

April 27, 2010



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Dear Sirs:

RE: Bill C-17, An Act to Amend the Criminal Code (investigative hearing and recognizance with conditions)

I write to you as President of the BC Civil Liberties Association, one of Canada's oldest and foremost civil liberties groups. I am writing to you concerning Bill C-17, a proposal to revive two provisions that had expired under the *Anti-Terrorism Act*, itself passed in late 2001. The proposed legislation permits detention for three days without charge, as well as compulsion to testify before a judge in the absence of a criminal charge in what the legislation calls an "investigatory hearing."

Spokespeople for both the federal Liberal party and the federal Conservative party have spoken positively about these measures. We wish to encourage you to refrain from passing these laws without further, and serious, consideration.

Canada has a long and proud history of adherence to safeguards to promote the independence of the judiciary, *habeas corpus*, and the presumption of innocence, and to severely restrict the ability of police to detain or jail without charge. Our concern is that this legislation does little to protect Canadians, while at the same time compromising many precious and hard-won democratic safeguards.

Efficacy of proposed legislation

With respect to the efficacy of these measures, we need look no further than the comments of the former head of the Canadian Security Intelligence Service, Reid Morden, O.C.. While we have had our differences with Mr.

Morden in the past, we agree with the quotations attributed to him by the CBC, in particular where he says:

Speaking strictly of those two particular provisions, I confess I never thought that they should have been introduced in the first place and that they slipped in, in the kind of scrambling around that the government did after 9/11 [. . .] It seemed to me that it turned our judicial system somewhat on its head. I guess I'm sorry to hear that the government has decided to reintroduce them.¹

Detention without charge for 72 hours

The proposed legislative change to permit up to a three day detention without charge would cause persons in Canada to be detained for longer periods without charge than those in the United States, South Africa, New Zealand and Germany, all of whom guarantee charge or release within 48 hours, and take us out of the role of being a world leader in ensuring Canadians must be criminally charged before they are detained beyond 24 hours.² Canada is often, and properly, looked to by the world as providing a model for democratic process and a rights-based approach that still considers the well-being of the polity. We should be loathe to provide succor to the countries of the world that engage in endless detention without trial in the name of fighting terrorism by moving closer to their policies rather than continuing to pressure them to move closer to our policies.

Limits on freedom without criminal charge

We are extremely concerned with the new power set out in this Bill that permits a judge to place conditions on people who are detained, with those conditions in place for up to a year, even if that person is not facing any criminal charge and without a trial. Such restrictions on liberty, without the safeguard of a criminal charge, trial and conviction beyond a reasonable doubt is an invitation to an abuse of process, or the perception of an abuse of process, by peace officers.

Use of rights-limiting measures in unanticipated ways

We note further that these powers are often used in situations that are not anticipated by the legislature. For example, in the Supreme Court of Canada hearing *Re: Application under s. 83.28 of the Criminal Code* ("Reference"), the Court noted that the provisions that you seek to renew were used to subject an uncooperative witness "to a mid-trial examination for discovery before a judge other than the Air India trial judge."³ Few would argue that

¹ CBC News, "Ex-spy-master pans anti-terrorism bill", April 23, 2010.

² Russel Jago, *Charge or Release*, (Liberty UK, United Kingdom) November, 2007.

³ (2005) 240 D.L.R. (4th) 147 at headnote.

examination for discovery relating to an historic event was not the intended purpose of the compelled hearing under s.83.28. Rather, such hearings were created to respond to a sudden and unexpected threat of or realization of a terrorist attack. Do not doubt that the risk of unanticipated use of this legislation in circumstances that further erode citizen rights without the justification of the extremely improbable “ticking time bomb” is very likely to take place again.

Effect of the proposed measures on judicial independence

We also adopt the logic of Justices LeBel and Fish of the Supreme Court of Canada in the *Reference* where they find that investigative hearings compromise judicial independence, a cornerstone of our democracy.

Although a judge may be independent in fact and act with the utmost impartiality, judicial independence will not exist if the court of which he or she is a member is not independent of the other branches of government on an institutional level. In this case, s. 83.28 requires judges to preside over police investigations; as such investigations are the responsibility of the executive branch, this cannot but leave a reasonable, well-informed person with the impression that judges have become allies of the executive branch.

First, s. 83.28 does not give the hearing judge the necessary tools to effectively play his or her role as protector of the fundamental rights of the person being examined.

Second, if it were possible to conclude that the judge could effectively rule on certain objections during the investigation, the fluidity and vagueness of the investigation procedure would still give too much discretion to the judge. A judge’s individual perception of his or her role will necessarily affect the nature and conduct of the examination. Some judges will be more inclined than others to protect the fundamental rights of the person being examined.

Third, in enacting s. 83.28, Parliament gave increased powers to the executive branch to enable it to investigate acts of terrorism effectively. A reasonable person might for this reason conclude that Parliament intended to use the judiciary to make the prevention and suppression of such acts more effective. The judge’s duties under s. 83.28 are unlike any of the duties traditionally discharged by the judiciary. The judge takes part in and facilitates the police investigation without having real power to act as a neutral arbiter.

Finally, the public's perception that the judicial and the executive branches do not act separately in an investigation under s. 83.28 will be heightened when the investigation is held *in camera*.⁴

Threat that information gathered will be used in jurisdictions without safeguards against torture and the death penalty

We query a key omission noted by the Supreme Court of Canada in the majority reasons of the *Reference* of the guarantee that information gathered will not be used against an individual "in relation to other types of hearings such as extradition or deportation hearings, or proceedings in foreign jurisdictions," especially given the Court's conclusion that "in order to meet the s. 7 requirements, the procedural safeguards found in s. 83.28 must necessarily be extended to extradition and deportation proceedings."⁵ While at the time of the *Reference* the Court was not aware of the scope of the issues around Canadian participation in the excesses around the treatment of Mr. Maher Arar and Mr. Omar Khadr, especially in terms of information sharing, we would urge you to consider how this information obtained at such hearings could potentially be used against Canadians, or others, abroad, particularly where the death penalty or torture prohibitions respected by Canada are not observed.

The danger of a permanent state of exception to rights and freedoms

Finally, we note with regret Justice Binnie's prescient comments about the resurrection and *de facto* permanence of these provisions have been realized. We note that the Court was assured, one can only assume by the Department of Justice, that these measures were temporary during argument in the *Reference*, which may have reassured the majority about the appropriateness of the provisions. Justice Binnie wrote, as if in anticipation of Bill 17:

In these circumstances we can take limited comfort from the declared intention of the government that the *Anti-terrorist Act* is a temporary measure. While its continued existence will depend on Parliament's appreciation of developments in the "war on terrorism", such temporary measures may well slide into a state of *de facto* permanence. The role of s. 83.28 in our criminal law should be approached with that unhappy prospect firmly in mind.⁶

We urge you to refrain from passing this legislation and giving it a state of *de facto* permanence in Canada. For whatever gains we may realize in

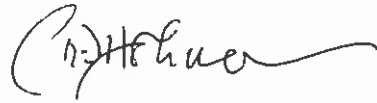
⁴ *Ibid.* at headnote.

⁵ *Ibid.* at para. 73.

⁶ *Ibid.* at para. 115.

combating terrorism, gains that are hotly contested by those who are in a position to know, we risk far more by eroding key democratic values, as well as our esteemed position as a world leader in protecting our citizens' rights. For us, citizen rights are a non-partisan issue, and we urge you to see them the same way.

Yours truly,

A handwritten signature in black ink, appearing to read "R. Holmes", with a long, sweeping flourish extending to the right.

Robert Holmes
President