

**The Parliamentary Review of Canada's *Anti-terrorism*
Act: A case study**

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Introduction¹

This paper uses recent Canada's parliamentary review of the *Anti-terrorism Act (ATA)*² as a case study to raise larger questions about the conduct of parliamentary reviews. After briefly introducing parliamentary reviews in Canada, the *ATA* and the provisions for its review, the paper examines the issues and challenges that the *ATA* review presented. The essential elements of the review such as its mandate, duration and the nature of resources and expertise required to support parliamentarians, Ministers and officials engaged in the review, are considered. Some of the advantages – and limitations - of a parliamentary review are discussed and other means of review, whether by individual experts or panels of experts, explored. The paper also examines external influences that affected the parliamentary review process, including the interest of civil society. The challenge to government in the interplay between the *ATA* review and judicial decisions and other ongoing processes is discussed. Finally, questions are raised for further consideration about how parliamentary reviews are structured.

Overview: Parliamentary reviews of legislation

Statutory reviews of legislation are relatively recent phenomena in Canada. Over the past 20 years, Parliament has increasingly incorporated requirements for statutory reviews into new legislation. Today, review provisions are to be found in at least 36 Canadian statutes. Recent reviews touch on a wide range of criminal law issues and include a review of s. 25.1 of the *Criminal Code* which authorizes the commission by police of what would otherwise be a criminal offence, the review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and the review of the *ATA*.

Given the inherent authority of Parliament to reconsider legislative provisions at any time, a variety of factors might be said to have spurred the specific inclusion of review requirements. For example, in the case of the 1983 *Access to Information Act and Privacy Act*, the legislation was characterized as a 'pioneering trailblazing experience' that merited reconsideration. Similarly, the 1992 passage of the *Corrections and Conditional Release Act* was considered 'watershed legislation' and a worthy candidate for review. The review provision of the 1984 *Canadian Security Intelligence Service Act* reflected the difficulties that had attended the drawn-out decision to create a separate civilian security agency and stormy passage of the legislation. The incorporation of a provision for the review by Parliament of the 2001 *ATA* stemmed from concerns relating to the swiftness with which the legislation had been developed and adopted, as well

¹ This paper draws on earlier work by the authors in a follow-up report to a Working Meeting on Parliamentary Reviews, Department of Justice Canada, April 2006.

² S.C. 2001, c. 41.

as questions about the balance that had been achieved between personal liberties and the security of the nation.³

Whatever the motivation, the provision for a three-year or five-year review of a legislative initiative by a House, Senate, Special or Joint Committee may place significant demands on government departments and agencies when they must prepare for, participate in, and respond to a parliamentary re-examination of the law. As well, there is no template for a parliamentary review and once the committee hearing stage is launched, the process can become unpredictable. Whereas the initial passage of legislation follows established stages through Parliament, the review of this same legislation may be shaped by diverse environmental factors. These include the political make-up of Parliament (and the committees charged with the review), party platforms, stakeholder agendas, media perceptions, public opinion and international influences.

In Canada, not all parliamentary reviews are acted upon in a timely manner, whether out of lack of resources, or parliamentary interest or time. Reviews of the *Criminal Code* DNA provisions and the establishment of the DNA Databank, and provisions relating to sex offence records are past due.⁴ If Parliament delays or fails to undertake a statutorily mandated review, the sanction may be criticism by the public or a political party. Other sanctions have not been explored in Canada. However, given the importance of the issues at play and their significance for the Canadian polity, the review of the *ATA* was unlikely to face this problem.

The *Anti-terrorism Act*

Canada's *ATA* was developed in the fall of 2001 as a response to the events of September 11 but also as the primary means by which Canada implemented its obligations under United Nations Security Council Resolution 1373⁵ and the two international anti-terrorism instruments (of twelve) that Canada had not yet ratified (namely the *International Convention for the Suppression of Terrorist Financing* and the *International Convention for the Suppression of Terrorist Bombings*).⁶ As well, the *ATA* provided the government with means for moving forward on related initiatives that officials had been working on for a number of years, namely amendments to the *Official Secrets Act* and the *Canada Evidence Act*.

³ Ibid.

⁴ See *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30, s. 3.1 requiring comprehensive review after three years of coming into force of the Act; the *DNA Identification Act*, S.C.1998, c.37, s. 13, calling for a five-year review as of June 30, 2000.

⁵ S/Res/1373 (2001), September 28, 2001, <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

⁶ The United Nations *Convention for the Protection of UN and Associated Personnel* was also implemented by way of the *ATA*.

Tabled on October 15, 2001, and largely in force by December 24, 2001, Bill C-36, the proposed *ATA*, was the subject of intense public and parliamentary scrutiny. The latter included consideration by House of Commons and Senate committees, as well as a Senate pre-study conducted simultaneously with the House review.⁷

The *ATA* was a wide-ranging omnibus Act that amended more than seventeen statutes, including amendments to the *Criminal Code* enacting specific terrorism offences and special investigative measures, to the *Official Secrets Act* amending the espionage provisions, to the *Canada Evidence Act* introducing a means of better protecting information relating to international relations, national defence or national security in criminal or other proceedings, to the *Proceeds of Crime (Money Laundering) Act* addressing terrorist financing and expanding the mandate of FINTRAC, Canada's Financial Transactions and Analysis Centre, and to the *National Defence Act* providing a legislative basis for Canada's cryptologic agency, the Communications Security Establishment (CSE). Among other things, the *ATA* also enacted the *Charities Registration (Security Information) Act* to protect the integrity of charities in the context of terrorist financing. As the House Subcommittee which later reviewed the Act noted, the *ATA* "...was complex legislation, dealing with difficult issues in a highly charged environment characterized by much fear and uncertainty about the unknown".⁸

Significantly, for the purposes of this paper, s. 145 of the *ATA* required a comprehensive review of the provisions and operation of the Act, within three years of royal assent, by a committee of the Senate, the House of Commons or both Houses of Parliament. The committees were then to submit a report to Parliament, including a statement of any changes that the committee recommended, within a year.

The ATA review

The parliamentary review of the *ATA* began in December 2004.⁹ A Subcommittee on Public Safety and National Security of the then House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness undertook the review on behalf of the House of

⁷ For more on Bill C-36, see

<http://www.parl.gc.ca/legisinfo/index.asp?Language=E&query=2981&Session=9&List=toc>

⁸ *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues, Final Report of the Standing Committee on Public Safety and National Security*, (No.7) Garry Breitkreuz, MP, Chair; Subcommittee on the Review of the *Anti-terrorism Act*, Gord Brown, MP, Chair, March 2007, 39th Parliament, 1st Session. (hereinafter *Subcommittee Main Report*), p.2, [http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=391&JNT=0&SELID=e24_ & COM=10804](http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=391&JNT=0&SELID=e24_&COM=10804)

⁹ News Release, Government Of Canada Welcomes Parliamentary Review Of *Anti-Terrorism Act*, December 14, 2004,

http://www.justice.gc.ca/en/news/nr/2004/doc_31336.html.

Commons. A Special Senate Committee on the *ATA* was also struck to conduct the *ATA* review. These Committees heard numerous witnesses during the 38th Parliament and the first session of the 39th Parliament. These included Ministers of the Crown, government officials and various non-governmental organizations including the Canadian Bar Association, the Canadian Civil Liberties Association and the International Civil Liberties Monitoring Group, Canadian and international academic experts, as well as members of international organizations such as Interpol.¹⁰ As well, the Senate Committee visited Washington, DC and London, England to consult with counterparts in the United States and the UK.

With the dissolution of the 38th Parliament and the intervening general election, the work of these committees was suspended. Following the January 2006 election, two new committees, with some changes in membership, were struck and mandated to conduct the *ATA* review, taking the previous testimony into account. These new committees, the Special Senate Committee on the *Anti-terrorism Act* and the Subcommittee on the Review of the *Anti-terrorism Act* of the House of Commons Standing Committee on Public Safety and National Security presented their main reports to the government in February and March of 2007 respectively.¹¹ We are now at the government response stage of the review.

It is premature to draw definitive conclusions about the *ATA* review and its impact on Canada's anti-terrorism policy. However, we assume that review by elected representatives of government action, particularly of government acts pursuant to its anti-terrorism regime, is desirable and valuable in a democratic society.

Executive scrutiny of the necessary response to terrorism occurs in the process of enacting legislation. The Government must consider questions such as: Is the legislation consistent with the rule of law? Are the objectives furthered in a manner in keeping with the rule of law? Are the proposed measures rational and proportional to the perceived threat? Are the proposed measures consistent with the *Canadian Charter of Rights and Freedoms (Charter)*?¹²

¹⁰ See Committee proceedings, 38th Parliament, 1st Session, in the House http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=381&JNT=0&SELID=e21_&COM=9242 and Senate, http://www.parl.gc.ca/common/Committee_SenMeet.asp?Language=E&Parl=38&Ses=1&comm_id=597 and in the 39th Parliament, 1st session, in the House, http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=391&JNT=0&SELID=e21_&COM=10917 and the Senate, http://www.parl.gc.ca/common/Committee_SenMeet.asp?Language=E&Parl=39&Ses=1&comm_id=597&past_meet=1.

¹¹ See *Subcommittee Main Report*, note 8; *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, Special Senate Committee on the *Anti-terrorism Act*, The Honourable David P. Smith, P.C., Chair, February 2007, (hereinafter *Senate Main Report*), tabled on February 22, 2007.

¹² The Preamble to the *ATA* includes this paragraph:

Like executive scrutiny, judicial oversight of government action is important but is of necessity, case-specific and dependent on the resources of litigants to engage the judicial process. In contrast, review by members of a democratically elected legislative body involved in the enactment of the legislation can be statutorily mandated and may further public accountability. Depending on the results of such a review, trust in or concern about the anti-terrorism framework or other legislative framework may be enhanced. In this context, we examine some of the issues and challenges in the *ATA* review.

Issues and Challenges presented by the review of the *ATA*

This part of the paper considers some of the Issues related to the mandate of the Parliamentary committees that undertook the *ATA* review. It also explores some of the external influences which affected the review process.

Mandate-Related Issues and Challenges

(i) Omnibus nature of the *ATA* and the potential breadth of the review

The parliamentary review of Canada's new anti-terrorism regime presented significant substantive and logistical challenges. First among these was the sheer size of the Act and the legislative changes envisioned in it. Running to 186 pages of statutory provisions, the *ATA* amended existing statutes, substantially revamped existing provisions like ss. 37 and 38 of the *Canada Evidence Act* or much of the *Official Secrets Act*, or extended the mandates of agencies like FINTRAC. Some sixty recommendations of the House Subcommittee's main report on the *ATA* review address issues such as the definition of "terrorist activity", the nature of certain terrorism offences, the provisions relating to terrorist financing and terrorism related property, the listing of terrorist entities, the deregistration of charities and the Attorney General's certificate regime under the *Canada Evidence Act*.

ATA issues were numerous, complex and the subject of considerable difference of opinion between witnesses called to testify before the review committees. Many of these issues are examined by our colleague, Stanley Cohen in his recent book, *Privacy, Crime and Terror*¹³ but cannot be canvassed in any detail here.

... Whereas the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights and Freedoms*;...

¹³ *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril*, LexisNexis Canada Inc. 2005.

Two provisions had been particularly controversial during the enactment of the *ATA*. These were: (i) the investigative hearing – a means by which the testimony of a witness or other person may be compelled subject to procedural guarantees against self-incrimination and the use of derivative evidence, in respect of alleged terrorism offences;¹⁴ and (ii) the recognizance with conditions – a mechanism designed to prevent terrorist activities by permitting an individual to be detained and brought before the courts for the purposes of imposing judicial supervision.¹⁵

While enacted by the *ATA*, some Members of Parliament and Senators were clearly concerned about these new investigative tools and considerable debate focussed on the degree to which they represented departures from the normal criminal law processes or not. As a result, these two investigative tools were enacted subject to sunset clauses which called for their cessation, if not extended by resolution of the two Houses of Parliament, within fifteen sitting days of December 31, 2006.¹⁶

The House Subcommittee which heard testimony from many witnesses, both from the government and non-governmental perspective, noted in its interim report, that both provisions had their roots in Canadian law. Provisions similar to the investigative hearing provisions may be found in the law relating to public inquiries, competition law and mutual legal assistance in criminal matters, while recognizance orders existed in the *Criminal Code* in relation to other types of violent, sexual or criminal organizations offences.¹⁷

The House Subcommittee called for the extension of these two provisions (to December 31, 2011) subject to certain amendments, including clarifying that investigative hearings could only be used in respect of imminent peril that a terrorist offence will be committed (rather than with respect to past acts). A further recommendation would have seen these provisions subject to further parliamentary review before any reauthorization of their use.¹⁸

The resolution seeking the extension of these provisions was debated in the context of the partisan dynamics of a minority Parliament. The House of Commons voted against the extension of the use of these investigative mechanisms on February 27, 2007, with a vote of 154-129, defeating the proposed motion to extend the application of these provisions by three years. As

¹⁴ See ss. 83.28 and 83.29 of the *Criminal Code*.

¹⁵ See s. 83.3 of the *Criminal Code*.

¹⁶ Sections 83.32 and 83.33 of the *Criminal Code*

¹⁷ *Review of the Anti-terrorism Act Investigative Hearings and Recognizance with Conditions*, Interim Report of the Standing Committee on Public Safety and National Security, Garry Breitkreuz, MP, Chair; Subcommittee on the Review of the Anti-terrorism Act, Gord Brown, MP, Chair. Adopted by the Committee on October 17, 2006; Presented to the House on October 23, 2006) (hereinafter *Interim Report*), at p.4.

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10804&Lang=1&SourceId=193467>

¹⁸ *Ibid.* at pp. 11-12.

a result, ss. 83.28, 83.29 and 83.3 of the *Criminal Code* ceased to have effect as of March 1, 2007.

In the *ATA* review as in other policy matters that come before it, Parliament was being asked to examine issues that require the resolution of competing social values. It was being asked to determine the appropriate balance in a democratic country like Canada between protecting human rights, on the one hand, and the effective prevention and prosecution of terrorist activities, on the other, in addition to making recommendations for improvements. Not an easy task.

Given the breadth of issues, not all received equal attention at the Committee stage and some were not considered at all. Issues like the use of immigration security certificates under the *Immigration and Refugee Protection Act (IRPA)*¹⁹ which facilitate the removal of suspected terrorists from Canada while seeking to protect national security information, or the definition of “terrorist activity” under the *Criminal Code* terrorism provisions were considered in great detail and commented on by numerous witnesses to the Committees. Other issues such those arising from s. 4 of the *Security of Information Act (SOIA)* dealing with the unauthorized disclosure of government information were subjected to a lesser degree of scrutiny and less witness testimony. The government had provided a discussion paper on the issues raised by s. 4 of the *SOIA* but the *Subcommittee Main Report* does not make any specific recommendations in relation to s. 4, other than to suggest the government refer to witness testimony in the event of future policy work.

Yet other provisions enacted by the *ATA*, namely those that are found in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, were the subject of a separate review of that Act conducted by the Senate Standing Committee on Banking, Trade and Commerce, which also found itself unable to examine parts of its broad mandate in a timely way.²⁰

(ii) Expansion of the Mandate by the Committees

The task which Parliament assigned itself was made even more difficult by the decision of the Committees, from the very beginning of the *ATA* review, that they would broaden the scope of the review to examine other national security issues not addressed in the *ATA*. For example, by the time Committee work started in December 2004, the use of immigration security certificates under *IRPA* was in the media. Interest in and concern with the regime would increase and form the basis for various recommendations in the main reports coming out of the *ATA*

¹⁹ S.C. 2001, c. 27, ss.76ff.

²⁰ See *Parliamentary Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, Stemming The Flow Of Illicit Money: A Priority For Canada*, Interim Report of the Standing Senate Committee on Banking, Trade and Commerce, October 2006, at p. 1; <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/bank-e/rep-e/rep09oct06-e.pdf>

review. However, the *ATA* itself had not amended *IRPA* in 2001 and the regime had existed in various legislative forms since 1978.²¹

Though the mandate of the review committees was set out in the relevant statute, it was clearly open to Committee members to modify this mandate in accordance with their collective views. Yet a decision to do so would also clearly impact on the time and resources which they could devote to reviewing what already formed part of their mandate. However, given the media and public interest in issues like immigration security certificates and the “parallel processes”²² also being conducted, it may not have been realistic to think that Parliament would limit its review to those national security issues engaged by the *ATA*.

The House Subcommittee formally extended their mandate to consider the use of security certificates under *IRPA* and issues relating to the unauthorized disclosure provisions of the *SOIA*, which also had not been amended by the *ATA*.²³ The Special Senate Committee effectively did the same without a formal modification of its mandate both by means of the witnesses called to testify and the questions of individual Senators. In the words of the Special Senate Committee,

We determined that our review must be comprehensive, encompassing more than merely a review of the legislative provisions enacted in 2001. An examination of the workings of the *Anti-terrorism Act* must necessarily refer to the entire Canadian antiterrorism framework, as it is the cumulative effect of all legislation and policies to address terrorism that is at issue. To merely review the provisions and operation of the *Anti-terrorism Act* would be to take an inappropriately narrow approach, and would prevent the Committee from understanding the full extent of the measures the government has taken to prevent and combat terrorism, as well as the combined effect these measures have had on Canadians. In consequence, the Committee did not limit its study to the *Anti-terrorism Act* itself; rather, we decided to examine other pertinent aspects of Canada’s anti-terrorism activities as well.²⁴

In this way, departments and agencies which might not have thought to find themselves involved in the review of the *ATA* became participants.

²¹ See testimony of Paul Kennedy, then ADM Public Safety on security certificate process, before the House Subcommittee, April 20, 2005; <http://cmte.parl.gc.ca/Content/HOC/committee/381/snsn/evidence/ev1789415/snsnev10-e.htm#Int-1240071>

²² See discussion, External Influences on the *ATA* review, below.

²³ The expansion of the Subcommittee mandate to address the *SOIA* issues was largely at the request of the then Minister of Justice who had referred this issue to the Standing Committee for consideration and suggested it be combined with the *ATA* review.

²⁴ *Senate Main Report*, *supra* note 11, at p.3.

(iii) Involvement of Numerous Government Department and Agencies

As the scope of the review expanded, so did the impact on government support to the Parliamentary committees conducting the review and of officials' support to Ministers. The number of department and agencies involved grew as the scope and interest of parliamentary questions expanded.

While the Minister of Justice had primary responsibility within government for the ATA review, other Ministers and departments were also clearly interested in and often had primary responsibility for the legislation under parliamentary scrutiny. For example the Minister of Public Safety and Emergency Preparedness in the 38th Parliament was the Honourable Anne McLellan who had been Minister of Justice during the enactment of Bill C-36 and had a particular interest in the legislation.

Other Ministers affected by the ATA review included the Minister of Foreign Affairs, the Minister of Finance (responsible for the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*), the Minister of National Defence (responsible for the CSE) and the Minister of National Revenue responsible for the *Charities Registration (Security Information) Act*. Many of these Ministers appeared before the review Committees as witnesses. Other Ministers such as the Minister of Immigration (responsible for CIC), the President of the Treasury Board, responsible for the government's response to public concerns about the application of the USA PATRIOT Act in Canada²⁵ and the Minister of Transport, responsible for the no-fly list and other aviation security concerns not addressed by the ATA but the *Public Safety Act 2002*,²⁶ also found themselves called to appear.²⁷ The heads of and officials from various government agencies in the law enforcement and intelligence sectors of the Canadian government were also asked to testify.²⁸

An interdepartmental working group of policy and legal officials, chaired by the Department of Justice's ATA Review Team Leader, supported the Government during the review. Membership in this Interdepartmental Working Group

²⁵ See *Privacy Matters: The Federal Strategy to Address Concerns About the USA PATRIOT Act and Transborder Data Flows*, http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_128/pm-prp/pm-prp_e.asp Taking Privacy into Account Before Making Contracting Decisions, http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBM_128/gd-do/gd-do_e.asp, March 28, 2006.

²⁶ S.C. 2004, c. 15.

²⁷ In the 38th Parliament, 1st Session, the Minister of Justice and the Minister of Public Safety and Emergency Preparedness appeared twice before the House and Senate Committees. As well, the Ministers of CIC and Transport and the President of the Treasury Board testified before the Special Senate Committee on the ATA. In the 39th Parliament, 1st session, the new Ministers of Justice and of Public Safety and Emergency Preparedness appeared.

²⁸ In the 38th Parliament, 1st Session, this included the Director of FINTRAC, the Chief of CSE, the Commissioner of the Canada Customs and Revenue Agency, the Commissioner of the Royal Canadian Mounted Police and officials from CBSA, CIC, DOJ, CSIS, the Superintendent of Financial Institutions Canada and the Department of the Solicitor General (Public Safety and Emergency Preparedness).

reflected the ministries and agencies affected by the review and grew as the scope of the review did. An equivalent Interdepartmental Communications Working Group facilitated the coordination of communications between departments and agencies affected by the review.

Other independent review bodies were also asked to testify, including the Privacy Commissioner of Canada, the Information Commissioner of Canada, the Security Intelligence Review Committee, the Commission for Public Complaints against the RCMP, the Commissioner of the CSE, and the Canadian Human Rights Commission.²⁹

(iv) Review by Parliamentary Committees

Many of the review clauses incorporated into Canadian legislation require that reviews be conducted by committee of the House, the Senate or jointly. While requirements for parliamentary reviews are increasingly incorporated into legislation, it is not clear that other mechanisms of parliamentary or executive accountability are considered.

Bill C-36 at First Reading contained a review and report provision which envisaged a three year parliamentary review by the House, the Senate or jointly. At the House Committee stage, this was amended to include the possibility of review by “such committee of the Senate, of the House of Commons or of both Houses 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...”.³⁰

Faced with a requirement to review the statute or provision after three or five years, Parliament decides as to form and manner of the review. Which Committee (or Committees) reviews a particular piece of legislation is generally negotiated as between the various House and Senate leaders of each party. Most reviews have been conducted by either a Standing or Special Committees of the House or the Senate. The *ATA* review is an exception to the extent that it was conducted simultaneously before both House and Senate Committees.

Advantages of parliamentary review

Review by Parliament (as opposed to an independent reviewer as in the UK model or a panel of experts as in the recently concluded review of the *Canadian Air Transport Security Authority Act (CATSA Act)*, to be discussed below) has several important features.

(i) Furthering public accountability of government

²⁹ *Supra* note 10.

³⁰ Eight Report, Standing Committee on Justice and Human Rights, 37 Parliament, 1st Session, November 2001;
<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=222&Lang=1&SourceId=37034>

Concerns about possible racial profiling by law enforcement and intelligence agencies, the use of security certificates under *IRPA* and new investigative measures under the *ATA* figured prominently in the search for public accountability of law enforcement and intelligence agencies and Ministers. It might be noted that parallel to the *ATA* review, other inquiries and processes including the *Commission of Inquiry into Actions of Canadian Officials relating to Maher Arar* examining the detention of a Canadian citizen, Mr. Maher Arar, in the United States, his subsequent removal to Syria where he was imprisoned and tortured and actions taken by Canadian officials after his return to Canada,³¹ and the Rae review into 1985 Air India bombing³² raised similar questions of accountability and oversight.

(ii) *Fostering public debate on important national issues*

Politicians, whether Members of Parliament or Senators, more directly represent the concerns of their constituents. In questioning during the review process, they were often particularly sensitive to public concerns and recent media discussions of anti-terrorism issues. The nature of the committee process, both in testimony before the Committee and its further dissemination on the Internet, by television and media reporting, also furthered the public debate on anti-terrorism issues.³³

The importance of Parliament's involvement in reviewing government action should not be underestimated. Ensuring an appropriate balance between individual rights and government response to anti-terrorism is clearly a very credible reason for including a mechanism for parliamentary review. However, as parliamentary reviews are increasingly relied upon and some are delayed, ensuring that Parliament continues to be capable of conducting the number of parliamentary reviews that it is presently being asked to conduct is important. Otherwise, a parliamentary review could become a form of "insurance policy" for legislators faced with difficult choices.

Limitations of parliamentary review

(i) *Difficulties in acquiring expertise and knowledge of complex policy issues*

Shifts in the political landscape over time may mean that the House Committee members who participate in the review of an Act are less likely to have participated in its initial enactment. On the one hand, this may bring fresh eyes to the issues at hand. On the other, given the competing demands on their time,

³¹ See the Arar Commission reports at <http://www.ararcommission.ca/eng/index.htm> .

³² See *Lessons to be Learned*, the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182 November 23, 2005, <http://www.publicsafety.gc.ca/prg/ns/airs/fl/rep1-en.pdf>

³³ Most Committee proceedings in the *ATA* review (other than those held *in camera*) were televised on the Cable Public Affairs Channel (CPAC) and also Webcast over the Internet.

Members of Parliament may, depending on their research staff and other resources, have limited time in which to gain expertise in potentially new subject matter.³⁴ By contrast, given their security of tenure, Senators who participated in the enactment of the legislation may have a greater likelihood of then reviewing its provisions and operations after three or five years. This time period may also afford Senators the opportunity to develop their familiarity with and knowledge of particular subject areas. However, neither is guaranteed.

Efforts were made to maintain the membership of the ATA review committees despite the election which disrupted the review. However, more members of the House Committee were replaced as between the 38th and 39th Parliaments. As well, more of the Senators on the review committees had been part of the enactment of Bill C-36 than members of the House Subcommittees.

An acknowledgement of the importance of developing familiarity with or expertise in the subject matter is highlighted by the fact that both the House and Senate reports in the ATA review recommend the establishment of a national security committee of Parliamentarians to provide oversight of the Canadian security and intelligence community. Such a committee had been proposed in Bill C-81, which died on the order paper in the 38th Parliament.³⁵ The Senate in its report recommends a Senate Standing Committee, with dedicated staff and budget, to benefit from its "...institutional memory in relation to the *Anti-terrorism Act* and other past developments in Canada's national security framework".³⁶ However, how such a parliamentary committee will work with existing parliamentary standing committees and other independent review bodies is not addressed in detail.³⁷

(ii) Difficulties of reviewing operations under an omnibus act

Generally, Parliamentarians have noted the difficulty of assessing the operations of government, given the increasing number of programs, government

³⁴ For similar concerns about expertise developed by Committee Chairs and Committee members themselves, see *The Parliament We Want: Parliamentarians' Views on Parliamentary Reform*, Report prepared by the Library of Parliament under the direction of Carolyn Bennett, MP, Deborah Grey, MP, and Hon. Yves Morin, Senator, December 2003, <http://www.parl.gc.ca/information/library/PRBpubs/sp1-e.htm>

³⁵ *An Act to establish the National Security Committee of Parliamentarians*,

<http://www.parl.gc.ca/legisinfo/index.asp?Language=E&query=4582&Session=13&List=toc>

³⁶ *Senate Main Report*, *supra* note 11, at p. 121.

³⁷ Various mechanisms for review of activities and agencies, whose mandates that were amended by the ATA, already exist. These include parliamentary committees like the Senate Committee on National Security and Officers of Parliament such as the Privacy Commissioner or the Information Commissioner who have review mandates under the *Access to Information Act* and the *Privacy Act*. Other independent bodies review the work of a particular agency, like the Security and Intelligence Review Committee, which scrutinizes the work of the Canadian Security Intelligence Service, or the CSE Commissioner. As will be discussed, Justice O'Connor in the Policy Review portion of the *Arar Commission* proposed new review mechanisms for the activities of the Royal Canadian Mounted Police and the national security activities of other government departments.

expenditures and the volume of available information.³⁸ In light of the expanded scope of the *ATA* review, it is fair to say that the review focused largely on the legislative framework of the *ATA* and the security certificate scheme under *IRPA* and focused less on assessing the potential threat of terrorism in Canada and the operations of the law enforcement and other agencies under amendments enacted by the *ATA*. The exceptions may have been the focus on issues of racial profiling by law enforcement and intelligence agencies and questions about the resources provided to these agencies to conduct their work.

Even a more limited parliamentary review, the review of sections 25.1 to 25.4 of the *Criminal Code*,³⁹ which authorize the commission by police of what would otherwise be a criminal offence (the “law enforcement justification” provisions), had difficulties addressing operational issues. Beginning in May 2006, the Committee held nine meetings and heard fifteen witnesses after which it produced an interim report. In its report, the Committee noted that it did not have sufficient evidence before it to make any recommendations for amendment to the *Criminal Code* provisions. In particular, the Committee felt it lacked the evidence as to the operational experience under the provisions (with only the RCMP having testified) necessary to adequately review them to that point. The Committee expressed its intention to fulfill its mandate and perhaps hold further hearings, *in camera*, if necessary.⁴⁰

Related to the issue of review of operations under an omnibus statute is the issue of the timing of the review itself and whether a statutory regime has been sufficiently applied to be able to assess its effectiveness. This is discussed in section (v) below.

Other review models

Statutorily required reviews of legislation need not always be undertaken by a parliamentary committee. One model made use of an advisory panel of experts. For example, the 2002 *Canadian Air Transport Security Authority Act*, which created the Crown Corporation, the Canadian Air Transport Security Authority (CATSA), to oversee aviation security at Canadian airports, required a review of the provisions and operation of the *CATSA Act*. Responsibility for this review was vested with the Minister of Transport, who was tasked with tabling his report in the House of Commons and the Senate by the end of the fifth year of CATSA

³⁸ *The Parliament We Want*, *supra* note 34, at pp.12-14.

³⁹ These provisions were enacted by *Bill C-24, An Act to amend the Criminal Code (organized crime and law enforcement)*, which in s. 46.1 provided for a review of these Criminal Code provisions three years after the coming into force of that section (as of February 1, 2002) by a committee of the House, Senate or both.

⁴⁰ Interim Report of the Standing Committee on Justice and Human Rights, Review of ss. 25.1 to 25.4 of the Criminal Code, (Adopted by the Committee on June 21, 2006; Presented to the House on June 22, 2006)

http://cmte.parl.gc.ca/Content/HOC/committee/391/just/reports/rp2315361/JUST_Rpt01/JUST_Rpt01-e.pdf

operations. On November 23, 2005, the Minister of Transport appointed a three-member Advisory Panel to conduct independent study and analysis, to undertake consultations and to prepare its report. The review was supported by a Secretariat within Transport Canada, which facilitated information briefings with CATSA and Transport Canada, among others.

The Panel in its final report, noted that it had consulted widely within government and with "...many others representing air carriers, airport operators, security service providers, industry and consumer associations, air travellers, labour organizations, law enforcement agencies, academic experts, freight forwarders, provincial and territorial governments".⁴¹ Much like the Senate Committee in the *ATA* review, site visits were conducted. In addition, public consultation sessions, based on a consultation document, were held in five Canadian cities (Toronto, Vancouver, Calgary, Montreal, and Halifax). Expert research papers were commissioned, addressing the aviation regulatory framework, aviation security, governance and government, organizational models, and performance measurement. As is evident from the Final Report, the review of the *CATSA Act* was more operational in nature than the review of the *ATA*. The *CATSA* review included a detailed examination of the management of *CATSA* operations. The fact that the *CATSA* review was mandated to focus on the legislative framework and operations of one agency rather than the various acts amended by the *ATA* no doubt contributed to this greater ability to examine operational issues.

The Advisory Panel was also able, in its own words, "... to discuss the issues freely and frankly with both CATSA and Transport Canada".⁴² Such discussions may have been facilitated by the format of the review.

Another model had been discussed during the pre-study of Bill C-36, the *Anti-terrorism Act*. The Senate had proposed an Officer of Parliament to monitor the exercise of powers under the *Anti-terrorism Act*.⁴³ In rejecting this proposal, the government of the day noted the constitutional sensitivities of having an officer of Parliament conduct "...a review of the exercise of the jurisdiction of a provincial attorney general or minister responsible for the police, or the police or the Crown counsel who report to them".⁴⁴ The Privacy Commissioner had also expressed concerns about "a fragmentation of oversight roles, which would weaken

⁴¹ *Flight Plan: Managing the risks in Aviation Security, Review of the Canadian Air Security Authority Act*, Report of the Advisory Panel, 2006, at p.15-17.

http://www.tc.gc.ca/tcss/CATSA/Final_Report-Rapport_final/final_report_e.pdf

⁴² *Ibid.* at p. 17.

⁴³ Recommended by the Special Senate Committee in its pre-study of Bill C-36, the *ATA*.

⁴⁴ Testimony of Richard Mosley, Assistant Deputy Minister, Criminal Law Policy, Department of Justice, Proceedings of the Special Senate Committee on Bill C-36 (formerly the Subject Matter of Bill C-36), Issue 7, December 4, 2001,

http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/07evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=90.

oversight” or “...a hierarchy of officers of Parliament, which ... would be untenable”.⁴⁵

Witness testimony in the *ATA* review also referred to the United Kingdom’s model which relies on an independent reviewer of anti-terrorism legislation, presently Lord Carlile of Berriew, who reports to the Home Secretary.⁴⁶ Lord Carlile, appearing as a witness before the Special Senate Committee, spoke to his role and his access to government information:

As to my powers, my responsibilities are stated very generally in the acts of Parliament under which I am appointed, though mine is a statutory appointment. I have to report on the operation of the legislation.

Nobody has ever tried to stop me from doing anything. If they did, and I thought it was important, I would of course resign at once. But hitherto, I have asked to see material; I have spoken to whoever I wished to speak to; I've occasionally had to ask for guidance as to whom to speak to; I've had access to other government departments; and I've been able to go and make comparisons abroad with other jurisdictions.⁴⁷ ...

A part of my responsibility is to try to weigh the balance between the civil liberties of the great majority of people, who want to go to work on the tube in London without being blown up, and the civil liberties of those who may be suspected wrongly—or rightly, for that matter—of having committed criminal offences. That is a very difficult balance....⁴⁸

Jurisdictions, including the UK, Australia and the United States, also rely on parliamentary or congressional committees mandated to oversee the work of the security and intelligence sectors, with varying powers to compel evidence and receive classified information.⁴⁹

⁴⁵ Debates of the Senate (Hansard), 1st Session, 37th Parliament, Volume 139, Issue 80, December 11, 2001 per Senator Sharon Carstairs, Leader of the Government in the Senate.

⁴⁶ See for example, *supra* note 10, Committee proceedings, 39th Parliament, House Subcommittee, June 21, 2006, at paras. 1705ff.

⁴⁷ *Supra* note 10, House Subcommittee, 38th Parliament 1st Session, November 1, 2005, at 1020; <http://cmte.parl.gc.ca/Content/HOC/committee/381/snsn/evidence/ev2077885/snsnev26-e.htm#Int-1446413>

⁴⁸ *Ibid.* at 1025.

⁴⁹ In the UK, the House of Commons Home Affairs Committee and the Parliamentary Joint Committee on Human Rights have been examining counter-terrorism related issues. In Australia, the Parliamentary Joint Committee on Security and Intelligence is one of several parliamentary committees recently examining Australian security legislation. In the US, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence assist in congressional oversight of security and intelligence activities.

Further academic work might usefully consider the qualitative output of these various mechanisms for review and the degree to which they actually spur legislative and policy reforms.⁵⁰

(v) Timing and Length of the Review

Under s. 145 of the *ATA*, the Parliamentary committees established to conduct the review were to report within a year of the beginning of the review. In practical terms, the *ATA* review began in December 2004 and, as of June 4 2007, we await a government response to the various Committee reports issued. Several factors contributed to the length of the *ATA* review. These included the seriousness and complexity of the issues, the number of witnesses called⁵¹ and the intervening election which ended the 38th Parliament and required the establishment of new Committees to conduct the review.

Ambitious in terms of its breadth, the review itself was lengthy. Yet, as the Standing Committee on Public Safety and National Security noted in its Interim Report on the controversial investigative hearing and recognizance with conditions provisions, five years of experience under the Act "...has not been a long enough period of time to fully assess their necessity and effectiveness".⁵² The Special Senate Committee on the *ATA* expressed similar concerns about making definitive judgments on the necessity of the two provisions subject to the sunset clause, given they had not yet been used.⁵³ Nevertheless, both Committees recommended the extension of the investigative hearing and the recognizance with conditions provisions, though for differing periods.⁵⁴ At the same time, both Committees emphasized the need for further review, both in relation to the two provisions subject to the sunset clause and the Act as a whole.⁵⁵

⁵⁰ For example, the report of the five year review of the *Access to Information and Privacy Act* completed in 1987, contained over 100 recommendations for legislative and administrative change, which in the assessment of the Library of Parliament's Research Service remain largely "unfulfilled": Kirsten Douglas, *The Access To Information Act And Recent Proposals For Reform*, Parliamentary Information and Research Centre, February 6, 2006,

<http://www.parl.gc.ca/information/library/PRBpubs/prb0555-e.html#aopenshut>

⁵¹ Over the 38th and 39th Parliaments, the Senate Committee heard over 140 witnesses, while the House Subcommittees heard some 87 witnesses over 86 hours of hearings.

⁵² *Supra* note 17, at p.5.

⁵³ *Supra* note 11, at p.70. See also the annual reports to Parliament on the use of these provisions, http://www.justice.gc.ca/en/anti_terr/reports.html

⁵⁴ The Special Senate Committee recommended the extension of the two sunsetted provisions for another three years to the end of the fifteenth sitting day of Parliament after December 31, 2009, (Senate Report, recommendation 18) while the House Subcommittee recommended their extension for five years to December 31, 2011 (*Interim Report*, recommendations 1 and 2). In their dissenting opinion to the Subcommittee's Interim Report, Serge Ménard of the Bloc Québécois and Joe Comartin of the New Democratic Party would have preferred a three year review period (rather than ten years after the coming into force of the *ATA*) in respect of the investigative review provision. They recommended the repeal of s. 83.3 of the *Criminal Code*.

⁵⁵ The Senate also requested further information be provided on the use of the two provisions and their necessity in the annual reports that the Attorneys General of Canada and the provinces that

Sections 38 of the *Canada Evidence Act*, as amended by the *ATA*, provided a regime safeguarding sensitive information during criminal and other proceedings and may be another example of provisions requiring time to mature prior to an effective review of their use. Despite the legislation coming into force in 2001, it is only now that these s. 38 cases are accumulating and winding their way through the courts. This suggests that there may be benefits in disaggregating omnibus legislation so that different parts can be reviewed when sufficient experience has been obtained under a particular provision.

When enacting legislation, a review by Parliament after a period of three or five years has often been prescribed. There is no magic in this choice. The choice of three or five years is probably linked to the normal life of a parliament and one or the other may be preferred depending on the perspective of those incorporating the statutory review mechanism. However, a three year period proved difficult for assessing the operation of the *ATA* given that major provisions had not yet been used. Prosecutions under the Act are only just beginning.⁵⁶ As a result, various enactments under the *ATA* are only now being challenged and tested in the courts. It is fair to ask whether it might not have been a more effective use of resources, given the substantial investment of governmental, parliamentary and witness resources, to consider a longer period in which to assess the operation of such broad legislation. Seven to ten years may be preferable from an operational perspective but may seem too far in the future for a parliamentarian faced with a controversial provision.

This issue is not moot as further review of the *ATA* is recommended by both the House Subcommittee and the Special Senate Committee in their reports. The House Subcommittee recommended a comprehensive review of the Act and its operations beginning no later than December 31, 2010 and to be completed within the year. As mentioned, both the House and the Senate recommended such review be conducted by parliamentary committee mandated to examine anti-terrorism laws and policies, among other national security questions.

(vi) Resources and Expertise needed to support Ministers and Parliament

The preparations for a parliamentary review often depend on factors such as whether the review entails a specific provision, a single statute or omnibus legislation. Their timing also is dependent on the contentiousness of the subject matter, and the degree to which it is thought that the review will attract media and public attention and debate.

are required by the Criminal Code to be tabled in Parliament. *Senate Main Report*, note 11, recommendation 17.

⁵⁶ The Khawaja prosecution on various charges of participating and facilitating terrorist activity and other *Criminal Code* terrorism offences was originally scheduled to begin in January 2007 but has been delayed by various pre-trial challenges to the *Criminal Code* and *Canada Evidence Act* provisions relied on. Others were charged in June 2006 with various terrorism-related charges in Toronto. The trials of seventeen individuals are in the preliminary stages.

At an early stage, key issues, partner departments and agencies, stakeholders, environmental pressures, cross-cutting processes and the development of options for the bureaucratic management of the process, need to be identified. Political direction will also shape the development of the review strategy.

Within the lead department, a nucleus of officials often supports the review process on either a full-time or part-time basis. Depending on the anticipated scope of the review, this team could include a leader/manager, substantive subject experts, information management resources, legal counsel and communications officers. Consequential resources for offices, computers, translation and other basics must be identified and obtained.

As a general rule, the review team works in consultation with an interdepartmental working group (IWG) of departments affected by the review. The IWG will receive direction from senior officials within the lead Department. Key contacts will be identified within affected departments and agencies, and participating departments may strike their own internal working parties. This structure assists the process from the initial preparations for the review, during the committee hearings and through to the preparation of the Government response.

The types of background materials to be prepared in advance of the review depend on a number of factors, including the kind of information resources available, the time and personnel available, the political direction received, the number of participating departments and agencies and the environmental context. Consultations papers may be issued for canvassing public views⁵⁷ or research or expert papers may be commissioned. For example, the Department of Justice conducted public consultations with ethno-cultural groups to assess the impact of the ATA in October 2004. Prior to this, research studies commissioned by the Department examined the views of the Canadian public, certain minority groups and Canadian scholars on the impact of the ATA. These studies were provided to the Parliamentary committees.⁵⁸

⁵⁷ For example, the Department of Finance issued a consultation paper prior to the beginning of the PCLMTFA review. See *Enhancing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime, Consultation Paper*, Department of Finance, June 2005, http://www.fin.gc.ca/toce/2005/enhancing_e.html

⁵⁸ See *Summary Report: Public Consultation with Ethnocultural and Religious Communities on the Impact of the Anti-terrorism Act*, November 29, 2004; *The Views of Canadian Scholars on the Impact of the Anti-terrorism Act*, Thomas Gabor, Department of Criminology, University of Ottawa, Draft Final Report, March 31, 2004; *Public Views on the Anti-terrorism Act (formerly Bill C-36) A Qualitative Study*, Millward Brown Goldfarb, March 21, 2004 and *Minority Views on the Canadian Anti-Terrorism Act (Formerly Bill C-36)*, March 31, 2003, http://www.justice.gc.ca/en/anti_terr/reports.html. See also the testimony of Richard Mosley, ADM Criminal Law Policy and Community Justice Branch, Department of Justice before the Sub-Committee on National Security of the Standing Committee of Justice and Human Rights, June 10, 2002 as to the proposed research plan.

Further materials provided included basic resource materials on the *ATA* made available to all Members of Parliament and Senators at the beginning of the review.⁵⁹ Technical briefings about the *ATA* were provided to the media and an *ATA* Review webpage on the Department of Justice Internet site was created as part of an educative process.⁶⁰ More specifically, the Parliamentary Committees were provided at the outset of the review with extensive background materials on the various provisions of the *ATA*, Canada's international anti-terrorism obligations as well as operations under the *ATA* to that time.

Where there are significant pieces of legislation under review, House and Senate Committees may expect that a review process will be introduced through the appearances of Ministers whose departments and agencies are implicated by the legislation. These ministerial appearances, as well as Ministers' concluding appearances, can provide the occasions to speak to matters of policy. In the *ATA* review, the two committees requested early appearances by the Minister of Justice and the Minister of Public Safety and Emergency Preparedness, and their officials, who outlined the government's view of the legislation and responded to Committee questions.⁶¹ Ministers appeared again November in 2005 prior to the dissolution of Parliament⁶² and new Ministers appeared upon the commencement of new Committee proceedings.⁶³

Just as Ministers were supported by senior officials and the *ATA* review Team, the work of the Committee is supported by a Clerk and research staff. The Clerk is responsible for matters related to committee logistics while the research staff supports the Chair and Committee with non-partisan work products, such as the identification and framing of issues, preparing background and analytic materials and briefing books, drawing up lines of questioning and compiling lists of potential witnesses. Concerns about the adequacy of resources provided to the Library of Parliament to do this work are raised in a 2003 report on parliamentary reform.⁶⁴

Despite this support to Committee members, it was evident from questioning and from their own descriptions that understanding the *ATA* was a daunting task with

<http://cmte.parl.gc.ca/Content/HOC/committee/371/snas/evidence/ev675887/snasev05-e.htm#Int-278041>

⁵⁹ *Parliamentary Review of the Anti-terrorism Act: Resource Materials to Members of Parliament and Senators*, Government of Canada.

⁶⁰ See http://www.justice.gc.ca/en/anti_terr/index.html

⁶¹ *Supra* note 10, Senate Committee proceedings of February 14 and 21, 2005, and House Subcommittee proceedings of March 22 and 23, 2005.,

⁶² *Ibid*, Senate Committee proceedings of November 14, 2005, and the House Subcommittee proceedings of November 16, 2005.

⁶³ *Ibid.*, Senate Committee proceedings of June 12, 2006, http://www.parl.gc.ca/common/Committee_SenMeet.asp?Language=E&Parl=39&Ses=1&comm_id=597&ast_meet=1 and the House Subcommittee proceedings of June 21, 2006.

⁶⁴ *The Parliament We Want*, *supra* note 34, at p. 20.

which some Parliamentarians struggled. Even Members of Parliament, who clearly made efforts to understand the *ATA*, were left frustrated with the number of their questions that remained unanswered. The format and length of the Committee hearings did not permit the detailed back-and-forth necessary to answer such questions.⁶⁵

As the Committee hearings progressed, the IWG met on a fairly regular basis so that departments and agencies could have a current knowledge of the Committee's business and interests, as well as of any promises made by Ministers or officials to provide information to the Committees and to ensure their follow-up.

The *ATA* Review Team within the Department of Justice worked closely with their counterparts at Department of Public Safety and Emergency Preparedness and dedicated considerable energy, often under tight timelines, to coordinating this work with other partner departments and agencies and Ministerial staffs.

At the response stage of a review, officials support Ministers providing analysis of recommendations and proposing options for action. Implementation of commitments made in the Government Response may follow promptly in the form of legislative, policy or operational change. In other cases, implementation of the government Response may be delayed due to political circumstances or events. If a subsequent review of the legislation is required, delayed implementation of any of the commitments in the Government Response may become issues in subsequent reviews of the legislation.

External Influences on the ATA Review

(i) Interest of Civil Society in the ATA Review

Interest in the *ATA* review was high, particularly among academics and the media. Certain issues such as allegations of racial profiling and concerns about the use of security certificates dominated media discussions. While not the reporting was not always an accurate reflection of the law, *ATA* issues were often discussed in the news of the day. In addition to media discussions, numerous individuals and non-governmental organizations from Canada and abroad were called as witnesses. Individuals and organizations testified as to the impact of the events of September 11, 2001, on their communities and raised concerns about racial profiling. A few witnesses conveyed the tragedy of terrorism and the impact on them as victims as well. This provided Parliament with a wealth of viewpoints and sometimes conflicting recommendations.

(ii) The Interplay of Parliament, the Courts and the Executive

⁶⁵ *Supra* note 10, House Subcommittee proceedings, November 16, 2005, at 1755-1805, 1830, per Tom Wappell, MP.

Numerous events and “parallel” processes affected the ATA review. Terrorist incidents such as those in London, Bali and Madrid brought home the implications of “home-grown” terrorism to Canadians. As other governments and international organizations responded to these new incidents of terrorism, Ministers were asked by the review Committees to assess the continuing adequacy of the ATA and Canada’s larger national security and *Criminal Code* framework.⁶⁶

The introduction of United Nations Resolution 1624,⁶⁷ prohibiting the incitement of terrorism, and efforts in the United Kingdom⁶⁸ and elsewhere to criminalize the encouragement, including the glorification of terrorism, is another example of these international influences. Before the Special Senate Committee on November 14, 2005, the then Minister of Justice, the Hon. Irwin Cotler, referred to international efforts to create a glorification offence, noting that

Both the Department of Justice Canada and PSEPC [Public Safety and Emergency Preparedness Canada] have been following these international developments closely. Canada already has measured laws that capture what other countries are trying to address and we have not felt it necessary to propose new measures or policies. However, we remain responsive to any recommendations your committee may make as a result of your review. We are willing to incorporate any appropriate measures, should they become necessary, from your canvass of comparative initiatives elsewhere.⁶⁹

In its main report, the House Subcommittee concluded *Criminal Code* offences prohibiting hate propaganda and its provisions dealing with the facilitation, instruction and participation of terrorist activity do not sufficiently address “..the glorification and encouraged emulation of terrorist activity”. It recommended the creation of a new offence, incorporating similar safeguards as the Supreme Court of Canada had considered important in the hate propaganda provisions.⁷⁰ The government is studying this recommendation as it considers the Committee reports.

Court proceedings also influenced the ATA review. The various court challenges launched by Messrs. Charkoui, Al-mrei and Harkat focused attention on the security certificate process in *IRPA* as did the hunger strikes of the detainees themselves in protest against the conditions of their detention. While the

⁶⁶ *Supra*, note 10, Committee proceedings, House Subcommittee, June 21, 2006, at paras. 1640ff.

⁶⁷ S/Res/1624 (2005),

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/510/52/PDF/N0551052.pdf?OpenElement>

⁶⁸ See the *Terrorism Act, 2006*, 2006, c. 11., s. 1 – offence of encouragement of terrorism, <http://www.opsi.gov.uk/acts/acts2006/60011--b.htm#1>

⁶⁹ *Supra*, note 10, Special Senate Committee, November 14, 2005.

⁷⁰ *Subcommittee Main Report*, *supra*, note 8, at pp. 11-12.

immigration security certificate regime had existed since the late 1970s in different forms, it had not been the focus of much public scrutiny until the ATA review committees added an examination of the *IRPA* security certificate process to their review. The Ministers of Justice and Public Safety were repeatedly questioned about the security certificate process and government officials presented a special panel on security certificates to the Senate and House Committees in the 38th Parliament to explain the *IRPA* security certificate process.⁷¹ Non-governmental witnesses also raised concerns about the process in testimony and submissions.⁷²

The challenges by Mr. Harkat, Charkaoui and Almrei to these provisions of *IRPA* in the Federal Court of Canada reached the Supreme Court of Canada, which struck down the *IRPA* regime as unconstitutional on February 23, 2007.⁷³ The Supreme Court held that the immigration security certificate procedure under the *IRPA* was contrary to *Charter* guarantees. Among other things, the regime did not sufficiently provide the detained person with opportunity to know the case against him. The *Charter* required the person be provided with this information or “a substantial substitute for that information must be found”.⁷⁴ One alternative that the Court noted was the UK system of special counsel who act on behalf of named persons in national security proceedings. The use of the special counsel had been extensively canvassed in the ATA committee hearings, though this testimony is not specifically mentioned in the Court’s judgement.

The Court also held that the right of the plaintiffs, all foreign nationals, against arbitrary detention had been denied when compared with the provisions applicable to permanent residents of Canada. According to the Court, regular detention reviews are required to ensure that detention pending deportation does not constitute cruel and unusual punishment nor is otherwise inconsistent with the principles of fundamental justice. The declaration of invalidity of the *IRPA* provisions was suspended for one year from the date of the Court’s judgement. During this time, existing *IRPA* provisions apply though the Court’s ruling permitted more frequent detention reviews for the persons detained. Following the Court’s judgment, the Special Senate Committee issued its Fourth Report, specifically citing the Supreme Court judgments and asking the government to go

⁷¹ *Supra*, note 10, Senate proceedings on March 21, 2005, and the House Subcommittee on April 20, 2005.

⁷² See for example, testimony of the Canadian Council of Criminal Defence Lawyers, the Canadian Muslim Lawyers Association and the Canadian Lawyers for International Human Rights, Amnesty International, Rights and Democracy, in the Senate Committee on May 2, 16, and 30, 2005, and the Justice for Mohamed Harkat Committee, the Campaign to Stop Secret Trials and the Canadian Council for Refugees and others on September 21, 2005, before the House Subcommittee.

⁷³ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9; <http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html>

⁷⁴ *Ibid.* at para. 61.

beyond their parameters to provide even greater protections to security certificate detainees.⁷⁵

Other judicial pronouncements on *ATA* provisions provided a backdrop against which the *ATA* review was conducted. Prior to the beginning of the review, the Supreme Court of Canada considered the investigative hearing provision in the *Re Vancouver Sun*⁷⁶ and *Re Application under s. 83.28 of the Criminal Code*⁷⁷ cases. In these cases, the Supreme Court upheld the constitutionality of the investigative hearing provision but extended the safeguards that apply in criminal proceedings for the use and derivative use immunity protections that apply to information obtained from compelled questioning⁷⁸ to deportation and extradition proceedings as well. The Court also held in the *Vancouver Sun* case that like other judicial proceedings, investigative hearings are presumed to be held in public, subject to a possible exercise of judicial discretion excluding the public or subjecting evidence to a publication ban in accordance with the Court's earlier jurisprudence in this area.

During the course of the *ATA* review, the Ontario Superior Court of Justice also considered s. 4 of the *SOIA*, which formed part of the Subcommittee's expanded review mandate. In *O'Neill v. Canada (Attorney General)*,⁷⁹ the Court held, among other things, that s. 4 of the *SOIA* was vague and overbroad in a manner contrary to s. 7 of the *Charter* and that some of its offences imposed criminal liability without a fault requirement. Another judge of the same court also examined the Criminal Code definition of "terrorist activity" in *R. v. Khawaja*.⁸⁰ Rutherford J. held that the Criminal Code terrorism offences were not void for vagueness nor overbroad but that the motivational requirement in the Code definition of a "terrorist activity" (the requirement that an act or omission be committed "in whole or in part, for a political, religious or ideological purpose, objective or cause") was contrary to rights within s. 2 of the *Charter* and could not be justified under s. 1 of the *Charter*.

The Chief Justice of the Federal Court of Canada also considered s. 38 of the *Canada Evidence Act*, as amended by the *ATA*, in *Toronto Star Newspapers Ltd. v. Canada*⁸¹ (reading down the requirement to hold closed proceedings under s. 38 to apply on to proceedings in which secret information is being considered). More recently, in *Khawaja*,⁸² the Chief Justice held that *ex parte* proceedings of s. 38 of the *CEA* did not infringe the accused's *Charter* rights in light of the various safeguards within the provision. While the courts in some of these cases

⁷⁵ Fourth report, Special Senate Committee on the Anti-terrorism Act, <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep04mar07-e.htm>

⁷⁶ [2004] 2 S.C.R. 332, 2004 SCC 43.

⁷⁷ [2004] 2 S.C.R. 248, 2004 SCC 42

⁷⁸ See s. 83.28(10) of the *Criminal Code*.

⁷⁹ (2006), 213 C.C.C. (ed) 389 (Ontario Superior Court of Justice, Ratushny J.)

⁸⁰ [2006] O.J. No. 4245 (Ontario Superior Court of Justice).

⁸¹ [2007] F.C.J. No. 165 (Lutfy, C.J.).

⁸² *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 648 (Lutfy, C.J.).

struck down certain portions of these statutes in issue, they also upheld as constitutional large parts of the *ATA* regimes they were considering.⁸³ Parliamentarians would have been aware of many of these decisions.

(iii) Parallel Processes - the Interplay of the *ATA* Review and Commissions of Inquiry

The Government of Canada, both the previous Liberal government and the current Conservative government, established commissions of inquiry, with the power to hear witnesses and make recommendations, with respect to issues that at times overlapped with concerns being raised during the *ATA* review.

The *Commission of Inquiry into Actions of Canadian Officials relating to Maher Arar*, conducted by Mr. Justice Denis O'Connor, the Associate Chief Justice of Ontario, examined the detention of Maher Arar in the United States, his subsequent removal to Syria where he was imprisoned and tortured and actions taken after his return to Canada. The first part of Mr. Justice O'Connor's inquiry was a factual inquiry into the events themselves.⁸⁴ As the Press Release announcing the first report notes,

... Commissioner O'Connor addresses many issues such as: the RCMP's national security activities, the information sharing practices of other government agencies; some recommendations touch upon the investigative interaction with countries with questionable human rights records as well as the issue of Canadians detained in other countries; some recommendations concern the need for Canadian agencies engaged in national security investigations to have clear policies and more training on issues of racial, religious or ethnic profiling:

Many of these issues were also raised during the *ATA* review and many of the same non-governmental witnesses appeared before both the Arar Commission and the *ATA* review Committees.⁸⁵

The second part of the inquiry involved a policy review examining mechanisms for review and oversight of the Royal Canadian Mounted Police's national

⁸³ See Stanley A. Cohen, "The Administration of Justice and National Security", Address to the CCISS Conference, Ottawa, Ontario, June 10-12, 2007, forthcoming.

⁸⁴ Press Release, Arar Commission releases its findings on the handling of the Maher Arar case, September 18, 2006, http://www.ararcommission.ca/eng/ReleaseFinal_Sept18.pdf. In his first report, Mr. Justice O'Connor also called an independent review of the cases of Messrs. Almalki, El Maati and Nureddin, Canadians who were similarly imprisoned and tortured in Syria. This review is presently being conducted by a former Justice of the Supreme Court of Canada who has been asked to report by January 31, 2008. See *Internal Inquiry into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abouž-Elmaati and Muayyed Nureddin*, Terms of Reference, <http://www.publicsafety.gc.ca/media/nr/2006/nr20061212-3-en.asp>

⁸⁵ See the Arar Commission, Factual Inquiry – Parties and Intervenors, <http://www.ararcommission.ca/eng/11d.htm> and the Policy Review - Schedule of Public Hearings, <http://www.ararcommission.ca/eng/12g.htm>

security activities. Again, there is some overlap with recommendations for review and oversight that came out of the *ATA* review committee reports. Justice O'Connor recommended, among other things, the creation of a new "Independent Complaints and National Security Review Agency for the RCMP" to oversee the law enforcement activities of the RCMP and the Canadian Border Services Agency and recommended the mandate of an existing Security Review Committee be expanded to review the activities of four other government departments.⁸⁶ Information could be exchanged, investigations referred as between these bodies and joint investigations conducted, assisted by the management of an "Integrated National Security Review Coordinating Committee" which Justice O'Connor also recommends be established.

A public inquiry is presently examining the events examined the circumstances surrounding the bombing of Air India Flight 182 in 1985, which resulted in the deaths of 331 Canadians. The *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* is being conducted by another former Justice of the Supreme Court of Canada, the Honourable John C. Major. This follows a study of the Air India bombing by a former Premier of Ontario as an Independent Advisor to the previous Minister of Public Safety and Emergency Preparedness which was conducted during the period of the *ATA* review.⁸⁷

A challenge to government during this time was the management of its support to these various parallel processes. Similarly, the Government is presently considering the Arar Commission recommendations as well as those made by the parliamentary Committees on the *ATA* review.

Preliminary Conclusions and Further Questions

As mentioned at the outset, a definitive analysis of the *ATA* review and its impact on Canada's anti-terrorism policy is premature. Parliament's role in holding the executive accountable for its actions under the *ATA* is fundamental to our free and democratic society. Recommendations for a standing committee of Parliament specifically designated to examine national security issues, whether the National Security Committee of Parliamentarians or some variation, could fill the need identified by the *ATA* review committees for further parliamentary scrutiny of the national security landscape.

Experience in the *ATA* review may lead to some preliminary conclusions about parliamentary reviews more generally:

⁸⁶ These include Citizenship and Immigration Canada, Transport Canada, Financial Transactions and Reports Analysis Centre of Canada and Foreign Affairs and International Trade. Press Release, December 12, 2006, <http://www.ararcommission.ca/eng/PolicyReviewDec12-English.pdf>

⁸⁷ *Lessons to be Learned*, the Honourable Bob Rae, *Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182* November 23, 2005, http://www.publicsafety.gc.ca/prg/ns/airs/_fl/rep1-en.pdf

- (i) When enacting new legislation, the Government introducing a bill or parliamentarians assessing it should carefully consider whether a comprehensive parliamentary review is the best means of achieving public accountability. Parliament and parliamentarians may wish to consider also the manner in which the review will be conducted, including options such as appointing an independent expert or a panel of experts reporting to a particular Minister. It is not clear presently how much thought is given to the form and manner of parliamentary scrutiny.
- (ii) Similarly, the executive and Parliament may wish to consider disaggregating the review of an omnibus bill or limiting review to particularly controversial provisions not subject to other existing review mechanisms. The number of years necessary to get sufficient evidence about how a provision is used will be an important factor, though the political context will likely colour any decision made.
- (iii) Parliament as a whole and particularly the parliamentary committees engaged in a review must consider the resources, financial and other, needed to support this work. They should consider whether witness testimony and submissions alone are sufficient. A parliamentary committee's review could be supplemented by independent experts commissioned to study specific aspects not covered by witness testimony. Other technological means could be used to foster public consultation (eg. Internet forums, etc.).⁸⁸ As well, government background briefings on specific issues or with panels of government experts might be contemplated.

Democratic accountability requires that parliamentary reviews remain a credible forum for public discussion of issues of national interest and a meaningful mechanism to assist in refining Canadian legislation and policy. The form, manner and substance of parliamentary reviews should be considered in a systematic way and we hope this overview paper will inform further discussion and study of their use in Canada.

⁸⁸ See *The Parliament We Want*, *supra* note 34, at p. 16-17 for a broader discussion for reforming the role of Parliamentarians to reflect constituent concerns.