HOUSE OF COMMONS

CANADA

REVIEW OF THE ANTI-TERRORISM ACT INVESTIGATIVE HEARINGS AND RECOGNIZANCE WITH CONDITIONS

Interim Report of the Standing Committee on Public Safety and National Security

Garry Breitkreuz, M.P.
Chair

Subcommittee on the Review of the Anti-terrorism Act

Gord Brown, M.P.
Chair

October 2006

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THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

has the honour to present its

THIRD REPORT

On May 29, 2006, in accordance with its mandate under Standing Order 108(1), your committee established a subcommittee with the mandate, pursuant to the Order of Reference made by the House of Commons on Friday May 19, 2006, to review the *Anti-terrorism Act* and, as part of that review, to also undertake a review of Section 4 of the *Security of Information Act* and the use of security certificates, and prepare a report on these matters.

On August 1, 2006, the Subcommittee agreed to first review the sections concerning investigative hearings and recognizance with conditions, which are the two sections subject to sunset clauses; and report its findings on these two issues to the Standing Committee on Public Safety and National Security in the form of an interim report.

ORDER OF REFERENCE

Extract from the Journals of the House of Commons of Friday May 19, 2006

By unanimous consent, it was moved, — That, notwithstanding the Order made on Tuesday, April 25, 2006, the Standing Committee on Public Safety and National Security be the committee for the purposes of section 145 of the Anti-terrorism Act (2001).

The question was put on the motion and it was agreed to on division.

ATTEST

AUDREY O'BRIEN
Clerk of the House of Commons

Extract from the Journals of the House of Commons of Thursday, June 22, 2006

By unanimous consent, it was moved, — That, notwithstanding the Order made on Tuesday, April 25, 2006, the Standing Committee on Public Safety and National Security be authorized to continue its deliberations relating to its review of the Anti-terrorism Act (2001) beyond June 23, 2006, and to present its final report no later than December 22, 2006.

ATTEST

AUDREY O'BRIEN
Clerk of the House of Commons

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INTRODUCTION

The terrorist attack on the United States in September 2001 was largely unexpected and had dramatic, long-term consequences. If it did not change everything, as many have said, it clearly changed the way in which the world and geopolitical developments are understood in the post-cold war, early twenty-first century. In the immediate aftermath of the worldwide shock of these extraordinary events, legislative and other steps were taken by the international community and by many countries. These initiatives were taken at a time when the full impact and consequences of these terrorist attacks were not clear.

It is within this broader context and to meet United Nations requirements of member states that Parliament adopted the *Anti-terrorism Act*, largely in force by the end of December 2001. Although this complex legislation went through the entire law-making process in less than three months, the debate across Canada, in both Houses of Parliament, and within the committees considering the bill was robust and wide-ranging. Underlying this law-making process was widespread, heightened uncertainty felt by all participating in it.

There were serious concerns at that time about the range and complexity of this legislation. While it was agreed that steps had to be taken to protect Canada and Canadians at a time of threat and uncertainty, not all were convinced that this legislation was necessary and that it appropriately balanced community safety and security, and individual rights and freedoms. Concerns were expressed that the new legislation would be used inappropriately and that some elements contained within it would be imported into other parts of Canadian criminal law. There was also a strong belief by others at that time that the *Anti-terrorism Act* was necessary to allow for the prevention of, and protection against, terrorist activity. Within this context, it was believed by many holding this view that the legislation was reasonable and proportionate, and contained numerous safeguards strong enough to protect constitutional rights and freedoms.

It was within this climate of opinion that Parliament, in considering this legislation in the fall of 2001, determined that, because of its extraordinary nature and the difficult issues with which it dealt, it wanted to revisit the Act. Consequently, in adopting the *Anti-terrorism Act*, Parliament incorporated within it both a review provision and a sunset clause.

Section 145 of the Act contains a provision requiring a comprehensive parliamentary review of the provisions and operation of the *Anti-Terrorism Act* (this Act in its entirety) three years after it received royal assent. This review was to be

completed within a year after it had been undertaken. The committee(s) was (were) to submit to Parliament a report containing a statement of any recommended changes.

Found in section 4 of the Act, section 83.32 of the *Criminal Code* contains a sunset clause related to investigative hearings and recognizance with conditions, also known as preventive arrests. This measure will be described in greater detail later in this report. The sunset clause applies to no other part of the Act. It was added to the Act because serious concern was expressed by many during the 2001 law-making process that these measures were largely unprecedented in Canadian law and could be used inappropriately.

The statutorily required review of this legislation was started in December 2004 by the Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness. Parliament was dissolved in November 2005 before it could complete its review. This task was then taken up by this subcommittee.

In continuing the review started by its predecessor, the Subcommittee, established on May 29, 2006 by the Standing Committee on Public Safety and National Security, has considered the evidence and submissions already received, as well as more recent information that had come to its attention.

Because the sunset clause will be triggered on December 31, 2006, the Subcommittee has decided to develop and table an interim report dealing with these two issues. It expects in this way to contribute to the debate later this year and in early 2007 about the reauthorization of these two measures.

Before setting out its findings and recommendations, the next parts of this report describe the necessary background within which they should be understood.

SUNSET PROVISIONS

The sunset provision inserted into the *Criminal Code* by section 4 of the Act can be found at section 83.32 of the Code. This section provides that the investigative hearing and recognizance with conditions provisions of the Code cease to apply at the end of the fifteenth “sitting day” of Parliament after December 31, 2006 unless, before the end of that day, they are extended by a resolution of both Houses of Parliament. A “sitting day” is one on which both Houses of Parliament are sitting. Cabinet is to establish by order the text of such a resolution extending the application of these provisions for a period not to exceed five years in length. Such a resolution is to be debated, but may not be amended, in both Houses of Parliament. If the resolution is concurred in by both Houses of Parliament, the provisions continue to be in effect for the designated period

following that date. The same process is to be followed for subsequent extensions of these provisions, if there are any.

INVESTIGATIVE HEARINGS

Section 83.28 of the *Criminal Code*, also contained in section 4 of the *Anti-terrorism Act*, deals with investigative hearings. Under this 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. If it is granted, the order compels a person to attend a hearing before a judge, answer questions, and bring along anything in their possession.

Any person ordered to attend such a hearing is entitled to retain and instruct counsel. A person attending is required to answer questions, but may refuse to do so, on the basis of law relating to disclosure or privilege. The presiding judge is to rule on any such refusal. No one attending at such a hearing can refuse to answer a question or to produce a thing on the grounds of self-incrimination. As well, any information or testimony obtained during an investigative hearing cannot be used directly or indirectly in subsequent proceedings except in relation to a prosecution for perjury or providing subsequent contradictory evidence.

Section 83.31(1) of the *Criminal Code* requires the responsible federal and provincial ministers to publish annual reports on the usage of these provisions. There have so far been no reported uses of investigative hearings. In June 2004, the Supreme Court of Canada in two companion cases related to the Air India trial in Vancouver constitutionally upheld this provision. The investigative hearing in relation to this trial was ordered but not held because the Air India trial was over by the time the Supreme Court of Canada had issued its rulings.

RECOGNIZANCE WITH CONDITIONS (PREVENTIVE ARREST)

Section 83.3 of the *Criminal Code*, contained in section 4 of the *Anti-terrorism Act*, deals with recognizance with conditions. With the prior consent of the Attorney General, a peace officer, believing that a terrorist act will be carried out and suspecting that the imposition of a recognizance with conditions or the arrest of a person is required to prevent it, may lay an information before a provincial court judge. That judge may order that person to appear before him or her. A peace officer may arrest without warrant the person who is the object of the information if such apprehension is necessary to prevent the commission of a terrorist activity.

Such a detained person must be brought before a provincial court judge within 24 hours, or as soon as possible thereafter. 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 only be adjourned 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, and to not be in possession of a weapon. If the person refuses to enter into such a recognizance, the judge can order that person to be imprisoned for up to 12 months.

Section 83.31(2) and (3) of the *Criminal Code* require the responsible federal and provincial ministers to publish annual reports on the usage of these provisions. There have so far been no reported uses of them.

EXTEND THE PROVISIONS AND SUBJECT THEM TO A FURTHER PARLIAMENTARY REVIEW

When Parliament considered the *Anti-terrorism Act* in the fall of 2001, investigative hearings and recognizances with conditions attracted a lot of attention from those who believed a legislative response to the terrorist activity was not necessarily the best approach to take. They argued that these two initiatives were unknown to Canadian law, had insufficient safeguards, and could be used improperly.

More recently, those opposed to these measures have said that since the annual reports on their use have shown that there has been no recourse to either of them, they have proven to be unnecessary. The Subcommittee disagrees with those who hold these views.

Both provisions are known to Canadian law. There are equivalents to investigative hearings, which are investigatory and not intended to determine criminal liability, within the contexts of the law related to public inquiries, competition, income tax, and mutual legal assistance in criminal law matters. As well, there are provisions similar to recognizances with conditions, that do not necessarily adversely affect rights and freedoms within the criminal law related to “peace bonds” issued to deal with anticipated violent offences, sexual offences, and criminal organization offences. Both legislative measures are consistent with, and grow out of, provisions well-known to the criminal law in Canada.

Both provisions have sufficient protections to ensure that rights and freedoms are protected. In relation to both investigative hearings and recognizance with conditions, there has to be prior consent of the Attorney General, judicial authorization is required, and a judge presides over the proceedings themselves, among other protections set out in the *Criminal Code*.

The mere fact that a legislative measure has not been used does not mean that it is no longer required. The Subcommittee believes they should be retained within the arsenal of tools that should continue to be available to counter terrorist activities. It also believes, however, that legislative amendments are required to this part of the Code to restrict and clarify some elements of this part of the anti-terrorist law adopted by Parliament. These recommendations for change will be set out later in this report.

Canada has only had five years experience with these two measures. This has not been a long enough period of time to fully assess their necessity and effectiveness. The Subcommittee believes that these measures should be renewed for a further period of five years.

However, this conclusion alone is not sufficient. As mentioned earlier in this report, section 145 of the *Anti-terrorism Act* required that this legislation be comprehensively reviewed after three years experience with its interpretation and implementation. Once the comprehensive review has been completed, section 145 of the Act will become a spent provision. This means there will be no further legislative requirement for review of this Act.

Not only does the Subcommittee believe that these provisions should be retained for another five years, it also has concluded that they should be subject to further parliamentary review prior to Parliament determining if they should be extended or allowed to expire under the sunset clause at that time. At the time of the next parliamentary review proposed by the Subcommittee, Canada will have had 10 years experience with investigative hearings and recognizance with conditions, and Parliament will be in a better position to assess the continued requirement for them.

RECOMMENDATION 1

The Subcommittee recommends that the provisions related to investigative hearings be extended to December 31, 2011.

RECOMMENDATION 2

The Subcommittee recommends that the provisions related to recognizance with conditions be extended to December 31, 2011.

RECOMMENDATION 3

The Subcommittee recommends that any further extension of investigative hearings and recognizance with conditions be subject to a prior comprehensive parliamentary review of the provisions and operation of these two measures.

The fact that the Subcommittee has recommended that the two measures under review in this report be extended, and that any further extension be subjected to a comprehensive parliamentary review, does not mean that there are not changes that can be made at this time to the relevant sections added to the *Criminal Code* by the *Anti-terrorism Act*. The fact that they have not been used, have counterparts in Canadian law, and have an array of safeguards in place to protect constitutionally guaranteed rights and freedoms, does not mean that the law does not have to be changed so that it is more precise and that the use of these measures does not have to be further restrained. Quite the contrary.

RESTRICT INVESTIGATIVE HEARINGS

There is a basic difference between investigative hearings and recognizance with conditions. investigative hearings are intended to be used in relation to terrorist acts that have already been committed and that are already under investigation, and terrorist acts that it is anticipated may be committed. In contrast, recognizances with conditions, as with "peace bonds" elsewhere in the *Criminal Code*, are preventive, intended to subject people to conditions and supervision so as to constrain their activity.

The Canadian Civil Liberties Association (CCLA) in its brief has expressed concern about the dual nature of investigative hearings. The CCLA accepted the necessity in some circumstances to compel testimony in an adjudicative hearing such as a criminal trial where the issues are clearly circumscribed. It stated that a distinction might be made between misdeeds already committed and perils imminently expected — the power to compel testimony should be limited to the latter situation.

The Subcommittee agrees with the position taken by the CCLA on this issue. There are already a number of investigative powers and techniques available to law enforcement agencies pursuing the perpetrators of criminal activity, which includes terrorism offences. Traditionally, Canadian criminal law has not accepted that testimony be compelled for investigative purposes, in contrast with adjudicative processes.

The Subcommittee believes that investigative hearings should only be available in relation to situations where testimony has to be compelled to prevent

activities where there is imminent peril of serious damage being caused as a consequence of their being successfully carried out in whole or in part. This recommendation can be implemented by amending section 83.28(4) of the *Criminal Code* so as to delete paragraph (*a*) from it.

RECOMMENDATION 4

The Subcommittee recommends that section 83.28(4) of the *Criminal Code* be amended to remove paragraph (*a*) so that investigative hearings are only available when there is reason to believe there is imminent peril that a terrorist offence will be committed.

CLARIFY AND SIMPLIFY DRAFTING

The rest of this report will set out a number of amendments the Subcommittee believes are necessary to the provisions in the *Criminal Code* dealing with investigative hearings and recognizance with conditions. Many parts of the *Anti-terrorism Act* deal with complex issues — this is often reflected in the drafting in many parts of this legislation. The intent of the drafting recommendations in this part of the report is to clarify and simplify certain parts of the legislation. This will tell those applying the *Anti-terrorism Act* what rules have to be respected in so doing and reassure Canadians that the law is clear and prescriptive of the conditions to be met in doing so.

The Subcommittee will first deal with several provisions in the Code that require redrafting so as to clarify their intent. Section 83.28(2) reads as follows:

> (2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information.

This can be described as the "triggering" provision that sets in motion an application for the ordering of an investigative hearing. It is essential that the language used here be as clear as possible. This provision should tell a peace officer what criteria have to be met to initiate the process. This subsection should be amended so that it is clear that the peace officer may make such an *ex parte* application where there are reasonable grounds to believe a terrorism offence will be committed. This language is already used in section 83.28(4)(*a*) and (*b*) setting out the grounds that must satisfy the judge before an information gathering order is issued.

There is one other issue in relation to this provision. It is not clear that the processes under the investigative hearings provisions are deemed to be proceedings under the *Criminal Code*. There may be release measures, delays and

other procedural requirements that are not dealt with in sections 83.28 and 83.29 of the Code. In an abundance of caution, the Subcommittee believes these measures should be deemed to be proceedings under the *Criminal Code*.

RECOMMENDATION 5

The Subcommittee recommends that, in conjunction with Recommendation 4, section 83.28(2) of the *Criminal Code* be amended to add the requirement that before a peace officer makes an *ex parte* application to a judge, the peace officer has reasonable grounds to believe a terrorism offence will be committed.

RECOMMENDATION 6

The Subcommittee recommends that section 83.28(2) of the *Criminal Code* be amended so as to deem anything done under sections 83.28 and 83.29 to be proceedings under the Code.

Section 83.28(4)(*a*)(ii) and (*b*)(ii) of the Code reads as follows:

> (4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and
>
> (*a*) that there are reasonable grounds to believe that
>
> (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or
>
> (*b*) that
>
> (ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and …

These provisions require clarification in such a way as to not restrict the intent of Parliament in respect of seeking the whereabouts of a person who has committed a terrorism offence or is suspected may commit one. This can be done by adding the words “and for greater certainty and so as not to restrict the generality of the foregoing”.

RECOMMENDATION 7

The Subcommittee recommends that the words "and for greater certainty and so as not to restrict the generality of the foregoing" be added immediately before the word "or" in section 83.28(4)(*a*)(ii) and (*b*)(ii) of the *Criminal Code*.

Section 83.28(5) of the Code reads as follows:

> (5) An order made under subsection (4) may
>
> *(a)* order the examination, on oath or not, of a person named in the order;
>
> (*b*) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (*d*), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;
>
> (*c*) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;
>
> (*d*) designate another judge as the judge before whom the examination is to take place; and
>
> (*e*) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

This provision seems to provide a discretionary power to a judge issuing an order. It is an odd formulation of this power in that prior to the last of the enumerated items, the word "and" is used rather than the more traditional "or". Quite clearly from our understanding of this provision and the legislative intent behind it, the word "shall" should precede paragraph (*a*) and the word "may" should precede paragraphs (*b*) to (*e*). As well, in paragraph (*a*) the word "a" is used to refer to the person named in the order. This is quite clearly the wrong word in the context of the intent of this paragraph.

RECOMMENDATION 8

The Subcommittee recommends that section 83.28(5) of the *Criminal Code* be amended by removing the word "may" at the end of the first line and inserting the word "shall" before paragraph (*a*) and the word "may" before paragraphs (*b*) to (*e*). As well, the word "a" in paragraph (*a*) should be replaced by the word "the".

Section 83.3(3) of the Code reads as follows:

> (3) A provincial court judge who receives an information under subsection (2) may cause the person to appear before the provincial court judge.

This section, as described earlier in this report, deals with recognizance with conditions which are similar to "peace bonds" issued under other parts of the Code. There are two issues with respect to this subsection. The first relates to the use of the word "may" in this subsection. The parallel provision in section 810(2) of the Code dealing with "peace bonds" uses the word "shall". For the sake of consistency and since the judge really has no discretion, it makes sense to use the word "shall" here as well. The second issue relates to the use of the word "the" in relation to causing a person to appear before a judge. The current drafting would seem to require that a particular judge deal with the matter. The difficulty comes if that particular judge is not available. The problem can be solved by replacing "the" by the word "a".

RECOMMENDATION 9

The Subcommittee recommends that section 83.3(3) of the *Criminal Code* be amended by replacing the word "may" by the word "shall" and the word "the" by the word "a" before "provincial court judge".

The opening words of section 83.3(8) of the Code read as follows:

> (8) The provincial court judge before whom the person appears pursuant to subsection (3)…

The intent here is that the reference be to the section of the Code. Hence, the reference should be to the section in its entirety.

RECOMMENDATION 10

The Subcommittee recommends that the opening words of section 83.3(8) of the *Criminal Code* be amended by replacing "subsection (3)" by "this section".

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

The Subcommittee recommends that the provisions related to investigative hearings be extended to December 31, 2011.

RECOMMENDATION 2

The Subcommittee recommends that the provisions related to recognizance with conditions be extended to December 31, 2011.

RECOMMENDATION 3

The Subcommittee recommends that any further extension of investigative hearings and recognizance with conditions be subject to a prior comprehensive parliamentary review of the provisions and operation of these two measures.

RECOMMENDATION 4

The Subcommittee recommends that section 83.28(4) of the *Criminal Code* be amended to remove paragraph (*a*) so that investigative hearings are only available when there is reason to believe there is imminent peril that a terrorist offence will be committed.

RECOMMENDATION 5

The Subcommittee recommends that, in conjunction with Recommendation 4, section 83.28(2) of the *Criminal Code* be amended to add the requirement that before a peace officer makes an *ex parte* application to a judge, the peace officer has reasonable grounds to believe a terrorism offence will be committed.

RECOMMENDATION 6

The Subcommittee recommends that section 83.28(2) of the *Criminal Code* be amended so as to deem anything done under sections 83.28 and 83.29 to be proceedings under the Code.

RECOMMENDATION 7

The Subcommittee recommends that the words "and for greater certainty and so as not to restrict the generality of the foregoing" be added immediately before the word "or" in section 83.28(4)(*a*)(ii) and (*b*)(ii) of the *Criminal Code*.

RECOMMENDATION 8

The Subcommittee recommends that section 83.28(5) of the *Criminal Code* be amended by removing the word "may" at the end of the first line and inserting the word "shall" before paragraph (*a*) and the word "may" before paragraphs (*b*) to (*e*). As well, the word "a" in paragraph (*a*) should be replaced by the word "the".

RECOMMENDATION 9

The Subcommittee recommends that section 83.3(3) of the *Criminal Code* be amended by replacing the word "may" by the word "shall" and the word "the" by the word "a" before "provincial court judge".

RECOMMENDATION 10

The Subcommittee recommends that the opening words of section 83.3(8) of the *Criminal Code* be amended by replacing "subsection (3)" by "this section".

APPENDIX A
LIST OF WITNESSES

Associations and Individuals	Date	Meeting
Thirty-eighth Parliament, 1st Session		
Department of Justice	22/03/2005	7
Gérard Normand, General Counsel and Director, National Security Group		
Department of Public Safety and Emergency Preparedness		
Paul Kennedy, Senior Assistant Deputy Minister		
Anne McLellan, Minister		
Bill Pentney, Assistant Deputy Attorney General		
Department of Justice	23/03/2005	8
Douglas Breithaupt, Senior Counsel, Criminal Law Policy Section		
Stanley Cohen, Senior General Counsel, Human Rights Law Section		
Irwin Cotler, Minister		
Gérard Normand, General Counsel and Director, National Security Group		
Daniel Therrien, Senior General Counsel, Office of the Assistant Deputy Attorney		
Financial Transactions and Reports Analysis Centre of Canada	13/04/2005	9
Josée Desjardins, Senior Counsel		
Horst Intscher, Director		
Sandra Wing, Deputy Director, External Relationships		
Canada Border Services Agency	20/04/2005	10
Caroline Melis, Director General, Intelligence Directorate		
Canadian Security Intelligence Service		
Robert Batt, Counsel		
Department of Citizenship and Immigration		
Daniel Jean, Assistant Deputy Minister, Policy and Program Development		
Department of Justice		
Daniel Therrien, Senior General Counsel, Office of the Assistant Deputy Attorney General		
Department of the Solicitor General (Public Safety and Emergency Preparedness)		
Paul Kennedy, Senior Assistant Deputy Minister, Emergency Management and National Security		

Organizations and Individuals	Date	Meeting
Communications Security Establishment	04/05/2005	11
David Akman, Director and General Counsel, Legal Services		
Keith Coulter, Chief		
Barbara Gibbons, Deputy Chief, Corporate Services		
John Ossowski, Director General, Policy and Communications		
Office of the Superintendent of Financial Institutions Canada		
Julie Dickson, Assistant Superintendent, Regulation Sector		
Brian Long, Director, Compliance Division		
Alain Prévost, General Counsel, Legal Services Division		
Canada Customs and Revenue Agency	18/05/2005	12
Michel Dorais, Commissioner		
Maurice Klein, Senior Advisor, Anti-Terrorism, Charities Directorate, Policy and Planning Branch		
Elizabeth Tromp, Director General, Charities Directorate, Policy and Planning Branch		
Royal Canadian Mounted Police	01/06/2005	13
Giuliano Zaccardelli, Commissioner		
Mark Scrivens, Senior Counsel		
Office of the Privacy Commissioner of Canada	01/06/2005	14
Raymond D'Aoust, Assistant Privacy Commissioner		
Patricia Kosseim, General Counsel		
Jennifer Stoddart, Privacy Commissioner		
Office of the Information Commissioner of Canada	08/06/2005	15
Daniel Brunet, Director, Legal Services		
J. Alan Leadbeater, Deputy Information Commissioner		
Security Intelligence Review Committee		
Timothy Farr, Associate Executive Director		
Sharon Hamilton, Senior Researcher		
Marian McGrath, Senior Counsel		
Commission for Public Complaints Against the Royal Canadian Mounted Police	08/06/2005	16
Shirley Heafey, Chair		
Steven McDonell, Senior General Counsel		
Canadian Human Rights Commission	15/06/2005	17
Ian Fine, Director, Policy		
Mary Gusella, Chief Commissioner		
Robert W. Ward, Secretary General		
Office of the Communications Security Establishment Commissioner		
Antonio Lamer, Commissioner		
Joanne Weeks, Executive Director		

Organizations and Individuals	Date	Meeting
B'nai Brith Canada David Matas, Senior Legal Counsel	20/09/2005	19
Canadian Arab Federation Omar Alghabra, President		
Canadian Council on American–Islamic Relations Riad Saloojee, Executive Director		
Canadian Islamic Congress Faisal Joseph, Legal Counsel		
Canadian Jewish Congress Mark Freiman, Honorary Counsel, Ontario Region		
Canadian Muslim Lawyers Association Ziyaad Mia		
Muslim Council of Montreal Salam Elmenyawi, Chairman		
Canadian Association for Security and Intelligence Studies Tony Campbell, Acting Executive Director	20/09/2005	20
Canadian Civil Liberties Association A. Borovoy, General Counsel		
Canadian Newspaper Association David Gollob, Vice-President, Public Affairs		
Imagine Canada Peter Broder, Corporate Counsel and Director Regulatory Affairs		
World Vision Canada Kathy Vandergrift, Director of Policy		
As an Individual Craig Forcese, Law Professor, University of Ottawa		
Amnesty International Canada Alex Neve, Secretary General, English Speaking Section	21/09/2005	21
Campaign to Stop Secret Trials in Canada Matthew Behrens		
Canadian Council for Refugees Janet Dench, Executive Director		
International Civil Liberties Monitoring Group Warren Allmand, Member of steering committee		

Organizations and Individuals	Date	Meeting
Justice for Mohamed Harkat Committee	21/09/2005	21
Christian Legeais, Campaign Manager		
As an Individual		
Paul Copeland		
Canadian Association of University Teachers	21/09/2005	22
James Turk, Executive Director		
Maureen Webb, Legal Officer		
Canadian Bar Association		
Greg DelBigio, Vice-Chair National, Criminal Justice Section		
Tamra Thomson, Director, Legislation and Law Reform		
Civil Liberties Union		
Denis Barrette, Legal Counsel		
Federation of Law Societies of Canada		
Katherine Corrick, Director, Policy and Legal Affairs		
George Hunter, Vice-President		
University of Calgary	05/10/2005	24
Gavin Cameron, Professor, Department of Political Science		
American Center for Democracy	26/10/2005	25
Rachel Ehrenfeld, Director		
B.C. Civil Liberties Association		
Jason Gratl, President		
Mackenzie Institute		
John Thompson, President		
As Individuals	01/11/2005	26
Lord Carille of Berriew		
Clive Walker, Professor, University of Leeds, School of Law		
Canadian Association of Chiefs of Police	02/11/2005	27
Vince Bevan, Vice-President, Chief, Ottawa Police Service		
Bill Blair, Chief, Toronto Police Service		
Vincent Westwick, Co-Chair, Law Amendments Committee		
As Individuals		
Boaz Ganor, Executive Director, International Policy Institute for Counter-terrorism		
Martin Rudner, Director, Canadian Centre of Intelligence and Security Studies		

Air India 182 Victims Families Association	16/11/2005	28
Bal Gupta, Chair		
Nicola Kelly, National Spokesperson		
Department of Justice		
Douglas Breithaupt, Senior Counsel, Criminal Law Policy Section		
Stanley Cohen, Senior General Counsel, Human Rights Law Section		
Irwin Cotler, Minister of Justice		
Department of Public Safety and Emergency Preparedness		
Anne McLellan, Minister		
As an Individual		
Maureen Basnicki		

Thirty-ninth Parliament, 1st Session

Department of Justice	21/06/2006	2
Douglas Breithaupt, Senior Counsel, Criminal Law Policy Section		
Bill Pentney, Senior Assistant of Deputy Minister, Policy Sector		
Vic Toews, Minister		
Department of Public Safety and Emergency Preparedness		
Stockwell Day, Minister		
William J.S. Elliot, Associate Deputy Minister		

APPENDIX B
LIST OF BRIEFS

Thirty-eighth Parliament, 1st Session

Air India 182 Victims Families Association

American Center for Democracy

Amnesty International Canada

B.C. Civil Liberties Association

BC Freedom of Information and Privacy

Barreau du Québec

Basnicki, Maureen

B'nai Brith Canada

Campaign to Stop Secret Trials in Canada

Canadian Arab Federation

Canadian Association of University Teachers

Canadian Bar Association

Canadian Civil Liberties Association

Canadian Council for Refugees

Canadian Council on American-Islamic Relations

Canadian Jewish Congress

Canadian Muslim Lawyers Association

Canadian Newspaper Association

Canadian Security Intelligence Service

Carter and Associates Professional

Civil Liberties Union

Commission for Public Complaints Against the Royal Canadian Mounted Police

Confederation of Canadian Unions

Copeland, Paul D.

Department of Justice

Department of Public Safety and Emergency

Federation of Law Societies of Canada

Financial Transactions and Reports Analysis

Forcese, Craig

Ganor, Boaz

Garant, Patrice

Imagine Canada

Information and Privacy Commissioner (Ontario)

International Civil Liberties Monitoring Group

Justice for Mohamed Harkat Committee

KAIROS - Edmonton Committee

Keeble, Edna

MacDonald, Alex

Mackenzie Institute

Office of the Privacy Commissioner of Canada

Registry of the Federal Court of Canada

Religious Society of Friends (Quakers),

Security Intelligence Review Committee

World Vision Canada

Thirty-ninth Parliament, 1st Session

Communications Security Establishment Commissioner

Department of Justice

Department of Public Safety and Emergency Preparedness

Finkelstein, Michael J.

Office of the Information and Privacy Commissioner of Ontario

A copy of the relevant Minutes of Proceedings (*Meeting No. 13)* is tabled.

Respectfully submitted,

Garry Breitkreuz, M.P.
Chair

DISSENTING OPINION

Dissenting opinion from Joe Comartin and Serge Ménard

From the outset, it must be understood that this is a preliminary report that addresses only two sets of provisions in the Anti-terrorism Act; namely, those pertaining to investigations and preventive arrests as provided for in sections 83.28, 83.29 and 83.3 of the Criminal Code, as amended by section 4 of the Anti-Terrorist Act.

We concur with the description of the specific historical context that led to the adoption of the *Anti-terrorism Act*.

We also agree with most of the recommendations made in the majority report of the Committee, which aim to provide better guidelines for the investigation process. This exceptional measure should be used only in specific cases in which it is necessary to prohibit activities where there is imminent peril of serious damage, and not in the case of misdeeds already committed.

We, like other members of the Committee are also of the opinion that another review of the provisions ten years after their coming into force is needed and would make it possible to better assess whether the provisions should be extended or allowed to expire.

We would have preferred a three-year period; however, we are willing to support the opinion of the majority for a ten-year period that should be the maximum amount of time allowed to pass before a final review of these exceptional measures is completed.

However, we do not agree with the Committee members' opinion regarding the preventive arrests provided for in section 83.3 of the Criminal Code, as introduced in the *Anti-terrorism Act*. Our reasons are as follows.

Terrorism cannot be fought with legislation; it must be fought through the efforts of intelligence services combined with appropriate police action.

There is no act of terrorism that is not already a criminal offence punishable by the most stringent penalties under the *Criminal Code*. This is obviously the case for pre-meditated, cold-blooded murders; however, it is also true of the destruction of major infrastructures.

Moreover, when judges exercise their discretion during sentencing, they will consider the terrorists' motive as an aggravating factor. They will find that the potential for rehabilitation is very low, that the risk of recidivism is very high and that deterrence and

denunciation are grounds for stiffer sentencing. This is what they have always done in the past and there is no reason to think they will do differently in the future.

We must also consider that, when it comes to terrorism, deterrence has limitations. First, it will have very little impact on someone considering a suicide bombing. Second, those who decide to join a terrorist group generally believe that they are taking part in an historic movement that will have a triumphant outcome in the near future and that will see them emerge as heroes.

Therefore, one cannot expect that new legislation will provide the tools needed to effectively fight terrorism.

Legislation can, however, be amended if police do not seem to have the legal means needed to deal with the new threat of terrorism.

Consequently we must ensure that the proposed measure does not unduly disturb the balance that must exist between respect for the values of fairness, justice and respect for human rights, which are characteristic of our societies, while also ensuring better protection for Canadians and for the entire world community.

Section 83.3, which provides for preventive arrests and the imposition of conditions, was advanced as such a measure when it was adopted.

Now, this provision has gone unused.

That is not surprising, given that police officers can use existing Criminal Code provisions to arrest someone who is about to commit an indictable offence.

Section 495 of the Criminal Code states that:

"(1) A peace officer may arrest without warrant

(a) a person […] who, on reasonable grounds, he believes […] is about to commit an indictable offence"

The arrested person must then be brought before a judge, who may impose the same conditions as those imposable under the *Anti-terrorism Act*. The judge may even refuse bail if he believes that the person's release might jeopardize public safety.

If police officers believe that a person is about to commit an act of terrorism, then they have knowledge of a plot. They probably know, based on wiretap or surveillance information, that an indictable offence is about to be committed. Therefore, they have proof of a plot or attempt and need only lay a charge in order to arrest the person in question.

There will eventually be a trial, at which time the arrested person will have the opportunity to a full answer and defence. The person will be acquitted if the suspicions are not justified or if there is insufficient proof to support a conviction.

It seems obvious to us that the terrorist act thus apprehended would have been disrupted just as easily as it would have been had section 83.3 been used.

However, it is this provision that is most likely to give rise to abuses.

It may be used to brand someone a terrorist on grounds of proof that are not sufficient to condemn him but against which he will never be able to fully defend himself. This will prevent him from travelling by plane, crossing the border into the United States and probably from entering many other countries. It is very likely that he will lose his job and be unable to find another.

One could compare this situation to that of Maher Arar upon his return from Syria before he was exonerated by Justice O'Connor. In fact, it will probably be worse, because it was the suspicions passed on by the RCMP that harmed Mr. Arar. If this new and temporary provision of the Criminal Code were used, it would be a judicial decision to impose conditions because of apprehended terrorist activity. The general public would see that person as almost certainly, if not definitely, a terrorist.

Terrorist movements often spring from and are nourished by profound feelings of injustice among a segment of the population. The fight against these injustices is often conducted in parallel by those who want to correct the injustices through democratic means and those who believe it is necessary to use terrorism.

The former made a positive contribution to the transformation of the societies in which we live today. They are often the source of many of the rights that we enjoy.

It is inevitable that political activity will bring the first and second groups together. Very often, the former will not even be aware that the latter are involved in terrorism. The planning of terrorist activity is by its nature secret.

The ease with which a person who has neither the inclination nor the intention to commit terrorist acts can be labelled a terrorist is thus disconcerting.

In order to determine whether a person is part of a terrorist network, security officers make use of electronic surveillance, but, as we saw in the Arar case, they also monitor the contacts of someone who they know or believe is connected to a terrorist network.

Now, to be able to order incarceration and, subsequently, the imposition of conditions of release, it is sufficient that the judge be convinced "that the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the

circumstances, including the apparent strength of the peace officer's grounds under subsection (2), and the gravity of any terrorist activity that may be carried out."

In other words, the apprehension of serious terrorist activity and grounds that appear founded will suffice. Proof that these grounds are well founded is not necessary.

It should also be noted that the person arrested need not be the one that is thought likely to commit a terrorist act, but only and simply a person whose arrest "is necessary to prevent the carrying out of the terrorist activity."

There is an importance nuance there that is both astonishing and disturbing. It can include innocent people who are unaware of the reasons for which terrorists are soliciting their aid in a planned activity while concealing the real reasons they are asking for aid. Secrecy is the very essence of a terrorist activity.

Some see in the reference to section 810 of the Criminal Code an indication that our criminal law already uses a procedure similar to that set out in section 83.3. While there is a similarity in the procedure followed, there is a very big difference in the consequences of applying these two sections.

Section 810 states:

"An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property."

That other person is then summoned (and not arrested) before a judge, who can then order that person to enter into a recognizance to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance.

The judge cannot commit that person to a prison term unless the person refuses to sign the recognizance, after listening to all the parties and being satisfied by the evidence adduced that there are reasonable grounds for the fears.

If the person signs the recognizance and respects the conditions, he or she remains at liberty, will not be sentenced and will thus have no criminal record.

This section is often used in the case of apprehended domestic violence or when there is enmity between two people that one of them fears may turn violent.

This provision and section 83.3 that we are currently studying are very different in nature and have radically different consequences.

There is also no comparison between the impact that the use of section 83.3 and section 810 would have on someone's reputation.

When the decision is made to depart from the fundamental principles underlying our system of criminal law, there is always a risk that these measures will later be applied in a manner totally different from those foreseen. That was the case with the imposition of the war measures act in 1970, which saw the incarceration, among others, of a great poet, a pop singer, numerous relatives of people charged with terrorist activities and almost all the candidates of a municipal political party.

In light of this analysis, we feel that Parliament should not renew section 83.3, which was introduced into the *Criminal Code* by the *Anti-terrorism Act*, for two fundamental reasons: one, it is of little, if any, use in the fight against terrorism, and two, there is a very real danger of its being used against honest citizens.

A terrorist activity deemed dangerous can be disrupted just as effectively, and in fact more effectively, by the regular application of the *Criminal Code.*

As a result, we recommend the abolition of section 83.3 of the *Criminal Code.*

Joe Comartin and Serge Ménard

MINUTES OF PROCEEDINGS

Tuesday, October 17, 2006
(*Meeting No. 13*)

The Standing Committee on Public Safety and National Security met *in camera* at 9:15 a.m. this day, in Room 362, East Block, the Chair, Garry Breitkreuz, presiding.

Members of the Committee present: Garry Breitkreuz, Gord Brown, Hon. Raymond Chan, Joe Comartin, Hon. Irwin Cotler, Laurie Hawn, Mark Holland, Dave MacKenzie, Serge Ménard and Rick Norlock.

Acting Members present: France Bonsant for Carole Freeman and Paul Zed for Hon. Maurizio Bevilacqua.

In attendance: *Library of Parliament*: Wade Raaflaub, Analyst.

Pursuant to the Order of Reference of May 19, 2006, the Committee commenced its study of the Review of the Anti-terrorism Act (2001).

It was agreed, — That the draft report of the Subcommittee on the Review of the Anti-terrorism Act be adopted.

It was agreed, — That the Chair, Clerk and Analyst be authorized to make such grammatical and editorial changes as may be necessary without changing the substance of the report.

It was agreed, — That 500 copies, in bilingual format, shall be printed.

It was agreed, — That the Chair of the Subcommittee on the Review of the Anti-terrorism Act present the report to the House.

The Committee proceeded to the consideration of matters related to Committee business.

It was agreed, — That the operational budget in the amount of $23,000 for the study of Bill C-12, An Act to provide for emergency management and to amend and repeal certain Acts, be adopted.

It was agreed, — That the proposed budget in the amount of $1,675, for the Committee's travel to the Canadian Association of Security and Intelligence Studies 2006 Conference from October 26 to October 28 in Ottawa, be adopted and that the First Vice-Chair present the said budget to the Budget Subcommittee of the Liaison Committee.

It was agreed, — That the honorable Anne McLellan be invited to appear in relation to the study of the report of the Commission of Inquiry on the events relating to Maher Arar.

It was agreed, — That RCMP Commissioner Giuliano Zaccardelli be recalled to appear in relation to the study of the report of the Commission of Inquiry on the events relating to Maher Arar.

It was agreed, — That the honorable Stockwell Day, Minister of Public Safety, be recalled to appear in relation to the study of the report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.

It was agreed, — That the Canadian Electricity Association, the Canadian Nuclear Safety Commission, representatives from either the Province of Quebec or the Province of Manitoba, and Dr. Jim Young be invited to appear in relation to the Committee's study of Bill C-12, An Act to provide for emergency management and to amend and repeal certain Acts.

At 10:35 a.m., the sitting was suspended.

At 10:36 a.m., the sitting resumed in public.

On motion of Irwin Cotler, it was agreed on division, — That this Committee recommends that the Government of Canada take the following action:

a) Issue an official apology to Maher Arar and his family;

b) Negotiate compensation with Mr. Arar for the ordeal of pain and suffering that he and his family endured;

c) Object to the American government for its breach of domestic and international undertakings in the confinement and rendition of Maher Arar to Syria;

d) Protest to the Syrian government for its torture of Mr. Arar; and

e) Implement all the recommendations of the O'Connor Commission.

On motion of Irwin Cotler, it was agreed on division, — That the Committee adopt these recommendations as a report to the House and that the Chair present this report to the House.

At 10:37 a.m., the Committee adjourned to the call of the Chair.

Louise Hayes
Clerk of the Committee