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

OTTAWA, Wednesday, October 24, 2001

The Special Senate Committee on the Subject Matter of Bill C-36 met this day at 2:00 p.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, if we could take our seats, we can proceed with our afternoon session.

This is the third day of our pre-study on the subject matter of Bill C-36, which is the government's response to the tragic events of September 11 in the United States. This bill is referred to as the anti-terrorist bill. Here in the Senate we are engaged in an unusual process called pre-study, which enables us to study the subject matter of the bill and bring forward recommendations and comments that we hope will be reflected by the House of Commons in the legislation, which will finally come before us.

When it does, of course, it will go through the normal routine of debate. Committee study in the Senate is an effort to get an early hand-in with suggestions and recommendations for possible changes before the legislation formally comes to us.

This afternoon, we are pleased to have a presentation from the Canadian Bar Association. We could not even think of discussing a bill like this without having the Canadian Bar Association here. We have with us the president of the association, Mr. Rice, who will make a statement. We have Mr. DelBigio, a member of the association and representing the legislative and law reform

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committee and the national criminal justice section of the Canadian Bar Association. Mr. Rice, please proceed:

Mr. Eric Rice, President, Canadian Bar Association: Honourable senators, the Canadian Bar Association welcomes this opportunity to comment on Bill C-36, the anti-terrorism bill. The CBA is a national association of about 37,000 lawyers, including also academics and judges.

Our association is dedicated to the administration of justice and the improvement of law. Every year we draw upon the experience, the knowledge and expertise of our members to make many submissions to Parliament on proposed legislation. We have only recently presented briefs on money laundering, charities and terrorist funding, immigration security issues, sentencing and parole, hate speech and privacy, all of which bear relevance to this bill.

Lawyers work every day in our communities and courtrooms dealing with our laws and how they affect people and how well they work in terms of what we have all come to value so much, our democratic freedoms and the rule of law.

(French follows - Mr. Rice continuing: Chaque jour...)

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(après anglais)

M. Rice : Chaque jour au sein de nos communautés et dans nos cours de justice, nous travaillons avec nos lois et voyons comment elles affectent les gens et comment elles s'impliquent dans le quotidien de nos libertés démocratiques et la règle de la primauté du droit.

(Mr. Rice, continuing, in take 1410: Bill C-36 is far reaching...)

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(Take 1400 ends in French. 1410 begins -- Mr. Rice continuing)

Bill C-36 is far reaching. It presents a shift in the equilibrium that is the balance between security and freedom. It is important that we all understand that and what that means.

(French follows – Mr. Rice continuing: Le projet de...)

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(après anglais)(M. Rice)

Le projet de loi C-36 embrasse l'âge. Il constitue un virage susceptible de briser l'équilibre entre sécurité et liberté. Il est très important que nous comprenions cela et ce que cela signifie.

(M. Rice : Lawyers, like everyone, were profoundly affected by the...)

(anglais suit)

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(Following French – Mr. Rice continuing)

Lawyers, like everyone, were profoundly affected by the events of September 11. In the six weeks since the terrorist attacks, we have all known what it feels like to share the pain of New Yorkers. It is impossible now for any of us to act as if nothing has happened. It is impossible to pretend that the comfortable expectations of freedom can have the same priority now.

We must think about what we have been through and to cope. Yet we must do so, keeping a sense of proportion and a sense of history. The CBA is committed to studying Bill C-36 and to providing valuable contributions to your deliberations.

We, as you, have had a short time to analyse and to consult on this complex bill. Like all Canadians, we support the government in eradicating terrorism and bringing terrorists to justice. We have assembled a group of senior lawyers from across Canada in numerous practice areas. They have put in hours and hours already. They have produced a preliminary report that will go to our National Board of Directors later this week in Ottawa. For now, I can report some of the committee's views, as can Mr. DelBigio who is a member of the committee and is familiar with the details.

I cannot give you the details of those conclusions today, but to assist you today, we will express a few of our concerns.

The critical issue is balance. How do we ensure our safety and security while at the same time respecting our rights and liberties?

If emergency powers are necessary, so be it. Let us fight back against terrorism and bring the guilty ones to justice, but let us not endanger the innocent in our haste. Let us not abandon the very freedoms and the rule of law, which are the terrorist's target.

For example, in this bill the government has cast a broad net by their definition of what should be considered "terrorism." The risk of casting such a wide net is that we may take in more than is needed or wanted. The definition could include many legitimate activities and that could disrupt social order, for example, the recent nurses' and truckers' strikes, anti-globalization marches, and demonstrations of First Nations people. We know that the bill was never intended to label these activities as terrorist and Canadians and our government will want to consider whether, therefore, the definition should be clearer.

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Defining "terrorism" is not a simple task. While the September 11 attacks were clearly terrorist, other examples may not, and often probably will not, be so clear. Our courts have consistently refused to define the concept, perhaps recognizing that acts constituting terrorism can depend on such things as social context, history, racial issues, religious and other group identity issues.

I would like to turn to a second and very important issue: the sunset clause. This bill must have a true sunset clause. It may be that emergency powers are necessary right now, and we do not take the government to task on that. However, it does not follow that the law must be made a permanent law. The mechanism for review, now in clause 145, is insufficient. It is especially important to have a sunset clause when the government has put these extraordinary legislative changes on such a fast track.

Given the far-reaching nature of the bill, Canadians need to be convinced, through the operation of legislative process, why these powers need to be extended. The government must bear the onus of establishing this to the satisfaction of elected representatives.

A true sunset clause would offer the leadership that Canadians need. Canadians, if they must for now, may be prepared to sacrifice basic rights, but they must be assured, as Mayor Guiliani said to his fellow New Yorkers: "We will get through this together." Or as one wise man said: "In times of peace, prepare for war. In times of war, prepare for peace."

Let us talk about the enforcement of the laws dealing either with the existing laws that provide many of the protections that this law seeks to provide, or the new law. Legislative action creating new offences, without adequate funding, to enforce existing laws may serve to create a false sense of security. The principal problem is that law enforcement agencies have inadequate resources to enforce the laws already on the books. The government must make a concerted commitment to fund law enforcement, intelligence gathering agencies and the military to levels that adequately protect national security and public safety.

I wish to comment on Bill C-36 in respect of hate crimes. In the wake of a growing number of hate crimes, Bill C-36 would increase the protection for racial and religious minorities within Canada, thereby ensuring that all Canadians are treated with equal dignity and respect. This is commendable. However, it also reflects the need to aim carefully at the target -- terrorists, and not to inadvertently hurt innocent people.

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Our experts have identified several other aspects of the bill that should concern us. I draw your attention to the headings: Investigative Hearings, Preventative Arrests, Financing for Charities, Money Laundering, Privacy Implications, Freedom of the Press and Access to Information, to name not all of them.

We in the CBA appreciate this opportunity. Debate on this far-reaching new law is important. Terrorism is a scourge, and it is not new. It has plagued the world every year for the last 100 years. We remember 1914, when so many Canadian lives were lost. World War I started over the terrorist assassination of only two people.

Societies that have been most successful against terrorism have refused to play into the terrorist's hands. Firmness of purpose, deliberation, adherence to the ways of democracy and the rule of law are the ways to maintain the support and confidence of the people, and to protect the people over the long haul. Emergency powers may be required at certain times, but every erosion of liberty should be thoroughly justified. The issues at hand do not necessarily dictate rejection of Bill C-36. However, they do require principled reflection in respect of the details before the bill is adopted. We will help in that reflection. We will put all of our efforts into helping Parliament get the bill right.

Thank you. My colleague, Mr. DelBigio, and I are pleased to answer your questions.

Senator Beaudoin: It is always a pleasure to have the Canadian Bar Association before our committees. It is often that we have witnesses from the bar at the legal committee, however this is a special committee. Your opinion is important.

You said that you are in favour of the sunset clause.

(1420 follows -- Sen. Beaudoin continuing: Do you have in mind...)

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(Senator Beaudoin continuing)

Do you have in mind a general sunset clause, or a sunset clause for certain clauses of the bill?

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Mr. Rice: We have in mind a general sunset clause with some exceptions, and we are looking at that. One part of the bill that we say should not be subject to sunset is the provisions against hate crimes and hate speech. That we say should survive and stay permanently.

Senator Beaudoin: You have taken the juristic approach to this bill. It is criminal law to a great extent. Of course, when we talk about criminal law, we usually talk about the Charter of Rights and Freedoms, which is part of the Constitution. There are three points that have been referred to by many persons: Protective detention, the right to silence and the interception of private conversation or communications.

There may be a good argument in favour of the preventive detention, and it may be justified under section 1 of the Charter. It is not long. It is precise and since no rights and freedoms are absolute, we may have good reason to have such a preventive detention. In that sense, the final debate, if ever it is challenged in court will be on section 1 of the Charter.

Probably the same argument may be used for the second point, the right to silence, which is basic in our system of criminal law. We are not obliged to speak. However, if you speak, it may be taken against you. Again, there are some guidelines around that.

The third item worries me, the interception of private communications.

When that is done in Canada, we go before the usual court, and we obtain a warrant. If this continues, I do not have any problem.

If it is a Canadian calling a person from another country, then the authorization may come from the minister instead of a court of justice. This is new. I do not know what the reaction of the court will be on this, but I have some concern because we shift a power from the judicial branch to the executive branch. Since you represent the Bar of Canada, I would like to have your reaction to that.

Mr. Rice: Let me deal with it, and let me ask Mr. DelBigio to supplement what I will say.

On the preventive detention, the committee recognizes that there seems to be tailored appropriately to the objective with constitutional safeguards.

Senator Beaudoin: You agree with the institution?

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Mr. Rice: I am saying that the committee has, at this point, recognized that there has been an appropriate attempt to tailor measures to be objective and the constitutional safeguards are there. I will say in parenthesis that the bill may have been there already in the Criminal Code.

On the interception of communications, you have put your finger on something that is of serious concern to the Bar, and our committee does see that the legislation on that point is at risk for a Charter breach that cannot be justified. Mr. DelBigio may wish to add to that. You have touched on an important point.

Mr. Greg DelBigio, Member, Legislation and Law Reform Committee and National Criminal Justice Section, Canadian Bar Association: Senators, it is probably the case that the provision that permits the interception of private communications without judicial authorization is an extraordinary departure from current law, from tested law. It is a departure that needs to be very carefully scrutinized. The importance of the current law is that there is an opportunity after the fact to test the validity of an authorization.

Having regard to the privacy interests, which are at stake, with the interception of private communications, that subsequent testing is important. That is a way of preserving privacy. It is a way of ensuring that the protection of privacy is always addressed. There seems to be no provision in clause 273.65 like that. The precise scheme by which authorization might be made is entirely uncertain and unclear. Having regard to the significant departure from established law, the CBA has concerns with respect to it and its validity.

Senator Beaudoin: That is my concern also. If we look at the jurisprudence, we have at least four cases to the effect that if you want to intercept a private conversation, you must obtain the authorization from the court. We are now in new waters, uncharted.

It all depends how section 1 of the Charter will be construed. They will have to say whether it is acceptable in a free and democratic society to substitute such a system to the one that is our own system, having regard to the circumstances in which we are now.

That answers my question. I have the same concern as you, because it is new. Prima facie, it is a violation of section 7 and section 8 of the Charter. The debate is whether the court will accept that under section 1 of the Charter? It is debatable in my opinion.

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Mr. DelBigio: You must remember that the reports of prior authorization by an independent judicial authorization is to be held to be necessary to the protection of rights. That is the screening. That is the barrier between the interest of the state and the privacy interest of the individual. To the extent that this new provision erases or alters that protection, it is of concern.

Senator Fraser: I was greatly intrigued by your list of areas that you said should concern us, without giving any further details. Might I ask you, at least as a starting point, why you think we should be concerned about freedom of the press under this bill?

Mr. DelBigio: There are a couple of concerns. First is the source of information for media outlets. Currently, it is believed that it is critical that the source at times remain private. That is essential to the flow of information between sources to the media. That is important to the functioning of the media. There is some concern that source information will not be protected here. Indeed, the media, within the investigative hearing, for example, might be compelled to provide information and to disclose source information. That is one type of concern that exists, having regard to the broad powers of the investigative hearing.

Senator Fraser: I may well be out of date but when I was in the business, there was no legal protection for media sources. If you wanted to protect your source, if push came to shove, you would have to go to jail.

(Take 1430 Follows - Mr. DelBigio: That is correct...)

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Mr. DelBigio: That is correct.

Senator Fraser: This is not a new situation that you are describing here.

Mr. DelBigio: There is an ongoing concern in that it is a new power and the power to compel, for example, a member of the media to attend at an investigative stage. It is well known that members of the media will often have information at all stages of an investigation or trial. The power to compel a media person to attend at an investigative stage and disclose that which they know is a significant departure from the state of the law as it now stands. That is to be distinguished from the power to issue a subpoena at a later stage.

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Senator Fraser: Obviously many Canadians are thinking very hard about this preventative detention. I was very interested in that it seems in your view to have been well crafted. Nonetheless, I wonder if they bring me in and I have my hearing before a judge within the prescribed period of time, and the judge prescribed conditions which, for whatever reason, I choose not to accept, maybe I just find they are unreasonable, whatever reason I refuse to accept them, I could be sent to jail for up to one year even though I have not been convicted of any crime or indeed of any offence. All I have done is refuse to accept some conditions.

Would it be appropriate at that stage to build in a referral process, assuming I or someone else is being sent to jail simply for refusing to accept conditions, not breaking the conditions later on, having accepted them? At that initial stage, would it be appropriate to build in an automatic, immediate referral to another judge or another court, or would that just be a useless stroke.

Mr. Rice: I would say first that your point is well taken. We will deal with that. It is a good question. The committee has not briefed me on that specific point. The police officer must begin with have reasonable grounds. There is a certain amount of trust in the institutions that is part of the process there.

There is a concern or some concern that this process of preventive detention and the protections still depend on the definition aspects. The definitions must be targeted squarely so that the arrest and detention is not used on discriminatory grounds. Do you have anything to add to that, Mr. DelBigio?

Mr. DelBigio: Certainly issues of arbitrary detention must always be carefully considered. Our committee has not considered the issue of an immediate referral. I can say it is one worth considering. It is the case that within the time period of a year, those circumstances that gave rise to necessity of detention in the first place might have changed and might no longer exist. I cannot say more than that on the issue.

Senator Murray: To try to save time I will put several issues before the witnesses and ask them to comment. I will not return to the charge.

First, I take your point about sunset laws, Mr. Rice and the need for them. Do you not also think that some kind of oversight provisions are also necessary for this bill, whether it be judicial screening or parliamentary oversight? I draw your attention to the provisions in the Emergencies Act, which we passed in 1998 or 1999, which is the successor statute to the War Measures Act, as you know.

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Second, I would like to have you or Mr. DelBigio comment on the utter lack of due process contemplated in the compilation and publication of the list of terrorists. You know that the intelligence and police services and the Solicitor General will compile these lists. That minister will take them to cabinet. Cabinet will publish them in the *Canada Gazette*. That is the end of it.

You can get off the list possibly. You have some judicial recourse to get it off, but your name is on it publicly, I would think that your reputation is mud.

I would also like you to comment on the completely unnecessary, elimination of due process with regard to citizens trying to use the Access to Information Act or the Privacy Act. The Information Commissioner and the Privacy Commissioner have been completely cut out and the Attorney General will be getting the unfettered power to declare that such and such information cannot be disclosed. The grounds are extremely broad.

Finally, I hear what you are saying about hate propaganda laws. You seem to favour these provisions of the bill. This morning we heard Professor MacKay, and he sees these provisions as a significant extension of existing hate propaganda laws, even if it is a good cause. He expresses his concern about them.

My question on that point is do we really need these provisions now in the context of this bill? Can we not have more time to mull it over?

Mr. Rice: Dealing with your second point, the lack of due process, both on the publication and respect to information, the committee has noted both of your concerns. The terrorist list aspect was characterized by some as startling. We will work on that.

The proposed clause 87.103 and clause 104 under the bill will amend three other acts. The Access to Information Act covers government health information. Existing legislation already protects from disclosure information that is injurious to national security, foreign relations and defence. It will cease to apply from the information in the certificate.

This appears, as you say, to exclude an independent review. We are concerned that there will be no independent review of the basis for the certificate. That is as much as I can say at this point. Again, you have touched on things that are of serious concern to the committee.

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Mr. DelBigio: I would only add that with respect to whether there should be an additional oversight provision, openness and public scrutiny of a significant shift in law is always important. If there are oversight provisions, there can be no harm.

Senator Murray: Would you address my other issue, the hate propaganda laws?

Mr. Rice: Can you just repeat your point on that?

Senator Murray: I have the impression that you favoured these provisions. That you certainly did not want the sunset clause applied to them. I quoted Professor MacKay this morning who was expressing some concern that they added to the present provisions. He expressed his concern on that score. The question is whether we really need these provisions and this law at this time, and whether we can have more time to think about that.

Mr. Rice: The overriding concern and belief of the committee was that as this legislation deals with racial and religious intolerance at a time when we do see an increase in intolerance. We have seen an increase in to the intolerance, even since September 11.

(Take 1440 Follows - Mr. Rice continuing: It would not hurt...)

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(1440 -- Mr. Rice continuing)

It would not hurt, and it would hopefully help, to have strong laws to protect minorities.

(French follows -- Senator Bacon: Croyez-vous qu'il serait...)

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(après anglais)

Le sénateur Bacon: Croyez-vous qu'il serait bien d'inclure une disposition qui prévoirait une revue annuelle de l'application de la loi par un organisme indépendant, comme le Comité de surveillance des activités du service de renseignements et de sécurité, pour les pouvoirs qui ne restreignent plus les droits et libertés civils comme l'interrogatoire obligatoire, la détention préventive et la confection de la liste?

Pour l'harmonisation et une application plus efficace de la loi anti-terroriste, croyez-vous qu'il serait judicieux de mettre sur pied un tribunal spécialisé pour les crimes terroristes et les mesures qui seront adoptées dans la loi projet de loi C-36?

(M. Rice : The committee did not consider whether to establish ...)

(anglais suit)

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(Following French)

Mr. Rice: The committee did not consider whether to establish a separate court. I have no reason to think, from the background of this and other bills we dealt with, that that would be favoured. As to whether we should have an annual review, I suppose it is a question of degree. Our recommendation, or the recommendation of the committee, at this time is that it would be a three-year sunset clause. That is as far as we have gone.

I missed the first part of your question. The translation kicked in half-way through. Have I missed any part of your question?

(French follows -- Senator Bacon: Non. Je me demandais...)

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(après anglais)

Le sénateur Bacon: Non. Je me demandais si vous favorisiez une revue annuelle de l'application de la loi par un organisme indépendant, comme le Comité de surveillance des activités de renseignements de la sécurité qui existe déjà. Un comité qui serait indépendant du Parlement.

(M. Rice : I am not avoiding your question, however I am...)

(anglais suit)

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(Following French)

Mr. Rice: I am not avoiding your question, however I am not able to respond, at present. I do not think our committee has considered that. However, I have taken note of your question, and I take your point. Thank you.

Senator Andreychuk: You have a process within the Canadian Bar Association. You go coast to coast and you have committees. The committee has yet to complete its process to have a definitive report for the CBA. Is this then a preliminary report, or is this the final report?

Mr. Rice: It is a preliminary report, but, as I said, it is the product of hours and hours of condensed work by these people from all sections of the Canadian Bar Association. They have worked together by conference calls and meetings. We are in the position where we have their report in its pre-preliminary form, and it touches on most of the issues that they have found in the bill.

However, there is a great deal of information in the bill that must be considered. We do have a report that we will deal with this weekend, and we are hoping that we will have a final report on this as soon as we can. We are a democratic organization and there are many views on how we are to approach this. We certainly want to hear from everyone. We are pleased with the process so far and with how much has been achieved. There is no shortage of interest.

I might add, there has been no shortage of commitment to work on this. People recognize that this is important, ground-breaking proposed legislation on a topic that has been on people's minds, more or less constantly, for the last six weeks.

Senator Andreychuk: You have touched on the fact that the definition of "acts of terrorism" may be problematic. In the same vein, there is a definition of the "facilitation of terrorist activity." That in itself may be problematic. According to clause 83.01 (2), knowledge is not an essential element of the facilitation. However, when we work through the bill further, clauses 83.03 and 83.04 indicate a requirement of the elements of knowledge or intent. Is there a difficulty with that?

Perhaps when you have your brief and before we have the final draft, I would be very interested to know your opinion as to whether the word "knowingly" should have been put into facilitation earlier. It may trap all kinds of people that we have been worried about, who might be the neighbour or who might

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inadvertently do something that could be construed as facilitating without actual knowledge that they have facilitated a terrorist activity. There is an inconsistency.

There is one part "knowingly," which I think is good. In the other part it is not included. From the criminal law viewpoint, I would like to know whether they think that is problematic.

In clause 83.14, innocent third parties who inadvertently facilitate terrorist activities, could have their property forfeited. Do you believe that it is the intent of the drafters to catch innocent third parties? We will not only have those people trapped, but it will present significant economic difficulties for their families. I would urge you to look at that and, if you can, comment today.

In the same vein as this investigative hearing, the question arises about privileged information. You have spoken about the press. Have you contemplated whether the privileged information could go to solicitor-client issues? That is much of the detail that I think the criminal law section should address and hopefully will address.

Mr. Rice: Thank you, senator. That very point was addressed by the committee. The inconsistency, and perhaps the breach under the Charter as a result, raises the question. You have raised an important point. This bill, as it reads or as it could read, states that an innocent person could be arrested, detained, have all of his or her property taken away and incarcerated for a lengthy period of time, under the umbrella of emergency rules. We do not believe it was intentional that innocent people would be subjected to prosecution under the results of this bill. However, the effect of it could be there. This is where the tightening needs to be administered. You picked one of the best examples.

However, I will let Mr. DelBigio talk about the details of how we analyzed that area of the bill because I know he dealt with that specific point.

Mr. DelBigio: On the issue of privilege, it is important to bear in mind that there are really two considerations. One is privilege and the other is confidentiality. Both are important to the solicitor-client relationship and important to the protection of the client. It is important to the maintenance of the solicitor-client relationship, so that legal advice can be freely obtained with confidence.

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Right now, the word "privilege" is included but the word "confidentiality" is not included. There has been a concern expressed by the committee that that omission is significant and that the bill should refer to both "privilege" and "confidentiality."

In respect of the forfeiture of property, it is important to look at the breadth of that provision. Again, it is property that has been used or will be used. Clause 83.14 (1) (c) reads as follows:

Currency and monetary instruments owned or controlled by or on behalf of an individual who has facilitated or carried out a terrorist activity, or is planning to do so.

The subclause tells us that it is regardless of whether the currency is derived from or connected to a terrorist activity or plan.

(1450 follows -- Mr. DelBigio continuing: It is important to contrast...)

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(Mr. DelBigio continuing)

It is important to contrast these forfeiture provisions with existing forfeiture provision this is section 12.2 of the Criminal Code dealing with the proceeds of crime. One example in the existing Criminal Code provisions is that property may be released for reasonable living, business or legal expenses. That does not seem to be included in this provision. Once property is seized and restrained and forfeiture provisions have commenced, a person may be, in effect, financially crippled in attempting to defend against this.

Senator Jaffer: I would like your opinion on the right to silence. Before I do that, I wish to confirm what Senator Beaudoin asked you about a sunset clause. I am now confused.

Are you saying that a sunset clause should be placed on the entire bill, or to some provisions in the bill?

Mr. Rice: A sunset clause should be added to the bill, with the exception of the hate crimes provisions.

Senator Jaffer: I will proceed to the right to silence. When the minister was here, she said that in Canadian law we have a right to silence and a right against

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self-incrimination. Would you comment on the provision, under investigative hearing, (10) on page 34:

No person shall be excused from answering a question or producing a thing under subsection (8)...

I am wondering if you have thought about this and what would your observations be about this part of the bill?

Mr. Rice: I will let Mr. DelBigio speak, but under investigative hearings generally, the committee has not taken a negative position on it to the extent that the reasonable grounds exist to believe that a terrorist offence has been or will be committed and provided that derivative use evidence is not allowed to be used against a person appearing and also ensuring that there is right to counsel.

This brings us back to solicitor-client confidentiality. It must imply that solicitor-client confidentiality will be protected. This is something that we have been talking about earlier, before this bill came along. The right to have your case before the court includes the right to have your own lawyer whose loyalty will be to you and who will keep in complete confidence what knowledge you have and what you say. The proposed legislation carries that forward and the same concerns apply.

In regard to the right to remain silent, I will let Mr. DelBigio address that question.

Mr. DelBigio: This is a significant shift in law. The provision does not draw a distinction between witnesses and suspects or targets of an investigation. The Supreme Court of Canada has held that the right to silence exists at the investigative stage of proceedings. To the extent that a target of an investigation might be compelled at an investigative stage, it needs to be considered whether this represents a significant or constitutional departure from existing law.

The bill provides for the right to counsel. There are concerns because often investigations need to occur in a timely fashion. You need to consider whether that is a meaningful right when there is no provision that says that counsel may be appointed. Section 684 of the Criminal Code provides for appointment of counsel in appeal proceedings if there is a significant risk that at an investigative stage where there are potential consequences and fallout from being compelled, that a person might not be able to retain counsel privately. It is absolutely unknown

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whether a legal aid scheme would provide for counsel. There should be a provision or at least consideration should be given to whether a court under one of these hearings can appoint independent counsel.

Consideration should also be given to the provisions in respect to derivative evidence. The litigation with respect to derivative evidence has always proven to be time consuming and complicated. The proving of whether evidence is derivative is always central to the litigation.

Consideration might be given to putting the onus on the Crown to show that evidence is not derivative. That is particularly so when the broader aspects of the bill are considered in what I would call the secrecy provisions, the various provisions that provide that evidence need not be disclosed in its entirety to the defence.

There are concerns surrounding this investigative hearing. I hope that has answered the question.

Senator Finestone: I am always interested to hear what the Canadian Bar Association has to say. I was listening to my colleague, Senator Jaffer, with respect to the sunset clause. I do not share that view, and I will tell you that in advance. I will tell you why.

There are things in the bill that you like. You like the hate crime provisions in the legislation. You make the observation that the government must make a concerted commitment to fund law enforcement and intelligence gathering agencies and the military to levels that adequately protect national security and public safety. You have said that although there may be emergency powers that are necessary right now, that does not mean that they should be permanent law in your view.

On the other hand, you note that you need these legislative actions which were needed in the first place. Do you think it would be important to review the bill in certain aspects and have sunset clauses on those clauses that seem the most egregious? I would like to ask you about the most egregious clauses, such as the privacy clause. Do you think that you could go through the bill, clause by clause, and make exceptions for the United Nations conventions, particularly the two that are covered here? Would you find that option acceptable?

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Mr. Rice: We have been told about that option. It is not really easy for us to comment upon it until we see which clauses are involved. You mentioned privacy. Obviously, we would consider whatever was proposed. Speaking generally, the consensus of the committee was that the entire bill, with the exception of the hate crime provisions, should be subject to a sunset clause. The bill is that far reaching. For that reason it needs to have this kind of full reappraisal.

You say to me that some exceptions should be considered for the United Nations conventions. The committee does not really accept that either. The starting point must be the values that we apply to our own Constitution, Charter of Rights, and our sense of what is better for us, and we start from there. First, we need to decide whether the measures go too far or not far enough or need to be clarified. The committee has not accepted that the international conventions as such are entitled to be excluded for the reasons that we have said.

(Take 1500 Follows -- Mr Rice continuing: You asked me specifically...)

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(Following Take 1450, Mr. Rice, excluded for the reasons that we have said. TAKE 1500 follows, Mr. Rice continues)

You asked me specifically about privacy elements, whether that is a high enough priority. The answer is, yes, that is certainly one that they would. However, to take them one by one and to trade-off or to do a list with an imposed threshold of some kind or a threshold of whether or not it should, I cannot say that at this point. I believe the consensus is that, no, we would not think it appropriate to do it piecemeal.

Senator Joyal: Mr. Rice, I would refer you to page five of your brief. In the last line of the second paragraph, that sentence made me jump in my chair. You said that the government must bear the onus of establishing this to the satisfaction of elected representatives. Does that mean only the House of Commons and that the Senate of Canada has no role in that regard?

Mr. Rice: That was not intended to be exclusive. We are more than pleased to see this august body have a look at all of these things as well. It may require a correction.

Senator Grafstein: Substitute the word "Parliament"

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Senator Joyal: I appreciate that consideration.

Mr. Rice: Yes, that is probably appropriate. Let me say one other thing that harkens back to what was asked earlier. We do not take any position and we are not intending to suggest anything about adequacies of funding or support for things. We are simply making a point that whether a new bill is needed or the existing measures are sufficient as law, they are only as good in law as the commitment to support them. We are just saying that in general terms.

Senator Joyal: I certainly agree with you on that.

I should like to refer you to the bill and ask for your further consideration on page 131, concerning an appeal to the Federal Court. That subclause reads as follows:

5.(4) An order on an application referred to in subsection (3) is not subject to appeal or review by any court at the instance of a party to the application.

On the following page, subclause 6.(2) states:

(2) A determination under paragraph (1)(d) is not subject to appeal or review by any court.

You have not commented on the exclusion of appeal. It is an important element that we would like to hear about from representatives of the bar in the days ahead.

I should like to return to your brief and what you are trying to tell us therein. If I understand your brief, you are saying that we are in a state of emergency and that we face a particular threat. Furthermore, we need some extraordinary or exorbitant powers but at a point in time that should lapse. That seems to be your reasoning. The problem is that the conclusion does not support the premise. If we were in a state of emergency, it would mean that the measures would be temporary. The government has so far refused the principle of a sunset clause, which is an expiration clause -- that is, a clause that would delete the extraordinary provisions of the bill.

I totally support some provisions of the bill because they are important, and so on. However, some of them are extraordinary, and extraordinary in one sense. Not only are there provisions in this bill that deal with what we thought were customary practice in our legal tradition, such as the warrant when a Canadian is

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being wiretapped; or, for instance, on an appeal, when a person wishes to protect his privacy. Further to the extraordinary power and the investigative authority that the police have under this bill, the political power of the day also gets extraordinary power by giving to the Minister of National Defence, to the Attorney General of Canada and to the Minister of National Revenue, to name those three, extraordinary powers, forever. That means that we are here changing something fundamental in the Canadian society.

In trying to understand what we are doing here, we must have a clear perception of the consequences further down the road. That is why we exist in this non-elected chamber, namely, to try to get some perspective on the long-term view of the implications of those changes in the years to come. We are now talking about al-Qaeda. However, it could be another group at another time. It could be an internal threat within Canada, too. We do not know. We have known it in the past; we can know it in the future. The United States has also known about similar threats internally as they have known about some externally also.

It is important for us to try to understand where the structure of the bill is applied in relation to what we thought, namely, that, as Canadians, we were protected by the Constitution of Canada. With the American bill, they recognize the continuity of the constitutional principle by putting a sunset clause on the extraordinary powers that are granted to the police forces in the United States. However, by not recognizing that, we are changing something fundamental in our way of seeing the protection of our rights and freedoms. We must have a serious reflection about this.

You said that you have been wrestling with many clauses of this bill, and rightly so. All of us are trying to understand one paragraph in relation with another paragraph and trying to get the entire picture of it. When will you be able to come forward to us with some additional comments so that we could profit from your experience in that overall context of what we must do today here?

Mr. Rice: You have put what I was trying to express, namely, the measure of concern and the seriousness of this new bill, as I wish I had been able to put it. We take it very seriously. As I said earlier, it is a drastic change.

Our committee has provided its draft report, which is a comprehensive one. We will be dealing with it with our directors at the end of this week. We will see what further work must be done before we come back to you. This is on a full tilt mode for us. We are working on this as hard as we can. We want to come forward as

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soon as we can. We do not want to work too much in haste, either. I understand your point. It is a matter of urgency for you and we are working as hard as we can.

That is as much as we can say now. We will do our very best.

Senator Joyal: Besides the analysis that you make on the legal points -- and, Mr. DelBigio has been able to do this afternoon, namely, to pinpoint on some specific paragraphs -- could you give us an appreciation of the overall direction that this bill is taking the country? This is important for us in terms of what we thought were our constitutional rights and the fundamentals of our democratic structure.

Mr. Rice: Yes.

Senator Joyal: Thank you.

Senator Grafstein: Obviously, we are all confronted by trying to navigate our way through new seas with new and elusive threats that we thought were almost beyond our imagination. Yet we were confronted with it. Everyone is grappling with this rather vague and elusive threat and trying to give Canadians a sense of security that we can deal with these problems at home and abroad.

(TAKE 1510 follows, Sen. Grafstein I wish to start with the sunset clause...)

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(Senator Grafstein continuing)

I wish to start with the sunset clause. I share Senator Finestone's concern about it. I proposed a five-year sunset clause with several caveats. Caveat number one would be that at a time when there was no clear and present danger from terrorist threats, the then act should be suspended. If this is an extraordinary bill, and five years from today the threat is not lifted, a sunset clause in my view should at de minimus have a condition precedent to ensure that at the time it is not caused to be ended.

It must deal with two other issues. First, if there are ongoing prosecutions during the period, there must be obviously a waiver of a non-estoppels against those prosecutions.

Finally, my narrow point here is that I fail to understand your position with respect to a sunset clause that does not wipe out the ratification of the UN treaties,

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which are the treaties dealing with money laundering and terrorism. That is Canadian policy. It has been approved by Canada. This bill ratifies these particular bills.

I did not quite understand your comment. We have approved these bills but we have not ratified them and made them part of domestic law. That has been our commitment to the United Nations. How do you square the position you have just given us to say that all you are concerned about is hate literature but you are not concerned about these UN treaties and instruments? I did not understand your position.

Mr. Rice: Which one is paramount when the provisions of a UN treaty run up against a breach of the charter, for instance? That is a concern. I will let Mr. DelBigio deal with that in a minute.

That is what I am talking about, not just that you would arbitrarily override it.

Senator Grafstein: If that is your position, I can understand that. Then you must tell us in what specific way the Charter is being overridden by the implementation of this bill into domestic law.

Mr. Rice: I understand that and we will have to deal with that.

Senator Grafstein: I do not need a long explanation, if that is your intention that would be very helpful to us.

Mr. Rice: Did you want me to deal with your other two points? The ongoing prosecutions would continue. That would go without saying.

Regarding no clear and present danger, there is the question of who would decide on a clear and present danger.

Senator Grafstein: Parliament.

Mr. Rice: Would that not amount to redoing the legislation?

Senator Grafstein: Parliament could decide five years hence that there is no clear and present danger, Parliament, in effect is, invoking this bill, so Parliament would decide. Who else but Parliament - both houses, by the way – should decide?

Mr. Rice: That is the object of the sunset clause is to call for a reappraisal by Parliament. If they do not reappraise, it is the other way around.

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Senator Grafstein: I believe that there is a distinction and a difference by suggesting that we establish as a preamble to a sunset clause that it is absent a clear and present danger to the threat of terrorism in Canada.

Mr. Rice: I understand that. I would not say that I agree or disagree with you, I am questioning by whom the determination would be if the clear and present danger existed.

Senator Grafstein: Parliament.

Mr. Rice: I would certainly note your point there.

Senator Grafstein: Give it some consideration. We are looking for help here.

Let me deal with an issue outside this legislation to see if we can arrest legitimate fears by the Bar and civil liberties associations in this extraordinary bill with extraordinary powers in these extraordinary times. Could we develop a mechanism here that would be an independent mechanism? For the moment, I characterize it as an independent oversight commissioner. That possibly, have I not thought it through, but that possibly could be an officer of Parliament in the same way that we have a Privacy Commissioner and others.

An independent oversight commissioner could receive complaints when an individual felt that the application of the law, these extraordinary powers, were beyond, and I use these words carefully, beyond public necessity on clear and reasonable grounds. We are back to that with which Senator Murray and others are struggling. How do we survey the problem? Absent a sunset clause or with a sunset clause, assuming it is five years, how do you survey the problem from now to then, without interfering in any way, shape or form with the extraordinary powers that the public believes the government needs to exterminate these terrorist cells within Canada and elsewhere?

I have been trying to come up with a model, based on Canadian parliamentary practice, that would allow an independent commissioner, a parliamentary officer, who, in effect, would have recommendary powers. If in fact there is a clear and persistent overreach by authorities, be it the ministers or the investigative officers, that could be brought to Parliament's attention in a report, perhaps an annual report or a half yearly report. If necessary, Parliament could then have evidence upon which to renovate this bill. Would you give that some consideration? Would you like to react to that?

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Mr. Rice: It is an interesting suggestion. I have a couple preliminary comments.

You are grappling with some of the same things that we are. We know that if there is an emergency and the government sees fit to bring down emergency measures. They are there for the purpose of getting rid of the scourge of terrorism that is keeping people in fear. How do we work with that? How do we preserve as much as our rights and freedoms?

Senator Grafstein: How do we prevent Canada from being a safe sanctuary for these people who do not plan anything for us, but for our friends.

Mr. Rice: To have someone in that type of position, an ombudsman position...

Senator Grafstein: I used the words "parliamentary oversight" very carefully. I am not into the ombudsman theory.

Mr. Rice: The approach that we took did not include that at this point. However, we went into certain areas where the courts had been excluded, we wanted them included.

Senator Grafstein: My notion is that it would not be a judicial process, it would be an oversight process done by an oversight commissioner so that we do not become entangled in costly or difficult due process. The idea here is that it is not working, a provision of the bill is not working. It is unfair. Here are two or three examples of that. They are extravagant examples. Government, Parliament, renovate this.

Mr. Rice: There are a couple of points to that. It is an interesting suggestion.

The first point you made is that with or without a sunset clause, until we see something that is certain to work, we would not want it at the expense of a sunset clause. I do not think that a person in that position need be compromised or adversely affected by the sunset clause.

Second, you did mention the word "recommendary" powers. That is a notch or two lower than a judicial decision to turn something down.

Senator Grafstein: I understand that. The deep problem is where to draw the line. As I said to my colleagues in the Senate, where is the exquisite equilibrium between liberty and security? It is that with which we are grappling.

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My concern is that if there is a systemic pattern of excessive power, then a report by a commissioner on a half-yearly basis would bring that to Parliament's attention, and Parliament will have to do its will and take responsibility to the Canadian public. That is a thought. Perhaps you would give it some further thought.

Chairman, I appreciate your indulgence.

(Take 1520 Follows - Mr. Rice: You are grappling...)

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(Take 1520 Begins -- next speaker Mr. Rice)

Mr. Rice: You are grappling with what our committee members grappled with intensely, and we say that that really points to one of the reasons for a sunset clause. We know that it would be difficult to get the perfect answer for the risks to our freedoms that the process necessarily implies. The sunset clause is an essential backstop.

Senator Fraser: I am hoping that you gentlemen can clear away some undergrowth for me here so that I understand what is going on here. I am not a lawyer. These are just general questions about the law, if you will. You will have noticed, I suppose, that the investigative hearing provisions say explicitly that a person has the right to retain and instruct counsel. I note your interesting point about appointment of counsel if necessary. However, the preventive detention clauses do not refer to a right to retain and instruct counsel. Is that because the law already provides that if you are hauled up before a judge you must have counsel?

Mr. Rice: That was our feeling. Mr. DelBigio dealt with that one specifically as well. I will let him field that question.

Mr. DelBigio: Presumably, once a person is detained, section 10 of the Charter provides a right to counsel upon arrest or detention would govern the circumstances.

Senator Fraser: I do not have to worry about that, really. If Senator Beaudoin says that I do not have to worry about it, I believe him.

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Senator Beaudoin: If I understood what was said, because of the jurisprudence, if you are detained you have a right to a lawyer. This is beyond any doubt.

Senator Fraser: Thank you. That is fine. I will wipe that one off my list of things to worry about.

The other item I wanted to ask you about is in connection with forfeiture of property. There is a clause on third party interests which says that if a judge is satisfied that a person who is not a terrorist has an interest in the property and has exercised reasonable care to ensure that the property will not be used to facilitate terrorist activities, then that person's interest will not be affected by the forfeiture.

My question relates to how you demonstrate that you have exercised "reasonable care." For example, in the case of real estate, do leases or mortgages normally include clauses along the lines of "to be used only for lawful activities" or something like that? In other words, is this a terribly onerous new provision, or is it something that would be relatively easy to demonstrate through the normal way you have conducted your business?

Mr. Rice: I do not know about that. Mr. DelBigio dealt with that one as well.

Mr. DelBigio: I am hesitating because I have not considered that, quite frankly. One aspect of the provision that I note is that there is no onus provision. It does not say the reasonable care and the onus being on either the Crown or the applicant to establish the presence or absence of reasonable care. All I can say is that it is a good question that I would like to be able to consider. I am sorry I cannot say more than that.

Senator Andreychuk: I wish to return to Senator Grafstein's point. The government continues to characterize this bill as not emergency situation. Therefore, they have not invoked any emergency measures. However, they continue to say that strategically, this is a long-term fight against terrorism. We have heard before, when the government has come forward to ask for more powers on gangs and other issues, that more tools, powers and restrictions on rights are necessary.

There has been a resistance to give the government all of the powers because the approach has always been to have a measured approach, try these things to see whether they are sufficient tools to curb the activity without unduly affecting our

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rights so that we have slowly and cautiously moved to curtail any rights when we see these impending problems. Here there seems to be the reverse, which is to say give us these rights because we will take these rights away, and give us these extraordinary powers and because of national security, international relations, we should not have to go through the same scrutiny.

Are you looking at the bill from that angle, that a more measured approach is warranted as opposed to the sweeping requests that the government is making in this bill?

Mr. Rice: We have not taken the approach of challenging the government on whether it was necessary to bring in legislation to combat terrorism. Our thrust has been to help them get it right so that as much as possible the rights and freedoms of Canadians can be protected.

We do not get into a debate on this, or into whether you should call it an emergency or not call it an emergency. No one can seriously contest that a serious situation dictates that serious measures be taken because these are serious measures.

Senator Andreychuk: What I am looking for from your brief, and if you can I assure me that this is what you will give, is given that some action must be taken, and that it may curtail some of our rights and freedoms, we are doing it to the least intrusive manner to accomplish the end but not to take away any more rights that are absolutely necessary to accomplish that end?

Mr. Rice: That is exactly our method. That is what we are trying to do, to help the government fashion this in a way so that it presents the least erosion of our liberties.

Senator Andreychuk: The fine minds of the lawyers across Canada might come up with alternatives to the ones that the Department of Justice and their people have put forward that may be equally effective against terrorism but less intrusive?

Mr. Rice: Exactly. I can tell you that there have been alternatives suggested in the preliminary report. That is what we will try to do. I ended by saying we will try to be as helpful as we can and that is what we will do.

(French follows -- Senator Beaudoin: Je voulais revenir au point de départ.)

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(après anglais)

Le sénateur Beaudoin: Je voulais revenir au point de départ. Il faut dire qu'on a demandé à la ministre de la Justice, si oui ou non c'était une mesure d'urgence. Elle a dit: «Ce n'est pas une mesure d'urgence».

L'intention est donc claire. Ce n'est pas une mesure d'urgence et le projet de loi a été rédigé au ministère de la Justice. On doit envisager cette loi comme ayant pour objectif d'être permanente, comme n'importe qu'elles autres lois. À moins que la ministre de la Justice soit invitée à revenir devant nous, auquel cas -- et pourquoi pas -- on va lui poser la même question. Si elle répond, non, ce n'est pas une mesure d'urgence, cela règlera bien des choses.

Les clauses crépusculaires sont importantes, mais ce qui est encore plus important, c'est de savoir si oui ou non cette mesure est une mesure d'urgence. Si elle n'est pas une mesure d'urgence, on va appliquer la jurisprudence de la Cour suprême que nous avons déjà. La Cour suprême peut changer sa jurisprudence. C'est arrivé souvent dans l'histoire de la cour. Nous avons un système un peu différent, peut-être même assez différent du système actuel. S'il n'y a pas urgence et que cette loi est permanente. on va appliquer les principes actuels. Il reviendra à la Cour suprême de décider si elle est justifiée sous l'article 1 de la Charte des droits et libertés. C'est le débat devant nous.

(Sen. Beaudoin: This bill probably be challenged because it is an important...)

(anglais suit)

(Take 1530 Follows French)

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(Following French, French having finished in 1520)

(Senator Beaudoin continuing)

This bill probably be challenged because it is an important bill. Like many statutes dealing with rights and freedoms, there is always someone challenging the statute. We must clear up that problem first. Then it is up to the government to say, "Well, we are of the opinion that it is justifiable in a free and democratic society. We take the risks; we adopt the statute."

This is not the first time that we have a problem like this one. However, this one is particular because of the September 11. The problem, whether or not it is constitutional is certainly before us.

Senator Kenny: What is the question?

Senator Beaudoin: I will ask the question to the chair: Will we have the minister before us?

The Chairman: Yes, we will have the minister before us, I say with confidence.

Senator Grafstein: I have great confidence in my friend, Senator Beaudoin. Though I am not a member of the committee, I would direct Senator Beaudoin's attention to the preamble, recitals 2 and 3. Unless I am misreading this, the government has not talked about an emergency, but there is no magic in the word "emergency." The origin of this bill is the nature of the threat. The government says:

WHEREAS acts of terrorism constitute a substantial threat to both domestic and international peace and security;

WHEREAS acts of terrorism threaten Canada's political institutions, the stability of the economy and the general welfare of the country...

I would like to rebalance this bill, if I can. Clearly, the government has said, and to my mind it is obvious that the Canadian political institutions, the stability of the economy and the general welfare of the country, are at risk. We read it in the papers every day.

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Senator Beaudoin: The threat may be permanent.

Senator Grafstein: For the moment I do not understand the dialectic of saying it is an emergency. This is an emergency of another kind. The government does not have to declare this is an emergency. I do not quite understand Senator Beaudoin's point.

Senator Beaudoin: The chair has stated that the minister will come back. I am glad. I will ask the question and if she repeats that it is not an emergency, that is the end of it.

Senator Murray: That is the end of it for you.

Chairman, the witnesses should be reminded that this really is pre-study. If this bill goes through the House of Commons and comes back here and gets second reading in the Senate, the bill will be back formally at this committee. In all likelihood, we will want to have the bar back here. By then, perhaps, their work on the bill and their report will have been completed.

The Chairman: I did make that point clear at the beginning as I try to do every day, just to remind people that this is a pre-study and that we do have our formal proceedings when the bill comes back to the Senate.

I thank our witnesses for being here. It is very important to have your views. It is good to know that you have a committee that it is struggling with these important and difficult issues. I am sure that we will see you again.

Senator Kelleher: Madam Chair, as we have ended somewhat early, I was wondering if our committee might have a discussion about Friday, perhaps *in camera*.

The Chairman: With the agreement of the committee, we will go *in camera* for this discussion.

The committee continued *in camera*.

(Next take 1630, the committee resumed in public)

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The committee resumed in public.

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The Chairman: Honourable senators, our next witness is the Minister of National Defence.

We are delighted to have you here, Minister Eggleton.

We are also delighted to have Mr. Keith Coulter, from the Communications Security Establishment. Welcome to you both.

We will begin with whatever statement the minister wishes to make and then proceed with questions from committee members. Please proceed, Mr. Eggleton.

The Hon. Arthur C. Eggleton, P.C., Minister of National Defence: Honourable senators, I am delighted that you are doing this preliminary examination of a bill that is yet to arrive officially on your doorstep. However, given the importance of the matter, and the timeliness required in dealing with it, I applaud your efforts.

I note that the Senate has done important work on terrorism and intelligence, most recently through the report of the Special Senate Committee on Security and Intelligence, chaired by the former Senator Bill Kelly. In many ways, the report of that committee anticipated several of the issues that Canada is facing today and highlighted the real risk that new technologies are posing to critical infrastructure. The members of that committee pointed to the importance of having access to relevant foreign intelligence. I hope the work that this committee will be doing, as you study Bill C-36, will build upon what has already been done by your colleagues.

(Mr. Eggleton continuing: Avant de débiter, j'aimerais profiter...)

(French follows)

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(après anglais)(M. Eggleton)

Avant de débiter, j'aimerais profiter de cette occasion pour souligner à nouveau que les Forces canadiennes et le ministère de la Défense nationale jouent un rôle de premier plan dans la campagne contre le terrorisme.

(Mr. Eggleton: As we all know, this campaign is a multi-dimensional...)

(anglais suit)

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(Following French)

As we all know, this campaign is a multi-dimensional one that involves many departments and agencies across the federal government. While the military is certainly playing an important role, the diplomatic, financial, legal and intelligence aspects of the campaign are just as crucial. At the end of the day, these other dimensions will win this campaign against terrorism, by all of them playing a role together.

Today, I would like to review with you the two main impacts that Bill C-36 will have on the National Defence Act. First, this bill will amend the act to align it with other pieces of legislation changed by the bill. Second, it will provide additional authorities to the Communications Security Establishment to collect foreign intelligence and protect the government's computer systems and networks.

Let me look at each of these in turn. The proposed anti-terrorism legislation before you will amend the National Defence Act to bring it into line with changes in the Criminal Code, the Canada Evidence Act, and the Security of Information Act. The military justice system will be given the tools necessary to deal with terrorism offences in line with the civilian system. For example, the act will now incorporate the definitions of terrorist offence, terrorist activity and terrorist group. Courts martial will be given the authority to impose more severe punishments in certain cases where an offender has been involved in a terrorist activity and to delay parole where an offender is convicted of a terrorist offence. In essence, these changes will ensure that there is no discrepancy between our civil and our military justice systems when it comes to fighting terrorism. We have two systems and this keeps them in sync.

The second aspect of Bill C-36 that affects the defence portfolio relates to the Communications Security Establishment or CSE. As part of the government's security and intelligence infrastructure, CSE's mandate is threefold. It is charged with, first, acquiring and providing foreign intelligence. Second, providing advice, guidance and services to help to ensure the protection of the Government of Canada's electronic information and information infrastructures. The third area of responsibility is providing technical and operational assistance to federal law enforcement and security agencies such as CSIS and the RCMP. In fulfilling this mandate, the men and women of CSE have served Canada and Canadians well.

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CSE goes back to the Second World War, but as the organization we have today, it was formally established in 1946 as the communications branch of the National Research Council. CSE received its current name in 1975 and became a separate employer under the National Defence portfolio. That arrangement continues today. For close to 60 years, the men and women of Communications Security Establishment have been working with quiet dedication to protect Canada and its interests.

As we all know, the world is changing, particularly dramatically in the security environment, since September 11.

(Take 1640 begins, Mr. Eggleton continuing: Therefore, CSE must change...)

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(Take 1640 Begins -- continuing with Mr. Eggleton)

Therefore CSE must change. That is why the proposed amendments to the act are important. They will remove significant barriers and enhance CSE's capabilities in foreign intelligence and the protection of government systems.

First, let me explain the function of foreign intelligence. CSE gathers foreign intelligence by targeting foreign entities abroad, offshore. These may be individuals, organizations, states, but they may not be Canadians. CSE does not direct its collection against anyone in Canada, nor does it target Canadians abroad. It helps government decision makers understand a very complicated world. It informs our decisions. It contributes to the development of our foreign policy. It helps to protect the security of our country and its citizens.

Producing the intelligence that government needs is becoming increasingly difficult over the past decade, to a great extent because of advances in technology. They have radically changed the world of communications. Priorities have also changed. During the Cold War, CSE was focused on Soviet communications, but as the Cold War ended the government required intelligence on a broader range of issues, still many of dangers in the world, still many security problems throughout the world, and so we changed our focus in terms of foreign communication targets. Today, particularly in the wake of events of September 11, CSE needs to further sharpen its focus on critical transnational issues, most important of which is terrorism.

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CSE's current legal framework hampers its ability to meet these new requirements. Under the Criminal Code CSE cannot collect communications that originate or terminate in Canada. This seriously limits CSE's ability to provide intelligence on issues that are critical to Canada's safety and security.

Let me illustrate that point, honourable senators. CSE currently focuses its collection only on foreign entities located outside Canada. If such a target communicates with someone who is located in Canada, CSE cannot intercept the communication. Two terrorists over in another continent communicating, we can take that; if one came to Canada we could not pick up that communication, even though it could be of vital importance to the security of this country. This means that CSE stands to lose communications of its targets exactly when they might have the most direct impact on our interests.

This constraint creates a serious gap in Canada's intelligence capabilities, but with this amendment in Bill C-36, CSE will be able to identify the communication of a foreign target abroad and be able to follow those communications wherever they go.

(French follows -- Mr. Eggleton continuing: Je veux souligner, cependant, que les...)

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(après anglais)(M. Eggleton)

Cependant, je veux souligner que les modifications proposées ne permettraient pas au Centre de sécurité des télécommunications de concentrer ses efforts de collectes sur les Canadiens et les Canadiennes.

(Mr. Eggleton continuing : What I will do, however...)

(anglais suit)

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(Following French -- Mr. Eggleton continuing)

What it will do, however, is allow us to gain access to key intelligence and, in turn, collaborate more effectively with our allies. Who are our allies in this context? Our key foreign intelligence partners are the United States, the United Kingdom, Australia and New Zealand. Again, that goes back to arrangements that were established in the Second World War, and they continue to be our allies for collecting, analyzing, sharing intelligence information. Those countries already have a legal framework in place that allows them to collect the kind of intelligence that I am coming here today to ask you for. We are at a disadvantage with our partners at the table now in terms of collecting information.

If we are to make a meaningful contribution to this international campaign against terrorism, Madam Chair, we must ensure that our legal framework is aligned with our partners.

As I mentioned earlier, another key aspect of CSE's mandate is protecting the government's electronic information infrastructures. Monitoring systems and networks is an indispensable tool in assessing the vulnerabilities of the networks, the vulnerabilities to hackers, whether they are individuals or organizations, terrorist or otherwise. We need to be able to ensure the protection of the Government of Canada's systems.

Under its current legal framework, CSE is restricted in its ability to monitor the technical data on government computer systems and networks that communicate with Canadians. The proposed amendments would authorize CSE to perform more effective monitoring of our computer systems and networks. This role will become even more critical as the government moves closer to making its services available on the Internet through the government On-Line Initiative.

Let me turn now to an issue that is of great importance to the government and I believe of great importance to all Canadians, and that is the matter of privacy. I want to assure this committee that CSE already operates under an effective control regime that protects the rights of Canadians. For example, officials from the Department of Justice examined CSE's planned operations in advance of their implementation to ensure their lawfulness. Second, the government appointed Mr. Claude Bisson, a former Chief Justice of the Quebec Court of Appeal, as Commissioner of the CSE. His mandate is to review CSE's activities to determine whether they are in compliance with the law. He has issued five annual reports,

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and the commissioner has found that CSE's operations fully comply with the laws of Canada.

CSE is also subject to other reviews: The Auditor General, the Privacy Commissioner, if they wish to go and audit they can do that, and others can as well. In fact, the Privacy Commissioner did an audit in 1996 and he found that CSE was in total conformity with the Privacy Act. I want to point out that CSE has an unblemished publicly available -- because these reports are all filed with both Houses of Parliament -- record of compliance with such controls. This will not change.

In fact, the safeguards applied to CSE's operations to protect the privacy of Canadians would be strengthened even further under this new legislation. As Minister of National Defence, before authorizing CSE to collect foreign communications that originate or terminate in Canada, I would have to be satisfied on four counts. First, that Canadians and persons would not be targeted. Second, the intelligence resulting from this collection could not be reasonably obtained by other means. Third, the expected value of the intelligence would justify the interception. Fourth, private communications would only be used or retained when essential to the advancement of international affairs, defence or security. These are all in the proposed legislation.

Equally stringent rules would apply to the other request we are making, which are with respect to the CSE's application in monitoring government computer networks. This would ensure that we continue to protect the privacy of Canadians, whose communications are carried on those networks. Prior to issuing an authorization for these purposes, I would have to be satisfied, first, that the interception is necessary to identify, isolate or prevent harm to the government's computer systems or networks; second, that the information could not be reasonably obtained by other means; third, that the consent of persons whose private communications may be intercepted could not be reasonably obtained; fourth, that satisfactory measures are in place to ensure that only information essential to identifying, isolating or preventing harm to the government's computer systems or networks will be used or retained. Fifth, satisfactory measures are in place to protect the privacy of Canadians in the use or retention of this information.

(Take 1650 Follows -- continuing with Mr. Eggleton: Finally, the CSE commissioner's own mandate...)

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(Mr. Eggleton continues)

Finally, the CSE commissioner's own mandate is being strengthened in the legislation. Over and above his mandate to review CSE's activities for lawfulness, he will also review activities carried out under ministerial authorization to ensure that they are in fact authorized, and will report annually to me on the review.

In conclusion, I cannot emphasize enough that good intelligence is one of the most important contributions that Canada can make to the campaign against terrorism that we are waging alongside our allies. It will also help us protect our troops in the field and help to protect our citizens here at home.

Bill C-36 will enhance Canada's foreign intelligence capacity by removing a barrier that prevents CSE from intercepting communications that may have a very direct bearing on terrorist operations. This change will bring CSE's authorities into line with those of our allies and assure them of our commitment to remaining an active and contributing member to our close intelligence partnership.

(French follows -- Mr. Eggleton)

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(après anglais)(M. Eggleton)

Maintenant, ce projet de loi nous permettra de protéger plus efficacement nos systèmes et nos réseaux informatiques.

(M. Eggleton : Also by way in conclusion, let me just say...)

(anglais suit)

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(Following French -- Mr. Eggleton continuing)

Also by way of conclusion, let me say that the Canadian Forces, the Department of National Defence, and the Communications Security Establishment, all working together, have a significant role to play in the campaign against terrorism, along with other government departments and agencies, as well as our allies. This is a collective effort and we need to be equipped to participate in a meaningful way. I believe that the additional authorities provided to CSE and the changes to the National Defence Act will enable us to do just that.

I therefore strongly recommend that, in examining the various aspect and components of Bill C-36, you give them your positive endorsement. Thank you very much.

The Chairman: Thank you, Minister Eggleton.

I wish to reintroduce Mr. Keith Coulter, the Chief of the Communications Security Establishment. Also at the table is Colonel Dominic McAlea, Deputy Legal Adviser and General Counsel, Military Office of the Legal Adviser to the Department of National Defence and the Canadian Forces.

Senator Kenny: Welcome, minister. It good to see you here.

I would like to compliment you and the government on bringing this legislation forward. It is appropriate that we have the CSE enshrined in legislation.

There was a report in the Ottawa *Citizen* yesterday that described an exchange in the other place I wonder if you could clarify it for the benefit of the committee. It was a question from, I believe, Mr. Owen, to Mr. Coulter regarding the use of the information that the CSE collected. The resolution of the discussion is unclear in the newspaper account, but the article in the *Citizen* suggests that Mr. Coulter said that information his agency collected could be handed over to the RCMP and other police officials. Mr. Owen replied that that was the case only if the information were essential to international affairs, defence or security.

Could you clarify that, please?

Mr. Eggleton: Thank you for asking that question, senator.

The dialogue arose over the issue of criminal activity. Mr. Owen was saying was that small time criminal activity -- if I can call it that -- would not fall under

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the definition of international affairs, defence or security. I think he is quite right. I do not think we have any dispute with that.

The issue is where the dividing line is, because there is major criminal activity, as referred to by Mr. Coulter, which could be relevant to drug smuggling or major organized crime activity. That, indeed, could be considered under the definition of security, international affairs, defence or security being the criteria.

I do not think there was really a disagreement on the fundamentals. There was, perhaps, a misunderstanding by the newspaper as to what the dialogue was about.

Mr. Coulter could even give you an example.

Mr. Keith Coulter, Chief, Communications Security Establishment: That was an unfortunate misunderstanding. The discussion was about where you set the bar, and the bar is set at a very high level in this legislation.

To give a couple of examples, if we had information that a boatload of people were headed toward our shores with unknown intentions and composition, I think we would want to share that with the relevant agencies. If we had information that a drug cartel were planning to launch a major initiative in Canada, that would be information with a fairly significant national security dimension and we would want to share that with the relevant agencies.

I was speaking in that zone of very essential information.

Senator Kenny: Mr. Bisson was here the other night. He referred to "defeats", which we were led to believe was a method of ensuring the privacy of Canadians.

How does the agency know whether it is focusing on a Canadian?

Mr. Eggleton: The targets are foreign entities outside the country. If a foreign entity outside the country is communicating with a Canadian, whether inside of Canada or outside, they cannot take that information. If the foreign entity is communicating with a place unknown, which could perhaps be Canada, again they cannot take that information. They cannot take a chance of being in violation of the Criminal Code if it turned out to be a communication within Canada. With the proposed amendment, they would be able to take that information.

In the former circumstance, if the agency came across a communication originating or terminating in Canada, they would have to eliminate it.

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Senator Kenny: I am trying to visualize how the information is collected. As an example, when a conversation is going on, how does one tell the nationality of the person talking on the phone?

Mr. Coulter: It is not a case of nationality. This is all about geography. We have to know where the communication is coming from and where it is going to, under the current regime, in order to make the intercept. The current test is that it must be both from and to a location abroad. Currently, we must be targeting a foreign entity abroad and the communication must start and finish abroad. We are not allowed to follow it into Canada.

There are technical ways of doing that. We are talking about a telephone call. We apply selectors and methods. That would not be, for example, a Canadian area code.

Senator Kenny: You would know the difference with a call from Montreal to Rock Island, Vermont?

Mr. Coulter: Absolutely.

Mr. Eggleton: Also, we would not be intercepting calls in any of our allied countries. They do not intercept calls in our country and we do not intercept calls in their countries.

(Take 1700 follows -- **Senator Kenny:** The question of oversight has come up in terms of this)

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(Following Take 1650, Mr. Eggleton, in their countries. TAKE 1700 begins.)

Senator Kenny: The question of oversight has come up in terms of this. When Mr. Bisson was speaking to us, he said basically that this is a group that no one complains about so he does not have much to do. Is the system entirely dependent on complaints for one to have oversight?

Mr. Eggleton: No. In fact, it does not have much to do. It may apply to dealing with complaints but it certainly does not apply to his overall mandate. He must satisfy himself, the government and me and, indeed, both Houses of Parliament and the people of Canada through an extension of the publication of the report, that CSE is operating in a lawful fashion. He employs such people as he

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needs and expertise that he needs to help check on the systems. He has complete open access to them so that he can determine that CSE is operating within the laws of Canada. In five annual reports, he has indicated in the positive in all cases.

Senator Kenny: Before the Defence and Security Committee we have had witnesses come forward saying that CSE was under resourced minister and was in need of new equipment. Perhaps they did not have enough staff. Will the new funds you have brought forward resolve that?

Mr. Eggleton: They will certainly go a long way toward resolving the issue of equipment. This is a one-time allocation that was announced last week -- \$37 million that is for the upgrading of equipment. As I indicated in my opening remarks, changing technology is quite rapid and we need to keep up in that department. We will be accelerating our purchase of new equipment. At the same time, we are examining the situation with respect to staffing levels. Approximately 1,000 people work at CSE. If we need more staff to be able to do an effective job and make a meaningful contribution and pull our weight within our alliance of intelligence-gathering countries, then we will be back looking for whatever resources we need to accomplish that.

Senator Kenny: We talked to the commissioner of the RCMP last night. One of his difficulties appears to be with staff who are competent in other languages and who are familiar with other cultures. Can you share with us whether the CSE has the same problem?

Mr. Coulter: We used to have a lot of Russian linguists during the Cold War and they are now people who work in other parts of the organization. It is a dynamic environment. One of the great strengths of the organization is its linguistic capability in all major language groups. It is a dynamic environment and some people who are trained in one language actually need to find either another language or move to some other area of the organization over time. We must bring in new people around the languages that we are concentrating on. As you can imagine, the corner of the world that we are very focused on right now has some languages and we were limited in our capabilities. We are working on that. I think we are in for the long haul there so there will be some evolution in that regard.

We can adapt and we do some language training. We share with CSIS and with other people expertise in areas where there is not a lot in Ottawa.

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Senator Tkachuk: Welcome, minister. I covered a bit of this ground with Mr. Bisson. You said that our allies do not intercept calls of Canadians and their allies. In other words, Americans are not spying on us. Would Americans be picking up information from, say, Saudi Arabia or Afghanistan to Canada? Do they do that or do we do that, on Americans?

Mr. Coulter: It is a partnership. The partnership that we have with the United States, Australia, UK and New Zealand is one in which we do not target people in those five countries. In terms of communication, everyone plays by their own rules.

Senator Tkachuk: What does that mean?

Mr. Coulter: The other four countries already have in place authorization focusing on foreign targets to pick up communications, say, coming into their country. Therefore, they are also playing by those rules, picking up the other partners' communications. We do not have that authority. The short answer to your question about us is, no, we do not. We defeat those communications without ever acquiring them because we do not have the authority to do that. That is what this legislation is all about. We want to catch up.

Senator Tkachuk: Yes, but I was asking about before that. When someone from Afghanistan called someone in Chicago, for example, and you heard that conversation -- or perhaps, a country that we were having trouble with at the time -- would you pass that information on to the Americans?

Mr. Coulter: Yes.

Senator Tkachuk: Do they do the same when they receive calls from our non-allies to Canada and pass that on to you?

Mr. Coulter: No. We have not had the authority to receive communications that involve Canadians, so they would not do that.

Senator Tkachuk: In the communications that are referred to, "intercept, private," does that include mail?

Mr. Coulter: No.

Senator Tkachuk: The bill says that "The minister may, for the sole purpose of obtaining foreign intelligence, authorize the communications secretariat to

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establish and to intercept private communication in relation to an activity or class of activity specified in the authorization." A letter is a private communication, is it not?

Mr. Eggleton: The authorization of the Communications Security Establishment, as the first word in the title of the organization indicates, is based on electronic communications.

Mr. Coulter: That definition of the global information infrastructure in the legislation does not include what we would call snail mail.

Senator Tkachuk: But it includes electronic mail such as e-mail?.

Mr. Coulter: Yes. If I could refer you to the definition in the legislation, it includes electromagnetic emissions, communications systems, information technology systems and networks, and any data or technical information carried on, contained in, or relating to those omissions, systems or networks. It is the high-tech end of communications.

Senator Tkachuk: E-mail?

Mr. Coulter: Correct.

Senator Tkachuk: To me, e-mail is mail but it is electronic mail. Someone sends a letter, so why not mail? Why not, as you call, it snail mail, Mr. Minister?

Mr. Eggleton: As I said, this is the national cryptology organization of the government. Its whole history has been based on dealing with encryption, decryption and electronic means of communications and interception of electronic communications. That has been the organization's history and its expertise. That is what it is equipped to do. That is all we are talking about.

Senator Tkachuk: I understand that, but I am asking as a matter of public policy. What we are dealing with here is with electronic mail. In other words, did not government not say that, perhaps, they might not be as high-tech as we think? Maybe they just send letters, to send information. As a matter of government policy, we have allowed the capturing of electronic mail, why not the capturing of regular letters from, say, Lebanon, Afghanistan, Iraq, Iran?

(TAKE 1710 follows, Mr. Eggleton continues: As I said, the history of the organization,...)

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Mr. Eggleton: As I said, the history of the organization, its function, and the only thing the government is considering here is to continue it. It is not considering the kind of thing you are talking about.

Senator Tkachuk: I am asking you as minister of the government, not in relation to them, but as a matter of public policy.

Mr. Eggleton: We have targeted foreign entities abroad, and it has been through the electronic communications means. That is all I am proposing we continue to do.

Senator Tkachuk: There was no reason for it. No one in cabinet said, "Hey."

Mr. Eggleton: That is not the history, the expertise or the equipment of the organization. It is electronic in nature.

Senator Tkachuk: Could I ask about more matters of public policy? Are we in a state of emergency? Are we in a state of war?

Mr. Eggleton: What do you mean by that?

Senator Tkachuk: We had 6,000 people killed in New York on September 11. I know it was not our country but it was our NATO ally under Article 5, which means that we have to respond as if it had occurred on our soil. I am asking you if we are in a state of emergency or a state of war right now.

Mr. Eggleton: There has been no official war declared. The last time any official war was declared was World War II. There has been none since then in an official sense. In an unofficial or colloquial sense, many conflicts are referred to with the terminology "war". What we do have here is a threat to the safety and security of Canadians and people in our neighbouring country to the south and all people, indeed, in the free world. The security environment has radically changed in these countries. It has fundamentally changed. We need to respond to that by ensuring the safety and security of Canadians and suppressing international terrorism to prevent it from coming to and damaging our country and its people. That is the state that we find ourselves in.

Senator Tkachuk: Therefore, this bill that we require so quickly is not really that important.

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Mr. Eggleton: It is quite important.

Senator Tkachuk: We are not in a state of war or emergency. We are just moving along gently. We have a bunch of troops out there. This reminds us of the Americans. They were not at war; they were just sending troops to Vietnam.

Mr. Eggleton: I do not agree with your characterization at all. While there may not be an imminent threat here in Canada, we can certainly not take that situation for granted. Certainly, the gathering of intelligence information is vital to the protection of our people.

Senator Tkachuk: I understand that.

Mr. Eggleton: It is vital to the protection of the people of our allies as well. This amendment has to do with the gathering of that intelligence information. If we have a situation now where we are targeting someone, say, in Afghanistan, and they are having a communication with someone else in Afghanistan, and if one of those people moves into Canada, then certainly we want to be able to continue to pick up that communication because it could have a very profound effect on the safety and security of Canadians, but we are not, under the current legislation, able to do that. Even though our allies all have that kind of provision, we are not able to do it. We need to be able to do that, and we need to be able to do it now to ensure the safety and security of Canadians.

Senator Fraser: Minister, welcome. My question has to do with the CSE's mandate as set out in the bill. The bill says that the mandate is (a) to acquire news and information for the purpose of providing foreign intelligence; (b) to provide advice, guidance, et cetera to protect the government's information infrastructure; and (c), to provide technical and operational assistance to federal law enforcement and security agencies. Then the bill goes on to say that to provide safeguards, the first two of those activities shall not be directed at Canadians or any person in Canada and shall be subject to measures to protect the privacy of Canadians. I wonder why the same safeguards do not apply to the third part of the mandate, providing technical and operational assistance to federal law enforcement and security agencies. Could you explain that?

Mr. Coulter: That article is focused on the fact that we play a support role in that third part of the mandate. We provide technical and operational assistance to the other agencies, and we operate under their authorities, so this says it is subject to any limitations imposed by law on those agencies.

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Senator Fraser: So it is help, not information? In other words, you can show them how to run a computer system with defeats and whatnot built in?

Mr. Coulter: For example, if the RCMP came to us with something they had lawfully obtained, say some encrypted information that they wanted decrypted, that is our business. We are the agency in Ottawa that can do that. We would decrypt it for them and hand it back. It is entirely a supporting role.

Senator Fraser: But you would not get into the business of using satellites to pick up conversations between two drug dealers located in Canada, using your equipment?

Mr. Coulter: No.

Mr. Eggleton: We might give advice to CSIS on the matter to assist them, but we would not be doing their work for them. When they deal in a Canadian context, too, there is also the question of judicial permissions that are required.

Senator Fraser: Your authorizations come on the next page of the bill, and I do understand that, but I am grateful for that clarification because it also seemed to go to the confusion that you were addressing in Senator Kenny's questions.

Can you give me an idea how often you would be involved in helping out law enforcement or security agencies? Is this something that happens on a regular or frequent basis?

Mr. Coulter: Yes, it does. It is an ongoing part of our work. As I say, it is a supporting thing. The things that are unique to us are the gathering of foreign intelligence and some aspects of the information technology security business. This is driven by demand from those other agencies. It is ongoing and regular but not the biggest part of our business by far.

Senator Beaudoin: My question is addressed to the minister and Mr. Coulter. If we are in the field of private communications, I understand that, in our country, we have two systems, or we will have two systems once this bill takes effect. If it is interception internally, I understand that we ask for the authorization of the court. If it is international, we ask the authorization of the minister. Is there a reason for having a different systems at the international level and the internal level?

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Mr. Eggleton: It is simply a matter that the judicial system has no authority in terms of collecting information internationally. They would only have authority if it involved collecting information in Canada. We target foreign intelligence abroad, so there is no authority by the judge to issue a warrant in that case.

Senator Beaudoin: If it is two Canadians at the international level, what happens?

Mr. Eggleton: We cannot do it.

Senator Beaudoin: Which system would apply?

Mr. Eggleton: We cannot do it.

Senator Beaudoin: You have to go before the Canadian court?

Mr. Eggleton: If it involves targeting Canadians or doing a communication interception in Canada.

Mr. Coulter: If two Canadians are abroad, you would not have a target because we are not allowed to target Canadians.

Senator Beaudoin: If it is a call from someone in Montreal to someone in Berlin or Rome or Paris, do you have jurisdiction?

(1720 follows, **Mr. Eggleton:** We would only have jurisdiction if)

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(Following Senator Beaudoin)

Mr. Eggleton: We would only have jurisdiction if we were targeting the person in Berlin, or a foreign entity abroad. "Foreign entity" is the key phrase. We can only target that kind of entity if they happen to be communicating with someone in Canada. We will not know about that from the beginning, but when that is discovered, we must defeat it or erase it, whatever you want to call it. It depends on the jargon you want to use. With this amendment, we would be able to follow it through as long as the information was essential to international affairs, defence or security and was obtained within the criteria that is outlined in the legislation that would then lead to my permission to do that.

Senator Beaudoin: It is qualified by that condition; is that correct?

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Mr. Eggleton: Yes, it is qualified by all of those.

Senator Beaudoin: You referred to other systems, the United States, Great Britain, Australia and New Zealand, is it the same system for them?

Mr. Eggleton: I would not say it is identical in all respects, but they do have the authority that we are asking for here today. New Zealand has recently gone that route. The others have had that for some period of time. We would be the only country of the partnership group that does not have the authority to follow a communication even into our own country.

Senator Beaudoin: What do they do in the other countries?

Mr. Eggleton: They collect that information. They are able to.

Senator Beaudoin: They have that right, but we do not; is that correct?

Mr. Eggleton: That is correct, we do not have that right.

Senator Beaudoin: That is why there are two systems, internal and external; is that correct?

Mr. Eggleton: I am not talking about their internal systems. I do not know how their internal systems work. Perhaps Mr. Coulter will have a better idea. However, if you wish to target communications of Canadians between two points in Canada, you need a judicial warrant to do it. We are not the organization that does that. CSIS, the RCMP or local authorities could be doing that. We would not be the ones to do that. We target foreign intelligence abroad and foreign entities abroad. Where we miss out right now is we can only collect information if it is totally abroad. If the information comes into Canada, we cannot keep it. Even though our allies can do similar things, they can keep that information if it comes into their country, we cannot. We are at a disadvantage from the allies with whom we share information. That is an important point. If we are to pull our weight, to do what they do, and share information, we should have the same ability to gather intelligence.

Senator Beaudoin: For national security and safety purposes; is that correct?

Mr. Eggleton: Yes.

Senator Jaffer: Minister, before I ask you my question, I would like to commend you on your excellent armed forces. I have visited the armed forces

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bases recently and met with people who were preparing to travel overseas. I have always been met with warmth and respect.

We are lucky in our country. We have people from all over the world. We have a wealth of knowledge and information. I understand that you have been given or will be given some additional resources to collect intelligence. I would like to know what plans you have to enlist more people who look like me.

Mr. Eggleton: I appreciate your interest in the Canadian Forces. I appreciate your visiting our troops, senator.

We are in a recruitment campaign right now. Our numbers are going up. We fell somewhat below where we would like to be, ideally. Our policy calls for about 60,000. We have fallen to about 58,500. We are on our way back up. Our effective strength is lower than that, but both those numbers are climbing again.

I would like to have the best possible people in the organization, but I would also like to have people that reflect the population that we have in our country today. In that way, more people of all origins in Canada would feel a tie with our Canadian Forces and would feel a comfort with our Canadian Forces if they could see their communities expressed in the personnel, whether regulars or reservists.

I am hopeful that in this recruitment campaign and beyond we will see a better reflection of our population and also a stronger representation by women in all aspects of the Armed Forces. Our organization is one of the few in the world that welcomes women into all its branches, including the combat arms and, most recently, submarines. We have larger submarines now, so there is more privacy in that respect.

We would certainly welcome a better reflection of our entire population and we are moving toward that.

Senator Jaffer: Minister, I know that is the case since you have you have been the minister. You have tried to do that. Far be it for me to tell you that the RCMP seems to be doing a good job in recruiting. I am sure you are working with them to see how they are recruiting different people in Canada. I would like to get the information as to what training programs or efforts are being undertaken to attract people. This is perhaps not directly involved with what you have come to talk to us about, but I see this as an important part of intelligence gathering. That is to say, to have people who reflect Canada in the Armed Forces.

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Mr. Eggleton: Within the Canadian Forces, we also have a more militarily-oriented intelligence gathering system, with CSE. CSE has about 1,000 people and most are civilian. There are about 20 military people in the organization, but it is essentially a civilian organization.

We have outreach programs now into various communities. We have special adaption programs for the aboriginal community. I recently received a report from my minister's committee on gender integration and employment equity. We are following through on those recommendations so that we can have an organization that better reflects the population.

Honourable senators will find that at the cadet and reserve level there is quite an extensive degree of integration of all people from different parts of the country. We need to do more work in terms of the regular force in that regard, but we are well on our way. We do have these recommendations from that committee to help and guide us in that direction.

Senator Stollery: I listened to the discussion that this information that would be collected could be used in serious criminal cases involving drug dealers and people like that. Everything in this bill talks about terrorism, international affairs, national defence and security. If you pick up some important information about a drug ring about to land an airplane full of cocaine in Canada, I see nothing wrong with turning that information over to the police. However, that is not in this bill. Perhaps it should be in this proposed legislation, but I would say that it was excluded by this legislation.

(Take 1730 begins, Senator Stollery continuing: I looked through all the definitions...)

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(Take 1730 Begins -- continuing with Senator Stollery)

I looked through all the definitions. I see nothing that talks about the Criminal Code or normal criminal offences. The reason we have the bill is to deal with an abnormal situation. Perhaps the bill needs to be amended to give the Communications Security Establishment the right to do that, but it is not in this bill, is it? In fact, it is excluded from the bill according to the definitions.

Mr. Eggleton: The definition in the bill -- on page 118 -- if you go to the bottom of the page in section 273.65, and right down to the very bottom, it states

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that it is essential to international affairs, defence or security. That is the mandate of this organization as it has been for 60 years. That is what it has been doing: Collecting information that is essential to international affairs, defence or security.

When we got into this discussion about major criminal activity, if we collect information about that, we would pass it on to the RCMP or CSIS. The reason that we would do that is because we would consider that that is relevant to the security of Canada. That is one of the words in the definition that you see on that page. As Mr. Coulter says, the bar is set high in that connection. We would be looking at things such as organized crime, or smuggling of people or drugs, major kinds of operations, not a petty crime but on the kind of crimes that are routinely dealt with on a day-to-day basis by local police forces. They would not meet the test of being relevant to the security of Canada.

Senator Stollery: Have you not been able to do that?

Mr. Eggleton: This is what we do and do now.

Senator Stollery: Would this information be handed on now?

Mr. Eggleton: Yes.

Senator Stollery: This bill does not change anything then.

Mr. Eggleton: This bill, for the first time, puts into a statute the Communications Security Establishment. The Communications Security Establishment was established in 1946 and re-established in 1975 by Order in Council, never by legislation, which was one of the things Senator Kelly suggested in his report happen and this is happening here now. What we are putting here, essential to international affairs, defence and security, is the way this organization is operated under Order in Council for a long period of time. The reason for the legislation, aside from what I just said of putting CSE into the act, is to get the expansion of this authority when it relates to an international entity communicating with an entity in Canada. That is the difference here; but it still has to meet, in the expanded form or in the present form, the test of essential to international affairs, defence or security.

Senator Stollery: I have no quarrel at all with the organization handing information on to the police. What concerns me is that in the drafting of this bill this implication is not made. The problem with that sort of thing is it develops into a kind of bill creep, it is what everyone worries about with this kind of legislation,

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that you pass it for one thing but it is used for another. If you were to oppose this legislation, which I do not, that would be the reason. We have a bill that is, by every stretch, in every paragraph, it seeps terrorism. It defines it, in the “whereas” sections, eradicating, threatening Canada's political institutions, et cetera.

I personally find this a serious flaw in the drafting that a bill, which would contribute to a view that the bill then can be used for things other than what it is intended, in my mind, because I did not know this. I had no idea. There we have it, Madam Chairman. Maybe that is something at which we should be looking.

Mr. Eggleton: What has motivated our coming here is this change that we need, the fact we are disadvantaged now in terms of the gathering of information from what our allies are and from what we feel we need for the security of Canadians. Terrorism is the motivation, but we are outlining in here what we already do. As I said, for the first time it is being put into legislation. Up until now it has been dealt with by Order in Council.

The question of criminal aspects is dealt otherwise, not in the section that I have come to speak about specifically. I am concerned, as this organization has been concerned with for 60 years, with the gathering of foreign intelligence abroad that is essential for international affairs, defence or security of Canada.

Now I will ask to Mr. Coulter to further elaborate to give you a comfort level.

Mr. Coulter: Under the current regime, the Government of Canada establishes intelligence priorities. Those intelligence priorities right now include transnational issues, such as organized crime, alien smuggling and terrorism. If we have a foreign to foreign communication and we acquire it and it is relevant to those zones, we can, under the current arrangements, provide it to the relevant agency. The authorization that the minister is talking about is that we are here, as he said, to get the ability to follow a communication into Canada and it is geared towards terrorism, but if we came across a piece of information targeting a terrorist organization, for example, that they were going to go up to something big and criminal that would touch on national security, that that would be in the zone of something that we could pass. That is all we have been trying to say.

Senator Stollery: Again, I do not want to take up any more time of the committee. I understand that. I understand that until now you can only work abroad and someone in one country listening to the communications with someone in another country. I quite understand, and I have no difficulty with the fact that

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that should be extended to Canada. Somehow, in the conversation, which was of course brought to our attention by that article in the newspaper, we have made a jump here from terrorism. I know you can say that a drug deal affects national security. I think that is stretching things.

Senator Finestone: I am finally beginning to understand what Mr. Bisson tried to tell me the other night when I did not understand one word.

I am intrigued to learn that this is a statutory act now before us. In this statutory act, which I am sure we all welcome, I am curious to know the implications, if you would not mind turning to page 120 of the bill, clause 273.62(4) states that directions issued under subsection (3) -- that is what the minister is doing -- are not statutory instruments within the meaning of the Statutory Instruments Act.

Does that mean you do not have to gazette your directions, Mr. Minister? What does that actually mean?

Mr. Eggleton: We are exempt from requirements for prepublication in that case.

(Take 1740 Follows -- next speaker Senator Finestone: Mr. Coulter, is the statutory mandate.)

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Senator Finestone: Mr. Coulter, is the statutory mandate that you now have clear? Does it give you the broadest possible reach and does it afford you the cooperation with the RCMP and CSIS that you need?

Mr. Coulter: The mandate defined in the legislation formalizes the current mandate given us by the government.

Senator Finestone: My concern is that you have the right to share with the RCMP or CSIS information that you acquire with regard to drug and money laundering criminality. Does this mandate give you that right?

Mr. Coulter: Yes. It is important to realize that the preponderance of our work will still be foreign-to-foreign communications. Only occasionally will we pick up linkages to Canada. We will continue to do what we have always done, that is, acquire foreign intelligence consistent with the Canadian government's intelligence priorities in all the areas that you mentioned.

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Mr. Eggleton: Aside from the cooperation we would have if we gathered foreign intelligence of interest to CSIS or RCMP in terms of their mandate, i.e., drug smuggling, organized crime and that kind of thing, we also cooperate with them in terms of technical advice or operational assistance, but they do their work themselves. We have some technical expertise, obviously, in the electronic communications area that enables us to be of assistance to them hence the third part of our mandate. They will do their work, but we can assist them. We can help them with decryption, for example.

Senator Finestone: That was my next question. In light of the very swiftly changing electronics environment in which we live, are you using Carnivore or Eqinox as part of your listening ear?

Mr. Eggleton: We cannot tell you that.

Senator Finestone: I did not ask you, then.

Do you have sophisticated new equipment to enable you to decipher all the new technology that makes encryption very complex?

Mr. Coulter: Yes, we keep working at it. Encryption and decryption is our business and we are trying to stay ahead of the game.

To return to the question on statutory instruments, the minister issues me written directions in certain areas and they may contain highly classified information. The purpose of that clause is to ensure that classified information is not published in the *Canada Gazette*.

Senator Finestone: Does that mean it is beyond the purview of the Access to Information Act?

Mr. Coulter: Everything is accessible, but highly classified and technical things would be protected and we would sever, as we do now.

Senator Roche: Minister, you opened your appearance here tonight by saying that you wanted to put your comments in the context of the campaign against terrorism. I would like to pose a question to you that goes beyond Bill C-36.

I hope, Madam Chair, that you will consider it relevant, as I felt that Senator Jaffer's question dealing with the Armed Forces was relevant.

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A major aspect of the campaign against terrorism has been the bombing of Afghanistan. I am aware, of course, that innocent civilians are not targeted. That being said, it is, unfortunately and increasingly, apparent that many civilians are being killed in the bombing. The U.S. has admitted that bombs are going astray. The United Nations said today that 70 per cent of the population of three of the largest cities in Afghanistan has fled the bombing. UNICEF has said that this crisis is threatening the lives of millions of women and children and that 1.5 million children may not make it through the winter. There are increasingly authoritative reports that show that the situation is turning from desperate to calamitous in that region.

Now that 17 days of bombing have passed and we have reached the point that we have, has the time has come that Canada might suggest to the U.S. and its coalition partners that there be a halt in the bombing so that those who are suffering so much can have aid delivered to them?

The Chairman: Senator Roche, that indeed goes far beyond the purview of a pre-study of Bill C-36. However, I will leave it up to the minister whether he wishes to respond.

Mr. Eggleton: I will indeed respond, Madam Chair. This is an important part of our concern about the campaign against terrorism. It is very important that every effort be made to target the terrorists and their supporters. In the context of Afghanistan, that means al-Qaeda and the Taliban regime that is supporting it. I think the two organizations are quite interwoven and have a long history together.

Every effort has to be made to avoid killing or injuring civilians. However, as you point out, senator, there are occasions when bombs do go astray. I would hope every effort will continue to be made. We are not directly involved in this bombing. We are joining the coalition, but we are not directly involved in that activity, unlike the circumstance that existed in Kosovo.

In Kosovo, there were also concerns and mistakes made. Canada was involved in hundreds of missions in the air campaign over Kosovo. We led about half the missions and used precision-guided munitions. In that campaign, our Air Force pilots took every precaution. Before the Kosovo air campaign, I went up in a CF-18 and was shown precisely how they go about determining the target. I know that when the actual decisions were taken our pilots took every precaution. I do not know of any innocent civilians being injured or killed as a result of actions by Canadian pilots at that time, but I do know that in the very few seconds they had to

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make a decision they took the decision very seriously and did so completely within the terms of the rules of engagement of which they were advised on a regular and ongoing basis by our own lawyers in uniform who were there as well.

(Take 1750 follows -- Mr. Eggleton continues -- I think it is necessary to follow that kind of regime.)

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(Mr. Eggleton continuing)

** I think it is necessary to follow that kind of regime. That certainly is the intent of the United States and the British forces there.

At the same time, while I would not counsel an end to the bombing and I certainly believe that the targeting needs to continue to be the al-Qaeda and the Taliban, millions of innocent people are being hurt by the state of conflict. They have been hurt by a state of conflict for decades now in Afghanistan. I hope that all countries, and I know Canada wants to be part of this, will come to the aid of these people. In fact, part of the troops we are sending over there will be people who will fly Hercules aircraft and an Airbus. We are sending them over there substantively for humanitarian purposes. I think it is necessary that we also turn our attention to helping the people of Afghanistan to rebuild their country and to get the kind of support and assistance they need and to rid the terrorists and the terrorist supporters from their midst.

Senator Roche: Thank you for your answer, minister. Could Canada use its influence with its partners to seek a halt in the bombing now for a limited period of time in order to get aid in to the people we want to help?

Mr. Eggleton: I think what is happening now is that there is a closing in on the terrorist organizations going on. The effort should be to continue to focus on these terrorist organizations, either in air attacks or ground attacks, and to isolate them as much as possible from the population and then be able to go in and aid the population. If we stop the attacks on the terrorist organizations, then that can give them time to strengthen their position, and I do not think that that would be in our interest to do that.

We have to suppress terrorism because terrorism is not only a threat to the people of Afghanistan and the people of the Middle East, but, as has become clear to us as a result of September 11, it is a danger to us here on this continent. What

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happened on September 11 happened in the United States, but we can never be complacent about these international terrorist organizations inflicting that kind of pain on Canada. I believe that it is in our interest to secure Canadians here at home by actions that we are taking here in this country now and in the future to ensure their safety and security, but also by contributing to the international effort currently in Afghanistan and other places where terrorist organizations exist. The al-Qaeda itself exists in many different countries. That is not to say there will be armed conflicts in other countries. As I indicated at the beginning of my remarks, this is a multi-dimensional campaign, and much and hopefully most of it will be non-military in nature. Things like cutting off the funds and recruitment and looking at the root causes are all part and parcel of dealing with this terrorism.

The Chairman: Thank you very much, Mr. Eggleton. Senator Roche, I do understand your concerns.

Senator Kenny: I have two quick questions. Minister, we have been discussing at some length the need for this legislation because it gives you the power to follow conversations into the country. What words do you rely on in the bill to have that authority?

Mr. Eggleton: The words that indicate that private communications will only be used or retained if they are essential to international affairs, defence and security are in proposed section 273.65(2)(d). I cited it previously. It is on my page 118. You see, "The Mminister may only issue an authorization" and then going down to (d):

satisfactory measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential for international affairs, defence or security.

Senator Kenny: It is those last three lines that do it.

Mr. Eggleton: Yes.

Senator Kenny: Is there a definition anywhere of "security"? When you were describing security earlier, you said you were relying on the definition when you were using it to deal with large drug shipments and matters such as that.

Mr. Eggleton: I am not aware of where we might find this definition. This is also based on practice established by Order in Council going back to 1946. There are other provisions in terms of respecting the laws and operating within the laws

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of Canada. The CSE commissioner, who has the oversight, has found we do operate within the laws of Canada. If security was too broadly interpreted, we could well find ourselves out of that framework of the laws of Canada.

As Mr. Coulter said, the mark is high in terms of determining what comes under security. Certainly, terrorism does, as does criminal activity that could be of a major criminal nature, organized crime, smuggling, drug operations, that kind of thing, not day-to-day criminal activity that would come under a local police force, for example.

Senator Kenny: I understood that if you were operating under Order in Council, but now that you have decided to proceed by way of legislation, some definition appears to be necessary. In the absence of definition in the legislation, are we to rely on the dictionary, or would it be of assistance if we provided a definition, or would you provide a definition?

Mr. Coulter: We are fundamentally talking about a foreign intelligence agency. We do some other things, but that is what this is about. In terms of the tests applied to gathering foreign intelligence, that is done by the setting of government priorities on an annual basis. In terms of the specific authority that the minister would grant us under this provision, he would have to be satisfied that it was essential to international affairs, defence or security, and we would have to go to him seeking the authorization and satisfy him that it met that test of essentiality. The minister is the approving authority. In the U.K., it is the Foreign Minister. In some other countries, including the United States, it is the Attorney General, but delegated to my counterpart down south. There is political oversight over all of this, so that is the test of essentiality, I have the burden of coming forward and making the case that this is essential for these purposes.

Mr. Eggleton: I might add there is one other entity which deals with this whole question of what is security and what are the priorities and parameters of the information that we are looking for. This comes under the jurisdiction of and is examined annually by a committee of the cabinet chaired by the Prime Minister. In terms of what would come within the elements of this definition of security, it would be determined on an annual examination by that committee.

Senator Kenny: I am glad to have that information. My only point is that upon reading the provision I would never have known that drugs were an issue here, had it not come up.

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Mr. Eggleton: Only if it affected the security of Canada and Canadians in a broad major context. A small drug-dealing situation would not come under national security, but a major one could well.

Senator Kenny: At this point, you do not see any merit in further definition of the word, do you?

Mr. Eggleton: Certainly from the operation standpoint, we have a strong handle on the authorizations here. I am certainly taking the advice of the Attorney General in terms of what is necessary for this legislation.

Senator Kenny: I was not thinking about you necessarily but perhaps future Ministers of Deference.

Mr. Eggleton: There are strict guidelines under which I must operate, and as they are outlined in the same section. Interception will be directed at foreign entities located outside Canada, information cannot be reasonably obtained by other means, it is essential to justify an interception, and the issues of privacy and not targeting Canadians are all vital issues that are part of our policy context.

The Chairman: Thank you, minister. I understand that you have to leave. We are grateful for your attendance and yours, Mr. Coulter. You have opened several windows for us. We thank you very much for coming and wish you well.

Mr. Eggleton: Thank you very much. May I just say one more thing in closing? I am not a lawyer, but when we get into talking about definitions, I am given to understand there is a fair bit of jurisprudence around the definition of "security". Not being a lawyer, that would not have leapt to mind automatically.

The Chairman: Thank you very much.

The committee adjourned.