CANADA'S RESPONSES TO THE LIST OF ISSUES

PRESENTATION OF THE FOURTH AND FIFTH REPORTS

COMMITTEE AGAINST TORTURE

MAY 2005

ARTICLE 2

QUESTION 1:

Please provide further information on the outcome of the discussions with the Canadian Red Cross on the establishment of a formal, structured monitoring programme for the facilities of the Ministry of Citizenship and Immigration.

On April 19, 2002, a Memorandum of Understanding (MOU) between the Canadian Red Cross (Red Cross) and Citizenship and Immigration (CIC) was signed. This MOU provides the Red Cross with access to immigration detention facilities administered by Citizenship and Immigration Canada (since December 2003 administered by the Canada Border Services Agency (CBSA)), and authority to monitor conditions at the facilities to ensure that practices adhere to departmental and international practices and standards. Through the provisions of the MOU, the Red Cross may conduct private, confidential interviews with detainees regarding treatment and conditions at the detention facility, provided that the detainee gives consent. The Canadian Red Cross is not required to provide CBSA advance notice of the inspection and must be given access to the entire facility to conduct a proper inspection. Under the MOU, the Red Cross agrees to undertake annually at least one visit per facility. In practice, the Red Cross completes approximately two to four visits a year for each of the facilities it currently monitors.

The MOU also permits other institutions to be specified, in particular provincial correctional facilities that house immigration detainees on behalf of CBSA. Currently the Red Cross conducts monitoring visits in provincial correctional facilities in the provinces of British Columbia and Quebec. The Red Cross has signalled its readiness to expand its monitoring program into other provinces, and CBSA is supportive of this initiative and will work with its provincial partners to achieve this objective. The MOU is currently being re-negotiated and will reflect the change in detaining authority from CIC to CBSA as well as Canada's enactment of the *Immigration and Refugee Protection Act* in June, 2002.

The Red Cross' approach to monitoring activities is to work directly with the management of each institution to find solutions together to address any concerns raised during a monitoring visit. The Red Cross monitoring teams at the end of each visit provide their comments orally to the person in charge of the institution. On subsequent visits the Red Cross verifies whether the areas of concerns have been addressed. Issues will only be raised to a higher level within the management structure, if concerns are not addressed at the institutional level. There is an ongoing dialogue with Red Cross representatives at both the institutional, regional and national levels where issues raised are discussed, including possible solutions and follow up action. The Red Cross does not divulge publicly its findings with regards to any of its detention monitoring activities.

The Canadian government respects the Red Cross approach to its monitoring activities, including the aspect of confidentiality. Therefore, if the Committee wishes to have further information regarding monitoring of immigration detention in Canada, including areas of concerns raised by the Red Cross, then those enquiries should be made directly to the Canadian Red Cross.

ARTICLE 3

QUESTION 2:

Please comment on the compatibility of the Immigration and Refugee Protection Act (IRPA) with article 3 of the Convention, given that it allows for the removal of foreign nationals after the removal risk is "balanced" against the risk to Canadian society.

Canada faces difficult choices as it seeks to take effective measures against terrorism while respecting human rights law. Traditionally, removals have been an important tool available to the government in reducing public safety and security risks created by non-Canadians. Canadian legislation, recently confirmed in 2002 through the proclamation of the *Immigration and Refugee Protection Act*, authorizes removal to a substantial risk of torture where, following a balancing of state and individual interests, the risk to national security or the security of persons is considered to outweigh the risk to the individual. These provisions apply both to terrorists and to serious criminals. During this process the foreign national is given the opportunity to present submissions to the Minister's delegate. Prior to removal, the foreign national (including failed refugee claimants, or those who are inadmissible on grounds of security, human or international rights violations, serious criminality or organized criminality), can apply for a Pre-Removal Risk Assessment (PPRA) wherein the balancing process takes place. Similarly, a person who was previously determined to be a Convention refugee can only be removed in limited circumstances after a careful consideration of the risk faced by this person. The decision to remove a person to a country where he or she may be at risk is made by the Minister's delegate after careful consideration of the country conditions and all other relevant information, including the risk the individual poses to Canadian society. These decisions are subject to judicial review.

In 2002, the Supreme Court of Canada upheld the constitutionality of this balancing exercise in the case of *Suresh*. While the Court accepted that removal to torture is absolutely prohibited at international law, it ruled that in defining the scope of human rights under the Canadian Charter of Rights and Freedoms, and in particular the right not to be removed to torture, the appropriate approach is not to consider that deportation is never possible but is rather one involving the balancing of state and individual interests. But while the approach may be different as between domestic and international human rights law, the result will generally be the same. The Supreme Court held that given the abhorrent nature of torture, it will almost always be disproportionate to interests on the other side of the balance, even security interests. Thus, the balancing process must generally favour the individual's right to be free from torture. Other means must generally be found to address security concerns. Ultimately, however, it would be impossible to say in advance that the balance will necessarily be struck the same way in every case. The Court held that removal to a substantial risk of torture might be justified, in exceptional circumstances. While the

Court did not define exceptional circumstances, it is expected that the interpretation given to this term would be very narrow.

Accepting that means other than removal must generally be found to address security interests, the Government of Canada is currently working on the development of a wider range of effective alternatives, including detention and supervised release. We have been consulting other States and are assessing the different alternatives which are in use in these States with a view to augmenting the alternatives currently available under Canadian law. Both Houses of Parliament are also examining these issues, in the context of their review of the *Anti-terrorism Act* of 2001.

QUESTION 3:

Please inform the Committee if certain countries are nominally designated as "safe country of origin" (fifth report, Para. 17) and, if so, please provide the Committee with information on the decision and review procedure with respect to the countries so designated. Please also provide further information, if available, on the incorporation of article 3 into domestic legislation.

Although the possibility of designating safe third countries as a means to improved responsibility sharing and the management of asylum claims has existed in Canadian legislation since 1988, it was only last year that the first country was so designated with the implementation of regulations giving force to the Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("the Agreement", implemented on 29 December 2004). Section 102 of IRPA sets out the criteria for designating safe third countries:

> 102. (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions
>
> (a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
>
> (b) making a list of those countries and amending it as necessary; and
>
> (c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).
>
> (2) The following factors are to be considered in designating a country under paragraph (1)(a):

(a) whether the country is a party to the Refugee Convention and to the *Convention Against Torture*;

(b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the *Convention Against Torture*;

(c) its human rights record; and

(d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

The Agreement applies to all claims made at the Canada-United States land border, save where the claimant:

- has a family member in Canada who is a Canadian Citizen or a permanent resident;
- has a family member in Canada 18 years or older who has made a claim for refugee protection in Canada and the claim has been referred to the RPD;
- has a family member in Canada who has been accepted as a protected person or accepted in principle for landing on humanitarian and compassionate grounds;
- has a family member in Canada who was admitted to Canada as a temporary worker or student and has a valid work permit or study permit
- is a person seeking re-entry to Canada at a land border port of entry who was refused entry to the U.S. and has not had a refugee claim adjudicated in the U.S.;
- is an unaccompanied minor;
- has in their possession a visa to enter Canada (other than a transit visa) or is a person who may be granted entry to Canada without the requirement of a visa but is required to hold a visa to enter the United States;
- has in their possession a travel document for permanent residents or for refugees issued by Canada;
- has been charged with or convicted of an offence that could subject the claimant to the death penalty in the United States or in a third country;
- is a national, or who, not having a country of nationality, is a habitual resident of a country in respect to which the Minister has imposed a stay on enforcement of removal orders.

There are arrangements in place for monitoring the operation of the Agreement which include the participation of the UNHCR and NGOs. This monitoring will help to inform the ongoing review of the designation of the United States and of the effectiveness of the Agreement. The Minister of Citizenship and Immigration is mandated through an Order in Council to review on a continuous basis the factors referred to in sub-section 102(2) of IRPA and to report to the Governor in Council on a regular basis on the review, or more often should circumstances warrant.

Regarding the Committee's request for further information on the incorporation of Article 3 into domestic legislation, the incorporation of Article 1 of the *Convention against Torture* into the consolidated protection criteria is considered both in refugee determination proceedings at the Immigration and Refugee Board and in the Pre Removal Risk Assessment process (described in paras. 15-18 of the Fifth Report, http://www.pch.gc.ca/progs/pdp-hrp/docs/torture/gv_e.cfm).

QUESTION 4:

Please provide the Committee with statistics, if possible, related to cases of non-refoulement based on article 3 of the Convention. Please also provide information on cases where "exceptional circumstances", in which deportation to face torture was considered justified, were invoked, as noted in paragraph 34 of the fifth report. Please also provide the Committee with information on the number of persons considered "ineligible" for a hearing by the Refugee Protection Division on grounds of security, as noted in paragraph 16 of the fifth report. Please explain how this can be reconciled with article 2, paragraph 2, of the Convention.

To date, Canada has not deported anyone to a country where the person was determined to face a substantial risk of torture. There are currently a few cases where the Minister's delegate determined that the risk to the Canadian society outweighs the risk to the person concerned that are pending before the Federal Court of Canada.

From 1996 to 2000, four persons were deemed ineligible for a hearing before the Refugee Protection Division, on grounds of security. As well during 2000-2004, two persons were determined ineligible for the same reason.

Individuals under removal order can apply for a Pre-Removal Risk Assessment (PRRA) prior to their removal. The protection grounds under the PRRA also include the risks mentioned in s.97 of the *Immigration and Refugee Protection Act*, including the definition of torture, by reference to article 1 of the *Convention Against Torture* (s.97 (1)(a)) and the risk to life and the risk of cruel and unusual treatment or punishment (s.97 (1)(b)). All PRRA officers receive extensive training on a number of international conventions, including the *Convention against Torture* and the Federal Court of Canada can review their decisions.

Canada acknowledges that its position cannot be reconciled with Article 2, paragraph 2 of the *Convention*, to the extent that application of the prohibition is to be given an absolute character. As stated under question 2, Canada's current approach is one involving the balancing of state and individual interests, and the government of Canada is currently working on developing a wider range of effective alternatives consistent with international and domestic human rights standards and Canada's commitment to the global struggle against terrorism.

QUESTION 5:

Please describe the measures that have been taken to remedy the deficiencies in the system for assessing fitness for expulsion determined by the Human Rights Committee in Ahani v. Canada (communication No. 1051/2002, Views adopted on 29 March 2004) to be in breach of article 13 (expulsion of an alien) in conjunction with article 7 (prohibition of torture) of the International Covenant on Civil and Political Rights.

Canada takes its international obligations very seriously and fully supports the important role mandated to the Human Rights Committee. It is Canada's position that it was in full compliance with its international obligations in this case and that it did not violate its obligations under Article 13 of the *International Covenant on Civil and Political Rights* (the *Covenant*).

Article 13 of the *Covenant* requires that the expulsion decision be reached in accordance with the law. The Supreme Court of Canada concluded that the process accorded to the author was consistent with the principles of fundamental justice guaranteed by the *Canadian Charter of Rights and Freedoms*. The Court was satisfied that Ahani was fully informed of the Minister's case against him and given a full opportunity to respond. The Court also concluded that the procedures followed did not prejudice Ahani. The decision to remove was confirmed to be in accordance with law by the Supreme Court of Canada.

Canada, on the basis of all of the evidence available to it, including Ahani's testimony and extensive submissions made by his counsel, concluded that the risk that the author would face upon return to Iran was only "minimal". Indeed, Canada's decision in this regard was upheld at all levels of judicial review and appeal. The Supreme Court of Canada held that the Minister's decision that the author did not face a substantial risk of torture on deportation was "unassailable."

Article 13 of the *Covenant* further requires the individual to be able to submit reasons against his removal, which Ahani was able to do. The decision to remove Ahani was the result of the balancing between the danger the author represented to the security of Canada and the risk he would face if returned to his country. This process culminated in the opinion issued by the Minister that Ahani constitutes a

danger to the security of Canada and that he faced only a minimal risk of harm upon deportation.

In order to simplify the process with respect to whether a person who is a danger to the security of Canada may be removed from Canada, the Canadian government now affords all such persons the same enhanced procedural guarantees. In particular, all documents used to form the danger opinion are now provided to the person redacted for security concerns and they are entitled to make submissions.

ARTICLE 11

QUESTION 6:

With respect to the situation of women offenders, the Committee notes that the Correctional Service Canada (CSC) has taken decisive action on all recommendations in the Arbour Report that are within its jurisdiction.

A) Please indicate which recommendations of this report are not within the jurisdiction of the CSC.

Of the 87 recommendations or sub-recommendations put forward in the *Arbour Report*, 4 were outside of CSC's jurisdiction. Recommendations 6(i), 8(a), 8(b) and 9(g) (listed below) all refer to legislative sanctions for correctional interference with the integrity of the sentence. CSC referred these recommendations to Justice Canada in 1996 for consideration and review.

The *Arbour Report* recommendations outside of CSC's jurisdiction are:

6(i) that body cavity searches and strip searches performed in contravention of these recommendations be treated as having rendered the conditions of imprisonment harsher than that contemplated by the sentence, for the purposes of the remedies contemplated in the recommendation dealing with sanctions. (See recommendation 8(b) and (c));

8(a) that the Department of Justice, at the initiative of the Solicitor General, examine legislative mechanisms by which to create sanctions for correctional interference with the integrity of a sentence;

8(b) that such sanctions provide, in substance, that if illegalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court:

> *(i) in the case of a non-mandatory sentence, a reduction of the period of imprisonment be granted, to reflect the fact that the punishment administered was more punitive than the one intended, should a court so find; and*
>
> *(ii) in the case of a mandatory sentence, the same factors be considered as militating towards earlier release;*

9(g) that failure to comply with any of the above provisions be treated as having rendered the conditions of imprisonment harsher than that contemplated by the sentence, for the purposes of the remedy contemplated in recommendation 8(b) and (c).

The Department of Justice has carefully considered all the Arbour Commission's recommendations which provide the most direct and, from the inmate's perspective,

advantageous form of remedies for an inmate who has suffered mistreatment at the hands of correctional authorities. As part of its consideration of these recommendations, Justice Canada canvassed the mechanisms currently found in the Canadian legal system to respond to the concerns giving rise to the recommendations.

The two rationales for the Commission's recommendations concerning correctional interference with the integrity of a sentence can be summarized as follows: the need to provide adequate redress for the infringement of prisoner's rights and the need to ensure compliance by correctional authorities with the law and with prisoner's rights.

In addition to remedies offered by section 24(1) of the *Canadian Charter of Rights and Freedoms*, there are many mechanisms currently in place to provide inmates with a remedy in case of mistreatment by correctional authorities. Some of these are aimed at redressing the infringement of the inmate's rights (e.g. habeas corpus, judicial review, civil actions, internal grievance procedure, and section 5 of the Canadian Human Rights Act). Other remedies are aimed at ensuring compliance by correctional authorities with the law and include criminal proceedings against staff, Correctional Investigator investigations, internal discipline of staff, Boards of Investigation, Citizens Advisory Committees.

The Arbour report was produced before Chapter 22 of the Statutes of Canada (formerly Bill C-41, Sentencing Reform) was proclaimed into law on September 3, 1996. It provides a statutory statement of the purpose and principles of sentencing in section 718-718.2 of the *Criminal Code*. These sections provide that the purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society. The objectives of sentencing include deterrence, denunciation, rehabilitation, reparation, accountability and separation from society where necessary. The fundamental principle of sentencing is the concept of proportionality. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. One of the principles contained in subsection 718.2 of the Criminal Code is the restraint principle that requires sentencing courts to consider all available sanctions other than imprisonment that are reasonable in the circumstances.

As a result of its analysis undertaken since the Arbour report was issued, Justice Canada concluded that the measures outlined above would more appropriately achieve the objectives underlying the Commission's recommendations.

B) Please provide information on any follow-up to the report on federally sentenced women issued in January 2004 by the Canadian Human Rights Commission (fifth report, Para. 41).

In February 17, 2005, the Correctional Service of Canada (CSC) publicly released *CSC's Action Plan in Response to the Report of the Canadian Human Rights Commission* (CHRC). The *Response* is available online at:

http://www.csc-scc.gc.ca/text/prgrm/fsw/gender4/CHRC_response_e.pdf

In preparing the *Response*, CSC carefully reviewed and consulted with stakeholders on all 19 of the CHRC's recommendations. Overall, the action plan will enable CSC to implement change and monitor the results. It should be noted that the CHRC commented publicly that they were pleased with the steps CSC has taken.

The following are highlights of CSC's *Response*:

CSC has agreed to work with external experts to develop a gender-informed approach to the initial security classification of women offenders. This includes developing a new scale for the initial security classification. Added to this, CSC is now in the implementation phase of a "built from the ground-up" security reclassification scale specifically for women offenders. During the field-testing phase, the reclassification scale demonstrated good reliability and validity for both Aboriginal and Non-Aboriginal women offenders.

CSC has put in place a number of initiatives to improve women offenders' employment skills and employability. To date, this has led to a 10% increase of employment opportunities in each of the women's facilities. CSC has also worked with the Conference Board of Canada to develop a gender-informed Employability Program designed to enhance the employability of women offenders through institutional work experience. A survey was recently completed to assess women offenders' work experience, training needs and skills in order to assist them in obtaining and maintaining meaningful work in the community. Results from this survey will lead to the development of a National Employment Strategy for Women Offenders, which is expected to be completed during fiscal year 2005-2006.

CSC will maintain its existing practices of employing male front-line staff in women's institutions. A number of measures are in place to ensure the privacy and dignity of women offenders. These include stringent selection standards for potential staff, clear operational policies and protocols for interactions between staff and women offenders and in-depth, specialized staff training for those working in women's institutions. CSC does not tolerate harassment or discriminatory behaviour. It will continue to monitor compliance with policies and standards.

Implementation of a few recommendations was not possible without legislative change. CSC must operate within the framework of the *Corrections and Conditional Release Act*. These recommendations include establishing an independent external redress body for offenders (Recommendation 19) and independent adjudication for decisions related to involuntary segregation (Recommendation 6a). As indicated in CSC response to CHRC's report, the Service will continue to participate in discussions on these topics and will work toward identifying strategies that are within its power. The Office of the Correctional Investigator (OCI) issued a detailed response highlighting its concerns with respect to CSC's action and indicated that further action is required in order to fully meet the recommendations of the CHRC. CSC is continuing its efforts to address the recommendations and acknowledges the ongoing concerns of the OCI and other stakeholders.

ARTICLES 12 AND 13

QUESTION 7:

Please provide information on the number of criminal and disciplinary proceedings instituted and sanctions imposed since the examination of the previous report, in addition to data on the number of complaints of torture or torture-related conduct filed against law enforcement personnel provided in the fifth periodic report.

The Canadian Center for Justice Statistics indicates that 4 charges of torture (s. 269.1 of the *Criminal Code*) were laid in 1999-2000 (4 cases); 2 charges in 2001-2002 (1 case) and 2 charges were laid in 2003-2004 (1case). The charges laid in 1999-2000 and in 2001-2002 were stayed or withdrawn. In 2003-2004, one charge was stayed or withdrawn and one charge is pending.

GOVERNMENT OF CANADA

No complaints with regard to torture or torture-related conduct were filed against RCMP, nor were any criminal or disciplinary proceedings imposed since the examination of Canada's last Report.

Similarly, no complaints with regard to torture or torture-related conduct were filed against the Correctional Service of Canada (CSC), nor were any criminal or disciplinary proceedings imposed since the examination of Canada's last Report.

Because of the nature of CSC's business, security incidents do occur and have to be addressed. The following data represent the number of use of force incidents classified as reportable during the past seven fiscal years. You will also find below the numbers on complaints and grievances in the internal grievance system that were filed by inmates after alleged use of force was applied and the percentage of cases upheld.

Fiscal Year	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05
Number of reportable incidents	n/a*	n/a*	n/a*	989	970	874	n/a
Proportion of incidents that were grieved	n/a*	n/a*	n/a*	9%	6%	5%	n/a
Complaints and grievances	63	44	52	87	56	40	59
Upheld	13%	14%	8%	11%	5%	15%	12%

Source: CRS as of February 2005 and Security Division NHQ.

*Data was unavailable for those years.

Use of force in CSC, refers to spontaneous or planned interventions by CSC staff to respond to disruptive and/or threatening behaviour by offenders. Staff members have been trained to follow all necessary procedures to ensure the health and safety of our personnel as well as our offender population.

CSC uses a Situation Management Model as a training tool and framework for all interventions. Unlike Use of Force models, verbal interventions are always an option reinforcing mediation and conflict resolution as effective techniques to diffuse or manage situations. The model sets out criteria to help staff determine appropriate options to diffuse tense situations. Options in the model range from verbal interventions to use of various levels of force to withdrawal from the situation. The basic premise requires that the least intervention required to ensure public, offender and staff safety be used.

CSC has a policy on appropriate use of force in the management of incidents. CSC has also put in place a Management Control Framework which specifies actions that have to be taken during and after an incident involving use of force to assure compliance with and accountability for all the above mentioned Acts and Policies. It provides instructions on the management and review of incidents involving the use of force. Each incident is measured against this Management Control Framework.

As well, all use of force incidents, inclusive of videotape, are reviewed by the Office of the Correctional Investigator, as was recommended in the Arbour Report.

PROVINCES / TERRITORIES

Newfoundland & Labrador

In 2000-2001 there were 35 complaints to the Complaints Commission. 14% were for unnecessary force, 20% for Discourtesy, 46% for Lack of Service and 20% for Conduct Contrary to Policy.

In 2002-2003 there were 38 complaints. 8% were for Unnecessary Force, 42% for Discourtesy, 8% for Lack of Service and 24% for Conduct Contrary to Policy.

In 2003-2004 there were 36 complaints. 20% were for Unnecessary Force, 36% for Discourtesy, 11% for Lack of Service, 8% for Release of Information, 11% for Conduct Contrary to Policy and 14% other.

Quebec

The Police Ethics Commissioner is the body responsible for civilian oversight of police officer, special constable and highway controller conduct.

Complaints filed with the Police Ethics Commissioner regarding conduct that violates Quebec's Police Code of Ethics:

In 2003-2004: 1,426 complaints; 53% of the complaints were deemed inadmissible, 35% were sent to conciliation, 9% were investigated and 3% were withdrawn by the complainant. In 47 cases, the police officer concerned by the complaint was summoned to appear before the Police Ethics Committee responsible for enforcing the Police Code of Ethics.

In the same year, the Police Ethics Committee ruled in 47 decisions involving 93 police officers. In terms of penalties, the Ethics Committee rendered 26 decisions involving 37 police officers. In all, 63 penalties were imposed, including 4 warnings, 3 reprimands, 10 rebukes, 1 demotion, 40 suspensions, 1 dismissal and 4 disqualifications.

In 2004-2005: As of March 29, 2005, the Police Ethics Commissioner had received 1,289 complaints. Detailed compilations will be available later, given that the Police Ethics Commissioner has 40 days to decide what to do with these complaints.

Manitoba

Manitoba Law Enforcement Review Agency's jurisdiction extends to 14 police forces with 1399 sworn police officers with a population of 720,229 citizens. The number of complaints to the Manitoba Law Enforcement Review Agency is 77 for the year 2000;

111 for the year 2001; 108 for the year 2002; 136 for the year 2003 and 149 for the year 2004.

Saskatchewan

Information has been provided on complaints against the police in the Fifth Report, for the years 2000-01, 2001-02, 2002-03 and 2003-04. The report of the Saskatchewan Police Complaints Investigator for the year 2004-05 is not yet available.

Under *The Police Act, 1990,* possible sanctions for a major disciplinary offence include dismissal; demotion; suspension; fine; order for a period of probation or close supervision; order to undergo counselling, treatment or training; reprimand.

British Columbia

From January 1st to December 31st 2004, there were a total of 379 new complaints filed against the Municipal Police under the *British Columbia Police Act*.

For further information, please see British Columbia's contribution to Canada's Fifth Report, which provided statistics on complaints before the Police Complaints Commission.

Nunavut

The Territory of Nunavut have instituted 280 disciplinary hearings against law enforcement personnel relating to minor infractions such as fighting or breaking the no smoking rules. Sanctions include warnings or segregation for an imposed period.

Yukon

The Commission for Public Complaints Against the RCMP received a total of 5 complaints out of the Yukon for the fiscal year 2004-2005.

All 5 complaints remain open. The Commission did not receive a request for review for these complaints as the RCMP did not yet complete their investigation. Once completed, the RCMP will send a letter to the complainant summarizing the results of its investigation. At that time, if the complainant is not satisfied with the RCMP's investigation of his/her complaint, he/she may request a review of their complaint by the Commission.

There were no further investigations by the Commission for the fiscal year

Other provinces and territories have indicated that they either have received no complaints (eg. Prince Edward Island, New Brunswick, Ontario), do not have such statistics (Alberta) or have no further information to report beyond that included in the Fourth and Fifth Reports.

QUESTION 8:

Following the final report on the APEC conference inquiry, have any additional steps been taken, other than policy changes, to hold accountable those responsible (fifth report, Para. 73)?

Most people understand disciplinary action to be the application of punishment in response to some failure to perform in accordance with an established standard. This understanding overlooks what the RCMP thinks is the principal function of discipline, which is to train, correct or develop by instruction or coaching.

Not all problems giving rise to breaches of discipline, misconduct or unsatisfactory job performance can be corrected through punishment. While a remedial approach to discipline recognizes that sanctions may sometimes be necessary, it also recognizes that there are many situations in which punishment is not only inappropriate, but unfair.

Issues around performance and conduct may be due to inconsistencies in rules, regulations and directives and the operational requirements of policing. The APEC inquiry highlighted this in that the RCMP learned from reviews of the actions taken by its employees as well as from the subsequent inquiry, and made adjustments to operational directives and its approach to pre-event planning.

These changes are highlighted in Canada's Fifth report and no further steps have been taken.

QUESTION 9:

Please provide information on any time limitations that may exist for the admissibility of complaints related to torture or other cruel, inhuman or degrading treatment or punishment.

There is no time limitation with respect to indictable offences such as torture (s. 269.1 of the *Criminal Code*). In the case of cruel, inhuman, degrading treatment, other offences may be relevant, such as "simple" assault (s. 265) which is dual procedure (indictment or summary conviction offence) as is assault with a weapon or causing bodily harm (s. 267). Generally, a time limitation of six months applies to a summary conviction. However, aggravated assault (s. 268) is indictable only and no time limitation applies.

GOVERNMENT OF CANADA

The time limit placed for filing a complaint with the Military Police Complaints Commission is one year after the alleged incident. However, this time limit may be

extended by the Chairman if he concludes that it is reasonable in the circumstances to extend the time.

The Correctional Service of Canada has a multi-level complaint and grievance procedure that embodies the principles of fairness, confidentiality and accessibility to allow redress to all offenders without fear of negative consequences. Paragraph 12 of the Correctional Service of Canada's *Commissioner's Directive 081 – Offender Complaints and Grievances*, the policy that governs the complaint and grievance procedure, stipulates:

> *An offender may submit a written complaint through the Institutional Grievance Coordinator or through the District Office on matters within the jurisdiction of the Commissioner. Normally, the problem shall have occurred within the previous 30 calendar days.*

The aforementioned thirty (30) day time limit is only a guideline. An offender's complaint or grievance will not be rejected solely on the basis of being outside the thirty day time frame, especially if the complaint or grievance relates to an issue that is seen to have a significant impact on the offender's rights and freedoms (i.e.: involuntary transfer decisions; placement in segregation; conditions in segregation; use of force; access to visits; Special Handling Unit placement / release decisions; urgent health services treatment; harassment; and discrimination).

Complaints filed after the thirty-day time limit are assessed and addressed on a case-by-case basis. While there are no specific criteria, certain questions will be asked, such as: Does there appear to be merit to this complaint? Is this an issue that may have significantly impacted the offender's rights and freedoms? When there is some doubt surrounding the merit and/or impact of the allegations outlined in the complaint, CSC will normally err on the side of addressing it.

Part IIII of the *Corrections and Conditional Release Act*, which establishes and governs the Office of the Correctional Investigator, also provides a mechanism for the investigation of complaints by or on behalf of an offender. This process is not subject to any legislative or administrative time limitations.

With regards to the RCMP, the statutes of limitations on complaints of a statutory nature are outlined in the *Criminal Code*.

The time limitation provided for under Part IV of the RCMP Act is "one year from the time the contravention (of the Code of Conduct) and the identity of (the subject member) became known to the appropriate officer. There is no time limitation provided for under Part VII of the RCMP Act (Public Complaints). Any complaint lodged after the enactment of Part VII (in 1988) may be considered as long as the subject member was still serving when the complaint was lodged. It is unlikely, however, that allegations of Torture would be treated as Part VII Public Complaints. It is likely that they would be "raised to a higher court", i.e.: to Code of Conduct or Statutory.

PROVINCES / TERRITORIES

Newfoundland & Labrador

The *Citizen's Representative Act* does have a no mandated limitation period; however, the Citizen's Rep may refuse to investigate a matter where it relates to a decision, recommendation, act or omission, of which the complainant has had knowledge for more than one year before the complaint is received by the Citizen's Representative.

A complaint to the Police Complaints Commission must be made within 3 months after the alleged misconduct occurred or, if there is a continuing misconduct, within 3 months after the last incidence of the alleged misconduct.

Quebec

The time limit set out by law within which a complaint must be filed with the Police Ethics Commissioner available to citizens who feel their rights have not been respected or who were treated improperly by a police officer is one year from the date of the incident or knowledge of the incident that gave rise to the complaint.

In terms of compensation, recovery for damages is subject to a limitation period of six months with regard to municipal police. As to compensation for bodily injury caused by a municipal or provincial police intervention, the three-year limitation period applies.

Moreover, in *Gauthier v. Beaumont*, [1998] 2 R.C.S.3, the Supreme Court indicated that the limitation period could be suspended when the victim was absolutely unable to act, for example, out of fear for his or her life.

Ontario

There are no special time limitations on admissibility of complaints related to torture, except limitation periods that apply in any civil, criminal or a complaints process set up under a statute.

Manitoba

Manitoba Law Enforcement Review Agency (LERA) normally requires a complaint to be filed within thirty days of an alleged incident, but there is provision for the LERA Commissioner to extend time for up to six months from the date of the incident.

There is no limitation period for a complaint to the Ombudsman, although the passage of time may be a factor in specific cases in determining whether to exercise the Ombudsman's discretion to investigate a matter.

In its contribution to the Fifth Report, Manitoba made reference to a new statutory procedure, *The Protection of Persons in Care Act*, concerning persons in 'care' situations. It has an investigatory and a prosecutions mechanism. The only limit on investigations is that they cannot go back before passage of the legislation in May 2001. A prosecution must be commenced within two years (in contrast with the usual

limitation under the *Summary Convictions Act* of six months (unless otherwise stipulated in the statute).

Saskatchewan

Section 38 of *The Police Act*, 1990, deals with initiation of complaints. Subsection 38(7) reads:

> No public complaint shall be received or made pursuant to this section after the expiry of six months from the day on which the complainant should have been aware of the incident complained of unless, on application by the investigator, the chairperson of the commission is satisfied that it is in the public interest to extend the time.

Alberta

At present there is no time limit on complaining about officer conduct to the chief of police but amendments are being introduced that will put a limit of one year on the filing of a complaint. This will not include allegations of criminal action, only officer conduct that falls short of criminal behaviour.

British Columbia

Complaints to the Police Complaints Commissioner must be filed within one year of the date of the incident.

With respect to Provincial Correctional Facilities, there are two routes for inmates to file a complaint, and in addition, complaints may be forwarded to the provincial Office of the Ombudsman: a) Grievance procedure under the Correctional Centre Rules and Regulations: there is no time limit for filing a complaint (with respect to time elapsed since the date of the incident). Once the complaint is filed, officials must respond within seven days; b) The Rules and Regulation also provide a second route, where complaints may be filed directly with the Director of Investigation, Inspection and Standards Office of the Ministry of Public Safety and Solicitor General. There are also no time limits with respect to filing by this route.

There are no time limits for the filing of a complaint to the Office of the Ombudsman.

New Brunswick, Prince Edward Island and Yukon do not have time limitations on the admissibility of complaints related to torture. **Other provinces and territories** have no further information to report beyond that included in the Fourth and Fifth Reports.

ARTICLE 14

QUESTION 10:

In addition to the information contained in paragraph 85 of the fifth report referring to victims of torture that occurred prior to arrival in Canada, please provide information on redress, compensation or rehabilitation provided to victims of torture that has occurred in Canada, or to their families, since the examination of the last periodic report.

Criminal injuries programs are administered by the provinces and territories. They do not require a conviction but they vary by province in terms of eligibility requirements, amounts of compensation, and what victims may make claims for.

Most Provinces have reported pertinent information on this topic under article 14 of their respective sections of either the Fourth or the Fifth Reports of Canada. In addition, the following information can be reported:

Newfoundland & Labrador

The Victim Services program began in 1992. The program is based on the principles that victims should be treated with courtesy, compassion and respect, that victims should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system, and that victims should receive prompt and fair redress for the harm they have suffered. Services are available to any victim of crime, but priorities for service include victims of violent crime. The nature of the offence and the victims response will be determining factors in ranking priority. Services are available to those who feel they have been victimized regardless of whether a complaint has been made to the police or a charge has been laid. There is no fee for the service.

Services available are:

- general information on the criminal justice system
- updated information on what is happening with the case
- pre-court preparation
- help with Victim Impact Statement
- identification and referral to specialized community resources
- provision of emotional support and short-term counselling during process for preparing for court.

New Brunswick

Should there be the need to provide services or programs to victims of torture, New Brunswick has an extensive network of victim services in partnership with many non-governmental organizations.

Quebec

Although they are not assistance programs as set out in paragraph 85 of Canada's Fifth Report, there are several types of recourse in Quebec available to citizens who feel their rights have not been respected or who have been treated improperly by a police officer. With respect to police work, all citizens can file a complaint with the Police Ethics Commissioner.

Case law in Quebec sometimes qualifies certain police actions as degrading treatment and further reveals cases of abusive use of force. These cases are most often examined by the Police Ethics Committee or the Quebec Court of Appeal before which the Committee decisions may be appealed. Also, compensation may be sought through the courts.

Alberta

There are a variety of mechanisms that an individual can avail themselves of to seek redress to mistreatment. These include:

- contacting a police agency;
- complaining to the Law Enforcement Review Board if they feel the redress is lacking or insufficient;
- contacting the Alberta Human Rights Commission;
- contacting the office of the Ombudsman;
- contacting a lawyer and/or pursuing a request for redress through the Courts;
- seeking assistance through the crimes compensation process.

ARTICLE 16

QUESTION 11:

Please provide updated information on the number of imprisoned persons and the occupancy rate of the accommodation capacities for the period from 2002 to 2004.

GOVERNMENT OF CANADA

CSC Capacity and Population Count

Table 1

2002-2003			
	Rated Capacity	**Population Count** **End of March 2003**	**Variance**
MEN	13,807	12,983	824
WOMEN	457	378	79
Total:	14,264	13,361	903

In 2002-03, CSC had a rated capacity of 14,264 beds across its five regions.[1] For men, there were 824 vacant cells, approximately 6% of the total capacity. For women, there were 79 vacant beds, approximately 17% of the rated capacity.

Table 2

2003-2004			
	Rated Capacity	**Population Count** **End of March 2004**	**Variance**
MEN	13,649	12,767	882
WOMEN	475	400	75
Total:	14,124	13,167	957

In 2003-04, the rated capacity for men decreased by 140 beds and the male population declined, leaving 882 vacant beds. For women, CSC increased its rated capacity from 457 beds to 475 beds. However, the population also grew, leaving fewer empty beds than the previous year.

Although it would appear that CSC had sufficient surplus capacity nationally between 2002 and 2004, it was not distributed equally at all security levels and in all regions. Consequently, in certain areas double bunking was required to safely manage the

[1] The total does not include beds purchased through exchange of service agreement with provincial partners nor does it include beds purchased through Corrections and Conditional Release Act Section 81 agreements with Aboriginal communities.

offender population at appropriate security levels while keeping individual offenders as close as possible to their community support networks.

The national double bunking rate has fluctuated over the last few years. In January 2002, the rate of double bunking was 9.3%. By January 2003, the rate increased to 10% but decreased to 6.3% in January 2004. CSC's most recent data (February 2005) indicates that the national double-bunking rate is 7.4%. In its last Annual Report (2003/04), the Office of the Correctional Investigator reaffirmed its continued concern with the practice of double-bunking in reception units and other non-general populations where conditions of confinement are more restrictive, and CSC continues to seek ways to build upon the progress that has been made on this issue.

PROVINCES / TERRITORIES

The data provided below refers to fiscal years unless otherwise noted.

Newfoundland and Labrador

Occupancy Rate of Newfoundland and Labrador Detention Centres

2002-2003: Average Count: 313.2; Utilization Rate: 79.5%; Capacity: 394

2003-2004: Average Count: 287.2 Utilization Capacity: 73.3%; Capacity: 392

Prince Edward Island

The Occupancy Rates for Adult Custody in Prince Edward Island are as follows:

2001-02: 61.8%

2002-03: 63%

2003-04: 75.8%

The number of admissions includes only those given an offender number:

2001-02: 830

2002-03: 862

2003-04: not available

New-Brunswick

The capacity for the five adult custody facilities is 284 and has remained unchanged for several years.

Daily custody adult population:

2001-02: 344

2002-03: 318

2003-04: 310

Québec

Number of people incarcerated and occupation rates:

2002-2003: 43,080 admissions involving 31,745 people

2003-2004: 40,492 admissions involving 30,063 people

For all Quebec institutions, the occupation rate observed is close to 100%.

The Corrections Services Branch (DGSC) has no control on the demand for detention bed space.

In June 2002, a report on correctional capacity presented the bed space requirements of detention facilities. To meet the growing offender population, it proposed measures to increase DGSC's prison capacity.

Temporary measures were implemented, increasing DGSC's prison capacity by 165 beds. This is how a number of institutions were asked to double the number of cells and open areas that were closed.

Increasing prison capacity allowed DGSC to keep offenders in their home region and near their social network.

Also, interregional client transfer mechanisms were implemented to manage client flow, in a context where detention facilities struggle to meet the demand.

A recent analysis of prison capacity confirms that there is still a need for bed space. Lastly, the Department of Public Safety's strategic planning will submit a prison infrastructure planning framework in 2005.

Ontario

These numbers include persons remanded to custody in prisons by courts, those sentenced by courts, those on intermittent sentencing, those charged with other federal offences, those imprisoned for immigration offences and those

imprisoned for other purposes (e.g. those that may be mentally ill and awaiting a bed at a psychiatric hospital).

2002-2003: 8,050 (including: Remand - 4,373; Sentenced - 3,001; Intermittent – 670; Federal – 149; Immigration – 218; Other – 21). Utilization 97.8%

2003-2004: 7,681 (including: Remand - 4,491; Sentenced – 2570; Intermittent – 558; Federal – 149; Immigration – 213; Other – 22). Utilization 89.7%

Saskatchewan

The Department of Corrections and Public Safety (CPS) provided supervision on an average daily basis to:

Adult Custody programs:

2002-2003 - 1,213 offenders
2003-2004 - 1,205
2004-2005 - 1,204

Adult Community correctional programs: 2002-2003 - 5,617 offenders2003-2004 - 6,095 offenders 2004-2005 - 5,903.

Young Offenders in youth custody programs 2002-2003 - 335

2003-2004 - 260

2004-2005 - 225

Young Offenders in community programs:

2002-2003 - 2,438
2003-2004 - 1,964
2004-2005 - 1,963

MANITOBA

The population averages of all adult custody and all youth custody are as follows:

	Adult Custody	Youth Custody
1999/2000	1101	293
2000/2001	1116	276
2001/2002	1114	263
2002/2003	1180	257
2003/2004	1231	185
2004/2005	1144	197

ALBERTA

The total operational capacity of adult custody facilities operated by the Correctional Services Division of Alberta Solicitor General is 2,135 beds. In addition to this, Alberta Correctional Services has a special purpose bed capacity of 697 beds. This capacity remained unchanged between 2002/03 and 2003/04.

Alberta Correctional Services operates 8 adult correctional and remand centres and 1 community correctional centre, which is under contract with an Aboriginal community. As well, Correctional Services manages four minimum security satellite camps, one of which is operated under contract by an Aboriginal organization.

In 2002/03, Correctional Services' facilities had a total of 25,845 adult admissions, and in 2003/04, there were a total of 26,289 admissions (a 2% increase).

British Columbia

Provincial Correctional Facilities (includes prisoners sentenced and awaiting trial, and prisoners service provincial time, under remand or immigration violations).

2002-2003: 2,064. 87.5% occupancy
2003-2004: 2,049. 91.1% occupancy

Between 2002-2003 and 2003-2004, 10 correctional facilities were closed, resulting in an overall reduction of the number of spaces.

Nunavut

The occupancy rate of the detention centres in the Territory of Nunavut is 100%. The Nunavut government is holding some offenders outside of its territory.

Yukon

The number of imprisoned persons between 01/01/2002 and 31/12/2004: total number of admissions to Whitehorse Correctional Centre (WCC): 1813 (assuming an incrementation for each admission)

The number of imprisoned persons between 01/01/2002 and 31/12/2004: total number of unique admissions to WCC: 601 (assuming an incrementation for each unique client admitted to WCC)

The occupancy rate for that period is 59.9%.

QUESTION 12:

Please provide information on the findings of the detailed independent evaluation on the Enhanced Segregation Review process noted in paragraph 189 of the fourth report.

In the context of CSC's *duty to act fairly*, the Parliamentary Sub-committee on Corrections and Conditional Release Act (May 2002) of the Standing Committee on Justice and Human Rights recommended (#21) that:

> (…) the Corrections and Conditional Release Act be amended to provide for the adjudication (by independent chairpersons appointed by the Solicitor General as part of the inmate discipline process) of involuntary administrative segregation cases every 30 calendar days and of voluntary administrative segregation cases every 60 calendar days.

The Government's response proposed an alternative to balance institutional responsibility and accountability with external oversight:

> (…) an enhanced segregation review process that includes external membership. This model will attempt to balance independent adjudication with the promotion of appropriate operational accountability by the Correctional Service of Canada. This model will be implemented on a pilot basis in all regions and a detailed independent evaluation will be undertaken. The development of the pilot may be guided by a Steering Committee comprised of internal and external members.

In response to Recommendation 21, an enhanced Segregation Review Board (SRB) model was implemented between October 2001 and April 2002 in five regional test sites. This enhanced model conducted hearings every 30 days and emphasized the need to retain the decision-making authority of the Warden in the administrative segregation process. However, it introduced changes to the composition of the institutional SRB by creating co-chair positions (Deputy Warden/Community Member) with shared authority and accountability to make recommendations to the Warden.

The impact of the participation of the Community Members was determined to enhance procedural fairness. As well, raising decision making to a higher level of authority (Deputy Warden) at the institutional hearing and enhancing the role of the Parole Officer responsible for the management of the case added to the perception of fairness. However, recommended actions did not differ significantly from solutions recommended prior to the pilot project as reasonable alternatives to segregation were not available given issues of incompatibilities among offenders who are affiliated with gangs, lack of bed space and requests to remain in voluntary segregation for protection.

An independent evaluation of the implementation of the enhanced SRB model was provided to CSC by Consulting and Audit Canada in the spring of 2003. They supported the fact that the enhanced process increased the level of procedural fairness, provided a more disciplined approach to the hearings and improved the quality of information being shared and documented. However, they also indicated that the presence of a

Community Member as part of the enhanced review process, did not significantly change the outcomes that would have been identified by the previously existing review process.

The evaluation further indicated that systemic barriers with respect to managing national decision-making processes (intra/inter-regional transfers) and resolving population management issues that were impeding the implementation of transfer recommendations should be examined and resolved. The report recommended that an enhanced review process should be defined that focuses on resolving cases that require regional and/or national solutions, (i.e. long-term segregated cases) and suggested that a review process, outside the authority and accountability of the institution, should be considered. The report suggested that continued participation of a Community Member in this review process should also be considered.

CSC undertook to review the cases of inmates released from administrative segregation during 2003-2004. The average stay for involuntary cases was 36 days from time of placement. The average stay for voluntarily segregated cases was 68 days. The review thresholds for hearings to be conducted are every 30 and 60 days respectively. Data indicated that the majority (91%) of involuntarily segregated cases were released from segregation by the third institutional review and that 80% of voluntary cases were released in the same time frame. These long-term cases pose significant challenges usually requiring intra and/or inter-regional transfers.

In light of these observations and findings, CSC is looking at options to implement the following initiatives - (i) the *best practices* related to both procedural and information-sharing improvements are being incorporated into the institutional segregation review process; (ii) an enhanced regional review function is being created in each region to monitor, review and implement reintegration solutions for long-term segregated inmates and (iii) a *Management Control Framework*, to monitor ongoing compliance with the legal/policy framework will continue to be implemented.

CSC maintains that the changes mentioned above will enhance the process to ensure compliance with the Rule of Law.

<u>QUESTION 13:</u>

As the fifth periodic report contains information (Para. 61) for the CSC pertaining to "harassment" complaints, could you please provide a definition of harassment?

CSC policy has the same definition of harassment as the Treasury Board of Canada's *Policy on the Prevention and Resolution of Harassment in the Workplace* (the anti-harassment policy for government employees):

> *(…) any improper conduct by an employee(s), offender(s), visitor(s), or volunteer(s), that is directed at and offensive to another person, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the Canadian Human Rights Act.*

OTHERS

QUESTION 14:

Please indicate whether Canada envisages the ratification of the Optional Protocol to the Convention against Torture. If so, has Canada taken steps to set up or designate a national mechanism which would conduct periodic visits to places of deprivation of liberty in order to prevent torture or other cruel, inhuman or degrading treatment or punishment?

Canada actively participated in the negotiation of the Optional Protocol to the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, and voted in favour of its adoption by the United Nations.

Canada supports the fundamental elements of the optional protocol regarding the establishment of an international mechanism to conduct visits to places of detention to prevent torture. The international Sub-Committee, once established, will be invited to visit Canada.

Domestically, Canada has a number of mechanisms in place both federally and provincially to protect persons in places of detention from torture. These include the courts, human rights commissions, correctional investigators, police oversight agencies, and ombudsman. Many of these bodies do have the power to visit places of detention and de facto conduct visits of places of detention.

Consultation and analysis are currently being undertaken to determine whether the existing mechanisms meet the requirements of the Protocol and if not, what measures would be necessary to meet the requirements. After this analysis, Canada will be in a position to make a decision as to the signature and ratification of the Optional Protocol.

QUESTION 15:

Please indicate whether there is legislation in your country aimed at preventing and prohibiting the production, trade, export and use of equipment specifically designed to inflict torture or cruel, inhuman or degrading treatment. If so, please provide information about its content and implementation. If not, please indicate whether the adoption of such legislation is being considered.

While the Canadian *Criminal Code* does not contain offences specifically aimed at weapons that are designed for the purposes of torture, there are many criminal offences for acts involving the unauthorized possession, use, trafficking in, or export or import of a “weapon”, which is broadly defined as “any thing used, designed to be used or intended for use in causing death or injury to any person or for the purpose of threatening or intimidating any person”, or a “prohibited weapon”, which is defined to include certain specified weapons with no legitimate purpose for civilian use (such as items that are intended to deliver an electric shock) or other weapons that are prescribed to be prohibited weapons. Under this purpose-based approach, weapons-related offences would pertain to a much broader range of items than those specifically designed to inflict to inflict torture or other cruel, inhuman or degrading treatment, and would certainly include those items. While it would be possible to provide for an offence or offences that more precisely targets the trade or production of items specifically designed to inflict torture or other cruel, inhuman or degrading treatment, we are not convinced that this would be practicable, as it could be very difficult to prove the purpose for which such items were designed, and the proscribed conduct would already be covered by existing offences.

Because Canada considers that its existing criminal offences adequately address the public safety objectives behind prohibiting the trade and production of equipment specifically designed to inflict torture or other cruel, inhuman or degrading treatment and due to the practical difficulty that could be encountered in prosecuting a more targeted prohibition, Canada is not currently considering adopting legislation that would specifically prohibit such trade or production. However, Canada would be interested in knowing what other states have legislated in this area and should others have arrived at a better solution, Canada would certainly be open to considering the adoption of a similar approach.

QUESTION 16 (A):

The Committee first asks if and how the provisions of the Anti-terrorism Act have affected human rights safeguards in law and practice and notes that paragraph 12 of Canada's Fifth report said that the Act contains rigorous safeguards to uphold the rights and freedoms of those affected by it.

To answer this question, it is important to note that the process of drafting of the *Anti-terrorism Act* took into account human rights concerns. As well, we provide statistics on how the *Act* has been used to date. Finally, the provisions of the *Anti-terrorism Act* contain numerous safeguards to protect against potential human rights abuses.

Process

- Following the Sept. 11, 2001 attacks, Department of Justice officials took stock of existing legislation, taking into account the threat presented by the new face of terrorism. Previous legislative responses to terrorism since the 1970s essentially focused on implementing ten of the twelve international anti-terrorism conventions. The insidious nature of terrorism dictated the need for new measures, having a preventive focus, because it was determined that punishing terrorist crimes after they occur is not enough.

- Experts in criminal law, anti-terrorism, human rights and legislative drafting developed the *Anti-terrorism Act*, an omnibus Act which amended numerous other statutes.

- The legislation was carefully scrutinized for consistency with the *Canadian Charter of Rights and Freedoms*.

- The legislative measures were designed to reflect a commitment to the safety of all Canadians and to strengthening Canada's ability to meet international obligations under United Nations Security Council Resolution 1373 as well implementing the remaining two international anti-terrorism conventions designed to suppress terrorist bombing and the financing of terrorism, while respecting Canadian values and interests, including the rights and values enshrined in the *Charter*.

- The Preamble of Bill C-36, the *Anti-terrorism Act*, noted, for example, that: "WHEREAS the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights and Freedoms*";

- The Government signalled its receptiveness to considering suggestions for amendment. A number of amendments were made during the Parliamentary Committee process to clarify and strengthen the provisions in the bill.

Statistics on the Use of the *Anti-terrorism Act*

Some concrete examples of how the *Anti Terrorism Act* has been used include:

- The Government of Canada has established a list of entities for which there are reasonable grounds to believe they have knowingly participated in or facilitated a terrorist activity. There are currently 35 entities on this list, and the process is continuing. The legislation requires that those on the list be reviewed every two years by the Minister of Public Safety and Emergency Preparedness. The first review has taken place, and all 35 entities remain listed.
- One individual has been charged with participating in the activities of a terrorist group under the *Criminal Code* and this matter is currently before the courts.
- One investigative hearing order was issued. This order was made in relation to the Air India case, which is being prosecuted by Attorney General for British Columbia. The Supreme Court of Canada determined that the investigative hearing process was constitutional.
- To date, no recognizances with conditions, commonly referred to as preventive arrests, have been issued.
- From 2001 to 2004, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) made 73 disclosures of information to law enforcement and intelligence agencies related to suspected terrorist financing and/or threats to national security pursuant to sections 55 and 55.1 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. In 2003-2004, FINTRAC disclosed to law enforcement and national security agencies 48 cases of suspected terrorist financing and/or threats to the security of Canada, the total value of which amounted to approximately $70 million.
- The Minister of Public Safety and Emergency Preparedness has published annual reports (2002 and 2003) on the use of arrests without warrant under the *Anti-terrorism Act*.
- The Attorney General of Canada has published annual reports (2002 and 2003) concerning the use of investigative hearings and the recognizance with conditions provisions of the *Act.*

The *Anti-Terrorism Act* has also allowed Canada to fulfill its many international obligations to implement counter-terrorism measures and to demonstrate leadership with respect to the implementation of UN requirements, particularly those in UN Security Council Resolution 1373.

Safeguards

The *Act* contains a number of safeguards, including the following:

- Judicial oversight of the *Act* by regular courts (not special or military courts) was maintained;
- The *Act* is consistent with Canada's legal framework, including the *Canadian Charter of Rights and Freedoms* and the requirement for due process;
- Judicial review, appeals and judicial oversight mechanisms are incorporated into the measures;
- The consent of the Attorney General is required for prosecution of the terrorism offences and to undertake new preventive and/or investigative measures;
- The scope of the *Criminal Code* provisions is clearly defined so that they are targeted at terrorists and terrorist groups and are not to be used for general law enforcement purposes;
- The new terrorism offences require a high degree of mental culpability;
- The burden of proof is on the state to establish that there was knowledge or intent on the part of the accused "for the purpose of facilitating or carrying out terrorist activity" and, in order to be guilty of an offence, an individual must know or intend that his or her act would help a terrorist activity to occur, even if the details of the activity are not known by the individual;
- The Act provides a comprehensive two part definition of "terrorist activity". The first part of the definition refers to offences implementing the twelve international anti-terrorism conventions. The second part of the definition requires that a number of intention and purpose elements be satisfied. The definition expressly excludes advocacy, protest, dissent or stoppage of work that is not intended to result in death or serious bodily harm, endanger another person's life or cause serious risk to health or safety of the public.
- An interpretive clause further clarifies that the expression of political, religious or ideological beliefs would not be considered a terrorist activity unless it also constitutes conduct that specifically meets the *Act*'s definition of "terrorist activity";
- The process of adding an entity[2] to the list of entities in respect of whom the Governor in Council or Cabinet is satisfied there are reasonable grounds to believe that the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity or that the entity is knowingly acted on behalf of or at the direction of a listed entity incorporates a number of safeguards. These protections include provisions for removal from the list, judicial review and safeguards to address cases of mistaken identity. As well, the list must be reviewed every two years by the Minister of Public Safety and Emergency Preparedness. The first two-year review was completed in late 2004;
- Procedural safeguards built into the civil forfeiture scheme in respect of terrorist related property include court protection of the interests of family members in the

[2] "Entity" is defined in s. 83.01 of the *Criminal Code* as "…a person, group, trust, partnership or fund or an unincorporated association or organization"

principal residence, access to the property in order to meet reasonable living/business needs and legal expenses, and appeal procedures;

- The investigative hearing provision requires a witness to answer questions but extends self-incrimination protections for the subsequent use and derivative use of the evidence obtained. As well, laws relating to the non-disclosure of information and privilege and the right to counsel expressly apply and a judge may impose conditions to protect witnesses and third parties;
- The recognizance with conditions power (commonly referred to as the preventive arrest power) requires a person, if detained by a peace officer as is allowed only under limited circumstances, to be brought before a judge without unreasonable delay and in any event within 24 hours, unless a judge is not available in which case the person must be brought before a judge as soon as possible. The judge can adjourn the hearing for up to 48 hours, so that the maximum time for which a person can be detained pending a hearing is 72 hours. The warrantless arrest of an individual can only be made in exigent or other limited circumstances. If a recognizance (with a maximum of 12 months duration) is imposed, the individual may apply to a judge to vary any conditions of judicial supervision;
- The Attorney General of Canada and the Minister of Public Safety and Emergency Preparedness, provincial Attorneys General and Ministers responsible for policing are required to report annually to Parliament on the use of the preventive arrest and investigative hearing provisions in the *Act*;
- The preventive arrest and investigative hearing powers will sunset after five years unless a resolution is passed by both the House of Commons and Senate to extend either or both of these powers for up to five more year, while making provision to grandfather proceedings that have already started prior to the sunset date so that they can be completed, if the powers are not extended;
- The mandate of FINTRAC, expanded by the *Anti-terrorism Act* to include analysis of suspected terrorist financing, does not permit the Centre to disclose complete analytical dossiers directly to law enforcement and intelligence agencies; rather, a judicial warrant on reasonable grounds must be obtained;
- Under the amendments to the *Canada Evidence Act* enacted by the *Anti-terrorism Act*, Attorney General certificates prohibiting the release of information that would be injurious to international relations, national defence or national security are subject to review by a judge of the Federal Court of Appeal, while the pre-existing provisions and process for the collection, use and protection of information were preserved under the *Access to Information Act*, the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*; and
- A comprehensive review of the provisions and operation of the *Act* is required to be undertaken by Parliament within three years after the *Act* received Royal Assent, which was December 18, 2001. This review is currently being undertaken by two Parliamentary committees, one in the House of Commons and one in the Senate.

Impact of the Act

The Department of Justice Canada is continuing its program of research to monitor the use and impact of the *Anti-terrorism Act*. Monitoring public opinion polling results and recently completed research studies have assisted the Department's preparations for the Parliamentary review of the Act, which is now underway. In particular, the Department completed two large two focus group studies which examined the views of minority groups on the *Anti-Terrorism Act* (March 2003), and which explored the views of the general public (March 2004). The full copy of the report titled: *Minority Views on the Canadian Anti-Terrorism Act (formerly Bill C-36)* can be accessed at http://canada.justice.gc.ca/en/ps/rs/rep/rr03-4.pdf. and *Public Views of the Anti-Terrorism Act (Formerly Bill C-36)* at http://canada.justice.gc.ca/en/ps/rs/rep/rr05-3.pdf.

A further report was commissioned which collected the views of Canadian scholars on the impact of the *Anti-Terrorism Act* on Canada, emerging trends in terrorism and what Canada should do to respond to these trends. The full report titled: *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act. March 31, 2004* is available at: http://canada.justice.gc.ca/en/ps/rs/rep/rr05-1.pdf.

On November 29, 2004, officials of the Department of Justice and the Department of Public Safety and Emergency Preparedness Canada met with representatives of various ethno-cultural and religious groups to discuss the impact of the *Anti-terrorism Act* on their communities. Participants raised a number of issues, including alleged racial profiling by the police and security forces, the need for effective anti-racism training within police forces, the lack of understanding about the *Anti-terrorism Act* within their communities and the desire for additional information about the *Anti-terrorism Act* and its operations.

Finally, the Government of Canada's National Security Policy of April 2004 announced that the creation of a Cross-Cultural Roundtable on Security. The mandate of the Roundtable is to engage Canadians and the Government of Canada in an ongoing dialogue on national security in a diverse and pluralistic society. In February, 2005, the Minister of Justice, the Minister of Public Safety and Emergency Preparedness, and the Minister of State (Multiculturalism) announced the 15 members of the Roundtable and its inaugural meeting was held from March 7-8, 2005 in Ottawa, Ontario, with the Ministers meeting with the members of the Roundtable at that time. Further meetings of the Roundtable are being planned for later this year.

To summarize, careful attention has been paid to human rights in the development and implementation of the *Anti-terrorism Act*. The provisions of the *Act* were tailored to protect national security and prevent terrorism, while respecting Canadian values, such as the *Canadian Charter of Rights and Freedoms*, as well as our international obligations. The *Act* is designed to protect both national security and civil liberties. In addition, the Government of Canada has taken, and will continue to take, steps to engage with members of ethno-cultural and religious groups in Canada regarding the impact of the *Act* on their communities.

<u>QUESTION 16 (B):</u>

The Committee asks for data on the number of judicial arrest warrants issued with regard to preventive arrests under the Anti-terrorism Act.

This refers to the power to order a recognizance with conditions in order to disrupt and thereby prevent the commission of a terrorist activity, which is found in section 83.3 of the *Criminal Code*. Although it is often described as "preventive arrest", the purpose of the provision is not to arrest a person, but to put a suspected person under judicial supervision in an effort to prevent the carrying out of a terrorist activity.

The precise wording for when a recognizance with conditions can be ordered is as follows:

> 83.3 (1) The consent of the Attorney General is required before a peace officer may lay an information under subsection (2).
>
> (2) Subject to subsection (1), a peace officer may lay an information before a provincial court judge if the peace officer
>
> (*a*) believes on reasonable grounds that a terrorist activity will be carried out; and
>
> (b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity.
>
> (3) A provincial court judge who receives an information under subsection (2) may cause the person to appear before the provincial court judge.
>
> (4) Notwithstanding subsections (2) and (3), if
>
> (*a*) either
>
>> (i) the grounds for laying an information referred to in paragraphs (2)(*a*) and (*b*) exist but, by reason of exigent circumstances, it would be impracticable to lay an information under subsection (2), or
>> (ii) an information has been laid under subsection (2) and a summons has been issued, and
>
> (*b*) the peace officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity, the peace officer may arrest the person without warrant and cause the person to be detained in custody, to be taken before a provincial court judge in accordance with subsection (6).
>
> (5) If a peace officer arrests a person without warrant in the circumstance described in subparagraph (4)(*a*)(i), the peace officer shall, within the time prescribed by paragraph (6)(*a*) or (*b*),
>
> (*a*) lay an information in accordance with subsection (2); or
>
> (*b*) release the person.

(6) A person detained in custody shall be taken before a provincial court judge in accordance with the following rules:

(*a*) if a provincial court judge is available within a period of twenty-four hours after the person has been arrested, the person shall be taken before a provincial court judge without unreasonable delay and in any event within that period, and

(*b*) if a provincial court judge is not available within a period of twenty-four hours after the person has been arrested, the person shall be taken before a provincial court judge as soon as possible, unless, at any time before the expiry of the time prescribed in paragraph (*a*) or (*b*) for taking the person before a provincial court judge, the peace officer, or an officer in charge within the meaning of Part XV, is satisfied that the person should be released from custody unconditionally, and so releases the person.

(7) When a person is taken before a provincial court judge under subsection (6),
(*a*) if an information has not been laid under subsection (2), the judge shall order that the person be released; or

(*b*) if an information has been laid under subsection (2),

(i) the judge shall order that the person be released unless the peace officer who laid the information shows cause why the detention of the person in custody is justified on one or more of the following grounds:

(A) the detention is necessary to ensure the person's appearance before a provincial court judge in order to be dealt with in accordance with subsection (8),
(B) the detention is necessary for the protection or safety of the public, including any witness, having regard to all the circumstances including

(I) the likelihood that, if the person is released from custody, a terrorist activity will be carried out, and
(II) any substantial likelihood that the person will, if released from custody, interfere with the administration of justice, and

(C) any other just cause and, without limiting the generality of the foregoing, that the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the peace officer's grounds under subsection (2), and the gravity of any terrorist activity that may be carried out, and

(ii) the judge may adjourn the matter for a hearing under subsection (8) but, if the person is not released under subparagraph (i), the adjournment may not exceed forty-eight hours.

(8) The provincial court judge before whom the person appears pursuant to subsection (3)
(*a*) may, if satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion, order that the person enter into a recognizance to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions prescribed in the recognizance, including the conditions set out in subsection (10), that the provincial court judge considers desirable for preventing the carrying out of a terrorist activity; and

(*b*) if the person was not released under subparagraph (7)(*b*)(i), shall order that the person be released, subject to the recognizance, if any, ordered under paragraph (*a*).

(9) The provincial court judge may commit the person to prison for a term not exceeding twelve months if the person fails or refuses to enter into the recognizance.

(10) Before making an order under paragraph (8)(*a*), the provincial court judge shall consider whether it is desirable, in the interests of the safety of the person or of any other person, to include as a condition of the recognizance that the person be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things, for any period specified in the recognizance, and where the provincial court judge decides that it is so desirable, the provincial court judge shall add such a condition to the recognizance.

(11) If the provincial court judge adds a condition described in subsection (10) to a recognizance, the provincial court judge shall specify in the recognizance the manner and method by which
(*a*) the things referred to in that subsection that are in the possession of the person shall be surrendered, disposed of, detained, stored or dealt with; and
(*b*) the authorizations, licences and registration certificates held by the person shall be surrendered.

(12) If the provincial court judge does not add a condition described in subsection (10) to a recognizance, the provincial court judge shall include in the record a statement of the reasons for not adding the condition.

(13) The provincial court judge may, on application of the peace officer, the Attorney General or the person, vary the conditions fixed in the recognizance.

(14) Subsections 810(4) and (5) apply, with any modifications that the circumstances require, to proceedings under this section.

To summarize, this provides a power for police, in the context of preventing the commission of a terrorist activity, after having received the consent of the appropriate Attorney General, and once certain grounds are met, to lay an information before a judge, after which the judge compels the attendance of a person in order to decide if the person should be released on a recognizance with conditions.

The power to arrest without warrant in these cases only applies in certain limited situations, such as in exigent circumstances. In all cases, even those involving the arrest-without-warrant power, the consent of the relevant Attorney General is required, the difference being that the consent of the Attorney General is not required to be obtained beforehand when a person is arrested without warrant, but it must be obtained in such a case before the person is brought before the judge. If arrested, the person would have to be brought before a judge within 24 hours if a judge is available or, if not available within that time, as soon as possible thereafter. The

judge could continue the detention pending a hearing, but that detention could not exceed 48 hours.

With regard to data on the use of this provision, the Attorney General of Canada and the provincial Attorneys General must report on the use of the recognizance with conditions (subsection 83.31(2) of the *Criminal Code*). However, the Minister of Public Safety and Emergency Preparedness and the ministers in charge of policing for the provinces must report on the use of the arrest without warrant power in relation to the recognizance with conditions (subsection 83.31(3) of the *Code*). For the period December 24, 2001 to December 23, 2003, these annual reports, from all these jurisdictions, have reported no use of this power. The annual reports that have so far been published for the period December 24, 2003-December 23, 2004 also show no use of this power.

The annual reports published to date by the Attorney General of Canada and the Minister of Public Safety and Emergency Preparedness are available at the following websites:

(i) Attorney General of Canada:

http://www.justice.gc.ca/en/terrorism/annualreport.html

http://www.justice.gc.ca/fr/terrorism/annualreport.html

http://www.justice.gc.ca/en/anti_terr/annualreport_2002-2003.html

http://www.justice.gc.ca/fr/anti_terr/annualreport_2002-2003.html

(ii) Minister of Public Safety and Emergency Preparedness:

http://www.psepc-sppcc.gc.ca/publications/national_security/ARC36_2002_e.asp

http://www.psepc-sppcc.gc.ca/publications/national_security/ARC36_2002_f.asp

http://www.psepc-sppcc.gc.ca/publications/national_security/ARC36_2003_e.asp

http://www.psepc-sppcc.gc.ca/publications/national_security/ARC36_2003_f.asp

<u>QUESTION 16 (C):</u>

The question is asked as to how "reasonable grounds", "grounds to suspect", and "exigent circumstances" are defined in practice.

As regards the first two phrases, it is more accurate, given the actual wording of the provision, to speak of "believes on reasonable grounds" and "suspects on reasonable grounds".

Given that to date this power has not been used, there is no evidence available by which to conclude how these terms are defined "in practice" under the *Anti-terrorism Act*. However, these concepts have been used in relation to other police powers. Therefore, how these concepts have been defined there may be used by way of analogy to illustrate how they may be used in relation to this new power.

<u>(i) Reasonable Grounds to Believe</u>

Canada's *Criminal Code* provides for a peace officer to arrest a person without warrant, in part, where he or she believes on reasonable grounds that the person has committed an indictable offence. In the Supreme Court of Canada case of *R. v. Storrey*, [1990] 1 S.C.R. 241, in the context of this arrest power, which at the time used the phrase "reasonable and probable grounds", it was held that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. However, the police are not required to establish a *prima facie* case for conviction before making the arrest. (*Storrey*, at 250-251.) In subsequent cases where the phrase "reasonable grounds to believe" replaced the previous phrase, the courts have confirmed that this ground comprises two elements: (a) that the peace officer subjectively believed that reasonable grounds existed and (b) objectively speaking, reasonable and probable grounds to believe existed. (See, for example, *R. v. Feeney*, [1997] 2 S.C.R. 13, at 33.)

<u>(ii) Reasonable Grounds to Suspect</u>

In Canada, since 1993, courts have recognized that peace officers have a common-law power of investigative detention for a brief period of time. In the case of *R. v. Simpson*, (1993) 12 O.R. (3d) 182, at 202, the Ontario Court of Appeal held, in part, that these cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. This serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice.

Thus, while "reasonable cause to suspect" is something less than the grounds required to arrest, it must be more than a mere hunch.

In the Supreme Court case of *R. v. Mann*, [2004] 3 S.C.R. 59, at 76, the majority of the Court said that the detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between a recent or on-going criminal offence. Thus, "reasonable grounds to suspect" involves a subjective and objective component, although it is not as high a test as "reasonable grounds to believe".

<u>(iii) Exigent Circumstances</u>

(a) <u>Exigent Circumstances elsewhere in the *Criminal Code of Canada or at common law*</u>

The concept of exigent circumstances that can justify an exception to the usual procedures governing the use of police powers with respect to entry and search in various situations had been recognized in Canada even before the *Anti-terrorism Act* came into force. For example, generally, in order to enter a dwelling house to arrest a person inside, the police in Canada are required to obtain a warrant authorizing entry to effect arrest. However, in the case of exigent circumstances, the police may enter a dwelling house without such a warrant. In this context, subsection 529.3(2) of the *Criminal Code of Canada* defines exigent circumstances as follows:

> (2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer
>
> (*a*) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or
>
> (*b*) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

Similarly, while generally the interception of a private communication by the police is only allowed if a judge gives prior authorization for the interception, the *Criminal Code* allows a police officer to intercept such a communication without judicial authorization in exceptional circumstances. These are that the peace officer believes on reasonable grounds that the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of that Part of the *Code;* that the peace officer believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property; and that either the originator of the private communication or the person intended by the originator to receive it is the person likely to perform the act that is likely to cause the harm, or is the victim, or intended victim, of the harm. (Section 184.4 of the *Criminal Code*).

As well, section 117.02 of the *Code* provides that, where a peace officer believes on reasonable grounds that a weapon, imitation firearm, prohibited device, ammunition or explosive substance was used in the commission of an offence or that an offence has been committed that involves a firearm, imitation firearm or other weapons described there and evidence of the offence is likely to be found on a person or in any vehicle, place or premises, the peace officer may, where the conditions for obtaining a warrant exist, but by reason of exigent circumstances it would not be practicable to obtain a warrant, search without warrant the person, vehicle, place or premises and seize any thing in relation to the offence believed to have been committed.

Another example where the courts have recognized exigent circumstances that justify the entrance by the police into a person's home was the case of *R. v. Godoy*, [1999] 1 S.C. R. 311. In that case, police officers had received a call from a radio despatch that a 911 emergency phone call originating from the accused's apartment had been disconnected before the caller could speak. When they arrived at the apartment, the police were met at the door by a man who partially opened the door, told them there was no problem, and then tried to close the door. The police entered and found inside the accused's common law-wife, who was sobbing and had considerable swelling above her left eye. The accused was charged with assault. The issue arose as to whether the police had the authority at common law to enter the apartment. The Supreme Court of Canada held that, in the circumstances of this case, the police had the power to enter the apartment. As then Chief Justice Lamer stated at p. 324 of the judgment, in this case, the police had a common-law duty to act to protect life and safety, they therefore had the duty to respond to the 911 call, and they had the power derived from the common law to enter the apartment to verify that there was no emergency.

In other words, *Godoy* was a case of exigent circumstances that justified the police officers' entry into the dwelling house in order to ascertain the health and safety of a 911 caller inside.

As these examples illustrate, Canadian criminal law and Canadian courts have recognized the existence of exigent circumstances that justify the use of police powers without requiring prior judicial approval in contexts having no relation to the *Anti-terrorism Act*.

(b) <u>Exigent or other emergency circumstances in relation to arrest without warrant pursuant to the recognizance-with-conditions power under the *Anti-terrorism Act*</u>

As already noted above, this arrest without warrant power can only be used if:

> "(a) either
>
> (i) the grounds for laying an information referred to in paragraphs (2)(*a*) and (*b*) exist but, by reason of exigent circumstances, it would be impracticable to lay an information under subsection (2), or

(ii) an information has been laid under subsection (2) and a summons has been issued, and

(*b*) the peace officer suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity … ”

There are two separate bases upon which an arrest without warrant may be made:

(i) If the grounds for laying an information exist, but, by reason of exigent circumstances, it would be impracticable to lay an information and the peace officer suspects on reasonable grounds that the detention of the person is necessary in order to prevent a terrorist activity, then the peace officer may arrest the person without warrant to bring the person before a judge in order to have the judge decide whether to order a recognizance with conditions.

(ii) Where an information has already been laid and a summons issued to compel the person to attend before the judge in order to have the judge decide whether to impose a recognizance without conditions, the peace officer may also arrest without warrant if the peace officer suspects on reasonable grounds that the detention of the person is necessary in order to prevent a terrorist activity.

As mentioned, the recognizance-with-conditions power has not been used.

<u>QUESTION 17:</u>

The list of court cases where constitutional arguments against provisions of the Anti-Terrorism Act 2001 have been advanced, and what the outcomes of those proceedings were.

Two Supreme Court of Canada cases have considered the investigative hearing provision under the *Anti-terrorism Act*, namely *Application under s. 83.28 of the Criminal Code (Re),* [2004] 2 S.C.R. 248 and *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332. These are the only constitutional considerations of the *Act* to date.

In June 2004, in *Application under s. 83.28 of the Criminal Code (Re),* the Supreme Court of Canada upheld the constitutionality of investigative hearings, while providing that they should generally be held in open court subject to principles that the Court had previously stated which may justify excluding the public.

The investigative hearing regime in s. 83.28 of the *Criminal Code of Canada* authorizes a peace officer investigating a terrorism offence to apply to a judge for an order requiring a person who is reasonably believed to have information concerning a terrorism offence that has been or will be committed to appear before the judge to answer questions. The answers and any evidence deriving there from cannot be used to incriminate the witness in any subsequent criminal proceeding. The witness has a right to counsel and the judge can impose any conditions at the hearing to protect the witness, third parties and the investigation.

An application for an investigative hearing order was made as part of the criminal investigation into the 1985 bombing of Air India flight 182. The subject of the order challenged it under the *Charter*. The British Columbia Supreme Court dismissed the constitutional challenge. The constitutional challenge was heard *in camera* in the lower court. During the course of the proceedings, the *Vancouver Sun* newspaper applied for access to the court proceedings and file. The application was denied in order to protect the on-going investigation.

The appeal to the Supreme Court of Canada was dismissed. In the case known as *Application under section 83.28 of the Criminal Code (Re)*, the investigative hearing provisions of the *Anti-terrorism Act* were found to be constitutionally valid. The Supreme Court found that the purpose of the *Anti-terrorism Act* is to prosecute and prevent terrorism offences. The judiciary is given a wide ambit to set or vary the terms and conditions of an order. This enables the judge to respond flexibly to the specific circumstances of each application and ensures that constitutional and common law rights and values are respected. Section 83.28 applies retrospectively because it effects only procedural change and does not create or impinge on substantive rights. Accordingly, it applied to the Air India investigation.

The majority of the Court, in a judgment delivered by Iacobucci J. and Arbour J., held that s. 83.28 of the *Code* does not violate s. 7 of the *Charter,* which provides that "[e]veryone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The section does not infringe the right against self-incrimination. However, the Court extended use and derivative use immunity beyond criminal proceedings to future extradition or deportation proceedings. The Court held that judges acting under s. 83.28 do not lack institutional independence or impartiality, nor are they co-opted into performing an executive function. Section 83.28 requires the judge to act judicially, in accordance with constitutional norms and the historic role of the judiciary in criminal proceedings. The independence of Crown counsel is not compromised by the investigative hearing process. The purpose of the hearing in this case was to investigate a terrorism offence and not to obtain pre-trial discovery. No reviewable error arises from the hearing judge's conclusion that the Crown met its onus to demonstrate in good faith that the hearing's purpose was investigative. The Court also held that subsection 11(d) of the *Charter*, the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal", did not apply in this case because the Named Person was not an accused.

Three of the seven Supreme Court Justices dissented. Mr. Justice Binnie argued that, while s. 83.28 was constitutionally valid, the use of the provision in the circumstances of this case amounted to an abuse of process, because it was being used for an improper purpose. In his view, it was being used by the prosecution to obtain mid-trial discovery of an uncooperative witness, which was unavailable to the defence.

In the *Vancouver Sun (Re)* decision rendered the same day, the Supreme Court held that that the proposed judicial investigative hearing be held in public, subject to any order of the presiding judge that the public be excluded and/or that a publication ban be put in place. The Court stated that judicial officers should reject the notion of presumptively secret hearings. Parliament chose to cloak investigative hearings with the attributes of a judicial proceeding, thus generating a presumption of openness even at the investigation stage. The presumption of openness should only be displaced upon proper consideration of the competing interests at every stage of the process. The existence of the order and as much of its subject-matter as possible should be made public unless, under the proportionality analysis of the test set out in the Supreme Court's earlier cases of *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442, secrecy becomes necessary. In applying the *Dagenais/Mentuck* test, judges should be expected to be presented with evidence credible on its face of the anticipated risks that an open inquiry would present, including evidence of the information expected to be revealed by witnesses. Applying the test in a contextual manner, a judge would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice. The Court held that it may very well be that, by necessity, large parts of judicial investigative hearings will be held in secret.

It may also very well be that the very existence of these hearings will at times have to be kept secret.

Arbour J., who co-delivered the majority judgment in this case, resigned from the Supreme Court of Canada in 2004 to become the United Nations High Commissioner for Human Rights. In a speech delivered to the Biennial Conference of the International Commission of Jurists in Berlin on August 27, 2004, she summarized this case and held it out as an example of how to combat terrorism in a manner that respects human rights. She said:

> In one of the last cases in which I participated as a member of the Supreme Court of Canada, we were called to rule on the lawfulness of a new provision of the Criminal Code that took effect as part of Canada's Anti-Terrorism Act of 2001, which was itself enacted in response to the September 11 attacks. The challenged provision, section 83.28, authorizes so-called "judicial investigative hearings" in which persons believed to have information relevant to acts of terrorism may be compelled to testify under immunity. The case concerned an attempt by the Crown to obtain information from the Appellant relating to an ongoing prosecution for the Air India bombings of 23 June 1985: in one attack, a bomb exploded at Narita Airport in Japan, killing two baggage handlers and injuring four others, while a second bomb less than an hour later exploded on board Air India Flight 182 off the west coast of Ireland, causing it to crash into the sea and killing all 329 passengers and crew.
>
> We had before us several questions, including the role of the judge in the investigative hearing, the need for secrecy of such hearings, the role of counsel for the person subjected to the hearing, and the threshold of relevance and admissibility applicable in such a hearing where information, rather than evidence, is sought. We decided to take a "broad and purposive interpretation of s. 83.28" which accorded with the presumption of constitutionality. We therefore found the challenged provisions of the Act to be constitutional and not in violation of the Canadian Charter of Rights and Freedoms (although we did say that the immunity protections should apply -- not only to criminal prosecution -- but also to extradition and deportation proceedings). In reaching our decision, we underscored that the challenge for democracies in the battle against terrorism is to balance an effective response with fundamental democratic values that respect the importance of human life, liberty and the rule of law. We said that, "Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law."
>
> I firmly believe that terrorism must be confronted in a manner that respects human rights law. Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative. It is particularly critical, in time of crisis, when clarity of vision may be lacking and when institutions may appear to be failing, that all branches of governance be called upon to play their proper role and that none abdicate to the superior claim of another.

Louise Arbour's speech is available at the following website: http://www.unhchr.ch/huricane/huricane.nsf/view01/3485B28EDDA173F0C1256EFD0035373C?opendocument

QUESTION 18:

Indicate whether the review of the Anti-Terrorism Act legislation, expected to commence in late 2004, is under way, as requested by Parliament, and please elaborate on the implementation of the so-called "sunset" requirement (Fifth report, para. 12)

The *Anti-Terrorism Act*, enacted by Parliament in December 2001, requires that a committee or committees of Parliament begin a "comprehensive review of the provisions and operation of the Act" within three years from the date that the *Act* received Royal Assent, which was December 18, 2001.

Separate reviews are underway in the Canadian House of Commons and the Senate.

In the House of Commons, the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness has tasked its Subcommittee on Public Safety and National Security to conduct the review. The Subcommittee began its review of the Act in December 2004.

In the Senate, a Special Committee on the *Anti-terrorism Act* was created in December 2004 specifically to undertake the review. The Senate committee began its hearings in February 2005. The *Act* requires that both committees submit a report to Parliament within one year of the commencement of the review, unless their mandates are extended.

Government departments and agencies have prepared briefing materials for these committees and are providing further information as requested by the committees. The Minister of Justice and the Minister of Public Safety and Emergency Preparedness appeared before the committees in February and March of 2005. The work of the committees continues at the time of this writing.

Each of these committees has a website for its review of the *Act*, as follows:

(a) For the Sub-committee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, see: http://www.parl.gc.ca/committee/CommitteeHome.aspx?Lang=1&PARLSES=381&JNT=0&SELID=e22_.1&COM=9242&STAC=1091248

(b) For the Special Senate Committee on the *Anti-terrorism Act* , see: http://www.parl.gc.ca/common/Committee_SenHome.asp?Language=E&Parl=38&Ses=1&comm_id=597

In the context of their review of the *Anti-terrorism Act*, both Parliamentary Committees are also examining other issues within the national security framework such as security certificates under the *Immigration and Refugee Protection Act*.

The *Anti-terrorism Act* contains a sunset clause that applies to two powers created by the Act – the investigative hearing (sections 83.28 and 83.29 of the *Criminal Code*) and the recognizance with conditions (section 83.3 of the Code). They lapse unless extended by resolution of both Houses of Parliament by the end of the fifteenth sitting day of Parliament after December 31, 2006 (section 83.32 of the Code). As well, both these powers are subject to annual reporting requirements (section 83.31 of the Code) by the Government of Canada and the provinces. The annual reports regarding the use of these two new powers published to date by the Attorney General of Canada and the Minister of Public Safety and Emergency Preparedness (formerly the Solicitor General of Canada) are found at the websites listed under Question 16(b).

Section 83.33 is a transitional provision that allows proceedings that began before these powers sunset to be completed after they sunset.