House of Commons
CANADA

Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

SNSN • NUMBER 022 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Wednesday, September 21, 2005

Chair

Mr. Paul Zed

Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (1335)

[*English*]

The Chair (Mr. Paul Zed (Saint John, Lib.)): I call the meeting to order.

Good afternoon and welcome to the Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. As our colleagues here at the table know, this afternoon's panel is pursuant to the order of reference on November 22, a study of the Anti-terrorism Act and the impact of the Anti-terrorism Act on rights and freedoms.

I'm pleased to tell you that we're joined this afternoon by three witnesses: James Turk of the Canadian Association of University Teachers, and Denis Barrette and Maureen Webb of La ligue des droits et libertés. Without any further ado, would you have opening statements to make? Then we'll begin the discussion.

[*Translation*]

Mr. Denis Barrette (Legal Counsel, Ligue des droits et libertés): Good afternoon; I am Denis Barrette, from the Ligue des droits et libertés du Québec. Members of Parliament, greetings.

The Ligue des droits et libertés feels that the Anti-Terrorism Act represents a greater threat for the future of our democratic society than terrorism itself. This legislation is not only prejudicial to the rights and freedoms of permanent residents and asylum seekers, but also to those of Canadian citizens.

The Anti-Terrorism Act permanently undermines several fundamental principles of our legal system which have been laid down over centuries in order to protect individuals against arbitrary action. These principles are the separation of the executive and the judiciary, the presumption of innocence, public and fair trials, accountability, and the right to remain silent.

Moreover, this act now makes it legal in Canada to detain individuals without trial during 72 hours or for an indeterminate period; it introduces suspicion as grounds for the intervention of the police, replacing the presence of reasonable grounds to believe; the criminalization of the motives of a crime; police investigations based on the political, religious or ideological motives of an individual or organization; a culture of police investigation based on anticipation and prevention, targeting particular sectors of the population; referral to torture justified by exceptional circumstances.

Amendments to the Canada Evidence Act force the courts to hold secret hearings, in camera and *ex parte*, to preserve national security and international relations.

The Anti-Terrorism Act introduces the possibility of holding secret trials by masking the identity of any person linked to the judicial process, including judges, lawyers, jury members, clerks, and even courtroom security guards. This evokes the dismal memory of the masked judges appointed by Fujimori to judge the presumed terrorists in Peru; this led to the arbitrary detention of thousands of innocent persons who wasted away in jail for many years.

Often, secrecy has been nothing but a pretext to mask the arbitrary. Quite recently, CSIS attempted to mislead the members of the oversight committee in charge of investigating the groundless refusal of a security clearance to diplomat Bhupinder Liddar. Maher Arar and the other Canadians who were detained and tortured in Syria were also victims of arbitrary acts.

These changes to our legal system are also in direct opposition to the principles set out in the Canadian Charter of Rights and Freedoms, i.e. the “right to life, liberty and security of the person”, article 7; “the right to be secure against reasonable search or seizure”, article 8; “the right not to be arbitrarily detained or imprisoned”, article 9; and many others. Those fundamental rights are also protected by international human rights instruments which Canada has ratified and is committed to respect.

Under the Anti-Terrorism Act, a terrorist activity can be, among other things, an

> [...] act or omission committed [...]
>
> (A) for [...] a political, religious or ideological purpose,
>
> (B) with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government [...] to do or to refrain from doing [...]

This definition is so broad that most groups that oppose certain policies of the current government could be targeted by this act, including alterglobalist or environmental groups. Some might even consider that the activities of a sovereignist movement are prejudicial to Canada's economic security.

If it were to be applied in an arbitrary fashion by some future government less concerned with civil liberties, this definition could jeopardize the pluralist character of our democratic system, as there is no humane and fair application of a law that favours arbitrary action. Any law that allows arbitrary action jeopardizes not only rights and freedoms, but also democracy.

The Secretary General of the United Nations, Kofi Annan, recently pointed out that:

> Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.

● (1340)

In the same address, the Secretary General pointed out that when governments sacrifice human rights and the rule of law, they play into the hands of terrorists.

One can understand that the attacks of September 11 or the ones in Madrid or more recently in London cause apprehension in the general public and in each one of us. However, we have to be wary of the fear that such events generate and we must above all beware of making decisions or adopting policies or legislation in the grip of this fear which only leads to arbitrariness.

[*English*]

The Chair: Thank you.

Mr. Turk.

Mr. James Turk (Executive Director, Canadian Association of University Teachers): Thank you, Mr. Chair.

My name is Jim Turk. I'm the executive director of the Canadian Association of University Teachers. I am joined by my colleague Maureen Webb, who is legal counsel to CAUT.

CAUT represents more than 48,000 academic staff at more than 100 colleges and universities across the country.

The review of the Anti-terrorism Act is a top priority for our organization. The values that underpin a free and democratic society are absolutely necessary conditions for Canada's universities and colleges to fulfill their public responsibility and to fulfill their role as institutions that search unreservedly for knowledge and truth and aim to instill a critical judgment and framework of mind in our students.

In our submission we were privileged to be able to draw on the expertise of our members, representing virtually all the university faculty in the country in the many areas of law that are affected by the Anti-terrorism Act, to try to provide to the committee a detailed legal analysis that we hope will be of use to you in this very important task that you have. We have some strong and pointed recommendations.

I will ask my colleague Maureen Webb to address those for you.

Ms. Maureen Webb (Canadian Association of University Teachers):

Good afternoon, gentlemen.

You've heard many days of testimony now by government officials, and they have been telling you that the Anti-terrorism Act is necessary to fill gaps in the Criminal Code, that it is necessary to fulfill Canada's international legal obligations, that it is a carefully balanced piece of legislation—balanced against individual rights and liberties—and that it is charter-proof.

As Jim Turk has just told you, we have filed a very detailed legal brief in rebuttal of these assertions by the government, and I hope some of you at least have had time to read it, because I think it should raise some serious questions in your minds about whether what government officials are telling you is correct.

I have a very short period of time and I have five things to tell you today.

First, there are no gaps in the Canadian criminal law without the ATA for addressing the phenomenon of terrorism. There are no gaps in the fulfillment of Canada's international legal obligations without the ATA, except perhaps one small jurisdictional gap in respect of bombings that do not constitute crimes against humanity.

Second, the terrorist framework that has been overlaid on the Criminal Code by the ATA is frankly a nightmare, and no amount of tinkering is going to fix it, because it is inherently flawed.

Third, this is not a carefully balanced piece of legislation. It's like a Mack truck driving through the essential liberties that make Canada a democracy.

Fourth, I want to tell you that you should forget about the charter arguments, because there are in fact much more serious things to worry about.

I may not have time to explain all of those points. I'll do my best to get through, but perhaps if you have questions you can pick up on some of them if I don't reach them.

Concerning no gaps in the criminal law or international legal obligations, those of you on this committee who are criminal lawyers or former solicitors general will know that the Criminal Code prior to the passage of the ATA had more than enough principles and provisions to address the phenomenon popularly known as terrorism. We list these at page 26 of our brief. They cover every conceivable terrorist act that could be committed in Canada.

The law of incomplete offences in Canada is very broad and it casts a wide net over all those who assist terrorists. We describe this law at page 27 of our brief.

There are more than enough sentencing principles in the Criminal Code as it existed before the passage of the ATA, and we list these on pages 29 and 30 of our brief. These principles would ensure that stiff sentences were meted out for terrorist acts.

In terms of international legal obligations, international legal experts or simply those who are willing to make a thorough inventory of Canada's actual international legal obligations will know that the ATA is not necessary to enable Canada to fulfill its international legal obligations.

There are ten international terrorism conventions that Canada is obliged to implement, along with the injunctions in Security Council Resolution 1373. I'm sure you're aware of these. It's very important to note that Security Council Resolution 1373 does not define terrorism, nor does it require states to do so. The international terrorism conventions also do not define terrorism and do not require states to do so. To be clear, there is no international legal obligation on Canada to define terrorism in the Criminal Code or any other piece of legislation.

The aim of the terrorism conventions—and really, the international approach to date—has been not to try to define terrorism, but to identify and target specific criminal acts that are generally associated with the phenomenon of terrorism, such as hijacking, hostage taking, or bombing public places.

● (1345)

These conventions seek to condemn the conduct; they seek to ensure that states criminalize the conduct; and in most cases, but not all, they require that states claim universal jurisdiction over these acts.

Security Council Resolution 1373 also requires states to criminalize specified criminal conduct related to terrorism, but does not require states to establish universal jurisdiction.

All of the conduct referred to in the 10 terrorism conventions and Security Council Resolution 1373 was criminal under Canadian law before the passage of the ATA, and all of the conduct that the international instruments require Canada to take universal jurisdiction over was also subject to Canada's universal jurisdiction before the passage of the ATA. I'll tell you how.

Section 7 of the Criminal Code established universal jurisdiction over all of the acts identified in the terrorism conventions, such as hijacking, hostage taking, attacks on airports and the like, and the incomplete offences related to them. At the same time, customary international law, which was later codified in 2003 with the passage of the Crimes Against Humanity Act, gave Canada a universal jurisdiction over all crimes against humanity, which most terrorist acts would be considered to be. It also gave Canada universal jurisdiction over incomplete offences related to crimes against humanity.

So without there being any necessity for the ATA, it would have been possible under Canadian law to prosecute all of the persons who were involved in the attacks on the twin towers and the attacks in Madrid and London without any need for the ATA.

That said, there is within this pre-ATA scheme one possible small jurisdictional gap. I'll tell you what it is. Canada, prior to the passage of the ATA, had no jurisdiction over bombing offences that did not also constitute crimes against humanity—and the International Convention for the Suppression of Terrorist Bombing required that it have jurisdiction over bombing offences. The fact was simply that the convention had not yet been added to section 7, as the other eight or nine conventions had been.

You can see that it's a small gap. Most bombings, like in London and Madrid, and on 9/11, would be considered crimes against humanity. Hypothetically there may be some that fail and are more like attempts, and not massive attacks on civilians, and which might not be considered crimes against humanity. You want to have universal jurisdiction over those too; that's why the bombing convention has to be added to section 7.

The ATA fills this small gap by adding the International Convention for the Suppression of Terrorist Bombing to section 7 of the Criminal Code and by creating another offence in subsection 431.2(2), which talks about bombing of public places, infrastructure and transportation systems. We would say that those are the only two provisions in the over 200 pages of the ATA that are necessary in Canadian law. All of the other parts of the ATA are either redundant to pre-existing law or they go way beyond what Canada's international legal obligations are. In fact, as my colleague Denis Barrette has just suggested, the ATA violates far more international legal obligations that Canada has than it actually fulfills in terms of human rights conventions.

● (1350)

My second point was that the terrorist framework is a nightmare you can't fix. I'm sure other groups will have testified to some extent about the definition of terrorism, how that definition is problematic, how Canadian law has never defined terrorism to date, and how international law has never defined terrorism to date.

There has been a great deal of pressure on the UN since September 11 to come up with a definition of terrorism. They were supposed to deliver that definition this fall at the reform summit, and again, its efforts are in tatters because in fact it's impossible to define terrorism.

Terrorism is a political concept, not a legal one. To say that an act is terrorist or not, one necessarily must make a moral judgment about the motive behind the crime, and that judgment will necessarily depend on the person's political, social, and historical background. So it is in fact impossible to create a definition of terrorism that is not either overinclusive in that it covers ordinary crimes, civil disobedience, or the justified use of force against oppressive governments and occupations, or underinclusive in that it does not cover some acts against civilians by state actors or quasi-state actors that ought logically to be included.

But the fact that terrorism can't be defined is not to say that these acts cannot be prosecuted. These acts are already covered in domestic and international law. They are covered by domestic law; they are covered by the law of crimes against humanity; they are covered by war crimes, international law. To inject a concept like terrorism, which is essentially a political concept, into this very important legal framework is to ensure that politics and not law determines culpability. If we're truly interested in condemning and prosecuting these acts, it must be the act and not the motive behind an act that is determinative.

So in our brief, which I hope if you haven't yet read you will take some time to look at, we go systematically through the terrorist framework that's overlaid on the Criminal Code, to show its excesses and its absurdities.

I have no time to take you through that, but just to highlight, did you know that under this act, police can charge people with monstrosities like conspiring to be an accessory after the fact of contributing—three layers of incomplete offences? It's convoluted in the extreme.

Did you know that someone selling milk to a person facilitating a terrorist activity—and terrorist activity could be something as benign as an anti-globalization demonstration—could be liable to a 10-year sentence?

A political activist instructing demonstrators on civil disobedience could be liable to a life sentence.

Do Canadians know? Do they understand yet that the Minister of Public Safety can list Greenpeace or Maher Arar as a terrorist, and then everyone who has contributed to them financially, worked for them, counselled them, is then guilty of the participation and financing terrorism offences?

● (1355)

The Chair: Your time is coming to an end here. Could you wrap it up so we can get to some questioning, please?

Ms. Maureen Webb: Yes, certainly.

This is quite an incredible point. The minister designates Maher Arar as a terrorist, and everybody who has helped him is suddenly guilty of the participation and financing offences under the Criminal Code. The only thing the Crown has to do to prove its case is to prove the fact of help, prove the fact of counselling or financial support. No one is able to challenge the terrorist label.

In short, this framework is not law; it is carte blanche. It is carte blanche for state agents to target groups and individuals in society, not for what they've done but for who they are or for what they think. While now the dragnet is sweeping up Muslims, that's not to say that tomorrow it couldn't be Quebec separatists or pro-life advocates.

The Chair: Thank you very much.

Mr. Sorenson, please.

Mr. Kevin Sorenson (Crowfoot, CPC): Thank you to you folks for coming today, and for your expertise and input. This committee has been given a huge responsibility in going over and reviewing Bill C-36.

Mr. Barrette, you said the decisions we deal with in this review shouldn't be based on fear. I think if this legislation had been drafted September 12, 2001, it would have been drafted out of fear. Our responsibility today is to review it. That's why the three-year review was put in—to give us an opportunity, not just from the standpoint of fear, but from the point of view of fact, to take a look at the legislation and ask how it has worked, what we would change, and what needs to be changed now that we have seen the last three years since the ATA.

Mr. Barrette, in your brief you characterized the Anti-terrorism Act as being "misleading, useless and dangerous". In regard to "misleading", you stated that this legislation really does not respond to the real threats to human security. I would humbly suggest that this legislation was never fully intended to respond to all the threats to human security, nor does the terrorism legislation ever suggest that terrorism is the greatest threat to human security. Terrorism is one threat to human security. It is the one threat that I think the world, globally, recognizes is very real and very present, and it's here now.

I agree with the report submitted to the Secretary General of the United Nations in December 2004, and I draw reference to that report because you reference it in your brief. In that report he stated that a number of major challenges are threatening peace and international security—war between states; violence within states; poverty; infectious diseases; environmental degradation; nuclear, radiological, and chemical and biological weapons; terrorism; and transnational organized crime.

The anti-terrorism legislation was never put in place to combat all those threats or concerns. It was designated to prevent terrorist attacks from occurring within this country through detection and apprehension of those who are deemed a threat to our country.

On that note, you compare the Emergencies Act to the Anti-terrorism Act in that its preamble mentions it applies for only a certain limited period of time. I would suggest this is because the Emergencies Act is enacted when an emergency takes place; when the emergency is over, the act is no longer in effect, whereas the Anti-terrorism Act is not there only for when a terrorist attack takes place. It's preventive in nature. There is a huge difference.

One witness suggested yesterday that within the act we have a legislated review every three years or five years. That, again, is why we do that. We keep looking at it to see if changes have to be made.

Last, on page 14 of your brief you say that the fear sparked by 9/11 that there would be increasingly deadly and unheard-of methods of terrorism hasn't materialized, and therefore, why do we need the act? I would respectfully suggest that because there has not been an increase in attacks here in our country, or perhaps even in our neighbouring countries, or in some of our allied countries, does not mean we can let our guard down or become complacent, because the minute we do so is exactly when such terrorist attacks may take place.

Is it possible that a terrorist attack hasn't taken place in our country because of the anti-terrorism legislation? Is that possible? Those are the questions that have to be answered. Do you agree that this could be the case? Do you think that the Anti-terrorism Act has had some effect? Do you think there is a potential that it has had some effect?

That question is to you.

Can I pose another question to Ms. Webb? You said, and we've heard before from other testimony, that the Criminal Code is sufficient. You played a little game, the “did you know” or “do you know” game.

● (1400)

Let's play another game, the “what if” game. What if the government was actually telling the truth? What if the government said that we completely rely on foreign intelligence agencies to help combat terrorism in our country? What if we do not have the resources to have people in all parts around the world and rely only on our own information in order to protect our country? What if they have told us that the criminal law or the Criminal Code is not enough?

Thank you.

● (1405)

The Chair: Mr. Barrette first and then Ms. Webb.

[*Translation*]

Mr. Denis Barrette: I will begin by answering the last question, Mr. Sorenson.

The Ligue des droits et libertés does not hold that prevention is unnecessary. Indeed in the Criminal Code we have provisions on prevention, among others on attempted contraventions, conspiracy, abatement, counselling, and so on. Police officers may investigate pursuant to those provisions.

In another connection, one of the problems under the Anti-Terrorism Act is that policemen are sent off on wild goose chases. Indeed, at some level, the act gives them the message to investigate groups or individuals whose religious, political or ideological motives may lead them to commit questionable acts.

This has to be put in the context we have experienced since September 11. Canada was being pressured by the United States. Among other things, Canada was accused of not having captured Ahmed Ressam, and of having sheltered the terrorist; all of these accusations were false. Policemen were under enormous pressure to find terrorists in Canada. They gave testimony to that effect during the Arar affair.

So they investigated the card business. I don't know if you were there this morning. On the basis of a card that was not checked because they were in a hurry—

I would like to finish—

[*English*]

Mr. Kevin Sorenson: I only have one point on that. Are you suggesting that Canada came up with the Anti-terrorism Act only because of pressure from the United States?

Mr. Barrette, I can tell you this. I think we knew on the governing side too that on September 12, and maybe even on September 11, that there was going to have to be some act, something that would have to come forward out of these attacks. We were at a point where we didn't realize if it was the first of many or if it was one stand-alone attack on September 11. There were three or four potential attacks that day.

But every country responded; the United States certainly did, Great Britain did, and Australia did. Many countries responded, and they responded not only because someone was arm-twisting and telling them that they had to come up and change something right now. We responded because we saw this as a global threat.

[*Translation*]

Mr. Denis Barrette: You referred to Great Britain. As a matter of fact, Great Britain has an antiterrorism act that is quite stringent and robust. We are talking about prevention, but that law did not prevent the attacks that took place recently in London.

I will now answer your second question.

[*English*]

Mr. Kevin Sorenson: There was one attack that they didn't prevent. But are you suggesting that it has not prevented any attacks?

[*Translation*]

Mr. Denis Barrette: Police officers may have told you that attacks were prevented.

I would like to conclude my reply, Mr. Sorenson. Police officers, with CSIS, long believed that by singling out a person who was not questionable terrorist acts would be prevented in Ottawa. This was not the case. Maher Arar was not even suspect. Mr. Amalki was suspect, but this turned out to be a house of cards that eventually collapsed.

Police officers committed a number of errors. We must not forget that they work with the RCMP and that the RCMP works with the CIA, the FBI and all of the Canadian departmental security agencies. It cannot be said that currently within police forces there is no influence from our neighbours to the south or political pressures which could lead—and did lead—to further cases such as that of Maher Arar.

Now, as I was saying, no one is opposed to prevention. No one is in favour of waiting to be the victim of a criminal act. However the problem is that unfortunately we target the wrong people. We make enemies and curtail rights and freedoms unnecessarily.

I would also like to reply to your second question. Insofar as security is concerned, you stated that the Ligue talked about food security, AIDS, malaria, and so on. In fact, the problem is a societal problem. If we talk about security at the societal level we first of all have to consider all of the threats as a whole. The Ligue is not alone in saying this; it is also the opinion of Kofi Annan of the United Nations.

Problems have to be considered globally. Lately the President of the United States was much criticized for not having considered in advance what would happen in a city confronted with a catastrophe, in this case, New Orleans. He is being criticized for having invested all of his energy in security measures to counter terrorism and curtail rights and freedoms, and for not having worked to secure cities in the event of catastrophes or terrorist acts. Indeed, terrorist acts, cyclones or floods are catastrophes. And yet, the richest country in the world did not realize this.

You are right, this does not only concern Canada and the United States. Globally, especially in the industrialized countries, all of the efforts and resources in the area of security were focused on terrorism or at least on the concept we had of it. I think we are not meeting the needs of humanity. On the contrary, and this is also Kofi Annan's opinion, we are playing into the hands of terrorists.

I believe I have answered your questions. Of course, we could debate this at length.

● (1410)

[*English*]

The Chair: We're running along here.

Mr. Kevin Sorenson: I have one comment before I hear from Ms. Webb, but at least four or five times you've said the ATA, the Anti-terrorism Act, is not needed because people are being wrongfully targeted or wrongfully charged, but that's the same in the criminal courts. There are people who have been in the courts, who have been incarcerated, who have been found guilty, and they've been wrongfully charged. That doesn't mean we throw those offences out of the Criminal Code; not at all. It means we have to do a review so that we can repair and make better the act, which is preventive in nature.

Ms. Webb.

Mr. Denis Barrette: May I answer, Mr. Chairman?

The Chair: Just one second. You're done with questions, Mr. Sorenson. We're at thirteen minutes, and I want to let Mr. Barrette answer and then Ms. Webb, and then I'll move to Mr. Ménard.

If you wouldn't mind, colleagues, I'm trying to rein everybody in a little wee bit.

Mr. Barrette, a short answer, and then Ms. Webb.

Mr. Denis Barrette: I have two things to say about what Mr. Sorenson said.

[*Translation*]

I'm going to say it in French, it will be quicker. Firstly, the Emergencies Act, formerly the War Measures Act, provides for compensation for victims. But to date in the case of Mr. Arar, no compensation has been contemplated.

Next, an accused individual is not detained indefinitely. There is generally a public trial, except under the Anti-Terrorism Act, which makes it possible to hold a secret trial. In the case of other types of criminal acts, there is a public trial with a possibility of release. I won't go through the list I enumerated earlier. This is not at all the same context.

I'm going to let Ms. Webb answer you.

[*English*]

Ms. Maureen Webb: In your question to me you said government officials had told you there were gaps in the Criminal Code, and the ATA was necessary to fill those gaps. I would respond by asking, has the government told you where the gaps were? To date I have not seen any testimony by government officials that got down to the details of where the gaps might be. You'll see in our brief, which was contributed to by many law professors across the country, that in their view there are no gaps. The criminal law is adequate. The criminal law has more than enough offences to deal with the phenomenon of terrorism. I think that's a problem in this whole debate. The government keeps it at a level of generality, and because it's such an enormous act and so detailed and convoluted legally, it's very easy for them to just give you that line and not get down to the brass tacks.

If you look at the Criminal Code in detail, the international conventions, and Security Council Resolution 1373 and compare them, you'll see there are no gaps. That is the opinion of our members, who are some of the top legal scholars in the country.

There's one thing I'd like to say to your first question. Benjamin Franklin said, “Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety”. I think the question is still out on whether the Anti-terrorism Act purchases a little temporary safety. In fact, I think there is doubt whether this kind of legislation is efficacious at all in preventing the kind of terrorism we're talking about. Unless you have information I don't, my understanding is that it hasn't been used yet either.

But at the same time, this kind of legislation does a great deal to our essential liberties in a democracy, like pluralism, criminal law protections, due process, right against self-incrimination, and prohibition against arbitrary detention; our individual civil liberties, like freedom of expression, and freedom of association; and our institutional checks and balances, like separation of powers, judicial review, and freedom-of-information accountable government. I would argue that those essential liberties are the preconditions of our individual and collective security. If we give up those, we lose the greatest amount of security we have in a democracy.

● (1415)

The Chair: Thank you very much.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): I too have very little time at my disposal, but I must take the time to express my appreciation of the two reports you have submitted to us.

I understand that the report the law professors are submitting to us today, which I have not read, is the one which was available before our hearings had even begun.

A Voice: [*Editor's Note: Inaudible.*]

Mr. Serge Ménard: That is correct. That one I did read, and I highlighted numerous passages.

I think that if someone wants to understand the point of view of those who believe that this is a dangerous law, your two reports are very complementary. The one from the Ligue des droits et libertés is shorter but for someone who has no legal training, it is much clearer and explains the situation in layman's terms very well. The brief from the law professors examines the legal arguments more in depth, which I found very relevant. I much appreciated the quality of these texts.

My first comment, following that of my colleague and friend Mr. Sorenson, would be to say that we experienced terrorism in Quebec some 35 years ago, and even some time before that, some 40 years ago. It began at the end of the 1960s and occurred again during the 1970s.

The first terrorists to be arrested asked for political prisoner status. The Prime Minister at the time, Mr. Trudeau, steadfastly refused, saying that there were no political prisoners in Canada, and that there should not be any. People are prosecuted because they have committed offences under the Criminal Code, because they have committed acts that are unacceptable in the eyes of society.

Do you think people have changed their minds since the time when Mr. Trudeau said that?

[*English*]

Ms. Maureen Webb:

Yes. I would say very much, because now we're saying it is not the act that matters, it is the excuse. It's the motive. Depending on your motive—

● (1420)

Mr. Serge Ménard: In the law.

Ms. Maureen Webb: Yes, in the law.

Mr. Serge Ménard: That's not the way it should be.

Ms. Maureen Webb: That's not the way it should be.

I think Mr. Trudeau's position was absolutely correct. There can be no excuse for attacks against civilians. These are abhorrent acts and people must be brought to justice.

But I think we have changed. By importing this definition of terrorism we're now saying the act does not matter; the motive behind the act matters.

In fact, there is a danger that people who are guilty of these acts may go free. When you make motive an element of a crime the way the Anti-terrorism Act does, when you say it's a terrorist offence if you did the act and you had the particular political motive, you're making motive an element of the crime. The Crown must prove beyond a reasonable doubt that there was a political motive. If it can't, there is a risk that the guilty will be acquitted. We have changed our view, and I think it's very problematic.

[*Translation*]

Mr. Denis Barrette: I would like to reply very briefly in order to be able to add an example from counsellor Julius Gray, from Quebec, which I find very pertinent.

The logic of criminalizing the motive leads us to paradoxical situations. Take a case where two people commit the same stock market fraud. The first individual does so for financial reasons, that is to say to put money in his pockets, while the second does it to discredit the capitalist system, for ideological motives, because he or she wants to show that the stock market does not work well, and that it takes very little to disrupt it. In both cases, the stock market fraud endangers Canada's security and has enormous consequences. The individual who commits such an act for financial gain is not targeted under the Anti-Terrorism Act, but the individual who commits this offence for ideological, political or religious motives—the relationship is vague—is targeted by this act, as well as all of his ideological or political collaborators.

As Ms. Webb said earlier, it is unimportant that one knows that one participates in a terrorist activity. It is very important, it is written in those terms.

Mr. Serge Ménard: We have very little time left. I would like you to focus on a particular topic. Bill C-36 was passed because exceptional circumstances were invoked. I understand that references were made to agreements signed by Canada, to other texts than the Charter of Rights and Freedoms.

I would like you to tell us whether these exceptional circumstances are indeed present. And when the state invokes these exceptional circumstances, what obligations does the state which signed these conventions have with regard to duration, methods of implementation, etc.?

Mr. Denis Barrette: First of all, this is covered by article 4 of the international Covenant on Civil and Political Rights. This article states that in a situation where the very existence of a nation is in peril, emergency or exceptional laws may be passed which for a given period of time, a defined period, curtail certain rights and certain freedoms, except those set out in this same article four, and which we listed in our brief. Among others, there is the right not to be subjected to mistreatment or cruel or unusual punishment, as well as torture. Moreover, a country that adopts exceptional legislation must inform the secretary general in advance. Now, I am certain that that was not done for the Anti-Terrorism Act.

I'm going to yield the floor to Ms. Webb or Mr. Turk.

[*English*]

Ms. Maureen Webb: No, that's fine.

[*Translation*]

Mr. Serge Ménard: You have nothing to add?

[*English*]

Ms. Maureen Webb: I would only say that most Draconian laws are brought in at times of emergency. They're conceived of as temporary laws or reviewable laws, like the Anti-terrorism Act, but almost without exception they have a way of becoming permanent. There's a professor from Tel Aviv University who's done a very interesting study that we quote extensively in our brief at the end. He shows that from decade to decade, in country to country, almost without exception, laws like the Anti-terrorism Act become permanent and their provisions intensify. The restrictions that were initially put on some of the powers wither away. They function creep, and they do another thing that parliamentarians like yourselves should be extremely concerned about: they introduce structural changes that are often permanent into systems of government. They tend to concentrate power into the hands of the executive, at the expense of the legislative and judicial branches, which often becomes irreversible, or certainly very difficult to unravel once this process starts. That's why I made the point earlier that there are more serious things to worry about than the charter arguments, because you've got to think, what do Draconian laws, which might seem like a good idea during the time of perceived crisis, do in the long run to democratic societies?

● (1425)

[*Translation*]

Mr. Serge Ménard: The arguments relating to the Canadian Charter of Rights and Freedoms were submitted. I believe they were submitted in writing.

But the concern I want to express to you goes a bit further than that, because you talked at some length about international agreements.

In your opinion, is Bill C-36 in compliance with the International Bill of Human Rights?

[*English*]

Ms. Maureen Webb: It violates all kinds of rights under the International Covenant on Civil and Political Rights and under the torture convention. Under this legislation a person can be tried as a terrorist in a court hearing that no one is allowed to know the existence of, with secret arguments, prosecuted by ministers and officials whose identities remain secret, based on court precedents that can also remain secret.

The heads of the Federal Court have talked about this themselves, and they find the situation untenable. That violates many of the guarantees under the international civil and political covenant. You could go systematically through and look at all of the international obligations the ATA violates. We haven't done that, but the corollary is, what does it violate in the charter? The government is not arguing that it doesn't violate charter rights. It violates a whole lot of charter rights. Their charter argument is that courts would uphold those violations under section 1 of the charter.

[*Translation*]

Mr. Serge Ménard: Ms. Webb, I apologize for interrupting you, but we have very little time. Sometimes I realize how difficult it is to do simultaneous interpretation. I can be passive in English. I don't know if you are.

My question was more specific than your answer. There is an International Bill of Human Rights. My question was addressed as well to Mr. Barrette and Mr. Turk. Is Bill C-36 in compliance with the International Bill of Human Rights, which Canada signed shortly after the Second World War?

Mr. Denis Barrette: I would say that it does not respect its principles. It violates all of the principles which gave rise to the Charter, to the Universal Declaration of Human Rights and afterwards to the pact. Consequently one can conclude that the Anti-Terrorism Act violates all of the fundamental principles upon which our western societies are built.

I can cite a specific example. Unfortunately, I know the principle, but not the article number in the Charter. I am referring to the obligation of international cooperation. We did not speak very much this morning about the impact of the Anti-Terrorism Act on international cooperation groups. Not only are these people at risk, but their work is made difficult. For the purpose of furthering international cooperation, they are or have been in contact, among others, with groups such as the FARC, in Columbia, or the Tamil Tigers. We know that following the tsunami, there was a truce between the Tamil Tigers and the governments in power. All of a sudden, governments began to cooperate with a type of group which had previously been considered a terrorist group.

What will happen, practically speaking, to people who do daily international cooperation work, be it in Guatemala, Salvador or Indonesia, and whose role it is to fulfil Canada's international, legal and moral obligations? They find themselves up against enormous difficulties because they are in contact with groups that are suspected of terrorism or supposed to be terrorists.

Was the answer too long?

[*English*]

The Chair: I'm going to jump in. It's not that your answer is too long, but Mr. Ménard's time has expired.

● (1430)

Mr. James Turk: May we just give a one-word answer to his question?

The Chair: Sure.

Ms. Maureen Webb: It is not consistent with the Universal Declaration of Human Rights.

The Chair: That's several words, but—

Mr. James Turk: No, it's not consistent.

Ms. Maureen Webb: I'm sorry, the translation gave a different name. I didn't recognize the name.

Mr. Serge Ménard: I don't think I used the right expression in French either, so we'll have to excuse the translators. Generally they are very good, but it's a hard job.

The Chair: Mr. Ménard, I don't want to cut you off summarily, but is there a last point you want to make before I move to Mr. Comartin?

[*Translation*]

Mr. Serge Ménard: Which particular provision of the Universal Declaration of Human Rights are you referring to?

Mr. Denis Barrette: May I add something, now that I have understood?

This isn't word for word, but the preamble goes something like this: The purpose of the Universal Declaration of Human Rights and of the agreement among countries is that once they have been freed from misery and hunger, people will no longer have to resort to arms to revolt against oppression. We are acting in a manner that is totally inconsistent with that logic when we prosecute people who are hungry and living in misery.

[*English*]

The Chair: Merci.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you for being here.

[*Translation*]

Thank you, Mr. Barrette, for your testimony.

[*English*]

Ms. Webb, concerning the point you made about the professor from Tel Aviv, I don't know if Canada is the exception. We went through the War Measures Act. Because it was invoked in the circumstances it was and because of the negative repercussions that flowed from it—identified in subsequent years, not at the time—it leads to the Emergencies Act. Then we get 9/11, and we, in a panic as a government, respond with the ATA.

Is there any hope that we'll come to our senses a bit further on? I'm not optimistic that this committee is going to, or that this government is in particular, but are there any chances? And if you can, forecast when it might happen.

Ms. Maureen Webb: I think Oren Gross would say that we're reverting to type, because that is what countries do. Country after country that enacts this kind of legislation makes the same mistakes. I think Canada did search its soul and got rid of the War Measures Act, and there was a political will to do that because Quebec was not satisfied with it.

Mr. Joe Comartin: So the only hope that we'll get rid of this bill —at least almost all the offensive part of it, which is most of it—is when it gets invoked, when it's actually used the way the War Measures Act was, at a time of crisis?

Mr. James Turk: Mr. Comartin, that's why what this committee recommends is going to be so vital. Mr. Sorenson talked earlier about how on September 12 it might have been in fear and reaction; that's why you have a three-year review.

On what would cause me to be pessimistic about what is going to happen, has the Minister of Public Safety indicated to this committee one word she would change in the act three years later? Is there any reflection whatsoever on what might have been done in haste or in fear?

I haven't seen any, and that's why the reaction of this committee and its report to Parliament is going to be decisive for the protection of human rights and civil liberties of Canadians. It's quite clear that the minister doesn't regret one word, doesn't acknowledge one overstep, and doesn't indicate one overreaction in what was done on September 11. We're here telling you, on behalf of academic staff at universities across Canada, there's nothing in this act that is necessary that couldn't have been dealt with by existing legislation.

So there was a vast overreaction on September 12, yet not a hint of any reconsideration, or saying, “Well, we went too far in this, but we need that”. In fact, we're urging you to ask the government, when they appear before you, if they can point to a single thing, other than the two exceptions Ms. Webb indicated, that wouldn't have been dealt with by existing legislation.

Mr. Joe Comartin: Let me take you up on that.

[*Translation*]

You may comment if you wish, Mr. Barrette.

[*English*]

When Commissioner Zaccardelli was here, I put the question to him of what advantage...and obviously he pointed out it had been used in the Air India case to compel the testimony of that one witness. Then charges were laid against that individual here in Ottawa. I pressed him about anything else, and then he got into the whole issue of prevention, much as Mr. Sorenson has today. When I asked how many incidents had been prevented, I think his answer was 16. I don't know where he came up with that answer. Then I asked him to explain, give me specifics, or give me some scenarios if he didn't want to give the specifics. He couldn't do that, but he promised to give me something in some kind of summary. I'm still waiting. That was back in late winter.

I'm asking if you've come across anything, if there are any reports from our security people, or if any research has been done that can point to this bill, this law, having prevented any incidents.

● (1435)

Ms. Maureen Webb: That's right. They used the investigative hearing provision in the Air India case years after the fact of it.

Mr. Joe Comartin: And it was unfortunately voted on by our Supreme Court.

Ms. Maureen Webb: Yes.

Mr. Joe Comartin: But have there been any studies? Has anybody seen anything?

Ms. Maureen Webb: No. I know there were some minimal reports that were filed. There's the guy who's being held—the fellow who was apprehended in Ottawa. But my understanding is he's being held under the ordinary Criminal Code.

Mr. Joe Comartin: No, actually I think there is—

Ms. Maureen Webb: Is he? No. It's a security certificate.

Mr. Joe Comartin: No. This is the other individual—that young man.

Ms. Maureen Webb: Right. But that's not the ATA, and it's not preventive arrest.

Mr. Joe Comartin: It's not a preventive arrest, but he has been charged with some section or other under the ATA.

Ms. Maureen Webb: Right. But what in the ATA prevents terrorism? Do terrorist defences deter suicide bombers? No. The preventive arrests—I think that's the only provision you could point to and say we might get some bad guy off the street in time.

Mr. Joe Comartin: You're getting ahead of yourself. That's my next question, but in a broader sense.

I'm playing devil's advocate for a minute here. You went through—and you did the same in your paper—and set out all the sections of the Criminal Code that could be used as alternatives to the ATA, showing that the ATA...as far as criminal charges were not to be used.

You didn't address, Ms. Webb—and Mr. Barrette the same thing—the amendments to the Evidence Act, and the amendments that in effect have created different due processes, or a lack of due process, that have undermined our due process. You hear strong arguments, and the Supreme Court accepted that, to compel that testimony in the Air India case. What about those provisions? Are they of any benefit?

Ms. Maureen Webb: That's why we needed 20 minutes instead of 10.

We didn't get to the amendments to the CEA. They are extremely alarming. We start our brief with that because they are sort of less examined by NGO groups than the terrorism offences.

I'll play the "did you know" game again. Did you know that the executive branch of government can keep secret, prevent the disclosure of any information it wants to keep secret in any legal proceeding in the country, including these proceedings? Unfettered discretion. If you look at the provisions, there are some legal nuances, but it boils down to unfettered discretion. The Attorney General can issue a secrecy certificate that can prevent any public inquiry, any parliamentary committee, including your own, from accessing information under section 38.13 of the CEA as amended.

The Chair: Not a parliamentary committee.

Ms. Maureen Webb: Any proceeding. The definition is "any proceeding in which evidence can be compelled". Legal scholars have listed—

The Chair: I think it's a debatable point, but anyway, we'll accept it. I'm not going to interrupt Mr. Comartin's questioning.

Mr. Barrette.

[*Translation*]

Mr. Denis Barrette: I agree with Ms. Webb, at least in so far as Parliament is concerned. However, section 38.13 of the federal Evidence Act is cause for grave concern. It came to our attention during the Arar inquiry to which I was a party that this matter might make its way to the Federal Court, the Federal Court of Appeal, and subsequently, to the Supreme Court, so that information of public interest can be disclosed in the course of a public inquiry.

If the Supreme Court decides that it is in the public interest to disclose the facts next year, the Attorney General of Canada could, against the wishes of the Supreme Court, issue a certificate and keep the evidence under wraps. In other words, the Executive now wields so much power that it could override a Supreme Court decision.

Section 38.13 must be interpreted in a completely logical manner to see that the Executive in fact has the last word in this, after the Supreme Court. This is a good example of the power of the Executive.

As far as secrecy is concerned, there is cause for graver concern because a secret process is being created and, as I said earlier, secrecy is often used to hide mistakes. In the case of potentially sensitive information, secrecy can be invoked in all proceedings, for instance, in matters involving the Régie du logement, Small Claims Court or a municipal council.

I'll leave it at that, because I could go on at considerable length. However, I wouldn't want to take up the committee's time.

● (1440)

[*English*]

The Chair: Mr. Comartin.

Mr. Joe Comartin: Tony Blair is trying to do it in England, and we heard from B'nai B'rith and the Canadian Jewish Congress yesterday a request that we recommend an incitement of terrorism to be an offence, to create a new offence.

I have two questions. One, is it necessary, given the...I should know this; I did one of the few trials in the country on it. Hate speech. We have that section. Do we need it, and if we do, what kind of impact would it have?

Ms. Maureen Webb: We have the hate speech provisions, which I understand are very broad. We also have "counselling to commit an offence", which is an incomplete offence.

Mr. Joe Comartin: The incitement to hatred, does it give us anything? If we were to think of going down that road, does it add anything that we don't already have? I suppose it depends on how it's worded.

Ms. Maureen Webb: Don't the hate speech provisions—

Mr. Joe Comartin: I'm sorry, not incitement to hatred, incitement to commit a terrorist act.

Ms. Maureen Webb: Incitement to commit a terrorist act.

Mr. Joe Comartin: It's just more specific.

Ms. Maureen Webb: No, in fact I think it's an example of a trend over the last ten years or more where politicians keep adding these very specific provisions that are redundant to existing principles and provisions in the code. But they're there to make a symbolic gesture to say we find this particularly abhorrent, or we want to respond to the last current event and let people know that this is condemned, when in fact it's redundant to what's already in the Criminal Code in the principles.

The real danger—and the criminal lawyers among you will appreciate this and have the same concern—is that this kind of accretion on the Criminal Code unduly complicates its interpretation and operation and prevents its principled application. So you have all these overlapping accreted, redundant provisions where one strong principle would have done the job. This is something that our members in the law faculties across the country have commented on a lot. I think these kinds of things are prime examples.

Mr. Joe Comartin: Mr. Barrette.

[*Translation*]

Mr. Denis Barrette: I agree. Again, this would merely add ideological, religious or political motives for a crime. The reference here is to inciting hate or counselling a person to commit a crime. I'm repeating myself somewhat when I say that it's similar to misleading police and causing more harm than good to the community in the process.

[*English*]

Mr. Joe Comartin: Do I have one more?

The Chair: Sure. It's your last question, though.

Mr. Joe Comartin: I want to go back to where you had cut off Ms. Webb on some of the due process, interfering with due process, and the amendments to the Canada Evidence Act. Are there any others that are of particular concern?

Ms. Maureen Webb: Under the Canada Evidence Act?

Mr. Joe Comartin: Mr. Zed is prepared to accept as potential that they'll shut us down at some point, the next time we hit a crisis, but I'm not. But go on to some other point.

Ms. Maureen Webb: I said did you know that the act allows for people to be tried in proceedings that nobody is able to know the existence of, with secret arguments, secret accusers, prosecuting officials whose identities are kept secret, and the court precedents themselves are kept secret. All of those pertain to the amendments to the CEA. That's the publication bans on justice participants in the CEA that the ATA has added. That's the mandatory *ex parte* hearings and mandatory secret court records. We quote two Federal Court justices—including the chief justice—who say these provisions are absurd. They've already been asking Parliament to change them. Those are also of concern.

● (1445)

Mr. Joe Comartin: Can we just do that one point on the chief justice, Mr. Chair?

The Chair: You're way over your time. Just a quick last point and then to Mr. Maloney.

[*Translation*]

Mr. Denis Barrette: One effect—and there are many—has to do with the right to justice. The Supreme Court maintains that unnecessary delays amount to justice denied, regardless of whether a criminal or civil matter is involved. The federal Evidence Act has necessarily led to a debate on national security in the Federal Court. The matter was then taken up by the Federal Court of Appeal and subsequently, but the Supreme Court. In the meantime, criminal as well as civil matters are in a kind of limbo. In my view, the types of delays suggested by the act give rise to justice denied. Thank you.

[*English*]

The Chair: Thank you, Mr. Barrette, Mr. Comartin.

Mr. Maloney, please.

Mr. John Maloney (Welland, Lib.): Mr. Barrette and Ms. Webb, you've presented us with some powerful positions. Are there any redeeming features in the Anti-terrorism Act at all?

Ms. Maureen Webb: I think the approach the Anti-terrorism Act should continue is the approach Canada and the international community have followed to date with respect to terrorism. That is to identify some of the more egregious crimes that are associated with this phenomenon and assume universal jurisdiction over them. The approach is to identify and target the crimes—the acts—not to try to start making motive an element of these crimes.

What we would say is yes, you have to implement the new terrorism conventions that come along—Canada is obliged to implement the Security Council resolution demands—but don't go down this road of trying to invent a definition for terrorism; do it the way it's been done to date. That is, criminalize the acts, not the motive; assume universal jurisdiction over the more egregious ones that the international community wishes you to assume universal jurisdiction over. But that's a very narrow part of the ATA.

Mr. James Turk: Just to be unambiguous, we are calling for the repeal of the act. We feel there are some gaps that would need to be covered by replacement legislation, such as the two conventions that aren't presently covered. Apart from that, we in fact think the dangers in the act far outweigh any benefits.

Ms. Maureen Webb: And to be clear, we think the financing of terrorism acts is already implemented in existing Canadian law. It's only the bombing convention that needs an addition, in section 7.

Mr. John Maloney: Weapons of terrorism, such as suicide bombers, are very difficult to deal with. Do we not need extraordinary measures to deal with that weapon of individuals who are prepared to sacrifice their lives to create havoc on the civilian population?

Ms. Maureen Webb: But I would ask you, where's the weapon in the ATA that prevents suicide bombers?

● (1450)

Mr. John Maloney: It's the investigations that get to these people before they in fact undertake their act.

Ms. Maureen Webb: Right. So—

Mr. James Turk: If you look around the world, there are countries that have far more oppressive legislation than the Anti-terrorism Act and they have been absolutely unsuccessful in preventing suicide bombers. The way you prevent suicide bombers is not by changing the law when your Criminal Code already has adequate provisions, but by a whole range of other things that are necessary to try to deal with the situation. Oppressive laws, at the end of the day, are not the solution to the problems caused by suicide bombers.

Ms. Maureen Webb: If you look at the reports that came out from the September 11th commissions, what they identified was a lack of intelligence, a lack of coordination between intelligence communities. They had a lot of suspicious phone conversations and things like that, which they had taped, and many of them hadn't been translated, or they weren't communicated between crucial institutions —between the FBI and other agencies.

It's good intelligence that's going to stop suicide bombers, and that kind of intelligence is not obtained by dragging people in for investigative hearings. From a terrorist cell member, you're not going to get at the truth through an investigative hearing. You're going to get at the truth by penetrating those communities, understanding those languages and cultures, those milieux, and successfully penetrating them in a traditional security intelligence sense. I think this is a point Monsieur Ménard has made, as a former solicitor general: that it's good intelligence, good coordination, good communication, and good police work.

Mr. John Maloney: Mr. Barrette, you're anxious to jump in here.

[*Translation*]

Mr. Denis Barrette: The Criminal Code refers to "conspiracy", an old offence. In school, we learned that "conspiracy" and "conspire" were derived from Italian or Latin. These are very effective weapons for the police and for prosecution purposes. In point of fact, a person can be found guilty of a conspiracy even though it may not have come to fruition. The key factor is that a plan was thought out and drawn up. Mr. Ménard could explain in greater detail how conspiracy is used as a weapon. It is a relatively effective weapon in the Criminal Code.

As for attempting to commit a criminal act, let me say again that in the case of an attempt just as in the case of a conspiracy, it's not necessary to have actually committed a criminal act to be arrested. There are other offences in the Criminal Code for which a person can be arrested, for the sake of preventing terrorist acts.

Ultimately, however, if a person decides to blow himself up, there is little we can do, even with information. I understand what my colleague is saying. We cannot arrest everyone for taking the subway or for behaving oddly. We have to make a choice: either we live in a society where people enjoy rights and freedoms, which carries a certain degree of risk, or we live in a society where the illusion of safety prevails but where in fact people have few freedoms.

The same is true of defrauders. The harsher the laws in place to prevent fraud, the more clever criminals become in finding new ways of committing fraud. Changing the law won't stop defrauders and criminals from attempting to break the law.

The way to prevent crime is by eradicating the root of crime. As Kofi Annan said, poverty and social injustice in the world are the leading causes of terrorism.

Clearly, we have to be vigilant when it comes to critical sectors of society such as airports, hospitals, water, etc. Measures are nonetheless warranted in the field of public health to guard against future criminal acts, bombings, subway accidents and the like. Exploding bombs are not the only threat to subways and trains. Train accidents are also a possibility.

As a society, we therefore have steps to take and choices to make. If, in the process, rights and freedoms are cast aside, as we've seen with the ATA, then in our view, we've embarked on the wrong course.

● (1455)

[*English*]

The Chair: Thanks.

Mr. Boudria, please.

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Thank you.

I'd like to go over something that was referred to before on terrorism not being defined. On terrorist activity, nevertheless, there are four pages of descriptions thereof in the act. Everything from the UN conventions to the other conventions are all repeated in it, plus two more separate pages of homegrown definitions are added to that. So it isn't quite the same as saying it is not defined. Terrorism is maybe not defined. Certainly, one could argue that the definitions of terrorist activities are too complete, incomplete, or whatever, but not that they're not there.

Ms. Maureen Webb: I'm sorry. That's not what I intended to say. What I meant to say was international conventions have not defined terrorism.

On the contrary, under the ATA, Canada has boldly gone off and created a four-page definition that refers to the acts and the conventions, but it also has a catch-all definition under "terrorist activity", which neither the Security Council resolution nor the international conventions attempt to do. They don't require states to come up with a definition of terrorism.

My exact point is that Canada is under no international obligation to define terrorism in the Criminal Code, yet it has done so, and its definition creates a nightmare. That's my point.

Hon. Don Boudria: In the less-than-ideal world in which we live, there's at least some possibility that we're not going to get rid of the act. That probably doesn't shock you, even though you're quite clear about what your preference is.

Could you give us more indication at least of where we could improve on the legislation? This morning and yesterday we had witnesses and talked about, for instance, the security certificates and other measures of how we can offer tangible recommendations to the minister to improve the process where it needs improvement—in addition to the recommendation you've already made to get rid of the act. That's fine, we've heard that. But in addition to that, so we can put something in to the effect that in the unlikely event that the minister doesn't want to get rid of the act, "The minister might want to consider..."—fill in the blank.

What are some of these recommendations?

Ms. Maureen Webb: I think Canada should look at what the United States and the U.K. have done. They have not created new terrorism offences based on a new definition of terrorism. All of the terrorism offences they've created for the purposes of stiffer sentences or universal jurisdiction are based on existing crimes. You see, what Canada has done is they've created new offences.

● (1500)

Hon. Don Boudria: We have?

Ms. Maureen Webb: We have. We have created new offences. We've created this definition of terrorist activity; then we create these new offences called "participation" and financing offences that are tied to this catch-all definition of terrorist activity, and it creates this convoluted, dangerous overlapping of criminal regimes that the United States and the U.K. have found to be unnecessary. They haven't done that; they've simply referred to existing offences. They would say, for example: "We say that hostage-taking is now a terrorist offence, and it attracts stiffer sentences and we have universal jurisdiction over it." But they haven't created new offences, and Canada has. So that would be one thing.

Another thing would be to get rid of this catch-all definition of terrorism.

Hon. Don Boudria: But there's a definition of terrorist activity, not terrorism.

Ms. Maureen Webb: I have no problem with saying that the acts that are—

Hon. Don Boudria: The terrorist activity, you mean.

Ms. Maureen Webb: Or terrorist activity. Clearly that's the intention of the convention, to identify specific criminal acts that are associated with the phenomenon of terrorism and single them out for universal jurisdiction. Isn't that right?

Hon. Don Boudria: But wouldn't you agree that some of the definitions that were added to this legislation are actually limiting in nature? In other words, not all of it is there to expand on the definition of terrorism activity. Some of it, and I read here, says that which is in whole or in part political, religious, or ideological, or that intentionally does all this grievous harm—and then there's a greater clarity clause on top of that....

I would argue that some of it is actually limiting, is it not?

Ms. Maureen Webb: No, not at all. It doesn't limit; it expands. The U.K. and the U.S. have not gone down that road. They have not created a definition of terrorist activity. They simply refer to existing criminal offences. That new definition expands exponentially the scope of criminal liability in ways that are unforeseen, unpredictable, and undesirable.

So I say get rid of that catch-all clause. It's an attempt by Canada to define terrorism. Nobody's done it before. The UN hasn't done it before. The U.S. and the U.K. haven't found it necessary to create this new sort of catch-all definition and create new offences out of it. They stick with the offences they had, and they single some of them out for stiffer sentences or universal jurisdiction, but they're not creating new things.

So definitely, that would be a recommendation, to get rid of that catch-all definition of terrorist activity. That's the heart of the nightmare.

The other thing that should be done is—and you as parliamentarians should be alarmed by this. The amendments to the Canada Evidence Act, the powers that are given to government to keep information from being disclosed, information that the public and Parliament should know about—those should be repealed.

The Chair: I'm jumping in here, colleagues.

Thank you, Mr. Boudria.

I'm going to give Mr. Sorenson a last word.

One thing the chair has observed is that in your submission you suggested the act be repealed. What about the financing provisions under this particular legislation for financing terrorism, and also the listed entities issue? Would you not preserve those as having any value at all?

Ms. Maureen Webb: Right here I have copies of the International Convention for the Suppression of the Financing of Terrorism for you. It's worth the read.

The Chair: The Canadian jurisdiction to deal with that is contained in this particular legislation. The Canadian jurisdiction is contained within this legislation.

Ms. Maureen Webb: Yes.

The Chair: You're suggesting that we repeal it, so how would we deal with the financing provisions and the listed entities that are...?

Ms. Maureen Webb: What I'm saying is that the ATA goes far beyond what is required by the International Convention for the Suppression of the Financing of Terrorism.

The Chair: I know, but your submission is that it be repealed, so you can't rely on the ATA in your world.

Ms. Maureen Webb: It's not necessary. It can be repealed and nobody will miss it, because existing law already implements the financing provisions in two ways.

The Chair: There isn't an existing law.

I suppose you're talking about money—

Ms. Maureen Webb: Let me explain. First, the financing convention does not require Canada to take universal jurisdiction over financing of terrorism offences, so you don't need the ATA to create universal jurisdiction for financing offences because it's not required by the convention.

● (1505)

The Chair: I'm not talking about whether it's required. It's Canadian law. In other words, either it's working as a piece of this legislative framework or it isn't. In your framework you're repealing it.

I simply wanted to ask the question about your position on it as to whether there was any merit to those two pieces of legislation that are contained within Bill C-36.

Ms. Maureen Webb: No, you don't need them, because there are already laws that would capture that activity.

The Chair: All right, thank you.

Mr. Sorenson.

Mr. Kevin Sorenson: Just for clarification—

[*Translation*]

Mr. Denis Barrette: First, can I answer your question, because I consider it to be important? I'll get to Mr. Boudria's question after that.

[*English*]

The Chair: All right, sure.

[*Translation*]

Mr. Denis Barrette: We the members of the Civil Liberties Union feel that certain aspects must be taken into consideration. We can understand why it's important to make the funding of terrorist activities illegal.

One of the major problems, particularly with respect to entities, is the whole aura of secrecy, the absence of a genuine right of appeal, the lack of accountability and of the means to challenge an entity's right to be on a list. Again, it comes back to the definition.

I would say, in response to Mr. Boudria's question, that what hurts most in the Antiterrorism Act is the reference to political, ideological and religious motives. A group may be identified as an entity, often and primarily because of religious and political motives. Of course, the definition of terrorist activities goes further than that.

I would also remind Mr. Boudria that according to section 83.19 of the Criminal Code, a person may unknowingly facilitate a terrorist activity.

As far as financing terrorism is concerned, the problem is the whole system of entities, the fact that an entity may challenge the fact that it is a listed entity.

[*English*]

The Chair: Thank you.

Mr. Sorenson.

Mr. Kevin Sorenson: I want to go back a little bit to what we've talked about. Maybe you can remind me. What other law in the Criminal Code lists motives? I know in the justice committee—Mr. Comartin might be able to refresh me. Was it the law to incite hatred or hate literature? Which law? There are other laws. Are there similarities here where the government felt perhaps it needed to include the motive for this? That's the first question.

I have one other little comment.

Ms. Maureen Webb: First of all, I want to say that financing of terrorism would be covered by incomplete offences like aiding and abetting, conspiracy, accessory after the fact, already in the criminal law.

As for motive, motive as an element of a crime is foreign to criminal law. It's foreign both in domestic criminal law and in international criminal law. Hate motive can be an aggravating factor at sentencing.

Mr. Kevin Sorenson: I realize that. In fact, I sat at committee and, if I remember correctly, I argued against including a motive of religion, race, or ethnicity, and things like that, in the law, but it is there.

All I need is this. Is it the hate literature?

Ms. Maureen Webb: Well, the hate motive is in sentencing under the Canadian Criminal Code, but other than that....

Mr. Kevin Sorenson: There is other law in the Criminal Code where motive is included.

Ms. Maureen Webb: Tell me what law that is.

Mr. Kevin Sorenson: Well, that's what I'm asking.

The Chair: Two of your colleagues want to answer the question.

Mr. Kevin Sorenson: No, there is another. I think it is the hate....

The Chair: All right. We have very little time here.

Mr. Barrette, do you have an answer?

Mr. Kevin Sorenson: He's going to give you the answer really quickly.

[*Translation*]

Mr. Denis Barrette: One mustn't confound culpable intent, or mens rea, with criminal motives. It's very important to distinguish between the two, Mr. Sorenson.

Take fraud, for example. Intent constitutes a component of the crime. If I relate a story to you for the purpose of taking property from you, then I am acting with culpable intent. The aim of my criminal actions might be to make some money. My actions may also be spurred on by ideological, or even racist motives. The problem, when dealing with grounds of a political, religious... I'm referring to the exact provision in the Criminal Code. I will read it to you aloud in English, to ensure the translation is correct and to avoid any ambiguity.

● (1510)

[*English*]

> (A) in whole or in part for a political, religious or ideological purpose, objective or cause....

[*Translation*]

That's much broader than culpable intent. Am I intending to commit murder or voluntary homicide? If I take an object, was it my intention to commit theft? My aim, my intent, is different.

[*English*]

Mr. Kevin Sorenson: I agree with you. I don't think that it's up to every lawyer to decide what the motive is for why this criminal act has taken place. I know that we included sexual orientation in one piece of legislation, together with religion, ethnicity, and whatever the other one is,

The only other comment I have is that we've gone over and over this in the Criminal Code, covering all the offences that would be under the ATA. I have a difficult time buying that this is just another ordinary type of crime. When you see the number of entities that are huge fundraisers, to say or suggest that the terrorists as we know them are just the same as a murderer or someone who takes another hostage, as bad as they may be, it is different. On the one hand, I argue that we shouldn't decide the motive, but on the other hand, terrorism is much worse than the ordinary type of crime.

The Chair: Thank you.

We are going to suspend here. On behalf of all of my colleagues, I want to thank you very much for your intervention. You've certainly generated a lot of interest. You will no doubt be hearing from us in due course on where we end up moving as a result of your intervention today.

We're suspended for a moment to bring in the next panel.

Thank you.

● (1510)

(Pause)

● (1530)

The Chair: I call the meeting to order.

I was just slightly delayed, colleagues. We may have an extra member or two delayed, but in any event thank you for your indulgence.

I'm pleased to welcome today, from the Federation of Law Societies and the Canadian Bar Association, Ms. Corrick, Mr. Hunter, and Mr. DelBigio. Did I get that right? You could have an easy name like Zed.

Mr. Serge Ménard: It's too easy. We have to explain to everybody, Z-e-d.

Mr. Kevin Sorenson: When he goes to the States we call him Paul Zee.

The Chair: Yes, that's right.

Welcome, and thank you for joining us this afternoon. We are, as you know, discussing the specific area of rights and freedoms as our theme for this afternoon's panel. You're all welcome to make an opening statement. I guess one group is going to make one statement and then the other, so please proceed.

Thank you.

Mr. George Hunter (Vice-President, Federation of Law Societies of Canada): Thank you, Mr. Chairman.

My name is George Hunter. I'm the treasurer of the Law Society of Upper Canada, which, translated, means the president of the law society of Ontario.

The Chair: Which means big bucks.

Mr. George Hunter: Well, in some circles.

I'm also the vice-president of the Federation of Law Societies of Canada, which is a federation of all of the regulatory bodies of law societies in Canada.

With me is Ms. Katherine Corrick, who is the director of policy with the Law Society of Upper Canada.

The Federation of Law Societies of Canada appreciates this opportunity to participate in this very important review of the Anti-terrorism Act. I appear, as I say, this afternoon on behalf of the organizations in this country that are statutorily mandated to govern the legal profession in the public interest: the 13 provincial law societies and the Chambre des notaires du Québec.

Our submission today in the written brief we've filed with you deals with our unique concerns as legislated overseers of the legal profession. Our focus is on those anti-terrorism measures that interfere with the lawyer-client relationship and prevent people from obtaining the effective assistance of a lawyer who is independent of the state.

This leads me to identify some of the basic principles that shape Canada as a free and democratic society.

The right to counsel independent of the state, who is fearless and loyal only to his or her client, is an undisputed principle of fundamental justice which has been enshrined in our Charter of Rights and Freedoms and recognized by the Supreme Court of Canada. In our view, the risk is that too many anti-terrorism measures trample on this principle.

Two sections of the Criminal Code expose lawyers to the risk of prosecution and imprisonment for fulfilling their professional obligations to anyone subject to the anti-terrorism provisions—section 83.03—and make it an offence to make “financial or other related services” available knowing that the services will be used by or will benefit a terrorist group. “Other related services” are not defined; legal services, therefore, may be included in that definition.

Similarly, participating in or contributing to the activity of a terrorist group “for the purpose of enhancing the ability of...[the] group to carry out terrorist activity” is an offence contrary to section 83.18. Participating in or contributing to a terrorist activity includes “providing...a skill or an expertise for the benefit of, [or] at the direction of...a terrorist group”. Obviously lawyers who represent clients subject to these provisions provide a skill or expertise for their benefit.

There's no exemption in the legislation for lawyers acting lawfully in the execution of their professional duties, giving legal advice, and representing accused or suspected persons. Instead, these lawyers are subject to prosecution under these sections and are liable to be imprisoned for up to 10 years.

Lawyers, like everyone else, are subject to the provisions of the Criminal Code dealing with criminal conduct, such as aiding and abetting and counselling, which prohibit lawyers from helping their clients to commit crimes. I say parenthetically that is the case with every law society and the rules and regulations that apply to their members. There does not appear to be a valid justification for failing to exempt legal advice and representation from the scope of these sections. The federation urges this committee to consider this subject.

Other Criminal Code provisions that adversely affect an individual's right to counsel include the freezing and forfeiture of property sections. Section 83.08 of the code makes it an offence to “deal directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group”. There is no requirement that the property is or will be connected to terrorist activity. This provision makes it an offence for lawyers acting for clients subject to these provisions to accept funds on account of professional services, disbursements, or the posting of bail. This is quite different from any other provisions of the statutory regime.

Furthermore, forfeiture orders of property owned or controlled by a terrorist group may be obtained pursuant to section 83.14. Funds held in trust by lawyers for professional services in related matters, or the posting of bail, can be ordered forfeited pursuant to this provision.

The forfeiture provisions differ from the general forfeiture provisions in the Criminal Code in three significant ways. Firstly, general forfeiture orders can only be made once a person has been convicted of an offence. Section 83.14 permits a judge to make a forfeiture order if satisfied on a balance of probabilities that the property is owned or controlled by or on behalf of a terrorist group.

● (1535)

There is no requirement that anyone be convicted of an offence before the forfeiture order is made. In fact, there need not be a judicial determination that the person or group is a terrorist group. The Governor in Council can determine that by placing the name of the person or group on the list of which you're aware.

Secondly, section 83.14 permits forfeiture of all property owned or controlled by a terrorist group, even in the absence of evidence that the property is derived from, has been, or will be used in connection with any offence. The general forfeiture provisions require that the property be derived from or used in connection with an offence before it can be ordered forfeited.

Finally, the factual basis for a forfeiture order under the general forfeiture provisions is proof beyond a reasonable doubt. Generally, a forfeiture order is made after a person is convicted of an offence related to the property. Convictions are based on the proof of facts beyond a reasonable doubt. However, section 83.14 requires a judge to make a forfeiture order once satisfied on a balance of probabilities, which you will appreciate is a much lower test than that of beyond a reasonable doubt, that the relevant conditions have been met. The combined effect of these provisions will make it very difficult, if not impossible, for anyone subject to these provisions to retain counsel, rendering their right to counsel illusory.

To prevent this, the federation recommends that funds or property a lawyer receives for professional fees, disbursements, and the posting of bail be excluded from the freezing and forfeiture of property provisions of the code.

This legislation not only creates barriers to the retention of counsel, but even if counsel is retained, that counsel will lack the independence necessary for an effective solicitor-client relationship. A number of measures designed to combat terrorism require lawyers to disclose confidential solicitor-client information to the state, in effect conscripting them against their clients and making it impossible for them to act as independent legal advisers with undivided loyalty.

For example, section 83.1 requires every person to disclose forthwith to the RCMP and CSIS the existence of property in their possession or control that they know is owned or controlled by or on behalf of a terrorist group, and any information about a transaction or proposed transaction in relation to such property. Lawyers who hold money in their trust account on behalf of entities listed by the government as terrorist groups will be forced to disclose confidential information to the RCMP and CSIS, and thus become witnesses against their clients.

The Supreme Court of Canada has on more than one occasion recognized solicitor-client confidentiality as a principle of fundamental justice. To preserve it, the federation recommends that confidential solicitor-client information be specifically excluded from any mandatory reporting measures.

The final substantive anti-terrorism measure the federation wishes to address is the security certificate process provided for in the Immigration and Refugee Protection Act. I know you've heard a great deal about that, and I need not go into its description. What I do wish to deal with is the nature of the hearing before a designated judge of the Federal Court to determine whether the security certificate is reasonable. I use the word “hearing” advisedly.

The government presents its case to the judge *ex parte* and in camera. The person affected is not present, nor is that person's counsel. No counsel independent of the government is present to cross-examine witnesses or otherwise test the reliability or accuracy of the information presented. The nature of the evidence presented at the secret hearing is not normally disclosed. The person concerned may receive a summary of the case, but it will not include the source of the evidence, or any other information the disclosure of which would be injurious to national security or the safety of any person. This effectively renders reviewing, challenging, and testing the validity of the information presented impossible.

The security certificate procedure violates an individual's right to two of the cornerstone principles of natural justice: the right to know the case one must meet, and the opportunity to do so.

● (1540)

The federation recommends that individuals subject to security certificates have the right to be represented by counsel of their choice, who will have access to all material to be submitted to the court, and the underlying files, subject to first undergoing a security clearance. If this option is not practicable in the opinion of the court, the individual must have the right to choose a special advocate from a roster of lawyers who have already undergone security clearances.

The federation recommends that the counsel or special advocate be permitted to retain experts such as security-cleared translators or experts in national security investigations to assist in reviewing the evidence. If this committee were to recommend the establishment of a special advocate system—and in the opinion of the federation, this is the minimum that is required to restore any notion of justice to this process—it is critical that the special advocate be permitted to communicate with the individual's counsel even after reviewing the secret evidence. To prohibit such communication, as is the case in Great Britain, will prevent the special advocate from being an effective advocate and fulfilling any meaningful role in the process.

We have recently seen an excellent example of how well this system can work, at the Arar inquiry. At this inquiry, commission counsel who is independent of Mr. Arar and the government has complete access to the government's files. He meets with counsel for Mr. Arar, who is able to suggest questions he can pose during the in camera *ex parte* hearing. In this way, commission counsel is able to vigorously test the reliability and accuracy of the government's information.

Finally, the federation urges this committee to recommend that all legislative provisions used to combat terrorism be reviewed at five-year intervals. Many of these provisions, which reshape important and fundamental legal concepts, were drafted and made law in just three months. Many of them expand state powers in significant and indeed disturbing ways. They deny Canadians the right to independent counsel and intrude on the confidentiality of the solicitor-client relationship. They weave these extraordinary powers into the fabric of our criminal and other laws, making them permanent features of our legal landscape. In the federation's respectful view, Canadians must be given a regular opportunity to evaluate the effectiveness of these measures and reassess their willingness to accept infringements of their rights and freedoms in the name of national security.

On behalf of the federation, thank you, Mr. Chair and members of the committee, for your invitation this afternoon. Of course, we are available for questions.

The Chair: Thank you very much.

Mr. Greg DelBigio (Vice-Chair, National Criminal Justice Section, Canadian Bar Association): I'd like to thank you for the opportunity to participate in this important review.

I'm the vice-chair of the National Criminal Justice Section and I'm a member of the Legislation and Law Reform Committee of the CBA.

The CBA is a national professional association that has in excess of 34,000 members across Canada. One of the objectives of the CBA is the improvement of law and the administration of justice. The written submission that has been distributed has been prepared as part of the advancement of that objective. The committee that prepared the written submission is made up of people from many different areas of expertise.

When considering the manner in which this legislation operates in relation to the Charter of Rights, it's necessary to consider the values at stake and the objectives of policing.

Effective policing is a prerequisite to safety and security within Canada and is dependent in part upon intelligence gathering. However, those objectives of safety and security must be balanced against values that are enshrined in and protected by the charter—for example, a commitment to social justice, to equality, to respect for a wide variety of beliefs, to protection of privacy, and to security of the person.

The law within Canada is clear: ends do not justify means. The law is clear that tactics that are used by the police are a matter that is presumptively of concern, and the courts have expressed concerns about the limits of acceptable police action. The rule of law must be maintained, and the proper balance between policing and security on the one hand and the protection of rights on the other can be achieved only with an open and effective mechanism of accountability.

In these opening remarks I will touch upon four areas of concern. The first is the breadth and scope of the legislation.

The definition of terrorism specifically incorporates considerations of religion, politics, and ideology into the definition of crime. There is a listing of entities, and there is the incorporation of broad language, such as “facilitating”. This broad language, and particularly the broad language of the incorporation of religion, politics, and ideology creates the risk that investigation may be conducted on the basis of religion, politics, or race. That would be not in accord with the values enshrined in the charter.

The second topic is law enforcement and intelligence gathering within the context of national security, as compared with traditional law enforcement.

Under a traditional model of law enforcement, the police would collect evidence as defined by law, and that definition of evidence brings with it a guarantee of reliability. There is a scrutiny of the evidence and the law enforcement techniques through a trial process. A trial process is public and creates accountability.

Intelligence-led policing, which has been discussed in various contexts, is a model of policing based upon intelligence gathering. It utilizes all of the investigative techniques that are available: surveillance, wiretap, informants, and the compulsion of third parties. Individuals may be targeted at the discretion of law enforcement or intelligence gathering agencies, and they may be targeted in a manner that is not public. The fact that an individual has been targeted or that intelligence is being gathered against the individual may never be made known to the individual. And there is a lack of accountability. This information that is gathered may be shared with other countries, and there's no control over the subsequent use or sharing of the information.

This operates in direct conflict with privacy interests that we in Canada enjoy. Intelligence gathered using techniques that also include the tracking of travel, the tracking of credit card use, the tracking of associations between people, covert taking of photographs, and the construction of profiles based upon that information, may be entered onto a database and indeed is entered onto databases. The information may be incomplete or inaccurate. Again, the information may and will be shared among different agencies and countries. And there is simply no opportunity for an individual to check the accuracy of that information. If the information is inaccurate, there is no opportunity to have that information removed. There's no opportunity to control the use of that information, and this creates a profound risk to privacy. It eliminates control over information.

● (1545)

With respect to questions of accountability, I would urge this committee to ask questions such as the following. What agencies within Canada are collecting intelligence? What techniques and technologies are being used? How is the information being used or shared? Are the current practices consistent with the rule of law? Are current practices consistent with the values that define Canadian democracy?

When determining whether or not intelligence-gathering is an appropriate measure, it's important to ask, how are threats to security to be measured? How are intelligence failures to be guarded against? And what are the limitations on privacy and the right to privacy, and what extensions of law enforcement powers are justified?

Many features of the anti-terrorism laws are extraordinary, and extraordinary measures demand extraordinary mechanisms of oversight and accountability. The burden is on the government to justify laws that will limit liberty or erode privacy. Right now there is a patchwork system of accountability as between different agencies.

The true measure of the effect of these laws is a measure of the cumulative effect of the laws. There must be a national, unified, independent review mechanism. There must be a power to make inquiries. There must be a power to respond to complaints. There must be a power to analyse the cumulative effect and operation of the laws and to make recommendations with respect to whether or not laws are needed or whether or not they comply with the Charter of Rights and Freedoms.

I would make two further remarks, and one is in relation to the law as it relates to the legal profession. I have heard Mr. Hunter's remarks, and the CBA has made the same submission, that an independent bar is essential to the functioning of Canadian democracy. It's essential that lawyers be able to provide legal services without the fear of investigation or prosecution or compromise, and legal services must be specifically excluded from the ambit of the act.

Finally, in relation to racial profiling and hate crimes, it must be recognized that Canada is founded upon fairness and equality. Hate crimes must be condemned and vigorously prosecuted, and racial profiling in investigation of crime or in intelligence- or information-gathering cannot be tolerated.

Thank you.

● (1550)

The Chair: Thank you very much.

I'm left with a fairly spartan force today. Monsieur Ménard, it's you and me, so you will open, sir, with the lead if that's acceptable.

[*Translation*]

Mr. Serge Ménard: Mr. DelBigio, if my understanding is correct, your oral presentation was much shorter than the written submission we received.

[*English*]

Mr. Greg DelBigio: Yes, the oral presentation was limited by a function of time, but we of course urge the committee to carefully review our written submission. I stand by it in every respect.

[*Translation*]

Mr. Serge Ménard: You spoke at length about the different lists compiled, specifically about lists drawn up on the basis of intelligence gathering by secret services.

[*English*]

Mr. Greg DelBigio: If you're asking within the context of intelligence-gathering, yes.

[*Translation*]

Mr. Serge Ménard: Isn't it true that these lists are secret?

[*English*]

Mr. Greg DelBigio: I agree that the intelligence that is gathered, compiled, is secret, and that is precisely what is a matter of concern and that is precisely why there needs to be an effective mechanism of accountability.

[*Translation*]

Mr. Serge Ménard: How can you conceive of an intelligence system where any information compiled must be kept secret and can never be disclosed to businesses or individuals who could use it against persons whose name appears on a given list?

During the course of intelligence gathering, there is always some uncertainty over the level of involvement of persons meeting with other persons, and so on and so forth.

● (1555)

[*English*]

Mr. Greg DelBigio: It is a process. There is always going to be uncertainty, and there should be no mistake, in the sense that the CBA does not take the position that there should not be intelligence-gathering. Intelligence is important to effective policing. The concern, though, is the way in which intelligence is gathered, used, and shared between agencies. It is useful, for example, to look at the potentially arbitrary nature or manner in which intelligence may be gathered.

In that regard, at page 15 of our written submission we refer to testimony before the Arar commission of the deputy commissioner of the RCMP, who provided an example. If the police are targeting an individual in an investigation and during surveillance that person is occasionally seen speaking to another individual, that other individual may be entered into the security intelligence system. The field officer who enters that individual's photograph or licence plate number—or if a conversation is overheard, perhaps the details of that conversation—does not need to receive specific authority to enter that information into a data bank. Once it's entered, that information may be shared with other agencies, including agencies from other countries, and that individual, who may have had a perfectly innocent meeting with a person who happened to be under surveillance, will now be caught up in the web of intelligence-gathering and that person will not know that he or she has been caught, and that person will be powerless with respect to any ability to have personal information removed from the databases.

[*Translation*]

Mr. Serge Ménard: I understand your position. However, harm is done when a person is treated unjustly by virtue of the fact that his name appears on a list.

Your written submission contains numerous references to issues that are much more fundamental, to contradictions between the act, the Charter and international obligations. I fail to understand why you attach so much importance to this matter.

If we want the police to investigate individuals under suspicion, it's inevitable that we're going to find in the information compiled names of persons who are completely innocent. The other agencies with whom these names are shared have to know that some of the people named are completely innocent.

I can understand if, at some point, when a person discovers that he cannot travel to a foreign country because his name is on a list, he is given an opportunity to explain himself. However, it's vital that any information gathered in the course of a criminal investigation, whether or not terrorism is involved, remain secret.

[*English*]

Mr. Greg DelBigio: Whether it needs to remain secret is a matter of debate, perhaps, and the debate will be informed by the purposes for which the information was initially gathered and whether or not there is an ongoing interest in keeping the information secret.

The concern that the CBA has with respect to this is that the gathering of information is not neutral with respect to the values that are protected by the charter and the values that are important to Canadian democracy, most fundamentally, privacy.

On the protection of privacy, the ability to control the use of personal information, the question was asked: Why attach importance to the gathering of intelligence? The answer is because that can have profound effects upon privacy interests and it can undermine and erode privacy interests in significant ways and in ways that are at present not properly accountable. It is through that that there needs to be proper and full accountability with respect to whether useful information is being gathered, how it is being used, whether it is being eliminated from databases when it is no longer useful, or whether there are simply ongoing profiles of Canadians being gathered in the databanks of intelligence-gathering agencies.

● (1600)

[*Translation*]

Mr. Serge Ménard: The fact is that we've heard from numerous sources that the ATA is useless and violates basic charter rights and our international commitments. The latter are based on our respect for the Universal Declaration of Human Rights, the 1988 legislation and so on. Yet, terrorism poses a threat and intelligence operations are one way of countering that threat. It's important to understand that.

However, you seem to forget all of these very important arguments which, in many cases, have been put forward by sharp legal minds, by law professors or by defence organizations. You're telling us that the ultimate means available to prevent terrorism, that is intelligence gathering, should also be an open, transparent process. I believe that if you make this process transparent, it immediately becomes worthless.

When we fought criminal biker gangs in Quebec, obviously we didn't want them to know that we were on to their money laundering schemes. Had they known that, they would have changed their tactics and we wouldn't have been able to seize this money. I imagine it would be even worse in the case of terrorist activities.

Your recall is fairly accurate. However, the threat of terrorism is quite unlike other crimes. Terrorism must be prevented whereas in the case of other crimes, we wait until they have been committed before meting out punishment. In my view, intelligence gathering is the most effective way of fighting terrorism. However, I also believe that law enforcement officials must be given considerable latitude in terms of recording their suspicions, however minor they may be. As a rule, intelligence gathering involves cross-referencing information. More than likely you've examined the events of September 11 to see if there were any indications that an attack was being planned. Some maintain that if the CIA and FBI had cross-referenced the information they had, however benign it may have seemed, they might have been forewarned and been able to prevent the attacks that were being planned.

In the course of their intelligence gathering operations, law enforcement officials must invariably be able to enter in these databases any suspicions they may have. I agree with you that if their actions unfairly violate a person's rights, then it's a serious matter. However, if we make these lists public, then they lose much of their effectiveness. After all, are they not the only tool we have left?

● (1605)

[*English*]

Mr. Greg DelBigio: Well, I need to be clear. The CBA is not taking the position that if a person is the subject of a criminal investigation the person should receive notice of that as the investigation is ongoing. That is not the position of the CBA.

The position of the CBA is that intelligence-gathering is not a neutral activity, and when one considers or wants to define harm associated with intelligence-gathering, it is something beyond simply being stopped at the border or prevented from being able to board an airplane. There is a loss of privacy with intelligence-gathering.

The accountability comes from a mechanism of review such that somebody in Canada has the ability to review the manner in which intelligence is being gathered and used. That is quite different from telling each person who is under criminal investigation the facts of that investigation.

I have one other point. What needs to be recognized is that terrorism is a danger, but the laws that have been enacted are significantly found within the Criminal Code. What that means is that the justification for those laws needs to be found in the same balance as is found for the justification of any other criminal law. It is not found in the powers of national emergency; it's found in the justification for domestic criminal law. That's where it was deemed appropriate and fit to include those laws, and that is the context within which the measure or justification of those laws is to be found.

[*Translation*]

Mr. Serge Ménard: You were wise to make these clarifications. I didn't understand your initial explanations, but I do know that the time available to us is very limited.

I agree that if, because of these lists, a person's rights are violated—for example, he cannot take a plane or readily travel to a foreign country—then there should be some kind of recourse available to him, especially if his name happens to appear on the list only because he once met with a person “of interest”, in police jargon, that is a person more strongly suspected of being involved in terrorist activities.

I'd like to discuss another problem with you. I'll have you know, Mr. DelBigio, that I'm asking you some of the harder questions, because often these are the last problems that I see. I believe I reacted like most legal experts in Canada in finding that the scope of the act is overly broad.

Fundamentally, existing legislation covered most every situation, with a few minor exceptions. I believe that's true, especially given that when I headed up Quebec's Department of Public Security, we were dealing with the problem of motorcycle gangs. We nonetheless were able, with the laws on the books, that is even before the gang busting legislation was in place, to break the most dangerous criminal organization in Canada by, among other things, systematically relying on intelligence gathering.

Nevertheless, there is a quite a difference between terrorism and organized crime. Until we have conclusive evidence of crimes committed by those involved in organized crime, we allow them to continue their illegal activities. In fact, we almost have no other choice but to let them do so. I know that when we were dealing with biker gangs, we were powerless for a while to prevent several murders. That's no small matter. However, in the case of the threat of terrorism, we're talking about activities that must absolutely be stopped, if possible.

Should the act contain a provision that would allow the government to act when intelligence organizations have information that they consider to be reliable about a planned terrorist act? What if the information comes from sources that cannot be revealed because disclosure would threaten someone's life? Should there be a provision in the act to allow the government to prevent this from happening and to stop these individuals from carrying out their terrorist plans?

● (1610)

[*English*]

Mr. Greg DelBigio: It certainly is the case that arguments were advanced three years ago that the existing powers of the criminal law were sufficient to combat even the sometimes catastrophic problems associated with terrorism, that there were powers of search warrant and wire tap, and that tracking devices could be used. The sharing of information is not new with these laws. I suspect that it's just more comprehensive.

The question, in a way, goes to what was a very controversial provision of the new laws, the preventive detention measure. The answer to the question of whether it is necessary is perhaps found in whether or not it is properly balanced with the protection of rights. If we are talking about the prevention of a crime that is about to occur, then one would hope it is information that is deemed reliable—not necessarily made public, because the Canadian law recognizes that in some instances informant information will be kept confidential, confidential even from a person accused of a criminal offence, in some instances. That is a recognized trade-off.

The question is whether the preventive detention measure is not necessary. Were we able to deal with all threats to Canada on the basis of the laws that existed prior to 2001? Quite frankly, I would say it's very difficult to know, because it's very difficult to measure the effectiveness of law. Since the enactment of these laws, there have been perhaps no terrorist measures against Canada. Does that mean the laws are working, or does it simply mean Canada was for some other reason excluded from the attention of terrorists? I can't answer that.

[*Translation*]

Mr. Serge Ménard: My colleague Mr. Comartin put a question about this matter to Commissioner Zaccardelli. He informed us that 16 planned attacks had been foiled. We asked him to give us a list and we're still waiting for one.

[*English*]

The Chair: Thank you very much, Mr. Ménard.

Mr. Comartin, please.

Mr. Joe Comartin: I am addressing my question to both groups. We heard a fair amount of discussion today about the security certificates. Has the federation intervened in this at all at any time? Has it taken a position, given some of the points that you made around the role of the lawyer and the rest of it? Has it taken a full position on the use of security certificates under the immigration laws?

Mr. George Hunter: No, it has not, other than in the context of the practicality of counsel, and that, of course, was the subject of my comments. As the committee will be aware, this matter, in a practical context, has now reached the Supreme Court of Canada in at least two cases, and it may well be that the federation would intervene at that context.

● (1615)

Mr. Joe Comartin: Is there any prospect that the Canadian Bar Association is going to intervene in the Charkaoui case?

Mr. Greg DelBigio: I think it is too soon to say, but in our written submission and in the hearing before the Senate committee, the CBA has taken a position with respect to the security certificates, particularly with respect to the lack of information and the lack of transparency.

Mr. Joe Comartin: Your position in front of the Senate, I assume, was the same as what is in the brief here.

Mr. Greg DelBigio: Yes. It was expanded upon, but it was in the brief.

Mr. Joe Comartin: In terms of the very last point you made, we had a fair amount of discussion today around the practicality of replacing them, assuming the Supreme Court strikes them down, and what we're going to replace them with if we have to replace them with another system. That debate will continue for a bit.

I have two questions about that. One, have you looked at an alternative model to the certificates? Coupled with that question, the very last paragraph—

Mr. Greg DelBigio: Can I ask the page number?

Mr. Joe Comartin: I'm sorry; it's page 32.

It's the whole issue of not returning someone to a country where torture is used, but then you go on to propose prosecution. We had some discussion. I don't think you were here yet when this discussion went on about the impracticality—that is, almost the impossibility—of Canada's being able to prosecute a number of these individuals, assuming the allegations and suspicions are accurate. We simply don't have the ability to get witnesses here, to get evidence here, in order to be able to prosecute. I was a bit surprised at the position you had shown. Maybe you know something that the rest of us don't.

Mr. Greg DelBigio: First of all, I'll say that the determination of whether or not a case can be prosecuted in Canada is not new to this context. Extradition law has a well-developed body of jurisprudence and a determined set of considerations that are brought to bear in determining whether or not a case can be prosecuted in Canada. Certainly in some cases it can, and sometimes it can't. It's going to depend on considerations such as where the witnesses are, where the evidence is, and, in some instances, where the crime was committed, and if Canada has jurisdiction over an event that occurred. Consideration of whether a person can properly—and when I say "properly", I mean as a matter of morality or law—be sent to face torture is a related consideration, but separate, as well. If a person can be prosecuted in Canada and would face torture elsewhere, that is perhaps compelling reason to prosecute the person here.

Mr. Joe Comartin: Mr. DelBigio, the problem is what to do if we can't prosecute. That's a good analogy that you've drawn with the extradition cases, but what happens there is that unless the person has committed a crime in Canada, and a determination is made that we're not going to extradite, the person is allowed to go free. Would you be—and I guess I'm asking the Bar Association—taking the position that if we cannot prosecute, we allow the person to go free?

Mr. Greg DelBigio: Again drawing from the extradition context, one of the other tools available is that Canada may seek assurances from the requesting country. That was explored in law relatively recently in the Burns and Rafay case, the case of the Canadians who were charged in the United States with murder and were to face the death penalty. The Supreme Court of Canada determined it would be improper to extradite them if they were to face the death penalty, but the act includes provisions whereby assurances may be sought. In some extradition cases, assurances are sought and accountability mechanisms are built into the process.

● (1620)

Mr. Joe Comartin: We saw the U.K. doing that with, I think, Syria, and a couple of other countries in North African and the Middle East. There was a fair amount of criticism of it—as opposed to the United States, where, because of our long relationship with them and our similar laws and similar values in terms of justice, we were safe in doing it. But would we be safe in doing it with countries that have a much poorer reputation for protecting human rights and abiding by treaties and international relations?

Mr. Greg DelBigio: Certainly it's the case if dealing with a foreign country that is a signatory to the same treaties Canada is, a country that shares legal traditions with Canada. There are going to be greater assurances that agreements will be recognized. It is perhaps the case that the more a foreign country strays from legal traditions similar to Canada's, or the greater the extent that there is indication a foreign country will not abide by assurances, or that an effective accountability mechanism cannot be built into assurances, the more that is perhaps going to tip the scales against a transfer.

Mr. Joe Comartin: Assuming we get to the point at which we're not going to make the transfer, we're not going to return the person.... I know England is struggling with this right now—as opposed to an absolute release, as opposed to indeterminate detention, they are looking at methodologies of ongoing surveillance and control over the individual, but the person may not be specifically incarcerated. I guess we're experimenting with that to some degree with Charkaoui right now. Has the Bar Association looked down the road at other possibilities? I know you didn't refer to this in the report.

Mr. Greg DelBigio: I don't believe that the CBA has formalized a position on that particular issue. It's indeed a difficult issue, in the sense that if there is reliable information that a person is of concern, and if there is no basis in existing Canadian law upon which to detain an individual or retain other control over an individual, and if the person is otherwise permitted by Canadian law to remain in Canada, the most that could be done under the existing laws is that the police can dedicate resources to watch the individual.

Mr. Joe Comartin: Given that some of these files are already costing well over $1 million—I think we've got one up to $5 million, and I don't think that takes into account a lot of legal fees paid by legal aid—it's a problem. I'm being a bit facetious.

Perhaps I'm asking the federations as well. The committee is struggling. If we go the route that counsel today was telling us we're going to go, which is that the Supreme Court is going to strike them down, we need to be in position with an alternative model before that comes. Has either the Bar Association or the federation looked at an alternative model, or perhaps at some provisions for a different way? Rather than the Federal Court doing it, could maybe a specific tribunal closer to the U.K. model deal with these cases? Could there be better training for the judiciary or the decision-makers within that, or the amicus curiae that you have proposed? There are a number of proposals, but with regard to the point you made in your brief, Mr. Hunter, to the amicus curiae counsel's being able to discuss much more extensively with the counsel for the detainee, have you seen a model overall that you would be prepared to promote for Canada?

● (1625)

Mr. George Hunter: Speaking for the federation, no, we haven't considered that, and I personally can't recommend one. I certainly appreciate the difficulty and the delicacy of that, because it catalyzes this whole issue. Where does the balance lie between the entitlements that we know and revere at law versus the risk we perceive and, inherently, what that risk might result in? That's the fine line. I can only tell you that the federation hasn't considered that. It has only looked at the existing process and whether or not that process meets the test, as we would see it. We think it does not.

If I may, my advice to the committee is that you have to start, in my respectful view, with the proposition that the liberties we enjoy, the freedoms we enjoy, and the heritage we have mean something. If you don't start with that proposition, it seems to me you give way to the other side. You basically say, you've won; those things that we hold dear don't count when the rubber hits the road. The rules change.

There is no easy answer, sir, I quite concede that, and I regret that I can't give the committee any further advice on that subject. But I respectfully suggest that you have to start with a presumption about our system. If you don't, you then have to ask the question, what does our system represent? What do Canadians expect? Governments must deal with and react to the exigencies such as befell our neighbours to the south. Governments have a responsibility to the citizenry to deal with these matters, but it is not something that is resolved by simply throwing the baby out with the bath, and it's not something that's resolved simply by making new rules. I think the previous panel made that point. Simply making new rules is not necessarily going to achieve anything. At least you have to test those rules to see that they're going to achieve something.

My sense in answering you, sir, is that you have to start with the presumptions upon which our system of democracy and freedoms are based. That's a tough one, I agree, but at the end of the day, which is worse? Do we have a society where notwithstanding our rules and our principles we toss them out because we concede to the fear, even though it's not established on any test that we know in law, or do we accept the risk? I'd rather be able to walk down the streets of this country with the freedoms that I know I have than with the assumption that they may be taken away in the exigency of the moment.

Mr. Greg DelBigio: I would simply refer you to our written submission, pages 30 through 32, where the CBA has made some specific recommendations. It is undoubtedly the case—it is part of our tradition—that hearings will be open, that they will be fair, that they will be adjudicated upon by a person who is independent, that there will be an opportunity for an individual whose liberties are at stake to obtain counsel and for counsel to act in a meaningful way. To the extent that the existing provisions do not meet those standards, it's a matter of grave concern.

Mr. Joe Comartin: Perhaps I can go to another area, Mr. DelBigio, and that's the charities. A couple of groups were before us yesterday, and one of the concerns we had was that when the CCRA was before us, they.... I may be being overly critical here, but they left me with the impression that everything was fine. We didn't get that same message from the groups yesterday, and we don't from your brief either.

Has the Canadian Bar Association had any direct contact—Mr. Hunter, I don't know if there would be any cause for the federation to have had contact—with CCRA on this or any discussion at all about some of the proposals you've put in your brief in terms of a standard and how to deal with this more fairly, let's say, with the charities?

● (1630)

Mr. Greg DelBigio: Ms. Thomson from the CBA is here as well. I did not come prepared to discuss charities just because of the ambit of what was before the committee today, but perhaps Ms. Thomson can answer that question.

The Chair: Ms. Thomson, since you're not actually registered, perhaps you wouldn't mind identifying yourself for the purposes of our committee.

Ms. Tamra Thomson (Director of Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair.

My name is Tamra Thomson, and I'm the director of legislation and law reform with the Canadian Bar Association.

Just as we recommend that the courts need a friend sometimes, so do witnesses—and so do MPs.

The Canadian Bar Association's section on charities and not-for-profit law contributed to the development of the submission you have before you. The concerns raised in the submission are ones that have been raised with CCRA, but frankly, it's the legal aspects of the terrorist financing provisions that we're dealing with. They're matters of law, and this is the venue, in the three-year review, to take a look at those. We're not privy to the testimony by the earlier witnesses, but we certainly raise concerns about the law in these matters.

Mr. Joe Comartin: The point you raised was one that they had raised as well, about dealing with emergency situations. The tsunami in Asia was the example they used, and the difficulty they had, or actually the fear they had, the whole chill effect.

To go back to my basic question, for that recommendation, did you present that to the CCRA, and did you have a response from them?

Ms. Tamra Thomson: I don't know of a specific response. If the committee would like particular information in that regard, then we would be happy to have members of our section appear before the committee. Today we were dealing with the theme of the overall impact.

Mr. Joe Comartin: I appreciate that, and I know I'm putting you on the spot a bit, but really, just because of the shortage of time we have, could you find out if there were direct overtures to the CCRA on the recommendations you made and if you received a response, and just communicate that to the clerk in writing?

Ms. Tamra Thomson: Most certainly.

Mr. Joe Comartin: Thank you.

Thank you, Mr. Chair.

The Chair: Thank you.

We have a little bit of time left, and the chair has a few questions for both the CBA and the federation. In the interests of time, I'll give you a flavour of what questions I have for you.

First, to the CBA, what problems do you see with the current definition of terrorist activity? How would your proposal change this, and what impact would this have on other parts of the ATA?

Mr. Greg DelBigio: The problems are twofold. First is what I alluded to in my opening remarks, and that is, by specifically incorporating considerations of religion, politics, and ideology into the definition it invites investigation based upon those considerations. That creates the risk of unacceptable profiling.

Second, the definition is more complicated than is needed in the context of immigration law. A narrower definition has been recognized and adopted as appropriate, and consistency within Canadian law would dictate that this definition be used.

The Chair: The last point is on the sunsetting of the ATA. Could you share with the committee your view on whether or not this should be re-enacted? Should there be a sunset clause, a further review? Have you given any thought to that?

Mr. Greg DelBigio: The value of a sunset provision is that it provides important opportunities such as these to review how laws are operating, whether laws are required, and whether laws are being used in a manner that complies with the Charter of Rights. It is important, and it would be useful for there to be ongoing sunset provisions.

● (1635)

The Chair: Okay.

To the federation, could you explain your amicus curiae proposal in relation to security certificates? And how would this improve the rights and freedoms of those involved?

Mr. George Hunter: We make two recommendations. The first is that anybody who is subject to these proceedings be entitled to counsel, who, in turn, having cleared the security requirements, would be entitled to access all information in the normal course.

We appreciate, however, the delicacy of these matters and the risks that are inherent in terrorism. In our view, at a minimum, the compromise would be the office of the special advocate, which I have mentioned in my brief. That advocate would be selected by the individual involved from a roster of lawyers who had previously been cleared, from a security perspective. That special advocate would be entitled to become privy in an appropriate fashion to information the government had, and in similar fashion relate to counsel for the individual involved so the special advocate could be equipped, in effect, in that process to challenge the evidence and arguments being made by the government before the court.

It's not the best of all worlds, but it is a compromise that we would argue is reasonable, having regard for the traditional entitlements that we've argued exist at law, versus the realities that governments must face. So it's a hybrid, if you will.

There are two other things I would say about that. The first is that the special advocate, to be effective—and we've made this point—would need to have certain resources available to him or her. Translators, for example, would be very important. One can conjure up a scenario in which the government's case would be premised on documentation coming from a foreign country, the language of which was perhaps not English or French. The ability to deal with that documentation, of course, would be highly dependent on effective translation.

Other resources that should be available to that special advocate would include expertise in the area of foreign affairs, broadly speaking, and anti-terrorist activities, because again it's the dynamic of those forces that is being brought to bear. In order to properly test, in an appropriate fashion, the effectiveness of the government's case, bearing in mind the principles of justice we revere, we think that is the compromise that would work.

To be blunt, there are two realities here that there has to be compromise on. First, in the typical solicitor-client relationship there is no impediment to communication between the solicitor and the client. The reason for that is obvious, because what is fundamentally required is a relationship of trust, and you will readily appreciate how that trust can evaporate if confidentiality and openness don't exist. We recognize that as a principle, but this is the compromise we make.

Second, in the dynamic between the special advocate and the government—we've seen this in the Anwar case, and it works well—there can be an effective relationship where communication can take place that will permit the individual involved to actually know sufficient information in order to equip the special advocate to contest the government's position.

It's not a perfect model, but in our view of the universe it's one that represents a reasonable compromise.

The Chair: Okay, thank you.

Mr. Ménard.

[*Translation*]

Mr. Serge Ménard: On this particular subject, Mr. Chairman, it's interesting because you seem to be the first person here who is trying to come up with a compromise between the right of the accused to the legal representation of his choice and the lawyer's need to have access to secret documents and to have security clearance.

I want to know if I'm understanding you correctly. If a person retains a lawyer who already has a security clearance, then he can trust that lawyer. If , however, a person selects a lawyer with no security clearance, you're suggesting that the first thing is to find out whether the lawyer is eligible to get a security clearance. If so, then that lawyer can be retained. If that lawyer is denied a security clearance, you're saying that the person must choose a lawyer from the list of those who have a security clearance. That person can then be in touch with the person's lawyer of choice. The person would then have two lawyers.

Is that in fact what you suggested?

● (1640)

[*English*]

Mr. George Hunter: That's correct.

[*Translation*]

Mr. Serge Ménard: I find your suggestion ingenious. You're the first person to come up with a proposal of this nature. In this instance, the person's right to retain the counsel of his choice is not really affected. The Canadian Bar Association didn't go this far.

[*English*]

Mr. George Hunter: No, but we recognize that in this dynamic, in this contestation of principles, there are two very important things: one is the traditional rights of the individual and the other is the integrity of our country against terrorist activity. It would be, in our view, unrealistic to expect parliamentarians with this immense responsibility to simply disregard one in favour of the other. That would seem, in the world we live in, to be unrealistic. In a perfect world I would argue something else, but it's not a perfect world, and you gentlemen and ladies have this onerous task.

[*Translation*]

Mr. Serge Ménard: In a perfect world, there wouldn't be any terrorists.

[*English*]

Mr. George Hunter: Yes. So the question then becomes, really, can we have it both ways? The answer is no, we can't have it both ways. But can we have a system that comes as close to protecting these values that we revere in the exigencies we face?

The Chair: I'm going to give the last comment once again to Mr. Comartin, but before I do that, to conclude this panel, I just want to get CBA's view of what Mr. Hunter said. Do you agree or disagree? Your reaction to this would be helpful.

Mr. Greg DelBigio: We certainly have made the recommendation that a specially appointed lawyer would be appropriate. Within that there are many different models.

As I hear Mr. Hunter, it seems like a very good recommendation, and it is certainly consistent with the recommendation we have made. At the bottom, what needs to be recognized is that there needs to be as little interference with the right to counsel as is possible.

The Chair: Thank you.

Mr. Comartin.

Mr. Joe Comartin: Mr. Chair, this actually is a follow-up to your question about the sunset. I just want to distinguish between the two terminologies, the review versus the sunset.

Mr. Hunter, in your brief you use the term “review”, and I assume that was meant consciously as opposed to sunsetting, which is automatic. Review would simply be what we're doing in this process. That's the federation's position?

Mr. George Hunter: That's the federation's position.

Mr. Joe Comartin: Mr. DelBigio, your brief doesn't make any reference.... I don't know if the bar association has taken a position on review versus sunset.

Mr. Greg DelBigio: When we were here three years ago we took the position that there should be a sunset.

Mr. Joe Comartin: Thank you, Mr. Chairman.

The Chair: Colleagues, on your behalf, I want to thank the law societies that have appeared before us today. I also want to thank my colleagues for the marathon session of the last two days. We have made some great progress in achieving a number of the panels that we wanted to achieve outside the normal parliamentary schedule, when we can often get interfered with by the nasty business of votes and delays and what have you. I want to thank you for that.

I will excuse the panel. Thank you. I appreciate your participation today.

Before we adjourn, Mr. Comartin, you wanted to say something.

● (1645)

Mr. Joe Comartin: It is pursuing the issue I raised at the end of the day yesterday on Mr. Mahjoub and his hunger strike and, quite frankly, his health condition.

I want to give notice now that I intend at the meeting next week—and if there are not further developments I will be asking you as chair to call a meeting next week so we can deal with that. The motion will be to the effect that we summons an individual from the Border Services Agency and from the ministry of corrections in Ontario who can give us answers as to his condition and the overall status of that file.

I would also ask, Mr. Chair, as that's the notice that I'd be giving, that Mr. Cole communicate my intent to do that to both the Minister of Corrections in Ontario and to the Deputy Prime Minister, since she is responsible for the Border Services Agency.

The Chair: We're in a bit of an awkward situation by virtue of not having quorum for notice of a motion. But it's effectively a notice of motion by virtue of your speaking publicly about it, so I won't get too legalistic about it—not with all these lawyers here—because I'm sure we could find contrary views.

Colleagues, I realize we're down to a pretty small force here today, but I want to say under “future business” that I'll be back to you with a proposal on travel to Montreal, Toronto, and Washington that has been on the outstanding agenda list. I've asked the clerk to start the process, because as you might know, there's a technical requirement: because we're a subcommittee, it has to go to the justice committee and then on to the Liaison Committee.

Mr. Ménard has had a conversation with a number of you regarding emergency preparedness—I'm not sure whether you've spoken to Mr. Comartin—about the possibility, if we were to go to Montreal, of our looking at an institution that deals specifically with emergency preparedness. We've been invited to participate and to have a look around in Laval, just outside of Montreal.

I wanted to put all those things, in the spirit of transparency, on the table.

I look forward to seeing you all next week—or the week after, but we'll be in touch.

Thank you very much.

We're adjourned.

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Publié en conformité de l'autorité du Président de la Chambre des communes

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