Submission on Bill C-36

Anti-terrorism Act

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CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by a working group of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The working group consisted of members of the National Aboriginal Law Section, National Air and Space Law Section, National Business Law Section, National Charities and Not-for-Profit Law Section, National Citizenship and Immigration Law Section, National Civil Litigation Section, National Constitutional and Human Rights Law Section, National Criminal Justice Section, National Environmental Law Section, National Insurance Law Section, National Intellectual Property Law Section, National International Law Section, National Media and Communications Law Section and the Racial Equality Implementation Committee. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the National Board of Directors as a public statement of the Canadian Bar Association.

Submission on Bill C-36
Anti-terrorism Act

EXECUTIVE SUMMARY

The Canadian Bar Association (CBA) has analysed Bill C-36 in the context of three overarching themes: the rule of law; the primacy of the *Charter of Rights and Freedoms*; and the current legal framework, both domestic and international.

The government must strike delicate balances between collective security and individual liberties. The *Charter* requires governments to demonstrate that limitations on guaranteed rights and freedoms are necessary and properly tailored to provide minimum impairment of those rights and freedoms.

The government currently has many legal tools to combat terrorist threats, under the *Criminal Code*, the *Immigration Act* and other statutes. Creating additional offences without adequate funding may create a false sense of security. The government should make a concerted commitment to adequate funding for law enforcement agencies, intelligence gathering agencies and the military so that the tools already available to them can be used fully.

i) Sunset Provision

The Bill creates extraordinary and wide-ranging powers. The necessary accompaniment to quick passage of such exceptional measures is a sunset clause. When governments seek to impose such restraints on fundamental rights and freedoms, particularly with limited time available for study and debate, those restraints must be limited in duration. The review mechanism provided in the Bill is insufficient and a true sunset provision is required. To the extent that provisions of the Bill subject to a sunset clause may implement treaty obligations not already

implemented, there is no reason in domestic or international law that the extraordinary provisions in the Bill cannot be time limited.

ii) Definition of Terrorist Activity

Defining terrorism is not a simple task. Our courts have consistently refused to define the term. The definition of "terrorist activity" will determine, more than anything else, whether the Bill strikes the proper balance. Given the broad powers contained in this Bill, it is imperative that the definition be drafted as precisely as possible. The proposed definition is too inclusive and unwieldy. It could catch activity that is not terrorist conduct, such as wildcat strikes or public demonstrations. We are also concerned about the potential for discriminatory impact.

iii) Terrorism Offences

The provisions allowing for a list of government-nominated terrorist entities contain insufficient procedural protections. Several of the terrorism offences are defined too broadly. The sections which prohibit financing of terrorism could curtail fundraising on behalf of groups fighting for the victims of oppressive regimes. The sections which prohibit facilitation of terrorism could capture people who have no criminal intent. Criminal intent should be required given the significant penalties associated with these offences. The offences of participating in or contributing to terrorism could include lawyers defending individuals accused of terrorist offences. The requirement that sentences for terrorism offences be served consecutively could result in grossly disproportionate sentences being imposed.

iv) Terrorist Property

The provisions concerning disclosure of information about terrorist property offend the right of clients to the confidentiality and non-disclosure of

communications with their legal counsel. That confidentiality and privilege are necessary for the proper functioning of our legal system. An exception should be made not only for solicitor-client privileged information, but for information lawyers are bound to hold confidential. The sections that prohibit dealing with terrorist property could apply to lawyers' professional fees and thus inhibit a person from obtaining counsel when they are subject to proceedings under the Bill. An exception should be made to exempt the payment of bail or of lawyers' fees from the provisions regarding the financing of terrorist activities. Several technical amendments should also be made to protect the interests of financial institutions and other persons who may be in possession of property belonging to entities found to be terrorist.

v) Proceeds of Crime (Money Laundering)

The Bill would require a person in charge of a conveyance to report the import or export of currency or monetary instruments, in certain prescribed circumstances. This adds an unwarranted level of responsibility to the person in charge of the conveyance, to be responsible for what passengers are carrying. The Bill may require charitable donations to be reported to the newly created Financial Transaction and Reports Analysis Centre of Canada (FINTRAC)[1], which would be problematic and cumbersome. Further, the Bill would unreasonably expand the government's power to disclose information to intelligence gathering agencies.

vi) Investigative Techniques

The preventive arrest procedure is a departure from what has been considered acceptable in Canada. A police officer exercising this power should have reasonable grounds to believe that terrorist activity is imminent. The provisions do contain a number of checks and balances. However, we remain concerned over its possible discriminatory application.

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[1] Individuals and businesses identified in the *Proceeds of Crime (Money Laundering) Act* and its Regulations will be required to report suspicious transactions to FINTRAC as of November 8, 2001.

The investigative hearing provisions limit the traditional right to silence. In addition, they bring the judiciary uncomfortably close to the police investigative activities. There are several safeguards in the investigative hearing provisions, although we recommend that they be amended to take better account of solicitor-client confidentiality and privilege, the right against self-incrimination and the special relationship between journalists and their sources. Proposed changes to the rules concerning admission of national security information could threaten the right to a fair trial.

vii) Racial and Religious Intolerance

The CBA endorses the proposed amendments to clarify that the *Canadian Human Rights Act* covers hate speech on the internet. It also supports amendments to the *Criminal Code* allowing the deletion of hate speech from an internet site and providing for an offence of mischief against religious property motivated by religious or racial prejudice. In our view, these provisions need not be subject to the sunset provision recommended for the rest of the Bill.

viii) Privacy

The CBA opposes the Attorney General's proposed power, by an unpublished certificate, to exclude the application of access to information and privacy legislation in the interest of protecting "international relations"and national security. This blanket power needs to specify better the circumstances under which it might be exercised and the types of information it would cover. The power should be subject to some form of review. The power should not be exercised in secret.

The proposed authority for the Minister of Defence to authorize interception of foreign communications should protect solicitor-client communications and communications to journalists. The authority should be exercised by a judge, not the Minister of Defence.

ix) Charities Registration (Security Information)

There are several flaws in Part 6 of the Bill, the proposed power to deregister charities under the *Income Tax Act* when they are alleged to have provided funds to terrorist groups. Charities would not be entitled to see all of the information on which the decision was based. Courts would be entitled to admit evidence normally inadmissible. The Bill should also provide for a due diligence defence.

x) Conclusion

The CBA appreciates the opportunity to provide input into this very important Bill. The debate on this Bill will be difficult, but it is part of a common quest to get the right response. We must ensure that the response will target terrorists and their organizations and affect the rest of us only to the extent necessary. We must make sure that the response does not usurp the very rights and freedoms that the terrorists themselves attack.

Even with the changes recommended here, the Bill will bring dramatic changes to Canadian law, will continue to attract challenges based on the *Charter of Rights and Freedoms* and will demand close monitoring to ensure that legitimate objectives are attained and abuses avoided.

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to comment on Bill C-36, *Anti-terrorism Act*. The CBA is a national association of 37,000 lawyers and other jurists, dedicated to the improvement of the law and the administration of justice. This submission has benefited from the input of senior lawyers from across the country in a number of legal disciplines, including Aboriginal, Air and Space, Business, Charities, Civil Litigation, Constitutional, Criminal, Environmental, Human Rights, Immigration, Insurance, Intellectual Property, International, and Media and Communications Law. In their respective disciplines, these lawyers bring to the table a wealth of knowledge, experience and expertise in how legislation is interpreted and applied.

Over the years, the CBA and its members have provided insight to Parliament and to government on proposed legislation dealing with criminal organizations, money laundering, charities and terrorist fundraising, security considerations in immigration matters, sentencing and parole, hate speech, privacy and other matters relevant to this Bill.[2]

Lawyers are on the front lines of the justice system. We understand the fundamental importance of the rule of law and the value of rights and freedoms in our society, and not just in a theoretical sense. To us, and to our clients, they are not a mere abstraction. They have a tangible reality.

A 1918 statement of then CBA President Sir James Aikins applies equally today:

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[2] Some recent examples include commentaries on: Bill C-24, *Criminal Code Amendments (Organized Crime)*; Bill C-95, *Criminal Code Amendments (Anti-Gang)*; Bill C-16, *Charities Registration (Security Information) Act*; Bill C-11, *Immigration and Refugee Protection Act*; Bill C-6, *Personal Information Protection and Electronic Documents Act*; and Bill C-22, *Proceeds of Crime (Money Laundering) Act*.

> In the common judgment of the people, the profession of the law and its members are held responsible for what is weak, uncertain and wrong in the law or defective in its administration and justly so in our democracy, for on whom else can they depend to advise and pilot them to better things.

The CBA has analysed Bill C-36 in the context of three overarching themes:

- the application of the rule of law;
- the primacy of the *Charter of Rights and Freedoms*; and
- the current legislative framework, both domestic and international.

A. Rule of Law

The elements of the rule of law can be described as follows:

> 1. in a decent society it is unthinkable that government, or any officer of government, possesses arbitrary power over the person or the interests of the individual;
> 2. all members of society, private persons and government officials alike must be equally responsible before the law; and
> 3. effective judicial remedies are more important than abstract constitutional declarations in securing the rights of the individual against encroachment by the state.[3]

The strongest weapon against terrorism is the rule of law. Our responses to the terrorist attacks of September 11 must strike delicate balances between collective security and individual liberties in the context of an existing legal and democratic framework that has served us well.

RECOMMENDATION:

The Canadian Bar Association recommends that the federal government's response to recent terrorist attacks balance collective security with individual liberties, with minimal

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[3] Professor H.W. Jones, restating Professor A.V. Dicey in Gerard Gall, *The Canadian Legal System* (Toronto: Carswell Legal Publications, 1983) at 71.

impairment to those liberties in the context of the rule of law and our existing legal and democratic framework.

B. Charter of Rights and Freedoms

The true measure of a society is how it treats the unpopular, the powerless and the disadvantaged. The *Canadian Charter of Rights and Freedoms* (the *Charter*) guarantees everyone a minimum standard of rights and freedoms. Governments can only infringe these rights and freedoms if the infringement is demonstrably justified in a free and democratic society. Justification focuses on the necessity and proportionality of the infringement. Although these rights and freedoms are often relied on by people not in the mainstream of society, their very existence moulds Canadian society, defines who we are and benefits all members of our community.

Bill C-36 is intended in part to implement the existing United Nations treaty framework in response to the continuing global threat of international terrorism. Nevertheless, implementation of Canada's international obligations is subject to scrutiny under the *Charter*. Bill C-36 has a broad sweep and implicates a number of *Charter* rights, including freedom of expression (section 2(b)), freedom of association (section 2(d)), the right not to be deprived of life, liberty or security of the person except in accordance with fundamental justice (section 7), the right to be secure against unreasonable search and seizure (section 8), the right not to be arbitrarily detained or imprisoned (section 9), the right to silence (section 11(c)), the right to a fair trial (section 11(d)) and the right to equal protection of the law (section 15). These are principles which are foundational to the Canadian legal system.

Of course, these rights and freedoms are not absolute. They are subject to reasonable limits. However, under section 1 of the *Charter*, these limits must be demonstrably justifiable "in a free and democratic society". Governments must

demonstrate that any infringements on these rights are necessary and that the infringements are appropriately tailored to legitimate public policy objectives. Government action must be a proportionate response to a pressing and substantial need. It must be rationally connected to its objective, must minimally impair the right or freedom in question and must properly balance the objective of the legislation with the severity of its effects.[4] A law can only be justified using credible and convincing evidence. In examining section 1, courts may take into account the extent to which the legislation fulfils international obligations.

C. International Obligations and Current Domestic Law

Combatting terrorism has been a UN priority for some time and an ongoing concern for Canada as a leading member of the international community with a commitment to rules-based solutions to international issues. Bill C-36 documents the existing framework of relevant UN treaty instruments as well as Canada's earlier implementation of at least ten of them. This framework encompasses twelve treaties and protocols. Canada has renewed and extended its international commitment to the permanent elimination of the terrorist threat. The UN Security Council served notice on all UN member states with Resolutions 1368 (12 September 2001) and 1373 (28 September 2001), pursuant to its authority under Chapter VII of the *Charter of the United Nations*, that terrorism poses an extraordinary threat to international peace and security. The UN anti-terrorism agenda will likely be fleshed out in greater detail in the coming months, by the Security Council and other UN organizations. In addition, the North Atlantic Treaty Organization, of which Canada is a member, designated the September 11 attacks as an attack on each NATO member, pursuant to Article 5 of the NATO Treaty, justifying, in the discretion of each member, actions in self-defence, including an armed response. This is the first time in the history of NATO that this provision has been invoked.

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4 *R. v. Oakes*, [1986] 1 S.C.R. 103.

The government has introduced Bill C-36 in this atmosphere of ongoing international necessity and concern for the security of Canadians. Yet, given this atmosphere of global and domestic urgency, it is important to consider the legal tools already in place to combat terrorism before enacting new laws and, in the process of enacting new laws, to ensure that existing mechanisms function effectively.

The government currently has many legal tools to combat a terrorist threat. Even without considering investigative authority under the *Canadian Security and Intelligence Service Act* or the *National Defence Act*, existing provisions of the *Criminal Code* provide an impressive "arsenal" to combat terrorist organizations. For example:

- definitions of "criminal organization," "criminal organization offence" and "offence-related property" in section 2;
- extraterritorial offences on aircraft, ships and fixed platforms, offences involving internationally protected persons and offences involving nuclear material, in section 7;
- removal of "compulsion" as a defence for members of a conspiracy, in section 17;
- the broad scope of the "parties to an offence" provisions in sections 21 through 24;
- the permissible force, on "justifiable and reasonable grounds", allowed by sections 25 to 31;
- the potential for life imprisonment for offences in Part II — Offences Against Public Order;
- the particularly invasive procedures of Part VI — Invasion of Privacy — dealing with the detection and prevention of all crime, and which are more easily accessed if in the name of combatting a "criminal organization", including:
    - the definitions;

  - the general ease of obtaining interceptions, with particularly broad exceptions under sections 186(1.1), 196(5) and 492, for example;
  - the broad power to keep information secret, both under Part VI and XV of the *Code* (e.g. section 487.3); and
  - the "good faith" exemption even if the limits of these provisions are breached;
- section 495, which allows police officers to arrest without warrant when they believe on reasonable grounds that the person is about to commit an indictable offence;
- the already tested and generous provisions of section 264.1 — Criminal Harassment;
- the potential for virtually any offence (from murder through arson and even "negligence") to generate a life sentence;
- the entire Proceeds of Crime provisions in Part XII.2;
- Part XIII — Attempts, Conspiracies and Accessories — and its particular reference to criminal organization (for example, section 467.1);
- the "special procedures" in place to ensure safe courtrooms, including the power to have an accused removed, video-link provisions, testimony of witnesses from behind screens;
- the reverse onus provisions in section 515(6)(a)(ii) and the practically absolute power in section 515(10)(c) for detention of an accused;
- the many powers of sentencing judges, and the deference paid by appellate courts to sentences imposed at first instance; and
- the *Emergencies Act.*

Indeed, the government acknowledges its current powers in the News Release which accompanied the introduction of the Bill. The last paragraph reads :

> The Act builds on Canada's longstanding and continuing contribution to the global campaign against terrorism. **Under the *Criminal Code*, terrorists can already be prosecuted for hijacking, murder and other acts of violence.** Canadian courts also have the jurisdiction to try a number of terrorist crimes committed abroad to ensure that terrorists are brought to justice regardless of where the offence was committed. [emphasis added]

We note, as well, that the current *Immigration Act* provides ample provisions to prevent terrorists from coming to Canada, or to detain and remove those here:

- applicants for visas abroad can be fingerprinted and photographed (*Immigration Regulation*, sections 44 and 45);
- anyone seeking admission at a port of entry can be fingerprinted, photographed, and detained for examination (section 23(3) and *Reg* 45);
- if a port of entry officer is not satisfied as to identity, or suspects that a person is a terrorist or a member of an organization engaged in terrorism, there is immediate arrest and detention for up to seven days, without review, and continued detention pending determination of admissibility (section 103.1);
- all refugee claimants are photographed and fingerprinted (*Reg* 45);
- a terrorist or member of an organization engaged in terrorist activities is inadmissible, detainable and removable. Detention is justified on suspicion, removal on reasonable grounds — a far lesser standard than criminal proof. There need not be any convictions;
- the Minister can issue a certificate that results in immediate detention of a foreign national in Canada, pending Federal Court review of the certificate. The Court and Minister can rely on evidence not disclosed to the foreign national. Permanent residents can also be subject to a certificate, and detention with detention review by an adjudicator (sections 39 and 40.1); and
- a suspected terrorist cannot make a refugee claim, and cannot avoid removal to a country of persecution (sections 46.01 and 53).

Legislative action creating additional offences without adequate funding even of current laws may create a false sense of security. First and foremost, the government must make a concerted commitment to funding law enforcement agencies, intelligence gathering agencies and the military to levels that allow full use of existing law enforcement tools for the protection of national security and public safety.

> **RECOMMENDATION:**
> **The Canadian Bar Association recommends that the federal government make a concerted commitment to funding law enforcement agencies, intelligence gathering agencies and the military to levels that allow full use of existing law enforcement tools for the protection of national security and public safety.**

Given the short time we have had to study such a wide-ranging and important Bill, our focus is on the fundamental issues it raises. We do not comment here on the vast number of smaller items and details, which should nevertheless be addressed. Our silence on these should not be taken as agreement and we may comment further on them.

II. SUNSET PROVISION

This Bill creates extraordinary powers, several of them beyond the realm of what would have been acceptable just a few months ago. It is wide-ranging and contains complex and interrelated provisions. It is difficult to predict how the law enforcement agencies will use these new powers or how effective those powers will be in eradicating the current threat of terrorism.

The Bill, over 170 pages in length, demands considered and principled reflection. However, we acknowledge the pressures to pass the legislation quickly. We believe that the necessary accompaniment to quick passage is a sunset clause.

When governments seek to impose extraordinary restraints on fundamental rights and freedoms, these restraints must be limited in duration. This principle is recognized in both domestic and international law. For example, under the *Emergencies Act*, declarations of an emergency automatically expire after a certain period of time (30 days for a public order emergency, 60 days for an international emergency, 90 days for a public welfare emergency and 120 days for a war emergency). Declarations can be continued by the Governor-in-Council for successive limited periods of time. Under Article 4 of the *International Covenant on Civil and Political Rights*, to which Canada is a signatory, civil and political rights may only be infringed during a public emergency "to the extent strictly required by the exigencies of the situation". Article 4 also contemplates that a declaration of public emergency will not be indefinite, requiring state parties to notify the UN of the date the emergency is over.

We recognize that in a public emergency, the tests used to justify a law under section 1 of the *Charter* may tilt away from individual rights and freedoms and toward the interests of collective security. If so, then measures taken to respond to the emergency must be limited to the duration of the emergency. If a case has been made for the powers in Bill C-36, then a sunset clause must ensure that they apply only for as long as they are needed. Canada should revert to the laws and rights we know unless circumstances then dictate that the extraordinary regime foreseen by Bill C-36 be prolonged.

In our view, the mechanism for review in clause 145 of Bill C-36 is insufficient. Given the scope of the Bill, Canadians need more than a review by a Parliamentary Committee. They need to be convinced through the operation of the legislative process that these powers must be extended. The government must bear the onus of establishing this to the satisfaction of our Parliamentary representatives.

Having said this, some portions of the Bill are of general value and should be retained past the operation of any sunset clause. These would include the additional protections against hate crimes [clauses 10, 12 and 88].

Some have objected to including a sunset clause on the basis that Canada cannot place a time limit on compliance with international treaty obligations. The government has indicated that many of the substantive offences are intended to implement certain international treaties.

We reject this argument. Compliance with international treaties is not the issue. Most of the offences which purport to implement international treaty obligations have already been implemented into domestic legislation — see section 7 of the *Criminal Code* and subsection (1)(a) of the definition of "terrorist activity" in section 83.01. In any event, even to the extent that provisions of the Bill subject to a sunset clause may implement treaty obligations not already implemented, there is no reason in domestic or international law that the Bill cannot be time limited.

At the end of the three-year period, Parliament could decide that Canada can comply with our international obligations in a less extraordinary and intrusive manner. Under international law, a country is always free to change the way it implements international treaties. A sunset clause ensures that Parliament will explore this opportunity in a meaningful way, without being bound to the original, hasty passage.

RECOMMENDATION:

The CBA recommends that clause 145 be amended to provide that Bill C-36 expires three years after it receives Royal Assent, except for clauses 10, 12 and 88.

III. DEFINITION OF TERRORIST ACTIVITY — Criminal Code Section 83.01(1)

Shortly after Bill C-36 was tabled in the House of Commons, a *Globe and Mail* columnist wrote that:

> . . . most Canadians will not be terribly inconvenienced by Ms. McLellan's proposals. Instead, the costs will be borne by people who find themselves targets of police suspicion because of their ethnic background, radical political views or association with immigrant communities that have ties with groups deemed to be terrorist fronts.[5]

The definition of "terrorist activity" will determine, more than any other section, the extent to which this perspective proves true. It is the threshold for the application of all the expanded powers and penalties in the remainder of the Bill. Parliament must identify with precision who those targets should be. The duty of law enforcement agencies is to implement Parliament's will, not their own. They deserve and expect clear guidance on that intent.

The need to provide such clear direction is significantly heightened by Bill C-24, Organized Crime, currently before Parliament. Bill C-24 would adopt a sort of "trust us justice" by exempting police officers from liability for committing several serious criminal offences. In the CBA's response[6] to the Department of Justice Discussion Draft, we emphasized our strong objections to putting police officers above the law. We know that most police officers are dedicated professionals with a difficult job to do and fully support giving them the resources and tools they need to do that job, but the proposals in Bill C-24 would actually put them above the law. Of even greater concern is that the Bill would allow police agents, often former gang members with their own self interests at heart, to commit the same acts with immunity from prosecution.

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5 Shawn McCarthy, "Sweeping curbs on freedom in antiterrorism legislation likely to go to top court" *Globe and Mail* (16 October 2001) at A5.

6 National Criminal Justice Section, *Drawing the Line on Policing* (Ottawa: CBA, 2001).

Defining terrorism is not a simple task. While the September 11 attacks were incontrovertibly terrorist, other examples may not be so clear. Perhaps recognizing that acts constituting terrorism can depend on (among other things) social context, historical perspective and racial, religious or other group identity, our courts have consistently refused to define the concept.[7] Instead, they have taken a case-by-case approach. Similarly, terrorism has not been defined in the *Immigration Act* or any other statute in Canada.

The term "terrorism" is used in neither the *Statute of the International Tribunal for War Crimes in Yugoslavia or Rwanda* or the *Rome Convention for Permanent International Criminal Court*, despite a clear and careful effort to define with precision the crimes over which these tribunals have jurisdiction. Nor has the UN defined the term — there are seven conventions dealing with specific acts but no general definition of terrorism. While the UN has made statements condemning terrorism, there has never been a meaning accepted by all or even a majority of the member states. Instead of seeking to enact one Convention dealing with terrorism, the UN has enacted specific conventions dealing with specific international crimes.

Obviously, Parliament's intention is not to target people on the basis of race, religion or ethnic background or to target those who engage in political dissent. The challenge of defining terrorist activity requires as much precision as possible. The proposed life sentences, cumulative sentencing, restricted parole and criminal procedure, preventive arrest, police surveillance, and freezing and forfeiture of assets are all engaged once people or events fall within this definition. The net must be cast narrowly enough to catch only those actually engaged in terrorist activity or planning.

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7 For example, see *Baroud v. Canada* [1995] F.C.J. A-29; *Ahani v. Canada* (1996), 201 N.R. 233 (F.C.A.); *Suresh v. Canada,* [2000] 2 F.C. 528.

There has been considerable discussion about the "balancing" approach attempted by drafters of the bill. In balancing competing interests of combating terrorism while maintaining our fundamental freedoms, we should also consider balancing the advantages and disadvantages of being over- or under- inclusive. If the net is too wide, people may be labeled as "terrorists", even on the basis of engaging in legitimate political dissent, conducting strike activity, being from a particular geographic area or adhering to a certain religious belief. By contrast, if the net is too small, then terrorists can still be punished under existing *Criminal Code*, which allows for life sentences for murder, manslaughter and attempted murder, among other crimes. In short, the chance for error is less with narrowness than with breadth.

A. Part (a) of Definition

The references in section 83.01(1) (a) (i) through (x) of the proposed definition, found in clause 4 of the Bill, appear simply to incorporate the various offences from the various UN treaties that Canada has ratified (or will ratify by operation of this Bill) as acts or omissions that will constitute "terrorist activity". To the extent that these Convention offences are already implemented, without analysing the detailed terms of each instrument, they are straightforward and unobjectionable, if perhaps unnecessary to the definition itself. The recurring phrase "that implement" may be interpreted that not all the offences in section 7(2) , for example, implement a Convention — must a person read the Convention to determine which parts actually do implement the Convention? If portions of the Convention were unimplemented by section 7(2), are they now declared implemented by this Bill? The provisions could be more straightforward if they simply referred to the offences in *Criminal Code* sections 7(2) or (3), and the Bill would suffer not at all by the outright removal of section 83.01(1)(a)(i) through (x), and its being added, for greater certainty, to sections 83.2 (see also section 83.7).

B. Part (b) of Definition

As proposed, the activities caught by section (b) of the proposed definition of terrorist activity is too inclusive and extremely unwieldy. Read in its most expansive interpretation, a terrorist activity could be an act or omission committed partially for a political, religious or ideological objective, partially with the intention of intimidating a segment of the public, or compelling a person, government or organization to do or not do something. The required intention can be to cause serious property damage likely to disrupt an essential service, facility of system, or to disrupt an essential service intending to cause a serious risk to the safety of any segment of the public. While there is an exception for lawful advocacy, protest, dissent or work stoppage, it is unavailable if the activity is unlawful or is intended to cause serious risk to the health or safety of any segment of the public.

Assuming that the focus of Bill C-36 is to provide an anti-terrorist tool independent of politics, religion and ideology, section (b)(i)(A) of the proposed definition does not add anything helpful overall. Indeed, it could be a superfluous and misleading hurdle. Although one normally expects to see terrorist acts in light of a particular cause, terrorist acts of any scale can have purposes totally removed from either religion or ideology — the nature of the act defines the offence, not the brand of motivation behind it. Moreover, by linking the definition to a religious or ideological context, the context may render it vulnerable to challenge under section 15 of the *Charter* which prohibits various grounds of discrimination.

Section (b)(ii)(E) of the proposed definition is particularly problematic in that it might catch unlawful activity — such as a wildcat strike or demonstration — that is not terrorist conduct, even though there may be "serious disruption of an essential service, facility or system". Civil disobedience short of terrorism is

addressed in other federal, provincial and territorial legislation, and should not be caught by this Bill.

- Does this definition include protest activities by Aboriginal people which disrupt an "essential" service or block a road, as a protest against development activities on Aboriginal lands?
- At Burnt Church, protestors disrupted the use of the highway and waterways to protest the lobster fishery and to compel government to recognize an Aboriginal fishery. Were they terrorists?
- What about those involved in recent nurses' or truckers' strikes, or the protestors at the Québec City summit or the Asia-Pacific Economic Cooperation (APEC) conference in Vancouver?
- What about political activists who may have appeared as "terrorist" to those in power at a given time, but who are ultimately remembered as champions of freedom, such as Louis Riel or Nelson Mandela?

Even when protests become unlawful, violent, or destructive most Canadians would view it as political expression gone too far, not terrorism. Arrests can be made, charges can be laid and people can be found guilty of crimes, under the law as it stands today. Defining such protests as terrorism, with heightened stigma and penalties, is undesirable and unnecessary.

RECOMMENDATION:

The CBA recommends that the definition of "terrorist activity" in section 83.01(1) be amended by removing sections(i)(A) and (ii)(E), and by removing reference to (ii)(E) from section(ii)(D).

C. Application of Definitions in Immigration Act

The broad scope of the definition of terrorist activity in Bill C-36 and its potential application in assessing the admissibility of persons who seek to come to Canada is of serious concern. Under sections 19 (1) (e) and (f) of the *Immigration Act*,

and section 34(1) of Bill C-11, the *Immigration and Refugee Protection Act*, past or future engagement in terrorism is a bar to admission to Canada. The standard of proof in these cases is simply reasonable grounds — there is no need to establish that there has, in fact, been a conviction. "Terrorism" is not defined in the *Immigration Act* or in Bill C-11. The definition of terrorist activity in Bill C-36 might provide the parameters for future use in the immigration context. Rather than allowing this to occur haphazardly or with imperfect correlation, it would be preferable to have express wording in Bill C-36 that incorporates the definition of "terrorist activity" into Bill C-11.

People are inadmissible to Canada not only if they have been convicted of "terrorist offences" but also if there are reasonable grounds to believe they have committed an offence outside Canada equivalent to an offence in Canada.[8] This is of particular concern given the broad scope of the term "terrorist activity" in Bill C-36, which may deem the applicant to have committed, or to be believed to have committed, a disqualifying offence in a jurisdiction in which the action is not considered to be an offence. This has serious implications for the possibility of an applicant trying to overcome the finding of inadmissability.

IV. TERRORISM OFFENCES

By deeming a "terrorism offence" to be a "criminal organization offence" within section 490(1.1) [clause 18 of the Bill], relating to detention of seized things, the Bill acknowledges that terrorist activity would already be caught by existing organized crime prohibitions. This Bill would convert current indictable offences to terrorist offences where they contain an element of terrorist direction or benefit, making them subject to a more severe penalty, for example in sections 83.2(1) and 83.27 [clause 4 of the Bill]. The terrorist nature added to the existing indictable offence elevates the maximum sentence to life imprisonment.

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8 *Immigration Act*, section 19(1) (c.1) (ii).

The complex provisions in Bill C-36 would arguably place a greater burden on the Crown by adding more elements to prove for a conviction of a terrorism offence. This is starkly illustrated by section 83.01(b). Its complex *mens rea* regarding terrorist activity may, unless by interpretation it is simplified, make it difficult to prove all the elements of the offence and even more difficult to explain to a jury. Acknowledging the potential for human error in attempting such explanations, we could witness repeated appeals and re-trials as a consequence, which would only diminish public confidence in the administration of justice. Proving simple conspiracy, murder and hijacking and parties to murder and hijacking for the events of September 11 would be simpler than to prove the offence of terrorist activity under that section, or the similarly complex section 231(6.01) dealing with a deemed first degree murder [clause 9 of the Bill].

A. List of Terrorists

In clause 4 of Bill C-36, section 83.05(1) provides for the Governor in Council to make regulations to establish a list of entities believed to be involved in, or acting for entities involved in terrorist activities. An entity can be listed solely on the basis that the Governor in Council or the Solicitor General through the Governor in Council has reasonable grounds to believe it should be added. Once an entity becomes a "listed entity", it is considered a "terrorist group" and is subject to the ensuing provisions in the Bill that criminalize involvement with, or support of any sort for a terrorist group, and all its property is frozen and subject to forfeiture.

Once listed, an entity can apply to be removed from the list, but only once, absent a material change in circumstance. If the Solicitor General does not respond, or responds negatively, notice is given, and the listed entity then has one opportunity for judicial review. At the review, the judge can examine any security or intelligence reports in the absence of the applicant or counsel, if of the opinion that disclosing the information would injure national security or endanger the safety of anyone. In addition, under section 83.06(1), the Solicitor General can

apply for an opportunity to provide information from a government, institution or agency of a foreign state to the judge, without disclosure to the applicant of the information considered. Only a summary statement would be provided to the applicant, devoid of any information that the judge believes would injure national security or endanger the safety of anyone. While the applicant is to have a reasonable opportunity to be heard, the applicant may not know the allegations to which it must respond.

In light of the dire consequences of being placed on the list, we must carefully consider the potential for serious injustice in regard to the degree of procedural fairness provided. Earlier concerns expressed in our National Charities and Not-For-Profit Law Section's submission on Bill C-16, *Charities Registration (Security Information) Act* apply:

> (f)oreign entities providing information may have political reasons for stifling the efforts of certain charitable organizations and may manipulate the information provided to achieve this end. If charitable organizations do not know the foreign information being considered in the case against them, they will also not be able to challenge the credibility of that information through cross-examination. This provision seriously hinders a charitable organization's right to be heard and to know the case being made against it. The Section has serious concerns about the procedural fairness of the Bill.[9]

While the Solicitor General must review the list every two years, we should recognize the potential for such a review to be highly politicized. At a minimum, given the potential repercussions on the entities listed and anyone associated with them, the review should be based on appropriate findings of fact and conclusions of law.

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9 (Ottawa: CBA, May 2001) at 4.

RECOMMENDATION:

The Canadian Bar Association recommends that there be significant enhancement of procedural protections in creating a list of terrorists if Bill C-36 is to be enacted.

The Canadian Bar Association recommends that the Solicitor General's review of the list be based, at a minimum, on appropriate findings of fact and conclusions of law.

B. Financing of Terrorism

The scope of sections 83.02 to 83.04 in clause 4, prohibiting financing of terrorism, is too broad. It would curtail fund-raising on behalf of organizations if there is a possibility that some of the money will go to groups fighting for the victims of oppressive regimes, even if the causes are legitimate and the regimes repressive. For example, donations to an organization of Afghani women who use most of the money to provide support for refugees but provide some funds to resistance fighters seeking to overthrow the Taliban regime by force could fall under this section. Canadians who financially support foreign Aboriginal groups seeking recognition of their rights are another example of those who would likely be guilty of this offence.

Section 83.03(a) appears to be so open-ended that it could encompass even legal representation as a benefit to those engaged in terrorist activity. Read expansively, it prohibits anyone from indirectly providing or inviting a person to provide financial or related services intending that they be used in part to benefit any person who is facilitating or carrying out a terrorist activity.

C. Participating, Facilitating, Instruction and Harbouring

The importance of narrowly and accurately defining terrorist activity and ensuring adherence to concepts of fundamental justice in creating the list of terrorists is

highlighted by sections of the proposed legislation pertaining to participating, facilitating, instruction and harbouring. Apart from all entities to be named in the proposed list, the definition of terrorist group includes any entity that has as one of its purposes terrorist activity, which we have earlier suggested is defined so broadly that it could include trade unionists, environmental protesters and the like.

Under the definition of facilitation in proposed section 83.01(2) [clause 4], a terrorist activity is facilitated whether or not the facilitator knows that a particular activity is facilitated. Why is no criminal intent required? How can someone facilitate a terrorist activity if they are unaware that they have done anything or omitted to do something that facilitated terrorist activity? Section 83.18(1) provides a sentence of up to ten years' imprisonment for "every one who knowingly contributes to, directly or indirectly, any activity" of a terrorist group. The offence is committed even if the group does not actually carry out a terrorist activity, the participation or contribution of the accused does not actually enhance the group's ability to facilitate or carry out a terrorist activity, or the accused did not know the specific nature of the activity that may be facilitated or carried out. The wording is so broad that it could include contributions to an organization that in turn contributes to an organization with links to terrorism, even absent knowledge that the contribution was going to that organization.

We are very concerned about the creation of offences that, though they are seen as serious and carry the most serious penalties, seem to require less than full *mens rea* or criminal intent. In our view, given the significant penalties and stigma attached to these offences, full *mens rea* should always be a requisite element. For offences that already carry life imprisonment, it is difficult to see a benefit in adding to already very serious offences, such as murder, hijacking or bombing. We should be frank about the limits of such provisions in actually contributing to a safer society.

RECOMMENDATION:

The Canadian Bar Association recommends that Bill C-36 clarify that the Crown must prove criminal intent to find anyone guilty of a terrorist offence.

The expansive definition of participating or contributing in section 83.18(3) includes offering to provide a skill in association with a listed entity, or remaining in any country in association with a listed entity. Lawyers representing accused terrorist groups could be seen as "providing a skill or an expertise for the benefit of...a terrorist group". In determining participation or contribution, a court may consider use of a name or identifying symbols of the listed entity, receipt of a benefit from any terrorist group or association with members of that group. This wording, in section 83.18(4), would also appear to include defence lawyers. For example, a lawyer making a constitutional challenge for an entity that believed it was wrongly included in the list and labelled as a terrorist group would receive a benefit (a retainer), and would provide an expertise or skill for the benefit of and at the direction of a group later found to be "terrorist". We are sure the government does not really intend to prohibit or dissuade members of the legal profession from acting in such a circumstance.

RECOMMENDATION:

The Canadian Bar Association recommends that lawyers acting for those accused of terrorist offences be specifically excluded from the ambit of section 83.18, dealing with participation in, or contribution to an activity of a terrorist group.

These sections again raise the question of how to distinguish between non-peaceful, perhaps even illegal protest and terrorist activity. Many Canadians originate from countries where there have been divisive political struggles for decades, perhaps in which they themselves have directly suffered. We question

whether our government should dictate which side of such struggles are defensible and which are not, and whether Canadians can offer support as their own consciences and experiences dictate.

From a drafting perspective, there are several confusing aspects to clause 4 of the Bill. A group of offences are discussed under the heading Participating, Facilitating, Instructing and Harbouring. A definition for the "facilitation" offence is in the definition section at the beginning of the Bill (section 83.01(2)), while apparently parallel definitions of participation and contribution are under the later heading with the offences themselves (section 83.18(1)). Also confusing is the fact that the facilitation offence requires knowledge in section 83.19, but does not in the definition section. We have earlier recommended that all offences in the Bill require full *mens rea*. Further, the concept of facilitation is integrated into several other offences, for example "enhancing the ability of any terrorist group to facilitate or carry out" in section 83.18(1).

RECOMMENDATION:
The Canadian Bar Association recommends that the facilitation offence in Bill C-36 be clarified by moving the definition in section 83.01(2)(c) to section 83.19.

D. Sentencing

Section 83.26 [clause 4] indicates that sentences that are not life sentences shall be served consecutively. The CBA, through its Committee on Imprisonment and Release, has long advocated against the imposition of consecutive sentences. In a 1999 submission, we argued that the current sentencing regime provides the flexibility required to be fair and appropriately punitive, as the circumstances required. Life sentences can be imposed for first and second degree murder, as well as for attempted murder. The totality principle allows judges to;

> (a)ssess the severity of each element but finally move beyond a mechanical calculation of elements to assess the global effect of a sentence. By simply adding the elements, the total may condemn an offender to a life of incarceration without any regard to the individual's circumstances, family obligations or rehabilitative prospects— all issues we believe judges should consider. It is the judge's responsibility to shape the global sentence to avoid undue harshness or excessive length and to ensure that the sentence is fit.[10]

It is important to bear in mind that Bill C-36 would not only capture potential perpetrators of acts similar to those we have recently witnessed. It would encompass a wide variety of political dissidents, some who might eventually resort to violent and destructive behaviour, others who would not. We must recognize the Bill's potential to go too far, and to impact disproportionately on religious, racial and ethnic minorities. The mandatory cumulative sentences, coupled with the breadth of the definition of terrorist activity, the potential for being "listed" erroneously and the very fine distinctions between offences such as "contributing to" or "facilitating" a terrorist activity, makes it too easy to conceive of a disproportionate sentence being imposed.

RECOMMENDATION:

The CBA recommends that the cumulative sentencing provision, section 83.26, be deleted.

Section 83.27(1) would deem a conviction for any indictable offence to be subject to a life sentence if it also constitutes "terrorist activity" and if a life sentence is not already the minimum punishment. Under section (2), the Crown would have to notify the accused prior to plea that the Crown intends to seek to apply that section.

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10 Submission on Bill C-251, *Criminal Code* and *Corrections and Conditional Release Act* amendments (Cumulative Sentences) (Ottawa: CBA, 1999) at 5.

V. TERRORIST PROPERTY

A. Freezing of Property, Disclosure and Audit

i) Solicitor-client confidentiality and privilege

Proposed section 83.1 [in clause 4] would require every person to disclose information about the existence of terrorist property, transactions involving terrorist property or proposed transactions involving terrorist property. The CBA objects to the potential application of this provision in respect of information subject to solicitor-client confidentiality and privilege.

Solicitor-client confidentiality is not for the benefit of lawyers. It does not provide a cloak for the commission of crimes. Rather, it is essential to the proper functioning of our legal system. It is part and parcel of the right to adequate representation. Lawyers cannot properly advise clients who do not feel comfortable telling them the whole story. Clients will only be forthcoming if they know that the information they communicate will remain in the lawyer's confidence. Diminishing protection for solicitor-client confidentiality provides clients with an incentive to withhold information from their lawyers. This does not serve the client, the legal system or, ultimately, the public.

Solicitor-client confidentiality is distinguished from solicitor-client privilege. Solicitor-client privilege is an evidentiary rule which prohibits admission into evidence of oral and written communications passing between the client and the lawyer. Solicitor-client confidentiality is a wider rule that applies without regard to the source of the information or the fact that others may share that information. The Bill must protect from its exceptional measures both the narrower rule of privilege and the wider rule of confidentiality to ensure the continuing integrity of our legal system and of the solicitor-client relationship, a pillar of our legal system and of the rule of law.

The importance of these principles is reinforced in recent appeal court decisions, which confirm the constitutional status of solicitor-client privilege. These cases have invalidated law office searches under section 488.1 of the *Criminal Code* on the basis that solicitor-client privilege is constitutionally protected under section 8 of the *Charter*.[11] The courts in those cases also opined that there may be constitutional protection for solicitor-client privilege under sections 7 and 10 of the *Charter*.

Section 83.1 would subject lawyers to criminal charges for performing their professional and public duty to keep client information confidential. This would be an egregious violation of solicitor-client confidentiality and privilege and amendment is needed to avoid such an event.

> **RECOMMENDATION:**
> **The CBA recommends that section 83.1 be amended by adding an exception for information which is subject to solicitor-client confidentiality and privilege.**

Section 83.08 [clause 4] provides that no person in Canada shall knowingly deal in property controlled by a terrorist group or enter into or facilitate any transaction in relation to such property. Section 83.03 would appear to apply to lawyers' legitimate and necessary financial transactions with clients – including payment of fees or posting of bail. This could affect the ability of people and entities to retain counsel when they are alleged to be subject to the provisions of this Bill. Such people, of course, have the right to legal representation, including the right to retain and instruct counsel under section 10(b) of the *Charter* for those who are charged with an offence.

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11 *R. v. Fink*, Court File No. C33537, December 4, 2000 (Ont. C.A.); *Lavallee, Rackel and Heintz v. Canada (Attorney General)*, [2000] A.J. No. 392; *White, Ottenheimer & Baker v. Canada (Attorney General)* (2000), 146 C.C.C. (3d) 28 (Nfld. C.A.). These cases are currently before the Supreme Court of Canada.

Bill C-36 should contain a provision similar to that found in section 5 of the *Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations*, which excludes funds "received or paid in respect of professional fees, disbursements, expenses or bail".

RECOMMENDATION:
The CBA recommends that section 83.08 be amended to provide that: "This section does not apply in respect of professional fees, disbursements, expenses or bail."

ii) Financial Institutions

Financial institutions should not be subject to civil or criminal proceedings where they have frozen terrorist property in good faith compliance with proposed section 83.08 [clause 4]. In fact, this principle is recognized in the disclosure obligation under proposed section 83.1(b), which provides immunity from criminal or civil proceedings for disclosures made in good faith, and under proposed section 83.11(3), which provides immunity for a person who makes a report concerning terrorist property in good faith. A similar immunity clause should be added to proposed section 83.08.

RECOMMENDATION:
The CBA recommends that a new section 83.08(2) be added providing that no criminal or civil proceedings lie against a person for freezing property in good faith under the section.

Under proposed section 83.24, proceedings in respect of an offence under the freezing of property, disclosure and audit provisions require the consent of the Attorney General. In the case of financial institutions, we recommend that the regulatory body of the specific financial industry in question (for example, the office of the Superintendent of Financial Institutions (OSFI)) be consulted on the

decision to prosecute. This would allow the Attorney General's decision to be informed by a regulator with knowledge of the particular industry in question. As noted above, OSFI has already issued directives in relation to the September 11 incidents.

RECOMMENDATION:

The CBA recommends that section 83.24 be amended to add a subsection which reads: "Where the prosecution relates to a body listed in section 83.11, the Attorney General shall consult with the Office of the Superintendent of Financial Institutions or other regulatory body for the institution prior to giving consent."

B. Forfeiture of Property

Section 83.14 [clause 4] outlines a procedure whereby currency, monetary instruments and other property of certain individuals may be forfeited to the Crown. In contested proceedings, a financial institution or other person having custody of those assets may have to monitor or participate in those proceedings, thereby incurring costs. The courts should have discretion to award reimbursement of those costs from the assets which are subject to the application.

RECOMMENDATION:

The CBA recommends that proposed section 83.14 of the *Criminal Code* be amended by adding a provision after section (7) stating that: "Where a person with an interest in the property appears at the hearing, a judge may order that person's costs be paid from the property which is the subject of the hearing."

C. Proceeds of Crime (Money Laundering) Act

The CBA has several concerns and observations about Part 4 of Bill C-36, proposed changes to the recently enacted *Proceeds of Crime (Money Laundering) Act*.

Proposed amendments to section 12(3)(a) [clause 54] will be crucially important. In the context of people coming into or leaving Canada, it requires reporting the import or export of currency or monetary instruments beyond a prescribed amount. The proposed addition would require that the person in charge of the conveyance make the report, in prescribed circumstances. In our view, the prescribed circumstances must be narrow. Requiring a person in charge of a conveyance to be responsible for what is carried by the passengers on the conveyance appears to add a level of responsibility that is unwarranted and beyond the reasonable control of the person in charge of the conveyance. We recommend that the prescribed circumstances, and the level and standards of investigation be clearly limited, and practically capable of enforcement.

> **RECOMMENDATION:**
> **The Canadian Bar Association recommends that the proposed "prescribed circumstances" in section 12(3)(a) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and the level and standards of investigation required as a consequence, be clearly limited and practically capable of enforcement.**

We are concerned about the impact of proposed clause 51(1) of the Bill, amending section 5(g) of the *Proceeds of Crime (Money Laundering) Act*, on legitimate charitable organizations and their counsel. While charities were previously exempted, the Bill may — perhaps inadvertently — now include charities among those required to report on suspicious or large transactions

otherwise caught by the legislation. Further, lawyers forwarding donations to charities seem also to be caught and if so, will be required to report to the Financial Transaction and Reports Analysis Centre of Canada (FINTRAC). These changes could be problematic and cumbersome for both charities and their legal counsel.

Proposed section 55.1(1) in clause 68 of Bill C-36, would significantly expand the ability to release information beyond that discussed in recent government consultations with the CBA leading up to the passage of the *Act* and its Regulations. FINTRAC's disclosure of information was to be significantly restricted and its content limited to tombstone information only. In our view, extending disclosure of information to CSIS on a relatively unlimited basis — the test is "reasonable grounds to suspect that designated information would be relevant to threats to the security of Canada" — unreasonably extends the potential for inappropriate disclosure of information. Section 55(3)(c) provides for recording of designated information in circumstances where no currency or monetary instruments are involved. It is difficult to envision how this could relate to money laundering when the legislation states that it is to deal only with financial transactions, and the exchange of cash and monetary instruments.

Section 60.1(5) [in clause 72] deals with service of an order, including delivery of an order to be served on a "person or entity to whom it is addressed". It is unclear in this section whom it is the judge is entitled to order. Is the intention to order FINTRAC itself to produce the information? It seems that section (5) would indicate that the order could be addressed to other persons, which would create an unwarranted expansion of the ability to access information and not fit within the concepts of the *Act*. If the intention is to allow the order to be issued to other persons, we question whether it belongs in money laundering legislation. A comparison with the current *Act* suggests that the confusion more likely arises from the use of "Director" to mean both that of CSIS and of FINTRAC. It appears that the Director of CSIS would ask a judge to order the Director of

FINTRAC to disclose information. The confusion may be generated by first specifying that the Director of CSIS may apply for the order, and then proceeding to the order being made of "the Director", in section (3), and allowing "the Director" to claim privilege, in section (7)(b).

VI. INVESTIGATIVE TECHNIQUES

The new investigative techniques provided by Bill C-36 are substantial departures from what has so far been considered acceptable in Canada. In particular, the mechanisms of preventive arrest and of investigative hearing involve departures which are serious and full of consequence. The involvement of the judiciary in police investigative activities brings judges closer to the inquisitorial role so problematic in other jurisdictions. The right to silence during the investigative phase has long been seen as fundamental to the rights of the individual, and the investigative hearing would do away with it. The preventive arrest mechanism exposes citizens to arrest and detention before any charges are laid against anyone. Even assuming such radical departures to be necessary, for a time, some aspects of the proposed mechanisms deserve attention prior to the Bill being passed.

A. Preventive Arrest

Section 83.3(4) [in clause 4] would permit a police officer who suspects on reasonable grounds that it is necessary to prevent an indictable offence constituting terrorist activity, to arrest without a warrant and detain a person at least until a provincial court judge is available. If the judge decides that the police officer has reasonable grounds for the suspicion, the judge may impose conditions in a recognizance for up to twelve months. If the person refuses to enter into the recognizance, the judge can commit the person to prison for up to twelve months.

We acknowledge that there are checks and balances in this part of the Bill. While "reasonable grounds for suspicion" is lower than the level of belief required for other peace bond provisions under section 810 of the *Criminal Code*, the procedure is similar apart from the initial arrest and detention. However, we are very concerned by the prospect, under section 83.3(4), of arrest and detention without warrant pending the availability of a provincial court judge. As currently drafted, the Bill would allow warrantless arrest and detention on a mere suspicion that a terrorist activity is planned, without need for a belief that the activity is in any way imminent. Either conditions must exist for an information to be laid but exigent circumstances make laying the information impracticable, OR an information must already have been laid and a summons issued, there is no requirement that the police officer reasonably believe that the danger is imminent, as is the case under current section 495(1) of the *Criminal Code*. Warrantless arrest and detention must be reserved for cases which truly demand it.

RECOMMENDATION:
The Canadian Bar Association recommends that section 83.3(4) be amended by making clear that arrest without warrant is possible only where the police officer "believes on reasonable grounds that the terrorist activity will be carried out imminently".

Finally, we remain concerned about the potential for the arrest and detention provisions to be inappropriately used to target certain populations on the basis of discriminatory grounds. This concern will be assuaged somewhat if our previous recommendations are adopted, particularly that in regard to narrowing the definition of terrorist activity and increased procedural fairness in the creation of a list of terrorists.

B. Investigative Hearing

There has been substantial discussion about the investigative hearing provisions in section 83.28 in clause 4 of Bill C-36, mainly in regard to their potential abrogation of the fundamental right to remain silent guaranteed under section 7 of the *Charter*. We note several safeguards that seem designed to secure its constitutionality:

- the Attorney General's consent, with a policy and briefing protocol, not unlike the dangerous offender and direct indictment protocols;
- independent judicial authorization to begin an evidence gathering procedure;
- the judge hearing the application must be satisfied on reasonable grounds; the evidence cannot be used against the person and derivative use immunity is provided; and
- the right to counsel is provided throughout the proceeding.

Further, there is some precedent for such an investigative hearing in *Competition Act* matters[12] and Mutual Legal Assistance Treaty requests. That being said, the investigative hearing is a significant shift in the area of criminal law and in the role traditionally reserved for the judiciary. It should be monitored closely, even pending its sunset. In addition, the provisions should protect all communications between clients and their legal counsel and ensure the right against self incrimination.

RECOMMENDATION:

The Canadian Bar Association recommends that section 83.28(8) should include the non-disclosure of confidential information, as well as privileged information.

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12 R.S. 1985, c.C-34, section 11.

The Canadian Bar Association recommends that section 83.28(10)(b) include an onus on the Crown to show that any evidence it intends to use in subsequent criminal proceedings against the person under investigation is not derivative use evidence.

The Canadian Bar Association recommends that section 83.28 state that a court has power to appoint counsel.

We note that the investigative hearings proposed in Bill C-36 could be used against journalists, forcing them to disclose information they collect and to reveal their sources and work, without an ongoing proceeding to determine the necessity of revealing that source. Freedom of expression, including freedom of the press, is a protected right in section 2(b) of the *Charter*. The activities of the media in gathering and disseminating information are vital to the proper functioning of a democratic society. Without it, the public cannot make informed decisions. Of vital importance to the process of public disclosure is the information provided by those in a position to know of the relevant conduct. Many sources will provide information only on the basis that their identity will not be disclosed. They fear the repercussions that may flow from disclosure, including victimization and physical harm.

In *Goodwin v. The United Kingdom,*[13] the European Court of Human Rights ruled that protection of journalistic sources was one of the basic conditions of press freedom. Because of the importance of this protection in a democratic society and "the potentially chilling effect an order of disclosure has on the exercise of

13 Unreported, March 27,1996, case number 16/1994/463/544.

that (press) freedom," such disclosure could not be ordered "unless it is justified by an overriding requirement in the public interest"[14].

The compulsory disclosure contemplated by Bill C-36 would have such a chilling effect on the media, and would likely result in people being less willing to come forward and give information to the media. It would inhibit free expression in the work and discourage reporters from using a confidential source with information that is in the public interest to disclose.

We recognize that, occasionally, protection of sources must give way to other more important considerations. The courts have recognized that an individual performing a journalistic function is in a special position, and should not be required to testify at a legal proceeding or public inquiry unless the questions sought to be answered are relevant, pivotal, proper, and necessary in the course of justice, and there is no other way to obtain the information sought. However, at issue here is not normal court hearings but pre-charge investigative hearings, with no parties being named and no clear delineation of evidentiary relevance. These protections exist to facilitate the flow of information essential for citizens to make informed decisions, not for the benefit of journalists.

RECOMMENDATION:

The Canadian Bar Association recommends that the exception in section 83.28(8)[clause 4] should include the relationship between journalists and their sources.

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14 *Ibid.*

C. Non-disclosure of Security Information under the *Canada Evidence Act*

Part 3 of Bill C-36 would amend the *Canada Evidence Act* to guard against disclosure of certain information of national interest during court or other judicial proceedings.

The need to suppress disclosure of information affecting national security is understandable, but the breadth of the prohibition coupled with the over-broad definitions of terrorism and terrorist activities is a concern. It leads to the tautological reasoning of "we say you are a terrorist, we have evidence that you are a terrorist, but in the interests of national security we will not show you the evidence, take our word for it… ." Although it creates an interesting codified process for dealing with disclosure, objections to disclosure and appeals of disclosure orders, it seems very cumbersome and complex, particularly bearing in mind interlocutory appeals and stay powers.

The meaning of section 37(8) [clause 43] and similar sections is unclear. It seems to suggest that if there is an objection to disclosure and a disclosure order is granted, and if the evidence is inadmissible, it can then become admissible upon application. The confusion arises from the words "but who may not be able to do so by reason of the rules of admissibility that apply before the court… ." This is likely to generate considerable litigation, particularly in the area of media and communications law.

Section 38.06 of the *Canada Evidence Act* [clause 43 of the Bill] authorizes admission into evidence of summaries of evidence where the entire evidence cannot be disclosed. This is a significant departure from current procedures and poses a serious threat to a fair trial. Immigration lawyers have experience with similar summaries, and have found that it is extremely difficult to conduct a fair defence based on such summaries. The current procedures and rules around privilege are more than adequate. We question the need to allow for the

introduction of summaries in all kinds of proceedings as a serious impediment to the right to a fair trial.

> **RECOMMENDATION:**
> **The Canadian Bar Association recommends that Section 38.06 should be amended so as to preclude the use of summaries of evidence in criminal proceedings.**

The confidentiality aspects and private nature of the hearings proposed in sections 38.11 and 38.12 [clause 43] are somewhat less troublesome, given that the court has jurisdiction to do this already, for example, in third party therapeutic record applications,[15] and in some aspects of access to wiretap materials. For example, in *R. v. Guess*,[16] some of the proceedings on access to the wiretap information were conducted *in camera,* in the absence of the accused, and on the order that defence counsel not disclose the information reviewed even to his own client.

VII. RACIAL AND RELIGIOUS INTOLERANCE

The CBA generally endorses the provisions in Bill C-36 which deal with the pernicious problem of racial and religious intolerance. The promotion of hatred against identifiable groups continues to be a problem in Canada. Indeed, incidents of hatred appear to have increased remarkably since September 11.

In its 1999 submission on the review of the *Canadian Human Rights Act*, the CBA recommended that jurisdiction over civil remedies for hate speech be consolidated under that *Act*. At the moment, jurisdiction is dispersed among different federal agencies, depending on whether the speech is transmitted through the telephone, radio or television, or the mail. The CBA also

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15 *Jones v. Smith*, [1997] 1 S.C.R. 455.

16 (2000), 148 C.C.C. (3d) 321 (B.C.C.A.).

recommended that the *Act* be clarified to include hate speech transmitted over the internet. Clause 88 of this Bill would make this change, although it still excludes hate speech emanating from a broadcast undertaking.

The CBA also supports the court's authority to order the deletion of hate speech from an internet site [clause 10] as well as the creation of a new category of mischief motivated by racial or religious bias, prejudice or hate [clause 12]. These are in furtherance of appropriate public policy concerning discriminatory attacks against racial and religious groups. It will send a strong message that Canadians do not tolerate such attacks.

VIII. PRIVACY

A. Access to Information and Privacy

Proposed clauses 87, 103 and 104 of the Bill would permit the Attorney General of Canada to issue a certificate prohibiting disclosure of certain information in order to protect international relations or national defence or security. This would apply to disclosure under the *Access to Information Act* (ATIA) [clause 87], the *Privacy Act* [clause 103] and the provisions of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) relating to collection, use, disclosure and retention of personal information by commercial organizations [clause 104). The amendments would render those Acts wholly inoperative in respect of information covered by the certificate.

The CBA supports the protection of information that is legitimately classified as sensitive. However, we have concerns about these provisions. The *Privacy Act* protects the privacy of an individual's personal information held by a government institution and provides individuals with a right of access to that information. *PIPEDA* protects personal information gathered in the course of commercial activities and provides for complaints to the Privacy Commissioner. *ATIA* provides Canadians with an ability to obtain information about the operation of

their government. These statutes provide an important framework for the protection and regulation of personal and public information in the federal sphere. Any exemptions should be drawn narrowly.

Canadians have a legitimate interest in obtaining information about their government and its operations. Public information is often used by individuals and groups for legitimate legal purposes. One example is environmental law, where review proceedings or enforcement actions (including private prosecutions) are often commenced after public information has come to light. This frequently occurs after individuals or non-governmental organizations obtain information from public registries through access requests.

Canadians also have legitimate interest in ensuring that their private, personal information is not disclosed to others. While governments and (with consent) businesses routinely collect personal information, the *Privacy Act* and *PIPEDA* help to ensure that this is done for proper purposes, in the least intrusive manner and in a manner that protects their information from unauthorized disclosure.

All three statutes currently prevent disclosure of information concerning security issues and international relations. We therefore question the necessity for these new provisions. If the intention is to exclude review of the exercise of certificate powers, then this is inappropriate.

The proposed amendments would completely exclude the application of each respective Act with respect to information in the certificate. As noted by the Privacy Commissioner, this would completely preclude the application of privacy law to such information. The Privacy Commissioner would be unable to review whether the Attorney General had exercised the certificate power reasonably. Information holders could presumably disclose personal information in a manner inconsistent with the *Privacy Act* or *PIPEDA*. Furthermore, rights of access and, potentially, correction would be eliminated.

The Bill would exempt the Attorney General's certificate from publication pursuant to the *Statutory Instruments Act*. Thus, the public would be prevented from knowing even that a certificate has been issued. This is inconsistent with our notions of open and fair government.

Currently, the *Privacy Act*, *PIPEDA*, and *ATIA* contain a "harm" test with respect to the disclosure of information concerning international relations, defence and security. That is, the disclosure of such information must be reasonably expected to be "injurious" to these interests. Clauses 87, 103 and 104 do not contain a "harm" test or any further limitation. They also do not require the Attorney General to specify the information that is subject to the certificate. Although the purpose of the certificate is to "prohibit disclosure of information", it is not clear what this means.

The certificate should be required to identify with some specificity the type, category or description of information in question so as to enable both data holders (i.e. branches of government and businesses) and data subjects (i.e. individuals) to know what is involved and to assist in compliance. In addition, the Bill does not propose any means for the public to find out whether a certificate has been issued in relation to particular information. If clauses 87, 103 and 104 are not deleted, then the Bill should be amended to provide the above clarifications. This would provide more certainty and allow for public debate of the particular measures.

The Bill does not set out any mechanism for independent review of the Attorney General's certificate, whether by the Privacy Commissioner or otherwise. Indeed, as noted above, the Bill may exclude any review by exempting the application of the entire legislation from information which is in a certificate. Some form of review is appropriate, to ensure the power is not abused.

We have concerns about the Attorney General's power as it relates to portions of *PIPEDA*. *PIPEDA* already contains detailed provisions prohibiting disclosure of personal information, including for national security purposes (see section 9).

The provisions should also specify what data holders should do when they face competing disclosure obligations. Can data holders disclose information subject to a certificate in accordance with obligatory disclosure requirements in *PIPEDA*, under the exclusions contained in section 7(3) of *PIPEDA* or under other legislation?

The issuance of a certificate under this proposed provision would potentially affect data holders' ability to comply with *PIPEDA* in a number of ways. It would potentially remove the rights of data subjects — for example the right to ensure accuracy of their personal information, the right to access their personal information, and their entitlement to dispute resolution. Again, there would be no statutory review mechanism for data holders or data subjects to challenge the validity of the certificate or its conditions.

The Bill provides for no life span for the access-barring effect of the certificate and the CBA recommends that it should be no longer than five years, subject to any renewal if the conditions justifying the certificate still apply.

RECOMMENDATION:

The CBA recommends that clauses 87, 103 and 104 be deleted.

In the alternative, the CBA recommends that:

(a) additional specific criteria be stipulated for issuing a certificate;

(b) some form of statutory review procedure be established, which would not necessarily suspend the immediate operative effect of a certificate pending any decision being rendered;

(c) a more refined approach be considered, for instance enabling an individual to continue to access or challenge personal information);

(d) the certificate specify the type, category or description of information in question; and

(e) the certificate be published pursuant to the *Statutory Instruments Act*.

(f) the certificate cease to have effect after five years.

B. Interception of Foreign Communications

i) Solicitor-client Confidentiality

Proposed section 273.65 of the *National Defence Act* [in clause 102 of the Bill] would allow the Minister of National Defence to intercept private communications for the purpose of obtaining foreign intelligence. In making such a determination, the Minister must weigh a number of considerations, including the presence of satisfactory measures to ensure privacy and ensure the communications only relate to matters of international affairs or security.

We are concerned that this power will be used to intercept communications between clients or potential clients and their solicitors, which are legitimately covered by solicitor-client confidentiality and privilege. We have discussed the importance of solicitor-client confidentiality and privilege and its constitutional dimension above.

The CBA is not comforted by the fact that the Minister of Defence must weigh considerations such as privacy in deciding whether to intercept such communications. The power granted to the Minister is unchecked and subject to potential abuse. Further, the Minister is an interested party and should not be tasked with balancing the various rights and interests involved. This duty is more appropriately vested in a judge, who is disinterested and dispassionate and has

experience dealing with concepts such as solicitor-client confidentiality and privilege and in balancing public interests with privacy rights. Such a procedure would enhance the appearance of justice in these cases and appropriately require Defence officials to make their case before obtaining such an authorization. Authorizations, once obtained, should be limited in duration under section 273.68 to three months, rather than one year.

ii) Journalists

The proposals in section 273.65 may have implications for freedom of the press under section 2(b) of the Charter. The free flow of information into newsrooms is fundamental to a journalist's ability to effectively report on the issues. This will necessarily involve communications with individuals and organizations outside Canada, either via telephone, fax or email. We have previously reviewed the importance of sources and the need to keep sources confidential. Section 273.65 removes any ability for journalists to keep their sources confidential. It is problematic principally because it relies on the Minister's discretion to weigh the government's interests and privacy rights.

RECOMMENDATION:

The CBA recommends that the references to the Minister in section 273.65 be amended to read "a judge". Further, the CBA recommends that section 273.65(2) be amended to add a new section, stating: "the interception does not involve solicitor-client confidences". The CBA also recommends that section 273.68 be amended to read "three months" instead of "one year".

C. Publication Bans

i) Justice System Participants

Proposed section 486(4.1) of the Criminal Code [in clause 16(2) of the Bill] would allow publication bans in respect of "justice system participants". Criminal proceedings are held in open court. Implicit in this is that media have the right to report what they hear in the courtroom. This informs the public about court proceedings and any potential impropriety or injustice. The Supreme Court of Canada has emphasized that publicity fosters public confidence in the integrity of the court system and understanding of the administration of justice.

The *Criminal Code* and the common law already provide adequate protection for witnesses, victims and informants. Each can seek a ban on publication of their identity during a criminal proceeding. The policy reasons for these bans have been thoroughly explored by the courts. However, this Bill seeks to restrict further freedom of expression and freedom of the press. It seeks to curtail public scrutiny of the administration of justice by preventing the publication of the identities of all individuals involved in the proceedings. This includes the judge, the prosecutor, the investigating officers, and the various lawyers involved. Essentially, the Bill allows the presiding judge discretion to ban the identity of those who are at the very centre of administering justice in Canada.

There are a number of important and practical arguments in favour of identifying "justice system participants" in public reports. In order to assess the handling of criminal cases by public authorities, as well as to evaluate the proceedings themselves and their result, the public must be able to learn all the facts about a case, including those involved in investigating and prosecuting the accused. Without an appreciation of such facts, it may be difficult to evaluate and criticize the results of a particular case as compared to others involving the same individuals. Unless the court proceedings are also to be closed to the public, those

able to attend will know the identity of an accused and be able to advise others in the community.

Even if Parliament deems it necessary to include such a limitation on freedom of expression, the Bill should make clear that the media have a right to apply to a court to oppose any ban. A ban on publication takes away the right of the publisher to publish, which is normally constitutionally guaranteed. According to the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corporation*[17], this right cannot be taken away without permitting the publisher to be heard. Section 486(4.5) should be amended to provide that notice of the application be given to media outlets and that media outlets be given standing to participate in the application.

RECOMMENDATION:

The CBA recommends that section 486(4.1) be deleted. Alternatively, the CBA recommends that proposed section 486(4.5) be amended to provide that notice of the application be given to media outlets and that media outlets be given standing to participate in the application.

ii) Charities

Under section 5(3) of the proposed *Charities Registration (Security Information) Act* (Part 6 of the Bill), a charity can apply to Federal Court during a deregistration proceeding for a ban on the publication of its name, and for an order that documents in the Federal Court file be treated as confidential.

The merit of this proposal was the subject of some debate in the CBA working group. Some were of the view that same considerations for publication bans in criminal proceedings should apply to charities. Such bans, it is argued, infringe the media's and the public's right under section 2(b) of the *Charter*. As with an

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17 [1994] 3 S.C.R. 835.

accused in criminal proceedings, there are arguments in favour of identifying the charity. Given the special role that charitable organizations play in society and the fact that they raise money from individuals, the public has an interest in knowing that a particular charity is the subject of a certificate. Publishing its identity can be critical in locating other witnesses and having them come forward to assist both the police and the charity.

As with reporting of a criminal trial, the public must be able to learn all the facts about a case, including details concerning the charity and other circumstances that may serve to identify it. This allows the public to assess the handling of a particular case by the authorities and to evaluate the adequacy and fairness of the proceedings themselves and their result. Revealing a charity's identity can reassure the public that those who may have "connections" are not treated differently. Otherwise, pernicious rumours about proceedings and reduced public confidence in the administration of justice can result. Providing the identities of those involved in legal proceedings makes reports of them more tangible to those who cannot attend.

The Bill does not allow for notice to media outlets in order to make submissions on the validity of the application, as contemplated by the Supreme Court of Canada in *Dagenais*. Furthermore, it does not outline the grounds upon which a judge can make such an order.

Proponents of publication bans in this context point out that there are different considerations than in criminal trials. Firstly, the process to deregister a charity is procedurally unfair. Charities which are the subject of these proceedings are denied the opportunity to know the case they have to meet. They are denied the ability to test the evidence against them through cross-examination. If the Federal Court upholds a deregistration, there is no appeal right. The charity has no due diligence defence. This process is fundamentally different from a criminal trial, where all of the issues are aired in open court, where all evidence can be

rigorously tested through cross-examination, where there is a right to appeal and where an accused must be found to have had a criminal intent (*mens rea*) for the offence.

Thus, people who are wrongfully accused of a criminal offence have an opportunity to "clear their name" through the procedural protections of the criminal process. If they are identified in the media, chances are that their acquittal will be published, thus salvaging their reputations (at least in part). There is less likelihood that a wrongfully accused charity will be able to clear its name through the procedurally unfair deregistration process.

IX. CHARITIES REGISTRATION (SECURITY INFORMATION)

Part 6 of Bill C-36 incorporates most of the content of Bill C-16, *Charities Registration (Security Information) Act*, which was introduced in the House of Commons in March 2001 but withdrawn with the introduction of Bill C-36.

If enacted, Part 6 would create an extra layer of scrutiny for registered charities and entities seeking registered charitable status. It could have a chilling effect on the charitable activities of Canadian charities, both domestically and internationally. It would impose significant liability on charities without providing any defences. In short, we believe it would unnecessarily hamper the legitimate operation of Canadian charities.

A. Differences between Bill C-36 and Bill C-16

There are some major differences between the treatment of charities under Bill C-36 and that under Bill C-16:

- Bill C-36 incorporates new definitions of "terrorism offence", "terrorist activity" and "terrorist group" into the Criminal Code. It criminalizes engagement in terrorism activities and the financial support of organizations

(including charities) that are involved with terrorism. It also criminalizes providing or collecting property for "terrorist activity", providing or making available property or services for terrorist purposes, and using or possessing property for terrorist purposes.

- Bill C-36 would expand the conditions for issuing a security certificate. Under Bill C-16, it applied only to charities who "made" resources available to a listed entity. Bill C-36 incorporates a future aspect, applying to a charity which has "made, make, or will make" resources available.
- Bill C-36 would extend the valid period of a security certificate from three years to seven years. This period commences on the day the certificate is first determined to be reasonable by the Federal Court.

B. Duty of Procedural Fairness

i) Limited Access to and Disclosure of Information

Bill-36 would limit the government's disclosure to a charity of information obtained in confidence from a foreign government, institution or agency. Charitable organizations would be precluded from testing the quality or credibility of that information. A hostile foreign government or entity may manipulate the information to harm a charitable organization, especially where there is religious hostility. The charity would be left defenceless.

ii) Rules of Evidence

In determining whether a certificate submitted by the Minister is reasonable, the Bill would allow a Federal Court judge wide discretion to admit any relevant information, even information which would otherwise be inadmissible. This could severely prejudice a charitable organization by eliminating its right to cross-examine on the information, to test the credibility of those providing it or to exclude prejudicial evidence. All these rights are otherwise available under the rules of evidence.

iii) No Right of Appeal

As in Bill C-16, the Federal Court's determination that a certificate is reasonable would not be subject to appeal or review by any court. This is inappropriate and unfair, considering the serious nature of allegations of terrorism and their potential consequences to the charity or organization involved.

C. Broad Definition of Terrorist Activity and of Terrorism Offences

As noted above, the definitions of "terrorist activities" and some of the terrorism offences (such as facilitation of a terrorist activity) are quite vague. A legitimate charity in Canada could face prosecution if it provided money to a legitimate agent in another country, which in turn unwittingly provided money, resources, or assistance to an organization that engaged in "terrorist activity", as defined. As recommended above, the government should reconsider the broad definition of "terrorist activity", and in particular the term "facilitates". Otherwise, it will criminalize legitimate activities of bona fide charities operating outside of Canada.

D. Limited Defence

i) Due Diligence Defence

The proposed legislation would penalize a registered charity or applicant for charitable status for directly or indirectly providing funds as services to terrorist entities. The complex social, political, and cultural structures of many foreign countries could make it onerous, if not impossible, to ensure that a Canadian charity's funds do not end up in the hands of a terrorist entity. The charity could be denied charitable status and could face possible law suits from its donors, its members and any victims of the terrorist activities. The Bill should provide a due diligence defence to bona fide Canadian charities which may inadvertently distribute funds to a foreign entity in good faith.

ii) Knowledge and Intention

The proposed revisions to the Criminal Code would create a specific intent offence of providing property to and financing terrorist groups. Despite this, the Bill does not distinguish between charities which intend their assets to be used for terrorist activities and those which could not possibly foresee that their assets would be distributed to terrorist groups. In other words, the bill would punish criminals the same way as legitimate charities trying in good faith to help others.

iii) Discrimination

We are concerned that charities with links to cultural, religious or ethnic groups will be targeted based on unfair stereotypes. The Minister may single out certain charities for special scrutiny based on culture, race, religion, or national origin, with deregistration being the ultimate penalty. Such discrimination would be contrary to section 15 of the Charter.

iv) Retroactive Effect

Under the Bill, a certificate could be issued on reasonable belief that an applicant or registered charity has made, makes or will make resources available to a terrorist entity. The Bill could apply retroactively to charities that have distributed funds in the past to foreign entities in good faith, but where those funds have ended up in terrorist hands. In our view, the Bill should apply only to distributions made after the Act comes into force.

E. Public Perception of Charitable Activities and Fundraising

Bill C-36 may negatively affect public perception of certain charities linked to particular cultures, regions and ethnic groups. It may in turn have a negative impact of the image of charities as whole. The Bill would have a chilling effect on the charitable activities of Canadian charities internationally, inhibiting many

Canadian charities from carrying out international operations, especially in certain volatile regions.

F. Liability Issues

i) Criminal Liability

Individual directors of a *bona fide* charity may face criminal liability if they intentionally make the charity's resources available to support terrorist activities, and this may affect the charity or innocent directors. In addition to any liability for innocent directors in such a situation, the charity may face law suits from donors, members or the victims of terrorist activities on the ground of breach of trust, breach of fiduciary duty or negligence.

ii) Vicarious Liability In International Operations

Under the *Income Tax Act*, a Canadian charity is not permitted to distribute its charitable assets to foreign entities unless:

- the recipient entities are foreign "qualified donees" as defined in the *Income Tax Act*; or
- the recipient entities are not "qualified donees", but an agency agreement, joint venture agreement, or cooperative agreement has been signed between a recipient foreign entity and a Canadian charity.

By entering into an agency, joint venture, or cooperative partnership, the Canadian charity may become liable for acts committed by foreign recipient entities. In practice, a foreign recipient entity acts as an agent of the Canadian charity. If it engages or will engage in terrorist activities, the Canadian charity could face deregistration under the Bill, in addition to criminal penalties for criminal conduct committed by foreign recipient entities. This also could affect civil liability of the Canadian charity for the acts of its agent. The Bill would therefore open the gates to Canadian charities being subject to unexpected criminal convictions and accompanying civil law suits.

iii) Breach Of Fiduciary Duty

Charities and their directors have a fiduciary duty to donors when they fail to protect and apply charitable assets for the intended purposes. If charitable status *is* revoked, the charity and its directors may be liable for breach of this fiduciary duty. Because Bill C-36 does not provide a due diligence defence, this could have an impact on the civil liability of the directors of the charity to donors.

iv) Insurance

Given the wide scope of potential liability under the Bill, liability insurance for directors and officers may not be available. Fines and penalties are normally excluded from insurance policies. Lack of insurance coverage will likely inhibit volunteers from becoming directors or officers of a charity.

RECOMMENDATION:

The CBA recommends that Part 6 of Bill C-36 be deleted.

In the alternative, the CBA recommends that the Bill be amended:

(a) in section 4, to provide that no certificate may be issued in respect of a charity's activities prior to the coming into force of the legislation;

(b) in section 6, to require disclosure to the charity of all information before the Federal Court in making its determination;

(c) to delete section 6(2);

(d) in section 6, to provide that the Court will not determine that a certificate is reasonable if the charity establishes that it exercised due diligence to avoid the actions listed in section 4(1); and

(e) to delete section 7.

X. CONCLUSION

The CBA appreciates the opportunity to provide input into this very important Bill. The debate on this Bill will be difficult, but it is part of a common quest to get the right response. We must ensure that the response will target terrorists and their organizations and affect the rest of us only to the extent necessary. We must make sure that the response does not usurp the very rights and freedoms that the terrorists themselves attack.

Even with the changes recommended here, the Bill will bring dramatic changes to Canadian law, will continue to attract challenges based on the *Charter of Rights and Freedoms* and will demand close monitoring to ensure that legitimate objectives are attained and abuses avoided.

All this can be acceptable, even in the current factual context, only if it is temporary, and only if it is known from the outset that the government is put to the onus, as the sunset period expires, of justifying continuation.

The *Anti-Terrorist Act* will form a legislative legacy. A true sunset clause increases the chance of leaving a good legacy rather than an unfortunate one.

IX. SUMMARY OF RECOMMENDATIONS

The Canadian Bar Association recommends:

- **that the federal government's response to recent terrorist attacks balance collective security with individual liberties, with minimal impairment to those liberties in the context of the rule of law and our existing legal and democratic framework.**
- **that the federal government make a concerted commitment to funding law enforcement agencies, intelligence gathering agencies and the military to levels that adequately protect national security and public safety.**
- **that clause 145 be amended to provide that Bill C-36 expires three years after it receives Royal Assent, except for clauses 10, 12 and 88.**
- **that the definition of "terrorist activity" in section 83.01(1) be amended by removing sections(i)(A) and (ii)(E), and by removing reference to (ii)(E) from section(ii)(D).**
- **that there be significant enhancement of procedural protections in creating a list of terrorists if Bill C-36 is to be enacted.**
- **that the Solicitor General's review of the list be based, at a minimum, on appropriate findings of fact and conclusions of law.**
- **that Bill C-36 clarify that the Crown must prove criminal intent to find anyone guilty of a terrorist offence.**
- **that lawyers acting for those accused of terrorist offences be specifically excluded from the ambit of section 83.18, dealing with participation in, or contribution to an activity of a terrorist group.**
- **that the facilitation offence in Bill C-36 be clarified by moving the definition in section 83.01(2)(c) to section 83.19.**
- **that the cumulative sentencing provision, section 83.26, be deleted.**
- **that section 83.1 be amended by adding an exception for information which is subject to solicitor-client confidentiality and privilege.**

- **recommends that section 83.08 be amended to provide that: "This section does not apply in respect of professional fees, disbursements, expenses or bail."**
- **that a new section 83.08(2) be added providing that no criminal or civil proceedings lie against a person for freezing property in good faith under the section.**
- **that section 83.24 be amended to add a subsection which reads: "Where the prosecution relates to a body listed in section 83.11, the Attorney General shall consult with the Office of the Superintendent of Financial Institutions or other regulatory body for the institution prior to giving consent."**
- **that proposed section 83.14 of the Criminal Code be amended by adding a provision after section (7) stating that: "Where a person with an interest in the property appears at the hearing, a judge may order that person's costs be paid from the property which is the subject of the hearing."**
- **that the proposed "prescribed circumstances" in section 12(3)(a) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and the level and standards of investigation required as a consequence, be clearly limited and practically capable of enforcement.**
- **that section 83.28(8) should include the non-disclosure of confidential information, as well as privileged information.**
- **that section 83.28(10)(b) include an onus on the Crown to show that any evidence it intends to use in subsequent criminal proceedings against the person under investigation is not derivative use evidence.**
- **that section 83.28 state that a court has power to appoint counsel.**
- **that the exception in section 83.28(8)[clause 4] should extend to incorporate the specific relationship between journalists and their sources.**
- **that clauses 87, 103 and 104 be deleted.**

- **In the alternative, the CBA recommends that:**
  - **(a) additional specific criteria be stipulated for issuing a certificate;**
  - **(b) some form of statutory review procedure be established, which would not necessarily suspend the immediate operative effect of a certificate pending any decision being rendered;**
  - **(c) a more refined approach be considered, for instance enabling an individual to continue to access or challenge personal information);**
  - **(d) the certificate specify the type, category or description of information in question; and**
  - **(e) the certificate be published pursuant to the *Statutory Instruments Act*.**
- **that the references to the Minister in section 273.65 be amended to read "a judge". Further, the CBA recommends that section 273.65(2) be amended to add a new section, stating: "the interception does not involve solicitor-client confidences". The CBA also recommends that section 273.68 be amended to read "three months" instead of "one year".**
- **that section 486(4.1) be deleted. Alternatively, the CBA recommends that proposed section 486(4.5) be amended to provide that notice of the application be given to media outlets and that media outlets be given standing to participate in the application.**
- **that Part 6 of Bill C-36 be deleted.**

  In the alternative, the CBA recommends that the Bill be amended:
  - **(a) in section 4, to provide that no certificate may be issued in respect of a charity's activities prior to the coming into force of the legislation;**
  - **(b) in section 6, to require disclosure to the charity of all information before the Federal Court in making its determination;**
  - **(c) to delete section 6(2);**

(d) in section 6, to provide that the Court will not determine that a certificate is reasonable if the charity establishes that it exercised due diligence to avoid the actions listed in section 4(1); and

(e) to delete section 7.