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## LEGISLATIVE SUMMARY



### ***Bill S-7:***

### ***An Act to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act***

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## ***Legislative Summary of Bill S-7***

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

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# LEGISLATIVE SUMMARY OF BILL S-7: AN ACT TO AMEND THE CRIMINAL CODE, THE CANADA EVIDENCE ACT AND THE SECURITY OF INFORMATION ACT

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## 1 BACKGROUND

### 1.1 PRINCIPAL AMENDMENTS

Bill S-7, An Act to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act (short title: Combating Terrorism Act) was introduced in the Senate on 15 February 2012 by the Honourable Claude Carignan, Deputy Leader of the Government in the Senate. It is a 30-clause bill which:

- amends section 7(2) of the *Criminal Code*,<sup>1</sup> which describes acts or omissions in relation to aircraft, airports and air navigation systems that have taken place outside Canada, and which, by operation of section 7(2) and section 83.01(1)(a) of the Code, constitute “terrorist activity” (clause 2);<sup>2</sup>
- introduce new terrorism offences to Part II.1 of the Code prohibiting individuals from leaving or attempting to leave Canada for the purpose of committing certain terrorism offences (clauses 6 to 8);
- increases existing penalties under the Code for those who knowingly harbour or conceal individuals who have committed terrorism offences, in certain circumstances (clause 9);
- reinstates provisions in the Code allowing for investigative hearings and recognizance with conditions/preventive arrest in relation to terrorist activity (clauses 10 to 13);
- amends sections 37 and 38 to 38.16 of the *Canada Evidence Act* (CEA)<sup>3</sup> in accordance with the Federal Court of Canada’s decision in *Toronto Star Newspapers Ltd. v. Canada*,<sup>4</sup> and in accordance with some, but not all, of the recommendations for change to the CEA made in the March 2007 report of the House of Commons Standing Committee on Public Safety and National Security’s Subcommittee on the Review of the *Anti-terrorism Act* (House of Commons Subcommittee)<sup>5</sup> (clauses 17 to 24);
- amends the definition of “special operational information” found in the *Security of Information Act* (SOIA),<sup>6</sup> to ensure that the identity of confidential sources currently being used by the government is considered “special operational information” under that Act (clause 28); and
- increases the maximum penalty for the offence of knowingly harbouring or concealing individuals who have committed an offence under the SOIA, in certain circumstances (clause 29).

On 8 March 2012, after second reading in the Senate, Bill S-7 was referred to the Special Senate Committee on Anti-terrorism for study. Following clause-by-clause consideration, the bill was reported back to the Senate on 16 May 2012, with two amendments and with observations.<sup>7</sup> On 30 May 2012, the Senate adopted the

committee's report, and on 31 May 2012, the bill received third reading, and was referred to the House of Commons. Bill S-7 received first reading in the House of Commons on 5 June 2012.

The first Senate amendment to Bill S-7 widens the scope of new section 83.3(13) of the Code. As originally drafted, section 83.3(13) seemed to specify that only the provincial court judge who had imposed the original recognizance with conditions could vary its conditions. The amended section, as set out in clause 10 of the bill, empowers any judge of the same court to vary the conditions.

The second Senate amendment to Bill S-7 ensures that the English and French versions of section 83.32(1.1) of the Code correspond with each other. This section, found in clause 12 of the bill, deals with review by parliamentary committee of the provisions and operation of sections 83.28, 83.29 and 83.3 of the Code, the sections dealing with investigative hearings and recognizance with conditions/preventive arrest. In adopting the report of the Special Senate Committee on Anti-terrorism, the Senate amended the French version of section 83.32(1.1) to clarify that a review of these provisions and their operation by parliamentary committee is mandatory. It did this by changing the verb "*peut*" ("may") to "*doit*" to match the English "shall" and making a related grammatical change in the last line of the section.

## 1.2 BACKGROUND TO PROPOSED CHANGES

### 1.2.1 INVESTIGATIVE HEARINGS AND RECOGNIZANCE WITH CONDITIONS/PREVENTIVE ARREST

It is important to note that part of Bill S-7 (clauses 10 to 13) contains the provisions found in the former Bill C-17, as it was originally introduced in the House of Commons on 23 April 2010.<sup>8</sup> Bill C-17, in turn, contained the provisions found in the former Bill C-19,<sup>9</sup> as well as those found in Bill S-3 as amended by the Special Senate Committee on the *Anti-terrorism Act* (Special Senate Committee) in March 2008.<sup>10</sup>

Like its predecessors, Bill S-7 proposes amendments to the *Criminal Code* that reinstate anti-terrorism provisions permitting a peace officer, with the prior consent of the Attorney General of Canada and in circumstances where a terrorism offence is under investigation, to apply to a judge for an order to compel an individual believed to have information relating to a particular offence to appear at an investigative hearing to answer questions and produce relevant information. The bill also reinstates provisions allowing for preventive arrest, and the placing of individuals under recognizance with conditions in circumstances where there is reason to believe that doing so is necessary to prevent a terrorist act.

Similar provisions allowing for investigative hearings and recognizance with conditions/preventive arrest were first introduced into the Code with the coming into force of the *Anti-terrorism Act*<sup>11</sup> in December of 2001. A sunset clause contained in that Act stated that the provisions in question would cease to apply at the end of the 15<sup>th</sup> sitting day of Parliament after 31 December 2006 (1 March 2007) 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/preventive arrest. 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.

Before the provisions expired, 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 application *ex parte* (in the absence of one or more of the parties to the hearing) 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.<sup>12</sup>

Like the original provisions governing investigative hearings and recognizance with conditions/preventive arrest introduced into the Code by the *Anti-terrorism Act*, the provisions contained in Bill S-7 reintroducing these processes into the Code are subject to a sunset clause. They are also designed to expire on the 15<sup>th</sup> sitting day after the fifth anniversary of the coming into force of the sunset clause itself, unless the operation of the sections allowing for these procedures is renewed by a resolution of both houses of Parliament.

When the new provisions governing investigative hearings and recognizance with conditions/preventive arrest are in operation, the Attorney General of Canada and the Minister of Public Safety are required to issue separate annual reports containing information about how frequently the provisions have been used. However, unlike the provisions on investigative hearings and recognizance with conditions/preventive arrest enacted in 2001, where only frequency of use needed to be detailed in the annual reports, the provisions in Bill S-7 require the ministers to explain why the operation of these provisions should be extended.

### 1.2.2 OTHER CHANGES

Bill S-7 also modifies section 7(2) of the Code, which describes various acts and omissions in relation to aircraft, airports and air navigation facilities taking place outside Canada that are also considered terrorist activities under section 83.01(1)(a) of the Code. In addition, the bill introduces into the Code several new terrorism-related offences, all involving leaving Canada or attempting to leave Canada for the purpose of committing certain other terrorism offences.

The bill also increases the maximum penalty under the Code for harbouring or concealing a person who has carried out a terrorist activity, where the purpose of the decision to hide the person is to enable him or her to facilitate and carry out terrorist activity. Currently, the offence of harbouring and concealing carries a maximum penalty of 10 years' imprisonment. Bill S-7 increases that penalty to 14 years in

circumstances where the person being hidden has committed a terrorism offence punishable upon conviction by up to life imprisonment.

In addition, Bill S-7 amends certain provisions found in sections 37 and 38 to 38.16 of the CEA relating to the non-disclosure of information in court or administrative proceedings. Some of these changes appear designed to respond to the decision of the Federal Court of Canada in *Toronto Star Newspapers Ltd. v. Canada*. In that decision, Justice Lutfy, then Chief Justice of the Federal Court, concluded that in circumstances where courts are holding a non-disclosure hearing under section 38.01 of the CEA and the following sections to determine whether specified information relates to or is potentially injurious to international relations, national defence or national security and therefore must be kept secret in separate court or administrative proceedings, the presumption of confidentiality applicable at the non-disclosure hearing should be restricted to situations where information is presented *ex parte*. Other changes to sections 37 and 38 to 38.16 of the CEA respond to some, but not all, of the recommendations made in the March 2007 report of the House of Commons Subcommittee.

As indicated previously, Bill S-7 also slightly alters the definition of “special operational information” found in the SOIA in order to clarify that the identities of informants currently used by the Government of Canada, in addition to the identities of those who have been used in the past or may be used in the future, are considered “special operational information” under that Act.

Finally, the bill increases from 10 years to 14 years the maximum penalty that can be imposed for the offence of harbouring or concealing an individual who has committed a SOIA offence, where the individual being hidden has committed an offence under the SOIA punishable upon conviction by up to life imprisonment.

Because the CEA and the SOIA appear to respond to recommendations made by the House of Commons Subcommittee and the Special Senate Committee during their respective reviews of the *Anti-terrorism Act*, it is helpful to understand both the context of the review these committees undertook and the relevant recommendations they made.

When the *Anti-terrorism Act* came into force in December 2001, it contained a review clause. Section 145 of that Act stated:

145. (1) Within three years after this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

(2) The committee referred to in section (1) shall, within a year after a review is undertaken pursuant to that section or within such further time as may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.



Two special committees were charged with this review. In the House of Commons, the 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 Standing Committee on Public Safety and National Security's 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/preventive arrest, and making 10 recommendations for change to these provisions, some of them technical and some of them more substantive.<sup>13</sup>

The subcommittee released its final report on the review of the remaining provisions of the *Anti-terrorism Act* in March 2007. The report contained 60 recommendations for changes to various provisions amended or introduced by the *Anti-terrorism Act*. Some of the recommendations were related to the terrorism offences introduced into the Code by the *Anti-terrorism Act*, some sought to change various aspects of sections 37 and 38 to 38.16 of the CEA, and some sought to change certain provisions in the SOIA. As in the subcommittee's October 2006 report, some of the recommendations were technical, while others were more substantive.

In the Senate, a Special Committee on the *Anti-terrorism Act* was also convened in December 2004 to undertake a comprehensive review of the provisions and operation of the *Anti-terrorism Act*. Like the House of Commons Subcommittee, the Special Senate 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, and others of whom felt it took necessary steps to prevent and deter terrorism.<sup>14</sup> In February 2007, the Special Senate Committee released its report on the review of the *Anti-terrorism Act*.<sup>15</sup> The report contained 40 recommendations. Two of them recommended changes to the investigative hearing and recognizance with conditions/preventive arrest provisions in the Code, and the remaining 38 were, among other topics, recommendations for changes to certain terrorism offences in the Code, to certain provisions in sections 38 to 38.16 of the CEA, and to certain provisions of the SOIA. The recommendations of both parliamentary committees will be discussed further in the sections below.

## 2 DESCRIPTION AND ANALYSIS

### 2.1 AMENDMENTS TO THE *CRIMINAL CODE*

#### 2.1.1 CHANGES TO SECTION 7(2) OF THE CODE (CLAUSE 2)

Clause 2 of Bill S-7 introduces slight changes to section 7(2) of the Code, which describes acts or omissions committed in relation to aircraft, airport, and air navigation facilities, in circumstances where these acts take place outside Canada. Section 7(2) allows Canadian courts to take jurisdiction over individuals who have committed the acts or omissions described in section 7(2), despite the fact that the events took place outside Canada, as long as the person who allegedly committed them is present in Canada.

Because section 7(2) of the Code is incorporated by reference into the definition of “terrorist activity” found at section 83.01(1) (a) of the Code, the acts or omissions described in section 7(2) of the Code, as well as threats, counselling, or attempts to commit them, also constitute “terrorist activity.” Furthermore, since the various terrorism offences found at Part II.1 of the Code all incorporate either the definition “terrorist activity” or “terrorist group”<sup>16</sup> found at section 83.01(1) of the Code by reference, changes to section 7(2) of the Code also slightly extend the nature of the acts or omissions that constitute terrorism offences under the Code. Section 7(2) of the Code describes the offences contained in the *Convention for the Suppression of Unlawful Seizure of Aircraft*<sup>17</sup> and the *Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation*,<sup>18</sup> both of which Canada has ratified. When such offences are committed in Canada – and, in the case of those involving aircraft, the aircraft is registered in Canada – they fall under the ambit of sections 76 and 77 of the Code, which create the offences of hijacking and of endangering the safety of an aircraft or safety at an airport. These are both indictable offences, carrying a maximum sentence, upon conviction, of life imprisonment.

Section 7(2) is designed to make the same acts or omissions, if committed outside Canada, offences under sections 76 and 77 of the Code as well. It also gives Canadian courts the jurisdiction to try those who have committed such acts or omissions as if they were committed in Canada, provided those who have committed them are found in Canada.

An inconsistency appears to exist between the acts prohibited by sections 7(2) and 77 of the Code. Section 77(g) – endangering the safety of an aircraft in flight by communicating false information – is not referenced in section 7(2). This inconsistency makes a section 77(g) offence prosecutable in Canada if committed in Canada, but not prosecutable in Canada if committed outside Canada, even if, in the latter case, the person who communicated the false information is found in Canada.

Changes introduced by clause 2 of the bill ensure that the offences described in all parts of section 77 of the Code are prosecutable in Canada, regardless of whether they were committed inside or outside Canada, as long as the alleged offender is found in Canada. The changes also ensure that the acts of damage to aircraft and damage to airports and air navigation facilities are more appropriately grouped together for the purposes of section 7(2) of the Code.

In addition, as stated above, because the various terrorism offences found in Part II.1 of the Code all incorporate either the definition “terrorist activity” or “terrorist group”<sup>19</sup> found in section 83.01(1) of the Code, the acts or omissions described in section 7(2) of the Code, as well as threats, counselling, or attempts to commit such acts or omissions, also constitute “terrorist activity.”

For example, section 83.19 of the Code makes it an offence to knowingly facilitate a terrorist activity. Adding section 77(g) to section 7(2) ensures that anyone who knowingly facilitates the communication of false information (e.g., by knowingly lending someone his or her cellphone, outside Canada, to make an emergency call about a false bomb threat in relation to an aircraft) could, if found in Canada after the event, find himself or herself charged with facilitating terrorist activity under section 83.19 of the Code, an indictable offence punishable upon conviction by up to

14 years' imprisonment. Accordingly, the changes made to section 7(2) of the Code by clause 2 of Bill S-7 have the effect of extending the types of acts that may constitute terrorist offences under the Code.

## 2.1.2 LEAVING OR ATTEMPTING TO LEAVE CANADA TO COMMIT OTHER TERRORISM OFFENCES (CLAUSES 6 TO 8)

In addition to the terrorism offences found in sections 83.02 to 83.04, 83.08 to 83.12 and 83.81 to 83.231 of the Code, Clauses 6 to 8 of Bill S-7 add four new terrorism offences to the Code, all of which have to do with leaving or attempting to leave Canada to commit several of the existing terrorism offences in the Code.

Clause 6 adds section 83.181 to the Code. It prohibits individuals from leaving or attempting to leave Canada, or boarding or attempting to board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside of Canada that is equivalent to the participation offence described in section 83.18 of the Code. Section 83.181 is an indictable offence punishable upon conviction by up to 10 years' imprisonment.

Clause 7 adds section 83.191 to the Code. This section prohibits leaving or attempting to leave Canada, or boarding or attempting to board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside of Canada that is equivalent to the facilitation offence described in section 83.19 of the Code. Section 83.191 is an indictable offence punishable upon conviction by up to 14 years' imprisonment.

Clause 8 adds sections 83.201 and 83.202 to the Code. Section 83.201 prohibits leaving or attempting to leave Canada, or boarding or attempting to board a conveyance, to commit an act or omission outside Canada that would be an indictable offence under federal law if committed in Canada for the benefit of, at the direction of, or in association with a terrorist group. Section 83.202 prohibits leaving or attempting to leave Canada, or boarding or attempting to board a conveyance, to commit an act or omission outside of Canada, that, if committed in Canada, would be an offence under federal law and would constitute a terrorist activity. The offences described in sections 83.201 and 83.202 are indictable offences and punishable upon conviction by up to 14 years' imprisonment.

While similar to many of the current terrorism offences in the Code, these new offences appear designed to allow for arrests and charges at the early planning stage of terrorist activity outside Canada, before a person even leaves Canada to commit terrorist acts. The preventive purpose behind the decision to introduce these new offences to the Code was underscored by remarks made by the sponsor of Bill S-7, Senator Linda Frum, during the bill's second reading in the Senate, when she stated:

[T]he horrific nature of terrorism requires a proactive and preventive approach. These new offences will allow law enforcement to continue to intervene at an early stage in the planning process to prevent terrorist acts from being carried out. The new offences would send a strong deterrent message, would potentially assist with threat mitigation and would make available a higher maximum penalty than would otherwise apply.<sup>20</sup>

### 2.1.3 EXTENSION OF SPECIALIZED ELECTRONIC SURVEILLANCE AND WARRANT PROVISIONS (CLAUSES 14 TO 16)

The *Anti-terrorism Act* introduced amendments into the Code which made it easier to use electronic surveillance to intercept the communications of those for whom there are reasonable grounds to believe that they have committed or will commit terrorism offences. The amendments also made it easier to collect DNA from them.

With respect to electronic surveillance, the *Anti-terrorism Act* amended the Code's wiretap provisions so that the investigative powers introduced in 1997 to make it easier to use electronic surveillance against criminal organizations could also be used to investigate the terrorism offences described above. The changes had the effect of:

- eliminating the need to demonstrate that electronic surveillance is a last resort in the investigation of terrorism offences, which is an exception to the general rule applicable in other circumstances;
- extending the period of validity of a wiretap authorization from 60 days to up to one year when police are investigating a terrorism offence; and
- permitting a delay of up to three years in notifying a target after surveillance has taken place, as opposed to the 90-day period that is applicable for other criminal offences.

The *Anti-terrorism Act* also amended the DNA warrant and collection scheme found in the Code so as to make the terrorism offences described in earlier sections of this legislative summary "primary designated offences" for the purpose of the collection scheme. In other words, the Code provisions allowing peace officers to apply for, and for judges to issue, a DNA warrant for the seizure of bodily substances during criminal investigations of certain offences, and those making collection of bodily DNA substances from those convicted of certain offences mandatory, were extended to apply to those being investigated in relation to as well as those convicted of terrorism offences described above.

Clause 14 of Bill S-7 adds the four new offences found in clauses 6 to 8 of the bill to section 183 of the Code. Section 183 defines the terms used in Part VI of the Code, which, among other things, gives peace officers the ability to apply to judges for warrants to intercept private communications of individuals when there are reasonable grounds to believe they have committed or will commit certain offences. By adding references to sections 83.181, 83.191, 83.201, and 83.202 of the Code to section 183, clause 14 ensures that wiretap provisions in the Code applicable to criminal organization and other terrorism offences found in the Code also apply for these four new terrorism offences.

Clause 16 of Bill S-7 amends section 487.04(a.1) of the Code, making the four new terrorism offences added in clauses 6 to 8 "primary designated offences" for DNA collection. This allows peace officers to apply for, and judges to issue, DNA warrants for the seizure of bodily substances when they are investigating individuals for these offences. Clause 16 also makes it mandatory to collect DNA substances from those

convicted of these new offences, as is the case for those convicted of the other terrorism offences contained in the Code.

Finally, clause 15 of Bill S-7 amends section 462.48(2)(d) of the Code, which allows the Attorney General of Canada to apply *ex parte* to a judge for an order that the Canada Revenue Agency make the income tax information of the person concerned available to a peace officer for examination in the following circumstances:

- there are reasonable grounds to believe that the person concerned has committed or benefitted from certain trafficking or criminal organization offences; and
- the income tax information is likely to be of substantial value in the investigation of these offences.

The amendments introduced by clause 15 allow the Attorney General to apply for, and judges to issue, such orders during the investigation of all terrorism offences found in the Code, including those introduced by clauses 6 to 8 of Bill S-7.

#### 2.1.4 HARBOURING AND CONCEALING SOMEONE WHO HAS COMMITTED TERRORISM OFFENCES (CLAUSE 9)

Bill S-7 increases the sentence for harbouring and concealing someone who has committed a terrorism offence in certain circumstances.

The amendments made by clause 9 of the bill increase the maximum penalty for harbouring or concealing a person who has carried out a terrorist activity from 10 years to 14 years in circumstances where the person being hidden has committed a terrorism offence punishable upon conviction by life imprisonment. In all other cases (i.e., where a person harbours or conceals a person who has carried out a terrorist offence punishable by a lesser sentence, or harbours a person who is likely to carry out a terrorist activity), the person who harbours or conceals the individual in question, would, upon conviction, be punishable by up to 10 years' imprisonment. In every case, however, in order to be guilty of the offence of harbouring and concealing, one must harbour or conceal the individual in question *for the purpose of* enabling him or her to facilitate or carry out a terrorist activity.

Clause 9 also amends section 83.23 of the code to create a distinction between situations where a person harbours or conceals someone whom they know has carried out a terrorist activity and situations where a person harbours or conceals someone whom they know is likely to carry out a terrorist activity (the House of Commons Subcommittee recommended making such a distinction in its March 2007 report). The changes make section 83.23 of the Code consistent with the accessory-after-the-fact provision in section 23 of the Code, when read in conjunction with section 463(a). These latter provisions prohibit persons from aiding others who have committed offences that carry a maximum punishment of life imprisonment. They also specify that the accessory can, upon conviction, receive a maximum sentence of up to 14 years' imprisonment.

#### 2.1.4.1 RECOMMENDATIONS NOT ACTED UPON: HARBOURING AND CONCEALING

The Special Senate Committee made no specific recommendations for change to the harbouring or concealing offence found in section 83.23 of the Code. However, in its March 2007 report, the House of Commons Subcommittee recommended removing the “purpose” requirement from section 83.23 in circumstances where one is harbouring or concealing someone who has already committed a terrorism offence. It was the subcommittee’s view that purpose wasn’t relevant when one decides to hide someone who had committed an offence in the past, but was relevant when someone who has never committed such an offence is likely to commit a future offence. In its report, the subcommittee made reference to a similar offence found in section 54 of the Code (harbouring or concealing a deserter from the armed forces), noting that this offence did not contain a “purpose” clause. The subcommittee’s recommendation on this point was not acted upon in Bill S-7.

#### 2.1.5 CONCORDANCE AND OTHER MINOR WORDING CHANGES (CLAUSES 3 AND 4)

Bill S-7 also enacts some minor wording changes to provisions found in Part II.1 of the Code. For example, clause 3(1) adds the words “ou de faciliter” to section 83.08(1)(b) and the words “des” and “tout autre service connexe” to section 83.08(1)(c) of the French version of the Code. These changes make the French wording equivalent to that found in the English version of these sections. As described above, section 83.08 of the Code makes it an offence to knowingly deal in property owned or controlled by a terrorist group, knowingly enter into or facilitate any transaction regarding such property, or knowingly provide financial or other related services for such property.

Clause 3(2) of Bill S-7 changes the wording in section 83.08(2) of the English version of the Code, replacing the words “the person” and “themselves” with “they” and “themselves.” This wording change is in accordance with a recommendation made by the House of Commons Subcommittee in its March 2007 report to reflect the fact that “themselves” is not a word.

Clause 4 amends section 83.1(1) of the Code, while clause 5 repeals section 83.12(2). These amendments are in accordance with a House of Commons Subcommittee recommendation to replace the word “and” in section 83.1(1) with “or.” The aim was to clarify that one must report to the Commissioner of the Royal Canadian Mounted Police (RCMP) or the Director of the Canadian Security Intelligence Service (CSIS) only property in one’s possession and control that one knows is owned or controlled by or on behalf of a terrorist group, and transactions or proposed transactions for that property.

The subcommittee also recommended the subsequent repeal of section 83.12(2). Currently, sections 83.1(1) and 83.12(2) of the Code, when read together, require individuals to advise both the RCMP Commissioner and the CSIS Director about such property and transactions, but indicate that it is not an offence if a person does not advise both. The subcommittee found these provisions confusing, and recommended the above changes to simplify matters.

In addition, clause 4 replaces the word “forthwith,” found in section 83.1(1), with “without delay” in the English version of the provision, to accord with “sans délai” in the French version.

## 2.1.6 INVESTIGATIVE HEARINGS (CLAUSE 10)

Clause 10 of Bill S-7 re-enacts sections 83.28 to 83.3 of the Code with minor changes to the wording and intent of the earlier provisions derived from the *Anti-terrorism Act*. As indicated previously, as originally introduced in Bill S-7, these provisions were identical to those found in the first reading version of Bill C-17, introduced during the 3<sup>rd</sup> Session of the 40<sup>th</sup> Parliament.<sup>21</sup>

Section 83.28 deals with bringing individuals who may have information about a terrorism offence before a judge for an investigative hearing. The objective is not to prosecute an individual for a *Criminal Code* offence, but to gather information. Under the provision, a peace officer, with the prior consent of the Attorney General, can apply to a superior court or a provincial court judge for an order to gather 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. The re-enacted version places more emphasis than did the original version on the need to have made reasonable attempts to obtain such information by other means, and it applies to past terrorism offences, as well as to potential future terrorism offences provided for in the earlier version. The new version also emphasizes 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 recommendations of the House of Commons Subcommittee.

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, and may only 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 called to 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 provided by an individual during an investigative hearing cannot be used against him or her in a subsequent proceeding except in relation to prosecuting him or her for perjury or for providing subsequent contradictory evidence in a later proceeding.

Section 83.29, which remains substantially similar to the earlier provisions, states that a person who evades service of the order, is about to abscond, or fails to attend an examination may be subject to arrest with a warrant. However, Bill S-7 adds that section 707 of the Code, which sets out maximum periods of detention for witnesses, also applies to individuals detained for a hearing under section 83.29.

#### 2.1.6.1 RECOMMENDATIONS NOT ACTED UPON: INVESTIGATIVE HEARINGS

Although the re-enacted provisions take into account one recommendation made by the House of Commons Subcommittee, as mentioned above, and would reintroduce into the Code investigative hearings in relation to terrorism offences, a legislative tool that both the subcommittee and the Special Senate Committee wanted to preserve in the Code, they do not address other recommendations made by the subcommittee.

For example, 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 make it explicitly clear that anything done under sections 83.28 and 83.29 is a “proceeding” under the Code. Finally, the subcommittee had recommended that sections 83.28(4)(a)(ii) and 83.28(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.

#### 2.1.7 RECOGNIZANCE WITH CONDITIONS/PREVENTIVE ARREST (CLAUSE 10)

Clause 10 of Bill S-7 also re-enacts section 83.3 of the Code, dealing with recognizance with conditions and preventive arrest to prevent a potential terrorist attack, with substantially similar provisions. 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. The judge may order the person to appear before any provincial court judge, whereas the original version of this section stated that the judge could order the person to appear before him or her only; 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 either before laying the information or before the person has had a chance to appear before a judge.

The person who has been detained must be brought before a provincial court judge within 24 hours, or as soon as is feasible (the original wording referred to “as soon as possible”). At that time, a show cause hearing must be held to determine whether to release the person or to detain him or her for a further period. This hearing can be adjourned for a further 48 hours only. The Special Senate Committee amended this provision in 2003, during its review of Bill S-3, in order to narrow the wording setting out 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* in 2002.<sup>22</sup> 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.<sup>23</sup>

If the judge determines that there is no need for the person to enter into a recognizance, the person must be released. If the judge finds that the person should enter into a recognizance, the person is bound to keep the peace and respect other conditions for up to 12 months. The conditions of the recognizance may also be varied by the judge who issued the original order, or, in accordance with an amendment made to Bill S-7 by the Senate, by any other judge of the same court. If the person refuses to enter into a recognizance, the judge can order that person to be imprisoned for up to 12 months.

#### 2.1.7.1 RECOMMENDATIONS NOT ACTED UPON: RECOGNIZANCE WITH CONDITIONS/PREVENTIVE ARREST

By reintroducing into the Code provisions regarding recognizance with conditions/preventive arrest, Bill S-7 takes into account the House of Commons Subcommittee and the Special Senate Committee views that these processes should remain available to law enforcement officials and the courts for the purpose of preventing terrorism offences. However, the revisions to these provisions do not incorporate some of the technical recommendations made by the House of Commons Subcommittee regarding recognizance with conditions/preventive arrest, including the replacement of the term “may” by “shall” in section 83.3(3) (as in section 83.28(5)) – because the judge effectively has no discretion in this area – and the replacement of “pursuant to section (3)” with “this section” in section 83.3(8).

#### 2.1.8 ANNUAL REPORTS RESPECTING INVESTIGATIVE HEARINGS AND RECOGNIZANCE WITH CONDITIONS/PREVENTIVE ARREST (CLAUSE 11)

As recommended by the Special Senate Committee in its February 2007 report on the *Anti-terrorism Act*, clause 11 of Bill S-7 adds new subsections to section 83.31 of the Code. They state that the separate annual reports on sections 83.28, 83.29 and 83.3 by the Attorney General of Canada 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.

#### 2.1.9 SUNSET PROVISION RESPECTING INVESTIGATIVE HEARINGS AND RECOGNIZANCE WITH CONDITIONS/PREVENTIVE ARREST (CLAUSE 12)

Clause 12 of Bill S-7 replaces sections 83.32(1), (2) and (4) of the Code. Section 83.32 contains the sunset clause related to investigative hearings and recognizance with conditions. Section 83.32(1) states that sections 83.28 to 83.3 will cease to have effect at the end of the 15<sup>th</sup> sitting day of Parliament after the fifth anniversary of the coming into force of Bill S-7, unless the operation of those sections is extended by a resolution of both houses of Parliament. Section 83.32(4) allows the provisions to be extended again later on. The terminology in these sections 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 12 and 13.

Section 83.32(1.1) of the Code, as amended, and section 83.32(1.2) of the Code make it clear that a comprehensive review of sections 83.28 to 83.3 and their operation shall be undertaken by a committee of the Senate or a committee of the House of Commons or a joint committee of both houses of Parliament, and that such committee(s) shall then report back to Parliament; the report is to recommend whether to extend the operation of those sections. This amendment, made by the Special Senate Committee in its 2008 review of Bill S-3, 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.

## 2.2 TRANSITIONAL PROVISIONS RESPECTING INVESTIGATIVE HEARINGS AND RECOGNIZANCE WITH CONDITIONS/PREVENTIVE ARREST (CLAUSE 13)

Clause 13 replaces the phrase “cease to apply” with “cease to have effect” in the transitional provisions. With this change, 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 section 83.28(2) application is already under way. A person in custody under section 83.3 shall also be released, except that sections 83.3(7) to (14) continue to apply to a person taken before a judge under section 83.3(6) before section 83.3 ceased to exist.

## 2.3 AMENDMENTS TO THE *CANADA EVIDENCE ACT*

### 2.3.1 SECTIONS 37 AND 38 TO 38.16 OF THE CEA (CLAUSES 17 TO 24)

Clauses 17 to 24 introduce various amendments to sections 37 and 38 to 38.16 of the *Canada Evidence Act* relating to the non-disclosure of information in court or administrative proceedings, either on the grounds of a specified public interest, or because the information relates to or would be potentially injurious to international relations, national defence or national security.

Some of the changes introduced respond to the decision of the Federal Court of Canada in *Toronto Star Newspapers Ltd. v. Canada*. Justice Lufy concluded in this case that where courts hold a disclosure hearing under section 38.01 to 38.16 of the CEA (more commonly referred to in the case law as “a section 38 application” or as “a section 38 non-disclosure proceeding”) to determine whether specified information relates to or is potentially injurious to international relations, national defence or national security and therefore must be kept confidential in separate court or administrative proceedings, the presumption of confidentiality should be restricted to situations where information is presented *ex parte*. Other amendments made to the CEA respond to some, but not all, of the recommendations made by the House of Commons Subcommittee in relation to these provisions.

### 2.3.1.1 SECTION 37(7) OF THE CEA (CLAUSE 17)

Sections 37 to 37.3 of the CEA, as amended by the *Anti-terrorism Act*, allow the Government of Canada to certify orally or in writing its objection to the disclosure of information (related to a specified public interest) to a court, person or body with jurisdiction to compel its production. The superior court hearing the objection to the production of information or, in other cases, the Federal Court, determines whether the objection should be upheld in whole, in part or not at all. These provisions set out rights of appeal to the provincial court of appeal or the Federal Court of Appeal, and to the Supreme Court of Canada.

As it currently reads, section 37(7) of the CEA specifies that

[a]n order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order, or a judgment of an appeal court that confirms the order, has expired, or no further appeal from a judgment that confirms the order is available.

In its March 2007 report following its review of the *Anti-terrorism Act*, the House of Commons Subcommittee indicated that it understood that the intent behind this provision was to ensure that, in circumstances where the Government of Canada has certified its objection to disclosure on the grounds of a specified public interest, disclosure authorized by an order will not occur until all appeals have been dealt with or all time periods for appeal have expired. The subcommittee recommended rewording this section to clarify that this was, in fact, the intent of this provision. Clause 17 of Bill S-7 largely adopts the suggested language contained in the subcommittee's recommendation, and clarifies that the information cannot be disclosed until all time periods for appealing a court order authorizing disclosure of the information have expired, and no further appeals are possible.

### 2.3.1.2 SECTIONS 38 TO 38.16 OF THE CEA AS THEY CURRENTLY OPERATE

In order to understand the changes Bill S-7 will introduce to sections 38 to 38.16 of the CEA, it is necessary to know how these sections currently operate.

Sections 38 to 38.12 of the Act stipulate that any participant in a proceeding who is required, or expects to be required, to disclose sensitive or potentially injurious information must advise the Attorney General of Canada of the possibility of such a disclosure. In cases involving proceedings under Part III of the *National Defence Act*<sup>24</sup> (military summary trials or courts martial), the minister of National Defence must also be notified in writing (section 38.01(5)).

The type of information that should be considered sensitive or potentially injurious is defined as follows in section 38 of the CEA:

"Sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.

“Potentially injurious information” means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security.

Once the Attorney General of Canada has been notified by a participant in a proceeding or an official that sensitive or potentially injurious information may be disclosed in a proceeding, no person may disclose that information. Persons are also prohibited from disclosing that such notice has been given to the Attorney General, that an application was made to the Federal Court for a review of the Attorney General’s decision not to disclose information, or that an appeal of the Federal Court judge’s decision has been launched (section 38.02(1)).

Following receipt of notice by a participant, official or entity, the Attorney General of Canada may, at any time, release some or all of the information, and may release it subject to conditions (section 38.03). If the proceeding in question is one that takes place pursuant to Part III of the *National Defence Act* (military summary trials or courts martial), the Attorney General may only authorize disclosure with the consent of the minister of National Defence (section 38.03(2)). If the proceeding is a prosecution, such as a criminal prosecution, that was not instituted by the Attorney General of Canada but by another entity, such as the Attorney General of a province or territory, the Attorney General of Canada may file a fiat on the prosecutor handling the case, in effect taking over the case from him or her, and then make the disclosure decisions referred to above. The only prosecutions involving sensitive or potentially injurious information that the Attorney General of Canada cannot take over by fiat are military proceedings under Part III of the *National Defence Act* (section 38.15). The effect of serving the fiat is to establish the full authority of the Attorney General of Canada over the conduct of the prosecution or related process. There is no provision regarding judicial review or publication of such a fiat.

The Attorney General of Canada may also enter into a disclosure agreement with a participant, official or entity who notified him or her in the first place, under which the Attorney General and the person, official and entity may concur on which information to disclose and which information not to disclose (section 38.031(1)). In cases where a disclosure agreement has been entered into, the person, official or entity may not apply to the Federal Court for an order to review whether more information should be released or held back (section 38.031(2)).

If the Attorney General of Canada does not release some or all of the information, and has not entered into a disclosure agreement with the participant, official or entity who holds the information, then the Attorney General must, if the person who gave notice is a witness in a proceeding, and may, in any other case, apply to the Federal Court for an order respecting this information. In a case where the Attorney General has decided not to disclose some or all of the information, a person wishing to cause the information to be disclosed may also apply to the Federal Court for an order respecting the information (section 38.04).

After hearing representations from both the Attorney General of Canada and, in courts martial and military summary trials, the minister of National Defence, the Federal Court judge may decide to hold a hearing on this matter, and order the Attorney General to notify all relevant parties. The Federal Court judge may give any person the opportunity to make representations during this hearing (section 38.04(5)).

Following the hearing, the Federal Court judge will decide whether the information at issue can be released in whole, in part, or not at all, or whether a summary of the information should be issued as an alternative. The Federal Court judge cannot order the release of the information if he or she determines that doing so would be injurious to international relations, national defence or national security, and that the public interest in non-disclosure outweighs in importance the public interest in disclosure. A party who is dissatisfied with the decision made by the Federal Court judge may appeal to the Federal Court of Appeal and, if leave is granted, to the Supreme Court of Canada (section 38.06 to section 38.1). Both the hearing before the Federal Court judge and any subsequent appeal must be heard in camera and, at the Attorney General's request, shall be heard *ex parte*, without any other party but the Minister and/or his representatives and the judge present (section 38.11).

Sections 38.13 to 38.131 deal with the power of the Attorney General of Canada to issue a non-disclosure certificate prohibiting the disclosure of information in a proceeding when a Federal Court judge has decided to order the release of some or all of the information the Attorney General is seeking to protect. The Attorney General may issue such a certificate solely to protect information obtained in confidence from, or in relation to, a foreign entity, or to protect national defence or national security. The certificate must be published in the *Canada Gazette*. It is in force for 15 years, unless it is reissued (section 38.13).

Subsection 38.13(5) of the CEA states that, notwithstanding any other provision of the Act, if the Attorney General of Canada issues a non-disclosure certificate, disclosure shall be prohibited. However, section 38.131 of the CEA allows a party to the proceeding to apply to the Federal Court of Appeal for review of the Attorney General's decision to issue a non-disclosure certificate. The application will be heard by a single judge of the Federal Court of Appeal who is empowered to confirm, vary or cancel the certificate. There is no appeal from the judge's decision.

Section 38.14 of the CEA states that, in the case of a criminal proceeding, a judge may make any order that he or she considers appropriate in the circumstances to protect the accused's right to a fair trial, other than ordering the disclosure of information that is subject to an Attorney General's non-disclosure certificate or to a court order prohibiting the disclosure of the information. In other words, in such a case, section 38.14 empowers the trial judge to stay proceedings against the accused person, draw an adverse inference against a certain party in relation to the undisclosed information, dismiss certain counts in the indictment or take other measures to preserve the accused's right to a fair trial. It is important to note that courts have similar powers in criminal proceedings when objections to disclosure are made by federal ministers under section 37 of the CEA, on the grounds of a specified public interest (section 37.3).

### 2.3.1.3 SIGNIFICANT FEDERAL COURT DECISIONS REGARDING SECTIONS 38 TO 38.16 OF THE CEA

As the provisions found at sections 38 to 38.16 of the CEA began to be used and the Federal Court started holding non-disclosure hearings under these new sections of the CEA, it became clear that, in some instances, the confidentiality requirements could lead to what were described as absurd results and/or did not respect the open court principle.

For example, in *Ottawa Citizen Group v. Canada*,<sup>25</sup> the Ontario Court of Justice had decided, under section 487.3 of the *Criminal Code*, to seal seven search warrants issued against Abdullah Almaki, partially on the basis that the Attorney General of Canada had been notified, pursuant to section 38.01 of the CEA, that some of the information contained in the search warrants was “sensitive” or “potentially injurious information.” Following this decision, the *Ottawa Citizen* made application in Federal Court for disclosure under section 38.04 of the CEA at the same time that it made an application before the Ontario Court of Justice to vary its order sealing the search warrants.

Justice Lutfy of the Federal Court ruled that the *Ottawa Citizen*’s section 38 application had been made prematurely. However, in so doing, he made some general remarks about certain provisions found in sections 38 to 38.16 of the CEA. In a section of his judgment entitled “*Post scriptum*: too much secrecy???” the then Chief Justice noted that despite the fact that anyone attending the hearings in the Ontario Court of Justice, where the decision to seal the search warrants was made, would have known that an application under section 38 of the CEA had been filed with the Federal Court by the Attorney General of Canada (that information was made public in the Ontario court hearing), the Federal Court was prohibited, by section 38.02(1)(c) of the CEA, from publicly acknowledging that such an application had been made, a situation that could lead to “unintended, even absurd consequences.”<sup>26</sup> He further noted that “[i]t [was] unlikely that Parliament could have intended that the drafting of section 38 would result in such a consequence.”<sup>27</sup>

Justice Lutfy also identified problems with certain other provisions found in sections 38 to 38.16 of the CEA, stating:

In the same vein, once the applicants had been authorized to make public the existence of this proceeding and the notice of application, the Federal Court was placed in the invidious position of maintaining confidentiality with respect to its records where one of them, the notice of application, could be in the public domain. This is because section 38.12(2) requires that the court records relating to the hearing be confidential. It is the breadth of the provision that appears to cause this difficulty ...<sup>28</sup>

Similarly, in this proceeding, I twice raised with counsel the necessity of the case management conferences having to be conducted with no access to the public. The hearings on the merits of this case have also been in private. Again, it is section 38.11(1) which requires that section 38 hearings shall be conducted in private. Even where the representatives of the Attorney General of Canada, the parties seeking access to the secret information and their counsel were all present, the hearings were secret. During these sessions, no secret information was disclosed. The need to exclude the public from those sessions was not obvious. The need for privacy during all

sessions of a proceeding involving secret information has been successfully challenged in the context of the *Privacy Act*, R.S.C. 1985, c. P-21: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at sections 52–60. In this proceeding, there was no constitutional challenge with respect to section 38.11(1).

The Supreme Court of Canada, in its recent consideration of another provision of the *Anti-terrorism Act*, has reiterated the importance of the public's access to court proceedings. The open court principle is a cornerstone of our democracy and "... is not lightly to be interfered with": *Vancouver Sun (Re)*, 2004 SCC 43 at sections 23–27. Section 38 is the antithesis to this fundamental principle.

These *post scriptum* comments concerning the Court's experience in this and other section 38 proceedings may be relevant to those involved in the review of the anti-terrorism legislation. They may wish to consider whether certain provisions in section 38 unnecessarily fetter the open court principle.<sup>29</sup>

Despite the above remarks, because he determined that the application for disclosure in this particular case had been made prematurely, Justice Lutfy did not make any rulings with respect to the constitutionality of the provisions he highlighted in this decision.

The Federal Court had another opportunity to consider the constitutionality of some of the provisions found in sections 38 to 38.16 of the CEA in a subsequent case, *Toronto Star Newspapers Ltd. v. Canada*. This case arose as a result of a lawsuit launched by an individual, Kassim Mohamed, against the Attorney General of Canada, alleging that the RCMP and CSIS had disclosed personal information about him to foreign security agencies. During the examination for discovery related to the lawsuit, the Attorney General of Canada was notified that sensitive or potentially injurious information was about to be disclosed. Accordingly, the Attorney General commenced an application in Federal Court under section 38 of the CEA, asking the court to determine whether the information in question could, in fact, be disclosed. The Attorney General allowed disclosure of the fact that a section 38 application had been made, pursuant to section 38.03(1) of the CEA, which was how the *Toronto Star* learned that the Federal Court was hearing this application. However, the Attorney General did not authorize the release of any further information regarding the proceedings. Subsequently, the *Toronto Star* challenged the constitutionality of sections 38.11(1), 38.04(4) and 38.12 (2) of the CEA.

Section 38.11(1) requires all section 38 application hearings to be held in private; section 38.04(4) requires that confidentiality be maintained for all applications made under section 38; and section 38.12(2) requires that confidentiality be maintained for all court records relating to a section 38 proceeding. The *Toronto Star* argued that the combined effect of these provisions was to deny it access to the Attorney General's section 38 application itself, as well as to all court records associated with the proceedings and that, as such, these provisions violated the open court principle and the right to freedom of expression guaranteed by section 2(b) of the Charter.

Like the *Ottawa Citizen* case mentioned above, this case was heard by Justice Lutfy. After reviewing these provisions, as well as the relevant case law, Justice Lutfy

determined that the provisions in question did, indeed, violate section 2(b) of the Charter, and could not be saved under section 1 because they did not impair the rights of the applicant as minimally as possible. Accordingly, he read down sections 38.11(1), 38.04(4) and 38.12(2), so that the presumption of confidentiality only applied to the *ex parte* representations allowed by each of these sections. He concluded that the court, rather than the Attorney General of Canada, should in most circumstances determine what information can be made public before a final decision by the Federal Court on non-disclosure proceedings. He also concluded that the information should presumptively be made public, unless a court orders otherwise, or unless the representations, whether oral or documentary, are made in the absence of one or more of the parties to the hearing.

#### 2.3.1.4 AMENDMENTS IN RESPONSE TO *TORONTO STAR NEWSPAPERS LTD. v. CANADA* (CLAUSES 19(2), 19(3), 20(1), 21 AND 22)

Clauses 19(2) and 19(3) of Bill S-7 amend section 38.04(4) and section 38.04(5)(a) of the CEA; clause 20(1) of the bill amends sections 38.06(1) and (2) of the CEA; and clauses 21 and 22 of the bill amend section 38.11(1) and section 38.12 of the CEA, and add new section 38.11(3).

These modifications introduce wording changes to the CEA designed to ensure that that the open court principle is better respected in section 38 non-disclosure proceedings, in compliance with *Toronto Star Newspapers Ltd. v. Canada*. For example, new section 38.04(4) adheres to the principle contained in current section 38.04(4) by ensuring that information, including documents filed with the court in a non-disclosure application, are initially kept confidential. However, when new section 38.04(4) is read in combination with new sections 38.04(5) and 38.12 of the CEA, one sees that the Federal Court now has the ability, after hearing representations made by the Attorney General of Canada – and in a military summary trial or court martial, by the minister of National Defence – to make documents relating to the proceedings, including court records, public. The exception is documents relating to the part of the court hearing that the judge determines should be heard in private and/or relating to a part of the hearing that was conducted *ex parte*. This is a power that the current provisions do not bestow on the court, although, since the *Toronto Star* case, the power has been available to the Federal Court through case law.

Similarly, new sections 38.06(1) and 38.06(2), when read in conjunction with new section 38.04(5) and sections 38.11(1) and 38.11(3), allow Federal Court judges to order that a section 38 non-disclosure hearing be heard in private or, at the judge's discretion, in public. In addition, these new sections empower the judge to disclose the fact that the application has been made. The only portion of the hearing that must, perforce, take place in private is the portion of the hearing that is conducted *ex parte*. The confidentiality of the *ex parte* portion of the proceedings is guaranteed by new section 38.11(3) of the CEA. Once again, Federal Court judges do not have these powers as these sections of the CEA are currently worded, although since the decision of the Federal Court in the *Toronto Star* case, they have had these powers through case law.



### 2.3.1.5 AMENDMENTS IN RESPONSE TO THE MARCH 2007 REPORT OF THE HOUSE OF COMMONS SUBCOMMITTEE ON THE *ANTI-TERRORISM ACT* (CLAUSES 19(1), 20(2), 23 AND 24)

Other amendments to sections 38 to 38.16 of the CEA have been made in response to recommendations by the House of Commons Subcommittee on the *Anti-terrorism Act* in its March 2007 report. For example, the subcommittee recommended that the wording of section 38.04(2) of the CEA be amended to ensure that whenever the Attorney General of Canada refuses to permit full unconditional disclosure of sensitive or potentially injurious information, except by agreement under section 38.031 of the CEA, proceedings should be initiated in Federal Court. Clause 19(1) of Bill S-7 amends section 38.04(2) accordingly.<sup>30</sup>

In addition, the subcommittee recommended that section 38.06 of the CEA be amended in the same manner as section 37(7), described above, to clarify that an order made by a Federal Court judge authorizing disclosure of information that the Attorney General is seeking to keep confidential does not take effect until all appeals have been exhausted, and all time limits granted for appeal of the order have expired. Clause 20(2) of Bill S-7 adds new section 38.06(3.01) to the CEA in order to make this clear.

Finally, clauses 23 and 24 respond to two other recommendations made by the House of Commons Subcommittee. Clause 23 amends section 38.13(9) of the CEA to reduce from 15 to 10 years the period during which a non-disclosure certificate issued by the Attorney General of Canada remains in effect. The certificate may be reissued. The House of Commons Subcommittee recommended in its March 2007 report that the certificate expire 10 years after the date it is issued, on the grounds that the 15-year period is too long, and that a shorter period would increase transparency and accountability under the Act.

Clause 24 has also been included in the bill in response to a subcommittee recommendation in its March 2007 report. The clause introduces new section 38.17 into the CEA, requiring the Attorney General of Canada to file annual reports in Parliament respecting the operation of sections 38.13 and 38.15 of the CEA, including the numbers of prohibition certificates and fiats issued under these sections of the Act each year. The intent is that this be an additional effort to increase transparency and accountability under the CEA.

### 2.3.1.6 CONCORDANCE AND A MINOR WORDING CHANGE TO THE CEA (CLAUSES 18 AND 20(3))

As with certain amendments to *Criminal Code* terrorism offences, Bill S-7 introduces several minor amendments to the CEA to ensure that the English and French versions of the statute are in accord with each other, as much as possible.

Clause 18 amends the definition of “sensitive information” found in the French version of section 38 of the CEA. Currently, the French version of that definition refers to information concerning international affairs (“affaires internationales”), defence, and national security. Clause 18 changes the wording in the French version of this definition to “relations internationales,” to match the English.

Clause 20(3) amends the French version of section 38.06(4) of the CEA, adding the words “du fait” to this section, in order ensure that it refers to both “facts and information” in accordance with the changes introduced to both the English and French versions of sections 38.06(1) and 38.06(2) by clause 20(1) of the bill.

#### 2.3.1.7 RECOMMENDATIONS NOT ACTED UPON IN THE CEA

While some of the recommendations made to sections 37 and 38 to 38.16 of the CEA by the House of Commons Subcommittee in its March 2007 report have been incorporated into Bill S-7 as amendments to the CEA, others have not. None of the recommendations for change to these sections of the CEA made by the Special Senate Committee on the *Anti-terrorism Act* have been incorporated into this bill.

For example, in view of the fact that section 38 CEA proceedings allow information to be withheld from a party in the interests of national security, both the House of Commons Subcommittee and the Special Senate Committee had recommended that the CEA be amended to allow a special advocate to represent the party during the private portion of the hearings. In addition, the Special Senate Committee recommended that the ability of the Attorney General of Canada to issue a prohibition certificate be narrowed, particularly when the information is being withheld because it “relates to” a foreign entity.

The committee similarly recommended that the definitions of “sensitive” and “potentially injurious” information found in section 38 of the CEA be amended so that information that relates to or may injure foreign relations is not kept confidential merely because disclosure of such information would embarrass governments if released.

Finally, the Special Senate Committee recommended amending section 38.131 of the CEA to require a Federal Court of Appeal judge to balance the public interest in disclosure against the public interest in non-disclosure, and to allow for an appeal from the decision of a Federal Court of Appeal judge under section 38.131, when deciding whether to uphold a non-disclosure certificate issued by the Attorney General of Canada under section 38.13 of the CEA.

The House of Commons Subcommittee had likewise recommended that section 38.31 of the CEA be amended to allow for an appeal from the decision of a single judge of the Federal Court of Appeal in relation to a non-disclosure certificate issued by the Attorney General of Canada.

In addition, the subcommittee recommended that the Government of Canada prepare written guidelines to assist “designated entities” in determining when they are responsible for notifying the Attorney General of Canada that sensitive or potentially injurious information might be disclosed in proceedings. These “entities” included judges of the Federal Court, members of the Immigration and Refugee Board, a service tribunal or military judge under the *National Defence Act*, the Public Service Labour Relations Board, the Information Commissioner, the Privacy Commissioner, the Security Intelligence Review Committee, and certain boards and commissions of inquiry.

The subcommittee also recommended making it mandatory for Federal Court judges to disclose information in section 37 or 38 proceedings when they are satisfied that disclosure of information withheld by the government would not injure international relations, national defence or national security, instead of merely giving judges discretion to do so.

Finally, the subcommittee recommended amending section 37 of the CEA to require that judicial hearings be held in private when their purpose is to determine whether to disclose information that a federal government minister has certified should not be disclosed on “specified public interest” grounds. The subcommittee was of the view that both section 37 and section 38 proceedings should be held in private for the sake of consistency and because of the interests at stake.

## 2.4 AMENDMENTS TO THE *SECURITY OF INFORMATION ACT*

The SOIA, formerly known as the *Official Secrets Act*, was significantly amended by the *Anti-terrorism Act*. The amendments included the creation of new offences relating to economic espionage, communication of safeguarded information to foreign entities or terrorist groups, and committing violence or threats at the direction of a foreign entity or terrorist group for the purpose of harming Canadian interests.

### 2.4.1 DEFINITION OF “SPECIAL OPERATIONAL INFORMATION” IN THE SOIA (CLAUSE 28)

The amendments also introduced the concept of “special operational information” into the Act, allowing deputy heads of government institutions, in the interests of national security, to designate as persons who are permanently bound to secrecy those who have, have had or will have access to special operational information. The new concept of “special operational information” was broadly defined as information that the Government of Canada is taking measures to safeguard and that may reveal, or from which may be inferred, any of a long list of types of information. Only the Governor General, the lieutenant governors of provinces and judges are exempt from being designated as persons permanently bound to secrecy.

Clause 28 of Bill S-7 makes an adjustment to wording in the definition of “special operational information” to ensure that it includes a concept included in the French version. Current section 8(1)(a) of the English definition makes it clear that special operational information includes the identities of individuals, groups or entities that have provided, or may provide confidential information, intelligence or assistance to the Government of Canada. However, it does not include the identities of individuals, groups or entities that are currently providing information, intelligence or assistance to the federal government. The French version of this provision does include such informants, using the words “qui est, a été ou est censé être.” Clause 28 adds the word “is” to the English version of section 8(1)(a) of the SOIA, to make it equivalent to the French.

#### 2.4.2 HARBOURING AND CONCEALING SOMEONE WHO HAS COMMITTED TERRORISM OFFENCES UNDER THE SOIA (CLAUSE 29)

Clause 29 amends section 21 of the SOIA in the same way as clause 9 amends section 83.23 of the Code: it increases the maximum sentence for harbouring and concealing someone who has committed a terrorism offence in certain circumstances.

The amendments introduced by clause 29 increase the maximum penalty for harbouring or concealing a person who has committed a SOIA offence from 10 years to 14 years in circumstances where the person being hidden has committed a SOIA offence punishable upon conviction by life imprisonment. In all other cases (i.e., where a person harbours or conceals a person who has carried out a SOIA offence punishable by a lesser sentence, or harbours a person who is likely to carry out a SOIA offence) the person who harbours or conceals the individual in question would, upon conviction, be punishable by up to 10 years' imprisonment. (The House of Commons Subcommittee recommended making such a distinction in its March 2007 report.)

#### 2.4.3 WORDING CHANGES IN THE SOIA (CLAUSES 25 TO 27)

Clauses 25 to 27 of Bill S-7 enact minor wording changes to the SOIA. Clause 25 replaces the heading found before section 2 of the SOIA in the French version of the Act. Currently, this heading reads "Définitions." Clause 25 would add the words "et interprétation" to the heading. The English version of this heading reads "Interpretation" only.

Clauses 26 and 27 would move the heading "Offences" from its current place before section 3 of the SOIA to a new location after section 3. In its March 2007 report, the House of Commons Subcommittee recommended removing this heading to reflect the fact that section 3 of the SOIA no longer contains any offences (prior to the amendments introduced to the SOIA by the *Anti-terrorism Act*, section 3 of the SOIA did contain offences).

#### 2.4.4 RECOMMENDATIONS NOT ACTED UPON IN THE SOIA

Bill S-7 amends the SOIA in accordance with all but two of the recommendations made by the House of Commons Subcommittee on the *Anti-terrorism Act* in its March 2007 report to Parliament. Not adopted was the recommendation to add "includes" to section 3 of the SOIA to indicate that the list of what constitutes a "purpose prejudicial to the safety or interests of the State" is clearly non-exhaustive.

Also not followed was the subcommittee recommendation to remove from section 21 the stipulation that to be guilty of harbouring and concealing under the SOIA, one must harbour or conceal for the purpose of enabling or facilitating an offence under the SOIA. The subcommittee recommended removing this "purpose clause" when the person being hidden and concealed had already committed an offence under the

SOIA, and reserving it for situations where the person is likely to carry out an offence under the Act.

Bill S-7 does not act upon any of the four recommendations regarding the SOIA made by the Special Senate Committee on the *Anti-terrorism Act* in its February 2007 report. One of these was a recommendation for change to the public interest disclosure defence found in section 15 of the SOIA, which is available, in certain circumstances, to persons who are permanently bound to secrecy but who, nonetheless, and without authority intentionally communicate “special operational information” as defined under the Act. Another was a recommendation to amend section 3(1)(a) of the SOIA, to remove reference to a political, religious or ideological motive from the definition of what constitutes a “purpose prejudicial to the safety or the interests of the State.”

The remaining two recommendations made by the Special Senate Committee concerned section 4 of the SOIA, which was of particular concern to the committee. Section 4 predates the *Anti-terrorism Act* and was relatively unchanged by that Act. It contains hundreds of possible criminal offences related to unauthorized information disclosure or “leakage.” It is interesting to note that the House of Commons Subcommittee also expressed serious concerns with the operation of section 4, which makes it an offence to communicate, receive or retain “secret” “official” or “secret official” information in certain circumstances.

Section 4 of the SOIA was the subject of commentary by several witnesses who appeared before the committees during their reviews of the *Anti-terrorism Act*. This was because the *Anti-terrorism Act* was used by the RCMP to execute search warrants at the home and office of *Ottawa Citizen* journalist Juliet O’Neill, on the grounds that she might have information in her possession classified as secret in relation to the investigation of Maher Arar.<sup>31</sup> The validity of the search warrants used against Ms. O’Neill were quashed by the Ontario Superior Court of Justice in *O’Neill v. Canada (Attorney General)*,<sup>32</sup> a decision rendered on 19 October 2006. The Court also struck down as unconstitutional parts of section 4 of the SOIA dealing with wrongful communication and receipt of secret information, and allowing another person to have possession of it (sections 4(1)(a), 4(3) and 4(4)(b)). The Court found that these sections provide no guidance to the public as to what constitutes prohibited conduct, and give the government the unfettered ability to arbitrarily protect whatever it chooses to classify as “secret official” – or even just “official” – information. The Government of Canada chose not to appeal this decision.

The Special Senate Committee on the *Anti-terrorism Act* recommended narrowing the information that is applicable for the purpose of the offences under section 4 and also recommended adding a public interest defence to section 4, whereby if a judge determined that a person acted in the public interest by disclosing secret or official information, and found that the public interest in disclosure outweighed in importance the public interest in non-disclosure, a person would not be guilty of an offence under section 4.

The House of Commons Subcommittee, while refraining from making recommendations with respect to section 4 of the SOIA, provided guidance in its report as to how, in its view, this section might be amended.

## 2.5 COMING INTO FORCE (CLAUSE 30)

Clause 30(1) of Bill S-7 states that sections 1 to 9 and 14 to 29 of Bill S-7 (in other words, all provisions but those dealing with investigative hearings and recognizance with conditions/preventive arrest) come into force on a day or day to be fixed by order of the Governor in Council.

Clause 30(2) states that sections 10 to 13 of Bill S-7, which deal with investigative hearings and recognizance with conditions/preventive arrest, likewise come into force on a day to be fixed by order of the Governor in Council.

The decision to separate the coming into force provisions in this bill was likely made in recognition that solely the provisions regarding investigative hearings and recognizance with conditions/preventive arrest are subject to a sunset clause, and that therefore these provisions, once enacted, would remain in force only if a resolution passed by both houses of Parliament is passed before the expiry date contained in that clause.

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## NOTES

1. [Criminal Code](#), R.S.C. 1985, c. C-46.
2. Section 7 makes offences committed outside Canada prosecutable in Canada if the person who committed them is present in Canada.
3. [Canada Evidence Act](#), R.S.C. 1985, c. C-5.
4. [Toronto Star Newspapers Ltd. v. Canada](#), 2007 FC 128, upheld on appeal; Application for leave to appeal to the Supreme Court of Canada (2007 FCA 388) refused 3 April 2008.
5. House of Commons, Standing Committee on Public Safety and National Security, Subcommittee on the Review of the *Anti-terrorism Act*, [Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues](#), March 2007.
6. [Security of Information Act](#), R.S.C. 1985, c. O-5.
7. Senate, Special Committee on Anti-terrorism, [Second Report](#), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, 16 May 2012.

8. [Bill C-17, An Act to amend the Criminal Code \(investigative hearing and recognizance with conditions\)](#), 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament. The bill was reported back to the House of Commons by the Standing Committee on Public Safety and National Security on 2 March 2011. However, the bill never reached third reading stage, and died on the *Order Paper* at the end of the 40<sup>th</sup> Parliament on 26 March 2011. None of the amendments made by this committee were included in Bill S-7 as originally drafted, although one of the amendments made by the Senate to Bill S-7 (amending the French text of section 83.32(1.1.) to ensure a mandatory review by parliamentary committee of sections 83.28, 83.29 and 83.3 of the Code, the investigative hearing and recognizance with conditions/preventive arrest provisions) effectively reintroduces one of the amendments to Bill C-17 made by the House of Commons Standing Committee on Public Safety and National Security.
9. [Bill C-19, An Act to amend the Criminal Code \(investigative hearing and recognizance with conditions\)](#), 2<sup>nd</sup> Session, 40<sup>th</sup> Parliament. This bill reached second reading stage in the House of Commons in June 2009 and died on the *Order Paper* when Parliament was prorogued on 30 December 2009.
10. [Bill S-3, An Act to amend the Criminal Code \(investigative hearing and recognizance with conditions\)](#), 2<sup>nd</sup> Session, 39<sup>th</sup> Parliament. The bill 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 39<sup>th</sup> Parliament on 7 September 2008.
11. [Anti-terrorism Act](#), S.C. 2001, c. 41.
12. [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.
13. 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](#), October 2006.
14. 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.
15. Senate, Special 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.
16. The definition of “terrorist group” also incorporates the definition of terrorist activity by reference.
17. [Convention for the Suppression of Unlawful Seizure of Aircraft](#), 860 U.N.T.S. 105, entered into force 14 October 1971.
18. [Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation](#), 974 U.N.T.S. 178, entered into force 26 January 1973.
19. The definition of “terrorist group” incorporates the definition of “terrorist activity” by reference.
20. Senate, [Debates](#), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, 29 February 2012, 1500.

21. As stated previously, although none of the amendments to Bill C-17 adopted by the House of Commons Standing Committee on Public Safety and National Security on 2 March 2011 made their way into Bill S-7 as originally introduced, one of that committee's amendments to Bill C-17 mirrors an amendment made to Bill S-7 by the Special Senate Committee on Anti-terrorism. The French version of section 83.32(1.1) of the Code was clarified by changing the language from "*peut*" ("may") to "*doit*" ("shall") to ensure a mandatory review of the investigative hearing and recognizance with conditions/preventive arrest provisions by parliamentary committee. The other two amendments that the House of Commons Standing Committee on Public Safety and National Security made to Bill C-17 (shortening the sunset clause for these provisions from five years to two years and ensuring that both a committee of the House of Commons and a committee of the Senate, or a committee of both houses of Parliament participate in the parliamentary review) have not been incorporated into Bill S-7.
22. [R. v. Hall](#), [2002] 3 S.C.R. 309.
23. Section 7 of the Charter guarantees the right to life, liberty and security of the person while section 11(e) provides the right not to be denied reasonable bail without just cause.
24. [National Defence Act](#), R.S.C. 1985, c. N-5.
25. [Ottawa Citizen Group v. Canada](#), 2004 FC 1052.
26. *Ibid.*, paras. 35 to 37.
27. *Ibid.*, para. 38.
28. *Ibid.*, para. 41.
29. *Ibid.*, paras. 43 to 45.
30. The House of Commons Subcommittee on the *Anti-terrorism Act* had also recommended that section 38.04(2) should be amended so that when the Attorney General declines to take action on sensitive or potentially injurious information, persons who may be required to disclose such information (other than witnesses), or persons who are not required to disclose it, but wish the information to be disclosed, do not have to apply to the Federal Court for a disclosure order, as is currently required in sections 38.04(2)(b) and 38.04(2)(c) of the CEA. The subcommittee also recommended the consequential repeal of section 38.04(3) of the CEA, since, if the Attorney General were required to make application to the Federal Court for a non-disclosure decision in all cases where sensitive or potentially injurious information may be revealed, section 38.04(3) of the CEA would not be necessary. Neither of these recommendations has been acted upon.
31. Maher Arar is a Canadian citizen with dual Syrian citizenship. In 2002, Arar was detained by United States immigration officers during a layover at JFK Airport in New York on a flight home to Canada from Tunisia. Despite his requests to be returned to Canada, Arar was removed first to Jordan and then to Syria pursuant to section 235(c) of the United States' *Immigration and Nationality Act*, which authorizes the expedited removal of arriving aliens suspected of terrorist activity. The United States government has stated that before this removal, it first obtained assurances from the Syrian government that Arar would not be subjected to torture. Arar was held in Syria for 10 months, during which time he was repeatedly beaten until he made a false confession to terrorist activity. No charges were ever filed against him, and he was eventually released back to Canada. On 28 January 2004, the Government of Canada announced a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, and on 18 September 2006, the Commissioner of the Inquiry, Justice Dennis O'Connor, cleared Arar of all terrorism allegations, making a number of findings about Canada's role in relation to his torture and rendition and setting out a series of recommendations relating to redress for Mr. Arar, and prevention of future incidents of this nature.
32. [O'Neill v. Canada \(Attorney General\)](#), (2006), 272 DLR (4<sup>th</sup>) 193.