Legislative Summary **LS-574E**

BILL S-3: AN ACT TO AMEND THE CRIMINAL CODE (INVESTIGATIVE HEARING AND RECOGNIZANCE WITH CONDITIONS)

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LEGISLATIVE HISTORY OF BILL S-3

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	7 March 2008	First Reading:	23 October 2007
Second Reading:		Second Reading:	14 November 2007
Committee Report:		Committee Report:	4 March 2008
Report Stage:		Report Stage:	5 March 2008
Third Reading:		Third Reading:	6 March 2008

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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BILL S-3: AN ACT TO AMEND THE CRIMINAL CODE (INVESTIGATIVE HEARING AND RECOGNIZANCE WITH CONDITIONS)*

INTRODUCTION

Introduced in the Senate on 23 October 2007, Bill S-3 proposes amendments to the *Criminal Code*(1) that would reinstate anti-terrorism provisions that expired under a sunset clause in February 2007. Substantially similar to the original provisions, which came into force with the *Anti-Terrorism Act* in 2001, Bill S-3 proposes provisions to bring individuals who may have information about a terrorism offence before a judge for an investigative hearing, and provisions dealing with recognizance with conditions and preventative arrest to avert a potential terrorist attack. It also contains a 5-year sunset clause and requires that the Attorney General and the Minister of Public Safety and Emergency Preparedness shall report annually with their opinion as to whether these provisions should be extended.

BACKGROUND

Bill S-3 essentially reintroduces provisions relating to investigative hearings and recognizance with conditions that first came into force in December 2001 with Bill C-36, the *Anti-Terrorism Act*. A sunset clause contained in that Act stated that the provisions in question would cease to apply at the end of the 15th sitting day of Parliament after 31 December 2006, unless they were extended by a resolution passed by both houses of Parliament. As of February 2007, no investigative hearings had been held and there was no reported use of the provisions on recognizance with conditions.

Before the provisions were set to expire, they were reviewed by the Supreme Court of Canada and by Parliament. The Supreme Court reviewed the investigative hearings

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) R.S.C. 1985, c. C-46, as amended.

portion of the *Anti-Terrorism Act* in the context of the Air India trial. The Crown had brought an *ex parte* application seeking an order that a Crown witness attend an investigative hearing pursuant to section 83.28 of the *Criminal Code*. (Neither the media nor the accused in the trial was aware that the application had been made.) That order was appealed to the Supreme Court. The Court released companion decisions upholding the constitutionality of these provisions, stating that investigative hearings do not violate an individual's section 7 Charter right against self-incrimination, as evidence derived from such hearings cannot be used against the person except in perjury prosecutions.(2)

In Parliament, two special committees were charged with review of the *Anti-Terrorism Act*. In the House of Commons, this review began in December 2004 under the purview of the Subcommittee on Public Safety and National Security. However, Parliament was dissolved in November 2005, and a new subcommittee was established to take over the work in May 2006. The House of Commons Subcommittee on the Review of the Anti-Terrorism Act heard a wide variety of testimony on the provisions and released an interim report in October 2006 dealing specifically with investigative hearings and recognizance with conditions.(3) The Subcommittee stated that it felt these provisions accorded with Canadian legal tradition and that sufficient safeguards were built into the process, but that there still remained some need for clarification. It suggested a number of technical amendments to the provisions, as well as some broader substantive ones.

In the Senate, a Special Committee on the Anti-Terrorism Act was convened in December 2004 to undertake a comprehensive review of the provisions and operation of the *Anti-Terrorism Act*. Again, this Committee heard from a broad spectrum of witnesses, some of whom felt that the *Anti-Terrorism Act* represented a substantial departure from Canadian legal traditions(4) and feared that use of these provisions might eventually extend beyond terrorism offences to other more generic *Criminal Code* offences, and others who felt that these provisions were not new, did not violate rights, and allowed threats to be addressed proactively. The

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(2) *Re Application Under S. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248; *Re Vancouver Sun*, [2004] 2 S.C.R. 332.

(3) Subcommittee on the Review of the Anti-Terrorism Act, *Review of the Anti-Terrorism Act: Investigative Hearings and Recognizance with Conditions*, Report 3, October 2006, available at: http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=193467.

(4) For example, some felt that the obligation to give testimony violated the right to remain silent, and that the preventative arrest power was too broad, as it may be grounded in mere suspicion.

Committee released its final report on 22 February 2007, making two recommendations for amendment with respect to the provisions for investigative hearings and recognizance with conditions.(5) The recommendations of both Parliamentary Committees will be discussed further in the section below.

By the terms of the sunset clause, the provisions of the *Anti-Terrorism Act* relating to investigative hearings and recognizance with conditions were set to expire on 1 March 2007 unless extended by a resolution passed by both houses of Parliament. A government motion to extend the measures without amendment for three years was defeated in the House of Commons on 27 February 2007 by a vote of 159 to 124, and the provisions ceased to have any force or effect.

DESCRIPTION AND ANALYSIS

A. Investigative Hearings

Clause 1 of Bill S-3 re-enacts sections 83.28 to 83.3 of the *Criminal Code* with only minor changes to the wording and intent of the earlier provisions derived from the *Anti-Terrorism Act*. Broadly, and as stated previously, section 83.28 of the *Criminal Code* deals with bringing individuals who may have information about a terrorism offence before a judge for an investigative hearing. The objective is not to prosecute an individual for a *Criminal Code* offence, but to gather information. Under the provision, a peace officer, with the prior consent of the Attorney General, can apply to a superior court or a provincial court judge for an order for the gathering of information under the following conditions: if there are reasonable grounds to believe that a terrorism offence has or will be committed; if there are reasonable grounds to believe that information concerning the offence or the whereabouts of a suspect is likely to be obtained as a result of the order; and if reasonable attempts have been made to obtain such information by other means. If granted, such a court order would compel a person to attend a hearing to answer questions on examination, and could include instructions for the person to bring along anything in his or her possession. In comparison with the original version of this section, the re-enacted provisions place increased emphasis on the need to have made reasonable

(5) Special Senate Committee on the *Anti-Terrorism Act*, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the* Anti-Terrorism Act, February 2007, http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.htm.

attempts to obtain such information by other means with respect to both potential terrorism offences in the future and such offences in the past (rather than only to future offences), and on the court's obligation to compel an individual to attend a hearing for examination in the appropriate circumstances. The use of the word "shall" instead of "may" to ensure that any orders made under section 83.28(5) compel an individual to attend a hearing resulted from one of the House of Commons Subcommittee's recommendations.

In addition, section 83.28 states that any person ordered to attend an investigative hearing is entitled to retain and instruct counsel. The person will be required to answer questions but may refuse to do so on the basis of law relating to disclosure or privilege. The presiding judge will rule on any such refusal. No one attending at such a hearing can refuse to answer a question or to produce something in his or her possession on the grounds of self-incrimination. However, any information or testimony obtained during an investigative hearing cannot be used directly or indirectly in subsequent proceedings against the individual except in relation to a prosecution for perjury or in providing subsequent contradictory evidence.

Section 83.29, which remains substantially similar to the earlier provisions, states that a person who evades service of the order, is about to abscond, or fails to attend an examination may be subject to arrest with a warrant. However, Bill S-3 adds that section 707 of the *Criminal Code*, which sets out maximum periods of detention for witnesses, also applies to individuals detained for a hearing under section 83.29.

1. Recommendations Not Acted Upon

Although the re-enacted provisions do take into account one of the suggestions made by the House of Commons Subcommittee, they do not address a number of other recommendations. The Subcommittee had also recommended that the revised investigative hearing provision limit its scope to deal only with imminent terrorism offences, and that it amend section 83.28(2) to make it clear that a peace officer must have reasonable grounds to believe that a terrorism offence will be committed before making an *ex parte* application and so as to deem anything done under sections 83.28 and 83.29 to be proceedings under the *Criminal Code*. Finally, the subcommittee had recommended that section 83.28(4)(*a*)(*ii*) and (*b*)(*ii*) be clarified by adding "and for greater certainty and so as not to restrict the generality of the foregoing" so as not to restrict the intent of Parliament. These recommendations were not acted upon.

B. Recognizance with Conditions (Preventative Arrest)

Clause 1 of Bill S-3, which re-enacts section 83.3 of the *Criminal Code* with substantially similar provisions, deals with recognizance with conditions and preventative arrest to prevent a potential terrorist attack. Under this re-enacted section, with the prior consent of the Attorney General, a peace officer may lay an information before a provincial court judge if he or she believes that a terrorist act will be carried out and suspects that the imposition of a recognizance with conditions or the arrest of a person is required to prevent it. That judge may order the person to appear before any provincial court judge, whereas the original version of this subsection stated that the judge may order the person to appear before him or her; this change is similar to one suggested by the House of Commons Subcommittee. If the peace officer suspects that immediate detention is necessary, he or she may arrest a person without a warrant prior to laying the information or before the person has had a chance to appear.

Such a detained person must then be brought before a provincial court judge within 24 hours, or as soon as feasible thereafter (the original wording referred to “as soon as possible”). At that time, a show cause hearing must be held to determine if the person should be released or detained for a further period of time. This hearing itself can be adjourned only for a further 48 hours.

If the judge determines there is no need for the person to enter into a recognizance, the person is to be released. If it is determined the person should enter into a recognizance, the person is bound to keep the peace and respect other conditions for up to 12 months. If the person refuses to enter into such a recognizance, the judge can order that person to be imprisoned for up to 12 months.

1. Recommendations Not Acted Upon

Again, the revisions made take into account some but not all of the technical recommendations made by the House of Commons Subcommittee. The Subcommittee had also recommended that (as in subsection 83.38(5)) the term “may” be replaced by “shall” in section 83.3(3), as the judge effectively has no discretion in this area, and that “pursuant to subsection (3)” be replaced with “this section” in subsection 83.3(8).

C. Annual Reports

As recommended by the Special Senate Committee, clause 2 of Bill S-3 adds new subsections to section 83.31 of the *Criminal Code* stating that the Attorney General and Minister of Public Safety and Emergency Preparedness' annual reports on sections 83.28, 83.29, and 83.3 shall include their opinion, supported by reasons, as to whether the operation of those sections should be extended.

D. Sunset Provision

Clause 3 of Bill S-3 replaces subsections 83.32(1), (2), and (4). Broadly, section 83.32 contains the sunset clause related to investigative hearings and recognizance with conditions. Following the recommendation of the House of Commons Subcommittee, but not the Special Senate Committee,[(6)] subsection 83.32(1) states that sections 83.28 to 83.3 will cease to have effect at the end of the 15th sitting day of Parliament after the fifth anniversary of the coming into force of Bill S-3, unless the operation of those sections is extended by resolution of both houses of Parliament. Subsection 83.32(4) allows the provisions to be extended again later on. The terminology in these subsections differs from the original sunset clauses, using the words "cease to have effect" and "operation" rather than "cease to apply" and "application." This new terminology is present throughout clauses 3 and 4.

New subsections 83.32(1.1) and (1.2) also state that a comprehensive review of section 83.28 to 83.3 and their operation *may* be undertaken by any committee of either or both houses of Parliament, and that such committee(s) shall then report back to Parliament, including recommendations as to whether to extend the operation of those sections. The permissive nature of this new provision can be contrasted with clause 145 of the *Anti-Terrorism Act*, which states that the review "shall" be undertaken. Although more permissive in nature, this amendment accords to some extent with the House of Commons Subcommittee's recommendation that any further extension of the provisions be subject to prior comprehensive parliamentary review.

(6) The Special Senate Committee recommended extension to the 15th sitting day of Parliament after 31 December 2009.

E. Transitional Provisions

Replacing section 83.33, clause 4 applies the new phrase “cease to have effect” to the transitional provisions. Section 83.33 states that if sections 83.28 to 83.3 cease to have effect in accordance with section 83.32, proceedings already commenced under those sections shall be completed, provided that the hearing commenced by a subsection 83.28(2) application is already underway. A person in custody under section 83.3 shall also be released, except that subsections 83.3(7) to (14) continue to apply to a person taken before a judge under subsection 83.3(6) before section 83.3 ceased to exist.

F. Coming Into Force

Clause 5 states that this Act will come into force on a day to be fixed by order of the Governor in Council.

COMMENTARY

Commentators have come out both for and against Bill S-3. Using the Air India inquiry as a backdrop, Royal Canadian Mounted Police Deputy Commissioner Gary Bass has made public statements supporting the bill, commenting that the renewed provisions will assist those who might otherwise be reluctant to testify by allowing witnesses to state that they no longer have any choice but to testify truthfully.(7) However, in the same context, Yvon Dandurand, a criminologist at the University College of the Fraser Valley in British Columbia, argues that compelled witnesses are still exposed to potential retaliation from those who expect them to lie if compelled to testify. He argues that such provisions make it clear that those who volunteer information to the authorities could find themselves subject to an investigative hearing, preventative arrest or a charge for a terrorism offence.(8) The Canadian Islamic Congress has also expressed its disapproval of Bill S-3 for fear that it will compromise civil liberties.(9)

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(7) Kim Bolan, “Investigative Tool Could Aid RCMP’s Air India Probe,” *Vancouver Sun*, 26 October 2007, p. A1; Jim Brown, “Anti-Terror Law Could Scare Off Witnesses, Air India Inquiry Told,” Canadian Press, 29 October 2007.

(8) Brown (2007); Yvon Dandurand, *Protecting Witnesses and Collaborators of Justice in Terrorism Cases*, Paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, 20 August 2007.

(9) Richard Foot and Juliet O’Neil, “Two Expired Terrorism Laws Reintroduced,” *The Gazette* (Montréal), 24 October 2007, p. A12.

In Senate Chamber second reading debate, Senator Baker proposed two changes to Bill S-3 that could be considered when it is referred to committee. The first proposal derives from the Supreme Court of Canada's decision in *Re Vancouver Sun* in which the court emphasized the need to publicly release as much information as possible about an investigative hearing. In paragraph 58 of the decision the majority of the court stated that:

> [W]e would also order that the investigative judge review the continuing need for any secrecy at the end of the investigative hearing and release publicly any part of the information gathered at the hearing that can be made public without unduly jeopardizing the interests of the Named Person, of third parties, or of the investigation: *Criminal Code*, s. 83.28(5)(*e*). Even in cases where the very existence of an investigative hearing would have been the subject of a sealing order, the investigative judge should put in place, at the end of the hearing, a mechanism whereby its existence, and as much as possible of its content, should be publicly released.

Senator Baker's second proposal refers to *R.* v. *Hall*,[(10)] a 2002 Supreme Court decision that struck down a portion of section 515(10)(*c*) of the *Criminal Code*. In that case, the court deemed that the words "[o]n any other just cause being shown and, without restricting the generality of the foregoing" in the context of ordering the detention of an accused were unconstitutional, violating sections 7 and 11(e) of the Charter, and declared them inoperative. Senator Baker pointed out that subsection 83.3(7)(*b*)(i)(C), which deals with an order for detention of an accused, also uses the phrase "any other just cause and, without limiting the generality of the foregoing…" He suggested that the constitutionality of this subsection be examined by the committee examining Bill S-3.

(10) [2002] 3 S.C.R. 309.