THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 4, 2008

The Honourable Senator David P. Smith
Chair
Special Senate Committee on Anti-terrorism
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Smith,

Re: Bill S-3 – *Criminal Code* amendments (investigative hearings and recognizance with conditions)

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill S-3, *Criminal Code* amendments (investigative hearings and recognizance with conditions). The CBA is a national association representing 37,000 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and in the administration of justice. The CBA Section membership is balanced between prosecutors and defence counsel from every part of the country.

Bill S-3 would reintroduce slightly amended versions of two former provisions of the *Criminal Code*, sections 83.28 and 83.3. Both sections were originally introduced as part of the 2001 *Anti-terrorism Act* [1] and were controversial from the outset. Neither was actually used as of February 2007,[2] and the House of Commons allowed them to "sunset" in March 2007.[3]

The investigative hearing provision in Bill S-3 would allow an application by police to require a witness to appear before a judge to answer questions to assist with investigating a terrorism offence. The Bill's recognizance with conditions would provide police with power to require an individual to appear before a judge to prevent a potential terrorist activity.

These powers, especially the power to conduct an investigative hearing, represent a significant departure from powers traditionally available to investigate criminal offences. It is significant that the provisions would again form a part of the *Criminal Code*, rather than a statute enacted to specifically address national emergencies or terrorism.

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1 SC 2001, c.41.

2 L. Barnett, Legislative Summary, Bill S-3, An *Act to amend the Criminal Code* (investigative hearing and recognizance with conditions) (Ottawa: Parliament of Canada, November 2007) at 2.

3 On February 27, 2007, Commons voted against renewing these two provisions, so they "sunsetted" on March 1, 2007.

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Apart from the power to compel a person to provide evidence at a preliminary inquiry or a trial, there has not historically been a statutory power to compel a person to attend to assist a criminal investigation by answering questions. Police may use all lawful means to elicit information from a reluctant individual. However, the right to silence has applied to all, including suspects or third parties in possession of relevant information, meaning that all are free to choose whether to speak to the police. The investigative hearing in Bill S-3 would represent a fundamental shift**,** eliminating in the circumstances defined, a right recognized both in common law and by the *Charter of Rights and Freedoms*.

Sealing Orders

Bill S-3 does not appear to permit sealing the application materials used to seek an investigative hearing. While the CBA Section does not support excessive use of sealing orders, applications pursuant to warrant provisions and other provisions in the *Criminal Code* may, under certain circumstances, be sealed. The same underlying rationale for existing sealing provisions in the *Criminal Code* supports including them for section 83.28. However, that procedure should allow the individual compelled to attend to access the materials filed in support of the application, regardless of whether the materials are sealed.

Application under Oath

Bill S-3 contains an important safeguard to balance the need to gather information for an investigation against individual privacy interests. An independent judge would review the materials in support of the application for an investigative hearing. This is consistent with other contexts where a judge relies on information to determine whether to grant, for example, a search warrant or wiretap authorization. In those other contexts, the judge considers information under oath. In contrast, Bill S-3 imposes no such requirement.[4]

The leading case of *Hunter v. Southam* [5] has established the importance of prior judicial authorization to prevent unjustified intrusions into personal privacy from occurring at the outset, rather than after the fact. The Supreme Court of Canada recognized the constitutional importance of guarding against "fishing trips", and held that "[t]he State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion".[6] That constitutional standard is met when the authorizing judge is satisfied that the requisite grounds exist, based on an application established under oath.

Given this constitutional precedent, the CBA Section recommends that Bill S-3 require that the application for compelled attendance at an investigative hearing be made under oath.

Right to Counsel

Section 83.28(11) would give the person subject to an investigative hearing the right to retain counsel. The presence of legal counsel would be critical for issues such as whether an answer to

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4 See, for example, section 487.

5 (1984) 14 CCC (3D) 97 (SCC).

6 *Ibid*, at 114-115.

a question will result in privileged information being divulged or whether a question goes beyond what is relevant to the inquiry. Certainly, the interests at stake could be quite significant. We recommend that section 83.28(11) be amended to specifically permit the individual to be represented by counsel during an investigative hearing.

We also suggest that the Bill give a presiding judge the power to appoint counsel. Legal aid might well be unavailable to those required to attend and answer questions, having regard to the limited availability of legal aid in most provinces and territories in Canada.[7] Even if legal aid were available under the relevant legal aid plan, the application and approval process could be inconsistent with the goal of an expeditious hearing. Empowering the judge to appoint publicly funded counsel would eliminate this potential delay.

Seizure of Property

Section 83.28(5)(a) would permit an order requiring the person involved to bring any thing in their possession or control to the presiding judge. Section 83.28(12) then provides that the judge shall order that the thing be given into the custody of a peace officer, if satisfied any thing produced will likely be relevant to the investigation of a terrorism offence. If satisfied of its "likely" relevance to "any terrorism offence", the judge would have no residual discretion as to whether the thing should be delivered to the custody of a peace officer.

This raises several concerns. First, it should be amended to permit the order to be made only when there are reasonable grounds to believe that the person has in his or her possession or control anything directly relevant to the scope of the investigative hearing, that is, relevant to a terrorism offence or to the whereabouts of a suspect.

Second, the Bill provides no restriction or control over whether the thing, once in the custody of a peace officer, may be inspected, copied, transferred to other agencies in Canada or even transferred outside of Canada. If, for example, an individual's computer was ordered into the custody of a peace officer, the contents of that computer could be read, copied and transferred to agencies both within and outside of Canada. This would represent a complete loss of privacy for the information, and could well go beyond what is necessary to advance the objectives of the Bill.

Bill S-3 contains no apparent restriction on whether compelled answers or seized property may be disseminated to foreign jurisdictions. While terrorism is often international in scope, Canada's protection against self-incrimination would apply only within Canada.[8] Compelled answers or seized property under Bill S-3 could quite readily lead to criminal jeopardy in a foreign jurisdiction. While the CBA Section appreciates that investigations may be more expeditious if information is shared with other countries, Canada should be cognizant of the risk of prosecution in a foreign country and the attendant risk of extradition or deportation to that country.[9]

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7 Most provinces and territories only fund legal representation if there is a significant or substantial likelihood of incarceration as a result of criminal charges.

8 *R. v. Hape,* [2007] SCC 26.

9 These concerns are far from academic. See *Minister of Justice v. Omar Ahmed Khadr* SCC 32147 (leave granted Oct 25, 2007).

Third, the criminal law already allows law enforcement agencies to apply for authorization to seize property.[10] Bill S-3's sections 83.28 (5) and (12) would effectively bypass those established warrant and production order provisions. At the very least, this could elicit challenges on compliance with section 8 of the *Charter*.

Section 490 of the *Criminal Code* is an example for review of property seized in other circumstances. However, it does not explicitly apply to property seized pursuant to these proposals. The relationship between section 490 and these proposals should be clarified.

While we recognize the need to balance expeditious investigatory procedure with the substantive rights of the witness, the proposal appears silent about any right of appeal for a person subject to an order or whose property has been seized. Having regard to all the interests at stake, we recommend that the Bill specifically provide an appeal process in relation to the powers under Bill S-3.

Use and derivative use protection

Section 83.28(10)(a) and (b) protects the person subject to the order only against use in a subsequent "criminal proceeding", suggesting that it would not apply to extradition or immigration-related proceedings. Use protection should extend to subsequent extradition or immigration-related proceedings. This concern was addressed by the Supreme Court of Canada in *Re: Application under section 83.28 of the Criminal Code*.[11] Constitutionally mandated protections should be specifically contained within Bill S-3.

Preventative Arrest

"Preventative arrest" in proposed section 83.29 is much the same as its earlier incarnation. A peace officer could lay information before a provincial court judge if the officer suspects that either a recognizance with conditions or arrest of a person would prevent a terrorist act from being committed. In our 2001 submission, the CBA recognized checks and balances in the preventative arrest provisions, but expressed concerns that the Bill permitted arrest and detention without warrant and without requiring that officers reasonably believe that danger is imminent, in line with the current requirement under section 495(1) of the *Code*. Again, while Bill S-3 refers generally to exigent circumstances, we believe that a particularized claim of imminent danger should be required. As the proposal in Bill S-3 is unchanged from its previous formulation, our earlier comments and concerns continue to apply.[12]

We also continue to stress that Bill S-3 represents a marked departure from those powers historically available to criminal investigators in Canada. For that reason, we support the inclusion of provisions to require monitoring, data collection, reporting and a sunset clause.

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10 See, for example, section 487 governing search warrants and section 490 governing detention of things seized.

11 (2004) 184 CCC 93D 449 at 479.

12 Canadian Bar Association, Submission on Bill C-36, *Anti-terrorism Act* (Ottawa: CBA, 2001) at 36-37.

We appreciate this opportunity to provide comments on Bill S-3, and trust that our input will be helpful to the Senate Committee's deliberations on the Bill.

Sincerely,

(original signed by Gaylene Schellenberg for Greg DelBigio)

Greg Delbigio
Chair, National Criminal Justice Section