July 3, 2002

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Department of Transport
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Dear Ministers:

Re: Bill C-55, *Public Safety Act 2002*

The Canadian Bar Association (CBA) is pleased to have the opportunity to provide its comments concerning Bill C-55, *Public Safety Act, 2002*. Much of the Bill is similar to its predecessor – Bill C-42, *Public Safety Act*. To the extent that Bill C-55 has not addressed our concerns, we rely on our previous submission concerning Bill C-42 (a copy of which is attached), which we provided to the government in February 2002. This letter provides additional comments which principally address the differences between Bill C-42 and Bill C-55.

Airline Passenger Information

Bill C-42 permitted collection and use of airline passenger information in two contexts – transportation security (proposed section 4.82 of the *Aeronautics Act*, in clause 5 of Bill C-42) and immigration (proposed section 88.1 of the *Immigration Act*, in clause 69 of Bill C-42, which

applied to all transportation companies). We submitted that the latter provision was overly broad, as it permitted collection of information for any of the myriad purposes under the *Immigration Act*. We also recommended that there be a temporal limit on the retention of this information.

Bill C-55 would amend and consolidate these two provisions in proposed sections 4.81, 4.82 and 4.83 of the *Act* [clause 5 of the Bill], which would establish a detailed code governing collection and use of airline passenger information. We applaud the new requirement that information must generally be destroyed within a certain period of time after it is disclosed (sections 4.81(6), (7) & (8) and 4.82(14)). We also applaud the removal of the provision allowing collection and use of passenger information for the general purposes of the *Immigration Act*. However, section 4.82 is still too broad.

We agree with the proposed power to scour airline passenger lists for the purposes of "transportation security" and "threats to the security of Canada". The safety of Canadians and of people travelling to Canada is an important objective which, on balance, overrides some infringements to privacy that this proposal would entail. It also accords with the overall objective of the Bill – to protect public safety by preventing terrorist threats.

However, we disagree with the proposal in section 4.82(4) that would permit collection and use of information for "identification of persons for whom a warrant has been issued". This would include persons subject to immigration warrants, arrest warrants issued outside the country for persons who can be extradited and arrest warrants for people who are alleged to have committed an offence with a potential punishment of five years or more.

There is little doubt that this proposed power would assist the authorities to apprehend those with outstanding warrants. However, in our view, it would do little to promote passenger safety beyond the protections for "transportation security" or "threats to the security of Canada" already contained in the Bill. We believe there is a tenuous connection between airline passenger safety and the presence of a person who is subject to an outstanding warrant and whose information cannot otherwise be collected under the categories of "transportation security" or "threats to the security of Canada". Further, police already have the power to obtain a search warrant under the *Criminal Code* in the normal course of they have reasonable grounds to believe that there is something in the passenger lists that will reveal the whereabouts of a person who has committed an offence.

We therefore recommend that references to warrants be deleted from section 4.82.

Subject to our comments below, we believe that the time period for destruction of information provided or obtained under proposed sections 4.81(6), (7) and (8) and 4.82(14) should be 24 hours from the time the flight in question lands. The principal purpose of collecting the

information is to deal with security threats relating to the flight itself. Further, section 4.82(14) already permits retention of the information past the relevant time period (in our suggestion, 24 hours) for the purposes of transportation security or the investigation of threats to the security of Canada. Therefore, there would seem to be no reason to retain the information for seven full days, unless the government can show that a longer period is necessary to protect against security threats relating to the flight itself, rather than some non-terrorist-related purpose.

In addition, we question why information disclosed by the Department of Transport to a person designated under proposed section 4.81(3)(d) does not have to be destroyed. Proposed section 4.81(7) only requires destruction of information provided under proposed sections 4.81(3)(a), (b) and (c) and proposed section 4.82(14) only requires destruction of information provided under proposed sections 4.82(4), (5) and (6). We cannot think of a reason why information under section 4.81(3)(d) would be treated differently and therefore recommend that section 4.82(14) be amended to provide for destruction of information under section 4.81(3)(d).

In our view, there should be an independent oversight mechanism to prevent unauthorized use or disclosure of passenger information and to ensure that information is only retained beyond the seven-day (or, as we propose, 24-hour) period for purposes of under proposed section 4.82(14). We assume that the procedures under the *Privacy Act* would apply to these matters. In terms of retention of passenger information, we agree with the Privacy Commissioner's recommendation that the Privacy Commissioner should receive copies of records prepared under section 4.82(14). This will allow an independent body to help ensure that information is only retained for as long as necessary.

Section 4.82(15) requires the Commissioner of the Royal Canadian Mounted Police or the Director of the Canadian Security Intelligence Service to conduct an annual review of retained information and order its destruction if they are "of the opinion that its continued retention is not justified". We believe that the word "justified" is too broad. The provision should read "of the opinion that its continued retention is no longer reasonably required for the purposes of transportation security or the investigation of threats to the security of Canada". Such an amendment would link the rationale for destroying the information to the purpose of retaining the information.

On a technical matter, we question why "transportation security" is defined only for the purposes of section 4.82 when the same expression is also used in section 4.81. The implication is that it has a different meanings in the two sections, which we assume is not the intention.

Interim Orders

We are pleased to see that the government has decided to limit proposed Ministerial powers to issue interim orders. We recognize that there may be circumstances where it is appropriate for Ministers to take quick action to protect public health and safety. At the same time, the power to issue interim orders without approval either by Parliament or by Cabinet offends Canadians' sense of democratic accountability. There must be checks and balances in the system.

The government has attempted to address this concern by, among other things, proposing to reduce the time frame during which an order is effective without the approval of the Governor-in-Council (from 90 days to 45 days). The government has also added a requirement that the interim order be tabled in Parliament within 15 sitting days.

While this is certainly a laudable improvement, in our view these time frames are still too long. Under proposed section 200.1(3) of the *Canadian Environmental Protection Act* [clause 27 of Bill C-55], an interim order ceases to have effect within 14 days, unless it is approved by the Governor-in-Council. We believe that a time frame in this order of magnitude is preferable. It strikes a more appropriate balance between the requirement of urgency and the need for accountability, especially given the potential impact of these types of orders.

For similar reasons, we believe the time frame for tabling an interim order in Parliament should be something in the order of five sitting days. We can see no reason for having 15 days delay.

Controlled Access Military Zones

We are pleased that the government has placed more limitations on the ability of the Minister of Defence to designate controlled access military zones (formerly "military security zones"). We agree that the power should be limited to military property and should continue to have temporal and geographic limits.

Having said this, it is still unclear how this power will be used in practice. Given that military zones can be designated in relation to movable military property, which can be placed in an area where protests are taking place (or are anticipated to take place), the potential arguably still exists for them to be used to inhibit legitimate dissent. We should be vigilant to ensure that this does not happen.

If these military zones are used to limit protests at international summits, they may also have an impact on Canadian charities. Charitable organizations face potential deregistration under the *Anti-terrorism Act* for facilitating the activities of those who fit within the broad definition of "terrorism" under that *Act*. Therefore, there may be potential negative repercussions for those

charities which aid protestors infringing a military zone whose activities fit within the definition of terrorism – for instance, those who cause substantial property damage that risks the safety of others. Affected charities may include hospitals that provide medical assistance or churches that provide accommodation for such protestors. In addition, when members of charities concerned with humanitarian or civil libertarian issues hold rallies or demonstrations at an international summit, they would face the restrictions imposed by any declaration of a military zone, along with potential penalties for infringing that zone.

Under proposed sections 260.1(10) and (11), the Minister may decide not to give notice of the designation to affected persons or publish notice of the designation in the *Canada Gazette* if the Minister believes it is inadvisable for, among other reasons, "international relations". In our view, the term "international relations" is too vague and provides insufficient grounds for not publishing a notice. The reasons for not giving or publishing notice should be limited to "national defence or security".

Proceeds of crime and charities

Clause 99 of Bill C-55 would amend the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* by expanding the power of the Financial Transactions and Reports Analysis Centre (FINTRAC) to collect information from various regulatory bodies (as proposed in Bill C-42) and for the purposes of "national security" (which is new to Bill C-55).

In our Bill C-42 submission, we comment on the expanded power to collect information as it relates to solicitor-client privilege. However, these new obligations – together with their expanded scope – may also have an impact on charitable organizations, depending on whether the *Proceeds of Crime Act* is interpreted to apply to charities (which at the moment is unclear). The inclusion of "national security" makes it more likely that a charity carrying out international fundraising or programs may become the subject of reporting obligations by its banks, lawyers, accountants and so on. Further, we are concerned that information disclosed by FINTRAC to the Department of the Solicitor General or the Canada Customs and Revenue Agency will be used in proceedings under the *Anti-Terrorism Act* to deny or revoke a charity's charitable status – with no ability for the charity to test the veracity of the information. We recognize that proposed section 65(3) of the *Proceeds of Crime Act* [clause 100 of Bill C-55] states that information from FINTRAC is to be used "only for purposes relating to compliance with Part I" of the *Proceeds of Crime Act*. However, we believe it is possible to interpret "compliance" in that section as including proceedings to deny or revoke charitable status.

Solicitor-client confidentiality

In our brief concerning Bill C-42, we expressed concern that the enforcement powers in the proposed *Biological and Toxin Weapons Convention Act* did not adequately protect a client's confidential information in the solicitor-client relationship. We note that section 12(1) of that proposed *Act* has been amended to provide that an inspector is a "public officer" for the purpose of section 487 of the *Criminal Code*, which deals with the issuance of search warrants. In our view, inspectors should also be "public officers" for the purposes of the *Criminal Code* provisions that establish a procedure to deal with claims of solicitor-client privilege in the context of search warrants. At the moment, this is section 488.1, however (as noted in our Bill C-42 submission), this section is subject to *Charter* challenge in cases which have been heard by the Supreme Court of Canada.

Our concerns remain about the threat to client confidentiality section 18. In our view, the exception for "confidential information" in section 19 does not assist because its exceptions (enforcement of the *Act*, obligations under the *Convention* or the interests of public safety) are too broad. The courts have long recognized that solicitor-client confidentiality may only be violated in extremely limited circumstances.

We thank you for the opportunity to provide our comments. Should you have any questions, please do not hesitate to contact us through Richard Ellis, Legal Policy Analyst, at the CBA's National Office (tel: (613) 237-2925, ext 144; email: **richarde@cba.org).**

Yours truly,

Eric Rice, Q.C.

c.c. Bob Kilger, M.P., Chair, Legislative Committee on Bill C-55