

STATEMENT BEFORE THE SENATE LEGAL AFFAIRS COMMITTEE ON BILL C-10

Today, I am very thankful to the Honorable Senators John D. Wallace, Joan Fraser and Pierre-Hughes Boisvenu, and other distinguished members... and guests, for allowing me to testify before you on such a sensitive issue, precisely **Justice for Victims of Terrorism Act**.

To testify before this committee of the Senate of Canada after 28 years of loyal service to my country is an unprecedented honor and privilege. I will humbly make a statement and hopefully share opinions. Sharing with you will be pretty much rewarding in itself.

First of all, I want to be clear with everyone in this room: I support entirely Bill C-10. Moreover, I support entirely Bill C-10 on the issue of victims of terrorism, as a former lawyer for the Association of Families of Persons Assassinated or Disappeared. I spent four years as a pro-bono lawyer with families dealing with the worst scenario a human being can imagine: the lost of close love one. In this sense, my personal relation with Senator Pierre-Hughes Boisvenu is unique and a truly genuine friendship.

Therefore, a very special and warm thank to the courageous and heroic people of the Association and especially to its founder Senator Pierre-Hughes Boisvenu. I also recognize as a true hero my dear friend Michel Surprenant whom daughter disappeared twelve years ago.

Representing these aggrieved families became over the years a passion but also a mission, a quest for justice!

MY STATEMENT

INTRODUCTION

To many my statement will seem awkward but it is not. We must do this but do it right!

In order to protect and secure the federal government of Canada, the provinces and our foreign allies, namely the United States of America, Federal and States, and our NATO allies, against any civil or tort procedure that could be undertaken by victims of terrorism in our court system, I suggest an **exclusion clause** that could be embedded into Bill C-10 with a country's list in a schedule to the law. Why embedding an **exclusion or exclusionary clause**?

Let me explain. My statement is a red flag, an alarm.

THE LEGAL BACKGROUND

Today I would like to share with you my concerns about a term, a word that is not defined or used under the Canadian criminal law. It is the word *support* like in *support of terrorism*.

What does the word *support* means? The generic term means *affirm, aid, back*. The Canadian Criminal Code provides no definition of this term. However, Section 3 of Bill C-10 provides us with the word *supporter* without a definition.

Therefore, I refer you to the definition provided by the USA Patriot Act under US Code, namely Title 18, section 2339A which defines clearly *material support or resources* to terrorists.

(Excerpt of the US Code) (Reference only)-----

2339A. Providing material support to terrorists

(a) **Offense.**— Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section [32](#), [37](#), [81](#), [175](#), [229](#), [351](#), [831](#), [842 \(m\)](#) or (n), [844 \(f\)](#) or (i), [930 \(c\)](#), [956](#), [1091](#), [1114](#), [1116](#), [1203](#), [1361](#), [1362](#), [1363](#), [1366](#), [1751](#), [1992](#), [2155](#), [2156](#), [2280](#), [2281](#), [2332](#), [2332a](#), [2332b](#), [2332f](#), [2340A](#), or [2442](#) of this title, section 236 of the Atomic Energy Act of 1954 ([42 U.S.C. 2284](#)), section [46502](#) or [60123 \(b\)](#) of title [49](#), or any offense listed in section [2332b \(g\)\(5\)\(B\)](#) (except for sections [2339A](#) and [2339B](#)) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) **Definitions.**— As used in this section—

(1) the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge

However, the Criminal Code contains already a provision on the *financing of terrorism*, namely referring to property and banking services in a narrow way contrasting with the lengthy enumeration of possible material support and resources provided by the US Code.

(Excerpt of the Criminal Code)(Reference only)-----

Financing of Terrorism

Providing or collecting property for certain activities

83.02 Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out

- (a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of “*terrorist activity*” in subsection 83.01(1), or
- (b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

- 2001, c. 41, s. 4.

Providing, making available, etc., property or services for terrorist purposes

83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services

- (a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
- (b) knowing that, in whole or part, they will be used by or will benefit a terrorist group,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

- 2001, c. 41, s. 4.

Using or possessing property for terrorist purposes

83.04 Every one who

- (a) uses property, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity, or

- (b) possesses property intending that it be used or knowing that it will be used, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

- 2001, c. 41, s.
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THE FIRST ISSUE

Section 4 of Bill C-10 extends the coverage of possible terrorist plot or act that includes under a new provision, namely Section 83.19 which reads *knowingly facilitating a terrorist activity*. It is the most generic and facilitating provision to cope with the term *support*.

But, are we not confusing the burden of proof required from the victim of terrorism that he or she proves the state of mind of the offender, namely a person, an entity or a government, with the expression *knowingly facilitating*? Under civil or tort law, such requirement does not exist, precisely proving the intention, sort of **civil mens rea**! I suggest that it must be clarified. Moreover, are such enumerations under U.S. and Canadian criminal law really useful for the purpose of a tort or civil procedure that requires only a wrongdoing, namely “une faute”, a drift from an accepted rule or norm, to trigger a condemnation for damages? These unanswered questions bring the second issue.

THE SECOND ISSUE

What is the nature of a government *subsidy* to a *charity* or an *entity*? Is it an “intangible or tangible” as mentioned in US Code s. 2339A (b) (1), a generic term I would argue, and not to be found in Canadian law or Bill C-10?

This obvious lack of a clear definition for *supporter* of terrorism and the absence of a provision defining *material support to terrorism*, as we find in US law, open a can of worms with unpredictable consequences. We lend some of the US perspective but not all. Let's see.

Often governments subsidizes in good faith charities or *entities*, bona fide association of diverse ethnic group and origin for whatever purpose. Unfortunately, it happens that some of these groups or charities keep close ties with persons or entities in their country of origin. Moreover, these countries sometime also face political unstable and unpredictable situations namely, for instance, ongoing civil war, territorial dispute, guerrilla warfare or resistance group of enemy combatants. It also happen that covert operations or intelligence network trigger a strong reaction from opposition groups perceived rightly or not as terrorists.

In other words, the world political landscape is file with conflicts of such complexity that bringing them, or case related, before our courts is a risky business that could disrupt the very peace and stability at the core of our pride as Canadians!

I want to be crystal clear: recent past proved that a charity subsidized by a government could also be a front for a terrorist group, or terrorism generally, or intelligence.

In subsidizing such a group, is our government, or any foreign government or ally, supporting terrorism? As a victim's lawyer, I would say "yes" and therefore such a state loses the benefit of immunity, which brings the next question.

Are we not imposing too much of a burden on the shoulders of the civil servant, or the politics, that has to decide on subsidies to a charity or an entity? Should we not reevaluate the due diligence of the whole process of subsidies, comprising CSIS assessment? Are we not taking too much of a risk, for instance risking to facilitate a terrorist organization some access to WMD (Weapons of Mass Destruction)?

In these matters, negligence within the due process would be a wrongdoing, "une faute" with consequences. As a victim's lawyer, I would sue the government. Are government subsidies to an entity, namely a charity, person or bona fide association, a kind of non intentional support or financing of terrorism? What if the said government was trapped or misled by the representatives of such charity group?

For instance, suppose that we allow Canadians with recent citizenship or not, as victims of terrorism, to introduce a tort procedure against a foreign government by reason of terrorism in a foreign country, and that such a procedure would also been directed against another Canadian originating of the same region but from a different ethnic or religious group, what could be our responsibility if such a foreign terrorist group was directly or indirectly subsidized by us as a charity? Let's suppose that I can prove, as a lawyer's victim, that such a grant was used to buy explosives or grenades, what could be the legal and political impact on our foreign relations? I would certainly sue any government that has contributed to my client's damages.

I am quite certain that, in the balance, whether negligence or not is proven, and based on a government failed due diligence –let's face this real possibility- if subsidies end up in terrorist hands to buy guns, explosives, or worst weapons of mass destruction, State Immunity Act would not apply.

We must keep in mind that a government in such a situation would be facing a civil action for damages with a preponderance burden of proof for the victim to make in order to win. Suffice to say that there would be no criminal intention to be proven beyond reasonable doubt. It is reasonably challenging but threatening for a government dealing with severe budget cuts or restrictions. I suggest that we should avoid such a risk. And the same principle should apply to our closest allies. We should not impact our foreign relations and take all means to preserve the integrity of our Executive. Allowing such civil actions against foreign governments acting in good faith but being trapped by terrorists, could also have meaningful consequences on our trade.

CONCLUSION

Therefore, let's not transform our court system into a universal jurisdiction under the laws of nations ending up on our soil with the unpredictable consequences of terrorism that occurred in foreign countries, namely overburdened courts and social unrest. We must not import terror by being too generous a nation. Let's protect our homeland.

However, I suggest that we offer to Canadians victims of terrorism in their country of origin, or elsewhere, as Bill C-10 propose, a framework of legal possibilities but also clear limits. It is the purpose of an exclusion or exclusionary clause.

I suggest that Bill C-10 should be amended to exclude from the scope of civil or torts procedure, Canada and its provinces, the United States and its States, and all our NATO allies, namely 28 countries. I refer to Article 5 of the Washington Treaty as a matter of strong consideration among free nations, in the aftermath of the Second World War: "all for one, one for all!".

By prohibiting into the law any legal civil procedure against their second homeland, Canada and our NATO allies, we set the rule very straight for the victims and protect our foreign relations. Bill C-10 would offer a clear path for damage recovery to victims but no threat to the actions of the Executive. **In other words, *State Immunity Act* should not be lifted for Canada and NATO Allies, even for the benefit of victims of terrorism. It is a matter of national security.**

As a former pro-bono lawyer for victims, the best scenario is suing a foreign state, an entity or a terrorist without interfering with the Canadian government and its closest allies.

Above all, Canada is a land of freedom and we abide by the rule of law, offering opportunities and a new beginning to those seeking hope and prosperity, not revenge and social unrest.

At some point, *State Immunity Act* protects the victims of terrorism and the whole community.

Thank you for listening. It is an honor and a privilege.

Me Claude Laferrière, avocat/Attorney at Law