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Editorial

The Parliamentary Review of the *Anti-Terrorism Act*

The day before the Supreme Court delivered its landmark judgment in *Charkaoui v. Canada*, 2007 SCC 9, a special committee of the Senate released a comprehensive report on the three-year review of the *Anti-Terrorism Act*, S.C. 2001, c. 41, and related matters. In late March, the Commons Committee on public safety and national security delivered its comprehensive review. Although the Court's judgment understandably grabbed the headlines, both Parliamentary committee reports deserve careful attention.

The Senate Committee report was delivered more than a year after the three-year review was required to be finished, but it at least came before investigative hearings and preventive arrests expired at the end of February as a result of a non-renewal of a sunset provision. The Commons sub-committee had issued a separate report recommending that investigative hearings only be available with respect to imminent and not past acts of terrorism, but that report received surprisingly little attention during the expiry debates.

Both committees examined the issue that confronted the Supreme Court in *Charkaoui*, but in a more comprehensive manner than was open to the Court. Unlike the Court, the committees did not focus only on the dilemma of judges receiving secret evidence *ex parte* when deciding whether to uphold security certificates under immigration law, but also similar national security secrecy provisions that could apply under s. 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and the review of listed terrorist groups.

Like the Supreme Court, both the Senate and Commons Committees found that there is a need for some form of adversarial challenge to governmental claims that secrecy is necessary and to evidence that cannot be disclosed to the accused. They recommended that special advocates represent the interests of the affected person whenever information is withheld for reasons of national security.

Both committees went beyond the Supreme Court's survey of a range of less rights-invasive alternatives and proposed that the affected party be

entitled to select a special advocate from a roster of security-cleared counsel who are funded by but independent from the government.

Crucially, both committees contemplated that the special advocate be able to communicate with the affected person and his counsel after seeing the secret information. This is fundamental to full answer and defence and an improvement on the British system. As was done by commission counsel for the Arar Commission, security-cleared counsel should be able to ask the affected person relevant information without disclosing legitimate secrets such as the sources of the information or the methods by which it was obtained

The Court's decision in *Charkaoui* combined with the committees' reports demonstrates how courts and the legislature can work in partnership to produce better and fairer policy. The Court found the immigration law provisions challenged before it to be wanting because there were less rights-invasive but effective alternatives, but has given Parliament 12 months to remedy the situation. Both committees have done research that should help Parliament to select among the range of available responses.

Both committees also made some other important recommendations that went beyond *Charkaoui*. They both recommended that judges only consider information and intelligence introduced in support of security certificates if it is reliable and was appropriately obtained. This is a crucial recommendation in light of the Arar Commission's recommendations about information that can be extracted under torture and the RCMP's transfer of inaccurate and unreliable information to the United States.

The Senate Committee also recommended the closing of the shameful *Suresh* exception that could possibly see a Canadian court hold that deportation to face a substantial risk of torture is constitutional. At the same time, the committee was not blind to the dilemmas presented by the detention of nationals from countries with poor human rights records. It recommended work on ensuring the effectiveness of assurances that a person will not be tortured, as well as work with the United Nations to ensure that those who cannot be deported because of torture concerns are not subject to indeterminate detention. The Commons Committee unfortunately ignored this issue.

The Senate Committee called for the deletion of the political, religious and ideological motive requirements for terrorism offences because of concerns that they might encourage racial and religious profiling. This followed the approach taken in *R. v. Khawaja*, (2006), 214 C.C.C. (3d) 399 (Ont. S.C.J.), but expanded it from the *Anti-Terrorism Act* to the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, and the *Security of Information Act*, R.S.C. 1985, c. O-5. At the same time, the Senate Committee recognized the need for reforms and recommended a need for a focus on the compulsion of governments or the intimidation of the public as a means to distinguish terrorism from ordinary crime.

The Commons Committee accepted the government's argument that the political or religious motive requirement is required to distinguish terrorism

from ordinary crime. It also recommended the addition of a vague new offence of glorification of terrorism for purposes of emulation, albeit subject to similar defences as available under s. 319(3) for hate propaganda. Although this proposal follows recent British law, it is far from clear that it will be effective in stopping either terrorism or extremist speech and it may result in the targeting of unpopular religious or political speech. Canada has already reported to the United Nations that we have adequate laws to deal with incitement to commit terrorism.

The Senate Committee recommended that Canadian law have a single definition of terrorism but unfortunately seemed to prefer the broader and vaguer *Criminal Code* definition of terrorism to the more restrained definition the Supreme Court used in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

The Senate Committee recommended a number of reforms to s. 38 of the *Canada Evidence Act*, which was amended in 2001 and will play a crucial role in cases where the government claims national security confidentiality. It recommended specification of how information the government wants to keep secret will actually harm national security, national defence or international relations, and that a judge should be able to balance the interests in secrecy and disclosure even in those cases in which the Attorney General of Canada has issued a certificate to block a court order for disclosure.

The Commons Committee made a number of largely technical recommendations about s. 38, including a requirement that the Attorney General provide lists of certificates and that court orders for disclosure not take effect until appeal periods end. Curiously, it recommended the revival of mandatory closed proceedings under the former s. 37.21 despite decisions such as *Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128, that rightly recognize that many mandatory *in camera* provisions for court hearings are unconstitutional.

Both committees rejected suggestions that ministerial authorizations for electronic surveillance outside of Canada conducted by our signal intelligence agency, the Communications Security Establishment (CSE) be authorized by judicial warrant. The Senate Committee did, however, call for a clear standard for ministerial authorizations and reporting of the number of such authorizations each year. The Commons Committee also recommended that the sitting or retired judge who reviews the CSE report on any violations of the Charter or the *Privacy Act*.

The Senate Committee report addressed the important issue of review and oversight and it recommended increased independence for the Cross-Cultural Roundtable on Security Issues and increased review of the RCMP's national security activities. The Commons Committee called for a national security committee of parliamentarians.

Although it is easy to disparage the unelected Senate, the special committee's report demonstrates the important and constructive role that the Senate can play. The unelected Senate Committee was more responsive to the concerns

of minorities affected by national security activities than the elected Commons Committee. The Commons Committee dismissed calls and judicial decisions for the deletion of the political and religious motive requirement and called for new offences against the glorification of terrorism and more, not fewer, mandatory secrecy provisions. It was, however, sensitive to the privacy concerns of all Canadians with respect to the activities of the CSE.

Both reports can play a useful role in fleshing out and expanding on the issues litigated in *Charkaoui v. Canada*. They also provide a much more rational and informed debate over difficult issues than occurred in the House of Commons over the expiry of preventive arrests and investigative hearings.

K.R.