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

EVIDENCE

OTTAWA, Tuesday, October 23, 2001

The Special Committee on the Subject Matter of Bill C-36 met this day at 10:00 a.m. to examine the subject matter of Bill C-36, to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism and explore the protection of human rights and civil liberties in the application of this Act.

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

The Chairman: Honourable senators, today we continue our hearings into the subject matter of Bill C-36, the bill addressing anti-terrorist actions that shocked the world on September 11 in the United States.

The Senate has chosen to use a rarely used process called pre-study which enables us, in advance, to hear witnesses and to make recommendations to the House of Commons before the bill is passed in that chamber. It will then come to the Senate. We will go through our formal process of debate and committee study.

We want to get our recommendations and our thoughts in as quickly as we can so that they, hopefully, they can be reflected in the legislation when it formally comes to the Senate chamber.

Yesterday, we heard from the Minister of Justice and the Solicitor General. We also had officials from the Department of Finance and the Canada Customs and Revenue Agency. We heard from the Director of the Canadian Security and Intelligence Services. We also heard from the Commissioner of the Communications Security Establishment.

Today, we will get into the issue of privacy. We have with us this morning the Honourable John Reid, who the Information Commissioner of Canada. I know that members of the committee around this table will be very interested in your comments, Mr. Reid.

These hearings have generated many questions, as they must. I would ask colleagues to be as concise as possible with their questions. To help us along,

Mr. Reid, you can be as pointed and concise as you wish to be. We are delighted to have you here. Please begin.

Hon. John Reid, P.C., Information Commissioner of Canada: Honourable senators, I am grateful for this opportunity to be with you. I have a number of concerns about certain provisions of Bill C-36. I want to be able to answer all the questions that you may have about the effect of that bill on the Access to Information Act.

Today, I am accompanied by my Deputy Commissioner, Mr. Leadbeater, Mr. Daniel Brunet, our legal counsel, and Mr. Dan Dupuis, Director General, Investigations and Reviews.

Madam Chair, I will get to the point. Clause 87 of the bill would authorize the minister at any time to issue a certificate that prohibits the disclosure of information for the purpose of protecting international relations or national defence or security. That same clause states that the Access to Information Act would not apply to any such information.

As a result, a minister, by issuing a certificate, would have an unfettered, unreviewable right to cloak information in secrecy for indefinite periods of time. I say "unfettered" because clause 87 contains terms that are undefined and overbroad in describing when the Attorney General may properly issue a certificate.

The Privacy Commissioner has suggested that the form of the words used in Bill C-36 would enable the minister to remove from the right of access the records of entire departments. I do not disagree with him that the loose wording leaves open the potential for an overbroad interpretation and application, and I say unreviewable, because clause 87, by removing information covered by a certificate from the coverage of the Access to Information Act, also removes the authority of the Information Commissioner and the Federal Court of Canada to independently review the information to determine whether secrecy is justifiable.

For those honourable senators who wish to understand the legal mechanisms at play, I refer you to sections 36(2) and 46 of the Access to Information Act. These sections state that the right of the commissioner and the court to examine records supersedes any privileges under the law of evidence or any restrictions in any other statute, including the Canada Evidence Act.

However, this powerful right to examine records only applies to records "to which this act applies." That is precisely why the amendment proposed in clause

87 of Bill C-36 states that the Access to Information Act does not apply to information covered by a certificate.

It is my strong belief, based on a review of 18 years of experience under the act, experience during times of war and crisis involving exchanges of highly sensitive information among allies, that our Access to Information Act poses no threat whatsoever to international relations, national defence or the security of Canada. Clauses 13, 15 and 16 of the bill contain powerfully and broadly worded exemptions from the right of access designed to ensure that no information will be disclosed which would be injurious to international relations, the defence of Canada or the efforts of Canada to detect, prevent or suppress subversive or hostile activities. I invite you to read those provisions, copies of which have been passed out to you and you will see the detailed and robust protections which Parliament had the foresight to put into the act.

There is a reason why the Access to Information Act carved out this important area of secrecy. In this country, we have experienced acts of terrorism -- bombing, kidnapping, assassination -- acts that were still fresh in the minds of governments and legislatures in the 1970s and the 1980s when the access act was formed.

When the act was written, as now, we were a net consumer of intelligence, mostly from the United States. We understood the need for protections which would be reassuring to our allies.

We simply do not need to respond to the current terrorist threat by going further. The Americans, for example, have not made nor do they propose to make any change to their Freedom of Information Act in the wake of the events of September 11. Only last week, the U.S. Department of Justice confirmed that there was no proposal to remove any records from the coverage of the United States' Freedom of Information Act, nor to limit the rights of the courts to examine records and to review refusals to disclose.

From all public explanations given by the minister and her officials, it would appear that the government itself has no doubt that the Access to Information Act contains fully adequate protections for information, the disclosure of which could injure international relations, defence or security.

Their explanation is this: Since our scheme includes the right of independent review, the government cannot give its allies 100 per cent iron-clad guarantee that information provided by them to Canada will remain secret. This explanation puzzles me and concerns me. Our major allies and suppliers of intelligence

information themselves operate under freedom of information laws. In the case of the United States, people say that our laws are much tighter than the American law. They understand that the purpose of these laws is to remove the caprice from decisions about security by subjecting such decisions to a legislative and judicial system of definition and review. Personally, I find it hard to believe that the government of any one of our major allies would insist, as a condition of information-sharing, that decisions about secrecy in Canada be entirely free of the rigours of statutory standards and independent review.

In the conversations my office has had with our allied jurisdictions, it is our understanding they all want the same thing -- the simple assurance that what needs to be protected can be protected. None of them doubts Canada's ability to do that under the existing Access to Information Act.

A recently completed independent review, commissioned by the Minister of Justice and the President of the Treasury Board, gives unequivocal assurances that the strength of the protections for national security information contained in the Access to Information Act is absolute. Professor Wesley K. Wark of the University of Toronto in a study entitled *The Access to Information Act and the security and intelligence community in Canada* states the following:.

> Public demands under Access can be countered by the application of the major clauses of exemptions, both mandatory and discretionary, offered under the Act. In the Security and Intelligence realm, the principal exemptions of relevance are Section 13 (Information obtained in confidence), Section 15 (International Affairs and Defence), Section 16 (Investigations, threats to the security of Canada), Section 21 (Advice and Recommendations). Altogether, the exemptions are a formidable defensive mechanism in the hands of the community to protect secrets. Both the Canadian Security and Intelligence Service and the Communications Security Establishment, the two main collectors of sensitive intelligence in this community, regard the Access Act as offering sufficient protection.

Later in his report, Mr. Wark goes on to say:.

> The Security and Intelligence Community must continue to have at its disposal the power to apply exemptions under the Access Act to protect information whose divulgence would be harmful to national security and the conduct of international affairs. The current Access exemptions provide powerful and sufficient tools to allow for such protection.

In 1983, the Access to Information Act had been reviewed in great detail by a standing committee of Parliament; an ad hoc committee of the House of Commons; two information commissioners, most recently in 2000-2001; and at least three separate reviews by public servants, the most recent and ongoing being the Task Force on Reform of the Access to Information Act. Never, not once, in those reviews has it ever been suggested that sections 13, 15 and/or 16 of the Access to Information Act are insufficiently strong to enable the government, with confidence, to protect information the disclosure of which could be injurious to international relations, defence of Canada or security. Never once in all these studies has it been suggested that independent oversight by the Information Commissioner and the courts somehow puts vital secrets at risk.

In the 18 years since the Access to Information Act has come into force, inappropriate disclosures of security and intelligence information has not been the fault of the Access to Information Act. On those rare occasions when it has occurred, the fault lay with ministerial aids, former intelligence operatives turned authors, misplaced briefcases and computers and, at times, revelations by ministers. These are quite proper reasons for attention to the Official Secrets Act, but not for the measures imposed in clause 87 of Bill C-36 for the Access to Information Act.

Even if there was some reason to be concerned about the sufficiency of existing exemptions to protect sensitive information, would the government's proposed solution be appropriate? Would it strike the right balance between protecting Canadians from terrorists and protecting them from state abuse? In my view, the government need not remove both steps of independent review in order to allow itself to prohibit the disclosure of certain records.

Since the Information Commissioner is, by law, bound to conduct his investigations in private, maintain all information in confidence and make only recommendations, he has no power to make orders. He can make only recommendations for disclosure. There is no need for the minister to impede or curtail the commissioner's powers to examine records in order to enable her to prohibit public disclosures. It is only the federal court which has the power to conduct proceedings in public and to order the public disclosure of withheld records.

If the minister believes that the courts might interpret the Access to Information Act in a way to compromise international relations, national defence or security -- a belief entirely without foundation in my view -- then that ought to be the focus of her legislative intervention. By leaving the Information Commissioner's power

intact, a mechanism would be put in place to enable an independent body to assess and inform the public about the appropriateness of the uses of the certificate by the Attorney-General, all this without risk of disclosure of the information covered by the certificate.

I hasten to add that even this middle road, in my view, is unjustifiable. We can and should trust the power of the exemptions contained in the act. We should trust the common sense and integrity of the judges of the Federal and Supreme Courts who review decisions taken by government to invoke these exemptions.

Before concluding, I wish to refer to the allegation made in several quarters that the provisions of clause 87 of Bill C-36 were intended as a mean-spirited attack of retribution on the Access to Information Act and the Information Commissioner. This allegation finds its roots in a rather public controversy between my office and the Crown concerning my right to examine certain records during the course of an investigation. After the issue made it all the way to the Supreme Court of Canada, where leave to appeal was denied and my right to examine the records was affirmed, the Crown continued to hold some records by issuing a certificate pursuant to sections 37 and 38 of the Canada Evidence Act alleging that it would be injurious to international relations, the defence of Canada and national security for these records to be seen by my office. This was done before the events of September 11.

I have challenged the validity of those certificates in the Federal Court and I fully expect, once the court has seen the records, as it is now may, and understands the absolute confidentiality they would be accorded in my hands, that this last impediment to the investigation will be removed.

However, if Bill C-36 passes in its present form, the minister will be legally able to issue a certificate covering the records in dispute and neither the Federal Court nor my office will ever see those records.

Despite this background, I am not one of those who believes that the purpose of clause 87 of Bill C-36 is to dictate the outcome of cases currently before the courts. My belief is that the minister and the government will entertain changes to this provision of the bill if they honestly believe that their goal of protecting Canadians and Canadian allies against terrorism can be accomplished by less intrusive means. My fervent hope is that my comments will help assure members of this committee and, through you, the minister, that clause 87 of Bill C-36 does not strike the right balance and should be withdrawn.

If this provision is not withdrawn, it should be focused by specific reference to sections 13 and 15 of the Access to Information Act, and it should not prevent the Information Commissioner from examining the information during the course of his investigations. Moreover, any provision that would diminish existing avenues of independent review should be limited to the shortest possible period of time.

Senator Beaudoin: We had a discussion here yesterday about another subject in which the same philosophy seems to be involved. When the interception of private communication is done within Canada, we go before a judge. When an interception is outside our country, it falls under the purview of the Minister of National Defence. That goes against the jurisprudence of the Supreme Court on communications. We have at least four cases on that.

In this case, it falls under the purview of the Attorney General of Canada, but it looks like the same philosophy. If the interception is outside the country and is in respect of international relations, a certificate is required. If a certificate is issued, that is the end of the matter.

Do you see some parallels between the two problems? In my opinion, there is a certain philosophy. We all agree, of course, that we must look after our security in the interests of national defence and that we should protect our international relations. However, I do not understand well why the system was changed to make a distinction between communications inside Canada and communications outside Canada. There must be a reason for doing that.

Mr. Reid: It is my understanding from reading the bill, senator, that the ability to issue a certificate applies to any information that the government has, coming from either outside sources or internal sources. It is an absolute power in that sense.

Senator Beaudoin: On both sides?

Mr. Reid: On both sides.

Senator Beaudoin: The power is absolute, in your opinion?

Mr. Reid: In my opinion, once it is excluded from the Access to Information Act, it becomes absolute because there is no review by either the Information Commissioner and no possible review by the courts. It is an absolute power to deny information forever.

Senator Beaudoin: In the case we studied yesterday, it was private communications. Now it is in the area of access to information. Perhaps the word is somewhat strong, but is it not an intrusion into your domain?

Mr. Reid: It is an intrusion into the ability of citizens to obtain information about activities of the government. My role in that is to conduct an independent review of decisions taken by government. When information is taken out of the Access to Information Act, one of the functions of which is to determine the way in which information is treated within the government, it is out of the system and no one can have access to that information unless the government chooses to give it to them. You have no right to it.

Mr. Alan Leadbeater, Deputy Information Commissioner, Office of the Information Commissioner of Canada: Senator, you make an interesting point. I had not made this connection before you raised it. With respect to clause 87, we have been told that the concern has to do with the ability of Canada to assure its allies of the 100 per cent, ironclad secrecy of this information before it would be given. A similar thing occurs in the other situation you mentioned. It is understood that there are adequate protections in this bill, except for the independent review. Section 13 at page 53 of the statute that was distributed to you is a mandatory exemption. It says that the head of a government institution shall refuse to disclose information provided by a foreign government. There is no doubt that would be protected, but there is that technical ability to go to our office and the court, and that is what the government wants to close off at this time.

Senator Beaudoin: Yesterday, in the case of private communications, we were substituting the role of the judiciary and we shifted to the executive branch of the state. This time it is shifted to the Attorney General of Canada, but the courts are not involved at all. It is the commissioner that is involved.

Mr. Leadbeater: It is both because it is a two-step review under our legislation. It goes to the commissioner and then to the court if the commissioner is not satisfied with the government's response or if the complainant is not satisfied with the government's response.

Senator Kenny: Mr. Reid, you report to Parliament.

Mr. Reid: Yes, I do.

Senator Kenny: You work for the people. The purpose of the act that governs you is to extend the present laws of Canada, to provide the right of access in records under the control of a government institution in accordance with the

principles that government information should be available to the public and that necessary exemptions to the right of access should be limited and specific, and decisions on disclosure of the government information should be reviewed independently of the government.

Mr. Reid: That is correct.

Senator Kenny: You are here making a brief for the people.

Mr. Reid: Yes.

Senator Kenny: What is going on? Is the government using a crisis to clip your wings for political purposes?

Mr. Reid: It is my belief that when the government decided to proceed with this bill it threw everything into it. As Mr. Leadbeater has pointed out, the desire to protect information coming from foreign service and to give certain guarantees was uppermost in their mind. In point of fact, from what our allies are doing, they are not making change to their access to information or freedom of information legislation, only Canada is.

Senator Kenny: Are you describing yourself as collateral damage, Mr. Reid?

Mr. Reid: I think we have been described as collateral damage by the government or this legislation.

Senator Kenny: Do you accept that?

Mr. Reid: No.

Senator Kenny: Do you think it is specific, that it was aimed at you? If you are collateral damage it means that it was not aimed at you.

Mr. Reid: Clearly, it was aimed at the information and privacy legislation. These are the places where the independent review of decisions by government on this information takes place. By definition as well it is also aimed at the courts because they lose their power to review those decisions.

Senator Kenny: You say you do not think it is necessary.

Mr. Reid: That is correct.

Senator Kenny: When you put the case to government officials, what did they say?

Mr. Reid: We were not consulted on the legislation when it was being drafted. We had one meeting with the Department of Justice afterward.

Senator Kenny: What do they say to you when you say that this bill is unnecessary, you do not need it, that you have protection already under the existing act? What is their answer?

Mr. Reid: Their answer is, "We will go back and look." We had a good meeting with the Deputy Minister of Justice. We explained our circumstances and how our office operates. We explained the fact that our office is basically a black box, when we do our investigations, nothing comes out. We have security levels that are mandated by CSIS and the RCMP. We are as secure as any office in the Government of Canada and more secure than most offices that handle this information. We said there is no danger in losing that material through our system.

When you do what is done in this clause, you lose the total ability to review what decisions are being taken by the minister.

Senator Kenny: If this one clause were fixed up, would the bill be acceptable, from your perspective?

Mr. Reid: That would solve a lot of problems. It would eliminate the problems that I am here to talk about.

Senator Andreychuk: Mr. Reid, you indicated that you thought, perhaps, one of the reasons for this bill is the ironclad guarantee that the government feels it must give its allies and counterparts. However, it appears that you have investigated rather fully the American system. Can they give us ironclad guarantees? Or are they subject to the same human and administrative failures within their government as are we?

Mr. Reid: In terms of the comparison of security clauses in our act and in the American freedom of information act, they are roughly comparable. However, I think ours are much more absolute than theirs. Like any institution, they are subject to human failures, as are we.

Senator Andreychuk: If I can draw a conclusion from what you are saying, they cannot give us an ironclad guarantee and nor can we give them one.

However, both could give reasonable guarantees under the existing acts; is that right?

Mr. Reid: Indeed they can. It is important to remember that the United States has decided not to alter its freedom of information legislation at all.

Senator Andreychuk: Is access to information, about which you spoke with Senator Kenny, necessary to ensure that the government is doing its job adequately? In a democracy, with such access-to-information provisions, some group of citizens or an individual will have the ability to test the government, to bring the government to account. In the Access to Information Act there is a provision that there be a report to Parliament to provide that mechanism. If all the power is put into the hands of the executive, I am not concerned about state abuse in an aggressive, dictatorial manner. Rather, I am concerned about sloppiness and shortcuts being taken with regard to something that is very serious. Is one of your concerns that when there is complete state control there is a tendency to reach for the quick and easy answer as opposed to going through modified and reasoned steps to come to any conclusion on certificates or whatever?

Mr. Reid: When we must look at documents that are in dispute what we see is knowledge on the people who are creating the documents. By and large, they are careful to ensure that they document reasons for their decision. Access to information and the knowledge that information will come out imposes a certain discipline on both civil servants and ministers. What is proposed in this bill is that information relating to undefined terms, such as security, information flowing from outside sources and military secrets, will be put outside the act. It would then have the same status as cabinet documents that are excluded from the act.

That means there would be no possibility of any kind of independent review of what the government is doing as a result of that information or with that information.

Senator Andreychuk: You are saying that you are satisfied that the process that the Canadian people have put in place gives the government all it needs to protect information that needs to be protected but that it gives Canadians something else, that is, some assurance that the government is acting appropriately; is that correct?

Mr. Reid: That is correct.

Senator Andreychuk: You have talked about the United States. The only place I have seen absolutes such as this is in governments that are not democratic,

that is to say where the government can unilaterally make determinations without any review mechanisms. Those governments are generally totalitarian, dictatorships and the like. The mark of a democracy is that there is a review of some sort. Is that your experience?

Mr. Reid: That is correct. Democracies usually take a risk in favour of access and liberty even when they are under stress.

Senator Andreychuk: Would it be fair to say that Bill C-36 was put together rather quickly and, perhaps, it was a matter of haste and that we should be encouraging the government to reflect on this point? I have heard the government say that it does not want to breach our human, parliamentary and democratic rights, except when it is absolutely necessary. Beyond the guarantees to our allies, do you see us encouraging the government to reflect on this point because of what it will do to our fundamental, democratic structures?

Mr. Reid: That is one of the test points for this piece of legislation. This is one of the most important legal rights that Canadians have. It is one of the few ways that we have to see what government actually does. It is our ability to look into the black box of government activity. If that is lost, then a significant ability of Canadians to be assured that their government is operating in proper good faith would be alienated.

Senator Andreychuk: If we lose that, you have pointed out what you think the cost would be. Removing clause 87 from the bill would in no way impair the Canadian government's ability to protect our security. Do you agree with that?

Mr. Reid: In taking out the clause dealing with the Access to Information Act and, in my judgment, the Privacy Act, that would be correct.

Senator Fraser: Mr. Reid, I understand your fidelity to your position, however, I am not persuaded that matters are as grave as all that. The Minister of Justice reminded us when she appeared before this committee that everything in this bill and every act or omission taken under this bill will be subject to judicial review. Any citizen can go to court for anything done under the proposed act.

Mr. Reid: Senator, when the minister issues a certificate to say that information is outside, it means that nobody can see it except those people who are inside. There is no court challenge to a certificate issued by the minister.

Senator Fraser: Not being a lawyer, I could instruct my lawyer to bring a case arguing, for example, that the information being protected by the certificate did not

need to be protected in order to serve the stated ends of protecting international relations or national defence or security. If I lost on that ground, then this information would be protected any way under any system of government we or anyone else has ever had. If information actually needs to be protected for the purposes of international relations or national defence or security, it is protected, anywhere, in the greatest democracies in the world including this one.

Mr. Reid: There are two things at play here. The first is that, by taking all of the security information out of the Access to Information Act and putting it at the same status as cabinet documents, that information is permanently alienated. You cannot see a cabinet document.

Senator Fraser: You are assuming that it will all be taken out.

Mr. Reid: The bill says in that clause that this information is permanently alienated from the Access to Information Act. It will have the same status as cabinet documents and they are excluded from the bill.

Senator Fraser: The Attorney General may -- not "shall" -- issue a certificate that prohibits the disclosure of information. Presumably any court in the land would say that it must be specific information, not just everything in the files of the Department of Foreign Affairs. It must be specific and it must be justified.

Mr. Leadbeater: Senator, you raise two points. Certainly you can take an action in court seeking to question that. What possible utility would it be when the reviewing court cannot see the information? The reviewing court cannot see the information so it is pretty hard for the court to decide whether there has been an abuse of the certificate. That is the whole point.

Cabinet confidences, as you know, are only taken outside the Access to Information Act for a period of 20 years. Any information that the minister attaches to the certificate is outside forever. It goes much farther than the existing system yet in the context of an act that already has protections for national security, international relations, defence of Canada and the detection and suppression of subversive or hostile activities. If that is the minister's concern and if she feels that some of those exemptions are not quite tight enough or that they need to be made tighter, that is one issue. However, I do not think that is the minister's concern. I think the minister's concern is simply to remove independent review.

Senator Fraser: I can only take the minister's word for it when she says that every single portion of this bill could be challenged in court. She expected that there would be challenges. I am sure she was telling the truth. I would expect

there to be challenges, too. Anyone would expect challenges to any legislation. However, I can understand your concern about permanence. I am much less concerned about the notion that, with respect, your bureaucracy does not get to decide; someone else gets to decide, namely, a judge.

Mr. Reid: We make no decisions. We have no power to implement decisions.

Senator Fraser: You decide whether to make a recommendation.

Mr. Reid: We must make a recommendation, which we do, to the department concerned. After that is done, either the department or the person who has made the complaint can go to court for a decision.

Senator Fraser: In this case, the person would go to court without you.

Mr. Reid: He could not go to court because the certificate permanently alienates the material from the court. The court cannot see the material.

Senator Fraser: The court can hear any case.

Mr. Reid: The court cannot see the material. It cannot make a decision on what it cannot see.

Senator Fraser: If this clause is attacked by the Supreme Court, then it can. I do not think I can go further on this question.

Senator Tkachuk: I have a lot of sympathy for your position. As one who has been involved in politics a long time, it is becoming more difficult to get information from governments. Question Period is not what it used to be on both sides.

I am bothered about the question of the justification that the allies were asking for assurances on the privacy of the information they give to us. As you pointed out, they have been giving us such information for a long time and it has not been leaked, unlike, as you say, other kinds of information that have been leaked.

Who were the Department of Justice officials who told you that was so? Can you give names or is that confidential information?

Mr. Reid: The meeting we had was with the Deputy Minister and it was held for them to hear our representations. We did not really get into a debate. We explained our concerns. We also gave them some indications that there were other

ways of amending the bill to give greater certainty if that is what they were looking for, rather than the fairly blunt mechanism found in the draft legislation before you.

Senator Tkachuk: We discussed this yesterday. Minister of Health Allan Rock, in his purchase of Cipro, has obviously caused some embarrassment. Could the government use the security clause of this bill to prevent revealing information on exactly what transpired there?

Mr. Reid: In my judgment, since the phrase is not defined in the bill, we really do not know what it means. The only place where those words are defined is in the Access to Information Act and there is no reference to that act. They could use anything and cover it under that.

Senator Tkachuk: I know Americans are always quite worried about the large envelope of the phrase "national security" when it comes to questions of information from the government. We should be worried about the same thing.

The government can justify anything under national security if the country is in some state of war or emergency. Even in this case, where no state of emergency has been declared, the government could use national security as justification to cover up any piece of information from anyone.

Mr. Reid: Senator, the only place those terms are defined is in the Access to Information Act which, by the way, is the where all information in the government is defined for the purposes of its utilization. There is no such phrase as "top secret" or "for your eyes only." All the phrases are in the Access to Information Act.

One of the points in my brief is that there should be some cross-referencing of the definition of those terms to the Access to Information Act where the terms are defined. Words in a piece of legislation that are not defined can mean anything whatsoever.

The difficulty with certificates being issued by the minister is that those definitions are held internally because it becomes extraordinarily difficult for a court to make a definition when it cannot see the documents.

Senator Jaffer: I dealt with your department a lot in my past life and when I read this I was concerned about what information would be released, especially with cases of refugee and especially when the minister intervenes.

I am somewhat confused about something that officials from the Department of Justice said yesterday. I will read what was said and ask you what they meant. A question was asked and Mr. Piragoff said:

> **Mr. Piragoff:** The prohibition certificate is in 38.13 of the Canada Evidence Act. The provision to which you referred in respect of the Access Commissioner is essentially the same certificate as that which would be issued under the Canada Evidence Act.
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> **Senator Tkachuk:** Why do you need this, then?
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> **Mr. Piragoff:** The Canada Evidence Act applies to judicial proceedings or administrative proceedings that are undertaken. In respect of the actions of the Privacy Commissioner or the Access Commissioner, there may not be any proceedings undertaken at that time.
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> **Senator Tkachuk:** I want to get this straight. I am not a lawyer and I am trying to understand it the way any citizen in Canada would understand it. I believe that the Attorney General can issue a certificate and use national security as a reason to deny the media or anyone else a request for information. Is that how this would apply? Is that what the Attorney General would do, in layman's terms?
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> **Mr. Piragoff:** The provision is a last resort for the Attorney General to ensure that information critical to national security is not disclosed in judicial proceedings, to which the Canada Evidence Act applies or through other government processes.

What follows is the part I am confused about. Mr. Piragoff continued:

> This power exists with our allies who have a procedure whereby a minister is able to issue a certificate to block the disclosure. In the United States, there are different levels of certificates. Some come from the President and others come from the Attorney General of the United States. The U.K. has a certificate system as well and, I believe, New Zealand and Australia also have such a system.

Can you enlighten me on that?

Mr. Reid: They do have these certificates, but they are all reviewable by outside agencies -- courts of record. In this case, there is no way to review the certificate being proposed. They are absolute. You can only review a certificate if

you can see the documents to which they refer. If you cannot see the documents to which they refer, a court or independent review agency has no power to do a review since it cannot see the evidence.

Senator Jaffer: What kind of independent body do they have in the U.K.?

Mr. Reid: They passed new legislation in the spring that creates a data commissioner who is also responsible for privacy and for access to information. It basically has the structure that we have in the provinces of Canada where the functions of the privacy commissioner and the information commissioner are in one office and one person.

(French follows -- Sen. Bacon -- Il semble y avoir beaucoup de frustration…)

(après anglais)

Le sénateur Bacon: Il semble y avoir beaucoup de frustration qui se dégage de votre texte ce matin. Je le comprends puisque vous n'avez pas été consulté pour le projet de loi C-36. À la lueur des questions et des réponses qu'on vient d'entendre, on a l'impression que vous sentez partir certaines responsabilités de votre agence. Seriez-vous plus à l'aise si nous recommandions une révision annuelle de la loi ou vous maintenez que l'article 87 doit disparaître?

(Mr. Reid: I would feel confortable with the review of the Act...)

(anglais suit)

(Following French)

Mr. Reid: I would feel comfortable with a review of the act on an annual basis. The dilemma with doing a review, however, when it comes to the flows of information in the government, is that you cannot do a review that would be very helpful because you could not see what the information flows were -- what was held back and what was not held back. That kind of a review would be effective, in a sense, if there was an agency that could tell you what the overall statistics are in terms of the utilization of this section of the act. Currently, there is no such provision. The only person who has the power to do that under the existing act is the Information Commissioner, and he clearly cannot do it the way this bill is structured.

It would be very difficult to do a review with which members of the House and Senate would feel comfortable when it come to this kind of information.

Senator Joyal: Mr. Reid, I have two questions. First, if I read section 61.9 that is under discussion this morning, and if I read the corresponding clauses to which you referred, clauses 13, 14 and 15, the description given in section 61.9 is generic while the definition contained in clauses 13, 14 and 15 are specifics under those headings. Am I interpreting that correctly?

Mr. Reid: That is correct.

Senator Joyal: That would be the main difference between the power that the minister has at present to retain some information and the power the minister would get through section 61.9?

Mr. Leadbeater: Senator, there is a difference, too, with respect to information relating to international affairs, national defence and the detection, prevention or suppression of subversive activities in that there is an injury test in the Access to Information Act that provides that an exemption requires a demonstration of injury from disclosure, whereas that is not present in the proposed clause 87.

Senator Joyal: As I said, there is a generic power given to the minister; no more injury test, that is, no more illustration of how it would be harmful; and no disclosure forever in the future, contrary to what we have had, as you alluded to, for 20 years for cabinet documents. Those would be the three major differences between the functioning of clauses 13, 14 and 15 and section 69.1?

Mr. Reid: There is the fourth element of no independent review.

Senator Joyal: The minister explained that she needs this exorbitant power due to present conditions. Can you tell us whether in the past some of our international allies or some provincial governments of Canada, have refused consent to disclosure because it was harmful to their interests?

Mr. Reid: Mr. Leadbeater has been at the office for a long time. I will ask him to reply.

Mr. Leadbeater: Our information from our own experience is that there has never been a situation where the government has claimed an injury to international relations, national defence or the detection or suppression of subversive activities where that information had been disclosed under the Access to Information Act.

We have communicated with the Justice Department in the United States and have been told that the Americans do not believe that our Access to Information Act poses a hazard to information they may provide to Canada in these fields. We have asked the Department of Justice here whether or not they have examples of situations where it may have occurred. Up until this point they have not provided any such examples.

Senator Joyal: In the past, have there been any leaks from your agency which would have embarrassed governments, agencies or foreign countries in relation to the application of the act?

Mr. Leadbeater: There never have been. In fact, in the litigation between us and the Office of the Prime Minister, the Government of Canada alleged that as a possibility. The Federal Court of Appeal actually examined our records. They determined that there had never been a compromise of sensitive information by the Office of the Information Commissioner.

Senator Joyal: You have referred to the capacity for review which exists in the American legislation and the new British law. Do you have a comparative analysis that you could provide us in the next few days on how the system functions in comparison with our system? In that way we could judge the arguments put forward about there being a danger to our relations with foreign allies in regard to clause 69.1 and other provisions of the bill which deal with a review of information that could involve foreign countries. As you know, in Part 6 of the bill there is a provision for review by a Federal Court judge. In fact, paragraph 6 at page 132 states:

> When the certificate is referred to the Federal Court, the judge shall, without delay...

Thus, there is already an example in the bill where there is a review of a certificate by the Federal Court. The certificate of the Minister of National Revenue is reviewable by the court, and it could involve foreign countries because the money that has been divested could be divested to agencies of foreign governments. To me there is a conflict between the proposed clause 6 and clause 69.1. In other words, a certificate under that section is reviewable by the court. It involves information that might deal with national security or international relations. However, under the section which pertains to your organization there is a much broader use of the certificate and, of course, no provision for a review by the court.

It would be helpful to have a comparison of that section of the bill which deals with certificates with what is reviewable in the U.K. and the United States. If that were done, we could compare the situation and have a better idea of how a review capacity should be included or recommended to the government.

Mr. Leadbeater: We will provide that information to you, senator.

Mr. Reid: I should note, senator, that the United Kingdom legislation has just been passed. It has not been implemented as yet on the information side.

Senator Joyal: I understand that the procedure of the review and its scope are the most important elements. Once there is a review, the second question is to the scope of the review.

Senator Finestone: Mr. Reid, I understood you to say that these certificates are not referable to the court where they have been issued by the Attorney General. Is that accurate?

Senator Beaudoin: Do you mean reviewable or referable?

Senator Finestone: Referable.

Senator Beaudoin: They are referable.

Senator Finestone: Can the court have access to the information covered by a certificate?

Mr. Reid: No.

Senator Finestone: If it says "may", what makes you say that it does not say "shall" or "must"?

Mr. Reid: If you look at it, it states that the certificate "may be issued". Having been issued, it is absolute and the court cannot look at the information covered by the certificate. You will find that on page 88 of the bill.

Senator Finestone: No judge, including a judge of the Supreme Court of Canada, can see the information that is in that certificate if it is specific to covering international relations, national defence or security; is that right?

Mr. Reid: We should be very careful, senator. The court cannot see the information covered by a certificate. Thus, the court cannot know what information is actually covered by a given certificate.

Senator Finestone: The Privacy Act is also impacted by this bill. Is it impacted to the same degree as is the Access to Information Act?

Mr. Reid: There is an impact from the point of view of a citizen being able to see his information. If it is covered by a certificate, it means that the same regime is in place. He cannot see it, and the court cannot review it. The Privacy Commissioner cannot review it either. The regime is the same in both cases because those are the two cases where there is an independent review of decisions made by government as to what can be released.

The Chairman: Senator Finestone, the Privacy Commissioner will be appearing before us this afternoon.

Senator Beaudoin: Senator Finestone raises a fascinating point. It is obvious that there is always access to the court. The minister has said that we may go before the court. Access to the court is part of the rule of law. However, it does not mean that the court will review the certificate, which is what Mr. Reid said. "Referred" and "to review" have two different meanings. One always has access to the court. A private citizen or any government may go before the court, and they will be heard.

The way I look at clauses 69 and 87 is that that ability is set aside. The court will hear you, but it will say, "The minister has that power and that is the end of it."

The distinction that I make here is that it is statutory, although I am not sure that the Constitution can be invoked because it is a statute. When you set aside section 6 of the Criminal Code and you intercept private conversations, of course you are

going against four decisions of the Supreme Court. You have constitutional law. Here it is not that clear. I do not see a constitutional system, it is a statutory system. Unless there is a liaison between this legislation and the Constitution, the act is there and we apply it. That is my reaction. In other words, yes, there is access to the court at all times. However, the right to review is another thing. In my opinion, that seems to be set aside.

I recall the conversation that we had with Senator Joyal yesterday, and I agree with that argument. If you set aside section 6 of the Criminal Code and you have the right to intervene and set aside the necessity of obtaining a warrant from the court, then constitutional law is involved. I am not sure that we can make the same argument here. I do not see that. To me it is a problem between the legislative and the executive. I do not see any constitutional protection there. I hope I am being clear, Mr. Reid.

Mr. Reid: You are very clear, senator, and I agree with you.

Mr. Leadbeater: Senator, with respect to the Access to Information Act, the courts have said that it is quasi- constitutional in that the right of access operates notwithstanding any other act of Parliament. However, I do not think anyone argues that there is a right of access to government records in the Constitution.

To that extent, I do not think this is open to, for example, a charter challenge or a constitutional challenge. It is simply a question of whether the harm articulated by the minister is being addressed properly by the clause.

Senator Beaudoin: We have had this debate for 20 years: What is quasi-constitutional and what is constitutional? In 1960 we had a quasi-constitutional bill of rights, but that was not good enough. That is why Mr. Trudeau introduced the Charter of Rights and Freedoms in the Constitution. That charter is constitutional. It may be that the information act is constitutional, but quasi-constitutional is not entirely constitutional.

(French follows--Senator Prud'homme… Ma question pourrait être adressée)

(après anglais)

Le sénateur Prud'homme: Ma question pourrait être adressée à un autre témoin ou à un ministre ou la ministre responsable.

Il y a des définitions dans cette loi qui demandent, à mon avis, beaucoup plus d'explications. Je prends la version anglaise de la page 13 du projet de loi C-36. C'est probablement le texte anglais, le reste semble être une version française du texte anglais, mais avant la fin de ce débat, j'aimerais que l'on révise très précisément la version française du texte anglais. J'ai vu quelque part des textes qui ne semblent pas se conformer exactement, mais ce n'est pas le but de ma question.

À la page 13, à la ligne 35 de la version anglaise. On lit ceci:

(Sén. Prud'homme: P6 83.01(1)…(*b*) an act or omission)

(anglais suit)

(Following French—Prud'homme cont… À la page 13, à la ligne 35 de la version anglaise. On lit ceci)

> 83.01(1)…(*b*) an act or omission, in or outside of Canada
>
> (*i*) that is committed
>
> (A) in whole or in part for a political, religious or ideological purpose, objective or cause...

Where is those things defined? An act that is ideological or religious for a colleague may be totally non-ideological or non-religious for someone else. I put myself in your able hands. You are there to protect Canadians. You are there to be the watchdog for Canadians who could be affected by this law without even knowing.

Go to page 15, in English, 83.01(2) states:

> 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…

(French follows--Prud`homme cont... En français, on dit qu'il n'est pas necessaire)

(après anglais)(Sén. Prud’homme… activity is facilitated…)

En français, on dit qu’il n'est pas nécessaire, pour faciliter une activité terroriste, que l’intéressé le sache. J'ai beau relire, il y a peut-être quelque chose que je ne comprends pas. N'importe quel sénateur ou député peut s'adresser à un groupe sans savoir que ce groupe est visé par la loi. Cela m'intrigue beaucoup.

(b) que cette activité ait été envisagée au moment où elle est facilitée;

(Sén. Prud’homme: -- In English, clause 83.01(2) states…_)

(anglais suit)

(Following French--Prud`homme cont... au moment où elle est facilitée;)

In English, clause 83.01(2) states:

> (*b*) any particular terrorist activity was foreseen or planned at the time it was facilitated...

Remember, in French, that language is very strong.

(French follows--Prud'homme cont...Il n'est pas necessaire...)

(après anglais)(Sén. Prud’homme)

Il n'est pas nécessaire, pour faciliter une activité terroriste:

(b) que cette activité ait été envisagée au moment où elle est facilitée;

(c) que cette activité soit effectivement mise à exécution.

Quelqu'un peut faire un discours sans action à des groupes qui ont des causes qui peuvent être interprétées par d'autres en vertu de la page 13 comme étant religieuses ou idéologiques.

Vous savez, je suis très prudent, monsieur le Ministre, puisque pour nous, les Canadiens français --

(Sén. Prud’homme: Minister once has Minister for ever…)

(anglais suit)

(Following French--Prud'homme cont.. les Canadiens français--)

Minister once and minister forever. You have been a minister, so excuse me at times if I call you minister.

We are not many around the table here who voted for the War Measures Act. As a matter of fact, if I look around, I think I am the only one. It is not a secret to you that I agonized tremendously over it. The pressure was immense. However, I did my duty to what I know as Canada and I voted for it. With the information that we now have, I would have voted against it. However, with the information given to me then, that was my duty. I promised myself that, from now on, as long as I am in Parliament, I will be extremely careful when bills of this kind arrive.

I do not apologize for being extremely careful in scrutinizing the meaning and who decides and what is the appeal for Canadians. If you care, Mr. Reid, to comment, I will be very attentive to your answer.

Mr. Reid: I regret that this is beyond my capacity as Information Commissioner. I would like to participate in the debate but I cannot do it in my current role.

The Chairman: Senator Prud'homme, that might be something you can raise with the Department of Justice officials when they come back.

Senator Joyal: Mr. Reid, in the last sentence of your brief, you say there should be an expiration clause for the shortest possible period of time. Time is a relative notion. What is "shortest" in your opinion?

Mr. Reid: When the Access to Information Act was passed, a parliamentary review was mandated in the act three years hence. That is one possible date that comes out of the Access to Information Act. There is a date in the United States of the end of February 2002 for one of their pieces of legislation dealing with this. That might be too short.

I do believe that this kind of legislation -- speaking as a former minister and member of Parliament -- on which Parliament should really be keeping a very tight watch.

Senator Fraser: It is my observation that this entire bill is to be reviewed by Parliament after three years, as it is now written.

The Chairman: Yes, and that would include the Senate.

Senator Fraser: That would include this clause.

The Chairman: Thank you, Mr. Reid and witnesses.

We will reconvene at 2:00 p.m.

The committee adjourned.