B.C. CIVIL LIBERTIES ASSOCIATION SUBMISSION
TO THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

Bill C-17, An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)

Speaking Notes: February 11, 2011

Introduction

The BCCLA is a non-profit, non-partisan advocacy group, based in Vancouver, British Columbia. Since its incorporation in 1963, the mandate of the BCCLA has been to promote, defend, sustain and extend civil liberties and human rights in Canada. We speak out on the principles which promote individual rights and freedoms, including due process and fundamental justice concerns in situations where individual interests are affected or engaged by the state.

In December, this Committee heard from our colleagues with the Interntional Civil Liberties Monitoring Group, La Ligue, the Canadian Council on American-Islamic Relations, and others. The BCCLA echoes many of the concerns so persuasively voiced here already – namely, that this proposed legislation does little to protect Canadians, while at the same time compromising many precious and hard-won democratic safeguards.

Preventative Detention

Let me start by addressing the preventative detention provision, which permits holding an individual without charge for up to 72 hours, based on mere suspicion of dangerousness. When this provision was last in force in the Criminal Code, it was never invoked. Advocates for preventative detention point to this statistic as demonstrating restraint on the part of law enforcement agencies. We view this as evidence that such sweeping powers of preventative detention are simply unnecessary.

Protection of personal liberty is a fundamental value in Canadian society, and indeed, in any free society. Expanding the powers of the executive to detain people must be examined with the utmost scrutiny. Canadian principles of fundamental justice impose limits – both procedural and substantive – on deprivations of liberty. This means two things. First, the process through which any individual is subjected to detention must meet the requirements of fundamental justice. Second, the substantive reasons for any detention must be justifiable in a free and democratic society.

Detention without charge or conviction is deeply problematic because it is based on a hypothetical – it depends upon speculating on the future dangerousness of an individual because of assumed propensity. Preventative detention is necessarily based on propensity reasoning because if there was

actual evidence of preparation to commit a terrorist act, of a conspiracy to commit a terrorist act, then there would be grounds to lay charges for committing a criminal offence and suspected individuals could be detained under the usual criminal law procedures. Stripping an individual's liberty where no offence has been found to have been committed – or where no offence is even suspected to have been committed – runs counter to basic principles of fundamental justice.

The Criminal Code, as it currently exists, already contains more than adequate mechanisms for prosecuting past terrorism offences and preventing future ones. The sweep of terrorism-related offences in the Criminal Code is broad. As defined in the Code, terrorist activity encompasses everything from conspiracy to the attempt or threat to commit an act of terrorism, to the actual terrorist act itself.

The Code also confers expansive powers on authorities to impose conditions on individuals who pose a danger to public safety. This is reflected generally in section 810.2, and with respect to terrorism offences, in section 810.01. And as recent law enforcement investigations have shown, the terrorism provisions in the current Criminal Code are effective – they have been successfully used to protect the safety of Canadians and to disrupt prospective terrorist attacks.

Detaining individuals based on predictions of future dangerousness is a troubling proposition. Because the requirements of proof are relaxed, there is an increased chance not only of error or abuse, but also of such errors or abuse going undetected and without remedy.

For example, it may be difficult to accurately assess whether the prediction of dangerousness is ultimately borne out. Let's say an individual is held in preventative detention, and no terrorist attack takes place. The fact that no terrorist attack ensued may mean that by detaining the individual, law enforcement officials successfully disrupted a terrorist plot. But it may equally mean that the detained individual was not involved in any planned attack at all. Such uncertainties cannot be the basis on which we permit Canadians and others in this country to be imprisoned, for any length of time. On the other hand, prosecuting inchoate crimes such as conspiracy permits the government to incapacitate potentially dangerous people and to disrupt terrorist plots before they can take place, but the evidentiary requirements for laying charges provides a measure of protection against mistake or abuse.

Separate from the deprivation of liberty associated with preventative detention, there is the stigmatizing effect of being labeled a terrorism suspect, or an individual associated with terrorist activities. We believe that it is fairly uncontroversial to say that the stigma attached to an accusation of terrorism is severe. Yet the system of preventative detention proposed in this bill would

effectively brand an individual as a terrorist, even though law enforcement officials may not have any grounds to lay charges, let alone evidence to convict, now or ever. The potential harm to that individual's reputation and other negative impacts flowing from being labeled a terrorist cannot be discounted.

Investigative Hearings

With respect to the second substantive prong of Bill C-17 – the reintroduction of investigative hearings – we would observe that such a mechanism effectively renders the courts an investigative tool of CSIS and the RCMP. Indeed, we would adopt the logic of Justices LeBel and Fish of the Supreme Court of Canada, when they found that investigative hearings such as the ones proposed here compromise judicial independence from the other branches of government, a cornerstone of our democracy. Although writing for the dissent, Justice LeBel and Justice Fish's words should have resonance for anyone who subscribes to the concepts of the rule of law and an independent judiciary:

> Although a judge may be independent in fact and act with the utmost impartiality, judicial independence will not exist if the court of which he or she is a member is not independent of the other branches of government on an institutional level.
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> […]
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> Section 83.28 requires judges to preside over police investigations; as such investigations are the responsibility of the executive branch, this cannot but leave a reasonable, well-informed person with the impression that judges have become allies of the executive branch.[1]

While the previous iteration of this investigative hearing provision may have been deemed "Charter-proof" – to borrow a phrase from Professor Kent Roach – that does not mean that these measures are truly compatible with the right against self-incrimination. As contemplated in Bill C-17, investigative hearings bear all the hallmarks of complying with the right against self-incrimination, such as requiring judicial authorization, use and derivative use immunity, and the right to counsel. We would submit, however, that they still do not comply with the spirit of the right to silence. We believe that Professor Roach, of the University of Toronto Law School, perhaps said it best, with respect to the 2001 version of this provision:

> Regardless of whether investigative hearings can or cannot survive Charter review, there is a strong case that they are unnecessary, unprincipled and unwise. Those who will talk will

[1] *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at paras. 174 and 180.

> do so without the threat of prosecution. Those who will refuse to talk or who lie will likely not be deterred by the threat of continued detention or prosecution for failing to obey a judicial order or for perjury. More fundamentally, it is unworthy to abrogate centuries of respect for the right to silence and the right against self-incrimination during police investigations. Attempts at Charter proofing, in the form of judicial authorization, right to counsel and use and derivative use immunity, should not take away from the fundamental damage that investigative hearings will do to our long traditions of adversarial criminal justice.[2]

And indeed, while the Supreme Court did find that the 2001 investigative hearing provision to be constitutional, it made that finding only after reading into the law what had not been expressly provided by Parliament. It placed limits on the use of investigative hearings – specifically, it held that information gathered could not be used against an individual in any kind of proceeding, including extradition or deportation hearings, or proceedings in foreign jurisdictions. As it is currently drafted, the investigative hearing provision fails to reflect those requirements, and leaves open room for potential misapplication of the law. Given the danger that information compelled through investigative hearings could potentially be used against Canadians or others abroad, perhaps by countries where human rights protections are not as robust as those found in Canada, we are deeply concerned that the Supreme Court's direction has not been codified here.

Finally, we wish to note that while the provisions at issue here – like their predecessors from 2001 – are accompanied by sunset clauses, we fear that putting these measures in law again will be far from temporary. We urge you to refrain from passing this legislation and giving it a state of *de facto* permanence in Canada. Canada has historically served as an example among nations of how democracy, freedom and respect for the rule of law can be upheld on an ongoing basis, but we must be vigilant in protecting these values. The measures proposed by this bill have afforded no demonstrable gains in combating terrorism and instead, will work to erode the democratic principles and ideals that we seek to protect.

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[2] Kent Roach, "Dangers of a Charter-Proof and Crime-Based Response to Terrorism," The Security of Freedom: Essays on Canada's Anti-Terrorism Bill, at 138.