Letter to Senator Fraser January 3, 2002

Firstly …

Senator Fraser's Original Letter:

Thank you for your letter concerning Bill C-36. I have voted in favour of the legislation.

I too had concerns when the legislation was first tabled. However after having studied the legislation twice, once in pre-study and once in its regular legislative course, I have become convinced that the legislation is sound. The Minister of Justice took the Senate's pre-study report seriously and made many of the suggested changes, including the inclusion of a sunset clause on two of the bill's most controversial provisions. The Senate's thorough study of this legislation has allowed everyone to make their concerns known. I am proud to have participated in the study of this bill.

We are now living in a world where the security of the citizens of all countries has been brought to the forefront. Every country must participate in the global effort to eradicate terrorism. I believe that the Government of Canada has crafted legislation that is truly Canadian in its balance between giving authorities the powers they need to keep us safe and respecting the civil liberties of Canadians.

I would like to note that the Canadian anti-terrorism legislation does not crate special military tribunals to try those who are found in contravention of the bill's provisions like the United States did. Those who are charged with terrorist offences in Canada will be brought before our regular criminal courts and will be tried by the same judges that try other Canadians. The process will not be held in secret and the people charged will have access to attorneys. As for investigative hearings, they are modeled after the preliminary inquiries that already exist in our Criminal Code. We are simply applying this concept in a different context. Finally, unlike the citizens of the United States, we Canadians do not have the right to remain silent. We have the right not to incriminate ourselves and the information gained during inquiries or hearings cannot be used against us. Nothing has changed in this regard.

Finally, we must never forget that the Charter of Rights and Freedoms will still apply as the notwithstanding clause was not used. There are also many safeguards built into the legislation to ensure that only those who are participating in or facilitating terrorism will be affected. Law-abiding citizens have nothing to fear from this legislation. We should all look forward to the Minister of Justice's first report to Parliament in one year.

Thank you again for sharing your concerns.

Senator Joan Fraser

Now the reply …

Dear Senator Fraser:

I have received a copy of your letter to some citizens of Canada and take grave exception to your total and shameful lack of knowledge of our criminal law proceedings, and our democratic system of justice (as they were) versus your own new law as it now is.

With respect Madam, you do not know what our law was, nor what your own new law does. The tragedy for us the citizens is that our representatives do not know or understand civics, nor the rule of law, nor the meaning of evidence, nor the process, nor application of our law as it was. You do not know what a star chamber process or inquisitorial process of law is or why they are bad. You do not understand civil liberties. In effect, you do not know what it is to be a democracy.

Investigative Hearings under Bill C 36:

You said: "As for investigative hearings, they are modeled after the preliminary inquiries that already exist in our Criminal Code. We are simply applying this concept in a different context." With respect Madam, this statement is woeful ignorance at best, willful deception at worst.

Investigative hearings under Bill C 36 are an instrument that uses the court to assist the police to gather evidence against a person whom the police define as a potential terrorist. The purpose of an investigative hearing is to force a suspect to make answer to police inquiries. This is unprecedented in the practice of our Criminal law prior to Bill C 36.

Preliminary hearings under our Criminal Code are an early step in the full and fair hearing process leading up to trial. It is the presentation of sufficient actual evidence already gathered in the prosecution of serious criminal offences to bring about a commitment of the accused to a trial. The purpose of a preliminary hearing is to determine if there is enough evidence produced by the Crown given under oath that an offence has been committed by an accused to take the matter to trial for full hearing.

An investigative hearing flows from an order by the court as a result of an application by a police officer made without notice to the person named who by order is commanded to attend and submit "for the gathering of evidence for the purpose of an investigation of a terrorism offence" (S. 83.28(2) Bill C 36) . The order will compel the person named to come before a judge to be examined maybe on oath, maybe not on oath by the Attorney General or his agent, and to bring "things" that the police think are relevant for examination.

An investigative hearing is not a compulsory step preceding or following the laying of a charge of terrorism against a person. It is an aid to the police by their choice. There may or may not be an investigative hearing before terrorist charges are laid.

A preliminary hearing cannot happen unless a charge against a person has been already made, was served on the accused person, processed by Crown counsel (lawyer for the

state), and until the accused has opportunity to obtain a defence lawyer if he/she wants one.

S. 83.3 of Bill C 36 permits a police officer to lay a charge of terrorism with the consent of the Attorney General. The police officer only needs reasonable grounds of belief that a terrorist activity will be carried out.

This is unlike a normal charge under the Criminal code which requires that a police officer believes on reasonable and probable grounds that a crime has already been committed. The police officer goes before a justice of the peace and swears that he/she has reasonable and probable grounds to believe an offence has been already committed by person X. The charge is served on the accused. At some stage a Crown counsel will decide whether or not the police have sufficient evidence to proceed to a successful conviction. This may be before or after a preliminary hearing result.

Right to a Defence:

Although Section 83.28 (11) of Bill C 36 says "a person has the right to obtain and instruct counsel at any stage of the proceedings" in reference to investigative hearings, that section is a ridiculous contradiction because the police officer can make the application for the investigative hearing ex parte, i.e., without notice to, or knowledge of, or presence by the person being named. A lawyer can be present with the person named at the actual ordered hearing, but the statute is clear that the person named must answer the questions put to him/her, and produce the "things " the court ordered to be brought. All the defence lawyer can do for the person named is to inform him /her that Bill C 36 compels the answers be given, that he/ she must produce the "things",and that he/she must stay for the duration of the hearing until the judge say he/she can leave.

Bill C 36 is not clear at to what happens to a person who refuses to answer the questions except to say that the judge can order the person named "to remain in attendance until excused by the presiding judge" (S83.28 (5) (b) and "the presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing" (S.83.28 (9). I interpret this to mean the judge can keep the person in jail indefinitely if he/she does not answer the questions. (Contempt of court charges by the court result in jail or fines under normal circumstances). Under Bill C 36, if the person does not attend the investigative examination or remain at the examination, the court can order the arrest of the person named. Once arrested, the person is to be produced to the judge "without delay" and the judge can order the person detained to ensure compliance with the order. This means held in custody until the questions are answered. (Bill C 36 is going to produce much litigation. Poor people are going to be victims as per usual. It will be interesting to see if government will permit legal aid for persons charged under Bill C 36.)

At a preliminary hearing there is no requirement on a person accused to give any evidence at all, i.e., to answer any questions of the Crown (lawyer for the state) or the judge. It is usual that he/she does not. Even in a full trial following a preliminary hearing,

there is no requirement that a person accused answer questions. He/ she chooses under the advice of his /her defence lawyer whether or not to give any evidence. If he/she chooses not to do so, the Crown cannot ask him/ her any questions.

The prosecutor does not put in the full case at the preliminary hearing, only enough to tell the preliminary hearing judge that there is enough evidence for a conviction on a full trial. If the judge at the preliminary hearing thinks there is enough evidence such that the accused might be convicted, a date for a full trial is set down. If there is not enough evidence, the matter is dismissed, thrown out.

At the end of a preliminary hearing the judge decides whether or not the person accused will be committed to a full trial.

At the end of an investigative hearing, the police officer decides whether or not to lay a charge against the person named, or to arrest the person to prevent the carrying out of a terrorist activity which the police officer believes on reasonable (but not probable) grounds will be carried out. Other Draconian measures of Bill C 36 kick in once a person is arrested for and charged with an alleged terrorist act or intent.

Under investigative hearings the classic Crown discretion is avoided. The prosecutorial job in the interest of justice is to decide if it is appropriate to proceed on a criminal charge against a person or group. Now, Bill C 36 skips the Crown lawyers and requires the police go direct to the Attorney General to proceed. The important Crown discretion of prosecutors whose job it is to advocate in the interests of the state is made redundant. Judges whose job it is is to rule objectively on legal grounds based on fair and full evidence tendered by prosecution and defence have been turned into assistants to police officers to gather information against a person the police suspect of potential terrorist offences, i.e., from as yet uncommitted or unthought of acts.

Rocco Galati, legal counsel for the Canadian Islamic Congress has pointed out that "Investigative hearings are nothing short of Roman Catholic inquisitions. That's all they are. Maybe without the torture. Maybe not. Every group in this country has suffered torture at the hands of our police. That is well documented."

Right to Remain Silent under Charter of Rights and Freedoms:

You Madam Senator have told citizens such a right does not exist in Canada. To say we did not have the right to remain silent in Canada (in our law as it was before Bill C 36) is another incredible and shocking inaccuracy. On arrest for crimes under our Criminal code other than your new terrorism crime, all a suspect is required to tell the police is name and address. That is all. Period. The required police warning to a suspect is to say "You are not required to say anything but anything you do say will be taken down and could be used against you in a court of law." Even after being taken into custody, no suspect whether or not charged with an offence is required to answer any question other than name and address, except now under arrest or detention for investigative hearings as a suspected terrorist.

US influence:

Further Madam, you incorrectly refer to Canadian lawyers as attorneys. In Canada legal counsel are not referred to as attorneys. That is a U.S. term. In Canada we are called lawyer, defence counsel, barrister, solicitor, prosecutor, or the Crown.

You say Bill C36 is truly Canadian. This is another inaccurate statement. These laws you senators and Members of Parliament are foisting on us citizens are modelled on the U.S. laws. Similar laws are being hastily implemented in Great Britain and Australia as you well know.

Military tribunals:

You say our Bill C 36 does not create military tribunals as the comparable U.S. law did, as if that should mitigate Bill C 36. The U.S. Patriot bill on which your Bill C 36 was modeled did not include the military tribunals. Bush made a special dictatorial edict on his own to create his military tribunals. He gave himself the power that he alone will identify who is a suspect anywhere "abroad". That Madam means - in the world. Bush dismisses national sovereignty. He has declared that he can come on to Canadian soil, point at your son, call him a terrorist, and haul your son away to the secret tribunals of torture and death. Unlike Spain, I have not heard our government say, "No! Suspects will only be turned over to a world tribunal operating under the rule of law."

Secret Trials:

Furthermore Bill C 36 creates secret trials. This too is unprecedented in our criminal law. Once it is alleged that you are a terrorist, you never get to see the evidence against you. Your lawyer never gets to see the evidence against you. All you get is a summary of the evidence against you. It is impossible for your lawyer to know the case he/she has to meet to defend you. This is fundamental violation of the human and Charter rights of an accused person.

Self incrimination:

It has been said by other of your compatriots that answers given at the investigative hearings by the person named cannot be used against him or her in a court. Any lawyer experienced in the practice of criminal law knows that is not true. (1) The police can use the answers to go and engage in further investigations outside the answers and that evidence can be used in court. (2) If the person named ever takes the stand to defend himself or herself, the case law and Bill C 36 itself is clear they can use your answers to say that you are lying. So it is not true that they can haul you in and anything said will never be used in court against you.

Charter of Rights and Freedoms:

Your statement that the protections of the Charter of Rights are not attacked or eroded by Bill C 36 is just not so. Bill C 36 systematically purports to throw out every Charter right we have. Your drafters have used language from precedents that overruled the Charter of Rights in order to try to "Charter Proof" this legislation. Further, Bill C 36 gives the Court the out to deny Charter defences by declaring the offending application of Bill C 36 to be necessary for national security. For you and the Minister of Justice and MP Stephen Owen and other MPs and Senators to be saying this is either a deliberate attempt to mislead the citizens or an unacceptable state of ignorance by people whose responsibility it is to know otherwise, to defend and protect us, and to preserve our rights and liberties. This can only be seen as a woeful, willful act of deception.

Rocco Galati , constitutional lawyer, has told you, "There is not one single right in the Charter that has been developed from the Magna Carta, to the English Bill of Rights, to the French Declaration of the Rights of Man, to the U.S. Bill of Rights, to the U.N. Charter, to the Canadian Bill of Rights and to our Charter that has not been buried by your myriad of anti-terrorism bills. There is not one right that is not completely undone." I concur.

Pride versus Shame:

You say you are proud of what you have done. I, Madam, like innumerable other informed Canadians, am appalled.

Constance Clara Fogal,
Barrister and Solicitor.

"Anyone who trades liberty for security deserves neither liberty nor security" ...Benjamin Franklin
"Fascism should rightly be called corporatism as it is a merge of state and corporate power" ...Benito Mussolini
"A nation that forgets its past is doomed to repeat it" ... Winston Churchill

DEFENCE of CANADIAN LIBERTY COMMITTEE/LE COMITÉ de la LIBERTÉ CANADIENNE
C/0 #401- 207 West Hastings St Vancouver BC Canada V6B1H7
Tel: (604) 687-0588; or (604) 872-2128; fax: (604) 872-1504 or (604) 688-0550
E-MAIL conniefogal@telus.net; www.canadianliberty.bc.ca

“The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled” Supreme Court of Canada A.G. of Nova Scotia and A.G. of Canada, S.C.R. 1951 pp 32