

Submission on Bill C-17

Public Safety Act, 2002

CANADIAN BAR ASSOCIATION



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PREFACE

The Canadian Bar Association is a national association representing over 38,000 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 the Canadian Bar Association with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the Canadian Bar Association.

Submission on Bill C-17

Public Safety Act, 2002

EXECUTIVE SUMMARY

The Canadian Bar Association realizes that fighting terrorism and ensuring the security of Canadians are important and legitimate government objectives. However, these objectives must be achieved in ways that impair *Charter* rights and freedoms as little as possible, through measures that are directly and rationally connected to the desired result. Fear of terrorist attacks cannot be used to justify increased government power to fight all crime, compromising long-standing constitutional guarantees.

Bill C-17, *Public Safety Act 2002*, goes further than its predecessors (Bills C-42 and C-55) in safeguarding individual rights. However, it still intrudes upon the privacy rights of Canadians in ways that do not represent legitimate compromises. It continues to allow the RCMP and CSIS to scour airline passenger lists, cross-referencing them with many other information bases for possible matches. Bill C-17 has retained s.4.82(11), which continues to permit information to be disclosed to any peace officer based on a reasonable belief that it would assist in the execution of a warrant. While the term, “warrant” has been more narrowly defined, it still covers offences that are not always extremely serious and not always linked to terrorism. Canadians currently can choose not to supply personal information to law enforcers, except in certain situations. It is naive to imagine that law enforcement personnel would not act upon inadvertent matches made while accessing passengers’ travel information, even when those matches

have nothing whatsoever to do with terrorism. We conclude that all references to warrants should be deleted from the Bill.

Once passenger information is obtained, it should be destroyed after 24 hours, rather than after seven days. The principle concern is passenger safety and security during the actual flight. We support an independent oversight mechanism to both prevent unauthorized use or disclosure of passenger information and ensure compliance with information destruction provisions.

Emergency directions made by the Minister or the Minister's delegate should be limited to 72 hours, as proposed by Bill C-17. We also appreciate the additional controls the Bill places on when security measures may be made.

The new proposed offence of "air rage" is both unnecessary and too broad, and should be deleted. Other *Criminal Code* provisions already cover the type of conduct contemplated.

Interim orders have been added to eight statutes and expanded in two others (the *Aeronautics Act* and the *Canadian Environmental Protection Act*). While these orders may allow for an appropriate response to an immediate threat, they should be balanced with measures to ensure accountability, given their potential impact on rights and freedoms. These orders are now more circumscribed and would now last for only 14 days, absent measures to extend them. This is in keeping with the CBA's early recommendations. The Bill proposes that these orders must also be tabled in Parliament within 15 days of being made, a measure to ensure Parliamentary oversight of this power. This is too long, and should instead be five sitting days.

Bill C-17 would expand the power of FINTRAC, the government's recently created financial transactions and reports analysis centre, to collect and exchange information for the purposes of national security. We oppose this expansion of

power, as it exacerbates our ongoing concern that FINTRAC's powers will erode the confidential nature of the solicitor-client relationship. We also anticipate a detrimental impact of this power on charities, as we anticipate that such information could be used to revoke or deny charitable status with no opportunity to challenge the veracity of the information.

In summary, Bill C-17, *Public Safety Act, 2002*, should not be enacted in its current form, without appropriate safeguards to preserve core Canadian values and legal traditions.

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I. INTRODUCTION

The Canadian Bar Association (CBA) is pleased to have the opportunity to comment on Bill C-17, *Public Safety Act, 2002* and the proposed Regulations to support that Bill. Much of the Bill is similar to its predecessors – first, Bill C-42, *Public Safety Act* and then, Bill C-55, *Public Safety Act, 2002*. To the extent that Bill C-17 is the same as the earlier versions, our concerns remain the same as those expressed in our previous submissions responding to Bill C-42 and Bill C-55, provided to the government in February 2002 and July 2002, respectively. In this submission, we reiterate and expand upon those views, and provide additional comments principally to address the differences between Bill C-55 and Bill C-17.

As a national association of 38,000 lawyers and jurists, dedicated to the improvement of the law and the administration of justice, we have provided insight to Parliament and to government on past proposals for legislation dealing with criminal organizations, money laundering, terrorist fundraising, security considerations in immigration matters, and other matters relevant to this Bill. More recently, we provided extensive submissions concerning Bill C-36, the *Anti-Terrorism Act*¹ and the earlier versions of Bill C-17.

The CBA acknowledges the importance of the fight against terrorism and the need to see to the security of Canadians. At the same time, it is imperative that we ensure that the rule of law is preserved, that our legal traditions are respected

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Ottawa: Canadian Bar Association, 2001 (<http://cba.org/PDF/submission.pdf>).

and that *Charter* rights and freedoms are infringed only to the extent demonstrably justifiable in a free and democratic society. Any infringement deemed demonstrably justifiable in the fight against terrorism should offer a rational and direct possibility of achieving that objective. Finally, it must be very carefully scrutinized to ensure that it does not inappropriately exploit Canada's fear of another terrorist attack to advance other state objectives unrelated to terrorism. Our common goal is to find the right balance between these considerations, and it is with that perspective that the CBA offers these comments on Bill C-17.

II. PRIVACY CONCERNS

A. Airline Passenger Information

The proposal to empower RCMP and CSIS officials to scour airline passenger lists, for the limited purposes of ensuring "transportation security" and countering "threats to the security of Canada", is a justifiable objective. The safety of Canadians and of people traveling to Canada is an important objective which, on balance, may override some infringements to privacy that this proposal would entail. However, the proposal must be assessed carefully to ensure that the likely advantages warrant the suggested infringement, and offset the damage such an infringement would constitute to *Charter* values.

Bill C-42 would have 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 C-55) 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 then amended and consolidated the two provisions into proposed sections 4.81, 4.82 and 4.83 of the Act [clause 5 of the Bill], to establish a detailed code governing collection and use of airline passenger information. We applauded the proposals to destroy information within a certain period of time after its disclosure (sections 4.81(6), (7) & (8) and 4.82(14)) and to remove the provision allowing collection and use of passenger information for the general purposes of the *Immigration Act*. Nevertheless, we believed that section 4.82 remained too broad.

The proposal in section 4.82(4) of Bill C-55 would have permitted collection and use of information for “identification of persons for whom a warrant has been issued”. This would have included persons subject to immigration warrants, arrest warrants issued outside the country for persons who can be extradited and arrest warrants for persons alleged to have committed an offence with a potential punishment of five years or more. Given the breadth of this power and its fragile nexus to the fight against terrorism, we recommended strongly that references to warrants be deleted from section 4.82, and are pleased to see that this recommendation is partially reflected in Bill C-17. However, section 4.82(11) continues to call for the disclosure of information to any peace officer based on nothing but a reasonable belief that it would assist in the execution of a warrant.

As stated by the Privacy Commissioner of Canada the day after Bill C-17 was tabled:

In Canada, it is well established that we are not required to identify ourselves to police unless we are being arrested or we are carrying out a licensed activity such as driving. The right to anonymity with regard to the state is a crucial privacy right. Since we are required to identify ourselves to airlines as a condition of air travel and since section 4.82 would give the RCMP unrestricted access to the passenger information obtained by airlines, this would set the extraordinarily

privacy-invasive precedent of effectively requiring compulsory self-identification to police.²

Authority to match passenger information against other information held by the RCMP and CSIS should not serve as a “fishing expedition” in the fight against all crime, in contravention of existing constitutional protections. Even limiting this matching process to the identification of risks to transportation security or potential terrorists allows significant potential for expansive, and *Charter*-infringing, interpretation. At best, there is a tenuous connection between airline passenger safety and the presence of a person aboard who is subject to an outstanding warrant, if that person’s information cannot otherwise be collected under the categories of “transportation security” or “threats to the security of Canada”. Police already have the power to obtain a search warrant under the *Criminal Code* in the normal course if 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.

In relation to the Canada Customs & Revenue Agency’s (CCRA) Advance Passenger Information/Passenger Name Record Program, the Privacy Commissioner of Ontario has said that government “has used ‘potential future threats relating to security, public health and criminal activity’ as the justification for its substantially increased powers under the recently amended *Customs Act*.” She continues,

If the prevention of terrorism activities is the goal, then this purpose should be clearly articulated and specific powers appropriately circumscribed. But if the policy goal is to expand the database tracking to assist with general law enforcement, then civil liberties, including privacy, should be protected with the traditional criminal law procedures. ... The development of a massive system for

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Press Release, November 1, 2002, statement released by the Privacy Commissioner of Canada, George Radwanski, regarding Bill C-17, *Public Safety Act*, 2002.

surveillance, profiling and data-mining, when applied beyond the legislated auspices of anti-terrorism, cannot be countenanced.³

For the use of the term “warrant” that remains in section 4.82(11), Bill C-17 would amend the definition to pertain only to those offences specified within regulations and with the potential for incarceration of five years or more. In a letter from the Solicitor General’s office in December, 2002, the CBA was told that the specified offences represent those of,

such a serious nature that ignoring them could put public safety at risk. In this way, the data-sharing regime would target offences that are directly related to terrorist or transportation security threats.⁴

However, we note that the regulations include offences that can encompass a very broad range of conduct and that are not necessarily directly related to terrorist or transportation security threats. More importantly, we agree with the Privacy Commissioner of Canada’s position that “this does nothing to address the fundamental point of principle that the police have no business using this extraordinary access to personal information to search for people wanted on warrants for any offences unrelated to terrorism.” The Commissioner goes on to say:

(T)he Government has removed the “identification of persons for whom a warrant has been issued” as a “purpose” for accessing passenger information under the legislation. But this is meaningless - indeed disingenuous - since the RCMP would remain empowered to match this information against a database of persons wanted on warrants and to use such matches to bring about arrests. It insults the intelligence of Canadians to suggest, as the Government does in its press release accompanying the bill, that the RCMP may “incidentally” come upon individuals wanted on *Criminal Code* warrants.⁵

³ Letter from Ann Cavoukian, Ph.D., Information and Privacy Commissioner of Ontario, to Hon. Elinor Caplan, Minister of National Revenue, November 20, 2002, in regard to CCRA’s Advance Passenger Information/ Passenger Name Record program (www.privcom.gc.ca/media/le_021120_e.asp).

⁴ Letter from Patricia J. Hassard, Assistant Deputy Solicitor General, Policing and Law Enforcement Branch to Simon Potter, CBA President, December 4, 2002.

⁵ *Supra*, note 1.

Without suggesting that Bill C-17 is a disingenuous insult to our intelligence, it is clear that it does allow for overly broad intrusion into the private domain. We repeat our previous submissions and continue to recommend that Bill C-17 omit any reference to warrants within section 4.82. To again quote Canada's Privacy Commissioner:

The place to draw the line in protecting the fundamental human right of privacy is at the very outset, at the first unjustifiable intrusion. In this instance, that means amending the bill to remove all reference to warrants and thus limit the police to matching passenger information against anti-terrorism and national security databases.⁶

The seriousness of the intrusion of Bill C-17 as currently drafted can be assessed by considering the possible precedential effect it might have on successor provisions. If Bill C-17 is justified, would it then be justified for the authorities, on a mere reasonable belief that the premises might harbour someone sought on a warrant, to demand the lists of all people staying in city hotels? Should all enterprises who sell reserved tickets to football games be required to maintain records of purchasers in case the authorities wish to find warrant-evaders among them?

RECOMMENDATION:

The CBA recommends that all references to warrants be omitted from Bill C-17.

B. Technical Concerns

i. Destruction of information

We have earlier maintained and continue to 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 for collecting the information is said to be to deal with security threats relating to the flight itself. 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, we see 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 for a 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). Without a valid reason for treating information under section 4.81(3)(d) differently, we recommend that section 4.82(14) be amended to provide for destruction of information collected under section 4.81(3)(d).

In our view, there should be an independent oversight mechanism both to prevent unauthorized use or disclosure of passenger information and to ensure that information is not retained beyond the designated date for destruction, except for the purposes of 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 again 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 RCMP or the Director of CSIS 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 this imposes an onus which is the reverse of what is demanded by privacy rights. The provision should instead read "of the opinion that its continued retention is reasonably required for the purposes of transportation security or the investigation of threats to the security of Canada".

ii. Consistency in Definition

On another technical matter, we question why "transportation security" is defined only for the purposes of section 4.82 when the same expression is used without definition in the preceding section 4.81. The implication is that it has different meanings in the two sections, which we assume is not the intention. To avoid potential confusion, we recommend that this be harmonized.

C. *Personal Information Protection and Electronic Documents Act*

Clause 98 of Bill C-17 would amend the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, section 7, so that organizations subject to *PIPEDA* would be permitted to collect and use personal information of individuals without their knowledge or consent, if for the purpose of making a disclosure for national security reasons, the defence of Canada or the conduct of international affairs, or as required by law. Such organizations already have legal

authority to disclose personal information, but the amendment would clarify that they can also collect and use that information without the target individuals' knowledge or consent. Presumably the justification for this expansion is that it would not be feasible to collect or use personal information about a passenger for the contemplated purposes if that collection or use had to first be approved by the passenger.

Again, privacy must be respected, and any exceptions to the privacy rights in *PEPIDA* should be limited to the greatest extent possible.

III. *AERONAUTICS ACT*

B. Security Measures and Emergency Directions

Clause 5 of Bill C-17 includes changes to Bill C-55 that would tighten provisions for security measures and emergency directions in the *Aeronautics Act*.

Emergency directions, proposed as additions to the Act through sections 4.76, 4.77 and 4.78, would allow the Minister or an authorized officer within the Department of Transport to issue directions to deal with an immediate threat. Under Bill C-17, such directions would cease to have force 72 hours after they are made, unless repealed prior to that time.

Section 4.72(1) would state that security measures may only be made if the matter could also be subject to aviation security regulation and, under Bill C-17, if secrecy is required. Secrecy is required if aviation security, the security of any aircraft, aerodrome, or other aviation facility or the safety of the public, passengers or crew members would be compromised if the measure was instead addressed in a regulation that became public. Once the Minister is of the opinion

that the security or safety interest would no longer be compromised by public disclosure, the Minister must publish notification of the substance of the measure within 23 days, and then repeal the security measure within the earlier of one year from notification, or the day an aviation security regulation is made to deal with the matter.

While we support carefully delineated Ministerial powers to act in exigent circumstances, we continue to be concerned about the disclosure provision for security measures. Under proposed section 4.79(1), where a court or other body is requested to compel production or discovery of a security measure, the Minister of Transport is to be given notice. The court or other body is required to examine the security measure *in camera* and give the Minister a reasonable opportunity to make representations on whether it should be disclosed. The court or other body then weighs the public interest in the proper administration of justice and the public interest in aviation security before deciding whether to order production.

The proposed subsection gives the Minister the opportunity to make representations concerning the security measure. However, it is silent on the ability of other parties to make representations concerning the appropriate balancing of public interests. We recognize that the proposed provision is very similar to the current version of subsection 4.8(2). However, as a matter of fairness and natural justice, all parties to the proceeding — not just the Minister — should be permitted the opportunity to make representations.

A person can face criminal charges in relation to security measures or an emergency direction. For instance, proposed section 4.85 contains a number of prohibitions relating to screenings that are required by a security measure or emergency direction. Proposed section 7.3(3) of the *Aeronautics Act* (clause 15 of the Bill) establishes a summary conviction offence when a person violates these provisions, a security measure or an emergency direction. The need to suppress

disclosure of information affecting aviation security is understandable. However, part and parcel of the right to a fair trial is that persons charged with an offence are entitled to know the case they have to meet. This includes disclosure of the security measure or emergency direction which forms the necessary context to the offence. Again, we recognize that this provision is similar to the current section 4.8(1). However, proposed section 4.79(1) should expressly permit disclosure of a security measure or emergency direction to a person charged with an offence arising from such a measure.

Alternatively, where a court or other body refuses disclosure of a measure or direction in a criminal proceeding, it should be entitled to make any order to protect the accused's right to a fair trial. We suggest a provision similar to that found in clause 37 of Bill C-36, amending the *Canada Evidence Act*:

37.3 (1) A judge presiding at a criminal trial or other criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 37(4.1) to (6) in relation to that trial or proceeding or any judgment made on appeal of an order made under any of those subsections.

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

- (a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;
- (b) an order effecting a stay of the proceedings; and
- (c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

RECOMMENDATION:

The CBA recommends that proposed section 4.79(2) be amended to permit all parties to a proceeding the opportunity to make representations on whether the security measure should be disclosed. In addition, the CBA recommends that proposed section 4.79(1) [clause 5] be amended to permit

disclosure of a security measure to a person charged with an offence arising from such a measure. Alternatively, the CBA recommends that where a court or other body refuses disclosure of a measure or direction in a criminal proceeding, it should be entitled to make any order to protect the accused's right to a fair trial.

B. Proof of Notice of a Security Measure, Emergency Direction or Interim Order

Under proposed section 6.2(3) of the *Aeronautics Act* [clause 10 of the Bill], which reflects the current wording in the Act, the Minister of Transport can sign a certificate stating that notice of a regulation, notice, security measure, emergency direction or interim order was made. In absence of evidence to the contrary, the certificate is proof that reasonable steps were taken to notify persons likely to be affected.

Individuals and businesses face criminal penalties for violation of security measures, emergency directions or interim orders (proposed section 7.3(3)). As a result, it is imperative that they know the content of such measures so that they can govern themselves accordingly. Indeed, the Bill recognizes this by requiring as a precondition to any conviction that reasonable steps had been taken to notify affected persons (proposed section 6.2(2)).

The Minister's certificate under proposed section 6.2(3) would effectively create a presumption that reasonable steps have been taken and imposes a reverse onus on the accused to rebut this presumption. We believe that the government should instead be required to show, if not actual receipt, at least that reasonable steps were taken to provide notice. The simple issuance of a Minister's certificate is insufficient to discharge the government's obligation in this respect, particularly when there is no requirement to publish a security measure or emergency

direction in the *Canada Gazette*. It would be Kafkaesque that the mere fact that a notice has been issued itself is proof that reasonable steps were taken to bring it to the attention of affected persons.

RECOMMENDATION:

The CBA recommends that proposed section 6.2(3) of the *Aeronautics Act* [clause 10 of the Bill] be deleted.

C. Air Rage

The Bill would create a new offence under the *Aeronautics Act* for engaging in unruly or dangerous behaviour on an aircraft — commonly known as “air rage”. Proposed section 7.41(1) [clause 17] would prohibit a person from endangering the safety or security of an aircraft in flight by intentionally,

- interfering with the performance of any crew member
- lessening the ability of a crew member to perform his or her duties or,
- interfering with any person who is following the instructions of a crew member.

We question the necessity of this proposed provision. Serious criminal behaviour of this sort is currently covered by section 77 of the *Criminal Code*, which (among other things) prohibits a person who is on board an aircraft in flight from committing an act of violence against a person that is likely to endanger the safety of the aircraft. It also prohibits a person from causing serious damage to an aircraft in service that is likely to endanger the safety of the aircraft in flight. Unruly passengers can also be charged with uttering threats (*Criminal Code*, section 264.1), assault (section 265), assaulting a peace officer (section 270)⁷ or mischief (section 430). Section 7(1) of the *Criminal Code* provides that an

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This includes the pilot in command of an aircraft in flight (s. 2, definition of “peace officer”(f)).

indictable offence is deemed to have been committed in Canada if it occurs on a Canadian aircraft in flight or an aircraft which terminates its flight in Canada. The Canadian Aviation Regulations currently require passengers to comply with the instructions of a crew member relating to safety.⁸ Before enacting section 7.41, we believe that the government should be satisfied that it will not simply add to the number of charges which an accused might face for what would really be a single offence, and that the existing provisions are insufficient to deal with the problem of air rage. We are not satisfied.

Proposed section 7.41 would include the serious incidents of air rage already found in section 77 of the *Criminal Code*, but would also extend to incidents of a relatively minor nature. In addition to our concern that proposed section 7.41 duplicates existing prohibitions, we question whether it is appropriate to criminalize behaviour that amounts to “interference” with a crew member’s duties but falls short of the “violence” or “damage” required under section 77. This query is not intended to minimize the difficult burden that air rage places on a flight crew. However, criminal prohibitions are the ultimate penalty in our society and should generally be reserved for conduct of a serious nature. Mere interference, without any indication of a terrorist scenario or indeed of any intent to cause injury to anyone or damage to anything, should not necessarily be a criminal offence.

We believe that the proposed provision is too broad. Arguably, it would include a passenger who, out of fear of flying perhaps, repeatedly summoned a flight attendant for no valid reason or an inebriated passenger disturbing other passengers but not engaging in violent behaviour of any sort. Such behaviour might be offensive or even disruptive, but it is not necessarily behaviour warranting criminal sanctions.

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Part VI, Subpart 2, s. 602.05(2).

RECOMMENDATION:

The CBA recommends that proposed section 7.41(1) be deleted.

IV. INTERIM ORDERS

Eight parts of Bill C-17 would amend the same number of statutes to allow the respective Ministers to make interim orders in cases where immediate action is required. Bill C-17 would also amend the *Aeronautics Act* and the *Canadian Environmental Protection Act, 1999 (CEPA)*, to extend existing Ministerial powers beyond those currently available. For the eight statutes where such a power would be created by Bill C-17, the interim orders may be made if the Minister believes that immediate action is required to deal with a significant direct or indirect risk on a matter that could otherwise be made, either by regulation or otherwise, by the Governor-in-Council. The order must be published in the *Canada Gazette* within 23 days, and ceases to have effect after 14 days, unless certain steps are taken to continue its effect to a maximum of one year. A copy of each interim order must be tabled in Parliament within 15 days after being made.

The parallel power under the *Aeronautics Act* expands that currently available by allowing such an order to be made in more circumstances, including those where a significant risk, direct or indirect, is presented to aviation safety or public safety, or where there is an immediate threat to aviation security or the security of aircraft or facilities. The Bill allows the power to be delegated to any officer of the department and imposes a requirement to consult with any person or organization considered appropriate prior to making the order. Similarly, existing Ministerial powers to make interim orders in *CEPA* are expanded to Part 8 of that

Act, dealing with Environmental Matters Relating to Emergencies. Unlike the other interim orders permitted under Bill C-17, the *CEPA* order can last to a maximum of two years once confirmed.

In Bill C-55, we were pleased to see that the government decided to limit the powers originally proposed in Bill C-42 for Ministers to issue interim orders. These powers 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. We have strongly argued, and continue to believe, that there must be appropriate checks and balances in the system.

The government first attempted to address concerns about accountability by, for example, 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). With Bill C-55, the government also added the requirement that the interim order be tabled in Parliament within 15 sitting days. We acknowledged that these changes were a laudable improvement, but argued that these time frames are still too long. We noted that under proposed section 200.1(3) of *CEPA* [clause 27 of Bill C-55], an interim order would cease to have effect within 14 days, unless approved by the Governor-in-Council. We urged the government to apply the same time frame to other legislation allowing for interim orders, and appreciate that the 14-day period is now applied throughout Bill C-17. In our view, that length of time 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.

We repeat our earlier suggestion that the time frame for tabling an interim order in Parliament should be something in the order of five sitting days, as we see no valid reason for having a 15-day delay.

V. CONTROLLED ACCESS MILITARY ZONES

In our past submissions, we expressed concern about how the power to designate controlled access military zones would actually be used in practice. Given that military zones could be designated in relation to movable military property, which could be placed in an area where protests are taking place or may be anticipated to take place, we argued that there was the potential for them to be used to inhibit legitimate dissent. We went on to note that if such military zones were used to limit protests at international summits, they might also have an impact on Canadian charities.

We suggested that if such a power was seen as essential, it should at least be limited to matters concerning military property, have temporal and geographic limits and that previously proposed section 260.1(2)(d) should be deleted. We are pleased that the government has omitted the sections allowing the Minister of Defence to designate controlled access military zones (formerly “military security zones”) in Bill C-17. However, we note that the government has simultaneously established Controlled Access Zones in Halifax, Esquimalt and Nanoose Bay harbours through an Order-in-Council, and has allowed itself the possibility of establishing additional zones if considered justified by security concerns.

We question what the legal authority is for creating Controlled Access Zones by Order-in-Council. We also question what criteria the government will use to establish such zones, and whether sufficient safeguards will be in place to ensure

they are limited to matters concerning military property, and also have temporal and geographic limits.

VI. PROCEEDS OF CRIME

Clause 100 of Bill C-17 would amend the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLA)* 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) for the purposes of “national security”. Clause 101 would amend section 65 of the *PCMLA* to allow information to be exchanged between FINTRAC and various bodies regulating those required to report suspicious transactions. The information would relate to the compliance of those persons with the *PCMLA* and could only be used for that purpose.

The amendment to section 65 would enormously expand the scope for information-sharing under the *PCMLA*. Part I applies to, among others, banks, trust companies, loan companies, life insurance companies, securities dealers, foreign exchange dealers, lawyers, accountants and real estate brokers. Many of these are already regulated by particular bodies, for example, law societies in the case of lawyers.

We continue to question the need for such a provision. The scope of information that could be exchanged is very broad. Arguably, information “relating to compliance” could include the content of reports made by the above individuals concerning their clients. For example, FINTRAC could compare reports concerning a particular client from that client’s accountant, bank and lawyer, and determine that discrepancies point to lapses in compliance. It could then forward the contents of various reports to each of the relevant regulators for further action.

These reports are to contain extremely confidential information concerning individuals' financial activities. It is inappropriate, in our view, to share this information with the various regulators.

Since we began consulting with government departments contemplating the introduction of legislation concerning proceeds of crime, we have stressed the fundamental importance of protecting confidential information between clients and their solicitors. We urged the government to exclude lawyers' confidential dealings with their clients from the ambit of the legislation, but the government has to date rejected this proposal. Challenges have since ensued across the country, with significant success. In fact, challenges have been so successful that the Attorney General of Canada has now agreed to apply an interlocutory order from British Columbia exempting lawyers from the reporting scheme of the legislation across the country. The matter is scheduled to be finally determined by the British Columbia Supreme Court in June 2003. By increasing the likelihood that solicitor-client confidences will be shared with entities outside of FINTRAC, Bill C-17 would make the *PCMLA* even more objectionable and constitutionally vulnerable than it already is.

The Bill also contains no accountability for persons who disclose information for purposes unauthorized by proposed section 65. Section 74 of the Act creates an offence for improper disclosure, but does not list section 65. If this proposal is to remain included, section 74 should be amended to provide an offence for improper disclosure under proposed sections 65(2) and 65(3). The offence should apply to improper both disclosure by officials of FINTRAC and by agencies to which the section would apply.

RECOMMENDATION:

The CBA recommends that clause 101 of the Bill be deleted.

Alternatively, section 74 of the *PCMLA* should be amended to

provide an offence for improper disclosure of information under section 65 by officials of FINTRAC as well as the agencies to which the section would apply

A. Proceeds of Crime and Charities

In addition to our concerns about the expanded power within Bill C-17 to collect information pertaining to proceeds of crime as it is likely to impact on solicitor-client confidentiality, these new obligations – together with their enlarged scope – may also have an impact on charitable organizations. Whether the *PCMLA* will be interpreted to apply to charities is, at the moment, unclear, but the words “national security” make it more likely that a charity carrying out international fund-raising or programs may become the subject of reporting obligations by its banks, lawyers, accountants and so on. Bill C-17 contains a corresponding amendment to the *Office of the Superintendent of Financial Institutions Act* that permits the Superintendent to disclose information to FINTRAC related to compliance by a financial institution. As a result, FINTRAC would have virtually unlimited access to collect information from various government databases related to national security, law enforcement, and financial regulation.⁹

Information disclosed by FINTRAC to the Department of the Solicitor General or the Canada Customs and Revenue Agency could 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 challenge the veracity of the information. We recognize that proposed section 65(3) of the *PCMLA* [clause 101 of Bill C-17] states that information from FINTRAC is to be used “only for purposes relating to compliance with Part I” of the *PCMLA*. However, we believe it would be

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For further elaboration of this portion of the submission, see, Terrance S. Carter, assisted by R. Johanna Blom and Sean S. Carter, “Charities and Compliance with Anti-terrorism Legislation” (paper presented to the Law Society of Upper Canada Estates and Trust Forum - 2002) at 33.

possible to interpret “compliance” in that section expansively enough to include proceedings to deny or revoke charitable status.

Certain provisions within Bill C-17 have been scaled back from those in the earlier versions, Bill C-42 and Bill C-55. For example, government power to enact “controlled access military zones” has been removed,¹⁰ and additional limits have been added to the use of detailed personal information from passenger lists. Both provisions would have had a significant impact on charities involved in international operations or protests at international summits, or donors giving to organizations that might be involved in activities with “controlled access military zones”.¹¹ We remain concerned, however, about the scope of the remaining powers with the Bill, and are committed to carefully monitoring its impact on Canadian charities, should it be enacted in its current form.

VII. BIOLOGICAL AND TOXIN WEAPONS CONVENTION ACT

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 noted 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. We argued that 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. Given that section 488.1 has recently been subject to *Charter* challenge at the Supreme Court of Canada, and has as a

¹⁰ C. Clark, “Revised bill scraps zones for military” *The Globe and Mail* (November 1, 2002) A4.

¹¹ *Supra*, note 6, at 5.

result been held to be unconstitutional, we expect that the section will be consequently amended.¹²

Our concerns remain about the threat to client confidentiality in 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 so broad. The courts have long recognized that solicitor-client confidentiality may only be violated in extremely limited circumstances.

VIII. CONCLUSION

The CBA appreciates the opportunity to provide its input into this Bill. We all have a stake in the fight against terrorism. However, our desire to do all we can to prevent terrorist attacks on Canada and Canadians does not justify reactive measures so unrelated to terrorism that they cannot realistically increase our security and can, in fact, unravel the very rights and freedoms we consider essential to our Canadian democracy. A letter from the Privacy Commissioners of the NWT, Nunavut, Nova Scotia, Saskatchewan, Manitoba, British Columbia, Alberta and Ontario to the Minister of National Revenue concerning the CCRA’s traveller-surveillance database, summarizes this concern:

While the heightened national security interest that exists since the events of September 11, 2002, may justify certain intrusions on privacy rights in the name of public safety, any such intrusions must be strictly limited to anti-terrorism purposes, must clearly be demonstrated to be necessary, and must not intrude on privacy rights any more than is absolutely necessary. The public interest in combatting terrorism cannot be used as an excuse to expand the powers of the police or other agencies of the state, for other purposes.¹³

¹² *Lavallee, Rackel & Heintz v. Canada* (Attorney General); *White, Ottenheimer & Baker v. Canada* (Attorney General); *R. v. Fink*, 2002 SCC 61. File Nos.: 27852, 28144, 28385. 2001: December 13; 2002: September 12.

¹³ Joint letter issued on November 12, 2002, to Hon. Elinor Caplan, Minister of National Revenue (www.privcom.gc.ca/media/le_021113_e.asp).

Before being passed into law, Bill C-17 must reflect an appropriate balance to allow us to take the reasonable steps we can take to enhance national security, and, at the same time, preserve core Canadian values and legal traditions.