Standing Committee on Public Safety National Security
December 3, 2012
Study of Bill S-7, *Combating Terrorism Act*

Testimony by Mr. Denis Barrette (Spokesperson, International Civil Liberties Monitoring Group):

Good afternoon. I am joined by Roch Tassé, coordinator at the ICLMG, an organization for which I am a spokesperson.

Thank you for having me. I will introduce myself. I am Denis Barrette, member of the Ligue des droits et libertés. I represent the International Civil Liberties Monitoring Group. Presentation-related documents in both languages have been distributed to you.

Certain provisions of Bill S-7 introduce a new offence for attempting to leave Canada in order to commit a terrorism offence, which is already forbidden and prohibited under sections 7, 21 and 24 of the Criminal Code.

We will mainly focus on the two provisions that were abandoned in 2007 owing to sunset clauses. I am talking about investigative hearings and preventive arrests used to physically and judicially monitor individuals. That's covered under sections 83.28 and 83.3 of the Criminal Code. In our opinion—and we have already said so before committees—those two provisions are dangerous and misleading.

Debate in Parliament on these issues must draw on a rational and enlightened review of the Anti-terrorism Act, which was rushed through Parliament following the events of September 2001. It must be reiterated that the two provisions discussed here rely on very broad definitions of terrorist activity and participation in a terrorist activity. They enable law-enforcement authorities to carry out preventive arrests and to compel individuals to testify for challenging authority and engaging in dissent, when such activities have nothing to do with what is normally considered to be terrorism.

Such a broad definition encourages the profiling of individuals labelled as “persons of interest”, on religious, political or ideological grounds. In its November 2005 report on Canada, the United

Nations Human Rights Committee noted its serious concerns with respect to the excessively broad definition of terrorist activity in the Anti-terrorism Act. The committee stated the following:

> The State party should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation and detention.

Today, in 2012, what is the real objective need for these two provisions?

From the time of their introduction in 2001 until their repeal in 2007, the only time they were used was in relation to the unfortunate Air India case, and we know what a police and legal fiasco that turned into—including the needless use of investigative hearings.

Since 2007, police investigations have successfully dismantled terrorist conspiracies using neither of the provisions we are talking about today. Furthermore, since 2001—in other words, in the last 11 years—none of the investigations that resulted in charges or convictions required the use of these provisions—whether we're talking about the Khawaja affair, the Toronto 18 or the group of four in Ontario.

The first provision compels individuals to appear before a judge and testify when the judge has reasonable grounds to believe that the individual has information about a terrorist act that has been or will be committed. A refusal to co-operate may result in an arrest and a one-year imprisonment.

This provision introduces the notion of inquisitorial justice into Canada's criminal law. That changes the paradigm between the state, the police, the judiciary and citizens. We know that, in Canada, as in all common law countries, criminal law is founded on the adversarial system. That is not the case in France, for instance, where an inquisitorial process is used. Our concern is that this new concept could be introduced in the near future into other Criminal Code provisions and applied to other types of crimes. This means that, in

the medium term, principles of fundamental justice—such as the presumption of innocence—could be affected.

We also believe that investigative hearings may bring the principle of judicial independence, and thereby, Canada's justice system itself, into disrepute.

With judicial investigative hearings, the entire concept of adversarial debate disappears. I invite you to carefully read the dissenting opinion of judges Fish and LeBel in the debate on section 83.28 of the Criminal Code. The two judges concluded their ruling as follows:

> The implementation of s. 83.28, which is the source of this perception that there is no separation of powers, could therefore lead to a loss of public confidence in Canada's justice system. The tension and fears resulting from the rise in terrorist activity do not justify such an alliance. It is important that the criminal law be enforced firmly and that the necessary investigative and punitive measures be taken, but this must be done in accordance with the fundamental values of our political system. The preservation of our courts' institutional independence belongs to those fundamental values.

Should this provision go into effect, it is to be expected that the Supreme Court will have to consider the constitutionality of section 83.28 again, especially, as noted by judges LeBel and Binnie, because it will give rise to much abuse and a number of irregularities.

Finally, we want to point out that, throughout these two provisions, the notion of suspicion as warranting retaliation against citizens is reinforced again.

With respect to the provision relating to the concern that a person might commit a terrorist act, it seems that legislators have forgotten the existence of subsection 810.01(1) of the Criminal Code, which states the following:

> A person who fears on reasonable grounds that another person will commit an offence under section 423.1, a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge.

That provision currently allows authorities to impose very onerous conditions on an individual suspected of participating in a terrorist activity.

In addition, the provision of Bill S-7 will also become an indirect way to collect and record information on innocent people under the Identification of Criminals Act, which specifically includes section 83.3 of the Criminal Code as grounds for fingerprinting.

I want to highlight a few specific problems. In the investigation on the mistreatment of Almalki, Elmaati and Nureddin, Judge Iacobucci wrote that the RCMP's lack of concern regarding the use of information obtained through torture was troubling. Once again, those who agree with information being obtained through torture, also agree with unreliable, suspicious and dangerous information.

We want to remind you of the need to establish some means of monitoring the activities of the state with respect to national security, as recommended by the Arar commission, in 2006. Six years later, we are still waiting. The absence of independent and effective mechanisms for national security can only increase the danger of applying these two provisions.

Finally, we want to highlight the fact that these provisions will become a worrisome tool of intimidation, even though they are not being directly enforced in the judicial system. For instance—and this is not a fictitious example—an officer of the RCMP or CSIS could very well tell an individual reluctant to answer the officer's questions that their failure to co-operate could result in them being detained and brought before a court. As occurred with McCarthyism, the fear of seeing one's reputation tarnished through such a process, being detained for 72 hours and then brought before a judge to answer questions masterminded by the police amounts to a powerful denunciation process.

And, when you're talking about denunciation through coercion, without the free and voluntary process imposed by our criminal law, you are also talking about unreliable, biased and false information. Every lawyer knows how unreliable reluctant witnesses can be. In addition, these provisions could be highly injurious, and their impact

will not be trivial, even if the individuals concerned are not compelled to appear before a court of law. If the provisions are used, they will result in people being labelled, even though they have never been charged.

We know—since the Arar commission of inquiry and Judge Iacobucci's investigation—that a simple inquiry can lead to torture, and destroy the life, reputation, career and future of an innocent individual who has not even been charged. We know that these provisions could, as we see it, be abused. I am thinking here of the Air India case.

We believe that Canadians will be better served and protected under the usual provisions of the Criminal Code. Reliance on arbitrary powers and a lower standard of evidence can never replace good, effective police work. On the contrary, these powers open the door to a denial of justice and a greater probability that the reputation of innocent individuals—such as Maher Arar—will be tarnished.

Therefore, we call for a true rational analysis of these provisions. That is your responsibility as parliamentarians. On the one hand, these provisions are not necessary or even really useful. On the other hand, it is highly likely that they ultimately target innocent individuals, lead to violations of rights and freedoms and bring into disrepute the administration of justice. We have everything to gain by doing away with repressive measures that are unnecessary and everything to lose by adopting them.