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RICHARD MOSLEY PRESENTATION

Thanks Tom. It's a pleasure actually to be on a panel with Tom, like myself, a recycled former prosecutor. I've done a number of sessions on Bill C-36, usually with a couple of law professors on the same panel who proceed to beat up on me and everything wrongheaded that we did. I'm reasonably confident that there aren't any law professors in the audience today, but if there are, I'd be happy to debate with you after the session.

My job on this panel today is to talk about Canada's anti-terrorism legislation which is referred to as Bill C-36. That was its number when it was in Parliament. It was introduced on October the 15th, shortly after the American legislation was tabled and became law in December.

I'm not going to talk to you about some other legislation that you may have read about today in the Canadian papers or saw on the news which is referred to as Bill C-55 called, *The Public Safety Act* of 2002, which replaced a bill which had been tabled before Parliament late last year and remained before that House, Bill C-42. I'm talking about C-36, not C-42 or C-55. Try to keep those numbers straight and there

will be a test at the end of this session.

C-36 is what we called an omnibus bill. It amended sixteen statues in a significant way and created one entirely new act. It amended another dozen or so as consequentials. The final print ran to a 186 pages and 146 clauses. No one, of course, has ever accused lawyers of using one word when ten would do. I'm not going to get into a lot of detail on the content. My object today is to give you an overview of what's in the legislation and if you wish further information, you can refer to our departmental website or download a copy of the bill, itself, from the House of Commons' website.

What happened after September the 11th is, we started drafting a response, a legislative response, almost immediately. We took stock initially and -- of our existing legislative framework and we had a lot of laws that could apply to any form of criminal activity that is normally related to terrorism. We had an extensive *Criminal Code* and other statutory framework, but in taking stock of the situation immediately following the tragic events of the eleventh, we concluded, as did our counterparts in the U.S. Justice, that the traditional approach of the criminal law was

not adequate to deal with this new threat of global terrorism. And not adequate because it dealt with conduct normally after the fact. There are and were in Code offences before the completion of the crime, but for the most part our law was geared to punishing people for what they did after they did it and did not have a preventive aspect to it. So, we set apart -- we set out to develop a new paradigm for our law that would -- would entrench preventive measures in our criminal statutes. At the same time, we wanted to ensure that Canada's law was in conformity with the global consensus that had been expressed in the form of the United Nations Conventions against the suppression of terrorist bombings, the suppression of terrorist financing, and the security council resolution which was adopted on September the 28th. We were also benchmarking what we are doing in Canada against what was already law in the United States about -- against what was being developed in the United States and against the legislation in other countries with whom we normally compare ourselves, such as the United Kingdom, France, Australia, and so on. All the while, respecting the values expressed in the Canadian *Charter of Rights and Freedoms*.

Now, on the screen now are the basic elements of this legislation. The tough new measures to suppress terrorist activity, new offences in the *Criminal Code*, new investigative procedures to disrupt terrorist networks and collect evidence, expansion of the authority to collect financial information, and Horst Intscher talked about the extended mandate given to his agency. Mechanisms to stop the supporters of terrorist groups from raising funds in Canada, which has been a subject of considerable concern. At the same time, we were well aware as -- as the days past, that one of the unfortunate incidents or fallouts of September the 11th was an increase in hate related incidents in Canada. So, we also wanted to build into the legislation a very strong signal that that kind of conduct was unacceptable.

A key to the structure of our law was a definition of terrorist activity. This is something that Canada had never previously attempted to do simply because there was never any agreement on what was terrorism or terrorist activity. The international community has been debating that since about 1937 when the League of Nations first tried to come up with a definition and the UN is still wrestling with a consensus as to how

you define this. But, we thought it was critical because we wanted to separate out these measures from the normal run of criminal law in order to rely on the national security justification which gives states, such as Canada, more scope in dealing with threats against our society than you would normally be able to accept for ordinary run of the mill criminal offences. At the same time we also had received a little warning from the Supreme Court of Canada that if we ever attempted to criminalize terrorism perse, we had to be prepared to define the term. So, we did. And what you see on the screen there is just a very brief summary of what it does. It actually runs to about four pages of legislative text and is extremely complex. The law professors are still debating over the meaning of this definition. But, it -- it incorporates something which we find when we look to U.S. documents produced by the State Department, Justice, or other agencies, which link the activity to the motivation or purpose, and in C-36 that's political, religious, or ideological purposes, a phrase we borrowed from the United Kingdom's legislation of 2000.

The Act also provides for the listing of terrorist entities. Now, we had already proceeded to do this

under the authority of the *United Nations Act* and its regulations. We implemented the security council's resolutions relating to the Taliban, to Afghanistan, and subsequently to al Qaeda, and we implemented each of the listings that were issued by the U.S. Administration. The international community collectively did this and those listings are still in effect, and in practical terms, freeze the property of any of those persons that may be found in this country. But, in addition to that, we set in place in the *Criminal Code* a new mechanism which would extend the authority to seize, freeze and forfeit, and an innovation in Canadian law is that this applies the capacity to forfeit the property applies, whether or not there are criminal proceedings in relation to -- this is similar to in the *U.S. Rico*. You can bring a form of civil forfeiture application, though in Canada we can now do this under C-36.

The Act contains a broad range of new crimes dealing with the participation in, facilitation of, or support for terrorist activity. This is modeled, for those of you who are familiar with it, on the organized crime legislation, Bill C-24, also recently enacted. In keeping with the prevention objective, these

offences apply whether or not the terrorist activity is actually facilitated or carried out, whether or not the accused's contribution actually enhances the network's ability to carry out their purpose, or whether or not the accused knows what that purpose may be. And why we did that relates very much to the statement from Usama bin Laden, himself, that was reported in the fall in which he said that the brothers who were selected for the martyrdom operation, many of them did not know what the object of the exercise was until they got on the plane. And what we wanted to deal with in this legislation was to set the authorities in place to go after the members of the networks, who are contributing in some way, but who do not know the broader plan -- aren't aware of how their contribution may assist it.

These new offences are extensive. I'm not going to list them, but, for example, the commission of any indictable offence that constitutes a terrorist activity -- anything that falls within the definition of terrorist activity, is itself an indictable office punishable by life imprisonment. Murder committed during the commission of any crime that is a terrorist activity is treated as first-degree murder. Sentences for any of these new offences are to be served

consecutive to any other imposed, and parole eligibility is restricted.

Now, this next slide which is going to come up any second, preventive arrest, was one of the most controversial aspects of C-36 when it was before Parliament. It -- countries like France and the UK, which have had a long experience with domestic terrorism on their territories, have had mechanisms to allow for the arrest and detention of suspected terrorists, without charge. Canada has never had anything of that nature and C-36 does stop short of that approach. But, again, in keeping with the prevention objective, the legislation provides the procedure to disrupt a terrorist operation where an officer has grounds to believe one is going to be carried out, and grounds to suspect that a particular individual will take part in it. That person may be arrested and brought before a Judge and can be detained for up to seventy-two hours at maximum, during which, of course, other proceedings may be initiated against him or her under the Code or other statutes, such as immigration removal proceedings.

The *Charities Registration Security Information Act* is an entirely new piece of legislation intended to

block the use of charitable status to raise funds to support terrorist operations abroad.

C-36 also amends the proceeds of *Crime Money Laundering Act* to expand the scope of the FINTRAC mandate to include the financing of terrorist activity. Supporting that extended mandate are new requirements enforceable by criminal sanctions that require anyone dealing with the property of a suspected terrorist entity to report it to the Commissioner of the R.C.M.P. or Director of CSIS. In addition, financial institutions are required to conduct periodic audits and report to the regulatory agencies to ensure that they are not dealing in property intended to support terrorism.

Another innovation in the Act is a procedure to provide for examining potential witnesses under oath to collect information related to the investigation of a terrorist offence or to locate someone who may commit such an offence. This is comparable as structured to U.S. investigative Grand Jury proceedings where a grant of immunity may be issued to require a witness to testify and, therefore, removing the protection of the Fifth Amendment. Similarly, a witness under the procedure in C-36 compelled to testify is given both

use and derivative use immunity for the information that they give up. This approach is not entirely unknown to Canadian law, as we have had in place since 1988 a similar mechanism under the *Mutual Legal Assistance Act* which allows us to collect information by that means for our foreign partners, including the United States.

The electronic surveillance provisions of C-36 are not a major departure from existing precedents. We already had the authority, for example, under Part 6 of the *Criminal Code*, to do some of the things that Tom has told you about that were approved by Congress in the *U.S.A. Patriot Act*. For example, we've been able to obtain roving electronic surveillance warrants for some time, as long as I can remember, and that's never really been an issue. We have not had as many of the impediments to the sharing of information that are -- that are found in the U.S. statutes. A key development though in this bill was the decision to give the Communication Security Establishment statutory recognition. CSE has operated for a long time, since just after the Second World War without legislation defining its mandate, scope and accountability. Its primary role is collecting foreign intelligence, but a

growing and important part of its mandate will be to assist law enforcement agencies with the expertise that it has developed in surveillance technologies.

Amendments to the *Canada Evidence Act* address one of the challenges that law enforcement is facing in recent years. It has become even more difficult in the new security environment and that is how, on the one hand, to provide adequate disclosure to those facing charges or other state action, such as immigration removal proceedings, and the use of sensitive information at trial without jeopardizing the source of that information which may include, for example, as Ward Elcock eluded to in his remarks, information received from our allies. C-36 gives the Crown new authority to manage the use of sensitive information in judicial proceedings, and if necessary, to prevent its disclosure. Now, the trade off to that new authority is that the Court, before whom the matter is proceeding, is empowered to protect the fair trial rights of the accused by making any necessary order respecting the use or application of the information as evidence up to and including a stay of proceedings if the Court determines that the accused can’t get a fair trial without that information.

Part 2 of C-36 substantially reforms and updates the *Official Secrets Act* and gives it a new name, the *Security of Information Act*. The OSA dated back to 1939 on the eve of the Second World War, was completely out of date, likely violated much of the Charter, and was effectively functus. In its reincarnation, new offences were created to modernize the spying crimes that were in the OSA taking into the account the new realities and threats, including those from terrorist groups. These new threats include efforts to intimidate members of ethnol cultural communities in Canada and risks of attack on critical infrastructures, both public and private. The Act also now includes specific offences aimed at protecting special operational information, such as the identity of covert agents from disclosure by persons formerly bound to secrecy, such as current and former CSIS employees.

As mentioned earlier, the bill also contains amendments to the *Criminal Code* and *Human Rights Act* intended to send a strong signal that behaviour such as damaging a church, mosque or temple, or disseminating materials meant to willfully promote hatred against groups identifiable by race, religion, color, or ethnic origin, is contrary to Canadian values and won't be

tolerated.

As those of you from Canada who followed the news reports of the parliamentary proceedings last fall will recall, there was much controversy over this legislation and much anxiety expressed by groups who felt that they would be the subject of potential law enforcement abuses. Members of Parliament and Senators were sincerely concerned about the potential for abuse and accordingly built in significant review mechanisms, including annual reports on the use of the two key investigative procedures that I've described. Those two procedures are also subject to a modified sunset clause and expire in five years unless extended by motion passed by both chambers of Parliament.

Finally, a comprehensive review of the implementation of the entire Act will take place in three years. Now, to support that process we will be undertaking an extensive research and, in collaboration with the provinces and territories, data collection program to provide information to Parliament as to how the legislation has been implemented. In addition to that we have undertaken a training program for law enforcement agencies starting initially with the R.C.M.P., but seats will be available for members of

provincial and municipal law enforcement agencies at those sessions as they are rolled out. One example of how we are doing this was demonstrated to the Canadian Association of Chiefs of Police in January where we presented a video which has since been converted to a CD format and which allows for individualized module by module training in and about the specific details of the legislation.

Now, these legislative measures are, of course, as you've heard over the course of the past day and a half, just one part of the federal government's initiative against terrorism. They were developed and adopted to enhance our preparedness to deal with the terrorist threat as it may arise in this country, and to ensure that Canada's criminal law would not be a weak link in the global fight against terrorism. While tough and effective if need be, they also respect Canada's fundamental values. And with that I'd like to thank you for your attention and return the mic Andrew.