THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

December 15, 2010

Via email: SECU@parl.gc.ca

Kevin Sorenson, M.P.
Chair, Public Safety and National Security
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Sorenson,

Re: Bill C-17 – *Criminal Code* amendments (investigative hearings and recognizance with conditions)

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-17, *Criminal Code* amendments, which would reintroduce investigative hearings and recognizance with conditions. We regret that time did not allow for an appearance before the Committee. The CBA is a national association representing 37,000 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and the administration of justice. The CBA Section membership comprises prosecutors and defence counsel from every part of the country.

The CBA first commented on Canada's legislative response to terrorism in 2001.[1] Since that time the CBA has made several submissions on various anti-terrorism initiatives and related topics.[2] In 2008, the CBA Section wrote to the Senate Committee concerning a predecessor to Bill C-17, which was then called Bill S-3. The CBA Section stands behind the recommendations in that 2008 letter, which is attached for your reference. There, we said:

> These powers, especially the power to conduct an investigative hearing, represent a significant departure from powers traditionally available to investigate criminal offences. It is significant that the provisions would again form a part of the *Criminal*

1 See, Canadian Bar Association submission on Bill C-36, *Anti-Terrorism Act* (Ottawa: CBA, 2001).

2 See, for example, the CBA's submissions on Bill C-42, *Public Safety Act* (Ottawa: CBA, 2002), to the Parliamentary Review of the *Anti-Terrorism Act* (Ottawa: CBA, 2005), to the Arar Commission of Inquiry (Ottawa: CBA, 2005), on *Privacy Act* Review (Ottawa: CBA, 2008), and its interventions at the Supreme Court of Canada in regard to the constitutional validity of investigative hearings (2003) and also security certificates (2006/2007).

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Code, rather than a statute enacted to specifically address national emergencies or terrorism.[3]

Because these provisions were highly controversial from the outset, the CBA Section is providing further comments on Bill C-17.

General Comments

As the national voice of the legal profession, the CBA has consistently urged that the federal government:

- ensure that people in Canada are protected against the harm caused by criminal offences, and that when they occur, those offences be investigated and prosecuted within the limits of the rule of law and having full regard for constitutional principles;
- demonstrate ongoing respect for human rights, and the rights and values protected by the *Canadian Charter of Rights and Freedoms*;
- recognize that rules and procedures in Canadian criminal law, as they existed prior to the addition of sections 83.28 and 83.3, were effective for investigating criminal offences, including those associated with terrorism;
- recognize that the rules and procedures in Canadian criminal law, as they existed prior to the inclusion of sections 83.28 and 83.3, were effective in protecting people within Canada from the harm caused by criminal offences, including those associated with terrorism;
- implement measures to ensure a comprehensive, effective and transparent mechanism for the review and oversight of all agencies associated with the investigation of terrorism related activities or offences.

The CBA Section has also consistently maintained that any departure from established legal rules and procedures can only be justified on the basis of evidence showing a clear and demonstrable need for that departure, given that existing rules and procedures are inadequate. In advancing that position, we recognize that the criminal law is not or should not be static or unresponsive to changing conditions within Canada. However, "fighting terrorism" must not become a mantra that can be cited, without more, to justify ever-expanding state powers and ever-increasing encroachment upon fundamental human rights, individual privacy and the rule of law.

The powers of investigative hearings (section 83.28) and the power of a court to impose a recognizance with conditions (section 83.3) became part of Canadian law against the backdrop of the 9/11 attacks. Those events generated an understandable sense of urgency, and significant changes in Canadian law were made very quickly. In that context, investigative hearings and the power of a court to impose a recognizance with conditions were included in the *Criminal Code*.

In March 2007, the House of Commons allowed those exceptional powers to "sunset", given they had been rarely used and the initial sense of urgency had subsided. As Bill C-17 would now reintroduce those exceptional powers, we urge calm scrutiny and evaluation of the Bill's provisions according to the usual established principles of Canadian criminal law. The CBA Section suggests avoiding phrases such as "war against terrorism", or the "short title" given to

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3 Letter from CBA Section Chair Greg Delbigio to Senator David Smith, concerning Bill S-3, *Criminal Code* amendments (Ottawa: CBA, 2008).

the Bill, "Combating Terrorism Act", as such terminology has the potential to distract and even alarm. Such terminology must not replace the careful debate that should guide the development of Canadian criminal law.

Findings of the Eminent Jurists Panel

Any review of law relating to the investigation or enforcement of terrorism offences must consider the comprehensive 2009 report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, an independent panel commissioned by the International Commission of Jurists. The Eminent Jurists Panel's report, *Assessing Damage, Urging Action* was prepared after it heard testimony and held discussions in more than 40 countries. The Panel stated:

> We have witnessed the harm done by terrorism and the fear generated by it. We have also witnessed the harmful results of intemperate responses to the threat of terrorism....[4].

Significantly, the Eminent Jurists Panel rejected the notion that the security that law provides must be seen in opposition to the recognition and preservation of individual rights.

> It is a basic tenet of this report that any implied dichotomy between securing people's rights and people's security is wrong. Upholding human rights is not a matter of being "soft" on terrorism.[5]

Further, the Panel concluded that "human rights are not, and can never be, a luxury to be cast aside at times of difficulty."[6]

Regrettably, on the basis of its extensive study, the Eminent Jurists Panel found significant evidence that fundamental principles have, in some instances, been cast aside in favour of laws and practices designed to assist in "waging war" against terror. The Panel concluded that countries must take stock and "re-affirm those basic principles".

> At the turn of the millennium, there was a clear international consensus on the nature of human dignity, the rights that flowed from that central premise, and the total illegality and unacceptability of practices such as torture. Seven years on from the tragedy of 9/11, it is time to take stock and re-affirm those basic principles. Much damage has been done to the international legal framework in these few short years. Priority must be given to actively undoing the grave harm that has been caused. It is time for change.[7]

If there is objective justification for expanding the powers of the state, there may be a corresponding requirement to expand mechanisms of oversight and accountability to ensure that the increased powers are used lawfully and with appropriate justification. The Eminent Jurists Panel wrote:

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4 Eminent Jurists Panel on Terrorism, Counter Terrorism and Human Rights, *Assessing Damage, Urging Action* (Geneva: International Commission of Jurists, 2009) at 159.

5 *Ibid*. at 16.

6 *Ibid.* at 18.

7 *Ibid.* at 25.

> Examples from the past show that human rights are at particular risk when States allow national security considerations to take precedence over the rule of law. One of the most serious shortcomings, reported from many jurisdictions, was the tendency of the authorities to broaden discretionary powers, without ensuring corresponding forms of accountability. States have often used the seriousness of risk – and the heightened level of fear in the general populace – to accrue more powers. Sometimes this increase in power might be objectively justified, but even in such cases, there is no obvious excuse for not increasing the role of oversight and accountability structures in monitoring the new situation. All the experience of the past is that, when the risk from terrorism is at its greatest, accountability is at its most necessary.[8]

In Canada, it appears that intelligence gathering and the dissemination of information gathered through intelligence efforts has become a cornerstone for investigating terrorism offences and terrorism related activities. Investigative hearings are a component of the intelligence gathering process. The CBA Section recognizes the necessity and importance of reliable information for Canadian law enforcement agencies. At the same time however, recent Canadian history has clearly revealed the importance of ongoing, effective and transparent oversight of intelligence gathering.[9]

This stress on appropriate oversight is consistent with conclusions reached by the Eminent Jurists Panel:

> Intelligence, by its very nature, poses potential risks to human rights and the rule of law. Nevertheless, it is worth considering briefly how and under what conditions these risks could become more imminent.
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> First, there is the question of secrecy. It is both necessary and legitimate for intelligence operations to be secret, and for intelligence agencies to protect sources. Granted this need for secrecy, there is no reason, in principle, why intelligence agencies should not be answerable for their actions. The rule of law requires transparency, not necessarily in terms of detailed operations and operational methods, but in terms of who makes decisions, how those decisions are made, and what safeguards exist to prevent, or subsequently punish, corruption, misuse, or illegality. Arrangements for accountability must therefore be essential features of intelligence structures, if the risk of secrecy is to be mitigated.[10]

Finally, the CBA Section is concerned about the potential for ever-expanding use of the controversial provisions of the *Criminal Code* proposed in Bill C-17, which were originally justified only on the basis of the extraordinary and tragic events of 9/11. Acts of terrorism prompted significant changes to Canadian law, including the enactment of sections 83.28 and 83.3. While many of those provisions are currently restricted to terrorism offences and terrorist activities, the Eminent Jurists Panel noted that "terrorism" has been used to justify side-stepping the rules and protections previously provided in the normal criminal law context by some countries.

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8 *Ibid.* at 43.

9 For example, see Commissioner Hon. Dennis O'Connor, Report from the Arar Commission of Inquiry (2006), Commissioner Hon. Frank Iacobucci, Report on the Cases of Almalki, Abou-Elmaati, and Nureddin (2008)and Commissioner Hon. John Major, Report in relation to the Air India inquiry (2010).

10 *Supra*, note 4 at 68.

The Panel was disturbed at the extent to which crucial legal principles are being degraded in the name of combating terrorism. The Panel expressed the view that some countries are supplanting the normal criminal justice system with legal tools intended to combat terrorism, in part to avoid the well-established evidentiary and procedural requirements of that system. The Panel described this as a very "slippery slope".[11]

The CBA Section is also concerned about the potential for the operation of sections 83.28 and 83.3 to be extended to other offences unrelated to terrorism. If these sections become an accepted part of the normal fabric of criminal law, the original exceptional justification for the provisions may well be forgotten. The general explanation that they make law enforcement more effective could easily be used to justify extending them beyond their present limits. Certainly, the "slippery slope" the Panel cautioned against must be avoided.

For this reason, the CBA Section commends the following conclusions of the Eminent Jurists Panel:

> States should take explicit precautions to ensure that any measures, intended to be exceptional, do not become a normal part of the legislative framework. Precautions could include ensuring that any new counter-terrorist laws or measures:
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> - fill a demonstrable gap in existing laws;
> - are subject to clear time-limits;
> - are subject to periodic independent review, not solely as to implementation, but also as to the continuing necessity and proportionality of the measure.[12]

Like the Eminent Jurists Panel, the CBA has also stressed that when exceptional state powers are shown to be justified, proportionate and necessary to combat terrorism in Canada, those powers should be carefully circumscribed, and accompanied by equally rigorous independent oversight.[13] We recommend that the Committee consider adding important safeguards during its study of Bill C-17.

At a minimum, the CBA Section recommends that oversight in this context will require a detailed reporting mechanism to facilitate scrutiny of how the provisions are being used. This information should be available to the public unless there is a demonstrated privilege issue involved.

Parliament has previously determined that the exceptional provisions proposed in Bill C-17 should be allowed to "sunset", and those provisions have accordingly not been part of Canadian law since 2007. Canadians cannot know, if reintroduced, how often the provisions would be used, the circumstances in which the provisions may be used, whether the provisions would be effective or whether and what concerns might be associated with any future use of the provisions. What is known is that when the provisions were law, they went unused, with one exception.[14] Also known is that since the provisions were allowed to sunset, Canadian criminal law has continued to operate effectively. If these provisions are to once again form part of Canadian law, we recommend that they should be accompanied by another "sunset" clause, to

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11 *Ibid.* at 118.

12 *Ibid*. at 164,165.

13 For just one example, see the CBA response to the Arar Commission of Inquiry, *supra*, note 2.

14 See, *Re: Application under Criminal Code (s.83.28)*, [2004] 2 SCR 248.

ensure that Canadians will again have the opportunity to reconsider the need for these extraordinary state powers.

Summary of Recommendations:

- When exceptional state powers are shown to be justified, proportionate and necessary to combat terrorism in Canada, those powers should be carefully circumscribed, and accompanied by equally rigorous independent oversight. The CBA Section recommends that the Committee consider adding important safeguards during its study of Bill C-17.

- At a minimum, the CBA Section recommends that oversight in this context will require a detailed reporting mechanism to facilitate scrutiny of how the provisions are being used. This information should be available to the public unless there is a demonstrated privilege issue involved.

- If these provisions are to once again form part of Canadian law, the CBA Section recommends that they be accompanied by another "sunset" clause, to ensure that Canadians will again have the opportunity to reconsider the need for these extraordinary state powers.

Thank you for considering the views of the CBA Section.

Yours truly,

(original signed by Gaylene Schellenberg for Margaret Gallagher)

Margaret Gallagher
Chair, National Criminal Justice Section