Legislative Summary **LS-635E**

BILL C-19: AN ACT TO AMEND THE CRIMINAL CODE (INVESTIGATIVE HEARING AND RECOGNIZANCE WITH CONDITIONS)

Dominique Valiquet
Legal and Legislative Affairs Division

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LEGISLATIVE HISTORY OF BILL C-19

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	12 March 2009	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

This bill did not become law before the 2nd Session of the 40th Parliament ended on 30 December 2009.

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

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CONTENTS

Page

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INTRODUCTION

Introduced in the House of Commons on 12 March 2009, Bill C-19 contains the provisions found in the former Bill S-3(1) as amended by the Special Senate Committee on the *Anti-terrorism Act* in March 2008.(2) Bill C-19 proposes amendments to the *Criminal Code* (the Code)(3) that would reinstate anti-terrorism provisions that expired under a sunset clause in February 2007. It also provides for the appearance of individuals who may have information about a terrorism offence before a judge for an investigative hearing and contains provisions dealing with recognizance with conditions and preventive arrest to avert a potential terrorist attack, all of which are provisions that are substantially similar to original provisions in the *Anti-terrorism Act* that came into force in 2001. It also contains a five-year sunset clause and requires the Attorney General and the Minister of Public Safety and Emergency Preparedness to issue separate annual reports that include their opinions as to whether these provisions should be extended.

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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) An Act to amend the Criminal Code (investigative hearing and recognizance with conditions), 2nd Session, 39th Parliament.

(2) The former Bill S-3 was amended by the Special Senate Committee on 5 March 2008, passed by the Senate on 6 March 2008, and had reached the debate at second reading stage in the House of Commons in April 2008, before it died on the *Order Paper* at the end of the 39th Parliament on 7 September 2008.

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

BACKGROUND

Bill C-19 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 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 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 *Canadian Charter of Rights and Freedoms* right against self-incrimination, as evidence derived from such hearings cannot be used against the person except in perjury prosecutions.(4)

In Parliament, two special committees were charged with review of the *Anti-terrorism Act*. In the House of Commons, this review was begun in December 2004 by 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.(5) The Subcommittee stated that it felt these provisions were in accord with Canadian legal tradition and that sufficient

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(4) *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.

(5) House of Commons Standing Committee on Public Safety and National Security, Subcommittee on the Review of the *Anti-terrorism Act*, *Review of the Anti-terrorism Act: Investigative Hearings and Recognizance with Conditions Program*, Report 3, October 2006, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=193467.

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(6) 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 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.(7) The recommendations of both parliamentary committees will be discussed further in the section below.

Under 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 C-19 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

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

(7) 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.

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 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 laws 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 C-19 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 section 83.28(2) be amended 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 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 (Preventive Arrest)

Clause 1 of Bill C-19, which re-enacts section 83.3 of the *Criminal Code* with substantially similar provisions, deals with recognizance with conditions and preventive 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. The Special Senate Committee on the *Anti-terrorism Act* amended this provision to narrow the wording of the grounds on which an individual may be detained. The

Committee deleted the words "any other just cause and, without limiting the generality of the foregoing" to bring this provision into line with the Supreme Court of Canada's decision in *R.* v. *Hall*[8] in 2002. In that decision, the Supreme Court struck down a section of the Code with similar wording as a violation of sections 7 and 11(*e*) of the Charter.

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 83.28(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 C-19 adds new subsections to section 83.31 of the *Criminal Code* stating that the separate annual reports on sections 83.28, 83.29 and 83.3 by the Attorney General and by the Minister of Public Safety and Emergency Preparedness shall include their opinions, supported by reasons, as to whether the operations of those sections should be extended.

D. Sunset Provision

Clause 3 of Bill C-19 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,[9] subsection 83.32(1) states that sections 83.28 to 83.3 will cease

(8) [2002] 3 S.C.R. 309.

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

to have effect at the end of the 15th sitting day of Parliament after the fifth anniversary of the coming into force of Bill C-19, 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.

As amended by the Special Senate Committee on the *Anti-terrorism Act*, subsections 83.32(1.1) and (1.2) also state that a comprehensive review of sections 83.28 to 83.3 and their operation shall 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. This amendment accords with the recommendations of the House of Commons Subcommittee and the Special Senate Committee that the provisions be subject to further comprehensive parliamentary review.

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

Some maintain that the proposed provisions are necessary and contain protective measures, such as the right to retain legal counsel, proof of the need for an investigative hearing and the requirement for the Attorney General and the Minister of Public Safety and Emergency

Preparedness to submit annual reports assessing the provisions.(10) On the other hand, according to some intelligence experts, the recent case involving Momin Khawaja,(11) the first person found guilty under the *Anti-terrorism Act*, clearly shows that the current law works well and that what some call the "aggressive" provisions included in Bill C-19 are not needed to effectively counter terrorism.(12)

Commentators came out both for and against the former Bill S-3. Using the Air India inquiry as a backdrop, Royal Canadian Mounted Police Deputy Commissioner Gary Bass made public statements supporting the bill, commenting that the renewed provisions would 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.(13) However, in the same context, Yvon Dandurand, a criminologist at the University of the Fraser Valley in British Columbia, argued that compelled witnesses would still be exposed to potential retaliation from those who expected them to lie if compelled to testify. He argued that such provisions make it clear that those who volunteer information to the authorities could find themselves subject to an investigative hearing, preventive arrest or a charge for a terrorism offence. The Canadian Islamic Congress also expressed its disapproval of the bill for fear that it will compromise civil liberties.(14)

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(10) Janice Tibbetts, "Anti-terrorist law on the way back: Contentious measure allowed to lapse two years ago," *The Vancouver Sun*, 12 March 2009, p. B2; and Bruce Cheadle, "Conservatives move to re-enact lapsed anti-terrorism laws," *Waterloo Region Record*, 13 March 2009, p. A3.

(11) On 12 March 2009, the Ontario Superior Court of Justice sentenced Khawaja to 10 and a half years' imprisonment on five counts under the *Anti-terrorism Act* and two other under the *Criminal Code*.

(12) Joanne Chianello, "Canadian legal system works: experts; Trial shows more aggressive anti-terror laws not needed," *Ottawa Citizen*, 13 March 2009, p. A5.

(13) 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," The Canadian Press, 29 October 2007.

(14) Richard Foot and Juliet O'Neil, "Two Expired Terrorism Laws Reintroduced," *The Gazette* [Montréal], 24 October 2007, p. A12.