# To the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

# Written Submissions by the Canadian Coalition Against Terror (C-CAT) Regarding Terror Financing in Canada

## An Outline

This submission is structured as follows:

- Part I addresses the importance of providing adequate constraints on terror financing;
- Part II asserts that Canada's existing legal framework has not adequately dealt with terror financing;
- Part III proposes that the creation of a civil cause of action against state and local sponsors of terror would constitute a powerful weapon in the campaign against terror financing;
- Part IV illustrates the efficacy of civil suits against terror sponsors;
- Part V summarizes the key elements of C-CAT's proposed legislation (Bill S-218);
- Part VI sets out a variety of questions and answers about the proposed legislation;
- Part VII provides the text of C-CAT's proposed legislation; and
- Part VIII provides selected quotes from experts in support of civil lawsuits against terror sponsors.

## Part I: The Terror Economy

In her highly acclaimed book *Terror Incorporated*, counterterrorism expert and economist Loretta Napoleoni maps out the international economic system that feeds terrorist groups the world over, with a turnover of about $1.5 trillion – roughly equal to the GDP of the United Kingdom.[1]

In Canada alone, FINTRAC reported that terrorist groups funneled an estimated $256-million through Canada in 2005-2006, and that it had detected as many as 34 suspected terrorist-financing networks operating in the country.[2]

Money is the lifeblood of terrorism.

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[1] Loretta Napoleoni. *Terror Incorporated: tracing the dollars behind the terror networks* (New York: Seven Cities Press, 2005), xviii.

[2] Financial Transactions and Reports Analysis Centre of Canada. "Highlights from FINTRAC's 2006 Annual Report - Making the Connections." October 4, 2006. http://www.fintrac.gc.ca/publications/nr/Hi2006-10-04-eng.asp.

Defeating terrorism therefore requires pursuing the patrons of terrorism, and disrupting the logistical, financial and material support they provide to terrorist bodies. David Aufhauser, former general counsel of the U.S. Department of Treasury and chair of the National Security Council's committee on terrorist financing, has noted that "Stopping the money trail…yields a double dividend of not only bankrupting terrorists, but also alerting us to and allowing us to pre-empt potential calamities that are being planned". Furthermore, he stated, "If executed well, the campaign against terrorist financing will bring more peace than any army of soldiers."[3]

## Part II: Terror Financing in Canada

It is C-CAT's contention that Canada's existing legal framework does not provide adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organizations.

Despite the enormity of the terrorist enterprise, terror sponsorship has proven difficult to prosecute. Victor Comras, who was appointed by Kofi Annan as one of five international monitors to oversee the implementation of Security Council measures against terrorism and terror financing, has observed that: "Most major terrorism's financial abettors and supporters…have successfully avoided criminal prosecution… The record on closing down entities and institutions feeding terrorism is even more dismal."[4]

This statement is also true in Canada. To date, no one has been criminally convicted of, and to our knowledge, even charged with, terror financing in Canada.

## Part III: Bill S-218 – Enhancing Canada's Laws in the Campaign Against Terror Financing

C-CAT maintains that the campaign against terror financing requires new and innovative strategies. Over the last three years, C-CAT has worked closely with MPs and Senators on the introduction of federal bills (S-218 and C-346) that will enable Canadian terror victims and their families to launch civil suits against foreign states and local Canadian individuals and organizations (including charities) that have supported terrorist groups responsible for the death or injury of such victims. Currently, Canadian law permits civil action against foreign states for breach of contract and personal injury in Canada, but not for sponsoring terrorist acts that murder Canadians outside Canada.

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[3] The Middle East Forum. "Shutting Down Terrorist Financing" by David Aufhauser. December 11, 2003. http://www.meforum.org/article/588

[4] Counterterrorism Blog. "Civil Liability is Crucial in the War on Terrorism: A Response to the Wall Street Journal" by Victor Comras. October 30, 2006. http://counterterrorismblog.org/2006/10/civil_liability_is_crucial_in.php

C-CAT's proposed legislation will (i) deter future acts of violence (by bankrupting or financially impairing the terrorist infrastructure); (ii) hold the wrongdoers responsible (even where the criminal system has failed); (iii) compensate victims; and (iv) enable terrorist assets to be located and seized. Counterterrorism experts maintain that the proposed legislation represents a new and valuable approach to combating terror's financiers, and will enhance counterterrorism efforts in Canada, the U.S. and the British Commonwealth.

## Part IV: S-218 – The Efficacy of the Civil Process

Criminal prosecution should remain an important tool in stopping terrorist operatives and their financial supporters. However, by harnessing the additional possibility of civil lawsuits, the proposed legislation opens a vital avenue in interdicting and defeating terrorist funding. Terror victims will be able to pursue terrorist sponsors that often evade the criminal justice system due to the high standards of evidence required for conviction.

The burden of proof in criminal law must meet the "beyond a reasonable doubt" test: the evidence must establish the defendant's guilt to a degree of certainty in which it is beyond dispute that any reasonable alternative is possible. This standard of proof – if applied as objectively and consistently as it is meant to be – makes it particularly difficult to obtain criminal convictions against the sponsors and enablers of terrorism. The complex financial networks that fund global terrorism have integrated state sponsors of terror, organized crime and thousands of institutions and organizations throughout the world, rendering the "beyond a reasonable doubt" standard unattainable in most cases.

In contrast, the standard of proof employed in adjudicating civil suits is on "a balance of probabilities". This standard is met if the proposition in question (whether the defendant is liable) is more likely to be true than not true. Therefore, evidence that establishes a defendant's status as a supporter of terror, which may not be sufficient for conviction in a criminal proceeding, can be enough to establish liability and obtain damages in a civil proceeding.

A recent United States decision highlights this distinction. On October 22, 2007, in a criminal case against three former leaders of a Muslim charity accused of funding terrorism, U.S. District Judge A. Joe Fish declared a mistrial for two of the former leaders when three jurors questioned the "not guilty" verdict that had been announced. The third leader was found guilty of one count of conspiracy to provide material support to a foreign terrorist organization, but was acquitted of 31 other charges. The charity for which all three leaders worked was the Holy Land Foundation for Relief and Development. [5]

[5] Greg Krikorian. "Mistrial in Holy Land Terrorism Financing Case." Los Angeles Times. October 23, 2007.
http://www.latimes.com/news/nationworld/nation/la-na-holyland23oct23,1,1922726.story?coll=la-headlines-nation

Yet in *Boim v. Quranic Literacy Institute, et al*., 127 F. Supp. 2d 1002 (N.D. Ill.2001), aff'd 291 F.3d 1000 (7th Cir. 2002), U.S. Magistrate Judge Arlander Keys found three Islamic charities – including the same Holy Land Foundation for Relief and Development – liable for damages in a civil suit brought by the family of a 17-year-old American boy shot to death in Israel. A federal jury in Chicago ordered these U.S.-based Islamic charities and an Illinois man accused of funneling money to terrorists to pay $156 million to the plaintiffs.

The efficacy of the civil suit approach has been noted by several experts. David Aufhauser explained that: "…Private actions can be of material assistance to the government… The bankers of terror are cowards. They have too much to lose by transparency… They're the weak link in the chain of violence. They are not beyond deterrence."[6] Victor Comras added that: "Civil liability cases… associated with terrorism may constitute the best constraints we have against their activities and our best chances to hold them accountable."[7]

Thus, harnessing this option would provide a powerful element of deterrence by offering a meaningful alternative to a criminal law process that has proved so unequal to the challenge of prosecuting terror sponsorship. The financiers, enablers and facilitators of terrorism fear transparency and exposure, and are rendered vulnerable to both through civil suits. Moreover, in the case of state sponsors of terror, criminal prosecution will generally be impossible or impractical, making civil suits potentially the only viable remedy.

## Part V: S-218 – A Summary of the Legislation

C-CAT's proposed legislation is comprised of four key components summarized below. The complete text of the bill is included in Part VI of this document.

1. Lifting State Immunity

Section 6.1 would be added to the *State Immunity Act* ("SIA") to permit claims in Canada against foreign states that knowingly or recklessly provide material support to any individual or group listed as a terrorist entity by the government of Canada. Currently, the SIA permits claims for breach of contract and personal injury that occurs in Canada, but not for sponsoring terrorist entities that kill Canadians. As the law already recognizes that sovereign immunity is not absolute, C-CAT is suggesting that the special case of terrorism be explicitly included in the exceptions to the law. Terrorism is a transnational phenomenon that presents unique challenges to the democratic world, and it requires special measures that reflect the scope and magnitude of the danger to Canadian society as a whole.

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[6] Jennifer Senior. "A Nation Unto Himself." The New York Times. March 14, 2004. http://www.nytimes.com/2004/03/14/magazine/14MOTLEY.html?pagewanted=8&ei=5007&en=6935d90b973c1690&ex=1394600400&partner=USERLAND

[7] *Supra* note 4.

2. Creating a Civil Cause of Action

Section 83.34 would be added to the *Criminal Code* to provide a civil cause of action to anyone who has suffered damages as a result of a breach of the Code's anti-terrorism provisions. Canadian constitutional law permits civil remedies to be added to federal legislation if such remedies are "functionally connected" to the federal statute. Here the connection is direct: the proposed civil remedy is available only if the plaintiff can show that he or she has been injured or has suffered loss or damage "as a result of conduct that is contrary to any provision in Part II.1" of the *Criminal Code*. The proposed provision mirrors the approach and language of section 36 in the federal *Competition Act*, which was unanimously upheld as valid by the Supreme Court of Canada in *General Motors v. City National Leasing*, (1989) 1 SCR 641. Section 36 of the *Competition Act* gives a civil cause of action to anyone who has suffered damages as a result of a party engaging in quasi-criminal, anti-competitive conduct contrary to Part VI of the *Competition Act.*

3. Retrospectivity

The proposed civil cause of action is retrospective to January 1, 1985, meaning that victims of terrorist attacks occurring on or after that date would be able to sue. Two of the largest acts of terrorism in North American history occurred after this date: the bombing of Air India Flight 182 on June 23, 1985, and the coordinated attacks against the United States on September 11, 2001.

Retrospectivity is crucial if the legislation is to achieve the intended goals of holding wrongdoers accountable. To allow those who have supported terrorist organizations and who may have personally benefited from affiliation with those bodies to be protected from civil suits is to grant immunity to all states, and potentially other sponsors, responsible for terror attacks to date, whom the law is intended to hold responsible. It is clearly in the public interest to ensure that those involved in the past sponsorship of terror resulting in the loss of Canadian life be subject to the provisions of this law.

Retrospectivity is also critical to fulfilling the deterrence objective of the legislation. The civil remedy must apply to past terrorist activity in order to make previous and potential wrongdoers think twice about future involvement in terrorist activity. To do otherwise would create a "deterrence vacuum" in which the criminal justice system with its limited capacity to convict and the civil process limited by the date of Royal assent would be unable to hold terror sponsors accountable and achieve any meaningful level of deterrence. Moreover, without retrospectivity, Canada would be in the absurd position of being forced to wait for a terror attack to occur before the proposed laws, designed for deterring the very attack that has just occurred, could become effective. This would clearly undermine the effectiveness of the law.

Finally, without the retrospectivity clause it is very uncertain whether the hundreds of Canadian victims of terror attacks perpetrated prior to the enactment of the legislation could sue the perpetrators and receive financial compensation. It would be contrary to the

intent of the legislation to restrict its application to future terror incidents and victims at the expense of those whose past suffering inspired its creation. In particular, and respectfully, it would be a mistake for Canada to enact legislation that would exclude its largest body of victims – the Air India families. Such a decision would add further hurt to a large Canadian constituency that has already endured too much additional and unnecessary pain over the last 22 years. This would be the latest chapter in a long series of traumatic events in the aftermath of the bombing, including: a general lack of adequate government response to the families of Air India victims after the attack; the failure to obtain criminal convictions against the perpetrators of the attack; the 18-year delay in listing Babbar Khalsa as a terrorist group in Canada despite its apparent involvement in the attack; and the 21-year delay in establishing an Inquiry to examine alleged governmental failures.

4. Enforcing Foreign Judgments

Proposed *Criminal Code* subsection 83.34(3) is a "comity" clause, which confirms that as a matter of Canadian public policy, foreign anti-terror judgments from similar jurisdictions and legal systems to Canada's would generally be enforceable in Canada.

Justice Major wrote in *Beals v. Saldanha*, [2003] 3 SCR 416, that "…the reality of international commerce and movement of people continue to be 'directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments.'" The reality of terrorism must also be taken into account. Terrorists, terror attacks and terrorist financing flow freely across international borders, and in order to combat effectively the threats they pose, countries such as Canada should honour and enforce similar foreign anti-terror judgments.

Civil suits against terrorists and their sponsors will be particularly effective tools in fighting terrorism if they result in assets being seized from the perpetrators. If a plaintiff obtains a foreign anti-terror judgment against a terrorist sponsor, and the successful plaintiff seeks to enforce the judgment in Canada where assets of the defendant are located, then enforcement should generally be permitted.

Importantly, the proposed comity provision does not require a Canadian court to enforce automatically the judgment of a foreign court. Rather, enforcement is only permitted if certain conditions are met. The enforcing court must first determine whether the foreign court had a real and substantial connection to the action or the parties. If a foreign court did not properly take jurisdiction, a Canadian court will not enforce the judgment. Even if the real and substantial connection is established, the defendant is still entitled to rely on common law defenses such as fraud, lack of natural justice, and public policy.

## Part VI: S-218 – Frequently Asked Questions

Below are some specific questions and answers about C-CAT's proposed legislation.

**1.** ***Why should victims of terror be given special consideration under the law?***

Terrorism is more than a particularly pernicious form of organized crime. It is different in its scope, intent, method and impact. Unlike organized criminality, it is often a function of state policies aimed at the citizens of other sovereign states. Its primary objective is not economic or personal gain in a criminal sense. Whereas the primary interest of most criminals is not to destroy themselves or society as a whole, the objective of terrorist attacks is to inflict maximum damage and horror on society for generations – for military and/or ideological purposes. While victims of terror may be targeted as members of a particular ethnic or social group, the attacks are seldom delivered with any surgical precision. These victims are generally not targeted for who they are but as representatives of a group, society or country. And while criminals for the most part avoid large-scale massacres of uninvolved persons, the primary purpose of terrorist activity is to create victims – the more the better – because victims are the vehicle through which terrorist goals are achieved. Crime can exist without mass murder and may in fact benefit from avoiding it; terrorism cannot. Terror victims, therefore, are not collateral damage in a conventional war between states. They are not by-products of another circumstance. They were neither caught accidentally in a drive-by shooting, nor targeted personally for the purpose of a specific gain – be it economic or otherwise.

The experience of Canadian terror victims is not only personal but also national – not unlike a soldier who falls in the service of his or her country. France has formally recognized this designation with legal provisions that provide terror victims with the rights and advantages accorded to civilian war victims by the disabled military pension code, and has also created a fund that offers financial compensation to these victims. The U.S. government has also established a fund for victims of certain categories of state sponsored crime.

Similarly, Canadian government policy with regard to these victims should reflect their unique status in this unprecedented war. Failing our victims is not only an injustice. It is a failure to deal with what terrorism is, and a failure to strengthen our society against terrorist success. The front-line soldiers in this new war are unarmed civilians who have little defense against other “civilians” who are the agents of terror both here and abroad, and the experience of these victims will define the contours of this war. The extent to which we can limit the impact on these victims will dictate the impact of terrorism on our society and the confidence of our society to weather this storm. Our ability to diminish that impact must therefore be a central component in any policy deliberations regarding terrorism. In addressing this issue, C-CAT’s legislation effectively provides another vehicle for undermining terrorism itself.

***2. Will the legislation trigger a rash of frivolous suits against foreign states that will impair our relations with the international community?***

No. The focus of the amendments is very narrow, applying only to the special case of terrorism. It does not provide a litigation option for other types of violations committed by state entities.

Furthermore, the proposed legislation contains several mechanisms that will prevent frivolous suits:

a. Unlike the U.S., which has legally designated “state sponsors of terror” against which suits may be launched, the proposed amendments would place the onus of proof of state-sponsorship on the plaintiff.

b. In order to lift a foreign state’s immunity, a plaintiff would need to prove that a foreign state supports a group listed by the Canadian government under the *Criminal Code* as a terrorist entity. Canada follows an extensive process before listing a group as a terrorist entity.

c. State immunity will only be lifted if the state has “knowingly or recklessly” provided material support to the listed terrorist entity.

d. The word “material” has been added to qualify further the support a foreign state would need to provide to a terrorist group before immunity could be lifted. “Material support” is defined as 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, transportation, and other physical assets, except medicine or religious materials.

e. Even if a foreign state’s immunity were lifted, the state would only be held liable if its conduct was contrary to the *Criminal Code* anti-terrorism provisions. These provisions already include a “mens rea” or “intent” component. They require a plaintiff to show that a defendant committed the act "knowingly” or with intent.

f. If the claim is against a foreign state where the terrorist act occurred, the plaintiff is required to provide the foreign state with the opportunity to arbitrate before the matter can be pursued in court.

g. Lastly, the court is directed to refuse to hear a claim against a foreign state with which Canada has entered into a bilateral extradition treaty or has been designated an extradition partner in the schedule to the *Extradition Act*.

These limitations provide ample protection against reckless use of the provisions, and compel a potential plaintiff to give serious consideration to the viability of any given case before proceeding with a costly and lengthy process.

***3. How is this legislation consistent with an effective Canadian foreign policy?***

The mechanisms outlined above will protect the vast majority of Canada’s key allies and trading partners from being subject to the implications of this legislation.

As for those countries which may be affected, this legislation represents a rather modest addition to a whole series of measures already enacted by Canada since 9/11, which have challenged the pre-existing norms of many areas in domestic and foreign policy. Like other countries, Canada passed tough and controversial anti-terror legislation, revisited its immigration policies, and banned terrorist organizations. All of these measures were pursued despite the warnings that they could have significant implications for winning elections and conducting a "robust" foreign policy.

This shift in policy reflects the recognition that terrorism represents a unique transnational threat requiring unique responses. Canadians and all those who are deemed enemies by global terrorism are now being targeted internationally as a function of policy – a situation that is fundamentally incompatible with the long-term policy interest of any democracy.

Moreover, Canada has enacted other principled policies in the past, despite the obvious risk they seemed to pose to Canada's foreign policy or economic interests. One such example was cutting off highly lucrative economic ties with South Africa in the 1970s and 1980s in order to pressure that country to end apartheid. In fact, Brian Mulroney was the first world leader to take this action despite the potential economic fallout not only from South Africa but also from other Canadian trading partners. Additional examples include insisting that human rights concerns be addressed with China despite the implications for Canada's multi-billion dollar trade relationship with China; banning Hezbollah as a terrorist body despite the warnings from Raymond Baaklini, the Lebanese ambassador to Canada, regarding the consequences for Canada and the potential danger to Canadians who may be touring the Middle East; refusing to submit to U.S. demands regarding prices of softwood lumber – thereby endangering relations with Canada's primary trading partner; and committing to cut down on air pollutants and greenhouse gases in order to protect the environment – despite resulting hardships to the economy. Furthermore, the risks to Canadians and to Canadian assets and interests resulting from our mission in Afghanistan far exceed any presented by this legislation.

In comparison to the policies described above, the proposed legislation poses minimal risk to Canada's foreign policy. Moreover, as all these cases demonstrate, the depth of Canada's standing in the international arena will not be summarily and irreparably undermined by allowing for litigation that leading Canadian litigators have confirmed is only actionable in carefully defined cases of clear-cut and egregious state sponsorship of terror.

Furthermore, fear of retaliation and risk to foreign policy cannot be – dare not be! – Canada's sole guiding principle of diplomacy. It has been precisely the argument that a stronger posture vis-à-vis state sponsors of terror would compromise foreign policy interests, which provided terror-sponsoring states with the ideal political and diplomatic environment to promote terror against the West – while simultaneously benefiting from relationships with the West without any real consequence. Ultimately, this policy neither deterred terrorist attacks against those states, nor did it mollify the animosity of those who sympathized with their goals. The resulting loss of thousands of lives and billions of

dollars bodes ill for the long-term policy interests of any democracy, and clearly justifies the short-term implications of taking appropriate steps to eradicate the danger.

***4. Are civil provisions against terrorist defendants consistent with international law?***

Yes. Article 5 of the 1999 International Convention for the Suppression of Terrorist Financing stipulates that, "each state party shall ensure that legal entities liable in accordance with provisions of the Convention are subject to effective, proportionate and dissuasive criminal, civil, or administrative sanctions that may include monetary sanctions."

***5. Is there any basis in existing law that provides compensation for terror victims from assets seized from terrorist sponsors?***

Yes. Article 8 of the International Convention for the Suppression of Terrorist Financing stipulates that each signatory shall consider establishing mechanisms whereby the funds from forfeitures referred to in article 8 of the Convention are utilized to compensate the victims of offences referred to in article 2 of the Convention.

Section 83.14(5.1) of the *Criminal Code* of Canada stipulates that any proceeds that arise from the disposal of property related to terrorist groups or activities may be used to compensate victims of terrorist activities.

Furthermore, British Columbia has joined Ontario, Manitoba and Alberta in introducing legislation that gives the government the right to seize the proceeds of criminal conduct. The British Columbia legislation authorizes the conversion of seized assets into cash that can be used to compensate the victims of the illegal activity. Michael Mulligan, a lawyer in British Columbia, told *The Lawyers Weekly* (March 25, 2005) that the legislation "has a lower burden of proof – on a balance of probabilities," and "allows for forfeiture even where a person is acquitted of the offence or never charged… In some circumstances it places the burden on the person who owns the property to prove it was not obtained from the proceeds of unlawful activity."

***6. What if a terror victim is unable to collect on a judgment against a terror sponsor?***

The Canadian legal system provides individuals seeking legal redress with the option of pursuing civil actions in an effort to obtain justice, vindication, and compensation for their losses. The law allows for the plaintiff to seek damages despite the fact that in some instances, the damages awarded may not be collectable. This is because the intent of civil suits is not only to provide a mechanism for financial redress, but also to give individuals an alternate avenue to pursue justice in the form of an officially sanctioned and public finding of liability against a perpetrator of injustice. In this respect, civil lawsuits may fulfill quite successfully the very goals of criminal trials: they promote justice by making a public statement about liability, and they act as a deterrent by highlighting the costs and consequences of certain modes of behavior.

The O.J. Simpson case is one of the most high-profile examples of the efficacy of civil suits. Simpson's criminal trial for the murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman culminated on October 3, 1995 in a verdict of “not guilty”. There has since been significant criticism of the prosecution, the police, the jury and the defence team. In the subsequent 1997 civil action against Simpson, the jury concluded – using the preponderance of the evidence test applicable in civil cases – that he had wrongfully caused the death of the victims. The jury ruled against Simpson on each of the eight technical questions of liability it was asked to consider, and ordered the defendant to pay compensatory damages of $8.5 million and punitive damages of $25 million.

The civil suit provided an opportunity for the victims’ families to seek a measure of justice by “punishing” Simpson through a highly publicized finding of liability. This court decision has doggedly pursued him throughout the years,[8] despite the fact that collecting damages from him has proven difficult.[9] The civil trial also provided an important public service by highlighting the issue of domestic violence, and making clear that some measure of justice can be achieved even when celebrities, armed with the best legal teams available, have managed to avoid criminal liability. In this case, like many others, successful collection was not essential to achieving many of the desired effects of the civil action.

Similarly, the successful collection of a defendant's assets is not the only motivation for bringing a civil action against a terror sponsor. Accordingly, the issue of “collectability” must not be the determining factor in the consideration of the proposed legislation. For while the collection of damage awards is an extremely important component of the bill’s utility for assisting victims and deterring terrorists and their sponsors, the bill has many other benefits. Even when collection is difficult or not possible, the civil process still provides effective deterrence and a sense of justice for victims by publicly identifying terror sponsors, holding them civilly accountable, utilizing the discovery process to unravel the illegal sponsorships that terror sponsors so desperately try to obscure, as well as establishing as a matter of public record the victimization of the plaintiffs by the defendants, and society's revulsion for terrorist conduct.

Civil suits provide an additional benefit – one that a criminal proceeding does not. Regardless of whether collection is successful, they provide a real voice for victims and

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[8] For example, a New Hampshire intellectual property attorney, William B. Ritchie, challenged the validity of Simpson's trademarks under a federal statute that bars immoral, deceptive, or scandalous subject matter. Ritchie argued that because of the whole sequence of events from 1994 through 1997, Simpson's very name had become immoral and scandalous and thus could not be protected as a trademark. Ritchie convinced the Court of Appeals for the Federal Circuit that he had standing to challenge Simpson's trademarks under the Lanham Act. Simpson has since abandoned his trademarks. More recently, on March 13, 2007, a judge prevented Simpson from receiving any further compensation from a cancelled book deal and TV interview. He ordered the bundled book rights to be auctioned. It was also reported that Simpson's Heisman Trophy was seized as an asset to pay the judgment.

[9] California law protects pensions from being used to satisfy judgments, so Simpson was able to continue much of his lifestyle based on his NFL pension. He subsequently moved from California to Miami, Florida. In Florida, a person's residence cannot be seized to collect a debt under most circumstances.

their families in the legal system. Criminal proceedings are brought by the Crown, not by the victim. Victims and their families have little or no control in how criminal proceedings are managed. In contrast, victims and their families are the plaintiffs in civil suits – they are responsible for initiating the process and deciding how to proceed. Canadian terror victims, who have suffered from some of the most heinous acts of violence, must be granted the same opportunity as other victims of crime to have their voices heard in a civil case. If the government does not want to create a compensation fund for victims like the U.S., France and Israel have done, and has been unwilling or unable to distribute to victims of terror – as stipulated by law[10] – any of the hundreds of millions of dollars of assets identified by authorities as terror-related, then at the very least, the government should provide the victims themselves with the option of pursuing justice and compensation in a civil proceeding.

The terror victims who have been at the forefront of lobbying for this legislation have been clear that the issue of whether or not they will ultimately collect damage awards should not determine whether this legislation is adopted by Canada. "Collectability" is not a governmental concern, but a factor that will be considered by plaintiffs and their counsel before initiating a suit – just as in any other civil suit. Each case will invariably be unique. In some cases, there will be significant assets to pursue, along with a good chance of collection. In other cases, a lack of accessible assets will preclude further action, while in yet other cases, the availability of assets will be inconsequential.

[10] *Criminal Code*, s. 83.14(5.1)

## Part VII:Bill S-218 with C-CAT's Proposed Amendments.

**SENATE OF CANADA**

Bill S-218 with C-CAT's Proposed Changes

*An act to deter terrorism by providing a civil right of action against perpetrators and sponsors of terrorism*

WHEREAS United Nations Security Council Resolution 1373 (2001) reaffirms that acts of international terrorism constitute a threat to international peace and security and the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts;

WHEREAS Canada ratified the 1999 International Convention for the Suppression of the Financing of Terrorism (the "Convention") on February 15, 2002;

WHEREAS article 18 of the Convention states that parties to the Convention must take all practicable measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate**,** organize or engage in the commission of offences set forth in the Convention;

WHEREAS article 2 of the Convention requires Canada as a signatory to take the necessary measures against any person that by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out offences under the Convention;

WHEREAS article 5 of the Convention states that liability under the Convention may be criminal, civil or administrative;

WHEREAS article 5 of the Convention states that each State Party shall ensure that legal entities liable in accordance with provisions of the Convention are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions that may include monetary sanctions;

WHEREAS, on February 12, 2004, the Government of Canada stated in its report to the Counter-Terrorism Committee of the United Nations Security Council ("the Security Council") that to date Canada has not taken any specific judicial action against a non-profit organization based on alleged or suspected involvement in the financing of terrorism;

WHEREAS the Government of Canada reported to the Security Council that the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") received a total of 17,197 Suspicious Transaction Reports between 2001 and 2003;

WHEREAS the Government of Canada reported to the Security Council that Canadian financial institutions had frozen $360,000 of suspected terrorist assets in 20 accounts as of April 17, 2002;

WHEREAS the 2003-2004 Annual Report of FINTRAC reported $70 million in financial transactions suspected of being linked to terrorist activity financing and threats to the security of Canada;

WHEREAS FINTRAC reported it has tracked down up to $140 million in funds linked to terrorism in 2004-2005;

Whereas FINTRAC reported that terrorist groups funnelled an estimated $256 million through Canada in 2005 -2006 and that it had detected as many as 34 suspected terrorist-financing networks operating in the country;

WHEREAS article 8 of the Convention states that each State Party shall consider establishing mechanisms whereby the funds from forfeitures referred to in article 8 of the Convention are utilized to compensate the victims of offences referred to in article 2 of the Convention;

WHEREAS subsection 83.14(5.1) of the *Criminal Code* provides that any proceeds that arise from the disposal of property related to terrorist groups or activities may be used to compensate victims of terrorist activities;

WHEREAS the intended victims of terrorist acts include the individuals who were physically, emotionally or psychologically injured by the terrorist acts and their family members;

WHEREAS the Government of Canada has recognized that the unique nature of the terrorist threat has mandated the need for further legislation, and has reported to the Counter-Terrorism Committee of the Security Council that Canada's *Anti-Terrorism Act of 2001* was enacted in recognition that further legislation was needed to reinforce the safety and security of Canadians;

WHEREAS the Government of Canada acknowledged in its report to the Security Council that there is no civil liability in tort for criminal offences relating specifically to terrorism;

WHEREAS the prohibition against terrorism is a peremptory norm of international law (*jus cogens*) accepted and recognized by the international community of States as a whole as a norm from which no derogation is possible;

WHEREAS the support and financing of terrorism is a crime under international law;

WHEREAS state immunity is generally accepted as being restrictive or relative, applying only to sovereign acts of state (*acta jure imperii*);

WHEREAS terrorism is a threat to democracy, and the support and financing of terrorism, which is a crime under international law, are not entitled to immunity when claimed to be sovereign acts of state;

WHEREAS the 1999 International Convention for the Suppression of the Financing of Terrorism and the United Nations Declaration on Measures to Eliminate International Terrorism encourage states to review urgently the scope of existing international legal provisions on the prevention, repression and elimination of terrorism with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter;

WHEREAS 280 Canadians were murdered on June 23, 1985 in the largest terrorist attack in North America prior to September 11, 2001;

WHEREAS numerous other Canadians have been murdered or injured in other terrorist attacks;

WHEREAS the Government of Canada reported to the Security Council that fighting terrorism is of the highest priority for the Government of Canada;

WHEREAS it is a policy priority of the Government of Canada to deter and prevent terror attacks against Canada and Canadians;

WHEREAS terrorism is dependent on financial and material support;

WHEREAS it is the policy of the Government of Canada to enable plaintiffs to bring civil lawsuits against terrorists and their sponsors, which will have the effect of impairing the functioning of terrorist groups, thereby deterring and preventing future terror attacks;

WHEREAS it is the policy of the Government of Canada that judicial awards against persons who engage in terrorist activities must be sufficiently large to deter future such conduct;

AND WHEREAS this Act incorporates into and confirms as Canadian law the existing peremptory norms and provisions of international law for the prevention, repression and elimination of terrorism;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

**STATE IMMUNITY ACT**

**1. The *State Immunity Act* is amended by adding the following after section 6:**

6.1 (1) In this section, "terrorist conduct" means any transaction, act or other conduct that involves or relates to the knowing or reckless material support of any terrorist entity that is a listed entity as defined in subsection 83.01(1) of the *Criminal Code*.

(2) In this section, the term "material support" means 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, transportation, and other physical assets, except medicine or religious materials.

(3) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any terrorist conduct of the foreign state on or after January 1, 1985.

**2. Subsection 11(3) of the Act is replaced by the following:**

(3) This section does not apply to an agency of a foreign state or to a foreign state that engages in terrorist conduct.

**3. (1) Paragraph 12(1)(*b*) of the Act is replaced by the following:**

(*b*) the property is used or is intended for a commercial activity or terrorist conduct;

**(2) Subsection 12(1) of the Act is amended by striking out the word "or" at the end of paragraph (*b*), by adding the word "or" at the end of paragraph (*c*) and by adding the following after paragraph (*c*):**

(*d*) the attachment or execution relates to a judgment rendered in connection with terrorist conduct.

**(3) The *State Immunity Act* is amended by adding the following after section 12(1):**

(1.1) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 6.1(3), the Minister of Finance and the Minister of Foreign Affairs shall fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

**4. Subsection 13(2) of the Act is replaced by the following:**

(2) Subsection (1) does not apply to an agency of a foreign state or to a foreign state that engages in terrorist conduct.

**CRIMINAL CODE**

**5. The *Criminal Code* is amended by adding the following after section 83.33:**

**83.34** (1) Any individual who or corporation which has suffered loss or damage on or after January 1, 1985 as a result of conduct that is contrary to any provision of this Part may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by the individual or corporation, together with any additional amount that the court may allow.

(2) The running of a limitation period in respect of a claim under subsection (1) is suspended during any period in which the individual who or corporation which has suffered loss or damage

(a) is incapable of commencing a proceeding by reason of any physical, mental or psychological condition, or
(b) is unable to identify the person who engaged in the conduct.

(3) Any court of competent jurisdiction shall give full faith and credit to a judgment or order of any foreign court in favour of an individual who or corporation which has suffered loss or damage as a result of conduct that is or would, had it occurred in Canada, be contrary to any provision of this Part.

(4) In this section, "person" includes a foreign state as defined in the *State Immunity Act*.

(5) In a claim brought under this section, if a court finds that
(a) the defendant breached any of sections 83.02, 83.03, 83.04, 83.08, 83.1, 83.11, 83.18, 83.19, 83.2, 83.21, 83.22, 83.23, or 83.231, in respect of a listed terrorist entity, and
(b) the same listed terrorist entity caused or contributed to the loss or damage to the plaintiff,

then the plaintiff need not show that the defendant's conduct caused or contributed to the plaintiff's loss or damage.

(6) The court shall decline to hear a claim against a foreign state under this section if the terrorist act causing loss or damage to the plaintiff occurred in the foreign state against which the claim has been brought and the plaintiff has not afforded the foreign state a reasonable opportunity to arbitrate the dispute in accordance with accepted international rules of arbitration.

(7) The court shall decline to hear a claim against a foreign state under this section if the foreign state is either
(a) a designated extradition partner whose name appears in the schedule to the *Extradition Act*, or

(b) bound by a bilateral extradition treaty with Canada, as of or after the date of enactment of this section.

(8) Nothing in this section affects the right of any individual or corporation to bring a proceeding against Her Majesty in right of Canada or of a province.

(9) For certainty, universal jurisdiction is not created in respect of the cause of action referred to in this section.

## Part VIII: Statements in Support of Civil Suits Against Sponsors of Terrorism

"Terrorist groups funneled an estimated $256-million through Canada this past year. The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) said it had detected as many as 34 suspected terrorist-financing networks operating in the country…"
– **National Post**, October 5, 2006

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"The increased violence perpetrated against innocents in recent years has made it necessary to develop new rules of the international relations game, in order to forestall terrorist acts here. One is a proposed parliamentary amendment to the State Immunity Act that would allow Canadian citizens who have been injured by state-sponsored terrorism to sue for compensation. That would apply to Canadian lives lost anywhere in the world, not just Canada. It is a bill worth passing."
– Canadian Business Magazine, May 22, 2006, "Make Them Pay" by **Jack Mintz, President and CEO of the C.D. Howe Institute**

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"If brought soberly and with substance, private actions can be of material assistance to the government, because I can tell you: The bankers of terror are cowards. They have too much to lose by transparency. Name, reputation, affluence, freedom, status. They're the weak link in the chain of violence. They are not beyond deterrence."
– **David Aufhauser,** f**ormer general counsel of the U.S. Department of Treasury and chair of the National Security Council's committee on terrorist financing**, now managing director and general global counsel of UBS

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"It's time either the courts or the legislature take the initiative and allow Canadian victims the legal redress they deserve."
– National Post December 23, 2005, "Counterterrorism in the Courtroom" by **Ed Morgan, a law professor at the University of Toronto** and an expert witness for the plaintiffs in *Ungar v. Palestinian Authority and Bouzari v. Islamic Republic of Iran*

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"Since the best way to reduce, and eventually even eliminate, terrorism is to take away its operating funds, this legislation could go a long way towards curbing terrorist activity in North America."
– **Ken Rijock, a Financial Crime Consultant** with more than 25 years of experience in the field of money laundering as a financial institution compliance consultant, and **trainer/lecturer to law enforcement and the intelligence services of both the United States and Canada**

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"The fact is that most major terrorism's financial abettors and supporters, whether for al Qaeda, Hamas, Hizbollah or other terrorist entities, have successfully avoided criminal prosecution… The record on closing down entities and institutions feeding terrorism is even more dismal. The failure of the international community to come to terms with a universal definition of terrorism shouldn't provide an excuse, as it seems to be doing, for institutions here or abroad to do business with known terrorist groups. Yet, it is still business as usual in many countries with at least some of these terrorist groups. The fact

that civil liability cases in US courts may now be able to reach out beyond our borders to individuals and entities associated with terrorism may constitute the best constraints we have against their activities and our best chances to hold them accountable."
**– Victor Comras,** counterterrorism expert, former senior State Department official and US diplomat, Director for Canadian Affairs at the State Department, **appointed by Kofi Annan as one of five international monitors to oversee the implementation of Security Council measures against terrorism and terror financing**

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"The effectiveness of civil suits is unmistakable in the case of Libya and the Lockerbie bombing. The exposure of Libyan complicity in the bombing of the Pan Am passenger airliner, in part, caused Libya to back away from its 'rogue state' bravado and publicly renounce the use of terrorism."
– **Dr. Peter M. Leitner**, **George Mason University, National Center for Biodefense** and The Center for Advanced Defense Studies, from a lecture at the Raoul Wallenberg International Human Rights Symposium in New York City on January 19-20, 2006

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"There is something fundamentally absurd with the current legal arrangement in Canada that allows lawsuits against Iran for selling you rotten pistachios, but bars legal action against them for sponsoring terrorist acts which kill Canadian citizens abroad…"
– **Dr. Peter M. Leitner**, **George Mason University, National Center for Biodefense** and The Center for Advanced Defense Studies, from a lecture at the Raoul Wallenberg International Human Rights Symposium in New York City on January 19-20, 2006