



**National Association of Women
and the Law**

**Association nationale de la
femme et du droit**

**The National Association
of Women and the Law**

**Submissions to the Senate Special
Committee on Bill C-36**

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The National Association of Women and the Law (NAWL) is a national, non-profit organization composed of lawyers, law students, legal academics and jurists promoting women's equality by means of law reform advocacy, research and education. Formed in 1975, NAWL has been working to improve women's equality in a broad range of legal fields over the years, including equality law, constitutional law, criminal law, health law, employment and labour law, family law and others.

NAWL is extremely concerned about the impact of proposed Bill C-36, *An Anti-terrorism Act*, on the civil and political rights, as well as the equality rights of persons living in Canada. We share the concerns and support the recommendations of the National Organization of Immigrant and Visible Minority Women of Canada.

We also have similar worries expressed by other organizations on a previous version of the bill and/or its amended version (in particular by the Canadian Bar Association, the Canadian Labour Congress, the Ligue des droits et libertés, the Barreau du Québec, the B.C. Civil Liberties Association and the Coalition of Muslim Organizations). While we applaud some of the amendments introduced in third reading of the bill, we remain convinced that this proposed legislation has fundamental flaws, and represents a threat to human rights in Canada.

We agree that it is important to take necessary steps to protect the population against acts of terrorism; however, we think the proposed bill does not strike the necessary balance between collective security and individual liberties. We fear that its limitations on rights and freedoms will have a disparate impact on groups of persons belonging to racialized minorities, on immigrants and other historically disadvantaged communities in Canada. We are also worried that these provisions will restrict legitimate political protest in Canada, and will have a chilling effect limiting free speech, freedom of association and political participation.

Bill C-36 creates extraordinary and wide-ranging powers. We consider the proposed review mechanisms will not be sufficient to ensure the respect of fundamental freedoms. These powers, if abused, could have severe implications for democracy in Canada. We agree with the Barreau du Québec that having an omnibus bill that integrates anti-terrorist provisions in the *Criminal Code*, the *Canada Evidence Act*, the *National Defence Act*, the *Access to Information Act*, the *Privacy Act*, and other legislation is fundamentally flawed and risks contaminating our basic rules and legal safeguards. Simply adopting a sunset clause, even if it were to apply to the whole bill, would not be sufficient, since much harm will be done in the first years of its operation. For this reason, we urge you to defeat the bill. We ask the House of Commons to redesign a stand-alone legislation that will actually conform to the human rights obligations to which our government is obligated under the *Canadian Charter of Rights and Freedoms*, as well as international human rights law.

While we are greatly relieved that the minister of justice has amended the initially proposed definition of terrorist activities, we remain troubled that the current definition is still too vague, thus allowing for the arrest and detention of persons who are not terrorists. In an open letter to Prime Minister Jean Chrétien dated November 22, the B.C. Civil Liberties Association provides the following example: “For example, tipping over a police cruiser in a crowd of demonstrators would clearly be a terrorist act under this definition, as would an attempt to engage police in a serious physical confrontation during a demonstration. Such acts are certainly heinous and criminal and not ever to be tolerated in a free and democratic society. But it is simply absurd and a dangerous exaggeration to describe them as terrorist.”

The definition of terrorist activities proposed in this bill would also include an act or omission that causes “serious interference with or serious disruption of an essential service, facility or system, whether public or private.” This is much too broad, and will entail confusion between illegal acts, and terrorist acts. We agree with the B.C. Civil Liberties Association that this part of the definition should be removed (83.01 (1)(b) (ii) (E)). Finally, we also agree with the Barreau du Québec that the introduction of the

notion of “economic security” in the definition of a terrorist act is vague, inappropriate and may have untold ramifications.

Bill C-36 also introduces the new concept of “facilitating” a terrorist activity in the *Criminal Code*. We share similar concerns with the Barreau du Québec that this new concept departs from the accepted and understood notions of aiding and abetting, found in section 21 of the *Code*. The notion of “facilitating” is not clear. Its introduction might “contaminate” the *Criminal Code*, and bring about confusion on the interpretation of aiding and abetting. Indeed, the concept is so vague that the Canadian Bar Association has expressed concern that section 83.18 will dissuade lawyers from representing accused persons or groups, out of fear of being accused themselves of providing a skill or an expertise for the benefit of a terrorist group! This directly affects the most basic right to legal representation.

This bill would allow for the inclusion of a government list of terrorists groups, of any entity for whom the Solicitor General has reasonable grounds to believe that it carried out, participated or facilitated a terrorist activity. While being on such a list will no doubt have drastic consequence for any organization, there are no procedural safeguards to challenge such a decision. On the contrary, the bill includes a presumption that if the Solicitor General does not respond within 60 days to an application challenging the inclusion of a group on such a list, it is deemed that the applicant remain a listed entity. While the applicant may apply for judicial review of this “decision”, the judge may examine in private all security or intelligence reports submitted by the Solicitor General, if he or she is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person. The applicant only has a right to receive a statement summarizing the information available to the judge.

In addition, the judge may receive any evidence, “even if it would not otherwise be admissible under Canadian law” and may base his or her decision on that evidence. There is no mechanism provided to appeal such a decision. This type of procedure is totally inconsistent with basic principles of fundamental justice, and is reminiscent of Star

Chamber principles. We agree with the Barreau du Québec that the presumption that the Solicitor General is deemed to have decided to recommend that the applicant remain a listed entity be removed. As well, we agree with the Canadian Bar Association that procedural protections are clearly insufficient for those who are identified on the “list of entities.”

The bill also provides for aggravated punishment in the form of consecutive sentences for a person found guilty of an offence relating to terrorist activities. This offends the basic principle of the individualization of sentences. It needlessly interferes with a determination which should be judicial and which should be based on all the different circumstances in each case.

We are also very concerned with the preventive arrest and detention provisions of the bill, as well as with the investigative procedures that are being introduced that clearly violate basic *Charter* protections, such as the right to silence. A peace officer may arrest and detain a person if he/she suspects that detention is necessary to prevent a terrorist activity. We are dismayed that this bill allows for arrest on mere suspicion, as this is a highly subjective criteria that will allow for uncontrolled abuse. Given the current climate, it may also give rise to a wave of discriminatory arrests against racialized persons and groups. We agree with the Canadian Bar Association that “preventive arrest should only be possible where a police officer believes that the terrorist activity will be carried out imminently. We should not countenance detention without warrant on mere suspicion that an offence will at some future time be carried out. This is a change that ought to be made even if there is a sunset clause applicable to the bill’s preventive arrest.”

The provisions regarding conditions for recognizance also represent a significant weakening of the civil liberties of persons living in Canada. Innocent people may refuse to enter into the recognizance, because the conditions imposed offend their right to freedom of expression, association or political participation, and thus find themselves in prison.

We are extremely concerned about the possible discriminatory application of the investigative procedures that are being introduced. Persons under investigation are presently not compelled to answer questions outside the framework of a trial. The proposed changes would represent a major expansion of investigative powers given to law enforcement agencies. The right to silence is a hallmark of fundamental justice under common law, and the bill's provisions will effectively abrogate that right, forcing persons to speak and provide evidence against their will. We agree with the Barreau du Québec when it writes: « À toutes fins utiles, on supprime le droit au silence, ce qui a pour conséquence de bouleverser profondément les valeurs et les principes du droit criminel ».

The increasing secrecy of criminal trials and the expanded list of reasons why the public may be barred from aspects of a trial, along with bans on publication of proceedings are of great concern. Our worries are compounded by the power to exclude the application of access to information and privacy legislation in the interest of national security and protecting international relations. In addition, we consider that the provisions concerning disclosure of information about terrorist property will offend the rights of clients to confidentiality and solicitor-client privilege. As the Canadian Bar Association has written: "Section 83.1 would subject lawyers to criminal charges for performing their professional duty to keep client information confidential. This would be an egregious violation of solicitor-client confidentiality and privilege."

We are concerned that the bill will facilitate the spying on Canadians, by providing the Canadian Security Establishment with increased powers, without any provision for independent review or judicial scrutiny.

We are also worried that the sections prohibiting the financing of terrorist activities would prevent fundraising on behalf of groups resisting oppressive regimes, or more simply providing funds for community survival. The lack of protection from abuse of process in decertifying charitable organizations may also have a very negative impact on capacity of communities to organize and provide essential support to their members.

Bill C-36 amends the *Canada Evidence Act* by abolishing sections 37 and 38, and replaces them with provisions that would allow for the exclusion of evidence on the grounds of a “specified public interest”, or because it may be “potentially injurious information” that could injure “international relations or national defence or national security.” The new provisions would allow for the complete exclusion of evidence in some cases, or the disclosure of only a part or a summary of the information. We agree with the Canadian Bar Association that “summaries of evidence should not be used in criminal proceedings... They are an affront to the principle of a right to full and fair defence, which necessarily entails the right to know the case to be met.” In addition, the bill provides that in making decisions on these issues, the court may receive into evidence anything that is appropriate “even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.” We agree with the Barreau du Québec that these regressive provisions are a major setback and must be denounced. This reform is being proposed without any evidence that there are problems with the current provisions in the *Canada Evidence Act*, that were adopted after extensive consultation, litigation and law reform work.

The deleterious impacts of Bill C-36 must also be considered in conjunction with the proposed provisions of Bill C-35, an *Act to Amend Foreign Missions and International Organizations Act*, and Bill C-42, *the Public Safety Act*. Bill C-42 would allow the government to declare a specific area a military-security zone and expel people from it for the defence of international relations, national security or to ensure the security of any person or any object. A civil servant briefing provincial representatives on the bill explained on November 28, that these measures could be invoked, for example, in situations such as the demonstrations against the FTAA held for the Summit of the Americas last April in Québec City. Many commentators are also arguing that the bill could be used to shut down any demonstrations against the G8 Summit that is planned next June in Kananaskis, Alta. The provisions of Bill C-35, when read in conjunction with Bill C-36, may be used to brand activists planning anti-globalization demonstrations as terrorists. Indeed, this would be the result of including foreign state representatives

attending meetings as “internationally protected persons”, and including in the definition of terrorism “a violent attack on the official premises, private accommodation or means of transport of an internationally protected person that is likely to endanger (that person’s) life or liberty.”

While we understand the need to protect Canadians from acts of terrorism, we urge the Senate to send a clear message to the House of Commons that the draconian measures adopted in haste, without time for a democratic debate and considered analysis, is unacceptable. Bill C-36 will profoundly alter Canadian law, in many different domains, yet the government has not even established that we are faced with a real threat of terrorism.

As women and as feminists, we certainly understand the need to take action against terrorism. Indeed, we have been fighting, as a movement, against domestic sexual terrorism that forces approximately 100,000 abused women and children to flee from their home and seek refuge in shelters every year. Women know what terror feels like, and we have been urging our governments to take effective measures against violence against women for over 30 years. Yet, we have never recommended that government infringe basic civil liberties to do so. Even though it is frustrating to see that abusers always benefit from the presumption of innocence, that guilty abusers are often be freed on procedural issues, and that it can be very difficult to obtain legal sanctions that effectively guarantee a woman’s security, or that validate her experience as a victim, feminists have never called for the kind of measures that we now see in Bill C-36.

This bill will create a climate where dissent is not tolerated, where racialized minorities live in a climate of insecurity and where the gradual erosion of our civil liberties and other human rights will be trivialized.

For these reasons, we urge that you oppose Bill C-36 and vote it down.