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*THE INTERNATIONAL CENTRE FOR CRIMINAL LAW  
REFORM AND CRIMINAL JUSTICE POLICY*

# **BREAKING NEW GROUND**

*A Collection of Papers in  
the International Centre's  
Canada-China Cooperation  
Programme*

March 2002



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Breaking New Ground: *A Collection of Papers in the International  
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# PREFACE

The *International Centre for Criminal Law Reform and Criminal Justice Policy* (ICCLR), formally affiliated with the United Nations, is an independent, non-profit, inter-regional organization that contributes to national, regional and international efforts to promote the rule of law in the administration of criminal justice around the world. The Centre supports these efforts through policy analysis, technical assistance, information exchange and research. In doing so, the Centre is guided by international human rights standards, Canadian foreign policy objectives and United Nations Crime Prevention and Criminal Justice Programme priorities.

This publication of papers is the culmination of several years of work undertaken by ICCLR in China as part of the China-Canada Criminal Law/Justice Cooperation Programme. The programme consisted of three separate but interconnected projects involving the criminal law and procedure reforms to Chinese law, the development of National Legal Aid legislation and the implementation of the *International Covenant on Civil and Political Rights* in China. ICCLR wishes to acknowledge the generous funding assistance received from the Canadian International Development Agency (CIDA) and the Ford Foundation.

The Centre wishes to extend its deepest appreciation to all of the government officials and other professionals that contributed their time and expertise to the success of the program. This included representatives from the Government of Canada from CIDA, Justice Canada, the Department of Foreign Affairs and International Trade Canada, Heritage Canada, the Royal Canadian Mounted Police, the Correctional Service of Canada, the National Parole Board of Canada, the Canadian Human Rights Commission and the Office of the Commissioner of Judicial Affairs. A special word of thanks is extended to the Ambassador and staff of the Canadian Embassy in Beijing for their ongoing commitment and support throughout the duration of the programme. Several provincial governments and agencies have been very supportive of our efforts with strong representation from the Ministry of the Attorney General of British Columbia, the British Columbia Human Rights Commission and the Human Rights Tribunal, the British Columbia Organized Crime Agency, the Justice Institute of British Columbia, the Legal Services Society of British Columbia and the Continuing Legal Education Society, the Legal Society of Saskatchewan, the Legal Services Society of Ontario and the Quebec Legal Aid Commission.

The Programme is particularly indebted to the Justices and staff of the Supreme Court of Canada and the Supreme Court of British Columbia for graciously agreeing to host and conduct study tours for the Chinese delegates who visited Canada as a key part of the programme. The



Centre is also grateful for the enduring support of the members of the International Society for the Reform of Criminal Law, the Canadian Bar Association (BC Branch), and members of the faculty and administration at the University of British Columbia and Simon Fraser University who contributed their time and expertise to the success of the programme.

The programme would not have been possible without the strong support and commitment of the ICCLR's Board of Directors and the timely and generous contribution made by several members of the Board. A special thanks to Professor Peter Burns QC, the Chair of the Board, Mr. Justice Iacobucci of the Supreme Court of Canada, and Professors Maureen Maloney QC, and Gerry Ferguson who actively participated in many of the project activities in the last eight years.

The Centre most especially thanks Dr. Vincent Yang, Director of the China Programme and Daniel C. Préfontaine QC., Senior Associate and former Executive Director for their joint management and implementation of the Programme. The work was accomplished with the support and effort of their ICCLR colleagues – Brian Tkachuk, Director of the Corrections Programme who was also jointly responsible for the China Corrections activities, Kathleen Macdonald and Janet Bayda, who provided management and financial support, Eileen Skinnider, whose research and analytical skills were invaluable, and Frances Gordon the Executive Director. This publication became a reality through the additional support, editing and organization assistance of Marla Morry and the volunteer contributions of Erin Jardine, Janet Beland, and Melissa Kendall.

Through the China Programme, the ICCLR has worked in cooperation with its Chinese partners, particularly the Research Centre for Criminal Law and Justice at the China University of Political Science and Law in Beijing (the "Beijing Centre"), the Supreme People's Procuratorate of China, the National Prosecutors College of China, the Chinese Prison Society, and the Legal Aid Centre of the Ministry of Justice of China. Many other national and provincial justice institutions and law schools in China have participated in the project activities. The objective of the China Programme is to support China's on-going development of its justice sector and its efforts to implement the principles of the rule of law and human rights in the areas of criminal law, criminal procedure, the administration of justice and crime prevention. The Centre wishes to express its sincere appreciation to all of its Chinese partners for their commitment to, and support of, this ongoing discourse of cooperation.

Over the past seven years, the ICCLR has provided support and assistance, through the multi-dimensional components of the China Programme, to its Chinese partners for their reform initiatives in the areas of criminal law and procedure, criminal justice policy, legal aid and professional legal training in China. The China Programme has involved a series of groundbreaking projects, including the *Ratification and Implementation of International Human Rights*

*Instruments, Reform of Criminal Procedure, Legislative Development of A Legal Aid System, Training and Research on Prosecution, and Sentencing and Corrections Exchanges.*

This publication is divided into six chapters corresponding to the aforementioned components of the China Programme, each including a composite of papers written by Canadian academics, legal professionals, and government officials. In addition, a chapter on the International Criminal Court is included, as ICCLR has engaged in discussion with Chinese officials and academics on issues relating to the soon to be established Court. Most of these papers were presented at conferences, seminars and symposiums in China and/or were included in various Chinese-language books published as part of the China Programme.

Chapter 1, **Ratification and Implementation of International Human Rights Instruments**, includes three papers, which together provide a comprehensive review and critical analysis of Canada's historical and contemporary experience in fulfilling its international human rights obligations. As China recently began to grapple with these challenges, these papers were presented as lessons learned and experience gained by Canada in the international human rights arena. The fourth and fifth articles discuss issues for China relating to the ratification and implementation of various international human rights instruments, including the *International Covenant on Civil and Political Rights*.

Chapter 2, **International Standards in Criminal Law and the Criminal Justice System**, includes three papers which comprehensively discuss the international standards relating to search and seizure, the right to counsel, the right to silence and their incorporation into Canada's criminal justice system. A fourth article provides a comparative analysis of the systems of proof in criminal law in the adversarial and inquisitorial systems, and includes a discussion on the application of the presumption of innocence in various domestic jurisdictions.

Chapter 3, **The International Criminal Court**, includes two papers presented at the Sino-Canadian Symposium on the International Criminal Court sponsored by the Renmin University of China, in collaboration with the ICCLR, in Beijing, in October 2001. These papers provide an overview of the main features of the *Rome Statute* on the establishment of the International Criminal Court (ICC) and discuss issues of domestic implementation from a Canadian perspective. Although China has not yet ratified the *Rome Statute*, it has always supported the concept of an ICC and played an active role in its formulation, while Canada continues to support efforts to encourage countries to ratify and implement this groundbreaking international instrument.

Chapter 4, **Review and Evaluation of Legal Aid Systems in Canada and China**, includes six papers aimed at assisting China in the development of an effective and efficient legal aid system. These papers range from an analysis of state responsibility to provide legal aid, an overview of some relevant legal aid policy and program development issues, and reviews and compari-

sons of the legal aid systems in Canada, China and other countries. Also included are two papers which evaluate the cost efficiency and effectiveness of the various legal aid models in Canada.

Chapter 5, **The Role of Prosecutors in Canada and China**, begins with a Preface written for a Chinese-language ICCLR publication entitled *The Roles and Standards of Procurators – A Comparative Study*, which has contributed to China's efforts to reform its prosecution service. The Preface provides a brief overview of the current procuratorial system in China, elements of a comprehensive reform initiative in this area, and a concise comparison of the role of prosecutors in China with that of their common-law counterparts. *The Role of Crown Counsel in British Columbia* provides an overview of prosecutors' duties and responsibilities, the principles under which they operate and significant developments in their role.

Chapter 6, **Sentencing and Corrections**, begins with an Introduction written for a Chinese-language ICCLR publication titled *A Comparative Study of the Chinese and the Canadian Correctional Systems*. The introduction includes a summary analysis of the Canadian and Chinese correctional systems by pointing out particular features of the Canadian system and identifying how they differ from those of their Chinese counterpart. The paper, *Corrections and Correctional Release in Canada*, provides a comprehensive overview of corrections and conditional release in Canada and was also featured in this publication.

This publication is the 14th book to be published through the work of the China Programme with financial assistance from the Canadian International Development Agency. The following books, published under the Programme in collaboration with ICCLR's Chinese partners, are in Chinese. Some of these books have English introductions and tables of contents.

- *Canada's System of Justice* (Chinese translation) (1996)
- *The Canadian Criminal Code* (Chinese translation) (1998)
- *The United Nations Standards and China's Legal System of Criminal Justice* (1998)
- *Selected Foreign Legal Aid Laws and Regulations* (1999)
- *Theories of Legal Aid in Various Countries* (1999)
- *Prevention and Control of Financial Fraud* (1999)
- *Chinese and Foreign Systems of Criminal Public Prosecution* (2000)
- *Compendium of United Nations Documents on Human Rights and Criminal Justice* (2000)
- *A Comparative Study of the Chinese and the Canadian Correctional Systems* (2001)
- *A Study on Legal Aid Legislation in China* (2001)
- *The Roles and Standards of Procurators – A Comparative Study* (2002)

- *A Study on Punishment and Sentencing* (2002)
- *Fairness in the Criminal Process: Theories and Cases* (2002)
- *A Study on Issues in Ratifying and Implementing the International Covenant on Civil and Political Rights* (2002) (forthcoming)
- *A Comparative Study of Financial Crime* (2002) (forthcoming)

We are indebted to our Chinese partners for their central role in researching and editing the China Programme publications. The sharing of expertise and knowledge between China and Canada, facilitated through ICCLR's China Programme, has enriched all those who have participated in the various exchange, research and training activities. We look forward to many more years of active cooperation with our Canadian and Chinese colleagues and friends.



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## CHAPTER 1:

# RATIFICATION AND IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

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# INTERACTION BETWEEN INTERNATIONAL AND DOMESTIC HUMAN RIGHTS LAW: A CANADIAN PERSPECTIVE

By Irit Weiser and Elisabeth Eid\*

## INTRODUCTION

**T**his paper describes the Canadian approach to the implementation of international human rights treaties. I will commence with a discussion of the Canadian legal and constitutional framework relevant to the ratification and implementation of international human rights treaties. Then, the steps that are taken domestically prior to ratifying a treaty will be outlined. Finally, I will discuss how Canadian courts have interpreted the relationship between international human rights treaties and domestic law.

## THE CANADIAN LEGAL AND CONSTITUTIONAL FRAMEWORK

At the outset, I would like to identify three aspects of the Canadian legal and constitutional framework relevant to the implementation of human rights treaties.

\* Irit Weiser and Elisabeth Eid are Senior Counsel of the Human Rights Law Section, Department of Justice Canada. Ms. Eid presented this paper at the Sino-Canadian International Conference on the Ratification and Implementation of Human Rights Covenants in Beijing, China, in October 2001. The Chinese translation of this paper is published in the 2002 Sino-Canadian joint publication entitled *A Study on Issues in Ratifying and Implementing the International Covenant on Civil and Political Rights* (Chen Guangzhong, Cheng Weiqiu and Vincent C. Yang, eds. Beijing: The Law Press.)



## **Treaty Adherence is an Executive Act**

In Canada, treaty-making is an Executive act, derived from the Royal Prerogative. Parliamentary approval is not required for Canada to enter into international treaties. The Senate Standing Committee on Human Rights is currently examining the way that the government deals with international human rights obligations, including whether Parliament should have a role to play in the process. The Committee is presently scheduled to report to the Senate on October 31, 2001.

## **Canadian Federalism**

Secondly, and perhaps most importantly, according to a 1937 case – often referred to as the Labour Conventions case,<sup>1</sup> although only the federal executive is empowered to enter into international treaties, the federal government cannot legislate to implement treaties in areas that would otherwise fall within provincial jurisdiction. This stands in contrast to other federations, such as Australia, where the federal government retains a residual power to legislate in furtherance of a treaty, even if the subject matter typically falls outside of federal jurisdiction.

As human rights is a matter of shared federal-provincial jurisdiction, the general practise is to only ratify a human rights treaty after obtaining the support of Canadian provinces and territories.

## **Dualist System**

Thirdly, Canada follows a dualist approach with respect to the domestic effect of international treaties.<sup>2</sup> This is similar in approach to other Commonwealth countries such as the United Kingdom, Australia and New Zealand. The dualist system means that international treaties in Canada are not self-executing. In other words, an international treaty alone cannot form the basis of an action in domestic courts, nor can Canadian courts grant specific performance of a treaty.<sup>3</sup> In order for the treaty obligations to be given the force of law domestically, they must be incorporated into domestic legislation.

As a general rule, human rights treaties are not incorporated into domestic legislation. This is often due to the fact that the same obligation appears in other international and domestic human rights instruments. For example, the *International Covenant on Civil and Political Rights*, (ICCPR) and the *Convention on the Rights of the Child* (CRC) contain some form of guarantee of freedom of expression. To legislate different freedom of expression guarantees – which are worded in different ways – could result in inconsistent legislative statements and it is at a minimum, a confusing legislative policy approach. Remember too that all these legislative

statements of freedom of expression would then be subject to the same guarantee contained in the *Canadian Charter of Rights and Freedoms*. Where the same guarantee appears at the domestic level, there does not seem to be a need to expressly incorporate the international guarantee.

These three features of the Canadian system render it unique and from a structural perspective, one of the most difficult places in the world for the purposes of implementing international human rights treaties.

## DOMESTIC REVIEW FOR PURPOSES OF RATIFICATION

In light of this legal and constitutional framework, what is done domestically so that Canada can ratify human rights treaties?

Typically, as a prelude to ratification, Department of Justice officials consult with colleagues in other affected federal departments and agencies, as well as with the provinces, territories, Aboriginal groups and other non-governmental groups, to determine:

- whether existing domestic laws and policies already conform with the treaty obligations;
- if there are inconsistencies, whether new legislation/policies should be adopted or whether existing legislation/policies should be amended;
- alternatively, whether it is appropriate to maintain the domestic position even though it is inconsistent with a treaty provision, and enter a reservation. Reservations are employed where the domestic position appears to be inconsistent and can not be changed for various reasons. Statements of understanding may also be used to assert how Canada views the interpretation of the treaty provision to ensure that domestic legislation is consistent.

As was mentioned previously, existing legislation and policies are often seen to conform with human rights treaty obligations, such that no new legislation is required. Where there is uncertainty as to whether a domestic measure is consistent with a treaty obligation, a legal opinion may be sought. In giving such advice, regard may be had to the text of the provision, the *travaux préparatoires*, and if they exist at the time, General Comments or views on cases of the treaty body respecting provisions of the treaty. At times inconsistencies or gaps in domestic legislation are found.

For example, prior to ratification of the *Convention Against Torture and Other Forms of Cruel, Unusual or Inhuman Treatment*, an internal review determined that there was no specific *Criminal*

*Code* provision prohibiting torture. A new offence of torture was added to the *Criminal Code* to which was attached universal jurisdiction.

Another example occurred when a comparison of the terms of the *Convention on the Rights of the Child* with domestic law and practice found two areas of possible conflict: one pertaining to detention of youth with adults, and the other concerning Aboriginal customary adoption<sup>4</sup>. For various reasons, a decision was made to enter two reservations to the Convention, rather than to amend domestic law.

## JUDICIAL TREATMENT OF CANADA'S HUMAN RIGHTS TREATY OBLIGATIONS

As I indicated earlier, Canada has a dualist system with respect to the relationship between international human rights treaties and domestic law and so unincorporated treaties cannot form the basis of a cause of action in domestic courts. However, treaty obligations clearly have an impact on the interpretation of domestic legislation, although the extent of that impact varies.

To look at how Canadian courts have applied international human rights treaties, I would like to divide the jurisprudence into two categories: 1) jurisprudence considering ordinary legislation; and 2) jurisprudence concerning the Canadian *Constitution* and in particular, the *Canadian Charter of Rights and Freedoms*.

### Ordinary Legislation

With respect to ordinary legislation, the courts have said that judges should strive to interpret such laws in accordance with relevant international obligations. In a recent decision of the Supreme Court of Canada, the court stated that the “values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”<sup>5</sup> However, if the express provisions of a domestic statute are contrary to or inconsistent with Canada’s international obligations, the former prevails.<sup>6</sup>

I am of the view that it is appropriate to read ordinary or non-constitutional legislation consistently with treaty obligations, wherever possible. It would respect the presumption that Parliament does not intend to act in violation of Canada’s international obligations. At the same time it respects the democratic process, because contrary domestic legislation prevails over a treaty obligation and unlike the *Constitution*, Parliament can pass new laws if they are unhappy with a court decision.

## Constitutional Provisions

The situation with respect to constitutional provisions is somewhat more nuanced. The most often cited statement of the law is that of former Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alta.)*.<sup>7</sup> In summation, he said:

... though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions (pp. 349-50).

Hence, the judiciary is not bound to apply Canada's international human rights treaty obligations, although they will be a relevant and influential factor in the courts' interpretation of the *Charter*.

I think such an analysis is appropriate in respect of the Canadian *Charter* because otherwise the courts would effectively be "making constitutional" international norms agreed to by the Executive. The treaty provision would be incorporated – through judicial interpretation – into the supreme law of our land and Parliament could not legislate in a contrary manner. In my view, this would be an inappropriate result in light of the fact that ratification is an Executive act, not subject to the debates and examinations typically inherent in a democratic, transparent, law-making process.

I think it is fair to say that until recently, the Court often examined the content of international provisions in a somewhat superficial manner, failing to give significance to the Government's act of ratification,<sup>8</sup> or to the commentaries and interpretations of the various treaty-monitoring committees. However, there has been a notable recent trend towards a more serious and informed consideration of international norms in Supreme Court jurisprudence.

For example, the recent decision of *United States v. Burns*,<sup>9</sup> showed a marked departure from that approach. That case concerned whether the Minister of Justice, in extraditing two individuals to face murder charges in the United States, was obliged to seek assurances from the US that the death penalty would not be imposed. The Supreme Court examined in a comprehensive manner the international community's position on the death penalty, as well as Canada's stance on the world stage, including not only ratification, but also our voting position on UN resolutions. The Court held that assurances that the death penalty will not be applied upon extradition must be sought in all but exceptional cases.

Despite my criticisms of the courts, one needs to recognize that they are not faced with an easy task. Canada's method of implementing its treaty obligations means that they are often

scattered throughout several statutes, at both federal and provincial levels, and that there is frequently no signal as to when a law implements a treaty obligation. The problem is particularly acute when existing law is relied upon for ratification purposes.

In addition, there is a myriad of treaty obligations Canada has undertaken and the interpretation of international human rights obligations is often skeletal in comparison to the rich and considered jurisprudence we have in Canada. For example, there is little doubt that the Supreme Court has examined the underlying values, purpose and application of such fundamental rights as equality, freedom of expression, right to counsel and so on in greater depth than any international body.

Also, in some areas, Canadian human rights legislation and thinking is way out ahead of the international movement. Same sex issues are a clear example of this. The international community is yet far from a consensus on whether sexual orientation is even an unacceptable ground of discrimination.

I should also say that the legal community at large has varying levels of knowledge of basic international human rights law (although over the last few years this situation also seems to have improved). Education on international human rights law could certainly be improved in law schools, and in the continuing education of judges, government lawyers and the private bar.

## CONCLUSION

Due to the dualist system under which Canada operates and the practise of not incorporating international human rights treaties, the latter do not form part of domestic law but serve as an important interpretive tool for domestic legislation and the Canadian *Constitution*. Recent cases suggest that there is a trend in judicial circles to give greater weight to international instruments. A similar trend is apparent in the United Kingdom, Australia and New Zealand.

Canada takes ratification of human rights treaties seriously as demonstrated by the in-depth review process that occurs prior to ratification. Improvements could still be made however, such as ensuring that on-going reviews of legislation and policies occurs post-ratification as well.

There are significant challenges in implementing international human rights treaties, but the values enshrined in such treaties make it well worth the effort.

## NOTES

<sup>1</sup> *A.G. Can. v. A.G. Ont. et al. (Labour Conventions Case)*, [1937] 1 D.L.R. 673

<sup>2</sup> With respect to customary international law, Canada's approach is monist in the sense that customary international law automatically forms part of domestic law. However, domestic legislation would prevail in the event of any inconsistency.

<sup>3</sup> *J.H. Rayner Ltd. v. Department of Trade*, [1990] 2 A.C. 518 (at p. 476). See also: *A.G. Canada v. A.G. Ontario (The Labour Conventions Case)*, [1937] A.C. 355 (P.C.); *Bancroft v. The University of Toronto* (1986), 24 D.L.R. (4th) 620 (Ont.H.C.); *Re Vincent and Min. Employment and Immigration* (1983), 148 D.L.R. (3rd) 385 (F.C.A.).

<sup>4</sup> Article 21 of the *Convention on the Rights of the Child* requires that an adoption be authorized by competent authorities in accordance with applicable laws and procedures. As it was unclear at the time of ratification whether the article would apply to Aboriginal customary adoption, a reservation was entered.

<sup>5</sup> *Baker v. Canada*, [1999] 2 S.C.R. 817.

<sup>6</sup> See *National Corn Growers*.

<sup>7</sup> [1987] 1 S.C.R. 313.

<sup>8</sup> *Slaight Communications Inc. v. Davidson*, *supra*; *Reference Re Public Service Employee Relations Act (Alta.)*, *supra*; *Canada (Human Rights Commission) v. Taylor*, *supra*; *Chan v. Canada*, *supra*; *R. v. L. (D.O.)*, *supra*, are exceptions to this general statement in which ratification was at least noted by the judges.

<sup>9</sup> 2001 SCC 7.



# CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS: THEIR IMPACT ON THE DOMESTIC LEGAL PROCESS

By Rebecca Winesanker Hunter\*

## INTRODUCTION

Over the past half-century a great number of international human rights instruments have come into force, and an elaborate system of bodies has been created both within regional human rights regimes and in the global or universal United Nations-sponsored arrangements, to supervise the observance of the obligations proclaimed in these instruments. By their acceptance of international conventions on human rights, many states have consented to international scrutiny of their treatment of individuals. States no longer view themselves as being able to do what they please within their borders without limitations. "The modern state no longer finds itself a free actor in the international sphere, nor even unconstrained domestically. Instead, its freedom of action is limited by a vast array of international legal commitments which operate as very real constraints on the policy choices open to a national government."<sup>1</sup>

\* Rebecca Hunter is the A/Director, Immigration Law Section, Department of Justice Canada (B.C. Region). The views expressed in this paper are the author's personal views and not to be attributed to the Justice Department. This paper is based on a thesis submitted by the author in November 1999, in partial fulfilment of the requirements for the LL.M. degree at the Faculty of Law, University of British Columbia. The Chinese translation of the paper is published in the 2000 Sino-Canadian joint publication entitled *Compendium of United Nations Documents on Human Rights and Criminal Justice* (Chen Weiqiu, Vincent C. Yang and Yang Yuguan, eds. Beijing: China Fa-zhi Press.)



Canada, having ratified numerous international human rights instruments and having acceded to individual petition procedures, now finds itself contending with these constraints and struggling to reconcile the obligations it has assumed internationally with the desire to defend laws and procedures established internally which might be perceived as being inconsistent with emerging international norms. The potential domestic impact of Canada's international posture on human rights has never been the subject of informed public debate in Canada. Even many in the legal community have yet to familiarize themselves with Canada's international human rights obligations. But awareness is growing, and increasingly individuals are not only filing petitions (including requests for interim measures) with international treaty bodies, alleging violations by Canada of its international obligations, but are also challenging Canada's legislation and administrative decisions in the domestic courts, on the basis of Canada's international obligations. As the Government of Canada grapples with the domestic consequences that flow from the assumption and implementation of international human rights obligations, it is instructive for other states which are giving consideration to ratifying international human rights treaties to examine the experience Canada has undergone during the past three decades as a result of participation in the international human rights arena.

## DOMESTIC IMPLEMENTATION: THE PLACE OF INTERNATIONAL HUMAN RIGHTS IN CANADIAN LAW

Canada has obediently and enthusiastically participated in the reporting process required by international bodies and has gone to great lengths to demonstrate to these bodies the ways in which it is complying domestically with its international human rights obligations through legislation, administrative practices, and judicial determinations. The seriousness with which Canada takes its obligations to report periodically to the treaty bodies is illustrated by Canada's fourth periodic report to the Human Rights Committee, covering the period from January 1990 to December 1994 (which was submitted, along with an update, in 1997). The report consists of 820 paragraphs and includes reports on measures adopted to implement the *International Covenant on Civil and Political Rights* by the Government of Canada, the Governments of the Provinces and the Governments of the Territories.<sup>2</sup>

There are those who say, however, that Canada's rhetoric is not always matched by its performance. One writer referred, some years ago, to the "rhetoric gap" in Canadian human rights policy.<sup>3</sup> Some human rights activists and critics of the government still find reason to refer to Canada as a human rights violator and point out that "[o]ur talk is not always matched by actions."<sup>4</sup> In some cases in which international treaty bodies have made requests of Canada,

Canada has ignored those requests. Before domestic courts the Government of Canada has “regularly argued that international instruments have no force in law unless expressly incorporated.”<sup>5</sup> While technically this legal principle is well-established, it is not unreasonable to conclude that by placing repeated reliance on this proposition before the courts Canada is in effect attempting to minimize its international human rights obligations. What accounts for the apparent inconsistencies in Canada’s behaviour? In order to understand this, it is instructive to examine the history of international human rights in Canada, the process by which Canada assumes international human rights obligations, and how issues involving the relationship between international human rights law and domestic law have unfolded before the Canadian courts.

### **Canada’s Entry Into the International Human Rights Arena**

Canada’s foray into the international human rights arena came in 1919 when Canada attended the Paris Peace Conference, signed the *Treaty of Versailles* and joined the League of Nations.<sup>6</sup> In November 1945, Canada ratified the *Charter of the United Nations* which had been adopted a few months earlier at the San Francisco Conference.<sup>7</sup> Two years later work began on drafting the *Universal Declaration of Human Rights*. The stance which Canada took on the international stage with respect to the adoption of the *Universal Declaration* reveals the contradictory sentiments within Canada at the time regarding Canada’s venture into international human rights. It also demonstrates the difficulties which a state faces in dealing with divergent domestic and international political pressures. In light of the recognition and respect that the *Universal Declaration of Human Rights* is afforded today, many are surprised to learn that Canada abstained in the vote on the adoption of the *Universal Declaration* in the Third Committee of the United Nations General Assembly. At the plenary meeting of the General Assembly Canada changed its position and voted in favour of the *Declaration*, and fifty years later what occurred in the Third Committee vote is perceived as a blemish on Canada’s otherwise honourable record in international human rights.<sup>8</sup>

Lester Pearson, the Canadian representative (then serving as Secretary of State for External Affairs), in an address to the General Assembly, offered the following explanation for Canada’s actions:

The Draft Declaration, because it is a statement of general principles, is unfortunately, though no doubt unavoidably, often worded in vague and imprecise language. We do not believe in Canada that legislation should be placed on our statute books unless that legislation can indicate in precise terms the obligations which are demanded of our citizens, and unless those obligations can

be interpreted clearly and definitively in the courts. Obviously many of the clauses of this Draft Declaration lack the precision required in the definition of positive obligations and the establishment of enforceable rights ...

Pearson explained that while Canada had some reservations on details in the Draft Declaration, the “Canadian Delegation ... approves and supports the general principles contained in the Declaration and would not wish to do anything which might appear to discourage the effort, which it embodies, to define the rights of men and women ...”

Canada’s less-than-enthusiastic support for the *Declaration* can be attributed in large part to the prevailing domestic socio-political climate. It has been said that the *Declaration* was “greeted with considerable hostility by the majority of mainstream forces in Canada,” including the political right, the business community and the legal fraternity.<sup>9</sup> The Canadian Bar Association adopted a resolution that the Draft Declaration should be examined “with the utmost care in all its juridical aspects before further action is taken, so that there may be no misunderstanding as to the meaning and effect thereof.”<sup>10</sup> While Canada would have preferred to delay the vote on the *Declaration* in order to further study and polish the provisions, international pressures prevailed, and the *Declaration* was adopted in December 1948, with Canada voting in favour.

While some may legitimately question the motivations of the Government and influential groups such as the Canadian Bar Association and suggest that the concerns they expressed were pretexts for underlying substantive opposition to international human rights, it is important not to dismiss out of hand some of the reservations which accompanied Canada’s venture into the arena of international human rights. This is particularly so in relation to the concern with vague and imprecise terminology, the desire to ensure a thorough understanding of the uses to which the language might be put, and the realization that such international instruments, even if non-binding, will influence the course of future international treaties, domestic legislation, and interpretation of obligations. It is, of course, understandable that states wish to avoid risking embarrassment on the international stage; however, it is equally important that states approach the actions which they take internationally with some caution and with a thorough understanding of the consequences that flow from those actions.

Hostility within Canada towards the United Nations human rights programme continued during the 1950s, and it took a radical change in the Canadian Liberal party leadership of the late 1960s before there was any acceptance.<sup>11</sup> “[B]y the 1970’s, Canada began a period of exceptional activism in international human rights that continues to this day.”<sup>12</sup> In its 1970 White Paper, Pierre Trudeau’s Liberal government made a commitment to a “positive and vigorous” approach to human rights. In 1977, Don Jamieson, Secretary of State for External Affairs stated, “Canada will continue to uphold internationally the course of human rights, in the legitimate hope that we

can eventually ameliorate the conditions of our fellow man.” Since then, both major political parties have taken up this “rhetorical commitment.”<sup>13</sup> During the 1980s and 1990s, Canada’s participation in the international human rights arena greatly increased. This was in part the result of individual communications brought before international treaty bodies, alleging violations by Canada of international covenants which Canada has ratified. There is now an increased focus of attention, both publicly and within government circles, on Canada’s international human rights obligations. The question no longer arises whether Canada will participate in a significant way in the international human rights arena. However, the extent of the international obligations which Canada has assumed and the impact of those obligations, is a matter which will only be clarified through much legal and political debate in the years to come.

### **Assuming International Human Rights Obligations: The Treaty-Making Process in Canada**

In Canada, treaty-making (including ratification which perfects the obligations created by a treaty) is an executive act derived from the Royal Prerogative. The power is exercised by the Governor General on the advice of ministers, and pursuant to statute the minister principally responsible is the Minister of Foreign Affairs and International Trade.<sup>14</sup> The formal legal authority for the execution of all international treaties takes the form of an order-in-council. Such approval is needed prior to signature and to ratification.<sup>15</sup> Some treaties, namely those which require legislative amendment or that deal with matters of national importance or that cut across the jurisdictions of several government departments, require policy approval from Cabinet prior to signature.<sup>16</sup> Parliamentary approval is not required for Canada to enter into an international treaty.<sup>17</sup> However, a practice has developed of submitting “the more important treaties” to the House of Commons for approval. The resulting Parliamentary resolution is not in the form of a statute and does not receive Royal Assent.<sup>18</sup> Sometimes a treaty is referred to a Standing Committee of the House of Commons or the Senate or a joint committee, and public sessions might be held inviting representations; but the extent to which recommendations of such committees is taken into consideration varies. This form of consultation is the result of the Government becoming aware that “public opinion has become more sensitive to the potential impact of treaties and in particular, to the absence of a public debate of the type the law making process is usually subjected to in Parliament.”<sup>19</sup>

Only the federal executive has the power to enter into international treaties. Canada traditionally took the position, internationally, that it could not enter into treaty arrangements which would infringe on provincial areas of jurisdiction, which included human rights.<sup>20</sup> At both the UN and the International Labour Organization Canada promoted a “federal clause” which would have permitted federal states to ratify treaties only in their areas of jurisdiction,

but Canada was unsuccessful in obtaining support for such a clause. Canada initially explained its reluctance to participate in the international human rights arena on the basis that it did not wish to interfere with matters that fell within provincial legislative competence.<sup>21</sup> In 1975, a framework was established for consultation with the provinces on ratification of human rights treaties.<sup>22</sup> It was agreed that provinces were to be consulted before Canada acceded to future international human rights covenants. At the first Federal-Provincial Ministerial Conference on Human Rights held in December 1975, and called in respect of Canada's ratification of the international human rights covenants, the Ministers approved a set of mechanisms for implementing the Covenants, which, among other things, proposed a continuing federal-provincial committee of officials responsible for human rights. This committee was established and continues to meet regularly.<sup>23</sup>

It is a well-established principle that once a treaty is entered into, it is not self-executing, that is, it does not automatically become part of Canadian law. "Where a change in the law is required to implement a treaty obligation, legislative action is required either by the Parliament or by provincial legislatures, depending on which level of government has general legislative competence in the relevant field as set out in the constitution."<sup>24</sup> As stated by the Privy Council in the *Labour Conventions* case:

It will be essential to keep in mind the distinction between (1) the formation and (2) the performance of the obligations constituted by a treaty... Within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes...<sup>25</sup>

This principle has been repeated by Canadian courts in numerous cases.<sup>26</sup>

Domestic practice prior to ratification has evolved to take into account the nature of Canada's federal system of government, including the federal-provincial division of powers, and the separation of powers between the executive and the legislature. "Typically, as a prelude to ratification, provincial, territorial and federal department of justice officials consult among themselves and within their respective jurisdictions to determine:

- whether existing domestic laws and programs already conform with a treaty's legal requirements;
- if there are inconsistencies, whether new legislation/programs should be adopted or whether existing legislation/programs should be amended;
- alternatively, whether it is appropriate to maintain the domestic position even though it is inconsistent with a treaty provision, and enter a reservation or statement of understanding."<sup>27</sup>

It has been stated by the current director of the Human Rights Law Section of the Department of Justice, that while various approaches are adopted, depending on the provisions of the treaty and the jurisdiction within Canada, "by far the most common conclusion reached by officials is that neither legislative changes, nor reservations are required, as the Canadian situation accords with the treaty obligations."<sup>28</sup> This "comfortable attitude" has been described by one writer as "*'passive incorporation'* (or, perhaps '*incorporation by complacency'*)," implying "a greater risk for neglecting difficultly foreseen situations, so that domestic law does not meet the international standard."<sup>29</sup>

Weiser has made the following comment:

The current situation is one of almost total uncertainty when a treaty is ratified on the basis of existing conformity with domestic law. The Government cannot know whether the legal analyses on which it based its decision to ratify will be given meaning in litigation before the courts. More importantly, Canadians cannot know what significance is to be given to treaty obligations in domestic litigation.<sup>30</sup>

Writers have commented, as well, on the uncertainty of treaty obligations created as a result of their interpretation by a treaty's supervisory organs. In discussing the issue of entering reservations to international human rights treaties, one writer has stated as follows:

The interpretation of a treaty in the discussion of the state reports, the interpretation of a treaty by the Committees in an individual complaint procedure, and the interpretation of a treaty through the formulation of general comments and general recommendations all compose what is known as the *acquis*, the system created through the human rights convention. The legal nature of the *acquis* cannot be determined in detail...In a way, the existence of a supervisory organ, and its practice, undermine the certainty about the obligations that parties to a treaty have. Attempts to restore certainty through reservations are therefore understandable.<sup>31</sup>

As the government faces an increasing number of challenges to its legislation and administrative decisions, based in part on an analysis of its international human rights obligations, and as domestic courts, not just international treaty bodies, become more open to such challenges, it will become increasingly important for the government to consider making changes to its treaty-making practices. Such changes might include public debate and an increased Parliamentary role, a more comprehensive examination of existing legislation and policies and the potential impact of assuming future international obligations, and a greater willingness to consider the use of reservations and understandings.

### **The Place of International Human Rights Law in the Canadian Courts**

Since treaties which the executive has entered into do not automatically have the force of law in Canada and since there has been little direct incorporation of treaties through Canada's domestic legislation, the issue of how Canada's international human rights treaty obligations are implemented domestically, as reflected through judicial determination, is not a simple matter. Increasingly individuals are challenging government actions and legislation, basing those challenges on human rights principles. Most of these challenges are based on the *Canadian Charter of Rights and Freedoms*. As awareness about international human rights principles has grown in the legal community and as references in judicial decisions to international human rights norms have increased, these challenges are more frequently including arguments based on Canada's international human rights obligations either by way of interpretation of the *Charter* or as an independent ground for challenge.

Prior to the proclamation of the *Canadian Charter of Rights and Freedoms* in 1982, references by the courts to international human rights instruments were "rare and perfunctory."<sup>32</sup> With the advent of the *Charter*, there has been a rapid expansion of jurisprudence focussing on fundamental human rights, and the Supreme Court of Canada has clearly recognized the significance of international human rights law for the interpretation of the *Charter's* provisions. However, while international authorities are cited with some frequency in Supreme Court of Canada judgments, many lower courts have yet to demonstrate much interest in international human rights instruments and jurisprudence. "... [W]ith the exception of Ontario Court of Appeal, the Federal Court, and Quebec Human Rights Court, the Supreme Court of Canada's enthusiasm for international sources has yet to arouse very much interest among Canadian appellate courts and courts of first instance."<sup>33</sup> In an address by Chief Justice Antonio Lamer, delivered in June, 1997, the Chief Justice spoke about "the growing tendency of national courts to rely on international human rights treaties, and by implication, on the decisions that interpret those treaties,

as aids to interpreting and applying the human rights which are protected under national law.” He stated as follows:

Unlike the recently adopted South African Constitution, the *Charter* does not contain a provision requiring or even encouraging Canadian courts to look at international law as an aid to construing its provisions. Nevertheless, the Supreme Court of Canada has frequently looked to the provisions of international human rights treaties to which Canada is a signatory as an aid to interpreting the Charter.

Chief Justice Lamer went on to discuss why the Supreme Court of Canada has been prepared to rely in various ways, in defining the content and scope of *Charter* rights, on international human rights law as an aid to *Charter* interpretation. He identified three rationales:

- The adoption of the *Charter* is understood as part of the international human rights movement. “...the *Charter* can be understood to give effect to Canada’s international legal obligations, and should therefore be interpreted in a way that conforms to those obligations.”
- International human rights law assists the Court to fulfill an important purpose of the *Charter*, i.e., “to secure for individuals the full benefit of the *Charter*’s protection.”<sup>34</sup> “...international human rights treaties serve as a benchmark against which to measure the protection provided by *Charter* rights.”
- “Finally, and most importantly, Canada’s international human rights obligations are relevant to *Charter* interpretation because they reflect the values of free and democratic societies ... International human rights law, as a reflection of what it means to live in a free and democratic society, is part of the background of principle which informs the interpretation of *Charter* rights and their limitation.”<sup>35</sup>

These issues were also addressed by the Honourable Mr. Justice G.V. La Forest at a conference of the Canadian Council on International Law in October 1996:

[P]erhaps the most interesting development has been in relation to issues that some may perceive as being simply domestic law, but which relate in substance to structural issues concerning the international order -- namely, the limitations placed on states in the exercise of their sovereign authority. The most obvious of these limitations are the general documents of the United Nations relating to human rights... It is fair to say that the international implementation mechanisms for these norms are still weak, and direct enforcement as customary law in Canada raises difficult problems. But the limitations on the power to



enforce international human rights standards in Canada seem to have diminished in importance since the enactment of the Canadian Charter ..., given the manner in which the courts, particularly our Court, has chosen to approach this constitutional document.<sup>36</sup>

Mr. Justice La Forest went on to make assurances that the Supreme Court of Canada is doing much more than paying lip service to these international human rights instruments:

[W]e do not confine ourselves to polite references to the international agreements themselves, but examine with care the interpretations given to them by international institutions and the domestic courts of many countries, as well as the writings of learned authors ... What is happening, then, is that we are absorbing international legal norms affecting the individual through our constitutional pores...

Nor is this development confined to constitutional issues. Increasingly, through general conventions and treaties, the international community is creating institutions and norms governing transnational activities and concerns. But these initiatives cannot be successful unless those international norms are applied with sophistication and understanding by the various national decision-makers before whom they are invoked. Unless these norms are integrated into the various national governmental processes, the rule of law cannot expand to adequately protect individuals throughout the world.<sup>37</sup>

In an earlier speech to the Canadian Council on International Law, Mr. Justice La Forest also referred to former Chief Justice Brian Dickson's comments on the Court's use of international law, stating that although the comments were made in dissent they reflect what the Court does.<sup>38</sup> Those comments, in the reasons of Dickson C.J.C. in *Re Public Service Employee Relations Act*, include the following:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the *Charter's* protection'. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially

when they arise out of Canada's international obligations under human rights conventions.<sup>39</sup>

William Schabas has stated, however, that despite frequent references to international instruments and cases, "the promise of Chief Justice Dickson's doctrine in terms of the role of such authorities in *Charter* interpretation has simply not been fulfilled. Almost a decade after his famous pronouncement, there are few examples where international human rights law has played a significant role in the determination of a *Charter* case."<sup>40</sup> He goes on to say that in subsequent case law "[t]here has been little analysis of Chief Justice Dickson's comments" and "judges have tended to make what are often quite perfunctory references to international human rights law with little concern for the theoretical underpinnings."<sup>41</sup> In a separate work, Schabas states that the Supreme Court of Canada appears to have sent the message to the Canadian judicial community that "international human rights law never binds the courts, that its sources are eclectic, contradictory and confusing, that erudite judges are of course welcome to invoke it, but that at the end of the day its significance is secondary and marginal."<sup>42</sup>

Anne Bayefsky has expressed the view that the place of international law in Canadian courts is precarious. She attributes this to the "failure of ... many ... Supreme Court of Canada judgments containing references to international law, to adequately articulate the justification for its use."<sup>43</sup> Bayefsky concludes that

...while the legitimacy of introducing international legal obligations of Canada into problems of interpretation of Canadian law is established, the impact of these international laws in any given case will apparently depend on the proclivities of a result-oriented decision-maker rather than on their inherent usefulness in the interpretative problem at hand.<sup>44</sup>

### **A Recent Illustration: The Convention on the Rights of the Child and Domestic Immigration Practices**

The Supreme Court of Canada recently had an opportunity to address squarely the question of the impact of international human rights law on Canada's domestic law in the case of *Mavis Baker v. Minister of Citizenship and Immigration*.<sup>45</sup> This judgment reiterates certain basic principles which are well-settled in relation to the domestic status of international instruments, in particular, the principles that an international treaty does not form part of Canada's domestic law unless it is implemented by legislation and that if it is not so implemented it can have no direct application within Canadian law. Beyond that, the articulation of the impact of international human rights law on domestic law remains less than clear. However, the *Baker* judgment

can be read as signifying an increased willingness of the Court to use creative means to ensure that domestic law is interpreted in conformity with international human rights obligations. It is useful to examine this case, to illustrate how arguments are unfolding before Canada's courts today with respect to the impact of international human rights law on domestic law. In considering the ramifications of this case, it should be noted that numerous court challenges to orders deporting both female and male adults have been brought in Canada based on the concept that the children these adults have brought into the world since their arrival in Canada, and who are therefore by birth Canadian citizens having the right to remain in Canada, also have the right to have their parents remain in Canada to take care of them.

Ms. Baker is a citizen of Jamaica. She came to Canada as a visitor in 1981, and has remained in Canada ever since. She had four Jamaican children before leaving there, and during her time in Canada gave birth to four more children who are Canadian citizens. In 1992, Ms. Baker was ordered deported from Canada on the basis that she had worked without authorization in Canada and had overstayed her visitor's visa. She then applied for an exemption, based on humanitarian and compassionate considerations, under section 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. An immigration officer rejected her application, finding that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence from within Canada and that it would not cause undue hardship for Ms. Baker to submit that application in the normal manner at a visa office outside Canada. Ms. Baker applied to the Federal Court of Canada for judicial review of the decision. The Federal Court Trial Division dismissed the judicial review application, concluding, *inter alia*, that the *Convention on the Rights of the Child* had not been incorporated into Canada's domestic legislation, that even if the *Convention* were part of domestic law, its Articles 3 and 9 were inapplicable, as a deportation of a parent is not an action concerning children and does not require a separation of parent and child, and that the doctrine of legitimate expectations does not operate to require that domestic decisions be based upon principles in international treaties which have been ratified by Canada but not adopted by statute into domestic law. The Court, however, certified the following question for appeal: "Given that the *Immigration Act* does not expressly incorporate the language of Canada's international obligations with respect to the *International Convention on the Rights of the Child*, must federal immigration authorities treat the best interests of the child as a primary consideration in assessing an application under s. 114(2) of the *Immigration Act*?"<sup>46</sup> The Federal Court of Appeal answered the question in the negative, concluding as follows:

[T]he *Convention on the Rights of the Child*, not having been adopted into Canadian law, cannot constitutionally give rise to rights and obligations as to how the dis-

cretion given by subsection 114(2) of the *Immigration Act* is to be exercised. That is, the Convention cannot prescribe, in a manner enforceable by the courts, the obligation to give the best interests of children, of an alien who is under order of deportation, superior weight to some other factors...Further, articles 3 and 9 of the Convention...do not by their terms purport to prescribe a priority for the best interests of the child in a proceeding under subsection 114(2) which involves the deportation of the parent and not of the child.<sup>47</sup>

One of the issues raised by the appellant before the Supreme Court of Canada was whether the Federal Court of Appeal erred in holding that a treaty such as the *Convention on the Rights of the Child* made by the executive branch of government does not have legal effect over the exercise of discretion under Canada's immigration legislation. The appellant argued that Canada's signature to the *Convention* necessarily requires it to be guided by principles of the *Convention* in the exercise of discretion that affects the rights and interests of family in general and children in particular.<sup>48</sup>

The respondent Minister of Citizenship and Immigration took the position on this issue that the *Convention on the Rights of the Child* does not apply in the case, as it has not been adopted into Canadian law; that even if it is applicable, the *Convention* has not been violated; and that Canada's ratification of the *Convention* does not create a legitimate expectation that immigration officers are required by law to give more weight to the best interests of the children when considering whether to exempt their parents from the requirements of the *Immigration Act*.<sup>49</sup>

A number of parties intervened in the hearing before the Supreme Court of Canada. Three separate factums were filed on behalf of the interveners, and each addressed the issue of the effect of international human rights treaty law on Canada's domestic law. The Charter Committee on Poverty Issues took the position that the Minister acted outside the jurisdiction granted by s. 114(2) of the *Immigration Act* (a) by failing to exercise her discretion so as to avoid violating ss. 7 and 15 of the *Charter*, as informed by Canada's obligations under the *Convention on the Rights of the Child* and related international human rights treaty obligations, and (b) by failing, in any event, to exercise that discretion in accordance with the relevant international human rights treaties, regardless of whether the *Charter* is violated.<sup>50</sup>

Ms. Baker was successful in her appeal, and the Court ordered that the matter be returned to the Minister for redetermination by a different immigration officer. The Supreme Court of Canada concluded that the notes of the immigration officer demonstrated a reasonable apprehension of bias. While this finding was sufficient to dispose of the appeal, the Court went on to consider whether, as a substantive matter, the humanitarian and compassionate decision under s. 114(2) of the *Immigration Act* was improperly made. In addressing this question, the Court examined the approach to review of discretionary decision-making, the standard of review

and whether the decision was unreasonable. The Court's analysis of whether the decision was unreasonable included comments on the relationship between international human rights law and domestic law which may well have a considerable impact, in future cases, in determining the extent of the influence of international human rights norms on statutory interpretation and judicial review of administrative decisions. The following comments are of note:

- **Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach ...** [emphasis added]
- A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in ... [Ministerial] guidelines for making H & C decisions ...
- [An] indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada.
- International treaties and conventions are not part of Canadian law unless they have been implemented by statute...[T]he *Convention* has not been implemented by Parliament, [and] its provisions therefore have no direct application within Canadian law.
- Nevertheless, **the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.** The legislature is presumed to respect the values and principles contained in international law. These constitute a part of the legal context in which legislation is enacted and read. **In so far as possible, interpretations that reflect these values and principles are preferred.** [quoting R. Sullivan, Driedger on the Construction of Statutes, emphasis added]
- **The principles of the Convention and other international instruments** place special importance on protections for children and childhood, and on particular consideration of their interests, needs and rights. They **help show the that are central in determining whether this decision was a reasonable exercise of the H & C power.** [emphasis added]<sup>51</sup>

The Court went on to hold that "because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an

unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned.”<sup>52</sup>

A brief minority judgment was delivered by Mr. Justice Iacobucci (concurring in by Mr. Justice Cory), dissenting solely on the issue of the impact of international law on domestic law:

I agree with L’Heureux-Dubé J.’s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of Ministerial discretion pursuant to s. 114(2) of the *Immigration Act* ... It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation ... **I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court’s jurisprudence concerning the status of international law within the domestic legal system.** In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague’s confidence that the Court’s precedent in *Capital Cities* ... survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, **the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.** The primacy accorded to the rights of the children in the Convention ... is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament ... **I am mindful that the result may well have been different had my colleague concluded that the appellant’s claim fell within the ambit of rights protected by the Canadian Charter of Rights and Freedoms. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption ... that administrative discretion involving Charter rights be exercised in accordance with similar international human rights norms.**<sup>53</sup>  
[emphasis added]

The minority judgment brings into focus the potential impact of the approach adopted by the majority with respect to the use of international human rights law in statutory interpretation and judicial review. While the Court did not undertake an in-depth analysis or elaboration of the domestic status of international human right instruments, the principles adopted by the majority have potentially far-reaching implications. The judgment may come to be seen as an important step in the direction of establishing a presumption that delegated power must be exercised in conformity with international human rights treaty law. The Court did reiterate the principle that an unimplemented international treaty has no direct application within Canadian law, and the reasoning in the decision did not go beyond establishing that the exercise of a delegated power might be unreasonable if international convention norms are not taken into consideration as an important factor in making the decision. However, the judgment may signal that it is not unreasonable to speculate that over time the law will evolve in such a way that international human rights treaty law will be accepted in its own right as a ground on which the exercise of administrative discretion can be challenged in Canadian courts. To what extent this direction is taken will be determined, in part, by how the courts apply this aspect of the *Baker* decision in future cases.

### **The Positions the Government Advances Before the Courts**

One of the questions that arises from cases such as *Baker* is how does one make sense of Canada taking a position before domestic courts which appears to be inconsistent with the international human rights obligations Canada has assumed and with the stance which Canada has taken before international bodies regarding domestic implementation of its international obligations. In *Baker*, the Government of Canada relied on the nature of its federal system of government, including the separation of powers between the executive and the legislature and the division of powers between the federal government and the provinces. The Government argued that even though it had (by its executive) ratified a treaty, the treaty could not give rise to legal rights and obligations domestically because it had not been expressly incorporated by legislation into the domestic law. One writer has stated that “[d]espite a duty to fulfill treaty obligations in good faith, it seems states are willing to hide behind the non-self-executing shield...”<sup>54</sup> The federal government has taken this position in other cases, in particular in immigration matters, and the position has found some favour in the Federal Court of Canada where most immigration cases are heard. Craig Scott writes as follows:

[T]he federal government’s lawyers, especially those serving the Department of Immigration, have been zealous in marching into court on almost a daily basis and going so far as to argue that the *Canadian Charter of Rights and Freedoms*

cannot be read to prohibit deporting someone where there is a substantial risk that the person will face torture after arrival at his destination -- in the face of clear textual provisions and case law laying down such a prohibition emerging from the UN Convention Against Torture regime.<sup>55</sup>

Mr. Scott may be overstating the case. However, it is not surprising that in a number of cases involving applications for stays of execution of deportation orders, where applicants raise the argument that Canada will, by deporting them, be in breach of its obligations under the *Convention Against Torture*, the federal government has taken the position that the *Torture Convention*, though ratified by Canada, does not form part of Canada's domestic law and therefore cannot be applied to limit the Minister's discretion under the *Immigration Act*. After all, this is an argument based on well-settled principle, and at least some of the cases in which these arguments are raised involve known terrorists or criminals convicted of other serious crimes who are making last-minute bids, through the courts, to put a stop to their removal from Canada. The stay applications often follow a number of immigration proceedings and judicial reviews afforded the individuals by domestic legislation. This is also the case in some of the "Canadian-born children cases," where Canada's immigration officials have taken steps to deport individuals on the basis of criminal convictions and the individuals, at the last minute, argue that they cannot be removed from Canada because their children, who are Canadian citizens and therefore entitled to remain in Canada, need their on-going parenting. It is not astonishing in these circumstances that those responsible for the enforcement of domestic immigration legislation are eager to utilize all arguments available to them to ensure that removal is not thwarted. Neither is it surprising that judges have leaned toward affording the administrative decision-makers a good deal of deference and have adopted reasoning, in dismissing stay applications, which allows for conclusions such as the following: "I agree with my colleague, Muldoon J., that 'Canada is not intended to be a haven for terrorists.' The public's interest in executing deportation orders of individuals found to be a danger to the security of the country clearly outweighs the private interests of the Applicant."<sup>56</sup> Many Canadians would applaud such a decision and would be appalled if the court ruled otherwise based on relatively unknown provisions in international conventions. Yet, is it defensible for the government to present positions to domestic courts which appear to be inconsistent with the obligations the government has assumed pursuant to international human rights instruments?

One writer has pointed out that both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have commented on conduct of Canada that "draws into question the good faith of Canada's commitment to doing what is necessary to implement Covenant rights within the Canadian legal order," and points specifically to the following com-



ment of the Committee on Economic, Social and Cultural Rights: “The Committee urges the federal, provincial, and territorial governments to adopt positions in litigation which are consistent with their obligation to uphold the rights recognized in the Covenant.”<sup>57</sup>

This question brings into focus some complex underlying issues which the Government is going to have to address, issues ranging from the procedure the Government has put into place for decision-making regarding the ratification of human rights treaties and optional protocols providing for individual complaint mechanisms, to the positions the Government takes when faced with practical consequences of assuming international obligations, which it has not foreseen and does not like. Frequently, the state is faced with making decisions in circumstances where there are competing interests to be taken into account. In discussing this in relation to the rights of the child, one writer has stated as follows:

States will insist on their sovereignty and will claim that they must have the right to control their own borders. They will maintain that they must ensure national security by deporting certain individuals. However, states must reconsider whether in some cases their actions are in fact in violation of the CRC, and whether a different approach can be found to ensure national security while not exposing children to unnecessary hardships.<sup>58</sup>

It appears from the majority judgment in the *Baker* case, that the Supreme Court of Canada is endorsing such sentiments, and that the Government will have to take a more serious look at practices and policies that lead to these present-day dilemmas.

## CANADA'S EXPERIENCE WITH THE HUMAN RIGHTS COMMITTEE AND THE COMMITTEE AGAINST TORTURE

Canada has ratified the six “core” human rights treaties, the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD); the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); the *Convention on the Rights of the Child*; and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). Canada has also acceded to optional provisions allowing individual communications to be heard by the treaty bodies established under the ICCPR (the Human Rights Committee) and under the CAT (The Committee against Torture). These treaty bodies have thus far adopted views only on a handful of issues raised by communications alleging violations by Canada of its international human rights obligations. Of these, there

have been findings of violations in eight cases by the Human Rights Committee and in one by the Committee against Torture. This portion of the paper summarizes the conclusions (the “views”) which the Human Rights Committee and the Committee against Torture have adopted concerning communications by individuals in respect of alleged violations by Canada of its obligations under the ICCPR and the CAT respectively, and the responses of Canada to views and requests of these treaty bodies. An examination of these cases illustrates that provisions of international human rights conventions are subject to varying interpretations and applications. With changing membership of the treaty bodies and shifting attitudes in various jurisdictions, provisions which were perhaps considered only as abstract general principles at the time of drafting and negotiating a convention may over time be put to unforeseen uses in their application. This is something that states should have regard to in making decisions on ratification and should monitor closely as the “jurisprudence” of treaty bodies evolves.

### **The Human Rights Committee**

The Human Rights Committee was established pursuant to Article 28 of the ICCPR, as a permanent human rights body to implement the *Covenant*.<sup>59</sup>

The First *Optional Protocol* to the ICCPR establishes a mechanism by which individuals may submit communications to the Human Rights Committee alleging violations by States Parties of individual rights enumerated under the *Covenant*. The *Optional Protocol*, along with the ICCPR, entered into force on March 23, 1976.<sup>60</sup> Under its terms, States Parties agree to recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of any of the rights set forth in the *Covenant*.

When Canada became a party to the *Optional Protocol* in 1976, there was very little public awareness in Canada of the decision to accede to it and no public debate. Since then, there have been numerous communications brought to the Human Rights Committee by individuals alleging that Canada has violated their rights under the *Covenant*.<sup>61</sup> Under the individual communication provisions, a communication must first be declared admissible before it can be considered on its merits. The conditions of admissibility of individual communications are set out in the articles of the First *Optional Protocol* to the ICCPR and elaborated on in rules of procedure. Communications with respect to Canada have been declared inadmissible on numerous grounds, e.g., that the author had failed to exhaust available domestic remedies, that the author’s claims did not come within the scope of the treaty, that the author was an association and not an individual, that the author had not substantiated his allegation of a violation, that the facts did not raise issues under any provision of the treaty, that the alleged violation occurred before the

entry into force of the treaty, that the author had failed to show that he himself was a victim of a violation, and that the submission constituted an abuse of the right of submission. This discussion is limited to the 17 cases which have been declared admissible by the treaty bodies and have then been considered on their merits.<sup>62</sup> The complaints which have formed the basis for these communications have related to the following issues:

- (i) extradition by Canada to a state in circumstances where the fugitive will potentially face the death penalty (*Kindler*<sup>63</sup>, *Ng*<sup>64</sup>, *Cox*<sup>65</sup>);
- (ii) deportation by Canada of long-time permanent residents (*Stewart*<sup>66</sup>, *Canepa*<sup>67</sup>);
- (iii) prisoners' rights: the right to be tried without undue delay; and treatment during detention (*Pinkney*<sup>68</sup>);
- (iv) the right of an individual convicted of a criminal offence to benefit from legislation which is enacted subsequent to the commission of the offence and which provides for a lighter penalty (*Alexander MacIsaac*<sup>69</sup>; *Gordon C. VanDuzen*<sup>70</sup>);
- (v) freedom of religion and reasonable accommodation requirements: the dismissal from employment of a Sikh for refusing to wear a hard hat at the worksite (*Bhinder*<sup>71</sup>);
- (vi) laws promoting or requiring the use of a particular language: restrictions against the use of English for commercial purposes (Quebec legislation -- Bill 101 as amended by Bill 178) (*Ballantyne* and *McIntyre*<sup>72</sup>; *Singer*<sup>73</sup>);
- (vii) the right of persons belonging to ethnic minorities to enjoy their own culture in community with other members of their cultural group (*Lovelace*<sup>74</sup>);
- (viii) political and economic status of indigenous communities (*Denny* and the *Mikmaq Tribal Society*<sup>75</sup>; *Ominayak* and the *Lubicon Lake Band*<sup>76</sup>);
- (ix) the right of access to the publicly funded media facilities of Parliament (*Gauthier*<sup>77</sup>);
- (x) the availability of public funding for religious schools (*Waldman*<sup>78</sup>).

While the submissions tendered to the Human Rights Committee have until recently been confidential (See now Rule 96 of the Rules of Procedure of the Human Rights Committee, August

11, 1997, CCPR/C/3/Rev. 5), the views adopted by the Committee are made public. The views summarize the claims of the authors and the observations made by the States Parties.

**(i) Issue: Extradition by Canada to a state in circumstances where the fugitive will potentially face the death penalty**

Canada is a party to numerous treaties governing the extradition of fugitives to foreign states.<sup>79</sup> Canada's treaty obligations are implemented into domestic law by the *Extradition Act*.<sup>80</sup> The issue of the treatment a fugitive may receive if extradited to the requesting state has arisen in a number of cases in Canada, in particular where individuals have challenged decisions of the Minister of Justice to surrender them for extradition to the United States. Whereas Canada has abandoned the death penalty for all civilian cases, many states in the United States have retained the death penalty.<sup>81</sup>

In three cases, the Human Rights Committee has adopted views concerning communications alleging that Canada's decision to extradite individuals to the United States violated various articles of the *Covenant*, including Articles 6, 7, 9, 14 and 26. These cases are *Kindler v. Canada*, *Ng v. Canada*, and *Cox v. Canada*. In all three of these cases, the allegations were based in part on the possibility that the death penalty would be imposed.

*Kindler v. Canada*: Views adopted July 30, 1993

The author of the communication in the *Kindler* case was a citizen of the United States who had been convicted in the State of Pennsylvania of first degree murder, conspiracy to commit murder, and kidnapping. The jury had recommended imposition of the death penalty. Prior to sentencing, Mr. Kindler had escaped from custody, illegally entered Canada and was subsequently arrested in Quebec. The United States requested extradition, which was ordered by a Canadian court, and Mr. Kindler's appeals from the extradition order were unsuccessful. Under the *Extradition Treaty* between Canada and the United States, Canada is entitled to refuse extradition unless the U.S. provides assurances that the death penalty will not be imposed or if imposed will not be executed.<sup>82</sup> Canada has stated before the Human Rights Committee that it does not routinely seek assurances with respect to the non-imposition of the death penalty, that the right to seek assurances is held in reserve for use only where exceptional circumstances exist. In this case, the Minister of Justice of Canada decided not to seek such assurances from the United States. The Minister's reasons for surrendering fugitives without seeking assurances that the death penalty would not be imposed or if imposed, not carried out, have been summarized as follows:

1. There was no merit in the suggestions that a fugitive would not receive a fair trial or sentence hearing in the United States (Ng);
2. There was no merit in the so-called 'death-row phenomenon' argument; the state's method of execution was accepted by the American courts (Kindler);
3. The provision in Article 6 of the Treaty should not be routinely applied: '[i]f it was intended that assurances should be sought other than for special reasons, that intent could have been clearly and simply expressed in the Treaty' (Ng);
4. Those who commit murder in a foreign state, particularly one with a long common border with Canada, should be discouraged from seeking haven in Canada as a means of reducing or limiting the severity of the penalty that might be exacted under the laws of the state in which the crime was committed (Ng and Kindler); and
5. The United States and Canada must work together to support law enforcement in the two nations (Ng).<sup>83</sup>

Mr. Kindler was extradited to the United States despite his having made a submission to the Human Rights Committee, and despite a request from the Committee to stay the extradition pending the Committee's examination of Kindler's communication.

The Committee observed that what was at issue was not whether Mr. Kindler's rights had been or were likely to be violated by the United States, which is not a party to the *Optional Protocol*, but whether by extraditing Mr. Kindler to the United States Canada exposed him to a real risk of a violation of his rights under the *Covenant*. It stated that if a State Party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his rights under the *Covenant* will be violated in another jurisdiction, the State Party itself may be in violation of the *Covenant*. The Committee specifically examined Articles 6 and 7 of the *Covenant*, and concluded that the facts of the case did not reveal a violation by Canada of any article of the *Covenant*.

Before concluding with this finding, the Committee expressed its regret that Canada had not acceded to the Special Rapporteur's request under Rule 86 to defer surrender of Mr. Kindler to the United States until the Committee had examined the merits of his communication.

*Ng v. Canada*: Views adopted November 5, 1993

Mr. Ng was a resident of the United States whose extradition had been requested by the United States to stand trial in California on nineteen criminal charges arising from multiple

and brutal killings. On twelve of the charges, Ng, if convicted, could receive the death penalty. Again, the Minister of Justice decided not to seek assurances from the United States that the death penalty would not be imposed or executed. The Supreme Court of Canada, which heard the case at the same time as the appeal by Mr. Kindler, held that Mr. Ng's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection for human rights or the standards of the international community. Mr. Ng was extradited, again in spite of a request by the Human Rights Committee to stay his extradition pending examination by the Committee of Ng's communication.

The Committee concluded, as in the *Kindler* case, that in the circumstances Mr. Ng was not a victim of a violation by Canada of Article 6 of the *Covenant*. Where the conclusion of the Committee in the *Ng* case differed from that in the *Kindler* case was in respect of Article 7 of the *Covenant*. The key issue was the manner in which execution of the death penalty was carried out in California, i.e., by gas asphyxiation. Mr. Ng presented detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible. The Committee found that Canada "had the opportunity to refute these allegations on the facts; (but) it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, 'it would be interfering to an unwarranted degree with the internal laws and practices of the United States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation.'" The Committee concluded as follows:

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the *Covenant*. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the *Covenant*, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

In August of 1992 the State of California enacted legislation (effective January 1, 1993) that enabled an individual under sentence of death to choose lethal injection as the method of execution in lieu of gas asphyxiation. The views of the Committee, which were adopted subsequent to this legislation coming into force, make no reference to this legislation. This was, however, pointed out in one of the individual opinions appended to the views.

When the Committee finds that the facts of a case reveal a violation by a State Party of an article of the *Covenant*, what are the consequences for the State Party? In this case, what followed from the Committee's finding was merely a request and an appeal to the State Party:

18. The Human Rights Committee requests the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future.

Finally, it should be noted that in its admissibility decision the Human Rights Committee again "expressed its regret" that Canada had not acceded to the Committee's request to stay Mr. Ng's extradition.

One final note on this case: On February 24, 1999, a California jury convicted Mr. Ng of eleven counts of first-degree murder. The Ng case has been described as "one of history's horrific serial killing cases."<sup>84</sup> On May 3, 1999, the jury recommended that Charles Ng be executed. Ng was sentenced to death on June 30, 1999.<sup>85</sup>

*Cox v. Canada*: Views adopted October 31, 1994

Mr. Cox was a citizen of the U.S. in detention in Canada. He was wanted in the State of Pennsylvania on two charges of first-degree murder; if convicted, he could face the death penalty. The U.S. requested his extradition, and it was so ordered by a Canadian court. The Minister of Justice ordered Mr. Cox surrendered without assurances. Mr. Cox claimed that the order to extradite him violated Articles 6, 7, 14 and 26 of the *Covenant*. He alleged that the manner in which death penalties are pronounced in the U.S. generally discriminates against black people. He submitted that if extradited and sentenced to death, he would be exposed to the "death row phenomenon," years of detention under harsh conditions while awaiting execution. While the author had not exhausted domestic remedies, Canada did not contest admissibility on this ground.

The Committee concluded that the obligations arising under Article 6, paragraph 1 did not require Canada to refuse the author's extradition without assurances that the death penalty would not be imposed. The Committee also concluded that the extradition would not entail a violation of Article 7. In arriving at this conclusion, the Committee considered that while confinement on death row is necessarily stressful, no specific factors relating to Mr. Cox's mental condition were presented; Canada had submitted specific information about the current state of prisons in Pennsylvania which would not appear to violate Article 7; Mr. Cox had not yet been convicted nor sentenced; the trial of two accomplices had resulted in life imprisonment

as opposed to the death sentence; and Mr. Cox had not adduced evidence to show that persons confined to death row in Pennsylvania were not afforded avenues of appeal within a reasonable time. In regard to the method of execution, the Committee stated that it had already had the opportunity of examining the *Kindler* case in which the potential judicial execution by lethal injection was not found to be in violation of Article 7.

The range of opinions held by members of the Human Rights Committee on the issues arising in these cases is readily apparent from the numerous individual opinions appended to the Committee's views. Two of the members would have found that Canada had violated both Articles 6 and 7. In their dissenting opinion they state that a State Party that has abolished the death penalty is under a legal obligation not to reintroduce it, and that this obligation includes an obligation not to indirectly reintroduce it by extraditing or expelling an individual within its territory to another State where he may be exposed to capital punishment. The dissenting opinion goes on to state that a violation of the provisions of Article 6 that may make the execution of a death sentence permissible entails necessarily and irrespective of the way in which the execution may be carried out, a violation of Article 7.<sup>86</sup>

The principles which have been established in these three cases in relation to extradition, in particular extradition by Canada to the United States, may be summarized as follows:

- (i) If a State Party extradites a person within its jurisdiction in such circumstances that as a result there is a real risk that his rights under the *Covenant* will be violated in another jurisdiction, the State Party itself may be in violation of the *Covenant*.
- (ii) Article 6, paragraph 1 must be read together with Article 6, paragraph 2 which does not prohibit the imposition of the death penalty for the most serious of crimes. If the person is exposed through extradition from Canada, to a real risk of a violation of Article 6, paragraph 2, in the United States, this would entail a violation by Canada of its obligations under paragraph 1. The requirements of Article 6, paragraph 2, must be met, i.e., that capital punishment is imposed only for the most serious crimes, under circumstances not contrary to the *Covenant* and other instruments, and that it is carried out pursuant to a final judgment rendered by a competent court.
- (iii) While States must be mindful of their obligation to protect the right to life when exercising their discretion in the application of extradition treaties, the terms of Article 6 of the *Covenant* do not necessarily require Canada to refuse to extradite or to seek assurances.



- (iv) Extradition would violate Canada's obligations under Article 6 of the *Covenant*, if the decision to extradite without assurances were taken summarily or arbitrarily.
- (v) In determining whether in a particular case the imposition of capital punishment constitutes a violation of Article 7, the relevant factors include personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.
- (vi) Whereas Article 6, paragraph 2 allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with Article 7. The execution of the sentence must be carried out in such a way as to cause the least possible physical and mental suffering. While execution by lethal injection meets this test, execution by gas asphyxiation does not.

In its fourth periodic report to the Human Rights Committee, Canada states, at paragraph 44: "Following the decisions of the Committee in *Kindler v. Canada*, *Ng. v. Canada* and *Cox v. Canada*, which raised articles 6 and 7 of the Covenant, the Minister of Justice takes into consideration the protection afforded by the Covenant in decisions on extradition requests that raise the issue of the death penalty." In concluding observations adopted by the Human Rights Committee on April 6, 1999, in relation to Canada's fourth periodic report, the Committee states, at paragraph 13:

The Committee is concerned that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refers to its General Comment on article 7 and recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk.

#### **(ii) Issue: Deportation from Canada of long-time permanent residents**

The issue of whether the deportation from Canada of a long-time permanent resident violates the ICCPR has been the subject of two cases in which the Committee has adopted views, *Charles E. Stewart v. Canada* and *Giosue Canepa v. Canada*.

*Stewart v. Canada*: Views adopted November 1, 1996

Mr. Stewart was a British citizen born in Scotland in 1960. At the age of seven he emigrated to Canada with his mother; his parents never requested Canadian citizenship for him. Almost all of Mr. Stewart's relatives resided in Canada. Mr. Stewart was convicted of numerous criminal offences. In 1990, an immigration inquiry was initiated, and he was ordered deported on the basis of those convictions. Mr. Stewart's efforts to appeal the deportation order were unsuccessful.

In his communication to the Committee, Mr. Stewart claimed that the facts revealed violations of Articles 7, 9, 12, 13, 17 and 23 of the *Covenant*. In particular, he asserted that Canada had failed to provide for clear legislative recognition of the protection of the family. He argued that he must be considered a *de facto* Canadian citizen, given his long residence in Canada, and that enforcement of the deportation order would amount to cruel, inhuman and degrading treatment.

The Committee concluded that "when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become 'his own country' within the meaning of article 12, paragraph 4 of the *Covenant*." The Committee went on to state that individuals who do not take advantage of the opportunity to become nationals and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada, and to bear the consequences thereof.

In regard to Articles 17 and 23, the Committee stated that the question was whether the interference, by deportation, with Mr. Stewart's family relations in Canada could be considered either unlawful or arbitrary. The Committee concluded as follows:

[T]he interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections. There is therefore no violation of articles 17 and 23 of the *Covenant*.

While the Committee found that the facts before it did not disclose a violation of any of the provisions of the *Covenant*, it should be noted that once again there were several dissenting opinions. One dissenting opinion illustrates the disparity of views held by Committee members on significant issues that have been raised before the Committee. For example, the dissenting opinion expresses the following principles:

- (i) If a State Party is under an obligation to allow entry of a person it is prohibited from deporting that person.
- (ii) The author has been deprived of the right to enter Canada, whether he remains in Canada awaiting deportation or whether he has already been deported. Individuals cannot be deprived of the right to enter 'their own country' because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or with the web of relationships that form his or her social environment.
- (iii) For the rights set forth in Article 12, the existence of a formal link to the State is irrelevant; the Covenant is concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it.
- (iv) The grounds relied on by the State Party to justify the expulsion of the author are his criminal activities. It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country, unless the State could show that there are compelling reasons of national security or public order which require such a course.
- (v) While the deportation proceedings were not unfair procedurally, the onus was on the author to show reasons against his deportation, not on the State to demonstrate that there were grounds for taking away his right to enter "his own country." In these circumstances the decision to deport the author was arbitrary.<sup>87</sup>

The concepts expressed in this dissenting opinion are diametrically opposed to those contained in the views adopted by the Committee, and to some basic principles enshrined in Canada's immigration legislation. For example, the *Immigration Act* sets out circumstances in which a "permanent resident" may be issued a removal order which, if not quashed or stayed, may result in the cessation of his permanent resident status.

*Canepa v. Canada*: Views adopted April 3, 1997

Mr. Canepa was a citizen of Italy by birth. At the age of five he emigrated to Canada with his parents. He never acquired Canadian citizenship. Mr. Canepa was convicted of a number of criminal offences in Canada, and was ordered deported on the basis of those convictions. Mr. Canepa's appeals were unsuccessful.

Mr. Canepa claimed to be a victim of a violation of Articles 7, 12, 17 and 23 of the *Covenant*. As in the *Stewart* case, Mr. Canepa alleged, among other things, that Canada had failed to provide for clear legislative recognition of the protection of privacy, family and home life of persons in the author's position; that his right to family life was violated by his deportation; that deportation of long-term, deeply-rooted and substantially-connected resident aliens who have already been duly punished for their crimes was not related to a legitimate State interest; and that enforcement of the deportation order amounted to cruel, inhuman and degrading treatment.

The Committee found that the facts before it did not disclose a violation of any of the provisions of the *Covenant*. The Committee relied on its views in the *Stewart* case that except in limited circumstances a person who enters a State under the State's immigration laws cannot regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The Committee found that the interference with the author's family life was not arbitrary; the separation from his family and its effects on him were not disproportionate to the objectives of removal which is seen as necessary in the public interest and to protect public safety from further criminal activity by the author. Again, there were a number of dissenting individual opinions appended to the views, specifically in relation to the Committee's narrow interpretation of the application of Article 12, paragraph 4 of the *Covenant*, linking "own country" to "nationality." Two of the dissenting members expressed the view that "there are factors other than nationality which may establish close and enduring connections between a person and a country" and that in such cases the individual "has a strong claim to the protection of article 12, paragraph 4."<sup>88</sup>

Two years after the Human Rights Committee adopted views in the *Canepa* case, the Committee expressed concern in relation to Canada's policies on expulsion of long-term alien residents. In Concluding Observations adopted April 6, 1999, in relation to Canada's fourth periodic report, the Committee states, at paragraph 15: "The Committee remains concerned about Canada's policy in relation to expulsion of long-term alien residents, without giving full consideration in all cases to the protection of all Covenant rights, in particular under articles 23 and 24."

### **(iii) Issue: Prisoners' rights: the right to be tried without undue delay; treatment during detention**

*Larry James Pinkney v. Canada*: Views adopted October 29, 1981

Mr. Pinkney was a citizen of the United States serving a five-year prison sentence in Canada for extortion. He had been convicted in 1976 by a British Columbia court and had been sentenced in January 1977. He sought leave to appeal his conviction and sentence to the British

Columbia Court of Appeal, and almost three years later, in December 1979, the B.C. Court of Appeal dismissed Mr. Pinkney's appeal against conviction and adjourned his appeal against sentence *sine die*.

Mr. Pinkney claimed violations of Article 14, paragraphs 1, 3(b), 3(c), and 5 of the *Covenant*. His allegations were that he was denied a fair trial because evidence was withheld which would have proven that he had no intent to commit the crime of extortion, that he was denied the right to produce those documents and that the hearing of his appeal was unduly delayed. Mr. Pinkney also alleged that his rights under Article 10, paragraphs 1 and 2(a) and Article 17, paragraph 1 of the *Covenant* were violated, by his ill-treatment while in detention. He alleged in particular that prison guards insulted him, humiliated him and physically ill-treated him because of his race; that during his pre-trial detention he was not segregated from convicted persons; and that his correspondence was arbitrarily interfered with.

With respect to the allegations concerning missing evidence, the Committee stated that questions concerning the missing evidence had been considered by the Canadian courts. The Committee observed that it was not its function to examine whether the assessment by the courts was based on errors of fact, or to review the courts' application of Canadian law, but only to determine whether it was made in circumstances indicating that the provisions of the *Covenant* were not observed. The Committee did not find any support for the allegation that material evidence was withheld by Canadian authorities, depriving Mr. Pinkney of a fair hearing or adequate facilities for his defence.

Regarding the question of undue delay, however, the Committee stated that the British Columbia authorities must be held responsible for the delay of two and a half years in the production of the transcripts of the trial for the purpose of the appeal, and concluded that the right under Article 14, paragraph 3(c) to be tried without undue delay should be applied in conjunction with the right under Article 14, paragraph 5 to review by a higher tribunal, and that consequently there was in this case a violation of both of these provisions taken together.

With respect to the claims based on alleged wrongful treatment during detention, the Committee found that it did not have before it any verifiable information to substantiate Mr. Pinkney's allegations of violations of Article 10, paragraph 1 and Article 17, paragraph 1 of the *Covenant*; that the requirement of Article 10, paragraph 2(a) regarding segregation of accused persons from convicted persons means that they shall be kept in separate quarters but not necessarily in separate buildings and that the practice of having convicted persons work as food servers and cleaners in the remand area of the prison was not incompatible with the *Covenant*, provided that contacts between the two classes of prisoners were kept strictly to a minimum necessary for the performance of those tasks; and that while the law in force at the time Mr. Pinkney was detained, governing control and censorship of prisoners' correspondence, did not

in itself provide satisfactory legal safeguards against arbitrary application, there was no evidence to establish that Mr. Pinkney was himself the victim of a violation of the *Covenant* as a result.

The Committee's conclusion, that the delay in producing the transcripts of the trial for the purpose of the appeal was incompatible with the right to be tried without undue delay, was not accompanied by any reference to any remedy which ought to be provided to Mr. Pinkney.

**(iv) Issue: The right of an individual convicted of a criminal offence to benefit from legislation which is enacted subsequent to the commission of the offence, and which provides for a lighter penalty**

Issues regarding the alleged violation by Canada of Article 15 of the *Covenant* have been considered by the Human Rights Committee in two cases, *Van Duzen v. Canada* and *MacIsaac v. Canada*.

*Gordon C. Van Duzen v. Canada*: Views adopted April 7, 1982

In 1967 and 1968, Mr. Van Duzen was sentenced upon conviction of different offences to combined terms which were to expire on June 11, 1978. He was released on parole in 1971, and while on parole was convicted (in December 1974) of an indictable offence and sentenced to imprisonment for a term of three years. Pursuant to section 17 of the *Parole Act 1970*, his parole was treated as forfeited as of the date of his conviction for the offence committed while on parole, and he was required to re-serve that time. As a consequence his combined terms were calculated to expire on January 4, 1985. In 1977, section 17 of the *Parole Act* was repealed and was replaced by provisions in the *Criminal Law Amendment Act 1977*. Under the new legislation, forfeiture of parole was abolished and the penalty for committing an indictable offence while on parole was made lighter for offences committed on or after October 15, 1977. Mr. Van Duzen alleged that by not making the "lighter penalty" retroactively applicable to persons who had committed indictable offences while on parole before October 15, 1977, the Parliament of Canada had enacted a law which deprived him of the benefit of Article 15 of the *Covenant*.

The Committee concluded that it was not necessary to examine the complex issues raised regarding the interpretation and application of Article 15, paragraph 1, as Mr. VanDuzen had been released even before the date when he claimed he should be released and therefore for practical purposes he had received the benefit he claimed. The Committee was of the view that the case did not disclose a violation of the *Covenant*.

The parties had made extensive submissions to the Committee with respect to the meaning of the word "penalty" and relevant Canadian law and practice. The Committee noted that its interpretation and application of the *Covenant* "had to be based on the principle that the terms

and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions,” and that though “the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning.”

*Alexander MacIsaac v. Canada*: Views adopted October 14, 1982

Mr. MacIsaac, too, claimed to be a victim of a breach by Canada of Article 15, paragraph 1. In 1968, he was sentenced to a term of imprisonment of eight years. In 1972, he was released on parole from a federal penitentiary, and in 1975, while on parole, he was convicted of an indictable offence and sentenced to a term of fourteen months imprisonment. Pursuant to the *Parole Act 1970*, the time which he had spent on parole (some three years and three months) was automatically forfeited. He was released again in May 1979, to serve the remaining part of his sentence under mandatory supervision.

Like Mr. VanDuzen, Mr. MacIsaac claimed that the *Criminal Law Amendment Act 1977*, in providing that time spent on parole after October 15, 1977 was not to be re-served in prison upon revocation of that parole, constituted a lighter penalty within the meaning of Article 15 of the *Covenant*, and by providing that the legislation was not to be retroactive the Government of Canada had contravened Article 15, paragraph 1. Mr. MacIsaac stated that the object of his submission to the Committee was to obtain an amendment of the Canadian *Criminal Law Amendment Act 1977*, so as to make it compatible with Article 15 of the *Covenant*.

The Committee noted that while this matter appeared to be of interest as affecting hundreds of inmates in Canadian prisons, this fact alone was not a reason for the Committee to consider the general issue, and that it was not its task to decide in the abstract whether or not a provision of national law was compatible with the *Covenant* but only whether there was or had been a violation of the *Covenant* in the particular case.

The Committee examined the relevant provisions of the *Criminal Law Amendment Act*, compared to the previous legislation, and in what way Mr. MacIsaac’s position was affected by the change in the system. The Committee noted that the system for dealing with recidivists was changed by the 1977 Act to make it more flexible, replacing automatic forfeiture of parole with a system of revocation which was at the discretion of the National Parole Board and sentencing for the recidivist offence which was at the discretion of the judge; and that the offence which Mr. MacIsaac was convicted of while on parole carried with it a maximum sentence of 14 years, but that the judge imposed a sentence of 14 months, explicitly mentioning that Mr. MacIsaac’s parole had been forfeited. That is, the sentence was directly linked with the forfeiture of parole. Mr. MacIsaac had not established that if parole had not been forfeited, the judge would have im-

posed the same sentence of 14 months and that he would therefore have been actually released prior to May of 1979. The Committee stated that Mr. MacIsaac had the burden of proving that in 1977 he had been denied an advantage under the new law and that he was therefore a victim, and concluded that he had not discharged this burden and that therefore the facts of the case did not disclose any violation of Article 15, paragraph 1.

**(v) Issue: Freedom of religion and “reasonable accommodation” requirements:  
Dismissal from employment of a Sikh for refusal to wear a hard hat at the worksite**

*Karnel Singh Bhinder v. Canada*: Views adopted November 9, 1989

Mr. Bhinder was a nationalized Canadian citizen born in India. He was a Sikh by religion and wore a turban in his daily life. In 1974, he was employed by the Canadian National Railway Company as a maintenance electrician at a site which the company declared, in 1978, to be a “hard hat area.” All employees working in that area were required to wear safety headgear. The relevant Canadian legislation at the time was the *Canada Labour Code* which contained specific provisions requiring a federal employer to adopt and carry out reasonable procedures and techniques to prevent or reduce the risk of employment injury; and to ensure that each employee exposed to certain dangers including working on an electrical facility wear or use protective equipment. Mr. Bhinder refused to comply with the new hard hat regulations, on the basis that it is a fundamental tenet of the Sikh religion that men’s headwear should consist exclusively of a turban. He also refused a transfer to another post. As a result of his refusal, his employment was terminated.

In his communication to the Human Rights Committee, Mr. Bhinder claimed that his right to manifest his religious beliefs under Article 18, paragraph 1 of the *Covenant* had been restricted by the enforcement of the hard hat regulations, and that this limitation did not meet the requirements of Article 18, paragraph 3. The Committee examined the case both with respect to Article 18 and to Article 26. The Committee concluded that the facts did not disclose a violation of any provision of the *Covenant*. With respect to Article 18, the Committee found that if the requirement that a hard hat be worn is regarded as raising issues under Article 18, then it is a limitation that is justified by reference to the grounds set out in Article 18, paragraph 3. With respect to the issue of discrimination against persons of the Sikh religion under Article 26, the Committee concluded that legislation requiring workers in federal employment to be protected from injury and electric shock by the wearing of hard hats is “to be regarded as reasonable and directed towards objective purposes that are compatible with the *Covenant*.”



**(vi) Issue: Laws promoting or requiring the use of a particular language: Bill 101 as amended by Bill 178 -- Restrictions against the use of English for commercial purposes**

Issues concerning the *Charter of the French Language*, Bill 101, have been considered by the Human Rights Committee in three cases, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada* (joined for consideration) and *Allan Singer v. Canada*.

*Ballantyne, Davidson, McIntyre v. Canada*: Views adopted March 31, 1993

The authors were Canadian citizens residing in the Province of Quebec. Their mother tongue was English. They were business people, many of whose customers were English-speaking. They alleged that they were victims of violations of Articles 2, 19, 26 and 27 of the *Covenant* by the Federal Government of Canada and by the Province of Quebec, because they were forbidden to use English for purposes of advertising, e.g., on commercial signs outside business premises or in the name of a business. The legislation which the authors were challenging provided that public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French.

With respect to Article 27 (the “minority rights” provision), the Committee observed that this article refers to minorities within ratifying States, and not minorities within any province of a State. The Committee concluded that English-speaking citizens of Canada cannot be considered a linguistic minority, i.e., in the State. Accordingly, the authors had no claim under Article 27. The Committee also concluded that there had been no violation of Article 26 (the “equality before the law” provision), as the prohibition of the use of English in commercial advertising applied to French speakers as well as English speakers.

The Committee concluded, however, that there had been a violation of Article 19, paragraph 2 of the *Covenant*. The Committee expressed the view that any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3(a) and (b) of Article 19, and it must be necessary to achieve a legitimate purpose. The Committee concluded that it was not necessary, in order to protect the position in Canada of the Francophone group to prohibit commercial advertising in English, and that “[a] State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s choice.” The Committee called upon the State Party to remedy the violation of Article 19 of the *Covenant* by an appropriate amendment to the law, and stated that it would wish to receive information, within six months, on any relevant measures taken by the State Party in connection with the Committee’s views.

Following the publication of the Committee's views, the Quebec government amended its legislation. This case is regarded as an excellent example of compliance with the Committee's views. The Quebec government complied with the Committee's views, though it had defied the same opinion from the Supreme Court of Canada at an earlier time.<sup>89</sup>

*Singer v. Canada*: Views adopted July 26, 1994

In the *Singer* case, the *Charter of the French Language* (Bill No. 101) was once again challenged on the basis that it discriminated against the author by restricting the use of English for commercial purposes. The Government of Quebec advised the Committee that the *Charter of the French Language* had been amended in 1993 and that the current legislation provided that public signs and posters and commercial advertising must be in French, but may also be both in French and in another language provided that French is markedly predominant; under the legislation, however, the Government may determine by regulation the circumstances where advertising must be in French only, where French need not be predominant, or where such advertising may be in another language only.

The Committee observed that its views on the Ballantyne/McIntyre communications applied to the case of Mr. Singer, and found that with respect to the previous legislation there had been a violation of Article 19, paragraph 2, but that under the amendments Mr. Singer had the right, albeit under specified conditions and with exceptions, to display commercial advertisements outside his store in English. The Committee concluded that the State Party had provided Mr. Singer with an effective remedy.

**(vii) Issue: The right of persons belonging to ethnic minorities to enjoy their own culture in community with other members of their cultural group**

*Lovelace v. Canada*: Views adopted July 30, 1981

Sandra Lovelace was a woman living in Canada who had been born and registered as an Indian but had lost her rights and status as an Indian in accordance with the *Indian Act* as a result of having married a non-Indian. She claimed that the *Indian Act* was discriminatory on the grounds of sex and contrary to Articles 2(1), 3, 23(1) and (4), 26 and 27 of the *Covenant*.

The Committee was of the view that the provision of the *Covenant* which was most directly applicable to Sandra Lovelace's complaint was Article 27. It observed that since Lovelace was ethnically a Maliseet Indian and had only been absent from her home reserve for a few years during the existence of her marriage which had since broken up, she was entitled to be regarded as belonging to this minority and to claim the benefits of Article 27. The Committee stated that

because Lovelace had been denied the legal right to reside on the Tobique reserve where a community composed of other members of her group existed, her right to have access to her native culture and language “in community with the other members” of her group had in fact been and continued to be interfered with. The Committee concluded as follows:

Whatever might be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe...[T]o prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

At the time the *Lovelace* case was being considered by the Committee, Canada was in the process of considering amendments to the *Indian Act* which would, among other things, end discrimination on the basis of sex. Subsequent to the views being adopted, Canada diligently reported to the Committee that steps were being taken to comply with the Committee’s views:

[A]s a result of the decision of the Human Rights Committee...Canada is anxious to amend the Indian Act so as to render itself in fuller compliance with its international obligations pursuant to article 27 of the *International Covenant on Civil and Political Rights*.<sup>90</sup>

Subsequently, the *Indian Act* was amended in this regard. The *Lovelace* case is often cited as an example of the effectiveness of the individual communication mechanism established under the *Optional Protocol*. The “standard version” of the Lovelace story is that “Lovelace took her case to the Committee and won” and Canada obediently amended the *Indian Act*. However, “[t]he story fails to note that the Canadian government was committed to changing the law well in advance of the case, and said that to the Committee.”<sup>91</sup> It is interesting to note that some two decades after the Committee’s adoption of views in the *Lovelace* case, the Committee has included the following as a principal area of concern in its Concluding Observations, adopted April 7, 1999, in relation to consideration of Canada’s fourth periodic report under Article 40 of the *Covenant*:

19. The Committee is concerned about ongoing discrimination against aboriginal women. Following adoption of the Committee’s Views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the

community. The Committee recommends that these issues be addressed by the State party.

**(viii) Issue: political and economic status of indigenous communities**

*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*: Views adopted March 26, 1990

Chief Ominayak, leader and representative of the Lubicon Lake Band, alleged violations by the Government of Canada of the Band's right of self-determination; its right to determine freely its political status and pursue its economic, social and cultural development; the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. In particular, he alleged that the Lubicon Lake Band's land had been expropriated for commercial interest and destroyed, thus depriving the Band of its means of subsistence and enjoyment of the right of self-determination, that the Band's existence was seriously threatened, and that by these violations Canada had contravened its obligations under Article 1 of the *Covenant*.

The Committee observed that an individual could not claim under the *Optional Protocol* to be a victim of a violation of the right of self-determination enshrined in Article 1. The Committee stated that there was no doubt that many of the claims presented raised issues under Article 27 which includes the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. After summarizing at some length the extensive submissions of the parties on extremely complex issues, the Committee simply offered the following conclusion:

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the *Covenant*.

The Lubicon Lake Band has frequently relied on the views of the Human Rights Committee in support of the Band's position that they cannot obtain justice in Canada.<sup>92</sup>

In its fourth periodic report to the Human Rights Committee, covering the period 1990 to 1994, Canada states, at paragraph 309: "The Committee...stated that the settlement offer made by the Government of Canada to the Lubicon Lake Band constituted an appropriate remedy within the terms of article 2 of the *Covenant*. This offer was not accepted by the Band, and after prolonged negotiations with the Band, in 1994, the Government of Canada announced that it

would appoint a negotiator to assist in the resolution of the dispute.” The Lubicon Lake land claim has not yet been resolved.

*Marshall v. Canada*: Views adopted November 4, 1991

The authors, officers of the Grand Council of the Mikmaq tribal society in Canada, submitted a communication to the Human Rights Committee both as individually affected alleged victims and as trustees for the welfare and the rights of the Mikmaq people as a whole. The authors sought to be invited to attend, as representatives of the Mikmaq people, constitutional conferences on aboriginal matters convened by the Prime Minister of Canada. The authors claimed that the refusal denied them the right of self-determination, in violation of Article 1 of the *Covenant*, and also infringed their right to take part in the conduct of public affairs, in violation of Article 25(a).

With respect to Article 1, the Committee simply stated in its views that it had already determined in the *Lubicon* case that a claim of an alleged violation of Article 1 cannot be brought under the *Optional Protocol*. The Committee, however, did examine the claim in relation to Article 25 of the *Covenant*.

The Committee concluded, in light of the composition, nature and scope of activities of constitutional conferences in Canada, as explained by Canada, that constitutional conferences constitute a conduct of public affairs. However, the Committee was deferential toward the role of the State in providing for the modalities of citizen participation in the conduct of public affairs. It expressed the view that “article 25(a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That...would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).” In the result, the Committee concluded that in the specific circumstances of the case the failure of Canada to invite representatives of the Mikmaq tribal society to the constitutional conferences on aboriginal matters did not infringe the right of the authors or other members of the Mikmaq tribal society to take part in the conduct of public affairs without discrimination and without unreasonable restrictions, and that the communication did not disclose a violation of the *Covenant*.

#### **(ix) The right of access to the publicly funded media facilities of Parliament**

*Robert W. Gauthier v. Canada*: View adopted May 5, 1999

Mr. Gauthier, a publisher of an Ottawa newspaper, applied for membership in the Parliamentary Press Gallery, a private association that administers the accreditation for access

to the media facilities of Parliament. While he was given limited privileges, his requests to the Press Gallery and to the Speaker of the House for full access, were denied and no reasons for the denial were provided. Mr. Gauthier's applications to the courts to review the decision of the Press Gallery were unsuccessful. Mr. Gauthier claimed that the denial of equal access to press facilities in Parliament constituted a violation of his rights under Articles 19, 22 and 26 of the *Covenant*.

The Committee concluded that the author's claim under Articles 22 and 26 of the *Covenant* had not been substantiated and was therefore inadmissible. However, the Committee was of the view that "[i]n view of the importance of access to information about the democratic process ... the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information." It went on to hold that this restriction was not justified under Article 19, paragraph 3, as the accreditation system had not been "shown to be a necessary and proportionate restriction of rights" within the meaning of Article 19 (3): The Committee stated as follows:

The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities.

The Committee concluded that the State Party was "under an obligation to provide Mr. Gauthier with an effective remedy including an independent review of his application to have access to the press facilities in Parliament" and to take measures to prevent similar violations in the future. The Committee requested the State Party to provide information, within ninety days, about the measures taken to give effect to the Committee's views.

**(x) Issue: The availability of public funding for religious schools**

*Arieh Hollis Waldman v. Canada*: Views adopted November 3, 1999

The author claimed to be a victim of a violation of Article 26, and Articles 18(1), 18(4) and 27 taken in conjunction with Article 2(1). As the father of two school-age children and a member of the Jewish faith who enrolled his children in a private Jewish day school, the basis of Mr. Waldman's claim was that the province of Ontario, by providing full and direct public funding to Roman Catholic schools but not to schools of his religion, violated his rights under the *Covenant*. Under the *Education Act* of Ontario, every separate school ("separate schools" being defined as

Roman Catholic schools) is entitled to full public funding. This statutory provision has as its basis a Constitutional guarantee of denominational school rights, which was included in the Canadian *Constitution* at the time of Confederation to protect the rights of Ontario's Roman Catholic minority. Roman Catholic schools are the only religious schools in Ontario entitled to the same public funding as the public secular schools.

The Committee noted that "the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective." Having found that the material before it did not show that members of the Roman Catholic community are now in a disadvantaged position compared to those members of the Jewish community who wish to educate their children in religious schools, the Committee rejected Canada's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation. The Committee concluded as follows:

[T]he Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, ...the material...does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

The Committee noted that the State Party is under an obligation to provide an effective remedy that will eliminate this discrimination, and requested Canada to inform the Committee, within ninety days, as to the measures taken to give effect to the Committee's views. Anne Bayefsky has pointed out that since the Human Rights Committee did not prescribe a specific remedy, "in theory the discrimination can end in one of two ways. Either equal funding can be extended to all religious schools on the same basis as Roman Catholics, or the 1867 Constitution can be amended to withdraw funding from Catholics."<sup>93</sup>

#### *The Committee against Torture*

The second treaty body which contains optional procedures to which Canada has acceded, for adjudicating individual complaints is the Committee against Torture. *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted by the General Assembly of the United Nations on December 10, 1984, and came into force on June 26,

1987 for the first twenty States which ratified it.<sup>94</sup> The Committee against Torture was set up in accordance with Article 17 of the *Convention*, which provides as follows:

1. There shall be established a Committee against Torture...which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

The Committee's function is to monitor the implementation by States Parties of the obligations they have assumed under the *Torture Convention*.<sup>95</sup> The Committee's functions, powers, and procedures are primarily modelled on those of the Human Rights Committee.<sup>96</sup>

Article 22 of the *Convention against Torture* contains an optional procedure enabling the Committee to consider communications from or on behalf of individuals who claim to be victims of a violation of the *Convention* by a State Party. The procedure applies only to those States Parties which have declared explicitly that they recognize the competence of the Committee to consider such communications. The procedure is modelled on the individual communication procedure contained in the First *Optional Protocol* to the ICCPR, but the procedures under the CAT differ in several respects from those under the ICCPR. Under the CAT, communications may be submitted not only by but "on behalf of" individuals (Article 22, paragraph 1). The wording of the requirement concerning the exhaustion of domestic remedies differs. Under the CAT, the requirement is qualified by not requiring exhaustion of domestic remedies if the process is unlikely to bring the person alleging the violation effective relief (Article 22, paragraph 5(b)). While the *Optional Protocol* under the ICCPR provides that the Human Rights Committee shall take into account written information made available to it, under the CAT the term "written" is omitted (Article 22, paragraph 4), leaving open the interpretation that the Committee against Torture could hold oral hearings and examine witnesses.<sup>97</sup>

Since the CAT came into force, there have been only two communications by individuals in respect of Canada which the Committee against Torture has considered on the merits. These two cases are *Tahir Hussain Khan v. Canada*<sup>98</sup> and *P.Q.L. v. Canada*.<sup>99</sup> (The Committee is scheduled to consider a third case, that of Tejinder Pal Singh.)<sup>100</sup> These cases did not concern allegations of incidents of torture or inhumane treatment within Canada, but rather the obligation of States Parties under Article 3 of the *Convention against Torture* not to return anyone to another State where there is substantial reason to believe that the individual would be in danger of being subjected to torture.



*Khan v. Canada: Views adopted 1994*

Mr. Khan was a citizen of Pakistan who entered Canada in 1990 and made a claim to Convention refugee status under the *Immigration Act*. The Convention Refugee Determination Division of the Immigration and Refugee Board of Canada determined, after an oral hearing, that Mr. Khan did not come within the definition of "Convention refugee," i.e., he had not established that by reason of a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group or political opinion, he was outside the country of his nationality and, by reason of that fear, unwilling to avail himself of the protection of that country. In arriving at its decision, the Refugee Division found that Mr. Khan had fabricated his oral evidence. In 1992, the Federal Court denied Mr. Khan's application for leave to appeal the decision of the Refugee Division. A deportation order was issued later that year. In 1993 the Minister of Citizenship and Immigration refused Mr. Khan's application for permanent residence based on humanitarian and compassionate grounds. In submissions made to the Committee, Canada stated that in none of these proceedings did Mr. Khan refer to ill treatment or torture during the claimed periods of detention in Pakistan, or to his fear of future torture. In his submissions to the Committee, however, Mr. Khan alleged that he left Pakistan in 1990 out of fear for his personal security, that while in Pakistan he had been tortured while in detention on two occasions, and that should he be returned to Pakistan he would be immediately arrested, detained and tortured. He provided the Committee with a letter from a medical doctor in Montreal affirming that Mr. Khan had marks and scars on his body which corresponded with the alleged torture. After having been informed that Mr. Khan had submitted a communication to the Committee against Torture, Canada arranged for a review of Mr. Khan's case by a post-claim determination officer (PCDO). The post-claim determination provisions of the *Immigration Act* provide an additional risk-assessment in cases where the Refugee Division determines an immigrant not to be a Convention refugee. Under this assessment, a PCDO examines whether the individual, if removed to a country to which he could be removed "would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country, including risk to the immigrant's life, extreme sanctions against the immigrant, or inhumane treatment of the immigrant." Canada stated in its submissions to the Committee that the PCDO evaluated all the materials presented on behalf of Mr. Khan including the materials submitted to the Committee. The PCDO reached a negative decision, concluding that Mr. Khan was one of thousands of residents in Northern Pakistan who advocate a change in the status of Kashmir and that there was no reason to conclude that Pakistani authorities would be interested in Mr.

Khan. The officer also doubted the credibility of Mr. Khan's story, in particular because he had commenced his refugee claim in 1990 but did not allege torture until 1994.

In his communication to the Committee, Mr. Khan argued that the real circumstances of his case had never been fairly examined by Canada. He claimed that as a student leader of the Kashmiri independence movement and as its representative in Canada, he had substantial grounds to fear that he would be subjected to torture if returned to Pakistan.

Canada did not raise any objection to the admissibility of Mr. Khan's communication, and requested the Committee to proceed to an examination of the merits. In considering the merits, the Committee observed that it was not called upon to review the prevailing system in Canada in general, but only to examine whether in the present case Canada complied with its obligations under the *Convention*. It stated that the issue before it was whether the forced return of Mr. Khan to Pakistan would violate the obligation of Canada under Article 3 of the *Convention* not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The Committee concluded that substantial grounds existed for believing that a political activist like Mr. Khan would be in danger of being subjected to torture, and consequently that the expulsion or return of Mr. Khan to Pakistan would constitute a violation of Article 3 of the *Convention*. The Committee expressed the view that Canada had an obligation to refrain from forcibly returning Mr. Khan to Pakistan.

Canada requested that the Committee revisit its views in the *Khan* case.<sup>101</sup> The Committee rejected the request. In its response to Canada's request, the Committee made the following comments:

National courts and tribunals have the primary responsibility to evaluate facts and evidence, to hear witnesses and to decide thereon. The Committee must always give due weight to the determinations of national courts and tribunals. At the same time, it must retain the competence to make its own evaluation of the risk of being subjected to torture and, in certain cases, to make a finding different in this respect from that of national courts and tribunals. In this connection the Committee observes that while national courts and tribunals have a recognized competence in examining refugee claims, the Committee has specialized knowledge and experience in evaluating the risk of torture.

The Committee went on to offer its opinion that reexamination of a case would be "theoretically and exceptionally" possible upon presentation of new facts or evidence which would have substantially changed the situation since the time of adoption of the Committee's views, but that

this was not the case in this instance. The Committee's final comment indicates disappointment with Canada's criticism of the Committee:

The Committee has taken note with concern of the tenor and the tone of the note verbale of the Government of Canada, as well as the attempt to impose Canada's perspective on the Committee's methods of work. Nonetheless, the Committee takes this opportunity to express appreciation for Canada's cooperation and welcomes the renewed expression of Canada's commitment to the ideals embodied in the Convention.<sup>102</sup>

No public statements have been made by the Government, subsequent to the Committee's views, as to Mr. Khan's status in Canada.

*P.Q.L. v. Canada*: Views adopted November 17, 1997

The author, P.Q.L., born in Vietnam, lived for some time in China, then at the age of 14, came to Canada with his family. Following several criminal convictions in Canada for theft, he was ordered deported on the basis that he constituted a danger to the public in Canada. The Department of Citizenship and Immigration reviewed his case, and concluded that there was no risk of torture or other inhumane treatment should the author be returned to China. He appealed his deportation order, but his appeal was denied. The Department of Citizenship and Immigration reviewed the author's situation, and concluded that there was no risk that he would be tortured or be accorded inhumane treatment upon his return to China.

In his communication to the Committee, P.Q.L. claimed that his life would be in danger if he were returned to China, that he would be punished excessively for having committed crimes in another country, and that he would be persecuted by the Chinese authorities as a result of his Vietnamese origin. In support of his claim he relied on the existence of systematic human rights violations in China, the fact that China was not a party to international human rights treaties, and provisions of the Chinese *Criminal Code* which he alleged could subject him to life imprisonment or even to the death penalty for crimes committed outside of China. Canada submitted that there was no link between the general human rights situation in China and the particular situation of the author, that the Chinese *Criminal Code* provided that punishment would not be applied or would be mitigated if the individual had already been punished, and that imprisonment for life or the death penalty would not be imposed unless there were aggravating circumstances, that the risk to the author had been examined by a special officer on behalf of the Minister of Citizenship and Immigration, and that there was no proof of bad faith, manifest error or a denial of justice warranting the intervention of the Committee with the conclusions of the Department.

The Committee noted with satisfaction that the author had not been deported by Canada pending the examination of this communication, in compliance with the interim request of the Committee. On the merits, the Committee examined the case in relation to Article 3 of the *Convention*, and stated that the object of the examination was to determine whether there was any personal risk of torture to the author and that the existence of human rights violations in China was not sufficient to find that the author was at risk. The Committee noted that the author was not part of a professional, political or social group which would be subject to repressive acts or torture by the Chinese authorities, that there was no indication that the author would be arrested and detained because of his conviction, and in any case there were not sufficient grounds for believing that he would risk torture. The Committee noted that it was not up to them to determine whether the author was entitled to stay in Canada; that the author had not proved his case that he personally risked being subjected to torture, and that the facts did not reveal a violation of Article 3 of the *Convention*.

The Committee in the *P.Q.L.* case, in contrast to the *Kahn* case, appears to afford a good deal of deference to the decisions made by domestic tribunals in Canada. However, the *P.Q.L.* case was one where the individual did not claim to have been tortured in the past in the country to which he was to be returned and had not been politically active on sensitive issues.

### **Canada's Responses to the Views and Requests of International Treaty Bodies**

Although international treaty bodies such as the Human Rights Committee and the Committee against Torture are not called “tribunals” or “courts” and do not issue “judgments” but rather views, the states which have acceded to their individual complaints mechanisms are expected to comply with their views and to respond to their interim measures requests. While Canada has a good record of compliance generally, its responses to requests of these international bodies has been inconsistent. The one area in which Canada has demonstrated an unwillingness to comply with requests made by these international treaty bodies is with respect to the issue of removal of individuals from Canada either by way of extradition or deportation.

#### **Extradition**

Pursuant to Rule 86 of the rules of procedure of the Human Rights Committee, the Committee's Special Rapporteur on New Communications requested Canada to defer the surrender of both Mr. Kindler and Mr. Ng to the United States until the Committee considered Mr. Kindler's and Mr. Ng's communications. Canada ignored these requests.<sup>103</sup>

How has Canada, as a signatory to the *Optional Protocol to the International Covenant on Civil and Political Rights* justified its decision to ignore these requests of the Special Rapporteur?

On October 15, 1991, Canada filed a “Response...to the Request of the United Nations Human Rights Committee’s Special Rapporteur on New Communications dated September 26, 1991.” The Government stated that it “recognizes that requests for interim measures...are an important feature of the effective discharge of the Committee’s responsibilities.” Canada informed the Committee of the reasons why Canada could not accede to the requests:

These cases presented Canada with very serious and exceptional circumstances, which led Canada to conclude that further delay in the extradition of the two fugitives would have the most serious adverse consequences for the proper administration of criminal justice, would discredit it and bring it into disrepute in the public mind...Requests for delay in cases involving the surrender of fugitive offenders to another state is the source of concern for the states involved. In Canada, extradition is subject to a lengthy and well-defined judicial process in which human rights claims are fully addressed. A request for a further and undetermined period of delay has serious implications for the administration of criminal justice and for the integrity of the extradition process.

The Government emphasized that in making its decision it had addressed the importance of bringing the serious criminal charges to trial in a timely way, the damage to the ability to bring the fugitives to justice if further delay were granted, and the fact that the fugitives would be afforded all the rights, protections and due process accorded by a sophisticated justice system in the receiving state. Canada also expressed its concern that “its ability to return fugitives accused of the most serious crimes to the United States not be impaired because of the very real risk that Canada become a haven for fugitives...” The Government referred, in this regard, to the “long and common border” and Canada’s obligations under its extradition treaty with the United States. Canada concluded its response as follows:

Canada takes its obligations under the International Covenant on Civil and Political Rights as well as under the Optional Protocol to the Covenant very seriously and gave very careful consideration to them in these cases. The procedures followed throughout the extradition process have respected the safeguards provided for in the Covenant...The Supreme Court of Canada has determined that in surrendering the fugitives, Canada has accorded them all their rights and has acted in accordance with its domestic and international obligations.<sup>104</sup>

As discussed above, the Human Rights Committee, in its views adopted on the merits of the Ng communication, requested Canada “to make such representations as might still be possible to avoid imposition of the death penalty” and appealed to Canada “to ensure that a similar

situation does not arise in the future.” Canada responded to the Human Rights Committee as follows:

- The Government of Canada had transmitted the Committee’s views to the Government of the United States and had requested information concerning the method of execution currently in use in the State of California;
- The Government of the United States had informed Canada that the law of the State of California provides that an individual sentenced to capital punishment may choose between gas asphyxiation and lethal injection as to method of execution; and
- In the future, should Canada receive a request for extradition which raises the possibility of the death penalty, the views of the Committee in the Ng communication will be taken into consideration in the extradition process.<sup>105</sup>

In a briefing note to the Minister of Justice prior to the adoption of views by the Committee, government officials discussed the issue of extradition in death penalty cases. The background section of the note includes the following:

The Committee’s decisions are not legally binding on Canada in the sense that the Committee has no means to enforce them. However, the Committee’s decisions set the international law standard for the interpretation of the Covenant. They have a political impact and attract considerable publicity at both the domestic and international levels.

The debate on the death penalty and on extradition to a country where the individual may face execution continues around the world and within Canada. The issue is now before the Supreme Court of Canada in a slightly different context, that is, with respect to the extradition of Canadian citizens to a U.S. state where they might potentially face the death penalty.<sup>106</sup> Amnesty International, one of the interveners in the case, has asked the Court to revisit its decisions in the *Kindler* and *Ng* cases in light of international trends toward abolition of the death penalty and widespread condemnation of the practice of the death penalty in the United States.

On the subject of Canada’s past refusal to comply with interim measures requests made by the Human Rights Committee, the Committee recently made the following observation: “The Committee expresses its concern that the State party considers that it is not required to comply with requests for interim measures of protection issued by the Committee. The Committee urges Canada to revise its policy so as to ensure that all such requests are heeded in order that implementation of Covenant rights is not frustrated.”<sup>107</sup>

## Deportation

In 1997, Canada deported Tejinder Pal Singh to India, despite a request by the United Nations Committee against Torture to stay his removal. In 1981, Mr. Singh was involved in the hijacking of an Indian passenger jet to Pakistan. He was convicted under the Pakistan *Penal Code* of hijacking and sentenced to a term of life imprisonment. He was released from prison in Pakistan in 1994. He entered Canada in 1995, presenting a Pakistani passport in a false name, and made a Convention refugee claim on the basis that he feared persecution in India. On December 8, 1997, the Minister of Citizenship and Immigration issued an opinion, pursuant to the *Immigration Act* that it would be contrary to the public interest to have Mr. Singh's refugee claim determined under the *Act*. In the meantime, Mr. Singh had submitted a communication to the Committee against Torture, and on December 18, 1997, the Committee reported to Mr. Singh's solicitors that a copy of the communication had been sent to Canada, requesting that information or observations in respect of admissibility be sent to the Committee within two months, and also requesting Canada not to expel Mr. Singh to India while his communication was under examination by the Committee.

Tejinder Pal Singh applied to the Federal Court of Canada to quash the Minister's opinion and to stay the execution of his deportation order. The basis of the application to quash was that the Minister did not take into account the treatment Mr. Singh would receive if deported to India. The Court dismissed the application, with no discussion of Canada's international obligations under the *Torture Convention*.<sup>108</sup>

Tejinder Pal Singh's communication to the Committee against Torture has not yet been considered. The proceedings of the Committee are considered to be confidential until a final decision is taken. This requirement of confidentiality is interpreted by the Government of Canada as including internal government documents with respect to the decision to deport Mr. Singh in the face of the Committee's request to stay deportation.<sup>109</sup> Thus the basis on which Canada justified its non-compliance with the request of the Committee against Torture is not yet public knowledge. In May 1999, there were twelve cases alleging violations by Canada of the *Torture Convention* pending before the Committee against Torture. In ten of those cases, the Committee requested Canada not to remove individuals. Those individuals have not been removed. It has not been necessary in all ten cases for Canada to face squarely the issue whether to comply with the Committee's request. For example, there may have been an Order by a Canadian court staying deportation, or there may have been a decision not to deport pending the making of an administrative decision domestically.<sup>110</sup>

Decisions concerning extradition and deportation go to the heart of one aspect of state sovereignty, the right of the state to exercise control over its borders and to protect its own citizens.

In the case of extradition of individuals to countries where they may face the death penalty, serious criminality as well as the state's extradition agreements with other countries, are involved. In the case of deportation, the basis for the decision to deport is also often a finding of serious criminality. It is understandable that Canada has balked at abiding by the requests of international treaty bodies not to remove in cases that involve murderers and terrorists. However, it will be necessary in the coming years for Canada develop a clear policy in regard to responding to requests of international treaty bodies, and to develop practices which are consistent with the obligations Canada has chosen to undertake in the international arena.

## CONCLUSION

In the past few decades developments in international human rights law have proceeded at a rapid pace and will likely continue to do so. The reluctance which Canada displayed in its initial venture into the international human rights arena was replaced some years ago by an enthusiasm which resulted in the assumption of a myriad of international obligations. While Canada was successful for some time in separating its international commitments from its domestic, the Government finds itself facing increasing demands that it reconcile the actions it takes on the international stage with the decisions it makes in the domestic sphere. In the years to come, there will no doubt be a marked increase in challenges to government action and legislation, which are based in part on Canada's international human rights obligations. In dealing with these challenges, both the government and the courts will find it necessary to come to grips with some difficult underlying issues raised by these challenges.

Few would quarrel with the notion that states should endorse international instruments which promote principles such as "universal respect for and observance of human rights and fundamental freedoms," and most would applaud states' involvement in international efforts to recognize individual human rights and prevent their infringement. At the same time, it is important that states understand the consequences that flow from ratification of international human rights instruments. These consequences do not for the most part appear immediately but slowly emerge through the monitoring mechanisms of international treaty bodies, the interpretations adopted by those bodies with respect to treaty obligations, the incorporation of international obligations into domestic laws and practices, and the rulings of domestic courts. Ratification attracts international praise, but meaningful participation in the international human rights arena also results in obligations which over time may have a serious impact in the domestic domain. Through a comprehensive examination of potential consequences, states can adopt a rational and effective approach to the assumption of international human rights obligations and find



the appropriate balance between participating in the realization and protection of international standards of human rights, and retaining the necessary latitude to control certain matters within the domestic sphere.

## NOTES

<sup>1</sup> Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998) at 5–6.

<sup>2</sup> <http://www.unhchr.ch/tbs/doc>.

<sup>3</sup> Margaret Doxey, referred to in Kim Richard Nossal, “Cabin’d, Cribb’d, Confin’d?: Canada’s Interest in Human Rights” in Robert O. Matthews and Cranford Pratt, eds., *Human Rights in Canadian Foreign Policy* (Kingston and Montreal: McGill-Queens University Press, 1988) at 48.

<sup>4</sup> Francisco Rico-Martinez, President of the Canadian Council for Refugees, “Our immigration policies do not meet international human rights standards” *National Post* (5 April 1999) A14.

<sup>5</sup> *Ibid.*

<sup>6</sup> W.A. Schabas, “Canada and the Adoption of the Universal Declaration of Human Rights” (1998) 43 McGill L.J. 403 at 407.

<sup>7</sup> *Ibid.* at 408.

<sup>8</sup> *Ibid.* at 403 and 406.

<sup>9</sup> A.J. Hobbins, “Eleanor Roosevelt, John Humphrey and Canadian opposition to the Universal Declaration of Human Rights: looking back on the 50th anniversary of UNDHR” (1998) 53:2 Int’l J. 325 at 325-26.

<sup>10</sup> The 1948 C.B.A. Y.B., cited in Schabas, *supra* note 9 at 418.

<sup>11</sup> Hobbins, *supra* note 9 at 341-42.

<sup>12</sup> William A. Schabas, *International Human Rights Law and the Canadian Charter*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1996) at 57.

<sup>13</sup> Nossal, *supra* note 3 at 47.

<sup>14</sup> Maurice Copithorne, “National Treaty Law and Practice: Canada,” article to appear in forthcoming volume of Monroe Leigh and Merritt R. Blakeslee, eds., *National Treaty Law and Practice: Studies in Transnational Legal Policy* (American Society of International Law).

<sup>15</sup> Correspondence dated March 3, 1999, to the writer from Jean Fredette, Deputy Director, United Nations, Human Rights and Humanitarian Law Section, Foreign Affairs and International Trade.

<sup>16</sup> *Ibid.* See also Copithorne, *supra* note 14 .

<sup>17</sup> Irit Weiser, “Effect in Domestic Law of International Human Rights Treaties Ratified Without Implementing Legislation” (1998) Can. Council Int’l L. Proc. 132 at 133. See also Copithorne, *supra* note 14.

<sup>18</sup> Copithorne, *supra* note 14. See also Anne E. Bayefsky, “International Human Rights Law in Canadian Courts” in Irwin Cotler and F. Pearl Eliadis, eds., *International Human Rights Law Theory and Practice* (Montreal: The Canadian Human Rights Foundation, 1992) at 145.

<sup>19</sup> Copithorne, *supra* note 14.

<sup>20</sup> Philippe Leblanc, “Canada’s Experience with United Nations Human Rights Treaties,” Issue No. 3 of *The Agendas for Change Series* (Ottawa: United Nations Association in Canada and the Canadian Committee for the Fiftieth Anniversary of the United Nations, November 1994) at 2 .

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 3.

<sup>23</sup> *Ibid.* at 3-4 and 16-18. See also Noel A. Kinsella, “Some Dimensions of Human Rights Standards and the Legislative Process” (1998) 47 U.N.B.L.J. 147 at 151 ff.

<sup>24</sup> See Copithorne, *supra* note 14.

<sup>25</sup> *A.-G. Canada v. A.-G. Ontario (Labour Conventions Case)*, [1937] A.C. 326.

<sup>26</sup> Schabas, *supra* note 12 at 21.

<sup>27</sup> Weiser, *supra* note 17 at 133.

<sup>28</sup> *Ibid.* Note: Weiser states in her paper that the views expressed are those of the author and are not to be attributed to the Department of Justice.

<sup>29</sup> Jonas Ebbesson, *Compatibility of International and National Environmental Law* (London: Kluwer Law International, 1996) at 206.

<sup>30</sup> Weiser, *supra* note 17 at 139.

<sup>31</sup> Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Dordrecht: Martinus Nijhoff Publishers, 1995) at 79.

<sup>32</sup> Schabas, *supra* note 12 at 12.

<sup>33</sup> Schabas, *supra* note 12 at 13.

<sup>34</sup> Quoting from Supreme Court of Canada jurisprudence: See Dickson C.J.C.'s reasons in *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at pp. 348-50, referring to *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295 at p. 344.

<sup>35</sup> The Rt. Hon. Antonio Lamer, Chief Justice of Canada, "Enforcing International Human Rights Law: The Treaty System in the 21st Century" (Address delivered at the Centre for Refugee Studies, York University, Toronto, Ontario, June 22, 1997) [unpublished].

<sup>36</sup> The Hon. Mr. Justice G.V. LaForest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 *Can. Y.B. Int'l L.* 89 at 97.

<sup>37</sup> *Ibid.* at 98.

<sup>38</sup> See Schabas, *supra* note 12 at 35, referring to an address of Mr. Justice La Forest, "The Use of International and Foreign Material in the Supreme Court of Canada," XVIIth Annual Conference, *Can. Council Int'l L. Proc.*, October 22, 1988, 230-241 at 232.

<sup>39</sup> *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 348-50.

<sup>40</sup> Schabas, *supra* note 12 at 232-33.

<sup>41</sup> Schabas, *supra* note 12 at 47.

<sup>42</sup> William A. Schabas, "International Human Rights Law and the Canadian Courts" in Thomas A. Cromwell, Danielle Pinard and Helene Dumont, eds., *Human Rights in the 21st Century: Prospects, Institutions and Processes* (Montreal: Les Editions Themis and the Canadian Institute for the Administration of Justice, 1997) at 44.

<sup>43</sup> Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 93.

<sup>44</sup> *Ibid.* at 95. See also Weiser, *supra* note 17 at 136.

<sup>45</sup> *Baker v. Canada (MCI)* (1999) 174 D.L.R. (4<sup>th</sup>) 193.

<sup>46</sup> See section 83(1) of the *Immigration Act*, R.S.C. 1985, c. I-2, as amended, re: appeals on immigration matters.

<sup>47</sup> [1997] 2 F.C. 127 at 151.

<sup>48</sup> Appellant's factum, paragraph 101, filed in the Supreme Court of Canada Registry.

<sup>49</sup> Respondent's factum, paragraphs 25 and 26, filed in the Supreme Court of Canada Registry.

<sup>50</sup> Factum of Charter Committee on Poverty Issues, paragraph 6, filed in the Supreme Court of Canada Registry.

<sup>51</sup> *Baker v. Canada*, *supra* note 45 at 229-232.

<sup>52</sup> *Ibid.*, at 232.

<sup>53</sup> *Ibid.*, at 234-235.

<sup>54</sup> Jonathan Todres, "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law" (1998) 30 Colum. H.R. L. Rev. 159 at 188.

<sup>55</sup> Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?," (1999) 10:4 Constitutional Forum 97 at 107.

<sup>56</sup> *Manickavasagam Suresh v. The Minister of Citizenship and Immigration* (1998) 141 F.T.R. 152 at 154 (per Tremblay-Lamer J); appeal dismissed (A-415-99, January 18, 2000).

<sup>57</sup> See Scott, *supra* note 55.

<sup>58</sup> Todres, *supra* note 54 at 197.

<sup>59</sup> Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991) at 13, 44.

<sup>60</sup> *Ibid.*, at 29, fn. 92.

<sup>61</sup> Schabas, *supra* note 12 at 71.

<sup>62</sup> Review of the Official Records of the Human Rights Committee and UN Human Rights website ([www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)).

<sup>63</sup> Communication No. 470/1991.

<sup>64</sup> Communication No. 469/1991.

<sup>65</sup> Communication No. 539/1993

<sup>66</sup> Communication No. 538/1993.

<sup>67</sup> Communication No. 558/1993.

<sup>68</sup> Communication No. 27/1978.

<sup>69</sup> Communication No. 55/1979.

<sup>70</sup> Communication No. 50/1986.

<sup>71</sup> Communication 208/1986.

<sup>72</sup> Communication Nos. 359/1989 and 385/1989, joined together for consideration by the Committee.

<sup>73</sup> Communication No. 455/1991.

<sup>74</sup> Communication No. 24/1977.

<sup>75</sup> Communication No. 205/1986.

<sup>76</sup> Communication No. 167/1984.

<sup>77</sup> Communication No. 633/1995

<sup>78</sup> Communication No. 694/1996.

<sup>79</sup> Anne Warner La Forest, *LaForest's Extradition to and from Canada*, 3rd ed. (Aurora, Ontario: Canada Law Book Inc., 1991) at 9.

<sup>80</sup> R.S.C. 1985, C. E-23, s. 3.

<sup>81</sup> Paul Michell, "Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter" (1998) 23 *Yale J. Int'l L.* 141 at 146-47.

<sup>82</sup> *Extradition Treaty Between Canada and the United States of America*, in force March 22, 1976, Article 6.

<sup>83</sup> See McLachlin J.'s judgment in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 841-42.

- <sup>84</sup> "It takes a killer to create a victims' gallery" *National Post* (25 February 1999) A15.
- <sup>85</sup> "Charles Ng sentenced to death for killing 11 people" *The Globe and Mail* (1 July 1999) A8.
- <sup>86</sup> Jose Aguilar Urbina and Fausto Pocar.
- <sup>87</sup> Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco Jose Aguilar Urbina.
- <sup>88</sup> Elizabeth Evatt and Cecilia Medina Quiroga.
- <sup>89</sup> Schabas, *supra* note 12 at 73-74.
- <sup>90</sup> U.N. Doc. CCPR/C/OP/2, p. 224, [1984-85] C.H.R.Y. 373, referred to in Schabas, *supra* note 13 at 30.
- <sup>91</sup> Douglas Sanders, "Implementing the Human Rights Covenants: Stories from the West," Paper presented at "Human Rights and the Twenty First Century" held by the Law Institute, Chinese Academy of Social Sciences, Beijing, April 12-14, 1999 [unpublished] at 19. See also Hugh M. Kindred, ed., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Canada: Emond Montgomery Publications Limited, 1993) at 625.
- <sup>92</sup> Interview with John J.L. Hunter, Q.C., Counsel for Daishowa in *Daishowa Inc. v. Friends of the Lubicon et al* (1998), 158 D.L.R. (4<sup>th</sup>) 699, 39 O.R. (3<sup>rd</sup>) 620 (Ont. Ct. – Gen. Div.).
- <sup>93</sup> Anne Bayefsky, "A sharp lesson for Ontario at the UN" *The Globe and Mail* (8 November 1999) A19.
- <sup>94</sup> J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988) at v.
- <sup>95</sup> Philip Alston, *The United Nations and Human Rights: a Critical Appraisal* (Oxford: Clarendon Press, 1992) at 509.
- <sup>96</sup> *Ibid.* at 510.
- <sup>97</sup> *Ibid.* at 537-538.
- <sup>98</sup> Communication No. 15/1994.
- <sup>99</sup> Communication No. 57/1996.
- <sup>100</sup> Department of Justice of Canada, Human Rights Law.

<sup>101</sup> Note verbale, March 3, 1995.

<sup>102</sup> May 8, 1995.

<sup>103</sup> See William A. Schabas, “Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion” (1991) 51:4 *Revue du Barreau* 673 at 675 and 687-88.

<sup>104</sup> Government document obtained through Access to Information request, on file with the writer.

<sup>105</sup> “Response of the Government of Canada to the Views of the United Nations Human Rights Committee on the Merits of Communication No. 469/1991 (Charles Chitat Ng v. Canada),” October 3, 1994 (Government document obtained by Access to Information request, on file with the writer).

<sup>106</sup> *Glen Sebastian Burns and Atif Ahmad Rafay v. Minister of Justice for Canada and United States of America*, Doc. CA022183/CA022191.

<sup>107</sup> Concluding Observations in relation to Canada’s fourth periodic report, adopted April 6, 1999, at paragraph 14.

<sup>108</sup> *Tejinder Pal Singh v. The Minister of Citizenship and Immigration* (1997) 140 F.T.R. 213 (per Muldoon J.).

<sup>109</sup> Response from the Department of Justice dated July 21, 1999, to *Access to Information* request, on file with the writer.

<sup>110</sup> Letter to the writer from Department of Justice dated June 11, 1999, on file with the writer.

# INTERNATIONAL HUMAN RIGHTS LAW – THE CANADIAN EXPERIENCE

By Professor Douglas Sanders\*

In the years since the second World War, international law has expanded remarkably. There are now debates, conferences, investigations, declarations, treaties and adjudicative bodies dealing with human rights, and a range of other social issues such as environmental protection. The overwhelming majority of States are now parties to more than one of the international human rights instruments. By the beginning of 2000, 141 States had acceded to the *International Covenant on Economic, Social and Cultural Rights*, and 144 to the *International Covenant on Civil and Political Rights*. A total of 153 States had become parties to the *International Convention on the Elimination of All Forms of Racial Discrimination*, and 112 to the *Convention against Torture*. Only the *Convention on the Rights of the Child* has been signed and ratified by virtually all countries.<sup>1</sup>

Even for States that have not signed or ratified particular human rights instruments, the pressure to comply with the new standards is strong. Pressure comes not simply from intergovernmental bodies, such as the various organs of the United Nations, but also from international financial institutions, regional inter-governmental organizations, individual States, non-governmental organizations, commercial interests and intellectuals. As well, western leaders have frequently predicted that economic globalization, freer trade and the spread of the internet will inevitably liberalize all states. Such predictions were common in the United States during the intense debate over the trade agreement with China in 2000.

Investigations of state practice are common. While the argument of “domestic jurisdiction” was again restated by China and Malaysia at the Asia-Europe meeting in Seoul, South Korea, in October, 2000, such arguments do not stop external criticisms, nor western practices of linking

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development assistance, economic relations, military cooperation, and sometimes diplomatic relations, to state performance on social issues.<sup>3</sup> China makes a point of not tying its own development assistance to social issues, something clearly appreciated by developing states.

The earlier exemption of the major powers from criticism at the United Nations and other inter-governmental fora has eroded. The People's Republic of China is a striking example of the change.

In 1998, Ms. Mary Robinson, the United Nations High Commissioner for Human Rights, visited China, with the agreement of the national government. A Memorandum of Intent was signed in Beijing under which the Office of the High Commissioner agreed to provide technical assistance in the field of human rights. A Needs Assessment Mission followed, spending two weeks in China in March 1999.

Why would China accept this United Nations involvement in a matter it constantly says is within "domestic jurisdiction?" It is logical for China to seek an ongoing, formalized relationship with the Office of the High Commissioner for Human Rights. Such a relationship has the possibility of reducing or managing the multiple pressures for on-site investigations and repeated criticisms from a seemingly endless set of bodies. A few examples of on-site investigations in China can be noted. The Australian government sent human rights delegations to China in 1991 and in 1992. The United Kingdom sent a delegation in 1992. The Special Rapporteur on Religious Intolerance visited in 1994. The Working Group on Arbitrary Detention of the Commission on Human Rights visited China in October 1997.<sup>3</sup> United States President Bill Clinton visited China in 1998, and publicly spoke of human rights issues, as did his successor, George W. Bush, early in 2002. A delegation from the European Union visited China in early 1999.

What is the result of these visits? After the visit in 1999, the European Union decided it would not sponsor a resolution on human rights in China at the 1999 session of the United Nations Commission on Human Rights. But the Commission session again involved criticisms of China (as well as other States):

UN rights chief Mary Robinson has expressed serious concern at a clampdown on freedoms of expression and association guaranteed in two UN treaties which Beijing has signed but not ratified, reports Associated Press. Robinson was speaking at a news conference at UN headquarters on Friday [March 19, 1999] ahead of the annual UN Human Rights Commission (UNHRC) meeting. She stressed the importance of dialogue with Beijing and promised "to engage with China in a programme of technical cooperation." She also said an assessment of China's record would take account of a report by a delegation which has recently advised Beijing on ratifying the UN covenants. Meanwhile AFP reports that Human Rights Watch said Friday that China "is carrying out one of

the worst crackdowns since 1989. It's time to balance dialogue with strong public pressure." Reuters adds that the press freedom watchdog Reporters without Borders called on the EU to censure China at the UNHRC conference.<sup>4</sup>

The motion at the Commission for an investigation of human rights in China was defeated. While a state-specific investigation was blocked, investigations by thematic rapporteurs, such as those on children or violence against women, already had mandates which allowed them to assess China's performance in specific areas.<sup>5</sup>

Ms. Mary Robinson returned to China in November 2000, to sign an agreement with President Jiang Zemin by which outside experts are to provide technical assistance to China on the implementation of the two major international human rights treaties.

Mary Robinson, the United Nations high commissioner for human rights, praised China for signing the agreement, which will lead to seminars on delicate rights issues and expert training on legal procedures and related topics. But she was careful to say in public that repression in China has actually worsened in the last two years. Thousands of followers of the Falun Gong spiritual movement have been sent to labor camps without trial, hundreds of democracy campaigners have been jailed, and censorship of political thought has recently tightened up. ... "The Chinese government has always supported international exchange and cooperation in the area of human rights because each country has its own way," Mr. Jiang told his visitor.<sup>6</sup>

China is not the only major power to be criticized at the United Nations. The United States has also been subject to criticism in recent years.

In 1995, the Human Rights Committee expressed its views on the first United States periodic report under the *International Covenant on Civil and Political Rights*. It criticized continuing racial discrimination and inequality (both in respect to blacks and native Americans), the retention and expansion of use of the death penalty, the imposition of the death penalty on persons under 18 and the mentally retarded, the extent of killings and woundings by police, the lack of adequate gun control, unequal treatment of certain aliens (including indefinite detention), prison crowding, medical research on minors and the mentally ill, criminal laws against private homosexual acts and the election of judges in certain states.<sup>7</sup>

The United States was criticized during the 1999 session of the United Nations Commission on Human Rights:

On the commission's opening day, Amnesty International for the first time placed the United States on its list of human rights violators, in the company

of Algeria, Cambodia and Turkey, among others, because of police brutality, violations against people in detention and increased numbers of executions.

Opposition in the session to the death penalty has the support of a number of states, including Germany, Norway, Finland and Italy.<sup>8</sup>

## CANADA AND INTERNATIONAL HUMAN RIGHTS LAW

Canada was not an early supporter of the development of the international law of human rights, and considered abstaining from the vote in the United Nations General Assembly in 1948 on the *Universal Declaration of Human Rights*. A basic Canadian concern related to the federal structure of the country. Canada has divided legislative jurisdiction over human rights issues.<sup>9</sup> Federalism is very important in Canada, both legally and politically, more than in most other federal States.

The decision was taken by the federal and provincial governments in 1975 to ratify the *Covenant on Economic, Social and Cultural Rights*, and the *Covenant on Civil and Political Rights*, together with the *Optional Protocol*. Since that time Canada has placed great emphasis on human rights in its foreign policy. Canada has ratified all major human rights instruments, and agreed to the optional provisions on interstate and individual communications.<sup>10</sup> Canada played a key role in the drafting of the recent convention on land mines. Canada is active in peacekeeping, election monitoring and advisory services.<sup>11</sup>

There are particular reasons why Canada has become such a strong supporter of international human rights law. One noted writer suggests that "... participation in rights talk may be one of the few mechanisms for symbolizing and securing unity in multicultural, polyglot communities" such as the United States and Canada.<sup>12</sup> Commentators within Canada saw the introduction of the *Charter of Rights and Freedoms* in the *Constitution* in 1982 as strengthening a sense of common identity, an important goal in a country with a large territorially based Francophone cultural minority, a diverse population and strong regional identities.

Additionally, Canada, a middle power, seeks to enhance its role internationally by multilateralism. Unilateralism would simply mean isolation. This makes the country a strong supporter of the United Nations and of the multilateral international human rights system which has developed under United Nations auspices. Canada is part of an informal "like minded group" of middle powers in human rights initiatives, along with the Nordic States, the Netherlands, Australia and New Zealand.

## DOMESTIC CANADIAN LAW

International treaties, including treaties dealing with human rights, do not become enforceable in domestic law when Canada becomes a party to the treaty. Domestic implementation requires legislative action by the federal or provincial governments, or both, depending upon the particular subject matter. Canada does not sign international human rights treaties until the national government has consulted with the provincial governments and obtained their agreement.<sup>13</sup> Such agreement does not mean that the federal and provincial governments will always enact legislation giving effect to Canada's international treaty obligations. There is no single pattern. Canada has often stated that the constitutional *Charter of Rights and Freedoms* represents the domestic implementation of the *International Covenant on Civil and Political Rights*.<sup>14</sup> But the *Charter* and the *Covenant* are not identical, with the result that Canada has not implemented the *Covenant* in full.<sup>15</sup> No single constitutional or legislative measure implements the *Covenant on Economic, Social and Cultural Rights*. Instead Canada has traditionally pointed to a number of social welfare programs which, it suggests, implement the *Covenant*.

Canada has said the following about the implementation of international human rights instruments in domestic law:

136. The Government of Canada – that is the federal Government – has authority to ratify international conventions on behalf of Canada. It is the practice for the Government of Canada to consult with provinces and territories before ratifying human rights conventions or other treaties involving matters within their jurisdiction and seek their support. International human rights conventions that Canada has ratified apply throughout Canada in all jurisdictions.
137. International conventions that Canada has ratified do not automatically become part of the law of Canada. Rather, treaties that affect the rights and obligations of individuals are implemented by domestic law. To some extent, human rights treaties are implemented by constitutional law, including the Canadian Charter of Rights and Freedoms, which applies to all governments in Canada. To a considerable extent, they are implemented by legislative and administrative measures.
138. Some human rights matters fall under federal jurisdiction, others under provincial and territorial jurisdiction. Therefore, human rights treaties are implemented by legislative and administrative measures adopted by all jurisdictions in Canada. It is not the practice in any jurisdiction in Canada for one single piece of legislation to be enacted incorporating a particular international human rights convention into domestic law (except, in some cases, regarding

treaties dealing with specific human rights issues, such as the 1949 Geneva Conventions for the protection of war victims). Rather, many laws and policies, adopted by federal, provincial and territorial governments, assist in the implementation of Canada's international human rights obligations.

139. All jurisdictions review their legislation for consistency with the human rights convention in question before ratification. To ensure compliance, existing legislation may be amended or new laws enacted. After ratification, Canada's international human rights obligations are taken into account in drafting new legislation.
140. In a federal State such as Canada, there may sometimes be differences in the manner of implementing rights in the various jurisdictions. These differences may reflect differences in local conditions. The following features of the Canadian legal system help to ensure that there are no significant discrepancies between jurisdictions in human rights protections:
  - (a) Measures adopted by all governments in Canada are subject to review under the Canadian Charter of Rights and Freedoms. This ensures uniformity of protection across Canada regarding the civil and political rights guaranteed by the Charter, and further that economic and social measures in all jurisdictions, and those relating to children or other subject matters covered by human rights conventions, satisfy the same criteria set forth in the Charter regarding such matters as non-discrimination and due process;
  - (b) The Supreme Court of Canada interprets and applies legislation enacted throughout Canada, thus contributing to consistency of approach. For example, the basic doctrines that the Supreme Court has developed regarding the ambit of human rights legislation – paramountcy, adverse-effect discrimination and reasonable accommodation – apply to human rights codes in all jurisdictions;
  - (c) Federal funding of provincial-territorial programmes may be conditional on certain national standards being met. For example, under the Canada Health and Social Transfer Agreement, eligibility for full federal contributions is conditional upon the provinces and territories maintaining the national criteria and conditions in the Canada Health Act, including those respecting public administration, comprehensiveness, universality, portability and accessibility;

- (d) Federal funding of provincial-territorial programmes is particularly helpful to the less prosperous provinces and territories and assists in preventing regional disparities in the implementation of rights;
- (e) Mechanisms exist to ensure that the various jurisdictions are aware of the approaches taken throughout Canada on human rights issues, and to promote coordination in this regard (see below).<sup>16</sup>

Three recent judicial decisions involving the *Charter of Rights and Freedoms* hold that officials exercising powers delegated to them by Canadian law must take into consideration international standards. If they fail to do so, their decisions will be overturned by the courts. This has established a legal principle similar to that found in the *Human Rights Act* in the United Kingdom, which made the *European Convention on Human Rights* binding on officials exercising administrative powers.<sup>17</sup>

The 1999 Supreme Court of Canada decision in *Baker v Immigration* dealt with a citizen of Jamaica, who had been living illegally in Canada for a number of years.<sup>18</sup> Ms. Baker had four children who were Canadian citizens. Canada sought to deport her, saying that she could apply for permanent residency in Canada from Jamaica. An immigration officer refused to allow her to make the application in Canada. The officer had the power to allow the application to be made in Canada on humanitarian and compassionate grounds. It was clear that immigration officials had a low estimate of Ms. Baker. She was unmarried, unemployed, and had four children in Jamaica in addition to the children in Canada.

Canada is a party to the *Convention on the Rights of the Child*. Most laws dealing with families and children are part of provincial legal systems. There is no national legislation implementing the *Convention on the Rights of the Child*. Did it have any relevance to the decision in the *Baker* case? The Supreme Court of Canada ruled that the values and principles in the *Convention* formed part of the legal context of the immigration legislation, and had to be considered in determining whether the decision of the immigration officer was a reasonable exercise of the discretion delegated to the officer. The decision had been taken without concern for the “best interests” of the children directly affected by the decision. The immigration official had been concerned with Ms. Baker, and had not considered the rights of the Canadian children. The court held that

...because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must therefore be overturned.

In 2001, the Canadian Supreme Court decided *United States v Burns*.<sup>19</sup> Canada had effectively abolished the death penalty in 1962, when the last person was executed in the country. The *Burns* case involved the extradition to the United States of two Canadian citizens to stand trial for a brutal murder of three family members of one of the individuals, an event that took place when the two were 18. The issue was whether Canada should seek an assurance from the United States that the death penalty would not be applied, or if applied, would not be carried out. Canada was specifically entitled to request such an assurance in the extradition treaty between Canada and the United States. The Canadian Minister of Justice had a policy that such an assurance would only be requested in exceptional circumstances. Previous extradition decisions of the Court had ruled that the death penalty was not, *per se*, prohibited by the *Charter* as “cruel and unusual punishment.”

The question was whether the Minister’s decision not to seek the assurance denied the two individuals their right to “life, liberty and security of the person” in a manner that did not accord with “the principles of fundamental justice,” wording found in section 7 of the *Charter of Rights and Freedoms*. The Court ruled that the Minister was required to seek the assurance in all but exceptional cases, relying on (a) the number of states that had abolished the death penalty, (b) the development of some international patterns on the matter of assurance in Europe and at the United Nations, (c) Canada’s advocacy on the issue internationally, and (d) recent Western criticisms of the death penalty based on evidence of a number of faulty convictions. While these factors led to the decision, the Court specifically stated that the death penalty was not, itself, yet a violation of international law.

The Court relied heavily on international and comparative materials, including submissions from Amnesty International. In justification of this approach, a statement by a previous Chief Justice was quoted:

The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*’s provisions.<sup>20</sup>

The Court noted that almost all major democratic states had abolished the death penalty:

In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present

time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan (“Dead Man Walking Out,” *The Economist*, June 10-16, 2000, at p. 21). According to statistics filed by Amnesty International on this appeal, 85 percent of the world’s executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.<sup>21</sup>

The Court also noted certain international developments. The *European Convention on Extradition* of 1957 had a clause allowing states to seek assurances that the death penalty would not be imposed. A similar provision was included in the *Model Treaty on Extradition* approved by the U.N. General Assembly in 1990.

We are told that from 1991 onwards Article 4(d) [of the U.N. *Model Treaty*] has gained increasing acceptance in state practice. Amnesty International submitted that Canada currently is the only country in the world, to its knowledge, that has abolished the death penalty at home but continues to extradite without assurances to face the death penalty abroad.<sup>22</sup>

In 2002, the Supreme Court of Canada decided *Suresh v. Canada*.<sup>23</sup> Suresh, a Tamil from Sri Lanka, had been given refugee status in Canada by the Canadian Immigration and Refugee Board. The Canadian government detained him and commenced deportation proceedings on an assessment that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka, and whose members are also subject to torture in Sri Lanka. Article 3(1) of the *Convention Against Torture* states:

No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

A summary of the decision reads as follows:

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by s. 7 of the *Charter*. Section 7 applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. In determining whether this deprivation is in accordance with the principles of fundamental justice, Canada’s interest in combating terrorism must be balanced against the refugee’s interest in not being deported to torture.



Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The *Charter* affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified. Deportation to torture is prohibited by both the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 33 of the Convention Relating to the Status of Refugees, which on its face does not categorically reject deportation to torture, should not be used to deny rights that other legal instruments make available to everyone. International law generally rejects deportation to torture, even where national security interests are at stake.<sup>24</sup>

While "deportation to face torture is generally unconstitutional," Canada's interest in combating terrorism is legitimate and can prevail but only in "exceptional" or "extraordinary" circumstances: "Barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protection by s. 7 of the Charter."<sup>25</sup> If the Minister has properly assessed the relevant factors, the Courts will adopt a deferential approach to a decision on whether a refugee's presence constitutes a danger to the security of Canada. In the end, the matter was sent back for a new hearing, to cure procedural defects in the earlier determination.

We see from the decisions in *Baker, Burns* and *Suresh* that international human rights material is a key determinant on how decisions are to be made by officials exercising discretion under Canadian law. This is a new and important way in which international law is enforced in Canada. The interpretation of the *Charter of Rights and Freedoms* has brought international law into the domestic system. The Court notes this in a passage in *Suresh*:

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.<sup>26</sup>

## THE DEVELOPMENT OF THE INSTITUTIONS OF INTERNATIONAL HUMAN RIGHTS LAW

The *Charter* of the United Nations is an international treaty that commits all signatories to support for human rights and fundamental freedoms. The *Universal Declaration of Human Rights* is seen now as an authoritative statement of the rights and freedoms referred to in the *Charter*. But of most significance are institutional developments in two areas: the bodies established under the *Charter* of the United Nations, and the treaty bodies established under the major human rights treaties.

The *Charter* gives no power to bodies such as the Commission on Human Rights or the Subcommission on Prevention of Discrimination and Protection of Minorities. There is no *Charter* authority for the state-specific or thematic rapporteurs, or for the High Commissioner for Human rights. The *Charter* has not blocked these developments, but they must be understood in terms of the gradual evolution of the international order, an ongoing incremental process. While the People's Republic of China has opposed any state-specific resolution on China in the United Nations Commission on Human Rights as unwarranted, it does not argue that such a resolution is beyond the competence of the Commission. The practice of such resolutions and investigations is too well established to be challenged in any general way. On-site investigations cannot be done under United Nations auspices without the consent of the government in question. But to deny access unreasonably to authorized rapporteurs or special representatives is virtually an admission of human rights violations.

Ratification of the United Nations human rights covenants advances slowly. Only the *Convention on the Rights of the Child* is approaching "universal ratification." The success of the *Convention on the Rights of the Child* has demonstrated the institutional problems with the present system of treaty bodies:

As of December 1998, the Committee had received 131 initial and 20 periodic States parties' reports. It had reviewed 93 reports, leaving a backlog of over 50 reports resulting in a waiting list of more than two years. For some time already, the Committee has systematically searched for ways and means to decrease this backlog of work, but most solutions proposed in this regard could not be implemented owing to the extremely busy schedule of Committee members during the three annual sessions and pre-sessional working groups, which represent three months of meetings per year. The amendment to the Convention expanding the membership of the committee to 18 experts has not yet entered into force.

To respond, in 1996 the High Commissioner for Human Rights developed a Plan of Action to strengthen implementation of the *Convention on the Rights of the Child*. A new support team will prepare discussions between Committee members and representatives of States parties and identify potential areas for follow-up work, including technical cooperation. These initiatives have to be funded through voluntary contributions, given the general financial and staffing limitations within the United Nations system. As of November 1998, a fund of US\$1,782,776.64 had been raised, enough to cover more than one years budget for the support team.<sup>27</sup>

A number of developments have proved necessary. The problem of states having to file numerous reports has been lessened with the development of the “Core Document” which can be submitted by a State to each treaty body, along with an addendum dealing with specific concerns of the particular treaty. Periodic meetings of the chairs of the treaty bodies are held. The competence of the individual treaty bodies is being harmonized with the development of individual communication procedures for treaties where such a procedure was lacking, such as the *International Covenant on Economic, Social and Cultural Rights*. An optional protocol allowing communications under the *Convention On the Elimination of All Forms of Discrimination Against Women* was agreed to in March 1999:

The new protocol, approved unanimously by the Commission on the Status of Women at its regular half-yearly meeting here last week, allows a woman suffering any form of discrimination banned by the convention to appeal to the experts’ committee once she has exhausted all means of redress in her own country.

Appeals also may be made to the committee by women’s organizations or other bodies acting on behalf of victims. But a victim must first give consent unless the author of the appeal can justify acting without it.

The committee may launch its own investigation into a member state’s conduct if it receives “reliable information indicating grave or systematic violations” of rights afforded women.

The committee has no power to compel a government to change its behavior. But if it finds a complaint justified, it must inform the country in question and make recommendations for correcting rights abuses....

A big U.N. human rights conference in Vienna in 1993 first called for a way to put teeth into the convention on discrimination against women. The call was repeated at the 1995 U.N. conference on women held in Beijing.<sup>28</sup>

The treaty bodies have gradually expanded their procedures. One innovation has been the development of “early warning measures and urgent action procedures,” which allow requests for information from States outside the regular reporting requirements set out in the treaty.

The Committee on the Elimination of Racial Discrimination has developed “urgent action” procedures, under which states can be requested to report outside the normal treaty reporting requirements. This allows the Committee to intervene in a current dispute in a country. Such an activist role for the treaty body was probably never contemplated by the drafters of the *Convention*.

On the Human Rights Committee, Mr. Prado Vallejo, who was retiring after 22 years on the Committee, commented in January 1999:

Although the Committee had been established during the Cold War, it had been able to overcome that handicap and had achieved consensus among its members. Over the years, the Committee had acquired considerable prestige, and the fact that every State in the world now included a human rights protection dimension in its international policy was a tribute to the efforts made by the Human Rights Committee, among others.<sup>29</sup>

This is an interesting statement, but not very accurate. The cold war gave an impetus for international debates over human rights. Human rights became matters for mutual accusations between the “western” and “eastern” blocs. The competition made the life of bodies like the Human Rights Committee difficult, but it played a major role in advancing the legitimacy of human rights discussions in international law and diplomacy. The two blocs both talked in the language of human rights.

I would argue that the Human Rights Committee has yet to acquire “considerable prestige.” It is not well known, and access to its “views” has been difficult until recently.<sup>30</sup> Like the European Court of Human Rights it simply cannot remain a part-time, voluntary body, and have any hope of achieving the respect and competence that are necessary for it to play its role. The influence of the Human Rights Committee on State practices is truly an influence “among others.” On its own it commands little attention.<sup>31</sup>

Another area of important growth has been “advisory services,” technical cooperation programmes and technical assistance programmes.<sup>32</sup> Election monitoring, another example, has become a routine and expected international function.

## EXPERIENCE WITH THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In the early days of the treaty bodies, there was reluctance to acknowledge the receipt of information from non-governmental organizations, even when such information formed the basis of questions by committee members. On May 11<sup>th</sup>, 1993, the Committee on Economic, Social and Cultural Rights adopted pioneering procedures for the participation of non-governmental organizations (NGO). NGO participation could now be open and formalized.

1. The Committee reiterates its long-standing invitation to NGOs to submit to it in writing, at any time, information regarding any aspect of its work.
2. In addition to the receipt of written information, a short period of time will be made available at the beginning of each session of the pre-sessional working group to provide NGOs with an opportunity to submit relevant oral information to the members of the working group.
3. Furthermore, the Committee will set aside part of the first afternoon at each of its sessions to enable it to receive oral information provided by NGOs. Such information should: (a) focus specifically on the provisions of the Covenant on Economic, Social and Cultural Rights; (b) be of direct relevance to matters under consideration by the Committee, (c) be reliable, and (d) not be abusive. The relevant meeting will be open and will be provided with interpretation services, but will not be covered by summary records. The purposes are: to enable the Committee to inform itself as fully as possible; to probe the accuracy and pertinence of information which would most probably be available to it anyway; and to put the process of receiving NGO information on a more transparent and open basis than is permitted by the current approach.
4. NGOs wishing to present oral information should inform the Committee in advance. In cases in which the Committee receives more expressions of interest than can be dealt with in the limited time available, the Chairperson of the Committee, in consultation with the Bureau, shall determine on an objective basis which NGOs will be invited to make an oral presentation.
5. To the extent that information provided to the Committee in writing under these procedures is referred to by any member of the Committee in questions posed to the State party, the relevant information should be available for consultation by the Government concerned and all other interested parties.

6. The Committee requests its Chairperson, in conjunction with the secretariat, to make these procedures as widely known as possible.<sup>33</sup>

Six days later Canada appeared before the Committee on Economic, Social and Cultural Rights for the review of its second periodic report. After three government representatives made presentations, members of the Committee began their questions. The Committee had been supplied with information by a coalition of Canadian non-governmental organizations, including the Canadian Council of Churches and the National Anti-Poverty Organization. This NGO information was used openly in questioning and in the Concluding Observations of the Committee.

Mr. Simma recalled a remark made some time ago by the Canadian delegation, during its first appearance before the newly constituted Committee, to the effect that the system of social welfare in Canada was closer to the Scandinavian than to the United States model. In the light of the information just submitted, he wondered whether the Canadian system was not now moving closer to the United States model (as, perhaps, was the Scandinavian system itself). Statistics showed that while Canada was the richest of the major industrialized countries to have ratified the Covenant (with a per capita GDP 60 per cent higher than Germany's), it also recorded poverty rates much higher than those of most other industrialized countries.<sup>34</sup>

The concluding observations of the Committee were adopted on May 27<sup>th</sup>, 1993, and released the next day.<sup>35</sup>

12. In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realization of the rights recognized in the treaty, and considering Canada's enviable situation with regard to such resources, the committee expresses concern about the persistence of poverty in Canada. There seems to have been no measurable progress in alleviating poverty over the last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups.
13. In particular, the Committee is concerned about the fact that, according to information available to it, more than half of the single mothers in Canada, as well as a large number of children, live in poverty. The State party has not outlined any new or planned measures to remedy this situation. Of particular concern to the Committee is the fact that the federal Government appears to have reduced the ratio of its contributions to cost-sharing agreements for social assistance.

14. The Committee received information from non-governmental organizations about families being forced to relinquish their children to foster care because of inability to provide adequate housing or other necessities.
15. The Committee is concerned that there seems to exist no procedure to ensure that those who must depend entirely on welfare payments do not thereby derive an income which is at or above the poverty line.
16. A further subject of concern for the Committee is the evidence of hunger in Canada and the reliance on food banks operated by charitable organizations.

The anti-poverty groups, who had worked closely with the Committee, obtained the Concluding Observations of the Committee on Friday afternoon, after the text was approved in a public session of the Committee. No one from the Canadian mission to the United Nations attended that afternoon session. Canadian officials heard of the criticisms for the first time in a front page story in the national Canadian newspaper, the Globe and Mail, on Saturday, May 29<sup>th</sup>.

The criticism by the UN committee, which includes members from 18 countries, is believed to be the harshest attack it has ever launched concerning the performance of an industrialized nation.

Earlier this month, the committee listened to two days of testimony by Canadian government officials and social groups. It gathered statistical data and studied photographs of homeless people in Toronto, lineups at food banks, and native people at Indian reserves...

It criticized the Charlottetown constitutional accord for putting social and economic rights into the category of "policy objectives" rather than "fundamental human rights."...

Bruce Porter, a Toronto human rights advocate and co-ordinator of a housing rights group who testified before the UN committee, said the report should put poverty back on the agenda of the federal government.

"It will shock the government and it will shock the public to think that Canada is seen as a country that violates people's rights by the extent of poverty and homelessness," Mr. Porter said.

The social groups, which were surprised that they were permitted to testify before the UN committee, said they were pleased by yesterday's report. "We

just weren't sure that they would really have the courage to go ahead and actually condemn a country with as much international clout as Canada," Mr. Porter said.<sup>36</sup>

This prominent coverage given to the Committee's observations illustrates a basic fact about Canadian media coverage. The media will cover criticism of Canada at the United Nations, in spite of the fact that normal coverage of United Nations events, beyond the Security Council and General Assembly, is rare. For example, Canada regularly has the largest government observer delegation at the Working Group on Indigenous Populations and often has the largest number of indigenous participants. Yet no regular coverage of these annual meetings occurs in Canadian media. Coverage of the Concluding Observations of the Committee on Economic, Social and Cultural Rights in 1993 was possible because (a) the observations criticized Canada, and (b) non-governmental organizations delivered the story to Canadian media, who would not otherwise have noticed the event.

In 1993, the Canadian Mission complained to the Committee about their handling of the review and the Concluding Observations:

As a strong supporter of the United Nations Human Rights Treaty monitoring system, we have always encouraged the efforts of the Committee to improve its working methods. In this spirit, Canada agreed to the Committee's decision to entertain informal oral presentations from two Canadian non-governmental organizations, notwithstanding the last-minute character of that decision...

With a view to improving its procedure in the light of this experience, the Committee may wish in future to request that non-governmental organizations provide copies of their submissions well in advance of their appearance. This would facilitate the committee's efforts to assess fully the material before it and enable States parties to provide considered comments... Such an approach would assist the Committee in engaging both non-governmental organizations and States parties in a serious dialogue. Furthermore, a more systematic approach to non-governmental organization participation will become essential as larger numbers of non-governmental organizations express interest in providing views to the Committee.

The Government of Canada is also concerned about the procedures followed in respect to the release of the Committee's concluding observations. Prominent and extensive reporting on those observations appeared in the Canadian media on 28 May 1993. On the same date, a member of the Committee commented in detail on the contents of those observations in an interview on Canadian national radio. In those circumstances, Canadian officials were compelled to



comment publicly on a 'draft' version of the Committee's observations obtained from a Canadian newspaper – a document the status of which it had not had the opportunity to ascertain from United Nations officials.<sup>37</sup>

The Committee agreed with aspects of the Canadian concerns. The Chair said that non-governmental organizations would be asked to submit their information as early as possible and copies would be forwarded to the Government concerned as soon as the documents were received. The Chair conceded that the Concluding Observations should have been faxed to the Canadian Mission as soon as they were approved in the public session. But, while making these concessions to Canada, the Chair was clearly pleased by the sequence of events:

It was true that the Committee's comments had given rise to extensive debate in the Canadian media. The Prime Minister of Canada had answered questions in Parliament relating to the concluding observations, and the matter had assumed quite significant proportions. The Committee itself had received letters from various organizations congratulating it on its handling of the Canadian report. Under the circumstances, it was inevitable that the matter should have been a somewhat sensitive one for the Canadian Government. His own view... was that the true purpose of the dialogue which took place in the Committee was to stimulate national discussion of important issues rather than to hand down judgements. For that point of view, the discussion which had taken place in Canada was the most appropriate achievement that the Committee could hope for...<sup>38</sup>

Another member said it would be a matter of pride for the Committee if all States parties took its findings so seriously.<sup>39</sup>

In 1995, the Canadian government introduced a budget which sharply cut social spending. Bill C-76, implementing the budget, ended the *Canada Assistance Plan*, under which the national government transferred funds to provincial governments for social assistance. In the past, Canada had said that it had implemented its obligations under the *Covenant on Economic, Social and Cultural Rights* by a series of programs, including the *Canada Assistance Plan*. As one columnist put it:

For at least 15 years, the Canadian government has cited the Canada Assistance Plan (CAP) as the essential vehicle of its compliance with the covenant's obligations.

CAP is the legislation that, since 1966, has allowed Ottawa to share the cost of welfare and social services with the provinces.

It ensures – nationally – that every person in need is eligible for financial aid. It ensures that the amount of income provided to a person in need will “take into account such person’s budgetary requirements” – that is, be adequate to the persons needs.

It ensures that people relying on social assistance will not be forced to work against their choice in order to receive assistance.

It ensures that a person who is denied financial assistance has the legal right to appeal. It ensures that a person relying on social assistance has legal standing to challenge the funding of the assistance program if the program violates any of CAPS standards.<sup>40</sup>

These statements are taken directly from lobbying material prepared by the National Anti-Poverty Organization. C-76 replaced the older pattern of conditional transfer payments with a block transfer, the Canada Health and Social Transfer, which did not oblige the provinces to meet the older standards in their programs. The National Anti-Poverty Organization, The Charter Committee on Poverty Issues and the National Action Committee on the Status of Women protested Bill C-76 to the Committee on Economic, Social and Cultural Rights.<sup>41</sup> The press conference announcing the appeal was held under a viaduct in East Vancouver, a place the organizers said would be a refuge for the homeless once the budget cuts took effect. The Chair of the Committee on Economic, Social and Cultural Rights wrote to the Canadian ambassador in Geneva asking about C-76, and gave a hearing to the non-governmental organizations.

The Committee explained its rules on Non-Governmental Organization participation in its Report on the 12<sup>th</sup> and 13<sup>th</sup> sessions in 1996:

26. In preparation for the pre-sessional working group, the Committee has asked the secretariat to place at the disposal of its members a country analysis as well as all pertinent documents containing information relevant to each of the reports to be examined. For this purpose the Committee has invited all concerned individuals, bodies and non-governmental organizations to submit relevant and appropriate documentation to the secretariat. It has also asked the secretariat to ensure that certain types of information are regularly placed in the relevant files.
27. In order to ensure that the Committee is as well informed as possible, it provides opportunities for non-governmental organizations to submit relevant information to it. They may do this in writing at any time, in accordance with the appropriate Economic and Social Council procedures. The Committee’s

pre-sessional working group is also open to the submission of information in person or in writing from any non-governmental organizations, provided that it relates to matters on the agenda of the working group. In addition, the Committee sets aside part of the first afternoon at each of its sessions to enable representatives of non-governmental organizations to provide oral information. Such information should: (a) focus specifically on the provisions of the International Covenant on Economic, Social and Cultural Rights; (b) be of direct relevance to matters under consideration by the Committee; (c) be reliable; and (d) not be abusive. The relevant meeting is open and provided with interpretation services, but is not covered by summary records.

28. As from its eleventh session, the Committee requested the secretariat to ensure that any written information formally submitted to it by individuals or non-governmental organizations in relation to the consideration of a specific State party be made available as soon as possible to the representative of the State concerned.<sup>42</sup>

In November 1998, the work of the anti-poverty coalition succeeded again. The *Globe and Mail* reported on new criticisms by the Committee on Economic, Social and Cultural Rights:

It was as if someone had strung a clothesline weighed down with Canada's dirty laundry across a United Nations committee room yesterday.

One after another, members of the UN Committee on Economic, Social and Cultural Rights chipped away at Canada's reputation as the best place in the world in which to live.

One member of the committee, Mahmoud Ahmed of Egypt, accused Canadian authorities of fighting the deficit on the backs of the poor. "It is unbecoming a democratic society," he said.

Canadian officials were asked a barrage of embarrassing questions as part of a periodic review of Canada's adherence to the international covenant on economic, social and cultural rights – which came into force in 1976....

Why do Canadian governments allow "subhuman" conditions to persist on native reserves, one committee member asked.

Why, in a "rich and apparently liberal" country experiencing an economic recovery, is the incidence of poverty among women on the rise, asked another.

Why has the rate of children living in poverty increased, queried Mr. Ahmed, who also wanted to know why some Canadian students had to resort to food banks.

“It’s one thing to beat the budget deficit, but not at the expense of bringing about a very harmful, a very inhumane social and economic revolution that is taking place now,” he said....

Many wanted to know why the federal government has not acted on the committee’s recommendation from the last review in 1993, that the Canadian Human Rights Act be expanded to protect social and economic rights.

“What’s the problem?” asked Virginia Bonoan-Dandan, from the Philippines.

A team of government officials, led by Mark Moher, Canada’s ambassador to the UN in Geneva, promised to answer. But they reserved their response until they could consult with Ottawa.<sup>43</sup>

The coalition of non-governmental organizations used a report “Women and the Equality Deficit” as part of their background materials, a report that had been commissioned by Status of Women Canada, a federal government ministry. One of the authors of that report commented on the significance, for her, of the November hearing before the Committee on Economic, Social and Cultural Rights and the December 4<sup>th</sup> Concluding Observations:

“The report was also useful because inside Canada, the media have not provided a public space for alternative voices to be heard. The important perspectives of women’s organizations, anti-poverty groups, disability groups, First Nations groups and others have been silenced by a conservative press that does not want to acknowledge that economic decisions raise human rights issues. So one important feature of the UN report is that it broke through, at least temporarily, that silence. For a few days, Canadians actually heard something different,” says Day.<sup>44</sup>

## EXPERIENCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Human Rights Committee, established under the *International Covenant on Civil and Political Rights*, is less open to non-governmental organizations, than the Committee on Economic, Social and Cultural Rights. The impact on Canada has come not from the public

sessions involved in the review of periodic reports but from adjudications under the individual communications procedure set out in the *Optional Protocol*. It is not surprising that the most important cases from Canada have involved members of two significant minorities, the indigenous peoples and the Francophones.

The language of the *Covenant* on the individual communications procedure is very cautious and limited. The individual makes a “communication.” The body making the decision is a “committee.” The conclusions are “views.” The Committee sessions considering communications are “closed.” The Committee had to decide whether to make its “views” public, or only submit them to the “author” and the “State party,” the only recipients specified in the *Optional Protocol*. It decided to make the views public so that parties could not misrepresent the reasoning or conclusions of the Committee. It is startling to realize that the Committee, after it was established, seriously considered the possibility of not making its “views” public. The *Optional Protocol* says that the Committee shall consider the communications “in the light of all written information made available to it by the individual and by the State Party concerned,” suggesting a bar on NGO submissions and on any public hearings or committee initiated investigations. Information submitted by the individuals and the States Parties are not made public by the Committee, though they are often disclosed by the individual who initiated the case. No procedures for involving NGOs comparable to those of the Committee on Economic, Social and Cultural Rights have developed. The contrasts to procedures under regular litigation in the west or to the procedures under the *European Convention on Human Rights* are striking.

The *Lovelace* case was filed in 1977 immediately after the *Covenant on Civil and Political Rights* came into force.<sup>45</sup> Sandra Lovelace had been a member of the Tobique Indian Band. She had married a non-Indian, and under the rules in the federal *Indian Act*, she had lost her status as an Indian. The main legal consequence was the loss of her eligibility to live on the Indian reserve.<sup>46</sup> Men and women were treated differently under the *Indian Act*: when a status Indian man married a non-Indian woman, the woman gained legal Indian status, and gained the ability to live on reserve land. After Sandra Lovelace’s marriage ended, she returned to her home reserve community, with a child, and lived in a house owned by one of her relatives. It was her request for housing that brought the issue to a head. The band council said it could not legally provide her with housing because she had lost Indian status. Sandra Lovelace argued a number of provisions of the *Covenant*. Because the loss of status had occurred before the *Covenant* had come into force, the views of the Committee dealt only with Article 27, which reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Committee concluded that her loss of status blocked her from enjoying her culture in community with the other members of her cultural group, that is the Maliseet Indians who were members of the Tobique band.<sup>47</sup>

The standard version of the story tells how Sandra Lovelace took her case to the Committee and won, and Canada changed the *Indian Act* to end sexual discrimination. The story fails to note that the Canadian government was committed to changing the law well in advance of the case, and said that to the Committee. The policy problem faced by Canada was the extent to which decision making over band membership should be returned to Indian hands. The competing policy agenda for Canada was not the perpetuation of sexual discrimination, but minority rights. Indian First Nations were demanding control over the definition of “community.” In the reform legislation of 1985, the Indian arguments for greater autonomy largely prevailed, though any women who had lost status by marriage gained status.

The *Lovelace* case was significant, and the principle involved is described later by the Committee in the following terms: “...a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.”<sup>48</sup> This has meant that any direct attacks on special measures for indigenous autonomy will not succeed in the Human Rights Committee, so long as they are positive measures. Collective rights were upheld, though the drafters of Article 27 were adamant that the section did not protect collectivities, that it was not a “minority rights” section.<sup>49</sup>

Another case involving indigenous people in Canada was important. In *Ominayak and the Lubicon Lake Band*, the Committee had to deal with a long dispute about the traditional territories of a Cree Indian band in northern Alberta.<sup>50</sup> The Band had been omitted from an earlier Indian treaty because of its isolation. No reserve had been established. In isolation, the band members continued a traditional hunting and trapping economy, until oil and gas exploration challenged that status quo. The dispute was very well known in Canada, and had led to a national Indian boycott of Shell Oil, and the exhibition of Indian art that Shell Oil had sponsored to coincide with the winter Olympic games in Calgary, Alberta. What was very difficult to determine, even for observers within Canada, was who exactly was to blame for the failure to resolve the dispute. Was it the Province of Alberta, which gained major revenues from the oil and gas industry? Was it Canada, which had ignored the band in the early days, and then underestimated its population to weaken claims to reserve lands? Was it the band, who had a very aggressive and demanding white adviser and activist lawyers?

The Committee was not able to figure out the story. Perhaps if it could have appointed a fact-finder to investigate and report, it might have been possible to get behind the stacks of documents supplied by the parties. Perhaps a hearing with cross-examination would have enabled

the story to be understood. Neither occurred. The “views” of the Committee are long. The Committee recounts at length the positions of the opposing sides. It concludes that the band has had their Article 27 rights infringed, but expresses hope that recent federal proposals may prove helpful. The decision did nothing to advance the resolution of the issue within Canada. A significant ruling was that the Committee could not consider any claim to “self-determination” under Article 1 of the *Convention*, for the complaints procedure was limited to “individual” communications.

The Committee’s decision in the *Ballantyne* case, like that in *Lovelace*, dealt with an issue that had been extensively debated in Canada. The Francophone majority in the Province of Quebec had long been concerned with the erosion of the French language in the “English sea” of North America. The separatist Parti Quebecois government in Quebec had passed the *Charter of the French Language* to protect French and ensure a French “visage publique” in the Province. The legislation prohibited the use of any language except French on public commercial signs. In domestic litigation, a group of English-speaking store owners challenged the law as in conflict with the *Charter of Rights and Freedoms*, which is a part of the Canadian *Constitution*. The Supreme Court of Canada ruled that the goal of protecting the French language through restrictions on the language of signs was valid, but that the legislation went further than necessary in interfering with freedom of expression. The Court struck down the legislation, suggesting that a law which required that French be predominant, with other languages appearing in smaller print, would be acceptable. The provincial Liberal Party, which at that point formed the government, had in fact promised to ease the language of signs law in its party platform. Nevertheless, the government felt that any concession on the language issue would bolster the separatist Parti Quebecois, then in opposition. To avoid giving the language issue to the opposition, the provincial government reinstated the law that had been struck down. The Canadian *Constitution* allows governments to override judicial decisions in *Charter* cases. Legislation can be enacted which states that it is to operate “notwithstanding” the *Charter of Rights and Freedoms*, and the legislation will remain in effect for five years (and can be re-enacted for further five year periods). The decision to invoke this unusual power sharply divided the provincial cabinet. Three prominent anglophone cabinet ministers resigned. The decision also provoked strong reaction against Quebec in English Canada, and was a major factor in the loss of support for the “Meech Lake Accord,” a package of constitutional amendments that the Quebec government strongly supported.

I have retold this somewhat complex story to emphasize that the issues involved in the *Ballantyne* case had been the subject of heated controversy in Canada.

The Human Rights Committee rejected any application of Article 27. The English in Quebec were not a “minority,” the Committee reasoned, because they were a majority in the country as

a whole. For Canadians, this was a stunningly stupid analysis. Quebec had its own government, and the English were a minority in Quebec, subject to provincial laws on language, education and culture. One can only conclude that most members of the Committee failed to understand the Canadian federal system. There are very few true federal states, and the Canadian constitutional system takes the division of legislative powers between the national and provincial governments very seriously.

The Committee then ruled that the law did not constitute discrimination on the basis of language, for the prohibition on the use of English applied to both English speakers and French speakers. Again, Canadians found this analysis a mockery of equality principles. It is almost a parody of “formal equality” arguments which effectively deny “substantive equality.”

The Committee ruled, as the Supreme Court of Canada had earlier, that the law represented an interference with freedom of expression:

A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.

This revealed no sensitivity to the minority language concerns of the Francophone majority in Quebec. The legitimacy of those concerns had been acknowledged in the decision of the Supreme Court of Canada, a far better reasoned and more balanced decision than that of the Human Rights Committee.

The decision was nevertheless successful. It was given wide coverage in the media in Canada, and provided a rationale for the Quebec government to reform its language legislation, something the provincial government wanted to do, but had felt unable to do for local political reasons.

There have been other cases in which the Committee has given substantive rulings in cases brought against Canada. They have dealt with the following issues: (a) extradition by Canada to a State in circumstances where the fugitive will potentially face the death penalty, (b) deportation by Canada of long-time permanent residents, (c) prisoners rights, specifically the right to be tried without undue delay and treatment during detention, (d) the right of an individual convicted of a criminal offence to benefit from legislation enacted subsequent to the commission of the offence and providing for a lighter penalty, (e) requirements on reasonable accommodation to religious belief by employers, (f) the political status of indigenous communities in constitutional negotiations, (g) and tax funded religious schools (when such an arrangement existed for another religious group). None of these issues has had the high political profile in Canada of the *Lovelace* and *Ballantyne* issues.



## CONTROVERSY IN AUSTRALIA

NGOs in Australia sent information to the Committee on the Elimination of Racial Discrimination on proposed amendments to the Australian *Native Title Act*, prompted by the High Court decision in the *Wik* case. The amendments were highly contentious in Australia (and came close to triggering a national election). In August 1998, under urgent action procedures, the Committee requested additional information from Australia, something it was technically able to do under Article 9, paragraph 1 of the *Convention*. Australia complied with the request, submitting a report and appearing before the Committee.<sup>51</sup> In March, 1999, the Sydney Morning Herald gave the Committee's conclusions front page coverage:

The United Nations race discrimination committee has found the Wik law in breach of Australia's international pledges not to discriminate racially, and called for an immediate reopening of talks with indigenous Australians.

In the first adverse finding on racial discrimination against a Western nation, the committee found that "provisions that extinguish or impair the exercise of native title rights and interests pervade" the law.

The Wik bill "appears to create legal certainty for governments and third parties at the expense of indigenous title," thus breaching the UN Convention on the elimination of all forms of racial discrimination, signed by the Liberal government in 1966....

The Prime Minister rejected the committee's findings and its recommendations that the Government address its concerns "as a matter of utmost urgency."

"Australian laws are made by Australian parliaments elected by the Australian people, not by UN committees," Mr. Howard said.

The UN committee will keep Australia on its "urgent action" list, and review the matter again in August. Committee members will also take up an invitation from ATSIC [the Aboriginal and Torres Strait Islanders Commission, a government funded indigenous body], the Opposition and the Democrats to visit Australia to see the working of the Wik law, after the Government declined to issue an invitation.

The Attorney-General, Mr. Williams, said that "the report is an insult to Australia in failing to acknowledge that there's another side to the story." He indicated that the Government might boycott the committee during its visit.

The findings support advice to the Government during the Wik debate from the Australian Law Reform Commission and a number of Queen's Counsel that the bill breached the UN convention.

The shadow attorney-general, Mr. Robert McClelland, said it was "hypocritical in the extreme for the Government to now claim that the UN committee got it wrong when all it did was agree with the Government's own legal advice."

The ATSIC commissioner, Mr. Geoff Clark, said the findings proved that "the Native Title Act is a racist act, and Aboriginal peoples are the victims of government racism."

The co-ordinator for Australians for Native Title and Reconciliation, Mr. Phil Glendenning said the Government "has now been found by impartial experts to be perpetrating exactly the opposite of reconciliation and equality for all Australians – again the situation highlights a serious moral vacuum in Canberra."<sup>52</sup> Australia pressed ahead and enacted the *Native Title Act* amendments.

Disputes continued. Australia faced sharp criticisms of its policies on the detention of refugees (boat people), mandatory sentencing laws in the Northern Territory which adversely affected Aboriginal people, and the refusal of the national government to apologize for the "stolen generation" of Aboriginal children who had been taken from Aboriginal families in the 1950s. In March and July, 2000, there were critical reports by the Committee on the Elimination of Racial Discrimination and the Human Rights Committee. At the end of August, the government was about to get another critical report, this time from the Committee on Economic, Social and Cultural Rights. In the immediate aftermath of a riot at the Woomera refugee detention camp, on 29 August, the government attacked the international human rights system, pledging to limit its involvement unless more respect was given to democratically elected governments:

Australia yesterday threatened to veto visits by United Nations human rights investigators and scale down participation in UN inquiries unless they are subjected to "effective reform."

Stung by what it sees as unjustified UN criticism of its policies towards Aborigines, the Australian government also warned it will not sign up to a new UN complaints body under a treaty on discrimination against women.

Foreign Minister Alexander Downer, Immigration Minister Philip Ruddock and Attorney-General Daryl Williams issued the treats in response to a review of Australia's involvement in UN committees.

The review was ordered following criticism by UN committees of mandatory sentencing legislation in the Northern Territory, of Prime Minister John Howard's persistent refusal to apologise to the so-called stolen generation of Aborigines and of mandatory detention of asylum seekers.

Mr. Downer said Australia would only continue to co-operate with the UN treaty committee system if it was radically overhauled to recognise the right to democratically elected governments to make laws for their country.

"The cabinet has decided that Australia's strategic engagement with the treaty committee system should depend on the extent to which effective reform can occur," he said.

"We'll only agree to visits to Australia by treaty committees ... and the provision of information where there's a compelling reason to do so."

"We will immediately implement a package of measures to improve our continued interaction with the committees, including reporting to and representation at treaty committees being based on more economical and selective approach where appropriate."

Mr. Williams said the UN committees had the wrong priorities, and paid too much attention to NGOs at the expense of democratic governments.<sup>53</sup>

Australia indicated that it would not sign the new optional protocol to the *Convention on the Elimination of Discrimination Against Women*, creating an individual communications procedure, though Australia had been active in the drafting process.<sup>54</sup> As expected, a couple of days later, the Committee on Economic, Social and Cultural rights issued a critical report on Aboriginal disadvantage in the fields of employment, housing, health and education.<sup>55</sup>

An issue raised in both the Australian experience and Canada's experience before the Committee on Economic, Social and Cultural Rights is whether the treaty bodies are more critical of the relatively open western democracies, than of other states. There are various reasons why this unequal treatment might occur. A treaty body might believe that a Western state would be less likely to attack the international human rights system if adverse findings occurred. Secondly, criticism of Western states would demonstrate to developing states that the system was not biased against them. And thirdly, more information is available on the situation of western states, to a large extent through the work of domestic NGOs, with the result that the treaty bodies will get better information on which to base criticisms. Barbara Crosette, the United Nations correspondent for the New York Times, commented on this issue:

A decision by Australia to limit its cooperation with the United Nations on human rights reporting has reopened a debate about whether international monitors are sometimes harder on democracies than on closed societies.

Some democracies, aware that information is more accessible and independent advocacy groups are more influential in their countries, are wary of the monitoring.

In Australia, a campaign has been building for months to curb access to United Nations monitors after reports came out critical of the government's judicial treatment of Aborigines and foreigners who seek asylum....

Australia's decision reflects opinions shared by some Americans who oppose what they see as a growing tendency towards international scrutiny. John Bolton of the American Enterprise Institute in Washington, a former assistant secretary of state in the Bush administration, said his objections were constitutional.

"What Australia has done is a triumph for democracy," he said in an interview. "Within a constitutional system of representative government, you're allowed to struggle for policy outcomes. In a democracy, sometimes you win and sometimes you lose. What Australia is objecting to is the idea that a losing side in a democratic country can ask for a lifeline to a U.N. agency."<sup>56</sup>

Criticism of Australia did not end. In the context of the Olympic Games in Sydney international media ran stories on the situation of Aboriginal people. Time Asia made it a cover story. A lead article in the New York Times was headed "Not a Game to the 'Stolen Generation': Australia's Aborigines make their case in the summer Olympic spotlight."<sup>57</sup>

## ASSESSING THE CANADIAN EXPERIENCE

Some lessons can be taken from two recent newspaper stories. The Manitoba Metis Federation announced that it would lodge a human-rights complaint with the United Nations over the refusal of the province of Manitoba to authorize a Metis child-care agency.<sup>58</sup> It is not unusual to see a story in the Canadian media in which a group is going to appeal to the "United Nations." Often the exact United Nations body is not identified or not correctly identified. Media reporters do not have a good grasp of the complex United Nations structure. This particular story identified the body correctly, as the Working Group on Indigenous Populations,

a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Indigenous leaders in Canada know a lot about the U.N., and would have given the accurate name of the body to the media. The Metis strategy is clearly stated in the article. The Metis Federation “hopes international attention will put pressure on the province...”

The Chair of the Working Group on Indigenous Populations, Madam Erica Irene Daes, has repeatedly stated that the body is not a “chamber of complaints” and has no competence to consider individual cases. It nevertheless has a mandate to “review developments.” The Metis were heard, for the Working Group is the most open body in the entire United Nations system. It will hear any indigenous person or representative of an indigenous community, as well as regularly accrediting academics who have no NGO affiliation. Going to Geneva may well embarrass the government of Manitoba. The story suggests there could be a “hearing” and could be a “decision” from the Working Group. Neither is possible. All that occurred was a presentation.

For any Canadian involved in United Nations processes, a second recent article, under the absurd title “Canadian women of both genders duke it out at the UN” is comedy relief, though a serious story.<sup>59</sup> At a meeting following up on the 1994 World Conference on Population and Development, a Canadian NGO called REAL Women, with largely male representatives, was battling for family values, against the Canadian government delegation, which REAL Women claimed was promoting a gay agenda internationally. In contrast, FAKE Women, a competing organization composed completely of women, whose name mocked that of REAL Women, was pushing a feminist agenda.

The Manitoba Metis Federation story tells us something about the degree to which international human rights has become internalized, incompletely, in Canadian law and politics. There is political power in “rights discourse” and in invoking an appeal to the United Nations. The United Nations Working Group on Indigenous Populations did provide a forum for the Metis complaint, though not a hearing or a decision. Metis issues, as rights claims, have not achieved recognition within Canada. Assimilationist assumptions are still very strong in practice, in contrast to stated government goals for Indian bands and Inuit communities. Metis issues are only beginning to be addressed in Canadian courts, so it is premature to think of Metis issues going on to the Human Rights Committee.<sup>60</sup> But the Metis hope for domestic recognition involves an international strategy.

The REAL Women story tells us about NGOs. REAL Women competes with other organizations in Canada to be a voice for women. Women’s groups have a long history in international fora, groups like the Women’s International League for Peace and Freedom. Women’s groups are central in the coalitions that have taken Canadian social policy issues to the Committee on Economic, Social and Cultural Rights. But not all women are feminists, and the divergent voices of NGOs nationally will be replicated by divergent voices internationally. The goals of “civil

society” mean that there should be a range of representative private organizations, sharing in the larger tasks of governance.

The story of Canada and the Committee on Economic, Social and Cultural Rights leads to certain observations. The *Covenant* was drafted in a period of increasing prosperity, in which everyone expected the “welfare state” and the social “safety net” to continue and expand. In fact, the experience of the 1990s has been the substantial trimming of state social expenditures. Responsibility has been decentralized (or off-loaded or down-loaded) from national governments to states and provinces in both the United States and Canada. If Canada is moving more to the United States model, as the member of the Committee on Economic, Social and Cultural Rights ruefully noted in a passage quoted in this paper, so too are the Scandinavian countries, to which Canada, in the past, had compared itself. The *Covenant*, with its goal of “progressive implementation,” did not foresee the retrenchment in the role of governments that has been so pervasive over the last decade. What are we to conclude? That progressive implementation of the *Covenant* is perhaps a generation away? Or has the role of the modern State changed?

Because Canada has prided itself on having much better social programs than the United States, including universal medical insurance, Canada was very vulnerable to criticism in the Committee on Economic, Social and Cultural Rights. It was our own claims and standards that were being used to criticize Canadian performance. Because the issues were legitimate in domestic debate, Canadian media were willing to cover the stories (when helped along by activist NGOs).

On a much different point, the experience of Canada with the Committee on Economic, Social and Cultural Rights has had very positive aspects. While Canadian government officials may feel that Canada proved to be the guinea pig for the expanded role of NGOs in the treaty body process, the expanded role is clearly a good thing.

In part, this is for the wrong reasons. The United Nations is so underfunded, that it is unable to properly service the treaty bodies. And the treaty body model, of part time, voluntary “experts,” is already out of date, inadequate to deal with the mandates. Some of the gaps in the process are filled by the NGOs.

In part, the opening to NGOs is being done for the right reasons. The United Nations can only become a more effective institution if the players expand beyond the diplomats and the representatives of intergovernmental organizations. If that leads to some REAL and FAKE women arguing in New York and Geneva, then it means that the debates that are taking place in Canada and other States are also taking place in United Nations fora.

The Canadian experience with the *Covenant on Civil and Political Rights* has generally been positive. Canada used the text of the *Covenant* as a major source in the drafting of the *Charter of Rights and Freedoms*, added to the *Constitution* in 1982. The two most significant decisions of

the Committee involving Canada, *Lovelace* and *Ballantyne*, both played positive roles. Both led to changes in legislation, changes that were likely in any case, but changes helped along by the Committee's work. Nevertheless, one has to add that the quality of much of the reasoning in *Ballantyne* was indefensible, and that the fact finding process in *Ominiyak* simply did not work. The Committee needs better members and better procedures.

## NOTES

<sup>1</sup> These figures come from UN document E/CN.4/Sub.2/2000/2, Observance of human rights by States which are not parties to United Nations human rights conventions, Additional working paper submitted by Mr. V. Kartashkin pursuant to Sub-Commission resolution 1998/28. Paragraph 7. The United States and Somalia are not parties to the *Convention on the Rights of the Child*.

<sup>2</sup> Achara Ashayagachat, Asem divided on human rights, Bangkok Post, October 21, 2000. China and Japan are the leading aid granting States which avoid linking grants to social issues.

<sup>3</sup> This included private interviews with about thirty inmates, including "political prisoners": U.N. Holds Private Talks with Prisoners in China, New York Times, October 22, 1997, A5.

<sup>4</sup> Human Rights Daily, Monday, March 22<sup>nd</sup>, 1999, e-mail "digest of latest human rights news."

<sup>5</sup> David Sanger, U.S. to Back the Censure of Beijing Over Rights, New York Times, March 27, 1999. See, for example, the section on China in the Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, fifty-fifth session, E/CN.4/1999/62, 28 December 1998.

<sup>6</sup> Erik Eckholm, China's Rights Stand: Progress or an Irrelevance?, New York Times, Monday, November 27, 2000, A8.

<sup>7</sup> Comments of the Human Rights Committee, CCPR/C/79/Add 50. The criticism was noted in the media. See Frank Ching, U.S. Role on Rights Reversed: UN Committee members Criticize Washington's Record, Far Eastern Economic Review, June 22, 1995, 40.

<sup>8</sup> Elizabeth Olson, Good Friends Join Enemies to Criticize U.S. on Rights, New York Times, March 28, 1999. See also Elizabeth Olson, U.N. Panel is Told of Rights Violations at U.S. Women's Prisons, New York Times, Wednesday, March 31, 1999, A16.

<sup>9</sup> On early Canadian reluctance, see Philippe LeBlanc, *Canada's Experience with United Nations Human Rights Treaties*, Canadian Committee for the 50<sup>th</sup> Anniversary of the United Nations, November, 1994, 1-5.

<sup>10</sup> One exception is Canada's failure to ratify the individual communications procedure in the *Convention on the Elimination of All Forms of Racial Discrimination*.

<sup>11</sup> Canada provided advisers to Hong Kong and South Africa in the drafting of bills of rights.

<sup>12</sup> Martha Minow, *Rights and Cultural Difference*, in A. Sarat, T. R. Kearns, *Identities, Politics and Rights*, Michigan, 1995, 347 at 356.

<sup>13</sup> The background to these arrangements is described in Philippe LeBlanc, *Canada's Experience with United Nations Human Rights Treaties*, Canadian Committee for the 50<sup>th</sup> Anniversary of the United Nations, 1994. He notes one exception to provincial agreement, the refusal of Alberta to agree to the *Convention on the Rights of the Child*. Canada signed the *Convention* without Alberta's agreement, which was only finally given in January, 1999.

<sup>14</sup> This is extensively documented in Anne Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation*, Butterworths, 1992.

<sup>15</sup> For example, article 27 of the *Covenant on Civil and Political Rights*, dealing with members of religious, linguistic and cultural minorities, has no equivalent in domestic Canadian law. Canada like most western states has group-specific provisions on minorities, not a general formulation like article 27.

<sup>16</sup> Canada, Core Document Forming Part of the Reports of States Parties, HRI/CORE/I/add.91, 12 January 1998.

<sup>17</sup> See Richard Edwards, *Reading down legislation under the Human Rights Act*, (2000) *Legal Studies*, 353-371.

<sup>18</sup> [1999] 2 S.C.R. 817.

<sup>19</sup> *U.S. v Burns*, [2001] 1 S.C.R. 283.

<sup>20</sup> Paragraph 80, quoting Chief Justice Dickson from his dissenting opinion in the *Public Service Employee Relations Act* case. The same passage is quoted again with approval in *Suresh v. Canada*, paragraph 46.

<sup>21</sup> Paragraph 91.



<sup>22</sup> Paragraph 83.

<sup>23</sup> January 11, 2002.

<sup>24</sup> From the summary or head note drafted by the Court itself.

<sup>25</sup> Paragraph 76. Paragraph 78 refers to “exceptional circumstances...”

<sup>26</sup> Paragraph 60.

<sup>27</sup> Note by the Secretary-General, Plan of Action to Strengthen the Implementation of the Convention on the Rights of the Child, Meeting of States Parties, 21 January 1999, CRC/SP/26.

<sup>28</sup> Paul Lewis, U.N. Adds Enforcement Mechanism to Treaty for Women, New York Times, March 21, 1999.

<sup>29</sup> Human Rights Committee, Summary Record of the Second part (Public) of the 1728<sup>th</sup> Meeting, CCPR/C/SR.1728/Add.1, paragraph 7.

<sup>30</sup> Recent views are available on the web site of the Office of the High Commissioner for Human Rights, <http://www.unhchr.ch>. For access to documents see also the web side of “For the Record” compiled by Human Rights Internet for the Canadian Department of Foreign Affairs and International Trade: <http://www.hri.ca/fortherecord1998>.

<sup>31</sup> For an assessment of the various treaty bodies see Philip Alston, James Crawford, the Future of UN Human Rights Treaty Monitoring, Cambridge, 2000, 563 pp.

<sup>32</sup> A listing of major areas of training conducted under the technical cooperation programme of the office of the High Commissioner for Human Rights is included in Report of the Secretariat to the Tenth Meeting of Persons Chairing the Human Rights Treaty Bodies, HRI/MC/1998/4. 7 September 1998.

<sup>33</sup> NGO participation in activities of the Committee on Economic, Social and Cultural Rights, E/C.12/1993/WP.14, 12 May 1993.

<sup>34</sup> Summary Record, Committee on Economic, Social and Cultural Rights, Meeting of 17 May, 1993, E/C.12/1993/SR.5, 25 May 1993, paragraph 88.

<sup>35</sup> E/C.12/1993/5.

<sup>36</sup> Geoffrey York, UN body chastises Canada on poverty, Globe and Mail, Saturday, May 29, 1993, page 1.

<sup>37</sup> Summary record of the 26<sup>th</sup> Meeting, Committee on Economic, Social and Cultural Rights, 24 November 1993, E/C.12/1993/SR.26, 26 November 1993.

<sup>38</sup> Paragraph 63.

<sup>39</sup> Paragraph 65.

<sup>40</sup> Michael Valpy, Canada is rapped at the UN, *Globe and Mail*, Thursday, May 11, 1995.

<sup>41</sup> Kevin Griffin, Anti-poverty groups plan complaint to UN, *Vancouver Sun*, Friday, April 28, 1995, page B2.

<sup>42</sup> Report of the Twelfth and Thirteenth Sessions, Committee on Economic, Social and Cultural Rights, 1996.

<sup>43</sup> Helen Branswell, Canada asked to defend its reputation: Embarrassing questions raised about child poverty, conditions on reserves, *Globe and Mail* (Toronto) Friday, November 27, 1998, A14.

<sup>44</sup> Nadene Rehnby, Canada Fails in Commitments to Women, *The Democrat* (newspaper of the British Columbia New Democratic Party), February, 1999, 8.

<sup>45</sup> It was filed by Professor Noel Kinsella, Chair of the New Brunswick Human Rights Commission and now a member of the Canadian Senate, but acting in his personal capacity on behalf of Sandra Lovelace.

<sup>46</sup> Other benefits were associated with Indian status, but they did not have a basis in the *Indian Act*. Various federal programs, including funding for post-secondary education, was provided to individuals with Indian status under the *Indian Act*.

<sup>47</sup> There are a number of ironies in this story. A claim to housing, a claim that properly should have been pressed under the *Covenant on Economic, Social and Cultural Rights*, became a claim to cultural rights. The decision of the Committee supported Sandra Lovelace's right to live in the community. In fact, she had been living in the community since her marriage ended. By the time the case proceeded to the issuance of "views," Sandra Lovelace had in fact regained Indian status. She had married a man from the reserve who had Indian status.

<sup>48</sup> *Kitok v Sweden*, communication No. 197/1985, CCPR/C/33/D/197/1985, 10 August 1988.

<sup>49</sup> They argued that it was not a minority rights provision because it protects "individuals" who are members of minorities, without giving recognition or standing to the minority as a

collectivity. This view of section 27 was strongly argued to the writer by John Humphry, the secretary to the committee drafting the covenant.

<sup>50</sup> Communication No. 167/1984, CCPR/C/38/D/167/1984, 28 March 1990.

<sup>51</sup> The Australian submission is CERD/C/347, 22 January 1999.

<sup>52</sup> Margo Kingston, Howard's Wik bill is racist, United Nations, Sydney Morning Herald, Saturday, March 20, 1999, page 1. This story is reproduced at length, for it illustrates the interaction of international standards and domestic law. First, the fact that Australia had signed the *International Convention on the Elimination of All Forms of Racial Discrimination* was held by the Australian High Court in the *Koowarta* case to justify the application of the national *Racial Discrimination Act* to both the national and state levels. That holding invalidated land laws which discriminated against Aboriginal people in the state of Queensland. Second, the Australian High Court ruled in the *Mabo* case that one effect of the *Racial Discrimination Act* was to prevent the taking without compensation of traditional Aboriginal lands. The subsequent *Wik* case held that Aboriginal title rights could survive in situations where pastoral leases had been granted, leading to the "Wik bill" amending the *Native Title Act*. Third, the domestic debate on the *Wik* amendments involved discussions whether the amendments violated the *Convention on the Elimination of All Forms of Racial Discrimination*. Fourth, after the government proceeded with the amendments stating that they did not offend the Convention, that issue was considered by the Committee on the Elimination of Racial Discrimination. Given the history of these issues in Australia, no one should have been surprised by the fact that the Committee considered the issues seriously.

<sup>53</sup> AFP, Australia may veto UN visits, Bangkok Post, 30 August, 2000, 1.

<sup>54</sup> Mark Riley, Mark Metherell, PM backed 'flawed' UN pact, Sydney Morning Herald, September, 5, 2000.

<sup>55</sup> Michelle Grattan, Howard set to explain criticisms to UN chief, Sydney Morning Herald, September, 4, 2000.

<sup>56</sup> Barbara Crossette, Australian action reopens dispute on human rights monitors, New York Times, 21 August, 2000.

<sup>57</sup> Jere Longman, New York Times, September 7, 2000, C25.

<sup>58</sup> Erin Anderssen, Manitoba Metis take foster-care protest to UN, Globe and Mail, Monday, April 5, 1999, A7.

<sup>59</sup> Stephanie Nolen, *Globe and Mail*, Saturday, March 27, 1999, D-1.

<sup>60</sup> There are a number of Metis rights cases in Canadian courts at the time of writing, but no decisions from the Supreme Court of Canada.



# IMPLEMENTING INTERNATIONAL HUMAN RIGHTS TREATIES: CHINA

By Peter Burns, Q.C.\*

Of the many international human rights treaties in force today, those sponsored by the United Nations Organization are the most significant in terms of universal adoption, if not universal compliance. China's recent signing and proposed ratification of the Conventions comprising that part of the "International Bill of Human Rights"<sup>1</sup> is of great importance to both the international community and China itself. The two Conventions comprising that part of the International Bill of Rights and the *Convention Against Torture*,<sup>2</sup> which China has already ratified, draws that country closer to the mainstream of conformity to a human rights based system of law.

This conference is concerned to examine the matter of implementation when a state ratifies such treaties. Of course, in the case of China, although ratification creates international legal obligations, treaties require endorsement by resolution of the People's Congress before they can be technically regarded as incorporated into domestic law.

Implementation of the Human Rights Treaties will involve both international and domestic action on the part of China. Internationally, there are certain reporting obligations and the need to involve itself in the election of the respective Committees that oversee their implementation at that level. But it is the domestic implementation that is most crucial and most elusive of the obligations. I propose to examine in this regard two treaties, one that China has ratified for some time – the 1984 *Convention Against Torture* – and the other which China has not yet ratified – the 1998 *Rome Statute of the International Criminal Court* ("Rome Statute").

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The treaty creating the *Rome Statute* is a true human rights treaty that intersects with international criminal law and humanitarian law.

## THE CONVENTION AGAINST TORTURE 1984<sup>3</sup>

In ratifying this *Convention*, China reserved on Article 20 and did not declare in favour of adopting Article 22. Therefore, the investigation jurisdiction of the Committee Against Torture (Art.20) and the right to individual communication (Art. 22) do not at this stage bear on the implementation of the *Convention*.

The Committee Against Torture (“the Committee”) is created pursuant to Article 17. It is the monitoring body that attempts to ensure that States party to the *Convention* observe its obligations. Under Article 19, State Parties must report to the Committee within a year of notification and then once every four years. The initial report should extensively describe the way in which the State Party meets the requirements of the *Convention* and subsequent reports should *inter alia* describe any changes that have occurred since the earlier report.

Generally, the *Convention* imposes the obligation upon a state party to take “effective legislative, administrative, judicial and other measures to prevent torture, as defined in Art. 1(i) from occurring in its territory.”

The Committee has expressed the view that full implementation of the *Convention* requires a State Party to enact a domestic crime of torture in terms consistent with the definition contained in Article 1. This is because there is a qualitative difference between torture and the usual classes of assault and homicide found in state criminal codes. But there is an even more compelling reason. A state must report to the Committee the steps taken to eradicate torture including sanctions imposed upon officials who may have participated in it. Unless there is a distinct crime of torture in a state’s criminal code, the administrative capacity to report in this respect is lacking. Article 2 prohibits “necessity” (including war or internal political instability) and “superior orders” from being raised as justification for torture.

Article 3 is becoming increasingly important to the work of the Committee. Under it “no state party shall expel, return (“*refouler*”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This provision is probably of little concern to China so long as it fails to declare in favour of Article 22 since virtually all the cases drawn to the Committee’s attention have been brought before it by this procedure. But, the obligation in Article 3 is a general one and a State Party should in its reports advise the Committee what procedure it has put in place to comply with it.

The obligations of Article 5 go to the matter of criminal jurisdiction. It requires a State Party to establish such jurisdiction on a territorial basis (including ships and aircraft) and a nationality basis (both active and passive).

As well, a universal jurisdiction must be established over alleged torturers who are present in a State Party's territory and where, for whatever reason, the State Party declines to extradite them to a requesting state to stand trial for that crime.<sup>4</sup> In such a case, the State Party would be obliged to initiate a regular criminal investigation with a view to prosecution before its own courts.

It should be noted that a state, having established its jurisdiction, may choose not to assert it. This is implicit in Article 6(4) of the *Convention*, but it is also clear that such jurisdiction will be exercised if a State Party decides not to extradite an accused person. This obligation is set out in Article 7. This does not mean that such an accused must be prosecuted, but that the case must be investigated and dealt with in the ordinary way by the authorities of the state party.

The crimes of torture, aiding and abetting torture, and attempted torture (*Quaere*: conspiracy to torture?) are deemed by Article 8 to be extraditable offences in any extradition treaties existing between States Parties, and Article 9 requires such states to co-operate fully with one another *vis-a-vis* any prosecutions related to such offences.

Article 10 of the *Convention Against Torture* is one that imposes enormous obligations upon a State Party. Under it "education and information" regarding the prohibition of torture must constitute an integral part of the training of civil and military personnel in charge of law enforcement, of medical personnel, of public officials and of other persons involved in the custody, interrogation or treatment of arrested, detained or imprisoned persons in the state [concerned].

China is a complex society with a variety of bureaucratic structures that will be affected by Article 10. It requires a large number of state departments to educate and re-educate personnel and then monitor the way in which personnel behave in that regard. This imposes a huge burden in terms of resources upon all States Parties, but it is a burden that must be met if the *Convention* is to be effected. The process itself may take many years to achieve its goals, it may cause adverse political and workplace responses along the way, but it must occur. It is the implementation of this provision together with Article 11 that truly measures a State Party's will to comport to the values and duties contained in the *Convention*.

Article 11 obliges States Parties to supervise and review their methods of interrogation as well as the way in which people are held in custody, detention or imprisonment. The state's competent authorities must ensure that a prompt and impartial investigation of complaints of torture is made (Article 12), and that individuals' complaints are dealt with seriously (Article 13). They must also ensure that witnesses and the complainant are neither intimidated nor ill-treated (Article 14).



In China, it also means that the system of “fanren guanli fanren,” whereby “cell bosses” participate in the administration of provisions by assisting cadres to [control] prisoners and [punish] the recalcitrant should be reviewed, with a view to its abolition.<sup>5</sup>

The obligation, contained in Article 13, to provide adequate redress and compensation for persons tortured is a far-reaching one. It may involve medical and social rehabilitation of the victim as well as compensation for the injuries sustained. It is usually insufficient to make provision for the victim to merely have the right to sue the torturer, unless the state recognizes that it is vicariously responsible for the acts of such functionary.

One of the most important provisions of the *Convention* is Article 16 which prohibits cruel, inhuman, or degrading treatment or punishment. In China, this requirement will need resource allocation to the penal system and may even involve changing the circumstances in which capital punishment is carried out.

## THE INTERNATIONAL CRIMINAL COURT

At a diplomatic conference of Plenipotentiaries held in Rome the Statute of the International Criminal Court was adopted on 17 July 1998. The statute itself will come into effect 60 days after the 60<sup>th</sup> ratification has been deposited with the Secretary General of the U.N.O.<sup>6</sup> To date, there are more than 75 signatories and one ratification (Senegal). Of the 5 permanent members of the Security Council, three have not signed the treaty creating the International Criminal Court – China, Russia, and the United States.

This treaty is at root concerned with human rights. It assumes jurisdiction over some of the most egregious breaches of human rights (war crimes, crimes against humanity, genocide – and perhaps the crime of aggression), asserts individual responsibility for such crimes, and sets out the institutional framework for vindicating those rights.

Why then would countries such as China and the United States not subscribe to such a treaty at present, and is there any prospect for change in the future?

China participated in the Preparatory Conferences leading up to Rome and had developed some concerns towards the evolving Statute. At the 52<sup>nd</sup> Session of the General Assembly, Sixth Committee, the Chinese delegate expressed the view that only those crimes recognized as international crimes by international customary law should be adopted for the Statute.<sup>7</sup> This would preclude the crime of aggression in the absence of a generally accepted definition, but extend to war crimes, crimes against humanity and genocide.

China has also expressed concern that the trigger mechanisms and the inherent jurisdiction of the proposed International Criminal Court do not give real effect to the doctrine of complemen-

tarity, whereby the Court is a supplement to and not a replacement of its domestic counterparts.<sup>8</sup> Given the clear provisions to this effect, particularly in Article 17, it is difficult to see how this argument can be supported.

The subject-matter covered by the jurisdiction of the International Criminal Court goes to the heart of human rights protection. Genocide and war crimes are obvious illustrations, and crimes against humanity extend, *inter alia*, to murder, extermination, enslavement, torture, and rape of a civilian population on a widespread or systematic basis. Putting the proposed crime of aggression aside, these are acts of such atrocity that they are unbounded by temporal or cultural considerations. Why then the reluctance of three of the modern super powers to ratify and effect the *Convention* setting up the International Criminal Court?

Apart from matters of principle, there must be a real concern that their national interest may be impaired by the intrusion of the court's jurisdiction. Given the trigger mechanism in Article 13 this is probably an exaggerated fear. But the concern that the system may degenerate into a form of human rights "ombudsman" clearly underlies much of the reluctance of states like China and the United States to sign and ratify the treaty setting up the International Criminal Court.

If China were to ratify the treaty creating the court, implementation would be heavily educational and re-educational. The armed forces and the police at every level would have to understand their obligations with regard to the defined crimes. As well, military prosecutors and courts in particular would require additional resources to give effect to the doctrine of complementarity.<sup>9</sup>

## GENERAL MATTERS OF APPLICATION

To this point I have concentrated on issues that will be thrown up in China applying the specific treaties that I selected, the 1984 *Convention Against Torture* and the 1998 *Statute of the International Criminal Court*. But all the Human Rights Treaties raise general matters of implementation as well. These include:

### **Structural Compliance**

Human Rights Treaties very often require a State Party to change its domestic laws and practices to conform to the obligations contained in them. This may mean enacting or amending domestic legislation, altering administrative and executive practices, or changing the effect of judicial decisions.

## Education and Re-education

Very often Human Rights Treaties contain norms and standards that are absent or contrary to those observed by domestic functionaries. This imposes a primary obligation upon State Parties to ensure that officials involved in the field of implementation are intellectually and professionally prepared for it. The most difficult task is to modify the behaviour of those already in the field. Hopefully, this can be achieved by persuading them by re-education of the moral desirability of observing the new standards of behaviour. But where this cannot be done effectively powerful sanctions may have to be resorted to. These may range from matters of loss of promotion opportunities (or actual demotion or transfer) to penal sanctions in extreme cases.

As well, a concentrated effort should be made to sensitize the *whole population* to the values in the Human Rights Treaties. Schools, colleges and universities should reflect in the content of their curricula the values that underpin the treaties.

## Resources

It is a given that the internal structural shifts and any sea-change in a society's basic value-system is going to be associated with considerable costs. This means that a state will have to prioritise its reform needs and act upon the most urgent as a matter of necessity. Since no state has unlimited resources, it probably means that no state has the capacity to meet all the obligations of these treaties at the outset.

But over time a focussed and properly funded reform programme could substantially achieve the treaties' objectives.

## Political Will

Human Rights Treaties are usually (and some like the *Convention Against Torture* are exclusively) concerned with the conduct of state agents *vis-à-vis* individuals and collectivities. Bureaucrats, and particularly police, prison and armed forces personnel, are by their own culture prone to follow not only the orders but also the perceived or intuited objectives of their supervisors and superiors.

It is crucial to the success of the Human Rights Treaties' implementation anywhere that the line officers understand that the managers and executive of the state organ concerned are committed to the values contained in them and to ensuring their enforcement.

In a country like China, which is vast in size but has a centralized government system, it means that Beijing must by clear direction advise all national and provincial institutions of its commitment to the treaties that it has ratified. It also means that the PLA command, and the Executives of the

police, prison and other relevant agencies must also issue clear directives to their personnel to like effect. Conduct in breach of the treaties' obligations must be swiftly and effectively dealt with.

If this clear message "from the top" is not forthcoming, bureaucratic and military behaviour is likely to stay fixed in its pre-Human Rights Treaties practices.

### **China's Role in the International Community**

Over the past 15 years or so China has become a more powerful voice in international affairs. Apart from being a permanent member of the Security Council, it is a nuclear power and has enormous capacity in its armed forces. As well, it is a prominent participant in all United Nations activities and is represented in most of its crucial organs and institutions.

In recent years, the point of political friction with powerful international voices, largely from the West, is in the context of human rights. By ratifying *and implementing* the International Human Rights Treaties, China would be in a virtually unassailable moral position on the world stage. Its international political authority would be undeniable. But by not ratifying all of these treaties or by not fully implementing those that it has ratified, China will find itself disadvantaged in its relations with other states and in international fora.

### **The Role of Non-Governmental Organizations**

One of the most problematic questions for China in the implementation of the Human Rights Treaties is the role of Non-Governmental Organizations (NGOs). Much of the impetus for human rights based reform in international relations has originated out of the agendas and work of these bodies, such as Amnesty International and Asia Watch.

NGOs act as a spur to government action, including compliance with treaty obligations, by attracting media attention and sometimes even participating in the formal legal process. As well, they provide treaty monitoring bodies with relevant information when those bodies are considering state reports. In short, they are an integral part of the process of oversight and enforcement of such treaty obligations and their political influence throughout the world cannot be ignored.

The NGO tradition in China is not so deeply imbedded in the traditions of politics and culture as they are in the West. But even in the West the modern expression of the NGOs is essentially a post-World War II phenomenon. China will probably have to come to terms with their activities at home as well as abroad. If it is able to do so it will learn that the resources and commitment of the NGO community can be greatly enabling and not only a political nuisance.

No government enjoys criticism from any source, but particularly not from those perceived to be professional critics. But NGOs tend to attract young, energetic, idealistic and creative members who, in all likelihood, would prefer to assist in implementing the terms of Human Rights Treaties rather than to be forced to provoke their own government into doing so. If China can harness the energy and co-operation of domestic NGO groups its own task in implementation will be that much easier to accomplish.

## NOTES

<sup>1</sup> *International Covenant on Civil and Political Rights*, 1966; and *International Covenant on Economic, Social and Cultural Rights*, 1966.

<sup>2</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984. China has also acceded to the *Convention on the Prevention and Punishment of the Crime of Genocide* 1948, and the *Convention on the Elimination of all Forms of Discrimination Against Women* 1979.

<sup>3</sup> For an account of how states party to the *Convention Against Torture* can satisfy their general reporting obligations under the Treaty, see Voyame and Burns, "The Convention Against Torture and Other Cruel, Inhuman on Degrading Treatment or Punishment," in the *United Nations Manual on Human Rights Reporting*, Geneva, 1997, HR/Pub/91/1 (Rev. 1).

<sup>4</sup> The Universal jurisdiction of a State Party in this regard pursuant to the *Convention Against Torture*, was recognized by the majority of the House of Lords in the Pinochet case *R. v. Bartle and the Commissioner of Police for the Metropolis et al. Ex Parte Pinochet*, dated 24<sup>th</sup> March 1999 (unreported to date).

<sup>5</sup> See Seymour and Anderson, *New Ghosts Old Ghosts – Prisons and Labour Reform Camps in China*, M.E. Sharpe, New York, at 80-81.

<sup>6</sup> Article 126.

<sup>7</sup> Statement by Mr. Duan Jielong, 21<sup>st</sup> October, 1997; Gopher://gopher.igc.apc...iccc/natldocs/52GA/china.

<sup>8</sup> *Ibid.*

<sup>9</sup> Which places the primary jurisdiction over the crimes referred to in the Statute in the domestic courts.

# THE RECOGNITION OF UNIVERSAL STANDARDS

By Dr. Vincent C. Yang\*

## A RESULT OF SINO-CANADIAN COOPERATION

The publication of *A Study on Issues in Ratifying and Implementing the International Covenant on Civil and Political Rights* is a result of cooperation between the Research Centre for Criminal Law and Justice at China University of Political Science and Law in Beijing, China, and the International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver, Canada. On behalf of my Canadian colleagues, I congratulate the Chinese co-editors, Professors Chen Guangzhong and Cheng Weiqiu, and the Chinese researchers for the successful completion of this project activity in 2002. The Canadian International Development Agency (CIDA) is acknowledged for its funding support to the China-Canada Project on the Ratification and Implementation of International Human Rights Covenants, which has led to the publication of this book

The English Preface starts with an introduction to the two Centres and the Project on the ratification of the *International Covenant on Civil and Political Rights (ICCPR)*. Although ratification of the *Covenant* by China may still take some time, the on-going preparation is already a positive sign of real progress in the right direction. The active preparation *per se* is a process of recognizing the *ICCPR* as a code of universal standards. It requires the reform of the law and practice in light of the standards. The second part of the English Preface provides a review of the

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legal issues relating to the ratification of the *ICCPR*. These issues are discussed in more detail in the 39 Chinese essays and 4 Canadian papers in the book. To address these issues, the Research Centre in collaboration with the Research Branch of the China Law Society also proposed their Recommendations in this book. To assess the importance of these recommendations, the Preface then presents a three-tier discussion of the universality of the *ICCPR* standards, touching on cultural relativism and some of the broader issues.

The Research Centre in Beijing is a high-profile independent institute for the reform of the criminal process in China. The Research Centre consists of some of China's best thinkers of the science of criminal procedure and senior experts from top institutions of the justice system. Its Chairman, Professor Chen Guangzhong, is also President of the Research Society of Procedural Law of China, which is a national umbrella association of almost all of the senior Chinese scholars and experts in the field. The other co-editor of the book, Professor Cheng Weiqiu, served the United Nations Committee on Crime Prevention and Control as its member during 1987-1993. Aside from the work of promoting domestic legislative reform and academic research, the Research Centre has engaged in various projects of cooperation with institutions in several western countries, including Canada, the United Kingdom, the United States and Germany. In this book, the Recommendations on the ratification of the *ICCPR* were prepared by distinguished Chinese scholars.

The Vancouver-based International Centre is a member of the United Nations Crime Prevention and Criminal Justice Network Institutes. Its current Director, Frances Gordon, and former Director, Daniel Prefontaine, Q.C., both graciously contributed to the Project and to this publication, with the help of an excellent researcher at the Centre, Eileen Skinnider. Elizabeth Eid of the Department of Justice of Canada is acknowledged for her contribution to the book. Since 1995, I have had the pleasure of serving the Centre as its Director of China Program and Senior Researcher. The Program aims at promoting a constructive relationship between China and the international community in criminal justice. It consists of Canada's first ground-breaking projects to work with China in criminal justice and law reform, including projects to support the reform of procedural and substantive criminal law, training of prosecutors, correctional reform, legislative development for legal aid, prevention of financial crime and research on the ratification of human rights covenants.<sup>1</sup>

The Chinese nation has over eight thousand years of history of civilization and enjoys a marvellous tradition of remaining humble and learning hard from others. Canada is a peace-loving country that promotes and cherishes democracy and freedoms under the rule of law. The exchange of ideas on the ratification and implementation of the international human rights covenants is a new area for cooperation between the two countries. In this field, the two Centres have undoubtedly built an important bridge for our nations.

In 1998, as a result of a three-year joint research project, the two Centres accomplished their first major publication in this field, *The United Nations Standards and China's Legal System of Criminal Justice*.<sup>2</sup>

In October 1999, hosted by the International Centre, Prof. Chen led a team of experts to meet with senior Canadian officials and experts during a visit to Canada. This was the first Chinese study tour to a foreign country specifically for research on the ratification of human rights covenants.

The China-Canada Project for the Ratification and Implementation of the International Human Rights Covenants in China was officially launched in January 2000. Later, the two Centres published their *Compendium of United Nations Documents on Human Rights and Criminal Justice*.<sup>3</sup> In December 2000, at the invitation of the Research Centre, Professor Douglas Sanders of the University of British Columbia and I joined Professor Chen and his colleagues at a Symposium on the United Nations Human Rights Covenants in Beijing. The Chinese and Canadian experts then together delivered a series of lectures to hundreds of officials and law students in Beijing and Hainan Province.

In summer 2001, invited by the International Centre, Professor Chen and six other senior Chinese scholars and justice officials visited Canada for a series of consultations with Canadian officials and experts regarding the ratification of the *ICCPR*. In October 2001, Frances Gordon, Daniel Prefontaine, Elisabeth Eid and I presented four papers at the Conference on the Ratification and Implementation of International Human Rights Covenants, a major event organized by the Research Centre in Beijing. This book has included some of the Chinese and Canadian papers that were presented at the Conference.

## LEGAL ISSUES ON RATIFICATION

The signing of both the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *International Covenant on Civil and Political Rights (ICCPR)* by the Government of China in 1997 and 1998 respectively was a historical landmark in the transition to the rule of law in the People's Republic. With the approval of the *ICESCR* by the National People's Congress of China in February 2001, and after China's entry into the WTO on December 11, 2001, the ratification of the *ICCPR* has become a more foreseeable development in the near future. Preparing the ratification of the *ICCPR* requires comprehensive assessment and adjustment of the Chinese laws according to the *ICCPR* standards.

This is the objective of the Research Centre and the Research Branch of the China Law Society in jointly preparing the Recommendations. In their Recommendations, they indicate



that, overall, the legal system in China has no difficulty in recognizing the *ICCPR* standards, although reform must proceed to make the domestic laws more compatible with the standards. The scholars recommend that China should have the least number of reservations. They urge the government to avoid any delay in preparing the ratification and to immediately ratify the *Covenant* when it is ready to do so.

We should fully appreciate the progress. The *Covenant* must be studied in the context of the broader system of international human rights law, which is a result of decades of development in human rights standards setting and implementation. The past decades have seen a four-phase evolution of these human rights standards in the United Nations: a preliminary stage of development leading to the adoption of the *Universal Declaration of Human Rights* in 1948, a following-up stage of treaty preparation leading to the passage of the *ICCPR* and the *ICESCR* in 1966, systematic effort in setting a broad range of more detailed standards and guidelines from 1966 to the end of the Cold War in the early 1990s, and then the present phase of focusing on implementation and improvement. The active participation of the People's Republic of China in this process did not start until the mid-1980s. It is encouraging that China has made so much progress in improving its legal environment during the past two decades.

The *ICCPR* legal principles are mostly elaborated in these United Nations instruments of criminal justice:

- 1) Those that provide standards regarding the treatment of prisoners, non-custodial measures, and treatment of female and juvenile offenders.<sup>4</sup>
- 2) Those that provide principles regarding the limits and use of punishment, especially in relation to the abolition or limitation of the death penalty and the prohibition of extra-legal punishment.<sup>5</sup>
- 3) Those that provide principles regarding the roles of law enforcement agencies and other organs of the justice system as well as regarding the status and conduct of police officers, judges, prosecutors, and lawyers.<sup>6</sup>
- 4) Those that provide standards on the protection of victims' rights against crime and the abuse of power, including the principles to reduce domestic violence, prevent the use of torture and protect women and children.<sup>7</sup>
- 5) Those that provide substantive definitions and procedural rules on combating international crimes.<sup>8</sup>

- 6) Those that provide principles for international co-operation in combating transnational crime, especially transnational organized crime, terrorism, corruption and drug crimes.<sup>9</sup>

For the purpose of preparing the ratification of the *ICCPR* and the corresponding law reforms in China, these instruments need to be studied together with the *Covenant*.

In implementing the *ICCPR* standards, criminal justice is an area of great potential for improvement in China. From the 1990s to date, China succeeded in making a series of important changes to its criminal law, the law of criminal procedure, and the laws governing the judiciary, the prosecutors, the police and the legal profession. These changes include a partial recognition of the presumption of innocence, an enhanced concept of judicial independence, some redefined roles of the prosecutors, new limits on police power in law, the new right to legal aid, growing independence of the legal profession, enhanced professional qualifications of judges and prosecutors, recognition of the right to defence in pre-trial detention, provision of legality in substantive criminal law, abolition of retroactive application of the criminal law, and so on.<sup>10</sup> The reform of the law, which is still ongoing, has greatly reduced the distance between the Chinese criminal law and the *ICCPR* standards. However, important issues still need to be addressed through continuing reform of the Chinese law and the system of criminal justice. To prepare for the entry to the *ICCPR*, the reformers need to examine the remaining differences and see what can be done to reduce them.

The Recommendations have identified some of the remaining problems and proposed changes. In the order of the *ICCPR* Articles, this author joins his colleagues in China in commenting on the following issues:

- i) The limits on the use of the death penalty. Article 6 of the *ICCPR* provides the right to life. Paragraph 1 of the Article prohibits arbitrary deprivation of life. Paragraph 2 provides that, in countries that have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes. Paragraph 4 stipulates that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. According to the Human Rights Committee, the prohibition of arbitrary deprivation of life requires that the law must strictly control and limit the scope of death penalty.<sup>11</sup> The present Chinese *Criminal Law* apparently has difficulties coping with this standard. The Law contains a large number of provisions of offences that carry the death penalty, and many of the offences are non-violent offences. It is desirable to reduce the number of capital offences, so that death can only be used in punishing the most serious violent crimes. The procedural safeguards of the accused person's rights in a case of death

sentence need to be strengthened and guaranteed. Such safeguards should include the provision of an effective counsel to the accused person and adequate time to prepare a defence. Further, the Law should allow the use of pardon or commutation of the sentence.

- 2) The prevention of torture. Article 7 of the *ICCPR* states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This, in conjunction with other human rights instruments, including the *Convention against Torture*, requires Member States to take effective measures in preventing the use of any type of torture, whether or not it has caused death or bodily harm. In China, although great effort has been made to prevent torture, more effective measures may need to be introduced to reduce torture, such as the introduction of a rule to exclude all evidence obtained by torture, effective access to the defence lawyer by the accused person, expanded investigation and prosecution of the torturers, and better police training for the prevention of torture.
- 3) Prohibition of forced labour. The existing system of labour re-education, which is defined as a non-criminal measure of compulsory education, is in direct conflict with Article 8 of the *ICCPR*. This system is also problematic under several other *ICCPR* provisions and may have to be changed or abolished.
- 4) The prohibition of arbitrary arrest and detention. Several administrative or “educative” compulsory measures under the current system in China need to be examined in the light of Article 9(1) of the *ICCPR* and other relevant international instruments.<sup>12</sup> These measures include labour re-education, compulsory employment at the expiration of a jail sentence, and detention “at designated time and designated location” for the investigation of corruption of a Communist Party official.
- 5) The right to be brought promptly before a judge or other officer authorized by law to exercise judicial power. The Chinese law may need to be revised to guarantee this right, as it is required under Article 9(3) of the *ICCPR*.
- 6) The right to apply for bail. An amendment to the Chinese law is desirable for the introduction of a system of bail in the criminal process, as it is required under Article 9(3) of the *ICCPR*.
- 7) *Habeas Corpus*. Article 9(4) requires that a detained person should be entitled to take proceedings before a court, so that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. An amendment may have to be made to introduce this system into the Chinese law.
- 8) The presumption of innocence. The Chinese *Law of Criminal Procedure* has partially recognized the presumption of innocence.<sup>13</sup> Also, conflicting interpretations have been

given to the meaning of this recognition. Therefore, it is necessary to amend the law in the light of Article 14(2), so that the law can give a clear and full recognition of the presumption of innocence.

- 9) The right to legal aid. Article 14(3) (d) requires legal aid as one of the minimum guarantees to everyone charged of a criminal offence in the trial of his case. Several countries including the United Kingdom have put a reservation on this provision.<sup>14</sup> Although legal aid is a new development in China, the law needs to expand the mandatory provision of criminal legal aid. Considering the scarcity of resources, the amendment to the law should at least make criminal legal aid available to all those who are financially eligible and have the likelihood of being sentenced to long-term imprisonment.
- 10) The freedom against self-incrimination. The Chinese law will need to have a new provision to fully incorporate the provision of Article 14(3) (g) of the *ICCPR* and directly recognize the right to remain silent.

Aside from these issues, the laws also need to be improved to enhance the recognition and protection of fundamental political rights and freedoms according to the *ICCPR* principles.

## THE UNIVERSALITY OF ICCPR STANDARDS

The introduction of changes to the legal system as discussed above is a recognition of the universal standards that are set forth in the *ICCPR* in conjunction with a large number of human rights standard-setting instruments.

According to the Centre for Human Rights of the United Nations, a total of over 100 standard-setting instruments that are essential in the present system of international human rights law were adopted before 1994, with only a few of them created prior to the founding of the United Nations in 1945.<sup>15</sup> Many of these instruments provide standards and norms in criminal law and criminal justice.<sup>16</sup>

In addition to international conventions that are usually categorized as instruments of international criminal law, the General Assembly and the Economic and Social Council of the United Nations have passed hundreds of resolutions and decisions on matters of criminal justice, including many declarations, model treaties, guidelines, and a vast number of various other documents.<sup>17</sup> Many of these resolutions and decisions promote the adoption and implementation of international human rights standards in criminal justice.<sup>18</sup>

To understand the nature and characteristic features of *ICCPR*, one needs to compare it with the relevant United Nations human rights instruments. This comparison has shown that:

- 1) The United Nations has seen many clashes in the evolution of its instruments on human rights. This reflects interactions and conflicts within the United Nations, geo-political relations, and interest and policies of the member States. Similarly, the *ICCPR* was a result of a long-time struggle within the United Nations in the Cold War era. It still has a great potential for improvement in the future.<sup>19</sup>
- 2) The United Nations instruments demonstrate a higher level of international consensus and applicability in comparison with those adopted by other international organizations. The vast majority of the countries in the world have signed and ratified the *ICCPR*, making its standards universally recognized.
- 3) The United Nations instruments vary, including international conventions, “soft laws,” model treaties and other instruments for the promotion of standards. Some instruments are binding, whereas others are morally persuasive or for the purpose of policy development.<sup>20</sup> In some countries, the *Universal Declaration* is considered a source of international customary law, whereas the *ICCPR* and the *ICESCR* are widely recognized as legally binding to all their member States.<sup>21</sup>
- 4) The United Nations instruments cover a broad range of subject matters, including various categories of human rights, such as economic, social and cultural rights, civil and political rights, the right of development, and so on. The *ICCPR* is the most important international treaty on civil and political rights. It provides for the basic rights in the legal process, including the minimum safeguards for human rights in criminal process. These rights transcend the political and cultural barriers between the various nations in the world.
- 5) The United Nations system of human rights instruments reflects a delicate balance between rights and obligations and places reasonable limitations on the exercise of rights. Unlike the *International Covenant on Economic, Social and Cultural Rights*, the *ICCPR* contains what Boutros Boutros-Ghali, former Secretary-General of the United Nations, called a “disabling clause,” which allows derogation but restrains their scope within the reasonable limit.<sup>22</sup>
- 6) The United Nations instruments are adopted for the universal respect and promotion of basic human rights. Their implementation primarily relies on the effort of the States. Like other major human rights treaties, the *ICCPR* is supported by a treaty-based international reporting and monitoring system. Unlike the *ICESCR*, however, the *ICCPR* is enhanced with the Optional

Protocols. One of Protocols has established a system of individual communications with the Human Rights Committee.

Under the General Assembly and the Economic and Social Council, two interrelated United Nations Programs are critical in creating and implementing these standards: one led by the Human Rights Commission with the human rights treaty committees, the other under the Commission of Crime Prevention and Criminal Justice. The Programs are interrelated in the area of criminal justice. In this area, the *ICCPR* serves as the cornerstone for the protection of human rights.

## THE MYTH OF ORIENTAL VALUES

In every sense, the ratification of the *ICCPR* will inevitably become a departure from cultural relativism. The common belief that the East and West cultures are fundamentally different in their notions of rights is widely shared by many in the world.<sup>23</sup> The assumption is that the Western notion of human rights emphasizes the rights of individuals and especially their civil and political rights, whereas the “Oriental” notion focuses on the rights of the collectives and particularly their economic, social and cultural rights as well as the right of development. This theory of cultural relativism appears to be groundless and misleading.

Boutros Boutros-Ghali wrote in his Introduction to an official publication, *United Nations and Human Rights (1945-1995)*:

Modern human rights law emerged at the end of the Second World War in response to the atrocities and massive violations of these rights witnessed during the conflict. In 1945, when the Charter of the United Nations was drafted in San Francisco, States laid the conceptual and legal foundations for the future development of international measures to protect human rights.<sup>24</sup>

Similarly, modern international standards and norms for the protection of human rights in criminal law and criminal justice also emerged after the end of the Second World War and the founding of the United Nations. Their evolution however was a very difficult process for many decades.

It is widely recognized that although the *United Nations Charter* includes no specific provision of human rights standards, the statement of “respect for human rights and for fundamental freedoms for all” and the mandate to promote the “universal respect” of these rights and freedoms did place this largest international organization in a legitimate and unique position to create human rights standards that would become universal to all its member States.<sup>25</sup> The

*United Nations Charter* was the first United Nations instrument to declare universal values of human rights, dignity, equality, justice and social progress.

The early history of the United Nations saw the opposite of the oriental myth. Evidence indicates that China acted very actively in promoting universalism, whereas the Western powers in fact joined the Soviet Union to oppose this concept in order to prevent international intervention into their internal affairs.

In a masterpiece of research on the evolution of international human rights, Paul G. Lauren recalls that during the pre-Charter time it was China that proposed that the United Nations should have the mandate to strive to secure social welfare and uphold the principle of equality of all States and all races. The Chinese representatives to the Dumbarton Oaks meeting in October 1944, according to Lauren, in fact raised the sole voice on international human rights, proposing that the new world organization should engage in such matters. The three “Great Powers” however firmly rejected this proposal, claiming that the new organization should refrain from intervention in the internal affairs of any state, and that it should be the responsibility of each State to respect the human rights and fundamental freedoms of all its people and to govern in accordance with the principles of humanity and justice. As a result, the draft Charter made by Britain, the United States and the Soviet Union mentioned nothing about humanity.<sup>26</sup> The debate continued from Dumbarton Oaks through to the San Francisco Conference in April 1945. Australia, New Zealand, India and many other countries voiced their support for adding international human rights for all people into the wording of the *Charter*. Facing mounting pressure from the majority of the States represented in San Francisco, the United States finally changed its position, resulting in the adoption of the *Charter* with the general statement of international human rights.<sup>27</sup>

Three years later, China again played an active role in supporting the passage of the *Universal Declaration of Human Rights*, at a time when China was in a civil war and the Nationalist regime was near to a total collapse in the mainland. The fact that China raised the sole voice in Dumbarton Oaks and welcomed the *Universal Declaration* indicates that it is groundless to presume that the Chinese culture in nature rejects international human rights values.

## THE EAST VS. THE WEST

The theory that socialist countries have a notion of human rights that is completely different from that of the capitalist west is a legacy of the Cold War.

Indeed, it is important to bear in mind the fact that the Cold War dominated international politics during 1945-1990. The shadow of the Cold War in peoples' minds is still an influential factor in the field of international human rights today.

During the first few years after its birth, the United Nations had less ideological difficulties in establishing its institutional framework, the principal organs and various specialized United Nations bodies. The United Nations also succeeded in adopting and reaffirming some of the less controversial humanistic standards through the trials of war criminals, the Geneva Conventions and several other instruments.<sup>28</sup> The most controversial task was indeed the preparation of the *Universal Declaration of Human Rights*.

The process of drafting the *Universal Declaration* saw geo-political and ideological clashes of profoundly different values and propositions with respect to international human rights. The concept of universal human rights was the issue of fierce debate in the United Nations and in many states, such the United States. The adoption of the *Universal Declaration* in 1948 was a great victory of universalism. Although at the time it was only a declaration of universal principles rather than a convention of law, its adoption loudly declared to the world that human rights were inherent, inalienable and universal, and that the recognition of human rights is the foundation of freedom, justice and peace in the world. As its Preamble states, the United Nations:

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society to secure their universal and effective recognition and observance ...

Among the rights that are defined as universal by the *Universal Declaration* are those often defined as basic rights and safeguards in criminal justice, including the right to life, liberty and security of person, the right against torture or cruel, inhuman or degrading treatment or punishment, the right to be equal before the law, the right to an effective remedy for violation of the fundamental rights, the right against arbitrary arrest and detention, the right to fair trial by an independent and impartial tribunal, the presumption of innocence, the right to defence, the principle of legality and so on.<sup>29</sup> The recognition of these rights in the *Declaration* as universal human rights was a historic development.

The Soviet bloc countries at the time refused to vote for the *Universal Declaration*, criticizing it for being too vague and possessing serious deficiencies.<sup>30</sup> In reality, as anyone with a basic knowledge of Soviet history can appreciate, the concept of universal human rights *per se* contradicts Stalinist theories of law, which dominated the jurisprudence of socialist countries for many decades.



As seen in China, the Stalinist attitude towards international human rights was influential during the 1950s. For political and ideological reasons, the new People's Republic had tremendous difficulties to recognize the basic concept of the rule of the law, let alone the *ICCPR* standards. Although China and the Soviet Union had a hostile relationship during the 1960s and 1970s, the Soviet influence remained seen in Chinese jurisprudence even during the 1980s, when "universal human rights" was condemned as a misleading Western concept. The first public event to promote the *Universal Declaration of Human Rights* in China was not held until 1988.

The ideological labels were to prevent the intrusion of Western ideas. The *ICCPR* standards and their proliferation in the various United Nations criminal justice instruments were developed on what Bassiouni called "a vision of world order which sought to transcend political and ideological barriers."<sup>31</sup> However, many of the standards are based on principles and concepts that were *originally Western* in the sense that, in legal history, they were first entrenched in Western laws, or first conceptualised and articulated by Western jurists in modern terminology, although some of the ideas might also be found in ancient non-western writings. To list a few of the "originally-Western" concepts, one might mention the rule of law, due process, judicial independence, presumption of innocence, and so forth. In the pre-reform era and the early post-Mao years, these concepts were labelled as something belonging to the capitalist West only and not acceptable in a socialist country.

For many decades after the adoption of the *Universal Declaration*, and especially following the passage of the *ICCPR*, the United Nations launched various programs to formulate international standards and norms in criminal law and justice and to promote their recognition and implementation.<sup>32</sup> But the recognition of these standards and norms in China was not an easy process. During 1949-1978, China only ratified a few international conventions regarding war crimes and racial discrimination. From 1978 to the late 1980s, many were confused seeing that China, on the one hand, started to participate in and even actively contributed to many relevant United Nations human rights activities, but on the other hand, continued to condemn concepts that were similar to *ICCPR* standards in legal science.<sup>33</sup> For example, China made important contributions to the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules).<sup>34</sup> This was probably the first document whereby China recognized the presumption of innocence. However, in the 1980s, presumption of innocence was at least twice officially labelled as a bourgeois principle.

The ideological labels gradually faded away during the 1990s after the Chinese government announced that human rights should no longer be "a patent of the capitalist class" and published White Papers on human rights.<sup>35</sup>

Now many in China would have no difficulty in agreeing that although the concepts of human rights were originally Western, they have become the *ICCPR* standards and should apply

universally to the entire world. In the meantime, China has also seen that non-western countries have played increasingly important roles in the various United Nations human rights and criminal justice programs.

## THE ISSUE OF INTERNAL AFFAIRS

Ratifying the *ICCPR* will make China subject to more international monitoring of its human rights situation.

External intervention in human rights related “internal affairs” has always been a concern to many governments, including those of the world powers.<sup>36</sup> Like many other developing countries, China is particularly concerned with the danger of western interference in its human rights affairs. “Despite its international aspect,” a white paper of the government contends, “the issue of human rights falls by and large within the sovereignty of each country.”<sup>37</sup> Some scholastic publications also hold that human rights are “in essence matters of domestic jurisdiction” and that the handling of these matters must follow the principle of non-intervention in domestic affairs.<sup>38</sup> Accordingly, questions concerning the treatment of prisoners, crimes with political motives, pre-trial detention and capital punishment are usually regarded as purely domestic in nature.<sup>39</sup>

State sovereignty is considered as the highest principle of China in dealing with international relations. This proposition reflects China’s history of dismemberment, oppression and humiliation at the hands of alien powers for over a century. It is worth noting that, before 1949, foreign powers had abused China for more than a hundred years.<sup>40</sup> Western powers, the United States in particular, are also condemned for their “human rights diplomacy” that uses human rights for the purpose of soliciting political changes to the current Chinese government.<sup>41</sup>

To many Chinese observers, the danger from the United States is not just a perception. Western pressure on human rights was instrumental to the collapse of the Soviet Union. For many years, the United States has also apparently applied double standards on China and on its allies, such as Israel and Saudi Arabia in the Middle East and some of the South American countries.

However, outside pressure may still be helpful to the reform of the law in a country, and the West can no longer dominate the United Nations agenda in the field of human rights. With respect to the *ICCPR*, the basic fact is that the vast majority of the States in the world have entered this treaty, and all the signatories are equally subject to the reporting and monitoring system that operates for its implementation. It is important to acknowledge that, as some Chinese scholars have agreed, the *ICCPR* reporting and monitoring mechanisms is simply a standard

practice in the field of international human rights.<sup>42</sup> This system is often criticized for being ineffective. It does not target a particular State.

By entering the *ICCPR*, a State is voluntarily making itself subject to a certain level of international intervention. However, history has shown that the existing *ICCPR* mechanisms can hardly allow any real intervention aside from creating a modest level of moral pressure on a State. This is particularly the case when the State is not a signatory to the *Optional Protocol of the Covenant*. In current Chinese discussion of the *ICCPR*, there has been no indication that China will soon be signing the *Optional Protocol*.

In general, international human rights standards are not imposed upon the States. Rather, they are recognised, accepted, adapted, and implemented by the sovereign States. Since the early 1990s, the United Nations has said to shift its work in the area of criminal justice from the promulgation of standards to their implementation. As Roger S. Clark has observed, in the language of the United Nations, *implementation* primarily consists of two elements: encouraging the sovereign Member States to apply international standards in domestic laws, and monitoring, supervising or assisting in the changes.<sup>43</sup> In implementing the *ICCPR*, the United Nations relies on the States. The mandatory reporting system of the *ICCPR* can create some pressure on the States, but the impact is so limited that a large number of the States often ignore their duty to submit the reports in time. After all, even if the Committee criticizes a State for failure to make progress or to fulfil its duty under the *ICCPR*, it rarely takes any further action to enforce its opinion or comment.

State cooperation in taking the actions is the key of success, even in the area of international criminal justice governed by a convention less controversial than the human rights covenant. When it comes to enforcement, international conventions on criminal justice have been primarily relying on domestic law and system. For example, Bassiouni indicates that:

Two methods have been used in enforcement: a “direct enforcement scheme” and an “indirect enforcement scheme.” The direct enforcement scheme contemplates the creation of an international criminal court and international machinery for the execution of an extra-national system of justice. The indirect enforcement scheme obligates States to prosecute or extradite violators of international normative proscriptions in accordance with national laws.<sup>44</sup>

He admits:

It must be observed that because there have been few efforts to create a direct enforcement system, all international criminal law conventions rely on the indirect system.<sup>45</sup>

Even with the recent changes in international law, international enforcement is still largely optional, slow and expensive.<sup>46</sup> The International Court of Justice has to exercise its power on the ground of the consent of the relevant States. The United Nations has succeeded in establishing two international criminal tribunals. But they have only managed to prosecute a very small number of individuals, including the former President of Yugoslavia.<sup>47</sup> The international criminal court to be created under the *Rome Statute* will also have limited jurisdictions on certain types of crimes only. Therefore, no international establishment of justice can replace the domestic system. And after all, international implementation of human rights standards is primarily through cooperation rather than confrontation.<sup>48</sup>

## CONCLUSION

In 2000, the United Nations Tenth Congress on the Prevention of Crime and the Treatment of Offenders passed the *Vienna Declaration on Crime and Justice: Meeting the Challenger of the Twenty-first Century*, calling upon the States to continue their effort in building “a fair, responsible, ethical and efficient criminal justice.” The Congress declares:

We reaffirm the goals of the United Nations in the field of crime prevention and criminal justice, specifically the reduction of criminality, more efficient and effective law enforcement and administration of justice, respect for human rights and fundamental freedoms, and promotion of the highest standards of fairness, humanity and professional conduct.<sup>49</sup>

A strong political commitment to human rights, the courage in taking the right actions and balanced and pragmatic development are the keys to a successful reform of the law in China relating to the ratification and implementation of the *ICCPR*. In all these aspects, the international community can provide some helpful assistance. However, it is still the people in China who have the best knowledge and capacity to make such changes that will best serve their long-term interest.

The ratification of the *ICCPR* will bring about more positive changes to the Chinese criminal process and the overall legal system. Although law reform is never an easy task, the twenty-first century will witness the creation of a new system of law and justice in China.

## NOTES

<sup>1</sup> Since the inception of the China Programme in late 1995, many important Canadian and Chinese legal institutions and hundreds of experts have established co-operative working contacts with each other, thousands of legal professionals and students have benefited from the lectures and events, and over ten books and numerous papers have been produced for publication.

<sup>2</sup> Chen Guangzhong, Daniel Prefontaine, Bian Jianlin and Vincent Cheng Yang (Eds.), (1998), *Lian He Guo Xin Shi Si Fa Zun Ze Yu Zhong Guo Xin Shi Fa Zhi*. Beijing: The Law Press.

<sup>3</sup> Chen Weiqiu, Vincent Cheng Yang and Yang Yu Guan, (Eds.), (2000), *Lian He Guo Ren Quan Gong Yue He Xin Shi Si Fa Wen Xian Hui Bian*. Beijing: China Legal System Press.

<sup>4</sup> For example, human rights safeguards in this category are seen in A/CONF/6/I, annex I, *Standard Minimum Rules for the Treatment of Prisoners*; E/RES/1984/47, *Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners*; A/RES/45/III, *Basic Principles for the Treatment of Prisoners*; A/RES/45/110, *United Nations Standard Minimum Rules for Non-Custodial Measures*; A/RES/40/33, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*; E/RES/1989/66, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*; A/RES/39/46, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and A/RES/3452(XXX), *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

<sup>5</sup> For example, human rights safeguards in this category are seen in E/RES/1984/50, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*; E/RES/1989/64, *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*; A/RES/3452 (XXX), *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and E/RES/1989/65, *Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.

<sup>6</sup> For example, human rights safeguards of this category are seen in A/RES/34/169, *Code of Conduct for Law Enforcement Officials*; E/RES/1989/61, *Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials*; A/RES/40/146, *Basic Principles on the Independence of the Judiciary*; A/RES/45/166, *Basic Principles on the Role of Lawyers*; and A/RES/45/166, *Guidelines on the Role of Prosecutors*.

<sup>7</sup> For example, human rights safeguards of this category are seen in A/RES/40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; E/RES/1989/57, *Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; A/RES/39/46, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and A/RES/3452 (XXX), *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

<sup>8</sup> A more recent example is the *Rome Statute* of the International Criminal Court. Part of the Statute serves as an impressively comprehensive statement of detailed procedural safeguards of human rights in the criminal process for the handling of international crimes. See, for example, Articles 55, 66, 67, 68, 69(7), 40 and 42.

<sup>9</sup> A recent example is the 2000 *Convention on Transnational Organized Crime*. This *Convention* includes provisions to secure the effective handling of transnational organized crime cases with due respect to the principle of equality. See, for example, under Article 16 (14), a request of extradition can be rejected if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person for the reason of discrimination against this person.

<sup>10</sup> For a more detailed discussion of the reforms to the *Law of Criminal Procedure and the Criminal Law of China*, see Chen Guangzhong et al. (Eds.), *The United Nations Standards and China's Legal System of Criminal Justice*. Beijing: Publishing House of Law. 1998. Chapters 3-15, 18-23. pp. 53-283, 344-484.

<sup>11</sup> Human Rights Committee General Comment 6, para. 3.

<sup>12</sup> See, for example, A/RES/43/173, *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment*.

<sup>13</sup> Article 12 of the *Law of Criminal Procedure*.

<sup>14</sup> The United Kingdom in its declaration of reservation indicates that the British Government would not apply or apply fully Article 14(3)(d) in British overseas territories. See The United Nations, *Multilateral Treaties Deposited With the Secretary General*. New York: The United Nations. 1983. p.124.

<sup>15</sup> See Centre for Human Rights, United Nations, "List of Instruments in Chronological Order of Adoption," in Centre for Human Rights, *Human Rights – A Compilation of International Instruments*. Vol. I (1<sup>st</sup> Part) Universal Instruments. New York and Geneva: The United Nations, 1994. pp. 413-418.

<sup>16</sup> In the United Nations documentation, topics on criminal law and criminal justice, such as capital punishment, conduct of law enforcement officials, detention, fair trial, international criminal jurisdiction, international criminal tribunals, juvenile justice, prisoners, prosecution, victims of crime and so on, also fall under the category of human rights. See Department of Public Information, United Nations, *United Nations and Human Rights (1945-1995)*. New York: The United Nations, 1995. pp.511-521.

<sup>17</sup> So far, the most comprehensive list of the documents was published by the United Nations in a bulletin in 1997. The bulletin listed a total of 121 resolutions and decisions adopted by the General Assembly and some 180 resolutions and decisions adopted by the Economic and Social Council during 1950-1996. See United Nations Office at Vienna, *International Review of Criminal Policy*. United Nations: New York. 1997. pp. 24-42.

<sup>18</sup> See, for example, A/RES/45/428, 14 December 1989, *Convention on the Rights of the Child*; A/RES/45/110, 14 December 1990, "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules);" A/RES/48/137, 16 December 1992, "Human Rights in the Administration of Justice;" and A/RES/49/457, 23 December 1994, "Capital Punishment."

<sup>19</sup> An example of such improvement is seen in the preparation of the *Third Optional Protocol of the ICCPR*. See The Administration of Justice and The Human Rights of Detainees. E/CN.4/Sub.2/1994/24.

<sup>20</sup> For example, the conventions, such as the *ICCPR* and the *Convention on Transnational Organized Crime*, are binding upon their member states. Most of the instruments however are not legally binding. Examples of these instruments are the declarations of the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the model treaties on extradition and mutual assistance in criminal matters, the *Code of Conduct for Law Enforcement and the Basic Principles on the Independence of the Judiciary*.

<sup>21</sup> H. Lauterpacht, in 1950, wrote: "although the Declaration in itself may not be a legal document involving legal obligations, it is of legal value inasmuch as it contains an authoritative interpretation of the 'human rights and fundamental freedoms' which do constitute an obligation, however imperfect, binding upon the Members of the United Nations." See H. Lauterpacht, *International Law and Human Rights*. 1950, p. 61, an excerpt in Henry J. Steiner and Philip Alston, *International Human Rights in Context – Law, Politics, Morals*. New York: Oxford University Press. pp. 147-152, at p. 151. In the 1990s, as William A Schabas observed, there was already some authority to support the claim that the Universal Declaration was a codification of customary law. See William A Schabas, *International Human*

*Rights Law and Canadian Charter*. Scarborough, Ont.: Carswell. 1996. p. 64. However, it is unclear whether or not the Chinese legal circles hold the same view. The Chinese Government and the judiciary have not officially referred to the Declaration as a source of international customary law.

<sup>22</sup> Boutros Boutros-Ghali, "Introduction," in Department of Public Information, United Nations, *United Nations and Human Rights (1945-1995)*. New York: The United Nations, 1995. p.45.

<sup>23</sup> For a quick review of the debate on universalism and cultural relativism, see Henry J. Steiner and Philip Alston (Eds.), *International Human Rights in Context – Law, Politics, Morals*. New York: Oxford University Press, 2<sup>nd</sup> Edition, 2000. pp. 323-402.

<sup>24</sup> See *supra* note 22, p.3.

<sup>25</sup> *Charter of the United Nations*, Articles 1 and 55.

<sup>26</sup> Paul Gordon Lauren, *The Evolution of International Human Rights*. Philadelphia: University of Pennsylvania Press, 1998. pp. 166-171.

<sup>27</sup> See *id.*, pp. 184-193.

<sup>28</sup> These include the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (1949), the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), and so on.

<sup>29</sup> *Universal Declaration of Human Rights*. Articles 3-11.

<sup>30</sup> See *supra* note 26, Chapter 7, pp. 205-240.

<sup>31</sup> M. Cherif Bassiouni, "Characteristics of International Criminal Law Conventions," in M.C. Bassiouni (Ed.) *International Criminal Law*. Dobbs Ferry, NY: Transnational Publishers, Inc. 1986. Vol.1. p.6.

<sup>32</sup> For an overview of the formulation of these standards and norms, see Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program – Formulation of Standards and Efforts at Their Implementation*. Philadelphia: University of Pennsylvania Press. 1994. A review of the development in this field, including the early effort at developing the conventions of international criminal law, is also seen in M. Lopez-rey's book, *A Guide to United Nations Criminal Policy*. Hant: Gower Publishing Company Limited. 1985.



<sup>33</sup> For example, when initiatives were launched to clear up “spiritual pollution” in 1983 and 1986-87, scholars were criticized for promoting the concept of universal human rights without applying the Marxist methodology of a “class analysis.”

<sup>34</sup> Resolution 1386 (XIV), Annex.

<sup>35</sup> For all ten white papers, see Dong Weizhen (Ed.), *Collection of China Human Rights White Papers*. Beijing: Xinhua Publishing House. 1998.

<sup>36</sup> According to the facts documented by Gordon Lauren, back in 1944-1945, the United States, Britain and the Soviet Union were arguing that human rights were matters of domestic jurisdiction and the United Nations should refrain from intervention in the internal affairs of any states. The government of the United States voted for the *Universal Declaration of Human Rights* in 1948 mainly because of mounting international and domestic pressure, whereas the Soviet Union tried every means to delay the passage of the *Declaration* and decided to be an abstention with its allies in the vote. During the process of developing the two International Covenants, the two super powers at the time again tried not to give the others any chance of using the United Nations to intervene in their domestic affairs. See *supra* note 11, at pp. 167-170, and 192-193, and 242-257. Similarly, many developing countries also worried about any intervention into their domestic affairs in the field of human rights. For example, Singapore and Malaysia are well known for advocating that human rights are matters of domestic affairs. See excerpts of relevant statements in Henry J. Steiner and Philip Alston, *supra* note 23, at pp. 584-586.

<sup>37</sup> Information Office of the State Council, “Human Rights in China” (1991), in Dong Weizhen (Ed.), *Collection of China Human Rights White Papers*. Beijing: Xinhua Publishing House. 1998. p.2.

<sup>38</sup> Fu Xueze, *Examining Human Rights from International Law*. Beijing: Xinhua Publishing House. 1998. Chapter 9, Internal Affairs and Human Rights. pp. 185-204.

<sup>39</sup> See Ren Jianxing, “Report of the Supreme People’s Court.” *People’s Daily*, 14 April 1990. p.2.

<sup>40</sup> As recorded in a human rights White Paper of the Chinese Government, starting from the Opium War of 1840, the imperialist powers of the world launched hundreds of wars against China and forced China in signing over 1,100 unequal treaties, causing massive destruction to the country. See Information Office of the State Council, *supra* note 37, pp.3-5.

<sup>41</sup> Luo Yanhua, *The Oriental View of Human Rights*. Beijing: Xinhua Publishing House. 1998. pp.20-40.

<sup>42</sup> Bai Guimei et al (Eds.), *Human Rights in International Law*. Beijing: Beijing University Press. 1996.

<sup>43</sup> See Roger S. Clark, *supra* note 32, pp.232-233.

<sup>44</sup> M. Cherif Bassiouni, "International Criminal Law and Human Rights," in M.C. Bassiouni (Ed.), *International Criminal Law*. Dobbs Ferry, NY: Transnational Publishers, Inc. 1986. Vol.1. p.25.

<sup>45</sup> See *id.*, p.3.

<sup>46</sup> See E. J. Osmanczyk (Ed.), *Encyclopaedia of the United Nations and International Agreements*. London: Taylor and Francis Inc. 1991. pp.447-448.

<sup>47</sup> See "UN Steps Up Pressure on Milosevic," [[www.cnn.com/2001/WORLD/europe/04/06/yugoslavia.tribunal/index.html](http://www.cnn.com/2001/WORLD/europe/04/06/yugoslavia.tribunal/index.html)].

<sup>48</sup> See A/RES/46/152 (18 December 1991), para. 15-16.

<sup>49</sup> A/CONF.187/4/Rev.3. Article 2.



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CHAPTER 2:

INTERNATIONAL  
STANDARDS IN CRIMINAL  
LAW AND THE CRIMINAL  
JUSTICE SYSTEM

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# IMPLEMENTING INTERNATIONAL STANDARDS IN SEARCH AND SEIZURE: Striking the Balance Between Enforcing the Law and Respecting the Rights of the Individual

By Daniel Préfontaine, Q.C.\*

## INTRODUCTION

A discussion of search and seizure in the criminal process requires an understanding of the powers that have been given to law enforcement authorities to do their job. This includes an appreciation of the kind of interference or intrusions exercised by the police in carrying out their duties in a person's privacy, home, family and papers. The universal starting point is recognition of the standard set out in Article 17 of The *International Covenant of Civil and Political Rights* which states that, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

In addition, everyone has the right to the protection of the law against such interference or attacks. Further, Article 2 of the *Covenant* requires each State Party to ensure that any person whose rights or freedoms are violated shall have an effective remedy to be determined by competent judicial, administrative or legislative authorities and the remedy will be enforceable

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when granted. Therefore, when a State Party ratifies the *Covenant* it undertakes to implement these requirements into domestic legislation primarily in the area of the criminal law. What does this involve?

It is universally and generally recognized in our modern age that one of the fundamental principles of the rule of law is that Criminal Law must begin with an enactment by a competent body creating a criminal offence. Most Nations do this pursuant to the authority of their *Constitution* and the crimes are generally enumerated in a law commonly known as a *Criminal Code* or similar type of *statute*. Further, to provide the powers necessary to enforce the law there are procedural rules that are set out that are to be followed by the investigating and prosecution authorities. In addition, rules of evidence are stipulated in other laws that are to be applied by an independent adjudicator. This is usually done by a constitutionally authorized court that is created to ensure that a person who commits a crime will be provided a fair trial in accordance with international standards. These minimum guarantees are contained in the *International Covenant* and enumerated in Articles 14, 15 and 17.

The Human Rights Committee, the treaty body that monitors State Parties' compliance of their obligations under the *Covenant*, assists States in understanding the extent of these rights by providing direction in General Comments. In General Comment #16 (1994), the Committee remarks that it is 'precisely in State legislation above all that provision must be made for the protection' against both unlawful and arbitrary interference. In the Committee's view, the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the *Covenant* and should be, in any event, reasonable in the particular circumstances. Even with regard to interference that conforms to the *Covenant*, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.

The Committee further notes that a decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. The Committee further articulates that compliance with Article 17 requires that the integrity and confidentiality of correspondence should be guaranteed, meaning that correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched.

It is a fundamental principle of the rule of law and a necessary part of a democracy that the citizens of a nation must be protected from unjustified intrusions of privacy and property by agents of the state. Otherwise, arbitrary actions by state officials could seriously affect the

personal freedom of the individual as a fundamental aspect of a free and democratic society. In this paper I will limit my comments to the topic of search and seizure and the remedies that have been provided for in the various jurisdictions when the police or investigating bodies have exceeded or abused their responsibilities. The focus of the paper will be on the Canadian and American experience. Some references will also be made to the European situation. First, some background notes to give us a context for our discussion.

## A HISTORICAL OVERVIEW

An important part of the work of the police in bringing persons to be held accountable for having committed a crime is the obtaining of evidence through the search of places and the seizure of things that are found there. This is in addition to all the other duties of law enforcement authorities such as finding and identifying the person who committed the crime and taking lawful statements and confessions as part of the evidence gathering process. Historically, the origins of the need to limit the powers of the authorities to enforce laws are of long standing in the Western tradition. Anglo-American-Canadian law has recognized for centuries that state authorities should not be permitted to have unlimited access to search and seize things belonging to citizens. Thus, in the common law world the protection against invasion of a person's home reaches back some 400 years ago in England. The maxim, "Every man's home is his castle" was a highly respected principle that was enshrined in the *Semayne's Case* of 1603. The English Court recognized the right of the homeowner to defend his house against unlawful entry by the King's agents. At the same time the authority to break and enter upon proper notice by appropriate officers was acknowledged. Shortly thereafter in the British colonies the urgency to protect against unreasonable search and seizures arose as a result of the English efforts to enforce the revenue laws against smuggling. Writs of Assistance by the King's agents were used as a general search warrant allowing entry into any house or other place to search and seize any prohibited and uncustomed goods. One of the consequences of these arbitrary powers led to the American Revolution with the American colonies declaring themselves independent as the United States of America. On a different track, the Canadian history was one of gradual evolution rather than revolution. The results of the European developments over the centuries have culminated in the adoption of *The European Convention on Human Rights*.

It can be concluded from this short history that a fundamental principle was established to the effect that state agents have been required to have legal authority for undertaking searches and seizures. Secondly, it is clear that the preference by the courts has been established requiring warrants that must be issued by an independent authority, usually a judicially constituted



body such as a judge or magistrate. And thirdly, reasonable grounds on the part of the police for searching and seizure must have been demonstrated. Overall, Canada followed the British common law tradition and incorporated major features of the British adversarial system including the standard for searches to be based on reasonable grounds. Nevertheless, there are a few situations where warrantless searches and seizures have been permitted during this historical development of the law in the Western tradition. These will be discussed later in the paper.

## THE CANADIAN SYSTEM

Canada became a separate country in 1867 with its own laws including several years later its own Criminal Code and procedures on search and seizure powers. Canada followed the British view of being concerned with the abuse of authority by the government and its officials. Today, preventing arbitrariness is still a central concern of Canadian criminal procedure even though the system grants considerable discretion to the police and the prosecution performing their functions to enforce the law. However, it is very clear that the State must prove that the crime was committed by the accused beyond a reasonable doubt based on evidence that has been properly obtained in accordance with the law.

### **The Canadian Charter of Rights and Freedoms**

Canadian criminal procedure and evidence attempts to be true to the principle of the rule of law. In fact, the passage of the *Charter of Rights and Freedoms* in 1982 in the *Canadian Constitution* sets out the law as we know it today. The primary aim of the *Charter* is to protect individual rights and freedoms from state action. This means that the *Charter* must be interpreted by the courts to constrain government from infringing upon those rights rather than to authorize governmental action. Using such an approach the *Charter* has imposed additional constraints to the common law on search and seizure powers.

### **Protection Against Unreasonable Search and Seizure in Section 8 of the Charter**

Section 8 in the Legal Rights part of the *Charter* declares, "Everyone has the right to be secure against unreasonable search and seizure." The word used in Section 8 is "unreasonable." The question is what is reasonable? To be "reasonable" the Canadian courts have said that the search must be authorized by law, the law itself must be reasonable and the search must be carried out in a reasonable manner. For the search to be one authorized by law, it must be authorized by a specific statute or common law rule, must be carried out in compliance with the

procedural and substantive requirements of that law and the scope of the search must be limited to the area and items for which the law has provided. The most common and preferred way of obtaining authorization to conduct a search is by getting a search warrant from a court. The authority and procedure are set out generally in the *Criminal Code of Canada*. However, there are many other federal statutes which have their own requirements such as in Drugs, Competition and Revenue cases and as well in provincial laws. Therefore, the presumptive rule is to obtain a warrant. However, it is recognized that if it is not feasible in the circumstances it is still possible to conduct a warrantless search, especially in those instances that are known as “exigent” circumstances, search incident to arrest or in “hot pursuit” situations.

The Supreme Court of Canada in its role as the ultimate interpreter of the *Constitution* and the *Charter* have found that the purpose behind the section is to protect the privacy of people as well as to guard against invasion of a person’s home and property. As a result in some cases the search and seizure powers themselves have been found to be unconstitutional, while in most of the cases it has been the failure of the police to abide by the rules that has resulted in the evidence being excluded as the remedy for the violation.

In determining what is reasonable, the Supreme Court of Canada has established the following principles:

1. The purpose behind Sections 8 is to protect the privacy of individuals from unjustified state intrusion.
2. This interest in privacy is, however, limited to a “reasonable expectation of privacy.”
3. Wherever feasible, prior authorization must be obtained in order for a search to be reasonable.
4. Prior authorization must be given by someone who is neutral and impartial and who is capable of acting judicially.
5. The person granting authorization must be satisfied by objective evidence on oath that there are reasonable and probable grounds for believing that an offence has been committed and that a search of the place for which the warrant is sought will find evidence related to that offence.
6. If the defence establishes that a search was warrantless, the Prosecutor must establish that it was reasonable.
7. A search is reasonable if it is authorized by law, the law itself is reasonable and if the manner of the search is reasonable.

## **What is a search and seizure?**

The other important question is what amounts to a search and seizure? It has been simply stated as conduct in a situation involving a reasonable expectation of privacy. Further what is the definition of privacy? Generally, it means that a person can keep personal information and his affairs secret and out of the public domain. The government comes into direct conflict when its agents need to investigate and prosecute crimes. Therefore, if there is an expectation of privacy then a search and seizure must be controlled. Thus, intrusions to a person's bodily integrity are in the highest level.

Homes are next in the category. In the lesser categories are offices and businesses, automobiles and other similar type places. Where licences or a regulated area are involved the expectation is considered lower on the scale. In terms of what constitutes a seizure it has been defined by the Supreme Court of Canada as, "the taking of a thing from a person by a public authority without that person's consent." It also includes compelling a person to give up a thing or object that he owns or has in his possession. Electronic interception of communications (wire-tapping), video surveillance, the installation of a tracking device on a vehicle and such things are all searches under Section 8 protection. However, some things are not considered searches. For example, a police check of the electrical consumption records of the accused obtained from a utility company does not engage section 8.

It is accepted that there are still uncertainties in this area. For example, the access to Bank Records may be one area where it will depend on the legislative basis for obtaining them or not. Of course, consenting to a search or seizure is in effect waiving a reasonable expectation of privacy and does not trigger section 8 requirements. Obtaining a true and informed consent becomes the real issue in these cases to ensure that it is voluntary.

It should be noted that when a search takes place under a regulatory scheme, as opposed to the investigation of a criminal offence, this makes a significant difference with respect to the level of expectation of privacy. For example, in Canadian law a demand by a police officer that a driver of a motor vehicle produce his licence and registration for the car pursuant to a Provincial statute does not amount to a search that invokes Section 8 requirements. The Supreme Court of Canada held that there is no reasonable expectation of privacy when someone is requested to produce a licence or other evidence in compliance with a legal requirement that is part of a legislated scheme to regulate conduct. Thus, in some situations Section 8 has no application. In addition, civil processes that result in the seizure of property are not within its scope. Further, a seizure of a person is not included because the person is protected under Section 9 from arbitrary detention or imprisonment.

## **What is a Valid Search?**

There are a series of questions that the decision-maker, usually a judge presiding in a trial, must ask when determining whether a specific search is constitutional and valid.

These include:

1. Was the action taken a search or a seizure? In other words was it a situation where there was a reasonable expectation of privacy.
2. If search or seizure did take place what is the level of expectation of privacy that is affected?
3. If the level of privacy as set out by the Supreme Court was reached then was the legal authority present?
4. Does the legal authority for the search require obtaining prior authorization and was it feasible to do in the situation?
5. If the legal authority requires prior authorization does it require that it be issued by a neutral and impartial decision maker?
6. Were the statutory requirements to obtain the warrant complied with when the search was conducted?
7. If the search was a warrantless search can it be justified? In fact was it done properly and in exigent circumstances or for the safety of the public or other valid reason.

If the judge finds that there is a violation the remedy of excluding the evidence can be invoked.

## **The Remedy of Excluding Evidence**

At this point, a short discussion is needed on the remedy a judge can invoke in a trial when he finds that evidence has been illegally or improperly obtained. The generally accepted reasons for excluding evidence are as follows:

1. To avoid the risk that the evidence is unreliable;
2. To preserve the integrity of the judicial process and the courts by ensuring that the courts and judges are not or are not perceived as condoning or encouraging unlawful or improper conduct on the part of the police;

3. To discourage police officers and other authorities from engaging in such conduct;
4. To protect citizens against violations committed;
5. To avoid undue prejudice to the accused in order to ensure a fair trial.

It is argued by some scholars and lawyers that the exclusion of relevant and reliable evidence obtained improperly or unlawfully is an effective means of disciplining police officers as well as maintaining the integrity and public confidence in the integrity of the judicial system. However, it would appear from Canadian and American experience that there is no convincing evidence that there is any deterrent effect on the police as such. In fact, it may in reality encourage circumvention of the law. It is more credible to state that the maintenance of the integrity of the courts is a better reason for the exclusionary rule. In addition, it is probably safe to state that excluding reliable and relevant evidence does not serve justice well unless the actions of the police are so unacceptable that the entire creditability of the administration of justice would be brought into disrepute in the eyes of the public. Now, some comments on the Canadian approach.

### **The Exclusionary Rule in Canadian Law- Section 24 of the Charter**

Section 24(1) of the *Charter* provides that anyone who has rights or freedoms that have been infringed or denied may apply to a court to obtain a remedy that is just and appropriate. The remedy that the court can apply is to exclude the evidence obtained in the course of a violation of a constitutional right if it is established that having regard to all the circumstances, the admission of the evidence in the proceeding would bring the administration of justice into disrepute. This has become known as the Canadian Constitutional exclusionary rule. Thus, the most common and important remedy in the criminal process is the exclusion of evidence under section 24(2) of the Charter. The consequence is that the judge may bring a prosecution to an end. This is known as a stay of proceedings. The effect is the same as if the accused had been acquitted after his trial. The accused is not convicted and is free to carry on with his life.

In order for the evidence to be excluded the defence must prove to the court three things: (1) that there was a breach of a *Charter* right; (2) that the evidence was obtained in the course of the *Charter* violation; and (3) that the admission of the evidence could, in all of the circumstances, bring the administration of justice into disrepute. Having shown that there was breach of the right by the police in gathering the evidence the defence must prove on a balance of probabilities that the admission of that evidence would bring the administration of justice into disrepute. At this point a basic question arises as whether the remedy of excluding the evidence is to punish

the police for their improper conduct or to prevent the courts from being implicated in that misconduct by condoning it by not excluding the evidence? The answer is the latter. The judge in making a decision of whether to admit the evidence must consider several factors. These include: (1) the relation to the fairness of the trial; (2) the seriousness of the violation including whether the violation was committed deliberately or in good faith, whether it was inadvertent or technical, whether it was done in urgent or exigent circumstances, whether other valid investigatory techniques were available and whether it was a pattern of violations; (3) the effect of the exclusion of the evidence on the reputation of the administration of justice. In other words would the exclusion bring the administration of justice into greater disrepute in the eyes of the community than to admit it.

However, there are two situations where evidence may still be admitted in spite of a violation that has an adverse impact on the fairness of a trial. The first is in the situation of derivative evidence, that is, evidence which is real evidence but whose location is derived from evidence emanating from the accused. The second exception is where it can be shown that the accused would have provided the evidence even if his rights would have been respected. This area includes statements made by the accused to the police, breath and blood samples, police lineups and re-enactments of the crime. One of the important factors has been the so-called “Good Faith” exception. This is where the police have relied upon previous court decisions or understanding of the law for their actions. It should also be noted that there is a limited power by the court to exclude evidence that has been allowed in situations where the fairness of the trial could be affected. This has been the case in cases where the police have used unfair tactics or methods that have not violated as such a Charter provision.

### **A Final Comment on Search and Seizure**

In Canadian criminal procedure law the use of search and seizure powers by the police in the investigation of crimes is probably one of the most difficult parts to deal with and is in a continuing state of development by the courts. The need to analyze each case is essential and to weigh the interests of the state and the police in enforcing the law against the protection of the rights of the individual as guaranteed in the *Charter*. Therefore, it can be concluded that the *Charter* has provided greater protection against self-incrimination and protection to more than simply property in the context of search and seizure cases.

## THE AMERICAN APPROACH

In the United States *Constitution* the Fourth Amendment sets out the protections against unreasonable searches and seizures by stating that,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Nevertheless, there were still lawful warrantless searches that could be undertaken such as, searches incidental to arrest. The result has been that only those pursuant to a warrant needed to be “reasonable.” However, over the years the Supreme Court of the United States has held that the police must, whenever practicable, obtain advance judicial approval of search and seizures through a warrant procedure. Of course, exceptions to searches under warrants were to be closely contained by the necessity for the exception. These exceptions today are in the administrative searches category justified by special needs. Thus, warrantless searches are permitted by administrative authorities in public schools, government offices, prisons and in drug testing of certain public and transportation employees justified on the basis of public safety. It is argued that this is justified because the government’s interest outweighs the privacy interests of the individual.

### **Effect of the Fourth Amendment**

For the Fourth Amendment to be applicable there must be a search and seizure occurring typically in a criminal case. The primary aim is to protect privacy where an expectation of privacy exists. Thus protection of the home is at the top of the list because of the right associated with the ownership to exclude others. The balancing test set forth by the United States Supreme Court examines the level of privacy interest involved and then the extent of intrusion involved. What constitutes a search depends on whether or not a person had a reasonable expectation of privacy in the place searched. The Supreme Court has held that an expectation of privacy arises in places outside the home including commercial premises. A search or seizure is not “unreasonable” if it is authorized by a warrant and that “probable cause” exists to believe that contraband or evidence of the crime can be found by the police. What is meant by probable cause has been held by the Courts to be whether or not there was reasonable grounds to believe that a law was being violated and that there was evidence to be found in the place identified to be searched.

## The American Exclusionary Rule

A discussion of this rule must include a comment on the alternatives to its use. In both the United States and Canada, it can be said that an illegal search and seizure as opposed to an unreasonable one may be the subject of a criminal action against the police, prosecuting the police for unlawful trespass or some type of offence. However, experience in both countries show that it is more likely that the police officer would be subject to disciplinary measures. Further, persons who have been illegally arrested or subject to an illegal search or seizure could launch a tort action for damages pursuant to common or statutory laws. In any event, the Supreme Court of the United States has held that the most effective method to deal with police misconduct is to have evidence obtained from an unconstitutional search excluded at a criminal trial. However, there are many exceptions. The most important exception is from a search that was undertaken in "Good Faith" on the basis of a warrant issued by a competent authority even if it turns out that the approval of the warrant was made without probable cause.

It is now clear that interceptions of telephone communications are treated as searches and thus are subject to *Fourth Amendment* requirements. Wiretaps must be approved in advance by a judge or magistrate. The same requirements exist in Canadian law. In fact, the Supreme Court of Canada has followed the American decisions in holding that electronic surveillance is a search or seizure within Section 8 of the *Charter of Rights and Freedoms*. The Court has held that the purpose of the prohibitions on unreasonable search and seizure is to protect the reasonable expectation of privacy. However, in contrast to the United States Supreme Court which has held that surveillance agreed to by a participant is not a search or seizure within the *Fourth Amendment*, the Supreme Court of Canada has refused to draw this distinction.

As a final remark it can be said about the American approach that although the exclusionary rule has not been completely repudiated, its utilization has been substantially curbed. Initial decisions reduced the broad scope of its application. This was the case with the adoption of the "Good Faith" exception some 15 years ago. Nevertheless, it is still considered an important tool to deter police misconduct even at the expense of letting a criminal go free.

## THE EUROPEAN EXPERIENCE

The *European Convention on Human Rights* has been adopted by the Western European countries as the governing body of law that is a reflection of the *International Covenant on Civil and Political Rights*. In respect to search and seizure the key article in the European Convention is Article 8 which imposes on states the obligation to respect a wide range of personal interests. It



provides in subsection 1 as follows: “ Everyone has the right to respect for his private and family life, his home and his correspondence.” Subsection 2 states:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8, by requiring that there be respect for private life, home and correspondence appears to restrict the power of the authorities when they are investigating crimes. The European Court of Human Rights in its decisions has attempted to reconcile the genuine needs of public officials with individual privacy by insisting that searches be controlled by some process of independent prior approval and supervision.

### **The Four Interests Protected by Article 8**

The Court has stated that “Private Life” as the first interest enumerated includes personal identity (including sexual identity), some aspects of moral and physical integrity, private space (hotel rooms), collection and use of information (medical records), sexual activities and some aspects of social life. The second interest is family life that includes a variety of relationships arising from marriages and children. The third interest is the home. Although Article 8 specifies only the home the Court has held that it includes a person’s professional or business office. This is similar to the American and Canadian interpretations. The fourth interest is correspondence that has been held to include telephone tapping cases. The European Court has made it clear that interception of telephone communications may create an interference with private life and correspondence and thus is a violation of Article 8.

### **Justification for Interference by the Authorities**

Article 8 provides for the interests to be protected and the power of the state to interfere with those rights. It is the applicant (the State) that must establish that there has been an interference. The real question that arises is whether the interference was “ in accordance with the law.” This not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. The general test is whether the state has established a scheme or process that is reasonable in the circumstances. The requirement is for the national law to protect against arbitrary exercise of any discretion that it confers on the authorities to carry out their duties. This is especially important in such areas as secret

surveillance and prisoners' correspondence. The state must identify the objective for which it is interfering with a person's right. Those aims are listed in the latter part of Section 8(2) as noted above. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such interferences.

A recent case in the United Kingdom, *Khan v UK* (2000) demonstrates how the European Court interprets 'in accordance with the law'. This case dealt with the use of covert listening devices at a time when no statutory system existed to regulate the use by police. The Home Office Guidelines were not legally binding nor directly publicly accessible. Therefore the Court held that this interference could not be justified in accordance with the law and that the collection of evidence against the accused through the use of a covert listening device amounted to a violation of his right to respect for his private life. It is interesting to note that notwithstanding the fact that the evidence was secured in a manner contrary to the *Convention*, the Court found that it was admissible as it did not conflict with the requirements of fairness. The conviction would stand.

A great deal of debate has revolved around what is 'necessary in a democratic society' as set out in the Section. It is the state to indicate the objective of its interference and to demonstrate the 'pressing social need' for limiting the enjoyment of the individual's rights. In this respect the protection of the lawyer-client relationship and the privileged interest has been regarded by the Court of high importance. The need to obtain prior authorization is very important in order to undertake a search and seizure of a lawyer's office.

In a series of cases, the European Court has reviewed the use of search warrants in various European countries. It should be noted that the Court has been unwilling to elaborate general statements of rights in these cases but rather reviews them on a case-by-case basis. This provides some limited direction on how these rights are to be implemented domestically. In *Funke v France* (1993), customs officials had searched the suspect's house for information related to a customs offence. Under the law at that time, these officials had exclusive competence to assess the scale of inspections. The Court was concerned about the very wide powers given to the customs authorities to institute searches of property which appeared "to be too lax and full of loopholes for the interference with the applicant's rights to have been strictly proportionate to the legitimate aim pursued." The Court held that the search and seizure was not justified under Article 8(2), emphasizing particularly the absence of prior judicial authorization.

*Niemietz v Germany* (1992) illustrates the fact that the procurement of a judicial warrant will not always be sufficient. In that case, the Court found that the warrant was drawn in too broad terms and the search, being of a lawyer's office, impinged on the professional secrecy where there was no special procedural safeguards in place.

In summary, the European Court continues to attempt to strike a balance in reconciling the right of the individual to his privacy guaranteed in Section 8(1) and the state's need to enforce the laws through its officials and justify interfering with the individual's rights pursuant to Section 8(2).

## CONCLUDING COMMENTS

The efforts of the Canadian, American and European jurisdictions that have been described above demonstrate that the requirements of the *International Covenant on Civil and Political Rights* in the area of search and seizure have not only been met but have gone beyond the minimum guarantees set out therein. However, the recent terrorist events make it obvious that the need for new laws and regulations enacted by governments will continue to increase the level of intrusions in our lives. Therefore, the challenge that we will continue to face in our democratic societies is to speak out when those laws are being formulated to ensure that they are reasonable and necessary for good governance, national security and the protection of our lives. While doing so, these interests will need to be balanced by an independent judiciary when they are applied to hold the state and its agents accountable under the rule of law for their actions. For those countries that have already signed the *Covenants* the obligations of ratifying the *International Covenants* and their implementation are clear in this respect. This is the meaning of living in a free, safe and democratic society in accordance with the rule of law and the protection of human rights.

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# THE RIGHT TO SILENCE – INTERNATIONAL NORMS AND DOMESTIC REALITIES

By Eileen Skinnider and Frances Gordon\*

## INTRODUCTION

This paper is intended for presentation at the Sino Canadian conference on the ratification and implementation of Human Rights Covenants held in Beijing October 2001. With the signing of the *International Covenant on Civil and Political Rights* by the government of the People's Republic of China in 1998 there is a growing recognition of the rights of criminal suspects. The principle of the presumption of innocence was included in the significant reforms made by China to the Criminal Procedural Law of 1996. This places the burden of proof on the prosecution. The 1996 law also includes a provision regulating that the criminal suspect must answer all relevant inquiries concerning the charge. The debate on whether the presumption of innocence provides for an implicit right to remain silent is one that is ongoing in China and elsewhere. According to the Asian Human Rights Commission, the People's Procuratorate of Shuncheng District (in the city of Fushan in Liaoning Province) have promulgated the 'zero statement rule' when prosecutors handle cases.<sup>1</sup> According to this rule, criminal suspects are allowed to keep silent during their interrogation by prosecutors. The Asian Human Rights Commission notes that this is the first time in China that the right to silence is recognized in a "law," though it is only the rule of a district procuratorate.

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With the growing debate of the relevance of the right to silence, this paper examines what it means according to international norms and reviews its practical implementation in various domestic jurisdictions. This examination reveals that in exercising this right, there are different issues and debates that arise about the right to silence during police investigations (pre-trial) and during the trial itself (at trial). Furthermore, the examination reveals that the debate about the nature of the right to silence appears to fall into two categories. One views the right as absolute and necessary to ensure a fair trial. The other views this right as subject to qualification in certain circumstances.

Part II of this paper explores the international and regional human rights instruments for an understanding of the norm of the right to silence, particularly with respect to the related principles of the presumption of innocence and the privilege against self-incrimination.

Part III describes the origin and history of these concepts. The remainder of the paper surveys how different domestic jurisdictions, particularly Canada, Australia, United States and the United Kingdom, have grappled with the issue of the right of silence, some through an analysis of case law; some through legislation reforms; some through empirical research.

## THE RIGHT OF SILENCE – THE NORM IN INTERNATIONAL HUMAN RIGHTS LAW

### **International human rights norms**

One sees fairly quickly from a review of the rights enumerated in the *International Covenant on Civil and Political Rights (ICCPR)* that the right to remain silent is not explicitly guaranteed. The obvious questions arise – does this mean that States can compel suspects to answer questions during interrogations and testify at trial? Does this mean that if a suspect or accused person chooses to remain silent, this silence can be used against him in the determination of guilt? To assist in an understanding of State obligations under international law, it is necessary to look at other rights explicitly described in the *ICCPR*, namely the presumption of innocence and the right not to be compelled to testify against oneself and how those rights relate to the right to remain silent. Underlying all this are the broader rights of the protection of dignity and fairness in criminal due process. It is the right of every person charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.<sup>2</sup> Being treated as innocent is fundamental to a fair trial and intrinsically related to the protection of human dignity. Above all, it guarantees against abuse of power by those in authority and ensures the preservation of the basic concepts of justice and fairness. The rules of evidence and the conduct of a trial must ensure that the prosecution bears the burden of proof throughout the

trial. Intertwined with the presumption of innocence is the right not to be compelled to testify against oneself or confess guilt, which is expressly set out in the *ICCPR*.<sup>3</sup> This means that authorities are prohibited from engaging in any form of coercion, whether direct or indirect, physical or psychological. Furthermore, judicial sanctions cannot be imposed to compel the accused to testify.<sup>4</sup>

It has been said that the right to silence is not a single right but consists of a cluster of procedural rules that protect against self-incrimination.<sup>5</sup> The right to choose whether or not to respond to questioning or to testify is guaranteed by the right not to be compelled to testify against oneself or confess guilt. But there is a debate as to how this right should be protected in the context of a criminal trial where the consequences of exercising the right to remain silent may be determined by the judge or jury. Those who argue for permitting adverse inferences to be drawn suggest that this does not nullify the privilege against self-incrimination as it simply allows the court to make a common sense assessment of all the evidence before it. They argue that the question is whether the power to draw adverse inferences is sufficiently coercive that the accused is not actually protected against self-incrimination. The other side of the argument is that any inferences from silence operate as a means of compulsion, shifting the burden of proof from prosecution to the accused. Simply put, the argument suggests that, the law cannot grant a fundamental right and then penalize a person who chooses to exercise it.<sup>6</sup> In order to understand the extent of this right in international law, an examination of the jurisprudence from international and regional bodies is essential.

The Human Rights Committee is the treaty body established to monitor State Parties' compliance with the *ICCPR*. Through its jurisprudence, including General Comments, Concluding Observations on States' reports and decisions from individual petitions, the Committee has elaborated somewhat on the meaning of these rights and on States Parties obligations under the Covenant. The Committee, in General Comment 13, noted that in many countries, the presumption of innocence has been expressed in very ambiguous terms or entails conditions which render it ineffective.<sup>7</sup> They have clearly stated that "by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt."<sup>8</sup> It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial. The Committee calls on States to pass legislation to ensure that evidence elicited by means of such methods that compel the accused to confess or to testify against himself or any other form of compulsion is wholly unacceptable.<sup>9</sup> In 1995, the Human Rights Committee reviewed the fourth periodic report of the United Kingdom and found that the modification of the right to remain silent in allowing the judge and jury to draw adverse inferences in certain situations



“violate various provisions of Article 14 of the Covenant [fair trial], despite a range of safeguards built into the legislation and the rules enacted thereunder.”<sup>10</sup>

In 1989, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a sub-commission of the United Nations Human Rights Commission) decided to appoint two of its members as rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial. In preparing a Third Optional Protocol to the *ICCPR* aimed at guaranteeing under all circumstances the right to fair trial, they also developed a *Draft Body of Principles on the Right to a Fair Trial and a Remedy*.<sup>11</sup> This body of principles, in elaborating on the accused’s right not to be compelled to testify against him or herself or to confess guilt, specifically sets out that ‘silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent’. Furthermore, any confession or other evidence obtained by any form of coercion or force may not be admitted into evidence or considered as probative of any fact at trial or in sentencing. Elaborating on the presumption of innocence, the *Draft Principles* reiterate that this places the burden of proof during trial on the prosecution and that all public officials shall maintain a presumption of innocence, including judges, prosecutors and the police.<sup>12</sup>

More recent international documents have explicitly included the right to remain silent. Both the Rules of Procedure and Evidence adopted by the criminal tribunals established by the United Nations Security Council for the Former Yugoslavia and Rwanda provide for an explicit right to silence during the investigation stage.<sup>13</sup> The *Rome Statute of the International Criminal Court* not only confers a right to silence, but also provides that silence cannot be used as “a consideration in the determination of guilt or innocence.”<sup>14</sup> This explicit expression of the right to remain silent in the most recent articulations of criminal justice in international instruments indicates the movement of the position that any procedural measures which may have the effect of pressuring suspects and defendants into speaking against their will violates international human rights standards.

## **Regional interpretation**

It is useful to explore the discussion surrounding the right to silence at the regional level. The regional human rights instruments mirror, to a certain extent, the norms as set out in the *ICCPR* and therefore provide a further opportunity to examine this issue.<sup>15</sup> It is the jurisprudence of the European Court on Human Rights, covering more than 50 years, that provides us with insight not only with respect to how the issue of the right to remain silent is understood but also how the Court has interpreted State Parties’ obligations under a human rights instrument. There have been more applications regarding Article 6 – the right to a fair trial – to the European

Court than any other provision in the *European Convention*. The court has often referred to the “prominent place which the right to a fair trial holds in a democratic society” and therefore has held that there is no justification for interpreting Article 6 restrictively.<sup>16</sup> The European Court does not, in practice, question the merits of the decisions on the facts taken at the national level. There is a wide margin of appreciation as to the manner of the national level court’s operation. Given the wide variations in the criminal administration process in different European legal systems, it is not surprising that national courts are allowed to follow whatever particular rule they choose so long as the end result can be seen to be a fair trial.

While the right to remain silent is not explicit in the *European Convention*, the Court held in *Murray v UK* that an individual’s right to remain silent under police questioning and the privilege against self-incrimination are “generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.”<sup>17</sup> However, the Court accepted that the right to silence was not an absolute right. It acknowledged the argument that international standards were silent on the precise implications an accused’s silence would have when the trial judge or jury weighed the evidence. However, the court, stating that a violation was a matter to be determined in light of all the circumstances of the case, did set some clear limits to the inferences that could be properly drawn. One such limit is that it would be incompatible with the *Convention* for a court to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or testify. Inferences could be made in the *Murray* case, because the court found that the circumstances “clearly” called for an explanation and that the inferences were “reasonable.” In these situations, an adverse inference could be drawn if certain safeguards were in place, including the right to counsel, providing a caution in clear terms and ensuring that the accused understood the possible consequences of their decision. In *Condron v UK*, the European Court found a violation when balancing between the right to silence and the circumstances in which an adverse inference could be drawn.<sup>18</sup> The court held that, as a matter of fairness, the jury should have been directed that if it was satisfied the applicant’s silence at the police station could not sensibly be attributed to their having no answer or none that would stand up to cross-examination, it should not draw an adverse inference.

In *R v Saunders*, the European Court noted the close link between the presumption of innocence and the freedom from self-incrimination.<sup>19</sup> The presumption reflecting “the expectation that the state bear the general burden of establishing the guilt of an accused, in which process the accused is entitled not to be required to furnish any involuntary assistance by way of confession.” This case followed the decision in *Funke v France*, where the court held that fairness embraced the right of anyone charged with a criminal offence “to remain silent and not to contribute to incriminating himself.”<sup>20</sup> Therefore, from the European jurisprudence, we see

that the court has interpreted an implicit right of silence. However, this right is not absolute and can be limited in certain circumstances.

## ORIGINS OF THE RIGHT TO SILENCE

### The history of the evolution of the right

A review of the history of the right to remain silent and the privilege against self-incrimination provides some understanding of the various perspectives and positions regarding the right to silence in different jurisdictions. As Wendell Oliver Holmes has said, “a page of history is worth a volume of logic.”<sup>21</sup>

The Latin phrase ‘*nemo tenetur prodere seipsum*’, meaning that no person should be compelled to betray himself in public, dates back to Roman times. It appears that at that time, the privilege was a check on overzealous officials rather than a subjective right of anyone who was accused of a crime. This principle guaranteed that only when there was good reason for suspecting that a particular person had violated the law would it be permissible to require that person to answer incriminating questions. In England, it was not until the late 16<sup>th</sup> Century and early 17<sup>th</sup> Century that we see clear statements of the principle being developed. This occurred around the controversial ecclesiastic courts, the Star Chamber and the High Commission, which were highly unpopular because they were used to suppress religious and political dissent and their procedures were seen as oppressive. The judges had power to interrogate an accused under oath. The suspect could be punished for refusing to testify and it was said that these courts endorsed the practice of torture during interrogation. Furthermore, the interrogation often took place before charges were laid and without the person being informed of what they had alleged to have done. In 1640, a statute brought an end to the practice of interrogating defendants under oath. The next year, in 1641, these courts were abolished.

After the abolition of these courts, the accused was not required or even allowed to take the oath. However, the practice of that time did not allow the accused to be represented by a lawyer. The accused had to speak for himself. Consequently, it was only when the practice of being represented by lawyers and the law of evidence emerged, the privilege against self-incrimination developed as a protection of criminal defendants in the common law. It was in 1898 in England that the *Criminal Evidence Act* was adopted making the accused a competent but not compellable witness. This meant that the accused had the right to testify under oath but not a duty. This Act allowed judges (but not prosecutors) to comment to the jury where the accused chose to remain silent. In practice, the comment was usually restricted to a direction to the jury not to assume that the accused was guilty on the basis of the accused’s silence at trial.

With respect to the right to silence during police interrogation, this principle developed along with the establishment of the professional police force in England in 1829. The development of this principle has been attributed to the suspicious ways confessions were taken. The right of a suspect to refuse to answer official questions was clearly accepted by 1912 with the inclusion of a rule in the *Judges' Rules* which was designed to provide guidelines for police interrogations of suspects. A decision of the English courts in 1914, *Ibrahim v R*, further established that an admission or confession made by the accused to the police would only be admissible in evidence if the prosecution could establish that it had been voluntary, made in the exercise of a free choice about whether to speak or remain silent. Most former English colonies adopted the right to remain silent during pre-trial interviews and at trial as part of their system of criminal procedure. Almost all continue to adhere to it, though subject to some modification.

### **The history of debate between abolition and retention**

The right to silence has been the subject of controversy from the time it became an effective part of the law. Jeremy Bentham published his well-known critique in 1827. His most famous comment: "Innocence never takes advantage of it. Innocence claims to the right of speaking, as guilt invokes the privilege of silence." He suggested that the right against self-incrimination had the inevitable effect of excluding the most reliable evidence of the truth, that which is available only from the accused person. This necessarily caused greater weight to be given to hearsay and other inferior sorts of evidence. He said this privilege confused sport with a search for truth. He claimed that the argument in favor of the privilege for the reason that it protected defendants against judicial torture and ideological persecution was misleading from history. In his day, by the 1800s, England had other, more effective and less harmful means of protecting freedoms of thought and belief. He further argued that this privilege had the inevitable effect of hindering courts from discovering the truth and formed no part of a rationale legal system. While his criticisms did not prevent the privilege from assuming its modern form at that time, his criticism has had long-term effects as forming the basis for current arguments supporting restrictions on the right in many jurisdictions.<sup>22</sup>

There have been other calls for the abolition of the privilege. An American judge's survey of the relevant law in 1968 (H.J. Friendly) argued that the lengths of the privilege in the United States were not rational. He followed similar arguments to Bentham but also looked at the right to privacy issue. Since the introduction of the Fifth Amendment, the protection of personal privacy became a central purpose of the privilege against self-incrimination. Friendly found the privacy-based arguments unconvincing since the privilege goes beyond conduct falling under privacy.<sup>23</sup>

Judge Zupancic of the European Court of Human Rights, analyses Bentham's argument that the right against self-incrimination had the inevitable effect of excluding the most reliable evidence of the truth.<sup>24</sup> Judge Zupancic actually turns this argument around suggesting that it is absurd to justify forms of self-incrimination as necessary in the name of truth finding. The relative nature of truth changes according to the definition of the all-powerful State. He argues that legal procedures have never been designed for truth finding. In fact, he is of the opinion that legal procedures, both adversarial and inquisitorial ones, are not well adapted to fact finding.

The right to remain silent and the privilege against self-incrimination have held different meanings at various periods of history. However, the right has always existed in some form. There is debate about how effective the privilege was as a safeguard for people accused of criminal activities. When it was first introduced in England, the privilege was only available for those under oath. But accused persons were not allowed to give evidence under oath and therefore could be subjected to incriminating questioning. When it did gather more strength in the 19<sup>th</sup> Century, it became the subject of heated debates that still exist in various domestic jurisdictions. The remainder of this paper will review the debate as it has unfolded in four jurisdictions.

## THE CANADIAN CASE LAW

### Common law, legislation and the *Charter*

In Canada, the right to silence and the right against self-incrimination exist as a combination of the common law, statute and the *Canadian Charter and Rights and Freedoms* (the "*Charter*"). Unlike many commonwealth jurisdictions, Australia and the United Kingdom in particular, Canada is a jurisdiction that has constitutionally entrenched fundamental rights affecting the relationship of the state and individuals accused of a crime in the *Charter*.

Any discussion of the right to silence requires reference to the presumption of innocence, a cornerstone of the Canadian and British criminal justice systems which has now been entrenched in section 11(d) of the *Charter*.<sup>25</sup> The significance of the presumption of innocence to the right to silence is that the presumption of innocence places the burden of proving guilt beyond a reasonable doubt on the prosecution alone. The accused cannot be forced to assist the prosecution in proving its case against him by providing testimonial evidence either at the investigation stage or at the trial. Thus, the prosecution is required to make out the case on evidence, other than the accused's testimony, before the accused is required to respond by calling other non-testimonial evidence.

The leading Supreme Court of Canada case that sets out the purpose of the presumption of innocence is *R v. Oakes* in which Chief Justice Dickson, at page 15, states:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. ... It ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.<sup>26</sup>

The corollary of the presumption of innocence is that the accused has the right to remain silent both before and during his trial. Prior to the *Charter*, the rights of an accused to remain silent applied in a narrow set of circumstances. However, through the interplay of sections 7, 10(b), 11(c) and 13 of the *Charter*, Canadian jurisprudence has developed a broad framework of principles aimed at protecting against the use of coercion by authorities in the conscription of the accused as a testimonial source.

The *Charter* does not explicitly articulate the right to silence. However, the Supreme Court has found the right protected as a principle of fundamental justice in accordance with section 7.<sup>27</sup> The right to silence conferred by section 7 is rooted in two common law concepts. First, the confessions rule, which makes a confession which the authorities improperly obtained from a detained person inadmissible in evidence and second, the privilege against self-incrimination, which precludes a person from being required to testify against himself at trial. Underlying both is the concern with the repute and integrity of the justice system. Therefore, the suspect, although detained under the State's "superior" power, maintains the right to choose whether or not to answer the State's questions. If he chooses not to, the State is not entitled to use its "superior" power to negate the suspect's choice.

One Canadian commentator describes the right to remain silent as general and abstract, "concealing a bundle of more specific legal relationships." It is only when examining the surrounding legal rules that this right can be more precisely identified.<sup>28</sup> These surrounding rules include the common law confession rule, the privilege against self-incrimination and the right to counsel. Section 10(b) provides that once detained, the accused is entitled to consult counsel and to be informed of that right.<sup>29</sup> The significance of this section is that it ensures that an accused is made aware of his right to remain silent at a time when that knowledge is most crucial to an informed choice. Section 11(c) protects the right of an accused not to be compelled to testify against himself in a criminal proceeding unless he so chooses.<sup>30</sup> Section 13 protects against the use of testimony by a person in one proceeding from being used against him in a subsequent proceeding.<sup>31</sup>

The right to silence has been expanded upon in recent decisions of the Supreme Court of Canada. These are two aspects to this right in the area of criminal procedure. The first is the pre-trial stage. The second is the criminal trial itself.

## Pre-trial silence

It has always been a basic feature of the common law that an accused person has a right to remain silent before his or her accusers. Viewed another way, it is a restriction on the police investigative power. That is to say, the police do not have a legal right to compel an accused person to provide them with answers to their questions. If an accused person does decide to speak to a “person in authority” during the course of an investigation then the common law places an onus on the prosecution to establish that the statement was given freely and voluntarily, without fear or the promise of favour. There is now the additional consideration of the rights of an accused person under section 7 of the *Charter* in which the accused may not be deprived of his right to life, liberty and security except in accordance with the principles of “fundamental justice.”

In 1990 the Supreme Court of Canada, in *R v. Hebert*, recognized and interpreted section 7 of the *Charter* as providing a guarantee to an accused person of a right to silence before trial.<sup>32</sup> The decision specifically dealt with the rights of a suspect during the course of the investigation of an alleged criminal offence. The facts in *Hebert* were that the suspect had insisted on his right to remain silent and had stated to the police that he did not wish to speak to them. Notwithstanding the suspect’s assertion of his right to remain silent, the police placed an undercover police officer in the accused’s prison cell and obtained a statement from the accused that was incriminating. Madame Justice McLachlin writing the decision for a majority of the Supreme Court articulated the legal principle in this way: “[T]he person whose freedom is placed in question by the judicial process must be given the choice of whether to speak to the authorities or not.”<sup>33</sup>

In the view of the Supreme Court of Canada in this case, to permit the authorities to do indirectly through trickery what the *Charter* does not permit them to do directly would be contrary to the purposes of the *Charter*. This reflects a concern to protect both individual freedom and the integrity of the judicial process through the exclusion of evidence that is offensive to those values as defined in section 7 of the *Charter*. Thus, the Supreme Court has justified the right of a suspect to remain silent at the pre-trial or investigative stage of the criminal process while more clearly defining the scope of the right.

However, the Supreme Court of Canada always attempts to achieve, in its criminal law decisions, a balance between the rights of the accused person and the rights of the State. Thus, in this case the court set out four limitations on the newly articulated pre-trial right to silence. These limitations arise from the practical circumstances of criminal investigations. Therefore, in the first instance this pre-trial right to silence does not prohibit the police from questioning the accused in the absence of his or her lawyer even after the accused has exercised his right to counsel, as long as the police do not deny the accused his or her right to choose whether or not to speak to them. Secondly, the right to pre-trial silence only applies after the accused person has

been detained by the police. The theory for this is that essentially the accused person is not under state control until he or she has been detained and therefore the need to protect an accused from the greater power of the state has not arisen. Thirdly, if the accused makes a voluntary statement to a cellmate who is not an undercover police officer or police informant, that statement may be used against the accused at his or her criminal trial. Fourthly, if the undercover police officer or agent does not actively set out to intentionally elicit incriminating statements from the accused, then those statements may also be admissible at the criminal trial against the accused.

In *Hebert*, the Supreme Court provided limited guidance regarding the distinction between active elicitation and passive undercover work. More recently however, the Court seems to have expanded the scope of what is permissible questioning by an undercover officer. In *Lieu*, the Supreme Court found that an undercover agent asking a cellmate, “What happened?” and saying, “Yeah. They got my fingerprints on the dope” was not, in fact, the equivalent of interrogation.<sup>34</sup>

Based on the foregoing analysis it is clear that the purpose of the right to silence is to prevent the state from subverting the right of a suspect to choose whether or not to speak to the authorities. However, it also appears that the right to silence at the pre-trial stage could be better and more clearly protected than this analysis suggests. For example, in contrast with the Miranda warning in the United States, in Canada there is no legal requirement on the police to warn an accused person that he or she has a right to remain silent. There also appears to be no requirement that the accused understand the right to silence. In addition, there is a fine distinction between what may be viewed as either the passive or the active behaviours of an undercover police officer in obtaining an incriminating statement from a suspect.

Recent cases at the Court of Appeal level have proposed that the right to silence should be more meaningful to ensure the purpose of the right – “to prevent the use of state power to subvert the right of an accused to choose whether or not to speak to authorities” is respected.<sup>35</sup> Therefore where the police continued to question the suspect after being told four times that he chose to remain silent, the court found a violation of section 7. The court found that the actions by the police “totally disregarded the accused’s desire and undermined his choice to remain silent.”<sup>36</sup>

Young persons (persons under 18 years of age at the time of commission of an offence) are accorded additional rights to those provided by the common law and the *Charter* based on their vulnerability to the coercive nature of police interrogation. Section 56 of *The Young Offenders Act* provides preconditions to the admissibility of a statement.<sup>37</sup> First, the statement must be proven to be voluntary. Second, the police must provide certain information to the youth in language that is appropriate to his level of maturity. This information includes cautions that he



is not obliged to give a statement and that, if he does, it may be used in evidence against him. A youth must also be informed that he has the right to counsel and the right to have a parent present while a statement is being taken. Third, the youth must be provided with a reasonable opportunity to exercise the right to have counsel and parents present.

The further, and logical, extension of the pre-trial right to silence is that the mere exercise of that right by an accused person should not result in any adverse inference as to the accused's guilt being drawn in any subsequent criminal trial. In *R v. Chambers*, the Court said that it would be a "snare and a delusion" to offer a suspect the right of silence during investigation only to later turn his silence against him at trial.<sup>38</sup> However, this is not an absolute right and there may be particular circumstances in rare cases when such evidence may be relevant and admissible. The reason for this is that, in the view of the Supreme Court, different considerations apply at trial such as the disclosure of the case that has to be met, legal representation of the accused and the enforcement of rules of admissibility of evidence by a legally trained judiciary.

### **At-trial silence**

In Canada, an accused cannot be compelled to testify at trial. However, the issue of whether the judge or jury could draw an adverse inference against an accused for not testifying has been the discussion by the Supreme Court of Canada in numerous cases. Back in 1994, in *R v. P. (M.B.)*, the Court found that the accused must answer the case against him or her when it is clear that there is a case to be met by the accused.<sup>39</sup> In the words of Chief Justice Lamer in *P. (M.B.)*, at pages 227-228, once a *prima facie* case has been presented that could not be non-suited by a motion for a directed verdict of acquittal, "... the accused can no longer remain a passive participant in the process and becomes – in the broad sense – compellable. That is, the accused must answer the case against him or her, or face the possibility of conviction." However, the Court did not suggest that the prosecution could use the accused's silence as a piece of inculpatory evidence or as a means to shore up an otherwise incomplete case against the accused.

Any ambiguity in the case law relating to the use to be made by a judge or jury of the accused's failure to testify was clarified by the Supreme Court in *R v. Noble*.<sup>40</sup> The majority of the Supreme Court (a 5 to 4 decision) established that any use of the accused's silence in order to establish his guilt beyond a reasonable doubt was impermissible even in the case of overwhelming evidence. The majority and the dissenting opinions articulate the debate amongst jurists in Canada. Writing for the dissenting opinion, Chief Justice Lamer poses one side of the debate:

Why has this Court commented so frequently on the effect of the accused's silence? Why has it arisen so often as an issue before this court? The reason is simple: silence can be very probative. ... Under the right circumstances...

silence can be probative, and form the basis for natural, reasonable and fair inferences.<sup>41</sup>

Sopinka J, writing for the majority puts forth the other side:

If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. Thus, in order for the burden of proof to remain with the Crown ... the silence of the accused should not be used against him or her in building the case for guilt.<sup>42</sup>

This concept of right to silence rests in the notion of protecting human dignity.

Where the accused raises a defence of alibi, the Court in *Noble* held that this failure to testify was an exception to the general rule that his silence may not be used against him. Where an accused relies on an alibi, the judge or jury may draw an adverse inference against him for his failure to testify. *Noble* raises the concern that while no adverse inferences can be drawn from the accused's silence at trial, the *Canada Evidence Act* bars a trial judge from advising the jury not to do so.<sup>43</sup>

Over the years, the Supreme Court of Canada has refined the meaning and scope of the right to silence both at the pre-trial and trial stage. It now appears that the law in Canada is that the right to silence is foundational and of broad application.

## THE AUSTRALIAN REVIEWS

### Legislation and case law

I now turn to an examination of the right to silence in two Australian states, New South Wales and Victoria, where recent reviews of the right to silence have been conducted by the relevant Law Reform Commissions. In New South Wales and Victoria, as in other Australian jurisdictions, the accused is a competent but not compellable witness, thereby expressly preserving the accused's right to remain silent at trial.<sup>44</sup> In Australia, the common law position is that if the accused remains silent at trial, the jury is then entitled to use the silence as the basis for drawing adverse inferences and the judge is permitted to comment on the accused's silence

and to instruct the jury on how that silence may be used in its deliberation. In New South Wales, legislation makes provision for a judge to comment on the accused's silence.<sup>45</sup> However, in Victoria, legislation provides that neither the judge nor the prosecutor may comment on the accused's failure to testify.<sup>46</sup>

Regarding the right to remain silent prior to trial, there is no law in any Australian jurisdiction that makes it an offence to remain silent in response to police questioning. The position at common law is that the trial judge and prosecutor are prohibited from commenting at trial on pre-trial silence.<sup>47</sup> The right to silence when questioned by police has been modified in different ways by numerous statutes. For example, in New South Wales, the *Traffic Act* requires drivers to produce their licence and provide their names and addresses when requested by police. Non-compliance is an offence.<sup>48</sup>

Two major decisions of the Australian High Court on the right to silence have raised questions as to the extent the Australian courts will protect that right. In the first case, *Petty v The Queen*, the court strongly upheld the suspect's right to silence whereas in the second, *Weissensteiner v The Queen*, the court appeared to back down from the statements made in *Petty* and recognised some limits on the right. The *Petty* decision (see Appendix) seemed to confirm the position that no adverse inference could be drawn from the exercise of the right to silence pre-trial, primarily because doing so would undermine the right to silence which was held to be a "fundamental rule of the common law." The court rejected a line of authorities that distinguished between inferences adverse to guilt and those adverse to credibility. The majority of the Court in *Weissensteiner* (see Appendix) distinguished *Petty* on the basis that the court was dealing with silence *at trial* rather than silence *before trial*. They held that an inference of guilt could not be drawn from silence, but that, if an inference of guilt was otherwise available on the evidence, that inference could more safely be drawn where the accused failed to provide an innocent explanation. Although both cases illustrate the importance not only of a right itself, but also as a protection of the suspect or accused, *Weissensteiner* shows that the right to silence may be limited. Although the right is not to be lightly disregarded, it is balanced against the desire not to exclude evidence which can rationally support a finding of guilt. It is not so clear in *Weissensteiner* as to when this balance will be struck.<sup>49</sup>

### **Recent reviews and empirical research**

A number of Australian states have conducted extensive reviews of the law relating to the right to silence.<sup>50</sup> These reviews generally do not consider whether the right to silence should be abolished. They define the right as meaning that a suspect should not be compelled to answer police questions or should not be compelled to testify at trial. Rather, the focus of the reviews

relates to whether it should be permissible for the exercise of this right to be used in any way against a suspect. Two of the most recent reviews will be examined for the purposes of reviewing the Commissions' use of empirical research in reaching their recommendations. In a report in July 2000, the New South Wales Law Reform Commission considered whether a right to silence should exist and if so, what ought to be the nature of any inference drawn from the exercise of that right.<sup>51</sup> In Victoria, a committee was formed to examine the right to silence at trial and pre-trial and the consequences that flowed in exercising these rights. Their report was distributed in 1998.<sup>52</sup> Both reviews provide details of the arguments for and against reform of the right to silence (both pre-trial and at trial). The main focus of the reform is permitting judicial comment on the inferences which the jury is entitled to draw.

One of the arguments for reform dates back to Jeremy Bentham's claim of the likelihood of misuse of the right by guilty suspects. The argument suggests that common sense demands that an innocent person would naturally deny an accusation leveled by police and offer an explanation for the circumstances or conduct which created suspicion. Others go further and argue that the right to silence is exploited by guilty suspects, particularly "hardened or professional" criminals, and that this impedes police investigations, prosecutions and ultimately convictions. It is noteworthy that both Australian reviews report that, in reviewing the empirical research, there appears to be no evidence to support these claims. In fact, the research indicates that very few suspects actually exercise the right to silence, which suggests that modifying the right would not significantly increase prosecutions or convictions. Moreover, the empirical evidence indicates that a suspect's reliance on the right to silence does not reduce the likelihood of charges being laid or the likelihood of the suspect pleading guilty or the likelihood of an acquittal at trial. Some Australian research suggests that the likelihood of a suspect being charged and convicted increases where the suspect exercises the right to silence. The data was inconclusive with respect to whether the right is exploited by suspects in relation to serious offences or exploited by professional or hardened offenders. The question raised is: if this is truly a right, can its mere exercise by a suspect ever be considered to be exploitation or abuse of the right?<sup>53</sup>

Another argument for reform relates to the concern of whether the criminal justice system is able to cope with complex trials and "ambush defences."<sup>54</sup> This position claims that reform would improve the efficiency of criminal investigation by police. However, there is no evidence that the right to silence leads to an excessively high rate of unjustified acquittals. Actually, in Victoria the conviction rate is 95% (or 98% with guilty pleas taken into account). The data shows that ambush defences only occur in 1.5% to 5% of the cases and that those who raise them are more likely to be convicted than acquitted. One English study found that every defendant who relied on an ambush defence was convicted.<sup>55</sup> The classic example of an ambush defence is an alibi which now has statutory rules in both states where the defence must disclose details before

the trial. The other side of this argument is that the creation of an adverse inference from the right to silence may actually create a positive incentive for the police to concoct silence.

It has also been argued that the right to silence during interrogation by police can be offset by other safeguards which provide adequate protection for suspects and address the power imbalance between suspect and police. Some of these safeguards include access to legal services or an independent observer during police questioning or electronic recording of the interview. While legal advisors more likely advise suspects to remain silent, research illustrates that this frequently forms part of a temporary strategy, including obtaining better disclosure of the accusations from the police. A weakness to this argument is the assumption that access to legal advice and other safeguards remove any legitimate reasons an innocent suspect might otherwise have for preferring to remain silent. Another weakness in this argument is illustrated by research conducted in England that shows that the quality of advice and representation is often disappointing. In juvenile cases where a parent, guardian or social worker can be present during questioning, research shows that they provide little assistance or guidance to the suspect. Furthermore, electronically recording the interview does not remove the many legitimate reasons which innocent suspects may have for remaining silent during police interrogation. The review by the Victorian Committee points out that when the United Kingdom modified the right to remain silent, this took place as one of a number of legislative changes that introduced other safeguards for suspects, including the legal aid duty solicitor scheme and electronically recorded interviews. The Committee cited the lack of publicly funded right to free legal advice in Victoria as a hindrance for introducing a modified right to silence.

Another argument for reform is that there is the need to regulate the use made of silence by juries. Where juries become aware that the defendant refused to answer police questions, the argument is that there is a real risk that they will place too much weight on the defendant's silence unless they are guided by judicial direction as to the inferences which can be drawn. However, it is one thing what a jury may infer, given no help from the court. It is another thing when a court solemnizes the silence of the accused into evidence against him.

There are a number of arguments for retaining the right to silence. One such argument is that there are many legitimate reasons for exercising this right, which are consistent with innocence. For example, suspects may distrust the police and fear that police will trick them into answering questions or distort their answers or harass potential defence witnesses. Suspects may be reluctant to repeat an explanation given to police informally which was disbelieved. Innocent suspects may have a desire to protect others or fear being labeled a police informant or fear reprisal by the offender. Suspects may want to conceal something unrelated to the crime which is personally embarrassing or something that they are ashamed of or to conceal illegal behavior, which is not under investigation. Suspects may be in shock and confusion at police accusations

or believe that the allegations are so absurd or offensive that they should not be dignified with a response. Suspects may genuinely not be able to answer police questions. The allegations may be vague and unclear. The police may not have revealed enough detail about the allegations to enable them to answer the questions. The events which give rise to the allegations may be so factually complex or the issues upon which guilt will turn so fine, that suspects may take the view that it would be unwise to answer questions until they had the opportunity to review their situation with the help of a lawyer. Suspects may refuse to answer questions upon the advice of a lawyer. Suspects may have limited language ability or be intoxicated or under the influence of drugs at the time of questioning or have low IQ or mental deficiencies. Research indicates that the physical or mental condition of the suspect was one of the main reasons for legal advice to remain silent. Research also shows that the suspect's general attitude towards the police is a key factor in determining the level of the suspect's cooperation with police questioning.

Another argument for retaining the right to silence as it exists in these jurisdictions is the effect that abolishing or modifying this right would have on police practices and modes of detection of crime. The concern is that modification could result in police manipulating interviews by framing questions in a way that encourages suspects to remain silent. The right to silence provides a necessary incentive to police to investigate thoroughly and search for evidence beyond mere confessions.

If this right is abolished or reformed, the concern expressed by these reviews is that this will result in the substitution of trial by a court by a trial in a police station, which is repugnant to our conceptions of the rule of law. If courts and juries are permitted to draw adverse inferences from the defendant's exercise of this right, it is argued that this would operate, in practice, as a form of compulsion, infringing the requirements that admissions made in police interviews be voluntary. Research in Northern Ireland indicates that, after the modification of the caution given to suspects by police, most suspects believed that there was an obligation to answer any questions put by the police. This argument suggests that any modification would undermine the fundamental principles of the presumption of innocence and the prosecution's burden of proving the defendant's guilt.

Both reviews recommend the retention of the right to remain silent. The New South Wales Commission concluded that the right to silence when questioned by police is "a necessary protection for suspects, and that its modification would undermine fundamental principles." The Committee in Victoria was of the view that the law relating to right to silence should not be changed. They were not convinced that the right to silence created any significant problems. They believed that any changes to this right may have undesirable effects and that allowing adverse inferences to be drawn from silence would create an unacceptable risk of miscarriage of justice. They did however, recommend that prohibiting judges from commenting on silence

was undesirable and should be lifted. Judges should be permitted to direct the jury, in accordance with *Weissensteiner*, about the circumstances in which, and purposes for which, it may use the accused's failure to testify in reaching its verdict.

## THE UNITED KINGDOM EXPERIENCE

### Recent changes in legislation

In the United Kingdom, there have been a number of reviews by various Committees and Royal Commissions dating back to 1968 on whether to abolish, retain or modify the right to remain silent.<sup>56</sup> The majority of these reviews recommended retaining the right to remain silent as it was defined in Halsbury:

The failure of an accused person when questioned to mention some fact which he afterwards relies on in his defence cannot found an inference that the explanation subsequently advanced is untrue, for the accused has a right to remain silent... The failure of the accused to testify on his own behalf may not be made the subject of any comment... but he should make it clear to the jury that failure to testify is not evidence of guilt and that the accused is entitled to remain silent and see if the prosecution can prove its case.<sup>57</sup>

Despite this, there remained strong political pressure to modify this right. The justification cited for modification was that it was necessary to respond to terrorist suspects, trained in counter interrogation techniques, who exploited the right to silence when questioned by police and raised ambush defences at trial.<sup>58</sup> In 1988 the Home Office established the Home Office Working Group on the Right to Silence which had as the term of reference to advise the government on how to change the law, not whether or not in principle some form of change was justified.

The law relating to the right to silence in the UK was substantially modified in Northern Ireland by the *Criminal Evidence (Northern Ireland) Order 1988* and in England and Wales by the *Criminal Justice and Public Order Act 1994*. These laws permit the jury to draw strong adverse inference from the exercise of the right to silence when questioned by police or at trial, and allow the trial judge to direct the jury accordingly. Both pieces of legislation allow the court to draw whatever inferences "appear proper" from the accused's silence in four sets of circumstances. First, when the accused fails to mention during questioning or upon charge any fact which he or she later relies in his or her defence at trial, if under the circumstances, he or she would have been "reasonably expected" to mention that fact.<sup>59</sup> Second, where the accused refuses to be sworn or to answer any questions at his or her trial.<sup>60</sup> Third, where the accused fails to account

for any objects, substances or marks upon him or her, or upon his or her clothing, or in his or her possession at the time of his or her arrest.<sup>61</sup> Fourth, where the accused fails to account for his or her presence at a particular place.<sup>62</sup> The 1994 Act contains three safeguards: no adverse inferences can be drawn against child defendants or defendants with certain physical or mental conditions; a defendant cannot be convicted solely on an inference drawn from his silence; and a failure to testify cannot give rise to criminal prosecution for contempt.

## Jurisprudence

The legislation is complex and has already resulted in a sizeable body of commentary and interpretation. The courts in Northern Ireland have interpreted the provisions in the 1988 Order widely, holding that such inferences can be drawn once the prosecutor has established a *prima facie* case and does not require that the prosecutor's case be "on the brink" of proving guilt.<sup>63</sup> In one case, unfavourable inferences were drawn where the defendant initially failed to mention the relevant fact but disclosed it later during police questioning.<sup>64</sup> The courts have also held that it is not necessarily reasonable for a suspect to fail to mention a fact on the basis of having received legal advice to remain silent.<sup>65</sup>

In England, the Court of Appeal in *R v Cowan and Others* rejected the argument that the 1994 Act altered or watered down the burden of proof as the prosecution still had to prove a *prima facie* case.<sup>66</sup> In the *Condrón v UK* case, which later went to the European Court of Human Rights, the English Court of Appeal held that legal advice by itself could not prevent an adverse inference being drawn, reasoning that this would render s. 34 "wholly nugatory." While the Court of Appeal noted that it would have been desirable for the trial judge to give some direction to the jury about drawing adverse inferences, the conviction of Condrón was safe because of the "substantial, almost overwhelming, evidence."<sup>67</sup> Some commentators have noted that the English Courts were more concerned with the safety of the conviction rather than whether the accused had received a fair trial and as such may have future decisions reversed by the European Court.<sup>68</sup>

## Debate and European Review

Criticisms of the 1988 Order and the 1994 Act surfaced as soon as the legislation was passed. These included being poorly drafted and ill considered, a potent source of confusion and resulting in wrongful convictions.<sup>69</sup> To some, the modification to the right to silence represents a clear shift in the burden of proof in the criminal trial in the United Kingdom. This position is that it is not simply curtailment or restriction but nothing less than abolition of the right to silence. If it is permissible for the silence of the suspect, under police questioning, to reinforce the prosecu-



tion's case, this must have the effect of putting pressure on suspects to give answers or run the risk that they will strengthen the evidence against them. This, in effect, removes the pre-existing right to say nothing without significant penalty. Some critics say this is a clear watering down of the prosecution's burden of proof. However, supporters of this modification argue that this change can be safely accommodated within the tolerances of a system that nevertheless remains committed to protecting the rights of defendants.<sup>70</sup>

The European Court of Human Rights, in a number of cases from the English courts, has used as its starting point for analysis the affirmation of the implicit right to silence in the *Convention*. Since that right is not absolute, the trial judge can draw strong unfavourable inferences from the defendant's silence when questioned by police using the "common sense" test, meaning where a situation clearly calls for an explanation, the court can take into account the accused's silence in assessing the prosecution evidence. Where a *prima facie* case exists against the accused independently of adverse inferences from the silence, this direct evidence combined with legitimate inferences could lead a jury to be satisfied beyond a reasonable doubt that the accused was guilty. However, the European Court also stated that the right to silence was an "inherent element" of a fair trial and that the right to a fair trial would be violated if the defendant were convicted solely or mainly on the basis of his exercise of the right to silence.<sup>71</sup>

Recent cases of the European Court give further indication how the English Courts should apply the right to silence and balance drawing adverse inferences. In finding a violation of Article 6, the Court noted in *Condron v UK* that "particular caution" was required before drawing an adverse inference.<sup>72</sup> The Court in *Averill* went farther when it said that "the extent to which adverse inferences can be drawn from an accused's failure to respond to police questioning must be necessarily limited." It further recognised that there may be other sufficient reasons for an innocent suspect to remain silent during police questioning besides relying on legal advice to do so.<sup>73</sup> With the passing of the *Human Rights Act 1998* in the United Kingdom, the case law of the European Court may have more impact on the Court of Appeal in requiring a determination of fairness in criminal trials rather than focusing on the safety of a conviction.

## THE UNITED STATES EXPERIENCE

### **The Fifth Amendment and *Miranda***

In the United States, case law has recognized two constitutional bases for the requirement that only voluntary confessions will be admitted: first, the Fifth Amendment which provides that no person "shall be compelled in any criminal case to be a witness against himself" and the

Due Process Clause of the Fourteenth Amendment which states that the voluntariness test is controlled by the Fifth Amendment.

In *Miranda v. Arizona*<sup>74</sup> the United States Supreme Court formulated a set of concrete constitutional guidelines in the area of police interrogation that has, over the past thirty four years, become part of the American lexicon. Prior to *Miranda*, a confession was excluded only where it was established by evidence that it had been made as a result of actual coercion, threat or promise. The Supreme Court decision departed from this rule and established an irrebuttable presumption that a statement was involuntary if taken in custody by the police without a "Miranda warning." Even where a confession could otherwise be proven to be voluntary and not the result of threat, coercion or promise, it would be excluded in the absence of the proper warning. The warning, which must be given prior to any questioning, requires the police to warn a person in custody of the following constitutional rights: a.) the right to remain silent, b.) that anything the suspect says can be used against him in court, c.) the right to have a lawyer present, and d.) the right to have a lawyer appointed by the state if the suspect cannot afford one. Furthermore, the police must afford an opportunity to exercise these rights throughout any subsequent interrogation. If at any time the suspect indicates that he wishes to consult a lawyer before speaking, the questioning must cease. Similarly, if the suspect indicates that he does not wish to be interrogated, the police must not commence questioning. A suspect who consents to answer some questions may withdraw that consent at any time. Once consent has been withdrawn, the police are required to stop questioning. At trial, the prosecution must prove that these warnings were given and the accused provided a statement to the police only after he "knowingly and intelligently" waived these rights.

Only statements stemming from custodial interrogation fall within the Miranda rules. The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In *Miranda*, the Court examined in some depth the nature and setting of in-custody interrogations as well as police training and common practices used to obtain confessions. It found that, although modern police practice uses psychological rather than physical methods to obtain statements, the similar intent was to "subjugate the individual to the will of the examiner," which the Court found was coercive and destructive to human dignity. Generally, the Court has upheld the principle that the accused's exercise of his right to remain silent should not be used as evidence against him at trial.

Over the years, the Supreme Court has carved out some exceptions to the strict interpretation of the Miranda rules. For example, where police informants pose as inmates and question the suspect about his involvement in a murder, an inculpatory statement may be admissible on the basis that there was no inherently coercive atmosphere where a suspect believes he is merely

chatting to a fellow inmate rather than talking to a police officer.<sup>75</sup> In *Pennsylvania v. Muniz*<sup>76</sup> the Supreme Court ruled that responses to booking questions which dealt with routine biographical information such as name, address, height, weight etc., were admissible despite the absence of a Miranda warning and waiver of rights.

### Recent developments

Subsequent to *Miranda*, the United States Congress attempted, by legislation, to limit the effect of the ruling by enacting a provision that allowed courts to admit as evidence otherwise voluntary statements where police had failed to inform the suspect of his rights according to the Miranda rules. In *Dickerson v. United States*<sup>77</sup> the Supreme Court reiterated that *Miranda* was a constitutional decision in which the Court had interpreted and applied the provision of the Constitution relating to the right against self-incrimination. As such, Congress did not have the authority to legislatively supercede the Supreme Court's decision by enacting legislation. The Court further declined to overrule *Miranda* on the basis of *stare decisis* even though it acknowledged the obvious disadvantage of a rule that excludes both voluntary and involuntary statements.

## CONCLUSION

From an examination of the international and regional human rights instruments and the implementation practice in various domestic jurisdictions, it would appear that the question is not whether there is a right to silence, but rather what is the precise nature of this right. Is it an absolute right essential to a fair trial or is it subject to certain qualifications in order to provide for a balancing between individual rights versus states' interests?

In 1966, at the time the ICCPR was drafted, the right to silence was not explicitly mentioned in any international instrument. However, recent developments, including the jurisprudence from the European Court on Human Rights, the *Draft Body of Principles on the Right to a Fair Trial*, the recent *Rules of Procedure and Evidence* adopted by the criminal tribunals established for the Former Yugoslavia and Rwanda and the *Rome Statute of the International Criminal Court*, appear to firmly establish this right as an international standard. The most recent articulation of this right in the *Rome Statute* provides for a broad interpretation in that "silence may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent."

While the right seems to be evolving in international law, in various domestic jurisdictions the nature and extent of the right to silence is very much in issue. In Australia, recent reviews

have examined whether the right should be abolished, modified or retained. In the United Kingdom, the legislative modifications of the right are much in debate both in domestic courts and the European Court on Human Rights. Canadian case law also reflects the debate as to the extent and effect of adverse inferences when a suspect exercises the right to silence. All of these jurisdictions recognise a right to silence both at trial and during investigation. The differences lie in the importance placed on this right and balancing the use of drawing adverse inferences with the presumption of silence and the right not to be compelled to testify against oneself. Underlying these differences is the fundamental debate dating back to the origins of the right to silence. There are those who believe that “innocence never takes advantage of it. Innocence claims to the right of speaking, as guilt invokes the privilege of silence.” On the other hand, some believe that the right to silence is fundamental to a fair trial and protection of human dignity and can never be qualified.

## NOTES

<sup>1</sup> Wong Kai-shing, “*The Right to Silence: The Zero Statement Rule*” found at [www.ahrchk.net/solidarity/200011/v1011\\_05.htm](http://www.ahrchk.net/solidarity/200011/v1011_05.htm)

<sup>2</sup> The *Universal Declaration on Human Rights*, Article 11: everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

*ICCPR*, Article 14(2): everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

<sup>3</sup> *ICCPR*, Article 14(3): in the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality... (g) not to be compelled to testify against himself or to confess guilt.

<sup>4</sup> Amnesty International, “*Fair Trials Manual*” (December 1998), found at [www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm](http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm)

<sup>5</sup> Michael, J. and Emmerson, B. “*Current Topic: The Right to Silence*” (1995) 1 *European Human Rights Law Review* 4 at 6.

<sup>6</sup> These arguments are summarized in the article by Michael and Emmerson, *ibid.* at 6.

<sup>7</sup> Human Rights Committee, *General Comment 13, Article 14 (Twenty-first session, 1984)* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/REV.1 at 14 (1994)

<sup>8</sup> *General Comment 13, ibid.*

<sup>9</sup> *General Comment 13, supra* note 7.

<sup>10</sup> CCPR/C/79/Add 55, July 27, 1995 at para. 17.

<sup>11</sup> *The Draft Body of Principles on the Right to a Fair Trial and a Remedy*, Annex II of the “*The Administration of Justice and the Human Rights of Detainees – The right to a fair trial: Current recognition and measures necessary for its strengthening – Final Report prepared by Mr. Stanislav Chernichenko and Mr. William Treat*,” E/CN.4/Sub.2/1994/24, 3 June 1994.

<sup>12</sup> *Ibid.*

<sup>13</sup> International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, adopted on 29 June 1995 and amended thereafter, consolidated text dated 31 May 2000, Rule 42 (found at [www.ictt.org](http://www.ictt.org)) and International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, last amended 12 April 2001, Rule 42 (found at [www.un.org/icty/basic.htm](http://www.un.org/icty/basic.htm).)

<sup>14</sup> *Rome Statute of the International Criminal Court* (UN Doc A/CONF.183/9) Article 66 (presumption of innocence) and Article 67 (to remain silent, without such silence being a consideration in the determination of guilt or innocence) (found at [www.un.org/law/icc/statute/rome.htm](http://www.un.org/law/icc/statute/rome.htm).)

<sup>15</sup> The *European Convention on Human Rights* (1956) Article 6 ensures that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. While this article further elaborates on the minimum due process rights, it does not explicitly provide for the right to remain silent nor the right not to be compelled to testify against himself or to confess guilt.

The *American Convention on Human Rights* (1978) Article 8 provides that every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law; the right not to be compelled to be a witness against himself or to plead guilty; and that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

The *African (Banjul) Charter on Human and Peoples' Rights* (1981) guarantees in Article 7 the right to be presumed innocent until proved guilty by a competent court or tribunal.

The *Cairo Declaration on Human Rights in Islam* (1990) Article 19 provides that a defendant is innocent until guilt is proven in a fast trial in which he shall be given all the guarantees of defence.

<sup>16</sup> Harris, D.J., O'Boyle, M. and Warbick, C., *Law of the European Convention on Human Rights* (1995).

<sup>17</sup> *Murray v UK* (1996) 22 E.H.R.R. 29 (ECHR) (this case and those cited below can be found at [www.echr.coe.int/](http://www.echr.coe.int/)).

<sup>18</sup> *Condron v UK* (2000) 8 B.H.R.C. 290 (ECHR).

<sup>19</sup> *Saunders v UK* (1997) 23 E.H.R.R. 313 (ECHR).

<sup>20</sup> *Funke v France* (1993) 16 E.H.R.R. 297 (ECHR).

<sup>21</sup> This review of the history of the origins of the right to silence and the privilege against self-incrimination is from a number of sources, including Helmholz, R.H., Gray, C.M., Langbein, J.H., Moglen, E., Smith, H.E., and Alschuler, A.W., *The Privilege Against Self-Incrimination: Its Origins and Developments* (The University of Chicago Press); Scrutiny of Acts and Regulations Committee, “*The Right to Silence: An Examination of the Issues*” Chapter 2 – The Origins of the Right to Silence (found at [www.parliament.vic.gov.au](http://www.parliament.vic.gov.au)); New South Wales Law Reform Commission “*Discussion Paper 41: The Right to Silence*” (May 1998); and Wolchover, D. and Heaton-Armstrong, A., *Wolchover and Heaton-Armstrong on Confession Evidence* (1996 – London, Sweet Maxwell).

<sup>22</sup> The details of Jeremy Bentham’s critique is described in Helmholz, R.H et al, *supra* note 21.

<sup>23</sup> *Ibid.*

<sup>24</sup> Zupancic, Bostjan, “*The Privilege Against Self-Incrimination as a Human Right*” paper delivered in Vancouver , Canada (Fall, 1999).

<sup>25</sup> *Charter*, section 11 – Any person charged with an offence has the right.... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

<sup>26</sup> *R v. Oakes* (1986) 50 C.R. (3<sup>rd</sup>) 1(S.C.C.)

<sup>27</sup> *Charter*, section 7 – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice and *R v. Hebert* [1990] 2 S.C.R. 151.

<sup>28</sup> Galligan, D.J. “*The Right to Silence Reconsidered*” paper discussed in *R v Hebert*, *supra* note 27.

<sup>29</sup> *Charter*, section 10 – Everyone has the right upon arrest or detention... (b) to retain and instruct counsel without delay and to be informed of that right.

<sup>30</sup> *Charter*, section 11 – Any person charged with an offence has the right...(c) not to be compelled to be a witness in proceedings against that person in respect of the offence.

<sup>31</sup> *Charter*, section 13 – A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

<sup>32</sup> *R v. Hebert* [1990] 2 S.C.R. 151

<sup>33</sup> *Ibid.* at p. 182.

<sup>34</sup> *Lieu* (1999), 27 C.R. (5<sup>th</sup>) 29 (S.C.C.)

<sup>35</sup> The purpose is set out in *R v Hebert*, *supra* note and the recent Court of Appeal cases are discussed in Stuart, D. *Charter Justice in Canadian Criminal Law* (3<sup>rd</sup> Ed.) 2000 at p115-116.

<sup>36</sup> *Otis v R* (2000), 37 C.R. (5<sup>th</sup>) 320 (Que CA)

<sup>37</sup> *The Young Offenders Act* R.S.C. 1985, c. Y-1. S.56 am. R.S.C. 1985, c. 24 (2<sup>nd</sup> Supp.), s.38; 1995, c.19, s.35

<sup>38</sup> *R v. Chambers* (1990), 80 C.R. (3<sup>rd</sup>) 235 (S.C.C.)

<sup>39</sup> *R v. P. (M.B.)* (1994), 29 C.R. (4<sup>th</sup>) 209 (S.C.C.)

<sup>40</sup> *R v. Noble* (1997), 6 C.R. (5<sup>th</sup>) 1 (S.C.C.)

<sup>41</sup> *Ibid.* at p 887.

<sup>42</sup> *Ibid.* at p 828.

<sup>43</sup> *Canada Evidence Act* R.S.C. 1985, c. C-5 – section 4(6) The failure of the person charged, or the wife or husband of such person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

<sup>44</sup> *Criminal Law and Evidence Act 1891* (NSW) and *Crimes Acts 1958* (Vic) s. 339.

<sup>45</sup> *Evidence Act 1995* (NSW) s.89.1 In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused: (a) to answer one or more questions, or (b) to respond to a representation, put or made to the party or other party in the course of official questioning.

89.2 Evidence of that kind is not admissible if it can only be used to draw such an inference.

89.3 Subsection 1 does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

Prior to the 1995 *Act*, the state of the law on this issue has changed from time to time: in 1893, case law permitted the trial judge to direct the jury to draw adverse inferences from an accused's failure to testify at trial. However, in 1900, this was modified by legislation in which judicial comment on the exercise of the right to silence at trial was prohibited.

<sup>46</sup> *Crimes Act 1958* (Vic) s. 339

<sup>47</sup> The common law position was articulated in *Petty v The Queen* (1991) 173 CLR 95

<sup>48</sup> New South Wales Law Reform Commission, *supra* note 21.

<sup>49</sup> The information contained in this paragraph is from *Petty v The Queen* (1991) 173 CLR 95 F.C. 91/029 and *Weissensteiner v The Queen* (1993) 178 CLR 217 F.C. 93/051 (1993) 68 A Crim R 251 (both found at [www.austlii.edu.au/cgi-bin/](http://www.austlii.edu.au/cgi-bin/)) and Stone, E. "Calling a Spade a Spade: The Embarrassing Truth About the Right to Silence" (1998) 22 Criminal Law Journal 17.

<sup>50</sup> In 1974, the Criminal Law and Penal Methods Reform Committee of South Australia recommended that in deciding guilt, the tribunal of fact be entitled to draw such inferences as seems to it to be proper from the accused's silence when questioned by police. In 1975, the Australian Law Reform Commission recommended retaining the existing law in relation to silence when questioned by police. In 1987, the same Commission recommended codification of the existing law and also permitting judicial comment on the exercise of this right at trial. In New South Wales in 1990, the Law Reform Commission recommended that no adverse inference be permitted from a refusal to answer police questions or participate in police investigations. In 1997, the New South Wales Police Commission called for a review to the right to silence. At the same time, the Director of Public Prosecutions also supported some relaxation of this right. Summaries of these reviews contained in New South Wales Law Reform Commission, *supra* note 21.



<sup>51</sup> New South Wales Law Reform Commission, *supra* note 21 (also found at [www.lawlink.nsw.gov.au/lrc.nsf/](http://www.lawlink.nsw.gov.au/lrc.nsf/))

<sup>52</sup> Scrutiny of Acts and Regulations Committee, “*The Right to Silence, Final Report*” (March 1999: Parliament of Victoria) (found at [www.parliament.vic.gov.au/sarc/RTS%20Report/rts99.html](http://www.parliament.vic.gov.au/sarc/RTS%20Report/rts99.html).)

<sup>53</sup> This section summarizes the empirical research done in England which is referred to in the New South Wales and Victoria reviews. Also the New South Wales Law Reform Commission conducted their own research, the results of which are contained in NSW Law Reform Commission Research Report 10 “*The Right to Silence and Pre-trial Disclosure in NSW*” (July 2000). The list of research is contained in the select bibliography annexed to the NSW Law Reform Commission report.

<sup>54</sup> “Ambush defences” mean those defences that are raised for the first time during the trial and based on evidence which could have been disclosed during interrogation.

<sup>55</sup> This study and other studies in the United Kingdom have been summarized in Leng, R. “*The Right to Silence Debate*” in Morgan, D. and Stephenson, G., *Suspicion and Silence: The Right to Silence in Criminal Investigations* (1994).

<sup>56</sup> In 1968, the Justice Evidence Committee proposed to retain the right to silence at trial but recommended that the prosecution be permitted to comment to the jury on the failure of the accused to give evidence at trial. The Criminal Law Revision Committee issued a report in 1972, where the majority of the Committee recommended that adverse inferences could be drawn from both pre-trial and at-trial silence “as appear proper” and such could be the subject of comment by the judge and prosecutor. Due to strong opposition to this report, no implementation took place at that time. The Royal Commission on Criminal Procedure in 1981 proposed the existing law to be retained and introduced a number of reforms including the duty solicitor scheme and substantive rights to legal aid during police questioning.

<sup>57</sup> 11(2) *Halsbury’s Laws of England* 937-38 (1990).

<sup>58</sup> Scrutiny of Acts and Regulations Committee, *supra* note 21, Chapter 6: The Right to Silence in the United Kingdom.

<sup>59</sup> 1988 *Order*, Article 3 and 1994 *Act* Section 34.

<sup>60</sup> 1988 *Order* Article 4 and 1994 *Act* Section 35.

<sup>61</sup> 1988 *Order* Article 5 and 1994 *Act* Section 36.

<sup>62</sup> 1988 Order Article 6 and 1994 Act Section 37.

<sup>63</sup> *R v Sean Murray* (Northern Ireland Court of Appeal, October 29, 1991) discussed in Jennings, A., Ashworth, A. and Emmerson, B. “*Silence and Safety: The Impact of Human Rights Law*” (2000) *Criminal Law Review* 879.

<sup>64</sup> *R v McLernon* (Northern Ireland, Belfast Crown Court, 20 Dec 1990, Kelly LJ) discussed in Jackson, J., “*Interpreting the Silence Provisions: The Northern Ireland Cases*” (1995) *Criminal Law Review* 587.

<sup>65</sup> *R v Kinsella* (1993) and *R v Connolly and McCartney* (1992) as discussed in Jackson, *ibid.*

<sup>66</sup> *R v Cowan and Others*, *The Times*, October 13, 1995.

<sup>67</sup> *Condon v UK* (1997) 1 Cr.App.R. 185 (Court of Appeal) discussed in Jennings et al, *supra* note 43.

<sup>68</sup> Jennings et al, *supra* note 44.

<sup>69</sup> Jennings, A., “*The Right to Silence – A lecture to the Criminal Bar Association*” (November 1999).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Murray v UK*, *supra* note 17.

<sup>72</sup> *Condon v UK*, *supra* note 18.

<sup>73</sup> *Averill v UK* (2000) Crim. L.R. 680.

<sup>74</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>75</sup> *Illinois v. Perkins* 496 U.S. 292 (1990).

<sup>76</sup> *Pennsylvania v. Muniz* 496 U.S. 582 (1990).

<sup>77</sup> *Dickerson v. United States* No. 99-5525 (2000).



# UNITED NATIONS STANDARDS REFLECTED IN THE CANADIAN CRIMINAL JUSTICE SYSTEM: THE RIGHT TO COUNSEL

By Daniel Prefontaine Q.C. and Eileen Skinnider\*

## INTRODUCTION

**H**uman Rights norms and standards in the administration of criminal justice have long been the focus of United Nations activities. The formulation of these standards and norms is aimed at promoting and ensuring the fair and equitable administration of justice and effective crime prevention. They represent internationally agreed upon principles of desirable practice on which governments can assess their own criminal justice systems and contribute to the development of the concept of the international rule of law. While international instruments such as declarations, principles, and guidelines have no legally binding effect, they can provide practical guidance and substance for the elaboration of conventional rights. This paper limits the focus of UN standards and norms in the administration of criminal justice to the right to counsel. Part II of this paper reviews the basic principles embodied in the international norm of the right to counsel while Part III illustrates how that right is reflected in the Canadian criminal justice system.

Inherent tension exists between individual rights and the interests of society in the administration of criminal justice systems. This tension is reflected in international human rights

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instruments, such as the *Universal Declaration of Human Rights*,<sup>1</sup> which sets out both the rights of people to enjoy domestic tranquillity and security of person and property without encroachment of criminal activity, and also the rights for equitable systems of justice that protect individual's rights and liberties. Striking the appropriate balance between these interests is a complex issue. There is a growing awareness of the structural causes of crime and a recognition that human rights issues are closely linked with criminal justice concerns. As crime becomes more complex and difficult to control, the operation of high standards and fairness also becomes increasingly important in any society that is governed by the rule of law and democratic principles. Part IV of this paper looks briefly at some of the issues that arise from this inherent tension in the Canadian criminal justice system.

## THE RIGHT TO COUNSEL IN INTERNATIONAL LAW

Before focusing on the specific principles of the right to counsel as embodied in international law, it is important to discuss this right within the overall concept of fair trial. The right to a fair trial is an essential part of any legal system purporting to be based on the rule of law. This right means that anyone facing a criminal charge is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A fair hearing requires respect for the principle of equality, the right to be informed promptly of the charge, the right to counsel, adequate opportunity to prepare a defence, the right to an interpreter, the right to be tried without delay, the right to be tried in one's presence, the right not to be compelled to testify against oneself and the right to be presumed innocent.

The right to a fair trial, in international law, affects not only criminal charges actually made in the various criminal justice systems but also criminal justice policy-making and standard-setting. There is a close link between criminal justice policy and the protection of human rights. Sometimes it is difficult to reconcile the required elements of a fair trial, of which the right to counsel is one, with the practical need to improve the efficiency of the crime control systems.

An important safeguard to a fair trial is the right to counsel which ensures necessary legal advice and assistance on detention and arrest to make an informed choice about how to exercise the right to silence and thereafter to ensure that the prosecution's case has been put to its proof and to enable the accused to make full answer and defence. All the principles regulating the legal status of the accused in criminal proceedings are aimed at ensuring the proper administration of justice.

In 1948, Member States of the UN unanimously proclaimed the adoption of the *Universal Declaration of Human Rights*, which recognises the interdependence of human rights and the rule

of law. The right to retain and instruct counsel is not specifically set out in the *Declaration* but can be inferred from Article 10, the right to a fair trial, and Article 11, the right to be presumed innocent until proven guilty by a fair trial at which everyone “ has all the guarantees necessary for his defence.”<sup>2</sup> At the time of proclamation, the plan was to use the *Declaration* as a framework for a human rights treaty. In the process of drafting these treaties, the Commission on Human Rights recognised the importance of the right to counsel and in 1961 undertook a study on “The Right of Arrested Persons to Communicate with Others to Ensure their Defence or Protect Their Interests.”<sup>3</sup> This study assisted the Commission in elaborating this right in the *International Covenant on Civil and Political Rights*.<sup>4</sup>

The *International Covenant on Civil and Political Rights (ICCPR)* sets out the basic human rights that are to be complied with in criminal procedures, and elaborates on the minimum guarantees required for the right to a fair trial. In the *ICCPR*, the right to a fair trial is dealt with, among other issues, in Article 14. Article 14 contains the following rights in the following paragraphs: paragraph 1, contains the general provision; paragraph 2, the right of the accused to be presumed innocent; paragraph 3, a list of minimum guarantees to be followed in criminal proceedings; paragraph 4, special procedures for juveniles; paragraph 5, right to review conviction and sentence; paragraph 6, right to compensation; and paragraph 7, rule against double jeopardy. The Human Rights Committee, the treaty organ established to monitor compliance by States of the *ICCPR*, maintains that the right to a fair trial, as provided for in Article 14, is one of the cornerstones of the *ICCPR* as a guarantee of the rule of law.<sup>5</sup>

The right to retain and instruct counsel is one of the minimum guarantees for a fair trial found in Article 14(3) of the *ICCPR*. Article 14(3)(b) allows for adequate time and facilities for the presentation of a defence as well as to communicate with counsel of one’s choice. Article 14(3)(d) sets out the right to be tried in one’s presence and to defend oneself in person or through counsel of one’s choice. It further provides for a person to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him in any case where the interests of justice so require and without payment by him in those cases where he does not have sufficient means.

The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>6</sup> takes the right to counsel out of the fair trial context so as to make it applicable from the time of arrest or detention. These principles elaborate on the rights contained in the *ICCPR*. Principle 13 states that at the moment of arrest or detention, or promptly thereafter, a person shall be provided with information on and an explanation of his rights and how to avail himself of such rights. Principle 17(1) entitles a detained person to have the assistance of legal counsel and be informed of this right and provided with reasonable facilities for exercising this right. Principle 17(2) sets out the right to legal aid where a detained person cannot afford to pay

and the “interests of justice” requires that he have counsel. Principle 18 elaborates on the right to communicate with counsel in confidence and privacy, allowing for adequate time and facilities in order to do so.

The *Basic Principles on the Role of Lawyers*<sup>7</sup> state that adequate protection of human rights require that all persons have adequate access to legal services provided by an independent legal profession. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights to defend them in all stages of criminal proceedings. The government is required to ensure the provision of sufficient funding and other sources for legal services to the poor. Governments must ensure prompt access to a lawyer for all persons arrested or detained and, in any case, not later than forty-eight hours from the time of arrest or detention.

It is recognised that children should be treated differently from adults when they are accused or convicted of criminal conduct. When regulating the legal status of juveniles in criminal proceedings, the *ICCPR* ensures that age be taken into account. A child who comes into conflict with the law has the right to be treated with dignity and worth, taking into account his age. Upon arrest or detention, children have the right to prompt legal and other assistance, such as medical or psychological services, as well as to contact family.

The *Convention on the Rights of the Child*<sup>8</sup> in Article 37(d) ensures that every child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. Article 40 provides for minimum guarantees for every child alleged or accused of having infringed the penal law, including the right to counsel.

The *Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*<sup>9</sup> in Article 15.1 provide that throughout proceedings, juveniles have the right to be represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country. The right to legal aid for juveniles does not require proof of indigence nor is it limited to cases that are deemed to be in the “interests of justice.” Article 15.2 allows for the participation of parents in these proceedings. This right is viewed as emotional assistance to the juvenile and can be denied if the court determines it would have a negative impact. The *UN Rules for the Protection of Juveniles Deprived of Their Liberty*<sup>10</sup> provide that where juveniles are detained under arrest or awaiting trial, they have a right to legal counsel and to be able to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisor. Privacy and confidentiality shall be ensured for such communications.

As discussed above, the basic principles in international law require some form of legal aid to be available to ensure that persons who cannot afford counsel have the ability to retain and in-

struct counsel. However, this right to free legal assistance is limited to cases where the “interests of justice” so requires. At the first UN Conference on Human Rights in Teheran, 1968, a resolution was approved that called upon Member States to guarantee progressive development of comprehensive systems of legal aid, including devising standards for granting legal assistance.<sup>11</sup> This resolution recognised that the provision of legal aid to those in need would strengthen the protection of human rights. There has been a lack of follow-up within the United Nations regarding the progress made by countries in developing comprehensive legal aid systems.

Rule 93 of the *United Nations Standard Minimum Rules For the Treatment of Prisoners, 1955*<sup>12</sup> specifically states that an untried prisoner shall be allowed to apply for free legal aid where such aid is available.

Principle 27 of the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order<sup>13</sup> deals with unrestricted access to the legal system. It mentions that appropriate mechanisms for legal aid and the basic protection of human rights should be established wherever they do not exist.

As can be seen from a review of the norms and standards on the right to counsel, there are a number of basic principles incorporated into that right. These include: the right to counsel of one’s choice, from a professional association of lawyers that is separate from the state; the right to communicate with counsel in circumstances that ensure confidentiality between counsel and client; the right to have adequate time and facilities to prepare one’s defence; the right to legal assistance without payment where the interests of justice so requires and where the person does not have sufficient means to pay; the right to self-representation, if one so chooses; and the right to have counsel at all stages of any criminal prosecution, including the preliminary investigation, periods of detention, trial and appeal proceedings. The right to counsel may also imply the right to competent counsel, but this is not expressly stated in the international instruments. However, the representation by incompetent counsel would be tantamount to the denial of the basic right to counsel. The Commission on Human Rights is presently discussing a draft Declaration on the Right to a Fair Trial and a Remedy<sup>14</sup>, which sets out in detail the basic principles of this right, including the right to counsel. This draft Declaration attempts to bring together in one instrument the principles of the right to counsel that have been developed since 1948.

## THE RIGHT TO COUNSEL AS REFLECTED IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

The Canadian criminal justice system is based on the tradition of British common law, which features an adversarial system with an independent judiciary, the presumption of inno-



cence, the burden of proof resting with the crown beyond a reasonable doubt (with exceptions), the noncompellability of the accused, trial by jury for serious offences, no criminality or punishment unless specified by law (*nullum crimen sine lege, nulla poena sine lege*) and the rule against double jeopardy.<sup>15</sup> Many of these features are part of the concept of the rule of law which was developed to guard against the abuse of authority by the State. The passage of the *Canadian Charter of Rights and Freedoms*<sup>16</sup> in 1982 has even more strongly entrenched the rule of law and its various components in our criminal justice system.

A key component of the adversarial system is the principle of “a case to meet.” The Crown bears the ultimate burden of proving guilt beyond a reasonable doubt. The accused need not assist the prosecution in making the case against him. The right to remain silent, the right to counsel and the voluntary confession rule are bound together by a common element, the right of individuals to make choices on whether to speak to the authorities or not.<sup>17</sup> The purpose behind the right to counsel is to enable the accused to learn about his legal position, in particular about the principle against self-incrimination and the right to remain silent.

The *Canadian Charter of Rights and Freedoms* guarantees the right to counsel. Section 10(b) of the *Charter* holds that “everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.” The Supreme Court of Canada has summarised the purpose behind s.10(b) as follows:

The purpose of the right to counsel guaranteed by section 10(b) of the *Charter* is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations. This opportunity is made available because when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him or herself. Accordingly, a person who is “detained” within the meaning of section 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty. Under section 10(b), a detainee is entitled as required to seek such legal advice without delay and upon request.<sup>18</sup>

The basic framework of the right to counsel in the Canadian criminal justice system has been elaborated by case law, which imposes fairly extensive duties on police authorities to ensure full understanding of the right. Whenever an individual is detained or arrested (hereinafter referred to as the detainee), the police must advise him of his right to counsel and inform him of the availability of legal aid and duty counsel and the phone number for reaching duty counsel. Duty counsel is a service provided by the government wherein counsel is available to give

detainees preliminary legal advice free of charge. Upon being advised by the police of the right to counsel, a detainee may waive the right or assert it. If the detainee asserts his right, the police must cease questioning until a reasonable opportunity to consult counsel has been provided. The “holding off” period will vary based upon whether the detainee is reasonably diligent in contacting counsel. If a given jurisdiction provides free legal advice through duty counsel then the holding off period will be shortened. However, apart from an emergency, the holding off period cannot be shortened because of administrative expediency or convenience to the State. If the detainee has not been reasonably diligent or has waived his right, the police can continue with the investigation without counsel being present. However, waiver is subject to an exacting standard. It must be voluntary and informed. The detainee must be aware of the consequences of waiving the right. Incapacitation or deception by the police can negate what may appear to be a knowing waiver. But, waiver need not be explicit. The right to counsel includes four main elements for discussion.

### **The triggering mechanism: detention or arrest**

The right to counsel under the *Charter* is not absolute. It is only available to someone under arrest or being detained. Therefore the judicial interpretation of the meaning of arrest or detention will substantially affect the right to counsel. Detention has been broadly defined by the Supreme Court of Canada as “a form of control by an agent of the State over the movements of a person by a demand or direction which may have significant legal consequences.”<sup>19</sup> In other words, the person is not free to leave the presence of the police.

### **The right to information**

The two rights in s.10(b) impose two different sets of duties on police. First, there is an informational duty, and second, there is an implementation duty, which is a duty to facilitate the exercise of the right to consult counsel. The type of information that must be provided by the police has changed over the years. The police must inform the detainee of the availability of legal aid and/or duty counsel services, if any, that are available in the jurisdiction, usually the local area.<sup>20</sup> This must also include information on how to contact these services, such as toll-free numbers.<sup>21</sup> The police need only mention those services available at the time of the detention.<sup>22</sup> If there is any indication that the detainee lacks the capacity to understand the rights, the police must explain the right in terms that he can understand and at a time when he is capable of understanding.<sup>23</sup> It is interesting to note that in the discussion regarding legal aid information required to be given, the Supreme Court said that this did not impose the duty on provinces to ensure that duty counsel or legal aid was available to all detainees in order to pro-

vide free and immediate preliminary advice. The court reasoned that s.10(b) did not expressly provide for such a right and the legislative history of the section showed that such a provision had been rejected. The court also stated that it would not impose the cost implied in requiring these services to be established on the provinces.<sup>24</sup> It should be mentioned that the division of responsibility between the Federal government and the provinces is probably unique and must be differentiated from other countries with unitary systems.

### **Implementation duties**

The implementation duties require that police provide the detainee with a reasonable opportunity to retain counsel. This includes providing reasonable means to facilitate contact with counsel; such as providing a telephone and privacy. Further, s. 10(b) imposes a duty on police to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. These duties are not triggered unless and until a detainee indicates a desire to exercise his right to counsel. The right to counsel also includes the right to retain counsel of one's choice. In determining what is reasonable opportunity, police must take into account the particular circumstances. It is important to remember that the detainee is under the control of the police and cannot effectively exercise his right to counsel unless they provide him with the means and the reasonable opportunity to do so, including allowing for privacy in communications.

There is no absolute requirement for police to ascertain whether the detainee understood the information provided. The onus is on the detainee to demonstrate that he did not understand his right to retain counsel.<sup>25</sup> A detainee who fails to understand the information because of linguistic problems or mental disability must somehow convey the difficulty to police before the police are placed under any additional duty to ensure understanding.

### **Waiver and duty to be reasonably diligent in exercise of right**

The detainee also bears some responsibility under s.10(b). He must exercise due diligence in pursuing the right. Failure to do so may be taken as a waiver of the right. The Supreme Court of Canada has clearly indicated that the duties imposed on the police can be suspended when the arrested or detained person is not reasonably diligent in the exercise of his rights.<sup>26</sup> The right to retain and instruct counsel can also be waived. In order for an alleged waiver to be valid however, it must be clear and unequivocal that the person waiving the procedural safeguard is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.

The rights set out in the *Charter*, and in particular the right to retain and instruct counsel, are not absolute and unlimited. They must be exercised in a way that is reconcilable with the needs of society. The duty of the detainee to act in a reasonably diligent manner limits the right to counsel. This limit perhaps addresses concerns that it could otherwise be possible to delay needlessly an investigation and in certain cases to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. From such a point of view, an arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner that the police cannot adequately carry out their tasks. Prior to the *Charter*, it was standard police practice to proceed without delay after arrest to interrogate the person charged. The importance of the s.10(b) right with its correlative restraint on police action places a duty on the detainee to act accordingly with reasonable diligence.

## ISSUES FOR DISCUSSION REGARDING THE RIGHT TO COUNSEL

In Canada, there is no express law providing police with authority to talk to people. It is important to bear in mind that many people will speak to the police because they are the police, that is, out of respect for or fear of authority rather than out of a desire to voluntarily engage in conversation. The situation changes when the police assert some legal constraint against the person with whom they are speaking. There is a strong principle in Anglo-Canadian law that individuals have the right to be free of restraints on their liberty unless the law states otherwise. Therefore police require either the consent of the individual to restrain or an express legal power to arrest or detain before any such restraint is permissible. Mere acquiescence or compliance with a police direction is not equated with consent. In order for there to be valid consent given to police, there must be a clear indication from police that there is a choice whether or not to follow the direction.

The right to counsel is designed to offset pressures created by the coercive environment of the police station, yet the Supreme Court of Canada's concept of the right as discussed above has never been expanded to bar altogether the taking of statements by police. One criticism of the *Charter* cases is that they illustrate that the crucial right to counsel depends on the persistent assertion of the detainee and thus may not protect the most vulnerable accused.<sup>27</sup> Unlike other jurisdictions, there is no requirement for lawyers to be present during custodial interrogations. In the United States, an assertion of the right to counsel means that interrogation will be suspended until counsel is present. Whereas in Canada, upon assertion of the right to counsel, the police must suspend the interrogation until the accused has been given a reasonable opportu-

nity to consult a lawyer. In Italy, no statement or admission is admissible in court unless the statement was taken in the presence of a lawyer.<sup>28</sup>

As noted previously, in discussing individual human rights in the administration of criminal justice systems, there is an inherent tension between the protection of the individual against the state and the interests of the society. International and national law are continually balancing the interests of both. On one hand, there are “crime control” advocates who believe that repression of crime is the paramount objective and the fewer restrictions placed upon police the better. They emphasise efficiency, speed and administration informality. On the other hand, there are “due process” advocates, who believe the criminal process is the appropriate forum for correcting its own abuses and abuses are to be minimised by the establishment of a full panoply of procedural rights for the individual.

In these “law and order” times, it has been argued that too much emphasis is placed on individual rights, which in effect subordinate society’s interest to have a safe community. Confessions are necessary or at least perceived by many to be necessary for effective police enforcement. The suspect is seen as a prime source of information concerning the crime and police believe it essential to question him early and record his position. A statement to the police can be received into evidence if it is proved to be voluntary. A voluntary statement promotes trustworthiness and is therefore considered to be more deserving of credit. In order for a statement to be considered voluntary, the individual’s rights must be respected. Yet it is noted that the relatively smooth functioning of our criminal justice system is very dependent upon the accused person waiving his right to require proof by the Crown by pleading guilty.<sup>29</sup> Hence the continual balance between crime control and due process rights. Interestingly, a US study noted that although many Americans have condemned the investigational constraints imposed by their Supreme Court, less than 3% of criminal cases are actually lost in the US because of successful suppression of evidence hearings.<sup>30</sup>

Back in 1988, the Law Reform Commission of Canada produced an interesting document discussing, in part, the political and moral philosophy behind our criminal procedure.<sup>31</sup> Such a discussion sheds light on the elaboration of the right to counsel in Canada. Canadian criminal procedure is seen to take into account three interrelated concerns; one, the pursuit of truth, two, the respect for human dignity (a notion which is broad enough to encompass the protection of society and the preservation of peace) and three, the protection against the risk of convicting innocent persons. These concerns are present within our system subject to certain tensions and disputes. One such tension is the tension between truth and justice. A major objective of the criminal process is to bring alleged offenders to justice. This involves a fair determination of their guilt or innocence using criminal procedures which ultimately are concerned with the discovery of truth. But truth is placed in the context of a larger concern to do justice. Prejudice,

opinion and speculation are not seen to help the cause of justice, therefore not every piece of such evidence is allowed to be regarded. The law values truth but also concepts of human dignity and privacy. Therefore the Canadian criminal process can be described as a qualified search for truth. It may, however, be the best method of securing the truth, since the process is ultimately a human one.

Another tension exists between the dual purpose of convicting the guilty and acquitting the innocent. Common law is haunted by the ghost of the innocent man convicted. One safeguard to counter this fear is the principle of the presumption of innocence. However, the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty, thereby increasing the risks to society's safety. In Western society, especially in the common law countries, the adage "it is better to let nine guilty persons go free than one innocent person to be convicted" is very important as a real social and political value.

An additional tension that exists is how to safeguard people's freedoms. Protection of society entails the protection of citizens from the harmful behaviour of others. Laws are necessary to define unacceptable acts and to protect people. Basic values must also be protected for society to retain its integrity. This involves the use of state authority, which leads to the wielding of power. This carries with it the possibility of abuse. In order to safeguard freedom, it is sometimes necessary to limit it. A task of justice is to keep a balance. If human dignity, freedom and justice are among the major values which the criminal law enshrines, we must assess carefully the way in which the law is enforced to ensure respect for these values. The elimination of crime, while important, must be subordinate to the larger purpose of maintaining and protecting important values. Repression of crime is not viewed as a self-sustaining goal. Rather it is only one method for pursuing the higher goal of maximising freedom in a democratic state.

Striking an appropriate balance between the interests of the community in bringing offenders to justice and the rights and liberties of the individual is a complex issue and cannot simply be resolved by means of a formula. Crime itself ultimately must be regarded as a human or social problem. The Canadian criminal procedure undeniably inclines toward the protection of rights and liberties. The presumption of innocence, the Crown's burden of proof in a criminal trial, the right to silence, and the right to make full answer and defence all bear testimony to this fact.

## CONCLUSION

The right to counsel in Canada is, by and large, in compliance with the right to counsel in international law. But like most societies, Canadians do not like crime and would prefer to apprehend and punish criminals. Canadian criminal procedure provides extensive protection for

individual rights, yet restrains individual freedoms with societal interests and concerns about police efficiency and safety. Our *Charter* rights are balanced, both through the operation of section 1 justification or through the balancing required by section 24(2) in deciding whether to admit or exclude evidence obtained in the course of a *Charter* violation. It can be summarised by these words:

Canadian criminal procedure is quintessential Canadian. Principled perhaps but certainly not dogmatic, neither individualistic in the extreme nor totalitarian, unwieldy at times and contradictory at other times in its quest for both efficiency and justice. Particular rights must be balanced and where in conflict and sometimes within rights, both the individual rights and societal interest must be balanced.<sup>32</sup>

The United Nations, through the UN Crime Prevention and Criminal Justice Network, promotes the use and application of human rights standards and norms in the administration of criminal justice. The UN Network of Institutes that support the work of the UN and the implementation of the Justice Programme, consists of the UN Crime Prevention and Criminal Justice Division and a number of interregional and regional institutes around the world, as well as specialised centres. The International Centre for Criminal Law Reform and Criminal Justice Policy, the interregional institute based in Vancouver, Canada, plays a definite and active role in assisting the international community in strengthening international cooperation in crucial areas of crime prevention and criminal justice and implementing the UN programme. The UN programme aims to provide appropriate assistance to Member States, through training, advisory services, emergency assistance and action-oriented research, and assisting in setting up projects in developing countries and countries in transition to implement the rule of law, basic human rights and democratic principles.

## NOTES

<sup>1</sup> *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948

<sup>2</sup> Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees

necessary for his defence. (2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

<sup>3</sup> The Study on the Right of Arrested Persons to Communicate with Others to ensure their Defence or Protect their Interests, preliminary report, E/CN.4/836; progress reports, E/CN.4/871, E/CN.4/881, E/CN.4/924; final report, E/CN.4/996.

<sup>4</sup> *The International Covenant of Civil and Political Rights* (1976) 999 UNTS 171. Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force 23 March 1976.

<sup>5</sup> Human Rights Committee General Comment #13, (Article 14), contained in UN Document CCPR/C/21/Rev.1 of 19 May 1989.

<sup>6</sup> *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173 of 9 December 1988.

<sup>7</sup> *The Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders

<sup>8</sup> *The Convention on the Rights of the Child*, adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990.

<sup>9</sup> *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* General Assembly resolution 40/33 of 29 November 1985

<sup>10</sup> *The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, General Assembly resolution 45/113 of 14 December 1990

<sup>11</sup> General Assembly resolution 2449 (XXIII), Legal Aid.

<sup>12</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Economic and Social Council resolution 663 (XXIV).

<sup>13</sup> *The Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order*, adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

<sup>14</sup> This *Declaration* is contained as an annex in the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial:



Current Recognition and Measures Necessary of its Strengthening, Final Report by S. Chernichenko and W. Treat, Special Rapporteurs, UN Doc E/CN.4/Sub.2/1994/24.

<sup>15</sup> Quigley, Tim, *Procedures in Canadian Criminal Law*, (1997: Carswell Thomas Professional Publishing) p.18.

<sup>16</sup> *Canadian Charter of Rights and Freedoms*, Schedule B, Part I, *Constitution Act*, 1982 (R.S.C. 1985, Appendix II, No. 44).

<sup>17</sup> *R v Whittle* [1994] 2 S.C.R. 914, 32 C.R. (4th) 1.

<sup>18</sup> *R v Bartle* [1994] 3 S.C.R. 173, 33 C.R. (4th) 83.

<sup>19</sup> *R v Therens* [1985] 1 S.C.R. 613.

<sup>20</sup> *R v Brydges*[1990] 1 S.C.R. 474, 46 C.R. (4th) 195.

<sup>21</sup> *R v Bartle*, *supra* note 18.

<sup>22</sup> *R v Latimer* [1995] 41 C.R. (4th) 1.

<sup>23</sup> *R v Baig* [1987] 2 S.C.R. 537, 61 C.R. (3d) 97.

<sup>24</sup> *R v Prosper*[1994] 3 S.C.R. 236, 33 C.R. (4th) 85.

<sup>25</sup> *R v Baig*, *supra* note 23.

<sup>26</sup> *R v Smith* [1991] 1 S.C.R. 714, 4 C.R. (th) 125.

<sup>27</sup> Stuart, Don “*Charter Protection Against Law and Order, Victim’s Rights and Equality Rhetoric*” 327 at p 333, in *The Charter’s Impact on the Criminal Justice System* ed. Jamie Cameron (Carswell: 1996)

<sup>28</sup> Young, Alan “*The Charter, the Supreme Court of Canada and the Constitutionalisation on the Investigative Process*” 2 at p 5 in Cameron, *supra* note 27.

<sup>29</sup> Quigley, *supra* note 15, p 127.

<sup>30</sup> Young, *supra* note 28, p 2.

<sup>31</sup> Law Reform Commission of Canada, *Our Criminal Procedure*, Report 32 (1988).

<sup>32</sup> Quigley, *supra* note 15, p 22.

# SYSTEMS OF PROOF IN CRIMINAL LAW

By Professor Gerry Ferguson\*

## INTRODUCTION

**A**ny legal system which is established for the purpose of proving criminal offences will necessarily involve both rules of procedure and rules of evidence. In some countries, some of these rules are given special status and primacy by being enacted as constitutional rights which can not be interfered with or overridden by ordinary laws.

In this paper, I will: identify the aims or purposes of a system of proof; distinguish between adversarial and inquisitorial systems of proof; outline the main features of the adversarial system of proof; and analyze in more detail a few select features including (i) the presumption of innocence, and (ii) rules concerning the exclusion of illegally obtained evidence.

## AIMS AND PURPOSES OF A SYSTEM OF PROOF

The primary aim of any system of proof is to determine whether the accused person committed a criminal offence; in other words, to determine whether the accusation against the accused is true. This is sometimes referred to as the search for truth.

But the search for truth is not an absolute or unconditional goal; it must be balanced and limited by other aims and objectives: "Truth, like all the good things, may be loved unwisely – may be pursued too keenly – may cost too much."<sup>1</sup>

In its search for truth, a system of proof must also construct rules which: (a) minimize the risk of mistakenly convicting the innocent; (b) respect the human integrity and basic rights of all persons, including the accused; and (c) protect the independence and integrity of the judicial system from illegal or corrupt practices by police, prosecutors or judges.

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## DISTINCTIONS BETWEEN THE ADVERSARIAL AND INQUISITORIAL SYSTEMS OF PROOF<sup>2</sup>

In Western countries, there are two distinct systems for proof of crimes: (a) the *adversarial system* which arose in England and which has been adopted in most English-speaking countries including Canada, the United States, Australia and New Zealand; and (b) the *inquisitorial system* which arose in continental Europe and continues to be used in most Western European countries, including France, Germany and the former Soviet Union.

The adversarial system is based upon the view that the proceedings should be structured as “a dispute” between two sides. The two parties are “adversaries” or opponents who are engaged in a fight to establish the true facts in the case. In criminal cases, the two parties are the prosecution representing the State and the accused. The two sides present “their case” before an impartial and independent third party (i.e. the court) who must decide on the outcome. The parties to the dispute are responsible for determining the issues in dispute and for collecting and presenting all necessary and relevant information on those issues. Thus, the two parties or adversaries have definite, independent, and generally conflicting functions. The prosecutor determines which charges or offences to proceed with, and then organizes and presents the evidence in support of those charges. The accused, on the other side of the dispute, decides whether to admit or dispute the charges, and if the latter, the accused then decides which defences to advance and presents evidence in support of those defences.

The judge’s role is that of an umpire seeing to it that the parties abide by the rules of procedure and evidence regulating the contest, and then at the end, the judge (or the jury if it is a jury trial) determines which party has proven its case. The judge does not investigate the case and generally does not ask questions of the parties or witnesses. The judge sits back and listens impartially to the “dispute” as it unfolds from the evidence presented by the two disputing parties. Each party gets to present its case in the most favourable light possible to that party. The judge then decides which version of the case is to be accepted.

Based upon the above description, it can be seen that the essential characteristics of the adversary system are the relatively active roles of the parties in preparing and presenting the dispute and the relatively passive, independent, and impartial role which the judge and jury play.

By contrast, in the inquisitorial system, the court independently *investigates* the facts, or has them investigated and prepared for the court, and the proceedings are not conceived of as “a dispute” but rather as an official and thorough “inquiry.” The parties are not responsible for, nor in control of, the manner in which the dispute is structured or presented. Instead, it is the court which structures and controls the inquiry.

The essential characteristic of the inquisitorial system is its reliance on a very active role for the judge and a relatively inactive role for the parties compared to the adversary model. Thus, the main distinction between these two systems is the court's role in pursuing the facts: judicial independence and passivity, relatively speaking, in the adversarial system, in contrast with judicial activity in the inquisitorial system.

## MAIN FEATURES OF THE ADVERSARIAL SYSTEM

### **The Need for Safeguards**

All countries agree that it is essential for the State to have the power to enact and enforce criminal laws to protect persons, property and public order and decency. However, it must also be recognized that the State's power to enforce criminal laws is a very powerful tool which can be used unfairly or oppressively. Thus, it is very important that the criminal justice system contain safeguards in the Constitution or criminal procedure laws in order to protect all citizens from arbitrary, unfair or oppressive use of criminal law powers. In Western countries which purport to be free and democratic societies, the adversarial system is built on a healthy distrust of State power. Thus, the adversarial system has built in a number of safeguards to protect all citizens from the arbitrary or unfair use of the criminal law by State officials.

### **Procedural and Constitutional Safeguards**

A brief list of some of the more important procedural and constitutional safeguards in an adversarial system like Canada are set out below:

- (a) At the Investigation Stage:
  - (1) everyone has the right not to be arrested or detained by the police unless the police have reasonable and probable grounds to believe that a person has committed an offence;
  - (2) everyone has the right not to have their person or property searched without reasonable grounds to believe that evidence of an offence will be found in the place to be searched;
  - (3) everyone has the right to be immediately informed of the reason for his or her arrest or detention, and the right to consult with a lawyer without delay upon arrest or detention;
  - (4) everyone (including arrested or charged persons) has the right to refuse to answer police questions (i.e. the right to remain silent);

- (5) everyone has the right to apply to a judge within 24 hours after arrest for pre-trial release and the right to be granted pre-trial release if the accused's detention is not necessary to ensure his or her appearance in court or to prevent his or her committing a further crime while on pre-trial release.
- (b) At the Prosecution Stage:
  - (6) the right to be informed of the precise charge,
  - (7) the right to counsel and the right to remain silent,
  - (8) the right to pre-trial disclosure of all relevant evidence which the prosecutor has in regard to the case,
  - (9) the right not to be prosecuted more than once for the same offence if previously acquitted (double jeopardy),
  - (10) the right to be secure against police entrapment or prosecutorial abuse of powers,
- (c) At the Trial:
  - (11) the right to be tried within a reasonable time,
  - (12) the right to be presumed innocent until proven guilty by the prosecution beyond a reasonable doubt,
  - (13) the right to make full answer and defence in person or by a lawyer, including examination and cross-examination of all witnesses,
  - (14) the right to testify or refuse to testify as a witness; it is considered an aspect of fundamental fairness to require the State to prove the charges against the accused without requiring the accused to incriminate himself or herself.
  - (15) the right to an open, public trial, by an impartial judge (and jury for offences punishable by 5 years imprisonment or more),
  - (16) the right under certain circumstances to have illegally obtained evidence excluded from his/her trial.

### **Enforcement of Safeguards**

The above rights and safeguards are not only *written* into the law and Constitution but they actually *operate in practice*. In order to translate or convert “rights on paper” into “rights in action,” it is essential for the government, and all agents of the government to accept and apply the rule of law. The rule of law means that legal rights must be fairly and impartially applied in all cases by all government officials. Cases can not be decided arbitrarily by political or government officials. In Canada, certain conditions exist which are necessary pre-conditions for the protection of rights:

- (a) judges are very independent from the government; it would be a serious offence for a government official to try to speak to or influence a judge about any case;
- (b) prosecutors and police may be prevented by judges from convicting a person if the police or prosecutors have abused their powers;
- (c) defence lawyers are very independent from both the government and the judges and they act as protectors of citizens' legal rights and claims; and
- (d) judges, prosecutors and police officers are well paid and therefore there is no need nor any general practice of taking bribes or engaging in corrupt practices.

## PRESUMPTION OF INNOCENCE

In this section of the paper, I will discuss:

- (a) the importance of and the purposes behind the presumption of innocence,
- (b) the statements of the presumption of innocence to be found in national and international documents,
- (c) the meaning and the application of the presumption of innocence, including
  - (1) standards of proof,
  - (2) burdens of proof,
  - (3) the application of the presumption of innocence to the elements of offences and defences, and
  - (4) reverse onus provisions as exceptions to the presumption of innocence.

### **The Importance and Purposes of the Presumption of Innocence**

The presumption of innocence has been considered a fundamental principle of justice in Western adversarial systems of criminal law for at least several centuries. In this paper, I am discussing the presumption of innocence as it operates at the accused's trial. The presumption of innocence in Canada and other English-speaking countries has two important components: (i) it means that an accused can not be convicted of a crime unless the prosecutor proves the accused is guilty, and (ii) the accused's guilt must be proved "beyond any reasonable doubt."

The presumption of innocence serves several important purposes.<sup>3</sup>

- (1) First, it reminds the judge (and jury) to set aside any pre-conceived notion that the accused is guilty simply because the accused was arrested and charged with an offence. Instead, the presumption of innocence reminds the judge and jury to decide the issue of guilt or innocence based solely on the evidence that is presented at trial.

- (2) Second, the presumption of innocence is a matter of fundamental fairness. If the State accuses a citizen of a crime, surely the State should be expected to prove that allegation. The fact that an accused person is not required to prove his/her innocence is considered a hallmark of a “free” country.
- (3) Third, the presumption of innocence also relates to fundamental fairness in another way. It is fair to expect the State to prove an accused’s guilt since the State generally has more time, money and skill to investigate and prosecute a case than the accused does; often the accused will not have the time, resources or skill to prove his innocence; recognizing that the accused is at a disadvantage, the presumption of innocence helps to even out that imbalance.
- (4) Fourth, the requirement that the accused be proven guilty “beyond a reasonable doubt” sets a very high level of proof for a guilty conviction in order to lessen the risk of mistakenly convicting an innocent person of a crime. Reducing as much as humanly possible the risk of mistakenly convicting an innocent person is a very important objective in a “free” country. However, there is a cost to requiring such high levels of proof since some persons who are actually guilty may be found not guilty due to lack of proof; the adversarial system is based on the assumption that it is better for 10 *guilty* people to be acquitted than for one *innocent* person to be wrongly convicted.<sup>4</sup>

In the case of *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, at 333, the Supreme Court of Canada described the importance of the presumption of innocence in the following words:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in human-kind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

## **National and International Statements of the Presumption of Innocence**

The presumption of innocence is contained in various international human rights documents. In most countries, the presumption of innocence is provided for, expressly or by implication, in the country's Constitution and/or its criminal laws. The following is a brief list of some of these statements.

### *Universal Declaration of Human Rights, 1948.*

Art. 11(1). Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

### *International Covenant on Civil and Political Rights, 1966*

Art. 14(2). Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

### *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1966.*

Art. 6(2). Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

### *ASEAN Inter-Parliamentary Organization Declaration of Human Rights, 1993.*

Art. 14 expressly provides for "the right to be presumed innocent until proven otherwise."

### *England*

England does not have a written constitution but the presumption of innocence is a deeply ingrained principle in England's unwritten common law (i.e. to be found in judicial pronouncements). For example, in *Woolmington v. D.P.P.*, [1935] A.C. 462 the House of Lords stated that the presumption of innocence (i.e. the duty of the prosecutor to prove the prisoner's guilt beyond a reasonable doubt) is "the one golden thread" that runs "throughout the web of the English Criminal Law."



### *United States of America*

The presumption of innocence is also recognized as an implied constitutional right in the U.S. *Bill of Rights* under the “due process” clause in the Fifth and Fourteenth Amendments. The presumption of innocence is also codified as a general rule in the Criminal Codes of many states in the United States of America.<sup>5</sup>

### *Canada*

Section 11(d) of the *Canadian Charter of Rights and Freedoms*, which is part of the *Canadian Constitution*, provides:

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

### *Singapore*

There is no express provision on the presumption of innocence in the *Singapore Constitution*. However, article 9(1) of the *Constitution* provides that life and personal liberty can be taken away only “in accordance with law.” In the case of *Ong Ah Chuan*, [1981] 1 M.L.J. 64, on appeal from Singapore to the Privy Council, it was held that the phrase “in accordance with law” does not refer to just any law passed by the government no matter how unjust, but refers only to laws which “conform to fundamental rules of natural justice.” The Privy Council held that the presumption of innocence is a fundamental rule of natural justice and thus the presumption of innocence is, by implication, part of Article 9(1) of the Constitution.

### *Hong Kong*

Article 11(1) of the *Hong Kong Bill of Rights Ordinance, 1991* contains an express provision on the presumption of innocence in the same language as Article 14(2) of the I.C.C.P.R.:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

### *China*

There has been debate and disagreement among Chinese jurists and commentators since the 1950s as to whether the presumption of innocence is part of Chinese criminal law.

The presumption of innocence is not expressly mentioned in the *Constitution* or the *Criminal Procedure Law, 1979*, and there is some language in the *Criminal Procedure Law* which seems inconsistent with the presumption of innocence.<sup>6</sup>

In any event, in March, 1996, the National People's Congress approved various amendments to the *Criminal Procedure Law*. One such amendment includes an express recognition of the presumption of innocence in the following words: "Art. 12: No one may be considered a criminal prior to their conviction in people's court."

## **The Meaning and Application of the Presumption of Innocence**

### *The Standard of Proof*

In non-criminal cases, where the plaintiff, for example, sues the defendant for breach of contract, the plaintiff must prove the breach of contract "on a balance of probabilities." In other words, the plaintiff must prove that it is more likely that the contract was breached than that it was not. Put in mathematical or probability terms, it must be at least 50.1% (or more) probable that the contract was breached. However, in criminal cases, the standard of proof, at least for the past 200 years, in Western countries like Canada and England, has been "proof beyond a reasonable doubt."

Proof beyond a reasonable doubt is a much higher standard of proof than proof on a balance of probabilities. Although proof beyond a reasonable doubt can not be converted into any exact percentage or probability terms, it means that the court must be very, very certain (i.e. perhaps 99% sure) that the accused is guilty. If the court thinks that the accused is "probably guilty," but the court still has some doubt, then the accused must be acquitted provided the doubt is not unreasonable. What is a "reasonable doubt"? A reasonable doubt is not an unrealistic, or imaginary doubt, but rather a doubt based on the evidence presented at trial for which the court could give a logical and rational explanation.

It is very interesting to note that the statements of the presumption of innocence in the national and international documents cited above do not refer to proof beyond a reasonable doubt or to any other express standard or quantum of proof. The documents simply say that an accused is presumed innocent until proven guilty "according to law."

Notwithstanding the absence of any reference to a specific standard of proof, it has been assumed for at least 200 years in Western criminal law systems, such as England,<sup>7</sup> United States,<sup>8</sup> Canada and Australia,<sup>9</sup> that the presumption of innocence can only be displaced by proof of guilty beyond any reasonable doubt.

The European Commission of Human Rights and the European Court of Human Rights have on many occasions interpreted Article 6(2) which guarantees an accused person "shall be

presumed innocent until proved guilty according to law.” It is unclear whether the European Commission or Court would demand proof beyond a reasonable doubt. In some cases they refer to “any doubt” and in other cases they refer to evidence that is “sufficiently strong” for conviction. In particular, the Commission and Court have described the presumption of innocence in the following words:

firstly that court judges ... should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.<sup>10</sup>

Likewise, the courts in countries such as Singapore prefer to use the expression “established to the satisfaction of the court” rather than the standard of “proof beyond a reasonable doubt.” In *Ong Ah Chuan* [1981] 1 M.L.J. 64, an appeal from Singapore, the Privy Council held that it is a fundamental rule of natural justice that a criminal conviction can only be sustained where “it has been established to the satisfaction of” the court. The Privy Council did not discuss whether “to the satisfaction of the court” is a lower standard of proof than “beyond a reasonable doubt.”

#### *Burdens of Proof: Persuasive versus Evidentiary Burdens*

In the judicial and academic discussion of the concept of burden of proof, sometimes there is confusion over two different sorts of burdens that may arise in a criminal case. The first and most important type of burden is referred to as the “persuasive” or “legal” burden. In criminal cases, the “persuasive” burden is on the prosecutor. The prosecutor must persuade the court that the accused is guilty beyond a reasonable doubt. In some limited instances (reverse onus clauses) a “persuasive burden” may be put on the accused, for example, to prove an affirmative defence or fact on a balance of probabilities (or even beyond a reasonable doubt). Placing a “persuasive burden” on the accused to prove something does infringe on the presumption of innocence.

The second type of burden is referred to as “an evidentiary burden” or “the burden of production.” An evidentiary burden simply means that one of the parties, either the prosecutor or the accused, has the obligation to produce “some evidence” on a particular point. For example, an accused generally has an evidential burden in regard to defences. If the prosecutor proves beyond a reasonable doubt that the accused intentionally killed the victim, the accused will be convicted of murder unless the accused meets the “evidential burden” of producing “some evi-

dence” that the killing was justified, for example, in self-defence. The accused does not have to prove self-defence beyond a reasonable doubt, or even on a balance of probabilities. The accused simply has the burden of producing “some evidence” that the killing “might” have occurred by reason of self-defence. Evidential burdens of this sort do not infringe upon the presumption of innocence. Once there is “some evidence” of self-defence produced by the accused, the “persuasive burden” falls on the prosecutor to prove beyond a reasonable doubt that the killing did not occur in self-defence.

### *Application of Presumption of Innocence to Offences and Defences*

What exactly does the presumption of innocence apply to? Does it apply to proof of both the elements of the offence and any defences? For many years, in English criminal law systems, it was assumed that the presumption of innocence applied to all essential elements of the offence, but not to proof of defences. That is no longer true in England or Canada, but that idea does persist in some countries.

#### England

In the famous English case of *Woolmington v. D.P.P.*, [1935] A.C. 462 (H.L.), the accused was convicted of murder. The trial judge told the jury that the prosecutor must prove beyond a reasonable doubt that the accused killed the victim. If that is proven, then *the accused must satisfactorily prove* any circumstances which amount to a defence such as accident, self-defence or incapacity. The House of Lords held that the trial judge was wrong. There should be no burden on the accused to prove his or her innocence. To do so, violates the presumption of innocence. Once there is some evidence of a defence such as accident, self-defence or provocation, it is up to the prosecution to prove beyond a reasonable doubt that the killing occurred in the absence of accident, self-defence or provocation.

#### Canada

In recent years, Canadian courts have applied the presumption of innocence to all aspects of innocence — whether those aspects are characterized as elements of the offence or defences. In *R. v. Whyte* (1988), 42 C.C.C. (3d) 97, the Supreme Court of Canada stated:

The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to

avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt ... as to the guilt of the accused.

## United States

The United States has adopted a narrow, formalistic approach to the issue of what the presumption of innocence applies to. In *Patterson v. New York* (1977), 432 U.S. 197, the Supreme Court held that the presumption of innocence requires the prosecution to bear the burden of persuasion for all ingredients of the offence. However, the Supreme Court held that the *Constitution* does not prevent the State from putting the burden of proof on an accused in regard to proof of defences. In the United States, many States, in their Criminal Codes, require the prosecution to disprove defences. However, some States require an accused to prove affirmative defences on a balance of probabilities and the Supreme Court has strangely held that that practice does not violate the presumption of innocence guaranteed by the *Constitution*. Furthermore, each State gets to define whether a particular fact or circumstance is an element of the offence or a matter of defence. Thus the State legislature can easily shift the burden of proof to an accused by defining a particular fact or circumstance as part of a defence rather than an element of the offence. The Supreme Court suggested that there were some obvious constitutional limits on the Legislative Assembly's power to do this, but the Court did not spell out those limitations.<sup>11</sup>

## Singapore

Section 107 of the *Singapore (and Malaysia) Evidence Act* places the burden of proving any exception or defence on the accused. In *Jayasena*, [1970] A.C. 618, the Privy Council, on an appeal from Malaysia, held that the accused must prove self-defence on a balance of probabilities in Malaysia and Singapore, although not in England (at least since the decision in *Woolmington*). However, *Jayasena* may now be impliedly overruled by *Vasquez*, [1994] 3 All E.R. 674, where the Privy Council held that the provision in the Belize *Criminal Code* placing the burden of persuasion for defences such as provocation on the accused violated the presumption of innocence (which is expressly contained in the Belize *Constitution*).<sup>12</sup>

## *Reverse Onus Provisions as Exceptions to the Presumption of Innocence*

Although the presumption of innocence is a fundamental right which is set out in Constitutions and international human rights documents, it is not an absolute or unbending right. As with other fundamental rights, most countries have created exceptions to the right.

The exceptions generally appear in the form of reverse onus provisions, where the law presumes the existence of an essential fact unless or until the accused proves otherwise.

### The Insanity Defence as an Example

The criminal law in many countries permits a reverse onus in regard to the defence of insanity. The law permits the prosecutor and court to presume that the accused is sufficiently sane to be held criminally responsible unless or until the accused proves (on a balance of probabilities) that he or she was insane at the time of the offence. If an accused raises a reasonable doubt about whether he or she is sane, that doubt is not sufficient for an acquittal; the accused must establish his or her insanity on a balance of probabilities. This clear infringement on the presumption of innocence has been readily accepted and justified by courts in various countries.

*England.* The defence of insanity in many Western countries was derived from or influenced by the famous English case of *M'Naghten* (1843), 8 E.R. 718 where the House of Lords laid down the criteria or test for the insanity defence. In that case, the House of Lords also stated, without discussion, that an accused is "presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to [the judge or jury's] satisfaction." Many years later in *Woolmington v. D.P.P.*, [1935] A.C. 462, the House of Lords held that there is no burden on the accused to prove his innocence and that it is sufficient for acquittal if there is a reasonable doubt about defences such as accident or self-defence. However, without any reasons, the House of Lords said that the insanity defence was a clear exception to the general rule that the accused did not have to prove his/her innocence and that it was proper to require the accused to prove the defence of insanity on a balance of probabilities.

*United States.* I have already pointed out that in the United States the Supreme Court has held that it does not violate the presumption of innocence to require the accused to prove affirmative defences (usually on the balance of probabilities). In *Leland v. Oregon* (1952), 343 U.S. 790, the Supreme Court went even further in holding that an Oregon statute that required the accused to prove his insanity beyond a reasonable doubt did not violate the constitutional protection of the right to be presumed innocent. It should be noted that although the U.S. *Constitution* does not prohibit placing the burden of proving the insanity defence on the accused, not all states do. Approximately one-third to one-half of the States in their Criminal Code still require the prosecution to prove the accused was not insane once the issue has been raised at trial.

*Commonwealth Countries.* In *Vasquez*, [1994] 3 All E.R. 674, on appeal from Belize, the Privy Council held that although placing the burden of proof on the accused for most defences (such as the defence of provocation in that case) was unconstitutional because it violated the presumption of innocence, the Privy Council concluded without reasons that placing the burden on the

accused to prove the insanity defence was “an obvious example” of a “sensible and reasonable” deviation from the presumption of innocence.<sup>13</sup>

*European Commission on Human Rights.* The European Commission on Human Rights has held that the presumption of innocence guaranteed in Article 6(2) of the *European Convention on Human Rights* is not violated by a law (such as the *M’Naghten Rules* in England) which places the burden of proving insanity on the accused.<sup>14</sup>

*Canada.* In *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193, the Supreme Court of Canada held that s. 16 of the Canadian *Criminal Code*, which presumes that the accused is sane unless or until the accused proves on a balance of probabilities that he or she was insane, does violate the constitutional right to be presumed innocent. However, the Supreme Court said that the violation was a reasonable limit on the presumption of innocence which could be justified in a free and democratic society. The Supreme Court asserted that the exception was justified because it would place an “impossibly onerous” burden on the prosecution if the prosecution was required to prove that the accused was sane. The Supreme Court ignored the fact that the burden to disprove insanity is already on the prosecution in one-third to one-half of the States in the United States and that the prosecutors in those States have not found that it is an impossible burden to prove that the accused was not insane.<sup>15</sup>

#### What Criteria Do Courts Use to Justify Exceptions to the Presumption of Innocence

In general, courts in various jurisdictions have not been very specific in setting out what factors or reasons justify the creation of a reverse onus on the accused which infringes the general rule that the accused does not have to prove his or her innocence. The approach of Canadian courts in recent years has generally been more detailed than courts from other countries.

*Canada.* In *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, the Supreme Court laid down a test for when interference with or limitations on fundamental rights are reasonable and demonstrably justified in a free and democratic society. In *Oakes* the accused was charged with the crime of “possession of a narcotic for the purposes of trafficking.” Section 8 of the *Narcotic Control Act* stated that once the prosecution has proven beyond a reasonable doubt that the accused possessed a narcotic, the accused will be presumed to have possessed the narcotic “for the purpose of trafficking” unless the accused proves on a balance of probabilities that his/her possession was not for the purpose of trafficking.

The Supreme Court held that reversing the onus to the accused to prove that his/her possession was not for the purposes of trafficking does on the face of it violate the presumption of innocence. The Supreme Court then said the remaining issue is whether or not that violation is a reasonable limit on the presumption of innocence which can be demonstrably justified in a free and democratic country. The Supreme Court concluded that the reverse onus in this case

was not reasonable or justified. The Supreme Court set out a two-prong test for determining when infringements of a fundamental right are reasonable and justified. That test may be summarized as follows:

- (1) *The purpose or objective* of the provision which infringes on a right (e.g. reversing the onus) must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. In other words, the government's objective [in this case, to make enforcement and prosecution of drug laws more effective] must be a matter of pressing and substantial concern in a free and democratic society. The Supreme Court in *Oakes* held that curbing drug trafficking was a matter of pressing and substantial concern, so the reverse onus provision in that case which infringed on the presumption of innocence was reasonable and justified under the first prong of the *Oakes* test.
- (2) Secondly, assuming that the provision which violates a *Charter* right is enacted in order to pursue a pressing and substantial objective, *the means* chosen by the State to achieve its pressing and substantial objective must be reasonable and justified (i.e. proportional) in three ways:
  - (i) First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, the means chosen to pursue the objective must be rationally connected to the objective.
  - (ii) Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as reasonably possible" the right or freedom in question.
  - (iii) Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance." The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and justified in a free and democratic society.

In *Oakes*, the Supreme Court held that the reverse onus in this case was not reasonable or justified because it violated the "rational connection" requirement under the second prong of the *Oakes* test. There was no rational connection between the proven fact (possession of a narcotic) and the presumed fact (possession for the purpose of trafficking) since possession of a small amount of a narcotic does not rationally support the inference that the possession is for



trafficking rather than for personal use. The Supreme Court did not find it necessary in this case to consider the other two parts of the “means” test.

*Commonwealth Countries.* In *Vasquez*, [1994] 3 All E.R. 674, the Privy Council held that although the presumption of innocence requires that all facts relevant to guilt must be proven beyond a reasonable doubt, exceptions to the presumption of innocence, where the accused is required to prove a fact, circumstance or defence, should be allowed where it would be “sensible and reasonable” to do so. If the reverse onus relates to an essential ingredient of the offence, it is less likely that the reverse onus on the accused will be found to be reasonable. In *Vasquez*, the Privy Council held that the absence of provocation is an essential ingredient of murder (without explaining why provocation is an essential ingredient), that there was no good reason for shifting proof of provocation to the accused and therefore the reverse onus was unreasonable and unconstitutional.<sup>16</sup> In *Lee Kwong-Kut*, [1993] 3 W.L.R. 329, at 346, the Privy Council held that the governmental objective (in that case “the war against drugs”) must be given considerable weight in justifying an exception to the presumption of innocence; “rigid and inflexible standards should not be imposed on the legislature’s attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime....”<sup>17</sup>

*European Court of Human Rights.* In *Salabiaku v. France* (1988), 13 E.H.R.R. 379, the European Court of Human Rights held that since Article 6(2) guarantees the presumption of innocence, presumptions of fact or law can not be regarded “with indifference” and the State must confine any such presumptions of fact or law “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”<sup>18</sup>

*United States.* The situation in the United States is rather unique. As the Supreme Court held in *Patterson* (1977), 432 U.S. 197, the constitutional protection of the presumption of innocence does not prevent State legislators from placing the burden of proof on the accused to establish affirmative defences. However, in regard to “elements of offence” the *Constitution* is interpreted very strictly; it places the burden on the prosecutor and presumptions or reverse onus provisions concerning elements of the offence are not permitted “unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt”: *Ulster County, New York v. Allen* 442 (1979), U.S. 140, at 167.<sup>19</sup>

## NOTES

<sup>1</sup> *Pearse v. Pearse* (1846), 1 De.G. & Sm. 12, at 28.

<sup>2</sup> See generally, Law Reform Commission of Canada, Working Paper 4, Criminal Procedure—Discovery at 5-11; M. Damaska, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study” 121 U. of Penn. L.R. 506 (1973).

<sup>3</sup> See generally: J.C. Morton & S.C. Hutchinson, *The Presumption of Innocence* (Carswell: Toronto, 1987) at 2 -6.

<sup>4</sup> W. Blackstone, *Commentaries on the Laws of England* (4th ed. 1770) Bk IV, p. 358.

<sup>5</sup> Paul Robinson, *Criminal Law Defenses* Vol. 1, 41-53 (West Publishing Co., St. Paul, Minn.) (1983) and Morton *supra* note 3 at p. 77 quoting *Sandstrum v. Montana* (1979), 99 S.Ct. 2450, at 2457.

<sup>6</sup> Gelatt, “The People’s Republic of China and the Presumption of Innocence” (1982), 7 J. of Crim. Law and Criminology 259, at 284-301. Gelatt summarizes the situation in the following words:

It would appear significantly more difficult to find the new Chinese Criminal Procedure Law theoretically consistent with a presumption of innocence principle, since the Chinese CP seems to contain many more major discrepancies with the principle than the other codes considered. The relation of the arrest standard to clarification of the “facts of the crime,” and the standard, apparently close to one of guilt, for prosecution, are both untempered by any provision comparable to the Soviet stipulation that the question of guilt must not be predetermined by the court. The reference to the accused person as the “offender” at the arrest stage also presents problems. Also, the absence of a right to counsel at pretrial interrogation, and the exclusion of counsel until virtually the eve of the trial, is a point of concern, as is the failure to afford many rights to counsel during his pretrial role. The possible indefinite extension of pretrial detention is relevant, though of relatively minor concern if limited and controlled as the provision for it indicates it should be. The failure to provide for the mandatory appointment of defence counsel when a public prosecutor is present at trial is problematic. Finally, the absence from the Chinese CP of a clear principle of fresh consideration of evidence at trial and of any indication of the burden of proof or the standard for decision at trial, while not in and of itself necessarily significant, in light of the other problems with the Chinese CP, serves to cast further doubt on the basis in the Chinese CP for a presumption of innocence.

<sup>7</sup> In England in *R. v. Finney* (1798) (cited in Morton, *supra* note 5, at 5) the court said “if there be a doubt, I take it to be a clear maxim, founded in humanity as well as law, that you must acquit

the prisoner.” In *Ministry of Pensions v. Greer* [1958] N.I. 156, at 162 (Morton at 81), the court stated: “Since the case of *R. v. White* (1865), at any rate, judges have been accustomed to direct juries that in order to be justified in convicting in a criminal case they must not act on a mere balance of probabilities but must be satisfied of the accused’s guilt beyond a reasonable doubt.”

<sup>8</sup> In the United States in *David v. U.S.* (1895), 160 U.S. 469 (cited in Morton, *supra* note 5, at 6), the court stated that proof beyond a reasonable doubt is implicit in constitutions that “recognize the fundamental principles that are deemed essential for the protection of life and liberty.”

<sup>9</sup> In Australia in *R. v. Phillips* (1868), 8 S.C.R. (N.S.W.) 54 (cited in Morton *supra* note 5, at 74) the court stated: “The prisoner is presumed to be innocent until he is proven guilty, and he is entitled to the benefit of every reasonable doubt that is raised in the case.”

<sup>10</sup> *Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights*, Vol. 2 at 721 (1984).

<sup>11</sup> P. Robinson, *supra* note 5, Vol. 1, at 19-54 (West Publishing Co., St. Paul, Minn., 1984).

<sup>12</sup> M. Hor, “The Presumption of Innocence—A Constitutional Discourse for Singapore,” [1995] *Singapore Journal of Legal Studies* 365-403.

<sup>13</sup> *Ibid.* at 376.

<sup>14</sup> *Application 15023/89 v. United Kingdom* (1990). The following summary of the application appears in Vol. 87 *Law Society Gazette* (England) (Aug. 22/990) at 31:

The Commission noted that the McNaghten rules concerned the presumption of sanity, not the presumption of innocence, as such. There were presumptions of fact or law in every legal system and they did not necessarily breach the Convention provided they remained within reasonable limits, which limits take into account the importance of what is at stake and maintain the rights of the defence. The Commission also noted that the prosecutor was required to prove beyond reasonable doubt that the applicant did the act charged. It found that the requirement on the applicant to present evidence concerning his mental health at the time of the alleged offence was not arbitrary or unreasonable in the circumstances of the present case. Manifestly ill-founded; inadmissible.

<sup>15</sup> G. Ferguson, “A Critique of Proposals to Reform the Insanity Defence” (1989), 14 *Queen’s Law Journal* 135, at 147-149.

<sup>16</sup> Hor, *supra* note 12, at 371-72; see also *Hong Kong v. Lee Kwong-Kut*, [1993] 3 W.L.R. 328 (P.C.) to the same effect, citing with approval the Canadian approach discussed in *Oakes*; Hor at 392).

<sup>17</sup> Hor, *supra* note 12, at 390-394.

<sup>18</sup> See Hor, *supra* note 12, at 390. See also the European Commission's discussion of the presumption of sanity in footnote 14.

<sup>19</sup> See also Robinson, *supra* note 5.



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## CHAPTER 3:

# THE INTERNATIONAL CRIMINAL COURT

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# THE QUEST FOR GLOBAL JUSTICE:

## An Overview of International Legal and Judicial Developments in Human Rights and Criminal Law and the International Criminal Court

By Daniel Prefontaine Q.C.\*

### INTRODUCTION

In the past half-century we have seen significant developments in International Human Rights Law, International Humanitarian Law and International Criminal Law. Over this period, the struggle has resulted in the promulgation of three generations of human rights. The first group is categorized as civil and political rights. Second is the cluster of economic, social and cultural rights, albeit with many limitations and exceptions. The third category is known as collective or group rights. It is quite evident that with the recognition of these different rights created through international instruments and customary law there is a basic requirement for remedies to be available and enforceable when the violation of these rights occurs. For decades we have recognized the traditional international crimes of piracy and slavery. Since World II we have defined what constitutes crimes against humanity, war crimes, genocide, apartheid and torture. Agreement on defining clearly other crimes, such as aggression and terrorism, has yet to be reached.

At this point it useful to note the distinction between international crimes and what are classified as transnational crimes. For example, drug trafficking and smuggling can fall into

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both categories but are generally considered to be transnational crimes; that is, crimes committed across borders. International crimes are seen as those crimes considered the most serious crimes of greatest concern to mankind, those crimes that shock the conscience of humanity, including crimes against humanity, war crimes, genocide and aggression. In effect, International Criminal Law refers broadly to the international law assigning responsibility for these certain particularly serious violations of international law in peace or war.

With respect to war, it is International Humanitarian Law that imposes constraints on how war may be waged. Its objective is to protect persons who do not (or no longer) take part in hostilities and to limit the methods and means of warfare for the benefit of all. The Law applies in time of armed conflict. The basic principles applicable to the conduct of war are found in treaties and customary law, especially the Geneva Conventions and Protocols, and apply to both international and internal conflicts. This is a topic of great interest and debate at the moment given the recent conflicts in Bosnia, Kosovo, Rwanda, Somalia, Israel, Palestine, East Timor, Sudan and Afghanistan. The issues arising in International Law are closely interrelated to International Human Rights law in protecting a range of human rights which applies at all times to those fighting in these conflicts, as well as their victims.

## INTERNATIONAL HUMAN RIGHTS, INTERNATIONAL CRIMINAL LAW AND THE ROOTS OF THE INTERNATIONAL CRIMINAL COURT

It is said that the Twentieth Century witnessed some of the worst atrocities committed in the history of mankind, accounting for more than eighty six million civilian deaths in over 250 conflicts in the past fifty years alone. It can also be said that the focus in the last 75 years or so has been on the pursuit of global justice to combat impunity and to hold accountable the perpetrators of horrific crimes against humanity.

Since the end of the Second World War we have progressed from the principles regarding crimes against humanity and war crimes established by the Nuremberg and Tokyo Tribunals, to a series of conventions and treaties adopted by the international community. The United Nations has been instrumental in taking concrete action to bring the perpetrators of the most heinous crimes against mankind to justice. The creation of the Nuremberg and Tokyo courts represented the opening act for one of the great developments in international law since World War II; that is, the prescription of an extensive body of law designed to protect all individuals from the abuses of their own governments.

The recent development of the law of human rights with its focus on the individual is seen in stark contrast to the nation-state approach in international law, which dominated the landscape since the late 18<sup>th</sup> century with the focus on relations and disputes between states. It is now widely accepted by the world community today that Nuremberg and its progeny (the two *ad hoc* tribunals for former Yugoslavia and Rwanda) have played a central role in establishing the legitimacy of International Criminal Law. This means that individuals will be accountable for official acts that violate the most precious elements of international human rights. It is recognized universally that international law has a critical role to play in setting standards for governments and their agents and setting out the consequences of failing to meet those standards. In this context, the Nuremberg International Military Tribunal Charter (IMT) provided the springboard for the development of International Human Rights Law.

The United Nations took the lead in developing an *International Bill of Rights* based on the Nuremberg principles. A series of international instruments were created over the years. This included the *International Covenant on Civil and Political Rights*, the *Convention on Genocide*, the *Convention on the Elimination of all forms of Racial discrimination*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on Torture*, the *Convention on the Rights of the Child* and others.

After some 50 years of prolonged discussion and debates, and the creation of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda, the movement for the creation of a permanent international tribunal to hold individuals accountable for the most serious crimes against humanity finally became a reality in July 1998 with the adoption of the *Rome Statute*. The *Statute* will enter force after 60 states have ratified it. At present, 139 countries have signed and 52 states have ratified. It is anticipated that the 60th ratification will occur within the next couple of months. The *Statute* provides that the Assembly of State Parties will then be convened within 60 to 90 days to begin the process of setting up the structure of the Court, electing the judges the prosecutor, etc. It is anticipated the Court should be in existence and ready to hear cases sometime in 2003.

The existing international conventions are the governing instruments of the International Criminal Court. However, the Court, when it comes into existence, will not have any jurisdiction as such to deal with atrocities committed to date. In other words, the jurisdiction of the Court is forward-looking. With respect to terrorism, the Court was not given express jurisdiction over this offence. However, after the Court comes into existence it may well be possible for it to take jurisdiction over future acts of terrorism under the offence of crimes against humanity, if they are committed on a widespread or systematic basis. In Canada, national legislation will apply, such as our Canadian law on terrorism (Bill C-36) recently adopted by Parliament. Now, let me provide you with a short overview of the International Criminal Court.

## THE INTERNATIONAL CRIMINAL COURT

In accordance with Part 1 of the *Rome Statute* for an *International Criminal Court*, the Court is established with an international legal personality and will be located in The Hague, Netherlands. Part 2 specifies the Court will have jurisdiction over the crimes of genocide, crimes against humanity and war crimes. One of the significant provisions of the *Statute* is the clear limitation of the Court's jurisdiction to be complementary to national jurisdictions, only proceeding with a case where a state is unwilling or unable to investigate and prosecute the case itself. Further, the Court can only deal with crimes that occur after it comes into existence.

### The Crimes

The *Rome Statute* in Part 2 in Article 5 gives jurisdiction to the Court over the most serious crimes of international concern, namely, genocide, crimes against humanity and war crimes. The definitions of these crimes are very detailed and are based on existing customary international law.

Crimes against humanity consist of certain acts – such as murder, torture or inhumane acts – which form part of a widespread or systematic attack directed against the civilian population. The significant element of these crimes is that they must be “widespread or systematic.” In terms of what this means there is no one source that identifies a precise definition of these terms under customary law. Further, the *Rome Statute* and the Annex on the Elements of Crime do not define the terms. However, it is recognized that the *ad hoc* tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) have considered and interpreted the substance of their meaning by applying them to real factual situations.

With regard to the definition of war crimes, it is those crimes that are committed in both external and internal armed conflicts. This is most significant given that internal armed conflicts have become the most prevalent and troublesome conflicts in our times. War crimes are defined as serious violations of International Humanitarian Law, which involves individual criminal responsibility including crimes relating to the conduct of hostilities, and crimes against protected persons.

The crime of genocide is set out in the *Statute* and reflects the definition in the *Genocide Convention*. The crime of aggression is also set out as one of the Article 5 crimes. The Court will not be able to exercise jurisdiction over this crime until such time as states can agree upon a definition and relevant preconditions are established and are adopted by a Review Conference to take place seven years after the creation of the Court. Part 2 also provides for specific provisions to deal with the elements of the crimes, preconditions to the exercise of jurisdiction, when

the Court can exercise jurisdiction and rulings regarding admissibility of cases for prosecution before the Court.

### **Jurisdiction and Proceedings**

International law recognizes the right of states to exercise criminal jurisdiction to prosecute these international crimes. The principles governing the exercise of jurisdiction by national courts include the state where the crime occurred, the state of the nationality of the suspect or the nationality of the victim and the protective principle for state security. In addition, for certain serious international crimes universal jurisdiction can be available to prosecute. A growing number of states, including Canada with the passage of the *Crimes Against Humanity and War Crimes Act* last year, have put in place laws to exercise universal jurisdiction over these international crimes such as, genocide, crimes against humanity, war crimes and torture.

Recent significant developments, including the Pinochet judgment in the United Kingdom and the convictions of the four Rwandans hiding in Belgium, indicate that universal jurisdiction is becoming a real tool to combat impunity and to deal with these serious crimes. There is now a significant effort being made to promote the adoption of universal jurisdiction by all countries. With respect to the International Criminal Court and its jurisdiction, the process can be initiated by any State Party against an individual accused of one of the crimes within the jurisdiction of the Court, by the Security Council or by the Prosecutor of the Court. The power of the Prosecutor to initiate proceedings on his own motion was considered essential by the drafters of the *Statute* in light of States Parties and the Security Council being reluctant to do so because of political considerations. However, the Prosecutor is subject to carefully crafted checks and balances in the screening process to ensure against any frivolous and possibly improperly motivated prosecutions. This includes the need to obtain prior judicial approval from a Pre-Trial Chamber of the Court and a consultation procedure with concerned states to allow them to challenge jurisdiction.

In addition, the power of the Security Council to refer situations to The Court and Prosecutor is considered a critical element since the Security Council can employ its enforcement powers under Chapter VII of the *United Nations Charter* to ensure that all United Nations Member States will comply with the request made by the Court. The *Statute* provides that before the Court can exercise jurisdiction there must be some form of state acceptance. In the case of a referral by the Security Council, the acceptance derives from the obligation of Member States to carry out the decisions of the Security Council as provided for in the *Charter* and Chapter VII to take measures for international peace and security.

However, in the absence of a Security Council referral, it is essential that acceptance must be given by either the state of the nationality of the accused person or the state in whose territory the crime was committed. Thus, State Parties automatically accept the Court's jurisdiction without a requirement for case by case consent. However, there is a transitional provision which allows new States Parties to withhold automatic consent over war crimes for a period of seven years. Finally, non-States Parties may also give acceptance on an *ad hoc* basis.

## **Complementarity**

The principle of complementarity describes the relationship between the Court and national criminal law jurisdictions. The preamble and Articles I and 17 of the *Rome Statute* provide that it is states that have the responsibility for bringing those responsible for the "most serious crimes of international concern," that is, genocide, crimes against humanity and war crimes (and eventually the crime of aggression) to justice. The *Statute* states the Court's jurisdiction is complementary to national jurisdictions and can only take jurisdiction when states are "unwilling or unable" to investigate and prosecute the case themselves.

However, the Court can assume jurisdiction where a proceeding by a state is not considered genuine or is seen to be a sham to protect their nationals from facing justice. It is important to note that the crimes of terrorism, hostage taking, hijacking, torture and the like are all within national jurisdiction and outside the *Statute*. Therefore, if the Court is to be an effective complement to states in the international system of justice for the above crimes, states must fulfill their obligations. States must enact national legislation, which provides that these crimes under international law are also crimes under national law wherever committed, no matter who has committed them or who is the victim.

## **Principles of Criminal Law in the Statute**

Part 3 of the *Statute* enumerates the basic general principles of criminal law, which state that:

- The *Statute* applies prospectively after the Court comes into force.
- The Court can only deal with persons over the age of 18 years of age at the time of the commission of the offence. This is consistent with other UN Conventions, particularly the *Convention on the Rights of the Child*.
- The title or official capacity of the accused person is irrelevant. This means that a person who has committed a crime cannot escape responsibility as a result of their position in government or the military.

- Statutes of limitation against prosecutions do not apply.
- Persons accused of crimes are to be held individually responsible for their crimes.
- A commander or a superior in a position of authority can be held liable for crimes committed by his subordinates.

## **Composition of the Court**

The *Statute* set out in Part 4 the structure of the Court with its three component bodies: the Office of the Prosecutor, the Registry, and the Judiciary with the Pre-Trial Chamber, the Trial Division and the Appeal Division. The Assembly of States Parties is responsible to elect the 18 judges of the Court, the Prosecutor and the Registrar. Removal of Officials is also by the Assembly of States Parties based on serious misconduct or breach of duty.

## **Pre-trial Proceedings**

Part 5 of the *Statute* set out the procedures in the investigation and prosecution stages including the initiation of proceedings, the functions of the Prosecutor and the Pre-Trial Chamber, arrest proceedings and initial proceedings before the Court. It also specifies that only serious cases will be brought before the court for prosecution by providing for a charge approval procedure by the Pre-Trial Chamber.

## **Trial Process**

Part 6 governs the trial process, including the functions of the Trial Division. Article 67 sets out the right of the accused to a fair and public hearing to be conducted in accordance with the standards derived from the *International Covenant on Civil and Political Rights* and other widely accepted international instruments. This includes the right to be presumed innocent, to be present during the trial, disclosure of the evidence by the prosecutor, to be found guilty beyond a reasonable doubt and the right to defence counsel to assist in the defence.

## **Appeals**

Part 8 deals with appeals. The Prosecutor and the convicted person have a right of appeal based on procedural error, error of fact or error of law. The convicted person can also appeal on any other ground that affects the fairness or reliability of the proceedings or the decision. The Appeal Division of the Court hears the appeals.

## **Sentencing, Penalties and Enforcement**

Part 7 deals with penalties and the determination of the sentence, the applicable penalties and the creation of a trust fund for victims. In keeping with the *United Nations Charter* the maximum penalty that the Court can impose is life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Otherwise the maximum penalty for offences is 30 years. The Court must review all sentences of imprisonment after the person has served two thirds of the sentence, or 25 years in the case of a life sentence, to determine whether the person's sentence should be reduced. If the Court decides not to reduce the person's sentence after the first review, the *Statute* requires the Court to continue to review the sentence in accordance with the Rules of Procedure and Evidence. In effect it will be an annual review.

The Court can also impose fines, forfeiture orders and reparation orders. The Court can order that fines and property collected by the forfeiture orders to be transferred to the Victims Trust Fund to be set up under the *Statute*.

One of the unique features of the *Statute* set out in Part 10 is the voluntary commitment by States Parties to accept sentenced persons in order to enforce the sentences imposed by the Court. The Court will have only very limited detention facilities at The Hague (as presently utilized by the ICTY), so it will be relying almost entirely on states to enforce its sentences of imprisonment in national detention facilities. States Parties who accept sentenced persons will sign agreements with the Court with such conditions as are appropriate. After acceptance by the state the sentence of imprisonment is binding with certain exceptions. The Court has primacy and is the body with the authority to make any significant decisions that have to be made in the execution of the sentence. However, the conditions of imprisonment are governed by the law of the state of enforcement consistent with accepted international standards governing the treatment of prisoners. This includes unimpeded communications between the Court and the prisoner.

## **State Cooperation**

Part 9 governs international cooperation and assistance, especially the obligation on the part of states to cooperate fully with the Court. It provides details on the cooperation measures required, such as the arrest and surrender of persons to the Court. In effect, this means that states must ensure that their national procedures allow compliance with the *Statute* and are no more exacting than their usual extradition requirements. Therefore, once the Court has determined that it may exercise jurisdiction in accordance with the principle of complementarity, State Parties agree under Article 86 to cooperate fully with the Court in the investigation and

prosecution of crimes within the jurisdiction of the Court. This means that the Prosecutor and the defence can conduct effective investigations in their jurisdictions, in that their courts and other authorities provide full cooperation in obtaining documents, locating and seizing assets of the accused, conducting searches and seizures of evidence, locating and protecting witnesses and arresting and surrendering accused persons. Detention facilities should also be made available to assist the Court until arrested or detained persons can be transferred to The Hague.

### **Management Oversight and Funding of the Court**

Part 11 deals with the Assembly of States Parties, which will provide management oversight to the Court. This includes the power to consider and decide the budget of the Court and to establish oversight mechanisms to enhance the efficiency and economy of the Court. The division of responsibility is similar to our national system of justice with the judicial administration by the Judicial Branch, that is, the judges themselves, and the administration of justice by the Executive Branch of government by the Minister of Justice or Attorney General.

Part 12 governs the financing of the Court, which is provided from assessed contributions made by the States Parties and any funds provided by the United Nations as well as any voluntary contributions that may be made to defray the cost of the Court's operations.

### **Final Clauses**

No reservations may be made to the *Statute*. The *Statute* may be amended at a Review Conference to be held seven years after the entry into force of the *Statute*. Any amendment must first be adopted by 2/3 of the States Parties at the Review Conference and thereafter must be ratified by 7/8 of all States Parties. Any amendments to the definitions of crimes will enter into force only for those states that have ratified them. The *Statute* enters into force upon reaching 60 ratifications. At that point, the Assembly of States Parties must be convened within 60 to 90 days. The Assembly of States Parties will then proceed to set up the Court including adopting the agreements and rules of procedure, elect the Judges and the Prosecutor and set in motion the financing requirements for the operation of the Court.

## **CHINA AND THE DEVELOPMENT OF THE COURT**

China has always supported the idea of setting up the International Criminal Court. The Chinese delegation has actively participated in the discussion of the various documents at the many Preparatory Commission meetings. The Chinese delegates have played a constructive



role in the formulation of these documents. China's delegates have expressed their hope that through these efforts, it can make a contribution to the establishment of an independent, just and efficient court with universal application. On the definition of the crime of aggression, China has expressed the view that an appropriate threshold should be set for this crime which constitutes individual criminal responsibility. The basis for doing so should be the customary international law. In the meantime, it should also be brought into line with with international realities.

## CANADA'S ROLE

Canada has played a leadership role in promoting and supporting the creation of the International Criminal Court. A strong commitment by Canada became a reality last year with the adoption of the *Crimes against Humanity and War Crimes Act*. The new law implements fully the *Rome Statute* into Canadian law. This includes creating new crimes and penalties, expanded jurisdiction to prosecute these crimes and extending full cooperation measures, through evidence gathering, surrender and other forms of assistance, to assist the new court and to support the existing and future *ad hoc* Tribunals. As well, Canada continues to support efforts to encourage countries that have not yet done so to ratify and implement the *Statute of Rome*.

## CONCLUDING REMARKS

The above overview describing the developments of the International Criminal Court leads to the conclusion that international law has only haltingly and incompletely recognized individual responsibility for human rights abuses in peace and conflict situations. In reality, states have only set up or engaged national or international tribunals to hold persons accountable on a sporadic and *ad hoc* basis. The legal environment is clearly not a coherent and complete regime. Treaty law overlaps with customary law, a variety of national laws and systems exist to protect offenders, national courts have acquired jurisdiction but are not willing or able to exercise it, a few *ad hoc* international tribunals are in place (and a few more are coming on stream in Cambodia, Sierra Leone and East Timor) and the emerging permanent international court has limited and prospective jurisdiction.

Overall, it can be concluded that for the foreseeable future international criminal law seems destined to remain a product of an *ad hoc* process of prescription, rather than the subject of a widely accepted set of crimes and procedures in an international criminal code. Nevertheless, the adoption of the *Rome Statute* can still be viewed as an incredible achievement in the develop-

ment of international law and accountability. Despite its shortcomings and limited jurisdiction, many are convinced that an appropriate balance has been struck between respect for national sovereignty and the quest for international justice. This has been achieved by enshrining the clear principle of complementarity giving primary jurisdiction to states, by imposing specific limits on the power of the prosecutor to initiate proceedings and providing carefully crafted Rules of Procedure and Evidence to govern the proceedings of the Court. The *Rome Statute* is the culmination of a long journey to implementing a regime of accountability for the heinous crimes committed against humanity. It is also the cornerstone for the ongoing and enduring struggle towards achieving the vision of the *Universal Declaration of Human Rights* and the *International Bill of Rights* for the universal respect for and observance of human rights and fundamental freedoms for all the citizens of the world.



# IMPLEMENTING THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: THE CANADIAN EXPERIENCE

Original text by Valerie Oosterveld

Presented by Elisabeth Eid\*

## INTRODUCTION

I would like to begin by thanking the organizers and sponsors of this conference. It is a great honour to be invited to speak here. I have been asked to speak about Canada's experience in implementing the *Rome Statute of the International Criminal Court* (ICC), which is a very timely topic considering the rapid pace of ratifications. As of October 12, 2001, the ICC Statute has 43 ratifications, and 60 are needed for entry-into-force. Canada knows of several imminent ratifications, in countries such as Nigeria, the United Kingdom, Poland and Peru. We also have reports of approximately 15 other countries having begun their ratification process. At this rate, it is conceivable that the *Statute* will come into force and the Court will be established some time in 2002.

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Canada actively participated in the negotiations that led to the establishment of the *Statute of the International Criminal Court*. I also understand that China was an active participant and made many constructive interventions during the negotiations.

Canada signed the *Statute* (which has the status of a treaty) on December 18, 1998. Before Canada can ratify a treaty, it must ensure that its domestic law is in conformity with the obligations specified in the treaty. This often requires passing implementing legislation prior to ratification.

Unlike many countries, Canada already had legislation respecting crimes against humanity and war crimes in the *Criminal Code* prior to the adoption of the ICC Statute. These existing *Criminal Code* provisions as well as other relevant statutes and regulations were examined in relation to the *Statute* to determine the extent of discrepancies and whether new legislation was required to bring Canada into compliance with the treaty. This review determined that new legislation was required.

## CRIMES AGAINST HUMANITY AND WAR CRIMES ACT

Canada was the first country to enact comprehensive implementing legislation in response to the obligations under the ICC Statute. This legislation is entitled the *Crimes Against Humanity and War Crimes Act* and was adopted on June 29, 2000. At the same time, other pieces of legislation were amended, such as the *Criminal Code*, and Acts dealing with extradition, mutual legal assistance, and witness protection.

Canada's *Crimes Against Humanity and War Crimes Act* was designed to serve two purposes. The first purpose was to implement the ICC Statute, in order to cooperate with the Court and to take advantage of the "complementarity" regime, under which countries have the first chance to investigate and prosecute a crime. The second purpose was to strengthen Canada's laws for the prosecution of serious crimes, to ensure that Canada will not become a safe haven for war criminals.

The drafting of Canada's *Crimes Against Humanity and War Crimes Act* took approximately eight months and was done jointly by the Department of Foreign Affairs and the Department of Justice. We also consulted with other government departments when it became necessary; for example, the Department of Defence and those government departments overseeing the prison system, the police and immigration/refugee claims.

We created an inter-departmental committee to oversee the drafting, which had to be done simultaneously in English and French. Our committee consisted of lawyers and legislative drafters.

Once the Departments of Foreign Affairs and Justice were happy with the text, it was submitted to the Ministers and then presented to Parliament. Within our Parliament and Senate, the *Act* went through eight stages before being adopted. It was examined in detail by the Parliament’s Standing Committee on Foreign Affairs, as well as the Senate’s Foreign Affairs Committee. The all-party Parliamentary Committee made certain changes to the *Act*, which was then referred to the next stage by consensus (which included centre, left and far right political parties). The Committees also heard many hours of testimony from witnesses, including nongovernmental organizations, members of the public, governmental experts and academics.

It took seven months before the *Act* made it through all stages and was finally adopted in June 2000. While this may sound quite slow, for Canada this is very fast. The adoption of the *Act* put Canada in a position to ratify the ICC Statute, which it did on July 7, 2000.

## EXAMINATION OF THE ACT

There are two kinds of provisions in the ICC Statute that countries must consider when they are considering implementing legislation: those that create *obligations* for countries and those that are *optional* for countries.

The ICC Statute clearly sets out certain obligations that countries must fulfil; for example, changing laws to allow for arrest and surrender to the ICC and criminalizing acts that could negatively affect the ICC, such as bribery of judges and threatening witnesses.

The ICC Statute also contains something called the “complementarity” principle – that is, the principle that countries have the first chance to investigate or prosecute a crime. The ICC will be able to investigate or prosecute *only* when a country is unwilling or unable to investigate or prosecute. The principle is called “complementarity” because the jurisdiction of countries and the jurisdiction of the ICC *complement* – but do not interfere with – one another. Under the complementarity principle, countries have the choice as to whether or not they want to investigate or prosecute. Therefore, it is up to each country to decide if it wants to incorporate the ICC crimes into its domestic laws, in order to allow for domestic prosecution, or to leave the prosecution to the Court.

I will begin with this issue – whether or not countries decide to incorporate the ICC crimes.

### **Incorporating the ICC Crimes**

Countries interested in implementing the ICC Statute need to decide if they want to incorporate the ICC crimes into their domestic law. Canada considered this question and decided

that it always wanted to have the choice to investigate or prosecute a crime, especially when a Canadian citizen is the suspect. Not every country will decide to do so. For example, a number of small Caribbean countries have stated that they may decide, for political and financial reasons, not to incorporate the ICC crimes into domestic law because they would prefer that the ICC always investigate and prosecute those crimes.

However, we predict that most countries that join the ICC will decide to incorporate the ICC crimes into domestic law in order to be able to exercise their right to investigate or prosecute, especially in cases involving their own citizens.

Countries have several options if they decide to incorporate the ICC crimes into their national laws. They can either amend existing criminal laws, such as their *Criminal Code*, *Geneva Conventions Act* or *Genocide Convention Act*. Or they can create a new, separate piece of legislation which incorporates the ICC crimes into a new war crimes prosecution structure.

Canada decided to create an entirely new law allowing for Canadian prosecutions of genocide, crimes against humanity and war crimes. We felt that this would be easier and also felt that the adoption of one act would clearly signal to the Canadian public just how seriously we took these crimes.

Countries have different choices in terms of how to incorporate the ICC crimes into their domestic laws. They can simply define the crimes by referring to Articles 6, 7 or 8 of the ICC Statute. Article 6 defines genocide, Article 7 defines crimes against humanity and Article 8 defines war crimes in the ICC Statute. This is what was done by New Zealand and the United Kingdom in their ICC Acts – they simply stated that Articles 6, 7 and 8 also form a part of their law.

Another option is for countries to reproduce the wording of the ICC crimes in their laws, or to attach the ICC crimes to their legislation.

Canada decided to go further. We not only wanted to be able to investigate and prosecute crimes that took place *after* the creation of the ICC, we wanted to be able to prosecute crimes that had occurred outside of Canada *before* the establishment of the ICC. As well, we were unhappy that certain crimes had been left out of the ICC Statute, such as the use of chemical or biological weapons, and we wanted to ensure that these crimes could be prosecuted in Canada, even if they were not included in the ICC Statute. We wanted to adopt a wider definition of crimes than was included in the ICC Statute.

Therefore, we decided to define genocide, crimes against humanity and war crimes by simply referring to customary international law, international law created through treaties or conventions and the ICC Statute. In other words, we stated that genocide, crimes against humanity and war crimes were crimes under Canadian law, and that these crimes were defined in Canada in the same way as they were defined under international law.

In order to provide the judge with some guidance on what customary and conventional international law is, we also included some examples of these crimes. For example, in our reference to crimes against humanity, we gave the examples of murder, extermination and enslavement.

In order to be absolutely sure that all ICC crimes were included in Canadian law, we stated in our legislation that all ICC crimes are to be considered crimes under customary international law as of July 17, 1998 (the date the ICC Statute was adopted). We felt comfortable saying this because the countries drafting the ICC Statute agreed that only crimes established in international customary law could be included in the Statute: therefore, the ICC Statute offers a persuasive statement by the international community as a whole of the state of customary international law at that time. By including a direct reference to the ICC Statute, we have ensured that Canada has implemented all of the ICC Statute crimes.

The benefit of not tying our crimes solely to the ICC Statute is that Canada's definition of crimes evolves as international law evolves, without needing any amendments to the *Act*. Take, for example, the age of recruitment of child soldiers. In the ICC Statute, the minimum age of recruitment is listed as 15, however, the *Optional Protocol to the Convention on the Rights of the Child* is higher. If the new, higher age enters customary international law, then Canada can use that age for its prosecutions and not just the age of 15.

### **Command Responsibility**

Within the ICC Statute, Article 28 sets out the principle that commanders who fail to prevent or punish crimes committed by subordinates, when they knew or should have known about these crimes, are to be held responsible. The reference to commanders includes military, paramilitary or civilian commanders or leaders, including Heads of State.

Within the ICC Statute, command responsibility is seen as a *mode of participation*, like aiding and abetting. The failure of the commander is seen as a form of participation in the crime itself, so the commander is charged with genocide, crimes against humanity or war crimes. This was also the approach in Nuremberg and Tokyo, and has been the approach of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

Canada did not have command responsibility as a mode of participation within its domestic laws and had to consider how to incorporate it. Even if a country has the doctrine of command responsibility in its military code, it will need to ensure that *civilian* command responsibility, and not only *military* command responsibility, is also reflected in its domestic laws. New Zealand incorporated command responsibility by referring to Article 28 in its laws, and the United



Kingdom reproduced the wording of the command responsibility article from the ICC Statute in its laws.

Canada had a problem with simply copying Article 28 into its *Act*. Under Canadian constitutional law, for all very serious crimes, the prosecutor must prove that the accused himself had some kind of knowledge (in other words, the prosecutor must show a *subjective* mental element). Therefore, the “should have known” form of liability is not allowed. Since, clearly, genocide, crimes against humanity and war crimes are serious crimes, we could not directly apply the “should have known” aspect of Article 28.

Since we could not include command responsibility as a mode of participation, Canada’s solution was to create a distinct new crime of “breach of command responsibility” with a “criminal negligence” standard (“knows or is criminally negligent in failing to know”). The crime provides for the same penalties as genocide, crimes against humanity and war crimes, so the result is just as severe as for these crimes.

The Canadian legislation encompasses both military commanders and civilian leaders. The Canadian legislation treats *police commanders*, in certain circumstances, as military commanders. We wanted to capture the phenomenon of the conflict in the former Yugoslavia, where many fighting forces were in fact composed of police and led by police commanders. In addition, we wanted to be able to capture police “death squads.”

## **Penalties**

Under the Canadian *Act*, genocide, crimes against humanity, war crimes and breach of command responsibility provide for penalties ranging up to and including life imprisonment. When the offence includes murder, there is a mandatory minimum sentence, such as life imprisonment for first degree murder. Canada does not apply the death penalty.

## **Jurisdiction**

States incorporating the ICC crimes into their domestic laws will also have to determine what types of jurisdiction they will assert. States will undoubtedly assert “territorial jurisdiction,” i.e. jurisdiction over the crimes committed *in their territory*, as this is the most basic ground of criminal jurisdiction.

States wishing to ensure that they can meet the complementarity test of the ICC will also wish to assert “active nationality” jurisdiction, i.e. jurisdiction over crimes *committed by their nationals*, anywhere in the world. This will preserve for countries the choice of prosecuting nationals for their acts rather than sending them to the ICC.

In its legislation, the United Kingdom asserted these two grounds of jurisdiction – jurisdiction over crimes committed on United Kingdom territory and by United Kingdom nationals anywhere in the world.

Other countries may wish to go further, even though this is not required to meet the complementarity test of the ICC. Some States may wish to assert “passive nationality” (or “victim”) jurisdiction; in other words, jurisdiction over crimes *committed against one’s nationals*.

Canada asserted territorial, and active and passive nationality jurisdiction, but also decided to go further and assert “universal jurisdiction.” Canada therefore incorporated into its law a provision allowing it to prosecute *any person found on Canadian soil* for the crimes found in Canada’s *Act*.

This is not the same as the law in Belgium. Belgium’s criminal law permits Belgium to exercise jurisdiction over anyone, regardless of whether or not that person was present on Belgian soil. Some have called this “super-universal jurisdiction.”

### **Temporal Scope**

Countries adopting ICC crimes will also want to consider the temporal scope, or time period, applying to the crimes.

The ICC will only be able to prosecute crimes committed *after* the entry into force of the ICC Statute. It is therefore forward-looking only. Many countries, in deciding the time scope for their legislation, will also make their legislation forward-looking only.

Some countries, on the other hand, will decide to make their legislation apply backward in time. New Zealand, for example, has decided to allow the prosecution of crimes committed since certain dates. Similarly, the Canadian legislation applies in the past, present and future.

The Canadian legislation allows for the prosecution of crimes committed outside of Canada in the past. This means that World War II crimes, as well as modern war crimes – for example, those committed in the Former Yugoslavia, Rwanda and in other recent and ongoing conflicts – will be able to be prosecuted.

The *Canadian Charter of Rights and Freedoms* – a document with constitutional status – expressly allows us to prosecute crimes committed before the entry into force of the *Crimes Against Humanity and War Crimes Act*. Section 11(g) of the *Charter*, in line with Article 15 of the *International Covenant on Civil and Political Rights*, guarantees the right not to be found guilty of conduct unless, at the time of the conduct, it constituted an offence under Canadian *or international law*, or was criminal according to the general principles of law recognized by the community of nations. Therefore, Canada can prosecute crimes committed as far back as the crimes of genocide, crimes against humanity and war crimes existed under international law.

Canada's legislation does not set any specific time limits, as was done in the New Zealand legislation. However, prosecutions can only occur as far back as genocide, crimes against humanity and war crimes were crimes under international customary or conventional law. For example, we know that genocide was a crime as of 1948 – the date of the adoption of the *Genocide Convention* – and therefore genocide crimes could be prosecuted from that date forward. To go further backward in time, a prosecutor would have to prove that genocide was outlawed under international customary law at that time, which might be difficult.<sup>1</sup>

## Defences

Under the *Crimes Against Humanity and War Crimes Act*, as a general rule, when a person is being tried in Canada for genocide, crimes against humanity, war crimes or breach of command responsibility, he or she can rely upon any defences available under the laws of Canada or under international law. The defences that can be used are those available at the time of the alleged offence *or* at the time of the proceedings.

However, there are exceptions. It is not a defence that an offence was committed in obedience to the law in force at the time, and in the place, of its commission. This avoids problems caused when a regime passes laws legalizing acts that would otherwise be illegal under international law, as the Nazis did in Germany the 1930s and 1940s.

During the ICC negotiations, there was quite a bit of debate about whether or not to include a defence of superior orders – for example, when a soldier claims that he did something illegal because he was ordered to do so by his superior. Under Article 33 of the ICC Statute, the defence of superior orders was allowed in limited circumstances involving war crimes that were *not* clearly illegal on their face. Canada's defence of superior orders was therefore amended to be the same as Article 33 of the ICC Statute.

In addition, Canada stated in its *Act* that the defence of superior orders cannot be based on a belief that the order was lawful, when that belief was based on information that encouraged the commission of inhumane acts or omissions against the group. In other words, take the example of Rwanda. A person could not claim that she followed an order because of hate information she heard in the newspapers and on the radio demonizing the Tutsi.

Under Canada's *Act*, in certain circumstances, special pleas of previous acquittal (called *autrefois acquit* in our law), previous conviction (called *autrefois convict*) or pardon may not be pleaded when the person was tried in a foreign court and the proceedings in that court were for the purpose of shielding the person from criminal responsibility. Basically, these pleas will not be respected if they were the result of a sham trial.

## IMPLEMENTING OBLIGATIONS

### Arrest and Surrender

I would like to turn now to the obligations contained in the ICC Statute that countries must implement. The ICC will only be effective if States can cooperate with the Court. One of the most important forms of cooperation is for States to comply with a request to *arrest and surrender* a person to the Court.

At the final negotiations in Rome, States disagreed as to the process that should be used to bring persons before the Court. Some countries argued for a simple *transfer* mechanism, where a State would send someone to the ICC with little or no domestic process. Other countries could not accept such a mechanism, especially to transfer nationals, and argued for using *extradition*. The solution was to oblige States to “surrender” a person to the Court, but leaving the procedure up to the State. However, that ICC Statute specifically says that the surrender procedure cannot be any more burdensome than the normal extradition procedures.

States therefore have two options when implementing the obligation to surrender: they can create a separate law for surrendering to the ICC, or they can amend existing extradition laws to include surrender to the ICC.

Canada decided to amend its *Extradition Act* to include surrender to the ICC. The year before, we had already included the possibility of surrender to the International Criminal Tribunals for the Former Yugoslavia and Rwanda, so we merely added the ICC to the list.

Basically, Canada’s surrender process is a shortened version of our extradition process. We chose to use the extradition process – in a modified form – because that process has been tested by our highest court and has been found to be constitutionally sound. We felt comfortable eliminating certain aspects of the regular extradition process because the surrender would be to an international court with strong, internationally-recognized safeguards.

We eliminated the grounds of refusal presently listed in the *Extradition Act*, and indicated that they did not apply to a request for surrender by the ICC.

In addition, Canada ensured that evidence can be adduced in a summary form. In a regular extradition case, all evidence presented would have to comply with the technicalities of regular evidence rules. In the case of a surrender to the ICC, however, evidence can be submitted in the form of a record of the case.

Other countries, such as New Zealand and the United Kingdom, have gone further than Canada and have eliminated the evidence requirement. For New Zealand and the United Kingdom, all that is required is satisfaction as to existence of a warrant of arrest issued by the ICC and of the identity of the person sought.

The *Extradition Act* was also amended to ensure that a person who is the subject of a request for surrender by the ICC would not be able to claim immunity from arrest or surrender. A person's claim of immunity would therefore not be a bar to surrender to the ICC. It is in this way that we dealt with the issue of immunities.

Canada does not have any constitutional bar to extraditing its own nationals, and therefore did not have to deal with this issue in its legislation.

Certain changes were made to allow the ICC itself to be able to participate in the surrender process. For example, when a person arrested in Canada is being considered for interim release (often called bail), the ICC can submit its recommendations to the Canadian court. If the ICC does submit recommendations, the Canadian judge would be *required* to consider the recommendations before making a decision.

All of these changes are meant to streamline the process, while at the same time protect the rights of the accused.

### **Other Forms of Assistance**

Of course, the ICC will also rely on the cooperation of States for matters other than arrest and surrender – for example, collection of evidence or location of potential witnesses.

Canada therefore amended its *Mutual Legal Assistance in Criminal Matters Act* to permit Canada to provide a wide range of assistance, from collecting evidence, to identifying persons, to freezing or seizing proceeds of crime, to providing reparations to victims.

Our intention was to ensure that Canada would be able to assist the ICC in much the same way as it presently assists other States with normal criminal investigations and prosecutions.

Therefore Canada's *Mutual Legal Assistance Act* was changed to allow for the police to:

- question suspects;
- serve documents;
- collect evidence, including evidence through the searching of gravesites;
- protect victims and witnesses; and
- allow for the temporary transit of an accused from another country to the ICC through Canada.

Canada also adopted investigation tools that would assist Canada, and not just the ICC, in prosecuting genocide, crimes against humanity and war crimes. For example, police can now use wiretaps and other electronic surveillance to gather evidence for Canadian investigations and prosecutions.

Some parts of our existing legislation had to be changed completely. Take, for example, when the ICC Prosecutor asks Canada to preserve certain evidence in order not to lose it while a State is challenging the jurisdiction of the Court over a particular case. Under our former law, before obtaining the order to preserve the evidence, there was a requirement for a Canadian court to determine that the foreign state or entity had *jurisdiction* over the alleged offence. Of course, it would be difficult to show the Canadian judge that the ICC had jurisdiction over the crime in question when that very issue is the subject of a challenge at the ICC itself.

We therefore amended the *Mutual Legal Assistance* Act to overcome this potential difficulty. The judge will no longer have to consider the jurisdiction of the requesting state or body over the offence before issuing an order. Instead, the Canadian court would only have to be satisfied that there are grounds to believe that an offence has been committed.

### **Restraint and Forfeiture**

Under the ICC Statute, States are obliged to:

- restrain, seize or freeze proceeds of crime;
- enforce fines or orders for forfeiture; and
- enforce reparations orders.

States therefore can either create a new regime, amend existing legislation or adopt a combination of the two when implementing these obligations. New Zealand's ICC legislation is a good example of a country choosing to create a new regime, while the United Kingdom and Canada have decided to both create a new regime *and* amend existing legislation.

Canada changed its *Mutual Legal Assistance* Act to allow an ICC order for seizure of proceeds of crime, or an ICC order for reparations, to be filed in a Canadian court. The Canadian court would then be able to enforce those orders *directly*.

We also decided to go further than was required by the ICC Statute and create something called the Crimes Against Humanity Fund. Money obtained through the Canadian enforcement of ICC orders for reparation or forfeiture, or ICC fines, would be paid into the Fund. As well, donations can be made to the Fund, and [net] proceeds received from forfeited property would be deposited into the Fund.

The Attorney General of Canada can make payments out of the Crimes Against Humanity Fund to the ICC, to the ICC Trust Fund, to the victims of offences and their families as identified by the ICC (or in Canadian cases), or otherwise as the Attorney General sees fit.

## Offences Against the Administration of Justice

Article 70 of the *Rome Statute* sets out offences against the administration of justice of the ICC over which the Court must have jurisdiction, such as:

- perjury;
- bribing a witness or a Court official;
- retaliating against a witness; and
- tampering with evidence.

Article 70 *obliges* States to extend their own criminal laws to cover these offences against the administration of justice of the ICC, where these offences are committed on their territory or by one of their nationals.

Therefore, in addition to the new offences of genocide, crimes against humanity and war crimes created in Canada's *Crimes Against Humanity and War Crimes Act*, this *Act* also includes crimes such as perjury and tampering with evidence. In fact, Canada decided to go further and include offences *not listed* in the ICC Statute, because we wanted to be sure to turn *all existing* Canadian administration of justice offences – which was a longer list than the one included in the ICC Statute – into offences against the ICC.

In addition, we decided to include more than just the crimes listed in Canada's *Criminal Code*, since some of the offences were old and used out-of-date language. We modernized these offences and broadened them to cover all potential crimes of interfering with the ICC, so they now include the offences of:

- obstructing justice;
- obstructing officials of the ICC;
- bribery of judges and officials of the ICC;
- perjury;
- fabricating or giving contradictory evidence; and
- offences relating to affidavits and intimidation.

Witnesses who have testified before the ICC are now protected from retaliation taken against them or their families. We also ensured that the ICC judges could be protected under Canadian law.

All of these offences would apply when committed in Canada or by Canadian citizens outside Canada.

## Privileges and Immunities of Court Officials

Under Article 48 of the ICC Statute, judges, the Prosecutor, the Deputy Prosecutor and the Registrar are to be given the same privileges and immunities as heads of diplomatic missions. Canada therefore amended its existing laws dealing with heads of diplomatic missions to apply these same provisions to these ICC officials.

Other ICC staff (such as the Deputy Registrar and the staff of the Office of the Prosecutor) are also to be given privileges and immunities, but exactly which privileges and immunities are still being worked out in negotiations on the Agreement on Privileges and Immunities, which should be settled in the next two weeks.

In order to ensure that the Agreement on Privileges and Immunities could be easily implemented in Canadian law once it was completed, without the long process of amending the *Crimes Against Humanity and War Crimes Act*, Canada has provided in its *Act* for this Agreement to be implemented through regulations or orders in council. This is also what the United Kingdom and New Zealand have also done.

## CONCLUSION

As you can see from the list of issues considered by Canada, implementing the ICC Statute into a country's domestic laws can be complex. However, as you can also see, it is not impossible. There are various decisions that may be taken by a country considering implementation, namely:

- whether or not to incorporate the ICC crimes;
- the time period to be covered by the legislation;
- the defences and penalties to apply to the crimes;
- the domestic procedures to take for arrest;
- whether to adapt extradition laws or create a brand new surrender process; and
- what legal amendments are needed to provide the best possible assistance to the Court for investigations.

I will conclude by noting that, if Canada can ever be of any assistance with respect to implementation in your country, for example, by answering questions about why we drafted our law as we did, please do not hesitate to contact us.

Thank you for giving me the honour of speaking to you about Canada's work on the International Criminal Court.



## NOTES

<sup>1</sup> Only the provisions applying outside of Canada are retrospective in application. This was because, in adopting the crimes that apply to conduct committed outside of Canada, we were merely strengthening the legislation adopted in 1987, which was also retrospective. It was a different story for crimes committed inside of Canada. The “inside Canada” provisions were created only for the purposes of implementing the ICC, and ICC implementation only need apply forward in time. The difference may look strange, but it flows from legislative policy adopted in 1987.

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CHAPTER 4:

REVIEW AND EVALUATION  
OF LEGAL AID SYSTEMS IN  
CANADA AND CHINA

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# THE RESPONSIBILITY OF STATES TO PROVIDE LEGAL AID

By Eileen Skinnider\*

## INTRODUCTION

Recently, with many jurisdictions experiencing a massive expansion in the amount of legal aid services provided and huge increases in the costs of providing these services, governments have begun to systematically reconsider the nature, scope and method of delivery of existing legal aid services. In many cases, major structural and program policy changes are being contemplated or implemented. The issue of responsibility of the state to provide legal aid becomes important in the restructuring or establishment of legal aid systems as it provides the overall rationale for them.

The responsibility of states to provide legal assistance has been defined throughout this past century on several different bases, including moral, political, social-justice and legal terms. This paper will focus primarily on the legal obligations of states to provide legal aid arising from international human rights law. The remainder of this paper is divided into three parts. The first part looks at the development of the concept of legal aid in western jurisdictions from the traditional view of formal equality to the broader concept of access to justice, recognising that existing legal aid schemes include elements of these concepts to varying degrees. The second part of this paper focuses specifically on the right to legal aid contained in international human rights law. From such a review, the right to state-funded legal assistance appears somewhat limited. However, the last part of this paper broadens the discussion of international legal obligations by reflecting on how other rights impact on the duty of states to provide legal aid and

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ensure equal access to justice. It should be noted that this paper does not attempt to assess the extent to which various states are in compliance with their international obligations respecting the provision of legal aid.

## THE DIFFERING CONCEPTS OF LEGAL AID

### The Traditional Concept

In most jurisdictions, there has been a long tradition of states providing some form of legal aid to the poor. A rather primitive right to access to justice dates back to England in the 1400s where the *Statute of Henry VII* (1495) waived all fees for indigent civil litigants in the common law courts and empowered the courts to appoint lawyers to provide representation in court without compensation.<sup>1</sup> During the 19th Century, most Continental codes of law contained the principle codification of the “poor man’s law,” providing court fee waivers and appointment of duty counsel for the very poor<sup>2</sup>. Lawyers were expected to act on a professional *pro bono* basis. This early concept of legal aid was primarily seen in relation to assistance in court. Legal advice outside the court and covering broader social issues was left to voluntary organisations, such as trade unions and churches<sup>3</sup>.

It was not until the 1940s and ’50s, that formal comprehensive statutorily funded legal aid schemes were established. These earlier legal aid schemes, such as England’s single national legal aid system established in 1949 and Ontario, Canada’s provincial legal aid scheme established in 1951, were limited with respect to the coverage and scope of services offered. Patterned on the legal services then offered to paying clients, the scope of services provided was generally limited to legal advice and legal representation in court to those who could not afford to pay the market price. The goal of formal equality was thus met.

Coverage under these earlier schemes tended to give priority to criminal law matters. The argument being that in criminal law matters, as opposed to civil law, demand is determined by the state and that an individual’s liberty is at risk<sup>4</sup>. Defendants in criminal cases have no choice but to defend themselves against the power of the state, which can be considerable as states generally spend far more on police and prosecuting services than on legal aid. Legal representation in criminal matters is important as it ensures that the liberty of an individual is not jeopardised by the state due to the individual’s inability to pay for legal services.

Under these earlier schemes, the primary providers of legal aid were lawyers and in particular, private bar members. The schemes in England and Ontario, Canada are still predominately delivery by a *judicare* or private bar model, which is one where the legal aid plan pays private lawyers a fee for service to provide individual case representation to those who are eligible.

Individuals are allowed, to some extent, choice of counsel. Despite the development of statutorily-funded schemes, legal aid was still primarily provided on a voluntary basis by the private bar and seen as a charity rather than a right.

### **The Broader Concept of “Access to Justice”**

The 1960s saw a broader approach develop with respect to the role of legal aid and legal services in general, particularly in the United States. U.S. President Johnson’s “War on Poverty” had as its objective the elimination of poverty, rather than the extension of existing legal services to non-paying clients. There was a realisation that the poor faced a host of laws, powers and abuses of power that fee paying clients did not. Coverage under legal aid schemes was extended to address the “unmet needs” of the poor, which included housing, social security, family and debt issues. Legal needs which focused on the needs of the poor gave rise to salaried community offices as the main model for delivering services. This ideology spread to Canada, Australia and Europe giving birth to the clinic or law centre movement. In the earlier movement, these clinics focused on strategies to improve the conditions of the poor rather than on individualised services.

By the end of the 1960s and early 70s, this renewed concept of social justice gave rise to the “access to justice” movement. Access to justice means effective access to the law requiring not only legal advice and representation in court, but also information and education of the law, law reform and a willingness to be able to identify the unmet needs of the poor. Access to justice requires “policies which deploy every possible means toward attaining their goal, including reform of substantive law, procedure, education, information and legal services”<sup>5</sup>. The goal being the attainment of substantive equality, which recognises the structural discrimination of the poor.

The coverage of legal aid schemes evolved to include civil law matters, including family, housing, debt, social security and other such matters. It has been recognised that the immense power of the state as the opposing party is not just limited to matters of criminal law but also influenced particular civil law matters, such as child welfare laws, pensions and social security rights. There has also been a re-thinking of the concept of liberty to include situations of violence against women in the family and other family law matters that may include non-criminal law sanctions in addition to criminal sanctions to protect the victim from risk of harm.

Also within the 1960s, the assertion of “rights” was a strategy common to various movements, which characterised rights as a positive affirmation of a state duty rather than as a negative, as a protection against state interference. The European Conference of Ministers issued a declaration on legal aid in the late 1970s which considered the right of access to justice

as an essential feature of any democratic society and firmly stated that legal aid no longer could be considered a charity but as an obligation of the community as a whole<sup>6</sup>. The resolution dealt with both criminal and civil legal aid, calling on states to assume the responsibility for financing these legal aid systems.

Many existing legal aid schemes include elements of these concepts to varying degrees which are reflected in the nature, scope and method of delivering legal aid services. Most jurisdictions provide coverage for criminal and civil law matters, albeit, some argue that in these times of fiscal constraint and capped budgets, criminal legal aid as a proportion of all cases is increasing. Some jurisdictions are implementing cost-effective strategies that use non-lawyers to provide legal aid. Such strategies reflect a broad understanding that education and information can effectively allow individuals to access the justice system.

## LEGAL AID UNDER INTERNATIONAL LAW

There exists a range of international norms and standards that are relevant to the question of a state's responsibility to provide legal aid, which began to be articulated by the international community after 1945 with the establishment of the United Nations and the development of international human rights law. These standards are contained in treaties, such as covenants and conventions, which are binding amongst the states that ratify them, as well as other instruments designed to provide guidance, such as declarations, principles, rules, recommendations and guidelines. The latter instruments, while not legally binding upon states, have been accepted by a large number of states and considered to have moral force.

Before addressing the specific provisions contained in the international instruments, it is useful to note how these international norms and standards are reflected in national laws. In some countries, with a dualist system, the international and domestic laws are viewed as two distinct systems of law and thus the treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, in order for a state to fulfil its obligations under a treaty, it is not necessary to incorporate the treaty directly into its own laws. A violation occurs only when a standard of the treaty is contravened and not when a state party fails to incorporate the provisions of the treaty into its own laws. In other countries, with a monist system, international law and domestic law are viewed as one coherent system of law with international law being supreme. There is no need to incorporate the treaty provisions into domestic law as the treaty becomes part of domestic law upon ratification.

## The International Covenant on Civil and Political Rights

It is principally the United Nations *International Covenant on Civil and Political Rights*<sup>7</sup> (ICCPR) that sets out specific obligations of states to provide state-funded counsel for indigent persons. Article 14(3)(d) of the ICCPR stipulates that an accused offender is entitled “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it”<sup>8</sup>. This provision for legal aid in Article 14(3) is set out among the minimum guarantees to which everyone is entitled, in full equality, in the determination of any criminal charge. Therefore, the right to free legal counsel is rooted in the idea of equality; however, this right is only specified in the context of the criminal justice system. An acceptable limitation on the availability of legal aid is provided for in international law as states are required to provide legal aid only where “the interests of justice so require.” Another accepted limitation to the right to counsel when it is provided by the state is that counsel may be assigned rather than a choice of counsel being given. The entitlement to this right is based on the costs of the legal representation and the inability to afford such costs.

The Human Rights Committee, which is the treaty monitoring body established by the ICCPR, has developed jurisprudence over the years addressing issues such as the scope and form of legal representation. The Committee, under the *Optional Protocol* to the ICCPR, is entitled to hear individual petitions that challenge a state’s compliance under the provisions of the ICCPR. The decisions rendered by the Committee, while not binding upon state parties to the *Optional Protocol*, are considered to have persuasive force. While providing some direction, the jurisprudence does not provide all the answers. Generally, the Human Rights Committee views individual cases in order to determine if there is a requirement to provide legal assistance in that particular case. The Committee does not see its role as an evaluator of whether or not a state’s comprehensive legal aid scheme is in compliance with the ICCPR. It has, however, made the comment that counsel should receive adequate remuneration for providing legal assistance under a legal aid plan<sup>9</sup>.

Some of the Committee’s decisions provide scope to certain elements of Article 14(3). For instance, although choice of counsel is conferred to all those who have been charged with a criminal offence, it seems that the state may “assign” legal representation in cases of indigence. The Committee has held that while choice of counsel may not be required by the state in these cases, such assigned counsel must be competent and independent from state authorities. The Committee, therefore, has focused not on the issue of choice of counsel, but on the way in which the administration of the legal aid service might infringe upon the freedom of lawyers to act on behalf of their clients.



In elaborating on the meaning of when the “interests of justice” would require free legal representation, the Committee considers the severity of the charge and the complexity of the case in making the determination. Therefore, in a case where the accused was charged with a minor criminal offence which would have likely resulted in a fine, the Committee found that the state was not required to provide state-funded legal assistance<sup>10</sup>. The Committee has also found that accused persons might have a right to legal advice prior to trial requiring the state to appoint legal counsel during the pre-trial contact with the criminal justice system. However, it is still unclear whether or not this right exists immediately upon detention.

The regional treaty, *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (the *European Convention*), provides for criminal legal aid in the same terms as the *ICCPR* and its jurisprudence has often been cited by international bodies in interpreting the requirements under the *ICCPR*. In determining whether the interests of justice require states to provide legal aid, the European Court has identified a number of factors to be addressed: the complexity of the case; the capacity of the particular accused to present the case him or herself; and, the seriousness of the offence and the possible penalty that could be imposed.

### **The Convention on the Rights of the Child**

It is recognised that children should be treated differently from adults when they are accused or convicted of criminal conduct. With respect specifically to the situation of young persons charged with a crime, the *Convention on the Rights of the Child*<sup>11</sup> (the *Children’s Convention*) requires states to ensure that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. It further provides the right to have legal or other appropriate assistance in the preparation and presentation of his or her defense.

While not creating an automatic right to public-funded legal counsel, the *Children’s Convention* does create a responsibility on the part of the state to provide a child with legal assistance in the preparation and presentation of his or her case when assistance is not otherwise available. The exact nature of the legal assistance to be provided has not been specified. It is interesting to note that while the *Children’s Convention* does not specifically address the issue of state-funded legal assistance for children, there is a provision that provides for the right to free assistance of an interpreter if the child cannot understand or speak the language used.

### **Other Relevant International Standards**

Other international instruments which are relevant for an individual to access state-funded counsel include the *United Nations Basic Principles on the Role of Lawyers*<sup>12</sup> which stipulate that governments shall ensure the provision of sufficient funding and other resources for legal services

to the poor and, as necessary, to other disadvantaged persons. The *Principles* state that professional associations of lawyers should cooperate in the organization and provision of services, facilities and other resources.

The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>13</sup> provides that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he/she does not have sufficient funds to pay. The *United Nations Standard Minimum Rules for the Treatment of Prisoners*<sup>14</sup> provide for untried prisoners to be allowed to apply for legal aid where such aid is available.

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*<sup>15</sup> provide that, throughout proceedings, juveniles have the right to be represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country. The *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* provide that where juveniles are detained under arrest or awaiting trial, they have a right to legal counsel and are to be able to apply for free legal aid where such aid is available.

### **Some Remarks**

All of the international instruments mentioned above, except for the *Basic Principles on the Role of Lawyers*, require some form of legal aid to be available to ensure that persons charged with a criminal offence who cannot afford counsel have the ability to retain and instruct counsel. These specific provisions on legal aid support the traditional concept of legal aid, focusing on matters of criminal law in terms of representation and advice in court proceedings. The specific reference to legal aid in terms of right to counsel in criminal matters reinforces the importance of the right to counsel to ensure a fair trial. The right to counsel would have little effective meaning if on the basis of one's income an individual could not afford that right.

Shortcomings often cited by commentators on plain reading of the right to legal aid contained in the *ICCPR* include the fact that the *Covenant* fails to address, in specific terms, the right to civil legal aid. Another concern mentioned is that this provision is too trial-centred without the proper recognition of fairness and equal access to justice.

Moreover, the international norms and standards do not specifically address the question of how to ensure legal aid is provided. The development of comprehensive systems of legal aid has been only briefly mentioned during the first UN Conference on Human Rights in Teheran, 1968. A resolution regarding legal aid called upon Member States to guarantee progressive development of comprehensive systems of legal aid, including devising standards for granting legal assistance and to simplify procedures so as to reduce the financial burdens of individuals

seeking redress<sup>16</sup>. This resolution, while not establishing binding legal obligations recognises that the provision of legal aid to those in need would strengthen the protection of human rights. There has been a lack of follow-up within the United Nations regarding the progress made by countries in developing comprehensive legal aid systems.

The 1990 instrument, the *Basic Principles on the Role of Lawyers*, while not specifically mentioning comprehensive legal aid schemes, does refer to the obligation of governments to provide funding for legal services to the poor and calls upon professional associations of lawyers to assist in the organising of these services, including resources and facilities.

## IMPLICATION OF OTHER RIGHTS ON LEGAL AID

Various other rights contained in these international instruments implicate the right to state funded counsel and equal access to justice. These rights, which involve principles that are generally considered to be requirements for a legitimate legal system, allow for a broader interpretation of the duty of states to provide legal aid than as set out in Article 14(3). Regional instruments, such as the *European Convention on Human Rights and Fundamental Freedoms* and the *Charter of the Organization of American States*, provide another source for interpreting the scope of these rights.

### **The Principle of the Rule of Law**

In 1948, the Member States of the United Nations unanimously proclaimed the adoption of the *Universal Declaration of Human Rights*, which recognised the interdependence of human rights and the rule of law. It has been said that the one normative justification for legal aid flows out of the state's commitment to the rule of law<sup>17</sup>. The principle of this rule implies that a government in all its actions is bound by rules fixed and announced beforehand. These rules make it possible for individuals to foresee with a fair degree of certainty how the authorities will use its coercive powers in given circumstances. Individuals can then plan their affairs on the basis of this knowledge. Protection under the rule of law would be an empty promise if individuals could not avail themselves of the law. This means that individuals require more than knowledge of the law but also effective access to it. According to some, it leads to an obligation on governments to provide resources necessary for individuals to know the law and to get access to it<sup>18</sup>. The rule of law guarantees equal access to those rules.

The *Charter of the Organization of American States* sets out the broad principle of the rule of law in Article 44 where it states that human beings can only achieve the full realisation of their aspirations within a just social order when Member States provide adequate provision for all

persons to have due legal aid in order to secure their rights<sup>19</sup>. This reference to legal aid in securing rights covers both civil and criminal law matters as it relates to effective recourse to ensure all human rights.

### **The Right to a Fair Hearing**

The right to a fair hearing is included in Article 14 of the *ICCPR* and extends not only to the determination of criminal matters but also to the determination of people's "rights and obligations in a suit of law"<sup>20</sup>. While the *ICCPR* has not elaborated on the meaning of a right to fair trial in terms of civil matters, guidance can be had from reviewing the jurisprudence of the European Court of Human Rights.

The right to a fair hearing is guaranteed in civil and criminal matters in Article 6(1) of the *European Convention*. As in the case of the *ICCPR*, the *European Convention* only refers specifically to legal aid in detailing the minimum guarantees in criminal cases.<sup>21</sup> The European Court on Human Rights, in *Airey v Ireland*, has interpreted the right to a fair trial in civil cases to mean effective access to the courts. This requires the state to provide publicly funded counsel in civil matters when it is in the interest of justice. The court has determined that the interest of justice criteria can be met if it is shown that the assistance of a lawyer is indispensable for the effective access to court either because legal representation is rendered compulsory or by reason of the complexity of the procedure or the case. Therefore the right to legal aid has been extended to civil cases through judicial interpretation.

In *Airey v Ireland*, the European Court issued a powerful statement about governments affirmative obligation to provide equal access to justice for lower income citizens: "the obligation to secure an effective right of access to the courts falls into this duty." The Court pointed out that the *European Convention's* guarantee of a right to a fair hearing in civil cases does not require governments to provide free counsel to poor people in all forums. Governments can satisfy the *Convention* by establishing, or continuing, forums which are simple enough in both procedure and substantive law to allow citizens to have a fair hearing without the assistance of a lawyer.

### **The Right to Equality**

The *ICCPR*, in Articles 14 and 26, provides for equality before the law, equality under the law, equal protection of the law, and equal benefit of the law. These suggest both formal equality, meaning the application of the law, and substantive equality, meaning the result and benefits of applying the law. For these equality rights to be effective, individuals must be given the ability to obtain legal assistance when required and thus effective access to the courts and the legal process.

Achieving equality has always been a goal of legal aid. In the earlier development of legal aid, the focus was on formal equality, assuming that legal aid clients required the same kinds of services as fee paying clients. There had been little recognition of the institutional structures that may impinge differently on specific groups. The concept of equality has been evolving in international law to include analyses of substantive equality to address the reality that the systemic abuse and deprivation of power that a group experiences cannot be met only by ensuring formal equality. The access to justice movement recognises the structural inequalities in our society and seek to implement policies that will assist the poor in achieving effective “equal” access to the law.

### **Economic and Social Rights Coupled with the Right to an Effective Remedy**

The *Universal Declaration of Human Rights* sets out in Article 25 the right of everyone to a standard of living adequate for the well-being of himself and his family, including food, clothing, housing and medical care and necessary social services. These rights are further elaborated in the *International Covenant on Social, Economic and Cultural Rights*. The *Universal Declaration* also establishes the right of an effective remedy. It has been argued that the unmet legal needs of the poor focus on the violation of these economic rights and that access to justice would be meaningless to them if they do not have at their disposal an effective remedy.

## **CONCLUSION**

International human rights law stops short of providing for an automatic right to legal aid for all individuals in criminal or civil law matters who lack the means to purchase such services. As can be seen from a review of the international standards, there is little question of the existence of a basic state obligation to ensure legal aid in some form. Even though there has been controversy about the extent of the obligation, the nature of funding and kinds of services covered, there is consensus that states are obliged to provide legal aid services to ensure access to justice.

It is impossible to say what level of expenditure would be necessary to comply with the standards in the conventions. Amounts actually spent by Member States differ considerably both over time and between jurisdictions. Both international and regional bodies that monitor compliance of these instruments have avoided setting limits in terms of financial support of legal aid schemes. The tendency on these matters is to allow Member States a considerable margin of latitude.

Recalling the principles cited at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, all legal systems should provide readily available, less costly and non-cumbersome procedures for the peaceful settlement of disputes and litigation and arbitration, so as to ensure prompt and just action for everyone. The right to legal aid is basic to ensuring effective access to justice.

## NOTES

<sup>1</sup> Johnson, Earl “*Toward Equal Justice*” 5 Maryland Journal of Contemporary Legal Issues p. 204.

<sup>2</sup> Blankenburg, Erhard “*Lawyers’ Lobby and the Welfare State: The Political Economy of Legal Aid*” contained in Volume II of the Conference Papers presented at the International Legal Aid Conference, Edinburgh June 1997 p. 2.

<sup>3</sup> As an example, in 1890 there was the development of legal aid advice centres instituted in trade unions and churches in Germany, discussed in Blankenburg, Erhard “*Lawyers’ Lobby and the Welfare State: The Political Economy of Legal Aid*” *ibid.*, p. 4.

<sup>4</sup> *Legal aid-Targeting Need*. Lord Chancellor’s Department, HMSO, CMND 2854, 1995 paras 4.38-40.

<sup>5</sup> Smith, Roger, *Justice: Redressing the Balance* (Legal Action Group, 1997) p. 9.

<sup>6</sup> European Conference of Ministers, Legal Aid and Advice: Resolution 78(8) adopted by the Committee of Ministers of the Council of Europe on 2 March 1978.

<sup>7</sup> *The International Covenant on Civil and Political Rights* (1976) 999 UNTS 171. Adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976.

<sup>8</sup> Article 14(3) of the *ICCPR*: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.

<sup>9</sup> *Reid v Jamaica*, Communication No. 250/1987 (20 July 1990).

<sup>10</sup> *O.F. V Norway*, Communication No. 158/1983 (26 October 1984).

<sup>11</sup> *The Convention on the Rights of the Child*, adopted by the General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990. Article 37: State Parties shall ensure that: (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.

Article 40(1) States Parties recognise the right of every child to ... (a)(ii) to be informed promptly and directly of the charges against him or her, and if appropriate, through his parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense; ... (a)(iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance ...

<sup>12</sup> *The Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

<sup>13</sup> *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173 of 9 December 1988.

<sup>14</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Economic and Social Council resolution 663 (XXIV).

<sup>15</sup> *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* General Assembly resolution 40/33 of 29 November 1985.

<sup>16</sup> General Assembly resolution 2449 (XXIII), *Legal Aid*.

<sup>17</sup> Dyzehaus, David “*Normative Justifications for the Provision of Legal Aid*” in *A Blueprint for Publicly Funded Legal Services* (Volume 2 of the Report of the Ontario Legal Aid Review, 1997) p. 475.

<sup>18</sup> *Ibid.*, p. 477.

<sup>19</sup> *The Charter of the Organization of American States as Amended*, Article 44.

<sup>20</sup> Article 14(1) of the ICCPR: All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...

<sup>21</sup> Article 6(1) of the *European Convention*: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...





# THE ROLE OF GOVERNMENT AND THE PROVISION OF LEGAL AID IN CANADA

By Maureen Maloney, Q.C.\*

## INTRODUCTION

Government involvement in the provision of legal aid is a relatively new phenomenon, developing primarily in the second half of this century along with a concern for human rights in general. The social suffering in the Great Depression that impacted on much of the world in the 1930s, the atrocities of the Second World War, and the national struggles for freedom and independence that were starting in the 1940s focussed attention on the responsibility of government to protect the rights of its citizens. The *Universal Declaration of Human Rights* passed by the newly formed United Nations in 1948 confirmed that responsibility.

Although many countries now have a legal aid system, the operation of those plans and the government's role in them vary greatly depending on a number of factors. First, there is the country's participation and commitment to international conventions dealing with human rights. Second, is whether the national constitution enshrines the same commitment to protect the rights of accused persons facing serious consequences. A country's economy and fiscal capacity will also play a role as a poor country may have less ability to provide state-funded

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counsel. The type of justice system will dictate the need for legal aid as the more complex and adversarial the system, the more likely it is that accused will require representation.

Government structure will also have an influence. In countries with more than one level of government, the division of responsibility for justice and the relative strengths of the various levels will influence the way legal aid is handled. If there is an existing legal aid system, that will likely impact how the system works when government takes responsibility. Finally, the relative strength of the stakeholders, including the legal profession, the court system, and the client advocacy groups, may influence the government's role in the governance and delivery of legal aid programs.

In this paper, I will look at how these factors have influenced the role of government in the provision of legal aid in Canada and particularly in British Columbia. I will look at the choices we have made and some of the lessons we have learned. My perspective is that of the senior provincial public servant responsible for a legal aid program.

## GOVERNMENT RESPONSIBILITY FOR LEGAL AID

The history of legal aid in British Columbia pre-dates the involvement of government. I refer you to David Duncan's paper, *Legal Aid Governance in British Columbia*, in which he provides an excellent history of the development of our legal aid system from the *pro bono* work of individual members of the bar, through a legal aid plan operated by the legal profession, to legal aid as a responsibility of government.

The shift in responsibility from the legal profession to the government is, in part at least, the result of our obligations under international conventions and agreements. The *Universal Declaration of Human Rights* includes the right to a fair hearing before an impartial tribunal.<sup>1</sup> Implicit in the right to a fair hearing is the ability to be able to participate and to understand the law and the process in the often-complex justice system. This means people unable to represent themselves may hire expert assistance. However, if the accused is unable to afford a lawyer and the potential consequences are significant, it may be necessary to provide a lawyer at no cost to the accused to ensure a truly fair trial. The *International Covenant on Civil and Political Rights* also speaks to the right to be informed by legal counsel in criminal cases "where the interest of justice so require" and without payment if the accused does not have the means to pay.<sup>2</sup> Indeed, it can be characterized as an important attribute of a free and democratic society. The full apparatus of the state should not be weighed against an individual without right of a full and fair defence which might in the more serious cases include the right to counsel to help the accused through an increasingly complex legal system.

These international covenants do not have the force of law in Canada but they are important, not only because our commitment to them influences how other nations view us, but Canadian courts often use them to interpret enforceable laws such as the Canadian *Charter of Rights and Freedoms* (the *Charter*). The right to a fair trial, as defined above, is guaranteed in the *Charter*.<sup>3</sup> Clearly, a right guaranteed under the national constitution and international covenants cannot depend only on the charity of the legal profession. It becomes the responsibility of the government.

This has been reaffirmed in the courts in Canada. A judge, confronted with a case in which legal aid has been denied to an impoverished accused and in circumstances where representation by counsel is essential to a fair trial, may stay proceedings until the funds for counsel have been secured. In practice, this means that if the state wishes to proceed with the case, the state must also fund the defence, usually through legal aid.

During the 1960s and 1970s in Canada, there was an overall trend towards government assuming greater responsibility for the social welfare of its citizens. It became the expectation that the disadvantaged had the right to a minimum level of social services without having to beg or rely on the whims of charity. Legal aid was only one of many programs that citizens came to expect from their government.

Legal aid is a necessary social program, not just because poor people are unable to afford legal counsel, but also because the disadvantaged are more likely to have problems with the law requiring professional legal advice. Whereas most of the middle-class in Canada require a lawyer only a few times in their lives, mainly for real estate transactions, wills and estate matters, and issues relating to marriage break-down, the poor are more likely to require a lawyer. First, to protect themselves from criminal prosecution as they are more likely to be arrested, charged, convicted and imprisoned than their wealthier neighbours for the same offence. Second, they are more likely to be victimized by unscrupulous landlords, employers, lenders, and debt collectors and need civil legal aid to obtain relief. Third, they are often dependent on government income support programs and will likely experience some difficulty getting their entitlements at some time in their lives.<sup>4</sup> Legal aid is, therefore, a necessity to the socially disadvantaged in our society and, as such, it is accepted as a responsibility of government.

## RESPONSIBILITY OF VARIOUS LEVELS OF GOVERNMENT

In a federation such as Canada, to say that legal aid is the responsibility of government is the easier part. Dividing the responsibility between levels of government can be a more challenging exercise. The Canadian *Constitution* gives both federal and provincial governments an interest

and responsibility for legal aid by virtue of the divided responsibility for the justice system. The *Criminal Code* is the responsibility of the federal government but the provinces enforce it and operate the court system, with the exception of the Federal Court and the Supreme Court of Canada.

This division of responsibility for criminal law has serious implications generally for the provinces in the administration of justice. A change to the federal legislation can have a serious impact on the demand for justice services at all levels including police, prosecutors, the courts, correctional services, and legal aid, all of which are provided by the provinces. Unfortunately, such a change is often made with no or insufficient additional funding from the federal government. Just one example, directly related to legal aid, is the federal *Young Offenders Act*, which among other things provides that anyone under 18 years of age charged with a federal offence has the statutory right to a court order appointing a lawyer paid for by the state regardless of the accused's financial eligibility or likelihood of imprisonment. Almost 25% of all criminal legal aid referrals in British Columbia are for young offenders, which clearly has an impact on the program's budget<sup>5</sup> and consequent ability to apportion services according to financial need and seriousness of potential impact for the defendant, young or old.

The federal role in civil justice is more complex. Legislative responsibility for civil statutes rests mainly with the provinces but there are some exceptions where there is federal legislation. For example, laws that govern marriage are provincial, while the *Divorce Act* is a federal statute. The intricacies of the Canadian *Constitution* are beyond the scope of this paper. Suffice it to say that both levels of government bear responsibility for civil law but the provinces are again clearly responsible for the administration of civil justice.

There are many historical and cultural reasons for the division of powers under our *Constitution*. In some matters, we believe there should be consistency across the country. The *Charter of Rights and Freedoms*, for example, applies to all Canadians and is consistent with the belief of the great majority of our citizens that we are all equal before the law and should have the same rights and protections in whichever province we reside.

We also recognize, however, that there are cultural, linguistic, attitudinal, economic and political differences across the country. Therefore, civil and family law is mainly provincial. Crime rates, divorce rates, and immigration rates vary as do levels of income, employment rates, standards of living and legal costs. It is important, therefore, that there also be flexibility to allow provinces to adapt the legal aid plan to their particular needs and circumstances.

The division of power, responsibility and jurisdiction between the federal and the provincial governments has not always been a comfortable one. The federal government has the greater capacity to collect revenue but the provinces have the greater responsibility to deliver programs. The federal government has used its fiscal capacity to impose national standards but provincial

governments are often of the view that the federal dollars provided are not adequate to meet those standards.

Local government in Canada has little role in legal aid. There is one exception to this that I think is a matter of interest to any country with significant indigenous or ethnic populations. Currently in Canada and particularly in British Columbia, we are in the exciting process of developing self-government among our Aboriginal people or First Nations as they have chosen to call themselves. Many First Nations are in the process of negotiating self-government agreements and we have recently concluded an agreement on the first modern-day treaty in Canada with the Nisga'a People of northern British Columbia and an Agreement in Principle with the Sechelt on the Sunshine Coast – an urban area. Most First Nations have band or tribal councils that have assumed responsibility for at least some of the day-to-day administration in their territory. In many cases, these councils have decided to establish and administer specialized community law offices. This raises the issue of special needs for some groups in our society and it is important that a justice system, including legal aid, recognize and accommodate these needs where appropriate.

## THE ROLE OF GOVERNMENT IN LEGAL AID

As a result of shared responsibility for justice, the federal government and the provinces also share responsibility for legal aid. In this section, I will look at how that responsibility is shared as I examine the role that government plays in the provision of legal aid in Canada and, in particular, in British Columbia.

### **Enabling Legislation**

Legal aid existed in Canada before there was any legal aid legislation. However, once government accepts the responsibility for legal aid, the usual means of exercising that authority is through legislation. Obviously, enacting legislation is a role that only government can fulfil.

There is, however, no federal legal aid statute. Instead there is a federal-provincial cost-sharing agreement for criminal legal aid, which not only determines how financial responsibility will be shared but also establishes some national standards as I shall discuss later. This has both advantages and disadvantages. A federal statute would have the force of law but it would also be a creature of the federal government and only the federal government could change it. The federal-provincial agreement requires negotiation and acceptance by all parties. It is for a fixed period and must then be renegotiated so that it is adaptable to changing circumstances. There is no similar agreement for civil legal aid. The impact of this will be discussed below.

Speaking from the point of view of a provincial government, we certainly want to be involved in decisions that affect us. The negotiated agreement gives us involvement but only as one voice among all the provinces and we are not always completely satisfied with the end result, particularly in regards to the federal contribution of funds.

All legal aid legislation in Canada is provincial, although our smallest province, Prince Edward Island where the legal aid program is administered directly by government, has no such legislation. In all other provinces there is legislation that establishes a legal aid plan that operates at arm's length from the government. Eight provinces have specific legislation for legal aid. However, for clarity, I should state at the outset that, for the most part, I will be referring to the *Legal Services Society Act* of British Columbia. The province of Alberta does not have a specific statute. Instead, it gives the Law Society, the governing body for the legal profession in Alberta, the statutory authority under the *Legal Profession Act* to establish, maintain, and operate a provincial legal aid plan.<sup>6</sup>

Although the legislation is in the end the responsibility, the creation and the final decision of the government, usually important pieces of legislation in British Columbia are enacted only after significant consultation with the stakeholders. In the case of legal aid legislation, stakeholders include the Law Society as it has both a history and an ongoing interest in legal aid, the Canadian Bar Association and legal aid lawyers. Community and advocacy groups, particularly those representing economically or otherwise disadvantaged people who are the clients of legal aid, are also included and, in British Columbia, this specifically includes First Nations organizations. The groups are ever expanding – probably in the future the group will include victims' groups, women's groups (especially because of family law) and defence and civil lawyers. The end product is improved by the input of these groups. It will also contain compromises and concessions. For example, the legal profession in British Columbia has taken a very active stand in favour of a *judicare* model of delivery, in which legal aid services are provided by the private bar for a specific tariff rate per hour or per case or per appearance. Lawyers have a very direct economic interest in maintaining a *judicare* delivery model. While legal aid is for many lawyers a charitable obligation and for most a small part of their practice, some members of the profession make all or most of their living from legal aid and this trend is growing in British Columbia. Furthermore, most genuinely believe that *judicare* provides the best service to the client.

Community groups may prefer community law clinics staffed by employee lawyers and paralegals. Often, clients only require the services of a paralegal which is provided more economically than professional legal services. Clinics also more readily provide summary advice, even to clients who do not qualify for legal aid, or can refer the client to an alternate means of resolving the problem. Community clinics are operated by a local board of directors which gives the community a greater sense of input and control.

Jurisdiction shared by the federal and provincial governments is a reality that we must deal with in Canada and one that requires considerable discussion, consultation, negotiation, and above all, cooperation. It is not without tension and frustration at times and we in British Columbia believe it works best when there is also shared financial responsibility, preferably equal financial responsibility.

## **Mandate**

As government has a responsibility to provide legal aid, it must also establish the mandate and overall goals of the program. This responsibility is again shared by both levels of government.

The federal government, through the cost-sharing agreement, uses its financial leverage to impose some basic national standards for criminal legal aid. In order to receive the federal contribution, the provinces must agree to provide certain coverage, notably, for “an offence contrary to an Act of Parliament or a regulation made under an Act of Parliament where, in the opinion of the provincial agency, there is a reasonable likelihood that upon conviction, there will be a sentence of open or closed custody or imprisonment.”<sup>7</sup> The agreement allows the province to determine eligibility levels but it requires that applicants who normally reside in other parts of Canada or other countries not be denied legal aid on that basis alone.

There is no similar requirement for civil legal aid and there is more variation in coverage from almost no family or poverty law coverage in New Brunswick and Prince Edward Island to our broad range of coverage in British Columbia and Manitoba. British Columbia covers serious family matters which may result in imprisonment or confinement, loss of livelihood or ability to protect and support the family, or which threaten the family’s health or safety. Other civil matters covered include: problems with pensions, income assistance, unemployment insurance, Workers’ Compensation Board appeals, small claims, debt problems, human rights hearings, landlord/tenant disputes, and immigration and refugee proceedings that could result in removal from Canada. In Manitoba, family law matters are covered where there is some benefit to be received from going to court. The decision to accept a case is based on the applicant’s chances of winning, whether going to court is necessary or not, and whether it is the type of case for which a reasonable person would pay a lawyer.<sup>8</sup>

In addition to some differences in coverage, there is also variation across the country for both criminal and civil legal aid in the details of the system including financial eligibility, tariff rates, and maximum payments per case. The rates and the methods of determining them are so complex and varied across the country that it is impossible to even illustrate the differences in any meaningful way in the space available here.



In British Columbia, the *Legal Services Society Act* provides a very broad mandate for the agency established to deliver legal aid in the province. Section 3 of *Act* states:

- (1) The objects of the society are to ensure that
  - (a) services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons; and
  - (b) education, advice and information about law are provided for the people of British Columbia.<sup>9</sup>

The only additional direction the *Act* provides is that services be provided to individuals of low income who face possible incarceration or have legal problems that could affect the health, safety or livelihood of the individual or the individual's family.<sup>10</sup> This is obviously very broad and subject to the exercise of discretion by those (in the case of British Columbia, the Board of Directors of the Legal Services Society) who implement the policy. All other decisions about eligibility, coverage, delivery model, and tariffs are considered management issues and left to the discretion of the Board. This ensures that the Legal Services Society will be independent of government control. The importance that British Columbia places on an independent governance model will be discussed later in this paper.

It should also be noted that governments may require legal aid plans to deliver services not included in their legislative mandate. The government of British Columbia, for example requires the Legal Services Society to provide a toll-free, 24 hour a day telephone line that gives legal advice without cost to the caller and without consideration of financial or other eligibility. The Society also provides duty counsel, again without regard to eligibility criteria, in many courts to advise accused in custody about the charges against them, court procedures, and legal rights including the right to counsel and to apply for legal aid. Where such direction is provided, it is important that it is clear and in writing to ensure that the legal aid plan is accountable for the delivery of the service.

## **Funding**

Funding of legal aid in Canada is almost entirely the responsibility of government. In British Columbia, government contributes 94% of the total budget. In Alberta, the government contribution is 78%.<sup>11</sup> Most of the remainder comes from provincial Law Foundations using the interest accrued on lawyers' trust accounts and from small client contributions.

For criminal legal aid, the federal government makes direct financial contributions to the provinces according to the cost-sharing agreement. British Columbia, for example, now

receives about 18% of the total Legal Services Society's criminal law budget from this federal transfer. Overall, the federal government contributes about 39% of the total criminal legal aid costs in all provinces.

Prior to 1996, the federal government also made direct payments to the provinces to offset some of the cost of civil legal aid. However, all federal transfers for social programs have now been rolled into a single payment which contributes to a variety of social programs and has as a consequence been dramatically reduced.

Therefore, the major responsibility for legal aid funding rests with the provincial governments. As indicated above, this presents some problems for provincial governments when federal contributions fail to cover the cost of federally imposed standards. Changes to other federal legislation can impact on the demand for legal aid services. I gave an example earlier of the impact of the federal Young Offenders Act on legal aid. These problems have been compounded in recent years with federal government cutbacks implemented to reduce the federal deficit. In our inter-governmental discussions in Canada, British Columbia is advocating, along with other provinces, that financial responsibility go along with decision-making where it impacts on another level of government.

## **Governance Model**

As I have already mentioned, the responsibility for the delivery of legal aid services rests entirely with the provincial governments. After determining the mandate, goals and objectives for legal aid in the province, the government must select the model of governance it believes will best achieve those aspirations. The functions of governance are to set the direction for the agency, to make policy decisions on matters of importance, to monitor the progress towards its goals, and to account for the success or failure of the organization. The governance model for legal aid in British Columbia is, in part, a result of history and the evolution of the system. It is also, however, the result of conscious choices made about how the system ought to operate.

Although most funding comes from government and government has a responsibility to provide legal aid, it is important that legal aid be seen to be independent from government. Government often has an interest in the outcome of legal cases, particularly those involving crimes where the state is the prosecutor. In all criminal cases, the government is the opposing party. The government, through a state prosecutor, conducts the prosecution of criminal cases. Government is also responsible for maintaining law and order. When the state has investigated and decided to charge alleged offenders, it believes that the accused are in fact guilty and need to be dealt with appropriately. The public also tends to blame government if it perceives that "criminals" are not brought to justice. There are, therefore, incentives for the state prosecutor

to “win” in court. It becomes an issue then, if the state, which prosecutes and has an interest in the outcome, should also determine whether the accused is entitled to a state-funded lawyer and, if so, at what rate that lawyer would be paid and the total amount available for the case, as these factors may have a direct influence on the quality of the accused’s defence.

And it is not just in criminal law, although this is the most obvious conflict. In many poverty and administrative law matters, the government is also the adversary. The provincial government is the opposing side in social assistance disputes, in cases of the apprehension of children at risk, and sometimes in human rights cases. In some family law issues, the government is, at least, an interested party. For example, the government has a financial interest if the failure of an ex-spouse to pay court-ordered child maintenance results in the custodial parent having to rely on state-funded social assistance to support the family.

Certainly the government of British Columbia has no intention of using the legal aid system to its own advantage, but it is very important that the system not only be in reality fair but also be seen to be fair. The accused and the public must have the confidence that the system will be just. Therefore, the government of British Columbia has decided that the agency that provides legal aid services should be governed and operated independently of the government while still providing accountability mechanisms particularly with respect to funding.

Equally important is the need for independence from the legal profession. As we have seen, the legal profession was instrumental in the development and early delivery of legal aid but it can also benefit greatly from the existence of a state-funded legal aid program. As discussed above, lawyers make their living from the delivery of legal services and, therefore, have a very direct economic interest in preserving the *judicare* model of legal aid delivery. If the legal profession controls the governance of legal aid, it can also set the rate of payment for legal aid cases and the breadth of coverage. Again the need for legal aid to be seen to be independent of the legal profession is as important as the actual independence. The public becomes suspicious when the group benefiting economically from the program also controls the delivery.

Less obvious, perhaps, is the need for independence from community and advocacy groups. This is not an area that appears to have received much attention because community groups have not historically had control of or participation in the governance of provincial legal aid programs. They have had a role in the development, governance and delivery of community law clinic programs but have really only recently been invited to participate directly in the governance of provincial legal aid agencies. These groups have the advantage of having community support and understanding the needs of the clients of legal aid but they can press these needs beyond the limit of resources and good management.

How then has the British Columbia government sought to provide this independence while making use of the expertise and knowledge all of these groups bring to the delivery of legal aid?

Section 2 of the *Act* establishes an independent, non-profit agency to operate the legal aid system at arm's length from the government.<sup>12</sup> Furthermore, to ensure the agency is truly independent, government shares the right to appoint the governing Board with both the legal profession and community groups. Since each of these parties appoints one-third of the Board members, no one interest controls the organization.<sup>13</sup> The *Act* also establishes a fixed term for appointments so that the performance of the appointees may be periodically evaluated. Directors may be appointed for a second term if their performance is satisfactory to the organization that appointed them.<sup>14</sup>

There is one potential drawback of this arrangement. In our experience, an organization works best when the directors work in the best interests of the agency to which they are appointed. It may happen, however, that the members selected by the various constituents see their role only as representing and advocating for that group. This can result in factions on the board or decisions made in the interests of one group rather than in the best interests of the organization. The option was to have people with no knowledge in the legal aid area so that there could be no actual or perceived conflict in the decision making. The problem, however, is that the board loses its past experience and enthusiasm for the area. This is a difficult issue for government as intervention to influence their partners' appointments may be seen as interference with the Board's independence. The government can set an example, however, in its own appointments, both by careful selection and by allowing and encouraging them to act independently in the best interests of the organization. For the most part, our experience with this model has been very positive and it has the support and confidence of all three constituents.

Not all Canadian provinces have selected an independent governance model. Prince Edward Island has a legal aid system delivered directly by government. Alberta and New Brunswick have legal aid plans administered by their respective Law Societies. In both cases, the Law Society appoints all the members of the governing body. The province of Ontario had a legal aid plan delivered by its Law Society. In April of this year, it will be moving to an independent governance model, very similar to that in British Columbia. All members of the Board will be appointed by the government but five of the ten will be selected from a list provided by the Law Society and the Chair will be selected in consultation with the Society. Clearly the trend in Canada is towards an independent governance model. With Ontario's change, seven of our ten provinces will have similar structures.

There is an assumption that the governance model will influence the type of delivery model chosen by a legal aid plan. Furthermore, it is assumed that a legal aid system governed by the legal profession would favour a *judicare* delivery model. Indeed, the provinces of Alberta and New Brunswick, in which the law societies operate the legal aid plans, the delivery models are almost exclusively *judicare*. The government of Ontario took the decision out of the hands of

the Law Society by dictating a mixed delivery model. The only province with complete government control uses a staff delivery model with the private bar taking cases only where the staff lawyers have a scheduling problem or a conflict of interest. In the other 6 provinces where there are independent governance models, two use staff lawyers almost exclusively and 4 have mixed delivery models.

## **Management**

The importance that the government of British Columbia places on independence should not be interpreted as a lack of concern with management and remaining responsible for the expenditure of public funds. We recognize that the legal aid system in British Columbia is complex. Such a system requires very sound management skills as well as knowledge and experience with the legal system. It requires innovation to meet the challenges and realities of the 1990s and the next millenium. It must inspire confidence from the profession, the clients, the public and the government. It must be able to manage large sums of public money and be seen to be using it wisely. The government does not underestimate the importance or the challenge of good management. If an agency is to be truly independent from government, it must be allowed to manage itself and perform the functions of governance.

This is a decision not without risk. We can minimize the risk by building accountability into the system. However, unless government manages the program itself or directs every aspect of management, it cannot guarantee it will be managed exactly as government might wish. It is a risk that the government of British Columbia has decided to accept and the commitment of the Legal Services Society to sound management has not disappointed us.

There is, however, one area where the government has decided to impose some management direction. The legislation prohibits the Society from incurring a financial deficit except with permission of the government.<sup>15</sup> Prior to this 1995 amendment, the Legal Services Society annually spent more than its budget. This is not to say that the Society acted irresponsibly. It is difficult to reduce spending when providing a demand-driven service and is more readily acceptable in better economic times. For many years the government accepted the cost overruns and authorized additional payments to cover the annual deficit. When that practice was discontinued, rising expenditures continued to exceed declining revenue and the Society began to accumulate a large debt that concerned both the Society and the government. The Society was obligated to take very difficult and often heart-wrenching decisions to deal with the deficit. And it did so in a responsible and responsive manner. Accordingly, certainly from the Finance Minister's point of view, this arrangement provides the discipline necessary to ensure fiscal responsibility and the Society has been fully responsible in this effort.

The province of Ontario has chosen to provide more management direction. In its new legal aid act and regulations, it specifies the basic governance and management models, establishes the areas of law covered and sets the financial eligibility criteria. It also prescribes the tariff to be paid to private bar lawyers delivering legal aid services.

The government could also choose to adopt a non-legislative process of providing policy direction to the Society. The federal government of Canada, for example, uses Cabinet directives to convey the government's expectations and decisions to funded agencies.<sup>16</sup> Policy directives are more flexible than legislation and can be implemented more quickly. Legislation, however, has the advantage of the force of law. It is also more transparent to public as it is debated in the legislature and is more readily available for public scrutiny. Again, British Columbia has chosen to limit the use of directives in favour of legislating a broad mandate and leaving management decisions to the Society.

There can be a dynamic tension between accountability and independence, and government imposition of some management direction can relieve that tension. Whereas Ontario, as we have seen, has chosen in its legislation to provide more management direction, in British Columbia, we have chosen to emphasize accountability measures.

## **Accountability**

Legal aid has come a long way in British Columbia from providing only the services of a lawyer for criminal offences that come before the courts. Today, it is a complex business consuming about 10% of the budget of the Ministry of Attorney General.

As government has constitutional and international responsibility for legal aid and provides most of the funding, it will need to ensure that the agency that delivers legal aid is accountable. This is particularly true where the delivering agency operates at arm's length from the government. If government is not directly delivering the legal aid program, it is its duty to scrutinize the way the program is managed and to hold the governors accountable. By this I mean government must be able to obtain the information it needs to determine if the program is operating up to standard and to take corrective or disciplinary action against the Board if it is not. As with all agencies that receive government funds, the Legal Services Society must be financially accountable for using public funds efficiently without waste or extravagance.

It is also important that the program fulfils the mandate expected of it and government will want to ensure accountability in this regard as well. There must be evidence, for example, that the program serves the people for whom it was intended. Legal aid is intended for the financially disadvantaged. It must be shown that these people are able to access the services but that people who do not meet the financial criteria are referred elsewhere. It must be demonstrable

that the mandated services are provided at an acceptable level of quality. The funds provided by government to legal aid are provided to fulfil a specific mandate and, therefore, cannot be used for other purposes, unless so directed by the government.

The legal profession will also be interested in accountability. Lawyers are expected to provide legal aid services at less than their usual rates. They will want to ensure that their sacrifice is not wasted by inefficiency. They will also want to be assured that they are treated fairly by the system in relation to their colleagues and that their clients have equal access to the system.

The public also has an expectation of accountability. Not only do they want assurance that their tax dollars are used wisely but they also have an expectation of fairness in the delivery of services. This is particularly true in today's difficult economic climate when governments are forced to cutback on some services in order to meet budget commitments and rising demand throughout both the social and economic sectors.

In British Columbia, the legislation requires an annual audit by the government's Auditor General of the Society's books, accounts and financial affairs.<sup>17</sup> An annual report is also required to be submitted to the Attorney General for tabling with the legislature. The report is a public document and gives a full description of the services and programs offered. It describes eligibility levels, coverage, procedures, and the location of branch and community offices. It includes a full range of statistics on the numbers of applications, referrals, and finances. In short, it provides the information necessary for the government and the public to hold the Society accountable.

Finally, the legislation includes a provision for the appointment of a trustee to manage and conduct the affairs of the Society in the event that government is satisfied that the best interests of the public are no longer being served.<sup>18</sup> Such a course of action would be unusual but it is in the end the responsibility of government to ensure provision of an effective and efficient legal aid program.

The Legal Services Society is also subject to accountability measures in other provincial legislation. For example, like other provincial government organizations it is covered by the legislation dealing with privacy and access to information and by the provincial *Human Rights Code*. Furthermore, the Office of the Auditor General of British Columbia periodically conducts a management review of the Legal Services Society as it does with other agencies funded by the provincial government. The last such review was in 1996.

By agreement, the Deputy Minister or an Assistant Deputy Minister of the Ministry of Attorney General attends Legal Services Society Board meetings. The Assistant Deputy Minister and the Society's executive hold regular liaison meetings. A member of the Ministry's staff is assigned responsibility for day-to-day liaison with the Society to ensure that issues and concerns are dealt with as they arise. The government of British Columbia finds that the measures in place have been sufficient to ensure accountability. The relationship between government and

the Society is cooperative despite the budget pressures we have experienced over the past few years.

## CONCLUSION

There is consensus in Canada that government has a responsibility to ensure that there is a system that provides at least some level of legal aid to persons of very limited income facing legal problems with significant consequences. By this we mean that government has a financial responsibility but it also has a responsibility to ensure the system meets the legal aid needs of its people.

This can be a challenging role for a provincial government. Speaking from the government of a Canadian province, I must stress that where the responsibility for legal aid is shared by more than one level of government, their respective roles and responsibilities must be clear. More important, the division of financial responsibility must be clear and it must also be shared. Where the federal government influences the expenditures of a provincial government, it must compensate the provincial government for the additional cost.

Secondly, the provincial government must work within the existing system and with the existing stakeholders. The legal profession has a vested interest in legal aid but it also has experience and expertise that can benefit the system. There are also community interests who know the clientele and their needs. In many places the community also has a history in the provision of legal services through community law clinics. Government must accommodate the interest of these groups while securing their cooperation in providing a legal aid system that meets the needs of the client.

Thirdly, government must satisfy the public that it is providing a necessary service to those in need while being fiscally responsible with taxpayers' dollars. The service must be seen to be fair and efficient. These challenges have become greater in Canada in recent years as demands for services increase at the same time as governments are attempting to regain control of government spending.

I have attempted to describe the ways in which British Columbia has attempted to meet these challenges in the provision of legal aid services. As you will have noted, not every province in Canada has come to the same resolution. We can learn from each other but we must also adapt those lessons to our own circumstances. I am sure the legal aid system as it continues to develop in China will also look somewhat different from our model in British Columbia but I hope you will be able to take something of value from our experience.



## NOTES

- <sup>1</sup> *Universal Declaration of Human Rights*, United Nations General Assembly, December 10, 1948, article 10.
- <sup>2</sup> *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171 [1976] C.T.S. 47, article 14(3).
- <sup>3</sup> *Canada Act 1982 including the Constitution Act, 1982*, 1982, c. 11 (U.K.), *Schedule B, Constitution Act, Part 1, Canadian Charter of Rights and Freedoms*, section 11(d).
- <sup>4</sup> *Legal Aid and the Poor: A Report by the National Council of Welfare*, Winter 1995, Ministry of Supply and Services Canada, pp. 4-10.
- <sup>5</sup> *Annual Report 1997-1998*, Legal Services Society, 1998, p. 11.
- <sup>6</sup> *Legal Aid in Canada: Description of Operations*, Ottawa: Statistics Canada, October 1995, unpaginated.
- <sup>7</sup> *Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating to the Young Offenders Act between the Government of Canada and the Government of British Columbia*, section 3.(1).
- <sup>8</sup> Hong, Lloyd, *Comparative Study of the Cost of Legal Aid in Canada*, The Law Society of British Columbia, September 1998, p.3.
- <sup>9</sup> British Columbia, *Legal Services Society Act*, Revised Statutes, Chapter 256, section 3(1).
- <sup>10</sup> *Legal Services Society Act*, section 3(2).
- <sup>11</sup> Hong, *Comparative Study*, pp. 18 – 19 and p. 23.
- <sup>12</sup> *Legal Services Society Act*, section 2.
- <sup>13</sup> *Legal Services Society Act*, section 5(2), (3), (4), (5) and (6).
- <sup>14</sup> *Legal Services Society Act*, section 5(7) and (8).
- <sup>15</sup> *Legal Services Society Act*, section 11.
- <sup>16</sup> *Legal Services Society Act*, p. 23.
- <sup>17</sup> *Legal Services Society Act*, section 15.
- <sup>18</sup> *Legal Services Society Act*, section 19.

# THE DEVELOPMENT OF LEGAL AID SYSTEMS IN SELECTED JURISDICTIONS

By Eileen Skinnider\*

## INTRODUCTION

This working paper was prepared as part of the Project Development Phase of the *Canada/China Cooperation Project to Assist China in the Development of a Legal Aid System in China*. That phase of the project was conducted under a contribution agreement between the International Centre for Criminal Law Reform and Criminal Justice Policy and the Canadian International Development Agency.

The purpose of this document is to provide a preliminary overview of some relevant legal aid policy and program development issues and to offer an initial discussion of how these issues are defined and addressed in Canada and in other selected jurisdictions. A more comprehensive comparative analysis of these issues will be conducted as part of the main phase of the Canada/China Cooperation Project. The following pages are meant only to provide project participants with a tool to facilitate the planning of future collaborative work and the setting of research priorities for later phases of the project. The initial list of policy and program issues covered in this document was arrived at through recent discussions and exchanges between the Centre's team of experts and members of the National Legal Aid Centre in Beijing. The list of issues covered in this paper is by no means exhaustive and will likely be expanded during later phases of the project. As it stands, it reflects the program development priorities identified by the Peoples' Republic of China for the establishment of a modern national legal aid system.

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The following chapters are based on a preliminary and limited review of the literature and legislation on legal aid systems in Canada, England and Wales, Australia, New Zealand and the United States. A list of some useful bibliographical references and a list of the legislation collected so far are being provided in two appendices. The working paper itself is divided into six main chapters dealing respectively with: (1) the responsibility of states under national and international laws to provide legal aid; (2) legal aid needs, coverage and the scope of legal aid services that can be offered; (3) a description of the main structural components of existing legal aid services; (4) a review of issues relating to the quality of legal aid services provided; (5) a review of the factors affecting the costs of these services; and, (6) existing funding mechanisms and their implications. This working paper is also available in Mandarin.

## THE RESPONSIBILITY OF STATES TO PROVIDE LEGAL AID

### **Articulating the State's Responsibility to Provide Legal Aid**

In most western jurisdictions, as is the case in China, informal schemes of legal aid have been around for some time. Courts had recognized inherent or explicit jurisdiction to appoint legal counsel in certain criminal matters. "Needy litigant rules" allowing for the waiving of court fees for indigent individuals had been available in certain jurisdictions. For some time, the provision of legal assistance by counsel was largely voluntary or charitable. It was in 1949 in England and 1951 in Ontario that saw the establishment of legal aid statutes. Despite the establishment of a formal scheme, legal aid was still primarily provided on a voluntary basis by the private bar. The view that legal aid was a right and not merely a charity gained wider acceptance in the 1960s. By the end of that decade and in the early 1970s, there was a renewed concept of social justice and a recognition of the need to provide socially disadvantaged groups effective access to the justice system and to available means of redress under the law. These developments were also accompanied by a progressive realization that some disadvantaged groups may experience different and very specific needs for legal assistance and representation. During the 1980s and 1990s, people's need for legal assistance and the recognition of these needs increased for a variety of convergent reasons. This resulted in most western jurisdictions experiencing a massive expansion in the amount of legal aid services provided and huge increases in the costs of providing these services. In recent years, governments have begun to systematically reconsider the nature, scope and method of delivery of the legal aid services provided by existing systems. In many cases, major structural and program policy changes are being contemplated or implemented.

A fast growing literature exists which attempts to redefine, circumscribe and clarify the responsibility of states to provide legal assistance to individuals and groups. That responsibility

can be defined on several different bases, including moral, utilitarian, social-solidarity, social-justice and legal terms. The issue of responsibility is important because it provides the overall rationale for the establishment or the restructuring of legal aid systems. It is also complex and full of implications for the nature, scope, equity and quality of the legal aid services that are provided. The discussion of states' responsibility to provide legal assistance is often couched in terms of general principles upon which the legitimacy of legal systems is understood to rest, or in terms of the legal obligations that the state has contracted under national or international laws.

### *General Principles*

The legitimacy of legal systems is generally understood to rest upon three sets of broad principles which are used to articulate the responsibility of the state to provide legal assistance. (1) The principle of the rule of law implies that government in all its actions is bound by rules fixed and announced beforehand. These rules make it possible for individuals to foresee with a fair degree of certainty how the authority will use its coercive powers in given circumstances. This allows individuals to plan their affairs on the basis of this knowledge. (2) The principle of fairness refers mainly to procedural fairness within the justice system. A commitment to procedural fairness leads to the recognition of legal rights, including the right to counsel, the right to a fair hearing, and the right not to be deprived of liberty and security except in accordance with fundamental justice. (3) The principle of equality can translate itself into four basic equality rights: (i) equality before the law; (ii) equality under the law; (iii) equal protection of the law; and, (iv) equal benefit of the law. None of these equality rights, it is often argued, can be effective without the ability to obtain legal assistance when required and thus effective access to the courts and the legal process.

### *Under International Law*

A narrower discussion of the responsibility of states to provide legal aid services is also possible in terms of the legal obligations contracted by the state under international law. There exists a range of international norms and standards that are relevant to the question of the states' responsibility to provide legal aid. Under international law, the right to counsel is embodied in the concept of the right to a fair trial. The right to counsel does not necessarily include the right to a state-funded or free counsel. However the right to counsel, the right to a fair trial along with the right to equality implicate the right to state-funded counsel. International instruments, principally the *International Covenant on Civil and Political Rights*, set out specific obligations of states to provide state-funded counsel for indigent persons.

## International Standards and Norms

The following briefly presents some international standards and norms directly relevant to legal aid.

### *The International Covenant on Civil and Political Rights*

Article 14(3)(d) of the United Nations *International Covenant on Civil and Political Rights* (ICCPR) states that an accused is entitled “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” This provision for legal aid in Article 14(3) is set out among the minimum guarantees everyone is entitled to, in full equality, in the determination of any criminal charge. Therefore while this right is specific to criminal matters only, it is rooted in the idea of equality. There is an accepted limitation on the availability of legal aid in international law as States are required to provide legal aid only where the interests of justice so require. The right provides for assigned rather than choice of counsel. The entitlement to this right is based on the costs of the legal representation and the inability to afford such costs.

### *The Convention On The Rights of The Child (CRC)*

With respect specifically to the situation of young persons charged with a crime, the *Convention on the Rights of the Child* provides that States shall ensure to children deprived of their liberty the right to prompt access to legal and other appropriate assistance and that children shall be entitled to have legal or other appropriate assistance in the preparation and presentation of his or her defence. This may not create an automatic right to public-funded legal counsel, but it does create a responsibility on the part of the state to provide a child with legal assistance in the preparation and presentation of his or her case when assistance is not otherwise available. The exact nature of the legal assistance to be provided is not specified.

It may also be worth noting here that, in the *European Convention on the Exercise of Children’s Rights*, Member States of the Council of Europe have provided themselves with a more precise articulation of how the child’s right to legal assistance may be exercised, particularly in situations where there may be a conflict between the interests of the child and those of the parents, and of the role and obligations of the child’s “representative.”

### *Other Relevant International Standards*

Other international instruments which are relevant for an individual to access state-funded counsel include:

- The *United Nations Basic Principles on the Role of Lawyers* stipulate that governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. The *Principles* state that professional associations of lawyers should cooperate in the organization and provision of services, facilities and other resources.
- The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provide that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he/she does not have sufficient funds to pay.
- The *United Nations Standard Minimum Rules for the Treatment of Prisoners* provide for untried prisoners to be allowed to apply for legal aid where such aid is available.
- The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* provide that, throughout proceedings, juveniles have the right to be represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country.
- The *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* provide that where juveniles are detained under arrest or awaiting trial, they have a right to legal counsel and are to be able to apply for free legal aid where such aid is available.
- The *Basic Principles on the Role of Lawyers* stipulate that “all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.” The *Principles* also state that “Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.”
- The *European Convention on Human Rights and Fundamental Freedoms* and its jurisprudence have been cited by international bodies and play a role in determining the scope of such rights under international law. The right to a fair hearing is guaranteed in civil and criminal matters in Article 6 of the *European Convention*. The European Court on Human Rights has interpreted this right to mean effective access to the courts, which requires the state to provide publicly funded counsel in civil matters when it is in the interest of justice.

### **International Standards Reflected in National Laws**

International norms and standards are reflected to varying degrees in national laws. In some countries with dualist systems, for international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legisla-

tion. In other countries with monist systems, international law and domestic law are viewed as one coherent system of law with international law being supreme. There is no need to incorporate the treaty provisions into domestic law as the treaty becomes part of domestic law upon ratification.

The question of States Parties' compliance with the international standards they have ratified is a matter which lends itself to both legal and empirical comparative analysis. No such international comparative analysis seems to exist at present on the right to counsel and the right to legal aid standards. However, since several international instruments create a duty for States Parties to report on their efforts to ensure compliance with the instrument, some information on the subject is most likely available and could perhaps be collated if necessary.

### *Canada's Legal Framework*

In dualist systems, like Canada, England, the United States and Australia, the provisions of a treaty must be incorporated into domestic law to be enforceable in domestic courts. Canada has a federal system of government. The Canadian constitutional arrangements provide that both federal and provincial governments have an interest in the delivery of legal aid. The federal government has criminal law powers and the provincial governments have responsibility for the administration of justice. The legal framework which is relevant to legal aid services include the *Canadian Charter of Rights and Freedoms*, the *Criminal Code*, the *Young Offenders Act*, as well as other federal and provincial legislation which mandate publicly-funded legal representation. There is no national legislation governing the provision of legal aid services in Canada.

- The *Canadian Charter of Rights and Freedoms*: irrespective of the statutory requirements, the obligation to provide legal representation will come from the *Charter*. Under the *Charter* there are three sections that have been argued as supporting a right to state-funded legal assistance: the right to counsel on arrest or detention (Section 10(b)), the right to a fair hearing (Section 11(d)), and the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (Section 7). The *Charter* provisions speak to the right to counsel, but do not specifically address how that counsel must be provided and at whose cost.
- The *Criminal Code*: confers the discretion upon a court to appoint counsel for an accused person.
- The *Young Offenders Act*: The *Act* establishes the policy for all of Canada's young persons. It proclaims (in s. 3) that young persons have the same rights and freedoms as all other Canadians, but also that they should have special guarantees of their rights. A young persons right to court-appointed counsel is one of these special guarantees. In criminal

matters, young persons have the right to counsel, appointed by the court, regardless of the nature of the offence, regardless of the financial circumstances of the young person or his/her parents, and without any apparent ability of the court to set criteria on the need for appointment.

- Several provincial statutes may also empower courts and administrative bodies to rely on legal aid services to assist individuals.

### *Other Countries*

In England and Wales there is a common law right to publicly-funded legal representation. England does not have a Bill of Rights that expressly provides for the right to legal aid. In England, courts have an inherent duty to “appoint” counsel for people unable to represent themselves and to afford legal representation. Under the *Legal Aid Act*, legal aid is mandatory only in a few situations, that is in murder cases, cases in which the accused is held in custody and cases in which the prosecution is seeking to appeal to the House of Lords. In all other cases, the provision of legal aid is discretionary. Legal aid is provided, subject to a requirement that the offender makes a contribution, when the court is of the opinion that it would in the interest of justice to so.

In Australia, which has a federal system of government, states have full jurisdiction over criminal law and the ultimate responsibility for the provision of legal aid services also lies at that level. The United States constitution provides the right to counsel. In that country, criminal legal aid is constitutionally mandated. The duty to appoint counsel for indigent persons in criminal matters developed under the equal protection and due process considerations. Legal aid for the indigent accused of a capital offence has been constitutionally required.

In all countries, special considerations apply concerning the right of young persons accused of an offence. The New Zealand’s *Children, Young Persons and Their Families Act* contains provisions to the effect that a young person charged with an offence must be represented by an ordinary barrister/solicitor or a youth advocate. In Australia, the legislation relating to young offenders and their right to counsel varies from state to state.



## LEGAL AID NEEDS, COVERAGE, AND SCOPE OF SERVICES OFFERED

### Coverage and Scope of Services Offered in Different Jurisdictions

Coverage is usually defined as the range of situations for which legal aid may be available, both in terms of types of issues, such as criminal, civil or family law, and scope of services, such as advice, representation or law reform activities.

The coverage to be provided by state-funded legal aid systems is limited, under international instruments, to offenders in criminal matters only, who cannot afford it in cases “where the interests of justice so require.” However, existing systems in most western jurisdictions cover a much broader range of legal representation and assistance needs which extend beyond the criminal law. Generally, legal aid systems make some form of provision for both criminal and civil legal aid. However, existing systems vary considerably in the extent to which they emphasize the provision of legal aid in civil and family law matters. Canada and England and Wales, for example, spend a little more than half of their legal aid resources on the provision of services in civil matters. Most systems make provisions for both direct legal aid, the provision of legal representation services to individual clients, and indirect legal aid, in the form of legal education and information services and sometimes also legal services to groups as opposed to individual clients. Rules concerning coverage and scope of services offered are usually set by those responsible for its funding.

The coverage and scope of legal aid services provided by various countries, and even within countries, varies considerably. In Canada, where each province and territory has its own legal aid system, different legal aid plans cover different types of cases. In England and Wales, the system for delivery of legal aid services has several components and each one is affected by different rules for coverage and scope of services. The Australian state and territorial legal aid commissions offer a variety of legal services, from advice, to duty counsel, to legal representation. Service coverage also varies from region to region and should be analyzed separately. A detailed analysis of these rules and legal aid plans is beyond the scope of this working paper and will have to be conducted at a later stage of the project.

### Criminal Law Defendants

While all western jurisdictions recognize their formal obligation to provide legal aid to indigent adults in criminal matters, the coverage and scope of the services provided still varies. Coverage restrictions are often specified in relation to the types of offences covered. The main criterion used refers to the likelihood that the accused, if convicted, would be sentenced to imprisonment. The citizenship status of the accused is generally irrelevant, as long as the individual

can meet other criteria of eligibility. Courts are frequently called upon to determine whether the coverage and the scope of the legal aid services provided in criminal cases is sufficient to meet existing rights of the accused under the law. Even in cases where the offender has been denied coverage by existing services, courts may still and frequently do order that a state-paid counsel be provided to the accused.

In Canada, since legal aid services are provided through provincially established legal aid programs, national minimum standards regarding the coverage and scope of services are indirectly established through the periodic negotiation of federal-provincial agreements concerning the sharing of the costs of the criminal legal aid services between the two levels of government. In general, these minimum standards provide for coverage in criminal cases where there is likely imprisonment or the loss of means of earning a livelihood. This is in keeping with the rights guaranteed by the *Canadian Charter of Rights and Freedoms* to ensure that all offence categories where the liberty of the legal aid applicant may be in jeopardy are included. In Australia and New Zealand, a wide range of criminal services are covered, including summary criminal proceedings if the accused has a reasonable defence or suffers from a disability. Guilty pleas are assisted in serious cases and assistance in bail applications and breach of probation hearings are provided for where there exists a reasonable prospect of success.

### **Children and Youth**

In western jurisdictions, young people involved in criminal matters are, due to their age and special circumstances, treated differently than adults. They also have special rights to legal assistance and the coverage tends to be more exhaustive than is usually the case for adult offenders. Legal aid may be offered by specialized services or as part of the regular legal aid plan.

In the case of young people, since most of them are financially dependent on parents or other adults, the question of whether they are able or not to afford legal representation can sometimes become complex. In Canada, young people who are involved in the criminal justice system are statutorily entitled to legal representation whether or not they are eligible based on a merit or means test, regardless of the financial situation of the parents, and without any apparent ability of the court to set criteria on the need for counsel appointment. Many western jurisdictions provide different ways for the state to recover from the parents, when appropriate, part or all of the cost of legal aid services offered to young offenders.

### **Civil Law Litigants**

Jurisdictions vary in the criteria set to determine coverage for civil matters. In reality, it appears that the bulk of civil matters covered in most jurisdictions are matrimonial or family

law matters. Some jurisdictions cover family law matters only when there is a threat of violence or where the welfare of a child is involved. In Canada, some provincial jurisdictions, such as British Columbia, have established criteria to offer priority to family law cases where immediate tangible benefits or immediate adverse effects may result from the proceedings. Measures to dissuade litigation or to favor alternative dispute resolutions may also be encouraged. In British Columbia again, applicants in family law matters must go to family court counselors and submit to a mediation process before *judicare* certificates are issued.

For matters other than those relating to family law, coverage criteria frequently include whether the civil action being considered or instigated could impact seriously on the applicant's life or livelihood. In many jurisdictions, applicants must show a reasonable likelihood of success to be covered.

### **Immigrants and Refugees**

Immigrants and others who do not have the legal status of a citizen may or may not qualify for legal aid services, depending on the rules set by each jurisdiction. In most jurisdictions, they qualify for most but not necessarily all available legal aid services. In general, even non-citizens qualify for criminal legal aid provided that other eligibility criteria are satisfied. Immigrants may also have special needs for legal services, including legal education and information, requiring special attention. Meeting such needs involves addressing issues of service delivery in a language and within a cultural context that often differs from that of the receiving country.

### **Appeals**

The extent to which legal aid services are offered in the cases of appeal also varies significantly from jurisdiction to jurisdiction. In non-criminal matters, the merit of the case and its potential consequences for the applicants usually provide the basis upon which a usually discretionary decision is made to provide legal aid services or not. In criminal matters, an important distinction is often made between whether the appeal is launched by the Crown or the accused. When the appeal is instigated by the prosecution, legal aid is often automatically provided to offenders provided that they meet other eligibility criteria. In cases where the appeal is initiated by the accused/convicted, a "case merit" test applies based largely on an evaluation of the likelihood of success.

## **Special Needs**

In several jurisdictions, legal aid systems provide services to special needs groups such as racial minorities or senior citizens. In some jurisdictions, there may also be some language rights involved which may create an obligation on the part of the plan to provide its services in the language of a minority group. In many cases, specialized legal aid clinics are established to address such needs. In addition, some legal aid services are sometimes provided in a limited number of test-case or constitutional litigation which may affect a particular group. In all such cases, the criteria for coverage are the subject of broad discretionary powers on behalf of the legal aid service managers in terms of whether to offer the service or not.

Prisoners constitute another group of individuals with special needs for whom varying levels of legal aid services may be provided. In disciplinary matters and in matters of administrative or quasi-judicial decisions concerning the release of offenders, legal aid services may be provided. In many jurisdictions, such services are offered by special clinics or specialized services within the legal aid system. Criteria for coverage vary considerably from jurisdiction to jurisdiction.

People with mental disabilities or illnesses often require many of the same legal aid services as other people living in poverty. Jurisdictions offer varying levels of legal aid services in such cases and legislation frequently exists establishing a duty on the part of the government to provide counsel, in certain situations, at its expense, to individuals with mental disabilities or illnesses.

## **Public Legal Information Needs**

Public legal information and education is another, more indirect, form of legal assistance often provided by jurisdictions. Legal information and education are also often discussed in terms of people's access to the justice system and their need to know their rights and obligations under the law. Legal information needs of special groups and of the population in general have been the object of some empirical research and some valuable research findings exist not only on the nature of these needs, but also on the relative effectiveness of various means through which they can be addressed.

Generally speaking, legal information needs tend to be addressed in most jurisdictions through both existing legal aid services and other specialized legal education and information programs. Canada has recently completed a national consultation on the state of legal information and education services in the country. Other countries also have valuable experiences to share in this area.

Another form of legal information/education services which must be considered concerns the efforts that are made specifically by various levels of government when new laws are in-

troduced and existing ones are modified. In such situations, it is particularly important that adequate measures be taken to ensure that the new legal framework is explained and communicated in terms that are easily understood by the public or those segments of the population that may be particularly affected by a new law. Such steps may not only improve general compliance with and public support for the new law, but may also affect the eventual level of demand for direct legal aid services.

## LEGAL AID SERVICES

### Criteria of Eligibility to Services

Closely related to the issues of coverage and scope of the services provided is the issue of establishing criteria of eligibility to the services. The issue of eligibility refers to the question of who is entitled to benefit from existing legal aid programs and services. It also refers to the question of the process through which the eligibility of each individual is determined. In most jurisdictions, eligibility is defined differently for adults and juveniles. It is also defined differently depending on the nature of the case, e.g. criminal or civil matter. Furthermore, certain types of legal services, such as summary advice services or duty counsel services often do not require the individual to submit to an eligibility test. Rather these services tend to be provided to all persons regardless of their financial means or income.

Generally speaking, individual eligibility to services is determined on the basis of either the financial circumstances of the applicant or the merits of the case, or both. In some jurisdictions, citizenship status is also considered. Two main eligibility tests tend to be applied: the means test and the merit test. In cases where both tests apply, the general rule appears to be that the applicant must pass the means test before his/her case is assessed on the basis of merit.

*Means Tests:* The entitlement to legal aid in Article 14 of the *ICCPR* is based on the costs of the legal representation and the inability to afford such costs. This would therefore cover persons of modest means who are faced with substantial legal expenses. Most jurisdictions assess financial eligibility of the applicant based on a needs-based means test. In Canada, each province establishes its own eligibility rules within the framework provided by relevant provisions of federal-provincial cost-sharing agreements. In Australia, the financial eligibility test used to be whether an applicant could afford to hire a private lawyer to provide the legal services required. However, in 1990, the federal government introduced a national means test which established maximum levels of income to determine an applicant's eligibility.

*Merit Tests:* Merit tests mostly apply in some criminal appeal cases and in non-criminal matters. There are several different ways in constructing the merit test. Some jurisdictions ask what

are the chances that the applicant will win the case and make the legal aid worthwhile. England has introduced a merit test along with the means test in civil cases to determine if the applicant is eligible for legal aid and looks at the applicant's chances of winning the case, the importance of the case, and the likely cost of the action as compared to its likely benefit. In Australia, most state legal aid programs apply a "reasonableness" test of merit. The first part of the test considers the possible benefit or detriment which may affect the applicant or the public depending on whether legal aid is granted or not. The second part considers the likelihood of success of the action envisaged.

### *Flexible Eligibility Programs*

Neither one of the above two eligibility tests necessarily translates itself into an "all or nothing" decision in terms of an applicant's access to legal aid services. Expanded eligibility programs exist in several jurisdictions which offer services, depending on the financial eligibility of the applicant and sometimes also the merit of the case, provided that some contribution is also made by the applicant. England has recently introduced client contribution payments over a period of time that are based on a sliding scale relating to the applicant's income. Several American states have flexible eligibility programs and programs, especially in the case of juvenile offenders, which allow for various ways of putting the applicant or his/her parents to contribution. In some cases, promissory notes may be signed which can be enforced, if necessary, through a civil court. In other cases, the applicants may have to reimburse part or all of the costs of the legal aid services received out of the proceeds of the case. In Canada, in the province of Manitoba, an expanded eligibility program was introduced in 1989. This program aims to provide legal aid to the working poor who have incomes just above the normal financial eligibility guidelines but are still unable to afford legal services at market prices.

### *The Eligibility Assessment Process*

The assessment of an individual's eligibility to legal aid services is usually based upon a formal application. In some cases, applicants may receive assistance in preparing the application. The actual assessment of the applicant's eligibility and the merit of a case is often guided by specific policies and guidelines. The responsibility for conducting the assessment lies at different levels of the system, depending on the model of service delivery. The assessment process also varies in each jurisdiction and can be different depending on the type of cases considered.

## Models of Service Delivery

There are two major models of legal aid services delivery, *judicare* and *staff lawyers*. They coexist with other less frequent formula. The two main models, in conjunction with different styles of service delivery, give rise to a large number of “hybrid” or “mixed” service delivery schemes.

*Judicare*: The *judicare* model, sometimes called the “private bar” model, is one in which a legal aid plan pays private lawyers a fee for services on an hourly or block fee basis to provide individual case representation to financially eligible individuals. Depending on the jurisdiction, clients are allowed either to choose their own counsel or to select a counsel from a limited list of available counsels established by the legal aid service or a law society. Legal aid services in several Canadian provinces and territories (Ontario, Alberta, New Brunswick, Northwest Territories), as well as in England and Wales and New Zealand, are predominantly delivered through a *judicare* model. In the United States, the assigned counsel system and the contract model are both derived from the *judicare* model. In both instances, services are provided by the private bar.

*Staff Lawyer Model*: Legal services can also be provided by staff lawyers employed by the legal aid authority on a salary. In Canada, legal aid services in Saskatchewan, Prince Edward Island, Nova Scotia and New Foundland are predominately delivered through the staff lawyer model. In the United States, most jurisdictions which operate a public defender system use the staff lawyer model. Within that model, clients usually have little or no choice of counsel. However, in most cases, the program allows a choice of counsel in criminal law cases which carry a potential mandatory life imprisonment sentence. The legal and support staff may be directly employed by the legal aid plan or may be employed by a specific legal aid clinic. Legal aid clinics can be organized to meet the legal aid need of a specific community or clientele. Some staff lawyer programs provide a full array of legal aid services within a defined legal domain, while others provide only summary advice.

*Mixed Models*: Mixed models are comprised of some mixture of *judicare* and staff lawyer components. In Canada, the provinces of Quebec, British Columbia and Manitoba rely on predominantly mixed models. The recently developed concept of a “multidimensional mixed model” may provide a versatile framework for developing new systematic approaches to controlling legal aid costs. Within that model, particular service delivery approaches are applied to particular service delivery problems. Such a model can include full service duty counsel, contracting out, paralegals, staff lawyers and private bar lawyers. Mixed models tend to recognize that different areas within a jurisdiction may have different populations, geographic character-

istics and other factors which should be taken into account in providing for the effective and fiscally responsible delivery of legal aid services.

*Duty Counsel:* Duty counsel is usually defined as a lawyer with a mandate to assist clients in docket courts. Legal assistance is provided, more or less on an emergency basis without any testing for financial eligibility, to persons who do not have counsel. Most jurisdictions provide duty counsel to ensure that applicants have at least minimum access to legal advice before a court appearance. Duty counsel can be provided by full time employees of a legal aid service or can be retained from the private bar by the legal aid service on a contract basis. Several jurisdictions have moved to salaried or full-time contract duty counsel.

*Block Contracting:* In some jurisdictions, it is possible for the legal aid plan to enter into a contract with a law firm for the provision of a block of services for a set amount of money.

*Assigned Counsel:* Counsel can be assigned by a court on an *ad hoc* or more structured basis. The court determines whether an accused is eligible and then appoints counsel on a case by case basis, usually from a list of private bar lawyers. Assigned counsel are usually paid on an hourly rate or block fee basis. This model is used for criminal legal aid in certain jurisdictions in the United States.

*Community Clinics:* Community clinics may be organized to meet the legal aid needs of a particular community or a specific clientele. Clienteles may include groups such as the handicapped, Aboriginal people, and youth. Some clinics specialize in certain areas of the law, such as personal injury, welfare benefits, immigration, consumer advocacy, tenancy law, housing, and women's issues. Other clinics offer advice and referrals on all legal matters. Most clinics are funded through direct or indirect block grants from the government. The Province of Ontario has what is probably the most varied system of clinics in the world, both in terms of the clientele it reaches and the specialties covered. England, Australia and New Zealand also have systems of clinics. In general, many of these clinics focus on poverty law issues.

*Citizens' Advice Bureau:* Citizens' advice bureaus provide free information and advice to clients about their rights and responsibilities, including advice on housing, finances and other matters besides law. In terms of legal advice, this generally does not extend to court representation. The bureaus are generally financed by local governments in conjunction with other social services. England, Australia and New Zealand have extensive systems of bureaus usually staffed by volunteers.

*Franchising:* Franchising involves a special contractual relationship between a law firm or individual lawyer and the legal aid authority. Individual lawyers and law firms, after an accreditation process based on the monitoring of quality and management standards, are referred legal aid work provided that they comply with standards established by a Legal Aid Board. Franchising involves the restructuring of payment arrangements, usually bringing with it various cash flow



advantages to the firm and the devolution of some of the powers of the legal aid boards to the legal aid practitioners. Franchising has been described as a hybrid of public service and private practice models. England has been experimenting with franchises since the late 1980s.

## **Service Providers**

*Lawyers:* Legal aid services may be provided by both private bar and staff lawyers. In the United States, existing systems rely almost exclusively on lawyers to provide legal assistance, whereas other jurisdictions also employ non-lawyers for services such as preliminary advice and information.

*Paralegals:* Paralegals are non-lawyer providers of legal services. The nature of the services which they offer is often constrained and defined by local laws governing the legal profession. Paralegals may work under the supervision of a lawyer or independently. Their duties can include the screening of applicants for civil legal aid, assistance in securing the enforcement of maintenance orders, some assistance in family law matters relating to guardianship and custody matters, eligibility determination in criminal matters, entering guilty pleas, speaking to sentence and service delivery in remote areas. Duties may also include drafting documents, interviewing witnesses, writing letters and in some circumstances, appearing in court. The majority of jurisdictions where paralegals are used report their services are cost-effective and tend to increase clients' satisfaction. The legal profession sometimes raises concerns concerning the quality of the services provided by paralegal professionals.

*Other Non-lawyer Legal Aid Providers:* Other non-lawyer legal aid providers include alternative dispute resolution personnel, mediators and counselors. In New Zealand, pilot projects in urban areas included alternative dispute resolution schemes and used the services of lawyers as mediators and in early neutral case evaluations. In England, a recent report on legal aid recommended that legal aid providers ought not to be restricted to lawyers, but should include professionals and agencies who can help bring about the settlement of disputes and prevent litigation.

*Law Students:* Law students frequently play a role in the delivery of legal aid services, usually augmenting professional and voluntary legal services. In most jurisdictions, they can be found in student clinics or community agencies. Law students are usually under the supervision of staff lawyers as part of legal training, legal education programs, or integrated public service plans.

*Self-help Components:* In some jurisdictions, the responsibilities of legal aid programs extend to the development and provision of public legal education and information services. These often include pamphlets, presentations, self-help kits and seminars. Other self-help services may include, for example, "do-it-yourself" divorce information.

## Governance

Governance of legal aid refers to the entity exercising authority over a legal aid program. A governance structure is established to oversee the overall management and administration of a legal aid program or agency, to set priorities and to provide managerial and financial accountability for the delivery of the services. In many jurisdictions facing fiscal constraints, the governance mechanism must fulfill its mandate to provide legal aid services within a fixed budget environment. In fulfilling its mandate, the governance structure generally provides for quality control mechanisms, directs the making and the implementation of policies, and sets and monitors management objectives.

### *Types of Governance Models*

There are several models of governance for legal aid services and agencies. Governance models include structures that operate under the executive branch of government, under the judiciary, or as independent public or private agencies. In most western jurisdictions, legal aid is governed by an independent public or private agency. That particular body is sometimes established by legislation. In many instances the governing body is a law society, a self-regulating professional body of lawyers. In other instances, the governing body is a specific and independent agency such as an independent commission or board.

*Governance by Law Societies:* In Canada, three jurisdictions are administered by provincial law societies. These are Ontario, Alberta and New Brunswick which are also predominantly judicare systems. In England, another predominantly judicare system, the law society administered legal aid until recently in 1987 when the government transferred governance to a new independent board. The recent Ontario Legal Aid Review Committee has recommended that legal aid be run by an independent commission rather than the law society. Law societies responsible for legal aid services generally establish a legal aid committee which functions like a board of directors for the program.

*Governance by Independent Boards or Commissions:* The majority of jurisdictions surveyed in a cross-jurisdictional study of legal aid in Canada, England and Wales, New Zealand, Australia and the United States were governed by an independent commission or board, with members appointed by the government. Within Canada, six legal aid plans are administered by an independent statutory organization. These include Newfoundland, Nova Scotia, Quebec, Manitoba, Saskatchewan and British Columbia. These jurisdictions generally have staff or mixed delivery models. In England and Wales, the administration of the legal aid system is divided between an independent statutory agency and the Lord Chancellor's office.

*Governance by a Government Agency:* This structure of governance is not very common. In some American jurisdictions, criminal legal aid is administered by public defenders who are appointed by the State Governor. In other jurisdictions, public defenders are elected. In the Canadian province of Prince Edward Island, the legal aid program is not established by legislation and legal aid services are directly administered by the provincial government. In England, the provision of legal aid services in certain criminal matters that are heard in the high courts are governed by the Lord Chancellor's Office.

*Governance by the Judiciary:* Another less common form of governance mechanism is governance by the judiciary. In certain places in the United States, the courts assign counsel and control the funding of criminal legal aid. In some jurisdictions in the United States, the public defender organization is an agency of the judiciary. In England, certain criminal matters are administered by the magistrates courts. In New Zealand, criminal legal aid is administered by the registrar of local courts and the legal aid committees. In that country, a recent report recommended the removal of the courts from the administration of legal aid.

#### *Legislative Frameworks Relating to Governance*

In most jurisdictions governed by independent agencies, the governing agency is constituted by statute. Those statutes set out the powers of the governing body. The government maintains the power to amend those statutes at any time. The statutes vary in detail, regarding the composition of the board and terms of office for members. The legal framework may deal with questions on how members can be dismissed, how the chair is selected, the question of remuneration for members, whether or not there is an executive committee and, if so, how members of that committee are selected. Some legislation contain a general statement of the objectives of legal aid, reporting and other accountability requirements.

In Canada, provincial governments control the administration and delivery of legal aid services. The federal government exercises its jurisdiction through a series of federal-provincial cost-sharing agreements. Australia also has a federal system of government in which responsibility for the administration of legal aid lies with each state. Due to the fact that the federal government makes conditional financial grants to the states, there exists a national legal aid system which establishes standards of legal aid and implementation plans. Each state and territory has a legal aid commission established by legislation. In New Zealand, a federal legislation establishes an independent crown entity, the Legal Services Board, to oversee legal aid. In England, the legal aid system was created by national legislation which has since been amended and is currently governed by the *Legal Aid Act*, 1988. In the United States where criminal legal aid and civil legal aid are organized separately, there are many governing regimes established, such

as state, commission supervision and county-administration systems. A national legislation establishes the Legal Services Corporation to administer funds with respect to civil legal aid.

#### *Powers and Responsibilities of Governing Bodies*

Governing bodies may be assigned different powers and responsibilities. In most western jurisdictions, the legal aid plans receive the majority of their funding from the government, therefore there are varying degrees of control by the government regarding board membership, mandate, tariff, eligibility, staffing and funding. This is reflected in the relative powers and authority of the various governing bodies. Theoretically, the government sets out in legislation or by regulation its expectations along with some general performance outcomes but does not specify how the agency is to reach these goals. Usually, legal aid administrators can exercise their own discretion in determining the nature and quality of services to be provided, the role and mix of service providers, the extent of the coverage provided and the criteria for evaluating financial eligibility.

#### *Effectiveness of Governance Mechanisms*

A recent review of the legal aid system in Ontario identified eight criteria that should be considered in designing a legal aid governance regime. They are as follows: independence; accountability; quality and comprehensiveness of legal services; innovation and experimentation; coordinated management of legal aid services; efficiency; public confidence; and resource mobilization. Details of these criteria and their impact on governance will have to be conducted at a later stage of the project.

## **QUALITY OF SERVICES AND LEGAL AID STANDARDS**

### **Quality Standards**

The debate over the best choice of a service delivery model has been a controversial one. Staff model advocates point to cost control as one of its primary advantages, while judicare model advocates cite higher quality of service and freedom of choice of counsel. Much of that debate tends to focus on which of the two, a “pure” judicare system or a “pure” staff model, is best. In recent years, the debate has been shifting towards the issue of finding the right array of service components, given the type of laws, the clients’ needs, case priorities, or the type of services to be provided.

Neither one of the two main service delivery models apparently offers performance characteristics that are systematically and always superior to that of the other. Therefore, in assessing the relative merits of different service delivery models, several criteria should be addressed. These criteria include: (1) the quality of representation, elements of which can include the clients' satisfaction with the service, the amount of time spent on a case, timeliness of the assistance provided, case outcome, the sophistication of the research and argument presented by counsel, the impact of the lawyer's work on the community as a whole, and continuity of representation; (2) access to justice, which measures the extent to which services are accessible to people in need of legal aid and their awareness of the existence of the services; (3) equality under the law; (4) independence of counsel, which can be defined in terms of whether the legal representation offered is free of undue control or influence that may be exerted by government; (5) choice of counsel, which addresses the relationship of trust and confidence between counsel and client; and (6) cost effectiveness, which may include comparisons between the costs of legal aid schemes on a per capita basis, by type of expenditure, by caseload, or on the basis of the cost of services per case.

### **Quality Assurance and Evaluation Studies**

Two main types of quality assurance processes are usually discussed in relation to legal aid services. Professional self-regulation provides some form of peer review. In most jurisdictions, lawyers are regulated by law society rules regarding professional accreditation and standards of professional conduct. Formal quality assurance programs can include the monitoring of a system's performance in terms of governance, management and administration, responsiveness to the needs expressed by community or the targeted clientele, service delivery, and quality of services.

Although it is beyond the scope of this paper to discuss them in detail, several evaluation studies have been identified during this preliminary review. They offer some good discussions of methodological and other related issues involved in the evaluation of legal aid services. Most evaluation studies are concerned with specific experimental projects designed to assess the feasibility and the merit of alternate practices and methods of service delivery.

## COSTS OF SERVICES

### Factors Affecting the Costs of Legal Aid

The costs of legal aid services have risen significantly in most jurisdictions during the last decade. In Canada, legal aid costs rose steadily in the 1970s, but then tripled in the ten years following 1984, from \$200 million to \$600 million. In England, in 1985-86, the cost of legal aid was £319 million plus administration costs of £21 million. In 1995-96, it was £1.4 billion.

Theoretically, there are many extraneous factors influencing the cost of providing legal aid services to a population. These include crime rates; population growth or other demographic changes which may affect the size of the groups targeted for services; inflation; availability of lawyers; changes in legislation; and, changes in the legal process. It is sometimes useful to distinguish between three categories of factors which can affect legal aid costs: (1) social and economic factors; (2) justice system factors; and, (3) legal aid system factors.

In the constant search for cost effective strategies for the efficient delivery of legal aid services, an understanding of the role of various factors in increasing the costs of service delivery will likely inspire the choice of cost-savings and cost-control strategies. If the increase in legal aid spending is seen as the result of an increase in direct legal services cost, then strategies aimed at controlling or lowering direct legal costs – e.g. expanding the role of paralegals, introducing alternative dispute resolutions and contracting out blocks of cases – will be favoured. If other factors are singled out, particularly factors that are external to the legal aid system and affect the level of demand for services, cost-control measures may tend to focus on factors such as the level of coverage offered, the scope of services provided, or eligibility criteria.

### Methods to Control the Costs of Services

Since funding for legal aid services is primarily from governments, recent increases in legal aid spending have brought about a number of measures to control the cost of legal aid and the amount of resources devoted to this service. There have obviously been renewed discussions and experimentation to achieve greater cost-effectiveness in the delivery of services. One strategy has been to cap or fix legal aid budgets, a move away from the traditional open-ended financial structure which allowed the overall level of expenditures to be driven directly by the demand for services. This has resulted in questions relating to means of prioritizing legal aid needs and services. In most jurisdictions, priority has been given to criminal legal aid, at the expense of services in family, civil law and poverty law matters. Some jurisdictions have reduced coverage, made eligibility requirements more limiting, reduced tariffs for lawyers, and found alternative sources of revenue. Most discussions focus on the issue of delivering the best possible

services to the greatest number of people possible, at the lowest costs. This involves questions of client needs, breadth of access, quality of service and strategic allocation of limited resources. Other strategies for cost control includes lowering direct legal service costs by expanding the role of paralegals and staff lawyers.

Most commentators argue that legal aid reform cannot be separate from the larger issues of justice reform. It would seem that a large portion of the costs of legal aid services could be addressed by rationalizing some aspects of the justice process itself. For example, greater efficiencies by Crown Counsel in an early determination of the Crown's position in criminal cases could result in cost-savings not only in the legal aid system, but also in the court system. Greater reliance on alternative dispute resolution mechanisms could also reduce the number of litigation and therefore also the demand for legal aid services.

## **METHODS OF FUNDING**

### **Funding by Different Levels of Government**

Most legal aid programs receive their primary funding directly through provincial, state, federal or municipal funding. In Canada, government contributions (both federal and provincial) account for 80-100% of total funding in most jurisdictions. In Australia, nearly 50% of funding comes from the federal government and 25% from the state level.

Canadian statistics are available on: Provincial and territorial contributions to criminal and civil legal aid for the last five years; Federal contribution to criminal legal aid, for the country as a whole and for each province and territory.

### **Cost-sharing Agreements**

In Canada, as previously mentioned, the transfer of funds to criminal legal aid is through federal-provincial cost-sharing agreements. These agreements have been used as instruments for setting national standards. The federal government's contribution is transferred to the provinces which are responsible for administering legal aid. The federal-provincial transfer of funds for civil legal aid is accomplished through the Canada Social and Health Transfer Payments Agreement. In 1990, the federal government has imposed a ceiling on the funding levels. The percentage of the provincial governments' contribution towards the total costs of legal aid varies from one province to another. The federal government sets aside a small amount of funds in a national Legal Aid Special Projects and Research Fund to encourage research, demonstration project and experimentation in the field of legal aid.

## **Contribution from the Legal Profession**

Contributions from the legal profession to the legal aid fund can come from a number of ways, including (1) law foundation contributions, the locally established law foundations collect the interest that accumulates on lawyers' trust bank accounts and contribute a set percentage of these sums to the legal aid fund; (2) annual legal aid levy, members of the law society are required to pay an annual legal aid levy, regardless of whether they perform legal aid work or not; (3) legal aid holdback, the legal aid scheme requires that the fees portion of a lawyer's legal aid invoice be discounted by a certain percentage to reduce the cost of legal aid. At the end of the year, if funds are still available out the regular budget for services, the amount of the holdback can be reimbursed in whole or in part to the lawyers. The holdback schemes vary with respect to percentages as well as with respect to certain types of cases.

### ***Probono services***

Other contributions by the legal profession include voluntary or mandatory *pro bono* work. *Pro bono* services are services provided directly to a client for reduced fees or no fee. Established systems for *pro bono* services are more frequently found in the United States than in Canada. In the United States, some systems require each lawyer to perform a certain number of *pro bono* hours yearly. Some bar organizations have adopted mandatory *pro bono* requirements for membership.

## **Client Contributions**

Client contributions are amounts paid by clients toward a portion of the costs of the legal representation and assistance they receive. This contribution can take the form of a user fee or an application fee collected from clients or applicants. This source of revenue typically represents less than 1 percent of the total yearly revenue generated for legal aid in most jurisdictions, however, in Australia and in three Canadian provinces, this source of revenue is more substantial. In England, recent changes in the law require a minimum payment by all legal aid applicants notwithstanding their financial circumstances. In jurisdictions with an expanded eligibility program, clients' contributions can be substantial.

## **Others**

Court costs is one area where some jurisdictions are raising additional revenue. Some states in the United States fund their programs through filing fees or court costs imposed on civil litigants. In British Columbia, some funds are raised through the sale of publications. Prepaid



legal services involves the payment in advance for future legal services and may be purchased by individuals from commercial providers or established by any group or by employers as employment benefits. This is most commonly found in continental Europe.

# LEGAL AID DELIVERY MODELS IN CANADA: PAST EXPERIENCES AND FUTURE DIRECTIONS

By Ab Currie\*

## INTRODUCTION

Canada provides a varied and interesting setting for the study of delivery models. In Canada, there are twelve legal aid plans, one in each of the ten provinces and two territories. Each of the legal aid plans operates independently, reflecting the fact that Canada is a federal state in which the provinces have responsibility for the administration of justice under the *Constitution*. Each legal aid plan has developed a delivery system which is at least in some ways different from the others. The provinces and territories vary considerably with respect to the demographic, economic and geographic characteristics which affect legal aid delivery and the choice of delivery models. This provides fertile ground for research which is comparative in nature, or research which can study the delivery of legal aid under a variety of conditions. Table I provides some basic information about the twelve legal aid plans in Canada.

This paper focuses on delivery models, in particular the cost and quality associated with different delivery models. The type of delivery model has been shown to have a major effect on the cost of delivering legal aid.<sup>1</sup> The issue of relative cost of different delivery models has been an important debate in Canada for nearly twenty years.

The table below shows the basic staff lawyer and private bar delivery models as they currently exist in legal aid plans in Canada. This reflects the traditional mixed model concept of

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**TABLE I. Selected Legal Aid Data - 1996-1997**

Province/ Territory	Total Population (000)	Total Expenditures (\$000)	Per Capita Expenditures (\$)	Approved Applications	Rate of Approved Applications (1000 Pop)	Delivery Model
Newfoundland	569.6	5,545	9.73	10,880	19	mainly staff
Nova Scotia	941.6	10,599	11.26	16,529	18	mainly staff
New Brunswick	760.8	3,608	4.74	1,629	2	judicare
Prince Edward Island	136.6	593	4.34	1,210	9	staff
Quebec	7,396.7	114,238	15.44	241,678	33	balanced staff/ private
Ontario	11,271.8	250,142	22.19	111,189	10	judicare; staff for poverty law
Manitoba	1,137.3	15,060	13.24	18,349	16	mainly judicare
Saskatchewan	1,017.5	8909	8.76	21,399	21	staff
Alberta	2,785.8	24,445	8.77	28,014	10	judicare
British Columbia	3,843.6	96,989	25.23	56,018	15	mainly judicare; staff for poverty law
Northwest Territories	66.8	5126	76.68	2,007	30	mainly judicare
Yukon	31.4	887	28.25	1,372	44	mainly staff

Note: Legal aid plans may count applications differently. Therefore, numbers of approved applications may not be strictly comparable.

Source: Canadian Centre For Justice Statistics, Legal Aid in Canada: Resource and Case Load Statistics, Statistics Canada, Ottawa, 1997.

staff and judicare delivery options. Later on in this paper, the concept of a complex mixed model will be introduced to describe more recent developments in legal aid delivery models. As Table II shows, the legal aid plans fall into three main categories with regard to delivery systems. Some legal aid plans, notably Ontario, New Brunswick, British Columbia and Alberta have predominantly private bar or judicare delivery systems. A judicare system is one in which lawyers in private practice are issued certificates to provide legal aid to clients. Some jurisdictions such as Saskatchewan, Prince Edward Island, Nova Scotia, and Newfoundland have mainly staff lawyer delivery systems. A staff lawyer system is one in which the service is provided by salaried lawyers employed directly by the legal aid plan. Some jurisdictions utilize both staff lawyers and private bar lawyers. Quebec, Manitoba, Yukon and the Northwest Territories have mixed delivery systems.

The delivery model pattern becomes somewhat more complex when type of service is considered. Among the four legal aid plans that are usually categorized as mainly judicare delivery systems, both Ontario and British Columbia mainly use staff lawyers to deliver civil legal aid

TABLE II. Legal Aid Service By Type of Delivery

		Type of Service				
		Young Offender	Adult Criminal	Family	Immigration	Poverty Law
Province / Territory		Type of Delivery By Per Cent				
British Columbia	Private bar	79%	85%	87%	88%	6%
	Staff	21%	15%	13%	14%	94%
Alberta	Private bar	57%	100%	97%	100%	na
	Staff	43%	--	3%	--	na
Saskatchewan	Private bar	2%	2%	4%	na	na
	Staff	28%	98%	96%	na	na
Manitoba	Private bar	60%	60%	65%	55%	20%
	Staff	40%	40%	35%	45%	80%
Ontario	Private bar	100%	100%	100%	99%	--
	Staff	--	--	--	1%	100%
Quebec	Private bar	49%	63%	43%	80%	40%
	Staff	51%	37%	57%	20%	60%
New Brunswick	Private bar	100%	100%	100%*	na	na
	Staff	--	--	--	na	na
Nova Scotia	Private bar	8%	8%	25%	na	na
	Staff	92%	92%	75%	na	na
Prince Edward Island	Private bar	7%	10%	38%	na	na
	Staff	93%	90%	62%	na	na
Newfoundland	Private bar	2%	2%	2%	--	--
	Staff	98%	98%	98%	100%	100%
Yukon	Private bar	25%	25%	25%	na	na
	Staff	75%	75%	75%	na	na
Northwest Territories	Private bar	80%	80%	95%	na	na
	Staff	20%	20%	5%	na	na

\* Note: New Brunswick provides family legal aid through two mechanisms. Legal Aid New Brunswick provides service in areas of guardianship, variation of support orders, and interim custody orders. The Domestic Legal Aid Program, operated directly by the New Brunswick Department of Justice also provides family legal aid using private bar lawyers under contract.

Source: Data provided by the legal aid plans. Percentages are based on 1997-98 data.

other than in family law. This is usually termed poverty law service. In Quebec, this is known as income security law. This area of legal service includes legal assistance in matters related to social welfare, employment insurance, housing, and debt. The other judicare plans, New Brunswick and Alberta, do not have significant poverty law service. All of the judicare plans use private bar lawyers exclusively, or nearly so, to provide legal assistance in young offender, criminal, immigration, and family matters.

Poverty law tends to be delivered mainly by staff lawyers in all legal aid plans. In Ontario, poverty law service is provided entirely by staff lawyers working in seventy community legal clinics throughout the province. The community clinic system is funded and administered separately from the certificate service, but still within the Ontario Legal Aid Plan. The Legal Services Society of British Columbia is a complex structure consisting of Branch Offices managed directly by the Society, and of Community Legal Offices (CLO) and Native Community Legal Offices (NCLO) which operate under contracts with the central Legal Services Society. In British Columbia, poverty law service is provided almost entirely by staff lawyers in CLOs and NCLOs. In Newfoundland, poverty law service is provided entirely by staff lawyers. In the mixed delivery plans, Manitoba and Quebec, poverty law service is provided mainly by staff lawyers.

In the other service delivery areas, young offender, adult criminal, family and immigration, there is consistency of delivery models within plans. Legal aid plans that are mainly *judicare* or mainly staff lawyer systems tend to be consistently so across these four types of service. Quebec is more balanced between private bar and staff lawyer delivery, and at the same time more varied than other mixed model plans. Staff lawyers are used mainly for family legal aid. Private bar lawyers are used mainly for immigration and adult criminal legal aid. Young offender legal aid is equally divided between the two.

## THE DELIVERY MODELS DEBATE

Canada has a fairly extensive body of empirical literature about the cost and quality of staff lawyer and *judicare* delivery. The empirical literature is instructive with regard to the relative cost and quality of these two delivery modes. This literature will be summarized in more detail in the next section. The body of research represents a debate about the merits of these two delivery approaches that has persisted in Canada for almost twenty years. The history of the delivery models debate is, in certain respects, as instructive as the results of the empirical studies.

The delivery models debate began with what might be considered the classic study comparing staff lawyer and *judicare* delivery: the Burnaby Study.<sup>2</sup> As described below in detail, the Burnaby Study was the first in a series of Canadian studies to show that staff lawyers could deliver legal aid at less cost and with a similar quality of service compared with *judicare* in criminal legal aid. A few years later, the evaluation of the Nova Scotia legal aid plan was published.<sup>3</sup> The Nova Scotia study reported lower costs for staff lawyers compared with *judicare* lawyers. However, the comparisons were not controlled for degree of case complexity. These studies were followed by a series of evaluations of legal aid plans, the British Columbia evaluation in

1984<sup>4</sup>, the Manitoba evaluation in 1987,<sup>5</sup> and the Saskatchewan evaluation in 1988.<sup>6</sup> The general findings of these studies were summarized in *Patterns in Legal Aid* (2nd edition) as follows:

staff lawyers spend less time per case than private lawyers  
staff lawyers tend to plead clients guilty more often than do private lawyers  
similar proportions of staff and private bar clients are convicted  
staff lawyer clients draw fewer jail terms than private lawyer clients.<sup>7</sup>

The *Patterns II* report comments that the traditional perspective of the private bar that staff lawyer delivery is inferior ‘is simply wrong’<sup>8</sup> Further, the report concludes that Canadian evaluations have generally found that cases referred to the private bar cost more than staff lawyer cases, even when there is no difference between the complexity and gravity of cases handled by private lawyers and staff lawyers. These differences cannot be explained in terms of differential case outcomes. Staff lawyer clients are convicted no more often than are the clients of private bar lawyers, and staff lawyer clients tend to receive fewer jail sentences.<sup>9</sup>

In 1987, the Canadian Bar Association (CBA) produced a report on legal aid delivery models.<sup>10</sup> The CBA report cautioned against drawing inter-jurisdiction conclusions because of the absence of comparable data from the various legal aid plans. However, the Canadian Bar Association report conceded that “in the criminal field where some hard data on quality exist, albeit crude, it appears that the staff model is capable of delivering the same outcomes for lower costs than the judicare model, or slightly better outcomes for the same cost.”<sup>11</sup>

The delivery models debate has, nonetheless, continued despite the mounting empirical evidence and the CBA report. On the surface, the continuing debate about delivery models would seem somewhat paradoxical. Although very recently some developments in the development of delivery models in Canada have begun to show a shift away from the traditional debate (these will be discussed in the section below on complex mixed models), the delivery models debate has continued; an ideological debate played out on empirical grounds. A few of the recent episodes illustrate well the nature of the debate.

In 1991, the Law Society of Upper Canada commissioned a critique of the Legal Aid Manitoba evaluation.<sup>12</sup> The Manitoba evaluation had produced the most direct evidence of the greater cost effectiveness of staff lawyer delivery to that point. The Pristupa report was an unrelenting critique of the ‘invalid, unreliable, irrelevant, and fatally flawed’ methods and findings of the Manitoba study.<sup>13</sup> According to the report, the ‘fundamental errors in questionnaire design as well as in the reporting of results and statistical inference render the report inappropriate, and inconsequential for any discussions about the costs and benefits of a Public Defender System ... the Manitoba Report has marginal or no application for Ontario.’<sup>14</sup> Three years after the critique of the Manitoba Evaluation, the same author, under contract to the Law Society of

Upper Canada, prepared a critique of both *Patterns in Legal Aid* and *Predicting Legal Aid Costs*.<sup>15</sup> Both of these Department of Justice reports had supported the relative cost-effectiveness of staff lawyer delivery compared with judicare delivery. The second *Pristupa report* claimed that “the inferences and conclusions drawn from the data in *Patterns* are inappropriate and statistically invalid,” that “no change in (Ontario) government policy should be considered that is based on the research methodology in *Patterns*,” and that “no changes in (Ontario) government policy should be considered that is based on the research methodologies used in *Predicting*.”<sup>16</sup> The Department of Justice commissioned two reports to answer the critique leveled by the *Pristupa Report on Patterns and Predicting*,<sup>17</sup> despite the fact that the Department recognized that the issues were not open to resolution on empirical grounds.

In 1993, a committee of the New Brunswick Department of Justice recommended a staff lawyer delivery model for that province.<sup>18</sup> This followed several years of relatively high costs per case reported by Legal Aid New Brunswick. Early in 1994, the Law Society of New Brunswick responded to the proposal for staff lawyer delivery with its own proposal to “allow the participating lawyers the opportunity to demonstrate to the public and the funders of the program that they, as a group, are prepared to make the sacrifices necessary to preserve the positive aspects of the Judicare system.”<sup>19</sup> In April 1994, the New Brunswick legal aid plan implemented a global budgeting system in order to contain costs under the judicare delivery system. Among other administrative measures, global budgeting involved a 40 per cent hold back of payments on certificates to the private bar in order to assure that expenditures would remain within a fixed budget.<sup>20</sup> This measure has preserved the judicare system in New Brunswick within a ‘hard-capped’ budget.

In 1992, an influential report on legal aid in British Columbia was published.<sup>21</sup> A main focus of the *Agg Report* was what the report considered underfunding of legal aid services. This set in motion a series of discussions between the Legal Services Society and the government not only about funding, but about achieving efficiencies in a number of ways. One important aspect of this discussion was the implementation of a mixed model for service delivery. With the exception of poverty law services, legal aid in British Columbia was delivered almost entirely by private bar lawyers at that time. In 1994, a Reform Package was introduced which included a number of major elements; a tariff reduction, a client contribution program, and a proposal to move to a 50 per cent staff lawyer system. The private bar reacted strongly to the mixed model proposal. In July 1994, the Association of Legal Aid Lawyers announced a withdrawal of services as a protest against the mixed model proposal. In September of 1994, a tri-party Accord was reached between the Law Society of British Columbia, the government, and the Legal Services Society to limit the number of staff lawyers to a total of 90 (amounting to about 15 – 20 per cent of total service delivery, and to require an evaluation of the mixed model within six months.<sup>22</sup>

A staffing freeze, which has been in effect since mid-1995, has effectively limited the staff lawyer component at its present level.<sup>23</sup>

Another recent attempt to experiment with service delivery innovation in British Columbia was the proposal to deliver criminal legal aid services under a contracting model. The original proposal developed in 1996 was to contract out approximately 4000 criminal legal aid cases in blocks of 50. This would have amounted to about one quarter of all criminal legal aid cases in the province. The private bar reacted with caution, but not with opposition, in the beginning. Despite the size of the proposed contracting project, it was referred to as a pilot project. In preparation for the main pilot project, a limited pre-pilot contracting project involving six contracts for blocks of 50 cases was undertaken in Victoria and Vancouver in 1997. During the pre-pilot phase of the project, private bar opposition grew to the point where the project was discontinued.<sup>24</sup> An evaluation of the pre-pilot phase of the project indicated that a 19 per cent cost saving was achieved, a successful contract administration relationship was maintained, and there was no difficulty attracting experienced counsel who provided quality service.<sup>25</sup>

These events in the history of the delivery models debate in Canada demonstrate the continuing opposition of the private bar to staff lawyer delivery. This shows that a delivery model is not only a technical-administrative mode of service delivery. There is a politics to delivery models reflecting a set of vested interests, typically very strong vested interests on the part of influential actors in the system. Importantly, what has continually fallen victim to the politics of delivery models is the ability of legal aid plans to experiment with innovative service delivery. Thus the ability of legal aid plans to develop more cost effective delivery approaches, or possibly to develop delivery approaches which address aspects of clients' problems other than those which 'would normally be provided by a lawyer' are compromised by the politics of the delivery models debate.

This observation will come as no surprise to those in other western countries. Forty years ago in Britain, the private bar described the proposed use of staff lawyers to deal with uncontested divorces as 'a fungoid growth on the profession'.<sup>26</sup> In the United States, the controversy over delivery models has been fraught with controversy, with the combatants accusing each other of bad faith.<sup>27</sup> An Australian observer has commented that the delivery models debate in that country has been inconclusive not only because the lack of empirical evidence but also because of the partisan debate.<sup>28</sup> Finally, the Canadian Bar Association has acknowledged that the delivery models debate is one in which the ideology and the rhetoric have outweighed the results of empirical research: "[T]here are few topics which appear to arouse such strong and varying opinions as the choice of delivery model. Ideology and personal experience come together on this topic, allowing most lawyers to hold and advocate positions with great conviction."<sup>29</sup>



The political, cultural, and other relevant circumstances in countries which are beginning to develop legal aid plans are certainly different from those in Canada or other countries with developed legal aid systems. It would not be expected that the same factors would shape debates about delivery models as has been the case in Canada. However, the mixed model debate in Canada does provide a useful cautionary tale. The choice of a delivery model may bring with it difficult political dynamics and impediments to future development. To the extent that these can be foreseen and avoided, improvements in cost-effectiveness and service delivery will be easier to achieve.

## THE COST AND QUALITY OF LEGAL AID DELIVERY MODELS IN CANADA: EMPIRICAL EVIDENCE

### Cost Comparisons

This section first presents research results relating to the relative cost of staff lawyer and private bar delivery. 'Raw data' from legal aid plan databases are not presented here, although these data are used in the Department of Justice *Patterns in Legal Aid* and in the Canadian Bar Association *Legal Aid Delivery Models* report.<sup>30</sup> Data from management information systems do not have controls for complexity of cases. Thus, intra-plan comparisons between staff lawyers and private lawyers may be flawed because of different referral patterns to private and staff lawyers, in which staff lawyers may tend to get the less complex cases. Inter-plan comparisons may be flawed because of different definitions of a case,<sup>31</sup> and different coverage provisions may result in comparisons of non-equivalent cases.

The first carefully designed study presenting evidence on the relative cost-effectiveness was the *Burnaby Public Defender* study published in 1981.<sup>32</sup> That study revealed that the average cost of staff lawyer cases was \$235 compared with an average cost of \$225 for Burnaby private bar lawyers and an average cost of \$264 for Vancouver private bar lawyers. (Burnaby is a suburb of Vancouver.)<sup>33</sup> A major concern with these findings revolved around productivity. About twenty per cent of the staff lawyers' time was spent on duty counsel work. Without the duty counsel work, staff lawyers could have increased their case loads by about fourteen percent.<sup>34</sup> If there had been an increase of only four cases per month, the average cost per case for staff lawyers would have dropped to \$192.<sup>35</sup>

The evaluation of the Manitoba legal aid plan produced what is perhaps the best data on comparative staff and judicare costs.<sup>36</sup> The overall average cost per case for staff lawyers reported in this study was \$197, compared with \$307 for private bar lawyers. Costs were further analyzed in terms of average cost by quartile thresholds of the case load as one way to control for possible

difference in case complexity. Staff lawyers completed the first 25 per cent of their case load for an average cost of \$48 or less, compared with \$201 for the private bar. Staff lawyers completed 50 percent of their cases for an average cost of \$100 or less, compared with \$263 for private bar lawyers. The point at which 75 per cent of all cases were taken into account produced average costs per case of \$241 for staff lawyers and \$310 for private bar lawyers.<sup>37</sup>

The Manitoba evaluation report also presented average costs per case for specific types of offences, comparing staff and private bar lawyers. The following table shows some of these comparisons.

**TABLE III. Average Costs Per Case for Selected Types of Criminal Cases**

Type of Case	Staff Lawyer	Private Lawyer
Weapons	\$214	\$340
Assault	\$149	\$305
Theft Over \$200	\$127	\$289
Break and Enter	\$121	\$273
All Cases	\$197	\$307

Source: Legal Aid in Manitoba, p. 172.

As well as differences in cost per case, the Manitoba study identified differences in hours spent per case by staff and private lawyers. Staff lawyers spent an average of 3.9 hours per case compared with 8.2 hours per case by private lawyers for assault cases. For weapons offences, staff lawyers used 5.2 hours, compared with 9.7 hours used by private lawyers. For break and enter cases, staff lawyers spent an average of 3.2 hours compared with an average of 6.9 hours spent by private lawyers. Thefts over \$200 required an average of 3.4 hours to complete the case compared with 7.5 hours for private lawyers.<sup>38</sup>

An evaluation of the Saskatchewan legal aid plan was conducted at about the same time as the Manitoba evaluation.<sup>39</sup> In connection with the Saskatchewan evaluation, a costing substudy was conducted to examine any possible advantage of moving to a mix including more private bar delivery.<sup>40</sup> At that time, about 98 per cent of all legal aid was delivered by staff lawyers. That study estimated that the total cost of legal aid would increase by thirteen per cent if one third of all legal aid were delivered by the private bar, and by sixty-four per cent if all legal aid cases were referred to the private bar.<sup>41</sup>

In 1993, the Alberta Legal Aid Society implemented a three year pilot project to deliver legal aid to young offenders by means of a staff lawyer clinic approach. Two clinics were established, one in Calgary and one in Edmonton, the two largest cities in the province. The evaluation

of the staff lawyer clinics demonstrated that staff lawyer delivery was more cost effective than private bar delivery.<sup>42</sup> In 1996, the average cost per case for staff lawyers was \$353 compared with \$500 for private bar lawyers. The private bar costs were about 30 per cent higher than for staff lawyers.

The staff lawyers working in the clinics performed duty counsel work as well as full service representation. The evaluation concluded that staff lawyers were more effective at resolving matters at the early stages of the justice process than were private lawyers. The cost savings that resulted from duty counsel resolving matters early in the process were estimated at \$2.4 million over the entire period of the evaluation. This was because of about 4800 certificates that were not created because matters were resolved by duty counsel.<sup>43</sup>

The empirical research that has been conducted to date in Canada points consistently to the conclusion that staff lawyer delivery is less expensive than judicare delivery. This raises the quality issue. Staff lawyers may be less expensive, but is the quality of service comparable to that provided by private bar lawyers?

### **The Nature and Quality of Service By Staff Lawyers**

The conclusion that there is a cost advantage in staff lawyer delivery is frequently countered by two main arguments; that the types of cases dealt with by staff lawyers tend to be less complex, thus explaining the lower cost; and that the quality of service provided by staff lawyers is inferior. The available evidence does not support either of these contentions.

#### *Do Staff Lawyers Provide An Inferior Service?*

One of the perennial arguments presented by critics of staff lawyer delivery has been that staff lawyers provide an inferior service. One way to assess quality of service is in terms of outcomes achieved for their clients by private bar and staff lawyers. Canadian research has shown that clients of staff lawyers and private bar lawyers are convicted at about the same rate. However, the clients of staff lawyers tend to receive fewer jail terms than the clients of private lawyers.<sup>44</sup> In the Burnaby project, clients were convicted in about sixty per cent of cases. This was about the same rate as for legal aid clients of private bar lawyers. However, about 40 per cent of the clients of private bar lawyers were sentenced to jail, compared with thirty per cent of the clients of staff lawyers. Staff lawyers tended to plead clients guilty slightly more often than private bar lawyers, but with no apparent effect on disposition or sentence.<sup>45</sup>

The evaluation of the British Columbia legal aid system in 1984 produced the same patterns. Clients of staff lawyers and private bar lawyers were convicted at similar rates. However, staff

lawyer clients were sent to jail thirty per cent of the time, while clients of private bar lawyers were imprisoned forty two per cent of the time.<sup>46</sup>

The evaluation of Legal Aid Manitoba again produced a similar pattern. Seventy-two per cent of both staff lawyer and private bar lawyer clients were convicted. However, only twelve per cent of the clients of staff lawyers were imprisoned, compared with twenty-three per cent of the clients of private practitioners.<sup>47</sup>

The Saskatchewan evaluation produced similar results. Only fourteen per cent of the clients of staff lawyers were convicted, compared with 32 per cent of private bar clients. In this case, however, it must be kept in mind that Saskatchewan is a 98 per cent staff lawyer system.<sup>48</sup> The private bar provides service in only a small number of cases where conflicts of interest exist, or where staff lawyers are not available to handle the case. There may, therefore, be differences in referral patterns that could account for these differences.

Finally, the evaluation of the Alberta young offender staff lawyer project showed findings which are generally consistent with the previous research. The Calgary office did not show statistically significant differences in disposition or sentencing compared with the private bar. The staff lawyers in the Edmonton office produced better sentences for their clients compared with the private bar.<sup>49</sup>

These results from studies conducted in different places and at different times all point to the same conclusion. Staff lawyers achieve similar conviction rates compared with private bar lawyers. Staff lawyers usually get fewer custodial sentences for their clients. This suggests that the quality of service provided by staff lawyers is at least equal to that provided by the private bar.

#### *Do Staff Lawyers Deal With Less Complex Cases?*

Opponents of staff lawyer delivery frequently argue that the cost advantage of staff lawyers arises because of different referral patterns. Dramatic differences in costs per case between staff lawyers and private bar lawyers, such as the difference of \$122 for staff lawyers versus \$729 for private bar lawyers reported in the Nova Scotia legal aid evaluation<sup>50</sup> which are not controlled for case complexity, may well reflect differences in referral patterns and should be interpreted with great caution.<sup>51</sup> However, in the *Burnaby Study* all cases were assigned to the staff office until over a period of weeks the work load optimum was reached. At that point, the office would accept no more cases, and all cases were assigned to the private bar. This process achieved a type of random assignment of cases. Thus, the cost difference could not be attributed to referral patterns.<sup>52</sup>

The Manitoba evaluation attempted to partially control for case characteristics by comparing staff lawyer and private bar costs and outcomes for specific types of offences.<sup>53</sup> As summarized above, staff lawyer costs per case were consistently lower for all categories of offences.

Both of these studies suggest that the cost advantage of staff lawyers can not be dismissed because of differences in referral patterns. The dramatic differences that appear based on 'raw data' that do not control for case type and complexity may to some degree reflect differences in referral patterns. The research that does exist on the subject suggests that after controlling for type and complexity of case, the cost advantage acknowledged by the Canadian Bar Association in the Legal Aid Delivery Models report remains.

#### *Are Staff Lawyers Independent of the Courts?*

It is frequently remarked that staff lawyers are not independent of the justice system as are private bar lawyers. The Canadian research shows that staff lawyers tend to plead clients guilty more often than private bar lawyers.<sup>54</sup> The evaluation of the Alberta youth staff lawyer project reported that staff lawyers tend to resolve matters earlier in the justice process than private lawyers. Yet in terms of outcomes, staff lawyer clients get similar levels of conviction and fewer custodial sentences compared with the clients of private bar lawyers. At a minimum, it does not appear that the greater tendency for pleas of guilty has any practical consequence for the quality of service, as measured in terms of outcomes. Henry and Fleming remark that "[t]he independence question is based on ideological concerns, predominantly of the legal profession, and is not, at present, backed up by any scientific empirical data."<sup>55</sup>

#### *Staff Lawyers Spend Less Time Per Case*

As pointed out above, private bar lawyers do tend to spend more time on cases than staff lawyers. Data from the Manitoba evaluation was presented above to show that private bar lawyers spent more time per case. Even more detailed data from the Manitoba study show that staff lawyers spent less time per case regardless of the plea, the sentence, or the disposition. The table below is reproduced from the Manitoba report.<sup>56</sup> The data shown in Table IV relate to four offence categories reported for combined time differences generally; assault (indictable), break and enter, theft over \$200, and weapons offences. These data demonstrate conclusively that private bar lawyers spend more time per case than staff lawyers. Further, it seems clear that the additional time spent by private lawyers achieves no advantage for clients in terms of the outcome of the case.

**TABLE IV. Average Number of Hours Per Case By Selected Case Factors:  
Staff and Private Lawyers**

Case Factors	Hours Per Case	
	Staff Lawyers	Private Lawyers
<b>PLEA</b>		
Guilty to Original Charge	4.1	8.7
Guilty to Lesser Charge	3.6	9.2
Not Guilty	6.5	14.8
<b>JAIL SENTENCE</b>		
Sentenced to Jail	4.2	9.4
Other Sentence	3.6	8.0
<b>DISPOSITION</b>		
Acquit	5.0	12.8
Dismissed	5.4	11.4
Stay	2.2	6.0
Convicted	4.2	8.5
Convict/Stay Mixed	4.0	9.5

Source: Legal Aid in Manitoba

Some very similar results emerged from the Alberta young offenders staff lawyer evaluation. The table below (Table V) compares the amount of time spent by staff and private bar on various aspects of cases.

**TABLE V. Time Spent on Aspects of Cases By Staff and Private Lawyers**

Aspects of the Case	Time Spent in Minutes	
	Private Lawyers	Staff Lawyers
Interviewing client	73	28
Interviewing parent	58	17
Determining course of action	40	12
Interviewing Crown	22	12
Interviewing Crown to prepare disposition	20	9
Reviewing disclosure	34	21
Appearance for plea concerning disposition	39	41
Speaking to Sentence	41	22
Reviewing disclosure for trial	57	19
Waiting time in court for trial	110	38

Source: Evaluation of the Staff Lawyer Pilot Project. p. 22

The Canadian data show that private lawyers tend to spend more time on cases than staff lawyers. The data from Manitoba suggests that the additional time does not result in better outcomes.

The explanation for the additional time spent by private lawyers may relate in part to the nature of payments to the private bar on a tariff system. A consistent complaint by the private bar is that legal aid tariffs are too low compared with the ‘market value’ for legal services, and that they are thus inadequately compensated for their services. This may lead to an incentive on the part of lawyers to bill to the maximum allowable limit. According to *Patterns*, “Alberta provincial evaluators have referred to this practice as *strategic billing*; Quebec provincial evaluators have called it *bill padding*.”<sup>57</sup>

### *Patterns and Timing of Guilty Pleas*

It has already been observed that one of the criticisms of staff lawyer delivery is that staff lawyers plead clients guilty more than do private bar lawyers. The implication is that the quality of the defence provided by staff lawyers is therefore less. This might also partly explain differences in time spent per case.

Data from the British Columbia legal aid evaluation did show a difference in the percentage of guilty pleas between staff and private lawyers.

**TABLE VI. Guilty Pleas by Staff and Private Lawyers in British Columbia**

	Staff Lawyer	Private Lawyer
	Percent	
Guilty Plea	84.1	78.5
Found Guilty	15.9	21.5

Source: An Evaluation of Legal Aid in British Columbia. p. 373.

However, the British Columbia evaluation also found that among those who did go to trial, equal proportions of staff lawyer and private bar clients received acquittals, stays or withdrawals of charges (see Table VII).

The Alberta youth staff lawyer evaluation compared the timing of guilty pleas entered by private lawyers and staff lawyers (see Table VIII).

**TABLE VII. Outcomes for Staff and Private Bar Clients**

	Staff Lawyer	Private Lawyer
	Percent	
Acquittal/Stay/ Withdrawal	27.2	27.8
Guilty	72.8	72.2

Source: An Evaluation of Legal Aid in British Columbia, p. 373

**TABLE VIII. The Timing of Guilty Pleas For Staff and Private Lawyers**

	Private Lawyers	Staff Lawyers
	Percent	
Guilty Plea Before Trial Date Set	46	76
Guilty Plea On Trial Date	54	24

Source: Evaluation of the Lawyer Pilot Project, p. 35

This table illustrates what may be a difference in approach or strategy between staff and private lawyers in the Alberta project. Staff lawyers show a much greater tendency than private lawyers to plead guilty before the trial date. Private bar lawyers show about an equal tendency for guilty pleas before the trial date and on the date of the trial. Pleading guilty on the date of the trial gives the appearance of a strategy to wait until the last possible moment in the hope that some unforeseen or hoped for event will swing the case in favour of a client who is otherwise without a good defence. There may, of course, be other explanations. This finding suggests that the practices of staff lawyers and private bar lawyers doing legal aid cases may be different. The data on guilty pleas and outcomes, and time per case and time per case and outcomes, suggest that the differences in approach do not affect outcomes.

However, the data presented above in Table VIII call to mind one of the main criticisms of staff lawyer schemes; that they are not independent. The Canadian Bar Association report on Legal Aid Delivery Models raises the possibility of potential conflict between the best interests of the client and the interests of the system “when the paymaster is the public purse.”<sup>58</sup> Within an adversarial legal system, the principal goal of the defence bar is to provide full and fair defence of the client’s interests. Defence schemes should be judged on how well they do this. These data suggest that more empirical evidence should be gathered on how staff lawyers and private



bar lawyers defend clients, and how any differences might impact on the best interests of the clients.

Based on the Canadian research, it can be concluded that staff lawyer delivery can be less expensive than private bar delivery, with no compromise with respect to quality of service. These conclusions are based on several studies carried out in different places and at different times, in legal aid plans which are different in many respects. Each study may have some methodological shortcomings, as one expects in all research into complex issues. However, the strength of this body of research is in the consistency of the findings regardless of differences in research approaches and settings.

### **Recent Developments in Mixed Model Delivery in Canada: From Simple to Complex Mixed Models**

Legal aid delivery is not a simple, one-dimensional issue. A delivery model must provide the best service possible, in the most cost-effective manner, in ways that address a number of major aspects of service delivery. Legal aid service is provided in different areas of law, to diverse client groups, in different geographical areas, and involving cases that vary from simple to very complex. These and other factors make legal aid delivery a complex and multidimensional problem, not a simple and unidimensional one. It stands to reason, then, that neither private bar lawyers providing service on a individual fee-for-service basis nor staff lawyers providing a similar service as salaried employees will necessarily be the best solution to all delivery problems.

Legal aid delivery in Canada is moving beyond the simple mixed model of staff lawyer and *judicare* delivery that has framed the debate about cost and quality in Canada for the past twenty years. What may be termed complex mixed models are emerging in Canadian legal aid, in which a variety of delivery modes are being developed to target specific service delivery needs.<sup>59</sup> The following section describes some recent innovations in legal aid delivery which point toward the development of complex mixed models.

This principle has been recognized with regard to legal aid delivery for different types of service for some time. For, example, the Ontario Legal Aid Plan has traditionally delivered poverty law service through a system of clinics employing staff lawyers, while delivering criminal, family, and immigration legal service using private bar lawyers through the certificate system. Similarly, The Legal Services Society of British Columbia has delivered poverty law service through quasi-independent Community Legal Offices and Native Community Legal Offices which operate under contract with the central Legal Services Society. The community office concept is intended to maximize community input into identification of needs and the delivery of service. In order to accommodate a sparse population in a vast geographical areas, the

Northwest Territories legal aid plan has delivered all types of service through eight legal aid offices and five clinics located in remote communities throughout the territory, in addition to the head office in Yellowknife.<sup>60</sup>

### *Contracting*

Contracting out legal aid cases to law firms is an alternative to either staff lawyer or judicare delivery. Contracting out has so far been used for very specific purposes in Canadian legal aid, rather than for mass casework. Contracting out was first introduced into the Legal Aid Manitoba system in 1992 with the Portage Legal Services Initiative.<sup>61</sup> The Portage experiment, named for the town of Portage La Prairie in the area, was an attempt to provide legal aid services in a cost-effective way to the rural and sparsely populated Interlake Region of central Manitoba. Law firms in the area were invited to submit bids to provide duty counsel and full representation services for that area. Under a contractual agreement with a local law firm, Legal Aid Manitoba was able to provide legal aid services at a lower cost than would have been the case with either staff lawyers or private bar lawyers using individual legal aid certificates. This contracting arrangement remains a regular part of the Legal Aid Manitoba delivery system. It serves as an example of how contracting may be used as an alternative to the traditional options of staff lawyer or private bar delivery to provide cost-effective service in rural areas.

The following year, in 1993, Legal Aid Manitoba began contracting out blocks of 50 young offenders cases in the Winnipeg area. With the proclamation of the *Young Offenders Act* the legal aid plan experienced a large number of legal aid applications with mandatory eligibility under Section 11 of the *Act*. Most of these matters were relatively simple, and in most cases would not have received service under the normal financial eligibility requirements and coverage provisions that applied to adult criminal offenders. Since that time several law firms in Winnipeg have been accepting contracts for blocks of 50 young offender cases, and this has since become a regular part of the service delivery system. There has been no formal evaluation of this delivery mode. Legal Aid Manitoba management has concluded that considerable savings have been achieved by contracting out young offender cases, and that the quality of service is satisfactory.<sup>62</sup> This project illustrates the successful use of contracting out as an alternative to staff lawyer or private bar delivery to provide service to a specific client group, in this case, young offenders.

The British Columbia Legal Services Society carried out a successful experiment contracting out both young offender and adult criminal legal aid in 1997. As was explained above in the section discussing the history of the mixed model debate, the original intention was to experiment with contracting on a mass casework scale. The large scale experiment was not carried out because of political reasons. However, the evaluation of the smaller pilot projects, two young

offender pilots in Victoria and two adult criminal pilot projects in Vancouver, showed that the projects produced an estimated cost saving of nineteen percent over private bar delivery, and that no problems attracting experienced lawyers to deliver quality service were encountered.<sup>63</sup>

One issue that arose in the planning of the British Columbia contracting project was to avoid, where possible, situations in which contracting would conflict with the work of the staff lawyers.<sup>64</sup> This reflects a broader issue with regard to complex mixed models. The various delivery modes in a complex mixed model should be complementary, and overall build toward an integrated delivery system comprised of delivery modes that are targeted toward specific delivery problems, and which function in a complementary manner.

### *Expanded Duty Counsel*

A novel concept in duty counsel service which reflects the complex mixed model approach is expanded duty counsel. This idea was piloted in criminal legal aid service in Manitoba from 1994 to 1996.<sup>65</sup> Following the implementation of an automatic charging policy for domestic violence in Manitoba, and the establishment of a specialized domestic violence court in Winnipeg, Legal Aid Manitoba experienced a dramatic increase in legal aid applications in this area. The cost of these additional cases was substantial. In 1994 the legal aid plan implemented the expanded duty counsel project, mainly in response to that situation. Expanded duty counsel was implemented in the domestic violence court and in the over-night custody court. One year later, the expanded duty counsel program was implemented for the non-custody docket. All clients encountered at first appearance receive service, regardless of financial eligibility. The main feature of expanded duty counsel is continuity; continuity of lawyers assigned to the same court for an extensive period of time, and continuity of the relationship between the lawyer and the client which allows the lawyer to retain a client first encountered in first appearance court. Expanded duty counsel might well be called a disposition model of duty counsel. The basic objective is for the duty counsel lawyer to dispose of as many simple cases as work load permits, as early as possible in the criminal justice process. This approach to service delivery rests on the assumption that a large proportion of criminal cases are quite simple. There are no complex points of law. The facts of the case are straightforward. If the duty counsel lawyer determines that there is a defence and that the case should go to trial, and if the accused person is financially eligible, the case will be transferred to a regular staff lawyer or a certificate will be issued to a private bar lawyer. However, if the duty counsel lawyer feels that the charge will result in a guilty plea or a stay of proceedings, (s)he will retain the case and attempt to resolve it in the best interest of the client. Usually this involves negotiation with the Crown Attorney. Expanded duty counsel lawyers retain cases that they feel can be resolved without a trial. However, depending on their

workload, and on the number of days per week that they had to be in first appearance court, the expanded duty counsel lawyers can handle a small number of brief day or half day trials.

The evaluation of the pilot project concluded that Legal Aid Manitoba achieved substantial cost savings by having the expanded duty counsel program dispose of cases, compared with the likely cost of private bar or regular staff lawyer service, with no compromise in quality of service.<sup>66</sup> The expanded duty counsel cases were assessed for coverage and financial eligibility, and were divided into certificate and certificate non-equivalent cases. Three indicators of seriousness and complexity; prior offences, other related charges, and breach of a judicial order were determined in order to assess the degree of case complexity and seriousness. These were compared with the costs of staff lawyer and private bar cases for the same offences. Overall the data showed that expanded duty counsel cases cost considerably less than either staff lawyer or private bar cases involving the same offences.<sup>67</sup> Such comparisons were very crude, however, because comparability was difficult to achieve. The private bar and staff lawyer cases would have included some more complex cases that the expanded duty counsel lawyers would not have dealt with. As well, the lawyers in the expanded duty counsel project may have handled cases differently than roughly identical cases would have been handled by private bar lawyers. It was, nonetheless, concluded that the expanded duty counsel service was cost effective.

Expanded duty counsel became a major component of the criminal legal aid delivery system in Manitoba following the pilot project phase. In April 1997, expanded duty counsel was adopted province-wide. The impact of adopting expanded duty counsel province-wide has not been assessed. The management information system at Legal Aid Manitoba has not yet been restructured to capture a full range of data on expanded duty counsel. However, data for criminal and youth legal aid, for both staff lawyers and private bar lawyers, show that expanded duty counsel is removing many cases from the full service certificate stream, and increasing the average cost per case for full staff lawyer and private bar certificate service. The table below (Table IX) shows the changes in the volumes and average costs of cases since expanded duty counsel was extended province-wide.

The volume of cases has declined and the average cost has increased in each category following the implementation of the expanded duty counsel program province-wide. This has occurred as expanded duty counsel has disposed of the simpler cases at the early stages of the criminal justice process before transfer to the certificate stream or to a staff lawyer for full service is required. This clearly shows how expanded duty counsel has become a separate delivery mode, and a main component of the legal Aid Manitoba service delivery system along with the staff lawyer and private bar delivery modes.<sup>68</sup>

In 1995, Legal Aid Manitoba opened an Urban Aboriginal Legal Aid Clinic in Winnipeg. The clinic had fewer clients than expected during the first year of operation. This was probably

TABLE X. Volumes and Average Costs of Adult Criminal and Young Offender Legal Aid, Manitoba, 1996-97 and 1997-98

Type of Service	Volume of Cases	Average Cost Per Case
<b>Private Bar</b>		
Adult Criminal		
1996-97	6175	\$454.68
1997-98	4867	\$641.57
Percent Change	-21%	+41%
Young Offender		
1996-97	1439	\$369.17
1997-98	1139	\$498.28
Percent Change	-21%	+35%
<b>Staff Lawyer</b>		
Adult Criminal		
1996-97	1863	\$355.85
1997-98	1555	\$448.63
Percent Change	-17%	+26%
Young Offender		
1996-97	1120	\$270.05
1997-98	699	\$344.01
Percent Change	-40%	+27%

Source: Legal Aid Manitoba management information system

because the expanded duty counsel program was removing many cases from the system, and thus from the specialized clinic. This points out how elements of a complex mixed model can come into conflict, and points to the necessity for integration of the components of a complex mixed model. A staff lawyer clinic designed specifically to serve a special needs clientele is, in itself, an illustration of the complex mixed model approach.

Duty counsel services in some other jurisdictions appear to operate in a similar fashion to expanded duty counsel. In the Northwest Territories, staff lawyers servicing circuit courts in remote villages tend to blend duty counsel and trial work as circumstances require. Legal aid lawyers are reported to routinely resolve cases at the duty counsel stages of proceedings. A 'presumed eligibility' system operates which ignores financial eligibility requirements unless a matter is sufficiently complex to require a legal aid certificate.<sup>69</sup>

Legal Aid New Brunswick reports that approximately thirty-five per cent of all duty counsel contacts result in completed or disposed matters.<sup>70</sup> No formal study of duty counsel services

has been carried out in that province. The nature of the matters resolved by duty counsel is not known. Duty counsel in New Brunswick is provided by private bar lawyers. It is not clear what similarities there might be between the New Brunswick and Manitoba duty counsel services.

Expanded duty counsel is a new approach to legal aid delivery that is designed to deal with that relatively large proportion of the overall case load that is of minimal complexity. These simple matters can be resolved competently by expanded duty counsel lawyers, retaining clients for a week or two until a second appearance, with a minimal amount of time, and at much lower cost than if certificates were issued to private lawyers for the same cases. Cost-effectiveness of the overall delivery system is achieved by utilizing this particular delivery mode targeted at the resolution of relatively simple legal aid cases at the early stages of the justice process. More complex cases are dealt with by private bar or staff lawyers.

#### *The Ontario Legal Aid Plan Pilot Projects*

The complex mixed model concept is an emerging approach in service delivery. Nowhere is this trend more apparent than with the certificate side (adult criminal, young offender, immigration, and family legal aid) of the Ontario Legal Aid Plan. In 1996, the Ontario Legal Aid Plan sought and received approval from the Law Society of Upper Canada, the governing body of the legal aid plan at that time, to launch an extensive series of pilot projects to test alternative service delivery methods. The pilot project initiative consists of 15 pilot projects in total, some which will be carried out in multiple sites. The pilot projects that will be put in place are as follows; in criminal legal aid: staff lawyer offices, expanded duty counsel, contracting; in immigration legal aid: an extension of the staff lawyer immigration pilot project<sup>71</sup> to encompass detention hearings, special immigration panels, contracting; in family legal aid: staff lawyer offices, contracting, expanded duty counsel, unbundled family law services<sup>72</sup>; in young offenders legal aid: staff lawyer offices, youth court counsel<sup>73</sup>, contracting for court-appointed counsel cases.

This ambitious pilot project initiative was developed in anticipation of the release of the McCamus Report on legal aid in Ontario, which was a government sponsored review of the Ontario legal aid system.<sup>74</sup> The McCamus Report recommended, among other things, experimentation with alternative delivery models.

As of late 1998, some of the pilot projects in immigration, youth, and family law are underway, or are about to be implemented. The Law Society decided to delay the implementation of the criminal legal aid pilots, since these would be more controversial among the politically powerful and conservative criminal bar. All of the pilot projects will be monitored and evaluated.

In their pilot project form, the projects are being designed and located so that they do not interact or compete with one another. However, it is clear that the projects that prove successful

will have to be implemented in such a manner that they become coherent and interdependent elements of an overall delivery system.<sup>75</sup>

The Ontario Legal Aid Plan has moved a considerable distance from being the champion of private bar delivery in the early 1990s<sup>76</sup> to having launched the most ambitious program of pilot projects on innovative service delivery in the history of legal aid in Canada. Clearly, the program of pilot projects is aiming beyond the simple mixed model of staff lawyer and *judicare* delivery toward a complex mixed model comprised of several complementary delivery modes.

### *Immigration Legal Aid In Ontario*

The delivery of refugee and immigration legal aid in Ontario is of special interest with respect to complex mixed models. During the past three years, the Ontario Legal Aid Plan has experimented with a refugee staff lawyer clinic in Toronto called the Refugee Law Office. The evaluation of the staff lawyer office demonstrated that the productivity of the clinic was not sufficient to make the clinic cost-effective, although the quality of service was high.<sup>77</sup> The reason for the low productivity was the choice, taken in order to respect right to choice of counsel in the strictest manner, not to assign applicants to the clinic. Applicants were informed about the clinic, but only as an option along with private bar lawyers. Many clients continued to gravitate toward private lawyers through informal networks of friends and family or other contacts. Thus, too many clients continued to gravitate toward private counsel through other referral channels. In the second phase of this pilot project, which is part of the pilot project initiative described above, the staff lawyer office is to assume responsibility for detention hearings. This is a previously unmet need that will augment the work of the refugee law office. Other measures are also being taken to increase the case load of the staff lawyer office.

Another immigration legal aid pilot project which is getting underway is the Specialized Refugee Panels project. Immigration cases from two particularly high volume countries, Mexico and Nigeria, will be assigned to special panels of private bar lawyers who have extensive experience dealing with refugee matters from those countries. Thus, what is emerging in refugee legal aid service, on an experimental basis, is a two-fold approach to service delivery in this area. The Specialized Panels are designed to deal with refugees from the high volume countries, with issues and problems unique to those countries of origin. The Refugee Staff Lawyer Office will continue to handle the more diverse case load from a larger number of countries, plus the detention hearings. This emerging arrangement demonstrates the essential feature of a complex mixed model; different delivery modes targeted at specific requirements within the overall service delivery system.

### *The Alberta Youth Staff Lawyer Office*

The Alberta Youth Staff Lawyer Office, which has been discussed extensively above, is an example of the development of a complex mixed model in that province. It reflects the complex mixed model idea because this is a staff lawyer office that is targeted toward servicing a specific clientele, young offenders, in cities where there is a high volume of those clients. The two staff lawyer youth offices in Calgary and Edmonton provide a variety of innovative services to meet the special needs of youth. These reach beyond the services normally provided by lawyers. These include: baby sitting provided by a downtown church so that female young offenders with children will have a place for them while appearing in court; a program of providing public transit tickets to youth to overcome transportation problems that would result in failures to appear in court; recreational activities and employment counseling aimed at crime prevention; and mental health assessments and counseling to assist young offenders to take advantage of solutions to the difficulties that may be underlying their legal problems.<sup>78</sup>

### *Assisted Self-Representation*

Assisted self-representation combines public legal information with summary advice and, possibly, some limited legal assistance. This type of limited service is designed to provide some assistance to applicants whose applications for legal aid are refused, because the legal matter does not fall within coverage provisions, or because the applicant fails, possibly by a very narrow margin, to meet the financial eligibility requirements. Assisted self-representation is a response to the increasing number of people who do not qualify for legal aid, as legal aid plans continue to cope with limited budgets.

One assisted self-representation project was attempted on an experimental basis by the Legal Services Society of British Columbia.<sup>79</sup> A number of booklets informing clients how to defend against a criminal charge were prepared by the Public Legal Education Department of the B.C. Legal Services Society. This material was provided to rejected applicants in five branch offices and community legal offices throughout the province. The results of the study showed that the legal information material did not prepare people to defend themselves effectively. However, the material was extremely useful in several other ways. The material was judged by clients to be very helpful in alerting them to the potential seriousness of their situation. A large percentage of the sample indicated that reading the pamphlets convinced them to borrow the funds to hire a lawyer. The legal information material provided useful information about sources of advice and assistance, other than legal aid, that might be available. The research indicated that an area not covered well by the original material, but a very useful type of information to be included in the future, was information about alternative measures and how to effectively present an



alternative measures option to the Crown Prosecutor. The study concluded that the public legal information was useful in a number of ways, but not primarily to prepare people to effectively represent themselves in court.

The Ontario Legal Aid Plan Pilot Project initiative includes an 'Unbundled' Family Law Services Project. Unbundled services is an assisted self representation project in family law. In this case, applicants will be issued a limited legal aid certificate for a few hours of service from a private bar lawyer to get advice or assistance in drafting documents, or to advise them about how to represent themselves.<sup>80</sup> At the time of this writing, the Unbundled Family Law Services project is just getting underway. There are no results to report at this point in time.

These two projects represent another delivery mode is emerging in Canadian legal aid. It is intended to deal with the lower priority legal matters for which legal aid plans have had increasing difficulty providing coverage in the past few years. It is a delivery mode that combines with the others to extend limited services to clients whom the legal aid plan could otherwise no longer afford to serve.

### *Complex Mixed Models*

These examples drawn from recent developments in service delivery illustrate the emergence of an approach to delivery models that goes beyond the traditional bipolar concept of a mixed model based on the staff lawyer – private bar options.<sup>81</sup> The traditional concept is a simple mixed model, as distinguished from what may be termed the complex mixed model. A complex mixed model is an integrated set of delivery modes (staff lawyers, private bar lawyers on fee-for-service certificates, expanded duty counsel, contracting) and structures (clinics) that are targeted at specific service delivery problems. The complex mixed model rests on the recognition that no one delivery mode is the best for all purposes, without qualification. Complex mixed models use a variety of delivery approaches in an integrated fashion to address some particular service delivery need. The components of a complex mixed model will vary from one jurisdiction to the next depending on the circumstances specific to that place. The specific components that are employed are essentially incidental. The essential element to the complex mixed model concept is the utilization of a range of delivery modes matched to specific delivery problems.<sup>82</sup>

## CONCLUDING REMARKS

Interest in delivery models in Canada has focused on the relative cost effectiveness of staff lawyer and private bar delivery of legal aid. The results of Canadian research carried out in several provinces points to the conclusion that staff lawyer delivery has been less expensive

than private bar delivery. For the most part, the evidence further suggests that the quality of the service provided by staff lawyers is equal to that provided by their private bar counterparts.

The Canadian research leaves one area of concern about staff lawyer delivery. There is evidence to suggest that staff lawyers plead clients guilty earlier in the criminal justice process than private bar lawyers. While this does not necessarily mean that the quality of the service provided by staff lawyers is compromised, it does suggest that staff lawyers and private bar lawyers may do their work differently. Further research should examine more closely the way in which staff lawyers and private bar lawyers do the work of representing clients.

The evidence that can be drawn from carefully designed research about staff lawyer and judicare costs, as opposed to uncontrolled comparisons based on raw data, is based on research in criminal legal aid. One evaluation of staff lawyer delivery of refugee legal aid did not find that staff lawyers were relatively cost effective compared with private bar lawyers. The evaluation concluded that this was due to low productivity of the staff lawyer office. The productivity problem was caused by the manner in which cases were assigned to the staff office. Therefore the results could not be generalized.

The Refugee Law Office study highlights the importance of productivity in any conclusion about the cost-effectiveness of staff and judicare delivery. The relative cost-effectiveness of the two basic delivery modes is a function of three variables; the level of the tariff, the sum of costs of staff lawyer salaries, benefits and overhead, and the *productivity* of the staff lawyers. A management strategy designed specifically to achieve productivity is necessary. Ultimately, cost-effectiveness must be achieved through productivity management. It does not come about automatically through some mechanism akin to the *hidden hand* in Adam Smith's economics.

The conclusion that staff lawyer delivery of criminal legal aid can be less expensive, and with no compromise to quality of service is well established. Other areas of service delivery are different from criminal legal aid, however. For example, family law cases are not so structured as are criminal cases. The issues in a family law dispute may be more complex and emotionally charged. Family law cases may be more protracted as disputes evolve over time. Legal matters in other areas of civil law would also be different from criminal law matters. The conclusions from the research in criminal legal aid delivery may not be generalizable to other areas, or at least all aspects of those types of service. Research comparing the cost-effectiveness of staff and judicare delivery in areas of legal aid service other than criminal should be carried out. The complex mixed model concept suggests, at least for heuristic purposes, that staff lawyer delivery may be better for some aspects of service delivery than for others. This specialization of delivery modes should be explored in any further research.

The delivery model debate that occurred in Canada for nearly two decades reflects an interesting history. One of the lessons that emerges is that a delivery model represents more than

simply a technical delivery option. In Canada, and elsewhere, delivery models have become burdened with a set of vested interests that have obscured the issues of cost and quality of service with rhetoric and ideology. The delivery models debate would be interesting if it were merely a ‘dust up’ between ideological foes driven by professional ethics and self-interest. It has been more than that, however. The proponents of private bar delivery have made arguments that cannot be dismissed out of hand. They have argued their case on the basis that accused persons should have a right to legal counsel of their own choice. Right to choice of counsel, it is argued, will result in the best quality of service because clients will choose the best available counsel, and that the solicitor-client relationship will be better by virtue of the trust that the client will place in a lawyer of his or her own choice. As well, it is argued that despite typically low legal aid tariffs, a private bar lawyer is more likely to mount a more aggressive defence on behalf of the client, since the private bar lawyer is free of any potentially compromising systemic relationships with the state. Nonetheless, the manner in which the delivery models debate has played itself out in Canada has stifled innovation and has been an impediment to the development of legal aid. Efforts by legal aid plans and policymakers to implement innovative pilot projects were sometimes resisted by the proponents of the existing delivery model.

Of course, one can not know if conditions in countries that are beginning to develop legal aid systems might develop in a manner so as to create the same constraining effect on innovation as has been the case in Canada. At least, the Canadian debate offers a ‘cautionary tale’ for those at the early stages of developing a legal aid system.

Even as the old debate about the advantages of staff lawyer versus *judicare* delivery lingers on, interesting new developments are emerging in delivery models. The *simple mixed model* of staff lawyer and *judicare* delivery that has framed the debate for the past twenty years is becoming eclipsed by the concept of the *complex mixed model*. The complex mixed model embodies the concept that neither the staff lawyer mode nor the *judicare* mode is categorically the best delivery option for all delivery problems. A legal aid delivery system must respond to a variety of delivery problems, reflecting different client groups, geographical factors, and types of service. Legal aid plans in Canada have recently begun experimenting with other delivery modes; contracting, specialized panels and expanded duty counsel, designed to address particular problems in legal aid delivery with more focused delivery options. The research and development agenda with respect to complex mixed models is to determine how a variety of delivery modes, targeted at specific delivery problems, can be developed into a complementary, mutually supporting, multidimensional legal aid delivery system.

## NOTES

<sup>1</sup> Patterns in Legal Aid II, Department of Justice, Ottawa, 1995; Paul Brantingham, Patricia Brantingham and Stephen Easton, Predicting Legal Aid Costs, Department of Justice, Ottawa, 1993.

<sup>2</sup> Paul Brantingham and Patricia Brantingham, The Burnaby British Columbia Public Experimental Public Defender Project, Department of Justice, Ottawa, 1981.

<sup>3</sup> Dale H. Poel, The Nova Scotia Legal Aid Evaluation Report, Entering the Third Generation, Department of Justice, Ottawa, 1983.

<sup>4</sup> P. L. Brantingham and P.J. Brantingham, An Evaluation of Legal Aid in British Columbia, Department of Justice, Ottawa, 1984.

<sup>5</sup> R. Sloan and Associates, Legal Aid in Manitoba: Evaluation Report, Department of Justice, Ottawa, 1987.

<sup>6</sup> DPA Group, Evaluation of Saskatchewan Legal Aid, Department of Justice, Ottawa, 1988.

<sup>7</sup> Patterns in Legal Aid, 2nd edition, Department of Justice, Ottawa, 1995. p. 34.

<sup>8</sup> *Ibid.*, p.34.

<sup>9</sup> *Ibid.* p. 70

<sup>10</sup> Canadian Bar Association, Legal Aid Delivery Models: A Discussion Paper, Ottawa, 1987.

<sup>11</sup> *Ibid.*, p. x.

<sup>12</sup> Teri Marlene Pristupa, A Critical Assessment of 'Legal Aid in Manitoba: An Evaluation Report (1987), 1991

<sup>13</sup> *Ibid.*, *et passim*.

<sup>14</sup> *Ibid.*, pp. 4-5.

<sup>15</sup> Teri (Pristupa) Prince, An Evaluation of Patterns in Legal Aid (2nd edition) and Predicting Legal Aid Costs, 1994.

<sup>16</sup> *Ibid.*, pp. 12 and 15.

<sup>17</sup> Colin Meredith, Response to 'An Evaluation of Patterns in Legal Aid (2nd edition) and Predicting Legal Aid Costs by Professor Teri (Pristupa) Prince'. Abt Associates, Ottawa, April

1994; and Paul Brantingham and Patricia Brantingham, Response to the (Pristupa) Prince Document of February 1994, Vancouver, May 1994.

<sup>18</sup> Departmental Committee on Criminal Legal Aid, Report to the Deputy Minister of Justice, 1993.

<sup>19</sup> Laurence E. Veniot, In the Matter of the Future of Criminal Legal Aid in New Brunswick, 1994.

<sup>20</sup> A. Currie, Legal Aid New Brunswick Global Budgeting Plan: Monitoring Report, Department of Justice, Ottawa, 1994.

<sup>21</sup> T. Agg, Review of Legal Aid Services in British Columbia, Government of British Columbia, Vancouver, 1992.

<sup>22</sup> A six month evaluation period was completely unrealistic, particularly in view of the implementation problems that would normally be expected during the early stages of any new program. Eventually, after about a year of evaluation design work, the evaluation was abandoned.

<sup>23</sup> The history of the mixed model implementation is contained in: A Program Review of the Implementation Phase of the Mixed Staff/Private Bar Model of Service Delivery, Legal Services Society, 1996.

<sup>24</sup> Contracting as a service delivery model would profoundly alter the economic relationship between the legal aid plan and the private bar, from a case-by-case fee for service arrangement toward a semi- competitive arrangement for blocks of cases. The number of suppliers of the service would potentially decrease. Contracting also presents issues with respect to right to choice of counsel, a central principle within the legal profession.

<sup>25</sup> Focus Consultants, An Evaluation of the Legal Service Society's Pre-Pilot Contracting Project, Legal Service Society, 1998. p. 18.

<sup>26</sup> Cited in Tamara Goriely, Legal Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework?, Lord Chancellor's Department, London, 1997.

<sup>27</sup> G. Singson, 'The Role of Competition in Making Grants for the Provision of Legal Services to the Poor', The Public Interest Journal, 57:1, 1991. p. 58.

<sup>28</sup> A. Crockett, Salaried Legal Services, Legal Aid Commission of Victoria, 1994. p.1.

<sup>29</sup> Canadian Bar Association, p.19.

- <sup>30</sup> See *Patterns in Legal Aid*, p. 44 and 57; and *Legal Aid Delivery Models*, p. 35 and 38.
- <sup>31</sup> For example, in some plans a case may include several matters. If a client is accused of more than one offence within a short time frame, the new legal matter is added to the certificate .
- <sup>32</sup> Paul Brantingham and Patricia Brantingham, *The Burnaby Experimental Public Defender Project: An Evaluation*, Department of Justice, Ottawa, 1981.
- <sup>33</sup> *Ibid.*, Report 1, p.9.
- <sup>34</sup> *Ibid.*, Report 7, p. 15.
- <sup>35</sup> *Ibid.*, Report 3, p. 64.
- <sup>36</sup> R. Sloan and Associates, *Legal Aid in Manitoba: An Evaluation Report*, Department of Justice, Ottawa, 1987.
- <sup>37</sup> *Ibid.*, p. 171.
- <sup>38</sup> *Ibid.*, p. 176-177.
- <sup>39</sup> The DPA Group Inc., *Evaluation of Saskatchewan Legal Aid*, Department of Justice, Ottawa, 1987.
- <sup>40</sup> The DPA Group Inc., *A Costing Substudy of the Saskatchewan Legal Aid Evaluation*, Department of Justice, Ottawa, 1989.
- <sup>41</sup> *Ibid.*, p. v.
- <sup>42</sup> RPM Planning Associates, *Evaluation of the Staff Lawyer Pilot Project*, Edmonton, 1996. p. 78.
- <sup>43</sup> *Ibid.* p. 71 to 73.
- <sup>44</sup> *Patterns in Legal Aid*, p. 34.
- <sup>45</sup> *The Burnaby Study*, pp. 8 and 9; *Patterns in Legal Aid*, p. 34.
- <sup>46</sup> Patricia Brantingham and Paul Brantingham, *An Evaluation of Legal Aid in British Columbia*, Department of Justice, Ottawa, 1984.
- <sup>47</sup> R. Sloan and Associates, *Legal Aid in Manitoba: Evaluation Report*, Department of Justice, Ottawa, 1987.

<sup>48</sup> The DPA Group Inc., Evaluation of Saskatchewan Legal Aid, Department of Justice, Ottawa, 1987. pp. 230-231.

<sup>49</sup> RPM Planning Associates Ltd., Evaluation of the Staff Lawyer Pilot Project, Edmonton, 1996. pp. 31, 48-49.

<sup>50</sup> Dale H. Poel, The Nova Scotia Legal Aid Evaluation Report: Entering the Third Generation, Department of Justice, Ottawa, 1983.

<sup>51</sup> See Patterns in Legal Aid, p.42.

<sup>52</sup> The Burnaby British Columbia Public Defender Project, Report 1, p.5.

<sup>53</sup> Legal Aid in Manitoba, p. 172.

<sup>54</sup> Patterns in Legal Aid, p. 34.

<sup>55</sup> Alister Henry and Andrew Fleming, A Literature Review of Public Defender or Staff Lawyer Schemes, The Scottish Office Central Research Unit, 1998. p. 21.

<sup>56</sup> Legal Aid Manitoba: Evaluation Report, p. 178.

<sup>57</sup> Patterns in Legal Aid, p.45.

<sup>58</sup> Legal Aid Delivery Models, p. 207.

<sup>59</sup> This concept was first introduced as the 'multidimensional mixed model' in A. Currie, The Evolution of a Multidimensional Model for Service Delivery in Canadian Legal Aid, Second International Conference on Legal Aid, Edinburgh, 1997.

<sup>60</sup> A wealth of descriptive information about legal aid systems in Canada is found in Canadian Center For Justice Statistics, Legal Aid In Canada: Description of Operations, Statistics Canada, Ottawa, 1997. Cat. No. 85-217XDB

<sup>61</sup> The Portage Legal Services Initiative, Project Report, submitted to the Department of Justice, Ottawa, 1993.

<sup>62</sup> Information supplied to the writer by Legal Aid Manitoba.

<sup>63</sup> Focus Consultants, An Evaluation of the Legal Services Society's Pre-Pilot Block Contracting Project, Victoria, B.C., 1998.

<sup>64</sup> The writer served as a research advisor to the B.C. Legal Services Society for the contracting project.

<sup>65</sup> A. Currie, *The Legal Aid Manitoba Expanded Duty Counsel Project*, Department of Justice, Ottawa, 1996.

<sup>66</sup> *Ibid.*, p. 71.

<sup>67</sup> *Ibid.*, p. 48

<sup>68</sup> Incidentally, the data shown in Table VI allow a comparison of staff lawyer and private bar costs in Manitoba using 'raw data'. As was explained above, management information system data of this type were not used in the main body of the text to discuss relative costs of staff and private bar delivery because they are not controlled for case complexity, and are therefore subject to the referral pattern bias.

<sup>69</sup> Legal Services Board of the NWT, *Legal Aid Bulletin 97-1, Topics: Presumed Eligibility for Circuit and Duty Counsel Services, and Circuit and Duty Counsel Generally*.

<sup>70</sup> *Legal Aid New Brunswick, Annual Report, 1997*. Also previous years.

<sup>71</sup> Durhane Wong-Rieger, *Evaluation of the Refugee Law Office, Ontario Legal Aid Plan*, forthcoming.

<sup>72</sup> A form of assisted self-representation.

<sup>73</sup> A form of expanded duty counsel.

<sup>74</sup> John D. McCamus, *A Blueprint for Publicly Funded Legal Services: Report of the Ontario Legal Aid Review, 3 Volumes, 1997*.

<sup>75</sup> This is the view of the writer, based on his role as Research Advisor to the Ontario Legal Aid Pilot Project Initiative, and a member of the Pilot Project Initiative Steering Committee.

<sup>76</sup> See the section above on the critiques of the Manitoba Evaluation, *Patterns in Legal Aid, and Predicting Legal Aid Costs* sponsored by the Law Society of Upper Canada.

<sup>77</sup> *Evaluation of the Refugee Law Office*.

<sup>78</sup> *Legal Aid Youth Offices: Special Initiatives*, n.d.

<sup>79</sup> A. Currie and C. McEown, *Assisted Self-Representation in Criminal Legal Aid: An Experiment in Limited Service Delivery*, Department of Justice, Ottawa, 1998.

<sup>80</sup> *Proposed Pilot Projects: Final Report, Ontario Legal Aid Plan, 1998*.



<sup>81</sup> There may be other examples of service delivery innovations that could be included here. The projects that have been included are not intended to be exhaustive, but only to illustrate the concept of a complex mixed model.

<sup>82</sup> In Alberta, staff lawyer offices were developed to provide specialized service to young offenders in the province's two largest cities. In Manitoba, contracting with private law firms in that province's largest city of Winnipeg was the approach that was chosen.

# CANADIAN LEGAL AID EVALUATIONS: COST EFFICIENCY AND COST EFFECTIVENESS LESSONS

By Professor Paul J. Brantingham\*

## OVERVIEW

### Legal Aid in Canada

**T**he Canadian system of legal aid provides legal services to poor people in order to ensure that access to justice is not restricted to the rich. Total legal aid expenditures in fiscal year 1996-97 exceeded \$536 million Canadian.

Under the Canadian *Constitution* responsibility for justice is shared between the federal government of Canada and the governments of the various provinces and territories. Since 1970, a national cost-sharing program has provided federal funds to support the operation of the various provincial and territorial legal aid programs, provided minimum coverage and eligibility standards are met.

All legal aid plans provide criminal defence services to indigent adult accused persons and to accused juveniles. The Department of Justice Canada administers federal cost-sharing funds for criminal legal aid.

All legal aid plans provide legal aid to poor persons in some civil matters. Civil law coverage includes family law (divorce, child custody) and immigration law in most jurisdictions. Civil law coverage extends to a variety of other matters in different provinces and territories (administrative law, landlord and tenant law, contract disputes, torts), but coverage varies from jurisdiction

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to jurisdiction. Human Services Development Canada and the Department of Justice Canada administer different federal civil legal aid contributions.

Federal cost-sharing contributions in criminal legal aid covered approximately 31% of net criminal legal aid expenditures across provinces and territories in the most recent year for which data are available. Federal cost-sharing contributions in civil legal aid covered approximately 21% of net civil legal aid expenditures across those provinces for which data are available in the most recent year for which data are available.

The Government of Canada has sponsored many evaluation studies and experiments aimed at finding ways to improve the legal aid system. Many of these studies have examined the cost-effectiveness or the cost-efficiency of the total legal aid system.

### **Criminal Law in Canada**

Criminal Legal Aid in Canada is part of the criminal justice system in Canada. It is related in its design and delivery to the Common Law origins of the criminal law in Canada. The criminal justice system is embedded within an adversarial system of justice. In theory, a criminal prosecution is a contest between equally capable opponents: a government prosecutor and an accused person, the defendant.

A person is accused of crime by government-employed prosecuting lawyers who are called *Crown Counsel*. Crown Counsel must prove beyond a reasonable doubt that the accused person is guilty of having committed the crime. The process of proving guilt is controlled by procedures set forth in the *Criminal Code* of Canada and by the elaborate rules of the law of evidence. Guilt may be determined by a plea of guilty entered voluntarily in open court by the defendant or it may be determined by trial before a judge (most cases) or before a judge and jury (very serious cases).

A defendant is not obliged to present a defence or do anything at trial. For instance, the defendant is not required to give evidence or answer questions put by Crown Counsel or by the Judge or Jury. If the prosecution case is weak, it may be abandoned (stayed or withdrawn) by the prosecutor, or, it may be dismissed by the judge after all prosecution evidence has been presented. Thirty percent of all prosecutions for crime conducted in the provincial courts of Canada in 1996-97 ended in this way. Only 64% of cases resulted in convictions. (Carrière, 1998:7).

The defendant may choose to mount a defence. Following the same complicated rules of evidence that control the prosecution, the defendant has the right to challenge all prosecution evidence, to cross-examine all prosecution witnesses, to call defence witnesses, to offer other evidence and to testify personally, under oath. (If the defendant chooses to testify he must then also answer questions put to him by Crown Counsel in cross-examination.)

Defence is a technical business that requires the services of a lawyer. This can prove very expensive, even in simple cases. Canadian trial lawyers may charge clients \$250 to \$450 per hour. Even a simple defence in a very simple case may require 8 to 10 hours of a lawyer's time. A complicated defence in a serious case may involve 1,000 hours or more of lawyer time. The costs of defence can quickly exceed the ability of the accused person to pay.

The theory of adversarial justice holds that justice will be done if the legal adversaries – the prosecution and the defendant – are relatively equally matched in terms of technical legal skills so that each can present the best possible argument for its position before the judge (and jury). If one side overmatches the other in legal skills and resources, a biased and unjust decision may result: innocent people may be convicted or guilty people may go free.

Legal aid in criminal cases is intended to prevent improper convictions by ensuring that the defendant has a lawyer to present any defence he wishes to mount. The evidence indicates that there is a substantial need for this social service. The historical evidence indicates that mistaken convictions attributable to lack of counsel were a problem in Canada prior to 1970. Conviction rates dropped by about 18 percent following the introduction of the national cost-shared legal aid system. Current data indicate that the cost of mounting a defence is beyond the reach of most criminal defendants. During 1996-97, criminal legal aid was provided in one-fourth of all criminal cases decided in Ontario. Criminal legal aid was provided in one-third of all criminal cases decided in Alberta, in more than half of all criminal cases decided in Nova Scotia, and in more than 90 percent of all criminal cases decided in Newfoundland. (Estimated from data found in Statistics Canada, 1998; Carrière, 1998.)

These data are even more powerful than they seem at first glance. The Canadian legal aid program provides lawyers to poor adults accused of crimes only when there is a strong likelihood of incarceration upon conviction. Legal aid is not provided, regardless of how poor the defendant might be, if a conviction would be likely to result in probation, or a fine, or some other sanction other than incarceration. Only one-third of convicted offenders received any kind of sentence to imprisonment in Canada in 1996-97 (Carrière, 1998:7). This means that legal aid must be offered to nearly all offenders facing potential prison sentence in most Canadian jurisdictions. Criminal defence has largely become a state-paid function in Canada.

## **Governmental Role**

Legal Aid in Canada involves the Government of Canada, the governments of each of the ten provinces and two territories, and government-funded agencies that provide the direct services to those needing legal aid. The Government of Canada has general responsibility, through agreements with the provinces, for providing partial funding to each of the ten provinces for

persons receiving criminal legal aid services. The provinces and territories have legislation covering the specific services provided within their respective jurisdictions. There is similarity in the provincial legislation as well as some differences.

Most importantly, from a cost efficiency and cost effectiveness perspective, the administrative structures are different from province to province. Some provinces (Prince Edward Island) provide legal aid services directly from government agencies. Some provinces (British Columbia, Manitoba, Quebec) enter into legislative and contractual agreements with independent non-governmental organizations for the provision of legal aid services. Some provinces (Ontario, New Brunswick, Alberta) have entered into agreements with the provincial lawyers' organizations, the Law Societies that govern professional conduct, to provide legal aid services.

This variety in the structural arrangements used to provide legal aid in Canada makes evaluations and studies of legal aid operations potentially valuable in understanding the strengths of different administrative structures. It also makes Canadian legal aid research useful in understanding the costs of providing services.

## **Services Covered**

### *Criminal Legal Aid*

The focus of this article is on the effectiveness and efficiency of criminal legal aid. All provinces provide criminal legal aid coverage. The coverage usually includes three types of services: Duty Counsel, Advice, and Representation.

*Duty Counsel.* Duty counsel provide emergency legal representation services to otherwise unrepresented defendants making a first appearance in criminal court. Duty counsel services are provided without regard to legal aid eligibility. Duty counsel are often empowered to take legal aid applications.

Duty counsel services may be provided by salaried staff lawyers, as in Toronto, or may be provided by members of the private bar retained for a fixed period of time for a fixed fee regardless of the number of separate defendants served, as in Vancouver. Local regulations may or may not permit a lawyer to continue to represent a client initially contacted while providing duty counsel services.

Some provinces provide duty counsel services in civil matters. These are normally provided in association with and as a by-product of criminal duty counsel services.

*Advice and Summary Service.* Most Canadian legal aid programs provide some form of limited formal legal advice and summary services without regard to the formal legal aid eligibility of the person receiving services. *Advice* is typically provided prior to any legal aid application by the client. *Summary services* such as making a telephone call or writing a letter on behalf of the

client are typically provided after a formal application for legal aid has been made and the application has been refused. In some provinces, such as Ontario or Nova Scotia, applications for legal aid may be approved for summary services only.

*Representation.* Representation services constitute the most important function of Canadian legal aid programs. Full legal services are provided to approved clients. The lawyer provides the same services a privately retained lawyer dealing with the same matter would provide. Most specifically, the defendant is represented in criminal court.

### *Civil Legal Aid*

Legal Aid services are provided for civil matters in most Canadian provinces. The most important services, by volume, involve family law issues: divorce; alimony; child custody. In 1996-97, civil legal aid accounted for anywhere from 22 percent of legal aid expenditures for direct services (advice, summary service and representation) in Prince Edward Island to 67 percent of direct legal aid expenditures in Quebec. More than half of direct legal aid expenditures in Ontario and British Columbia went for civil legal aid.

## **Service Delivery Models**

Legal Aid is provided in different ways depending on the province. Generally the administrative structures may be classified into three categories: Staff lawyer model; Private Bar model; and Mixed private and staff model

### *Staff Lawyer model*

The staff lawyer model provides legal services through salaried staff lawyers. Lawyers are hired by the legal aid plan and provide services to legal aid applicants as part of their normal duties. Staff lawyer salary scales and caseloads are important elements in cost-efficiency and cost-effectiveness.

### *Private Bar model*

The private bar model provides legal services to legal aid applicants through private lawyers. Private lawyers may be retained on a case by case basis. Payment will be made according to some fixed fee schedule. Some legal aid plans set an hourly tariff that remunerates at a fixed rate per hour. Some legal aid plans use a transactional bloc tariff that remunerates at a fixed rate for completion of specific units of legal work such as representation at first appearance, representation at a preliminary hearing, or representation at trial. The structure of the fee tariff and the

monitoring of private lawyer billings are important elements in cost-efficient and cost-effective legal aid programs.

Recent private bar delivery models have begun to experiment with contractual models in which lawyers contract to provide services to a bloc of cases (say, 50 or 100 cases) for a fixed fee. This approach can be cost-efficient for the legal aid plan, but holds a potential for reduced effectiveness of services.

#### *Mixed Model*

Mixed model systems provide legal aid services to applicants through some mixture of salaried staff lawyers and referral to private lawyers. Cost-efficiency and cost-effectiveness can be high in mixed models provided that the legal aid plan monitors quantity and quality of services in relation to costs on a continuing basis and reassigns work in order to optimize quality while minimizing cost.

## EVALUATION MODEL

### **Overview**

The standard Federal/Provincial agreement on criminal legal aid provides for periodic independent evaluation studies to assess the extent to which effective legal aid services are available on a uniform basis at reasonable cost to Canada and the provinces and territories. Each evaluation is funded jointly by Canada and by the province or territory where the evaluation is conducted.

**Cost-Efficiency** modeling is intended to find ways to meet stated standards in the quantity and quality of legal services provided to clients at the lowest possible cost. **Cost-Effectiveness** modeling is intended to find ways to maximize the quantity and quality of legal aid services provided to clients for a fixed quantity of money.

Development of alternative cost-efficiency and cost-effectiveness models for improving a national legal aid program requires evaluation of legal aid agency *performance* in four issue areas: Accessibility; Eligibility; Effectiveness and Impact; Cost.

#### *Accessibility*

Canada supports a national legal aid program, in part, to ensure fair, equitable and uniform access to legal aid services across the country. Achieving this goal depends, to a substantial degree, on the accessibility of legal aid services to those who need them.

*Accessibility* has four dimensions: awareness; availability; location; and approachability. People must be *aware* of the legal aid program – what it covers and what circumstances make people eligible for it – in order to access services. Legal aid must be *available* – open for business and able to provide service when people need it – if people are to use it. Legal aid intake points must be *located* so people can reach them with reasonable ease if they are to use legal aid services. Legal aid must be *approachable* – it must have a business style that is congenial rather than frightening to potential clientele – or people may not seek legal aid when they need it.

### Results from Evaluations

When addressing the issue of accessibility, the jurisdiction-based evaluations completed to date have generally found highly varied use of legal aid services. The evaluations looked at patterns within jurisdictions. They generally found that the utilization rate (i.e., the number of people receiving criminal legal aid per unit volume of population) seemed to depend more on the existence of a nearby legal aid office than on either the crime rate of the area or the poverty rate of the area.

The inter-jurisdictional variation in legal aid utilization rates across the provinces and territories of Canada is quite high. Utilization rates vary quite widely. The evaluation evidence indicated that this variation was strongly related to the number of access points that provided the legal aid programs in the different provinces but only weakly related to presumptive indicators of a need for legal aid services such as the crime rate or measures of economic need.

The pattern observed in the evaluations still appears valid. Table I provides the most recently available data on legal aid utilization rates. Numbers of approved criminal and civil legal aid applications per 1,000 population are shown for each of the 10 provinces and for Canada as a whole. The correlation between the crime rate and the criminal legal aid utilization rate is low ( $r = 0.28$ ). That is, variations in the crime rate can explain only about 8 percent of the variation in the criminal legal aid utilization rate. Unemployment is a logical indicator of need for legal aid. Yet the correlation between unemployment rates and criminal legal aid utilization rates is very low ( $r = 0.11$ ) and explains only 1 percent of the variation. The correlation between unemployment and civil legal aid utilization rates is weak but negative ( $r = -0.21$ ).

The method used by different legal aid plans to make legal aid services available and accessible varies across Canada and across individual provinces. Some jurisdictions rely heavily on the private bar; some make heavy use of staff lawyers; others use more balanced combinations of staff lawyers and private lawyers to deliver services. Some jurisdictions depend primarily on staff offices to provide legal aid; others have clinics and community law offices as well. Still other jurisdictions use members of the private bar as local and regional access points for those in need



of legal aid. Since initial legal services are provided to arrested persons before and at initial court appearances through duty counsel programs in all Canadian jurisdictions, duty counsel services often serve as legal aid access points. In addition, defence counsel travel on circuit to provide criminal legal aid services in remote areas. Circuit locations, though open only occasionally and briefly, also provide legal aid access points.

TABLE I. Legal Aid Utilization Rates per 1,000 population 1996-97

Jurisdiction	Criminal Legal Aid Utilization Rate	Civil Legal Aid Utilization Rate	Crime Rate 1997	Unemployment Rate 1997
Newfoundland	14	5	557	18.8
Prince Edward Island	8	1	680	15.1
Nova Scotia	10	7	821	12.3
New Brunswick	2	0	622	12.9
Quebec	7	13	662	11.4
Ontario	5	5	734	8.5
Manitoba	8	8	1095	6.6
Saskatchewan	15	6	1212	6.0
Alberta	7	3	913	6.0
British Columbia	8	6	1287	8.7
Canada	8	9	836	9.2

Source: Statistics Canada, 1998; Kong, 1998; CANSIM.

Legal aid utilization rates within individual jurisdictions appear to depend most heavily on the structure and location of the legal aid access points:

- In British Columbia, regional variations in the utilization rates for criminal legal aid depended most strongly and directly on variations in the numbers of legal aid intake court workers per capita and in the numbers of legal aid staff per capita. Variations in civil legal aid utilization rates in family law matters depended most strongly on variations in the number of legal aid staff per capita.
- In Manitoba, variations in both the criminal and the civil (family law) legal aid utilization rates were most strongly related to the presence or absence of a permanent legal aid office in the area. The criminal legal aid utilization rate was 50 percent higher in regions with a legal aid office than in regions without a resident legal aid office. The civil legal aid utilization rates in regions with a legal aid office were double those of regions without a legal aid office.
- The Ontario, evaluation found a different pattern. Ontario legal aid areas were apparently defined on the basis of *homogeneity* of legal aid access points and delivery mode. With access *standardized*, criminal legal aid application rates correlated strongly ( $r = 0.79$ )

with criminal court charge rates and with other logical predictors of need for criminal legal aid including the proportion of Aboriginals in the population, the divorce rate and the incidence of low income families. The civil (family law) legal aid application rate was strongly correlated with the male unemployment rate and the immigration rate.

A related question is whether legal aid utilization rates are consistently related to the type of service delivery mode. The criminal legal aid utilization rate is strongly related to the relative proportions of cases handled by staff lawyers and by private lawyers on referral. In 1996-97, criminal legal aid utilization rates varied directly with the proportion of cases handled by salaried staff lawyers ( $r = 0.79$ ). That is, criminal legal aid utilization rates rose as the proportion of those cases assigned to staff lawyers increased. Almost two thirds of the variation in criminal legal aid utilization rates could be attributed to the mode of delivery ( $R^2 = 0.63$ ). The civil legal aid utilization rate is *not* as strongly related to the relative proportions of cases handled by staff lawyers and by private lawyers on referral ( $r = 0.31$ ). Less than one-tenth of the variation in civil legal aid utilization rates can be explained by mode of delivery ( $R^2 = 0.9$ ).

### *Eligibility*

The aim of the national legal aid system in Canada is to ensure that all residents of Canada who are in essentially similar legal and economic circumstances are treated similarly with respect to their eligibility for legal aid. The standard legal aid agreement between the Government of Canada and the various provincial and territorial governments specifies particular offence categories that must be granted legal aid and specifies that eligibility criteria must be sufficiently flexible to permit equitable treatment in the result.

Eligibility decisions typically have two components: a determination that the applicant is financially eligible; and a determination that the type of problem that the applicant has is one that is covered by the legal aid plan. Provinces set financial eligibility requirements.

Criminal legal aid should be provided to financially eligible adult applicants who are charged with an indictable offence or with a summary conviction offence where there is a substantial likelihood of imprisonment, a custodial sentence, or the loss of a means of livelihood upon conviction. Coverage is also provided for extradition proceedings and for some appeals. Legal aid is generally available for young offenders (aged 12 to 18) when it is in the best interest of the young person to be represented by counsel and he/she is unable, personally, to afford counsel. Legal aid is also provided to young persons for whom the court, in its discretion, has ordered counsel appointed regardless of other circumstances of eligibility.

Eligibility evaluation issues in Canada have asked whether the flexibility requirement is met in practice and whether the application of eligibility rules results in differential treatment of

persons in substantially similar circumstances in different places. Federal evaluation efforts have focused on two measures: legal aid utilization rates, and the representational consequences of eligibility rules and decisions.

## Results From Evaluations

The various provincial legal aid evaluations generally found that the eligibility criteria used in the studied jurisdictions were relatively *inflexible*. Financial eligibility determinations were sometimes found delegated to specially trained eligibility assessment staff, but were most commonly found delegated to paralegals, intake staff or clerical staff. In the result, this delegation pattern was found to produce widely varied, but still inflexible, applications of eligibility criteria. Inflexible income guidelines were found in use in five of the six major federal evaluation studies.

Fixed income tables were found to be in use to determine financial eligibility for legal aid in seven of the twelve Canadian jurisdictions. For example, Saskatchewan was found to be using, as its sole criterion for determining financial eligibility, the fixed income table used to determine whether the applicant would qualify for provincial welfare payments. In Ontario, determination of financial eligibility was delegated to the provincial Ministry of Community and Social Services which used a fixed income table. British Columbia used fixed income tables to determine eligibility from 1982 until early 1990.

Fixed eligibility criteria appear to be applied with even less flexibility in periods of economic restraint. In British Columbia, during the economic recession of the mid-1980s, it was reported by various legal aid staff that persons who called before coming into a legal aid office were screened according to fixed income tables and turned away over the telephone.

It has been difficult for evaluation studies to test the impact of eligibility decisions. Historical data indicate that conviction rates dropped by about 18% following the implementation of the national legal aid program. This suggestive historical pattern cannot be tied directly to legal aid: we do not know the status (undefended, defended by privately engaged counsel, defended by legal aid paid counsel) of any of the defendants whose cases make up these historical statistics.

Only a little is known, so far, about what happens to accepted and rejected legal aid applicants. The British Columbia evaluation presented the results of one application trace that may illustrate a common pattern. A small sample of Vancouver applicants, comprising both those whose legal aid applications were rejected and those whose were accepted, was traced through the court system. Table 2 presents the incarceration rates for accepted and rejected applicants who were found guilty. Table 3 presents representation patterns for all applicants studied.

TABLE II. Incarceration Patterns: Vancouver Applicants Who Were Convicted, October, 1982

Application Status	Jail	No Jail	Total
Accepted	74 (68.5%)	34 (31.5%)	108
Rejected/Legal Coverage	5 (13.5%)	32 (86.5%)	37
Rejected/Financial Reasons	5 (62.5%)	3 (37.5%)	8
Rejected/Legal Coverage but financially eligible	1 (33.3%)	2 (66.7%)	3

Table II shows that legal aid staff were able to make a fairly accurate estimation of the likelihood of incarceration upon conviction, the key *substantive* ground for determining whether to approve an application for criminal legal aid. Only 23 percent of the rejected applicants were jailed upon conviction. In contrast, more than two-thirds of the accepted applicants were jailed upon conviction.

Table III displays representation patterns found in the British Columbia evaluation. More than a quarter of the rejected applicants with known outcomes appeared in court without representation. Only a small number of persons rejected for financial eligibility reasons proceeded to court without representation. Almost 70 percent of those rejected for financial eligibility only and almost 43 percent of those rejected for legal coverage reasons only still retained private counsel. Conversely, notice that those who were rejected solely on legal coverage grounds were most likely to end up unrepresented.

TABLE III. Representation Patterns: Vancouver Applicants, October, 1982

	Unrepresented	Legal Aid Lawyer	Private Lawyer	UBC Law Student	Unknown
Accepted	0	31 (100%)	0	0	0
Rejected: Legal Coverage Only	16 (22.9%)	0 (0%)	30 (42.8%)	20 (28.8%)	4 (5.7%)
Rejected: Financial Reasons Only	3 (13.0%)	0 (0%)	16 (69.6%)	1 (4.4%)	3 (13.0%)
Rejected: Both Reasons	3 (50.0%)	0 (0%)	2 (33.3%)	1 (16.7%)	0 (0%)

In the Saskatchewan evaluation, where persons appearing in court without counsel were interviewed, most stated that they had opted against retaining a lawyer because they did not believe that their problem warranted the investment of time or money necessary to obtain counsel. In the Nova Scotia evaluation, it was reported that a third of imprisoned persons had

been unrepresented at trial. In New Brunswick, more than half of legal aid clients said that they would have gone unrepresented had their applications for legal aid been rejected.

Findings on the impact of going to court unrepresented differ. A study conducted in Toronto early in the history of the Ontario legal aid plan maintained that unrepresented defendants were better off than defendants represented through legal aid (Wilkins, 1975). In a more recent study of administrative tribunal cases, provincial evaluators in Quebec argued, in contrast, that:

- persons who appear at the tribunal hearing obtain better outcomes than persons who do not;
- persons who are represented by laymen obtain better outcomes than persons who represent themselves;
- persons who are represented by private lawyers obtain better outcomes than persons who are represented by laymen; and
- persons who are represented by legal aid staff lawyers obtain better outcomes than persons represented by private lawyers (Gervais & Cloutier, 1983).

### *Effectiveness and Impact*

The purpose of funding a legal aid plan in an adversarial judicial system is to ensure that the system works properly. This is accomplished by ensuring that the legal services provided through legal aid plans are effective, competent, quality services.

**Effectiveness** issues revolve around measures of the quality of legal services provided, and the results produced by those services. **Impact** issues revolve around the effects legal aid services have on the client's situation, the operation of the justice system, and perceptions of the fairness and efficiency of the justice system.

Determining the quality of legal services is complicated. To date, no common lawyers' professional or governing body anywhere has managed to develop an agreed set of measures or methods for assessing the quality of legal services. Moreover, courts have so far addressed the issue of the quality of legal services only in terms of minimum standards of professional competence. In the absence of professional action in this arena, evaluators have been able to ask only limited questions and use only limited techniques in addressing the quality of legal aid services.

Federal evaluation efforts have assessed effectiveness and impact issues using two measures: *conviction and sentencing outcomes* in similar cases handled through different modes of legal aid delivery, and *surveys of informed opinion* about the quality of legal aid services.

## Results from Evaluations

*Outcome Analysis.* One of the central approaches to measuring the quality of criminal legal aid services has been to assess criminal case outcomes. This is particularly important because much American legal aid literature and some older Canadian legal aid literature, has argued that criminal defence services provided through legal aid plans are inferior to services provided by privately retained lawyers. That is, it is claimed that when persons with identical criminal histories are prosecuted for identical criminal acts, those defended through legal aid are more likely to be convicted and are more likely to receive more severe sentences than those defended by privately retained counsel.

Four evaluations – the Burnaby Public Defender evaluation, the British Columbia evaluation, the Saskatchewan evaluation, the Manitoba evaluation -- studied the outcome of cases handled by salaried legal aid staff lawyers and by private lawyers taking legal aid cases on referral. All of the evaluations reached the same results:

- staff lawyers spend less time per case than private lawyers;
- staff lawyers tend to plead clients guilty earlier and more often than do private lawyers;
- similar proportions of staff and private lawyer clients are convicted;
- staff lawyer clients draw fewer jail terms than private lawyer clients.

The Manitoba evaluation introduced statistical controls for clients' prior records and for types of cases. It found that even with these controls in place, guilty outcome rates for staff and private lawyer clients were not statistically different; but staff clients received fewer jail terms than private lawyer clients. In break and enter cases, staff clients drew jail sentences in 18.7 percent of the cases; private lawyer clients received jail sentences in 34.8 percent of the cases. In serious theft cases, staff clients received jail sentences in 13.6 percent of the cases; private lawyer clients received jail sentences in 27.6 percent of the cases. Only in assault cases did staff and private lawyer clients receive equal proportions of jail terms. Moreover, the lengths of jail sentences imposed on staff and private lawyer clients who were jailed were statistically indistinguishable.

Less thorough examinations of case outcomes conducted during the course of evaluations in New Brunswick and Ontario also tend to support the general patterns observed in the four evaluations that focused on the issue.

## Satisfaction Surveys

Surveys of Canadians' opinions about the quality of legal aid, notwithstanding the issue mentioned in the preceding section, are remarkably consistent and upbeat: clients are satisfied; lawyers believe that legal aid services are generally competent; and judges believe that legal aid lawyers are generally competent.

### *Client Satisfaction*

Canadian legal aid clients are very satisfied with the services they receive from legal aid. Table IV summarizes the evaluation data. Despite differences in populations surveyed and the specific phrasing of questions, a consistent and strong pattern emerges out of seven evaluation studies.

TABLE IV. Client Satisfaction with Legal Aid Services

Evaluation	Percent Satisfied
New Brunswick	96 % unconvicted 83 % convicted
Nova Scotia	89 %
Quebec	82 %
Manitoba	87 % "case well handled"
Saskatchewan	74 %
British Columbia	85 %
Burnaby Public Defender	86 %

### *Opinions of the Bench and Bar*

Evaluations in New Brunswick, Quebec and Saskatchewan report high levels of judicial satisfaction with the quality of services provided by lawyers handling legal aid cases. In Manitoba, 91 percent of respondent judges rated the quality of legal aid services as of "good" or "high" quality. General judicial opinion, however, appears to hold that the quality of criminal legal aid practice is higher than the quality of civil legal aid practice.

The private bar in general is less sanguine about the quality of legal aid work than either clients or the judiciary. Still, opinions are positive.

- In Ontario, a majority (57 percent) of those lawyers taking legal aid cases maintain that the quality of service provided to legal aid certificate clients is as good as or better than the quality of work provided to private clients.

- In Saskatchewan, almost three-quarters (73 percent) of respondent lawyers said that legal aid work is as good as or better than work done by the private bar for private clients.
- Crown prosecutors in Manitoba rated legal aid staff lawyers better than private defence counsel; however, the private bar judged staff lawyers to be weaker than private defence counsel.
- In Nova Scotia,
  - 89 percent of private bar respondents said that legal aid staff lawyers were as good as, or better than, private lawyers at criminal defence;
  - 88 percent said legal aid staff lawyers were as good as, or better than, private lawyers on family law matters;
  - 53 percent said that legal aid staff lawyers were as good as, or better than, private lawyers at administrative law;
  - but 58 percent said that legal aid staff lawyers were not as good as private lawyers in their handling of civil matters.

### *Cost*

The final set of evaluation issues considered in Canadian evaluations of legal aid revolves around cost. The Government of Canada, the governments of the various provinces and territories, and the operators of the various legal aid plans must be concerned with the cost of different strategies for delivering legal aid. Any service should be provided at the lowest cost consistent with competent, quality work.

Cost must be monitored carefully. During the late 1980s and early 1990s, the cost of the Canadian legal aid system went out of control. As shown in Figure 1.1, costs skyrocketed, tripling between 1986 and 1995 from less than \$200 million to more than \$640 million. This occurred during a period in which inflation was relatively low, crime counts increased by only 16 percent and the number of approved legal aid applications increased by only about 50 percent. Average cost per approved application increased from \$417 in 1986 to \$914 in 1995. This increase outstripped the willingness of the federal and provincial governments to pay. Legal aid plans in several provinces were forced to the edge of bankruptcy and had to reduce both expenditures and services.

Several cost issues are explored in the Canadian evaluation studies.

- The first issue involves a determination of the cost of services provided in different locations through different delivery strategies.



- The second issue involves the relative cost-efficiency and cost-effectiveness of different delivery strategies. There is always a conceptual tradeoff between the cost of a service and the quality and effectiveness of that service. The object in conducting evaluation costing is to identify optimum strategies that can provide the highest quality legal services at the lowest cost.
- The third cost issue is the rate of compensation paid to lawyers who provide legal aid services.

### Results From Evaluations

Evaluations in five provinces that use both staff lawyers and private bar referrals to handle the legal aid caseload have all demonstrated that cases handled by staff counsel cost less than cases handled by private lawyers on referral. Table V sets out comparable findings on criminal case costs from four individual evaluations. Similar findings were made with respect to the average cost of family law cases.

**TABLE V. Average Cost per Case, Criminal Cases, Evaluation Study Findings**

	Staff Lawyer	Private Bar
Nova Scotia (1981-82)	\$ 122	\$ 739
Quebec (1980-81)	\$ 105	\$ 214
British Columbia (1980)	\$ 106	\$ 192
Manitoba (1987)	\$ 121	\$ 273

The Quebec Ministry of Justice maintains an on-going monitoring system for its legal aid plan. Cost analysis is central to its annual reports. Annual data show a continuing cost advantage for the staff lawyer mode of delivery, even though the size of the differential fluctuates with adjustments to staff lawyer salary scales and to private bar tariffs.

There may be many reasons for the observed differences in cost. The Burnaby Public Defender and Manitoba evaluations, for instance, found that private lawyers spent more time, on average, per case than did staff lawyers. This might explain the cost differentials.

Another explanation might be that the more difficult cases and the more difficult clients are referred to the private bar rather than kept by legal aid staff lawyers. This would necessarily drive up the cost of cases handled by the private bar.

A third explanation might be that staff lawyers are forced to handle inappropriately high caseloads. Lower costs should be interpreted, in this explanation, as a result of inadequate time spent on cases by staff lawyers.

Another possible explanation is that staff lawyers are experienced and efficient, while the junior private lawyers who often actually handle legal aid cases are less experienced, less efficient, and consequently more expensive on average.

The Canadian legal aid evaluations found no substantial support for the differential case difficulty explanation for the observed differences in average cost per case. These cost differences were observed in the Burnaby Public Defender study even though cases were randomly assigned to staff lawyers or to the private bar, statistically controlling for differences in case and client difficulty. The cost differences observed in the Manitoba evaluation remained strong even when charge and prior record were statistically controlled.

When the tariff system permits billing by hour, lawyers have an incentive to bill for the maximum allowable hours. Alberta provincial evaluators referred to this practice as “strategic billing;” Quebec provincial evaluators have called it “bill padding.” Although lawyers across Canada almost universally condemn the legal aid tariffs in their own jurisdictions as providing inadequate compensation, staff salary schedules pay lower effective hourly rates than the legal aid referral tariffs.

The observed cost differences cannot be explained in terms of differential case outcomes. Staff lawyer clients are convicted no more often than are private bar clients, and staff clients tend to receive fewer jail sentences. As the Manitoba evaluator pointed out, although private lawyers spend more time, on average, per legal aid case, the extra time has no measurable impact on case outcomes and may therefore be an indicator of inefficiencies.

On the other hand, interview data suggest that private lawyers develop better relationships with their clients than do staff lawyers. When combined with data on client satisfaction, the cost data observed in the legal aid evaluations raise questions about the cost efficiency and cost effectiveness of legal aid in most jurisdictions. Legal aid plans may be paying premiums to the private bar largely to help maintain high levels of client satisfaction with private lawyer services.

### *Marginal Costing*

The Saskatchewan legal aid evaluation undertook a preliminary study of marginal costing: What would happen to costs for criminal legal aid if the private bar referral rate were increased from current levels? (In a jurisdiction primarily using private bar referrals to handle the legal aid case load, the comparable question would be: What would happen to costs and cost-efficiency if the use of staff counsel were increased?)

In Saskatchewan, the marginal cost of handling additional legal aid cases through referrals to private lawyers appeared to be higher than the marginal cost of handling them through the extant staff lawyer system. The *maximum* estimate of marginal cost for the staff system was \$240

per criminal case. The *minimum* estimate for referral of criminal cases to members of the private bar was \$285. For a conversion to 100 % referral to the private bar, the Saskatchewan evaluators estimated the marginal cost at \$676 per case for criminal cases. A comparable substantial increase in marginal cost was also estimated for civil legal aid in family law matters.

It should be reiterated that the observed cost differences are probably related in a substantial way to differences in the salary structures for staff lawyers and in the equivalent hourly rates paid private lawyers under the legal aid tariffs. If the salary structure were increased substantially in relation to the tariff rates, the observed cost differences would decrease or perhaps disappear. Similarly, if the effective tariff rates were increased substantially in relation to existing staff lawyer salary structures, the observed differences in cost would increase.

Table VI provides an estimate of full-time equivalent billings for the provinces and territories for expenditures in 1988-89. This estimate suggests that at that time lawyers taking 300 legal aid cases a year could expect to bill the legal aid plan anywhere from a low of about \$50,000 in Prince Edward Island to almost \$298,000 in Ontario. Although these estimates were controversial when first advanced, they were subsequently confirmed by audits of legal aid payments to individual lawyers in various provinces.

**TABLE VI. Projected full-time Equivalency Gross Pay**

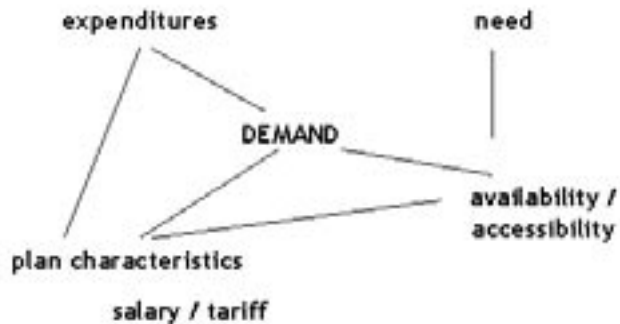
Jurisdiction	180 Cases	200 Cases	300 Cases
Quebec			
Ontario	\$178,642	\$198,491	\$297,737
British Columbia	\$ 75,583	\$ 83,859	\$125,789
Newfoundland	\$ 61,335	\$ 68,150	\$102,225
Prince Edward Island	\$ 30,378	\$ 33,754	\$ 50,630
Nova Scotia	\$ 64,381	\$ 71,535	\$107,302
New Brunswick	\$111,110	\$123,455	\$185,183
Manitoba	\$ 73,583	\$ 81,759	\$122,638
Saskatchewan	\$ 44,412	\$ 49,346	\$ 74,019
Alberta	\$ 92,881	\$103,201	\$154,801
Northwest Territories	\$ 87,410	\$ 97,123	\$145,684
Yukon	\$134,814	\$149,793	\$224,690

Associated (although not necessarily consciously) with these differential work volumes, *judicare* lawyers have been found to opt for trial more frequently than the staff lawyers. This, depending on tariff levels and salary levels, could produce higher legal aid costs and will produce higher court costs.

## A MODEL FOR COST-EFFECTIVENESS AND COST-EFFICIENCY EVALUATION

Figure 2 provides a framework for consideration of cost-effectiveness and cost-efficiency in light of the findings of the Canadian evaluations. Plan expenditures are a function of demand for legal aid and plan characteristics. Demand for legal aid, which represents formal requests for legal aid, is a function of the need for legal aid as expressed through the screen of availability and accessibility. Plan characteristics include the form of legal aid delivery – staff model, private bar model, mixed model -- and the specifics of the salary and private bar tariff. Availability and accessibility are a function of plan characteristics and the number of different contact points – places where people can apply for legal aid. The Canadian experience indicates that all of these must be monitored in order to provide efficient and effective legal aid services at reasonable cost. Happily, the Canadian experience indicates that the quality of services lawyers provide under any arrangement is likely to be high.

FIGURE II. A Legal Aid Evaluation Model



## MEASUREMENT FOR LEGAL AID MONITORING

In measuring the need for legal aid, a number of predictor variables have proven worth considering in the Canadian evaluation studies. These variables include:

- Total Population
- Males 15-24
- Males over 15

- Persons never married
- Persons separated
- Persons divorced
- Number of female single parents
- Total number of families
- Number of persons who have changed residence locally
- Number of migrants
- Population above 15
- Mean income
- Unemployment rate
- Real income per capita
- Crimes known to the police
- Number of persons charged by police or Procuratorate
- Number of persons charged according to court records

For statistical analysis in assessing the availability of legal aid services, the following variables have proven useful:

- Number of lawyers providing legal aid services
- Number of support staff providing services
- Number of private bar members providing services
- Number of superior court locations
- Number of lower court locations
- Number of traveling circuit court locations
- Total court personnel
- Per capita expenditures on prosecution
- Total number of legal aid offices

In tracking the model, it is also important to have information on staff lawyer salaries and caseloads; and on tariff schedules for payment of private lawyers who handle cases for the legal aid system. Expenditure and encumbrance data should be readily available from legal aid organizations.

With these data it is possible to track expenditure trends against anticipated trends in legal aid demand and predict cost trends. These predictions can then be used to adjust the system in different ways to increase cost-efficiency or cost-effectiveness. For instance, it would be possible to force efficiencies by adjusting legal aid support payments to agencies to reflect what would be needed by the most efficient agencies only. This would put pressure on inefficient agencies to become more efficient. Alternatively, it should be possible to fix the amount of legal aid support, then work with agencies to increase the quantity of services provided. The Canadian experience indicates that substantial increases in quantities of service can be realized before quality of service begins to decline.

## SUMMARY

The Canadian experience in legal aid evaluation has established the importance of monitoring the cost-efficiency and cost-effectiveness of legal aid organizations and services. Attention should be paid to the structure of the legal aid delivery system, to the number and location of legal aid intake points, and to the structure of the remuneration paid to lawyers who provide services. Failure to do this can cause the system to spin out of control. Attention to these issues can help maintain an optimal system.

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# REVIEW OF LEGAL AID IN CHINA

By Dr. Vincent C. Yang\*

## INTRODUCTION

### The Review

**R***eview of Legal Aid in China* is part of the results of the initial phase in the CIDA-supported China-Canada Legal Aid Legislative Research Co-operation Project. It is a brief review of the development and present practice of legal aid in the People's Republic of China. This *Review* provides an overview of the development of legal aid in China, highlights the main aspects of existing legal aid programs, and concludes that there is a need for a well-defined legal framework to establish a modern legal aid system in China.

### The Concept

“Legal aid” is a concept relatively new in Chinese legal terminology. However, legal aid service *de facto* has been in operation in China for many years, although few western publications have reported its existence. Since 1979, when the People's Republic of China adopted its first *Law of Criminal Procedure*, court-appointed free legal representation has been made available to many criminal defendants in the trial and appeal process. In recent years, the establishment of a “legal aid system” has become a hot topic for discussions in China. What it really refers to is the establishment and development of a *modern* legal aid system. In general, such a system

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should have these characteristics: a specialized comprehensive legal framework for legal aid, well-equipped professional bodies of governance and services, detailed coverage and eligibility criteria, systematically designed service delivery models, and formalized government financing schemes and arrangements.

### **Sources of Information**

This review is based on recent on-site observations of legal aid organizations in major Chinese cities, analyses of most-updated Chinese laws, regulations and documents, and discussions and verification with Chinese officials, legal scholars and lawyers. Important legal documents reviewed include the *Law of Criminal Procedure* 1996, the *Lawyers' Law* 1996, the *Law on the Protection of Juveniles* 1991, the *Law on the Protection of the Rights and Interests of the Elderly* 1996, the *Law on the Protection of the Rights and Interests of Women* 1992, the *Law on the Protection of the Rights and Interests of Handicapped Persons* 1990, local regulations relevant to the service of legal aid in Jiangsu, Guangdong, Shanghai, Wuhan, Beijing, Qingdao, and a large number of documents issued by the various government departments or legal aid organizations.

## **DEVELOPMENT OF LEGAL AID IN CHINA**

### **Early Development**

#### *Recognition of the Right to Counsel*

In 1979, the Chinese Government re-established a formal legal system which recognized the right to defence lawyers in criminal proceedings. Under the *Law of Criminal Procedure* 1979, the court may appoint a lawyer for a defendant if he or she does not have someone to act as his or her legal representative in court. In practice, under this rule, a large number of Chinese lawyers are appointed by their law firms at the requests of the courts every year, and their fees are mainly paid by the courts or the governments through the law firms. For example, during the 1980s, most of the lawyers associated with the Shanghai No. 4 Law Office had the experience of working as court-appointed legal counsels.

#### *Reduction and Waiver of Legal Fees*

Although "legal aid" mainly refers to the provision of lawyers' legal service, it may, in a broad sense, also refer to the reduction and waiver of litigation fees by court. Under the *Law of Civil Procedure*, individual citizens who cannot afford to pay the standard litigation fees to the

courts in civil cases can apply to the courts for a waiver, reduction or postponement in making the payment. In some cases, Chinese lawyers have also been encouraged or required by regulations to reduce or waive their legal fee if the clients cannot afford to pay them. For example, the *Law on the Protection of the Rights and Interest of the Elderly* sets out that legal aid should be made available to those elderly persons who cannot afford lawyers.

#### *Non-litigation Free Legal Service*

The non-litigation means of dispute resolution, such as mediation and consultation, have been used in China since 1949. Free mediation and consultation on family and civil matters are often organized by government officials, enterprise officials and community leaders. Some of the officials have para-legal training and sometimes provide advice with references to the laws. In some cases, the mediators are lawyers who work with community leaders on a *pro bono* basis.

#### *Lack of A Modern System*

Prior to the mid-1990s, although legal aid service had in fact been in existence in China for many years, the concept of legal aid was not officially recognized in China, and the service was not provided under a legal aid system or plan. By modern standards, a legal aid system or plan should include a specialized legal framework, specialized bodies of governance, detailed coverage and eligibility criteria, systematically designed service delivery models, and formalized government financing schemes and arrangements.

### **Recent Developments**

#### *New Initiatives*

Prior to 1995, there was no specialized legal aid organization in China. In 1994, the Ministry of Justice of China announced a plan to establish a modern legal aid system in China. The Ministry issued policy directives to the various local justice bureaux in the provinces and municipalities, where a number of “experimental” initiatives were later launched to make legal aid regulations and set up legal aid centres or in-house sections. More recently, it was also proclaimed in a work plan of the Ministry of Justice that a modern legal aid system should be established and developed in five-fifteen years.

### *Institutional Growth*

In 1995, the Guangzhou Municipal Legal Aid Centre and a number of municipal legal aid centres were established. In 1996, the Ministry of Justice set up a preparation group for the National Legal Aid Centre of China. In the same year, the Guangdong Provincial Legal Aid Centre and the Sichuan Provincial Legal Aid Centre were established. In 1997, the National Legal Aid Centre of China and the National Legal Aid Foundation were formally announced open for operation. Till the end of 1997, China had set up one national-level legal aid centre, 16 provincial level legal aid centres, and over 100 lower level legal aid centres across the country. By late July 1998, the total number of legal aid centres in the country had increased to 200. In only four years (1995-1998), China has quickly created an institutional establishment for its emerging legal aid system, which now consists of legal aid centres, other service providers and legal aid foundations at national, provincial, municipal, country and district levels. Most of the centres have started to deliver legal aid services. The centres are mostly under the leadership of justice bureaux. In addition, a number of law firms and law schools (e.g., the Wuhan University Law School) have established their own in-house legal aid sections or clinics.

### *Legal Reform*

In 1996, China's National People's Congress (NPC) passed the *Amendments to the Law of Criminal Procedure*, which now is considered a historic development in the reform of China's legal system. This *Law*, for the first time in the history of the People's Republic, recognizes the fundamental principles of the presumption of innocence and the right to defence counsel in the pre-trial investigation process, and specifically requires access to legal aid service for certain special groups of eligible persons in court proceedings. Also in 1996, the NPC enacted the *Lawyers' Law*, which proclaims that legal aid is a duty of Chinese lawyers. In the meantime, a number of local regulations were adopted by the provinces and municipalities, whereby those defendants who are poor and elderly, juvenile, handicapped, or facing charges of serious criminal offences have the priority to access legal aid services.

### *Theoretical Development*

In the Chinese context, like every major groundbreaking reform of the economy, the reform in law and justice always starts from the discussion of new theoretical thinking and the promotion of new theoretical concepts. Unlike many presumed, the word "theory" in Chinese legal science never carries a narrowly-defined meaning of being purely academic; rather, it always has a policy and practical implication. Similarly, "research" in law and justice is never just

to find and describe; rather, it leads to changes or recommendations of changes to policies, laws and practice. For two decades, China's economic and social reforms have led to the awakening of conscience in the society about human rights and freedoms. This has been the fundamental force driving the reform of the legal system towards the rule of law in China. In Chinese theories, the general justifications for the establishment of a legal aid system are similar to those in Western democratic countries: legal aid is to provide equal access to justice, to ensure that the right to lawyer can be exercised, and to protect human rights.

## EXISTING PATTERNS OF LEGAL AID

### **Governance**

#### *Transition*

China has not developed a solid governance structure for legal aid services; rather, what has emerged in recent years is a mixture of structures subject to major changes pending in the next few years.

#### *The NLACC*

Of all the legal aid centres in China, the National Legal Aid Centre has unique roles and responsibilities. The NLACC, formally established in 1997, is a bureau-level agency of the Ministry of Justice of the People's Republic of China. It now has 20 staff members. This Centre provides nationwide administrative supervision in the area of legal aid. It is also a research body for policy and legal development. The current principal mandates of the Centre are: (1) to prepare national strategic plans or regimes for the development of a legal aid system in the country; (2) to organize legislative research for the drafting of China's National Legal Aid Law and its Implementation Regulations, as well as conduct theoretical research on relevant matters; (3) to manage and supervise the work of local legal aid organizations in the country; (4) to develop international exchange and cooperation activities.

#### *LACs*

The local government-funded legal aid centres administer and deliver legal aid services. They are subject to horizontal and vertical supervisions. Every legal aid centre is subject to supervision from the bureau of justice in the area. A higher-level legal aid centre may also provide "supervision" to a lower-level centre. This kind of supervision is not based on the sharing of any

cost, but on the vertical administrative relationship between the higher-level and lower-level governments. In some areas, legal aid centres are set up by local law societies. These centres have no direct government funding support, but still have to accept supervision from the local justice bureaux.

### *Law Firms*

In criminal cases, Chinese courts can appoint defence lawyers. In some areas, legal aid centres, local justice bureaux and law societies have been assigning legal aid cases to law firms. The law firms are required to identify lawyers to accept the cases. However, given the market-oriented reform to China's lawyers system, some of the firms may have serious difficulties to provide the required legal aid services simply because of a lack of interest among the lawyers or a lack of funds.

### *Regulations*

Most legal aid centres have their own chapters, regulations or guidelines for the handling of legal aid cases. In some provinces and cities, the justice bureaux and the law societies may each issue its own legal aid regulations. Some of the law firms also have their own internal guidelines regarding the handling of legal aid cases. The Ministry of Justice is now making the effort to consolidate and unify the basic rules of these regulations.

## **Revenue**

### *Main Sources*

In general, there are three main sources of revenue to support the legal aid services: government funding, fix-rate contributions from law societies and public notary services, and public and private donations. In some areas, law firms are required to transfer part of the legal fees into a special account to pay the costs of legal aid services by their own lawyers. Also, in some areas, applicants for civil legal aid service are required to pay application fees up front when they submit application documents.

### *No Cost-sharing*

Every local government is responsible for financing or making necessary arrangement to finance the legal aid service in its own jurisdiction. There is no cost-sharing regime between the various levels of governments for legal aid. The Central Government of China does not allocate

funds to local legal aid plans. Nor does a provincial government provide funding to city or county level legal aid services in the province. In general, lack of funding is a serious problem in the development and implementation of the various “experimental” legal aid plans in China.

### *Reserves and Foundations*

Some of the centres have tried to balance their books by handling profitable cases as well as legal aid cases, and use the profit as part of the revenue for legal aid. Also, a number of legal aid foundations have been established at the national level and in many local areas. These foundations are administered by foundation committees which often consist of representatives of the government, lawyers and representatives from the business community. These foundations are only at a preliminary stage of development. To most of the foundations, it has been a real challenge to raise a large amount of funds from the corporate and individual donors.

## **Delivery Models**

### *Emerging Models*

There is no “judicare” or “certificate” legal aid program in China. Legal aid services are delivered by three kinds of organizations: first, government legal aid centres which indeed fall into the category of “staff lawyers” model in Western terminology; second, ordinary law firms through the work of their lawyers appointed and paid by courts or by the firms; and university or community based legal aid clinics.

### *Staff Lawyers*

The legal aid centres set up by the Ministry of Justice and provincial and lower-level justice bureaux are governmental agencies. They have government officials and staff lawyers. These are full-time government employees with different levels of legal training. Their salaries are paid by the government. This determines the fact that their income level in general is relatively low in comparison with lawyers working in law firms. The disparity may pose a threat to the stability of the staff in legal aid centres.

### *Law Firms Lawyers*

All government-funded legal aid centres are at a preliminary stage of development and operation. Most of them are small-size organizations. Therefore, in most areas in China, legal aid cases are still mostly handled by lawyers associated with law firms. In a criminal legal aid case,



the client can sometimes suggest to the court which firm he or she prefers, but cannot shop around and make the final decision. The case is assigned by the court to a firm either directly or through the legal aid centre in the area, and then assigned to the lawyer by the firm. Under this system, it is a problem that some of the firms tend to assign the ordinary cases to their junior associates.

### *Clinics*

There are a limited number of community based legal aid clinics, but these are not “independent community organizations” as they would be in the Western context. They locate in their communities, but are subject to government policies and administration. The growth of university-based legal aid clinics is an interesting aspect in the development of community-based legal aid in China. A number of law schools have set up legal aid clinics which depends on university funding and the *pro bono* work of law professors and students. These clinics are administered by the government-funded law schools.

## **Coverage and Eligibility**

### *Lack of Unified Standards*

Under the 1996 *Law of Criminal Procedure*, the court *may* appoint a defence lawyer to provide legal aid to any defendant who cannot afford to pay the service. Under the same Law, the court *shall* do so if the defendant is blind, deaf, dumb, juvenile, or facing the possibility of a death sentence, if the person does not have a lawyer for any reason. The special groups listed here only count for a small proportion of the population charged of various offences in courts. Therefore, to the vast majority of the population, access to legal aid is a matter subject to discretion and local regulations. With the exception of the special groups, there is apparently a lack of unified legislation specifying the coverage and eligibility criteria of legal aid. Regulations on the process of application and approval for legal aid also vary among the various areas. Every local legal aid centre or law firm follows a variety of rules: some are laws presumably mandatory and applicable to the entire country, e.g., the provisions in the *Law of Criminal Procedure*; some are made by the executive branch of the national or local governments, e.g., documents issued by the Ministry of Justice; and some are made by the legal aid centres themselves. Given the lack of a well-developed legal framework in this area, the existing rules are not always followed in practice, the individual service delivery bodies have a lot of discretionary power in their operation, and disparities are seen among the various provinces and regions.

### *Coverage of Cases*

Criminal legal aid is the main task of all legal aid programs in China, but the requirement of this service under the new *Law of Criminal Procedure* has not yet been fully implemented in practice. Legal aid centres are also required to provide legal aid services in family, civil and administrative law cases. Legal aid is most provided in trial cases, although some services are also made available in cases of appeal. Furthermore, many legal aid organizations provide non-litigation legal advice and assistance to a variety of clients. Some government-run notary public agencies also provide free service to certain groups of clients. Interestingly enough, whether or not bankrupted enterprises may also access legal aid for the interest of their employees has been an issue subject to debate in Chinese publications.

### *Priorities and Tests*

Under various rules, criminal defendants who are poor and elderly, juvenile, handicapped, or facing charges of serious criminal offences which carry heavy punishment, have the priority to access legal aid services. Individuals who are poor and elderly, juvenile, or handicapped, also have the priority to access legal aid in family, civil and administrative law cases. In a number of areas, women who cannot afford a lawyer are also listed as a priority group for legal aid. A few existing legal aid programs in China apply a “merit test,” i.e., the test which requires a possibility to win the case or a reasonable ground to take legal action in court. Again, in terms of the specific coverage of family, civil and administrative law cases, there is a high level of flexibility and disparity in the various provinces and regions.

### *Financial Eligibility*

The rules of financial eligibility vary among the various legal aid programs. In some areas, only orphans, the handicapped persons suffering from poverty, and people facing “extraordinarily economic difficulties” can get legal aid. In a number of other areas, financial eligibility is simply defined as “real economic difficulty in paying the fees to lawyers.” There are areas where the only criterion of financial eligibility is “living below the poverty line.” There are also areas which simply have no specific definition of financial eligibility in their regulations, so everyone can apply, although they are not guaranteed to receive the service.

## CONCLUSIONS

### Needs for National Standards

The establishment of a modern legal aid system requires a well-designed legal framework. Now, different rules have been introduced by various governments in China to launch various ‘experimental’ legal aid programs. Some of these regulations are better articulated than the others, but all of them are written in a relatively simple and general language. The lack of unified national standards and systematically detailed rules has made it impossible for the programs to satisfy the needs. In some areas, the local regulations do not express the basic meaning of legal aid, and the concept of legal aid is almost unknown to the public. This, in turn, has created difficulties to win the desirable support of the financial departments and the society to the experimental programs. Therefore, the drafting of a specialized law to set the national standards of legal aid is essential to the on-going development in China.

### A National Legal Aid Law

The NLACC is responsible for drafting China’s national *Legal Aid Law*. This will be China’s first specialised legal aid statute. The *Law* will establish national standards and rules for all legal aid services in the country. Given the lack of experience in legal aid legislation, the Chinese drafters of the *Law* should conduct a systematic study of legal aid statutes and regulations of other countries, and consider the applicability of some of the concepts and rules in the Chinese context. To clearly understand this context, they also have to undertake a survey of the needs for legal aid services and the applicability of national standards in the various regions in China. This will help to ensure that the new *Law* will reflect the general rules of legal aid and fully cope with the needs and conditions in the various regions in this vast land of 1.2 billion people.

### Broader Context

Recently, President Jiang Zheming introduced the concept of “a socialist country under the rule of law” at the 15<sup>th</sup> Congress in 1997. The establishment of a modern legal aid system is an important new initiative in the transition towards the rule of law in China. In my discussions with Chinese officials, the main justifications identified for the development of legal aid are the growth of a “socialist market economy” which demands the rule of law, the improvement of law as part of the “spiritual civilisation,” legal aid as part of China’s new social security mechanisms, and the need to enhance the protection of human rights.

## **The ICCPR**

In January, 1998, the Chinese Government announced its intention to sign the *International Covenant on Civil and Political Rights*. Recent developments indicate that China may join the *Covenant* later this year. Article 14(3) (d) of the *ICCPR* sets out that legal assistance for everyone who does not have sufficient means to pay for it when charged with a criminal offence is a “minimum guarantee” the State must provide. Therefore, the development of a modern legal aid system is an important step not only in implementing the 1996 *Law of Criminal Procedure* of China, but also in fulfilling the responsibility under this *Covenant* once the Government signs it.

## **Impact on Human Rights**

Although criminal legal aid is now the focus of development, civil and other categories of legal aid services also play important roles in ensuring equal access to justice and safeguarding human rights. In particular, assisting the development of a modern legal aid system in China will hopefully improve the protection of the rights and interests of the poor people, the elderly, women, juveniles, handicapped persons and other disadvantaged people in the various legal and non-legal proceedings.

## **International Assistance**

For many years, the development of Chinese laws has been an aspect of the overall reforms in the Chinese society; it has also been a process of studying and borrowing ideas and experiences of other countries. In the international community, Canada and other Western countries have the needed experience available to share with China for the establishment of a modern legal aid system. This has now been well acknowledged by officials and legal experts in China through the exchange of information. Based on all the observations and analyses, there are good reasons to conclude that the Ministry of Justice of China and NLACC are firmly committed to the development. This Review concludes that there is a need for international assistance in the development of a legal framework for a modern legal aid system in China.



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CHAPTER 5:

THE ROLE OF PROSECUTORS  
IN CANADA AND CHINA

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# THE CHINESE PROCURATORS – A COMPARATIVE PERSPECTIVE

By Dr. Vincent C. Yang\*

The publication of the book entitled *The Roles and Standards of Procurators – A Comparative Study*, is a result of cooperation between the Research Institute of Procuratorial Theories of China (the “Institute”) in Beijing and the International Centre for Criminal Law Reform and Criminal Justice Policy (the “Centre”) in Vancouver, Canada. It is the first major Chinese publication to systematically introduce the roles and standards of Chinese procurators to international readers. It is also the first major Chinese publication for Chinese readers to systematically compare the roles and standards of the Chinese procurators with those in the relevant international instruments and in some foreign jurisdictions. The People’s Procuratorates and their procurators play important roles in the historical transition of the nation to the rule of law. Given the powerful status of the procuratorates in China, the book will have some far-reaching impact on the promotion of the rule of law and legal professionalism in the People’s Republic. As the Canadian Co-Editor assisting in this research project, I congratulate my counterpart Professor Zhang Zhihui, a leading scholar known for his work in the field of criminal law, and his colleagues in China for making this joint effort a visible success. The Canadian International Development Agency (CIDA) is also acknowledged for providing financial support for the sharing of the costs in this project.

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The current Chinese system of *jian-cha ji-guan* and *jian-cha-guan*, usually translated as the “procuratorate” or the “procuracy” and the “procurators” respectively, was re-established in the late 1970s and earlier 1980s.<sup>1</sup> In 1978, the National People’s Congress (NPC), by adopting the 1978 Constitution of the People’s Republic of China, declared its decision to re-establish the abolished system of procuratorates.<sup>2</sup> One year later, in a legislative package of seven major laws, the NPC passed the *Organic Law of the People’s Procuratorate* to define the organizational structure of the procuratorates, their roles and mandate, their powers, as well as the principles and procedures for the use of their powers.<sup>3</sup> The system started to function in the 1980s, when only a small percentage of the procurators had been legally trained, mostly in poorly designed programs during the 1950s and the early 1960s. The vast majority of the procurators were receiving some short-term legal training while doing their work. I recall that during the three years of 1982-1984, when Prof. Zhang and I were among the first group of LL.M students in China, there was no substantive research publication on the system of the procuratorates. However, we were encouraged to witness the emergence of professionalism in the Chinese procuratorial service in those years. It was their strong commitment to the transition to the rule of law that was directing that generation of Chinese procurators to overcome the tremendous difficulties in their work. To understand the new laws, they tried to catch up by studying the science of law on the weekends and in the evenings. An extremely friendly tie was developed between the handful of academics and the new practitioners for the sharing of knowledge and information. Those were the good old years of facing the great challenges in building a system of justice on the ruins of the Cultural Revolution (1966-1976).

It has been a great transition of two decades. Significant progress has been made in nearly every aspect of the Chinese society, including the system of law and justice. The procuratorial system has also progressed, not only in its size, but also in its quality. In 1995, after many years of debate, the *Law of Procurators* was promulgated. This *Law* demonstrated an effort to raise the professional standards of all Chinese procurators.<sup>4</sup> The *Law* also introduced a classification of professional ranks and mechanisms for the promotion and discipline of the Chinese procurators.<sup>5</sup>

In 1997, the amended *Law of Criminal Procedure of China* entered into force, bringing about comprehensive changes to the practice of the procurators.<sup>6</sup> Some of the changes have had a significant impact on the roles and powers of the procurators. Under the new *Law*, their work in criminal litigation now shares more similarities with those of their western counterparts. The new *Law*, for example, provides that no one shall be considered guilty unless he is convicted by a court according to the law. Thus, the *Law* abolished power of the procuratorate to convict an accused person by “exempting” him from prosecution.<sup>7</sup> The *Law* introduced some new procedural safeguards for the protection of the rights of accused persons. The accused person is now

allowed to contact his lawyer during the almost entire pre-trial investigative process, rather than only seven days prior to the opening of the trial.<sup>8</sup> The *Law* also changed the trial process, borrowing some ideas from the adversarial system. This includes improved rules of open trial, a moderated role for the judge in questioning the accused person and examining the witness, a more clearly defined burden of proof on the prosecutor, and new rules allowing serious cross-examination of the accused person and the witness by both parties.<sup>9</sup>

Changes in the laws have created new pressure on the Chinese procurators to improve their professional skills and enhance their working standards. Many in the legal circles expressed serious concerns about the professional quality of the procurators. In 1997, when the Amendments to the *Law of Criminal Procedure* became effective, there were over 180,000 officials employed in the procuratorates nationwide, but only 0.4% had university degrees, and fewer had university law degrees. Furthermore, corruption and abuse of power have become new problems facing the procurators. In 1998, for example, some 1,641 officials in the service of procuratorates in China received disciplinary or legal sanctions for corruption and other wrong doings.<sup>10</sup>

A new wave of reform has been launched to improve the system of the procuratorates and enhance the professional quality of the procurators. In 2000, the Supreme People's Procuratorate of China issued its blueprints for the launch of a comprehensive initiative.<sup>11</sup> In this plan, entitled "Implementation Opinions Regarding the Reform of the Procuracy for Three Years," the Supreme Procuratorate declares that the reform shall apply some general principles including, among others, the following that may be interesting to international observers outside China:

1. The reform shall make the system of the procuracy compatible with the progress in developing the socialist market economy and promoting the rule of law in China;
2. The reform shall help to ensure that the procuratorates will exercise their powers and fulfil their responsibilities lawfully and independently;
3. The reform shall enhance the supervisory functions of the procuratorates to ensure fairness in the administration of justice and the protection of human rights;
4. The reform shall benefit the development of a procuratorate system of Chinese characteristics as well as facilitate the borrowing of good foreign experience; and
5. The reform shall support the effort of improving the professional quality of the procurators and the quality of their work in implementing the law.

As the Supreme Procuratorate rightfully indicated in its plan, international cooperation can provide useful assistance to this new endeavour. In the past six years, the International Centre in Vancouver, under the leadership of Professor Daniel Prefontaine and with the support of the Board of Directors, has engaged in a ground breaking program of cooperation with our work-

ing partners in China. During 1996-2001, my Canadian colleagues and I delivered many lectures and seminars to procurators in Beijing, Shanghai, Guangzhou, Wuhan, Chongqing and Hainan. The International Centre in Vancouver also hosted some eight delegations of procurators and other delegations of legal professionals from China. In these years, I had the pleasure of giving lectures and seminars to approximately 3,000 Chinese colleagues and law students. In the meantime, many Canadians were able to learn the basics of the Chinese systems from the delegates. Also, through this Program and other initiatives supported by international donors, I have enjoyed working with my colleagues in developing and conducting many research projects on the system of procuracy and other legal topics. In 2000-2001 alone, three books were published through cooperation with scholars at the National Prosecutors College of China.<sup>12</sup> These books are now used as teaching tools in training programs for Chinese procurators.

Although mutual exchange and learning have increased significantly in this field, in many aspects, the roles and standards of the Chinese procurators are still very different from their common-law counterparts. I offer the following comments on some of the remaining differences and key issues for comparisons.

1. The political nature and independence of the institution. A fundamental difference between the Chinese procuratorial system and its western counterparts is that the former is subject to the leadership of a political party, that is, the Chinese Communist Party. Under the current Chinese law, the procuratorates shall be free from intervention from any “administrative organs, social associations and individuals.”<sup>13</sup> This provision of independence does not apply to their relationship with the Party. Since the re-emergence of the procuratorial system in the late 1970s, Chinese law reformers and scholars have been trying to clarify the specific meaning of this leadership in law. For example, my friend Professor He Jiahong, in his SJD dissertation, joined the others in 1995 in advocating that the “Party’s leadership should be separated from the administration of the criminal justice system and procuratorial work,” that the Party committees should stop making decisions on the prosecution of “important” criminal cases, and that they should stop recommending candidates for the position of the Procurator General.<sup>14</sup> In fact, the recommendation by the Party also applies to the selection and appointment of the other procurators. In a western country like Canada, although the attorney generals are political appointments, it would be politically suicidal if they attempted to intervene in the handling of cases. It would also be very difficult for an Attorney General or his Party to influence the appointment and removal of the ordinary crown counsels.

2. The legal status of the institution in the justice system. During the early 1950s, a Soviet concept of the procuratorate exercising the power of “supervision” over other state organs was applied in the creation of the Chinese procuratorial system. According to a Russian expert lecturing in China at the time, the Soviet procuratorial system enjoyed two types of supervisory powers: “judicial supervision” over the police and the courts and “general supervision” over all the other state organs.<sup>15</sup> The Soviet procuratorates were granted this unique status and became an extremely powerful centralized establishment during the years of Stalin’s Great Purge in the 1930s. However, even during the 1950s, when the Chinese procuratorates were given both the roles of judicial and general supervisions in law, they were never able to exercise the supreme power of “general supervision” in practice.<sup>16</sup> Still, under the current Chinese law, the procuratorates are defined as “the state organs of legal supervision.” In comparison with the prosecution service in a common-law country, the Chinese procuratorate enjoys a very high status in the system of justice and in the state apparatus. For example, the Supreme Procuratorate and the Supreme Court have equal status in the Chinese justice system. Like the Supreme Court, the Supreme Procuratorate can issue “judicial interpretations” regarding the specific application of the law in the handling of cases.
  
3. The principal roles and functions of the institution. Obviously, the Chinese procuratorates have more powers than their common-law counterparts, which are primarily the prosecution agencies. The powers of “legal supervision” are much broader than the powers to prosecute and appeal in court. They are the powers to approve and issue arrest warrants to the Chinese police, to initiate their own criminal investigation, to conduct their own arrest, search and seizure, to initiate a process to change a judgment of the court after the judgment becomes effective, to supervise the execution of a death sentence, to supervise the execution of a jail sentence, as well as to appeal a judgment in a case of civil or administrative law. Further, in Chinese law and terminology, appeal by the procuratorate is defined as “supervision of the trial” in the court. However, when a court makes a judgment that is against the position of the prosecutor, it is not described as the supervision of the court over the procuratorate. In recent years, an increasing number of scholars have expressed views favoring a narrower definition of the roles and functions of the procuratorates. Professor Tan Shigui, for example, argued that the investigative branch of the procuratorates should be transferred to the police department, and that the procuracy power should not be defined as “judicial power.”<sup>17</sup> Other scholars have proposed that the procuratorates should no longer have the power

to approve or issue arrest warrants, or enjoy a “supervisory power” on trial, and should not be given the power to appeal a judgment in civil and administrative proceedings.<sup>18</sup>

4. The roles of the procurators in protecting human rights. Human rights became a hot topic for open discussion in Chinese legal studies in the 1990s. In relation to the roles of the procurators, the focus of scholastic discussion has been on the procedural rights of the accused and convicted persons in the criminal process. In general, Chinese scholars agree that the procuratorates and the procurators play an important role in protecting these rights.<sup>19</sup> However, although significant progress has been achieved in this field, the Chinese procurators still face many problems in law and in practice. For example, some of the major issues that Chinese scholars have raised in their discussion of the implementation of the 1996 *Law of Criminal Procedure* are indeed relevant to the procurators. These problems include the abuse of power by some individuals in the procuratorial service, extended pre-trial detention beyond the legally defined duration, the lack of a legal provision requiring a full disclosure of evidence to the defence prior to trial, refusal to allow the defence lawyers to meet with their clients in detention, and so on.<sup>20</sup> In this respect, the learning of relevant Western expertise and specific legal mechanisms can be very helpful to the Chinese reformers.
  
5. The professional qualifications and code of conduct of the procurators. Although the professional quality has improved over the past two decades, long-term effort is still required for enhancing professionalism among the Chinese procurators. For example, a university law degree is minimum qualification for the appointment of a prosecutor in almost every western industrialized country, but not in China, and especially in its less developed areas. While making the effort to enroll more law school graduates, the Chinese reformers are also advocating the implementation of most other professional standards that are considered minimum and universal under international instruments. These international instruments include, among others, the *United Nations Guidelines on the Role of Prosecutors*, the *Basic Principles on the Role of Lawyers* and the *International Covenant on Civil and Political Rights*. More recently, the *International Association of Prosecutors* adopted its Standards in Beijing.<sup>21</sup> Furthermore, in recent years, in addition to what the *Law of Procurators* has already adopted,<sup>22</sup> great effort has been made in developing a detailed code of conduct for the Chinese procurators.<sup>23</sup> Still, systematically articulated codes of conduct need to be developed in China, not only for prosecutors, but also for judges and practicing lawyers.

6. The safeguards for the profession and work of procurators. The *Law of Procurators* of China provides rules regarding the appointment of procurators, their tenure and retirement, salary and benefits, retirement, discipline and rewards, as well as training, test and examination. Many differences are found in comparison with the rules in common-law countries. For example, in China, the procurators are appointed by the people's congress, rather than by the executive branch of the government or through election. The salaries of the Chinese procurators are almost similar to those of the ordinary civil servants in the executive branch of the government. This means that their income is in general much lower than that of the practicing lawyers. Among the problems relating to the independence of the procuratorates, many local prosecutorial agencies have difficulties in securing enough funding for their work. Their budgets are often subject to the arbitrary decisions of the local governments. Further, there are still many people entering the procuratorial service with no legal background. To cope with this problem, nearly every Chinese procurator is required to attend training within the service. The National Prosecutors College and its provincial branches, for example, have offered massive short-term and long-term training programs for all the senior prosecutors in China. Still, the disparity of professional skills among the procurators is a major problem.

All of these differences have made further comparative studies a meaningful exercise. It is our hope that this discourse will continue and expand for more sharing of ideas and experience in assisting the reform of the law and improvement of the systems.

*The Roles and Standards of Procurators – A Comparative Study* is a product of research mainly conducted by the Research Institute of Procuratorate Theories, a think tank of the Supreme Procuratorate. Dr. Ye Feng of the Supreme Procuratorate is acknowledged for his strong support of this initiative. In 2001, invited by the International Centre, Professor Zhang spent nine months in Vancouver to study and observe the Canadian system of criminal justice. Professors Simon Verdun-Jones and Curt Griffiths of Simon Fraser University in Vancouver are also acknowledged for their warm-hearted assistance to this visit.

In recent years, some scholars have proposed that the study of the “Science of Procuracy” has become “a new academic discipline of social science” in China.<sup>24</sup> I believe that the publication of this book will be beneficial to the continuing growth of this new science in the People's Republic of China.

## NOTES

<sup>1</sup> Because of the difficulties in language, some English writers would translate *jian-cha ji-guan* as “the prosecutorial agencies” (or “procuratorial agencies” or “prosecution service”), and use the English word “prosecutor” as an equivalent to *jian-cha-guan*. This however could be misleading, given that “*jian-cha*” in Chinese refers to a much broader range of functions and powers than “prosecution” in English.

<sup>2</sup> See Article 43, *The Constitution* of the PRC of 1978. The system of procuracy was abolished under the Constitution of 1974 as a result of the launch of the Cultural Revolution. In 1976, after the arrest of the “Gang of Four,” which included the widow of Chairman Mao and three other senior officials of the Party, the Chinese Government declared the ending of the Cultural Revolution.

<sup>3</sup> See the *Organic Law of the People’s Procuratorates* of the PRC, 1979. In the meantime, the Congress passed China’s first ever *Law of Criminal Procedure*, which defined the roles of the procuratorates relating to criminal prosecution, investigation and the powers of “supervision” in the criminal process. The other five laws adopted in the same legislative package included China’s first *Criminal Law*, its first *Law on Sino-Foreign Joint Ventures*, and the *Organic Law of the People’s Court*.

<sup>4</sup> Under Articles 10(6) of the *Law*, it would be ideal if new procurators are mostly graduates from law schools. The Article however failed to make this a mandatory qualification.

<sup>5</sup> Chapter 7 of the *Law* has introduced a classification of twelve ranks. It however failed to specify the professional qualifications of these ranks.

<sup>6</sup> The Amendments to the *Law of Criminal Procedure* were adopted in 1996. For a discussion of these Amendments, see Chen Guangzhong and Yan Duan (Eds.), (1996), *Annotations and Application of The Criminal Procedure Law of the People’s Republic of China*. Jilin: Jilin People’s Press.

<sup>7</sup> See Article 12 of the *Law* of 1996. Under the old *Law of Criminal Procedure* (1979), if the procuratorate believes that the accused person has committed a minor crime, it can exempt him from prosecution. The exemption, however, is kept as a criminal record, and the accused person, who is convicted by the procuratorate, has little legal means to appeal the conviction or seek remedies because the case is not decided by a court.

<sup>8</sup> Article 96 of the *Law* of 1996 permits a suspect to contact and hire the lawyer after the first interview by the investigative agency or start from the day when a compulsory measure,

such arrest or detention, is applied to him. Article 33 of the *Law* stipulates that the suspect can hire a defence lawyer or defender, starting from the day of the transfer of his case from the investigative agency to the prosecution agency.

<sup>9</sup> See Articles 11 and 152 (open trial), Articles in Part 3 (trial), and 162 (2) (acquittal on the ground of insufficient evidence).

<sup>10</sup> Tan Shigui (ed.), (2002) *Research on Justice Reform in China*. Beijing: The Law Press. pp. 23 and 26.

<sup>11</sup> See Supreme People's Procuratorate of China, "Implementation Opinions Regarding the Reform of the Procuracy for Three Years," in Research Office, the Supreme People's Court of China (ed.), *Outline of Five-Year Reform of the People's Court*. Beijing: The People's Court Press. Annex. pp.361-371.

<sup>12</sup> See Vincent Cheng Yang and Shan Min (eds.), (2000), *Chinese and Foreign Systems of Criminal Public Prosecution*. Jiang Li Hua and Vincent Cheng Yang (eds.), (2000), *Essentials of Foreign Criminal Procedure*. Jiang Li Hua and Vincent Cheng Yang (eds.), (2001), *Criminal Defence in American Criminal Proceedings*. All three books were published by The Law Press in Beijing.

<sup>13</sup> Article 126 of the *Constitution* of the PRC. A similar provision is seen in Article 9 of the *Organic Law of the People's Procuratorates* of the PRC.

<sup>14</sup> See He Jiahong with Jon R. Waltz, (1995), *Criminal Prosecution in the PRC and the USA: A Comparative Study*. Beijing: China Procuracy Press. pp. 415-418.

<sup>15</sup> See Zhang Peitian, (1997). *On the Chinese Procuracy System*. Beijing: China Procuracy Press. pp. 128-131. In this section of the book, Zhang presented an outline of a "special report" by a Soviet expert at the first National Justice Conference in China in 1950.

<sup>16</sup> See the first *Organic Law of the People's Procuratorates* of the PRC in 1954. This *Law* provided for both the powers of supervisions. It also required the creation of a centralized procuracy system that was not subject to the control of local governments. Only three years later, during the Anti-Rightist Campaign in 1957, the procuratorates were ordered to accept the absolute leadership of Party committees and their power of general supervision was in fact abolished.

<sup>17</sup> Tan Shigui, (2000), *Research on the Chinese Judicial Reform*. Beijing: The Law Press. pp. 114-118. The book also reports that some scholars would not view the procuracy power a "judicial power." See pp. 310-314.



<sup>18</sup> See Liu Lixian and Zhang Zhihui, “Research on the Power of the Procuratorates,” and Zhang Xuedan, “Debate and Thoughts Regarding the Powers of the Procuratorates,” in Sun Qian and Liu Lixian (eds.), (2001), *Prosecution Review*. Vol. 2. Beijing: The Law Press. pp. 83-145, 146-203.

<sup>19</sup> See for example, Zhang Yongeng, “The Prosecutorial Supervisory Protection of Human Rights in Our Country,” and Song Yinghui and Wu Jie, “On Prosecutorial Supervision and Human Rights Protection in Criminal Proceedings,” in Sun Qian and Liu Lixian (eds.), (2000), *Prosecution Review*. Vol. 1. Beijing: The Law Press. pp.399-413, 414-423.

<sup>20</sup> See Chen Guangzhong and Song Yinghui (eds.), (2000), *Research on Issues in the Implementation of the Criminal Procedural Law*. Beijing: China Legal System Press.

<sup>21</sup> For a review of the IAP Standards, see Nicholas Cowdery, 2000, “The Standards of the International Association of Prosecutors with Some Thoughts from Downunder,” a paper presented at the 2000 IAP 4th conference in Beijing.

<sup>22</sup> See provisions in Chapters 1 and 3 of the *Law of Procurators* of the PRC.

<sup>23</sup> The Chinese procuratorates, in recent years, have launched many research and training programs to develop and promote new professional standards. See, for example, Chen Shiqu, (1998), *Practice of Prosecutor in Court*. Beijing: China Democracy and Law Press.

<sup>24</sup> Sun Qian and Liu Li Xian, “Preface,” in Qian and Liu Li Xian (Eds.), (2000), *Prosecution Review*. Beijing: Law Press. pp. 1-5, at 2.

# THE ROLE OF CROWN COUNSEL IN BRITISH COLUMBIA

By David Winkler, Q.C.\*

## STATEMENT OF PURPOSE

The Criminal Justice Branch of the Ministry of Attorney General, is a key component of British Columbia's criminal justice system. Its purpose is to contribute to the protection of society by preparing and conducting prosecutions diligently, objectively and fairly.

The Criminal Justice Branch was established 25 years ago when the province created a structure to consolidate into one body all prosecutors, some of whom were employed by municipalities and others who were private lawyers acting from time to time as prosecutors. However, it was not until 1990 in response to the report by Commissioner Stephen Owen arising from the *Discretion to Prosecute Inquiry* that the Crown Counsel system was formally established by legislation which recognizes prosecutorial independence and discretion.

The *Crown Counsel Act*, R.S.B.C., 1996, c.87, s.2, sets out the functions and responsibilities of the Criminal Justice Branch and of the lawyers who are employed by the Branch to conduct prosecutions on behalf of the Crown throughout the Province. This Act formally recognizes the Assistant Deputy Attorney General (ADAG) as the head of the Criminal Justice Branch and gives the ADAG responsibility for the administration functions and responsibilities of Crown Counsel. To ensure accountability to the public, while maintaining the independence of the Criminal Justice Branch from undue political influence, any directions from the Attorney General regarding specific prosecutions must be given in writing to the ADAG and be published in the Gazette thereby making such directions public.

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Legislative, evidentiary and policy changes and initiatives continually affect and change the duties and responsibilities of Crown Counsel. The current role of Crown Counsel is that of a public servant free from improper influence exercising discretion to make fair and just decisions throughout the prosecutorial process.

## GENERAL PRINCIPLES

Crown Counsel represent the interests of society as a whole, not just the interests of specific individuals. This prosecutorial role was set out with authority by Mr. Justice Rand of the Supreme Court of Canada in the following quotation:

It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

*Boucher v. The Queen (1954) 110 C.C.C. 263 at 270 (S.C.C.).*

The Law Society Professional Conduct Handbook, Rule 18 states:

**When engaged as a prosecutor the lawyer's prime duty is not to seek a conviction, but to see that justice is done.** The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. The prosecutor should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or to an unrepresented accused of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused. [emphasis added]

Crown Counsel must act with fairness, objectivity, impartiality and independence in the pursuit of justice, performing their duties without regard to improper influence or interference from any source.

The exercise of prosecutorial discretion guided by established policies is essential to the principled approach used in conducting prosecutions that ensures accountability without unworkable rigidity or fear of reprisal from any source. The Supreme Court of Canada has recognized that prosecutorial discretion is an essential feature of the criminal justice system which extends throughout all aspects of it (*R. v. Cook* (1997) 7 C.R. (5th) 51 (S.C.C.) p. 58-59).

The rule of law is one which Crown Counsel is to apply consistently, diligently and with the highest ethical standards.

## THE JUSTICE SYSTEM WITHIN WHICH CROWN COUNSEL PRACTICE

The Justice system is adversarial in nature with defence counsel and Crown Counsel having very separate and distinct roles. Within this adversarial system, both Crown Counsel and defence counsel must follow the strict evidentiary rules which have evolved to ensure innocent people are not wrongly convicted on unreliable, untrustworthy evidence.

The role of defence counsel is to pursue any and all legitimate defences for their client within the confines of their ethical responsibilities and legal duties as practicing members of the legal profession. Defence counsel have no duty to the public other than in their role as an officer of the court.

Crown Counsel have a duty to the public above and beyond that of an officer of the court that is to ensure that justice is done. In presenting their case, Crown Counsel "... cannot adopt a purely adversarial role towards the defence." (*R. v. Cook, supra at p.60*). Crown Counsel are entitled to legitimately press the strength of the prosecution but not go beyond the requirement to put the case forward in a fair manner. Crown Counsel are governed by the principle that justice does not require a conviction to be obtained at all costs.

## CROWN COUNSEL RESPONSIBILITIES

In carrying out their duties, Crown Counsel represent society as a whole. Crown Counsel do not act for individual victims, witnesses, the police, special interest groups or third parties. Many individuals and groups advocate special interest positions. While the values of society must be considered in carrying out prosecutorial duties, acting on the directions of particular advocacy groups would impede the ability of Crown Counsel to represent society as a whole. Independence sufficient to maintain impartiality is an essential component of the role of Crown Counsel.

Responsibilities of the Crown Counsel, mandated by the *Crown Counsel Act*, are as follows:

- a) to approve and conduct, on behalf of the Crown, all prosecutions of offences in the Province;
- b) to initiate and conduct on behalf of the Crown, all appeals and other proceedings in respect of any prosecution of an offence in the Province;
- c) to conduct, on behalf of the Crown, any appeal or other proceeding in respect of a prosecution of an offence, where the Crown is named as a respondent;
- d) to advise the government on all criminal law matters;
- e) to develop policies and procedures in respect of the administration of criminal justice in the Province;
- f) to liaise with the media and affected members of the public on all matters respecting approval and conduct of prosecutions of offences or related appeals;
- g) any other function or responsibility assigned to the Branch by the Attorney General.

## SIGNIFICANT DEVELOPMENTS IN THE ROLE OF CROWN COUNSEL

The responsibilities of Crown Counsel are affected by a number of legislative, case law and policy developments which include the following:

### **Witnesses/Victims Participation in the Criminal Justice System**

The *Victims of Crime Act* (VOCA), R.S.B.C. 1996 c. 478, entitles victims to information regarding the specific counts against an accused including convictions in the case, reasons for a Crown Counsel decision regarding charges and mandates that all victims, as defined in the Act, are given a reasonable opportunity to have victim impact information presented to the court before sentence is imposed.

### **Disclosure of Information to an Accused**

Historically, Crown Counsel determined on a case by case basis if disclosure of the Crown's case to the defence counsel or the unrepresented accused was required. In 1991, the Supreme Court of Canada confirmed in the case of *R. v. Stinchombe*, (1991) 68 C.C.C. (3d) 1 (S.C.C.), that

with certain exceptions, the Crown has a duty to make complete disclosure of all relevant information in the Crown's possession as soon as practicable. The determination of what is relevant and what fits within a disclosure exception can be extremely complex.

An example of a further major change in disclosure requirements is the *Criminal Code* sections 278.1 to 278.91 which govern disclosure of third party records in sexual assault proceedings. Enacted on May 12, 1997, these sections provide that Crown Counsel must not disclose any record which was created with a reasonable expectation of privacy except by Court order or if a waiver is given by the complainant or witness who is the subject of the record. Crown Counsel remains independent from the victim or witness in the process for disclosure of a record. The Ministry of Attorney General provides funding for independent legal representation of victims during these specifically defined proceedings affecting their privacy rights.

### **Disclosure of Information to others**

Recognition of the public right to be kept informed regarding the decision making process in the justice system has resulted in legislation which governs the provision of such information to others. Crown Counsel must comply with Section 15(4) of the *Freedom of Information and Protection of Privacy Act* which states:

The head of a public body must not refuse, after a police investigation is completed to disclose under this section the reasons for a decision not to prosecute:

- (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
- (b) to any other member of the public, if the fact of the investigation was made public.”

### **Abuse of Process**

The ability of the judiciary to control the court process and the use of prosecutorial discretion is entrenched in the abuse of process doctrine. In 1985, the Supreme Court of Canada affirmed the following statement from the Ontario Court of Appeal:

... there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.

*R. v. Jewitt* (1985) 21 C.C.C. (3d) 7 (S.C.C.) at p. 14

The doctrine requires that the societal interest in pursuing prosecutions be balanced against society's interests in fair play and decency in the prosecutorial process. The difficulty for Crown Counsel lies in balancing societal interests when those interests do not remain static; societal perceptions of what is arbitrary, unfair or unjust continually change.

### **Charter of Rights and Freedoms**

The enactment of the *Canadian Charter of Rights and Freedoms* in 1982 has resulted in a significant increase in the complexity of legal arguments in many criminal cases. For example, prior to the *Charter*, in determining admissibility the courts focused mainly on the merits of the evidence. Now, the Courts initial focus is on an assessment of how the State obtained the evidence. This approach has created a significant body of new law. Any potential evidence improperly obtained through an infringement of an accused's *Charter* right will be the subject of a judicial analysis to determine if its admissibility would bring the administration of justice into disrepute.

Another example where the *Charter* has had a dramatic impact is with respect to trial scheduling. Judicial stays can result where there is an infringement of the accused's *Charter* right to a trial within a reasonable time.

### **Complicated Procedures and Evolving Evidentiary Rules**

The development of new investigative techniques such as DNA analysis makes it necessary for Crown Counsel to develop sufficient expertise to present such evidence to the court in a meaningful way. The appropriate level of expertise must be maintained through ongoing training and education.

Crown Counsel must also respond to evolving evidentiary rules as noted in the following excerpt from the Supreme Court of Canada:

Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action ... then the rule ought to be changed.

*R. v. Salituro* (1991) 68 C.C.C. (3d) 289 (S.C.C.) at p. 305

### **Liability**

In 1989, the Supreme Court of Canada stated that Crown Counsel are not immune from civil suits for malicious prosecution. A Crown Counsel who has acted maliciously and caused

damage to the accused, can be held personally responsible to the claimant. Although the onus is on the claimant to establish the abuse, this does not prevent the bringing of a suit which may later be held not to have had the proper evidentiary foundation. The fact that the threat of civil legal action exists must not affect Crown Counsel's pursuit of objective, impartial and independent decision making.

## PRIORITIES

The setting of prosecutorial priorities is governed by the Crown Counsel Policy Manual which is a public document and available for review by the public upon request.

It is a priority for the Criminal Justice Branch to ensure that the public is protected through the consistent application of Branch policies concerning the effective prosecution of high risk violent offenders.

The Criminal Justice Branch views offences including those that involve violence against women in the context of a relationship and offences against children as requiring priority in the setting of early hearing dates, assignment of experienced counsel and the assignment of the same Crown Counsel throughout the prosecution process when possible.

## THE INITIATION OF PROSECUTIONS

Offences in British Columbia are investigated by the Police or other investigative bodies who initiate the start of the prosecution process by forwarding the information obtained to Crown Counsel for a review in a document called Report to Crown Counsel (RTCC).

All members of the public from the previously convicted to the popular community leader must be protected from the stigma attached to a criminal charge which is ill founded and unsupported by the proper evidentiary foundation. The development of the current Crown Counsel charge approval standards occurred in response to the perception that some cases were being placed in the system which did not have the proper foundation to result in a conviction.

Section 4 of the *Crown Counsel Act* defines Crown Counsel responsibilities involving prosecutions as follows:

4(3)(a). Examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate;

4(3)(b). Conducting the prosecutions approved; and



4(3)(c). Supervising prosecutions of offences that are being initiated or conducted by individuals who are not Crown Counsel and, if the interests of justice require, to intervene and conduct those prosecutions.

The exercise of Crown Counsel discretion is guided by the Crown Counsel Policy Manual with the Charge Approval Guidelines as a core policy.

## CHARGE APPROVAL GUIDELINES

In determining whether a charge is to be approved for prosecution, Crown Counsel examine the evidence provided to determine: (1) whether there is a substantial likelihood of conviction and, if so (2) whether a prosecution is required in the public interest.

A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is satisfied, Crown Counsel must determine: (1) what material evidence is likely to be admissible; (2) the weight to be attached to admissible evidence; (3) viable but not speculative defences.

If a case satisfies the substantial likelihood of conviction component of the charge approval standard, then the public interest factors will be considered while viewing the particular circumstances of each case and the legitimate concerns of the local community.

### **Public Interest Factors in Favour of Prosecution**

It is generally in the public interest to proceed with a prosecution where the following factors exist or are alleged:

- (a) the allegations are serious in nature;
- (b) a conviction is likely to result in a significant sentence;
- (c) considerable harm was caused to a victim;
- (d) the use, or threatened use, of a weapon;
- (e) the victim was a vulnerable person;
- (f) the alleged offender has relevant previous convictions or alternative measures;
- (g) the alleged offender was in a position of authority or trust;
- (h) the alleged offender's degree of culpability is significant in relation to other parties;
- (i) there is evidence of premeditation;

- (j) the offence was motivated by the victim's race, national, or ethnic origin, colour, religious beliefs, sex, age, mental or physical disability, political views, or sexual orientation;
- (k) there is a significant difference between the actual or mental ages of the alleged offender and the victim;
- (l) the alleged offender committed the offence while under an order of the Court;
- (m) there are grounds for believing that the offence is likely to be continued or repeated;
- (n) the offence, although not serious in itself, is widespread in the area where it was committed.

### **Public Interest Factors against a Prosecution**

It may not be in the public interest to proceed with a prosecution where the following factors exist or are alleged:

- (a) a conviction is likely to result in a very small or insignificant penalty;
- (b) there is a likelihood of achieving the desired result without a court proceeding. This could require an assessment of the availability and efficacy of any alternatives to prosecution. Crown Counsel need not conclude, in advance, that a prosecution will proceed in the public interest if a referral for an alternative measure is not acceptable. Information with respect to the suitability of a candidate for diversion or alternative measure is a factor to be taken into consideration by Crown Counsel in reaching a final charging decision;
- (c) the offence was committed as a result of a genuine mistake or misunderstanding (factors which must be balanced against the seriousness of the offence);
- (d) the loss or harm can be described as minor and was the result of a single incident, particularly if caused by misjudgment;
- (e) the offence is of a trivial or technical nature or the law is obsolete or obscure.

### **Additional Factors to be Considered in the Public Interest**

- (a) the youth, age, intelligence, physical health, mental health, and other personal circumstances of a witness or victim;
- (b) the personal circumstances of the accused, including his or her criminal record;
- (c) the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;
- (d) the need to maintain public confidence in the administration of justice;
- (e) the time which has elapsed since the offence was committed.

To ensure the appropriate application of the charge approval standard, information forwarded to Crown by the police or investigative body will be reviewed for completeness. Reports which do not meet the basic requirements of a RTCC will be returned in a timely manner with a request for additional information.

A decision not to charge will be conveyed to the person or investigative body who provided the information to Crown Counsel.

It is the responsibility of the police to contact the Administrative Crown Counsel should they wish to discuss reasons for rejecting a charge and seek a review. Following a full discussion with the Administrative Crown Counsel, a Regional Crown Counsel may also review the decision and advise the police of his or her decision about the charge(s).

The proper use of Crown Counsel discretion ensures that each individual case is considered on the basis of its unique circumstances, local community standards, applicable law and policy from the time of the charge approval decision until the time of the consideration of an appeal. Rigid application of criteria would ignore the complexity of the law, the individual accused and the unique circumstances of individual victims. The need for Crown Counsel policies is an acknowledgment that the circumstances of cases can be complicated by public perception and concerns, victim concerns, evidentiary hurdles, legislative developments and case law decisions. Principled Crown Counsel discretion governed by established policies, allows the consideration of the many facets of a criminal case without compromising accountability to society for prosecutorial decisions.

## ALTERNATIVE MEASURES

Based on the assumption that not all anti-social behavior requires criminal sanctions imposed by the Court, the Criminal Justice Branch has over the years established policies and procedures to divert minor offences away from the criminal justice system and into alternate measures programs. Such diversions reflect the notion that many lesser offences can best be dealt with by using community resources other than the provincial court system. Minor offences such as petty theft and mischief are often dealt with by requiring the offender to participate in community programs as a way for the person to make restitution for his or her wrong doing. Decisions on which type of offences and which type of offenders ought to be diverted is made by Crown Counsel and guided by their policy manual.

## CONTINUING OBLIGATION TO APPLY CHARGE APPROVAL STANDARDS

The two components of the charge approval standard are applied by Crown Counsel throughout the prosecution to ensure that the charge continues to meet this standard. The Crown Counsel doing the initial charge approval does not have the benefit of hearing testimony and a case may materially change during the course of trial preparation or during a preliminary hearing. If, subsequent to the laying of a charge it becomes apparent that Crown charging standards are no longer met, then it is the duty of Crown Counsel to terminate the prosecution.

## RESOLUTION DISCUSSIONS AND STAYS OF PROCEEDINGS

Resolution discussions are essential to the proper functioning of the justice system in British Columbia “and when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally” (*Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, Martin, G. Arthur, Hon., Ontario 1993*).

Resolution discussions include all discussions between Crown Counsel and defence counsel as to the charges laid and their possible dispositions. Such discussions are beneficial because they allow Crown Counsel to consider information known only to the defence. Since there is no obligation on the defence to provide disclosure of its case to Crown Counsel this is an important method for obtaining information on the following:

1. whether the accused intends to plead guilty to the offence charged;
2. the views of defence counsel on any weakness in the Crown’s case;
3. the views of defence counsel as to viable defences based on the evidence available,
4. and whether the accused will provide a written admission of facts to narrow the issues and shorten the trial.

Resolution discussions often result in a guilty plea or admissions of facts which otherwise would have to be proven. The early resolution of criminal charges reduces trauma and inconvenience to victims and witnesses and results in a more efficient justice system where trials are either not necessary or are shorter due to the focussing of the proceedings on those facts which are clearly in issue.

Where practical, Crown Counsel will inform the victim or the victim's family of the proposed resolution and provide an opportunity for that person to express any concerns to Crown Counsel in a case involving death, serious injury or severe psychological harm. Crown Counsel while considering any expressed concerns maintains the independence to make the decision as to the appropriate charge or disposition in accordance with relevant Criminal Justice Branch policies.

Victims are entitled to the reasons why a decision was made respecting charges. Crown Counsel must also offer victims a reasonable opportunity to have information about the impact of the offence presented to the court on sentence proceedings, whether there is a negotiated disposition or a trial.

In a case where a charge alleges that a person is responsible for a death or the charge is attempted murder, conspiracy to murder, counseling murder or in a serious case where there has been or is likely to be, significant public concern with respect to the administration of justice, Crown Counsel must discuss with the victim or victim's family and Regional Crown Counsel the proposed decision to direct a stay of proceedings or to agree to a particular disposition as a result of a resolution discussion. The victim or victim's family will be advised that any concerns they express will be made known to and considered by Regional Crown Counsel.

Crown Counsel will accept a guilty plea only to a charge which meets the charge approval standard. Assessment of the ability to prove the case is made on the information available to the Crown who can not accept a guilty plea where the case can not be proved. This ensures that the information placed before the court on a sentencing supports the offence being alleged and ensures that a guilty plea is not being entered by an accused for purposes which have nothing to do with guilt (for example to protect another person). The onus is always on the Crown to place before the court proof beyond a reasonable doubt that the accused has committed the offence charged.

Multiple charges may be reduced through a stay of proceedings by Crown Counsel when the offence(s) to which the accused pleads guilty appropriately reflect the criminal conduct of the accused and provide an adequate sentencing range given all of the circumstances.

## **BALANCING THE DEMANDS**

For Crown counsel "public interest" includes a public need for fiscally responsible prosecutions which do not sacrifice the quality of the Crown's case. The ability to prove the case must be balanced against the reality that decisions can unnecessarily inconvenience witnesses, add time to a crowded court system or cause extra financial costs through the use of unnecessary experts,

videos, audio tapes or pictures. Crown Counsel must make decisions regarding how the case will be prosecuted without knowing what witnesses may become unavailable for a variety of reasons, what defence motions or Charter arguments will be made and without a requirement for defence to make reciprocal disclosure to Crown.

## ACCOUNTABILITY

In Canada, Crown Counsel are delegated their authority by the Attorney General and are ultimately responsible to the Attorney General for their decisions.

The Provincial Attorney General is an elected member of the legislature appointed to the position of Attorney General by the leader of the governing party in the legislature, the Premier of the Province.

There is a general acceptance that decisions with respect to who should or should not be prosecuted should be made without reference to the political affiliation of the accused person or to the political agenda of the government of the day. At the same time, it is recognized in a representative democracy that the government of the day has a legitimate interest in determining general policies relating to the justice system. For instance, while the government can determine how many court houses should be built and how many judges and prosecutors should be hired, the government should not make decisions as to which judge or prosecutor should be assigned to a particular case. While the government should be able to make a policy that spousal assault will not be tolerated, it should not make a decision as to whether a particular individual should be charged with assaulting his wife. In British Columbia there are several mechanisms in place designed to delineate the respective roles of the Attorney General and those working within the Criminal Justice Branch.

This relationship is an evolving one. While incursions by politicians into the prosecutorial realm have generally been resisted, at least for the past 30 or 40 years, there have been occasions where questionable pressure has been applied with respect to specific prosecutions. Generally this pressure has not been successful in affecting the prosecution in question.

Nevertheless, in 1990 there were allegations that charging decisions made with respect to certain politicians had been subject to improper pressure. A Royal Commission was held to examine this issue and while the Commission concluded that in fact the Criminal Justice Branch had not responded to any inappropriate pressure, recommendations were made to further protect the public from the improper exercise of political authority. The Report, by Commissioner Stephen Owen on the Discretion to Prosecute Inquiry resulted in the passage of the Crown

Counsel Act which recognized and institutionalized prosecutorial independence in the exercise of discretion to prosecute.

The exercise of prosecutorial discretion must never be equated with a lack of accountability, however, it must always be remembered that:

Proceedings are conducted in public and any member of the public is free to bring the conduct of Crown counsel to the attention of the Attorney-General. In practice, Crown counsel must be prepared to account for their actions on every single case they prosecute.

*Prosecutorial Discretion: A Reply to David Vanek (1987-88),*  
30 *Crim L.Q.* 378, at pp. 378-79.

## MEDIA

The large number of stories dealing with the criminal justice system in all forms of media stresses the important role information dissemination plays in public education. The *Crown Counsel Act* recognizes the importance of the provision of information by requiring Crown Counsel to liaise with the media. It is important for the public to understand that in order to ensure the proceedings are conducted in a fair and just manner, Crown Counsel must be extremely careful not to discuss a case in any manner which compromises the ability of the judiciary or members of a jury to conduct an impartial review of the evidence before the court. As a result, the information provided by Crown Counsel during the conduct of a case is necessarily limited. Legal requirements under such legislation as the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, witness safety concerns and whether an appeal will be taken can all impact on the information given to the media following a court decision.

## CONCLUSION

Crown Counsel are subject to duties and responsibilities which ensure that the law is applied in a uniform, consistent manner with the highest ethical standards from the charge approval stage to the completion of the prosecution. The duties and responsibilities will continue to change in accordance with the needs of society and the Courts.

The protection of the public is a paramount priority for those conducting prosecutions on behalf of the Attorney General.

The conveying of information to victims, witnesses, the public and media is an important, and in some instances statutorily required aspect of the prosecutorial process. Protection of the

integrity of the process, legal requirements and witness safety concerns during and after the criminal process can limit the information provided to the public.

Crown Counsel are independent advocates representing society as a whole who must, on occasion, make decisions which may be potentially unpopular. The role of Crown Counsel incorporates accountability for decisions made throughout the prosecution without imposing rigidity in the decision making process. Prosecutorial independence is a requirement in a just and democratic society.





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CHAPTER 6:  
SENTENCING AND  
CORRECTIONS

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# THE STUDY AND COMPARISONS OF CHINESE AND CANADIAN CORRECTIONAL SYSTEMS

By Dr. Vincent C. Yang\*

**A** *Comparative Study of the Chinese and the Canadian Correctional Systems*, jointly produced by correctional experts in China and Canada, is an important result of the cooperation launched by the China Prison Society (the “Society”) and the International Centre for Criminal Law Reform and Criminal Justice Policy (the “Centre”) in Canada for the promotion of a constructive dialogue in criminal justice between the two countries. This publication is important in the history of cultural exchange and friendly cooperation between China and Canada, because it is the first book that the two countries have jointly published in the field of corrections, and it is the first time that Canadian and Chinese experts have systematically introduced the main aspects and features of their systems to each other. I would like to take this opportunity to pass on our warm regards from the Centre and the Canadian participants to the Society and our Chinese colleagues. Appreciation is also due to the Canadian experts for their contribution to the book. I thank Brian Tkachuk and Monique Trépanier of the Centre for taking the lead in effectively organizing the Canadian experts and coordinating their work in this project during the past year.

\* Dr. Vincent Cheng Yang is a Law Professor at Macao University of Science and Technology and Director of the China Programme and Senior Researcher at the International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver, Canada. This paper appeared as the Introduction to a 2001 Sino-Canadian joint publication entitled *A Comparative Study of the Chinese and the Canadian Correctional System* (Vincent C. Yang with Wang Zhengduo, Lan Jie, Xu Jiugan, eds. Beijing: The Law Press). Dr. Yang presented an earlier version of this paper at the Beijing Conference on Recidivism and Rehabilitation of Released Offenders in China in November 1999.

Rehabilitation of offenders through corrections is an essential component of the system of criminal justice and crime prevention. It plays a unique role in protecting the legal rights of individual citizens and maintaining the basic order of a society. This book is built on a series of exchange activities between the Society and the Centre during recent years. On the Canadian side, the discourse was made possible due to the financial support of the Canadian International Development Agency (CIDA) to the Centre's China-Canada Criminal Justice Cooperation Program. As Director of the Program, I would also like to acknowledge CIDA for its support to the Sino-Canadian dialogue in this new field of cooperation and to the publication of the book.

Project-based cooperation between China and Canada in the field of criminal justice began in 1995, when the China-Canada Criminal Justice Cooperation Program of the Centre was launched. The correctional component of this Program started in October 1997. In early 1997, preliminary mutual interest was expressed between Jin Jian, President of the Society, and Brian Tkachuk, Director of the Corrections Program of the Centre, during the Pacific Rim Regional Conference on Reintegration of Discharged Prisoners in Hong Kong. Later, I had several discussions with senior officials of the Society and government departments during my visits to Beijing. In October 1997, Daniel Prefontaine, Q.C., Executive Director of the Centre, and I visited the Ministry of Justice of China and formally met with senior officials of the Ministry in charge of international affairs, as well as Jin Jian, Wang Mingdi, Vice President, Wang Zhengduo, Deputy Secretary General, and other officials of the Society. A consensus and preliminary plan for cooperation in 1998 was developed during the visit. In November 1997, the Centre arranged a visit of the Minister of Justice of China, Xiao Yang, to Vancouver. During the visit of his delegation to the Burnaby Correctional Centre for Women, the Minister expressed his strong support to the promotion of Sino-Canadian cooperation in corrections.

In 1998, two formal exchange visits of special importance took place. In May 1998, at the invitation of the Society, the Centre organized the first ever Canadian corrections delegation to China. This delegation consisted of Daniel Prefontaine, Executive Director of the Centre, Lucie McClung, Senior Deputy Commissioner of Correctional Service of Canada (now Commissioner of CSC), Donald Demers, Assistant Deputy Minister of the Ministry of the Attorney General of British Columbia (MAG of BC), Michael Gallagher, Warden of William Head Institution, Brian Tkachuk, Director of the Corrections Program of the Centre, and myself. In Beijing, meetings were held for the exchange of views and information with President Jin Jian of the Society, Director General Du Zhongxing of the China Prison Bureau, and many other officials. After touring prisons and community offices in Beijing, the delegates gave presentations on Canadian federal and provincial corrections at a pilot seminar organized by the Society at the headquarters of the Ministry of Justice of China.

In September 1998, at the invitation of the Centre, the Society sent a delegation to visit Canada. The group was led by Vice President Wang Fei and Deputy Secretary Wang Zhengduo of the Society and included Li Detian, Director, Tao Guoyuan, President of the Jiangshu Provincial Prison Society, Yang Mushong, President of the Fujian Provincial Prison Society, and Dong Zhengyan, a researcher of the Shanghai Prison Bureau. The delegation, accompanied by Brian Tkachuk and I, visited over ten federal and provincial institutions and introduced the Chinese system of corrections to Canadian officers at a special seminar. In addition, the delegation visited the National Parole Board (NPB) and community-based correctional centres in British Columbia. This was the first exposure of Chinese officials to the Canadian systems of parole and community-based corrections in Sino-Canadian history.

Through the visits in 1998, Canadian and Chinese correctional services developed a trust and consensus for in-depth discussions of correctional theories, laws, policies and practical experience. The year of 1999 saw continuing exchanges between the two countries in this field. In October 1999, at the invitation of the Ministry of Justice of China, Lucie McClung led a delegation to attend the 19th Asian and Pacific Conference of Correctional Administrators in Shanghai. Other delegates included Pieter de Vink, Deputy Commissioner of CSC, Renee Collette, Executive Vice Chairperson of NPB, Brian Tkachuk and myself. After the Conference, as part of the Centre's China Program, the delegates delivered a special seminar that was organized by the Shanghai Prison Society. They introduced the work of the CSC, the Board, community-based correctional programs in Canada, and the Centre's international projects. Approximately 150 well-educated employees of the Shanghai Prison Bureau engaged in discussions with the delegates, indicating a strong interest in learning through international comparisons. After the seminar, as guests of the China Prison Society, Renee Collette, Brian Tkachuk and I presented papers at the 1999 Beijing Conference on Recidivism and Rehabilitation of Released Offenders. The topics were Parole in Canada, "Offender Reintegration through the Use of Alternative/Non-Custodial Measures," and "A Multi-level System of Release for Graduate Advance." In June 2000, the Shanghai Prison Society organized another seminar for Daniel Prefontaine, Brian Tkachuk and I. Over 150 officials and researchers from the correctional service of Shanghai listened to presentations on parole, risk assessment, reintegration of offenders and other topics.

In September 2000, at the invitation of the Centre, the Society sent a delegation to visit Canada. The delegation was led by Vice President Wang Mingdi of the Society and included Chen Zhixing, Deputy Director General of Shenzhen Municipal Bureau of Justice, Xu Keqi, Vice President of the Gangsu Provincial Prison Society, Chen Chuanshui, Vice President of the Anhui Provincial Prison Society, Liu Guangze, Representative of the Sichuan Provincial Prison Society, and Zhang Qing, an interpreter. During this visit, a Memorandum of Understanding for cooperation in the next five years was signed by the Centre and the delegation. The del-

egation, accompanied by Brian Tkachuk and I, visited federal penitentiaries and community corrections centres in British Columbia and Ontario, met with the Commissioner of CSC and the Chairperson of the NPB and many senior officials. The delegation also attended several seminars organized by the CSC to address specific topics of corrections. The success of this visit has prepared a foundation for continuing cooperation between Canada and China in corrections for the next five years.

In the meantime, a joint effort was made to promote research and publications. In 1998-99, I was provided with some of the recent publications by the China Prison Society, including a book of Jin Jian (as editor in-chief) entitled *General Theories of Prison*. Canadian research materials were collected and transferred by Brian Tkachuk of the Centre from the CSC and other Canadian sources to China. Based on a literature review, the Chinese and Canadian working partners selected several research topics that were comparable in theories and important to policy development and practice. In February 1999, Wang Mingdi and Wang Zhengduo of the Society and I designed a project for the research, translation and publication of a book entitled "A Comparative Study of Chinese and Canadian Correctional Systems." A working group consisting of officers of the Society and scholars was created in China to produce three Chinese chapters. In Canada, the Centre's team coordinated experts from the CSC, the NPB, Ministry of the Attorney General of British Columbia, the Department of the Solicitor General of Canada, and an expert advisor (volunteer) in preparing manuscripts and materials that were later processed collectively and compiled into three chapters on Canadian corrections. The chapters were translated by Chinese scholars designated by the Society. Mr. Wang Zhengduo and Professor Lan Jie on behalf of the Chinese partners, and I on behalf of the Canadian contributors, reviewed and edited the Chinese and English texts. The book has now been published in China.

Chinese publications on Canadian corrections are rare, although a brief report of an incident or an activity in a Canadian penitentiary is occasionally seen in a Chinese book. It was not until the cooperation between the Society and the Centre that a few Canadian corrections papers were presented in China or published in Chinese journals. Similarly, in Canada, there is a lack of publications about the Chinese correctional systems. The publication of this book has filled a gap.

To compare the correctional systems in Canada and China, I offer three general observations of the basic aspects.

First and foremost, what China has developed is defined as a socialist correctional system of Chinese characteristics. This system demonstrates certain features of a united and centralized state in combination with a socialist political system and ideology. In addition, its operation undoubtedly reflects traditional Chinese culture, the current status of economic development and various contradictions in the on-going transition of the Chinese society. In Canada, the

federal-provincial constitutional framework determines the division of federal and provincial corrections systems. The underlying philosophies, laws and policies of the Canadian systems are based on basic values of western societies and the principles of the rule of law. Their origins are found in the tradition of Christianity and the particular Canadian culture and history, and especially in the extensive social reforms that were accomplished during the last half-century. Also, the operation of the Canadian systems reflects the welfare-state concept and relies on the tremendous resources in the country. Therefore, a comparison of the Chinese and Canadian systems has to recognize these fundamental differences between the two countries.

Second, the correctional services in both countries, in spite of the differences, share many similarities. They have a common mission, which is to protect the safety of society and assist the rehabilitation of offenders. They recognize and implement common principles, which are the rule of law, fairness and justice. They also strive to recognize and respect the basic rights of offenders. They make the effort in maintaining a balance between the rights and interests of the offenders and those of the victims and public safety. These similarities indicate great potential and the need for borrowing ideas and sharing experiences between the two countries.

Third, the Preface of this book lists nine features of prison services in China. I offer nine corresponding points in the same order to present a general picture of the Canadian correctional system in comparison with its Chinese counterpart:

1. The basic principles of corrections in Canada are public safety, offender reintegration, openness and accountability to the public and the victims in decision-making, and fairness in prison administration and treatment of offenders. Top priority in the operation of the system is given to public safety. In the meantime, great efforts are made to secure the earliest possible release, rehabilitation and reintegration of the vast majority of prisoners.
2. Prisons do not provide academic education, but emphasize the delivery of standard school courses and job training programs. Programs of psychological treatment such as anger control are delivered. Prisons also provide access to law books and lawyers, so that the inmates can conduct self-studies of the law and address their legal issues. The purpose of this exercise is however not to help the inmates recognize the harm of their offences but to protect their own interest.
3. There is no forced labour in prisons. On the one hand, prison labour and production are voluntary. On the other hand, inmates who refuse to participate in both the working programs and the study or training programs generally have difficulties in trying to achieve an early success in their parole applications. In addition, owing to the strong



opposition of the private sector and the unions as well as other difficulties, the scope of production is always very limited in Canadian prisons.

4. The federal and provincial correctional services are independent of each other. However, they both follow the laws and apply the legal procedures in their operation. Prisons are categorized into different security levels. Inmates are classified and incarcerated accordingly. Effective tools based on scientific research are used in the assessment of the risks and needs of offenders. Experts are heavily involved in corrections. There are consistent efforts made to apply multi-disciplinary science and knowledge in correctional programs.
5. There is no forced reform of offenders. Offender classification and conditional release are important mechanisms to direct and encourage the inmates to follow the regulations and behave in prisons. Participation in a correctional program is based on consent of the offender who also has the right to access the correction plan that the authority has prepared for him. Those who do not want to work can participate in study or other correctional programs. The environment in most prisons appears to be very relaxing, with the inmates being able to enjoy a considerable amount of freedom.
6. Systems are in place to prevent the abuse of inmate rights. The Office of the Correctional Investigator, which receives and investigates inmate complaints, is independent from the CSC. With such a system in operation, the inmates are not afraid of revenge. Applying the theory that “incarceration per se is punishment, and offenders should not be punished again in the institutions,” effort is made to reduce the differences between prison life and the life outside.
7. The participation of non-governmental organizations (NGOs) in corrections has become a legally established system. Various NGOs play important roles in corrections, especially in community-based corrections. The Government provides funds to these NGOs, defines their status in law, and ensures the opportunities for their involvement. However, the NGOs in corrections are mostly those with a mandate relevant to corrections or criminal justice. The ordinary government departments, the military, enterprises and other institutions that do not have a relevant mandate are rarely involved in corrections.
8. “Prison police” is not a concept referring to correctional officers in Canada. However, standards for the recruitment of correctional officers are close to those of police officers.

ers. Self-paid pre-recruitment career training is required. Efforts are made to enhance professionalism among officers. Qualifications for the hiring of parole officers are higher than that for police recruitment. Interestingly, most correctional officers do not wear uniforms while working inside the prisons.

9. The vast majority of inmates are granted conditional release. "Release at the end of the sentence" is rare. Offenders who are on conditional release continue to participate in correctional programs, which include training of working skills. Like other citizens, they have rights under the law. Discrimination against these people is not allowed. However, released offenders may face difficulties in finding a job. Also, a person with a record of sexual offence will have problems continuing a career if the work requires frequent contact with children.

In addition, the Canadian system of corrections is different from its Chinese counterpart in these aspects:

1. The federal system in Canada under the constitutional principle of separation of power between the federal and provincial governments determines the separation of the federal and provincial correctional systems. The CSC can issue instructions and provide funds to federal prisons and parole offices in the various regions in the country. It cannot do so to the provincial prisons and other provincial institutions that are under the Ministries of Attorney General of the provinces. This establishment is very different from China, where the national prison department exercises the power of leadership over local departments.
2. The government provides great resources to the correctional service. This guarantees the modernization of facilities and the application of high-standards in prisons throughout the country. In general, a reasonable level of satisfaction is found amongst the staff regarding their salaries and working conditions. In comparison with many other developed countries, the housing/living conditions in Canadian prisons are relatively higher. In this aspect, significant differences can be seen between China and Canada, which is largely due to different levels of economic development and historical factors.
3. Inmates in federal penitentiaries are mostly convicted of violent offences, drug offences and sexual offences. A large proportion of inmates in provincial prisons are convicted of non-violent property offences, but the sentences are under two years. Significant differences are seen in the different proportions of property offenders in the prison

population in China and Canada. This, to a certain extent, has determined the different themes of correctional programs in Canadian and Chinese prisons.

4. Treatment of offenders is based on the plans of case management implemented by correctional officers and experts. The prison administration is responsible for prison security. Federal penitentiaries and parole authorities conduct continuous supervision and assessment on the offenders during the entire duration of the sentence, which includes the time spent in the institutions and the time of conditional release. Assessments are conducted at various stages of corrections to determine the level of risks, needs and corresponding measures to address the risks and needs. However, prisons do not encourage inmates to report on each other. In fact, considering the needs of prison security and inmate safety, the authorities are often against the idea of seeing the inmates watching and reporting on each other in the institutions.
5. There are many high-ranking female officials of correctional services and female wardens of male offender institutions. The current Commissioner of the CSC and the Acting Chairperson of the NPB are both women. Female officers are often used to supervise male inmates and work on night shift within male offender wings or units. In principle, men and women are equally qualified to work independently.
6. An effective, multi-stage and multi-level system of conditional release is well established in Canada. Parole is decided in a hearing in front of parole board members who are independent from the correctional service and the court. With the exception of some murderers and a few dangerous offenders, inmates are commonly released on parole or other types of conditional release after serving part of the sentence. Special offices are created for the supervision of parolees and the implementation of community-based corrections. The federal parole and community corrections have reported outstanding results in making sure that the vast majority of released offenders do not re-offend during the time of conditional release.

To assist readers in China as well as in other countries, I offer the following comments on the content and methodology of *A Comparative Study of the Chinese and Canadian Correctional Systems*.

First, the objective of producing the book was to provide a systematic and highlighted introduction to the main aspects of the correctional systems in China and Canada. Through its publication, we hope that readers in China will obtain a general picture of Canada's correctional system, and readers in Canada and other countries will appreciate the development of correc-

tions in China. This can facilitate mutual understanding, mutual learning, sharing of expertise, and advances for mutual benefits. For this reason, there are similarities between the book and many textbooks, allowing the book to be used in the training of correctional officers. Some difficult issues are briefly mentioned in the book, but not discussed in detail. These issues should be addressed in further studies.

Next, the book in its two parts describes the Chinese and Canadian correctional systems separately. The two parts are in the same order: starting from an overview, followed by institutional corrections, and then release and reintegration. This design encourages the readers to compare the relevant aspects of the two systems by themselves. There are two kinds of law-and-justice related books of comparative studies that have been published in China and in other jurisdictions: those with an author presenting a cross-nation comparison on a topic in each one of the chapters, and those with an author only describing the system in one country in a chapter and leaving the task of comparison to the readers after they read all the chapters. Given that our contributors to this book have limited knowledge about each other's systems, it would be reckless to comment on the systems in a comparative way. Therefore, the book is designed in a way that encourages readers to make their own comparisons.

Third, "library research," i.e., research on existing literature, is the methodology in producing all of the chapters of this book. These materials can be divided into three categories:

- (1) laws and regulations, such as the *Prison Law and the Joint Notice on the Residence and Settlement of Released Offenders in China*, and the *Corrections and Conditional Release Act* as well as the *Canadian Charter of Rights and Freedoms*;
- (2) official reports, statistics and plans of correctional departments, training materials of corrections, and materials for public education; the Canadian chapters have also incorporated some documents of NGOs that participate and have an interest in corrections; and
- (3) materials produced by researchers and scholars.

Caution is required when one reads the statistics in the book. Their reliability depends on the original sources and the methods of data collection.

The Chinese chapters in the book may serve the needs of Canadian readers, whereas the Canadian chapters provide valuable information to Chinese readers. The book is, however, not the end of our discussion. Many issues have to be explored and examined in further studies. Also, the translation of some of the names of the organizations and professional terminology needs to be improved in the future. We will appreciate comments and suggestions for such improvement.

I believe that the book's publication will benefit further exchanges between China and Canada in the field of corrections, and hope that our friendship and cooperation will continue to develop in the years to come.

# CORRECTIONS AND CONDITIONAL RELEASE IN CANADA

Edited by Vincent Chen Yang, PhD and Brian Tkachuk.\*

## OVERVIEW OF CANADIAN CORRECTIONS

### The Role and Mandate of Corrections in Canada

#### *Roles and Responsibilities*

Responsibility for adult corrections in Canada is divided between the federal government and the 10 provinces and three territories. Under the terms of Confederation in 1867, the *British North America Act* gave responsibility for “penitentiaries” to the federal government, and responsibility for “prisons and reformatories” to the provinces. In 1868, the federal government’s first *Penitentiary Act* legislated that “penitentiary” would be defined as the system to hold inmates sentenced to two years or more, leaving “prisons and reformatories” to hold inmates serving sentences of up to two years less a day. The “two-year split” between federal and provincial governments’ responsibility for corrections in Canada has been entrenched since that time.

From 1867 to 1966, the Department of Justice was responsible for criminal and correctional law and operations. This included federal police, federal prosecutions, criminal legislation,

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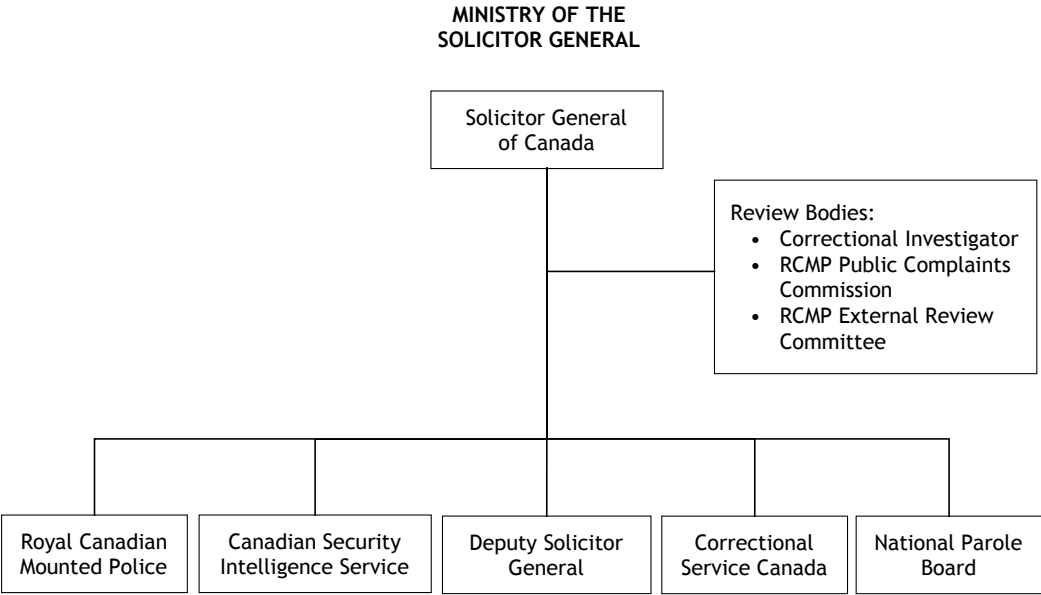
This paper appeared as Part II of the 2001 Sino-Canadian joint publication entitled *A Comparative Study of the Chinese and the Canadian Correctional Systems* (Vincent C. Yang with Wang Zhengduo, Lan Jie, Xu Jiugan, eds. Beijing: The Law Press.) The paper was presented by Renee Collette at a Seminar for Senior Chinese Prison Officials in Beijing, China, in October 1999.

correctional legislation and operations, clemency, and conditional release (such as remission and parole). This changed in 1966 when the Ministry of the Solicitor General (see Figure 1) was created, due to concerns about the proximity of the prosecution and police functions. The Department of Justice retained responsibility for federal prosecutions and criminal legislation, including the *Criminal Code of Canada*. The Ministry of the Solicitor General of Canada, as outlined in the *Department of the Solicitor General Act*, was given responsibility for:

- (a) reformatories, prisons and penitentiaries
- (b) parole, remissions and statutory release
- (c) the Royal Canadian Mounted Police (RCMP), and
- (d) the Canadian Security Intelligence Service (CSIS) (which was created several years later)

The Solicitor General’s mandate has included the operation of the First Nations Policing Program since 1992.

**FIGURE 1. Organizational structure of the Ministry of the Solicitor General**



## *Legislative Mandate of Canadian Legislation for Justice and Corrections*

The *Criminal Code* is administered by the Minister of Justice, and sets out criminal offences, penalties, and related criminal procedure. It also includes some matters relating to parole eligibility, especially in relation to sentences for murder, as well as clemency. The *Code* was first enacted in 1892, and has been revised many times since.

The *Corrections and Conditional Release Act (CCRA)* is currently the primary piece of legislation guiding adult corrections in Canada. It was created in 1992 and replaced the 1868 *Penitentiary Act* and the 1959 *Parole Act* which were outdated and had not kept pace with rapid legal reforms after the 1982 creation of the *Canadian Charter of Rights and Freedoms*. The CCRA was based on extensive consultations with government partners, lawyers, judges, victims, offenders, police and the public.

Part I of the CCRA is devoted to matters pertaining to the Correctional Service of Canada. Part II is devoted to the operations of the National Parole Board, and Part III covers the Correctional Investigator, a federal ombudsman for offender complaints. *Corrections and Conditional Release Regulations* provide further detail on the matters in the *Act*. Federal corrections is also informed by the *Transfer of Offenders Act*, a federal statute which establishes a framework for the international transfer of offenders. Under the *Transfer of Offenders Act*, Canadians who are convicted and sentenced abroad may be returned to Canada to serve their sentence; similarly, someone from abroad who is convicted and sentenced in Canada can be returned to their home country to serve their sentence.

The *Charter of Rights and Freedoms* is another important piece of legislation of general application to all Canadians, including offenders. Offenders retain all the rights of a citizen except those inherently removed by virtue of their incarceration, such as their freedom of association with the general public.

While sentences of up to two years less a day are administered by the provinces and territories, the Solicitor General of Canada retains overall legislative authority through the *Prisons and Reformatories Act*. However, the scope of this *Act* has been considerably reduced since 1867, and most matters pertaining to provincial or territorial corrections are found in the statutes of those jurisdictions.

The last major piece of legislation governing federal corrections and conditional release is the *Criminal Records Act*. This *Act*, created in 1970, allows for a criminal record to be sealed and set apart, after the passage of a specified period of time and if certain criteria are met. This statute respects the principle that offenders can reform and lead law-abiding lives, and that at a certain point their past record should no longer have a negative effect on them.



There are a number of other pieces of federal legislation which play a more limited role in the administration of federal corrections, for example the *Immigration Act* in relation to matters respecting foreign offenders, and the *National Defence Act* in relation to military offences.

Canada is also a signatory to various international instruments which affect corrections, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners, and the International Covenant on Civil and Political Rights.

### *Youth Justice*

Canada is currently working to establish a renewed *Youth Criminal Justice Act* based on respect for values such as accountability and responsibility, in light of the expectations of youth, families and society. It also makes clear that criminal behaviour will lead to meaningful consequences. The new system will make a clear distinction between violent and non-violent crime and ensure that youth face consequences that reflect the seriousness of their offence. It will also work to prevent youth crime and support the effort of criminal youth to turn their lives around.

There are three specific areas of focus in the renewed *Youth Criminal Justice Act*. These are preventing youth crime, ensuring there are meaningful consequences that encourage accountability for offences committed by youth and improving rehabilitation and reintegration for youth who will return to the community.

The government has consulted widely with the Canadian public since 1998 on this issue. The new *Youth Criminal Justice Act* will replace the *Young Offenders Act*. The Act gives more flexibility to the provinces and allows them to choose options in some areas that best meet their needs. It will allow courts to choose appropriate sentences, such as custody for violent crimes, and other approaches, such as offender accountability, community involvement and victim and family participation. It encourages a cooperative approach to youth crime, since experience has shown that justice is only one piece of the puzzle. Long-lasting solutions address areas such as child welfare, mental health, education, social services and employment.

There are four core principles of youth justice: the protection of society is the paramount objective of the youth justice system; young people should be treated separately from adults under criminal law; measure to address youth crime must hold the offender accountable, attempt to address the criminal behaviour and repair harm done; parents and victims have a constructive role to play in the youth justice system.

Some aspects of the new legislation include allowing an adult sentence for any youth 14 years or more who is convicted of an offence punishable by more than two years in jail, if the Crown applies successfully to the court. The legislation will expand the offences for which a

youth convicted of an offence is given an adult sentence, since at present, only 16 and 17-year olds accused of murder and sexual assault are subject to adult offences. It will extend the group of offenders who are expected to receive an adult sentence to include 14 and 15-year olds, and create an intensive custody and supervision sentence for the most high-risk youth.

The overall approach by the federal government is a commitment to improve the health, safety and well-being of Canada's children and youth, so they have the utmost opportunity to develop their full potential.

### *The Structure and Jurisdiction of Provincial Corrections*

As set forth in the federal *Criminal Code*, there is a division of responsibility for the administration and delivery of corrections in Canada. This "two tier" structure is determined by the so-called "two-year rule" in which the federal government is charged with the custody of offenders receiving a sentence or a series of sentences totaling two years or more. The provinces and territories, herein referred to as "provinces," are responsible for offenders who receive a sentence or a series of sentences totaling less than two years. This delineation of responsibility allows for local and regional interests to be addressed, with the provinces and the federal government working cooperatively to provide correctional services across the country.

The selection of sentences by judges can be influenced by the capacity of a correctional system to provide adequate treatment through its custodial and community programs. For example, a judge may sentence an offender to two years less a day, to be served in jail, followed by one year of probation, instead of three years of federal incarceration. In this example, the provincial system could offer more appropriate treatment, whether in custody or in the community. The needs and treatment of the offender can be better serviced by the province in this instance, without posing an undue risk to the public or subjecting the offender to a federal term of incarceration with more "criminally mature" inmates.

### *The Structure and Jurisdiction of Federal Corrections*

The Correctional Service of Canada (CSC) is the federal government agency responsible for offenders sentenced to imprisonment for two years or more. CSC contributes to public safety in Canada in collaboration with its Ministry partners, the Department of Justice, and with the provincial, territorial and community organizations responsible for policing, sentencing, corrections, crime prevention and social development.

## *Mission and Philosophical Mandate*

The *CCRA* specifies that the:

purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by:

- (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
- (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

In addition, the Mission Statement of the Service provides a unifying vision for the organization:

The Correctional Service of Canada (CSC), as part of the criminal justice system and respecting the rule of law, contributes to the protection of society by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control.

The Mission Statement defines the goals towards which the organization strives, as well as CSC's approach to both the management of the organization and the management of offenders. It provides a basis upon which CSC is held accountable, and encourages openness in the conduct of staff's duties. The Mission Document contains "Core Values" to articulate the ideals of the Mission, "Guiding Principles" to articulate the key assumptions which direct staff and "Strategic Objectives" which articulate the Mission's goals.

**Part I** of the *CCRA* provides a detailed framework for daily operations and programs. It addresses such matters as treatment programs, inmate discipline, search and seizure, temporary absence and work release programs, which will be described in Chapter 2. The Act specifies that the Commissioner is under the direction of the Solicitor General, but the Minister is normally at arm's length from daily operational matters and decisions. The Minister is responsible for the Service in Parliament, and the Service itself is subject to various reviews, audits and other forms of public scrutiny and accountability.

The National Parole Board (NPB) is an independent administrative tribunal responsible for making decisions about the timing and conditions of release of offenders to the community on various forms of conditional release. The Board also makes pardon decisions, and recommendations for clemency.

The *CCRA* empowers the Board to make conditional release decisions for offenders serving penitentiary-length sentences as well as offenders in provinces and territories without their own Parole Boards. Provincial Parole Boards currently exist in Quebec, Ontario and British Columbia. The *Criminal Records Act* entitles the Board to grant, deny, or revoke pardons for convictions under federal acts or regulations. The Board also conducts investigations and provides recommendations in relation to applications for clemency. Each year, the Board conducts about 20,000 conditional release reviews.

**Part II** of the *CCRA* describes eligibility for conditional release of the decision-making procedure when granting conditional release and the management of offenders once released. The Board is subject to the policy and legislative direction of Parliament, but is independent in its decision-making. Board decisions can be reviewed by the courts on procedural grounds. The Minister is answerable for the Board in Parliament, and the Board itself is subject to various reviews, audits and other forms of public scrutiny and accountability.

## **Community Corrections**

Community Corrections means correctional services and community-based programs that assist in supervising sentences of the courts, or portions of custodial sentences that are served in the community on release from prison. Community Corrections emphasize public safety and provide support to offenders who are re-establishing themselves as law-abiding members of the community.

Probation is the cornerstone of community corrections. A sentence of probation means the offender is allowed to remain in the community under conditions of a probation order, instead of serving a custody sentence. Further details of the roles of probation and other community sentences are provided in the section entitled *The Operations of Institutional and Community Collections*.

## **The Offenders and the Institutions**

### *Federal Offenders – Numbers and Types*

Under the direction of the Commissioner of Corrections, CSC operates 52 federal penitentiaries (46 for male offenders, 6 for female offenders), 17 Community Correctional Centres for offenders on conditional release, 71 parole offices and 19 parole district offices. CSC also contracts with approximately 175 Community-based Residential Facilities operated by non-governmental agencies which provide community accommodation and services. CSC is responsible for approximately 22,000 offenders; approximately 13,000 are incarcerated, and the remainder

is serving sentences in the community on conditional release programs. The operations of CSC are carried out by National Headquarters in Ottawa and five Regional Headquarters across Canada.

All correctional facilities are categorized into four general types: secure, medium, open or community. Secure correctional facilities place a major emphasis on control of offenders, separation from society and the protection of the public. Medium custody correctional centres use a combination of physical security features and organized offender work programs or specialized training programs for offenders. Open custody correctional centres are minimum security centres with high levels of work and training programs. Community correctional centres provide custody for offenders within or near their home communities.

Penitentiaries are classified and operated as maximum, medium, minimum, community correctional centre or multi-level facilities.

There are currently six institutions for female offenders. They are located in Atlantic Canada, Quebec, Ontario, Alberta and Saskatchewan and the Okimaw Ohci Healing Lodge, designed primarily for Aboriginal offenders, in Saskatchewan. The Prison for Women institution in Kingston closed in July 2000.

CSC programs are designed to serve the specific needs of different groups. Among offenders, Aboriginal and women offenders have special needs that require carefully targeted programs. In addition to the Okimaw Lodge noted above, the Pe Sakastew Healing Lodge in Alberta operates for Aboriginal male offenders. The healing lodges for Aboriginal offenders are part of the Correctional Service of Canada's overall strategy to use traditional Aboriginal values and processes when working with Aboriginal offenders.

The Service's strategy with female offenders includes working in a manner that is conducive to their successful reintegration. This includes such things as the woman and child program, which is designed to promote stability and continuity for the child in its relationship with the mother. CSC has also set up small independent-living units in female institutions, which promote responsibility and independence for the female offender, within an environment of limited controls.

The number of federal offenders in correctional institutions as of March 31, 1999 was 12,837, including 305 female offenders (see Figures II and III).

An accurate profile of CSC's offender population is necessary so we can develop and maintain programs to target areas that contribute to the person's offences. For instance, CSC develops special programs for violent offenders, such as anger management, and substance abuse programs for offenders with drug and alcohol problems.

**FIGURE II. Profile of the male population in 1998-1999**

	<b>Total Number:</b> 12,532	<b>%</b>
Age 20 to 34	6,100	49
Serving a first penitentiary sentence	6,489	52
<b>Length of sentence:</b>		
Under three years	2,241	18
Three to six years	3,832	31
Six to ten years	2,066	16
Ten years or more	1,866	15
Life or indeterminate	2,527	20
<b>Offence:</b>		
Murder - first degree	636	5
Murder - second degree	1,593	13
Schedule I (violence)	8,245	66
Schedule II (drugs)	1,498	12
Non-scheduled (non-violent)	1,742	14
Sexual	2,223	18

Source: Basic Facts About Federal Corrections

**Figure III. Profile of the total female inmate population in 1998-99**

	<b>Total Number:</b> 305	<b>%</b>
Age 20 to 34	170	56
Serving a first penitentiary sentence	210	69
<b>Length of sentence:</b>		
Under three years	99	32
Three to six years	103	34
Six to ten years	31	10
Ten years or more	20	7
Life or indeterminate	52	17
<b>Offence:</b>		
Murder - first degree	14	5
Murder - second degree	38	12
Schedule I (violence)	153	50
Schedule II (drugs)	71	23
Non-scheduled (non-violent)	42	14
Sexual	9	3

### *Static and Dynamic Security in Federal Penitentiaries*

There are two kinds of security within CSC institutions: dynamic and static. Dynamic security means the professional, positive relationships between staff members and offenders. It is the daily talking and interaction that takes place between staff and offenders. CSC believes that this interaction has an effect on the culture of the organization, and a review of security incidents shows that problems in institutions happen when there is little positive interaction between staff and inmates. When there is an over-reliance on technology, problems arise; technology should not define policy. Dynamic security is important for maintaining a safe environment and enhancing relationships that give the offender confidence to reintegrate into society.

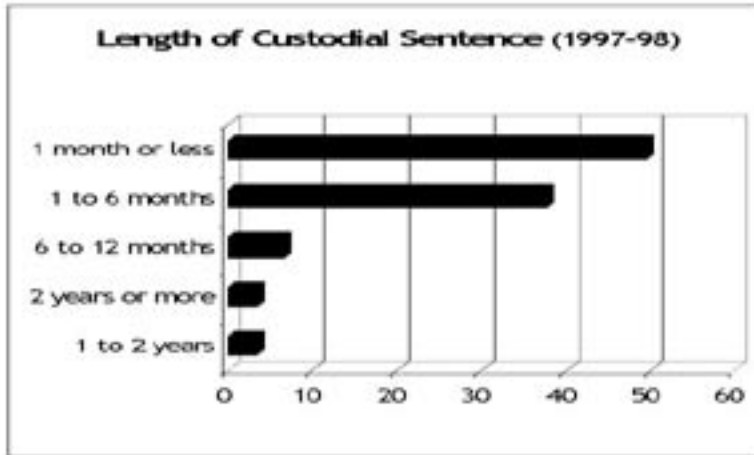
CSC also maintains static security, that is, the hardware and facilities that are used to contain inmates. These include walls, fences, razor wire, towers, PIDS (Perimeter Intrusion Detection System), security cameras, direct supervision, secure cells, security barriers and control posts.

### *Provincial Offenders – Numbers and Types*

All provinces, with minor variations, have a structure for the classification of offenders. There are two main areas of focus within this classification “system.” The first is risk: the risk that the offender may re-offend, or not comply with the order of the court or act as a danger to the community. Risk factors include the number of current convictions, number of prior periods of supervision, history of non-compliance, age at first arrest, escape history and frequency and severity of violence history. The second area is the needs of the offender. Some examples of criminogenic needs are pro-criminal attitudes, the offender’s peers and associates, substance abuse, antisocial personality, problem solving skills and hostility or anger.

Most adult custodial sentences in Canada are relatively short thus resulting in the majority of sentences being six months or less (see Figure IV).

Figure IV. Most Adult Custodial Sentences Ordered by the Court are Short Term



Source: Adult Criminal Court Survey, Canadian Centre for Justice Statistics, Statistics Canada

The total number of provincial inmates in Canada as of 1997 was 19,244, distributed amongst the various provinces and territories (see Figure V).

FIGURE V. Inmates in Provincial Custody

	1993	1997
Canada	19,481	19,244
Newfoundland	380	302
Prince Edward Island	96	92
Nova Scotia	436	398
New Brunswick	467	384
Quebec	3545	3302
Ontario	7254	7778
Manitoba	893	908
Saskatchewan	1214	1177
Alberta	2718	1957
British Columbia	2113	2517
Yukon	73	79
Northwest Territories	293	351

Source: Statistics Canada



Figures VI and VII depict the profile of both the female and male offenders in provincial custody.

**FIGURE VI. Canadian Provincial Female Inmate Population 1996**

	%
Age 18-24	18
<b>Length of Sentence</b>	
Less than 1 Month	6
1 to 3 Months	20
3 to 6 Months	25
6 Months to 1 Year	21
1 Year to 18 Months	10
18 Months to 2 Years	9
<b>Offence</b>	
Homicide	5
Sexual	2
Other Violent	20
Property	36
Other Criminal Code	36

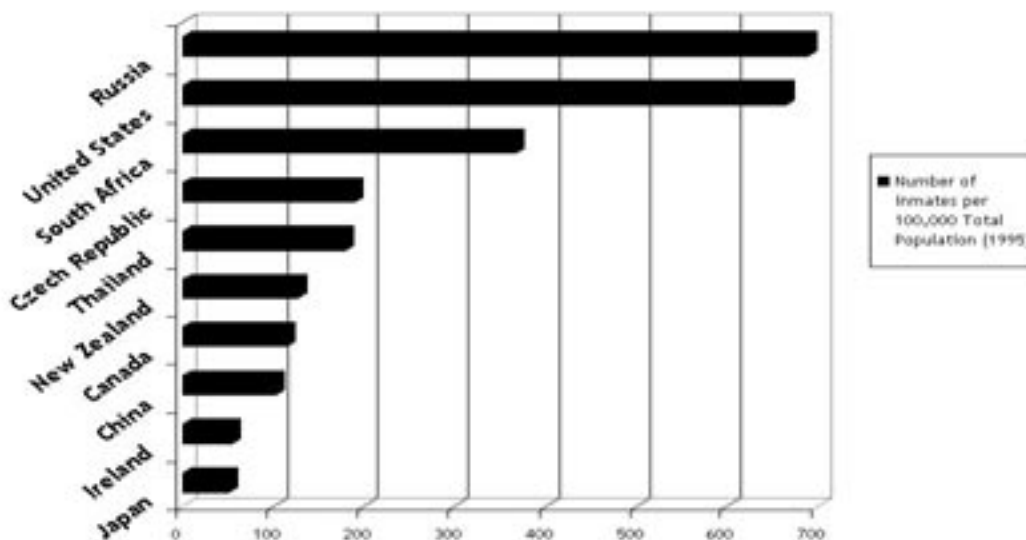
**FIGURE VII. Canadian Provincial Male Inmate Population 1996**

	%
Age 18-24	26
<b>Length of Sentence</b>	
Less than 1 Month	5
1 to 3 Months	15
3 to 6 Months	24
6 Months to 1 Year	22
1 Year to 18 Months	15
18 Months to 2 Years	13
<b>Offence</b>	
Homicide	3
Sexual	7
Other Violent	24
Property	35
Other Criminal Code	31

### Rates of incarceration

Federal rates of incarceration have remained relatively stable in recent years and are currently around 21 inmates per 100,000 people in the general population. Provincial rates in comparison varied from a low 76 per 100,000 Canadians in the province of Ontario, to 193 per 100,000 in the province of Saskatchewan (1995). Combined, Canada's overall rate of incarceration is 120 per 100,000, slightly higher than China's but significantly lower than Canada's closest neighbour, the United States, at 640 per 100,000 (see Figure VIII).

FIGURE VIII. International Incarceration Rates

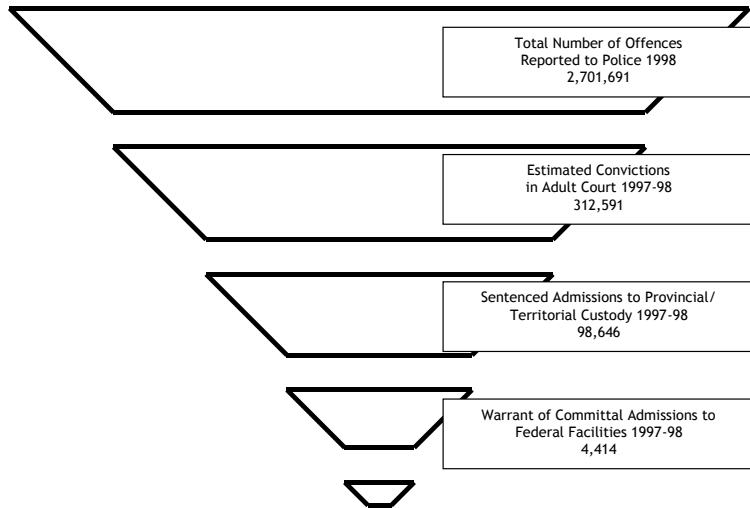


It is important to note that in Canada, a relatively low number of offenders received carceral sentences in comparison to the overall number of offences reported to police and the number of court convictions (see Figure IX).

### Offender Rights – The Correctional Investigator

The federal Correctional Investigator's Office was established in 1973. It serves as a prisoner ombudsman by conducting investigations into the problems of federal offenders related to decisions, recommendations, acts or omissions of CSC that affects offenders individually or as a group. The Correctional Investigator (CI) may not investigate any decision, recommendation,

FIGURE IX: Charge versus custody ratio



Source: Uniform Crime Reporting Survey, Adult Criminal Court Survey and Adult Corrections Survey, Canadian Centre for Justice Statistics, Statistics Canada; Correctional Service Canada.

act or omission of the National Parole Board (NPB). In addition, the CI may initiate an investigation at the request of the Solicitor General.

Upon conducting an investigation, if the CI determines that a problem exists and is not satisfied with the action taken by CSC, its office must inform the Solicitor General. The CI must also submit an annual report to the Solicitor General describing the activities of the office during the year within three months of the end of the fiscal year. The Solicitor General must table a copy of the report in Parliament within 30 sitting days. The CI may at any time make a special report to the Solicitor General, on urgent matters, who must also table such reports within 30 sitting days of Parliament.

The CI is organized with a central office, with investigators who travel regularly to all penitentiaries and parole offices across Canada. In 1997/98, 5463 complaints were received by the CI's office, and 2872 interviews conducted with offenders.

The CI plays an important role in ensuring that individual offenders have access to an independent complaint mechanism. The CI also plays an important role in responding to and investigating broader, systemic problems.

### *Victims' Rights*

In 1988, Canada established the Canadian Statement of Basic Principles of Justice for Victims of Crime. It was intended to ensure fair treatment and inclusion of victims and to guide federal, provincial and territorial laws, policies and procedures in implementing these principles. It was based on the 1985 *UN Declaration of Basic Principles for Victims of Crime and Abuse of Power*. In 1989, the Correctional Service of Canada committed itself in its Mission Document to “ensure that the concerns of victims are taken into account in discharging its responsibilities.”

In 1992, the Canadian government established the *Corrections and Conditional Release Act* that officially gave victims certain rights, primary of which was to receive information about offenders as they served out their sentence. Changes to this legislation are being considered. They will likely give victims additional rights, for example, the right to make a statement at Parole Board Hearings and listen to audiotapes of those hearings.

All CSC institutions and parole institutions have a Victim Liaison Coordinator to ensure that information about offenders is shared in a timely and professional manner with victims. This work is enhanced by the use of an electronic Offender Management System that now includes information specific to victims. This was developed and implemented by both the National Parole Board and the CSC. Both these agencies collaborate in the delivery of information to victims. The CSC is currently involved on an intensive review of its services to victims, with both internal and external partners including victims rights groups. The training of staff in these areas is considered a priority by CSC, as is the security of victim information, timely notification, and doing everything possible to eliminate revictimization. These efforts are being made within a restorative justice framework that recognizes victims' needs and how central victims are in the aftermath of crime.

### *Staff Profiles*

There are approximately 14,000 staff members at the CSC, of whom 82 per cent work in federal institutions. Half of these are correctional officers, and 8 per cent are employed in community supervision. There are approximately 2800 women working as correctional officers, social workers and in other positions directly with offenders. Many of these work in male correctional centres with male offenders.

## Non-Governmental Organisations (NGOs)

### *History*

Community Corrections require citizen involvement in order to function because citizens and offenders interact in the community. The question is not whether there will be citizen involvement, but what form that involvement will take. Originating in Europe, citizen involvement was brought to international attention by the contributions of John Howard and Elizabeth Fry. Paradoxically, as a result of the Quakers having created the first prototype prison, which has become the ultimate sanction in Western corrections, voluntary citizen involvement in corrections accelerated.

In Canada, citizen involvement in corrections is primarily carried out through non-government organizations. Since Canada's first prison, Kingston Penitentiary, was built in 1835, Canadian citizens have been involved in improving service to the offender and society, and reforming the system. Some significant achievements by non-governmental organizations in Canadian corrections include:

- the convening of the first national public forum or convention on corrections in 1891 in Toronto
- the appointment of a Salvation Army Officer as the first Parole Officer for Canada in 1905
- the opening in 1954 of the first halfway house for adult offenders in Toronto
- the emergence of Aboriginal organizations providing programs for Aboriginal offenders
- The creation of the National Task Force on Federally Sentenced Women, which was made up of many non-government organizations. The result of the Task Force was the 1990s document called *Creating Choices* which has become a model for women's corrections in Canada.

### *Types and Roles of Non-Governmental Organizations*

The first non-governmental organizations were motivated by religious and humanitarian forces. Today's non-governmental sector is more diverse in type but has maintained its commitment to service, reform and education.

There are four discernable categories of non-governmental involvement. These are Representational, Entrepreneurial, Policy Advocates and Direct Service Voluntary Agencies.

## Representational

This category includes groups in the field of corrections whose primary concern is to serve their members and/or the community.

*Union of Solicitor-General Employees (USGE)*. The USGE represents close to 16,000 members working under the Solicitor General of Canada and the Department of Justice in approximately 138 locations in Canada and was formed in November 1966. Its members are employees in the Correctional Service of Canada, the Royal Canadian Mounted Police, the National Parole Board, the Canadian Human Rights Commission, the Privacy Commission, the Supreme and Federal Courts of Canada and the Canadian Security Intelligence Service. The Union ensures that staff is given an opportunity to comment and advise management on major policy issues, particularly those that directly affect its members. Similar unions to the USGE exist in all provinces.

*Citizen Advisory Committees (CACs)*. CACs were established in the 1960s in CSC's new medium and minimum security institutions. They are made up of community volunteers who serve as advisors to the local penitentiary or parole office administration and help communicate with the neighbouring community. Today, all major federal correctional facilities and most parole supervision offices are served by CACs. Their mission is to contribute to the protection of society by interacting with the staff of the Correctional Service of Canada, the public and offenders and to provide impartial advice and recommendations. They also foster public participation, develop community resources and act as independent observers.

## Entrepreneurial

This category includes a number of Canadian firms and individuals who provide programs, products and services specifically in relation to corrections while generating a profit for their organization.

Canada has no private, for-profit adult prisons at present. However several provinces have shown some interest in exploring this concept. The province of Ontario in November 1999 announced that the operation of at least one of its new 1200 bed facilities, currently under construction, would be privately managed.

In Canada, there are also a number of multi-service, private sector agencies that deliver direct social and human service programs under contract to governments. These companies specialize in designing and managing residential and community-based corrections for youth and adult offenders. Specific services include operating halfway houses for adult offenders, supervising community service orders for adult and young offenders, operating open and closed custody facilities for young offenders, coordinating adult diversion programs and providing intensive supervision programs and residential attendance (as a term of a probation order) pro-

grams for young offenders. These agencies' primary method for securing business is through requests for proposals issued by government departments.

### Criminal Justice Policy Advocates

This category includes organizations that have a specific focus on promoting sound correctional practices based on research, experience and proven practices.

*The Canadian Criminal Justice Association (CCJA)*. The CCJA is at the forefront of organizations urging improvement within the broad field of criminal justice. It was officially founded in 1919 as the Prisoners Welfare Association. Today it is a broad membership-based association representing all elements of the criminal justice system, including private citizens. It exists to promote rational, informed and responsible debate in order to develop a more humane, equitable and effective justice system. The strategic intent of the CCJA is to:

- Provide the public criminal justice participants and concerned observers with balanced information and education;
- Create opportunities for debate, consultation and advice, initiation of change, monitoring of progress, and improvements in the areas of crime prevention, community based programs, public policy, justice program services and legislation;
- Advocate for fairness, equity and protection of rights;
- Foster communication, collegiality, consensus and cooperation; and
- Promote research and the advancement of knowledge;
- The CCJA attempts to develop a national forum where views can come together to achieve consensus around issues, policy and the law. Its membership includes those working in the field of criminal justice, and increasingly, the police, the judiciary, the Crown and defence bar, victim groups, those involved with young offenders, other related services and the public. It publishes a newsletter, a magazine and a scientific journal throughout the year, as well as a Justice Directory of Services and a Directory of Services for Victims of Crime. They convene an interdisciplinary conference on Criminal Justice every second year in Canada to discuss current issues and learn of latest developments in criminal justice.

*National Associations Active in Criminal Justice (NAACJ)*. The NAACJ aims to enhance the capacity of member organizations to contribute to a just, fair, equitable and effective justice system. It is a coalition of 18 national organizations, some of which provide services to offenders or ex-offenders. Other members of NAACJ actively promote community-based alternatives to

incarceration or engage in criminal justice research. Members of NAACJ work to prevent crime through social development and seek to increase public confidence in the justice system. The purpose of NAACJ is:

- to contribute to the education of members, interested organizations and the general public through activities that share and generate knowledge and information
- to assist member organizations through activities that share and generate expertise
- to support the development of policy related to criminal justice by promoting consultation and policy forums with the federal government.

*The Church Council on Justice and Corrections (CCJC).* The CCJC was established in 1974 by the Canadian Council of Churches and the Canadian Council of Catholic Bishops and reflects the historical involvement of the Church in corrections in Canada. Its mandate to the Church is to strengthen the ministry in criminal justice. For governments and voluntary agencies, it is to advocate for reform and policy analysis, and for the public, it is to encourage them to confront the destructive consequences of crime and be socially responsible.

Within recent years, these criminal justice policy organizations have developed an international focus. This interest is exemplified by organizations such as the International Society for the Reform of Criminal Law, the International Centre for Criminal Law Reform and Criminal Justice Policy and the International Corrections and Prisons Association, the latter of which was founded in Canada in 1998, but is committed to encouraging the best corrections practices around the world.

#### Direct-Service Voluntary Agencies

The greatest, longest and most influential non-governmental involvement in Canadian corrections is that of the voluntary direct-service organizations, traditionally referred to as After Care and Prisoners Aid Societies. The voluntary nature of these organizations persists even though they may receive funding from government; they also get funding from citizens and are responsible to their local communities through their respective elected boards of directors. These organizations represent the highest ideals of service and voluntary action. The best known of the direct-service agencies are:

*The Salvation Army*, founded in 1865 is a religious and charitable movement and branch of the Christian church. The mission of the Salvation Army is to minister to offenders, victims, witnesses and persons affected by and serving in the Justice System by practical assistance and through a demonstration of Christian love and concern. The Army provides visitation and



counseling services, post-release planning, residential service, employment searches as well as supervision for parolees.

*The John Howard Society of Canada* is made up of provincial and territorial societies comprised of people whose goal is to understand and respond to the problems of crime and the criminal justice system. The Society works with people who have come into conflict with the law, advocates for change in the justice process, engages in public education and promotes crime prevention through community programs and intervention. Its member agencies provide a wide range of services in the field of criminal justice, from crime prevention to parole supervision and post release support and residential service.

*The Canadian Association of Elizabeth Fry Societies* is a federation of autonomous societies which works on behalf of women involved with the justice system, particularly women in conflict with the law. Elizabeth Fry Societies are community-based agencies dedicated to offering services and programs to marginalized women and advocating for legislative and administrative reform. In recent years they have been instrumental in helping shape Canada's response to federally-sentenced women. Member agencies continue to provide prevention, counseling and reintegrative services to women in conflict with the law.

*The St. Leonard's Society of Canada (SLSC)*, a national affiliation of non-profit, community organizations and individuals committed to the prevention of crime through programs that promote responsible living and safe communities. It provides highly specialized residential and non-residential programs for chronic substance abusers, long-term offenders and developmentally-challenged offenders. It provides services based in halfway houses, and member organizations provide residential, counseling and preventative services to offenders. SLSC have been instrumental in the development of a special program for Lifers and long-term offenders, together with the Correctional Service of Canada and the National Parole Board. They operate the only after care residence devoted to Lifers on parole.

*The Seventh Step Society of Canada* is a self-help program working in the criminal justice system with offenders or ex-offenders to help them change behaviors that led them into conflict with the law. Problems are confronted and resolved at weekly meetings held in correctional institutions and in the community. The Seventh Step Society also runs public education sessions by ex-offenders and offenders for junior and senior high school students to provide information on the criminal justice system. Community services include operating halfway houses, parole supervision, referrals and training for volunteers.

### *Impact and Influence*

Non-governmental organizations in corrections represent groups that are publicly committed to achieving improved service, better programs and a more supportive public. They are

motivators for change and a way to reach Canadians. Although largely dependent on public financial support, they remain frequently critical of government proposals, policies and programs. Despite this, there is a hard-earned mutual respect that exists between the public and non-governmental sectors.

The non-governmental direct service agency is a vital and vibrant part of Canadian corrections and makes major contributions in the field of corrections. An example of a public and voluntary agency relationship is the new LifeLine program. LifeLine has access to federal funds through contracts with federally-funded voluntary agencies such as the John Howard Society, the St. Leonard's Society and Aboriginal organizations. The LifeLine program employs Lifers (who are long term offenders on parole) to return to work in prisons with long-term inmates. The program also develops community resources and promotes greater public awareness of humane and effective corrections.

In relation to emerging philosophies, policies and programs, it is again a tribute to the voluntary sector, that the CCJA Biennial Congress is firmly established as the definitive recurring forum for Canadian Criminal Justice and Corrections. A final deserved compliment to this sector is the recognition in law by the Government of Canada, within the *Corrections and Conditional Release Act*, that the Correctional Service of Canada will consult with this source of experience and expertise before initiating major policy or program implementation.

All of the organizations and individuals within the non-governmental sector contribute greatly to the public's understanding, involvement and support. Their role and responsibility goes beyond a singular focus on the offender to a contribution to developing policies, innovating programs, and hopefully protecting all involved; victims, staff members, offenders and citizens.

## THE OPERATIONS OF INSTITUTIONAL AND COMMUNITY CORRECTIONS

### **Provincial Corrections**

#### *Institutional Administration, Operations and Programs*

##### Jurisdiction

The provinces establish legislation that enables them to develop policies and procedures, provide information to the court related to sentencing and provide correctional services, programs and facilities for adults remanded in custody or sentenced to a period of incarceration. They have the responsibility to supervise persons granted bail as well as those offenders placed

on probation and provincial parole. The provinces also establish and administer programs that serve as alternatives to the formal court (sentencing) system.

While each province may describe its mission/mandate in a unique way, the over-arching mission, whether stated or implied, includes:

- Protection of the public
- Assurance that court-ordered sanctions, incorporating punishment, deterrence and treatment are carried out in a manner consistent with their intent, provision of avenues for offenders to make restitution and reparation for damages to victims and communities
- Provision of positive and constructive activities for offenders in custody, on probation and those involved in alternative (pre-court) programs
- Assistance to sentenced offenders to re-establish themselves in the community following release from custody

## Security

Provincial Corrections provide a range of custodial facilities for adult men and women. Persons who are remanded into custody or sentenced to a term of two years less a day are housed in provincial (as opposed to federal) facilities. When an offender receives a jail sentence of two years or more, he/she will likely remain in custody in a provincial centre for up to fifteen days before being transferred to a federal penitentiary. In some provinces, female offenders serve their term in provincial facilities under a formal agreement between the CSC and the provinces concerned, regardless of the length of sentence.

All provincial facilities are categorized into four general types: secure, medium, open or community. In secure facilities, the major emphasis is on control, and the separation from and protection of the public. Medium and open facilities place a major emphasis on organized work projects or specialized training programs. In community facilities, a major emphasis is on community employment, training and educational opportunities.

Almost all remand inmates (these are offenders awaiting trial) are housed in secure facilities. Upon receiving sentencing, inmates are admitted at various correctional centres within a province, depending on their classification. A priority is given to classifying and admitting prisoners to the appropriate facility as quickly as possible. The focus of risk to the public and the needs of the offender are a cornerstone to the classification system in all provinces.

*Provincial Secure Correctional Centres.* The main features of secure provincial custodial centres are high levels of physical and technological security. Control, separation and protection of the public are prime concerns. Secure imprisonment should be achieved in as humane a manner as possible. Programs and activities are provided in work, recreation, education, life-skills and personal development to enable offenders to make positive use of incarceration.

Offenders placed in or transferred to secure facilities are held there until their sentence expires, or until they are released on parole or they qualify for reclassification to medium, open facilities or supervision in the community. Community supervision usually involves placement in a Community Resource Centre or the offender's personal residence, often with mobility restrictions and intensive staff or electronic monitoring of the offender.

Offenders are placed in a secure facility when they are considered dangerous to the community as a result of a number of convictions for violent and destructive behavior. There may be professional opinions that the offender is violent and unpredictable, the offender displays violent, aggressive behavior that poses a threat to inmates/staff in a less secure setting, there is a likelihood of escape and an obvious lack of improvement in attitude.

Offenders may be placed in secure facilities if they show serious management problems, if the information available on the offender is insufficient to determine the level of security required (due to the offender's evasiveness during the classification interview) or if there is a need for further checks on the offender's background.

Other reasons for placement in a secure facility include the need for a medical or psychological assessment, such as when the court has recommended forensic treatment, the offender has an unstable background, the offender has social or intellectual deficiencies that may cause problems in placement, the health problems of the offender require hospital care or the offender was under psychiatric or psychological treatment before being sentenced.

Finally, other reasons include a need for the offender to be readily available for legal counsel, or has pending legal concerns, such as further criminal charges, an immigration hearing, an up-coming trial, an on-going investigation, a deportation order or an appeal of sentence or conviction.

*Provincial Medium Security Correctional Centres.* Medium security centres use a combination of static and dynamic features to maintain security over the inmate population. Static security refers to walls, fences and the variety of technological security features; dynamic security means the positive interaction that takes place between staff and offenders. Static security is maintained through perimeter fencing and strategically located closed circuit television cameras provide enhanced static security, while high levels of programming and staff supervision provide dynamic security.

Programs in medium custody jails vary. Work programs may include farming, gardening, laundry, and general maintenance work including grounds maintenance. Inmates may also learn skilled trades such as tailoring, woodworking and metal work. In most provinces, during forest fire season, inmate fire fighting crews are trained and available on a standby basis. Work programs are often operated as a cooperative effort with other levels of government or the private business sector. Inmate labour is not abused or exploited and inmates receive fair payment for the work or services they are asked to provide.

Inmates classified to medium custody do not generally require as high a level of security as with secure custody facilities and can be housed in an open setting. The following criteria is generally considered when classifying inmates to a medium custody centre:

- No history or pattern of serious violence
- No recent escape from a medium or secure custody centre
- No serious drug dependencies requiring ongoing medical support
- No recent involvement in any major drug trafficking/conspiracy activities

*Provincial Open Custody Correctional Centres.* Open facilities consist of minimum security centres, semi-isolated forest camps and farm settings. They provide supervised accommodation with appropriate work and training programs. Work programs are similar to those of medium security facilities, and are organized in partnership with different levels of government and with the private business sector; inmates are paid a fair salary. Some centres focus programming on a certain type of offence such as sex offending or on mentally disordered offenders or female offenders.

Inmates classified to an open centre can generally be defined as those who pose no more than a minimum risk to the community, require a minimum amount of supervision, are not considered likely to escape, do not have serious medical issues and are generally physically fit.

*Provincial Community Correctional Centres.* Provincial Community Correctional Centres provide custody for offenders near their home communities. These are typically group homes or multi-unit facilities. Inmates housed in these facilities are either serving short sentences or approaching the end of longer sentences. Inmates in community correctional centres have demonstrated a greater degree of social responsibility and have sound prospects for employment or schooling. Most inmates leave the centre during the day on temporary absence to attend jobs and training programs, and return in the evening. If the inmates earn money, they are expected to pay room and board fees, pay debts, make restitution and support their families. Community correctional centres provide an environment in which inmates can develop personal responsibility and the positive attitudes needed to re-enter the community on a full time basis. The inmates

are connected to community agencies that provide counseling and other support services that will help them reintegrate after their release. Some CCCs may be operated by the community corrections division of the provincial corrections department, or through a service contract with a non-profit organization.

Inmates classified to a community correctional centre can generally be defined as those posing no threat to the public or themselves, demonstrate responsible behavior and motivation, and are able to benefit from educational and vocational training programs in the community.

### Offender Discipline

Though some of an inmate's rights have been suspended or restricted by incarceration, it is important to recognize the principles of administrative and procedural fairness in dealing with inmate discipline. In provincial correctional centres, Disciplinary Panels must be established to give the inmate a fair hearing and a chance to be heard. A disciplinary hearing is not a criminal trial but rather an administrative hearing with rules to ensure a fair presentation of the evidence, a hearing for both sides and a just determination of the facts.

The disciplinary process involves the following:

- Initiation of Disciplinary Proceedings – When an inmate breaches a rule that cannot be dealt with informally, an officer will write a formal incident report, citing the regulation breached and the names of all those involved
- An investigating officer will be appointed to review all aspects of the incident
- A disciplinary panel hearing will be held within a prompt and reasonable time frame
- The panel will determine if the allegations have been substantiated and the inmate will be advised of the panel's findings.
- An inmate has the right to request a review of the disposition
- An inmate has the right to appeal the disposition and process to an external agency established by provincial legislation or ultimately through the courts system

Inmate Segregation is a form of sanction prison authorities may administer to ensure the safety and security of the offender, other inmates, staff and the public. However, there are administrative procedures in place to ensure fairness to the inmate. Staff must:

- Inform an inmate, in writing, of the reasons for the placement in segregation
- Notify an inmate in advance of each review of placement into segregation, in order to permit the inmate to present his or her case at a hearing
- Advise the inmate, in writing, of decisions concerning his or her status

## Provincial offenders' rights and redress mechanisms

As with federal law, provinces have a duty, under federal and provincial laws, to act fairly with inmates held in correctional facilities and to not act or render decisions towards inmates in an arbitrary or discriminatory manner. Both federal and provincial inmates have legal rights. Inmates can take their grievances to correctional officials, external agencies and the courts to request a hearing. Various courts have recognized that inmates possess rights and have often ruled in their favour.

## Provincial case management

*Calculation of Sentence.* Every effort is made to manage the sentence of an inmate as fairly as possible. This begins with the admission process, which includes the calculation of sentence. The institutions' records officer informs the inmate of how much remission can be earned on the sentence, when release may occur and the parole eligibility date.

*Classification and Sentence Planning.* The classification officer interviews the inmate, prepares an assessment of risk and needs and prepares a sentence management plan with the inmate. The plan is created based on the offender's court history, family concerns, educational and work record, and any areas of individual need identified in the assessment of risk and needs. The plan places the offender in the most appropriate facility available at the time, details training or work opportunities that might be suitable, describes when counseling should be provided and suggests when support is required for release planning; the plan also gives the dates to initiate actions or reviews.

Corrections staff use the sentence management plan to work with the inmate. The inmate is encouraged to exercise initiative and make use of the programs and services available. This may mean requesting a transfer, participating in programs, applying for temporary absences or applying for parole. The sentence plan can be reviewed at any time, with amendments made by the classification officer as circumstances change.

*Temporary Absences.* Giving full consideration to the safety of the public, the inmate is encouraged to use community resources whenever possible. He or she may use these to seek employment, continue with education/training programs started before or during incarceration, seek specialized counseling or treatment, or visit family.

*Temporary Absences (with an Electronic Monitoring component of surveillance).* Some temporary absences may be granted with a condition that the inmate is monitored by means of an electronic device, often attached to the ankle or wrist. This form of temporary absence supervision is targeted at those who are serving shorter sentences, or nearing the end of a longer sentence. Inmates considered for electronic monitoring must pose no danger to the community and their

home situation must be suitable. In some provinces, Electronic Monitoring programs may be administered by a Community Corrections organization.

*Parole Applications.* The inmate is eligible for parole after having served one third of his/her sentence. After receiving the inmate's application, the parole coordinator gathers the required documents and reports, which are then formally presented to the provincial Board of Parole for a hearing.

*Detaining Citizens of Foreign Countries.* When it becomes evident that an inmate could be subject to deportation, Canadian Immigration is notified. The inmate is advised of his or her rights including those of communication and access to Consular officials. Where the inmate requests that Consular officials be notified, the inmate shall have access to telephone and written communication and interview/visits from Consular officials. Canadian Immigration officials work closely with correctional centre directors and the inmate, and make available all pertinent information regarding the inmate's status. Translation services are provided where necessary. Food, health care and other services are adopted/provided to address cultural differences, wherever possible.

*Exchange of Service Agreements.* Provinces often enter into agreements with the federal government of Canada that allow inmates serving penitentiary sentences to transfer to a provincial correctional centre. An application for transfer is made at the federal facility either at the beginning of a federal offender's sentence while the inmate is still in a provincial correctional centre, or after the inmate has arrived at the federal penitentiary. The agreement also allows for the transfer of provincial prisoners to a federal penitentiary, although these transfers are less frequently requested. The reasons for transfers are usually because of the availability of treatment within or near a provincial facility, or for humanitarian reasons in relation to contact with family or support networks.

Provinces also establish inter-provincial exchange of service agreements, making it possible for an inmate to transfer to the province or territory of their residence. The Government of Canada has also entered into treaties with over 60 sovereign entities, that allow the transfer of prisoners between countries. For example, a citizen of certain states within the United States, and who is sentenced to more than six months in Canada, can apply for transfer to serve the sentence in a prison in the United States, and vice versa.

There must be a formal agreement between countries in order to transfer offenders; these agreements are called bilateral treaties or multilateral conventions. The treaties and conventions apply to all federal and provincial offenders. Both of the countries must approve, and offenders must give their consent. Foreign offenders in Canada who are under provincial or territorial jurisdiction, including probationers, can be transferred to their own country. And Canadians



abroad serving sentences of less than two years or on probation can be transferred to Canada to their provincial jurisdiction.

### Programs and Services

Provinces may describe differently those programs that are put in place to address the risks and needs of offenders. Many provinces, and certainly the Correctional Service of Canada, group their offender programs under the title of “Core Programs.” They are structured to allow the offender treatment while under community supervision, or during incarceration. The provinces provide structured programs that may be operated by trained corrections staff or professionals within the communities. Successful programs involve offenders who are receptive to treatment opportunities and who have well trained teachers with a high degree of interest in the offenders. Research has shown that programs delivered in a community setting are better attended by offenders, and have a greater impact on reducing recidivism, than when they are delivered in jail.

Offenders under provincial jurisdiction are in custody, or are under community supervision for a relatively short period of time. In order to offer the public protection from serious offenders, correctional officials need to assist in the development of internal controls and lifestyle changes among offenders. Programs are designed to directly influence beliefs, attitudes, lifestyles and skill deficits. The programs are based on sound research and are offered within the context of the least intervention necessary to effect change in behavior.

Some examples of priority or “core” programs offered by the provinces are:

- Motivational Programs, which teach offenders that they are capable of change
- Cognitive Skills Programs, which teach thinking skills, related to crime avoidance
- Educational Upgrading Programs, which teach basic literacy and numeracy
- Substance Abuse Programs, which address offenders’ abuse or dependence on alcohol or drugs, Anger Management, which helps offenders, distinguish between anger and violence
- Living Skills Programs, which help offenders develop skills for a more stable lifestyle, prepare for the job market and how to manage their financial affairs
- Family Violence Programs, which address the specific crime of violence against women in relationships
- Sex Offender Programs, which address the specific crimes of sexual assault, sexual interference and incest

There are a number of other programs and activities offered to offenders by the provinces. Most provincial correctional centres offer the following programs:

*Health.* The generally accepted mandate between provinces is to provide emergency and ongoing health care to offenders. This is accomplished by screening all inmates upon admission to a centre and making any necessary referrals to medical professionals and counseling services. Appropriate care and follow-up is provided, according to the individual's needs.

In provinces where communicative diseases are higher than other diseases (such as British Columbia) testing may be offered for sexually transmitted diseases such as HIV and Hepatitis B upon admission to the centre, with treatment, counseling and follow-up. Provincial corrections take an active role in public health services including immunization, education and harm reduction measures. These services may include methadone, availability of condoms and lubricants, and distribution of bleach for the purpose of cleaning injection and piercing equipment. Corrections' health officials interface with hospitals, community physicians and public health organizations. These linkages assist with the continuing care of offenders upon release back into the community. These measures are based on the "Harm Reduction Model" which helps prevent others from being hurt or harmed by offenders' behaviour.

Medical Services are fully available to all inmates. On-site medical services usually include daily nursing and, at minimum, weekly physician and dentist attendance; optometry, physiotherapy and x-ray services are also provided, either on-site or at an outside clinic. Psychiatric and psychological assessments and counseling are provided either in conjunction with other provincial ministries or from contracted services in the community.

*Religion.* The principle of treating all inmates with respect and dignity means that the provincial government makes every attempt to provide services or linkages for all religious denominations. Aboriginal offenders receive religious services from native band elders, some of who may be staff members, and other representatives from the Aboriginal communities. Other religious services are provided by staff chaplains or by contracted chaplains.

*Visiting.* Visits provide an opportunity for inmates to maintain contact with friends and provide a mechanism for inmates to strengthen family relationships with spouses and children. There are three general categories of visitors:

- Professional, such as lawyers, doctors, chaplains, police, probation and parole officers
- Program officials, such as volunteers, private agencies and community groups who provide an activity, program or service to a number of inmates, either in group settings or to individual offenders
- Family, Friends and Relatives. There is a minimum number of visiting hours, in this category, established by each provincial correctional organization.

There are four types of visit settings. These are official, closed, open and private family visits. Official settings are used in the case of professional visits requiring confidentiality and privacy based on the information being discussed. Closed settings have a barrier, such as a glass partition, between the inmate and the visitor that prohibits physical contact. Open settings have no barrier between the inmate and the visitor and allow for physical contact. During Private Family Visits, inmates may access a self-contained area, such as a cottage or apartment, which permit overnight visits with family members.

All visitors coming onto the grounds of a correctional centre are subject to have their person, vehicle and articles of property searched for contraband.

*Education.* Educational programs are provided to inmates. However, the length of the offender's sentence may limit the duration and intensity of programs offered to individuals. Education upgrading for Grades one through 12 is generally offered. Remedial education is offered. Other examples of educational programs provided are vocational training and counseling, computer skills, literacy and tutoring.

*Recreation.* Access to outside physical recreation is a legislated requirement. It also greatly assists in the general management of the inmate population. Recreation is provided on a daily basis. On-site gymnasiums, outside exercise yards and ball fields allow sports and weight training. Library services are also available to inmates. Social recreation is available through such programs as TV rooms, videos, bingo, cards, group activities and a wide range of crafts and hobbies. Inmates are assisted to sell their arts and crafts to the community.

*Employment.* Every effort is made to provide meaningful work for inmates. Some examples of work programs are farming, gardening, laundry and general maintenance work including grounds maintenance. Inmates may also learn skilled trades such as tailoring, woodwork and metalwork where they manufacture finished products that can be used within the institution or sold, at fair market value, in the community. Opportunities for female offenders may include: hair dressing, dog grooming and training, horticulture, tailoring, laundry, floral design as well as general cleaning and building maintenance.

## Current Issues

*Pressures on the System.* It is important to mention that all jurisdictions experience political, social, internal and service demand pressures. Recent history has included an almost constant pressure to review policies and processes to achieve increased efficiencies and new strategies to meet our stated mandate. Resource pressures affect two main categories of expenditures, operational (staff and material) and capital costs (institutions and community offices).

There are two key pressures currently affecting provincial corrections. The first is the increased numbers of offenders awaiting trial and being held in custody or receiving bail and being supervised in the community. The second is the significantly greater number of people receiving community supervision (probation) than those receiving jail time. These two general trends are compounded by the increase in the seriousness of offenders sentenced to community supervision and to custody. These two general areas of pressure have required provinces to focus their attention on the classification, case management and alternatives to the traditional methods of offender control.

*Responses to Pressures.* The following seven broad avenues of response are examples of initiatives generally adopted or being considered by the provinces.

- **Staff Recruitment, Training and Retention:** Funding is directly related to the quality of correctional staff and providers of services and programs. In some provinces pre-employment courses are a prerequisite for all new recruits. Wages and benefits have been increased along with reduced work hours. Most jurisdictions have implemented staff recognition programs along with methods to reward high achievement. Career planning and assistance with individual growth within the justice system is commonplace among the provinces. Recruitment policies support the need for the hiring of greater numbers of staff from the Aboriginal and other cultural minority groups. Specialized training is being undertaken to focus on specific, high volume profiles such as sexual offenders and mentally disordered offenders.
- **Alternate Methods of Supervision:** More alternatives are being looked at, in the areas of probation supervision, bail reporting and custodial control. Some examples are automatic bail reporting methods and electronic monitoring procedures.
- **Case Management:** More intensive case management is being exercised, with Risk and Needs being in the forefront of offender case planning. This ensures the accurate allocation of resources is in accordance with the offenders' treatment plan.
- **Alternate Methods of Program Delivery:** Provinces continue to use staff, contract workers and volunteers to deliver programs and services in the most expert and effective way.
- **Capital Construction:** Care is taken to ensure high standards of human dignity when institutions are being planned or renovated. Provinces enter into partnerships with the Correctional Service of Canada through Exchange of Services Agreements for the security and programs needs that are common to both their offender populations. One example is the joint funding for construction and operation of institutions to house both federal and provincial female offenders.

- **Alternatives to Probation and Custody:** Provinces are making greater use of diversion programs and other alternative measures. All jurisdictions are experiencing considerable progress in developing and implementing alternative measures programs that divert offenders from the formal court/sentencing system. Diversion is an approach in which adults accused of certain criminal offences have their prosecution halted for a period of time, while interested parties negotiate an agreement to participate in community-based conflict resolution, counseling, or treatment programs. Diversion initiatives often involve police, prosecutors, corrections, community and contracted agencies.
- **Restorative Justice:** There is an approach comparable to diversion that attempts to avoid the traditional adversarial method of resolving disputes in the justice system. This approach is contained in the Restorative Justice Framework. The framework of collaborative dispute resolution (civil and family law) and restorative justice (criminal law) provides a more flexible series of non-adversarial options for dispute resolution and holds the offenders accountable for their actions of crime with meaningful consequences, and provide healing for individuals and those affected by crime.

A collaborative dispute resolution process allows people to settle disputes by negotiating an agreement that takes into account the interests of both parties as well as those affected by the dispute. Some examples are: mediation, where a neutral third party who has no decision making power helps the disputing parties to reach their own acceptable settlement, and arbitration, where an arbitrator makes a decision and the parties decide in advance if the arbitrator's decision will be binding.

The restorative justice approach can be used at any stage in the criminal justice process, from before a decision is made to lay a criminal charge, until the offender completes any sentence that has been imposed by the court. Some examples of this approach include: 1) Victim and Offender Reconciliation Program, which bring the victim and offender together, with a trained mediator, to discuss the offending behavior. These programs can be used as a part of an informal out of court process, after sentencing or while the offender is incarcerated. 2) Circle Remedies, which use First Nations justice methods to resolve criminal behavior. Circles are inclusive processes where the entire community is encouraged to participate in expressing thoughts and feelings about an offence and finding a remedy that will promote healing. Circles often function as a pre-sentence advisory process for the court. 3) Family Group Conferences, which are used by many community accountability programs to deal with offenders referred to the program by police. This approach brings victim, offender and their support groups together with a trained facilitator to reach an agreement about the harm caused by the crime.

Community sanctions with treatment planning are used, whenever appropriate in part because there is evidence to suggest that jails can be “schools of crime.” Offenders are thus reintegrated back into the community as soon as it is safe to do so.

### Special Needs Offenders

*Female Offenders.* Women in prison receive ongoing review and scrutiny. Females are under-represented in the correctional system. This dynamic creates its own set of challenges with planning and delivering separate custodial security and the provision of appropriate treatment programs and activities for a relatively small proportion of incarcerated inmates. Based on the relatively low numbers of female offenders there has been a tendency to centralize females held in custody. The inherent challenge with this approach is to somehow encourage and facilitate inmate contact with family members and support systems in their home communities.

The majority of incarcerated women have been physically and sexually victimized by men. Programming and operational issues therefore, are considered in light of the need for women to have a safe and supportive environment in which to heal. Women offenders have unique and greater medical needs than men, such as gynecology and pregnancy related care. Also, women, perhaps due to their histories of abuse and socialization experiences, have a greater need for privacy than do male offenders. As such, cross-gender staffing presents greater difficulties for women inmates than for male inmates.

Specialized education and job skills training for women are important considerations. Vocational programming must be offered in both traditional and non-traditional fields, to assist women to secure employment and become more self-sufficient upon their return to the community.

### *Community Corrections*

#### Jurisdiction

Community Corrections can be defined as correctional services and community-based programs that are set up to supervise sentences of the courts and offer alternative program options to the courts’ sentencing systems, while providing public safety and supporting the efforts of offenders to become reestablished as law-abiding members of the community.

Community Corrections consists of offenders on probation. Probation was legally established in Canada in 1889 enabling judges to suspend the imposition of a sentence and to release an offender on a “test” or probation of good conduct. Since that time provinces have enacted legislation to create probation and services to the courts, as well as the supervision of offenders

in the community. Judges may impose probation orders in the criminal courts for a period not to exceed three years. A probation order has two types of conditions: general conditions are those restrictions which apply to all probationers, including the requirement to obey the law and report to the supervising probation officer. Specific conditions are directives aimed at the needs of the individual offender. Some examples are the payment of restitution, completing a community service or attending a community program.

Community Corrections supervises approximately 80% of the total adult provincial offender population, including those in custody and in the community. Community Corrections is no longer considered just an adjunct to custody or an alternative to jail, but a preferred, directed sentence with custody being used as a “last option,” wherever possible and appropriate.

Each province has its own way of organizing probation, assigning duties to probation officers and setting up programs available to the supervised offenders on probation. Here is a brief description of the general role of a probation officer, in three broad categories:

*Officers of the Court.* This is the traditional role of probation. It is here that probation officers obtain the legal authority and can exert their strongest influence, and it is here that probation officers strike their major alliances with police and court agencies. As an officer of the court, the probation officer supervises and ensures that offenders comply to court orders and sees that case management plans are established and carried out.

*The Probation Officer’s Relationship to Offenders.* Supervising offenders is a major part of probation, and if a probation officer strikes a balance between enforcement, counseling and mediation, there is the chance to affect great change on the offender’s behavior and attitudes. This balance is achieved by supervising the offender (based on an assessment of risk), influencing and motivating, and assisting the offender to enroll in core programs that will change their behavior. If a probation officer is supervising a person convicted of assaulting a spouse, they will assess the client’s risk of re-offending, monitor the terms of the order and attempt to ensure the safety of the victim. The probation officer might also determine that the client’s anger problem and substance abuse are strongly linked to future offending, and will refer him to anger management and substance abuse counseling and treatment programs. The probation officer develops, reviews and modifies where required, an integrated case management plan, which attempts to address the needs of the offender.

*Probation Officers as Community Partners in the Criminal Justice System.* Probation officers are community corrections’ representatives. They inform and educate others about the role and function of corrections in the community. By providing information and advocating on behalf of criminal justice in public forums, probation officers foster community awareness, understanding and public protection. The probation officer is responsible for notifying victims. A victim is

informed of the supervision status of the offender, whom to contact if there is a safety issue and is referred to community victim service organizations for further support.

In summary, the role of the probation officer is at the centre of an integrated offender management system. Probation officers ensure offenders answer to both the court and the community:

*In Court* – Probation officers conduct investigations, complete reports and conduct enforcement

*With the Client* – Probation officers conduct supervision, counsel clients and conduct assessments

*In the Community* – Probation officers offer community protection and are community advocates and program developers

### Chronological Case Involvement

Now that the overall purpose of probation has been shown to be the cornerstone of community corrections, the following will describe, in chronological order, the various components and roles of probation within provincial community corrections.

*Diversion.* Depending of the type of offence committed, Crown provincial prosecutors and in some cases the police, may decide that consideration should be given to divert the offender from the formal court system. Their authority to determine this is contained in federal legislation. The legislation refers to diversion as “alternative measures.” Provinces have undertaken to expand alternative measures programs because Diversion:

- Is a timely and effective alternative to formal court proceedings
- Is more immediate than charges proceeding through the court system
- Provides an opportunity for the offender to accept personal responsibility for the offence
- Is sensitive to individual needs and circumstances of the offender and the victim
- Includes a logical consequence for the offender
- Is meaningful to the victim, offender and general community
- Can be as effective as a court appearance in preventing recidivism

Alternate Measures Programs are normally developed, funded and evaluated by provincial community corrections in conjunction with other government departments.



*Bail.* The *Canadian Charter of Rights and Freedoms* places responsibility on the courts to release an accused person until trial. There is a presumption of “innocence until proven guilty.” Therefore, if an accused person is arrested, held in custody and recommended to remain in custody, the Crown prosecutor must “show cause” why the accused should not be released. Sometimes a probation officer will attend a show cause hearing to provide information about the accused, particularly if the person is currently under community supervision. The accused will either be held in custody or receive a court-ordered undertaking to appear. The probation officer’s pre-bail report to the court is often an oral report and it should include: criminal record and other outstanding charges, past response to bail or other community supervision, a summary of their living situation, comments on victim (s) and alternatives to detention, including release conditions.

Bail is a Judicial Interim Release. Bail is granted based on federal legislation, created mainly to ensure the offender appears in court and that there is no likelihood of them committing a further offence. Provincial probation officers or police are designated to supervise an offender placed on Bail. In some provinces the number of Bail cases are low, while in other provinces the number of persons granted Bail by the courts have reached high levels. The offender is expected to report to a probation officer. If through reporting or non-reporting of the offender, the probation officer has concerns regarding the adequacy of the bail conditions or of a need to detain the offender in custody, the probation officer is to notify the Crown (prosecutor) of the information. The Crown will determine if recommendations to the court should proceed to change or revoke the Bail order.

*Pre-Sentence Information.* One very important function of the probation officer is to provide background information on the offender to the court, in order to assist in determining an appropriate sentence. Prior to sentencing, a judge may request a probation officer to complete a pre-sentence report. The report will include family background, education, employment history, alcohol/drug use and medical needs, criminal record, attitude toward offence, victim impact statement and evaluation and recommendations regarding safety of the public and the needs of the offender.

*Sentences with Community Supervision.* The court may sentence the offender directly to probation in the community, or a sentence may be incarceration followed by a term of community supervision. Institutional and community corrections staff work together to ensure an integrated case plan is developed and that a continuous treatment program is provided for individual offenders. Two other sentencing options in the community are conditional and intermittent sentences. Fines and Restitution are also legal sentencing options, but may be included with other sentencing options such as probation and conditional sentences.

The judge may order more than one type of sentencing option after an offender is convicted. For example, an offender may receive a fine or restitution in addition to probation, a conditional sentence or jail, a jail sentence followed by probation, or a conditional sentence followed by probation.

*Conditional Sentences.* The conditional sentence is actually a term of imprisonment, less than two years in duration, but the offender serves that sentence in the community. The court must be satisfied that the sentence will not endanger the safety of the community. A conditional sentence may also be followed by a probation order not exceeding three years. Generally, a probation officer will supervise the conditional sentence order and any probation order that follows. Failure to abide by the terms of a conditional sentence order may mean the offender may be ordered by the judge to serve the remainder of the sentence in custody.

*Intermittent Sentences.* In this option, the jail sentence is served on a periodic basis. It is only available to prison sentences that do not exceed 90 days. Generally jail time is served on weekends. While the offender is not in jail, he or she is bound by a probation order to follow certain specified conditions. The judge can also order that the probation order will continue for up to three years after the intermittent time is served.

*Probation Order.* A judge can give a sentence of probation or “suspend” a punitive sentence, which allows the offender to remain in the community under conditions of a probation order, not to exceed three years.

When an offender is sentenced to a term of probation, he or she must appear at the designated community corrections (probation) office within a specified time frame. At the office, the probation officer will establish the identity of the offender, collectively review the court order and verify the offender’s understanding of the conditions. The probation officer will also provide the offender with information regarding his/her rights and the process with which to address any complaints of dealings with the corrections system and make the offender aware that the victim(s) will be informed of the probation conditions. The probation officer will then begin the steps in developing a case management plan for the offender. The plan will be based on matching programs and services with the risk and needs of the offender. Modern research indicates that this matching process assists greatly in reducing recidivism, and that an inappropriate level of supervision and programming may actually increase recidivism. The type of intervention service is matched with the offender’s criminogenic needs. With all risk and needs assessments, the safety of the public is paramount.

The Risk/Needs assessment process must be supported by available treatment programs, referred to here as Core Programs. Research shows that sanctions and supervision alone have little impact on recidivism. Core Programs are designed to promote long-term changes in a serious offender’s thinking, skills and the lifestyles that are known to contribute to crime. Research

shows that Core Programs are certainly most effective when delivered in a community setting. Core programs often include motivating the offender to change, Violence Prevention, Substance Abuse Management, Family Violence, Sex Offenders, Cognitive Skills, Educational Upgrading and Living Skills. The offender may also be required to complete community work service. The probation officer must balance the case plan to facilitate reasonable time for the offender to satisfactorily complete all components of the plan.

In some instances probation supervision may be transferred within and between provinces. Legislation, policies and practices have been established to facilitate the necessary relocation of an offender, usually for employment or reasons of family contact and support. Another important factor needing attention during case planning and supervision is the right of the offender to practise or observe their individual religion so long as this does not violate the spirit or intent of the court order.

Funding for specialized supervision is becoming the preferred way to protect the community. In this way, serious offence cases are assigned to experienced staff who are trained and supported in specific disciplines.

If an offender is convicted of an offence while being bound by a probation order, the order can be revoked and the original sentence imposed. In addition, if the offender does not follow the conditions of the probation order, the Crown prosecutor can lay a new charge of "breach of probation." The compulsory conditions of a probation order are to keep the peace and be of good behavior, appear before the court when required, notify the court or probation officer in advance of any change of name or address, as well as any change of employment or occupation.

Optional conditions may include specific reporting requirements by the court or thereafter directed, remain within the jurisdiction of the court, abstain from owning or carrying a weapon, abstain from alcohol or non-prescription drugs, provide for the support or care of dependents, perform community work service and participate in treatment programs.

### Temporary Absence

Temporary Absence is a procedure by which an incarcerated person is gradually re-introduced to life in the community. This procedure takes the form of a permit to be absent from the place of incarceration for a day or short period of time. Such permission is a privilege which the incarcerating authorities are empowered to grant under provincial legislation. Prior to the granting of a temporary absence, a community assessment is completed to determine the applicant's (offender's) suitability to be absent from the correctional facility. Usually, but not exclusively, community assessments are completed by probation officers. If the temporary

absence is granted, and depending on the conditions and length of absence, the offender may, while in the community, come under the supervision of a probation officer.

*Electronic Monitoring-A Supervision Tool.* Current technology has enabled some forms of electronic monitoring (EM) of offenders while on temporary absence in the community. The most widely used technology is that of a bracelet, attached to the offender, which is electronically connected to a central monitoring station. The original intent of electronic monitoring was to enforce “house arrest.” Gradually it has become a community-based alternative to incarceration. Provinces are using and administering EM in differing ways, but generally it is used for low risk offenders who do not pose a threat to the community. Program participation and supervision by probation officers is an integral component of electronic monitoring.

## Parole

Parole is a procedure by which an inmate who qualifies by statutory criteria is released from prison before expiration of sentence. Inmates released on parole serve their sentence until the expiry date of the warrant in the community. The processes and provisions of parole must generally reinforce the offender’s responsibility as a citizen and support any reparative measures in which the offender may be involved because of the offence(s).

The guiding principles of parole are:

- The protection of society
- Consideration to the reasons and recommendations of the sentencing judge and available information provided by correctional and law enforcement officials, victims and the parole applicant
- Members make the least restrictive decision consistent with the protection of society
- Supervised release increases the likelihood of reintegration and long-term protection of society
- The limits on the freedom of the parolee in the community must be restricted to those necessary and reasonable to protect society and to help the offender reintegrate with society
- Responsibility for the management and supervision of offenders may come under the jurisdiction of either federal or provincial corrections. If an offender is sentenced to jail for two years or more, the offender is generally managed by federal corrections. When an inmate under this jurisdiction applies for parole, the Parole Board of Canada (National Parole Board) hears the application and the parolee is usually supervised in the community by federal parole officers.

For jail sentences of less than two years, and where a province has established a Provincial Parole Board as in British Columbia, Ontario and Quebec, provincial inmates apply to the Provincial Parole Board. In the rest of Canada, all federally and provincially incarcerated inmates apply to the National Parole Board. Provincial parolees are generally supervised by provincial probation officers.

## Current Issues

*Workload Management.* Many provinces have experienced a significant increase in community caseload numbers in recent years. Extra funding has not been readily available to provide additional staffing and programs. Through the use of risk based offender management systems, provinces are focussing their staff and programs on the medium and high-risk offender and exploring alternate ways to provide programs and support for the lower risk offender. The development and effective implementation of Core Programs in communities is an integral part of the offender management system.

*Female Offenders.* Provinces continue to find a need for more innovative programs for female offenders serving their sentence in the community. Most provinces provide community supervision for federal female offenders once released from custody. Female offenders have special needs but their numbers are under-represented in relation to the total inmate population, in both institutions and the community. The provinces are using their own resources, and those available through agreements with the federal government, to offer efficient programs in as many communities as possible.

*Multi-Culture Society.* Canada is a country of diverse economic, political, religious and cultural backgrounds. While there are differences between the provinces, many provinces also have internal cultural diversity. One example is British Columbia where approximately half of the population is Non-Caucasian. This varied human landscape presents numerous challenges for the justice systems. Correctional organizations are working to address the needs of the different cultures through specialized alternative measures programs, supervision and treatment programming. Real efforts are being made to recruit staff and contracted community programs that reflect the cultural differences and needs of our offender populations.

## **Federal Corrections: The Correctional Service of Canada**

### *Institutional Administration, Operations and Programs*

The Correctional Service of Canada (CSC) is responsible for administering sentences of two years or more. CSC Administration and Operations are responsible for Security, Offender Discipline, Case Management, and Programs and Services.

These areas work in collaboration with one another for the protection of society by providing the opportunity, direction and assistance to each offender to become a contributing member of society. The Correctional Service of Canada realizes that to achieve this goal its staff must work together and include the offender in the process; the offender plays an active part in his/her own individual 'Correctional Plan'. This plan focuses on key areas for change based on assessment of those factors that brought the offender into contact with the law.

## Laws

The Correctional Service of Canada accomplishes its mandate through direction provided in various pieces of legislation and directives. The main bodies of relevant legislation are the *Corrections and Conditional Release Act* (1992), *Corrections and Conditional Release Regulations* (1992) and *Criminal Code of Canada* (1985), and various other acts such as *Freedom of Information and Protection of Privacy Act* (1990), *Charter of Rights and Freedoms* (1982), and *Immigration Act* (1985). To support and help interpret the legislation there are the CSC Commissioner's Directives (CDs), Standard Operating Practices (SOPs), Regional Instructions (RIs), which are unique to each region and Standing Orders (SOs), which are also unique to each institution. The hierarchy of laws and directives are as follows: (1) Laws and Regulations (2) CDs (3) SOPs (4) RIs and (5) SOs.

The Mission Statement, Core Values and Guiding Principles of the Correctional Service of Canada focus the laws and directives of CSC's daily operations. The Mission of the Correctional Service of Canada (CSC), as mentioned earlier, states: "The Correctional Service of Canada, as part of the criminal justice system and respecting the rule of law, contributes to the protection of society by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control."

The *Corrections and Conditional Release Act* and *Corrections and Conditional Release Regulations* are two pieces of legislation that directly affect the operations of the Correctional Service of Canada. The *Corrections and Conditional Release Act* defines the structure under which we operate and the *Corrections and Conditional Release Regulations* more clearly define the rules and regulations under which we operate.

The *Criminal Code of Canada* defines our legal limits when it comes to such issues as the use of force and the status of certain staff as Peace Officers and their duties and obligations under the *Criminal Code of Canada*.

The *Charter of Rights and Freedoms*, as part of our Constitution, list the basic rights and freedoms of every Canadian citizen. Pursuant to the *Freedom of Information and Protection of Privacy Act* the offender (and any citizen) has the right to view any documents that relate to the person held within the government's possession. There are certain limitations placed on what

can be viewed, depending on whether national or institutional security is effected, or if there is concern for the safety of another person. Offenders have the right to view any reports on themselves that are generated by the Service, subject to security and safety concerns. CSC also has an obligation to protect offenders' rights to privacy by ensuring that only officials who need specific information can gain access to the offenders' files. The *Immigration Act* affects foreign nationals who are incarcerated in Canadian institutions.

## Security

An offender's security rating is established upon admission and determines the security level of the institution where the offender will be housed. The security rating is determined using assessment tools and techniques. Just as is done at the provincial level, it is during this assessment that the offender's "risk and needs" levels are determined. The offender's security level is reviewed on a regular basis throughout his/her sentence. Offenders can lower their security level through participation in programs and responsible behaviour.

Maximum-security facilities are designed to prevent escape through extensive perimeter and interior security. Offenders in these facilities are closely guarded and their movement closely monitored and controlled at all times. Medium facilities also have extensive perimeter security, however, they allow offenders greater freedom of movement inside the facility than in maximum security institutions. The perimeters of maximum and medium institutions are monitored by both electronic and devices (PIDS) with staffed security posts, and response patrols. The PIDS or Perimeter Intrusion Detection System, is a state-of-the-art electronic system that assists CSC in deterring escapes or intrusion onto institutional property. It works in conjunction with motion detectors in the ground, on fences and on cameras. The motion detector alarms and cameras are monitored through a central monitoring area.

Minimum and Community Correctional Centres have no notable perimeter or internal barriers. They have locked windows and doors, a basic alarm system, and monitored access to the facility.

The professional, dynamic and frequent interaction between the staff and offenders is an essential component of effective security in CSC institutions. Dynamic security involves an active staff presence in all areas of the institution in which offenders congregate, and staff maintain a positive interaction with the offenders. Staff get to know offenders and take an interest in their well-being.

Selection and training of staff is vital for good security. Interpersonal skills and problem solving are emphasized. The current method of training for security staff is based on the

CAPRA model, developed for and used by police officers, which focuses on experiential learning principles based on problem solving exercises and resolution scenarios as teaching tools.

Good static security is also important. Static security comprises the facility's physical layout, barriers and doors, and involves the consistent application of institutional routines and its regular searches. Regular searches of cells, rooms and other areas is completed as stated in the *Corrections and Conditional Release Act* (CCRA) as well as Standard Operating Practices (SOP) and Institutional Standing Orders (SO). There are a specified number of live body counts that must be completed at each institution on each shift. The minimum number of counts is dependent upon the institution's security level.

*Communication Essential to Effective Corrections.* Effective communication between all staff is crucial to good security. Staff members continuously provide information to other staff directly involved with offenders and to others on a need-to-know basis. Daily activities are recorded and logged in a logbook that each operation unit is obliged to maintain and review. This logbook is used to record any relevant information on offender behaviour that was observed. Logbooks are legal documents and are treated as such by Correctional Service of Canada and the courts. A shift briefing is also performed with the oncoming shift. Incidents of a more serious nature are written into more formal reports, forwarded to institutional heads, and recorded on the offender's file.

In addition to written reports, information is gathered through the use of video cameras and voice recorders situated throughout the institution, although telephone conversations may also be monitored; this is subject to the legislation governing such activity and based on the principle of "reasonable cause." All persons, vehicles, and objects entering the institution are subject to search. Search techniques include patting down the person, visual inspection of a vehicle and/or briefcase or purse and use of metal detector. Ion scanners are being used more frequently to detect the illegal drugs entering the institution. X-ray equipment and drug sniffing dogs are also used to monitor persons and effects entering an institution.

Each institution is responsible for developing a "Contingency Plan" in the event of an emergency. CSC's policy is to be prepared for any possible emergency. This may include riots, fires, explosions and natural disasters. CSC's overall priority in an emergency is protecting the public, offenders and staff while preserving life, preventing injuries and minimizing property damage.

Resolution of all emergencies is attempted without force. Protection of property is ensured without unduly risking life. Crisis managers never authorize any action that provokes or escalates an existing emergency. The rules and regulations on the use of force are strictly followed and monitored closely.

The Correctional Service of Canada works under the premise that the best results in offender rehabilitation are gained when offenders are placed in the "least restrictive" security



setting. The best way to protect society in the long run is through the successful reintegration of the offender, and this can best be obtained by providing active assistance and direction to the offender with the minimum amount of controls necessary for the protection of society. This allows offenders to take responsibility for their actions and provides more opportunities for learning and personal growth.

*Security Incidents and National Investigations.* Incidents are events, which have resulted in death, serious bodily injury or disturbance of usual operational activities through deliberate intent or an act of violence by one or more offenders. Investigations are conducted into incidents that affect the security and/or safety of an offender, the staff or the public, and/or the operations of CSC.

Investigations into major security incidents are done either at an institutional level, regional level or the institutional and community levels, depending on the seriousness of the incident. Murder is investigated at the national level, while hostage taking, major disturbance, use of force, escape or other high profile incidents can be studied at either a national or regional level, depending on the seriousness of the incident. Attempted murder, death by overdose or natural causes, suicide or attempted suicide and minor disturbances are examples of incidents handled at the regional or institutional level depending on the seriousness of the incident.

Since 1993, there has been a steady decline in both institutional and community security incidents at CSC. This is due to an improved assessment and classification of offender procedures, the use of programs devised to reduce violence, and an emphasis on the treatment of substance abuse problems.

The purpose of investigations is not to assign blame. They do, however, provide a valuable opportunity for CSC to review its performance, correct deficiencies and make improvements.

## Offender Discipline

“Offender discipline” must be corrective in nature and establish behavioral expectations; the intent is not to punish the offender, but to help change behaviour. Offender discipline must be timely and consistently applied. Offenders have committed an offence if they have contravened the rules and regulations of the institution and/or laws of Canada.

Staff are encouraged to take all reasonable steps to resolve the matter informally, using conflict resolution and mediation models. If an informal method of resolution is not possible, the staff member may lay an Institutional Charge against the offender. Charges are either serious or minor in nature, depending on the severity of the alleged offence committed by the offender.

Charges of a minor nature may be dealt with by Correctional supervisors. Those categorized as serious are heard in an “institutional court,” presided over by an Independent

Chairperson. Offenders are entitled to be present at these hearings, unless their presence would jeopardize the security of the institution or the safety of his/herself or others. Offenders can call witnesses and are entitled to view any documents used in the hearing. In a serious case, offenders can have legal representation. Offenders can also be charged by police for crimes committed while in custody.

The person conducting the hearing must be satisfied beyond a reasonable doubt that, based on the evidence presented, the offender is guilty of the stated offence. An offender who is found guilty of a disciplinary offence is liable to sanctions that are listed in the *Corrections and Conditional Release Act*. Sanctions are to be proportionate to the seriousness of the offence. If an alleged offence is deemed to be of a very serious nature, the offender may also be charged by the police and have to appear in criminal court on the charge.

CSC has a random urinalysis program which monitors offenders for use of illegal or unauthorized drugs and/or alcohol. Offenders are chosen at random to provide a urine sample, which is then tested by an independent laboratory. If the sample is over the tolerance levels, disciplinary actions may be taken against the offender. A positive urinalysis test may have other implications for the offender, such as an unfavorable report to the National Parole Board should the offender be in the community, and a return to custody. Refusal to provide a urine sample is considered a disciplinary offence. The purpose of the urinalysis program is to detect the use of illegal drugs in the institutions, and to enforce the policy regarding the use of illegal drugs. There is no tolerance for the use of drugs in correctional facilities, other than those prescribed by a medical doctor. Illegal substances include alcohol, marijuana, heroin, cocaine, valium and other types of drugs.

If an inmate has been charged or convicted of a drug-related offence in the institution or where there are reasonable grounds to believe that the inmate has been involved in drug-related activities, a reassessment of risk and needs is completed and a number of administrative consequences are considered. These consequences may include, but are not limited to, the following: suspension of private family visits, denial or restriction of regular visits, loss of work placement or denial of conditional release. More serious offences may result in a transfer to an institution with an increased security level.

It is incumbent on offenders to demonstrate to the institutional head or delegate that they are no longer involved in drug or alcohol activities, do not constitute a risk to the security of the institution, and are making genuine efforts to avoid drugs and alcohol. This may require urinalysis testing during a specified review period and/or involvement in a drug program.

*Administrative Segregation.* Offenders may be placed in what is referred to as Administrative Segregation. This is the “voluntary” or “involuntary” placement of offenders into segregation cells. While in Administrative Segregation, offenders have access to the same amenities as those

in the general population, except for those limited by the area. All offenders in segregation are entitled to a minimum of one-hour of exercise a day, as well as access to shower facilities. They are also allowed visits and access to programs.

There must be a reason if offenders are placed in segregation involuntarily. These can include acting in a manner that would jeopardize the safety of the institution and or persons, and/or their continued presence in the general population would jeopardize an investigation, or jeopardize their own safety. Offenders are to be informed as to why they are being placed into segregation and every attempt must be made to find alternatives to segregation. Offenders' segregation status is reviewed on a regular basis, as are the alternatives to segregation. Access to programs and visits may be reduced due to their segregation status.

Offenders placed in Administrative Segregation have the right to retain and instruct legal counsel at the earliest opportunity, and each offender admitted to Administrative Segregation must be informed of this right. They must be informed of the reasons for being placed in segregation.

#### Offender Rights and Redress Mechanisms

Offenders retain most rights enjoyed by ordinary citizens except those taken away by the courts at the time of sentencing. As specified in the *Canadian Charter of Rights and Freedoms*, an offender's constitutional rights cannot be limited further than what could be "demonstrably justified in a free and democratic society."

Information gathered and written about the offender may be shared with the offender; the exceptions to this would be when security of a person or the institution is at stake. Staff must take care to ensure their reports are accurate and factual. The offender also has a right to privacy; the reports on him/her are viewed by only those persons who have a need. Offenders have the right to have their reports done in either of the official languages of the country (English and French).

*Training.* The growing ethnic diversity of the Canadian population has made it necessary for CSC to examine some of its policies and training methods. During the past several decades, the number of immigrants has grown to approximately 16% of Canada's population. It is estimated that visible minorities will constitute more than 20% of Canada's population by the year 2003. The birthplace of immigrants has also changed in recent years, with an increasing proportion being Asian-born. The majority of the recent immigrant groups have come from Asia, Latin-America, Africa, and the Caribbean. This influx has highlighted cultural, religious, and linguistic distinctiveness to Canadian culture. Given that the number of visible minority and second and

third generations Canadians are increasing, we can anticipate that their representation in the correctional system will rise proportionately.

Staff training is designed to sensitize offenders and staff to different cultures. Ideally, both staff and offenders should speak the same language; CSC policy guarantees that any offender with difficulty speaking English or French has the right to interpreter services in quasi-judicial proceedings. These are proceedings where the loss of liberty or privileges is at stake, such as disciplinary hearings in the penitentiary and Parole Board hearings in institutions. No major decisions concerning an offender's freedom will be made without the offender's full understanding. The Service makes efforts to locate and maintain working relationship with local agencies to ensure that it has access to people who can assist us in communicating with the offender in his/her own language.

*Grievances and Complaints by Offenders.* The Corporate Development Sector of CSC responds to inmate grievances, human rights issues and requests for access to information. The offender complaint and grievance procedure gives the offender an opportunity to express concerns informally and in writing. The grievance procedure also entitles offenders to receive a response to grievances from four administrative levels, if necessary, starting with a supervisor at the institution and culminating with the Commissioner of Corrections. Offenders may also write to a number of appointed and elected officials, under sealed envelope, and can receive replies the same way. Complaints may be sent to the Correctional Investigator, who is independent from the CSC, and reports directly to the Solicitor General. Finally, an offender may have recourse to the federal courts.

## Case Management

Offenders' correctional strategy for assessment and programming is delivered through a process called Case Management. This process provides direction and support to offenders throughout their sentence. Case management involves four areas:

*Initial Placement and Assessment.* This process begins as soon as the offender receives a federal sentence, and information is compiled and the Intake assessment is completed. Next, the offender's "Risk and Need" level is determined. The Correctional Plan is completed, including the programs and interventions needed. The programs and interventions are designed to reduce risk and prioritize interventions based on need.

*Institutional Supervision and Reporting on Correctional Plan Progress.* The offender's behaviour and progress in his/her correctional plan is monitored by each member of a multi-disciplinary case team. Regular meetings are convened by a member of the team, and include the offender, and information is shared regarding offenders' behaviour and progress. If there has not been

any progress, or if an offender's behaviour has deteriorated, intervention may be required. Adjustments are based on changing circumstances.

*Preparation of Cases for National Parole Board Decisions.* The National Parole Board (NPB) is the authority for making decisions to safely release each offender back into the community, and under what conditions. However, CSC is responsible for preparing the offender for such release, ensuring offenders follow their correctional plan and making recommendations for release at the earliest possible time.

The decisions by the NPB may be for Full Parole, Day Parole, Temporary Absences, Work Releases or Detention Hearings. Those serving a life sentence have their Parole temporary absence eligibility dates set by the courts. Those serving a fixed sentence have their release eligibility dates set out in the regulations. The NPB has the legal authority to grant unescorted temporary absences, in most cases. The Wardens of institutions have the authority, by law, to grant short term temporary absences on certain categories of offenders, usually nonviolent offenders. The National Parole Board may also delegate this authority to Wardens in other cases, such as medical purposes. Unescorted temporary absences are for resocialization purposes, so that the offender can maintain family contact and/or prepare for eventual release.

*Community Supervision.* Correctional Service of Canada monitors offenders who are released into the community until the end of the court imposed sentence. The Parole Officer in the community monitors the progress made towards the Correctional Plan and monitors offenders' progress against release conditions set by the National Parole Board. All efforts are aimed at the safe reintegration of the offender at an appropriate time. The Reintegration Process is designed to integrate all the activities and services and to focus staff towards achieving this objective. Staff work closely, too, with police, and try to keep their supervision quota at one parole officer per 25 offenders. Halfway houses and special programs assist in offenders' safe reintegration into society.

There are several key individuals in the implementation of the reintegration process:

*The Parole Officer (PO).* The PO is the principal manager of the intervention process. He or she works with the offender and others in the case team to develop an intervention strategy and oversee its implementation. Parole officers work in institutions (PO-I), and in the community (PO-C). The community officer is initially responsible for gathering the background information on the offender at the time of sentence. The officer in the community works with the officer in the institution to develop a plan that will continue when the offender is released back into the community. When released from the institution the offender will be under the supervision of a community Parole Officer.

*The Correctional Officer II.* As the first line worker in the correctional institution, the CO-II is responsible for updating of the Correctional Plan by interacting directly with the offender,

and gathering all pertinent information from other caseworkers and observing the offender's behaviour directly. The CO-II also completes reports for internal decisions such as voluntary transfers, Private Family Visits and pay raises.

*Program Officer.* As a specialist in one or some specific domains, the Program Officer is a member of the Case Management Team and participates in the implementation of the *Correctional Plan* while the offender is in custody. He or she delivers a specific program and reports on the changes achieved by the offender.

*The Offender.* As architects of their own change, offenders are responsible for their current situation, involvement in the intervention activities, the changes they must create, and the risk they present. This involves improving behaviour and accessing participation in key programs and activities.

The best protection for society in the long term lies in the safe and successful reintegration of offenders. The Reintegration of the offender involves differentiation, planning, continuity and information management. These help define the way in which Correctional Service of Canada focuses its efforts, and the content of reports and assessments covering these activities. They also provide a reference framework for analysis, planning and intervention with the offender.

*Differentiation.* Offenders are differentiated in terms of their needs, risks, and their motivation to participate in the correctional plan.

*Planning.* The planning principle applies to the management of the entire sentence. In order to be effective and fair, it must be based on an accurate assessment of the offender. Planning must target change or control of certain contributing factors, and describe the main areas in which the offender needs assistance to change. Plans are established considering eligible release dates from prison. An effective plan must also determine when a program should be taken and where it should be taken. Planning should determine if the program would be more effective in the institution or community.

*Continuity.* Interventions can only be effective if there is continuity between each effort. Each intervention should proceed in a logical manner and the overall plan should remain consistent throughout the sentence.

*Information Management.* Good information is the key to any successful correctional plan; this information must be made available to those who need it. The Correctional Service of Canada uses an electronic offender case file system called the Offender Management System (OMS). All CSC information about an offender is stored on this system. All offender-related reports are completed on OMS and are accessible to only those that require access. This system is controlled via password access and is closely monitored for unauthorized use. Only people with a need to access a file can gain access. Certain parts of this database are shared with other agencies in the field of criminal justice. The National Parole Board has extensive access to OMS.

Sharing of information is to ensure the safety of the public and successful reintegration of the offender.

To achieve this and produce a quality correctional plan, complete, verified, high-quality information is required at the beginning of the sentence. Since planning covers the entire sentence, it is important that the probation officer in the community be involved in the process. The Correctional Plan is the road map for intervention for the entire sentence, not just the institutional portion.

The reintegration process is focussed on three main correctional objectives:

- Intake assessment and correctional planning;
- Intervention with the offender (*Correctional Plan Progress Report*); and
- Decision process.

Mentioned in the security section was the offender's risk level. The risk level is determined while in the intake phase. A custody rating scale is completed on each offender. The initial security classification is determined primarily by using the Custody Rating Scale which takes into consideration the following factors as required by the *Corrections and Conditional Release Regulations*:

- the seriousness of the offence committed by the offender;
- any outstanding charges against the offender;
- the offender's performance and behaviour while under sentence;
- the offender's social, criminal and, where applicable, young-offender history;
- any physical or mental illness or disorder suffered by the offender;
- the offender's potential for violent behaviour; and
- the offender's continued involvement in criminal activities.

The Custody Rating Scale (CRS) is a research-based tool that was developed to assist in determining the most appropriate level of security for the initial penitentiary placement of the offender.

The Correctional Plan is initiated when the offender arrives at the correctional intake facility. Each CSC region has a reception centre to fulfil this function. The offenders' dynamic and static needs are assessed. Criminogenic needs are identified and targeted for programs and services, as well as the level and when and where the best time would be for the offender to receive a particular program. Accurate report gathering draws on information from a number of sources,

such as police, family, victims, community Parole Officer and others. Victim Impact Statements are used to assist in determining the harm done to the victim. The Intake Assessment and Correctional Planning process must be completed within 70 calendar days from the offender's sentence commencement date.

An important factor that must be taken into account when developing the Correctional Plan is the offender's willingness to participate in the plan. This willingness can be determined by interviews with the offender. Offenders' motivation level must be established, and effort made to encourage the offender to partake in programs.

Progress regarding the Correctional Plan must be updated every six months if the offender is serving less than a 10 year sentence, and annually if serving more than 10 years. This is done through interaction with the offender and with educational or workplace supervisors. Offenders must be interviewed within 24 hours of arrival at the Intake Assessment Unit to verify information already gathered and to identify areas that need immediate attention, such as physical or psychological concerns including suicide.

Immediate needs identified during the initial Intake interview are referred to the appropriate specialist. The existence of critical information is entered as either an "alert," "flag" or "need" in the Offender Management System (OMS). Exchange of Service Agreements (ESAs) are available to address specific needs of offenders. ESAs are agreements with the Provinces to transfer offenders to provincial institutions in the home province of the offender. The offender can be transferred at admission or anytime during their sentence.

Safety, respect and dignity for all are three ideals that sum up what the Correctional Service of Canada strives to achieve. Safety of the public is achieved through the successful reintegration of the offender back into the community. This is accomplished by focusing on the criminogenic needs of offenders, and referring them to the appropriate program, at the appropriate time and in the setting most conducive to affect change. This requires the compilation and use of accurate data, and the sharing of this data with other agencies. Interventions and programs are based on proven, researched and accredited methods. CSC maintains respect for the culture and gender of the offender, and maintains that respect when it intervenes and interacts with the offender. Respect for staff and their diversity and support of the goals of CSC are paramount to success. The dignity of the person is fundamental in any working relationship and to humans in general.

## Programs and Services

Programs are designed to address the criminogenic needs, or changeable risk factors, of the offender, and use the cognitive learning theory model. This model uses thinking patterns



that promote positive social solutions to problems. Offenders must be referred to a particular program via their Correctional Plan. Program participation is based on the level of need, since CSC has limited resources, and programs are scheduled according to need and possible release dates. If an offender is deemed to be of high risk, and the program meets those needs and is also required for conditional release, then he/she is given priority for the program. If there is no demonstrated need for taking a particular program then the offender will not be referred to it. Research has determined that too much intervention in low risk cases can have a negative effect on the offender. The need level and type of programming for each offender is always an important consideration.

Most offenders lack the basic skills, such as low levels of education, poor interpersonal relationships, lack of internal controls, drug abuse or they themselves have been victims of abuse and do not know how to deal with the abuse. CSC offers programs targeted to help develop a basis for change in the offender.

Programs that are offered include the Literacy Program, Cognitive Skills Training, Living Skills, Sex Offender Treatment Programs, Substance Abuse Programs, Family Violence Programs and Survivors of Abuse/Trauma. In addition to these programs the offender is offered psychological and psychiatric counseling to address mental health needs. These needs may be part of the correctional plan or to deal with stress brought on by other factors.

The Correctional Service of Canada is aware that to be effective, programs must be geared to the specific offender. Specific programs and program environments have been developed to meet the cultural needs of Aboriginal offenders and female offenders. The healing lodges and regional women's facilities are good examples of this. The Correctional Service of Canada wants to ensure that the needs and cultural interests of offenders belonging to ethnocultural minority groups are identified and that programs and services are developed and maintained to meet those needs. Since October 1994, CSC has had a policy aimed at determining the needs and specific cultural characteristics of minority offenders.

Education is an important aspect of the offenders' plan. An offender is to have a minimum of a Grade 12 education, and the Service will encourage the offender to obtain a high school diploma. Post-secondary education is available and supported through correspondence but at the offender's expense.

Ethnoculturally trained workers are provided to compensate for cultural differences in an effort to bridge the ethnocultural gap between offenders and case management personnel.

All programs and their delivery are consistent in each institution throughout CSC, which then maintains the integrity of the program. The services programs have accreditation by international experts. Each program is developed so that it has the greatest impact, and the integrity and goals of the program are based on research. Program delivery persons are selected

and trained so that the program they deliver is in the manner the program was designed to be delivered, using the techniques found to be most effective. The offender is tested prior to participating and again after the program is completed. This is done to measure the progress of the offender.

*Employment.* If offenders are not in school or a program, they are expected to be employed in the institution or looking for employment. The Correctional Service of Canada offers a wide range of employment positions in its institutions. The positions are designed for learning skills that can be taken into the community. The work place supervisor is a member of the Case Management Team and is consulted regularly regarding the progress of the offender.

CORCAN is an agency of CSC. It operates as an independent business that supports the goals of the CSC by providing employment and training opportunities to offenders incarcerated in federal penitentiaries, and to offenders after they are released into the community. In this way, it assists offenders to safely reintegrate into Canadian society.

Some CSC institutions also offer accredited trade programs. Offenders can apply work time towards an apprenticeship in a trade, such as electrician, plumber, and carpenter. Workers in CORCAN plants or other trades may be able to earn more money because of the nature of the work that they perform. However, these positions are ones of privilege and the offender must demonstrate his or her trustworthiness and desire to follow his or her correctional plan and the rules of the institution.

All offenders have a certain percentage of their pay deducted and placed into a savings account. This savings account has to contain a minimum level of funds which are given to the offender when he or she leaves the institution.

*Personal Development.* The Correctional Service of Canada is aware that to be effective the offender also needs access to personal development programs. This includes such things as recreation, hobbycraft, social, ethnic and religious groups.

Religion, spiritual beliefs or practices often the predominant indicator of one's culture are important needs to respond to. Religious customs such as different days of worship, diverse religious and/or spiritual leaders, and special foods or dress vary widely and in institutional settings particularly, can be difficult to accommodate. CSC works closely with the Interfaith Committee on Chaplaincy and Aboriginal organizations, which provide crucial information regarding religions and multi-faith calendars. The service provides as much opportunity as possible for each offender to worship his or her faith in the prescribed manner of that faith.

Social events are an important part of life in an institution. These tend to be larger events designed to promote family contact and can include a large part of the offender population, with the event usually lasting for half a day. The social may be culturally focused, sponsored by one of

the social groups in the institutions. Food is prepared and the guests are brought into the institution for the duration of the event. Most socials occur around special holiday times.

Socials are over and above normal visits. The Service is active in promoting the maintenance of family ties. Visits from family and friends are encouraged. For extended visits there is the Private Family Visiting Program.

*Private Family Visiting Program.* The private family visiting program provides eligible offenders and visitors with extended private visits within the institution to enable them to foster personal relationships in home-like surroundings. The program seeks to lessen the impact of incarceration on both the offender and his or her family, to encourage offenders to develop and maintain family and community ties in preparation for their return to the community and to lessen the negative impact of incarceration on family relationships.

All offenders are eligible for private family visits. There are exceptions to this rule, most notably if there is a possibility of family violence, or the offender is participating in unescorted passes for family contact, or if they are in a special handling unit or being transferred to one. The following family members are eligible to participate in the program: spouse, common-law partner, children, parents, foster parents, siblings, grandparents and persons with whom, in the opinion of the Institutional Head, the offender has a close familial bond. The duration and frequency of private family visits shall normally be up to 72 hours per offender, once every two months. However, special circumstances may dictate other periods or frequencies at the discretion of the Institutional Head.

*Health Care.* Basic health care is afforded to all offenders without cost. The service has doctors, nurses, psychologists, psychiatrists, dentists, and optometrists on staff or on contract. Arrangements are made with hospitals for use by the Service. The offender is given all basic and necessary medical attention that is needed. CSC has a number of offenders that require treatment for such diseases as diabetes and cancer. There are also a number of offenders who are physically challenged and/or are in their advanced years and require special attention. Aging offenders is an emerging issue that is fast becoming one of CSC's new challenges.

Another challenge to Health Care services is the effective management of infectious diseases such as Tuberculosis, Hepatitis A, B and C, and Acquired Immune Deficiency (AIDS/HIV) Syndrome. Medication is strictly controlled and dispensed to the offender by qualified medical staff. Non-essential medical treatments are not paid by CSC.

*Basic facts of program and education use:*

- From 1994 to 1997 there was an average of 58,000 enrollments to correctional programs.
- Each year, approximately 42% of the national number of enrollments are for Education programs, followed by 24% in Substance Abuse programs. Family Violence programs

record the least enrollment: equivalent to 3% of the total national enrollment on a yearly basis. The only program areas to demonstrate a decrease in enrollment in 1996-97 were Family Violence programs, by 1%, and Personal Development programs by approximately 4%.

### *CSC Community Corrections*

Most of Canada's federal offenders serve only part of their sentences in prison. Part of their time is served in the community, where they adhere to certain conditions and are supervised by professional staff of the Correctional Service of Canada. The work of gradually releasing offenders, ensuring that they do not present a threat to anyone, and helping them adjust to life beyond prison walls is called community corrections. Such work is essential because experience has shown most criminals are more likely to become law-abiding citizens if they participate in a program of gradual, supervised release.

The Correctional Service of Canada is dedicated to protecting society by controlling offenders and by helping them change the attitudes and behaviors that led them into criminal activity. The first steps toward change are taken in the prison setting. But if the change is to last, it must continue in the community, where almost all offenders eventually return.

The transition from confinement to freedom can be difficult; offenders have a better chance of success if they receive supervision, opportunities, training and support within the community.

Conditional release occurs only after a thorough assessment of the safety risks that offenders may pose to society. Offenders who appear unlikely to commit crimes or break certain rules may go on conditional release, as an incentive to make positive changes in their lives. In addition, the law requires the release of offenders who have served two thirds of their sentence, but only if they are not considered dangerous. Both types of offenders must abide by specific conditions when they are back in the community and carefully supervised by CSC staff. If offenders violate the rules, they may be sent back to prison. Moreover, CSC works to prepare offenders for eventual release, through prison programs that promote law-abiding lifestyles. Such programming continues while offenders are on conditional release.

Under the CCRA, the NPB has exclusive jurisdiction and absolute discretion to grant, deny, terminate or revoke parole for inmates in federal, territorial, and many provincial institutions, except for cases under the jurisdiction of provincial parole boards. The National Parole Board may also, when applicable, revoke the statutory release of an offender.

The National Parole Board relies on the CSC to prepare reports and recommendations on the cases that come before the Board. The Correctional Service of Canada supervises offenders

on parole or statutory release to ensure that they adhere to the conditions of release set by the National Parole Board.

Research shows that supervision alone does not help offenders change. Supervision together with programming does. Correctional programs in the community are tailored to the offenders' needs. Some programs help address the problems of daily living, relationships and emotions. Others focus more specifically on education, sexual deviance and alcohol or drug abuse. Programs in the community are designed to build on the gains that the offender has made in institutional programs.

### Work Release

This program allows an inmate, classified as minimum or medium security, and who is judged not to pose an undue risk to reoffend, to do paid or voluntary work in the community under supervision. Eligibility for work release usually occurs at one-sixth of the sentence.

During the period 1998 to 1999, there were between 330 and 480 federal offenders in the community on a work release each month.

### Temporary Absences

An offender may be allowed to leave the institution for short periods of time for medical or humanitarian reasons or for community services, maintaining family contact or accessing rehabilitation programs. All offenders may be considered for medical or humanitarian escorted temporary absences. Only minimum or medium security offenders may be considered for other types of absences.

Temporary absences may be escorted or unescorted. For escorted absences, the offender is accompanied by one or more security officers, or by a trained volunteer from the community. There were about 38,000 escorted temporary absences in 1998-1999, and 99.9% were completed successfully.

### Day parole, full parole and statutory release supervision

Day parole, full parole and statutory release are forms of conditional release which allow some offenders to serve the balance of their sentences outside of prison. The average number of federal offenders being supervised in Canada during 1998-99 were:

Day parole	1,516	(18.4%)
Full parole	4,210	(51.1%)
Statutory release	2,508	(30.5%)

Eligibility criteria are outlined further in the next section of this document.

## PAROLE AND CONDITIONAL RELEASE

### **The Concept and the History**

#### *The Concept*

In Canada, most prison inmates serve sentences with specified terms of imprisonment. Upon completion of the term, inmates must be released. A minority of Canadian offenders are sentenced to indeterminate terms of imprisonment, including offenders who have been sentenced for life, or declared “dangerous.” The concept of parole is based on research that shows the gradual, controlled and supported release of offenders helps them re-integrate into society as law-abiding citizens, and contributes to a safer society.

Canada, like many countries, has made conditional release programs part of its criminal justice system. Parole is a form of conditional release which allows some offenders to continue to serve the balance of their sentence outside of prison. It is a carefully constructed bridge between incarceration and a return to the community. The National Parole Board reviews the facts of a case and decides whether or not an offender may be permitted to return to the community, before the end of the sentence of incarceration. Offenders on parole are released under the supervision of a parole officer. They have the opportunity to become contributing members of society provided that they abide by the conditions of their release. If the conditions of parole are not met, the NPB, taking into account the information provided by the CSC, has the power to revoke the parole and return the offender to prison.

The *Corrections and Conditional Release Act (CCRA)* specifies that the “purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.”

In addition, the Board’s Mission Statement says:

The National Parole Board, as part of the criminal justice system, makes independent, quality conditional release and pardon decisions and clemency recommendations. The Board contributes to the protection of society by facilitating, as appropriate, the timely integration of offenders as law-abiding citizens.

## *The History*

The system of conditional release and supervised freedom for offenders was established in Canada in 1899 by the *Ticket of Leave Act*. At that time, there were no statutory limits defining parole eligibility, and conditional release could be granted to anyone by the Governor General of Canada. The Act viewed conditional release as a method “to bridge the gap between the control and the restraints of institutional life and the freedom and responsibilities of community life.”

In the 1930s, penal reformers had begun to question the punitive orientation of the penitentiary system, which led to the 1936 Royal Commission’s investigation into the Canadian penal system. The Commission recommended that rehabilitation should become the purpose of incarceration. They attributed the cause of high recidivism rates to the absence of any serious attempt on the part of authorities to address the reformation of inmates. As part of this reform, vocational training and education courses were introduced in prisons, and community services were increased.

In 1959, the *Parole Act* created the National Parole Board as an independent, administrative body within the Department of Justice. The Parole Board had the authority to grant, deny, terminate or revoke conditional release. At this time, parole was seen as a “logical step in the reformation and rehabilitation of a person who is imprisoned.” It was described as an appropriate control mechanism that provided for the supervision of offenders and allowed for revocation of conditional release for violation of parole conditions.

In 1966, the *Department of the Solicitor General Act* assigned, as one of the responsibilities of the Solicitor General, the management and direction of reformatories, prisons, penitentiaries, parole, and remissions. The National Parole Board became part of the Ministry of the Solicitor General, which now includes three other agencies, namely the Royal Canadian Mounted Police, the Correctional Service of Canada and the Canadian Security Intelligence Service. It was in 1977 that the National Parole Board was severed from the Parole Service, which later became part of the Penitentiary Service, later named the Correctional Service of Canada.

The 1980s saw greater emphasis placed on crime prevention, victims of crime and public protection. In 1986, an amendment to the *Parole Act* allowed the Board to detain or place under strict residential conditions until the end of their sentence, certain inmates who were considered high risk. Also in the 1980s, the Board adopted a Mission Statement and introduced decision-making polices, which enhanced its openness and accountability.

In 1992, the federal government enacted the *Corrections and Conditional Release Act (CCRA)*. The CCRA describes the National Parole Board’s responsibilities in the areas of parole and other forms of conditional release. It also links corrections and conditional release, and provides clear direction for the Board by emphasizing public safety in conditional release decision-making.

The CCRA also describes the rights and entitlements of victims of crime, and measures which address the needs of special groups such as Aboriginals, women offenders and ethnic groups.

Good decisions require an effective link between legislation and daily operations. The Board has developed a set of decision policies to ensure a thorough assessment of risk of reoffending – such as psychological and psychiatric assessment, and writing decisions – while respecting the rights of offenders, victims and all others involved in the conditional release process.

The effectiveness of parole as a strategy for community safety contrasts with Canadians' perception that a high number of parolees commit new crimes. This highlights the need for public information and community involvement, so that the public understands the benefits of parole.

In fact, current research demonstrates the long-term effectiveness of parole, and the progress that has been made by offenders on parole in recent years. Nine out of every 10 offenders released on parole do not commit a new offence, and 99 out of every 100 releases do not result in a new violent offence. Offenders on parole account for less than one-tenth of one percent (10 in 10,000) of violent crimes reported to the police each year. Research data also illustrate that the majority of offenders who reach the end of their sentence on full parole remain free from serious crime after the end of their sentence. Long-term follow-up on these offenders shows only about one in 10 have returned to a federal penitentiary eight to 10 years after completion of their full parole.

The process of case review and risk assessment used by the Correctional Service of Canada and the National Parole Board is effective in identifying those offenders most likely to reintegrate successfully in the community.

## **The Parole Boards: Federal and Provincial Jurisdictions**

### *The Role of Releasing Authorities*

The National Parole Board is an administrative tribunal that has exclusive authority under the *Corrections and Conditional Release Act (CCRA)* to grant, deny, cancel, terminate or revoke parole. It may also detain offenders subject to statutory release in federal and territorial institutions, and in provincial institutions where the province does not have its own parole board. The Board decides whether to issue, grant, deny or revoke a pardon under the *Criminal Records Act*, and makes clemency recommendations to the Solicitor General, who submits the recommendation to Parliament. The Board does not have jurisdiction over young offenders unless tried in an adult court, or over offenders serving only intermittent sentences (weekends).

After a conviction, and in cases when the court orders the incarceration of an offender, either federal or provincial correctional authorities administer the sentence. The court may



become re-involved if an offender, having served 15 years of a life sentence with a 25 year parole eligibility date for first or second-degree murder, applies for a Judicial Review under section 745 of the *Criminal Code*. A Judicial Review allows certain offenders serving life sentences to apply to have their parole eligibility date reduced. The National Parole Board has no role in the judicial review process. Furthermore, if the jury decides to reduce the parole eligibility date of an offender, the decision does not mean that the offender will automatically be released on parole. The offender must still apply for parole through the regular process. The case would then be reviewed by the Board which decides whether the offender will be granted parole.

The police are notified of any conditional release. In most cases, an offender will have to report regularly to both the parole supervisor and the police. The police will become involved if the offender is suspected of any further criminal activity, and the Board is also notified.

### *Appointment of Board Members*

The National Parole Board is made up of men and women from across Canada. They come from a wide range of professional backgrounds including corrections, policing, psychology, law, business, social and community work. When a position on the Board comes vacant, it is advertised in the Canada Gazette, which outlines the criteria and qualifications each member must possess. The National Parole Board screens and interviews selected candidates and then makes recommendations to the Solicitor General. Ultimately, Board Members are appointed by Parliamentary decision, approved by the Governor-in-Council.

Good decisions about the timing and conditions for release of offenders to the community are critical for community safety. The key to having strong decisions is having dedicated and professional decision-makers who are selected as candidates for appointment to the Board based on the principles of competence and merit.

The National Parole Board provides Board members with an extensive regime of training, and performance assessment. Training is provided through the Board's Professional Standards and Development Program, which is based on a philosophy of continuous learning and promoted through annual training of 10 to 15 days per Board member, as well as participation in self-development activities such as conferences, and workshops. An annual review process provides feedback to Board members on their decision-making, in a constructive manner.

The NPB has been assigned responsibility in three areas.

1. It makes decisions about the timing and stipulations of release of offenders to the community who are on various forms of conditional release, especially parole.

2. It is responsible for making decisions to grant, deny or revoke pardons under the *Criminal Records Act* and the *Criminal Code of Canada*.
3. The Board makes recommendations for the exercise of clemency through the Royal Prerogative of Mercy.

National Parole Board members come from diverse communities and backgrounds, to ensure the Board represents Canada's diverse communities. There are five regional offices of the National Parole Board across Canada, as well as a national office in Ottawa, where the Appeal Division of the Board is located.

Parole Board hearings are held every day in the NPB's five regions, on a rotational basis, from institution to institution. The Board members' decisions may involve a review of the offender's file, or a Parole Board hearing in which the offender, an assistant to the offender and a representative of the Correctional Service are present. Two or three Board members will review the case, assess the risk of reoffending and make a decision to grant, deny or revoke parole.

Board members try to ensure that their decisions meet the diverse needs of the offenders and the communities to which they will return. An example of this is the "Elder assisted hearing," where an Aboriginal elder attends a Parole Board hearing to help the Aboriginal offender understand the decision-process and ensure it addresses the unique needs of the offender and his or her community.

#### *Number of National Parole Board Members*

In 1999, there were 90 members of the National Parole Board. There are 45 full time members, and 45 part time members. Full-time members also include the Chairperson, the Executive Vice-Chairperson and six Vice-Chairpersons (one for each region and one for the Appeal Division). The 45 part-time members assist the Board in dealing with heavy workload demands.

National Parole Board members are a diverse group: it is 67% male, and 33% female. Of those, 30% speak both English and French (which are Canada's two official languages) and 70% are English speaking. Nine per cent are Aboriginal people, and 4% represent visible minorities; 89% have a background in criminal justice, including 62% with experience in corrections and conditional release.

Board members are paid an annual salary. They are provided with extensive training on law, policy and risk assessment. They are also supported by a national staff of 225 people, who develop policy, provide training, and ensure that all information required for decision-making is available in a timely manner. Staff of the Board are involved extensively in providing information for victims of crime, making arrangements for members of the public who express an interest

in observing parole hearings, and for responding to public requests for access to the Board's registry of decisions.

## **Types and Conditions of Release**

### *Eligibility*

There are four types of conditional release: temporary absence (escorted and unescorted), day parole, full parole, and statutory release. Conditional release does not mean the sentence is shortened, it means the remainder of the sentence may be served in the community, under supervision with specific conditions.

By law, all offenders must be considered for some form of conditional release during their sentence. However, even if an offender is eligible, release may not be granted if the National Parole Board is concerned for the safety of society; release on parole is never guaranteed.

Temporary absence is usually the first type of release an offender will be granted. As described in the previous chapter, temporary absences may be granted for various reasons, including for work in community service projects, contact with the family, personal development or medical reasons. Offenders are eligible to apply for escorted temporary absences (ETAs) any time throughout their sentence. For sentences of three years or more, offenders are eligible to be considered for unescorted temporary absences (UTAs) after serving one sixth of their sentence. For sentences of two to three years, UTA eligibility is at six months into the sentence. For sentences under two years, eligibility for temporary absence is under provincial jurisdiction. Offenders serving life sentences are eligible for UTAs three years before their full parole eligibility date.

Day parole allows offenders to participate in community-based activities to prepare for release on full parole or statutory release. Offenders on day parole must return nightly to an institution or a halfway house unless otherwise authorized by the National Parole Board. Offenders serving sentences of three years or more are eligible to apply for day parole six months prior to full parole eligibility. Offenders serving life sentences are eligible to apply for day parole three years before their full parole eligibility date. Offenders serving sentences of two to three years are eligible for day parole after serving six months of their sentence. For sentences under two years, day parole eligibility comes at one-sixth of their sentence.

Full parole allows the offender to serve the remainder of the sentence under supervision in the community. An offender must report to a parole supervisor on a regular basis and must advise on any changes in employment or personal circumstances. Most offenders (except those serving a life sentence for murder) are eligible to apply for full parole after serving either one-third of their sentence or seven years. Offenders serving life sentences for first-degree murder

are eligible after serving 25 years. Eligibility dates for offenders serving life sentences for second-degree murder are set between 10 to 25 years by the court.

Statutory release, by law, requires that most federal inmates be released with supervision after serving two-thirds of their sentence. Offenders serving life or indeterminate sentences are not eligible for statutory release. Statutory release is not the same as parole because the decision for release is not made by the National Parole Board. The Correctional Service of Canada may recommend to the NPB that the offender be detained in the institution for a certain period, up to warrant expiry, if certain concerns exist. The primary consideration for doing this is the belief that the offender may reoffend, in a violent manner, prior to warrant expiry.

Offenders must agree to abide by certain conditions before release is granted. These conditions place restrictions on the offender and assist the parole supervisor to manage the risk posed by an offender in the community. Whether on parole or statutory release, offenders are supervised in the community by the Correctional Service of Canada and will be returned to prison if they are believed to present an undue risk to the public. The National Parole Board has the authority to revoke release if the conditions are breached.

### *Pardons and Clemency*

A pardon allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated they are law-abiding citizens, to have their criminal record sealed. Under the *Criminal Records Act*, the National Parole Board may issue, grant, deny, or revoke pardons for convictions under federal acts or regulations of Canada.

Once a pardon is awarded, any federal agency (and provincial governments tend to follow this rule) that has records of convictions must keep those records separate. The *Canadian Human Rights Act* prohibits discrimination based on a pardoned conviction. This includes discrimination in the services that a person needs or the eligibility to work for a federal agency. The *Criminal Records Act* states that no employment application form within the federal public service may ask any question that would require an applicant to disclose a pardoned conviction. This is also true for a Crown corporation, the Canadian Forces, or any business within the federal authority.

There are a number of limitations to a pardon. It may not be recognized by foreign governments nor will it guarantee entry or visa privileges to another country. A pardon does not erase the fact that a person was convicted of an offence. If a person is prohibited under the *Criminal Code* from driving a vehicle or possessing a firearm for a specified period of time, a pardon will not return those privileges.

A person can apply for a pardon after a waiting period which is calculated from the date a person completed the entire sentence, including any part of the sentence that may have been

served in the community, or fines or restitutions have been paid. The waiting period for a summary conviction is three years and for an indictable offence it is five years. A pardon automatically ceases to have effect if a person is later convicted of an indictable offence. Further, the National Parole Board may revoke a pardon if a person is later convicted of a summary offence, or is no longer of good conduct, or the Board learns that a false or deceptive statement was made or relevant information was concealed at the time of the application.

Clemency through a Royal Prerogative of Mercy is an exceptional remedy which may be granted where there exist circumstances of extreme hardship or inequity beyond that intended by the Courts, or out of proportion to the nature and the seriousness of the offence. The National Parole Board conducts the investigations into the merits of the applications and makes a recommendation to the Solicitor General. Where the Minister supports the grant of clemency, he submits his recommendation to the Governor-in-Council or, in some cases, to the Governor General of Canada who will make the final decision.

### *Conditions and Supervision*

The Correctional Service of Canada (CSC) is responsible for supervising offenders on conditional release from a penitentiary and from institutions in provinces and territories without their own boards of parole. Supervision is also provided by contract through the CSC with provincial governments and non-governmental agencies such as the Salvation Army, John Howard Society, Elizabeth Fry Society, St. Leonard's Society and some Aboriginal organisations such as the Native Clan Organization and the Native Counseling Services of Alberta.

Community supervision involves monitoring and helping the offender to reintegrate into society. The parole supervisor reviews the offender's file and sets a schedule to meet with the offender, gives instructions, may contact community resources and the police, and may visit the offender's family, friends, employer or others. If offenders do not abide by the conditions of release, they may be returned to prison. More than half of the offenders who are returned to prison are re-admitted because of a violation of a condition of release, not because of a new crime.

The CCRA regulations set out conditions which apply to all day paroles, full parole and statutory releases. These conditions are that offenders on release: (1) must travel directly to their place of residence and report to the parole supervisor immediately and thereafter as instructed by the parole supervisor (2) must remain at all times in Canada within the territorial boundaries fixed by the parole supervisor (3) obey the laws and keep the peace (4) inform the parole supervisor immediately on arrest or being questioned by the police (5) carry the release certificate and the identity card provided by the releasing authority and produce them on request for identifica-

tion to any peace officer or parole supervisor (6) report to the police if and as instructed by the parole supervisor; (7) advise the parole supervisor of their address of residence on release and thereafter report immediately any change in address, normal occupation, domestic or financial situation (8) are not to own, possess or have control of any weapon. In addition, day parolees must return to their penitentiary or halfway house at intervals specified.

The Correctional Service of Canada can recommend, and the Board may impose, other conditions which must be related to the previous criminal behavior. These are the offender (1) must abstain from drugs other than prescription or over the counter (2) must abstain from the use of alcohol (3) must avoid certain persons, such as persons who have a criminal record (4) must avoid certain places, for example not to enter any liquor store (5) follow treatment plan or counseling (6) cannot contact the victim or victim's family.

## **The Decision on Conditional Release: Principles and Process**

### *Hearing Process*

The protection of society is the paramount consideration in any decision of release. The Board will grant parole only if it believes the offender will not present an undue risk to society before the end of the sentence, and the release of the offender will contribute to the protection of society by assisting him or her to become a law-abiding citizen.

A hearing usually takes place in the institution where the offender is incarcerated. It is a meeting between the offender and Board members, conducted to assess the risk the offender may pose to the community should he or she be granted conditional release. At hearings, Board members review the offender's case with the offender and, in some cases, his/her assistant. They then make their decision, taking into account the criteria set out in the law. Board members provide the offender with reasons for their decision at the hearing. Some decisions are made on the basis of a parole case file review.

An offender may choose to have someone present as an assistant. This person may advise the offender and make presentations on behalf of the offender. The assistant could be, for example, a friend, relative, lawyer, a member of the clergy, an elder or a prospective employer. An offender, or someone acting on behalf of the offender, may appeal the decision to the Appeal Division of the National Parole Board.

### *Principles*

The *Corrections and Conditional Release Act* lists six principles that apply directly to boards of parole:

- Protection of society is the most important consideration in any conditional release decision;
- All relevant information must be considered;
- Parole boards enhance their effectiveness through timely exchange of relevant information among criminal justice components and by providing information about policies and programs to offenders, victims and the general public;
- Parole boards will make the least restrictive decision consistent with the protection of society;
- Parole boards will adopt and be guided by appropriate policies and board members will be given appropriate training;
- Offenders must be given relevant information, reasons for decisions, and access to the review of decisions to ensure a fair and understandable conditional release process.

### *Risk Assessment and Risk Management*

The National Parole Board policies require that Board members systematically review the risk that an offender might present to society if released. First, Board members review all available and relevant information about the offender to make an initial assessment of risk. This includes the offence, criminal history, social problems such as alcohol or drug use and family violence, mental status (especially if it affects the likelihood of future crime), performance on earlier releases, information about the offender's relationships and employment, psychological or psychiatric reports, opinions from professionals and others such as Aboriginal elders, judges, police, information from victims, and any other information that indicates whether release would prevent an undue risk to society.

Board members also consider the statistical probability of an offender to reoffend. They look at how often new offences are committed by a group of offenders with characteristics and histories similar to those of the person under review.

After this initial assessment, the Board looks at such specific factors as: institutional behavior; information from the offender that indicates evidence of change and insight into criminal behavior and management of risk factors; benefit derived from programs that the offender may have taken, such as substance abuse counseling, life skills, native spiritual guidance and elder counseling, literacy training, employment, social and cultural programs, and programs that help offenders deal with family violence issues; appropriate treatment for any disorder diagnosed by a professional; and the offender's release plan.

## *Openness and Accountability*

The Board's openness is achieved through the accessibility to information and decisions by offenders and victims, by the public through the decision registry, as well as, through the ability for observers to attend hearings. The Board is accountable through its legislation and policies, as well as, adherence to the National Parole Board Mission and guiding principles. The Board's professionalism is maintained through a structured appointment process, annual performance appraisals and the extensive and ongoing training undertaken by Board members.

### **Boards of investigation and Chairman ordered investigations**

A Board of Investigation is a review that may be conducted by the National Parole Board and/or the Correctional Service of Canada when an offender on conditional release is charged with a serious violent offence in the community. This process is automatic when the offence involves a death. Both the Chairperson of the National Parole Board and the Commissioner of Corrections have the authority to conduct investigations. When the offender is subject to Statutory Release, CSC will normally conduct the investigation. When the offender has been released by the Board decision, the investigation is normally conducted jointly by both agencies. The investigation team includes a representative from both agencies and a community representative from the region in which the offence took place.

Investigations are conducted to determine the facts of the incident and analyze all issues related to the release and supervision of the offender. It is not an investigation of the actual offence, since such an investigation is normally completed by the relevant police jurisdiction. A report is completed following the investigation which states the team's findings and may include recommendations. The Board of investigation looks into all information related to the offender's behavior prior to release, the Board's release decision and conditions of that release, supervision of the offender and offender's behavior after release. They also examine how staff and Board members applied the law and relevant policies and procedures. The investigation team has the authority to talk to anyone or look at any information they see as relevant to the investigation.

Boards of Investigation do not normally contact the victim or victim's family during the investigation. Exceptions may be made when the victim has information as a result of their relationship to the offender which cannot be obtained in any other way. Arrangements for such contact are made through the police investigating the case. The investigation team is asked to ensure that contact is made only after any court proceedings related to the offence have been completed. The victim and family will be advised of the report before it is released to the public.



Their report may be released to the public when a written request is made to either CSC or the National Parole Board, as required under the *Access to Information Act*.

An investigation usually begins within two weeks after the offender has been charged with the new offence. The length of time to complete an investigation varies according to the complexities of the case and may take up to six months before the report is finalized. Public access requests are processed after the report has been finalized. When the investigation team completes the report, it is submitted to the Chairman of the National Parole Board and the Commissioner of Corrections. Action plans are developed in response to recommendations contained in the report. The results of the report are shared with the regional offices, national office staff and other Parole Board members to ensure that lessons are learned.

### **Observers at Hearings and the Role of Victims**

The *Corrections and Conditional Release Act* permits the National Parole Board to admit observers at hearings. Anyone over the age of 18 may apply to be an observer at an offender's hearing. However, exceptions are possible in some cases for attendance of those under 18 years of age. By law, observers are not permitted to participate in the hearing itself. However, observers may submit information to the Board, in advance of the hearing, that will be considered in the review of the case. Observers may listen, but are not permitted to speak at the hearings. Observers are free to take notes during the hearing but cannot tape nor photograph the proceedings. The Board may ask an observer to leave if the observer disrupts the hearing or hinders the board's ability to assess the case, is likely to upset the balance between the "observer" and the "public," or may endanger the security and good order of the institution. The Board must give reasons for any denial. Victims may apply to be an observer at an offender's hearing.

According to the *Corrections and Conditional Release Act*, a victim includes the person(s) who suffered harm or damages as a result of a crime, as well as the relatives of a victim who has been killed or is unable to respond. Victims may authorize someone to act for them. Victims can request information from and also provide information to the National Parole Board. Both the National Parole Board and Correctional Service of Canada have designated staff ready to assist victims and their families with their requests for information.

Like any member of the public, a victim can request and will receive basic information about the offender. This includes information on the Board's decisions made after November 1, 1992, the length of the offender's sentence, and when the offender becomes eligible for parole. Victims are entitled to additional information if the appropriate authority at the Board decides that the victim's interest clearly outweighs any invasion of the offender's privacy that could result from the release of the information. This can include information as to whether the of-

fender is in custody, and if not, why; where the offender will be released to; where the offender is being held; when the offender is released; what type of release the offender received; and any conditions attached to an offender's release. Victims are not automatically informed of when an offender is being considered for release. This information can only be given to victims upon request.

Victims also provide information to the National Parole Board. They can submit a Victim Impact Statement which is a written description of the harm done to the victim, or the loss which they have suffered due to an offence. In addition, victims may submit any new or additional information they feel is relevant for the Board to consider. Victims are encouraged to send this information as soon as possible after the offender is sentenced or before an offender becomes eligible for parole.

The law requires the National Parole Board and Correctional Service of Canada to share any information with the offender that will be used in making a decision, including information provided by the victim. Information cannot be used if it is not shared with the offender. However, the offenders will not receive any personal information such as the address or phone number of the victim.

Information from victims can aid the Board in understanding the seriousness of the offence committed and whether or not the offender understands the effect the offence had on the victim. This helps the Board assess whether that person is likely to reoffend and whether additional conditions might be necessary to manage a particular risk that the offender might present, especially if the offender will be living near the victim or is a member of the victim's family.

## **Decision Registry**

The National Parole Board records its decisions, including reasons for the decisions, in a data bank called the decision registry. These decisions concern conditional release, return to prison, detention and the decisions and reasons made and given by the Appeal Division of the Board. Decisions made by heads of federal correctional institutions concerning temporary absences and work releases are not included in the decision registry.

Anyone interested in a specific case must request information in writing and give reasons for requesting a copy of the decision. The only information the Board will withhold is that which may jeopardize the safety of someone, reveal a confidential source of information, or adversely affect the return of an offender to society as a law-abiding citizen.

## ANNEX 1: GLOSSARY AND ACRONYMS:

CSC and the Service – The Correctional Service of Canada

NPB – National Parole Board

CCRA – *The Corrections and Conditional Release Act*

Offenders and inmates – prisoners

Institutions / facilities / penitentiaries / jails – prisons





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and Criminal Justice Policy**

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