

THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND
COMMERCE

UNOFFICIAL – UNOFFICIAL EVIDENCE

OTTAWA, Wednesday, April 9, 2008

The Standing Senate Committee on Banking, Trade and Commerce, to which was referred Bill C-10, An Act to amend the Income Tax Act, including amendments in relation to foreign investment entities and non-resident trusts, and to provide for the bilingual expression of the provisions of that act, met this day at 4 p.m. to give consideration to the bill.

Senator W. David Angus (*Chair*) in the chair.

The Chair: Welcome to this meeting of the Standing Senate Committee on Banking, Trade and Commerce. I am Senator David Angus from Quebec. I am the chairman of the committee. To my right is my distinguished Deputy Chair, Senator Yoine Goldstein, also from Quebec. To my right is Senator George Baker from Newfoundland. To my left is Senator Mac Harb from Ottawa and Senator Wilfred Moore from Halifax. Just sitting down is Senator Nancy Ruth from Toronto, and to her left is Senator Pierrette Ringuette from New Brunswick and Senator Michel Biron from Quebec.

Also assisting me is our eminent and efficient clerk, Dr. Line Gravel, and from the Library of Parliament, invaluable support staff, June Dewetering

Without further adieu, I welcome everyone to these hearings, not only the persons in the room but those watching on the television network CPAC and also on the World Wide Web. I understand the interest in this particular bill is very high.

(French follows in 1610 - Chair cont'g)

(après anglais)(Chair)

Nous poursuivons notre étude sur le projet de loi C-10, Loi modifiant la Loi de l'impôt sur le revenu, notamment en ce qui concerne les entités de placement étrangères et les fiducies non-résidentes ainsi que l'expression bijuridique de certaines dispositions de cette loi, et des lois connexes.

(Chair : That is a long way)

(anglais suit)

(Following French - Chair cont'g)

That is a long way of saying that this is an omnibus bill that contains many bundled amendments to the Income Tax Act, largely unrelated but a collectivity of provisions of law that have been waiting for an appropriate time to be brought to Parliament.

The bill had a previous life as Bill C-33 in the first session of this Parliament. It died on the Order Paper last year and had been reintroduced as Bill C-10 when this session of Parliament began. It has been at this committee since December 4.

There are many aspects to the bill, but our focus today is clause 120 of the bill today. Clause 120 purports to amend section 125 (4) of the Income Tax Act that sets out the rules that apply for purposes of computing the Canadian film or video production tax credit. It has become quite controversial. This is our second couple of hearings on the matter. Last week the Minister of Heritage Canada and Status of Women, the Honourable Josée Verner came before us to explain the bill, as well as officials from her department and from the Department of Finance.

Opponents of the legislation are concerned that this particular provision I am referring to, clause 120, may or does threaten freedom of expression, as well as the financial foundation upon which the film and television industry in Canada was built.

However, those who support the bill, including the government, say that the proposed law would in no way restrict freedom of expression but would simply enable the government to ensure that taxpayers' funds are spent wisely and responsibly and not in a way that contravenes public policy.

The purpose of these hearings is for honourable senators to hear reasoned arguments by all interested parties, wherever they stand on the issue, so that we can provide proper sober second thought to the proposed legislation.

We have with us this afternoon very distinguished witnesses. We have two panels. We can be here until shortly after six o'clock, so I will ask everyone to try to be restrained not only in their presentations but in their questioning in particular.

I see other senators have joined us, and distinguished ones they are: Senator Tommy Banks from Alberta, another colleague from Quebec, Senator Francis Fox, and Senator Len Gustafson from Saskatchewan.

Senator Fox: For my understanding, you said we have until six o'clock. My understanding is that the first panel is from 4:00 until 5:00.

The Chair: Yes. We are a little late getting started. We will be restrained, and tomorrow as well. We are trying to hear everyone who has expressed an interest in being heard. I am underlining the fact that people will miss out on their chance to speak if certain of us speak too long.

We have very distinguished witnesses to start. From REAL Women of Canada, we have Diane Watts. Representing Science for Peace, Rose Anne Dyson, from their Media Working Group, at the University of Toronto, and Council on Global Issues, at Ryerson University. With her, from Canadians Concerned about Violence in Entertainment, is Eileen Shapiro.

Diane Watts, Researcher, REAL Women of Canada: Thank you for inviting us to appear before the committee. I have a bad cold. I will do my best to project my voice.

In November 2005, the Auditor General of Canada issued a report on its review of the Department of Canadian Heritage's support for cultural industries in Canada. The cost of this program at that time was \$2.2 billion; it is presently \$5 billion annually. The purpose of these grants is to encourage Canadian cultural content so as to develop Canadians' sense of "belonging" and "building the country's national identity." These are the objectives of the program and the grants.

Regretfully, the material created by the culture industry in Canada by way of these grants has rarely achieved these objectives of uniting Canadians. Instead, these grants have had the opposite effect in that they have resulted in works that alienate and offend many Canadians. This is because the producers represent in many cases the views of very few Canadians. In 2006, only 4 per cent of Canadian box office receipts went to Canadian-produced films, while 88 per cent went to Hollywood-produced films and 8 per cent went to others.

It should be pointed out that perhaps one of the reasons these taxpayer-funded programs are disconnected from the Canadian public is because of the lack of control by the Canadian Heritage Department's audio-visual certification office regarding the authorization of grants. According to the Auditor General's report, CAVCO is supposed to award only to individuals who are Canadian citizens or permanent residents of Canada. However, the report reveals that CAVCO does not always require

key personnel to submit documentation supporting their citizenship. In fact, the entire Canadian cultural funding system administered by the Heritage Department was severely criticized by the Auditor General's 2005 report. The latter report stated that Canadian Heritage needs to strengthen its strategic direction, results, measurements and accountability structures to improve efficiency and effectiveness in its program and operations. Because of the failure of the Heritage Department to ensure that funding is properly applied with proper accountability structures, these grants have been seriously abused.

One example that we give is the Vancouver Queer Festival held in 2006. The material viewed in that festival is apparently offensive even to those who have same-sex attractions since they stayed away from the festival in droves. These are usually considered to be liberally progressive in their appreciation of the arts, and yet they did not appreciate what was presented to them. According to information obtained through Access to Information, the festival costs were \$530,000, of which only \$92,000 went to the film presenters, and most of the amount went to the administrators of the festival. That is, the administrators of the festival benefited extremely well from the festival, but not the artists producing the films shown in the festival. It is noted that less than one tenth of the costs were covered by box office revenues.

The films shown were obviously not attractive to the public. I cannot even name them in public. They are very offensive. Even the titles themselves are offensive. It is little wonder that the homosexual community for whom the festival was intended did not bother to attend since this fringe selection of film offerings was scarcely culturally uplifting. Yet, \$23,000 was given to this festival by the Heritage Department, \$44,000 by the Canadian Council for the Arts, and \$53,000 by Human Resources and Skills Development. These grants we believe are a clear abuse of taxpayers' money and contrary to public policy, and they do not support Canadian culture.

We are in support of the amendment to the Income Tax Act.

There have been objections to the amendment, which gives financial support to productions and refuses to give those to productions that are contrary to public policy. This provision first appeared in 2003 when Minister of Heritage Sheila Copps promoted it. I believe it was on the occasion on the controversial film about convicted murderer Paul Bernardo. The government wanted to distance itself from this film.

The minister offered to draft guidelines so as to preclude taxpayers' money being used for this offensive material. I believe this bill uses the same phraseology as was used at that time.

We are opposed to too much input by the Canadian film and television production industry to assist in proposing the guidelines because we believe that would constitute a very obvious conflict of interest.

In closing, the Canadian film and television producers are calling this provision on public policy funding a serious attack on creativity, freedom of expression and they are calling it government censorship. This is simply not true. No films are either banned or destroyed under this provision. Film producers can represent whatever perspective or depictions of violence or sex they wish that are not contrary to the Criminal Code but not via taxpayers' money.

Disgruntled artists are arguing that funding from Canadian Heritage is their entitlement regardless of how or what they choose to depict in their films and programming, and regardless of how detrimental these films may be, especially to women, children and adolescents. We provide an appendix of scientific studies done showing the detrimental effect of sexually explicit material on societies. It includes softcore pornography, which many of these films engage in.

In effect, some filmmakers want carte blanche to use government grants any way they choose, regardless of the consequences on productions on society. Artists should be held responsible for their work, the same as plumbers, lawyers, physicians and carpenters. Other industries have to meet strict requirements and regulations to gain tax credits. Why not those undertaking artistic endeavours? Why should artists claim to have the right to operate freely by way of taxpayer funding yet not be held responsible for their work?

Why should the taxpayers support them if their works are detrimental to society and/or do not appeal to the public because of their subject matter, such as necrophilia, especially since such works only alienate and offend them? This defeats the major objective of the program: to develop Canadians' sense of belonging and building the country's national identity. Many of these films do not do that at all. They just offend Canadians.

In short, the government has a fiscal responsibility to the taxpayer. This proposed amendment in Bill C-10, section 120, is merely an attempt to carry out this important responsibility to the taxpayer and the citizens. Thank you.

The Chair: Thank you very much, Ms. Watts. That was very interesting. Our practice is to hear all witnesses and then proceed with questions.

Rose Anne Dyson, Chair, Science for Peace (Media Working Group) (University of Toronto) and Vice President Media Relations, Council on Global Issues (Ryerson University): Thank you for this opportunity to speak today and comment on Bill C-10. My colleague, Ms. Shapiro and I, are here to speak in support of the bill and to present the other side of the story by addressing some of the points raised by its opponents.

First, the notion that the bill is supported only by religious evangelicals is wrong. The need to eliminate tax support for films and other productions that contravene the public interest was recommended long before Shiela Copps introduced it two Liberal governments ago; it was first recommended 30 years ago and is long overdue.

It was called for by the Ontario Government Royal Commission on Violence in the Communications Industry, set up under the leadership of the former Ontario Premier, Bill Davis. It was chaired by the late Judy LaMarsh, a lawyer and broadcaster who served in the Liberal cabinet of Prime Minister Lester B. Pearson.

It released its report in 1987 with over 87 recommendations. One of them was to let film producers who rely on questionable conduct in their scripts to find their own funding sources independent of the public purse. This was regarded as an approach that would avoid the censorship issue and focus instead on the principle of discretionary funding. Around the world, this report was welcomed as one of the finest multidisciplinary studies of its kind, however in Canada it was, and still is, largely ignored.

I renewed the call for discretionary funding of film productions in my thesis at the University of Toronto in 1995 and in my book, *Mind Abuse: Media Violence in an Information Age*, published by Black Rose Books in 2000. I will leave a copy with you. The 50 plus recommendations I had in my doctoral thesis are woven into the concluding chapters. Among them are the need to eliminate funding for something contrary to the public interest.

The Chair: The book will be made available to the clerk. Thank you.

Ms. Dyson: This book is available in most public and school libraries across the country; community college and university libraries; and is frequently used by teachers and students alike.

My colleague, Ms. Shapiro and I, who both hold graduate degrees in Education and Psychology, represent a broad coalition of individuals that include teachers, health professionals, lawyers, academics, media scholars, parents, school trustees, artists, spiritual leaders, business executives and members of the media themselves.

We agree with journalist John Ivison who argued in defence of Bill C-10 in the *National Post* on March 6 saying that the criteria for withholding funding from production should actually be broadened. He said:

I'm outraged as a taxpayer. Telefilm Canada handed out \$158-million last year, including to such productions as *Sperm* and *The Masturbators*.

Telefilm Canada's mission is to bolster productions that reflect Canadian society, as my colleague pointed out, with its linguistic duality and cultural duality. These films did neither.

He pointed out that David Balcon, a policy advisor to the CRTC in the 1970s who helped draft Telefilm Canada's funding rules, dismisses arguments that the current proposed amendments to the Income Tax Act are about freedom of expression. We agree. Parliament has a right to define and proscribe limits to all the programs it initiates. There are a number of areas in the media already exempt from tax credits such as news, sports and talk shows. The government should not be funding pornographic nor gratuitously-violent films and video games, either.

I was reminded that the film, *American Psycho*, based on the book of the same name and considered a how-to manual for Canadian serial killer, Paul Bernardo, received \$120,000 in tax credits.

It was reported in *The Globe and Mail* last Friday, April 4, that the Third Annual Feminist Porn Awards was to be held in Toronto to honour achievements in such categories as "best smutty schoolteacher" and "golden beaver award for Canadian content." In today's *Globe and Mail*, it was reported that, after being denied funding many times, the producer of a script for a film based on the Montreal massacre which

occurred in 1989 has finally been given money after some adjustments. It has been funded to the tune of \$3.1 million. We think that is unfortunate.

To argue that the bill involves censorship and threatens artistic freedom is intellectually dishonest. Profit-driven productions involving gratuitous violence and sexual exploitation in films and video games, which are a huge and growing part of the entertainment industry, hardly need credits in order to thrive, given the easy and cheap audience that sex and violence have always provided. The suggestion that public funding for these must be protected in order to safeguard creative expression is a leap in logic. It is self-serving and aimed at stifling debate before it even gets under way.

Who, exactly, is insisting on censorship here? Media scholars, along with over 6300 individuals representing more than 250 organizations around the world, argued that the privilege of censorship has moved almost exclusively into the hands of large media conglomerates who decide what the rest of us see, hear and read along with our children.

Better distinctions must be made between corporate freedom of enterprise and individual freedom of expression because they are not the same thing. The indiscriminate use of the word "censorship" by special lobbying interests helps to sustain confusion in the public sphere and to insure business as usual for media industries regardless of the consequences. No other industry has enjoyed such *carte blanche* immunity from corporate responsibility and public accountability. It suggests a remarkable degree of perceived entitlement at a time when the carbon taxes are being discussed in terms of who should be subject to them. It might be time to look at a possibility of some kind of carbon tax on those who pollute the cultural environment. My colleague, Gary Boyd, who teaches educational technology at Concordia University in Montreal had this to say about the bill:

I was delighted to see a posting about the need to cut off funding for violent, socially destructive films, which have been the big money makers and effectively teach aggressive role behaviour to youth. Unfortunately, the valid arguments for freedom of non-denominative rational speech, which is essential to democracy, have been grossly extended to the licence of expression for "advertainment" pushers to spread their all-too-aesthetically-and-dramatically-appealing pathological behaviour models.

Yesterday, I met with members of a panel set up last summer by Ontario Premier Dalton McGuinty to review the roots to youth violence following the shooting of student Jordan Manners in a Toronto school. It is co-chaired by former Ontario Chief Justice Roy McMurtry, who also served as Attorney General during the Davis years, and helped to set up the Lamarche commission, which released its report in 1977. Along with everyone else associated with that particular commission, he too expressed profound disappointment that so little had been done to address the mushrooming problems of media violence.

Throughout urban centres in North America, youth gang violence escalates along with hand-wringing among municipal politicians, community workers and teachers. This has resulted in what was described on the front page of the *Globe and Mail* on January 10, 2008, following the release of the Faulkner Report commissioned by the Toronto District Board of Education to look into the problem as a growing culture of fear.

Meanwhile, despite thousands of studies demonstrating harmful effects, the tide of violent entertainment, including gangsta rap music lyrics, violent video games and formulaic action films, continues. Not only is production and distribution unimpeded, but it is also supported and funded by our own tax dollars. Last fall, an international coalition of over 786 organizations from 120 countries based in Geneva, Switzerland, announced November 19 as World Day for the Prevention of Child Abuse from Exposure to Media Violence. Several weeks ago, I attended the 52nd Commission on the Status of Women at the United Nations in New York City on behalf of Canadian Voice of Women. At that time, Secretary-General Ban Ki-moon announced his initiative to address growing evidence of violence against women throughout the world, pointing out that one in three women will be a victim of abuse at some stage in her life.

In 1984, U.S. Surgeon General C. Everett Coop was among many researchers who spoke at a symposium at the Ontario Institute for Studies and Education in Toronto. It was co-sponsored by C-CAVE, the organization that Ms. Shapiro and I represent today. He identified the harmful fallout from media violence and pornography as one of the most serious mental health problems facing the world. Since then, things have gotten progressively worse. For government to stand by and do nothing in the face of this epidemic of violence gripping society, is not an option. Many different strategies are required to address these ominous dreads.

Every sector of society must do its part -- government, industry, the health sector, the education community and parents. Passage of Bill C-10, to eliminate tax credits for production deemed to contravene the public interest would be a start. It could be enormously helpful in shifting the parameters for profit and actually channel creativity to be more consistent with the public interest at large. Certainly, it would help artists.

During the International Film Festival in Toronto last September, it was reported in the *Toronto Star* that the industry is facing a crisis. Production is down. It was also reported in the *Los Angeles Times* that audience fatigue is beginning to set in from the entertainment deluge of crazed killers, wanton vampires and jiggling co-eds on film screens. A new screened-based industry strategy is needed that departs from reinvestment in the same old re-invented genres. This could be a win-win situation for all. We applaud the commitment of the Senate to ensure cultural policy that embraces the principle of artistic freedom. I have two grown children who are members of the arts community. The safety, health and education of the most vulnerable and youngest among us must not be sacrificed to placate fear mongering for the purpose of maintaining the unbridled pursuit of profit in the entertainment industries.

Business as usual is no longer possible anywhere. The world is changing. Wanton pollution of both the cultural and natural environments cannot continue. Tax dollars collected by governments that we elect are finite and must be spent wisely. New regulations are necessary to reflect our changing realities, and Bill C-10 is one example.

We recommend the following adjustments to the bill, as it stands: There should be measures to ensure that the kind of productions not eligible for tax cuts be clearly spelled out to include extremely violent and pornographic films and video games. A good rule of thumb on how this could be applied would be to refuse tax breaks to any script or production not deemed suitable for airing on public televisions, such as the CBC or TV Ontario. Criteria developed by the Canadian Association of Broadcasters in the early 1990s, with help from the CRTC, the Canadian Teachers Federation and C-CAVE, for the purpose of administering the Broadcast Standards Council could be drawn upon as well.

Steps should be taken to ensure that films likely to be denied tax credits due to harmful affects also be denied funding, such as that provided by Telefilm. This would ensure consistency in how cultural policy is developed at all levels. Provinces who do not yet have similar policy to deny tax credits to production deemed contrary to the

public interest, should be encouraged to adopt such a policy. I made this recommendation to the committee in Toronto yesterday because we learned recently that the Ontario Media Development Corporation is funding extremely violent video games.

Additional aspects of the bill that would provide for greater transparency on how scripts and creative personnel associated with productions receive credits would help to prevent abuses that have occurred in the past. Also, extending the scope of the tax credit program to the very early stages of scriptwriting would avoid a production deemed inappropriate halfway through the process. Certainly, it is my understanding that it is difficult at times to differentiate between foreign and domestic productions but any new rules should apply to both foreign and domestic scripts.

Thank you for your attention. I welcome your questions. A copy of my presentation was circulated along with a bibliography to give a chance to read more of the ideas that I have raised today. I could leave a copy of the latest issue of a periodical that I edit for the Canadian Association for the Studies of Adult Education. I have two articles: *Shifting the Paradigm Toward a Greener Earth*; and *Media Business and Community*.

With the indulgence of the committee, my colleague would like to add a comment or two based on her 30 years' experience with the Toronto District School Board.

The Chair: Did you present for Ms. Shapiro as well?

Ms. Dyson: Yes.

Eileen Shapiro, Member, Canadians Concerned about Violence in Entertainment: I feel honoured to be here today with my esteemed colleague, author and media expert, Dr. Rose Dyson. We both share a deep concern about violence and pornography in the media, which are saturating the industry at an unprecedented rate.

We do not need another study to corroborate the effects of this upon our youth. I continue to be stymied at the lack of action taken in this direction. For years and years, from one administration into another, this issue has been on the front burner, but to what avail? It has never been properly addressed. Bill C-10 would be a small step in the right direction. It would signal to responsible adults everywhere that we do not condone the limitless expression of sex and violence in the media under the guise of

freedom of artistic express. We know the harmful effects this has on our youth. We are not in the dark about this.

For over 30 years I have been a teacher in the public school system. I have taught hundreds of students. I have witnessed first-hand the decline in standards of speech, dress and morality. The students definitely mirror the industry without question. Adolescents look upon media icons as role models to emulate, and emulate they do.

Ironically, over the past number of years we have introduced standardized testing once more into our school system. Ministry testing has become a household name. Where has this been reflected in the media, where standards appear to be nowhere in sight? Our hard-earning taxpaying dollars help to support this, no less.

The majority of parents if polled would overwhelmingly support the return of good taste, dignity and wholesome values to the popular media. As parents, grandparents, teachers and guardians of our young, to do nothing about this in my opinion would be to fail them. They deserve far more. They need us to groom them, to teach them and to exemplify how to lead healthy and productive lives. This we cannot do in a vacuum. What is required is thoughtful planning, action and a determined effort on our part to stand up to those who would say otherwise.

I urge the Senate to pass Bill C-10. This would be a definite moral victory for all Canadians of good conscience. After all, are we not the trusted guardians of the next generation?

The Chair: Before I go to the senators for questions, Ms. Dyson, you indicated some following adjustments in the bill as it stands to ensure that the kind of productions that would not be eligible for tax cuts be clearly spelled out, et cetera. Are you aware that the bill does provide for the minister to issue guidelines in this regard?

Ms. Dyson: Yes.

The Chair: Do you not think that is sufficient?

Ms. Dyson: Yes. They would be part of the guidelines, I expect.

The Chair: That would comply with this recommendation.

Ms. Dyson: I think so, but I also support what Ms. Watts said about some caution being exercised as to how much the industry itself will establish the guidelines or the criteria. It is not that there are not many well-meaning people in the field, and they

have to be consulted, certainly, but we do not want to end up with the scenario of the fox guarding the henhouse. We need to make sure there is representation from all sectors of society in the establishment of these guidelines.

The Chair: Three other senators have arrived since I make introductions. To my far left is Senator Trevor Eyton, who is the sponsor of this legislation, a concerned Canadian. He is from Ontario. To my far right is Senator David Tkachuk, from Saskatchewan, and from Kandahar directly off the plane, Senator Michael Meighen of Ontario.

Senator Baker: Thank you to the witnesses for their excellent presentations. You each addressed the subject in a very broad way and you covered things other than the tax credit, which is, of course, the subject of this legislation.

Ms. Dyson, I wanted to correct you on one thing that you mentioned. Your exact words were that the tax credit cannot be given to a talk show or a sporting event so, therefore, why should it be given for a film on pornography? I just wanted to correct you that when you go to regulation 11-06-1B8, pornography is excluded. Pornography is an excluded production under the act, under the regulations, just as, as you correctly pointed out, talk shows, sporting events and this sort of thing.

The Chair: I do not want to interrupt your very eloquent question, but you are referring to regulations.

Senator Baker: They are under the Income Tax Act.

The Chair: Are they in force at the moment?

Senator Baker: Yes.

The Chair: Are you sure?

Senator Baker: I have them here, Mr. Chair.

The Chair: You may find that you are in error, but subject to that, please proceed. We understand these regulations were abrogated.

Senator Baker: I spoke to the income tax department yesterday. You say the regulations are not in effect.

Senator Harb: Not this bill, but the income tax regulation, yes.

Senator Baker: I stand corrected.

The Chair: This is a highly charged issue. We want the record to reflect accurately, and we are trying to be evenly balanced.

Senator Baker: I stand corrected on this. My apologies to you; you were correct and I am wrong.

Ms. Dyson: You are wrong on what I said also, but I will get to that in a minute.

Senator Baker: I imagine I am. Ms. Dyson, as you know, we have the penal obscenity laws in Canada. We also have the provincial censorship boards. Now there will be a new board at the tax credit level. How do you think that will make up for the ineffectiveness, as you point out, of the film Ontario Film Review Board, for example?

Ms. Dyson: To backtrack to one of the first things you said, I pointed out that talk shows and news are not eligible for tax credits. I do not think I said, "therefore, pornography and violent scripts should not be either." I was using that as an example of how there are other areas in the media industries that are not eligible so it is not as if everybody who happens to be in media industries automatically gets a tax credit. That was my only point in that context.

You say that that is already applied. I think we have heard here today that there are all kinds of abuses in terms of who is getting this funding. You may have regulations or laws that I do not know about. You are more conversant with them than I am. You say these regulations are around that pornographic scripts are not eligible for tax credits. If that is the case, why are they getting them? Why are these regulations not being implemented? Something is not working there.

With respect to the criminal law, I know there has been much discussion in the newspapers about how we already have a Criminal Code that can take care of any abuses or excesses. It seems like a terrible burden to be inflicting on the public at large to expect that the court system would handle abuses from an industry that ought to early on be held accountable and responsible to the public interest before it releases its product into the community. Also, this tax credit, as I understand, will simply discourage the production of material that could be in the public interest.

There are two different kinds of functions on behalf of the public interest and there is room for both.

With respect to the film review boards, the kind of lobby that has been orchestrated to challenge or get rid of this particular bill is symptomatic of what I have observed over 25 years of working on these issues. The industry is there pushing for more leniency in terms of, in this case, the credits they get for their scripts. In Ontario regarding film review boards, there has been a steady erosion of the standards over the last 10, 20 or 30 years and what it can do. It can no longer ban a film of any kind. If it dared to suggest that something had to go back to the producers, even with a restricted label, more often than not – according to members of my organization that have sat on the board – they will be lobbied and harassed until a different, more lenient classification criteria will be given to a production that will enable greater distribution.

The Chair: You have made yourself clear but, in fairness, we will need to have a decent chance to let everybody have their five minutes. Senator Baker asked one question and his whole five minutes were used up so I am giving him another minute.

Senator Baker: I was not aware that the Income Tax Act, when you look at the regulations governing the awarding of a tax credit, you see excluded productions in the regulations. They spell out, as you pointed out, sports programming – there is a whole section. One of them says pornography. However, I am told this is not into effect so I stood corrected on that.

You were not asked to appear nor did you have the opportunity to appear before the House of Commons committee on this particular bill, were you?

Ms. Dyson: No, I was not.

Senator Baker: There were no hearings in the House of Commons concerning this particular portion of the bill. In fact, the word "film" was not mentioned in any debate in the House of Commons or in the committee hearings on this bill. The word "film" was not even mentioned.

Two political parties, namely the Bloc Quebecois and the NDP, said that if they had known it was in the bill, they would have examined it further and they would have proposed amendments to it. They are asking the Senate to send it back to the House of Commons so that they can have a say. They missed the nine pages in this bill.

My question is this: What do you think of the House of Commons regarding not seeing this section of the bill, not addressing it and asking that it be returned so they can re-examine this portion?

Ms. Dyson: It is too bad they did not do their job the first time around. This is not a new initiative. As I understand it in our organization, Canadian Concerned about Violence in Entertainment, has been supporting the sort of tax credit revision through the previous two Liberal administrations. As I said in my remarks, it would be unfortunate if this goes back to the House. We have been fiddling and going back and forth on this for over 30 years. It is time to do something.

The Chair: The record will show it had all parties' support, including the Bloc and the NDP.

Senator Moore: Thank you for being here, witnesses. I would like to clarify something, Ms. Dyson. Are both you and your colleague, Ms. Shapiro, with the Canadians Concerned about Violence in Entertainment?

Ms. Dyson: Yes.

Senator Moore: Are you members or officers?

Ms. Dyson: I am the president.

Senator Moore: Are you an executive member, Ms. Shapiro?

Ms. Shapiro: I am the co-chair.

Senator Moore: The chair in his remarks at the beginning highlighted the section of the bill which is very important and has caused most of the interest from the cultural community. I will read that:

The Minister of Canadian Heritage shall issue guidelines respecting the circumstances under which the conditions in paragraphs (a) and (b) of the definition of “Canadian film or video production certificate” in subsection (1) are satisfied.

This is the key part:

For greater certainty, these guidelines are not statutory instruments as defined in the Statutory Instruments Act.

That means those guidelines can be changed at any time – it is open-ended authority – and they are not subject to review by Parliament, by the House of Commons or by the Senate of Canada. Do you think that is right?

Ms. Dyson: I am not a lawyer. I am sure there are many areas that government has to proceed in good faith from one administration to another. I am not sure what point you are raising.

Senator Moore: This was not in previous drafts. This is a new section. This is a new sentence. This is a very sweeping section. It is unassailable. I suppose you could go to court over it but otherwise Parliament does not have any say. I just thought that you, as a Canadian, may have a position on that.

Ms. Dyson: Parliament does not have a say but I thought the minister did.

Senator Moore: The minister only.

Ms. Dyson: The committee under the minister, established by the minister.

Senator Moore: No, the minister only has this authority.

Senator Tkachuk: The minister is responsible for Parliament.

Senator Moore: Read it. It says "these guidelines are not statutory instruments." We can move amendment.

The Chair: Clearly the response is also in order.

Senator Moore: Do you have an opinion on that?

The Chair: It is a legal issue.

Ms. Dyson: I would hope that Parliament and the minister would act in good faith in establishing a committee to develop guidelines, as she set out in her remarks, a copy of which I read early on. As far as the legal fine tuning, I would want to leave that to the discretion of her and her ministry.

Senator Moore: Do you think it is appropriate that one person has that authority?

Ms. Dyson: It is not one person.

Senator Moore: There is only one minister.

Ms. Dyson: You will have to take this up with your lawyers. There seems to be a difference of opinion.

Senator Moore: I suggest it is a policy issue. It is not a legal issue.

Ms. Dyson: I do not think one person should ever be entirely responsible for making a decision about a script. I would be surprised if this minister or any other Minister of Heritage would have the time to review a script in detail by herself.

Senator Moore: Ms. Watts, you said in your remarks that too much input by film and television industry would involve a conflict of interest. Could you explain that?

Ms. Watts: They would want to have as much leeway as possible to do whatever they want, to get all the funding they wanted all the time and to be as extreme as they could possibly be if they thought it could bring them fame and notoriety. There should be input from many areas and groups of society. It should not be just the so-called cultural industry. There is a whole Canadian culture that is moving forward and doing very well. Many of them really are not that much in touch with what is so-called the cultural industry.

There should be broad consultation in the development of guidelines. It is too close to sounding as if they would develop their own guidelines and they would be as extreme as they wanted to be. This is the problem: They are disconnected from the average Canadian. Often, they do not promote the values that Canadians are looking for support from the government. They are also at cross purposes with what other departments are telling us. Statistics Canada tells us that the traditional family is the safest, healthiest and most secure place for men, women and children. The family breakup leads to increased poverty. We made a presentation before the House of Commons Standing Committee on Canadian Heritage and claimed that current television programming fails to portray the positive, healthy reality of contemporary family structure. We can say that for the so-called arts and cultural industry. We should encourage them to be more creative in areas other than trying to attract attention with soft pornography, which is harmful to society. We do not want these people, who are causing divisions in society, producing material that is offensive to Canadians. We do not want them to be setting the guidelines. We want all Canadians to be consulted.

Senator Moore: I appreciate your comments. I find them interesting, especially your remarks about your perception of people in industry to be excessive or extreme.

Ms. Watts: I made comments about films at the Film Festival in Vancouver.

Senator Moore: I heard what you said earlier. There was an interesting piece in today's *Globe and Mail* wherein the Oscar-nominated actor/writer Sarah Polley was quoted. She said:

This legislation threatens freedom of expression as well as the very financial foundation upon which this industry was built. Take that away, and many of us would be hard-pressed to understand the motivation to stay here.

. . . The whole thing is sloppy. Of course we shouldn't invest in movies filled with excessive pornography or hate. That makes sense, and there are rules to prevent that. But there are a lot of things that have not been rigorously thought through.

I guess she meant, thought through in this proposed legislation. I would say that she is a lady of some credibility.

Ms. Watts: Yes. This does not interfere with freedom of expression. It interferes with the use of Canadian tax dollars to produce material that is offensive to Canadian families.

Senator Moore: This is an acknowledgment by a producer and actor -- an award-winning acclaimed person -- that does not quite fit with your perception of what an industry person might look for.

Ms. Watts: There are many views from many Canadians. Also, I think it is rather precarious for that industry to build its foundation on tax credits and government grants. Many other industries do not depend on government grants and tax credits to flourish in Canada. I think if they are creative and appeal to the highest standards, Canadians of all ages are reaching for, they will be successful without tax credits and handouts from government.

Ms. Dyson: She is an American. I do not think Sarah Polley is Canadian, is she?

Senator Moore: She is Canadian all the way.

The Chair: We will see her tomorrow and have the opportunity to hear her view.

Senator Harb: In light of the time, I want to make a statement and ask you if you agree or disagree. We are dealing with something that is similar to the problem of a dog on a leash. The question is: How long is the leash?

The definition of "contrary to public policy" is the question. Hearing what you have said, I am sure you will agree that we have a controversy in the public domain. As senators, we have received thousands of letters from across the gamut, including film producers, book publishers, television producers, reporters, authors, et alia. There is no question about the controversy that is brewing over the definition of "contrary to public policy."

Would you agree that in light of what is happening now, given that in excess of 50,000 people work in the industry with an output in benefit to the Canadian public of close to \$2.4 billion, it would be wise for us to develop, in consultation with industry and other interested stakeholders, the guidelines first and then the regulations before passing the bill?

Ms. Dyson: It depends on whom you will develop these guidelines in consultation with. I repeat what I said earlier and what my colleague has just said: This should not be left entirely to the industry to develop. They are not the only ones that have an interest in how these tax dollars are spent. You should include teachers, health professionals, psychologists and other people who know something about how media impacts on young people, in particular. That is how the standards adhered to by the Canadian Broadcast Standards Council were developed. Many things have not gone well there but we will leave that discussion for another time.

The point is, those guidelines were developed in consultation with many stakeholders, not just with the industry.

Senator Ringuette: Owing to time, I will keep my question succinct and hope to receive a response in kind.

Ms. Watts, you represent the organization REAL Women of Canada, which is a lobbying organization. Is that right?

Ms. Watts: We lobby for legislation that will be beneficial to the family and will give women greater opportunity to have true choice of career in society, including that of caring for family full time.

Senator Ringuette: Have you or anyone from your organization lobbied ministers or officials of the current government in respect of the issue we are discussing today?

Ms. Watts: We are appearing before this committee.

Senator Ringuette: Have you made representation on this issue to any ministers or officials?

Ms. Watts: No, we have not. We were invited to appear before the committee and this is our form of advocacy.

Senator Ringuette: I appreciate that. Ms. Dyson, you mentioned in your statement that you do not agree with a tax credit of \$120,000 for the production of a film that depicts the Montreal massacre. Actually, I find that tragic event to be a very sad but true fact of our history. I hope to see the film, if it is completed. I hope that my daughter will see it and that every Canadian will see it to remind us of what can happen with violent people and to remind our young people to be careful and aware of such potential situations.

Why do you not agree with a tax credit for this film?

Ms. Dyson: I made two different points that you might have confused. It is my understanding that \$120,000 in tax credits went to the production of American Psycho, which was very controversial. It was regarded as something that would be extraordinarily traumatic for the victims who suffered as a result of Paul Bernardo's killings. The entire community of Burlington took steps to ensure that the book is not in their local library.

I know this argument is used often by those who rely on what some describe as "blood money" to develop their scripts and movies. Many such films have been well done and received all kinds of awards both in Canada and in Hollywood.

However, this is being repeated over and over and over again. You can make the same arguments about the Second World War, the Vietnamese war or the video games coming out, such as Manhunt 1, 2, 3 and 4. You say you want your children to play these violent video games to develop great marksmanship. If we loosen the gun control laws, maybe they can shoot before the next person shoots.

The repetition of these themes over and over again in the cultural environment results in glamorization of role models that end up being problematic. We know that with Marc Lapine.

Senator Ringuette: What was your statement in regard to the Montreal massacre?

Ms. Dyson: From what I read in today's *Globe and Mail*, Telefilm has given \$3.1 million to the producers of a film based on the Montreal massacre.

Senator Ringuette: Are you for or against that?

Ms. Dyson: I think that is unfortunate. I believe it will be very difficult on the victims of this particular crime. I have worked with them in the past. I would be very surprised if they are in favour of this production.

The Chair: That has nothing to do with this law.

Senator Ringuette: We are talking about tax credits and guidelines and so forth. It has everything to do with this bill.

I would like to know if you agree that Canadian film producers will be considered under Bill C-10 with some kind of censorship while American producers will receive benefits from Canadian tax dollars with no guidelines or anything. How do you feel about that?

Ms. Dyson: I am not very happy about that, any more than the artists are. I do not think the tax credits should be there for either foreign or domestic productions. The same guidelines and criteria should apply to both kinds. It is my understanding that there is a great deal of confusion as to whether a production is Canadian or American. Canadian content quotas have to be met and some creative angles developed to get around them. That is just what I hear and read.

Senator Ringuette: Would you agree that tax credits would not be available for the following material: hate propaganda, obscene or child pornography, or any other illegal material as defined in the Criminal Code?

Ms. Dyson: I am sorry, I want to be sure I understand your question. Would you repeat it?

Senator Ringuette: Yes. We are looking at Canadian productions that would not have tax credits. We have a possible definition here of films consisting of hate propaganda, obscene or child pornography, or any other illegal material as defined in the Criminal Code.

Ms. Dyson: In other words, do I think anything that is defined as illegal in the Criminal Code should be denied tax credits?

Senator Ringuette: That is in addition to propaganda, child pornography and so forth.

Ms. Dyson: Certainly anything that would not pass the test of what is set out in the Criminal Code should not receive tax credits, either. I think tax credits should stop or be denied quite a bit before anything comes before the courts.

Senator Ringuette: Yes. We are looking at how to put standards into the definition.

Ms. Dyson: Are you asking me if I think the criteria for guidelines should be the same?

Senator Ringuette: Yes.

Ms. Dyson: Not quite. The criteria for what is eligible for tax credits should be more stringent than what is in the Criminal Code. In other words, excessive violence and pornography in films should not be funded or encouraged through the public purse. We are talking about tax credits only, Telefilm and things like that.

There might be some iffy productions out there, such as the Montreal massacre, in my view. They should have to find their own funding, even if they are not illegal.

Senator Ringuette: I cannot stand any production that has blood. I do not go to see them. That is not to say they do not have artistic value, but I cannot support their creation.

Senator Banks: I have two short questions. The first is to Ms. Watts. You mentioned your view that film producers ought to be able to stand on their own two feet like other Canadian industries. Can you give me an example of a Canadian industrial sector that does not receive public support?

Senator Meighen: How about musicians?

Senator Banks: Musicians get a lot of support. So does the oil industry and the manufacturing industry. Every aspect of Canadian industry receives public support of one kind or another, farmers, fishermen, whatever. Our society is built in terms of its industrial aspect largely on the fact that there is public support. I wonder if you know of an exception.

Ms. Watts: The comment was that the film industry is founded on government support. That was the comment in question. The tax credits and the government grants were the foundation of the industry.

There would be less objection if the purpose of the grants was followed. The purpose of the grants was to encourage Canadian cultural content so as to develop Canadians' sense of belonging and building the country's national identity. Unfortunately, much of these so-called cultural products do not do that, such as soft pornography.

Senator Banks: That is a subjective view. Ms. Dyson, in a general way, nobody could question that there ought to be guidelines for applications for grants for anyone for anything. Would you agree that a clear set of definitive guidelines set out in advance before we start spending money on a film would be a better process than an arbitrary decision by one person at any point during the course of the production?

Ms. Dyson: Absolutely, and that is my understanding. The bit of law read earlier suggests otherwise. From what I have read of the minister's remarks, that is exactly what is intended.

Senator Tkachuk: Just to clarify, in the press release of the Department of Finance in 2003, amendments to the Income Tax Act relating to films and video productions under subsection 6 (7), the Minister of Canadian Heritage shall issue guidelines respecting the circumstances under which the conditions in paragraph (a) and (b) of the definition of Canadian film and video production certificate in subsection 1 are satisfied. For greater certainty, these guidelines are not statutory instruments as defined in the Statutory Instruments Act, which is exactly the same as presently. There is no difference.

I just wanted to clarify, because I think Senator Moore implied that there was.

Also, you mentioned you had read the brief that the minister had given to the committee. I believe she had said that she would lift this public policy provision for one year.

The Chair: She would defer it.

Senator Tkachuk: She would defer it or lift it for one year, and has asked the industry to assist in the drafting of the guidelines over that period of one year. We have not yet heard whether the industry has enthusiastically run to her invitation.

Based on what you had said earlier, do you think it should just be the industry assisting in the guidelines or perhaps other organizations as well?

Ms. Dyson: I definitely do not think it should be just the industry. There are a lot of stakeholders in the cultural community and environment; film, television and video production contribute enormously to it.

Therefore, I believe that these guidelines should be drafted by people from the education community. You can draw upon the expertise of media scholars, psychologists, teachers and health professors. There are many different areas that ought to be invited to send representatives to participate in this process.

Senator Tkachuk: Thank you. To answer Senator Banks' question, my father was a small businessman for 20 years and received no subsidy or tax breaks throughout his life. I am sure there are thousands of small businessmen and -women across this country who are in the same boat. If certain privileged groups do receive taxes and special breaks that others, like my father, never did, then perhaps that is a public policy issue we should deal with, Senator Banks.

The Chair: Senators, we have another panel coming. Before terminating this one, Senator Goldstein, our distinguished deputy chair, has pointed out some interesting anomalies in terms of language.

Senator Goldstein: Thank you very much for appearing to share your views with us, Ms. Dyson. Ms. Watts is not here, but I thank her and Ms. Shapiro, as well.

In your oral and written presentations, you use the term "public interest." The statute uses the term "public policy" in English and *ordre publique* (public order) in French. Do you think there is a distinction between "public policy," "public order" and "public interest?"

Ms. Dyson: Yes. I think "public interest" would be a broader term. "Public order" probably conjures up notions of law enforcement. "Public policy" is something that that governments in particular concern themselves with.

Senator Goldstein: Your approach, if I understand it correctly, is that the guidelines should concern themselves with the broader issue of "public interest?"

Ms. Dyson: Yes.

Senator Goldstein: Would you suggest that support for films featuring homosexuality would be contrary to public interest?

Ms. Dyson: Not necessarily. I think that homosexual or same-sex relationships of one kind or another might very well be in a script that could be approved or given tax credits. I do not feel that is an area that should be excluded automatically.

I am more concerned about the gratuitous violence and sexually exploitation used, whether it involves same-sex relationships or the sexual exploitation of children, particularly the latter. There is a lot of it.

Senator Goldstein: I agree. I do not think you will find any disagreement and this table.

Did you see "Shake Hands with the Devil?"

Ms. Dyson: That is Senator Romeo Dallaire's film. I saw "Rwanda," I think. I certainly think very highly of Senator Dallaire's work. I have not seen the film, but I do have his book.

Senator Goldstein: Would you agree, since you know about the film, that it depicts extraordinarily horrible violence – suicide and all kinds of things that none of us want to see? Would you suggest that film should not have been supported by tax credits?

Ms. Dyson: I am not against all violence. It is possible to have a good script or be a good documentary, such as Senator Dallaire's was, presumably, although, as I say, I have not seen it. I did see "Rwanda" and there was not much spared. I think it is important to have.

I am talking about gratuitous violence; unnecessary violence. There are ways in which this can dominate an entire script. We can throw up our hands and say, "You cannot decide because it is in the eyes of the beholder." Many film producers will argue that they must have this in order to be able to get their story across meaningfully.

I do not know how much time we have to go into the gradual de-sensitization of society in general as a result of the "bar" of what is acceptable and allowed being lowered more and more every year and every decade.

Senator Goldstein: Are you comfortable having a single person determine where that bar is?

Ms. Dyson: No, I do not think a single person under any circumstances determine such a thing.

Senator Goldstein: That is what the statute indicates.

Ms. Dyson: I get the impression there is confusion around the table as to what is in the bill; whether it is one person or not. Personally, I find it ludicrous to imagine that either this Minister of Heritage or any other one could devote all of his or her time to making this decision with no outside help.

The Chair: On that point, I think the majority around the table are aware that, in nearly every statute, the minister responsible for a particular subject matter is referred to as "the minister." However, it does not just mean the minister.

I would like to thank the senators and witnesses for this first section of this evening. I think we are having a very mature and interesting discussion. You have contributed to it in a significant way. Thank you for coming.

I am pleased to welcome our next panel of witnesses: from the Canadian Civil Liberties Association, Noa Mendelsohn Aviv, Director, Freedom of Expression Project; from the Canadian Conference of the Arts, Alain Pineau, National Director, and Keith Kelly, Senior Policy Adviser; and from the Book and Periodical Council, Mark Young, Representative of the Playwrights guild of Canada, and Franklin Carter, Book Editor, Researcher and Representative of the Book and Periodical Council's Freedom of Expression Committee.

Ms. Aviv, please proceed.

Noa Mendelsohn Aviv, Director, Freedom of Expression Project, Canadian Civil Liberties Association: Good evening, honourable senators. Based on the session, in particular the questions I have just heard, it sounds like this committee is highly conversant in the issue. I thank you for hearing me and I hope I have something to contribute. I am from the Canadian Civil Liberties Association and am the Director of the Freedom of Expression Project. I have only five minutes so, as much as I would like to tell you about the importance of this freedom to our process, to our artistic and self-expression and to our very democracy, I will not focus on that. But, make no mistake, the provision we are talking about is an issue of freedom of expression. We are talking about an arbitrary and unjustified limit on expression. I will be happy to take questions later. For now, I will tell you a what-if story.

What if I asked you to give me a cheque for a good cause, and I assured you that even though you had not filled in the amount, I will not take more than needed. You would have some good questions for me. You would ask: "What do you mean by a good cause?" "How much exactly will I be withdrawing?" "Who gets to decide the questions anyway?" How can you trust me or my affiliates not to take more than we agreed upon or more than we need?" Bill C-10 and the provision we are talking is that blank cheque that the government is asking you to sign. If this honourable house signs off on it as it is and the bill becomes law, it would allow the government to take away tax credits from any production that contravenes public policy, whatever that means. This bill could give the government almost unlimited power to decide which films they think are bad for the Canadian people, whether it is material they do not like or even material that denigrates the government and its actions, so long as they can make out that the films are against public policy. While the courts might not ultimately allow this, they might even strike down the whole section for vagueness, the question before this committee is: How much unlimited power are you willing to give the government to suppress our cherished and vital freedoms? The government has reassured us, and the bill states, that there would need to be guidelines. The government has said that they will consult industry and restrict the scope of this power to certain limited categories. Even if we can trust this government implicitly, how can we trust its successors. The government might consult with the film industry and might even consult with the public and civil liberties organizations, although they have not said that they will. They might make limited guidelines, but they might change their minds or they might change the guidelines; and they might do all of that tomorrow, if they choose to do so. That is the chief problem with this bill and, in a democracy, "trust us," is just not an answer.

If the government is to suppress speech, the bill needs to spell out clearly and explicitly what the criteria are and it has to do so in a way that restricts basic freedoms as little as possible. What could those criteria be? According to Minister Verner's testimony before this committee, the bill is looking to close a loophole for material that contravenes the Criminal Code, such as indecent material, hate propaganda, and child pornography. When asked to describe what other material she could possibly object to, it was not clear whether she gave a definitive answer.

It might be understandable why the government would wish to deny tax credits to productions that violate the Criminal Code but, if this is the extent of the restriction,

the bill needs to say so. There is no need to give more power than this to government to restrict freedom of expression.

The bill also needs to set out who gets to make this decision and how. To revoke a tax credit that could amount to tens or hundreds of thousands of dollars, this is a harsh, retroactive measure that should not be in the hands of the minister. The bill needs to say that to revoke a tax credit, the minister would have to apply to a court and prove to a court. A court then would have to find that had there been a prosecution in this case, the film would have led to a criminal conviction because of its content.

Other than Criminal Code violations, what else is the minister suggesting? According to some government statements, one excluded category would be excessive sex or significant sexual content. This reminds me of that scene in *Anne Hall* when the couple is in therapy. The analyst asks Annie, "Do you have sex often?" She replies, "Constantly. I would say three times a week." Then the analyst asks Alvie, "How often do you sleep together?" He answers, "Hardly ever. Maybe three times a week." For some people, any on-screen sexual content is too much sex. We sort of heard that in the last session and, if we think back to Hollywood films of a bygone era, that is how people used to think. For others, there are far fewer limits.

The next category that the government suggested was gratuitous or excessive violence, which raises value judgments too. For example, if we have a film about war, should that film be allowed to show the horrors of war? A previous witness this evening mentioned a film about World War II or about the Vietnam War. What about a documentary about Saddam Hussein? Should the film show his execution? Everyone has seen it because it is on You Tube. For all of its gratuitous violence, would we want to deny a tax credit to something like *Looney Tunes*?

The third and final suggested category is hateful speech or expression that denigrates another group.

Here, as well, there is no great clarity. There are many examples that come to mind. The one I was thinking of was already mentioned in previous section, and that is the Honourable Senator Dallaire's important film, *Shake Hands with the Devil*, about the genocide in Rwanda. Does that film not denigrate one of the sides to the conflict? Are there perhaps groups, such as racists or terrorists, that deserve such denigration? The categories are very unclear.

What if a filmmaker wanted to portray the historic events that led up to Canada's becoming one of the first countries in the world to recognize same-sex marriage, a fact for which we have to be tremendously proud? The debate on the topic in Parliament, in this honourable house and in the courts was passionate and heated. Some very strong things were said. A film that showed both sides of the debate would be likely to offend and the question would not be, who will be offended by it; the question would be, who will not be offended by it? These value judgments could be terribly limiting on the material that filmmakers could make and that the Canadian public could receive. The freedom of expression of both could be deeply affected.

How do we decide which categories are acceptable? Who gets to decide? How many films could be excluded without clear criteria? I think I have demonstrated that the previous suggestions are not clear by any stretch. How many filmmakers would be chilled by the fear of denial? The minister tried to reassure this committee that the number of films that would be excluded would be very small, indeed, a handful out of a thousand a year, and some of those might already be covered by Criminal Code violations. In order to exclude this tiny number of bad films, is it really worth risking the large number of good and important films that might never get made?

We have already seen that there has been controversy and censure of some of the most important Canadian films ever made, such as the classic anti-war film, *If You Love This Planet*, a National Film Board of Canada production about Billy Bishop, and there were calls to not fund films about abortion and gay youth, films that were also made by the National Film Board of Canada. Should these too be suppressed in the name of public policy, and should the government get to decide? If we give the government a free hand to pick off certain movies and chill our artists, how many more innovative films on controversial topics will get made? Would that not be a terrible loss?

To conclude, this topic slipped completely beneath the radar of the House of Commons, as this committee is aware. While it was there, it did not receive adequate public scrutiny and attention. The Senate is now in a position to rectify this error and send the bill back to the House of Commons for full consideration and consultation.

Considering the dangers inherent in this bill and its ability to suppress and limit one of our most valued freedoms, the Canadian Civil Liberties Association calls on this committee not to sign off on this blank cheque.

(French follows -- Mr. Pineau: Bonjour monsieur le président)

(après anglais)

Alain Pineau, directeur général, Conférence canadienne des arts : Bonjour monsieur le président, je suis le directeur général de la Conférence canadienne des arts. À mes côtés, Keith Kelly est l'ancien directeur général de la CCA et notre actuel conseiller politique senior. Il a beaucoup d'expérience dans ces dossiers.

Nous tenons d'abord à remercier le comité de nous avoir invités aujourd'hui et transmettre des remerciements particuliers à la greffière du comité Mme Gravel qui nous a grandement assistés dans la préparation de notre présentation en nous fournissant des informations que nous avions de la difficulté à obtenir.

Monsieur le président, la CCA est la plus ancienne et la plus vaste organisation culturelle au pays qui se préoccupe de questions de politique culturelle. Nous avons des membres de tous les coins du pays, des groupes linguistiques, culturels et de toutes les disciplines. Ce n'est pas la première fois que la CCA comparaît devant un comité parlementaire pour débattre d'un projet de loi perçu généralement comme portant atteinte à la liberté d'expression des artistes, créateurs et professionnels des arts et de la culture. Il semble en effet que cela soit un thème récurrent, quel que soit le parti au pouvoir.

(M.Pineau : In 1993, the government introduced)(anglais suit)

(Following French -- Mr. Pineau cont'g)

In 1993, the government introduced and passed with almost record speed child pornography legislation that many feared would erode artistic freedom and cause a chill in the cultural sector. The Deputy Prime Minister of the day, the Honourable Don Mazankowski, assured the cultural sector that the legislation would never be used against artists. The first person charged under this legislation was Eli Langer, a Toronto artist who was eventually vindicated of any offence.

In 2002, when revisions of the Criminal Code were introduced, similar fears developed in the cultural sector. Would unpublished manuscripts or other artworks become vulnerable to charges under the proposed legislation? Eli Langer was still fresh in the minds of artists in all disciplines and had shown if necessary that those who enforce the laws are not those who pass them. Now, after the current contentious amendment has been in the hopper for several years through different governments, we find ourselves back in somewhat familiar territory, addressing legislative proposals that risk subjecting the work of Canadian artists and producers to vague and discretionary guidelines, and there is potential for after-the-fact subjective judgment by politicians and public servants.

In the course of the reviewing Bill C-10, it is apparent that the intentions of the minister and her officials are consistent with a commitment of this government to greater accountability and transparency in dealing with the public purse. The CCA fully supports the government's objective in ensuring the prudent use of public funds for any purpose. The CCA also appreciates the open spirit that the minister and her officials have demonstrated in addressing concerns that have arisen about the overly broad nature of subsection 125.41.

However, as the Canadian Library Association has noted in its letter to you, real transparency could be better achieved if the legislation were to require regulations under the Statutory Instruments Act, rather than to propose a less transparent framework based on guidelines that can be changed at will overnight. While this may present another option for Parliament, the CCA cannot support any alternative that in the end delivers the same result. The governmental efforts may be seen by some as overkill, given the extensive provisions within the Criminal Code dealing with every variety of offensive behaviour and depictions. They may be in fact duplicate standards that have been adopted by the broadcast industry and other sectoral bodies and which

are found at various stages of the creation of audiovisual content. The CCA has been somewhat reassured that neither the minister nor her officials plan to rush to implement guidelines that have not been the subject of extensive consultation with creators, producers and distributors who may be affected by the guidelines.

However, the question remains for us: Are additional measures necessary and, if they are, what should they be? A simple reference to existing legislation may be all that is required and would keep the appropriate arm's-length relationship between politicians and bureaucrats on the one side, and the public funding of artists and cultural content on the other.

The CCA does not take any comfort either from the fact that provisions exist in several provincial programs similar to the proposed amendment to the Canadian film and video certification program. Quite frankly, the debate around Bill C-10 may have inadvertently broadened the debate to the provincial level where artists and producers may be encouraged to take up the challenge with their respective governments.

Some suggest that an overly broad amendment to the Income Tax Act could not withstand a Charter challenge. This would involve, however, a lengthy and expensive process that could lead to unnecessary expenditure on the part of a government concerned with the public purse. Perhaps the Senate committee could refer this subsection to the Supreme Court for an advance opinion prior to either passing Bill C-10 or, rather than delay the passing of this mammoth act, delay the proclamation of this particular subsection until such a ruling and eventually the draft guidelines are available for review and public comment. This approach could short-circuit what promises to be contentious and animated debate, not only in Parliament but in the boardrooms where producers, broadcasters and distributors make decisions regarding content every day. There is the fear of a chill, of second-guessing of responsible decision-makers and, most important, the fear of self-censorship. None of this is to be dealt with as paranoia when it comes to the issue of public funding of cultural expression.

In closing, I would ask you to keep the experience of Eli Langer in mind as you proceed with the examination of this legislation.

Mark Leiren-Young, Writer, Producer, Film Director, Representative of the Playwrights Guild of Canada on the Book and Periodical Council's Freedom of Expression Committee, Book and Periodical Council: The Book and Periodical

Council is the umbrella association for Canadians associations involved in the writing, editing, publishing, manufacturing, distributing, selling and lending of books and periodicals in Canada. Our member organizations represent approximately 6,000 individuals and 5,500 firms and institutions. The associate members of the BPC represent several thousand individuals firms and institutions.

Our Freedom of Expression Committee monitors censorship issues in Canada, organizes Freedom to Read Week and each year produces an information kit on issues of intellectual freedom. The BPC has a long history of working with the federal government to ensure freedom of expression in Canada. We are proud to work with all federal parties and feel that freedom of expression stands above politics.

I represent the Playwrights Guild of Canada on the Freedom of Expression Committee. I have been asked to represent them today as both a long-standing member and a writer of who has scripted over 100 hours of television. I recently finished writing, directing and producing my first feature film "The Green Chain."

I am here with Franklin Carter to express the BPC's concerns about the provisions in Bill C-10 that would allow the Department of Canadian Heritage to deny tax credits – which are provided as an incentive for employing Canadians on film and television productions if a film or television production – is determined to be contrary to public policy.

It is our belief that, if section 120.3 is enacted into law, it could discourage people from investing money in provocative films and television programs. More important, it could encourage film makers, producers and writers to censor themselves. At the BPC, we believe the phrase "contrary to public policy" is subjective and vague and, as such, is open to interference and abuse.

We wonder if this section, if enacted, could be used to deny tax credits to a television series like Trailer Park Boys because the characters drink, smoke and sell drugs. Could it be used to deny films like David Cronenberg's "Eastern Promises" because that contains graphic violence and nudity?

Perhaps of greater concern is that bankers and investors may wonder the same things and be reluctant to finance potentially controversial projects for fear that labour tax credits could be denied after a film or television production has been completed. If a film or television program has been already been funded through Telefilm Canada and/or the Canadian Television Fund, both of which have their regulations ensuring the

content is suitable for broadcast, does that not mean the project has received approval from the organization which represents Canadian public policy and which has the mandate, qualifications and context to review content?

Telefilm Canada's basic funding guidelines already state that, for any project to be eligible for funding, the project must not contain any elements of gratuitous violence; serious or gratuitous sexual exploitation; must not be obscene, indecent or pornographic within the meaning of the Criminal Code; or be libellous or in any other way unlawful. Telefilm Canada and the Canadian Television Fund both have rules in place to allow agencies to withdraw all funding for any projects that violate the Criminal Code and/or the Canadian Association of Broadcasters code of ethics.

We would also like to expression our concern that this controversial clause was never debated in the House of Commons nor candidly discussed with anyone in the film and industry. It was not discussed with the Canadian public.

If guidelines were to be established, who will be watching all the films and television programs to determine which ones are contrary to public policy? If the department is not planning to establish a system for viewing every film and television show, how will officials know which ones are "contrary to public policy?" Would there be any way for film and television producers to appeal the denial of tax credits? How would a system like that work?

If the government drafts guidelines for holding funds for withholding inappropriate films, will we would be seeing similar guidelines developed to threaten music, art installations and theatrical performances?

In 2007, the Department of Canadian Heritage revised the application guidelines for its book publishing industry development program to deny funds to publications that have "significant sexual content, excessive or gratuitous violence and similarly offensive material." The BPC worries that these guidelines are also subjective, vague and open to interference and abuse.

We would urge your committee to send the section 120.3 of Bill C-10 back to the House of Commons for debate. We hope our Members of Parliament will revise or remove section 120.3 of Bill C-10 and remove this threat to film and television production.

It is our belief that this legislation is unnecessary and potentially chilling to creative expression in Canada. The Canadian government's system for funding films and television shows should be designed to encourage artistic expression, not stifle it. We thank the Government of Canada for its ongoing support for the arts in Canada and respectfully suggest that section 120.3, as designed, runs counter to that tradition. Thank you for your time and attention to this important matter.

The Chair: Thank you, sir, for an interesting and relevant presentation. Are any other witnesses at the table offering a presentation? We will proceed to questions.

Senator Baker: I will first congratulate the witnesses. Each witness who presented made reference to the fact that, in our democracy in Canada, in the House of Commons, not one member of the elected members referenced this new law when speeches were given at second reading, at third reading, report stage or in the committee. None of the people affected by the legislation were asked to appear as witnesses, which is a part of our democracy parliamentary process. Not one of you were asked to appear.

It is an extraordinary event to see a bill passed in this manner. If this section ever goes to the courts – which it undoubtedly will – it will cause issue. Your organization intervenes in practically every case that has to do with matters such as this. I congratulate you for the marvellous work you have done. It is an extraordinary situation that no one Parliament knew that this was being passed and two political parties are asking for a second chance because they did not know what they were voting for.

Do you think, based on the principle that the NDP and the Bloc have admitted publicly they did not know what they were voting for, it should be returned to the House of Commons?

Mr. Leiren-Young: Absolutely.

Ms. Mendelsohn Aviv: For that and many other reasons it should be returned to the House of Commons.

Senator Baker: My final question relates to a subject which I brought up earlier. I was wondering why you would have a censorship board in the Department of Canadian Heritage regarding a certificate that is in the Income Tax Act and the regulations, over and above the provincial censorship boards like the Ontario Film

Review Board which you changed recently – the Theatres Act is out. Then, on top of that, our own federal laws exist. Why would this new bureaucracy be set up?

However, I brought up the fact that you cannot get a tax credit in Canada today – and you have not been able to for some time – if you produce pornography. That is in the regulations. I brought that up earlier and the chair and co-chair misunderstood what I was saying. I had to go and get the case law and present it a moment ago to prove the fact.

You have the three levels: Federal/penal regulations, the provincial censorship boards and you have now in the tax credit their own rules regarding minister saying pornography is the most important aspect and you cannot get a tax credit if you produce pornography. Now a new bureaucracy is being put into place.

Do you see the need for this when you already have the condition under the tax credit and in other jurisdictions as well?

Ms. Mendelsohn Aviv: I certainly would not want to step in on behalf of the government and say what the purpose is. However, I can see many dangers to that because the new provision is so incredibly broad.

Mr. Leiren-Young: When the minister spoke with you last week, there were only two films that would have fallen under this act in the last six years.

Senator Fox: There is none others before that. You can go back to the Confederation if you want.

Mr. Leiren-Young: Two films in six years hardly seems reason to prompt the creation of new censorship board.

Senator Baker: She emphasized pornography, which is already ineligible for the tax credit under existing law.

Senator Eyton: For the record, I repeat: These are not new provisions. They have been around in one form or another for about five years. Some public discussion and press releases related to these provisions, perhaps in a slightly different form, about three years ago. Beyond that, four provinces -- Prince Edward Island, Nova Scotia, Newfoundland and British Columbia -- have similar provisions.

We must not treat the issue as brand new. It has been blown up and earned much attention in the last little while but has been around for a long time. There is no

intention, I believe, on the part of the government to make dramatic change. It was simply doing what had not been done over a period of four or five years.

You must be aware of this history as well. You must have been aware of these provisions, perhaps in a different form, in the regulation and then following table legislation, were you not?

Mr. Leiren-Young: I think part of what may be making it more contentious now is that the labour tax credits are built so deeply into the funding for films. When you present a film budget to Telefilm, you have to incorporate these many labour tax credits. If you are incorporating something in and the best answer you can give is, probably I am eligible for this credit, that will scare off banks and other financial institutions. Perhaps that has made this more contentious at this time.

Senator Eyton: That was a supplementary question so I will come back later.

Ms. Mendelsohn Aviv: Despite the wonderful compliment we received about being involved in every intervention, we are not aware of every expression issue in Canada. The fact that these provisions in some form or another have been floating around and that they exist provincially, reminds me of what someone's grandmother said about two wrongs not making a right. This house has the opportunity to fix things or at least to send it back so we can try to make things right. That is what we are asking you to do.

Mr. Pineau: If I may, I will repeat what we said earlier. We know this has been around for a long time. Our organization is not equipped to sit through that to find that, no, we have not seen it before. I know there are many political undertones to the discussion around this everywhere. We do not care which government is bringing it forward. It would have been bad under the previous government and we would have appeared before the committee for the same reasons that we are here today. The issue at hand is unacceptable, whatever the political stripe of the government because it provides a huge weapon toward resolving a non-issue to begin with. We believe that there are all kinds of provisions upstream and downstream to complement that. Our information is such that if by any misfortune a granting issue, whether Telefilm or the CTF or other, provides money to a movie or television production that ended up being condemned under the Criminal Code, then there are provisions under the Code to deal with it. The Criminal Code, under Proceeds of Crime, has provisions to reclaim the money and to reclaim the investment made in the movie in the first place. We do not

need that kind of second guessing, which opens up a terrible prospect for freedom of expression.

Senator Baker: In recognition of the bill that we are considering, in the explanatory notes, it says that references given to November 14, 2003, to the simplification and better target the tax incentives for certified Canadian films. That is the only reference made. You can go back to that and find that it was a suggested revision circulated to the film industry at the time that had nothing to do with legislation.

My final question is: Is it not true that your funding for the minister's certificate, which you need to claim your tax credit, is given at the end of the process. You send in your income tax return and on that there are two conditions under the law: that you are a Canadian production and that the minister has verified your approximate expenditures of production. Is that correct?

By the very law we have under the heritage minister's authority, this is all done at the end -- after the entire production has been completed and you are claiming your credit. Is that correct?

Mr. Leiren-Young: Yes. For many independent producers, that is the first time they see a paycheque because they have to finance based on bank loans. I have worked with people who have waited two or three years to see that paycheque from the tax credit, which is the final element in their financing.

Ms. Mendelsohn Aviv: I am not an expert on the financing side of the industry but I have understood that there is a potential prior approval process as well. We are concerned about the possibility that the minister would be able to revoke funding after the film and commitments are made. That is why I want to remind the committee that we think it is necessary for the minister to not have that discretion. Instead, it should be in the hands of a court based on an application to make that decision. We would not fine someone \$100,000 without the matter going to court so how could we possibly take away this kind of money without it going to court?

Senator Tkachuk: Mr. Leiren-Young, the labour tax credit is not part of Bill C-10. That is for foreign films and we are talking about Canadian films and video productions, which are part of Bill C-10. I want that to be clear.

A question was asked about the fact that this provision was instituted and proposed in 2003. There was a press release by the director of communications of the Canadian Film and Television Production Association on the announcement. The press release says that producers across the country are thrilled with the announcement made today in Ottawa that will increase the labour-based tax credit in the Canadian film and television production industry. After almost three years of complex negotiations, the Department of Finance and the Department of Canadian Heritage unveiled draft amendments to the Canadian Film or Video Production Tax Credit, which affects Canadian content. I could make a copy and leave it with you in case you do not have it.

There was a lot of consultation, when this original proposal was brought forward in 2003, with the production industry, and there has been no change to the legislation. Therefore, what has changed?

Franklin Carter, Book Editor, Researcher, Representative of the Book and Periodical Council's Freedom of Expression Committee, Book and Periodical Council: The Book and Periodical Council learned about this only in February. Our organization deals chiefly with books and periodicals. Film is a little outside our mandate. Some of our organizations, such as the Playwrights Guild of Canada, of which Mr. Leiren-Young is a member, are potentially affected by this. We would be interested in seeing that document, if you can provide it to us.

Senator Tkachuk: It is right here. I will make copies of the press release. You can phone the Canadian Film and Television Production Association about this.

Mr. Carter: For the record, that organization is not part of the Book and Periodical Council. This is the first I have heard of it.

Senator Tkachuk: I want to clarify the information. It was you people who said that there was no consultation. I am saying there had to be some consultation because they had a press release from 2003 that talked about the complex negotiations and consultation on the issue. All of you are either talking about guidelines or not talking about guidelines. I am confused here. Do you say there should be no guidelines at all and that this particular public interest provision should be removed, or should it stay but it should be governed differently? In other words, the minister should not be responsible; someone else should be responsible?

Mr. Carter: I think the guidelines probably kick in earlier when filmmakers apply for financial assistance from an organization like Telefilm Canada. Is that not true? Do they not have guidelines?

Mr. Leiren-Young: Yes, they do.

The Chair: This is the case of a chairman's delight. All five red lights went on. We will hear from Mr. Kelly first and see how it goes.

Keith Kelly, Senior Policy Advisor, Canadian Conference of the Arts: The consultations were extensive leading to the 2003 announcement, which is absolutely true. The object of the consultations was how to liberalize the criteria of the program to make it easier for film producers to receive certification for their projects. I am sure all of the attention was focused on those measures to liberalize the approach to the certification process.

Bill C-10 is a compelling read for about a page and a half. I certainly sympathize with those parliamentarians who either did not feel they had to read every word or whose eyes could stay open long enough to read every word.

Once we focused in on that phrase, "contrary to public policy", for the arts community it was an unpleasant reminder of some of the paths that we have been down. Mr. Pineau mentioned the *Eli Langer* case and further revisions to the Criminal Code in 2003 around child pornography. That dealt with undistributed and unpublished manuscripts and drawings.

I think the consultations leading to that 2003 announcement were mainly with the film industry itself. Their principle preoccupation was to liberalize the provisions of the program to give them access to the capital they needed to produce films in an environment that is now very expensive to produce film. The Canadian Film and Television Production Association are here tomorrow. I think they will be able to speak to that far more effectively than we can.

The Chair: By their own omission, they have been involved in discussions and they have issued their own press release. Mr. Pineau, your light was next.

Mr. Pineau: I am at a disadvantage because I was not around in my current job in 2003. However, I would be extremely surprised if the people who wrote this were supporting their amendment. As my colleague said, they were supporting and

rejoicing at the broadening of the system and probably did not see the devil in the details.

Ms. Mendelsohn Aviv: I wish to answer your second question about guidelines, because I certainly addressed it in my submissions. It is our position that if a statute will allow the government to suppress one of our basic freedoms, it needs to do it as little and as clearly as possible so that we all know where we stand. Regulations and guidelines have a different role. Their role is to tell us which forms to submit and within how many days, and so on. However, our elected representatives are those who should be setting out the general principals for government and for the Canadian public; that is, what they can and cannot do.

If the minister keeps talking about this loophole because of Criminal Code violations to which she must give tax credits, then why can the act not say that? It is neither detailed nor complicated. Neither is it a cumbersome form that we are asking to put into the statute. It is that little phrase that she brought into this committee. That is the role of a statute and that is the role of our elected representatives.

If the bill goes through as is, contrary to public policy, this could include any number of violations of freedom of expression. For example, let us say a group -- and, this is coming down the line soon -- wants to protest the G8 or globalism before the Olympics. That is likely to happen. Let us say they want to produce a film in the lead-up to it. Let us say the government is concerned about the protests that will be happening at the Olympics. Those are all possible scenarios that we will be witness to in a couple of years. Could the government say, "We are concerned about these protests. We are trying to have a peaceful Olympics. We do not want a repeat of what is happening with the torch ceremony in China right now. It is against public policy. We want the Canadian Olympic Games to go smoothly. That is good for industry and for the Canadian image." "Contrary to public policy" could include that scenario as well. Surely, it is not up to government to pick and choose which things it finds to be contrary to public policy.

Our statute should state very clearly what things are excluded and what things are not -- not guidelines.

Mr. Leiren-Young: I think the scope of these hearings is showing just how much concern there is over a vague guideline like Canadian public policy. Over 38,000 people have joined a Facebook group to protest this. It was 38,250 when I checked it

this morning. Looking at how broadly people draw this, one of the films that was mentioned earlier was a reference to the necrophilia film, *Kissed*. In 1996, that was nominated for the Genie award for best picture. It played around the world. I do not think there is any film festival or country in the world where that film was declared pornographic. Yet, it is clear some people think that is one of the films that should be in the tax credits.

Senator Tkachuk: Is it possible in Canada for people to express their opinion without a film subsidy or a tax credit? Is it possible for the cultural community to do that or is that impossible?

Ms. Mendelsohn Aviv: Absolutely. However, in this situation, Parliament has decided to give this tax credit. It is a blanket benefit. It should not now be able to select out those that it does not like unless there are clear, fair and non-arbitrary criteria that are as limited as they need to be.

Senator Tkachuk: I want to get to that. Previous to 2005, this particular provision was in the guidelines. We made all the films you were talking about when this provision was a regulation. It was a regulation with the same force to decide or not decide as is contained in this bill. However, we never had any of those apocalyptic disasters taking place previous to 2005.

It is obvious that you supported it because you worked under that provision all those years. Perhaps the government should take this provision that it had before 2005 and put it back into the regulations. We would be at a status quo, but there would be no change from what is now in the act. Is that what we can work under? It seems that is what you all worked under for all those years.

Ms. Mendelsohn Aviv: I am not a filmmaker. I am from a civil liberties association. I have neither worked under it nor do I support it. This is my first awareness of it. I am taking the opportunity to ask you good people to send it back to the House so that they can fix it and make it better.

Senator Tkachuk: It was here for a long time before the lights went on.

The Chair: It seems there is an important role for the Senate to play here.

Senator Tkachuk: Obviously, there is, because we are having a great debate here that is very interesting. Thank you.

The Chair: I have noticed the time. There are no other committees sitting, so I will go through the list if everyone can stay with us. Senator Ringuette, you are next. I believe the sponsor of the bill would like to ask questions, though.

Senator Tkachuk: I am not leaving because I do not find this interesting, because I do. However, we have our other committee and we are considering a report. It is important for us to be there.

The Chair: I understand that. Did the proud sponsor of the bill want to ask any questions before leaving? I think Senator Ringuette would cede the floor to you.

Senator Eyton: I wanted to pick up on the consultation. The minister offered to meet with the industry and the general public to try to settle the guidelines. Would you be part of that as well? I am curious as to how you would see the process of consulting with the industry and others about appropriate guidelines. If that opportunity were there, would you take advantage of it?

Mr. Kelly: We definitely would, but only to make the points we are raising today. It is certainly not a capitulation. We would want to find out what has been the motivation in this subsection. Why has it moved from a regulation to a guideline? How will those guidelines be interpreted? We would be happy to engage in that consultation process, but with a more skeptical approach than, yes, we will go along with anything you can come up with.

Mr. Pineau: For all the reasons that have been explained, we oppose guidelines after the fact. We believe guidelines are appropriate when you apply for granting money. After that, it becomes arbitrary. They can be changed overnight according to considerations that have nothing to do with the purpose at hand and that can hinder creativity and cultural expression.

It is unfortunately the mandate of artists to push the envelope. They are often running against the major trends of society. Many of the artworks that are now recognized as masterpieces in whatever genre would initially have been killed by this sort of process.

Senator Eyton: That really was not the question. If there was consultation, would you be there? The other part of that question was, how would you visualize that consultation? How broadly would you see it with the Canadian public in general? It is Canadian tax dollars that are being provided to fund the productions.

Mr. Kelly: It would be very difficult for a member of the Canadian public to responsibly address the criteria behind the financing of film and video certification. It is very complex, as you will find out tomorrow.

Senator Eyton: The Canadian taxpayer has some stake in that. Do you not have interest when these are partly your dollars and you want to see them spent responsibly?

Mr. Kelly: Those dollars are defended through the Auditor General and through regular audits of all of these agencies.

Senator Eyton: I was not talking about process. I was talking about a judgment.

Mr. Kelly: You are talking about defence of the use of Canadian taxpayers' dollars. We already have enough security in the Office of the Auditor General and in the other instruments at Treasury Board, the management accountability framework. I do not think we need another test of efficiency. We also have a new parliamentary budget officer.

Senator Eyton: I would assume that was process. I was looking for some real involvement such as you would take for yourself.

Mr. Pineau: We do not think there is room or need for a Star Chamber of people with their own particular opinions at that time. The processes are in place.

Senator Eyton: You will try to restrict it to the industry and perhaps a few others?

Mr. Pineau: No. We are dead set against guidelines to begin with. You can consult everybody until the cows come home.

Senator Eyton: I got that point.

The Chair: We need a cooperative effort here. I want all the senators to be heard.

Senator Ringuette: You have indicated, Mr. Pineau, that you wish that the Senate committee could refer this subsection to the Supreme Court. I wish we could. Unfortunately, we do not have that power. The only entity that can refer a question to the Supreme Court of Canada is the Government of Canada, i.e., the Prime Minister. Therefore, we are out of luck there.

I enjoyed the questions from my colleague Senator Eyton in regard to consultation. I have some historical facts for you.

This committee received Bill C-10 in December. At the end of January, the first week of February, this issue hit the papers. The members of this committee were very interested because this bill is in front of our committee on another issue, the question of foreign trusts. All of a sudden, there is this issue. We started to get emails. I got over 5,000 emails. This is quite an issue of public interest.

On March 6, before the Easter break and before the committee resumed its current hearings on this issue, as a member of this committee I was called for a briefing by the department and the officials of the ministers involved. I was told on March 6 that the industry for the last two weeks had been in discussion with the minister and the department, and the issue would probably be resolved by the time this committee resumed its hearings.

Last week, April 2, the minister comes before our committee and says, "I welcome everyone. I want to consult for the next year."

Since the beginning of February, particularly March 6 and then April 2, have any of you been consulted? Have none of you have been consulted yet, even though the members of this committee have been told that the industry was being consulted over a month ago?

(French follows -- **M. Pineau** : Je vous dirai cependant)

(après anglais)

M. Pineau : Je vous dirai cependant que certains de nos membres qui vont comparaître ici ont été consultés et ils sont plus directement concernés par le sujet.

Le sénateur Ringuette : Donc vous êtes conscient qu'il y a certains membres plus concernés.

M. Pineau : Nous ne l'avons pas été mais certains de nos membres sont directement concernés.

Le sénateur Ringuette : Je me posais la question parce que le sénateur Eyton semblait vous dire que vous ne vouliez pas être consultés.

Le président : Il ne s'agit pas de l'industrie. Nous recevrons les gens de l'industrie demain.

M. Pineau : Non. Notre position, comme je vous l'ai dit, et je ne prendrai pas plus de temps, c'est qu'on n'a pas besoin de ces lignes directrices.

Le sénateur Ringuette : Avec les témoins précédents, j'ai indiqué une définition qui selon moi serait très réaliste et qui devrait être dans les statuts de façon claire et nette concernant les items qui ne donneraient pas droit au crédit de taxe et puis je cite.

(Sén. Ringuette : Hate propaganda, obscene or child pornography)(anglais suit)

(Following French -- Sen. Ringuette cont'g)

Hate propaganda, obscene or child pornography or any other illegal material as defined in the Criminal Code; would that be satisfactory and definitive for all of you?

Mr. Kelly: Two Sundays ago, I went through section 5 of the Criminal Code. I cannot envision an activity that would be deemed offensive that is not listed in there.

Senator Meighen: You should come to the House of Commons.

Mr. Kelly: There is even a provision for lewd theatrical productions. I would say that such an approach would be pretty comprehensive and it would avoid the second-guessing by a mysterious tier of decision-makers.

Senator Ringuette: You are a policy adviser to the umbrella organization for all the arts industry in Canada, Mr. Kelly. You would agree that this would put an end to all of this and provide clarity. Mr. Pineau, it would comply with the Supreme Court.

Ms. Mendelsohn Aviv: We do not seek that kind of provision, but we can understand why the government may want to institute it. We are also no great supporters of some of the provisions in the Criminal Code, but we could understand their application in a tax credit regime.

(French follows-Senator Fox: Je dois dire que j'ai été très impressionné par...)

(après anglais)

Le sénateur Fox : Je dois dire que j'ai été très impressionné par vos présentations respectives. Cela me réconforte beaucoup de penser que vous avez ces positions qui, en plusieurs points, sont conformes à mes propres instincts concernant ce secteur.

Je dois dire que j'ai été également impressionné par un article du professeur Pierre Trudel, de l'université de Montréal, qui parlait, à propos du projet de loi C-10, d'une violation injustifiée de la liberté d'expression. Il en fait l'analyse pour conclure qu'un texte de loi permettrait d'indiquer, je le cite, « ce qu'il faut entendre par la notion d'ordre public avec le mécanisme joint, ce mécanisme constitue de la censure ».

La ministre nous a répondu, et je pense que M. Trudel a vu cette réponse disant que ce n'était pas de la censure car, si on vous refuse l'accès à des fonds publics, en vertu des programmes de Téléfilm ou des programmes de crédit d'impôt, qui sont deux programmes différents – et il n'est pas vrai que si vous allez à l'un vous allez nécessairement à l'autre – personne ne vous empêche de produire un film au Canada avec vos propres fonds.

J'aimerais connaître votre propre réaction à la réponse de la ministre; M. Trudel pour sa part dit que c'est comme prétendre que le refus de servir les gens d'une minorité visible au restaurant n'est pas une violation du droit à l'égalité puisque ceux-ci peuvent toujours aller manger ailleurs. Personnellement, la réponse de la ministre m'offusque, je pense que M. Trudel a parfaitement raison.

Est-ce que vous réagissez différemment à la réponse de la ministre, disant que ce n'est pas de la censure si les gens n'ont pas droit à des fonds publics et qu'ils n'ont qu'à aller se faire servir à un autre restaurant?

(Mr. Leiren-Young : Part of the concern about censorship is that...)

(anglais suit)

(Following French)

Mr. Leiren-Young: Part of the concern about censorship is that what you have created is a climate where producers, writers and artists will have to censure themselves for fear they will not be eligible for the tax credit. What will happen is if you cannot guarantee that this very stable piece of funding is viable for you, you have to go to bank and say, "Well, I am probably okay with this stuff. I am probably okay making *Eastern Promises*, I am probably okay making *Kissed*," and I am assuming that banks are not really fond of hearing "probably." Since they are not fond of hearing "probably," if you are a Canadian producer, you will be afraid to present *Eastern Promises* to Telefilm if you cannot line up that last bit of your funding. You will be afraid to take *Kissed* to the bank because you cannot guarantee you will get that last bit of funding.

Telefilm requires you to have that tax credit built into your structure now, and you are now saying anything with controversial material has to be funded outside the system because you are afraid that you will be ineligible for these funds. That is the fear. That is where you get the censorship.

Ms. Mendelsohn Aviv: My friend here has mentioned the chilling effect on artists and I would add the following about freedom of expression: First, freedom of expression is promoted through support of the arts, second, the government has chosen to create a public arena for expression by supporting the film industry and they have conferred a blanket benefit. Once they have done that, for them to be able to pick out in an arbitrary fashion which films they do not like, I certainly see that as a freedom-of-expression issue and it is unthinkable that they should be allowed to do so.

(French follows-Senator Fox: Ma deuxième question porte sur les éléments...)

(après anglais)

Le sénateur Fox : Ma deuxième question porte sur les éléments subjectifs. Quand on a un système de crédit d'impôt où il y a des éléments objectifs, il peut être, il est vrai, difficile de décider si un scénario a été, oui ou non, écrit par un Canadien mais on finit par trouver une réponse objective à cette question.

Quand on entre dans le domaine des éléments subjectifs, vous avez répondu en disant que ce n'est sûrement pas un groupe de fonctionnaires, de quelque ministère que ce soit, qui devrait décider en fonction de l'élément subjectif, dicté par des lignes directrices qui peuvent être changées d'un jour à l'autre par un ministre, mais que cela devrait être traité par un organisme extérieur.

Si vous dites que les critères d'exclusion, à défaut d'un meilleur mot, devraient être libellés d'avance et refléter des éléments du Code criminel, qui devrait décider si effectivement il y a transgression de ces éléments du Code criminel par le film en question? Est-ce que c'est encore le groupe de fonctionnaires ou est-ce que, dans votre esprit, une fois les critères entrés dans les lignes directrices, c'est un regroupement extérieur, comme un tribunal. Les tribunaux de droits communs sont habitués à décider si un acte criminel a été commis ou non. Je ne connais pas un fonctionnaire, si futé qu'il fut, qui puisse décider si, oui ou non, un acte criminel a été commis; ce n'est pas son rôle, ce n'est pas son travail.

Est-ce que vous dites, même si c'est libellé d'avance, que cela devrait être jugé par une compétence extérieure?

Le président : Vous avez posé la question et vous y avez répondu aussi.

(Mr. Leiren-Young : If I understood that correctly, it is not up to the attorney general ...)

(anglais suit)

(Following French)

Mr. Leiren-Young: If I understood that correctly, is it not up to the Attorney General to decide who has violated the Criminal Code?

Senator Fox: Under this provision it will be a group of bureaucrats from the Department of Justice and the Department of Heritage to decide whether or not there is transgression of the so-called directive. We dealt with that in your initial.

Mr. Leiren-Young: I would assume if something violated the Criminal Code that the Minister of Heritage would refer the project to the --

Senator Fox: My question is that now you have gone to the extent of saying the criteria should be established in advance, who decides whether or not that criteria has been met? If you say anything that is in the Criminal Code this film ought not to be financed or funded under the tax credit, if there is something in it that transgresses the Criminal Code who decides that? Do the bureaucrats decide that or do I come back to what Ms. Mendelsohn Aviv was saying before, that it has to be an outside, external body competent to deal with this kind of issue?

Ms. Mendelsohn Aviv: Just to clarify, the position I took is not just any outside body but a court.

Senator Fox: Do you still maintain that position?

Ms. Mendelsohn Aviv: Certainly in the event of revocation I would say that it would have to be a court to which a minister would have to apply. Not that they must prosecute anyone under the Criminal Code, but the film itself; the court should find and the minister should have to prove that the material would have led to a criminal conviction. In the absence of that you do not take a hundred or so thousand dollars out of someone's pocket.

Senator Fox: Since the beginning of the tax credit system we are told there are only two films -- since the beginning of Confederation, I suppose -- that would have transgressed these elements.

A lot of this came out -- we are told when we read all sorts of newspapers -- of the Bernardo case, that it was at the origin of all this kerfuffle. Anyone who has been to law school had been told time and time again that hard cases make bad law. Is this a case where a hard case makes bad law? Is there not another way of dealing with the

Bernardo excess? If Bernardo were to make money out of a book or make money out of a film that received tax credits, is there a way under the provisions of proceeds of crime for any government to recoup?

Instead of going the censorship way, and this is clearly censorship, they could go the other way; would you share that point of view?

Mr. Leiren-Young: Earlier people were talking about funding a film about the Montreal massacre. There have been a couple of amazing films about September 11, there was an incredible film about the United flight that went down, so do you make all those films go away, are you not allowed to touch current history? I am sure that anyone making a film about the Montreal massacre is doing it because they want to explore an important social issue and they want to get at the heart of how those things happen, not to exploit it.

Ms. Mendelsohn Aviv: Regardless of what the alternatives are, it does not justify what is being presented here.

Senator Fox: What I am saying is that if indeed you can get at the Bernardo type of case through the proceeds of crime, then I do not have to worry about it under this provision. I will not need this provision at all. It is dealt with somewhere, in the same way many other elements of concern are dealt with and contained in the Criminal Code, which becomes a test applied by a court that is used to dealing with this type of issue and not by bureaucrats who have never dealt with these issues previously. We will be changing things over a period of time, since we have two cases every 100 years that do not meet these tests and therefore are dealt with only once in a person's career.

It would be much better to have it dealt with by an outside court and let a court decide whether or not this is pornographic, hateful or an exploitation of sex, youth and all of that. That is the point I am making by raising this.

I come back to the fact that hard cases make bad law. The whole legislation falls around the fact that Paul Bernardo could have made a film and made some money. Look at the alternatives of getting back at Bernardo. You do not have to affect the whole film industry because Bernardo could have made some money. You hit Bernardo in another way. Would you agree?

Senator Meighen: I do not think they will say "no."

I have a question for my own benefit because, unfortunately, I did not have the benefit of hearing the previous witnesses. You are the first I have heard from with regard to this matter.

I want to circumscribe the debate in my mind, if I can. Other than the fact that we are dealing with guidelines rather than regulations, what is different from the situation that existed from 2003 on?

Mr. Kelly: The move of the regulation to the guideline.

Senator Meighen: That is the only difference I have heard. Can you tell me what else has changed? Of course, you can have a debate as to whether this is a civil rights time bomb, as I think Ms. Mendelsohn Aviv described it, probably quite rightly, that has been sitting there since whenever.

You tell me that would be an interesting debate, but what has changed other than guidelines instead of regulations?

Mr. Leiren-Young: My guess is that this slid by the artists the same way it slid by Parliament and everyone else.

Senator Meighen: I am not trying to point fingers about why we did not discover this earlier.

Mr. Leiren-Young: No. I think the 2003 regulations came out the same way.

Senator Meighen: You have been working happily since 2003 with no problems. There are many films or books that have not been destroyed and grants have not been cut. The only change I have heard is that we are now dealing with a guideline, which some people have argued -- maybe correctly -- is more loosey-goosey and may be changed more easily than a regulation.

I want to make sure that the sky did not fall in 2003. You are now saying it may fall in 2007, and one reason for that is that we are dealing with a guideline and not regulation?

Mr. Leiren-Young: One reason it may fall is because by red-flagging this, people are now aware of the instability. This has now raised a red flag for bankers and producers.

Senator Meighen: Still, it is not a heck of a change from the situation that has survived without undue problems since 2003, is it?

Ms. Mendelsohn Aviv: I have two thoughts on this. The first is that my research team, who is very good but very small, did not uncover any regulations that set out this kind of restriction. There was only a regulation that restricted pornography, and the two cases talked about from the last six years would in any case have been covered under that regulation.

To the best of my knowledge, and I hope I am not wrong, there were no regulations. This whole thing is a change. There was a proposal for these kinds of regulations and perhaps a discussion paper. I am not even sure there was a bill because we looked long and hard for that bill when it was mentioned by the minister.

Therefore, it is an enormous change to bring this in and say that things like excessive violence and gratuitous sex and offensive material would not be eligible for tax credits, and things that contravene the public policy would not be eligible for tax credits either. It is all a change. Even if it were not, let us fix it.

Senator Meighen: I was not arguing that. Your evidence is that the press communiqué that Senator Tkachuk was referring to was not referring to any legislation but merely to discussions?

Senator Baker: If I can clear this matter up by going to the explanatory notes of the bill from November 14, 2003.

The Chair: You have read them out already. We heard them previously. The record will show that.

There is a lot of misinformation. In any event, I will give the last word to Mr. Kelly because two or three times his microphone light has been flashing, and then we will wrap up.

Mr. Kelly: What has changed I think is that as a result of this discussion, we are now seeing a process, which was never visible before, beginning to be articulated by the minister and her officials. There will be a panel of some sort that will make decisions about productions that are consistent with public policy or contrary to public policy.

I think that level of detail was never made available previously, and I think that is what has changed. We now know that this is a very contentious provision, and we know that the minister is proposing ways to apply it. If they went on before, I have been in the business for 30 years and I have never heard of it.

I think the biggest change is that the discussions and debate have fleshed out how this provision will be implemented, and that has caused a lot of concern in many quarters.

Senator Banks: I want to ensure I understand what the witnesses would prefer.

You have said that you would prefer that the process was one that is, in effect, retroactive but that would have to be determined by a court. Is that the view of everyone or does everyone think this should somehow be done in front rather than retroactive? You see it when the production is complete. Here it is, here is what I did, and that is the point you were talking about, that you would have to prove in a court that this completed film would, if it prosecuted, contravene the Criminal Code.

We heard earlier suggestions that perhaps something could be put out by way of guidelines or regulations in front so that producers would know -- and these would be subject to change from government to government -- that if they meet these qualifications or fail to be caught by these regulations or guidelines, then they will be eligible for the tax credit. Which of those would you recommend or prefer?

Ms. Mendelsohn Aviv: I apologize if I have misled you. I certainly do not prefer revocation. I was addressing something in the bill already. I said that if they will be in a position to revoke tax credits, then it has to go to a court. However, that is certainly not preferable.

The fact that there would be guidelines -- which I do not think is the place for them. I think they should be in the statute itself. The fact that there could be a statute or guideline that sets out which films do not get a tax credit, whether it is applied before or after, is a very general abstract kind of category.

The big question for the industry and for the artist will be how those guidelines or statutory language and definitions would be applied in my specific case. You need both in as clear as possible language that limits expression as little as possible, and you need a very strict regime about how to apply those definitions.

Senator Banks: Someone will have to make an arbitrary determination, as they do now. When you apply to Telefilm for funding, there is this many applications and this much money. Someone makes an arbitrary decision based on you do not know what and you do not know who. There are already arbitrary decisions being made in terms of who gets the money, and they do not apply to the tax credit.

Is it possible to devise a set of criteria in front that will give the kind of assurances that you can take to the bank? Is that possible to do?

Mr. Leiren-Young: The Telefilm credits are not arbitrary. They are decided by people who are dealing with the content and context of films all the time.

Senator Banks: Everyone who meets the qualifications does not always get the money.

Mr. Leiren-Young: Absolutely not, but they are being judged --

Senator Banks: On what?

Mr. Leiren-Young: You would need Telefilm here to answer that one.

Senator Banks: My point is that arbitrary choices are made. That is the nature of it. I want to know whether you think it is possible that there is a sieve in front through which a producer can tell a bank that he or she is eligible for the tax credit. Is there such a thing?

Mr. Leiren-Young: That is currently set up based on Canadian content.

Senator Banks: A set of criteria can be made that will satisfy that?

Mr. Leiren-Young: Yes, that is currently in place.

Ms. Mendelsohn Aviv: With the exception on the regulation on pornography, I understand that there are currently no criteria that deal with the content of film, and that is a very difficult thing to judge. Telefilm may give grants, but the tax credit is applied as a blanket benefit, and there is a huge difference between that scenario and this one. No one today need question whether the content of their film, other than the Canadian aspect of it, will qualify. If you make a film and employ enough Canadians, et cetera, you qualify for the tax credit.

Senator Banks: Unless you are making this kind of film?

Ms. Mendelsohn Aviv: Unless you are making pornography.

Senator Banks: Or a news program or a talk show.

Ms. Mendelsohn Aviv: That is correct.

Senator Banks: So definitions do exist.

Senator Meighen: What if you make a film that violates the Criminal Code?

Ms. Mendelsohn Aviv: To my understanding, today you would still be eligible for the credit, which is why we have said that, though we are not seeking this, we understand why the government would want to close that loophole, as the minister put it.

The Chair: We have had a very good discussion. This committee is providing a forum for the airing of this debate.

We will be meeting again tomorrow at 10:45. We have so many witnesses that we will be in the much larger Room 160S across the street in Centre Block.

There is clearly still much confusion, which is not uncommon when you have a debate on moral and philosophical issues like this. Let one thing be clear: We were well briefed when we started these hearings. The steering committee was told that at the time of the *Bernardo* case, Minister Copps said that we needed a tool to ensure that government money was not given to horrendous film projects. That was a subjective judgment made at that time. Regulations were drafted. I believe that the enabling legislation was the Income Tax Act.

When the great civil-liberty-minded Irwin Cotler got wind of this a couple of years later, he said that this should not be resolved by regulation, that this was too serious and important to the fabric of our Canadian morality, culture and society. He said that it needed to be enshrined in a bill, and this bill was produced. That bill was reproduced and we have it here now and are giving it sober second thought, and I suggest to you that the process is working.

That is the genesis of this bill. All guidelines are subjective. Senator Banks posed the rhetorical question we are all asking: How can we develop a set of guidelines that work, are fair, do not violate liberties and become cherished principles in this society?

This is what the minister has offered. He has asked for tools but said he will not use them until we have a mutual understanding of what will work. That is where we left off last week after hearing from the minister.

Your input today is very useful. Many officials and people from the minister's office are here listening, as are we all. Thank you very much for coming.

The committee adjourned.