February 26, 2002

The Honourable Andy Scott, P.C., M.P., Chair
Standing Committee on Justice
and Human Rights
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr. Scott:

RE: Bill C-217, *Blood Samples Act*

I am writing as Chair of the Canadian Bar Association (CBA) National Criminal Justice Section (the Section) in regard to Private Members' Bill C-217, the *Blood Samples Act*. The Section consists of both Crown and defence counsel from across the country. We appreciate this opportunity to participate in your Committee's consideration of the Bill.

In our view, Bill C-217 is troubling legislation. Without a doubt, people have a legitimate interest in ensuring that they and their loved ones are not inadvertently exposed to potentially fatal viruses. Bill C-217 would permit a warrant authorizing a mandatory blood sample to provide information about possible exposure to those administering and enforcing the law, or for "good Samaritans". While the Bill seems to address a simple problem related to health matters, it raises several serious concerns.

We must consider when and if the state should be allowed to take blood to verify the health of a person, regardless of whether that person knows, or wishes to know that information about his or her own health. We must also consider the need for safeguarding the privacy of the person subjected to the test and the test results. For example, detained persons are included within Part II of the Bill. Without appropriate safeguards, it would not be long after a blood sample was taken from a prisoner before the entire prison population knew that the person had been tested for HIV. Although there is a prohibition against the results of the test being received in evidence, nothing in the Bill precludes derivative use of the results. On a broader level, once such a process is in place for some diseases, it may well be extended to other stigmatized infectious diseases. Will the Bill lead to systematic discrimination against certain groups of people, or generally against people who are ill or suspected of being ill? We must be cognizant

of the prejudice and discrimination that this Bill could foster, whatever the results of any particular test.

Certainly, there are valid reasons for people who perform "designated functions" or who have acted as “good Samaritans” to know whether they have been exposed to hepatitis B or C, or HIV. To achieve that goal, however, the Bill would require a determination of which occupations or activities should and should not qualify for its benefits, and also an implicit assessment of which people are sufficiently suspect that they should be subjected to mandatory blood sampling.

The Bill contains two thresholds for forcing a person to submit to a blood test. In clause 3, persons in the “designated functions” or persons who have assisted or attempted to assist another person based on a belief that the other person was in danger, had suffered, or was about to suffer physical injury, must believe on reasonable grounds that they have come into contact with a bodily substance that, under the circumstances, may have infected them with one of the three viruses. In clause 5, a justice considering the application must be satisfied that, while performing a designated function or acting as a “good Samaritan”, there are reasonable grounds to believe that the applicant did have contact with the bodily substance of another person in such a way that the applicant may have been infected.

In our view, there must be objective medical grounds to believe that a person is likely to be infected with one of the viruses at issue before considering an infringement of the bodily integrity of another individual to the extent contemplated. Absent objective medical grounds, the mere suspicion that a person might be infected, based on appearance, socioeconomic status, sexual orientation or on any underlying stereotype, should be considered inadequate. While we do not question the sincerity or good intentions of the justices and the applicants included in these clauses, we are concerned that the Bill does not incorporate medical expertise to determine the likelihood, or even the possibility of a virus being transmitted.

The persons from whom the blood samples would be taken are not necessarily detained, accused or even suspected of any crime. However, clause 9 of the Bill would criminalize their refusal to give the blood sample. At a minimum, it should include the usual phrase “without reasonable excuse”. The Bill is so vague about the circumstances that would found a successful application for a blood sample that we believe its warrant process is unlikely to withstand *Charter* scrutiny. If such a law were to be enacted, surely it should require scientific evidence that, given the nature of the virus and the contact that took place, the virus is reasonably likely to have been transmitted in fact and the incubation period is such that there are real advantages to obtaining the information in the manner contemplated.

An application involving so significant an infringement of a person’s bodily integrity should be decided by a judge, as opposed to a justice as defined by the *Code*. Absent an objective judicial balancing, based on an informed medical opinion, we believe that the Bill is insufficiently tailored to achieve the objective of providing prompt information about exposure while respecting the right to privacy and bodily integrity of the proposed targets of the Bill.

Thank you for the opportunity to consider Bill C-217. We look forward to elaborating further on our concerns and responding to any questions during our appearance before your Committee.

Yours truly,

Heather Perkins-McVey
Chair