

## **CCPA Analysis Of Bill C-36 An Act To Combat Terrorism**

### INTRODUCTION

The Canadian government has a responsibility to protect Canadians from actual and potential human rights abuses of the sort that took place in New York and Washington on September 11th. In so doing, however, the government must strike a delicate balance between collective security and individual rights. This task is never easy but is made more difficult in times of heightened fear and tension. It is, though, precisely at such times that the need to protect fundamental rights and freedoms is the greatest.

Bill C-36 creates far-reaching powers with major implications for civil liberties. It provides a sweeping definition of terrorism that risks capturing legitimate political dissent. It departs from key tenets of our criminal justice system, such as the right to remain silent. It empowers the Solicitor General to recommend that groups be put on a public terrorist list without any advance notice or an opportunity for response prior to listing. It significantly reduces the openness of our judicial system and of government.

Unlike the War Measures Act, Bill C-36 is not emergency legislation. This Bill will forever change laws such as the Criminal Code, the Official Secrets Act, the Privacy Act and the Canada Evidence Act. These changes, which could substantially alter the operation of Canada's judicial system, have been drafted quickly without the benefit of meaningful public consultation and discussion. Key questions must be asked in determining what the Bill's future should be.

These questions are:

Is this Bill necessary in order to combat terrorism? Has the government demonstrated satisfactorily that existing domestic legislation, including the Criminal Code, the Immigration Act, the National Defence Act, the Security Offences Act and the Official Secrets Act, is not adequate?

Will the measures in Bill C-36 make Canadians safer? Are there not more effective responses, such as better enforcement of existing laws and measures to improve communication between, for example, the RCMP and the Canadian Security Intelligence Service?

Will key provisions of the Bill withstand scrutiny under the Canadian Charter of Rights and Freedoms? Will Canadians have to challenge any rights' violations at a high personal and financial cost?

If the Bill is fundamentally flawed, can it be saved by the addition of a sunset clause, or are substantive amendments needed to ensure fairness?

Unfortunately, the broad scope of this Bill and the short time frame for responding, have precluded a comprehensive analysis of its complex provisions. This brief is, therefore, directed at an examination of those parts of Bill C-36 that have the greatest potential for civil liberties' violations, or for rendering our justice system and government more secretive and less accountable.

Those parts of Bill C-36 causing the greatest concern are:

the definition of "terrorist activity" which could encompass legitimate protest and dissent;

the process whereby organisations are put on a public "terrorist" list without procedural protections;

the vague definitions of the new terrorist offences of "participating, facilitating, instructing and harbouring", offences that carry substantial penalties;

intrusive new investigative procedures, including a new investigatory hearing that removes the right to silence;

important changes to the Privacy Act and the Access to Information Act that would prohibit the disclosure of information to Canadians;

the creation of new layers of scrutiny for charities which will significantly hamper their legitimate operations.

#### DISTINGUISHING BETWEEN TERROR AND DISSENT

(Clause 4, definition at new Criminal Code section 83.03(1)(b))

Who could be the object of police suspicion if Bill C-36 becomes law? Who may be arrested without a warrant, compelled to answer questions at an investigatory hearing, charged with vaguely worded yet serious new offences, put on a public terrorist list? Will it be those whose intention is to inflict terror, or could it be those targeted because of their particular ethnic background, religion or political views? How "terrorist activity" is ultimately defined will determine answers to such questions.

The definition of "terrorist activity" is a key provision in the Bill. New Criminal Code offences, carrying heavy penalties upon conviction, are based on "terrorist activity". A group may be listed, with serious consequences, if there are reasonable grounds to believe that it has carried out, participated in, or facilitated a "terrorist activity" or is acting in association with a group engaged in such activity.

The task of trying to define terrorism is a daunting one. International efforts to craft a

definition having enough precision to be meaningful and yet not encompass a wide array of political dissent and protest have not been successful. For this reason, international law has come to approach terrorism with reference to certain specific acts such as hostage taking and hijacking.

#### "Terrorist Activity" - A Definition

Rather than focusing only on specific acts of terrorism, the government has adopted a generalized approach that is far reaching and unwieldy. The definition in Bill C-36 has three main elements:

an act or omission committed inside or outside Canada for political, religious or ideological purposes or cause AND

with an intention to either: intimidate the public with regard to security, including its economic security, or to compel a person, government or national or international organisation to do or refrain from doing any act AND

with an intent to do one of the following:

- cause death or serious bodily harm,
- endanger life,
- cause a serious risk to the health or safety of the public, -cause serious public or private property damage when that is also likely to disrupt an essential service, facility or system, or to disrupt an essential service intending to cause a serious risk to the health or safety of the public

OR

-cause serious interference with, or serious disruption of, an essential service, facility or system EXCEPT as a result of lawful advocacy, protest, dissent or stoppage of work not intended to cause death or serious bodily harm, endanger a person's life or be a serious risk to the public's health or safety.

None of the key terms are defined in the Bill. What is the meaning of: a "political purpose," a "serious risk to health or safety," "serious interference," an "essential service, facility or system"? These and other terms in this section are open to differing interpretations. The Supreme Court of Canada, for example, has defined "serious bodily harm" as any hurt or injury, whether physical or psychological, that interferes in a substantial way with a person's physical or psychological well being, health or integrity. This might include a bad scare. The ordinary meaning of the term "serious bodily harm" is more restrictive.

#### Capturing Dissent

Could legitimate dissent be caught by the definition? What about First Nations blocking a highway; environmentalists trying to stop logging; anti-globalization protesters demonstrating to prevent the signing of a trade agreement; unions interfering with the delivery of a health service?

Arguably the protection against such far-reaching application is in the exception for "lawful advocacy, protest, dissent or stoppage of work", as long as such activities are not intended to cause death or serious harm. The problem with the exception is that civil dissent often has an "unlawful" element. Unions may be engaged in wildcat strikes. Demonstrators may stray, intentionally or unintentionally, beyond the bounds of what is strictly lawful by trespassing, causing a disturbance or resisting arrest. It's one thing to consider such activity as a possible violation of the criminal law. It's quite another for such activity to be labelled "terrorist" with the stigma and harsher legal regime that such labelling would entail.

It is also unclear whether the term "lawful" in the Bill refers only to Canadian law or if it also includes what is "lawful" in the country where the alleged "terrorist activity" took place. This is an important question given that terrorist acts may be committed inside or outside Canada. As Amnesty International points out in its brief on Bill-36, in many parts of the world protest, even peaceful protest is illegal. Amnesty cites the cases of possible prisoners of conscience who face legal sanctions, imprisonment, or other forms of punishment by the state for such activities as:

involvement in a successful blockade of US forestry company logging operations;

participating in a national civil disobedience campaign against one party military rule;

protesting against the construction of an electricity supply network running through the region where indigenous people live.

#### Enforcement

The lack of precision in the definition raises serious concerns about arbitrary and unpredictable enforcement. Canada's criminal justice system has frequently been criticised for systemically discriminating against certain groups, especially First Nations. Could Bill C-36, if it becomes law, have a disproportionate impact on particular racial, ethnic or religious minorities?

#### Changes to the Definition "Terrorist Activity"

The definition of "terrorist activity" must be clarified and narrowed. The "political, religious, or ideological purpose" for the activity does not add anything helpful to the definition and should be deleted. As pointed out by the Canadian Bar Association in its submission on Bill C-36, the nature of the act defines the offence, not the motivation behind it. Moreover, by linking the definition to a

religious context, the context may make this part of the Bill vulnerable to a section 15 Charter challenge which prohibits discrimination on the basis of religion.

The reference to "terrorist activity" must also be carefully circumscribed to ensure that legitimate advocacy, protest, dissent and work stoppage, even if unlawful, are not caught. The focus of any amended definition should be on the intention to seriously intimidate and to cause death or endanger life, or to cause serious risk to physical health or safety.

#### THE TERRORIST LIST (Clause 4 of Bill, s.83.05(1))

Bill C-36 proposes a process whereby Cabinet, acting on the recommendation of the Solicitor General, may name any entity (defined in the Bill as "a person, group, trust, partnership, fund or an unincorporated association or organisation") as one involved in terrorist activity, and put that entity on a list of terrorists. The consequences of listing are serious. The group is subject to other provisions in the Bill that criminalize involvement with, or support for, a terrorist group. All the group's property is frozen and subject to forfeiture. Its public reputation will be in jeopardy.

While groups can seek a review of the decision to list them, this can only be done after the decision has been made. Many groups will not have the resources to seek a review. Even if a challenge is successful, the fallout from the initial decision to list will likely be irreversible.

In light of the dire consequences of being on the terrorist list, additional procedural protections are required. At a minimum, groups must have an opportunity to respond before a recommendation is made to name them as terrorist. The Solicitor General should be required to notify the group concerned that (s)he is considering recommending to Cabinet that the group be named as a terrorist organisation. The group would then have an opportunity to respond to evidence against it.

#### NEW TERRORIST OFFENCES (Sections 83.18-83.27)

Terrorist groups are defined in relation to terrorist activity. They are either entities on the list created by Cabinet or they are groups that have as one of their purposes facilitating or carrying out a terrorist activity. Facilitation could occur whether or not the facilitator knows that a particular terrorist activity is being facilitated. Given that the activities of unions, environmental groups and advocacy organisations could be caught by the current definition of terrorist activity, this approach to facilitation is especially troubling. How can someone facilitate an act if they are unaware that they are so doing?

Section 83.18(1) provides a sentence of up to ten years imprisonment for "everyone who knowingly contributes to, directly or indirectly, any activity" of a terrorist group.

The offence is committed even if the group doesn't actually carry out the terrorist activity, even if the contribution of the accused doesn't actually enhance the group's ability to facilitate or carry out a

terrorist activity, or even if the accused didn't know the specific nature of the activity that may be facilitated or carried out. Would this broad wording catch the contribution of Canadian environmental group X that contributes to South American environmental group Y, knowing that a wing of group Y is involved in violent anti-logging protests, considered to be "terrorist", but not knowing that its contribution will actually facilitate a specific terrorist act?

Given the serious penalties associated with these terrorist offences, such offences must be clarified and the element of criminal intent be added as an essential component of the crime. In other words, the Crown prosecutor would have to prove that the accused knew that (s)he was facilitating a particular terrorist act.

#### INVESTIGATIVE PROCEDURES (Clause 4, Sections 83.28-83.3)

Bill C-36 contains new investigative procedures, including preventive arrest and investigatory hearings. These procedures represent a significant departure from fundamental tenets of Canada's criminal justice system, and could lead to human rights' violations.

The preventive arrest mechanism in the Bill allows for citizens to be arrested and detained before any charges are laid against anyone. Under Section 83.3(4), for example, a police officer may arrest someone without a warrant where the officer suspects on reasonable grounds that detention is necessary to prevent the commission of an indictable (serious) offence that also constitutes terrorist activity. Someone could be arrested on the mere suspicion of a police officer that a terrorist activity is planned, without belief that the activity is in any way imminent. The Bill does contain checks and balances e.g. those detained if arrested without warrant would have to be taken before a judge within 24 hours, or as soon as a judge is available. There is, however, a concern that section 83.3(4) and other arrest and detention provisions in the Bill could, particularly given the expansive definition of "terrorist activity", be inappropriately used to target those with certain unpopular political views, or those from certain ethnic or religious groups.

The proposed investigatory hearing, where those with material information relating to a terrorist offence may be compelled to answer questions, has important implications for freedom of the press in this country. As the Canadian Bar Association has pointed out in its submission, these hearings could be used against journalists. Journalists could, for example, be forced to disclose information they collect and to reveal their sources and work without the benefit of an ongoing judicial proceeding where the need to reveal their sources could be determined. The protection of journalistic sources is a basic condition of press freedom in a democratic society.

Despite the checks and balances in these sections of the Bill, the new techniques of investigation have the potential for infringing basic rights and must be carefully monitored should this Bill become law.

#### PRIVACY AND ACCESS TO INFORMATION (Clauses 87, 103 and 104 of the Bill)

Information and privacy laws are critical to the protection and regulation of personal and public information in the federal sphere. Clauses 87, 103 and 104 of the Bill would permit the Attorney General of Canada to issue a certificate prohibiting disclosure of certain information in order to protect international relations (a very vague term) or national security or defence. This would apply to disclosure under the Access to Information Act, the Privacy Act and the Personal Information Protection and Electronic Documents Act. The proposed changes would render those Acts wholly inoperative in respect of information covered in the certificate. There is no review of the exercise of certificate powers. In addition, the Bill would exempt the Attorney General's certificate from publication so that the public would be prevented from even knowing that a certificate has been issued. This is not consistent with principles of fair and open government.

Information that is legitimately classified as sensitive is already protected from disclosure in information and privacy laws. These new provisions are, therefore, not necessary and should be withdrawn.

#### CHARITIES (Part 6 of the Bill)

Part 6 of the Bill incorporates most of the contents of Bill C-16, Charities Registration (Security Information) Act which was introduced in the House of Commons in March of this year but withdrawn with the introduction of Bill C-36. Part 6 adds another layer of scrutiny for registered charities and those seeking charitable status. If enacted, Bill C-36 could have a devastating effect on the activities of Canadian charities, both at home and abroad. Charities against whom a security certificate is issued will lose their charitable status. Entities seeking to become registered charities would be ineligible if a certificate had been issued against them. The conditions for issuing a security certificate have been expanded in Bill C-36 to include, for example, charities who made resources available to a terrorist group but also those who "made, make or will make" resources available in the future.

Bill C-36 would penalize a registered charity or applicant for charitable status for directly or indirectly providing funds or services to "terrorist groups." This brings us back to the problem of what constitutes terrorism". Under a military dictatorship, a group engaged in civil disobedience may be deemed "terrorist." Will a Canadian charity be penalized for contributing to such a group? What about those foreign entities whose major purpose is to undertake humanitarian work, but who may be affiliated with a "terrorist group"? It will simply not be possible for Canadian charities to ensure their funds don't end up in the hands of those deemed "terrorist."

Part 6 of the Bill should be deleted.

#### REGULAR REVIEWS

In addition to a sunset clause, regular six-month parliamentary reviews are needed given the sweeping nature of the Bill and its potential for serious infringement of basic rights and freedoms.

## CONCLUSION

Bill C-36 does not represent an appropriate balance between civil rights and national security.

Bill C-36 is a threat to the fundamental rights and freedoms of those living in Canada. Nor does it meet standards of fairness, openness and accountability that are the hallmark of democratic government.

Although a sunset clause would be better than no sunset clause, merely adding such a clause to a fundamentally flawed Bill is unacceptable.

The government has not demonstrated that Bill C-36 is necessary to combat terrorism and increase the security of Canadians.

Although this brief suggests specific changes to various provisions of Bill C-36, these changes if enacted, would not by themselves be sufficient to redeem the Bill and warrant its passage.

Accordingly, Bill C-36 should be withdrawn and the government should initiate a broad public discussion about what measures are needed to protect the security of Canadians, and what if any new legislation is necessary.

Before introducing any new legislation, the government must demonstrate to Canadians why existing laws (with perhaps, better enforcement and coordination) are not sufficient to combat terrorism.

Any new legislation should be referred to the Supreme Court to ensure that it is consistent with the Canadian Charter of Rights and Freedoms.

Any new legislation must include independent third party oversight and review, reporting directly to parliament.

This analysis was submitted as a Brief to the House of Commons Justice Committee