

CANADIAN MEDIA LAW UPDATE

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BLG COURT BAN ALERT: CANADIAN 'TERRORISM' HEARINGS HELD IN CAMERA

[79] On 23 July 2003, the British Columbia Supreme Court shed a few rays of light on recent *in camera* hearings held at the Vancouver Courthouse by releasing an eight paragraph 'synopsis' to explain:

... the general nature and result of recent in camera hearings concerning the interpretation, application and constitutionality of the new s 83.28 of the Criminal Code, which provides for investigative hearings in relation to terrorism offences, as defined in s 2 of the Code.²

Before the synopsis was released, *The Vancouver Sun*, a daily newspaper, made fruitless attempts to obtain access to the Courtroom where the *in camera* hearings were being held.

2 May 2003 Court Order for Investigative Hearing

In her 23 July synopsis, Madam Justice Holmes of the British Columbia Supreme Court informs the public that a Court order was issued on 6 May 2003 pursuant to s 83.28 of the *Criminal Code* requiring an individual (who is not publicly named) to attend before a judge for examination by the Crown in relation to terrorism offences committed nearly 20 years ago. The offences concerned bombs placed on Air India flights: one bomb exploded on the ground in Japan killing two baggage handlers; the other destroyed Air India flight 182 off the coast of Ireland killing 329 passengers and crew.

The synopsis does not identify the judge who made the ruling nor does it say whether the order was made *ex parte* or only after notice to the intended witness.

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² *In the matter of an Application Under s 83.28 of the Criminal Code* [2003] BCSC 1172. Full text available at: <http://www.Courts.gov.bc.ca/Jdb-txt/SC/03/11/2003BCSC1172.htm>.

The trial of two individuals on charges of conspiracy to murder and other offences relating to the two explosions is currently under way at the Supreme Court of British Columbia in Vancouver before Justice Josephson.

[80] Section 83.28 of the Criminal Code

This provision came into force on 24 December 2001 as part of a package of amendments to the *Criminal Code* made by the *Anti-Terrorism Act 2001* (SC) c 41. It provides that the police may apply (with the prior consent of the Attorney General) to a provincial or superior Court judge for an *ex parte* order for the 'gathering of information' for the purposes of 'an investigation of a terrorism offence.'

The Court may make the *ex parte* order if satisfied there are reasonable grounds to believe that (i) a terrorism offence has been committed and (ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order.³ Given the context of the 6 May 2003 order referred to in the 23 July synopsis, the May 6 order was obviously made pursuant to this authority.⁴

The Court may order the examination, on oath or otherwise, of a person named in the order and require that person to attend at a place fixed by the judge for the examination and to remain in attendance until excused by the examining judge. The order may also require the person to bring anything in their possession or control with them to the examination and to produce it to the presiding judge.⁵

A person named in the order is required to answer questions put to him or her by the Attorney General or the Attorney General's agent. The witness is not entitled to refuse to answer on the grounds that the answer may tend to incriminate him or her,

³ Section 83.28(40(a)).

⁴ Alternatively, the Court may make the *ex parte* order if satisfied (i) that there are reasonable grounds to believe that a terrorism offence will be committed, (ii) there are reasonable grounds to believe that a person has direct and material information that relates to such a terrorism offence, or that may reveal the whereabouts of an individual who the peace officer suspects may commit such a terrorism offence, and (iii) reasonable attempts have been made to obtain the information referred to from that person: see s 83.28(b).

⁵ Section 83.28(5).

but no such answer is admissible in subsequent criminal proceedings against the witness, nor is evidence derived from the examination admissible in subsequent criminal proceedings.⁶

The Court may order anything produced during the investigation examination to be given to the police if it will likely be relevant to the investigation of any terrorism offence.⁷

Issues at Secret hearing 23 June 2003

The synopsis made public by the Court on 23 July reveals that a number of significant legal issues came before the British Columbia Supreme Court at an *in camera* hearing which took place a month earlier on 23 June 2003, namely:

1. Can an order for an investigative hearing validly issue in relation to a terrorism offence alleged to have been committed before s 83.28 came into force?
2. Is the order in question sufficiently specific?
3. Do s 83.28 and the order violate the right to silence, including the principle against self-incrimination, of the person required to attend for the examination?
4. Do s 83.28 and the order breach the accused persons' fair trial rights by providing for pre-trial or mid-trial preparation or discovery for the Crown that is not available to the defence?
5. Does s 83.28 interfere with the independence and impartiality of the judiciary, by providing that a judge will preside over the examination? [81]
6. If the order is valid and the investigative hearing is to proceed, should counsel for [the two Air India accused] be entitled to participate in the hearing, and if so how?⁸

These are novel, complex issues of constitutional importance. They engage longstanding principles at common law as well as individual rights guaranteed by the Canadian Charter of Rights and Freedoms. The public and the news media were not permitted to be present in Court to hear the submissions concerning these issues.

⁶ Section 83.28(8), 83.28(10).

⁷ Section 83.28(12).

⁸ Synopsis, [6].

Disposition of the Issues at the in camera 23 June 2003 hearing

The 'synopsis' simply states that 'the [6 May 2003] order was validly issued and constitutionally sound.' The synopsis does not explain how the Court reached this conclusion nor does it cite any jurisprudence in support.

The 23 July synopsis also states that the participation of counsel at a s 83.28 hearing is 'inappropriate in most cases but ...in the unusual circumstances of this case, counsel for the two accused persons [in the Air India prosecution] as well as the agent for the Attorney General ... should be entitled to examine the person in the investigative hearing.' The synopsis does not explain how the Court reached this conclusion nor does it cite any jurisprudence in support.

The reasons for decision of the Court pronounced 21 July apparently address those issues. However, those reasons for decision have been withheld from the public and the news media.

Secrecy Orders

The synopsis states that the 'hearing is to be subject to restrictions protecting the privacy and other rights and interests of the person examined and the integrity of the investigation.' It does not say why the Court reached this conclusion nor does it cite any jurisprudence in support. It does not identify the statutory provision or other common law principle relied upon in making the order.

The synopsis also states: 'my reasons for decision dated July 21, 2003, which involve a more extensive discussion of the issues and the underlying facts, will remain sealed until the conclusion of the investigative hearing or any earlier order of the Court.'

The individual who is the subject of the 6 May 2003 order for an investigative hearing has reportedly sought leave to appeal that order to the Supreme Court of Canada. It could therefore be a long time before any investigative hearing is conducted and concluded so that the 21 July 2003 reasons for decision may be released to the public or to the news media (depending on the outcome of the 19 August application by *The Vancouver Sun* newspaper).

Although the synopsis does not expressly state the Court's authority for holding the *in camera* hearings, or making the secrecy orders, it appears these orders were made pursuant to s 83.28(5). It states that an order for an investigative examination may 'include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.'

Comment

The decision of the British Columbia Supreme Court to hold *in camera* hearings over the past three months and to seal the Court's 21 July reasons for decision on [82] fundamental constitutional issues raises important questions about the future scope of public access to Court proceedings, particularly in relation to matters concerning terrorism.

Whether or not the Court is entitled to exclude the public and the news media from an investigative hearing pursuant to s 83.28 of the *Criminal Code*, the Court's decision to withhold from the public (even temporarily) its reasons for decision of 21 July addressing fundamental issues of law is difficult to reconcile with the longstanding common law constitutional principle of the 'open Court' — that all Courts (with rare exceptions) should be open to the public and that the media should be free to report testimony, submissions, judge's decisions and everything else which transpires in criminal or civil legal proceedings.

In view of the fact that post-9/11 amendments made by the *Anti-Terrorism Act* to the federal *Criminal Code* are obviously now being employed by the government to investigate offences which occurred nearly two decades ago, how did the Court sidestep the ordinary rule against the retrospective application of statutory amendments? The normal rule of statutory interpretation is that statutes are not to be interpreted as having retrospective operation unless such a construction appears very clearly in the amendment or arises by necessary or distinct implication. Did the Court find clear provisions in the *Anti-Terrorism Act* amendments making them retroactive? If so, will the Court's reasoning be potentially applicable to other provisions of the *Anti-Terrorism Act* amendments?

How did the Court address the normal rule that statutes should not be given an interpretation that would impair existing rights, unless that effect cannot be avoided without doing violence to the language of the statute? The order for an investigative hearing clearly impairs the right of the proposed witness to remain silent and not cooperative with a police investigation. Does the Court's reasoning make other people, whose knowledge may only address pre-9/11 events, vulnerable to orders for an investigative hearing under Anti-Terrorism legislation?

There are no answers to these questions in the 23 July eight paragraph synopsis. It is difficult to understand how publication of the Court's 21 July reasons for decision on these questions could impair the privacy rights of the individual sought to be examined in this particular case or the national security of Canada or any other country.

How did the Court apply other constitutional principles established by the Supreme Court of Canada since the Charter came into force in 1982 when it answered the other important questions listed by the Court in its synopsis? It is impossible to tell. It is also difficult to understand how publication of the Court's reasons for judgment concerning the application of Charter rights to the *Anti-Terrorism Act* amendments would invade the privacy of the proposed witness or impair Canada's fight against terrorism.

The decision to withhold the Court's 21 July 2003 reasons for decision from the public has potentially serious implications for the proper functioning of our system of law. What guidance can the synopsis possibly provide to other judges or other proposed witnesses if other applications for investigative hearings come before other Courts? None, obviously.

Temporary or permanent secrecy orders withholding from public scrutiny the Court's rulings on fundamental constitutional issues could undermine our society's basic approach to the development and application of the law. That approach is based on the principle that judges are bound by legal precedent, which means they generally must follow previous decisions of judges at the same level as well as the decisions of higher Courts. This rule promotes uniformity in the application of the law.

Uniformity is impossible if important constitutional rulings remain secret, even temporarily.

It remains to be seen whether the media application on 19 August will be successful in prying loose more information about these Court proceedings under the *Anti-Terrorism Act* amendments to the *Criminal Code of Canada*.