alliance on Race Relations thanks Mr. Falconer for all the time that he has spent on his own, pro bono, to work for us. We do not usually have that luxury. For ann ordinary citizen who is under all kinds of doorknocking and suspicions, I cannot overestimate that factor of fear. In a sense, it is easier for us to go to our MP or our senator, but we do not have the opportunity if you do not take the responsibility very seriously, and we will really have lost something.

The Chairman: I understand your point, and I think every one around the table does. I would reassure you on two levels as far as the Senate is concerned. The Senate, at any time, is able to call in ministers and have a study within its committee system. This is special committee, not a standing committee or a regular committee. We were asked to give our views by the government, in advance. It was their initiative. They wanted to hear from us before the bill even went to the House of Commons committee.

The Senate has the ability to form a special committee and not to send it to a regular committee which might not have been able to have the time because of all the other things that were on agendas. This committee was formed for the specific purpose of this bill and has been engaged in that now for a number of weeks.

We also, though, have two new committees that have just begun in the Senate, and they almost fit right into the comments that you were making. One is a standing or permanent committee on human rights. Senator Andreychuk is the chair of that committee. We also have a new committee on defence and national security that goes into all of these issues as well. We as a body, even well in advance of September 11, have taken those issues seriously. Regrettably, we are here today discussing this because of September 11, but prior to that, there was concern within the Senate of Canada on issues of human rights, on issues of national security, on issues involving our intelligence community, on issues of our military. We decided to form two standing committees. That does not happen very often unless there is a collective will that these are important issues.

Regardless of what is in Bill C-36, in terms of the Senate of Canada, we have a continuing oversight capacity and some very vigilant and diligent members of this chamber. You mentioned Senator Poy. She is a very active member of our Senate. We are concerned about this on a continuing basis. The availability of overview or to bring people in for discussion is there and will continue to be there. Because of what has happened on September 11, I can assure you that the antennae and the instincts and concern of individual senators on their own and collectively will not let these concerns disappear.

Mr. Falconer: May I respond to Senator Bryden? Senator Bryden, you asked for specificity, which you are entitled to. As a technician, as a lawyer who believes in specificity, I simply point you to clause 83.01(1)(*b*)(i)(*a*). Get rid of religious, ideological and political beliefs as an element of an offence in our country. That is the specificity. Just eradicate it. The rest of the clause can stand without it. There is no other way to be clear.

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The Chairman: This has been a very instructive, elevating and lively discusion. I think all our witnesses for taking the time to attend here.

The committee adjourned.