The Three-Year Review of the Anti-terrorism Act

Both the Senate and House of Commons committees conducting the three-year review of Canada's Anti-terrorism Act, S.C. 2001, c. 41, have heard considerable evidence about the law and its operation. So far, only one person has been charged with the new criminal terrorism offences and no preventive arrests or investigative hearings have been reported even though the Supreme Court has affirmed in a 6:3 decision that investigative hearings are consistent with the Charter: Application under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248, 184 C.C.C. (3d) 449 sub nom. R. v. Bagri, 21 C.R. (6th) 82.

To their credit, the committees have not so far limited themselves to the review of the Anti-terrorism Act, but have also considered security certificates and other uses of immigration law as anti-terrorism law. Security certificates have been used to detain five suspected terrorists and the Supreme Court will soon hear Charter challenges to the ability of these certificates to order a person deported, perhaps to torture, on the basis of evidence that is never disclosed to that person or subject to adversarial challenge. These pending decisions should not prevent Parliament from reforming the problematic process of security certificates. Parliament has many more reform options than those open to the Supreme Court.

This special issue features four articles that may hopefully be of some assistance to the committees as they finalize their recommendations to Parliament. They may also be of assistance as the Department of Justice, the government and Parliament debates what, if anything, should be done to change the Anti-terrorism Act and the national security dimensions of the Immigration and Refugee Protection Act, S.C. 2001, c. 27.

The government will face pressures to expand anti-terrorism laws even though many who appeared before the committees and many who have contributed to this special issue argue for either repeal or retrenchment of the existing laws. In the United Kingdom and in Australia, governments are...
proposing dramatic expansions of anti-terrorism laws. In Britain, the government wants to enact new laws against the direct or indirect encouragement of terrorism and the display of terrorist publications. The Blair government also is arguing that a maximum 90-day period of preventive arrest is necessary in the wake of the London bombings. The response of the Canadian government remains unclear and thus debate about anti-terrorism remains urgent, despite understandable fatigue among all concerned.

The first paper in this issue by Don Stuart argues for the repeal or at least substantial redesign of the Anti-terrorism Act. Professor Stuart argues that the idea that stronger criminal law and wider police powers are needed to respond to terrorism is a myth. He also argues that the fact that the Act has not been invalidated under the Charter does not mean that it is just. He revisits proposals that the present Minister of Justice Irwin Cotler made to reform the Anti-terrorism Act at the time it was debated in October and November of 2001. He argues that the problem of racial profiling should be taken seriously both under the regular criminal law and in the enforcement of anti-terrorism law while also expressing some skepticism about anti-discrimination or anti-profiling clauses being added to the criminal law.

Stanley Cohen offers a different perspective on the Anti-terrorism Act from that of Professor Stuart. Cohen argues that the law is demonstrably justified in a free and democratic society and that it is considerably more restrained than new anti-terrorism laws enacted in the United States or the United Kingdom. He argues that the open court principle as affirmed by the Supreme Court in Vancouver Sun (Re), [2004] 2 S.C.R. 322, 184 C.C.C. (3d) 515 sub nom. R. v. Bagri, 21 C.R. (6th) 142, has never been absolute. With reference to the court's decision to uphold ex parte proceedings in Ruby v. Canada (Solicitor General); Ruby v. Royal Canadian Mounted Police, [2002] 4 S.C.R. 3, 219 D.L.R. (4th) 385, 22 C.P.R. (4th) 289, he suggests that the need for Canada to rely on secret information received from its allies may justify reasonable limits on the open court principle. He stresses the importance of accountability for secret security activities, while acknowledging that the ability of judges to see secret evidence in security certificate cases has not dispelled controversy about these procedures. He cautions that the British experience with special advocates has been controversial and that there must be careful attention to design issues if such a procedural innovation is to be used in Canada.

Maureen Webb provides a comprehensive and extensive analysis of many facets of the Anti-terrorism Act. She examines the definition of terrorist activities in the Anti-terrorism Act in light of the failures to reach international agreements on the meaning of terrorism and concludes that Canada's definition could allow the political targeting of dissenters as terrorists. She also criticizes the breadth of the terrorism offences — especially their combination of inchoate forms of liability — while also arguing that the
existing criminal law was adequate. She examines how amendments to the *Canada Evidence Act* and other features of anti-terrorism law increase secrecy while defending the importance of the open court principle. Webb also critically examines increased investigative powers, including the ability of the Communications Security Establishment to intercept evidence without judicial warrant, investigative hearings and preventive arrest powers.

The issue concludes with my own article suggesting ten ways to improve Canadian anti-terrorism law to respond to overbreadth but also to focus on the most serious security threats. I propose a more minimal definition of terrorism that focuses on violence, the removal of deeming provisions that restrain the ability of judges to interpret the Act, and the removal of constructive liability in s. 83.231 of the *Criminal Code* (which was added in 2004 as a new hoaxing terrorism offence). I also argue that Canada does not require the proposed British offences against encouraging terrorism and terrorist publications nor control orders such as those provided in its *Prevention of Terrorism Act*, 2005 (U.K.), 2005. c. 2. I propose various reforms to s. 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and the introduction of special advocates to provide adversarial challenges to evidence subject to national security confidentiality claims. I also argue that a clause defining and prohibiting racial and religious profiling would be useful. I urge Parliament to renounce the possibility left open by the court in *Suresh v. Canada*, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1, 37 Admin. L.R. (3d) 159, of deportation of a terrorist suspect to torture while also suggesting that Parliament should address the difficult issue of what can be done with a terrorist suspect who cannot be deported.

It is important to keep the debate about how democracies should respond to the evil of terrorism alive and fresh within government, the judiciary, the bar and civil society. It is hoped that this issue plays some small part in that vital process about what has become one of the defining issues of our times.

K.R.