Government of Canada | Gouvernement du Canada

International Covenant on Civil and Political Rights

Interim Report in follow-up to the review of Canada's Fifth Report

November 2006

Canada

Catalogue No. CH37-4/7-1-2007E-PDF
ISBN 978-0-662-46594-2

Introduction

1. On October 17 and 18, 2005, Canada appeared before the UN Human Rights Committee for the review of its Fifth Report on the *International Covenant on Civil and Political Rights*. In its concluding observations following the review, the UN Committee asked Canada to submit information with respect to four of its recommendations (12, 13, 14 and 18) within one year.

Recommendation 12: *The State party should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation or detention.*

2. On October 24, 2006, in *Khawaja*, Mr. Justice Rutherford of the Ontario Superior Court of Justice struck down the motive requirement in the general definition of "terrorist activity". In his view, it infringes paragraphs 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*, which guarantee the freedom of conscience and religion, and the freedom of thought, belief, opinion and expression respectively. Furthermore, he held that the motive requirement could not be justified under section 1 of the Charter because it was not "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society". Accordingly, he severed the motive requirement from the remainder of the general definition of "terrorist activity". The result is that the prosecution is not required to prove such a motive beyond a reasonable doubt.

3. However, Mr. Justice Rutherford also held that the various offences with which Mr. Khawaja is charged are constitutional. In his view, they are not vague or overbroad. These offences include knowingly facilitating a terrorist activity and knowingly contributing to any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to carry out a terrorist activity.

4. In enacting the *Anti-terrorism Act*, the motive requirement in the definition of terrorist activity was deemed necessary to appropriately define and limit the scope of the legislation. It was believed that the reference to a religious, political or ideological purpose would not stigmatize or single out people on the basis of their religion, political beliefs or their ideologies because, before exposure to criminal liability can exist, the rest of the clause requires that there also be an intention to intimidate the public or a segment thereof, as well as an intended consequence, such as causing death or serious bodily injury, endangering a life, causing a serious interference or disruption of an essential service facility or system. It was also felt that the motive requirement would help to distinguish terrorist activity from other forms of criminality that are intended to intimidate people by means of violence. Additionally, there are a number of safeguards in place to ensure that the motive requirement would not be subject to abuse. For example, the interpretive clause found in section 83.01(1.1) ensures that the expression of political, religious or ideological thought, belief or opinion, *unaccompanied* by harmful conduct, would not fall within the definition of terrorist activity. The consent of the relevant Attorney General of Canada is also required for the prosecution of a terrorism offence (section 83.24 of the *Criminal Code*).

5. Canada's Department of Justice is currently examining Mr. Justice Rutherford's decision. It is not known at this time if the decision will be appealed. Canada will include any further information on these developments in its next report to the Human Rights Committee.

Recommendation 13: *The State party should review the Canada Evidence Act so as to guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access. The State party, bearing in mind the Committee's general comment No. 29 (2001) on states of emergency, should in no case invoke exceptional circumstances as justification for deviating from fundamental principles of fair trial.*

6. The importance of protecting information the disclosure of which could harm international relations, national defence or national security has been long recognized by Parliament and Canadian courts. The national interest in the proper handling of confidential information can be most acute in cases involving information relating to international relations, national defence or national security.[1] In *R.* v. *Thomson,* the Supreme Court of Canada observed that "all governments must maintain some degree of security and confidentiality in order to function."[2]

7. With that in mind, a judicial balancing of interests becomes necessary to protect sensitive or potentially injurious information the disclosure of which could impact on international relations, national defence or national security, while still providing for fair trial rights of individuals. The section 38 regime set out in the *Canada Evidence Act* is subject to the *Canadian Charter of Rights and Freedoms.*

Section 38 of the *Canada Evidence Act*:

8. Any participant in connection with, or in the course of, a proceeding is required to notify in writing as soon as possible the Attorney General of Canada of the possibility of the disclosure of information that the participant believes is sensitive or potentially injurious information. Disclosure of the information, which is the subject of a notice, is prohibited unless such disclosure has been authorized in writing by the Attorney General of Canada. The Attorney General of Canada may, subject to any conditions he or she considers appropriate, authorize the disclosure of all or part of the information.

9. The Attorney General of Canada may, and at times must, apply to the Federal Court for an order with respect to the disclosure of sensitive or potentially injurious information. The participant, or the person who seeks disclosure, may make a similar application. The onus rests with the Attorney General of Canada to prove the probable injury to international relations or national defence or national security.

[1] See *Minister of Employment and Immigration* v. *Chiarelli,* [1992] 1 S.C.R. 711 regarding the need for confidentiality in national security cases.
[2] [1992] 1S.C.R. 385.

10. Upon a finding that disclosure of the information would result in injury, the Court must then determine whether the public interest in disclosing the information is greater than the public interest in not disclosing it.

11. If the Federal Court orders disclosure, it must do so in the manner that is most likely to limit any injury to international relations or national defence or national security. For instance, a judge could order the disclosure of a part or a summary of the information or a written admission of facts relating to the information. The Federal Court may also issue an order permitting the introduction into evidence of the information in the main proceedings in form and/or subject to conditions imposed.

12. If a judge determines that a party to the proceeding was not given the opportunity to make representations and that the person's interests are adversely affected by an order, the judge shall refer the order automatically to the Federal Court of Appeal for review.

13. The decision with regards to disclosure made by the Federal Court can be appealed to the Federal Court of Appeal and also to the Supreme Court of Canada.

14. The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, other than an order calling for the disclosure of the information. The judge may, for example, stay the proceedings, dismiss the counts of the indictment or draw any inference against any party on any issue relating to the information that cannot be disclosed. The information protected by the Federal Court is not used in the criminal proceedings.

Recommendation 14: *The State party should ensure that administrative detention under security certificates is subject to a judicial review that is in accordance with the requirements of article 9 of the Covenant, and legally determine a maximum length of such detention. The State party should also review its practice with a view to ensuring that persons suspected of terrorism or any other criminal offences are detained pursuant to criminal proceedings in compliance with the Covenant. It should also ensure that detention is never mandatory but decided on a case-by-case basis.*

15. In addition to its international human rights obligations, Canada also has a corresponding obligation to protect the safety and security of people within our borders. Part of this responsibility is to take action against non-Canadians who are in Canada and present a threat to national security or the security of persons.

16. The security certificate process has existed in one form or another since at least 1978; this constitutes an exceptional measure and is employed judiciously. The security certificate process was designed to enable the government to expeditiously remove persons who are inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, while ensuring the protection of sensitive security and criminal intelligence information, the disclosure of which would be injurious to national security or the safety of any person.

17. The *Immigration and Refugee Protection Act* (IRPA) contains provisions that outline the process for the judicial review of a certificate signed by two Ministers. This process permits the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration to sign a certificate, stating that a permanent resident or foreign national is inadmissible to Canada. This assessment is done on a case-by-case basis.

18. The certificate, once signed by the Ministers, is referred to a judge of the Federal Court for a determination of the reasonableness of the certificate. The judge is required to examine the information and any other evidence relied upon by the Ministers within seven days after the referral of the certificate.

19. The Human Rights Committee commented that individuals detained under security certificates are not adequately informed about the reasons for their detention, and have limited judicial review rights. Detention review proceedings under security certificates take place in open proceedings as well as in the context of an in-camera, *ex parte* process that permits the Government to protect classified information from public disclosure for reasons associated with national security or the safety of persons. The Federal Court may hear some evidence *ex parte* but the judge also has a statutory obligation to provide to the person concerned a summary of the confidential information heard in private, so that the person is reasonably informed of the circumstances giving rise to the certificate, without revealing any information the disclosure of which would be injurious to national security or the safety of any persons. The security certificate process also provides the person with the right to be heard, to respond to the Minister's allegations, and to call witnesses. Various governmental officials regularly testify and are cross-examined in open court at reasonableness hearings and the detention reviews.

20. It is worth noting that the non-disclosure and use of classified information in the immigration removal process is not unique to Canada as other countries are also permitted to consider this type of information.

21. Canada would also like to note that this issue was previously addressed by this Committee in Communication No. 1051/2002 on June 15, 2004, in the complaint of Mansour Ahani. The Committee concluded at that time that it was not unfair for the Government of Canada to have used an *ex parte* process as long as a redacted summary of information was provided to the author of the complaint. Furthermore, the Committee also concluded that the detention under a security certificate does not constitute *ipso facto* arbitrary detention.

22. If the certificate is found to be reasonable by the Federal Court, it is conclusive proof that the individual named therein is inadmissible to Canada. This means that the person named will be deported. A certificate found not to be reasonable is set aside and is of no effect. The Federal Court's decision on the reasonableness of the certificate generally cannot be appealed; IRPA contains a privative clause, which prohibits judicial review of a designated judge's reasonableness finding by appellate courts. However, at common law,

the appellate courts have created exceptions to this rule by allowing appeals on questions involving constitutional and Charter challenges and jurisdictional questions.

23. If a foreign national has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, a Federal Court judge may, on application by the individual, order the individual to be released, if the judge is satisfied that the individual will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or the safety of any person.

24. The Committee observed that the State party should review its practice with a view to ensuring that persons suspected of terrorism are detained pursuant to criminal proceedings in compliance with the Covenant. In Canada, the investigation of criminal activities and the filing of charges fall under the independent discretion and authority of police and prosecutors. The security certificate is an immigration removals process and is separate from criminal law. Foreign nationals convicted of serious crimes in Canada are also inadmissible to Canada and will face removal proceedings. To reiterate, the security certificate process aims to remove non-Canadian citizens from Canada when they have been found to pose a serious threat to public safety or national security.

25. The end of the process occurs when an individual, pursuant to a security certificate determined to be reasonable by the Court, is removed from Canada. The maximum length of detention of security certificate subjects detained under IRPA is ultimately a judicial determination.

26. The Committee also noted that under security certificates, detention is mandatory for foreign nationals until 120 days after the certificate has been found to be reasonable, when a foreign national would then be entitled to a detention review (if they have not been removed from Canada). In 2006, in *Re Jaballah,* a security certificate proceeding, the Federal Court of Canada granted a foreign national an exemption to this rule under the *Canadian Charter of Rights and Freedoms*. The Federal Court of Canada has recently upheld the security certificate as reasonable under IRPA. The Court is also currently conducting a thorough review of the grounds for continued detention concerning the individual.

27. In June 2006, the Supreme Court of Canada heard three cases (*Almrei*, *Charkaoui*, *Harkat*) challenging the constitutionality of certain aspects of the security certificate process. The challenges focused on, *inter alia,* the mandatory detention of foreign nationals without review until 120 days after the certificate is found reasonable (*Almrei*), discrimination in the certificate process detention regime against non-citizens (*Charkaoui*), the *ex parte* process for the protection of national security information (*Charkaoui*, *Harkat*), including the possibility of *an amicus curiae*/special advocate as a possible remedy (*Harkat*). The lower court decisions, which are on appeal in these cases, held that the current certificate process conforms with constitutional requirements. Decisions from the Supreme Court are expected in late 2006 or early 2007.

Recommendation 18: *The State party should put an end to the practice of employing male staff working in direct contact with women in women's institutions. It should provide substantial information on the implementation of the recommendations of the Canadian Human Rights Commission, as well as on concrete results achieved, in particular regarding the establishment of an independent external redress body for federally sentenced offenders and independent adjudication for decisions related to involuntary segregation, or alternative models.*

28. The Correctional Service of Canada's (CSC) does not intend to change its practice of employing men as front-line staff in women's institutions.

29. In 1994, CSC determined that recruitment for front line staff at the new regional women's institutions would be open to both men and women as there is no *bona fide* justification for front-line staff in women's institutions to be female. With that decision, staff selection has not been based on gender, but rather on criteria directly related to duties, a demonstrated sensitivity to, and awareness of, women's issues, professionalism and an ability to work in a women-centred environment. A proactive staffing approach was established that focused on the implementation of policies, a comprehensive women-centred training program and physical adaptations to the institutions. This staffing approach strives to respect the privacy and dignity issues of women offenders while ensuring that male correctional employees pursuing employment opportunities in women's institutions are not discriminated against based on their sex.

30. In their report entitled, *Protecting Their Rights – A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women,* the Canadian Human Rights Commission (CHRC) concluded that, "the Correctional Service of Canada must vigorously pursue other alternatives before impairing the employment rights of men…". They acknowledged that the *National Operational Protocol – Front Line Staffing (1998)* had, "achieved some success in mitigating the negative effects of the presence of male guards on women inmates at risk, but it could be improved." Accordingly, the CHRC made recommendations regarding CSC's Women-Centred Training Program and the *National Operational Protocol*. In terms of Women-Centred Training, CSC delivers a one, three or ten-day program to staff at the women's institutions depending on their position.

31. The CHRC endorsed CSC's decision to employ men in front line positions and recommended that the *National Operational Protocol* be converted to a formal policy document. CSC promulgated *Commissioner's Directive 577, Operational Requirements for Cross-Gender Staffing in Women Offender Institutions* in March 2006 (http://www.csc-scc.gc.ca/text/plcy/doc/577-cd.pdf). The new policy document is largely based on the 1998 *Protocol* and addresses requirements that must be met where we have men working in a women's institution. The promulgation of *Commissioner's Directive 577* formalizes requirements for staff which will assist in bringing national consistency to these issues. Progress will be monitored through CSC's accountability monitoring tools and in the long-term, an evaluation project.

32. As of July 2006, 17.7 percent of the front line staff (Primary Workers) at all women's institutions are men; 82.3 percent are women. Generally, the proportion has been relatively consistent since the women's institutions opened. An exception is Edmonton Institution for Women where there is a higher proportion of women in front line positions (88.1 percent are women; 11.9 percent are men); this is likely a result of the exclusion order that was in place at this site until 2001. In addition, at Okimaw Ohci Healing Lodge and the women's unit at the Regional Psychiatric Centre (Prairies) all front line positions are currently staffed with women.

Implementation of the Canadian Human Rights Commission recommendations

33. In April 2006, CSC released a document entitled, *Ten Year Status Report on Women's' Corrections*. The Report, which can be found at: http://www.csc-scc.gc.ca/text/prgrm/fsw/wos24/tenyearstatusreport_e.pdf, addresses the recommendations and changes that resulted from the *Arbour Report*, as well as from the subsequent major reviews of the past decade, including:
    - *Report of the Auditor General of Canada to the House of Commons, on the Reintegration of Women Offenders*;
    - *The 26th Report of the Standing Committee on Public Accounts*; and
    - *Protecting Their Rights – A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (Canadian Human Rights Commission).

34. This report provides a detailed update on how CSC is responding to the CHRC's recommendations, including the issues of an independent adjudication model for involuntary segregation and an external redress body for federal offenders.

Provinces and territories

35. In all provinces and territories, offenders have access to recourse through mechanisms such as the human rights commissions or tribunals and Ombudsman. In most jurisdictions, internal policies and procedures are in place for dealing with complaints or alleged wrongdoings. Offenders may also use outside advocacy groups, such as the John Howard Society (http://www.johnhoward.ca) and the Elizabeth Fry Society (http://www.elizabethfry.ca/).

36. With respect to the employment of male staff in women's correctional institutions within their jurisdictions, provincial and territorial governments generally have an approach similar to Correctional Services Canada. The following provides more specific information on the situation in each jurisdiction.

British Columbia

37. There is one all-female correctional institution in British Columbia and two mixed facilities. Front line correctional staff responsible for the direct supervision of women inmates is restricted to female staff. Cross-gendered staffing is allowed in other positions at all facilities with the following exceptions: cross-gendered staffing is not allowed in

changing areas or living units where dignity and privacy cannot be provided. There are exceptions in extreme circumstances or emergencies.

Alberta

38. Alberta does not operate a female-only correctional institution. Male staff is not assigned to work on the female units, but provide cover off of the units as required. Male staff supervises female offenders during co-ed activities outside of the living unit.

Saskatchewan

39. Saskatchewan's policy is consistent with the prohibition of gender discrimination in employment. The Saskatchewan Human Rights Commission granted three exemptions regarding corrections workers:
    - Skin searches of inmates are to be conducted by corrections workers of the same gender as the inmate, unless exceptional or unusual circumstances exist.
    - Continuous observations of inmates who may be performing private bodily functions, who are in a state of undress, must be conducted by corrections workers of the same gender as the inmates.
    - Employment in any of the living, admitting or secure areas where female inmates are held are restricted to female corrections workers.

40. The Pine Grove Correctional Centre is the only women's-only correctional institution in Saskatchewan. The duties of corrections workers at Pine Grove involve working in the offender living areas that, prior to February 2006, restricted male corrections workers. However, a number of other positions are open to males (eg. administration, support staff, maintenance, program positions and food services).

41. A pilot project has been implemented which allows two male corrections workers to be deployed to the Living Units at the Pine Grove Correctional Centre. The project plan was shared with the Saskatchewan Human Rights Commission prior to implementation. An analysis of the project will be conducted and shared with the Commission on or before December 31, 2006. In the meantime, the Commission has maintained the exemption.

Manitoba

42. At Portage Correctional Centre, the province's all-female correctional institution, there are 48 staff: 41 female and 7 male. The few male frontline staff work under restrictions similar to those of other jurisdictions. There is no more than one male on shift at any one time and they must be partnered by female staff. There are exceptions in extreme circumstances or emergencies.

43. Manitoba is in the early stages of constructing a new women's correctional centre and is embarking upon a review of policies, protocols and staff training with respect to cross-gender staffing. That review may be completed by December 2006.

Ontario

44. Ontario's policy with respect to the assignment of male and female correctional officers is consistent with the Ontario *Human Rights Code*'s prohibition on discrimination on the grounds of sex in hiring and work assignments and demonstrates consideration and sensitivity towards the personal dignity and modesty of inmates. These objectives are achieved by ensuring an appropriate balance of male and female officers on each shift so that duties requiring officers of the same sex as inmates can be performed routinely (e.g. supervision of showers, escorts).

45. The Vanier Centre for Women, Ontario's facility that is dedicated to services for female offenders, provides pre- and post-disposition supervision and specialized programming for women in conflict with the law. It operates with a high proportion of women on staff (approximately 65 percent of correctional officers are women). In addition to the action taken to increase the representation of women in the correctional workforce, it should be noted that there are positive benefits in having positive male role models working with female offenders.

46. All correctional officers participate in sensitivity training. In addition, the Ministry of Community Safety and Correctional Services is gradually training its entire front line staff in the "Women In Conflict with the Law" program that is offered at the Ontario Correctional Services College.

Québec

47. Québec has two female-only institutional facilities, one in Montreal and one in Québec City.

48. A directive, in place since 1985, sets out the powers of correctional officers for pat-downs and strip searches. The directive clearly indicates that women must always be patted down by a female staff member, that strip searches must be conducted by a person of the same sex except in emergency situations, and that when a witness is required, the witness must also be of the same sex. An emergency situation is defined as a situation in which the time needed to find a member of the same sex to conduct the search would put the lives or safety of individuals in danger.

New Brunswick

49. While New Brunswick does not have a specific female correctional institution, there are female offenders units in the adult and youth correctional facilities.

50. New Brunswick has been hiring female officers for over 20 years. As of September 20, 2006 New Brunswick has 244 correctional officers (22 part-time and 222 full-time). 57 are female, full-time correctional officers and 7 are female, part-time correctional officers. The percentage of female correctional officers (26 percent) compared to the number of females incarcerated is much greater (10 percent).

Nova Scotia

51. The new *Correctional Services Act* came into force on July 1, 2006, and includes a code of professional conduct. The new Act provides for Minister-appointed inspectors, a complaint procedure, and separate housing for female and male offenders in institutions and in hospitals. The Act provides generally that female offenders are to be supervised by female employees. Searches are to be conducted by an employee of the same gender as the inmate being searched.

52. The legislation provides that:
- a superintendent shall ensure that every female offender in a correctional facility is supervised by a female employee;
- detained persons of one sex are held separate and apart from detained persons of the opposite sex as soon after being taken into custody as is reasonably possible and are supervised by persons of the same sex as soon after being taken into custody as is reasonably possible;
- no male employee shall search a female person and no female employee shall strip search a male person; and
- no inmate or visitor shall be searched by a person of the opposite sex unless the person is a health care professional or the person is an employee who has reasonable cause to believe that an immediate pat search is necessary because the inmate or visitor may be concealing contraband that may be dangerous or harmful to any person or property.

Prince Edward Island

53. While Prince Edward Island does not have separate facilities for women, female frontline staff members deal with female offenders in separate female living units for both adult and youth offenders.

Newfoundland and Labrador

54. Frontline staffing in Newfoundland and Labrador is conducted in the same fashion as that of Correctional Services Canada. The ratio of male/female staffing is similar. In 1996, by a ruling of the Newfoundland Human Rights Commission, the Department of Justice was forced to a adopt a staff gender ratio at the Women's Correctional Center in Clarenville. Protocols have been implemented to protect privacy by limiting the roles of male correctional officers, but it is placing added pressure on female staff.

Yukon

55. The only correctional centre in the Yukon houses both men and women. Correctional officers of both genders are on staff and specific procedures exist regarding male staff accessing the female offender living unit (they must first announce themselves and be admitted to the unit by the offenders and ideally, be accompanied by a female correctional

officer). A female correctional officer is scheduled to be on duty at all times so that a female officer is present and available to deal with the female offenders specifically.

Northwest Territories

56. The Government of the Northwest Territories operates one all female adult correctional institute and one female young offender facility. The current staffing contingent of the adult facility is all female and the youth facility has one male staff on staff.

57. Both policy and practice in the institutions is to be carried out with due diligence and care to respect the privacy and personal dignity of all offenders regardless of gender. All correctional staff receive training in human rights issues as they apply to offender management and all staff must adhere to a professional conduct code. The Northwest Territories is developing programming specifically to meet the needs of female offenders.

Nunavut

58. The Baffin Correctional Centre operates a female unit separate from the main institution but on the same grounds. The unit is staffed by female officers, although male officers assist with supervision as required. Female offenders who do not match the criteria of the female unit at Baffin Correction Centre are transferred to institutions in Ontario and the Northwest Territories with whom there are agreements in place.