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THE SPECIAL SENATE COMMITTEE ON BILL C-36

EVIDENCE

OTTAWA, Thursday, December 6, 2001

The Special Senate Committee on Bill C-36, to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, met this day at 8:00 a.m. to give consideration to the bill.

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

The Chairman: Honourable senators, the committee will now begin its hearings on Bill C-36. The special committee was created at the request of the government initially to provide an advance instruction or suggestion to the government on our concerns and possible recommendations for changes to the bill. That unanimous report was presented to the other place several weeks ago, some of our recommended amendments to the bill were made, and it is now before us again.

This morning we are pleased to have witnesses from the Canadian Arab Federation, Dr. John Asfour and Ms Amina Sherazee.

Dr. Asfour, please proceed.

Dr. John Asfour, President, Canadian Arab Federation: Honourable senators, thank you for accommodating us. We are pleased that you understand the urgency of our appeal, and we are hopeful that our contribution will benefit all Canadians.

I will ask Ms Sherazee to speak to the issues, after which I will comment.

Ms Amina Sherazee, Legal Counsel, Canadian Arab Federation: Honourable senators, thank you for this opportunity to appear before you to make our comments today. The Canadian Arab Federation submits that Bill C-36 significantly erodes the constitutional rights and protections such that its provisions and measures are indefensible. The Canadian Arab Federation believes this government's efforts to pass such blatantly unconstitutional legislation under the

guise of fighting terrorism in the name of national security will not be lost upon the people and the judiciary of Canada.

Our assertion was recently confirmed by the support of the Court of Justice in Ontario in the decision of the Government of *France v. Uzgar*. This was a decision dealing with alleged acts of terrorism, in which the court pointedly rejected the premise that such measures can bury our Constitutional rights. The court unequivocally stated and I quote:

> While I appreciate that recent world events have brought the existence of terrorism to the forefront of most people's thoughts, I would hope that the vast majority of reasonably informed and right thinking members of our community would agree that notwithstanding those events, every citizen of this country is still entitled to basic constitutional rights and freedoms. Whatever reasonable concerns may arise from recent world events, they cannot legitimately be used as a justification for legal shortcuts that impinge on constitutionally protected rights. We maintain that this bill contains significant shortcuts.

Notwithstanding the amendments, the Canadian Arab Federation still opposes major elements of Bill C-36. Specifically, we state that Bill C-36, as drafted, is severely overbroad and catches such activities as consumer and market boycotts, anti-globalization protests and general dissent as terrorist acts, which is wholly inappropriate and constitutionally offensive and unjustifiable in a bill to address terrorism.

Bill C-36 contains unacceptable offences that do not require any knowledge for an accused to be guilty of facilitating a terrorist activity. Bill C-36 contains unacceptable preventive arrests without warrant or charge for 72 hours and without any stop on any revolving door on the 72 hours, so as to artificially extend the 72 hours perpetually.

Bill C-36 still contains unacceptable investigative hearings and extermination of the rights to remain silent, the right against self-incrimination, as well as arbitrary arrest. Bill C-36 contains provisions for secret trial mechanisms and procedures for the seizure and forfeiture of property and charge, conviction and sentence without ever seeing the evidence or case against the person accused.

Bill C-36 has no real sunset clause. As such, permanent legislation of this nature is completely offensive to constitutional guarantees.

Finally, the review and reporting procedures in the bill do not envisage qualitative review and reports and are thus meaningless and wholly inadequate.

For these reasons, we think Bill C-36, in essence and its global application uses, drives an historically unacceptable, racial and religious wedge and is an excuse to extinguish the civil liberties of all Canadians. We strongly oppose the misuse of race and religion to hyperventilate an atmosphere of fear, paranoia, mistrust, at the expense of and in the name of the Muslim and Arab communities, with the effect of general deprivation of all civil liberties.

For those reasons, the Canadian Arab Federation therefore strongly urges the implementation of the following recommendations. First, we recommend a tightening of all definitions of terrorists, terrorist activities and terrorist groups to the concern of what is the core of terrorism, namely, the threat or use of violence and arms by an armed group or individual against an unarmed group or individual for political, racial, religious, social or economic reasons, including state terrorism. We recommend that any reference to any labour, free speech dissent activity or enterprise, as well as the criticism and boycott of financial and other markets and/or businesses, be removed from the definition of terrorist group, terrorist activity or act.

Specifically, the Canadian Arab Federation recommends that the Senate delete the term "economic security from the proposed section 83.01(1)(*b*)(*i*)(B).

We recommend that all of the proposed section 83.01(1)(*b*)(*i*)(E) be removed from the definition; and that the exemption of state terrorism be deleted from the definition.

We also recommend that full *mens rea* and knowledge and intent be required as any other criminal offence as the constituent element required proven before criminal guilt may be pronounced.

We recommend that preventive arrests be removed from Bill C-36, as such arrest powers are most likely to be abused for the simple reason that Canadians, as any other people, are human beings and err and act on racially intolerant impulses, in particular in the criminal justice system where Royal Commission inquiries have concluded, as well as the Supreme Court of Canada, that systemic racism exists in Canada from the individual level through to Canadian institutions. If these preventive arrests must be implemented, they ought to be separated from the

Criminal Code and put into the Emergencies Act where parliamentary committee supervision, report and monitoring ensures the absence of abuse.

We also recommend that, upon arrest, all the rights guaranteed under the Charter be respected, including but not restricted to the right against arbitrary arrest, the right to remain silent, the right against self-incrimination, the right not to have property seized nor forfeited without prior judicial conviction or judgment, the right to a fair and open trial, the right to make full answer and defence, and the right to know the case against you. As such, we recommend investigative hearings ought to be removed from Bill C-36.

We recommend the elimination of secret trials and secret trial mechanisms and procedures and the requirement that trials adhere to current and normal criminal procedure of adequate disclosure to know the case against you and be allowed to make full answer and defence. While there is a need to protect the identity and source of informants and witnesses, and sometimes to protect their identity, such provisions are currently available and exercised within the context of general criminal proceedings and terrorism and terrorist acts should be processed in no different fashion. In any event there should be no seizure, nor forfeiture of property or secret trials without prior judicial determination by way of conviction or judgment.

Considering the broad and pervasive powers of Bill C-36, we require a real sunset clause, not a renewable clause as is proposed in the proposed section 83.32. This clause should apply to the bill in its entirety. If this proposed legislation rather than coming under the Emergencies Act is to be a criminal law of general application, the clause should require an expiry date before the next federal election to ensure public and democratic accountability.

We recommend that the review and reporting mechanisms ought to require qualitative and substantive reports and reviews by a superior court judge sitting akin to a public inquiry or a Royal Commission to ensure independent and judicial reporting and scrutiny, thereby ensuring public and constitutional accountability.

Finally, and despite the assurances of the Minister of Justice that Bill C-36 conforms to the Charter, whatever form it takes, we recommend that it ought to be referred to the Supreme Court of Canada to determine its constitutionality.

Those are our recommendations, Madam Chairman.

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In conclusion, the Canadian Arab Federation submits that we cannot help but conclude that Bill C-36, taken together with Bill C-35 and Bill C-42, is an attempt by this government to stifle the current evolution of human rights culture among the general population, as was witnessed at the APEC summit in Vancouver, and the anti-FTA protests in Quebec City and elsewhere in the world, including Seattle and Genoa.

We are here to remind you that the laws of this country, up to and including the Charter, have developed to support this human rights culture and to mitigate against the excesses of the state powers to repress and suppress this culture by the excessive use of military and police force, which we also saw in Vancouver and Quebec City.

The legislative agenda before this Parliament also makes it clear that this government is manipulatively and opportunistically pursuing a globalization and militarization agenda in the name of security, and that this could entail the use of law and abuse of legislative power in order to push it forward. If you choose to do so, you will be doing a disservice to the people of Canada, to the office you hold, and to the Constitution you have sworn to uphold.

If this bill is passed as it currently stands, it will seriously contribute to the erosion of a free and democratic society. Therefore, in the words of the Uzgar decision, we implore honourable senators to maintain your reasonable and right thinking, and incorporate our recommendations. We strongly counsel caution and careful drafting.

We thank you again for this opportunity.

Dr. Asfour: I would like to add to the comments made by Ms Sherazee that members of the Arab and Muslim community see themselves in a bind here. Most of these people have come from countries that have experienced dictatorship, suppression, repression and poverty. They come to this place and find that all of a sudden there are measures to remind them of their past and the anguish and pain in which they lived.

I can tell you that for the first time Arabs and Muslims in this country are afraid because they do not know what the 72-hour preventive arrest will include. They do not know what will happen in those 72 hours and how and why they must testify and why they cannot remain silent. When people are afraid, governments and officials must re-evaluate their action and their policies.

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We cannot have a country that makes people frightened. It is in the your hands to see that this kind of thing will never happen. Canadians have fought long and hard. Our history is long, and I am proud to say that we are known all around the world for our freedom, our tolerance and our ability to live next to each other with all the differences.

This passport is the most valuable as a civil protection. I do not talk about it religiously, because religious people have their own books to value, but this is the one that I value. As a Canadian, I am very proud to go all over the world and go to South Africa and see Mandela and say, "We are free, just like you." We have contributed to the freedom of the world.

I am a proud Canadian. I see that a certain segment of our society is threatened. How is it threatened? Tolerate me for a minute. Canadians tolerate each other. They are threatened. A man at work is pointed at because he is a Muslim or an Arab. He cannot report this to the police.

A woman in the street, walking with a headscarf is a target. That headscarf of has become a target to comments of intolerance, prejudice and racism.

In Montreal, where I live, two days after September 11 a doctor was almost strangled in the elevator with her own head scarf at the Royal Victoria Hospital because of intolerance. We have those elements.

If you transfer a power to a police body that is anywhere between 70,000 to 100,000 strong across the country, you are giving them a prescription for abuse. In 72 hours a lot of things can happen. If one individual is abused and his or her civil liberties are taken away, then all our civil liberties are in jeopardy.

Honourable senators, I will give you three names to ponder -- Jean Pierre LeClerc, Scott Ferguson, and Mohammed Mohutabir. These are fictitious names mind. Guess who will be arrested. Who will be investigated under this bill? Who has been harassed since September 11?

Rightly or wrongly, due to a certain association with trouble spots in the world, the focus and the light is on Muslims and Arabs. Tomorrow, it could on Jean Pierre LeClerc and Scott Ferguson.

The Senate is the house of reflection. You represent the intelligence, the wisdom, the bright light, the incredible ability to reason and the incredible ability to reflect and subsequently see what is good for our country and our people. It is

so ironic that we go all over the world to other people to teach them what freedom, tolerance and human rights is. Now we are introducing bills to take away our civil liberty, human rights, freedom and our ability to tolerate each other.

Why do we have to be affected? Why do we have to be influenced by what others are doing? Why do we have to answer to the drums of others? Why do we have to rush such a bill and give the justice minister a Christmas gift to put under her Christmas tree this Christmas?

I hope you will prevent this. Christmas trees are not made to have bills and laws in Canada such as Bill C-36, Bill C-42 and Bill C-35.

In the end, it is up to you. This is the final day. Do not make it the beginning of a dark history in our country. You are responsible for Canadians. You are responsible for the house you represent. You are responsible to uphold the laws and the Constitution and the Charter of Rights, especially, of this country. In the end, you are responsible for your conscience and for what you believe in.

I hope that when you go to sleep tonight you will tell yourself, "I will sleep comfortably because I have made the right decision," either to amend this bill or defeat it. The House of Lords in the United Kingdom defeated a similar bill. Do not be swept by emotions.

I do not know why the justice minister wants this bill so fast. Countries are not built in two months or three days. Certainly our lives have changed, but have they changed so drastically as to erode civil liberties? There is something in the national anthem that says, "O Canada, glorious and free..." I do not know, will Canada be free after this?

Thank you.

Senator Lynch-Staunton: It is not my role to defend the government's legislation, but I must say that your interpretation of it is somewhat harsh, and I think unfair. I know the sensitivities, which have allowed you to express the harsh opinions that you have and the anxieties that you hold. However, there is one aspect of your brief, which does trouble me. It is represented in both in the written brief that we received yesterday and in your presentation today, which is the summary of the brief that you are convinced that the Muslim and Arab communities are being directly targeted by this bill. You say, "Bill C-36 is an unacceptable racial and religious wedge against civil liberties of all Canadians. It

has a Muslim and Arab focus and the Canadian Arab Federation finds it totally unacceptable and refuses to accept that the Muslim and Arab communities will now have their turn at being a target of injustice." I want you to show me where in this bill these two communities are being singled out.

Ms Sherazee: I would turn your attention to section 83.14(4). Under that provision, in determining whether an accused is participating or contributing to any activity, the court can consider the use of a name, word, symbol or other representation of identities. It does not take a genius to figure out that we demonstrate our identities, our cultures and our religions through the use of words, symbols and language practices.

If I am engaged in a practice that is religious and perfectly reasonable within my religion, it is a traditional practice, and a terrorist organization --

Senator Lynch-Staunton: Excuse me. Could you indicate again to which clause you are referring?

Ms Sherazee: Yes, it is section 83.14(4).

Senator Lynch-Staunton: I do not see it there.

Senator Joyal: It might be in the old bill.

Senator Fraser: I am not saying that what you say is not in the bill somewhere, but it is not 83.14(4).

Ms Sherazee: I am sorry, I am looking at the old bill.

In any event, the provision to which I refer allows the government to use such factors in considering this.

We must be cautious when we give such blanket permission for the interpretation of particular religious symbols. That will taint and stigmatize an entire community and prevent it from participating in that religion. It will also target it. This is what I mean by how the bill can create a stigmatization effect that will have long-term implications for a culture and a community.

It is not uncommon for women in the Muslim community who have worn the hijab to consider whether they should continue to wear the hijab or remain home for fear of being harassed and abused.

There is no recourse for this. If one is called a name walking down the street, there is no real legal recourse to it, but it has the effect of instilling fear. It has the effect of differential treatment. It is racism. If you have legislation that allows the court to use these things, then there will be a detrimental effect in the long run.

History teaches us that whenever there is a time of war and there is a particular enemy abroad, there is also an enemy within. This happened during World War II when the Japanese were interned. This happened during World War I. We do not want to see this happening now. There is currently a war on terrorism and it is taking place in the Middle East. The Middle Eastern community is being targeted.

I will leave statistics and particular racial incidents for Dr. Asfour to comment on, but I would caution you to not ignore that reality.

The Chairman: In the new bill, this is section 83.18(4), found on page 29.

Senator Lynch-Staunton: Again, I am sure we could think of other groups who have symbols, names and words. The exclusivity that you are attributing to this bill has yet to be proven, though it is quite obvious that because the last terrorist attack has been attributed to a certain community, those identified with it are naturally more apprehensive than others.

I would not want you to leave the impression that because members of your community, as others, are harassed on the street or in their offices, that that has anything to do with Bill C-36 or even that Bill C-36 can correct it. That is a societal problem. That is an ongoing problem of prejudice and racism.

Also, remember that when the terrible Japanese and Italian internments took place, and the harassment of Ukrainians during the First World War and after, there was no Charter in place in Canada. In 1980, when nearly 500 people were arrested, there was no Charter to protect them. Now there is a Charter to protect them, and to protect all Canadians and non-Canadians who are in Canada. Our Charter extends that far. I do not think you should ignore that in your presentation.

I suppose you would argue that this bill is not Charter-proof and that the excesses that you claim could be committed by the police will be committed anyway, whatever the Charter says.

I know where you are coming from. I see what happens in the United States where who knows how many hundreds have been arrested and are under detention.

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Ms Sherazee: The figure is 2,000.

Senator Lynch-Staunton: The figure varies, but it is too many, that is for sure. You are very anxious that this not happen here and you fear that it might happen through this bill. There are preventive arrests and investigative hearings that are not part of our Canadian traditions, but this is in response to an ongoing terrible event that was climaxed on September 11.

While I am the first one to challenge that the bill is Charter-proof, as the Justice Department claims, I also feel that no matter how bad or good the bill is, it applies to every terrorist, whether known or suspected, and is not aimed particularly at one or two communities.

Dr. Asfour: We are saying that we have no problem in combatting terrorism. We want it fought as much as the next individual. We are saying that we do have the mechanism. We do have the laws on the books already that can deal with whatever problems arise. We have CSIS; we have the courts; we have the power to take anyone in. Why enlarge this power and make it so thin and so broad and give it to so many people who, for one reason or another, may misinterpret it and abuse it? This is all we are saying.

We are saying also that documented so far by the Canadian Muslim Council are 130 cases of harassment, abuse, brutality and arrest. Those are cases on their site and they have been publishing every little case reported. To one case reported, there may be five or ten not reported.

At this point, no other group is being targeted. No other group has been harassed but the Muslim and Arab groups.

Senator Fraser: Ms Sherazee, you said something in your remarks that a number of witnesses have also said, that I and some of my colleagues believe to be incorrect. You said that this bill could find someone guilty of facilitation even if they did not know they were facilitating a terrorist activity. It is true that one could have made that interpretation of the first version of the bill. This was something that this committee drew public attention to in the report on its pre-study.

The present version of the bill has been corrected to ensure that one must have been facilitating knowingly. One cannot be swept up because one did not know that the person being given a helping hand to was a terrorist.

For example, to be on the list of entities, you must have knowingly carried out or participated in or facilitated a terrorist activity. The new clauses state as follows: 83.18, "…everyone who knowingly participates in or contributes to…"; 83.19, "…everyone who knowingly facilitates…"; 83.21, "…every person who knowingly instructs…"; 83.22, "…every person who knowingly instructs…"; 83.23, "…everyone who knowingly harbours or conceals…".

What you do not have to know is which specific terrorist act you may have facilitated. To illustrate: If I give Senator Bryden the materials with which to make a bomb and an instruction sheet on how to make and place bombs, but I do not know exactly where; and I tell him that I think it is probably a good idea that he should place some bombs -- maybe on Parliament Hill, but I do not know exactly where or when he will place the bomb, I can still be found guilty of facilitation because, obviously, I knew I was facilitating something, even if I did not know precisely where or when the bomb would be planted. Forgive me, Senator Bryden.

That is a crucial distinction that Canadians, in general, including those who may be watching this on television need to be made aware of. If you have found, in the present version of the bill, any other instance where, through inadvertence, you did not have to knowingly facilitate the action, please draw it to our attention.

Ms Sherazee: I draw your attention to the new clause 83.14 (1)(*a*) and (*b*), which states that a person need not have any knowledge to lose their money or their property. I printed that off the Internet, so I do not have the same page numbers as you have.

Senator Fraser: I am looking further down.

The Chairman: The reference is on page 25, senators.

Ms Sherazee: It is the new clause 83.19.

Senator Fraser: Clause 83.14(8), on page 27, basically states that if you took reasonable care to ensure that your property would be properly and lawfully used, you are off the hook.

Ms Sherazee: Reasonable care is different from intent, and it is different from knowledge.

I disagree with your interpretation of the new clause 83.19, simply because, regarding subclause (1), if we have disagreements, then understandably the public will also have disagreements about this. It specifically states that you have to know. It does require knowledge, but the new clause 83.19 (2) contradicts that and says, "…whether or not you know...".

Senator Fraser: That is the point I was trying to make.

Ms Sherazee: The crux of this is activity, or whether there has been a facilitation. We think that it cancels the two out. You can still, without knowledge, without intent, without an activity, be found liable.

Senator Fraser: I do not agree with you for the reasons that I just stated, nor, I must tell you, does the Minister of Justice or the commons committee that voted in this amendment. Should a disagreement arise in court, judges go to the parliamentary proceedings sometimes to clarify the intent of the law, if it is confusing.

Some Honourable Senators: Oh, oh.

Senator Fraser: They do.

Senator Joyal: I am not so sure about that.

Senator Jaffer: As-salam Alaikum. September 11 was a terrible blow on the North American continent for all Canadians. We all felt it. We all know Muslims died there as well. For the Muslim and Arab communities, September 11 has continued. I have people writing to me daily about the harassment they are suffering at the hands of police. Every time I receive a letter, I send it to the authorities, and they immediately look at it to see what is happening.

I would like to know, from both of you: How can we work together to continue? What kind of things would assure the community that the tolerance that Canadians have always shown will continue? What do you think needs to happen?

Dr. Asfour: Strike out preventive arrest, first. Stop the police from phone-tapping. Stop the police from computer-tapping. We have the laws, and you can arrest anyone at this time for a crime. It dawned on me the other day that we are securing security for the future. It is just like saying to Canadians, "You all have to buy artificial legs, because ten years from now, you will lose a leg."

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This country is still safe; we have not had any problems. We have not had any disasters. I hope to God that we never have that. I know we will never have that. It is not a fertile land for violence. Why do we have to give the police the power to arrest on suspicion? How do I guarantee that once this bill is enacted, that tomorrow, someone will not come to me and say, "John, you said that Parliament Hill has begun a police state. You are under arrest because you are fear mongering."

Simply because we are asking for human rights, people think that we are in fear; but we are not. It is a reality, whether this bill targets the Muslims and Arabs or others, it is a reality. Please, I cannot impress upon you enough that, if a community feels terrorized and frightened, we should pay attention to that community, to their feelings and to their aspirations.

Senator Jaffer: Dr. Asfour, perhaps I was not clear, and I apologize for that. We have listened carefully to your comments on the bill and we will endeavour to remember your words. However, I am asking you, specifically because you are a leader in the community, what would help to ease the anxiety in the community? What kind of general steps, forgetting this bill, would help the community?

Dr. Asfour: Pure consultation: the community needs to be consulted about what is happening to it, about how to protect itself, and about where to go when someone is harassed. Many people do not have the mechanism or knowledge to report their harassment. Many people do not have the means to ask for a lawyer's help. Incidents are not reported to us or to you clearly and adequately as soon as they should be reported. We need assistance in all of this; we need consultation; we need to know who is being targeted; and targeted people should be able to seek help and legal advice. They should have their "day in the sun" -- their day under the Constitution.

Ms Sherazee: I would add to that comment that, when you pass legislation, you are sending a message to the public. Citizens look to the government to give instructions on how to conduct themselves. If you pass Bill C-36 in its current form, you are sending a message to the law enforcement and the intelligence agencies, as well as the general public, that it is okay to racially profile and it is okay to target, because it is all being done in the name of security, and that great threat justifies whatever measures we take.

We are saying that law is a good way to send a message of tolerance to a people. The way that its minorities are treated is what will determine how tolerant Canada will be, particularly in a time of crisis.

In addition to that, there needs to be appropriate consultation. This legislation is being rushed through. We had to scramble to appear before you today. There are many communities and organizations that have not even had an opportunity to read this bill that will be detrimentally impacted.

We are asking you to deliberate and take time. This is a very important measure. Terrorism is a grave threat. The review of this bill needs to be done properly.

Dr. Asfour: If there will be an oversight, we would love to be a part of that.

Senator Beaudoin: You raised a point regarding new section 83.19 on page 29. Obviously this is the kind of problem that may be raised in court. In the first paragraph they say "knowingly" and in the second paragraph, they say: "For the purposes of this Part, a terrorist activity is facilitated whether or not a) the facilitator knows that a particular terrorist activity is facilitated."

We heard the possibility that the court may refer to our debate. I hope so. They do that at the level of the Supreme Court. I wish to thank them, but there is no certainty about that.

This is why we have suggested, in our pre-study, which was unanimously adopted, that we had a certain protection because of the additional powers and that that protection for us is an officer of Parliament and a sunset clause. We hope that the bill will be amended to include that, as we have suggested in the first pre-study.

Obviously, when you give additional power, there is a risk that it be challenged before the court. There is the risk, of course, if the bill is permanent, as this one, that the court would be somewhat more severe than if it is really an emergency case.

In my opinion, that is the reason why we suggested two amendments on this. We are doing something. I think this bill is very important. We need something but we have to respect our own Constitution.

I do not know if that answers your question, Ms Sherazee on the terrorist activity, but there is some doubt in that paragraph.

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Ms Sherazee: I would like to make a comment about the sunset clause. If you look at new section 83.32, it is not a real sunset clause because these clauses can be extended by resolution, not by Parliamentary debate or process. That is completely by-passed. Are they constitutional, democratic safeguards and supremacy? We would really caution you to pass it is.

The Chairman: On the question of resolution, we have had this in a number of situations in the past; this is a process that is debated. It is a process that is available to either house for committee study. In the past with resolutions, we have had joint committees, sometimes separate ones. I simply wanted to insert this. There is a parliamentary process that does surround the resolution that requires not only decision but also permits hearings in debate.

Senator Andreychuk: If I understand your submission, you are saying that there is a target or a profiling in the bill, or are you saying that part of our justice system is how the bill is administered. Do you have some concerns that the targeting will occur in the administration of the bill by those who are going to exercise the power across this land and that will mean many people at many times? Inevitably, there will be, either through honest belief or otherwise, an excess of the power, is that one of your submissions?

In the detention period of 72 hours, would it alleviate your fear if there were some sort of double-check or other scrutiny? It would be done according to the bill in the confines and privacy of those who are entitled to do the investigation. If that investigative process had some double-check on it, would it ease your fears of that proposed section?

Ms Sherazee: It is true that the application and the enforcement of law are just as important as the proclamation of a law.

The problems exist on both ends in regard to Bill C-36. The problem with the law is that it is vague and overly broad. The very core of the legislation, which is the terrorist definition of terrorist activity, will exacerbate the conditions that Arabs and Muslims are feeling, as well as other racialized groups currently.

It will also create a climate in which the enforcement mechanisms that are currently used and the discriminatory results will be reinforced.

We are saying that the legislation itself is giving the tools to the enforcement officials to enforce it in a manner that will be overly broad and that will have racist

consequences. As to whether there should be an additional check and balance in terms of the investigative hearings, we would support any measure that would introduce additional checks and balances.

The review mechanisms that are currently in the bill fall short of giving us substantive and qualitative information. It is not sufficient for the Solicitor General or the Attorney General to provide statistics on the number of preventive arrests or investigative hearings.

We need to take those statistics and understand what they mean. The people who are in the best position to be able to do that are not solicitors general and attorneys general, but the people who actually have intimate interaction with the legislation. We propose that that is the judiciary and that is an independent body. Those should be a part of the review mechanism.

Senator Joyal: Dr. Asfour, and Ms Sherazee, I read your brief. It raises so many pointed legal issues in reference to the Charter because you refer to case law where the court has had to pronounce on some of the freedoms that you maintain have been infringed upon in the bill. Is it your intention, if the bill were to pass as is, to make a court challenge, either you as a federation or in conjunction with other groups in Canada interested?

I refer to your definition, for instance, of terrorist activities that could include lawful activities in a free and democratic society, the absolute liability that you say is contrary to both common law and Charter interpretation and the rights entrenched in section 8 of the Charter. It seems to me that it is almost a pre-feasibility study of a court challenge. Is it your intention to consider that in the near future?

Dr. Asfour: I do not know if we are in the business of having a government draft laws so that a federation such as ours goes to court to challenge it. Our mandate is to provide Arabs and Muslims in this country with their rights and duties, to talk to them, to teach them, show them what a Canadian has and does not have.

Obviously, you see that there are not only many loopholes, but holes, in this bill. Simply, the bill was rushed. I understand that 500 lawyers of Her Majesty worked on it day and night and everyone from every department came in and lumped in every last bit of what they wanted to put into it. The Justice Minister came down to the Justice Committee and, before hearing what the committee had

to say about what they found from their hearing, she said, "Okay, I am introducing these two amendments," and they were surgical amendments. That was it and they closed the debate on it in Parliament. Here you are, a house like yours, given only four days to debate such a humungous piece of work and you must report simply so that someone can have a nice Christmas. I am sorry, this is a country here; this is not a Christmas gift.

Of course this bill will be challenged. We are not the only ones who see it as such. Yes, senator, we will challenge it, but we should not have to. It is not our business to challenge the government. The government should look after its own citizens. The Justice Minister should listen to the people. She went on national TV and said, "I listened to the people." I do not know to what people she is listening.

We do not have to challenge this bill, senator. We do not have to go to court, waste money and effort and create animosity among Canadians. We do not have to challenge the police when they abuse power. We do not have to challenge judges. We do not have the facilities to employ lawyers and go to court day in and day out to challenge a bill. As I see it, this is unnatural in our Canadian landscape.

Please, heed what we are saying and do not allow this bill to turn our country into a police state.

The Chairman: Thank you very much, Dr. Asfour and Ms Sherazee. We are pleased that you were able to come today. You have given us a vivid description of your views on the bill. They will certainly be studied by our committee members who, as you see yourself, are very interested in what you had to say. We thank you for coming. We wish you well.

Dr. Asfour: Thank you for accommodating us. We really appreciate this.

Senator Lynch-Staunton: Madam Chair, can you tell us what Monday will bring as far as our schedule goes?

The Chairman: The plan, Senator Lynch-Staunton, is that we meet as a committee at 10:00 o'clock on Monday and begin our clause-by-clause review of the bill. We would continue that as long as necessary. We are cognizant of the reality that there is a budget being released on Monday. Some of our senators may have some role to play after it is released. However, our concern will be the clause-by-clause analysis of the bill and any amendments that may be forthcoming.

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To facilitate our work, I suggest that any amendment by any senator be in writing and in both languages to facilitate the work of the committee.

We also may wish to consider some of the questions that have been raised in our hearings that have been outside the actual clauses of the bill and upon which we might make reasoned and brief observations. We can perhaps work together on that, Senator Lynch-Staunton.

The Senate will be meeting at 8 p.m. on Monday evening. It is my hope that we will be able to complete our work and present our report to the Senate that night.

Honourable senators, our next group of witnesses is now before us. We will hear from Mr. Trudell, who is Chair of the Canadian Council of Criminal Defence Lawyers. From the Canadian Civil Liberties Association we have Mr. Borovoy. From the Federation of Law Societies of Canada, we have Mr. Royal, who is a board member for Alberta and the Northwest Territories. As well, we have Ms Corrick, who is from the Law Society of Upper Canada.

Welcome all. We are pleased you could be here with us today. As you have seen, we have many senators who ask many questions. We try to accommodate each of them. It all depends on how loyal we are to each other with brief and succinct questions and as compressed but full answers that our witnesses can give.

With that caution, I would ask those of you who wish to give brief opening statements to please proceed.

Mr. William M. Trudell, Chair, Canadian Council of Criminal Defence Lawyers: Honourable senators, on behalf of the Canadian Council of Criminal Defence Lawyers, it is an honour to be here. We are grateful.

Prior to today's appearance I submitted to the committee a letter. In my opening statement I would like to go over it, after which I will have some brief comments.

The letter states:

> Dear Senators:
>
> You have been asked to approve perhaps the most important piece of legislation in our lifetime, Bill C-36, the *Anti-Terrorism Act*.

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Never before has the nation's hopes for your guidance and trust in your wisdom been more acute. Never before has the necessity for scrutiny not rubber stamping been so vital to the Canada we are and the Canada we may become.

We have placed an enormous amount of trust in our elected leaders, assuming that they know more than we do, or they would not request the powers in this Bill. We want to reject any suspicions that they are being bullied by American anecdote or law and order propaganda whispered by the powerful.

Many citizens, members of the Bar, journalists, academics, and elected and appointed representatives of Government have expressed concerns about the sweeping nature of the *Anti-Terrorism* legislation and its companions still to come.

These voices are not extremist and deserve to be heard. Indeed, Minister McLellan has a reputation for being firm but fair and open to consultation on changes to legislative proposals and has so acted here. But her mandate is different from yours. She in effect is the Chief Law Enforcement Officer in this country. You are the Nation's gatekeepers of the protection of individual liberty. You must examine this Bill closer to the ground, measure its impact and attempt to mitigate its negative potential.

There are many problems with this Bill. Perhaps, its complexity is a central one. It must be cross-referenced and read in conjunction with other legislation and international obligations. Even then it is difficult to understand.

But some provisions are clear. The unique powers it grants to Ministers and officials to issue certificates and restrict disclosure pulls shades down on open government.

The extraordinary and chilling powers it grants in relation to preventative arrests, investigative hearings, and compelling testimony are unknown in this country, and untested in their need and effect.

Mistakes will be made. Individuals will be targeted, arrested, perhaps then released. In the meantime their families will be the source of

speculation in their communities, their children the objects of derision in the schools. The damage will be irreparable.

These extraordinary times seem to have resulted in extraordinary measures. They also call for extraordinary vigilance.

The Canadian Council of Criminal Defence Lawyers asks you Honourable Senators to consider carefully the proposed amendments that you will hear this week. Nevertheless, there is one key amendment that we feel is absolutely necessary.

Despite certain revisions from its original draft in providing for a yearly parliamentary report regarding the preventive arrest & investigative hearings provisions and a 3-year review, there is no real accountability in this Bill.

If those responsible decided that it is not in the public interest to report, they won't. Review provisions without teeth are historically meaningless. They do not happen.

This legislation requires an independent ombudsman, not to interfere but to oversee.

A retired Justice of the Supreme Court of Canada or Provincial Appellate Court should be named as an overseer and given the tools to do so effectively.

All preventative arrests, investigative hearings, their results, all Ministerial certificates issued, and the reasons therefore, must be reported to this "Overseer" annually.

This Ombudsman could hear Ministerial requests for the nondisclosure to Parliament of matters set out in the annual review report provisions. In this way meaningful independent accountability would be effected.

The main problems with this legislation are the sections which authorize operations in the dark. With this simple provision, Canadians perhaps could achieve a second level of security. Someone will be watching the State.

Ombudsman offices are key features of democracies. They oversee conflicts of interest and the working of Ministries. In this way, while

trusting in our elected representatives, we insure checks and balances along the way.

We urge the Senate to do no less with Bill C-36. In the rush to proclaim new measures of security, in these dark times, we should ensure a glimmer of light.

We have today provided to the members of the Senate a brief setting out certain concerns with other sections which I hope that you have an opportunity to consider.

Last night while coming to Ottawa I heard reports of the Auditor General who oversees government spending. It struck me that that is about money. When we are talking about privacy and our individual rights, how can we say that an auditor, an ombudsman is not important here?

It is our respectful submission to you that we are not in any way trying to interfere with the proper provisions of this legislation. This is a special committee and this is a special piece of legislation.

I also could not help but hear rumours in the press, et cetera, that were unkind to this committee, that said it is all over, all that is left now is a package and a bow. I do not believe that. Our council does not believe that.

I would ask you to consider: What is wrong with having someone oversee this measure? The Senate's proposal on its first review of this bill was something like that of an independent parliamentary overseer. It was rejected. I do not know why.

What would be wrong with having someone there, an overseer, an auditor, to ensure that we have real accountability? Thank you very much, Madam Chairman.

Mr. Alan Borovoy, General Counsel, Canadian Civil Liberties Association: Honourable senators, we in the Canadian Civil Liberties Association have long believed that one of the most vital roles the Senate can play in our system is to improve and enhance the processes of Parliament. This is very much needed in relation to Bill C-36.

At the heart of it is the unresolved dilemma, if you like, of whether this bill is an emergency one or is it designed to create new normal powers? The problem is that in a way the government has given us the worst of both worlds. The way it

has been rushed through the House is characteristic of an emergency; but, except for two provisions, these measures will linger indefinitely. That makes it look like new normal measures. This is a quandary that really needs to be overcome.

Therefore, we suggest that to whatever extent this committee approves clauses of the bill, those clauses ought to be subjected to a much shorter sunset clause -- a year. I submit that nothing would be lost in the government's campaign against terrorism. They could have their bill immediately and proceed to enforce it. However, to whatever extent they wanted any of these measures to linger, they would be effectively required to introduce them in manageable segments throughout the year so that there could be a proper public and parliamentary debate.

This bill is so full of complex features and it has been pushed so fast that there has hardly been an opportunity for any of us to digest its implications. We suggest in doing it this way we could be approaching it properly. Let them proceed, but ensure that in a year's time it would lapse. In the meantime, if they wanted any of these measures to be more permanent ones, then let us have a proper debate at the time so that we are competent to conduct a proper debate.

I would like to spend the few remaining moments that I have to indicate that with all the rush, the bill still, even with its amendments, contains serious flaws. I want to outline a couple of them.

Please go back to the controversial definition. In response to the criticism that the way the definition currently stands, it would bar Canadian citizens from supporting insurrectionary activities against repressive regimes abroad. The minister points to the exemption at the end. She invokes a UN protocol that would give some sort of protection to insurrections against colonial domination, alienation occupation and racist regimes. These do not exhaust the range of repressive regimes in this world.

Suppose, for example, there had been an insurrection against the former Soviet Union, Red China or Saddam Hussein. These regimes are home grown tyrannies. They are neither colonial, nor alien. Insofar as racism is concerned, these regimes are prepared to abuse their citizens without regard to race.

As long as any insurrection against such regimes is not deliberately targeting innocent civilians for serious violence, why should it be unlawful for Canadians to support them? In this connection, I will distribute in a moment a possible draft

amendment to the definition that would incorporate some of this. I am not wedded to the terms, but it would give you some idea of how we might accomplish this objective, which I gather from what the government says they favour. It is just that they have not accomplished it.

The other part of the definition concerns the removal of the word "unlawful." This would protect some of the civil disobedience that falls short of what most of us think of as terrorist.

Consider again the recent nurses' strike in the Province of Alberta. It was conducted against a government bill. Therefore it would satisfy the requirement of a political purpose. It represented a serious disruption, or could represent a serious disruption, to an essential service, a hospital service. It could cause serious risk to the health of a segment of the public. Was it then intentional? Does it satisfy that requirement? Since it might be said that the nurses knowingly took the risk to their patients, such intent might be attributed to them. I am not insisting definitively that this is the way that a court would ultimately interpret the section or a jury might ultimately rule on the facts. I am simply suggesting it is reasonably arguable. There is just no earthly reason why the legitimate fight against terrorism requires running the risk. In short, clause (*e*) should be removed. Nothing would be lost.

One other illustration to show how little attention has been paid to these things. Regarding one clause in the bill, I do not know if I have seen any discussion of it except my own. In case you do not read my stuff, I will tell you.

There is the clause in the bill that say that individuals, as well as organizations, can wind up on the list. This would mean that it would be unlawful for the rest of us to deal with the property of such individuals. We could not buy their homes, their cars or even their clothes. We could not rent from them.

It is one thing to treat an organization this way. Its institutional life is limited. However, individuals have ordinary lives to lead. There must be something repugnant about transforming a person into a legal pariah without ever having convicted such person of any unlawful conduct. How necessary is this to the fight against terrorism? I would consider, for example that almost inevitably, any individual who is being considered for the list is likely already to be under intense surveillance, thereby enhancing the opportunity to intercept potentially any unlawful behaviour.

Finally, we endorse that which Mr. Trudell has said about independent oversight. I notice in this connection that Professor Marty Friedland suggested that the Security Intelligence Review Committee be given this function. It already has had the experience, and it has the machinery. However, we ought to agree on the principle of a proper system of accountability.

I then return to the original suggestion that to whatever extent you are inclined to accept any of the current provisions of the bill, subject them to a very short sunset clause so that if the government wants these things to linger, we will have at long last, a proper parliamentary and public debate, all of which is, as always, respectfully submitted.

Mr. Peter Royal, Q.C., Board Member for Alberta and Northwest Territories, Federation of Law Societies of Canada: Honourable senators, my good friends at the bar, ladies and gentlemen, I appear here this morning on behalf of the regulators of the legal profession, the 13 constituent provincial law societies. Nunavut advised yesterday that they are supportive of our brief. I do speak on behalf of the 81,000 lawyers in this country. I will be speaking on behalf of the federation and dealing with the affairs of the bar, the bar that are provincially mandated to self-govern the affairs of our respective organizations in the public interest.

We are pleased to be able to appear before you here this morning, and also for the opportunity to file with you our written brief, which I know you have received, and I will assume you have all read. We are also mindful of the large number of organizations that have asked to appear, and we are also sensitive to the time constraints under which the committee is operating.

Having said that, however, the voice of the legal profession in this forum is an important one, I suggest, given the potential breadth of this legislation.

Our perspective as legislated overseers of our profession is distinct from that, for example, from the Canadian Bar Association, which presented the Commons committee studying the bill with an impressive written brief supplemented by their helpful oral submissions made by Simon Potter and his colleagues. Different, too, is our perspective from that of the Canadian Council of Criminal Defence Lawyers represented by Mr. Trudell and the Canadian Civil Liberties Association represented by Mr. Borovoy.

Our submissions will deal with particular unique concerns that we have with respect to this legislation.

However, having said that, we join with others who have expressed significant reservations about many aspects of this proposed legislation. Our focus will be on the core values of our profession and on the ethical obligations of our members. It is said that the Law Societies, the Barreau du Québec and the Chambre are the gatekeepers of the profession, and that is so. We regulate admission; we compel our members to carry mandatory, professional liability insurance; we require the maintenance of an assurance fund to reimburse clients where misappropriation has occurred; we provide continuing legal education programs; and we are responsible for ensuring the ongoing competence of our members and that, where appropriate and warranted, disciplinary sanctions are imposed upon them.

The special and specific concerns that we bring before your committee are those shared by all of our respective Law Societies. We speak to the issue with unanimity and with one voice. That should give the committee members who know, I suspect, a thing or two about lawyers, given there are several distinguished members of our profession amongst you here this morning, some real cause or cause for concern. That is that 81,000 members of our profession have agreed so quickly on so much. This is indicative of the significance we, the in the legal profession, attach to this extraordinary bill.

Honourable senators, we have the task of advising our members on a daily basis about their clearly competing and conflicting responsibilities that will arise under this legislation. We have the task of ensuring, as far as possible, the continued maintenance of an independent bar, which is something that is clearly in the public interest.

This leads us into the identification of some fundamental principles that shape us, as a free and democratic society. The right to counsel, independent of the state, one who is fearless and who has undivided loyalty to his or her client, is an undisputed principle of fundamental justice, and one that is enshrined within the Canadian charter. We suggest that this proposed legislation seriously compromises this right. This proposed legislation creates unwarranted barriers between solicitor and client, and it mandates that lawyers must routinely breach their professional obligations toward those clients. There are two clauses of Bill C-36 that will subject lawyers to the risk of criminal prosecution for fulfilling their professional obligations, in advising and representing anyone subject to the provisions of the bill. Clause 83.03 makes it an offence, punishable by up to ten years in prison for

making financial or other relayed services available, knowing that the services will be used by or beneficial to a terrorist group. "Other related services" are not defined in this bill. The bill will further make it an offence to knowingly participate in or contribute to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of the group to facilitate or carry out terrorist activity. I refer to clause 83.18(3):

> Participating in or contributing to an activity includes (*a*) providing or offering a skill or expertise for the benefit of, at the direction of or in association with a terrorist group;

A court may consider the fact that a person received a benefit from a terrorist group in determining whether the person participated in or contributed to any terrorist activity. The penalty for this offence is also up to ten years in prison.

It cannot be denied, I suggest, that lawyers who represent individuals or groups subject to the provisions of the legislation, provide a skill or expertise for the benefit of a terrorist group. In addition, a lawyer's retainer may be considered a benefit received from a terrorist group. Lawyers could be prosecuted for participating in or contributing to the activity of a terrorist group and be imprisoned again for up to ten years. These are not, I suggest, fanciful, imaginary or far-fetched scenarios. I suggest that our members have legitimately expressed these concerns in respect of such potential liability.

There is no exemption from these provisions for lawyers who act lawfully by the giving of legal advice and by providing representation to accused or suspected persons. There does not seem to be a bona fide reason for this, given that lawyers, like everyone else, are subject to the regular Criminal Code provisions that deal with criminal conduct, such as aiding and abetting, counselling, being an accessory after the fact, attempts and conspiracy; all criminal offences that prohibit lawyers from assisting clients to commit crimes.

Canadian lawyers are courageous and they honour the principle that every person has the right to counsel. To expect lawyers to risk criminal prosecution, we suggest is asking too much of our profession. The requirement that the provincial Attorney General, must first consent to such a prosecution is not a sufficient safeguard, in our respectful submission.

Other features of this bill that will adversely affect the right to counsel, include the amendments to the code, making it an offence to knowingly deal directly or

indirectly in any property owned by, controlled by, or on behalf of, a terrorist group. Entering into or facilitating any transaction in respect of such property and providing financial or other related services in respect of such property, will also on an offence. This provision will make it an offence for lawyers acting for people or groups subject to the bill to accept retainers from their clients for professional services. This is the so-called "freezing of property" provision found in the legislation.

Furthermore, the bill provides for forfeiture orders of property owned or controlled by a terrorist group. Lawyers' retainers held in their trust accounts could well be ordered forfeited, pursuant to these provisions. Unlike the general forfeiture provisions that we find in the Criminal Code, no substantive offence need first be proven beyond a reasonable doubt. Indeed, there may be no charge ever brought for the respondent, owner or possessor to answer. The requisite onus is the civil standard -- proof on a balance of probabilities. Unlike the new Proceeds of Crime (Money Laundering) Act, money received by lawyers for professional fees, for disbursements, or for the posting of bail has not been exempted from these provisions of Bill C-36.

The combined effects of this legislation will make it difficult, if not impossible, for someone subject to the provisions of the bill to retain legal counsel, rendering their right to the counsel of their choice to loosery, I suggest.

However, it is not only barriers to the retention of counsel that this legislation creates that are of concern for us. For even if counsel is retained, that counsel will necessarily lack the independence necessary to the maintenance of a proper solicitor-client relationship. There are a number of provisions in the bill that violate the requirement that solicitors hold in confidence information received from their clients. Bill C-36 will routinely require lawyers to disclose confidential solicitor-client information to the state, thereby conscripting them against their clients and making it impossible for them to act as independent legal advisers with undivided loyalty.

The new clause 83.1 of the bill requires everyone to disclose forthwith to both the RCMP and CSIS, the existence of property in their possession or control that they know is owned, or controlled by, or on behalf of a terrorist group, information about a transaction or a proposed transaction, in respect of such property. Lawyers who hold money in their trust accounts on behalf of entities listed by the government as terrorist groups, for example, will be forced to become witnesses against their clients and immediately disclose the existence of such trust funds to

both RCMP and to CSIS. Failure to do so will subject lawyers to fines of up to $100,000 or ten years in prison.

Furthermore, amendments to the Proceeds of Crime (Money Laundering) Act will expand the nature of transactions that lawyers will be required to report to FinTRAC, including financial transactions that lawyers have reasonable grounds to suspect are related to a terrorist activity financing offence. The bill prohibits lawyers from telling their own clients, with the intent to prejudice a criminal investigation, that they have made such a report, whether such an investigation has begun. In essence, the bill compels lawyers, on pain of imprisonment, to breach the fundamental principles underlying the solicitor-client relationship and to not inform their clients that the relationship has been breached. The FLSC, the Law Society of British Columbia and laterally, the Law Society of Alberta, have recently challenged the constitutionality of section 5 of the Proceeds of Crime (Money Laundering) Act. This section requires that lawyers make reports about their clients, without advising those clients, principally on the basis that it compels lawyers to gather and provide evidence against their clients on behalf of the state. I noticed that Minister McLellan alluded to this when she appeared before your committee a day or two ago.

On November 20, 2001, the British Columbia Supreme Court issued an interlocutory order exempting lawyers from the application of section 5 of the regulations pending a full hearing of the Federation's petition. In making the order, the Honourable Madam Justice Allan described the proclamation of section 5 of the regulations as the authorization of, and I quote: "…an unprecedented intrusion into the traditional solicitor-client relationship." Bill C-36, honourable senators, will expand this intrusion.

This proposed legislation, as noted by Professor Irwin Cotler, M.P., McGill University, is not so much charter proof as Minister McLellan asserts, as it is charter bound.

I will speak to the point about conscripting lawyers against their clients in investigative hearings. Much has been said about that. Bill C-36 will compel individuals who police believe have information about terrorism offences that have been committed, or will be committed, or information about the whereabouts of a suspected terrorist to appear before a judge to answer questions and/or to produce anything in their possession or control to the presiding judge. Witnesses will find themselves impaled on what the late Professor Wigmore referred to so eloquently as the "three horns of the triceratops." What should I do here? Should I disclose

and cause harm to others or myself? Should I commit perjury? Should I refuse to answer questions, thereby resulting in my detention?

These hearings not only represent a disturbing departure from the fundamental right of a citizen to remain silent during the investigation of a suspected offence, a right recognized by the Supreme Court as a principle of fundamental justice enshrined within section 7 of the Charter, but they also amount to judicially supervised interrogations of witnesses or suspects, positioning the judiciary much closer to the investigatory process than ever before.

The bill is silent with respect to sanctions that may be imposed for a witness who refuses to appear, refuses to answer questions or to produce things in their possession and/or control. Presumably, broad contempt powers would be available to the court for the offending witness.

Will lawyers be required to appear before a judge to answer questions about their clients? Information covered by solicitor client privilege is protected from disclosure during an investigative hearing, but confidential solicitor-client communication is not. Again, lawyers could be conscripted against their clients.

Our colleagues from Ontario, from the Law Society of Upper Canada, feel so strongly about investigative hearings and the entire topic of preventive arrest that they urge that these clauses of the bill ought to be removed from the bill in its entirety. Our federation has not touched upon this topic in our submission because it is outside the ambit of our concerns as regulators.

Two final provisions on the question of solicitor-client confidentiality ought to be mentioned. The bill will permit the search a lawyer's office, pursuant to a warrant per clause 83.3. This is not extraordinary. However, the bill is silent on the process for determining a claim of solicitor-client privilege. Criminal Code provisions setting out procedures for determining the issue of solicitor-client privilege have been struck down recently by superior courts of appeal in several provinces. The issue is scheduled to be heard in the next week or two by the Supreme Court of Canada in a number of companion cases such as Lavalee, Regina and Fink, a case from Ontario which is rather aptly named, and White and Al against the Attorney General of Canada. The absence of any mention about the confidential nature of information that may be seized in lawyers' offices or the topic of solicitor-client privilege sends the wrong message to law enforcement officials. There is reason to be concerned that material seized from a law office

during such a search may not be sufficiently protected from disclosure to the state pending a judicial determination on the issue of privilege.

Finally, amendments to the National Defence Act, contained within Bill C-36 will allow the Minister of National Defence to authorize the interception of private communications between a foreign person and a Canadian citizen. This is a significant change, we suggest. No judicial authorization is required at all. The power is vested solely in the minister. Until now, the Communications Security Establishment, the body that actually conducts the surveillance, was only permitted to target foreign communications. This power could well be used to intercept or could result in interception of confidential solicitor-client communications on the authority of the Minister of National Defence alone.

Bill C-36, honourable senators, expands state powers in significant and disturbing ways. Many of them will deny Canadians the right to independent counsel, and they will intrude on the confidentiality of the lawyer-client relationship. The bill weaves these extraordinary powers into the fabric of our criminal law and other laws making them part of our legal landscape.

The added danger in this is that these exceptional measures and powers will become the norm. What will the government do the next time the country faces a terrorist crisis? It will ratchet up the already extraordinary measures in place. Powers, once granted law enforcement agencies, are rarely withdrawn.

The further danger is the leakage of these extraordinary measures into the rest of the criminal justice system. We do not have to look too far to find recent examples of this. At the recent conference on Bill C-36 held at the University of Toronto, Professor Oron Grass of Tel Aviv University noted that the curtailment to the right of silence in the United Kingdom as an example of this kind of leakage.

In 1988, the British government enacted an order in response to a series of serious terrorist attacks. The order limits the right of silence to suspects accused in a police investigation and at any subsequent trial. The government said at the time that these measures were proclaimed that they were essential to combat terrorism in Northern Ireland. Unfortunately, the language of the order was not confined to terrorist acts, but limited the right to silence of all criminal suspects and accused in Northern Ireland.

Six years later, the British Parliament enacted similar legislation that applies to the entire United Kingdom. There is no reason to believe that a similar situation

cannot happen here in Canada. Someone who knows something about a terrorist will be compelled to answer questions before a judge now. Why not someone who knows something about a sex offender or an armed robber? This is a slippery slope indeed.

Bill C-36, as noted by my good friend Mr. Borovoy, is really an emergency piece of legislation disguised as an ordinary statute. A five-year sunset clause on some of its provisions that can be renewed for a further five years with a simple majority vote in both Houses of Parliament will not prevent these extraordinary state powers from becoming part of our normal legal process.

The aim of Bill C-36 is to provide greater security for Canadians but greater security at what cost? In our view, Bill C-36 comes at too high a cost, one that Canadians ought not to be willing to pay.

As legislators, ladies and gentlemen, you should be very concerned about moving ahead so quickly with such radical legislation. This legislation which, when passed, will have a significant, long-term and adverse effect upon our legal system.

There has been little public input, no meaningful public or parliamentary debate, no consultation with concerned stakeholders. These failings are of grave concern to the regulators of the legal profession in Canada, and we urge the committee to take under serious advisement the specific regulations contained within our written brief.

It is unfortunate that some have characterized our position as wanting to be above the law. Our concern is to ensure that citizens of Canada continue to enjoy their right to retain and be represented by independent counsel. We urge the committee to look closely at the seven recommendations that we urge upon you found within paragraph 17, 24, 28, 32, 37, 43, and 46 of our brief.

On behalf of the federation, I thank you Madam Chair and your colleagues for your invitation here this morning and the obvious attention you have paid to our submission. We would be pleased to answer any questions senators may have.

Senator Beaudoin: I was very impressed, Mr. Borovoy, by your suggestion that we adapt a sunset clause to the circumstance. Obviously, the choice was made by the government to select a bill that is permanent and not to declare an emergency, as was possible. It was a choice.

We must now comply with it. The fact is that those additional powers will be challenged to a certain extent in courts. All lawyers have raised points to challenge when appearing here. Some articles are particularly debatable. This is why we refer to the sunset clause. That is one way to deal with the problem.

You suggested that we have a shorter sunset clause, and that we select each point in particular and that we have a debate on this. I would like to know more about your idea. I am converted, since a certain time, to a sunset clause, but there are many possibilities.

Mr. Borovoy: Senator, I always like to address the converted.

This is how it would work. To whatever extent you are inclined to approve the bill in its current form, we suggest you subject those sections, all of them, to a one-year sunset clause. That would effectively mean that if the government wanted to have any of those measures linger longer in the law, they would be required to reintroduce those measures in manageable segments. At that time, within that year, there could be proper parliamentary and public debates.

Senator Beaudoin: They have already said that they accept the principle of the sunset, or the equivalent to a certain extent, to two points. That means that for all the rest, they are against a sunset clause. It means that 95 per cent of the bill will be submitted in one year to a new debate?

Mr. Borovoy: That is why we said the one vital role for the Senate in these things is to improve the processes in Parliament. I suggest the way to do that is for a senatorial initiative to subject the rest of the bill to a much shorter sunset clause. If the government wants those clauses to become permanent, they would be effectively forced during the year to reintroduce those sections. Then we could have a proper debate on them in manageable segments at a time.

Senator Beaudoin: One year is not very long, and that is 95 per cent of the bill.

Mr. Borovoy: I suggest that one year is much longer than six weeks. That is what we are talking about at the moment. It has been six weeks since the bill was first introduced. That is all the time that there has been to deal with more than 130 pages filled with complex new sections, many of which have never really come to public discussion in all this time. We suggest that a year would give much more opportunity for that. In the meantime, nothing would be lost to the government

because they could have the bill. They could just proceed, but it would be pressured if it wants to reintroduce any of those clauses. There would be time for proper debate. The Senate's role would be one of ensuring the integrity of the parliamentary processes.

Senator Beaudoin: I cannot agree more that the Senate is there for that. We are a legislative house and we are here to improve the legislation. That is what we do. People ignore that. The press ignores that we are doing that in our committee work. In my opinion -- and I may be biased, of course -- we are doing a very good job in that field.

I will think more about this, but I am somewhat surprised by your suggestion. In my opinion, the government has already made a choice. Except for two points, they want this bill to be permanent. Right from the beginning, I asked the Minister of Justice if this bill would be permanent and she said yes. I asked, is this bill subject to a notwithstanding clause? She said no. I agree with that. That is a good thing in practice, if this bill is challenged then. It could be challenged in several areas, especially the very legalistic areas.

Your proposition is interesting, but I have some difficulty understanding how it would work in practice. It is easy to identify all of the articles within a year. However, they will want to keep the bill in force and they cannot challenge all of them at the same time.

Mr. Borovoy: There would be no need for that. As I say, the bill would be intact. Once you approve it, they can go ahead.

Senator Beaudoin: That is clear.

Mr. Borovoy: They would have a year to decide which of those measures -- and it may be all of them -- they want as permanent. The difference is the increased pressure to reintroduce manageable segments and allow for better parliamentary and public debates. I am not suggesting that this is utopian or perfection. I am simply suggesting that this would be considerably less bad than what we have now.

Senator Bryden: A great deal could be asked of this panel and we do not have much time. I will try to ask questions that are illustrative of my concerns. I will go backwards in relation to how the presentations were given.

In relation to the Federation of Law Societies of Canada, you indicated that you are speaking for 81,000 lawyers. As they said during the American revolution, 40 million Frenchmen cannot be wrong. I assume 81,000 lawyers cannot be wrong either. However, we have heard a significant number of lawyers in this committee. If one analyzed those presentations, one would find that the lawyers not only do not make the same points. In many instances, they disagree with each other. Within this room, there are a significant number of lawyers. If you represent most of the lawyers in Canada, I presume you have picked up my associations which are the Canadian Bar Association and the New Brunswick Law Society. I certainly was not consulted on this matter and I certainly do not agree with most of the things that you say in your brief. As Senator Tkachuk would say, I want the 500 people who are watching on camera to realize that. You may be speaking for associations who represent different people; however, I do not believe it is fair to say that you are representing the views of 81,000 lawyers.

Senator Tkachuk: As long as you let everyone know you are a Liberal, too, Senator Bryden.

Senator Bryden: I thought they all knew.

I would ask you to address one point in relation to all the issues you have raised. That is the position taken by the minister before this committee yesterday or the day before. She said no one is above the law, including lawyers; we expect everyone to obey the law. I find it difficult to accept the assertion being made by the Federation of Law Societies of Canada that, in providing legal counsel to someone charged with terrorist activity, they could be charged with something like facilitation. That argument simply cannot be sustained and I cannot speak strongly enough against it.

The bill has been carefully drafted to ensure that it criminalizes only those who knowingly deal in profit and provide financial assistance.

Another significant concern is that there may be some fundamental misunderstanding of our ordinary law in the proposed section where you deal with the requirement for warrants for wiretaps and the concern with the Minister of Defence, it is my understanding that the way our law works is that the requirement for a warrant is a warrant to tap the phones of the target. You do not need a warrant, then, to be able to listen to the conversation of someone who calls the target or who the target calls.

The courts in Canada have no jurisdiction to target or to issue warrants for foreign targets. We do not have jurisdiction to do that. No court would do that. Yet, the establishment that is doing the listening is prohibited from targeting Canadians. The only targets that they are dealing with are foreign targets. Therefore, your indication that you can get a warrant to target the people that the Canadian security establishment would be listening to is, as I understand our law, just plain wrong. That is that aspect.

By the way, among lawyers who do not agree, Professor Monahan was here yesterday and he does not agree that we need a generalized sunset clause.

In any event, to say that you sunset the entire bill in one year, Mr. Borovoy, means that to a large extent we might as well not pass it and perhaps that is your point. The planning of the terrorist activity that occurred on September 11 took years in the development and planning for it and so on. To have been able to prevent it by the provisions in this bill, if they would have helped, would have taken months and years to do. There would be no opportunity to implement any of the valid provisions of this bill within a year if you are saying, "What is more, it is all done within 12 months." There will be a significant period of time for there to be any function.

Finally, Mr. Trudell, if you could address the issue of an independent ombudsman. Once again, there were a number of witnesses who were here whom we questioned. They had a number of difficulties with this ongoing role of some sort of super-agency. The Privacy Commissioner categorically objected to having another agency overseeing what he does. SIRC does the same thing as does the RCMP advisory board.

Another issue is that much of what may be poorly done or abused under this bill will arise in the provinces where much of the police activity will be done. What is the constitutional position in a federal ombudsman somehow being able to take over that jurisdiction? There are some provisions in relation to the Emergencies Act, but that is for a short period of time and was a negotiated deal, and was agreed to in advance.

Mr. Royal: I will try to be as brief as the senator, Madam Chairman. I did not mean to suggest and I do not think the committee inferred from my remarks that 81,000 lawyers ever speak with one voice on any topic, ever. What I am speaking of are the 14 constituent organizations that are umbrella organizations, all are

speaking with one voice as regulators of the profession and benchers of the various law societies.

Honourable senators should know that our brief went out to each of those organizations and they have each adopted the comments that are contained within the brief. That is what I meant by my remarks. I do not want you to misinterpret them, and I do not think you did.

To deal with the questions that you put to me specifically, dealing first with the question that is really raised in new section 83.18 of the bill, and is it possible that a lawyer conducting his or her proper professional duties could be caught by the offence provisions found within 83.18, I ask you to make note of these new subsections and then I will give you a possible scenario in which a lawyer could be targeted for prosecution.

If honourable senators look at new sections 83.18(1), 83.18(3), 83.13(3)(*b*), in particular, and 83.18 (4)(*c*), those are the provisions you need to have in mind when I present you with the scenario which I suggest is neither fanciful nor imaginary.

Let me suggest that I represent a group within Canada, members of whom from time to time are engaged in armed struggle with respect to a foreign government in a foreign territory. They would be a terrorist group, I suggest. I provide them with my skill or expertise as a lawyer, whether an immigration or criminal lawyer, securing release on bail, providing advice and so forth. I arrange for members to be lawfully freed in Canada as part of my professional obligation. The directions and instruction instructions for me to act come from the group abroad. They instruct me to act on behalf of the group to secure these people's release. There is no exemption in this proposed legislation for a lawyer acting lawfully giving legal advice and representation.

When I provide legal advice to this group who are making propaganda or raising money, I am aiding or abetting under the Criminal Code a person who is clearly facilitating a terrorist activity. I have potential liability. I do not think that is fanciful, Senator Bryden. I can tell you, and I am not in a position to name the lawyer, but from a senior lawyer we have received just such an inquiry, a real concern expressed by a senior and capable lawyer who is well-known to me.

Senator Bryden: There is cross-reference to the legal representation that is provided for in the Criminal Code where property has been frozen or seized to

permit a variation of the freezing or seizure in order to allow for living expenses or even to get your fees paid.

Mr. Royal: That is a different issue.

Senator Bryden: The same type of exemption relates. I cannot enter into a debate; I wish I could. The way you are interpreting those sections are missing the sections that are the overriding provisions and that is where people knowingly facilitate and so on.

Mr. Royal: This is why we need consultation, because it is impossible for you and I to have this kind of debate in this setting.

However, if what you say is the case, why do we not have a special provision in the bill providing an exemption for lawyers carrying on their proper professional activities? Why would we be concerned about putting that in the bill so it is clear?

Senator Bryden: Why do we not put in a reference that the Charter of Rights and Freedoms applies? There are certain things, and particularly lawyers, are presumed to know. One of them is the law.

Mr. Royal: All I am saying, senator, is that we have received inquiries from our members who are concerned. It is not clear in the legislation. As this legislation is so compendious, all-encompassing and broad, as Mr. Borovoy said, it is being thrust upon us in six weeks and our members have concerns.

The second area of inquiry you had is with respect to wiretapping and what you are talking about is the one-party consent; that is, where you can tap with one party's consent. I appreciate what you are saying about the court not having jurisdiction to issue an authorization for a target abroad. The response may be that you simply cannot do it and you should not leave it up to a single minister to do it on his or her fiat, in my respectful submission.

Senator Bryden: Are you saying that although we can target Canadian citizens with a warrant, to audit their conversations, we should not be entitled to audit the conversations on a worldwide basis?

Mr. Royal: My discomfort is leaving it up to a single minister, without review power.

Senator Bryden: Who would you leave it up to? The courts cannot do it. They have no jurisdiction. They would not do it because they have no jurisdiction.

Mr. Royal: I am not sure that actually follows. You could give the court jurisdiction, if you wanted to. Why could you not?

Senator Bryden: What would you do, make him *persona designata* or something?

Mr. Royal: If you look at this legislation, you will see there are broad provisions with respect to extraterritoriality. Section 7 of the code is significantly amended to allow this extraterritorial reach of this legislation, presumably you could encompass it within that legislation.

The Chairman: I will have to intervene here and draw attention to the clock. This is debate, and it is good debate, but Senator Bryden has asked questions of Mr. Borovoy, as well as Mr. Trudell, and we want to hear their response. Also I have three other senators who are eager to ask questions.

Mr. Borovoy: To pick up on that last exchange, nothing would prevent the Parliament of Canada from conferring the jurisdiction on the courts to issue warrants for conversations between here and elsewhere. There is nothing to limit that.

To respond to the question that you asked me, senator, I would say to you it simply does not follow that if you enact the bill and then subject it to a one-year sunset clause, you may as well not enact it at all. Of course that does not follow. You would have the bill immediately. The government and all police forces could then act on it. If there were any problem about some of these provisions requiring re-enactment or anything of that kind, it would be easy enough to provide for that right now, just as the bill already does with respect to the five-year sunset on preventive detentions and investigative hearings. It provides for the possibility that there may be some damage to investigations that carry on longer. That is easy enough to deal with. In that way, nothing would be lost in the government's fight against terrorism.

What would be gained is the possibility, at long last, of a proper parliamentary and public debate with respect to any sections of this bill that are designed to linger indefinitely.

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Mr. Trudell: The ombudsman that we are suggesting here oversees. What have you in proposed section 83.31 is the annual report provisions that provides that the Attorney General of Canada and the attorney general of every province must file a report. It is not enough to say, "We cannot do anything about it because all these investigative hearings and preventive arrests will happen in the province." Proposed section 83.31, the new annual report provisions, calls upon a report from only the Attorney General of Canada but the attorney general of the provinces also.

The problem with the annual report, the problem with the sunset clause and the problem with the three-year review is that they all have off-ramps.

This is how I will answer your question, senator. The proposed section 83.31(4) sets out a limitation. It states:

> The annual report shall not contain any information the disclosure of which would
>
> (*a*) compromise or hinder an ongoing investigation…
>
> (*b*) endanger the life or safety of any person;
>
> (*c*) prejudice a legal proceeding; or
>
> (*d*) otherwise be contrary to the public interest.

We are putting a lot of trust in someone who says, "Look, if we give you the information it is contrary to the public interest." We say this -- give it to the ombudsman so that we will have meaningful reporting to the ombudsman. The annual report is meaningless. It is absolutely meaningless because the minister can stand up and say, "If you only knew what I knew. I cannot give it to you because it might be contrary to the public interest." It might, which is more relevant, probably if there is a real threat, endanger a prosecution, but someone needs to know that.

It is not a constitutional problem at all, with respect, because the annual provision calls for a report by not only the federal government but the provinces. All we want is someone to be the gatherer of all these extraordinary powers and provisions and then report annually.

Senator Bryden: When he gets the reports from the provincial attorneys general, what does he do with them?

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Mr. Trudell: He reports annually to the House.

Senator Bryden: Which house?

Mr. Trudell: The House of Commons.

Senator Bryden: We do have separation of powers in this country.

Mr. Trudell: It does not matter whether I am a police officer with the RCMP in Ottawa or an OPP officer in Ontario or an officer in British Columbia. That is what this is about. I am acting on preventive arrest under the Criminal Code, a federal statute. So it is not subdivided. It is a federal statute.

Senator Bryden: Why do the police not then report directly to the Attorney General of Canada?

Mr. Trudell: Do you mean now?

Senator Bryden: Under this bill. Why is it separate? Why does it go to the provincial attorneys general? Their report, presumably, will be tabled in their legislature.

Mr. Trudell: Senator Bryden, the provincial attorneys general have to give consent in terms of some of the provisions and some of the rights.

I respectfully submit that a report perhaps should go to the province but, as it says in clause 83.31, the attorney general of the province should then be reporting to the ombudsman. There is a call here for the attorney general of the province to report, gather the information on an annual basis of when these extraordinary powers are used. There it is. What will they do with it?

I say make it clear. They give it to the ombudsman and the ombudsman reports to Parliament. There is nothing the matter with that.

Senator Bryden: You are assuming they will do that. You cannot compel them to do that.

Mr. Trudell: There is another pair of eyes, which is all I am saying to you. There will be abuses here.

Senator Jaffer: Mr. Borovoy, the last time you were in front of us we were talking about democratic rights. I think you have drafted this, at my request, to

have something in front of us. I very much thank you for that. I know you have put in a lot of work on this draft, which is something we should be doing. Thank you for your assistance.

I have just been looking at it now. You talk about a regime outside Canada with a system of government that is not based on freely given consent. How would you address the issue of one-party states?

Mr. Borovoy: To whatever extent the citizens in that country did not have an alternative, I would suggest that their consent is not freely given.

Senator Tkachuk: I wish to get to your intriguing proposal about the one-year sunset clause. Frankly, I am of the view that I am not sure we need this bill at all.

I am a supporter of increased funding for defence, CSIS and other related areas where government can really make efforts to prevent terrorism, but I do not see any evidence that any Canadian citizens are terrorists. This is a problem of foreign organizations coming into North America, and in this particular case, to New York. Some enter surreptitiously, and many of them have illegal passports or student visas, and they are able to commit a terrorist act such as bombing the trade towers.

Let us get back to Senator Bryden's point. You are all in the legal profession, and I am not, but are there not plenty of provisions in the Criminal Code and in the current justice system, such that if we made some changes to the refugee policy, it would allow us to fight terrorism without this bill?

Mr. Borovoy: Senator Tkachuk, that may be the case, but I do not need to resolve that problem in order to make the recommendation that I have.

I am saying, even assume that the bill is warranted, that some such powers ought to be adopted. Even on that assumption, nothing would be lost to the government's plans, because it could act immediately; it would have the bill it wants. However, by sun-setting it, that effectively forces the government, if it wants any of those sections to endure for a longer period, to reintroduce those sections during the year. If the government does that in a piecemeal fashion -- manageable segments at a time -- then at least we would have the protection of a proper public and parliamentary debate, because the process would be slowed down.

In the meantime, they would have their bill.

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Senator Tkachuk: Let me put it another way: What provisions in the bill, assuming my first supposition is correct that there is no evidence that Canadian citizens are terrorists, make it easier to find terrorists than we can find them now, using the existing provisions in the Criminal Code?

Mr. Trudell: Can I respond to that?

Senator Tkachuk, it seems that the preventive arrest and investigative hearing form an investigative tool that the government has said they need to investigate and eliminate the threat of terrorism. This bill is based on trust. You might be right that we do not need it and that the Criminal Code is already empowered to do this, but this bill is based upon trust that we are living in extraordinary times. Our position is: Trust, but verify.

Senator Tkachuk: I am with you. If we were living in extraordinary times, there could be short-term war measure provisions; or there could be a short-term, three-year bill under emergency powers. However, this is forever.

Mr. Trudell: That is why Mr. Borovoy's point is correct, and that is why, if you read the sunset provision, you will understand that it is not a sunset provision. Someone will introduce a resolution that says we need to continue it, and it will last for another five years; and it is only in relation to the extraordinary powers of preventive arrest and investigative hearings. That is all the sunset clause covers. There is no sunset clause.

Senator Tkachuk: I agree with you, there is not.

(French follows -- Senator Poulin: J’ai beaucoup apprécié la qualité...)

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(après anglais)

Le sénateur Poulin: J’ai beaucoup apprécié la qualité de vos interventions. J'ai été surprise du fait que vous avez dit que cette loi, et je vais utiliser les mots qui ont été utilisés, «it’s been thrust upon lawyers».

Nous sommes tous d'accord pour dire que nous vivons des circonstances extraordinaires. Les événements du 11 septembre, à notre grande surprise, ont créé un choc collectif et individuel, en raison des circonstances qui se sont produites cette journée. Si cette catastrophe n'avait pas eu lieu, on ne serait pas réuni aujourd'hui pour discuter du projet de loi C-36.

Ce qu’il y a de plus sérieux encore, c'est qu'il y a des actes terroristes qui se continuent au moment où on se parle dans différents endroits dans le monde entier. On est d'accord pour dire que le Canada n'est pas à l'abri de cette affreuse réalité que cause le terrorisme et ses conséquences. Les individus et les familles ainsi que le commerce et les relations internationales en sont affectés, et le sentiment de sécurité des Canadiens est altéré.

Depuis que l’on étudie le projet de loi C-36, j'ai reçu beaucoup d'appels. Ces appels sont des demandes nous pressant davantage à nous prononcer sur le projet de loi C-36. Les gens formulant ces appels nous demande d’être plus exigeants sur le plan législatif en ce qui concerne la sécurité.

Nous avons entendu plusieurs témoins nous dire qu’il y a équilibre entre le besoin de sécurité et le respect des droits et libertés des personnes quant au projet de loi C-36.

On a entendu au Sénat, au moment de l’étude au préalable et lors de réunions continues, quelque 40 témoins. À la Chambre des communes, le comité a entendu près de quatre-vingts témoins avec un horaire accéléré.

De retour au comité du Sénat, dans le processus habituel, on aura entendu une quarantaine de témoins. Cela veut dire environ 160 témoins. Quand on me dit que le Sénat ne consulte pas, je suis très surprise. Cela fait plus de dix ans que le Sénat n'a pas utilisé le règlement qui lui permet de faire une étude au préalable.

Nous faisons notre travail de façon accélérée, même dans des circonstances extraordinaires, parce que nous ne savons pas ce que l'avenir nous réserve.

Cependant, nous sommes conscients que nous avons une longue tradition du respect des droits humains.

(Sén. Poulin: We are thrusting this legislation on lawyers).(anglais suit)

(Following French -- Sen. Poulin continuing)

We are thrusting this legislation on lawyers. Mr. Royal, will you comment on my surprise at this?

Mr. Royal: I am pleased to do so, Senator Poulin. You will forgive me for responding in English.

The tragic incidents of September 11, which we are so familiar with, elicited the response of a bill on October 15 out of the air, so to speak. There was no consultation before the bill was presented to the House, no consultation with the bar or with any stakeholders or interested groups that I am aware of. There was no invitation to provide input to the bill. We were presented with this mammoth, 145-page, 170-provision bill that you are well familiar with.

We had to come up to speed very quickly. We tried to get before the Commons committee, but we did not put our request in on time. There is a rush to judgment happening. There is a rush to pass this bill. It has significant, potential, long-term deleterious effects on practicing lawyers. It breaches a long-standing tradition that I am to hold in confidence information that I receive from my client in our professional relationship.

Those sorts of things are important to the bar, and we must be careful that, although we need to respond quickly, we do not need to do, and we ought not to do, long-term damage to the lawyer-client relationship.

Senator Poulin: I have a supplementary, Madam Chair.

The Hon. the Speaker: Briefly, Senator Poulin, because we are at the end of our time.

Senator Poulin: I share with you your concerns about the implementation of the bill, and I think that is shared by everyone who has either appeared before us as a witness or who was sitting here as a members of the committees in both Houses.

Do you not feel, though, that the tools of review and tools of reporting that are given will definitely ensure the concerns that you have will be addressed?

Mr. Royal: No, I will echo the remarks of Mr. Trudell. I do not think that the shallow reporting provisions will give us any real --

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Mr. Borovoy: A mechanistic report on numbers does not give you a proper evaluation of what is going on. To have a proper evaluation, it should come not from a minister, Solicitor General or Attorney General, who has political interests in making the system look good. I do not mean to impugn anyone's integrity with that, but that is the perception that the public is bound to have. It should come from an independent source.

You heard many witnesses. Please understand that those witnesses did not have an opportunity to collaborate with each other. One did not know what the other was going to say; yet very often they were repeating each other. Numbers of provisions of this bill were never addressed in any of these sessions. It could not be done with this kind of process.

Senator Poulin: I have to admit that I was personally pressured when the heads of the agencies who report to the different ministers reassured us that the reports would not only be quantitative, but would also be qualitative. I think everyone is taking this very seriously.

Mr. Borovoy: The bill requires only that it be quantities, so that is all that the public will get.

Mr. Trudell: In our material we placed before you, we have given you examples of what certain government ministers or agents could say. They could say, "We cannot report this to you now because of these escape clauses." That is our concern.

The Chairman: Thank you very much to our guests. Thank you very much for taking the time to come here today. Obviously this could go on endlessly, but we have had a good discussion. I much appreciate the time you have given to it.

I would like to remark that today is the day, colleagues, that we are mark the anniversary of the 1989 massacre of 14 young women at L'École Polytechnique in Montreal. Parliament established in 1991 that December 6 would be a national day of remembrance. Throughout the Senate at 11:00 a.m., we will pause for one moment in all of our committees and workplaces to remember that very sad day. I wanted you to know that.

We are moving to our third and final witness of this morning in the hearings of the Special Committee of the Senate on the Subject Matter of Bill C-36.

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We have with us now the Information Commissioner of Canada, the honourable John Reid, and with him for this presentation are Alan Leadbeater, who is the Deputy Information Commissioner of Canada, Dan Dupuis, the Director General of investigations and Reviews within the office of the Information Commissioner, and Daniel Brunet, the General Counsel for the Commission.

Mr. Reid, thank you very much for coming. I know you have been out of the country. It is a pleasure to have you here today. You were here for our pre-study, and we are glad to have you back again.

Mr. John Reid, Information Commissioner of Canada: Thank you very much, Madam Chair. I am grateful for the opportunity.

My purpose is to express concerns about amendments to the bill that have been made since the pre-study was done by this honourable Senate committee. I take the Minister of Justice at her word that certain of these amendments were intended to minimize the effect of the proposed section 38.13 certificate on the rights of Canadians to an independent investigation by my office. However, the wording of the amendments, in my view, does not accomplish what the minister intended.

As now worded, clauses 43 and 87 of Bill C-36 give the Attorney General of Canada more power to undermine the independence and effectiveness of my office than was the case with the original wording of Bill C-36. In particular, the new amendments give the Attorney General the power to bring to a halt the entirety of an investigation, even if only a very small portion of the investigation relates to information covered by a section 38.13 certificate.

Let me take you through how the amendments work to accomplish this unprecedented result. First, under the amended version of proposed section 38.13 of the Canada Evidence Act, the Attorney General is authorized to issue a certificate prohibiting disclosure of information in connection with "a proceeding," which includes an investigation of a complaint by the Information Commissioner after an order is made "that would result in the disclosure of the information." In the absence of qualifying words such as "disclosure to the public or a member of the public," it would be open to the Attorney General to issue a certificate under section 38.13 to resist an order for the production of records made by the Information Commissioner during an investigation.

The minister and her officials insist that it is not the intention of section 38.13 to enable a certificate to be issued in response to an order from the commissioner

for the production of records to him and not for disclosure to the public or any member of the public.

In her evidence before the House of Commons Committee on Justice and Human Rights on November 20, 2001, the minister testified that "the certificate could only be issued after judicial review of an access or privacy request." Yet, in three cases currently before the Federal Court, the Attorney General is resisting the provision of this type of information to the commissioner. In these cases, she is arguing that compliance with an order to the commissioner for production of records to him constitutes "a disclosure" for the purposes of sections 37 and 38 of the Canada Evidence Act.

It is vital, in these circumstances, for proposed section 38.13(1) of the Canada Evidence Act to be further amended to make it clear, in line 27, page 91, that the certificate may be only issued after an order or decision that would result in the disclosure "to the public or a member of the public" of information to be subject to the certificate has been made. I consider it vital to secure this amendment because of the effect the certificate will have under the amendments on the role of the Information Commissioner by virtue of the proposal to amend the Access to Information Act by adding section 69.1.

The proposed section 69.1 has been amended in a most troubling way since Bill C-36 was subject to pre-study by this committee. It now provides that where a certificate is issued before or after a complaint to the Information Commissioner is made, all proceedings relating to that complaint are, in effect, discontinued..

As some senators may know, access requesters normally do not request access to a specified record. Rather, they normally request access to records on a particular subject, as for example the efficiency of Canada's gun registry, or the replacement by National Defence of Sea King helicopters, or Health Canada's response to the anthrax scare. Some records relating to the subject of a request may be denied based on one or more of the exemptions set out in the Access to Information Act and, if so, requesters have the right to complain to the Information Commissioner to obtain an independent investigation into whether or not secrecy is justified.

It may transpire that during the investigation a portion of the withheld information may be the subject of a certificate under section 38.13 of the Canada Evidence Act. Under the current wording of proposed section 69.1 of the Access to Information Act, the investigation of all aspects of the complaint, including

refusals to disclose information not covered by a section 38.13 certificate, would be discontinued. Clearly, this is an unnecessarily broad interference with the right of Canadians to an independent review of decisions by government to refuse access to records. As I said, this troubling result is one that the minister professes not to intend.

The clearest evidence that this is a mistake, requiring correction, is found by comparing the proposed section 68.1(2)(*a*) of the Access to Information Act with the proposed section 70.1(2)(*a*) of the Privacy Act. Senators will find that in attachment number one that we have provided for you.

In the Privacy Act provision, the term "information" rather than "complaint" is used. The Privacy Commissioner's investigation will only be discontinued after a certificate is issued insofar as it relates to the information covered by the certificate. On the other hand, the entirety of the Information Commissioner's investigation into a complaint will be discontinued. This error of drafting results in the abrogation of a right of Canadian citizens that the Federal Court of Canada has called quasi-constitutional. It is important that this error be corrected.

There is an even more fundamental concern with the proposed section 69.1 of the Access to Information Act. There is no reason why a certificate under section 38.13 of the Canada Evidence Act should be allowed to have any effect on the investigatory role of either the Information Commissioner or the Privacy Commissioner. Neither of them has the power to disclose or order the disclosure of information that is covered by a section 38.13 certificate. That is why I have recommended the following.

First, proposed section 69.1(1) of the Access to Information Act should be amended to suspend only the portions of the act that relate to judicial review and which, hence, could result in disclosure of the material covered by a certificate used under section 38.13 of the Canada Evidence Act. Second, proposed section 69.1(2) should be amended so as to avoid any discontinuance of the commissioner's investigations. Senators will see that in attachment number 2. A similar amendment should be made to proposed section 70.1 of the Privacy Act.

There can be only one reason to limit these officers of Parliament -- the Information and Privacy Commissioners -- to carrying out their watchdog roles with respect to denials of access to information. Since it is not because there is a possibility that disclosure might result -- neither commissioner has the power to release information or to order it released -- it must be to muzzle them in their

independent reporting function to the Senate, the House of Commons and the people of Canada.

If these proposed sections -- 69.1 of the Access to Information Act and 70.1 of the Privacy Act -- are not further amended, as previously described, there will be no possibility in cases where section 38.13 certificates are issued for the Information and Privacy Commissioners to make recommendations to government about excesses of secrecy by means of certificates, nor to report to complainants and Parliament as to any excesses there may be in the use of certificates by the Attorney General.

As I said in my letter to this committee on November 28, 2001, the power proposed in section 69.1 of the Access to Information Act and in section 70.1 of the Privacy Act is a power to silence watchdog officers of Parliament which this minister may not have intended and may not use but which stands ripe for abuse for years to come.

In closing, may I say a word concerning clause 43 of the bill wherein the Canada Evidence Act is amended by adding section 38.13(1) to create an opportunity to seek, from a judge of the Federal Court of Appeal, an order varying or cancelling a section 38.13 certificate.

If this is the quid pro quo of cutting off independent review under the Access to Information Act, it is woefully inadequate. The review permitted under the proposed section 38.131 of the Canada Evidence Act, at paragraphs 8, 9 and 10, and you can see that in an attachment number 3, that review would be so limited as to be fruitless for any objector and it would be demeaning to the reviewing judge. The reviewing judge's sole role would be to review the information for the purpose of deciding whether or not it relates to, first, information disclosed in confidence from or in relation to a foreign entity; two, national defence; or, three, security.

That means that virtually all information held by CSIS, CSE, DND, DFAIT, C and I, the RCMP, or most other departments, would easily meet the relating test in one or more of these categories. This is a form of judicial review that cannot assess the sensitivity of the information and is so stacked in favour of the Attorney General, that it is not mere hyperbole to describe it as window dressing. This type of review does not subject the decisions of the Attorney General to issue certificates under new section 38.13 to any meaningful accountability.

Honourable senators will recall that after my previous experience before this committee I provided a chart indicating the form of independent review of secrecy certificates provided in the legislation of our principal allies, the U.S.A., the United Kingdom, Australia and New Zealand. Perhaps that chart helped persuade members of this committee to recommend that the bill be amended to offer judicial review of a proposed section 38.13 certificate.

I wish to point out that the relating test type of judicial review provided in amended Bill-C36 does not resemble in any way the forms of judicial review contained in the legislation of our allies. What the minister has proposed falls far short of what these other countries are willing to provide to their citizens by way of independent review. Even those of us who support strong anti-terrorism measures have every right to expect no less here in Canada.

Thank you for your patient attention.

Senator Murray: Mr. Reid, when the Privacy Commissioner, Mr. Radwanski, was here the other day, he was almost lyrical in his praise of the amendments that had been accepted by the minister and the House of Commons to those proposed sections of the bill that that are of particular interest to him. One would think that this was biggest advance for privacy since the invention of Venetian blinds. I agree with him to the extent that the minister gave him more than he asked for. Not only do the amendments restore the role of his office and his role in the process, they also did what he did not ask, which was to restore a process of judicial appeal. He was very happy and I share his view of that.

Is it that you disagree with his perspective and his views on that matter, or you have, in your role, been treated differently and less advantageously, if I can put it that way, by the House of Commons in these amendments?

Mr. Reid: If you go back and look at his original testimony at the same time as mine, we both agreed that the best situation would be not to touch either the Privacy Act or the Access to Information Act. The way those acts operate, they provide more than full protection for that which the government wishes to protect. That is particularly true when it comes to national defence, national security and information received from a foreign entity. These are well covered in both acts now.

The minister and the government felt it necessary to amend the bill so as to provide an absolute guarantee that certain information could be protected from

disclosure. That is the certificate and the way it applies. Even accepting for the moment the need for that guarantee has been demonstrated, there is no need to go as far as this bill does in order to secure such a guarantee.

My view is that guarantee can be achieved without interfering in any way with the investigatory process of either the Privacy Commissioner or the Access to Information Commissioner. We are both lawfully bound to keep secret anything that the government wants to be kept secret. We cannot order any information disclosed. We can only recommend additional disclosure if we believe that the net of secrecy has been cast too widely.

The minister has clearly indicated that there is no fear of disclosure during the commissioners' investigations. She has given no reason why a certificate should intrude in any way into those investigations. That is why I proposed amendment number 2.

Second, as I said in my remarks, there is a difference in treatment in terms of the investigations by the Privacy Commissioner and by the Access to Information Commissioner. In the case of the Privacy Commissioner, when a certificate is issued, it applies only to the information covered by the certificate. That means that he can continue his investigation, but he cannot see that narrow amount of information.

In the case of the Information Commissioner, when a certificate is issued, it applies to the complaint. That is, it causes the investigation to cease and to stop.

There is a tremendous difference in the way each office is treated.

Senator Murray: As I recall Mr. Radwanski's testimony, he emphasized the fact that this would take place after an order had been made, in his case. In your case, it is before an order had been made; is that correct?

Mr. Reid: That is correct. Once the order comes, the investigation ceases. When an order comes in the case of his investigation, the information is eliminated, but the investigation continues.

Senator Murray: Which of the amendments would solve that problem for you?

Mr. Reid: That is attachment two.

Senator Bryden: On this point, Minister McLellan said that if an order for disclosure in relation to your act was made, and if the order dealt totally or in part with information that fell within those limited categories, and then she would issue a certificate. She said that the Access to Information Commissioner could continue with all other aspects of investigation without being affected.

Mr. Reid: That is not what the legislation says. That applies to the Privacy Commissioner; it does not apply to the Information Commissioner's investigations.

Mr. Alan Leadbeater, Deputy Commissioner of Access to Information: Honourable senators, if you look at attachment one, page 1 is the provision relating to the Access to Information Act. Subparagraph (2)(*a*), says that once a certificate is issued, all proceedings under this bill in respect of the complaint are discontinued.

If you look at the corresponding section, which is the next page of attachment one, with respect to the Privacy Act, the same paragraph 2(*a*) says that where a certificate is issued, all proceedings under this act with respect to that information are discontinued.

Senator Bryden: I am aware of that.

The Chairman: Senators, it is 11 o'clock. We will pause for a moment of silence in remembrance of the massacre of 14 women at L'École Polytechnique in Montreal in 1989.

[*Moment of silence observed*.]

Senator Bryden: Witnesses, I do not have the exact quote in front of me but the minister certainly indicated that, read as a whole, the impact of the complaint reference and the information reference in the privacy bill are intended to be the same. You argue that it does not say that, but the fact is that it is the case. It is a personal decision by the minister. Her power in this particular provision cannot be delegated. The minister alone can do this.

If this is a drafting error -- and she did not say that -- and if it were not possible to correct that drafting error in this process, a miscellaneous corrections bill could introduce the correction. We get such bills on a regular basis. I do not know whether the minister would make that sort of commitment.

Senator Murray: That is what clause-by-clause is for.

Senator Bryden: I wanted to raise that. Clearly that was the impression. I do not think anyone disagrees. The intent of the minister is that the position of your office would be the same as that of the Privacy Commissioner.

Mr. Reid: That is why I have referred to it as an error in drafting, senator. One would hope it would be possible to have that error corrected before the bill becomes final in law.

Senator Fraser: I start, with some trepidation, by pointing out a small error in Senator Murray's remarks. This is just for the record. The Privacy Act provisions do include provision for certificates that are issued before a complaint is filed to the Privacy Commissioner. As I understand the testimony that has been brought here on several occasions now by the various ministers and officials, that means if a certificate has been issued in relation to some other court proceeding, the minister will not pre-empt a citizen's right before the citizen has even taken any action. It is all there on page 133 of the bill.

Mr. Reid, I am distressed by your dismissal of judicial review as window dressing. I find that quite distressing and, as I read the bill, I also find it puzzling. In particular, I think it is worth focusing on the judge's ability to vary the terms of the certificate because from that flows, it seems to me, an assurance that your other fears of the whole complaint being stopped in its tracks. Your fears should be assuaged by that. Otherwise, what would be the point of varying the terms of the certificate. If the certificate could in fact just stop everything, then either you uphold the certificate or you do not uphold the certificate but there is no point in varying it.

If you vary it, surely the point is to ensure that in all respects the prohibition on disclosure and on other related matters will be kept as narrow as possible to relate to the protection of national defence and national security or to information that has been obtained in confidence from a foreign state. I believe all states consider that such material should be kept confidential.

That strikes me as the only possible reason one would allow a judge to vary the terms of the certificate.

Mr. Reid: If you look at what the judge can actually do, he can only vary it in relationship to the way the information is referenced. The test that is provided is a very low-level test. It simply has to "relate to."

Look at what a department like External Affairs does. Almost every document "relates to." Every document in the Department of National Defence "relates to." That is a very low-level test.

Senator Fraser: I can think of many things that do not.

Mr. Reid: You would be surprised at what "relates to" means in judicial terms. The barest connection means it "relates to." That is the interpretation. If in fact it "relates to," the judge will not have much power to vary the certificate.

Senator Fraser: The judge has, in this bill, the power to vary the certificate.

Mr. Reid: He has the power but that power is limited by the term "relates to." If you wanted to give him a power to change the certificate that would be useful and meaningful, you would then change the test from "relates to" to having a higher standard. There are other words that could be used there.

Senator Fraser: The judge determines what "relates to" means and I suspect that you and I will not here settle our disagreement about what this paragraph means. I, at any rate, find it a very substantial protection.

Senator Beaudoin: Right from the beginning, I suggested including access to the court. Finally, I won my case on that. I understand your preoccupation. If anyone is in favour of recognizing the difference between executive, legislative and judicial, I fall in that category.

I am in favour of access to the court because our judicial system has not exaggerated in the past. We have a long tradition of independence. It is the only branch of the state that is entirely impartial in a sense. In the legislative and executive branches, we are not always impartial. Politics is playing.

However, they should not be involved at the judicial level. In constitutional law, the Supreme Court has been very good, in my opinion. They do not invade the legislative and the executive field. I am inclined to agree with what is there.

I know that some people say that when they interpret the Charter of Rights and Freedoms they go too far sometimes, but I disagree strongly. They are doing their job. Their job is to be sure that there is democracy under the law and the Charter of Rights.

Therefore, I am glad that there is such an amendment.

Mr. Leadbeater: We are not aware of any judicial review test that is currently available to Canadians under other legislation that is this low. This test is lower than any tests available to our allies in reviewing certificates.

When the minister spoke to us, she said that she was concerned about sensitivity of information. The court is not entitled to assess the sensitivity of the information. The court cannot determine if the minister is overusing the certificate? The role of the court is simply to say whether the information relates to national defence.

That test is a lower level test that is used for any judicial review in the country. We take the position that the test is stacked in favour of the Attorney General. Their initial fear was of a misguided judge. That is why they had to have this certificate, and they have put in this form of judicial review because it, in effect, allows them to satisfy themselves that they will always win those cases.

Surely the minister will never certify information that does not relate to national defence, but will it always be of sufficient sensitivity that it requires complete prohibition? That is the issue at which the court will not be able to look.

Senator Beaudoin: When there is a question of interpretation, the judge is in the best position to rule whether it is legal or illegal, whether it is constitutional or unconstitutional. This is our system. I consider it to be the basis of our democracy.

If the courts exaggerate, we should have a debate in Parliament and speak about it. They had a debate in the United States in the depression when Roosevelt made some appointment to the Supreme Court, but we never had the debate like that in Canada because they have not exaggerated. When the Charter of Rights was enshrined in the Constitution they did a magnificent job dealing with 450 cases in 15 years. It is unbelievable. I am inclined to defend the courts on this. They are very useful. When we are living in difficult times, such as now, I think the courts are useful.

Mr. Leadbeater: We agree. We simply say to give them their normal role, do not give them a reduced role. Give them their normal role.

Mr. Reid: It is also interesting that there is no appeal from the decision, which is unusual.

Senator Beaudoin: I like the appeal. I think the appeal is part of the rule of law, if there is an access to the court. Unless we have good reasons to stop the appeal, we should never do that. That is my belief. I have never changed my mind on this.

Mr. Reid: In this particular provision, there is no appeal.

Senator Beaudoin: At least, I won the first instance.

Mr. Reid: I salute you on that. You have been much more successful than I have been.

(French follows: Senator Poulin:)

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(après anglais)

Le sénateur Poulin: En ce qui concerne l'accès à l'information, vous dites ne pas être à l'aise avec l'amendement proposé -- suite à la revue par la préétude du Sénat -- parce qu'une décision pourrait être prise par un juge d'une cour d'appel fédérale. Vous trouvez que cet amendement est inadéquat. J'aimerais vous lire ce que la ministre de la justice nous a dit concernant votre inquiétude et je cite:

(Sen. Poulin: Information Commissioner Reid objects to what he considers …)

(anglais suit)

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(Following French: Poulin continuing)

He says:

> Information Commissioner Reid objects to what he considers a weak review mechanism. A decision of the government to amend Bill C-36 to include a Federal Court review was made in response to a Senate recommendation and in response to concerns raised by a number of stakeholders, the Federal Court of Appeal has been given broad powers including the power to quash or vary a certificate if information does not fall within the limited categories set out in Bill C-36. The Information Commissioner has suggested that other jurisdictions have greater review powers than those set out in the bill. However, Bill C-36 clearly provides a more than adequate review mechanism.

This is the Minister of Justice speaking.

> Let me briefly inform you about some of the other countries to which we compare ourselves regularly. For example, the courts in Australia and New Zealand do not have the power to quash but they only have the power to refer the matter back to the appropriate minister with a recommendation that the minister give further consideration to the issue. That is it. The minister can ignore that recommendation at that time and proceed with a certificate banning the information. In the United States, the courts have the power to quash the certificate and the review mechanism is based on a class test very similar to the one proposed in Bill C-36.
>
> In conclusion, having reviewed the Information Commissioner's representations, we do not believe that further amendments are required to adequately protect his important role.

(French follows: Senator Poulin continuing)

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(après anglais)(Sén. Poulin)

Quand j'ai entendu la ministre de la justice nous dire cela, j'ai tenté de me rappeler l'esprit avec lequel la Loi sur l'accès à l'information a été adoptée. Cette loi soutient votre agence, monsieur le commissaire. Je me suis souvenue que le but de cette loi était d'augmenter la transparence de la gestion des fonds publics. L'esprit du projet de loi C-36 est d'assurer que les Canadiens et les Canadiennes ont les moyens de prévenir des actions qui mènent au terrorisme.

On a entendu plusieurs témoins louer l'équilibre entre un besoin de sécurité -- on sait que dans ce besoin existe une nécessité de confidentialité -- et le respect des législations existantes dont votre législation, votre agence et la Charte des droits et libertés. M. Leadbeater disait que nous devrions prendre des moyens normaux. Nous sommes tous d'accord pour dire que nous sommes dans des temps extraordinaires. Ne trouvez-vous pas qu'il y a quand même un équilibre entre la Loi sur l'accès à l'information et le besoin urgent d'augmenter les moyens de sécurité pour prévenir ce qui pourrait arriver si on n'avait pas ces moyens ?

(11:20 -- M. Reid : The minister and I disagree on what the courts in Australia…)(anglais suit)

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(Following French)

Mr. Reid: The minister and I disagree on what the courts in Australia and in New Zealand can do. They do have the same power to vary, rescind or quash a certificate. The review bodies in the United States and in the United Kingdom have the same powers. If you look at the judicial and administrative reviews provided in the United States, the United Kingdom, Australia and New Zealand, you will see that they provide that the court can have a full review of the records and discuss the merits of secrecy. Where a review relates to a class-based reason for security, as opposed to an injury-based test, the classes are extensively defined in their legislation. They are not defined in our legislation. Ours is a much looser kind of system and the test is much lower.

To go to your point concerning the impact of the legislation on the Access to Information Act, basically the bill removes, in theory and in practice, significant amounts of information that have been traditionally made available to Canadians under the act -- information that would not be considered, in my judgment, secret. It goes far beyond the provisions in the Access to Information Act under which no secret has ever come out in the 18 years from the Department of Defence, or from the Department of Foreign Affairs, or from CSIS, or from the RCMP. This is a significant move to take information out of the normal course of circulation in Canada.

Is it justified under the terms and conditions in which we live today? I think not, at this stage, because it has not been proven. I am fearful that, once these provisions are in the law, they will be in the law and they will not be subject to review. They will basically stay there because it is always easier for governments to take away informational rights than it is to give informational rights.

Senator Tkachuk: I am asking for information regarding government advertising in the Department of Defence. Right now, I can obtain that information if I go through the proper procedures. The scenario is such that I have asked for that information. Walk me through the process to show us what the government can do to prevent me from obtaining that information. From what you said, they can prevent me from accessing that information.

Mr. Leadbeater: To take your example, first your request is received by the department. Some information they are prepared to give you and some of they will apply exemptions to. For example, they may exempt some of the actual contract

rates that they have been charged to an advertiser. That would be under one of the exemptions of the act.

However, there may also be one contract in that group that the minister feels is sensitive in respect of national defence and to that applies a certificate. Now, the certificate may have been applied before we receive the complaint, if, for example, there is a related proceeding, or it may be we contend under the provision, applied as soon as we ask to see the record. Once you complain to us about being denied this, our first step is to go to the minister to ask for the record. Normally, we receive all the records, and we make a judgment about the appropriateness. However, this time, in response to our request to see the document, the minister may put on the section 38.13 certificate, which is exactly what she has done in a case that we are already investigating against national defence.

Under the provisions of the bill that is before you, our investigation must come to a halt at the moment of the certificate, even though part of the information was denied to you, not under the certificate at all, but under one of the other exemption provisions of the act.

We cannot continue to look at that other information; and we cannot continue to look at any portion of the complaint, because of the wording, which you have seen in Appendix One such that all proceedings in respect of the complaint are discontinued.

Our view is that, in years to come, when that comes forward for judicial interpretation, the minister's view of what she intended will not be as persuasive to the court as the words "Parliament included" in the legislation. It is Parliament's intent that courts look at. When they use two separate words in two identical provisions, that means something to courts, as you know.

Our investigation of your request for that information would come to a halt, even though only one small portion was covered by the certificate.

Senator Tkachuk: What can I do, as a citizen, at that point? Can I go to court to get this information? Could you go to court to deem the certificate ridiculous?

Mr. Leadbeater: No, the act provides that only the party can go to court. You could go to court and you pay your own shot. When it gets to court, the court has only one test to apply: Is the information subject to the certificate? Does it relate

to national defence? Is it injurious to national defence, is it sensitive? Was it provided by a third country? What does it relate to?

If it does not relate to, you will have your certificate quashed. Our suggestion is that the government will always win that one. The government will not put a certificate on a piece of information that does not at least arise to the test of relate. However, the contract itself could be no more than a contract that is embarrassing to the minister.

Senator Tkachuk: That is right. Our job is to ensure that citizens do not always have to go to court and to make it as easy as possible for people. We all know that government loves to keep the venetian blinds closed, as we all know, including this government. We should be doing all we can to provide that it is not injurious to national security.

You are saying now, that this was just a drafting error.

Mr. Reid: Based on what the minister has said publicly, that she did not intend it, therefore it is a drafting error.

Mr. Leadbeater: If you look at Appendix two, you will see the new wording that we would like to see in that clause.

Senator Tkachuk: Attachment two?

Mr. Leadbeater: Yes. The underlined portions would be the additional words.

Senator Tkachuk: "Provisions of this act respecting review in a Federal Court and then before the Federal Court pursuant to section 41 and 42."

Mr. Leadbeater: "In respect of information, not the complaint," as well.

Senator Tkachuk: How would that then change my application?

Mr. Leadbeater: You would receive an independent review from our office in respect of the appropriateness of the certificate. We would, at the end of the day, report to you that we either did not think it was an appropriate certificate or we did think it was appropriate. We could not tell you what the information is, but we would report to you. Then, we would say, if you consent, that we would go to court on your behalf and challenge this.

Senator Tkachuk: That would be better than me going to court.

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Mr. Leadbeater: That is our normal process. If we recommend to a minister that a document be disclosed, and if the minister refuses, then we offer to go to court on behalf of the individual. In 99.9 per cent of the cases, we are successful in convincing the minister to follow the recommendation without going to court. However, in those cases where it does not happen, we will go to court. If we end up in court under this proposed legislation, the minister, even with these provisions, would be able to prevent the court from releasing the document.

At least Canadians, parliamentarians and you would have had an independent review of the merits. The other route that is in the bill, is to go before a judge of the Federal Court of Appeal, where you will not get a review of the merits. You will receive only a review of the relating to test.

Senator Bryden: You, or whoever is giving you legal advice, may be misinterpreting clause 38.13(1). You seem to say that the problems only concern "relates to." It states:

> **38.13** (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* …

That is one basis on which she can issue a certificate -- in relation to a foreign entity or in confidence from a foreign entity. That is one test. She can also issue a certificate “for the purpose of protecting national defence or national security…” It does not say "relating to" national defence.

The test in relation to Senator Tkachuk's example is not whether the information relates to defence. The minister's certificate is there for the purpose of protecting national defence.

Mr. Leadbeater: In attachment number 3, look at clause 38.131, subparagraphs (8), (9) and (10). In the bill itself, that would be at page 93.

We looked at those paragraphs and asked ourselves why it was that the judge could not assess the purpose for the certificate? The minister must issue a certificate for the purpose of protecting national defence, national security and so forth, as you have read. When it comes to the judge's ability to vary that, the judge

cannot assess whether the minister properly assessed her role. He can only assess whether the information relates to those classes.

In a normal case of review, a judge would be looking to say that the minister is only supposed to issue that if it is for the purpose of protecting national defence, but not in this case.

Senator Bryden: With all due respect, that is precisely my point. The minister is only allowed to issue a certificate in very limited circumstances, only if it relates to information received from a foreign entity in confidence, to protect that confidence, or in relation to a foreign entity. She can do that. She cannot issue a certificate simply because the foreign entity is not a pleasant place or any of that. Her power is restricted to that.

The other restriction is for the purpose of protecting national defence or national security.

When you get to the section that gives the right of appeal, then the court would be restricted, of course, to analyzing whether the minister had properly exercised her authority under this act to issue the certificate within those three circumstances. One is relating to a foreign entity; second is to protect a confidence; and third is to protect national security and defence. Absolutely, the judge is in a position to decide -- as they do all the time -- on the competing pieces of advice. Was she doing this to protect national defence or not? If the answer is yes, the certificate continues. If the answer is no, then it is wiped out.

To go one other step, the certificate can be varied if only half of the information really relates to protecting defence or the other criteria.

Senator Tkachuk: It does not say "protecting." It says "in relation." Clause 38.131(8) says "in relation to, a foreign entity…"

Senator Bryden: That is what it says. A judge can determine that some of the information is subject to the certificate. That is the only thing the judge can determine.

Senator Tkachuk: Or to national defence or to security. I say she can do it on anything.

Senator Bryden: She can only do it on the basis of the empowering section of the statute. It is a long time since I had to do one of these. The empowering clause

is clause 38.131. Her certificate must relate to that clause. The judge, when interpreting that section, the one that you indicate is a very weak or wimpy -- I do not know which term you used.

Mr. Reid: Window dressing.

Senator Bryden: Window dressing. I hope it is a non-Venetian blind window dressing. The judge will analyze whether the certificate is valid. To be valid, the information must relate to a foreign entity or a confidence, or it is issued for the purpose of protecting national defence and security.

That is the point. I believe we have here, at most, a dispute over the interpretation of the various provisions that are here and how the courts will interpret it.

Mr. Leadbeater: Senator, you have explained very well that the normal form of judicial review of a decision taken by a member of the executive is a review for legality. You can also have a *de novo* review on the merits where the courts will substitute their judgment. That is a decision Parliament makes when it sets up a piece of legislation.

You are arguing that a *de novo* review for legality is implicit here. If that is the case, why use these words? Why remove the judicial review? There is a privative clause here. There is no judicial review under the normal section 18 of the Federal Court Act, which is the review for legality, put in this type of review. Parliament does not do that with respect to any other decision of the executive.

Senator Bryden: This is a very restrictive power given to a member of the executive. Therefore the court will review the exercise of that very restricted power in terms of the implementing section. That is my opinion. The court may do something else.

You are perhaps overly concerned that it will not give a person a fair shake. I put it to you that it is likely to be the minister who will not get a fair shake, because the clause is so restrictive in its implementation.

Senator Fraser: This is supplementary to Senator Tkachuk's question.

As I was listening to Mr. Leadbeater walk us through the process, somewhere in there I heard him say that, in order to appeal a certificate, the citizen will have to pay his or her own shot in court. I do not see how that necessarily follows.

A certificate will only be issued after an order for the disclosure of the information.

You say that the Minister of Justice currently interprets your orders to receive information from the government as disclosure. That means the certificate must be issued after you have issued that order. That makes you a party to the proceeding, and the parties to a proceeding may apply to the Federal Court of Appeal for an order varying or cancelling the certificate. Why could you not pay? Why does poor Joe Citizen have to pay?

Mr. Leadbeater: The tribunal issuing the order is not a party to the proceedings before them. We are the tribunal that issues the order.

Senator Fraser: You are the party to the proceeding in terms of dealing with the government.

Mr. Leadbeater: For example, if the certificate is issued in a criminal proceeding, the criminal court cannot go to the court and try to have it appealed. It must be one of parties before them. That is similar to our process. We are the court issuing the order. The parties before us are the complainant and the government institution. We are the tribunal considering the complaint. We clearly do not fall within the term "party to the proceeding;" we conduct the proceeding.

Mr. Reid: In our legislation we are given the powers of a superior court of record. Clearly, we cannot be a party to anything we are adjudicating.

Senator Joyal: You cannot be judge and party at the same time.

Senator Fraser: I would not have thought you were acting as judges; but I will live with that answer.

Senator Joyal: I want to come back to the issue on the interpretation of the scope of the review.

When the minister is empowered to issue a certificate, as you have stated, the objective is to protect confidentiality of information coming from foreign sources or that has been passed on to Canada under the seal of confidentiality. That is rather easy to determine. If it comes from France, Great Britain or Northern Ireland, whatever, we just have to put the name of the country on top and that is it, or the document says this is granted under the seal of confidentiality. This element is easier to understand.

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The problem stems from the protection of national defence and national security. That is a broad subject. We can deem that anything that pertains to national defence is for the security of the country. We can deem that anything that pertains to health protection, for instance, in the case of anthrax or a biological weapon, could be deemed to relate to national security because we should not provide information on how many vaccines we have because that would show our weaknesses to a terrorist group. In other words, the concept of protection is wide. There is no easy determination as in the first category.

When you read the appeal, that is provided in new section 38.131(8), in relation to, it moves the test to a mere classification of the issue. Is this classified as defence or national security? That is essentially a classification test.

If you must say "protection," then there is a reasonableness test that is applied. To me, the variation between the interpretation of those two articles lies on this. If you only have to say classification, the very heading of the paper is almost sufficient to say that this comes from national defence, DND, or it comes from Health Canada and so forth. The judge would only need to appreciate if the matter relates to the class of subject. In new section 38.13(1) it is a matter of protection. There is an element of appreciation that this information is aimed to protect. The judge can apply the test. He must measure if the information in front of him is really of such a nature that it protects the defence, or maintains the defence of Canada.

The way I understand your presentation and the discussion that has taken place amongst ourselves this morning is that you would be happy if we would had protection in new section 38.131(8) of the bill:

> If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act*, or to national defence or security...

If you sustain your interpretation of the certificate that the minister is empowered to issue, it contains the reasonableness test. Just a reproduction of the same definition would be sufficient to convey your point; am I right or wrong?

Mr. Leadbeater: You have expressed it very well, Senator Joyal. You may recall, when we first appeared, we drew your attention to sections 13 and 15 of the current legislation. Section 13 is a class test that you call a categorizing test for

information received in confidence from foreign governments. Section 15 is the injury-based test for information about national defence and so forth. We encouraged the government to approach this by reference to these sections of the act. A minister may certify that information meets either section 13 or 15 of our act. That is the way all the allies do it.

What you come to with your wording is almost the same point. You reintroduce the issue of an injury test into those portions of national defence and security that are now contained in section 15 of our legislation. That very well expresses our concern, that the ability of the court to assess the sensitivity of the information, which, after all, is what the minister is concerned about, the sensitivity of the information, and if there will be an independent review of that, a court or body must be able to look at that sensitivity.

By the strange wording of new subsections 38.131(8), (9) and (10), it appears to be a legislative effort to restrict the judge from looking at those sensitivity issues. The addition of words such as those you were speaking about would help reintroduce those concepts into the bill.

Senator Joyal: Is there a provision in the Federal Court Act that would help us to alleviate your fear by appealing to the general review power of the court to maintain the kind of capacity of the court to review that element that we feel is missing in new subsection (8)?

Mr. Daniel Brunet, General Counsel, Office of the Information Commissioner of Canada: Honourable senators, review is subject to section 18 of the Federal Court Act. What you have in this legislation is a departure from the general review by the judiciary of these types of decisions.

It is a total departure from it. It is a departure from the point of view of the admissibility of evidence. It is a departure from the test that the court is bound to apply. It is a very restrictive test. As we said before, no other jurisdiction is applying a test like this in regard to a certificate.

We N you alleviate all these concerns by making these certificates subject to review by Federal Court under section 18 of the Federal Court Act.

Mr. Leadbeater: This bill specifically removes that possibility.

Mr. Brunet: Let us go back to the general review proceedings under the Federal Court Act where you have a review by the trial division and subject to

appeal. If there is any error of law, t can be subject to federal appeal and review by the Supreme Court of Canada, and that would satisfy the concern of the Information Commissioner, and hopefully all Canadian citizens.

Senator Furey: Mr. Reid, I wanted to revisit your concern with clause 69.1, in particular (2) (*a*). I feel I have some understanding of what your interpretation of that is in that it shuts down the whole process. I am trying to reconcile that with Minister McLellan's statement before this committee on Tuesday. She said:

> The effect of the certificate would be to stop the right of access to that information. That is, where there is a complaint before the commissioner, the complaint is discontinued only with respect to the certified information. The commissioner does not lose the ability to continue his investigation with respect to other matters…

You are saying that is not what the legislation is saying.

Mr. Reid: It is precise and accurate as it plies to the Privacy Act.

Senator Furey: Is there some way we can reconcile the difference in terms of the issuance or the bringing forward of a new complaint, less the prohibited information?

Mr. Reid: The easy answer is to simply change the word "complaint" for the word "information." That would solve the problem.

Senator Furey: That is a very complicated process at this stage.

Mr. Reid: I understand that. The problem is that if you ask for the information again, you will still run into the certificate.

Senator Furey: If a new complaint is initiated, less the prohibited information, that could be acted upon.

Mr. Reid: You do not know what the prohibited information is. I do not know what the prohibited information is.

Mr. Leadbeater: I think I understand the point the senator is making. Could a person reapply for a narrow band of information to the government having asked for everything on the subject? Now that person would ask for everything on that subject except what is covered by the certificate. They could get another denial on

portions of it, and e another complaint to us, which we would then begin to investigate with respect to that particular information. Assuming that one year had not elapsed from the date of the request because the requester has one year only to complain to us, there probably could be a convoluted mechanism whereby someone could go back to reopen their request, pay their money again and get their information.

It would be enormously convoluted and complicated, especially if we were to come to a circumstance in which it was relevant to us to determine the merits of that complaint, to see the withheld information under the certificate.

Senator Furey: That process, each though convoluted, would not be prohibited by the language of this particular amendment?

Mr. Leadbeater: Unless in the second investigation, we felt it relevant to require the production of that certified information, in which case we would be back to square one.

Senator Joyal: If I can, on the same issue, I am sure my colleague will be interested to know this. If there were cases that involve the implication of this section, would it be reported in your annual report to Parliament so that we would have a check later on how this provision has been used?

Mr. Leadbeater: The odd part about the current wording of clause 69.1 renders us functus with respect to any complaint, which means we cannot report to the complainant, to Parliament or to the government and make recommendations, even preliminary ones at the stage of the investigation where it has come to a halt. Our legal advice was that we would not have our reporting powers under this provision because we are rendered functus. Once that happens, you have no power to do the reporting.

Senator Fraser: The bill says the certificate will be published in the *Canada Gazette*.

Senator Joyal: I know, but that does not give us the information of what happened to the certificate. If we were to eventually study how this bill has been implemented, it would certainly be helpful to know there has been such a certificate and that you were refused by the court to go beyond that. Otherwise, I do not know how we will be maintaining the monitoring of that power.

The Chairman: Thank you. We also should be looking at our own powers as a Senate should this bill come into play to be able to institute our own reviews as we go along. People forget that we do have that capacity, and we are not bound by a three-year review.

I want to thank you Mr. Read and all of you for coming here today. These are important issues. Obviously, our committee is reading the lines, and it has been a challenging presentation. We thank you for it.

The committee adjourned.