CANADA'S RESPONSES TO THE LIST OF ISSUES

PRESENTATION OF THE FIFTH REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

HUMAN RIGHTS COMMITTEE

OCTOBER 2005

CHECK AGAINST DELIVERY

This document provides responses to the advance list of issues identified by the Human Rights Committee that were tabled in writing with the committee during its review of Canada's fifth report on the implementation of the *International Covenant on Civil and Political Rights*. Additional information related to these issues was provided verbally to the Committee during the review.

RIGHT TO SELF-DETERMINATION

(ARTICLE 1)

QUESTION 1: Please provide information on the concept of self-determination as it is applied to Aboriginal peoples in Canada, including Métis people, as promised in paragraph 8 of the periodic report. (Previous conclusions, § 7)

The Human Rights Committee, in considering Canada's fourth periodic report on implementation of the *International Covenant on Civil and Political Rights*, at its 65th session, expressed an interest in knowing more about the elements that make up the concept of self-determination as applied by Canada to Aboriginal peoples further to information provided in Canada's fourth and fifth periodic reports. The purpose of this response is to discuss the application of the right of self-determination to indigenous peoples living within democratic states, and the issues arising from the implementation of such rights, for those states and indigenous peoples.

The right of self-determination at international law:

1. The Charter of the United Nations refers to the principle of self-determination of peoples. Article 1(2) provides that one of the purposes of the United Nations is:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

2. Article 2 provides that "[t]he Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles" including:

> 1. The Organization is based on the principle of the sovereign equality of all its Members.
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

3. The *Declaration on the Granting of Independence to Colonial Countries and Peoples* (General Assembly Resolution 1514 (XV) of 14 December 1960) declared that "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (op2). This statement was situated in the context of references to putting an end to colonialism, "dependant peoples", the "process of liberation", the movement of "dependent territories" into "freedom and independence", "the movement for independence in Trust and Non-Self-Governing Territories", and putting an end to

"colonialism and all practices of segregation and discrimination associated therewith." The Declaration stated that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory," emphasizing the link between a dependant people and a specific national territory. This Declaration included the following qualifying language:

> 6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.
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> 7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

4. The right of peoples of self-determination is also contained in common Article 1 of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Although the Covenants did not define the "peoples" who have the right of self-determination, the "peoples" referred to in Article 1 was understood to apply to the entire population of existing states and to other "peoples" in a colonial situation. The general characteristics of "peoples" have been discussed in various fora but no definition has been agreed upon.[1]

5. The right of self-determination was elaborated upon by the UN General Assembly in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States* (adopted 24 October 1970), which contains several reference to self-determination in the context of the subjection of peoples to "alien subjection, domination, and exploitation" and ending colonialism with repeated references to respect for territorial integrity. This Declaration stated *inter alia* that:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

[1] In relation to whether a collectivity is a "peoples" entitled to "self-determination", a UN study by Cristescu of 1981 set out the following criteria:

- The term "peoples" denotes a social entity possession a clear identity and its own characteristics;
- It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
- A people should not be confused with ethnic, religious or linguistic minorities whose existence and rights are recognized in Article 27 of the *International Covenant on Civil and Political Rights*.

This descriptive approach of a people relied in part on a description of who does not have the right of self-determination to assist in determining who does hold the right, thus providing little assistance in the context of the discussion of indigenous collectivities.

6. This statement acknowledged that the right could be implemented in ways other than the establishment of an independent state. The Declaration also articulated a qualification on the right:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government respecting the whole people belonging to the territory without distinction as to race, creed, or colour.

7. This qualification was reiterated by the World Conference on Human Rights in the *Vienna Declaration and Programme of Action,* adopted in June 1993, as follows (in paragraph 2):

> …this [right] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples, and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind.
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> It is implicit in this language that States recognize that there may be collectivities within States which qualify as a people with the right of self-determination under international law, although no definition of "peoples" has been agreed upon. In addition, the language used implies that the right of self-determination may amount to less than an entitlement to an independent, sovereign state, and may be fulfilled when the State in which a people resides respects equal rights and is possessed of a government representing the whole people belonging to the territory without distinction of any kind.

In addition, a UN General Assembly resolution has been adopted each year on the general issue of self-determination, but without further elucidating the definition of "peoples" or the content of the right (see A/Res/58/161).

The application of the right of self-determination to indigenous peoples

8. The discussion on the right of self-determination has arisen in a number of UN fora, sometimes with reference to its possible application to indigenous peoples. The Committee for the Elimination of Racial Discrimination discussed the right of self-determination in *General Recommendation 21, Right to Self-determination*, Forty–Eighth

Session, 1996. The Human Rights Committee has raised the issue of its application to indigenous peoples, in CCPR/C/79/Add.105, and CCPR/C/79 add.112.[2]

9. State practice[3], as evidenced in the periodic reports of states to the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, does not support an assertion that *all* indigenous collectivities qualify as peoples under Article 1 of the Covenants, simply by virtue of being indigenous.

Discussions in the UN Working Group on a draft declaration on the rights of indigenous peoples

10. An open-ended inter-sessional working group of states on the draft declaration on the rights of indigenous peoples (WGDD) was established by ECOSOC resolution 1995/32 for the sole purpose of elaborating a draft declaration, considering the draft United Nations Declaration on the Rights of Indigenous Peoples annexed to resolution 1994/45 of 26 August 1994 of the Sub-commission on Prevention of Discrimination and Protection of Minorities. Article 3 of the draft declaration before the WGDD contains a right of self-determination for indigenous peoples that is modelled on the language contained in Article 1 of the Covenants, but does not directly reflect the language of Article 1 common to the Covenants. Article 3 of this draft reads as follows:

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[2] *Right to self-determination: 23/08/96. CERD General recommendation 21, (General Comments), 48th session, 1996* par.4. "In respect of the self-determination of peoples two aspects have to be distinguished. …. an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.
Para. 5. In order to respect fully the rights of all peoples within a State, Governments are again called upon to adhere to and implement fully the international human rights instruments…. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of Governments. In accordance with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly. Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.

[3] As per paragraph 3(b) of Article 31 of the *Vienna Convention on the Law of Treaties*, which sets out the general rule for interpretation:

> 3. There shall be taken into account together with the context:
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

11. One of the fundamental issues raised by draft Article 3 is how the right of self-determination would apply to indigenous peoples who live within existing democratic states. The discussions which have taken place in the UN WGDD since 1995 have shown that there is as yet no consensus on the existence, scope or content of this right or to whom it applies. Indeed, at the UN Working Group few States have indicated unqualified support for the principle that all indigenous collectivities, simply by virtue of being indigenous, qualify for a right of self-determination at international law. The reports of the Chairperson-Rapporteur on those meetings indicate that many States do not accept this principle at the present time[4].

12. An extensive discussion of Draft Article 3 took place during the 5th session of the working group of the Commission set up to consider the draft declaration. The report of the working group is contained in document E/CN.4/2000/84. Representatives of indigenous groups argued in favour of an unqualified right of self-determination, though that did not necessarily mean that the right would be used to secede from the States of which they now formed a part. Representatives of Governments were either opposed to inclusion of the right to self-determination or sought to give it a more limited meaning than was given to that right in the context of decolonization.

13. Two understandings of the right to self-determination are under discussion. One concerns so-called "internal" self-determination which essentially refers to the right to effective, democratic governance within States, making it possible for the population as a whole to determine their political status and pursue their development. The other seeks to equate the right to self-determination with the right to some - but unspecified - degree of autonomy within sovereign States.

14. The discussions among States and indigenous representatives have considered issues such as: the relationship between Article 3 of the draft declaration, and Article 1 of the Covenants; the relationship between Article 3 and other sections of the draft declaration, specifically Article 31 which refers to self-government; the scope and content of a right of self-determination as exercised by indigenous collectivities within existing democratic states; and, the relationship between the rights of individual members of indigenous collectivities and the rights of the collective.

15. The discussion is most focussed in the UN open-ended, inter-sessional working group of the Commission on Human Rights, established to elaborate a draft declaration on the rights of indigenous peoples, however it is being addressed as well in related fora, such as the UN Working Group on Minorities.

[4] E/CN.4\1996/84; E/CN.4/1997/102; E/CN.4\1998\106; E/CN.4/1999/82; E/CN.4/2000/84; E/CN.4/2001/ 85; E/CN.4/2002/98.

16. In the 6th session of the Working Group on Minorities, the Chairperson/ Rapporteur Mr. Asbjorn Eide provided to the group a provisional discussion paper entitled "The relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples."[5] In this paper, Mr. Eide notes it is still under debate whether indigenous peoples are "peoples" in the sense of common Article 1 of the Covenants, with a right of self-determination, and raises questions about the content of the right, especially as regards the concept of territorial autonomy which has traditionally been at its core:

> The controversy on this issue is still not resolved. While ILO Convention No. 169 uses the term "peoples", it emphasizes in its article 1.3 that the use of that term shall not be construed as having any implications as regards the rights which may attach to the term under international law….. The draft indigenous declaration goes much further: it proposes in its article 3 that indigenous peoples shall have the right of self-determination and by virtue of that right be entitled freely to determine their political status and freely pursue their economic, social and cultural development. This formulation, based on common article 1 of the International Covenants, is one of the most controversial elements in the draft declaration. It has been discussed since the draft was transmitted to the Commission on Human Rights.[6]

> Conceptually and in practice, territorial autonomy should be kept separate from cultural autonomy. Their respective benefits and risks should be discussed. Generally, it is difficult to accept a principle of territorial autonomy based strictly on ethnic criteria, since this ran counter to the basic principles of equality and non-discrimination between individuals on racial or ethnic grounds. There are, on the other hand, strong arguments in favour of forms of cultural autonomy which would make it possible to maintain group identity. What is special for indigenous peoples is that the preservation of cultural autonomy requires a considerable degree of self-management and control over land and other natural resources. This requires some degree of territorial autonomy. The scope of and limits to such autonomy are difficult to specify, however, both in theory and on the ground in specific cases.[7]

17. As noted above in Mr. Eide's comments, the discussion at the WGDD has shown little consensus among states on the scope and content of a right of self-

[5] "Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples." Eide and Daes: E/CN.4/Sub.2/2000/10.
[6] Ibid at para. 12.
[7] Ibid at para. 15.

determination of indigenous collectivities. This is specifically made clear in the report of the Chair on the sixth session of the Working Group[8].

18. Furthermore, the discussion of terminology itself, reflected in Annex "I" to the report of the meeting of the WGDD, in January 2002, reflects the lack of consensus among states as to whether indigenous collectivities are "peoples" in the international law sense. The explanatory note to Annex "I" of the report reads as follows:

> There was no consensus on the term "indigenous peoples" at the working group on the draft declaration. Some States can accept the use of the term "indigenous peoples". Some States can accept the use of the term "indigenous peoples" pending consideration of the issue in the context of discussions on the right to self-determination. Other States cannot accept the use of the term "indigenous peoples", in part because of the implications this term may have in international law, including with respect to self-determination and individual and collective rights. Some delegations have suggested other terms in the declaration, such as "indigenous individuals", "persons belonging to an indigenous group", "indigenous populations", "individuals in community with others", or "persons belonging to indigenous peoples". In addition, the terms used in individual articles may vary depending on context. Some delegations have suggested that if the term "indigenous peoples" is used, reference should also be made to Article 1.3 of ILO Convention No. 169. Hence, the bracketed use of the term "indigenous peoples" in the draft declaration is without prejudice to an eventual agreement on terminology.[9]

19. In his report on the 10 th session of the WGDD held in 2004, the Chair reported on the results of informal meetings on Article 3, facilitated by Canada and a representative of the Indigenous Caucus. In summary, the facilitators noted that it was important to acknowledge that all representatives of indigenous peoples and some States supported article 3 of the Sub-Commission text. During the course of their consultations, the facilitators had identified a number of proposals concerning the right to self-determination of indigenous peoples which they forwarded for further consideration by the Chairperson-Rapporteur. In general, the facilitators were encouraged by the positive intent expressed in all the proposals received and the genuine commitment to achieving consensus. A notable development in most of the proposals was the comprehensive, or "package deal" approach to addressing the right of self-determination. Using that approach, the right of self-determination was stated clearly and situated within a context that was clarified in a combination of preambular and/or operative paragraphs. While in some proposals, the existing text of article 3 was unchanged, others diverge in the use of preambular and operative paragraphs and, in one proposal, the use of an explanatory note,

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[8] Draft report of the working group established in accordance with Commission on Human Rights resolution 1995/32, Chairperson-Rapporteur: Mr. Luis-Enrique Chávez, November 27, 2000 E/CN.4/200o/WG.15/CRP.1, to be included in document E/CN.4\2001/85. See paras. 47-86.

[9] Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, Chairperson-Rapporteur: Mr. Luis-Enrique Chavez (Peru). E/CN.4/2002/98, March 2002.

to situate the right. The Chair noted that the critical issue of "territorial integrity" had yet to be resolved and that there was no consensus to date. While there was no consensus on Article 3 the Chair noted that the facilitators were greatly encouraged by the evidence of an emerging consensus.

Questions now being discussed before UN WG of states and Article 3 of the Draft Declaration

20. For Canada, and many other states, the discussion of implementation of a right of self-determination, for indigenous collectivities living within democratic states, whether it flows from common Article 1 of the Covenants, or Article 3 of the draft declaration, raises many unanswered practical questions such as: who is "an indigenous people"; who forms the collective; can an indigenous collectivity be a "people" only if they have a land base; can a right of self-determination be applied differently to different indigenous groups within one state; how is the right of self-determination of an indigenous people implemented vis-à-vis the right of self-determination of the whole people of the State of which the indigenous are a part; can the right be exercised while respecting the political, constitutional and territorial integrity of the state (in other words, essentially as an internal right); under what circumstances, if any, could the right include the right to secede from a state? Additionally, states must consider how the rights of the indigenous collective are to be balanced against the human rights and fundamental freedoms of the indigenous individual that the state also has duties to uphold. A better understanding of these and other questions relating to implementation will need to be achieved before states are able to recognize a right of self-determination for indigenous people living within their boundaries.

Canada's position in the WGDD on self-determination

21. The Government of Canada is participating actively in the discussions at the United Nations on the development of a Declaration on the Rights of Indigenous Peoples, and has stated repeatedly its support for a strong declaration that is universally applicable, and that recognizes a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states. This right will have to take into account the variety of circumstances in which both states and indigenous peoples find themselves throughout the world.

22. In attempting to determine how such a right could exist and be implemented within existing democratic states, while noting that States must avoid including prescriptive solutions in the declaration, the Government of Canada has suggested this right would have to accord with the following principles:

- this right of self-determination respects the political, constitutional, and territorial integrity of democratic states. It does not imply the right to secede from a democratic state, or immunity from the laws of the state;

- exercise of the right involves negotiations between states and the various indigenous peoples within those states, to determine the political status of the indigenous peoples involved, and the means of pursuing their economic, social and cultural development;
- these negotiations must reflect the jurisdictions and competence of governments and must take account of different needs, circumstances and aspirations of the indigenous peoples involved;
- this right of self-determination is intended to promote harmonious arrangements for self-government within sovereign and independent states conducting themselves in accordance with international law; and
- consistent with international law, the right shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states, conducting themselves in compliance with the principle of equal rights and self-determination of peoples, and thus possessed of a government representative of the whole people belonging to the territory, without distinction as to race, creed or colour.

23. The Government of Canada believes that, in negotiations of the declaration, the goal is to develop a common understanding consistent with evolving international law of how this right of self-determination is to apply to indigenous collectivities which qualify as peoples under international law and what the content of this right includes. Once achieved, this common understanding will have to be reflected in the wording of the declaration.

24. At the WGDD in 2004, Canada expressed its support for a proposal for Article 3 and related preambular paragraphs submitted by some indigenous representatives with an accompanying explanatory text. Canada looks forward to discussing this proposal further in the 11th session of the Working Group and at the meeting being hosted by Mexico, in September 2005, to discuss critical issues in the draft declaration.

Government of Canada's position on the right of self-determination within Article 1

25. The Government of Canada believes that the understanding of the right of self-determination is evolving to include a right for groups living within existing states which qualify as peoples under international law that respects the political, territorial and constitutional integrity of the State. However, the discussions which have taken place in the WGDD since 1995 have shown that there is as yet no consensus on the existence, scope or content of this right, or to whom it applies. Nor is there any State practice to refer to which would clarify the scope and content of such a right. A discussion follows, reflecting the Government of Canada's current thinking on the issues. The Government of Canada's views may continue to evolve as the discussion continues.

26. International law does not define which are the "peoples" who have the right of self-determination, or of what the right itself consists. Traditionally, the "peoples"

referred to in Article 1 was understood to apply to the entire population of existing states and to other "peoples" in a colonial situation. The content of the right was generally equated to a right of independent statehood. While the general characteristics of peoples have been discussed and elaborated, in various fora, no conclusive definition exists in international law. There is no international consensus on which collectivities qualify as "peoples."

27. In this traditional approach to self-determination, the entire population of Canada constitutes a "people" for the purposes of Article 1. The Canadian people exercise their right of self-determination as a sovereign nation state within the community of nations.

28. As well, in this traditional approach, indigenous collectivities[10] and other peoples living within the existing state of Canada participate in the exercise of the right of self-determination as part of the people of Canada. Indigenous individuals in Canada benefit from all the rights in the international covenants. Canada has a government representative of the whole people belonging to the territory, without distinction of any kind.

29. In addition, Canada undertakes special measures for indigenous individuals and collectivities in Canada, to enable them to fulfil their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the country of which they are citizens. In 1982, the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada[11] were given constitutional recognition and affirmation.[12]

30. The Government of Canada recognizes that there may be collectivities, within the overall population of a State, that may meet the criteria of a "people" at international law and who have a right of self-determination under common Article 1 of the Covenants. The Government of Canada recognizes that some indigenous collectivities may meet the criteria to qualify as "peoples" at international law, on the same basis as other collectivities qualify as peoples.

31. The Government of Canada does not accept, however, that *all* indigenous collectivities qualify as peoples under Article 1 of the Covenants, simply by virtue of

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[10] The words "people" and "peoples" carry specific consequences in the context of Article 1. As well, Canada's constitution as amended in 1982, recognizes and affirms the existing Aboriginal and treaty rights of the "Aboriginal peoples of Canada". In Canada's view these words when used in Canada's constitution do not necessarily have any implication at international law. To avoid confusion in this part of the report, Canada will use the term "indigenous collectivity" to denote an indigenous group that may wish to assert a right of self-determination under Article 1.

[11] Presently, the government of Canada when using the term "indigenous" in international fora refers to those included within the term "Aboriginal peoples of Canada" in the *Constitution Act, 1982*.

[12] This gives special protection to Aboriginal and treaty rights. Aboriginal rights have been found to include land rights, and land-related rights such as hunting and fishing rights. Treaty rights are those rights specifically named in the individual domestic agreement between the Crown and the Aboriginal collectivity.

being indigenous.[13] Precisely which indigenous collectivities qualify as peoples in international law remains unclear. However, in the government's view, it is clear that, under existing international law, a collectivity can only claim a right under Article 1 if it meets the generally accepted criteria for a "people" at international law.[14]

Canadian situation

32. Canada is committed to the observance and protection of the right of self-determination of all peoples embodied in Article 1 of the Covenants.

33. Canadian law has considered the issue of the exercise of a right of "self-determination" by a group living within an existing state. In the *Reference Re: Secession of Québec*, the Supreme Court of Canada considered who is a "people", as only a "people" are entitled to exercise the right of self-determination. The Court noted "the precise meaning of the term "people" remains somewhat uncertain".[15] The Court did not provide a definition of the term "people", finding that in the context of the issue before it, it was unnecessary to do so. However, in the opinion of the Court, a "people" may include "only a portion of the population of an existing state" and the term "does not necessarily mean the entirety of a state's population". [16]

34. In discussing the "scope" of the right of self-determination, the Court discussed the concepts of internal self-determination: "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state";[17] and external self-determination which the Court noted can be best defined "as in the following statement from the *Declaration on Friendly Relations* as: [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a <u>people</u> constitute modes of implementing the right of self-determination by <u>that people</u>. [Emphasis added.]".[18]

35. The Court concluded its discussion of external self-determination, summing up the state of international law, on this point as follows:

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[13] Hereinafter, this will be described as "a right of self-determination for indigenous collectivities as indigenous".

[14] In relation to whether a collectivity is a "peoples" entitled to "self-determination" the UN study by Cristescu of 1981 set out the following criteria:

- The term "peoples" denotes a social entity possessing a clear identity and its own characteristics;
- It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
- A people should not be confused with ethnic, religious or linguistic minorities whose existence and rights are recognized in Article 27 of the International Covenant on Civil and Political Rights.

This descriptive approach of a people relied in part on a description of who does not have the right of self-determination, to assist in determining who does, providing little assistance in the context of the discussion of indigenous collectivities

[15] 1998 (2) SCR 217, at par. 123.

[16] Ibid. At par.124

[17] Ibid. At par.126.

[18] Ibid.

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[19]

36. Given the conclusions of the Court on the question before it, the Court found it unnecessary to address the specific situation of Aboriginal people in Québec.

37. In the Supreme Court of Canada decision *Mitchell v. MNR*[20] the minority decision of Mr. Justice Binnie emphasizes that the Canadian government, indigenous communities in Canada, and the Canadian courts, are giving serious attention to the questions of the place of indigenous communities within the larger Canadian population. In his decision, His Honour discussed the concept of "shared sovereignty" developed by the Royal Commission on Aboriginal People, commenting that:

- The Royal Commission does not explain precisely how "shared sovereignty" is expected to work in practice, although it recognized as a critical issue how "60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities" would "interact with the jurisdictions of the federal and provincial governments" in cases of operational conflict (final report, vol. 2, *supra*, at pp. 166 and 216). It also recognized the challenge Aboriginal self-government poses to the orthodox view that constitutional powers in Canada are wholly and exhaustively distributed between the federal and provincial governments…The Royal Commission Final Report, vol. 2, states at p. 214 that:

  > Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.[21]

38. His Honour, concluding that it is unnecessary to come to any conclusion on the assertions of the Royal Commission, stated that: "What is significant is that the Royal Commission itself sees Aboriginal peoples as full participants with non-Aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it".[22]

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[19] Ibid. at par.138.
[20] *Mitchell v. MNR*, 2001 SCR 33.
[21] Ibid., at par.. 134.
[22] Ibid. at par.135.

39. The Government of Canada notes that whether implementing minority rights, a policy recognizing that Aboriginal people have rights of self-government, or a right of self-determination, the practical questions raised are not dissimilar. How can groups, living in an existing democratic state, fulfill the economic, social and cultural objectives of the group, while being part of the sovereignty of the state? Through programmes and policies and special measures, the Government of Canada attempts to support this objective in the domestic context, and through participation in the UN Working Group on the Draft Declaration contributes to development of international law on this point.

QUESTION 2: Please be more specific about the new approaches adopted at Federal level when negotiating comprehensive land claims agreements with Aboriginal peoples. What precisely are the legal and practical differences between, on the one side the "modified rights model" and the "non-assertion model", and on the other side extinguishment of land rights? Please also inform the Committee about the practices of Provinces and Territories in this regard. What is the policy regarding past extinguishment of land rights, such as those of the Innu people? (Periodic report, § 186; Previous conclusions, § 8)

A) Please be more specific about the new approaches adopted at a federal level when negotiating comprehensive land claims agreements with Aboriginal people.

On May 31, 2005 a Policy Retreat was held with Cabinet members and national Aboriginal organization leaders. At that time, the Minister of Indian and Northern Affairs committed to engaging in a major agenda of renewal and change to policies and processes for addressing Aboriginal and Treaty rights. Policy renewal will be based on recognition and reconciliation of rights in the context of ongoing and evolving relationships with Aboriginal people, consistent with the recognition of Aboriginal rights in section 35 of the *Constitution Act, 1982*. The agenda for policy renewal covers a broad range of issues, including:

- implementation of self-government;
- resolution of Aboriginal land rights;
- implementation of historic treaties; and
- implementation of modern land claims and self-government agreements and treaties.

The Government of Canada is committed to pursuing a collaborative approach to policy renewal with Aboriginal people and National Aboriginal Organizations. The substantial work on policy renewal is expected to begin over the course of the coming year with appropriate involvement of Aboriginal rights holders, National and Provincial Aboriginal organizations, and provincial and territorial governments.

B) What, precisely are the legal and practical differences between, on the one side the "modified rights model" and the "non-assertion model", and on the other side extinguishment of land rights?

When the Comprehensive land claims policy was introduced in 1973, its primary purpose was to address the ambiguity associated with Aboriginal rights and title so that governments, Aboriginal people and third parties would know, with a high degree of certainty, how land and resource rights were held and by whom. This was achieved by extinguishing or exchanging all of the undefined Aboriginal rights of the particular

Aboriginal group and replacing them with rights clearly set out in a treaty. This is often referred to as the "release, and surrender" certainty technique.

In 1986 the requirement for blanket extinguishment was withdrawn. The revised Policy provided for two certainty techniques: 1) Cede, release and surrender of Aboriginal rights to land and natural resources in the settlement area; and, 2) Cede, release and surrender of Aboriginal rights to land and natural resources except on specified lands retained by the Aboriginal groups.

Since 1986 Canada has undertaken to develop alternatives to surrender approaches while still providing certainty to all parties regarding their rights and use, management and ownership of lands and resources. Policy changes have occurred incrementally and are reflected in particular agreements. Responding to circumstances at the negotiation table, parties to the Nisga'a treaty, for example, developed the modified rights model for achieving certainty. Under this approach Aboriginal rights and title are continued and modified to become the rights and title as set out in the final treaty, which exhaustively enumerates the section 35 (*Constitutional Act, 1982*) rights of the Aboriginal group. In other words, certainty is achieved by modifying the Aboriginal rights to be the rights set out in the treaty, rather than by surrendering the rights. The Nisga'a treaty does include a fallback release of rights, but the release only becomes operative if the courts find that a release is necessary to give effect to a particular provision of the treaty. The technique applies to land, resources and self-government alike.

Within the context of the Tlicho negotiations the non-assertion certainty technique was developed. With this technique the Tlicho nation does not surrender Aboriginal rights, rather they agree not to exercise or assert any land or natural resource rights other than the land and resource rights set out in the agreement. With respect to Aboriginal rights other than land rights, the Tlicho agreement provides an orderly process for bringing additional rights into the treaty by agreement or as a result of a court decision. As in the Nisga'a agreement, there is a fallback release that becomes operative only is the courts find that a release is necessary to give effect to provisions of the treaty.

Under both the Nisga'a and Tlicho agreements, Aboriginal rights are not extinguished; they continue to exist after the treaty. Certainty is achieved through agreement of the parties to modify rights, or not to assert certain rights, rather than through the surrender of Aboriginal rights. In both cases there is a fallback release mechanism which becomes operative only if a court determines that a release is necessary to give effect to particular provisions of the treaty agreement between the parties. This is very different from previous certainty models which were based upon the full surrender of Aboriginal rights in exchange for treaty rights.

Some Aboriginal groups still criticize the backup release of rights mechanism as a residual type of extinguishment. In recent negotiations with First Nations, additional options are being considered which do not have a backup release. Additional approaches to certainty are currently under study by the Government of Canada and will be

considered in pursuing policy renewal, including approaches based on the recognition and coexistence of rights.

C) What are the practices of the provinces and territories in this regard?

Provincial and territorial governments have different policies with respect to achieving certainty to lands and resources through land claims agreements. Their views, like those of the federal government and Aboriginal groups, are considered at the negotiation table by the Aboriginal group and federal government and contribute to the certainty model adopted, or developed, by the parties to the negotiation of a particular land claims agreement.

Based on the 15 principles that the National Assembly adopted in 1983 to guide its relations with Aboriginal people, in 1998, the Government of Québec adopted guidelines entitled *Partnership, Development, Action*, for dealing with the Aboriginal nations. Since then, several agreements have been signed between the Government of Québec and Aboriginal communities or nations. These include framework agreements, statements of mutual understanding and respect, special agreements or sector-based agreements
(http://www.autochtones.gouv.qc.ca/relations_autochtones/relations_autochtones).

The Government of Québec is also pursuing negotiations with the Aboriginal nations with a view to concluding comprehensive territorial agreements. Mention should be made in particular of the following two agreements that the Government of Québec concluded:

- The *Agreement Concerning a New Relationship Between the Government of Québec and the Crees of Québec* (the Peace of the Braves) was signed in 2002. It concerns in particular cooperation between the Crees and Québec in developing energy, forest and mining resources.

- The *Partnership Agreement on Economic and Community Development* in Nunavik was concluded in 2002 with the Inuit. It deals primarily with economic and community development.

In Newfoundland and Labrador, representatives from the Labrador Inuit Association (LIA), Government of Canada, and Government of Newfoundland and Labrador signed the Labrador Inuit Land Claims Agreement on January 22, 2005. This is the first modern-day treaty in Atlantic Canada.

This agreement will bring clarity to land ownership and the management of resources, allowing Labrador Inuit to further pursue economic development opportunities consistent with their cultural values. The agreement will create a stable environment for investment benefiting Labrador Inuit and all Newfoundlanders and Labradorians.

This agreement is not extinguishing land rights of the Inuit. The largely undefined Aboriginal rights of Labrador Inuit are being exchanged for the certainty of defined rights set out in the treaty.

D) What is the policy regarding past extinguishment of land rights, such as those of the Innu people?

Section 35 of the *Constitution Act, 1982* protects **existing** Aboriginal and treaty rights. Canada understands treaties that were signed in the past to be binding on all signatories. While Canada is working with groups to understand historic and modern treaties in a modern-day context, Canada will not "open-up" or re-negotiate treaty provisions, including those pertaining to extinguishment of Aboriginal rights. Where Aboriginal rights have been extinguished through past treaties, Canada recognizes the existing treaty rights that replaced the group's Aboriginal rights.

With respect to the Innu people, treaties have not yet been concluded with the Innu of Quebec or Labrador. Canada is negotiating comprehensive land claims agreements with both the Innu of Quebec and Labrador and the respective provincial governments (Quebec and Newfoundland and Labrador). A technique for achieving certainty to land and resources will be decided upon by all three parties in the context of those negotiations.

QUESTION 3: What steps have the Federal, Provincial and Territorial governments taken to promote the equal participation of Aboriginal women in the negotiations of self-government agreements, treaties, and any agreement relating to Aboriginal people?

The Government of Canada is taking active steps to promote the equal participation of Aboriginal women in the negotiation of self-government agreement and land claim (modern treaty) negotiations.

Following the federal government's 1995 Federal Plan for Gender Equality, the department of Indian and Northern Affairs began, in 1998, to integrate Gender Equality Analysis (GEA) into programs, policies, legislation and negotiation activities. The department's gender equality policy promotes social cohesion and capacity-building in communities. Thus, implementing the equality policy in negotiations can accelerate the ratification process.

In 2003, the Women's Issues and Gender Equality Directorate (WIGE) led a strategy to strengthen the Indian and Northern Affairs Canada commitment to Gender Equality Analysis which became a departmental priority. As part of this initiative, work was initiated on draft guidelines for "Women's Participation in the Negotiation Process". The guidelines, which are currently pending official approval in fall, 2005, are intended to raise awareness concerning Canada's commitments toward the equality policy and accompanying practical measures in order to support Aboriginal women's organizations.

The guidelines for federal negotiators suggest approaches to systematically implement the equality policy in the negotiation process. Part of this includes informing other parties (provinces/territories and Aboriginal groups) of the federal government's commitments stemming from the Federal Plan for Gender Equality. The proposed guidelines also include tools that allow local women's organizations to conduct consultations within the context of their communities' social and cultural dynamics. Thus, local women's organizations would be in a position to recommend strategies in line with the social and cultural dynamics of their communities.

As self-government agreements themselves, as well as the laws passed by an Aboriginal group pursuant to their jurisdiction under a self-government agreement, must comply with the Canadian *Charter of Rights and Freedoms*, the rights of women are protected.
The Department of Canadian Heritage Aboriginal Peoples' Program (APP) promotes the participation of Aboriginal women in the treaty negotiations process. The APP includes an initiative that supports projects by Aboriginal women's groups in Canada, regardless of where they live, to develop Aboriginal women's positions, strategies and research on Aboriginal self-government, to participate and partner with Aboriginal and women's groups/organizations as well as with Aboriginal governments on self-government initiatives, and to communicate with and inform Aboriginal women on this critical issue

affecting their lives and those of their children and families. This initiative has an annual allocation of $500,000 per fiscal year.

The Aboriginal Women's Program (AWP) which is a part of the APP works with Aboriginal women to ensure their full participation in their own communities and within Canadian society. The AWP provides funding support to independent Aboriginal women's groups toward achieving this important goal. The purpose of the AWP is to assist independent Aboriginal women's groups/organizations to carry out activities that: (1) support the full participation of Aboriginal women within their communities and Canadian society; and (2) assist them in reclaiming and using their unique Aboriginal identity and cultures.

In April 2005, a new policy framework was approved by the federal government for the Aboriginal Peoples' Program after Canadian Heritage consulted extensively throughout the renewal process with Aboriginal stakeholders including Aboriginal women's organizations and territorial governments. Canadian Heritage, in partnership with Aboriginal stakeholders, will complete the transition to the new APP over a period of three years.

Provinces and Territories

Most of Canada's provinces and territories encourage the participation of Aboriginal women in the negotiation of self-government agreements and any agreement relating to Aboriginal people. In Saskatchewan, both the Federation of Saskatchewan Indian Nations (FSIN) and the Métis Nation - Saskatchewan (MNS) have women's organizations that were created to provide input into processes such as self-government negotiations, as well as negotiations and agreements related to issues of employment, health, education and child and family services. The Meadow Lake Tribal Council (MLTC) now has a First Nation woman leading negotiations on behalf of the First Nations at the Federal/Provincial/MLTC negotiating table. Plans are underway to conduct a gender analysis of the draft MLTC self-government agreement in the fall of 2005.

Through the First Nations and Metis Women's Initiative of the Saskatchewan Department of First Nations and Metis Relations, funding is provided to provincial representative Aboriginal women's organizations to assist with capacity development, including developing the capacity to respond to governance discussions and negotiations that are conducted by the FSIN, MLTC or MNS. In addition, funding is provided to another provincial women's organization representing off-reserve First Nations and Métis women, Saskatchewan Aboriginal Women's Circle Corporation. This organization is recognized by the Native Women's Association of Canada and provides input on various provincial and national initiatives. Although the representation of women in executive positions at the FSIN and MNS is low, there are now approximately 14 women chiefs representing First Nations in Saskatchewan - more than at any other time in the past. It is hoped the growing number of women chiefs will lead to more equitable representation at

negotiating tables and discussions on agreements for service delivery. This trend has been noted in local level Métis political organizations as well.

The Province of British Columbia is co-funding (with the Office of the Federal Interlocutor) the Métis Provincial Council of British Columbia to support Métis Women's Secretariat Governance Capacity. The contract is intended to provide funding assistance to ensure adequate representation of the Métis women (from their regions) in the form of the Métis Women's Secretariat of British Columbia (MWSBC).

As a related item, the province has also entered into two separate memoranda of understanding (MOU): one with Canada and the Métis Provincial Council of British Columbia and one with Canada and the United Native Nations Society. Both of these memoranda note in their respective purpose sections that the MOU's are designed to help bring the perspectives of Aboriginal families (women and youth) to the attention of the province (and Canada) as part of these tripartite fora dealing with self-governance.

The province of New Brunswick is working to make sure that Aboriginal women are represented equally in any treaty / rights discussions with the First Nations in its territory. More female chiefs are being elected as representative of Aboriginal peoples (3 in New Brunswick) in the province, and at the last roundtable, National Aboriginal Women's organizations were present. The province of Manitoba provided funding to Aboriginal women's group such as the Mothers of the Red Nation to participate on negotiations on land claims agreements.

The Ontario Ministry of Health and Long-Term Care continues to engage the Ontario Native Women Association (ONWA) in the design, development and delivery of a number of Aboriginal health programs and initiatives. Additionally, the Ministry has worked with the ONWA, the Native Women's Association of Canada and the federal government to develop a national Aboriginal Health Blue Print to improve the health status of Aboriginal people across Canada including Aboriginal women.

In Newfoundland and Labrador, the Province does not suggest to other parties the composition of their negotiating teams. The representation of aboriginal women on negotiating teams varies by aboriginal group. For example, the negotiating team of the Miawpukek First Nation Self-government agreement is primarily Mi'kmaq women; the Labrador Inuit Association land claims negotiation team had slim majority of male negotiators; and there are no Innu women on the Innu Nation land claims negotiating team. A small minority of Innu women are on Innu negotiating teams regarding the devolution of Child, Youth and Family Services; Income Support; and Education.

The province of Alberta also views the responsibility to promote the participation of Aboriginal women in the negotiations of self-government agreements as vesting with the Chief and Council of Aboriginal peoples.

QUESTION 4: Please provide more detailed information about the recommendations made by the independent Panel charged with conducting a review of the Canadian Human Rights Act and the Standing Senate Committee on Human Rights, as well as on action taken by the Government to follow up on these recommendations. Please also elaborate on the discussion regarding the establishment of a public body responsible for overseeing implementation of the Covenant and for reporting on any deficiencies. (Periodic report, § 12-16; Previous conclusions, § 10)

A) Please provide more detailed information about the recommendations made by the independent Panel charged with conducting a review of the Canadian Human Rights Act and the Standing Senate Committee on Human Rights, as well as on action taken by the Government to follow up on these recommendations.

In 1999, the Minister of Justice announced the establishment of an independent Panel, chaired by Justice La Forest, to conduct a review of the *Canadian Human Rights Act* (CHRA) – the first comprehensive review since 1977. The report (La Forest Report or the Review Panel's report) was released in June 2000. The report contains 165 recommendations covering various issues. The recommendations focus on two key areas of reform:

(a) Process: Changing the focus from an individual complaints-based system to a systemic discrimination approach or equality model, including a more pro-active role for the CHRC, a direct access model for claims to go directly to Tribunal, and mandatory workplace internal responsibility systems.

(b) Scope of Act: These recommendations include adding new grounds such as social condition and gender identity and the removal of defences and exceptions such as the Indian Act exemption and mandatory retirement defences.

The Review Panel's report is the first comprehensive review of the *Canadian Human Rights Act* in over twenty years. The Government of Canada is committed to the protection and promotion of human rights. Modernizing human rights legislation is a complex task which the Government takes very seriously. The recommendations of the Review Panel make a significant contribution to our understanding of the protection of human rights in Canada and are an important consideration in developing our strategy.

The Review Panel's report provided an overall guide on issues needing reform rather than a detailed plan of action. As the federal government reviewed the La Forest recommendations over the past few years it become increasingly evident that they required greater research, detailed analysis and testing. This was particularly important since, once implemented, most of these recommendations would radically alter the federal human rights system, and affect many federal government departments and federally-regulated organizations. We believe that engaging many of these partners is indispensable if we are to achieve credible and effective reform. Consequently, we will take the time required to attain these objectives. We want to ensure that any reform will

stand the test of time. We are moving forward cautiously and are taking a staged approach.

As part of the potential reforms, we have addressed recommendations in the report that suggested extending the prohibition of hate messages to those disseminated over the Internet, and that section 67 be repealed to ensure all Aboriginal people receive the full protection of the Act. Section 67 is also addressed in our response to Question 10.

With respect to hate, section 13 of the CHRA was amended in 2001 to make it clear that Internet hate messages come under the jurisdiction of the Commission. Specifically, section 13 prohibits individuals from communicating telephonically any matter likely to expose a person or group to hatred or contempt on the basis of a prohibited ground of discrimination. Since 2001, this now includes communications by means of computers and the Internet.

In addition, the Government is committed to reforms that enhance systemic remedies to make human rights protection more effective. In considering reform, we will recognize developments in human rights, in particular the evolving concept of equality such as "adverse effect" and "systemic discrimination", as well as the need to provide recourse to individuals.

With respect to the recommendations touching on structural and mandate reform of the Canadian Human Rights Commission and the Canadian Human Rights Tribunal, contained in the Review Panel Report, the Government has undertaken a cost analysis of various models, and has begun developing options for reform.

The Government of Canada is also taking steps aimed at further enhancing the Canadian Human Rights Commission's broad mandate to provide adequate remedies. In follow-up to the La Forest report of 2001, the Canadian Human Rights Commission introduced new process reforms in May 2003. In the last two years the Commission has introduced changes to its complaint process resulting in reduced processing times and more consistent decision-making.

On December 13, 2001, the Standing Senate Committee on Human Rights issued a Report entitled "Promises to Keep: Implementing Canada's Human Rights Obligations". At that time, the Report recommended a response to the CHRA Review Panel Report.

B) Please also elaborate on the discussion regarding the establishment of a public body responsible for overseeing implementation of the Covenant and for reporting on any deficiencies.

One of the Panel's recommendations was that the Canadian Commission on Human Rights be under a duty to monitor and report to Parliament and the United Nations Committee on the federal government's compliance with international human rights treaties (recommendation 130). The issue of whether the *Canadian Human Rights Act*

should be amended to provide a mandate to the Canadian Human Rights Commission to monitor Canada's international human rights commitments is being discussed and will be given further consideration within the context of follow-up to the recommendations of the Panel Review.

QUESTION 5: What action has been undertaken to address the Committee's concern about the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant? Please indicate the extent to which human rights legislation, at the federal, provincial and territorial levels, still confers authority to human rights commissions to refuse to refer a human rights complaint for adjudication. Please provide statistical data on the number of human rights complaints that have been dismissed by human rights commissions in all jurisdictions since 1999 (previous conclusions, para. 9).

A) What action has been undertaken to address the Committee's concern about the inadequacy of remedies for violations of Articles 2, 3 and 26 of the Covenant?

Articles 2, 3 and 26 - Equal rights and effective remedies

The *Canadian Charter of Rights and Freedoms* applies to all governments – federal provincial and territorial. Section 15 of the *Charter* makes it clear that every individual in Canada – regardless of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability or any analogous ground – is to be considered equal. This means that governments must not discriminate on any of these grounds in its laws or programs. Section 28 of the Charter also makes clear that both women and men are equally protected under the Charter. Anyone who believes his or rights or freedoms under the Charter have been infringed by any level of government can go to court to ask for a remedy. Section 24 of the Charter provides that the court can grant whatever remedy it feels appropriate under the circumstances. The court may also make an order that a law is of no force or effect. This power comes from section 52 of the *Constitution Act, 1982*.

The *Canadian Human Rights Act* (CHRA) provides protection from discrimination related to employment, or to the provision of goods, services, facilities or accommodation that are customarily available to the general public in areas of federal jurisdiction. The prohibited grounds of discrimination include race, national and ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for an offence for which a pardon has been granted.

The CHRA provides for a range of remedies. The Government of Canada emphasizes that the Canadian Human Rights Commission and Tribunal have a broad mandate with respect to complaints alleging discrimination. In order to ensure that Canada has an effective human rights system, the Government continues to take steps to protect existing rights and provide effective remedies for violations that may occur.

In follow-up to the La Forest report of 2001, the Canadian Human Rights Commission introduced new process reforms in May 2003. The Commission has introduced changes to its complaint process resulting in reduced processing times and more consistent decision-making. The quality of the complaint process has been improved by creating multi-disciplinary teams consisting of investigators, policy analysts and lawyers to

examine complaints of discrimination. These changes ensure more timely and equal access to the rights protected by the legislation. As a result, the backlog has been significantly reduced and the average age of the active caseload is less than one year. An assessment of these reforms is due in 2006.

The Canadian Human Rights Commission has a very broad mandate to provide adequate remedies to reduce discriminatory practices. It provides various services to all Canadians. It is also supported by legal and policy research, to provide appropriate remedies to victims of discrimination and to eliminate discriminatory practices and policies. Additionally, it is supported by a promotion branch which conducts research, information programs, advocacy, and training workshops. It also develops policies to guide employers and service providers and increase predictability and transparency; educates and disseminates information to the public on human rights through a strategic communications plan; and liaison and cooperative activities with other human rights organizations within Canada and abroad, advocacy groups, employers, service providers, community organizations and governments or levels of government.

Canadian Human Rights Act- Pay Equity

Additionally, section 11 of the *CHRA* and the *Equal Wages Guidelines, 1986,* issued by the Canadian Human Rights Commission outline the obligation of employers to provide women with equal pay for work of equal value.

The Canadian Human Rights Commission is also responsible for conducting compliance audits under the *Employment Equity Act*. The Act requires federally regulated employers to develop and implement an employment equity hiring and promotions plan in order to move toward a work force which equitably represents women, Aboriginal peoples, persons with disabilities, and members of visible minorities.

In recognition of the need to clarify the manner in which pay equity is implemented, the Government of Canada in June 2001 announced the establishment of a Pay Equity Task Force to review federal pay equity legislation.

In May 2004, the Task Force submitted its report to the Ministers of Justice and Labour with recommendations for improving section 11 of the *Canadian Human Rights Act*, which makes it a discriminatory practice to pay men and women differently for performing work of equal value. The Task Force made 113 recommendations which supports replacing the existing complaints-based legislation with proactive legislation. The Government is evaluating the recommendations in consultation with major stakeholders.

B) Please indicate the extent to which human rights legislation, at Federal, Provincial and Territorial levels, still confers authority to human rights commissions to refuse to refer a human rights complaint for adjudication.

The *Canadian Human Rights Act* confers a broad discretion on the Canadian Human Rights Commission to deal with human rights complaints, including referral to adjudication by the Canadian Human Rights Tribunal. The Act provides that the Commission may decide not to refer a complaint to the Tribunal if further inquiry is not warranted. Further inquiry is generally not warranted if the available evidence does not support the allegations in the complaint, or a substantial remedy has been made available.

Section 44 of the *Canadian Human Rights Act* provides:

> 44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.
>
> (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied
> (a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or
> (b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,
> it shall refer the complainant to the appropriate authority.
>
> (3) On receipt of a report referred to in subsection (1), the Commission
> (a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied
> (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and
> (ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or
> (b) shall dismiss the complaint to which the report relates if it is satisfied
> (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or
> (ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).[23]
>
> (4) After receipt of a report referred to in subsection (1), the Commission
> (a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and
> (b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

An individual may challenge before the Federal Court of Canada, the decision of the Commission not to appoint a tribunal to examine a complaint.

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[23] 41 (c) the complaint is beyond the jurisdiction of the Commission;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or
(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

C) Please provide statistical data on the number of human rights complaints that have been dismissed by human rights commissions in all jurisdictions since 1999.

Outcomes for complaints dealt with between January 1999 and July 2005:

CANADIAN HUMAN RIGHTS COMMISSION

Outcomes for Complaints Dealt with between January 1999 and July 2005

	OUTCOMES				
	Not to deal with[1]	Settled[2]	Referred to Tribunal	Dismissed[3]	TOTAL
1999	44	213	52	352	661
2000	39	286	123	372	820
2001	48	273	85	266	672
2002	46	301	70	312	729
2003	213	499	195	395	1302
2004	340**	369	122	406	897
2005	270	180	14	232	696

** The increasing number of decisions "not dealt with" is primarily attributable to an increase in decisions to refer complaints to grievance or other available review procedures, as a first step, following recent jurisprudence which clarified that arbitrators have the authority to interpret and apply human rights legislation. This was not always the case in previous years when the Commission accepted complaints irrespective of whether a grievance on the same issue was already proceeding.

[1] Cases that the Commission decided not to pursue under section 40-41 of the Canadian Human Rights Act because they were filed more than one year after the alleged act of discrimination, or because the complainants were asked to first pursue other redress mechanisms, or for other reasons.

[2] Settled in mediation, in the course of investigation, through conciliation or before Tribunal hearing

[3] Includes cases in which the Commission took no further proceedings because the complainants withdrew or abandoned their complaints.

Provinces and Territories

Most Provinces and territories human rights legislation continues to confer authority to human rights commissions to dismiss a human rights complaint for adjudication. It is important to note that dismissals include cases where the commissions had no jurisdiction or where the investigation made it clear there was no discrimination, or where the complaint were frivolous or vexatious or abusive (e.g. the complainant had already settled the matter with the respondent and signed legally binding releases, then filed a complaint). Withdrawals or abandonment can occur for various reasons, especially when it becomes clear that the respondent has a strong nondiscriminatory explanation for its conduct. However, this decision is taken only after mediation, negotiation and investigation of the case. After a Commission's decision, the complainant can ask the commissioners to reconsider their decision.

In Alberta, the *Human Rights, Citizenship and Multiculturalism Act* requires the Alberta Human Rights and Citizenship Commission director to attempt settlement of human rights complaints through conciliation or investigation. About 50% of complaints are resolved to the satisfaction of the parties through conciliation. Complaints that are not resolved through conciliation are investigated to determine if there is evidence that there may have been unlawful discrimination. If the evidence shows that there may have been unlawful discrimination, and if the respondent refuses to provide a suitable remedy, the Director of the Commission forwards the complaint to the Chief Commissioner, who establishes a tribunal to decide the matter. If the evidence shows that there was no unlawful discrimination, the Director will dismiss the complaint. In this case the complainant has the right to appeal to the Chief Commissioner. If the chief commissioner agrees that there is no evidence of unlawful discrimination, he upholds the dismissal. The complainant can seek judicial review of the Chief Commissioner's decision through various levels of court. If the Chief Commissioner believes that there may have been unlawful discrimination, he will establish a tribunal to decide the matter. Between January 1, 1999 and December 31, 2004 the Alberta Human Rights Commission dismissed 489 (12%) of the 4,203 complaint files that were closed during that period. Of these 489 complaint files, 168 were dismissed subsequent to a review by the Chief commissioner of the director's decision to dismiss. The complainants did not appeal the other cases.

In Manitoba, the procedure is the same as in the other provinces, and the Manitoba Human Rights Commission tries to resolve through negotiation because this tends to lead to a more timely remedy, and it gives both parties a sense of "ownership" of the final outcome. As a result of a pre-complaint mediation process, and other pre-investigation mediation procedures 40% of disputes coming to the attention of the Commission are resolved to the satisfaction of both parties either before a formal complaint is filed, or before a formal investigation takes place. Assessments of the process have thus far shown strong approval ratings for the process from both complainants and respondents.

In 1999, there were 77 pre-complaints resolutions at the Manitoba Human Rights Commission, and an additional 236 formal complaints disposed of during the year for a

total of 313. Among the group of formal complaints there were 60 pre-investigations settlements, 60 withdrawn and abandoned complaints; 92 were dismissed for reasons of frivolous or vexatious, or the acts described in the complaint do not contravene the Code or the evidence supporting the complaint is insufficient to substantiate the alleged contravention; 4 were referred for adjudication and 9 were settled in Board-directed mediation. There were 11 "Others". In total the settlement rate was 46%; the dismissal rate was 30% and the withdrawn/abandoned rate was 19%. Less than 2% were referred to adjudication and "others" make up the 100%. In 2004, the dismissal rate was 27%; the settlement rate (including pre-complaint) was 61%; there was a withdrawn/abandoned rate of 12%; and a 3% were referred to adjudication.

In New Brunswick the Commission has been able to settle the majority of complaints without referral to a Board of Inquiry hearing. In April 2004, the Commission introduced a process of early mediation to assist parties in reaching an early resolution to complaints. This initiative has been very successful. Between 1999 and 2004, the New Brunswick Human Rights Commission received 1034 complaints, 243 were settled through negotiation and mediation, 276 were dismissed, 93 were either abandoned, withdrawn or non-jurisdictional and 24 were referred to a board of inquiry.

In Ontario, the *Human Rights Code* does not require the Ontario Human Rights Commission to deal with all complaints. Section 34 of the *Code* allows a respondent to ask the Commission not to deal with a complaint or the Commission can decide to not deal with the complaint if it is of the opinion that it:

- can be more appropriately dealt with under another piece of legislation;
- is trivial, frivolous, vexatious or made in bad faith;
- is not within the Commission's jurisdiction; or,
- is based on occurrences that are more than six months old.

The person making the complaint can ask the Commissioners to reconsider this decision by filing an application for reconsideration *within 15 calendar days*.

Complaints that are not referred to the Human Rights Tribunal of Ontario, by the Commission, are disposed of under section 36 (2) of the *Code*. Between 1998 and 2005 the Commission dismissed 2313 complaints and did not deal with 1656.

The Newfoundland and Labrador *Human Rights Code* allows the Commission, after an investigation, to determine whether or not a matter will be sent to a Board of Inquiry. If the matter is not sent, however, the Complainant can apply to the Trial Division of the Supreme Court of Newfoundland and Labrador for an order that the Commission must refer the complaint to a Board of Inquiry.

Since 1999, only 5 complaints have been dismissed by the Yukon Human Rights Commission.

QUESTION 6: Please explain how the State party reconciles its commitment to consider in good faith the Committee's final decisions under the Optional Protocol, and its reluctance to consider that it is under an obligation to implement the Committee's recommendations for interim measures. (Periodic report, § 47-48; Previous conclusions, § 14)

The Government of Canada always gives careful consideration to interim measures requests from the Committee, and will respect them where it is possible to do so. Canada notes that it usually acts in accordance with the interim measures requests issued by human rights bodies. It is committed to do so in the future, although the decision whether or not to act in accordance with an interim measures request must necessarily be made on a case-by-case basis. This should not in any way be construed as a diminution of Canada's commitment to human rights or its ongoing collaboration with the Committee.

Canada is of the view that interim measures requests are non-binding. Article 39(2) of the *Covenant* provides that the Committee shall establish its own rules of procedure. Rule 86 of the Committee's Rules of Procedure provides that the Committee may inform the State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. The language of Rule 86 is consistent with the non-binding nature of the Committee's views. Neither the Covenant nor the Optional Protocol provides for the Committee to make orders binding on States.

Canada appreciates that in the recent past the Committee has quickly reviewed and acted on requests to lift interim measures. We will take into consideration that this can be an efficient procedure to use when examining interim measures requests issued by the Committee.

COUNTER-TERRORISM MEASURES AND RESPECT OF COVENANT GUARANTEES

QUESTION 7: Please provide more detailed information about the definition of terrorist activities in the *Federal Anti-terrorism Act*, and the results of the comprehensive review of this Act directed by the Parliament. Please also describe briefly the provisions adopted at the Provincia1 and Territorial levels to prevent or reduce the threat of terrorist activities (art. 4). (Periodic report, § 62, 66, 565)

A) The Definition of "Terrorist Activity" in Subsections 83.01(1) an (1.1) of the *Criminal Code*

A core provision of the *Anti-terrorism Act* (ATA) is the *Criminal Code* definition of "terrorist activity". The definition, which has two components, applies to activities inside or outside Canada. Satisfying either component constitutes a "terrorist activity". The first component of the definition is defined in part as an act or omission committed in or outside Canada that would be an offence under the major international instruments that apply to terrorist activities, like hijacking and terrorist bombing.

In the second part, a general definition of "terrorist activity" was provided. Under this general definition, "terrorist activity" may also be an act or omission undertaken, inside or outside Canada, for a political, religious or ideological purpose that is intended to intimidate the public with respect to its security, including its economic security, or to compel a person, government or organization (whether inside or outside Canada) from doing or refraining to do any act, and that intentionally causes one of a number of specified forms of serious harm. These harms include causing death or serious bodily harm, endangering life, causing a serious risk to health or safety, causing substantial property damage where it would also cause one of the other previously listed harms, and, in certain circumstances, causing serious interference or disruption of an essential service, facility or system, whether public or private. As well, that aspect of the definition that relates to seriously interfering with or disrupting an essential service contains an exception for advocacy, protest, dissent and stoppage of work, providing this is not intended to cause any of the other forms of harm referred to in the definition. This exception recognizes that even unlawful protests and strikes that could lead to the disruption of an essential service are not the same thing as terrorist activity under the *ATA*.

The legislation does not target any particular group. Further, political, religious or ideological activities are not criminalized in and of themselves. Rather, only acts or omissions of the extreme and harmful type referred to under the definition of "terrorist activity", which are undertaken specifically for political, religious or ideological purposes, fall under the definition of "terrorist activity". In effect, the reference to "political, religious or ideological purposes" is a *limiting aspect of the definition* that helps distinguish terrorism from other types of criminal activity, such as organized crime.

Under the extended definition, prosecutions of terrorism offences can be undertaken in Canada even if the ultimate terrorist activity takes place outside of Canada or is intended to take place elsewhere. The definition of "terrorist activity" applies to an act or omission that is committed in or outside Canada provided that certain factors exist.

The full statutory definition of "terrorist activity" can be found at the following website which contains the full text of the *Anti-terrorism Act (*see new section 83.01 of the *Criminal Code* set out in the *Act* :

http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=N&StartList=A&EndList=Z&Session=9&Type=0&Scope=I&query=2981&List=toc-1

The Results of the Comprehensive Review of the *Anti-terrorism Act* Directed by Parliament

Section 145 of 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.

A motion was adopted by the House of Commons on December 9, 2004 authorizing the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to begin a review of the *Anti-terrorism Act*. Its Subcommittee on Public Safety and National Security has begun this work. The Senate adopted a similar motion on December 13, 2004, establishing a Special Committee to undertake a separate review. The Senate Special Committee on the *Anti-terrorism Act* has also started its work.

These committees are to report back to Parliament within one year, unless their mandates are extended. The scope and focus of the review of the *Anti-terrorism Act* are set by these Parliamentary committees.

These two committees have not yet completed their reviews of the *Anti-terrorism Act*. To date, they have conducted a broad review of Canada's anti-terrorism and other security measures. The House of Commons Subcommittee formally expanded its mandate to include two issues that fall outside the scope of the *ATA* – security certificates under the *Immigration and Refugee Protection Act* (*IRPA*), and section 4 of the *Security of Information Act* (*SOIA*) which relates to unlawful disclosure of certain Government information. The Senate Committee has also addressed these issues without formally expanding its mandate. Issues discussed by both committees have ranged from the adequacy of the definition of "terrorist activity", to security certificates under *IRPA*, to the impact of the *Anti-terrorism Act* and related legislation upon ethno-cultural and religious communities, to the effect of the legislation on charities, and to whether there is adequate oversight or review of the legislation.

B) Provisions Adopted at the Provincial and Territorial Level to Prevent or Reduce Terrorism

Criminal law measures fall exclusively within the jurisdiction of the Government of Canada. The measures described below relate to activities that fall within provincial jurisdiction.

Major emergencies require extremely close co-operation between the federal government, provinces and territories, communities, first-line responders and the private sector. The Government of Canada has committed to establishing a permanent, high-level Federal/Provincial/Territorial forum on emergencies in order to allow for regular strategic discussion of emergency management issues among key national players. Provincial, territorial, and federal ministers agreed on an 8 point action plan that will see governments collaborate on such things as improved training, public alerting, harmonizing emergency response frameworks and reviewing our disaster financial assistance arrangements. In addition, the Department of Justice, through the Coordinating Committee of Senior Officials (CCSO) meets with senior officials from the provinces and territories to discuss issues relating to criminal law, including anti-terrorism measures.

The following gives a brief description of anti-terrorism measures taken by some of the provinces. The Fifth periodic report noted in paragraph 565 that *Alberta's Security Management Statutes Amendment Act* amended 17 Alberta acts to prevent or reduce the threat of terrorist activity and to enhance the province's ability to respond to emergency situations. Alberta also advises that, on March 25, 2003, the Premier of Alberta approved the Alberta Counter-Terrorism Crisis Management Plan. (ACTCMP). The ACTMP has four components:

(a) a capability to establish a level of threat for Alberta;
(b) a cross-sector standardized capability to identify critical infrastructure in Alberta;
(c) an integrated approach to assist both the private and public sectors to understand and establish appropriate levels of security precautions based on the level of threat and the facilities level of criticality; and
(d) an emergency notification system which can advise all partners of changes in level of terrorist threat, and which can assist in preparation activities.

As well, the province of Saskatchewan, in 2003, passed the *Miscellaneous Statutes (Security Management) Amendment Act, 2003*, which amends several provincial acts. It defines emergency powers, allows for a more effective response to threatened terrorist activity, and enhances emergency powers. For example, amendments to the *Change of Name Act* are intended to prevent individuals from acquiring false identification for purposes related to terrorist activity, while those made to the *Clean Air Act* will allow the appropriate Minister to respond to the threat of terrorist activity by ordering the shutdown of facilities and the cessation of activities that are contributing to air contamination.

The Government of Ontario has undertaken many initiatives to minimize the risk of terrorism in the province. The provincial legislative framework is provided by Section 28 of the Adequacy and Effectiveness of Police Services Regulation (O. Reg. 3/99; Adequacy Standards Regulation) that requires every chief of police to establish procedures that are consistent with any federal or provincial counter-terrorism plan designated by the Minister. Section 26 of this regulation requires every chief of police to prepare an emergency plan for its police force setting out the procedures to be followed during an emergency. Thus, in summary, the counter-terrorism (CT) framework that applies in Ontario comprises both the National Counter-Terrorism Plan (NCTP) at the federal level and the Provincial Counter-Terrorism Plan (PCTP) at the provincial level. Ontario developed and implemented, on March 14, 2003, the PCTP which:

- provides a management framework in Ontario for all actual or potential acts of terrorism or credible threats thereof including Chemical/Biological/Radiological/ Nuclear (CBRN) threats and incidents;
- outlines a management structure and response framework to deal with the broad public safety issues of a terrorist act by addressing the mitigation, preparedness/planning, response and recovery phases of a provincial response;
- addresses both Strategic and Tactical Incident Management; and
- provides a notification protocol to be followed in the event of an anticipated/actual terrorist act as well as protocol to be followed in the event of an emergency (may or may not be caused by terrorism).

QUESTION 8: Please indicate whether persons arrested under the provisions of the Anti-Terrorism Act that enable preventive arrest have the right of access to an independent counsel, and if so, at what stage of the procedure. Do the amendments to the Canada Evidence Act introduced by the Anti-Terrorism Act enable a criminal court to condemn a person on the basis of evidence to which that person does not have full access? Please indicate how often these provisions have been applied, and provide examples if possible (arts. 9 and 14) (periodic report, paras. 63 and 91).

A) Please indicate whether persons arrested under the *Anti-terrorism Act* that enable preventive arrest have right of access to independent counsel, and, if so, at what stage of the procedure?

The *Anti-Terrorism Act* (*ATA*) provides for a recognizance with conditions, which is a measure that is intended to assist peace officers to disrupt terrorist attacks.

If a police officer believes, on reasonable grounds, that a terrorist activity will be carried out and suspects on reasonable grounds that the imposition of a recognizance with conditions on a particular person is necessary to prevent it, then that person can be summonsed or arrested to be brought before a judge.

The object of bringing the person before the court is for the court itself to consider whether it is desirable to impose conditions on the person. The court may impose such conditions or may release the person without conditions. The burden is on the government to show why conditions should be imposed. If the person refuses to abide by conditions that are judicially ordered, the court may commit that person to prison for up to 12 months.

The use of the recognizance with conditions is only available under strictly-defined conditions and is subject to numerous procedural safeguards. Except for emergency or exigent circumstances, the consent of the Attorney General is required beforehand. Even in emergency situations, this consent will be required after the fact in accordance with the delay prescribed by the *ATA*. In all cases, an initial judicial hearing must be held within 24 hours, or as soon as possible. The maximum period a person can be detained after the initial judicial hearing is 48 hours. The purpose and effect of the provision is not to allow for indefinite detention, but to permit a judge to impose conditions considered necessary, for example, to prevent a terrorist activity from being carried out (e.g. a recognizance to keep the peace and be of good behaviour).

The annual reports of the Attorney-General of Canada that cover the period from December 23, 2001 to December 23, 2004 show that this power has not been used by federal authorities.

Right to Counsel

First, in the event that a person is arrested, either with or without warrant, by a peace officer in order to bring him or her before a judge for a decision as to whether a recognizance with conditions should be imposed, section 10 of the Canadian *Charter of Rights and Freedoms* would apply. This section provides as follows:

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefore;

(b) **to retain and instruct counsel without delay and to be informed of that right**; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not valid. (emphasized in bold)

The Supreme Court of Canada has considered the right to counsel pursuant to this *Charter* guarantee in several important decisions. The right to counsel accrues at the earliest stages, in essence at the point of detention, which may even precede the actual moment of arrest. Reasons for the detention or arrest must be given. The individual must also be advised of the existence and availability of duty counsel or legal aid where the applicable provincial schemes provide for same. In relation to the *Anti-terrorism Act*, in the specific context of the investigative hearing provisions, the Supreme Court has viewed the role of counsel as being an expansive one: *Application under s. 83.28 of the Criminal Code (Re)* [2004] 2 S.C.R. 248.

Therefore, in the circumstance where a person is arrested by a peace officer in order for the person to be brought before a judge to determine whether a recognizance with conditions under section 83.3 of the *Code* should be imposed, the *Charter* guarantees the person the right to retain and instruct counsel without delay. The *Anti-Terrorism Act* is no way derogates from this right or from other *Charter* protections, as the *Act* was drafted in a manner so as to comply with the *Charter*.

Second, there may arise situations where the person is not arrested but compelled by a summons to attend before a judge to have a decision made as to whether the recognizance with conditions should be imposed. In this regard, it should be noted that the recognizance with conditions power under the *ATA* was modelled in large part on previously existing recognizance-with-conditions powers found in Canada's *Criminal Code*. For example, under section 810 of the *Code*, a person who believes on reasonable grounds that another person will cause personal injury to the person, his or her spouse, common-law partner, or child may lay an information before a judge and the judge may then cause the parties to attend before him or her to decide if a recognizance with conditions should be imposed on the other person. Similar powers exists under section 810.01 of the *Code*, if a person fears on reasonable grounds that a person will commit, for example, a "criminal organization offence"; and under section 810.1 of the *Code,* if a person fears on reasonable grounds that a person will commit sexual offences, such as sexual touching or incest, in respect of a person under 14 years of age. In these cases, where a person is not arrested to compel appearance before a judge but is instead

compelled to appear by a summons, the person has the right to seek to and obtain the advice and presence of counsel prior to attending before the judge. The same would apply in the case of a person who is compelled by summons to appear before a judge for the purpose of deciding if a recognizance under section 83.3 of the *Code* should be imposed.

B) Do the amendments to the Canada Evidence Act introduced by the *Anti-terrorism Act* enable a crimina1 court to condemn a person on the basis of evidence to which that person does not have full access? Please indicate how often these provisions have been applied, and provide examples if possible (arts. 9 and 14).

A person cannot be condemned on the basis of evidence to which that person does not have full access.

Section 7 of the *Canadian Charter of Rights and Freedoms* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Included in section 7 is the right to a fair trial, the right to a full answer and defense and the right to disclosure.

If the Attorney General of Canada does not authorize disclosure of the information and the Federal Court of Canada does not order disclosure of the information under s.38 of the *Canada Evidence Act* (CEA), the information must remain protected and cannot be disclosed. Thus, the prosecutor cannot use the information in the course of the trial and the trial judge (who is a different judge than the Federal Court judge that ruled on the *Canada Evidence Act* application) does not have access to the information. In short, an accused cannot be convicted on the basis of evidence that the accused does not have access to.

Section 38.14 of the *Canada Evidence Act* protects the accused right to a fair trial. Specifically, the person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, including an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence; an order effecting a stay of the proceedings; and an order finding against any party on any issue relating to information the disclosure of which is prohibited.

Section 38 of the Canada Evidence Act

The *Anti-Terrorism Act* (ATA) reformed section 38 of the CEA. Section 38 sets out a mini-code of procedure, establishing pre-trial, trial and appellate procedures to assist all parties and persons involved in proceedings in which there is a possibility that information, if disclosed, would cause injury to international relations or national defence or national security.

The section 38 regime provides that:

- Notice must be given to the Attorney General of Canada in circumstances where it is foreseeable that the disclosure of information in connection with or in the course of "proceedings" could be injurious to international relations or national defence or national security. "Proceedings" includes a criminal prosecution as well as other types of proceedings before a court, person or body with jurisdiction to compel the production of information.

- All information covered by a notice is, by law, prohibited from being disclosed unless authorized to be disclosed by the Attorney General of Canada or the Federal Court of Canada;

The Attorney General may, upon receipt of a notice, authorize the disclosure of information;

- The Federal Court may, upon application, authorise the disclosure of the information, part of or a summary of the information, with or without conditions.

- As a last resort, the Attorney General of Canada can personally issue a certificate to prohibit the disclosure of information obtained in confidence from, or in relation to, a foreign entity or for the purpose of protecting national defence or national security, but only after an order or decision that would result in its disclosure has been made.

The reforms built on the former scheme that existed, but improved upon it. They introduced greater flexibility into the system. They offer the opportunity for evidentiary issues to be resolved early on in the proceedings by providing for notification to the Attorney General of Canada of possible disclosure of injurious information. They improve the federal government's ability to protect from disclosure--while concurrently providing greater options for parties to use-- information relating to international relations or national defence or national security in proceedings, in a manner that is consistent with the parties' fair trial rights. For example, in a recent decision in the matter of *R. v. Ribic*, a decision of the Federal Court of Appeal, the use of edited transcripts of testimonies in a criminal trial in lieu of the viva voce testimony of the witnesses was authorized. Summaries of the information are also an option which the court can order. The Federal Court is also authorized to order the introduction into evidence in the main proceeding of information authorized for disclosure.

Both the Attorney General of Canada and the Federal Court are required to balance the competing public interests in disclosure against non-disclosure of the information, if it finds that the disclosure of the information would be injurious. In the criminal context, the Court held that whether the information would probably establish a fact crucial to the defence is an important factor to consider when balancing the competing interests at stake.

If, after balancing the public interest in disclosure versus the public interest in protecting the information, it is determined that the information should not be authorized to be disclosed, or if the Attorney General of Canada personally issues a certificate of non-disclosure, section 38.14 of the CEA provides that the judge presiding at a criminal proceeding may make any order, other than disclosure of the information, that he or she considers appropriate in the circumstances to protect the right of an accused to a fair trial.

For example, under section 38.14 of the CEA the judge may stop the proceedings if the judge takes the view that the accused would not otherwise get a fair trial.

Notice has been received by the AG in the course of nine different "proceedings". The Federal Court has rendered decisions in some of those cases. In other instances, notices have been withdrawn or the process that they have triggered is still pending. In one case, the matter is before the Federal Court.

To date, no Attorney General certificate has been issued.

QUESTION 9: Please report to the Committee on the procedure for the issuance of "security certificates", which enable the State party to detain and expel immigrants and refugees on the ground of security concerns. Please also provide information on the number of affected persons and the extent to which effective remedies are made available to them (arts. 7, 9 and 13).

A) Please report to the Committee on the procedure for the issuance of "security certificates", which enable the State party to detain and expel immigrants and refugees on the ground of security concerns.

A carefully considered and rigorous process is undertaken when it comes to the issuance of security certificates. The decision by the Ministers of Public Safety and Emergency Preparedness (PSEP) and Citizenship and Immigration to sign a certificate is based on security or criminal intelligence information and other information obtained in confidence. Due to the serious implications of issuing a certificate, the preparation of supporting documentation follows a rigorous process.

The supporting documentation must contain sufficient information to allow the Ministers to conclude that an individual is inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality as defined by the *Immigration and Refugee Protection Act* (IRPA).

The certificate, once signed by the Ministers, is referred to a judge of the Federal Court of Canada, for a determination of the reasonableness of the certificate. The certificate regime is based on a framework of judicial control. When a certificate is issued, all other immigration proceedings under IRPA regarding the individual are suspended until the Federal Court makes a decision on the reasonableness of the certificate.

A permanent resident may be arrested and detained if a warrant is issued. In order to do so, there must be reasonable grounds to believe that the person is a danger to national security, or to the safety of any person, or is unlikely to appear for a proceeding or for removal. Within 48 hours of the arrest, the Federal Court must commence a review of the reasons for the detention of the permanent resident and must do so at least once every six months following each preceding review. Foreign nationals[24] who are named in a certificate are automatically arrested and detained.

The judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit. On each request of the Minister made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national

[24] Foreign national means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.

named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person.

The judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed. The judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.

If the judge determines that the certificate is unreasonable, the certificate is quashed. If a certificate is deemed to be reasonable by the judge of the Federal Court, it is considered conclusive proof that the permanent resident or foreign national named in it is inadmissible. This means that the person named will be deported.

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

The certificate process has repeatedly been upheld by the Courts as constitutional and consistent with the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada has ruled that the certificate process strikes the proper balance between the rights of an individual and the need to protect Canada's national security. Adil Charkaoui, named in a security certificate, has recently been granted leave to appeal to the Supreme Court of Canada to challenge the constitutionality of the IRPA security certificate process.

B) Please also provide information on the number of affected persons and the extent to which effective remedies are made available to them (articles 7, 9 and 13)

Security certificates are an exceptional measure that is employed judiciously and its issuance is based upon a thorough process with heavy reliance upon the judicial system. Since 1991, only 27 certificates pertaining to 26 individuals have been issued. Currently in Canada, six individuals are being held on security certificates. Four individuals are convention refugees and therefore protected from deportation unless CIC completes a danger opinion and it is not thereafter quashed by the Courts.

A Minister’s delegate (a senior government official) must assess the risk to the individual upon return to his or her country of origin and the danger to Canada’s national security, and then balance the two. The decision to remove a person to a country where he or she may be at risk is made after careful consideration of the country conditions and all other

relevant information, including the risk the individual poses to Canadian society. The Federal Court of Canada then reviews this decision.

The Federal Court's decision on the reasonableness of the certificate generally cannot be appealed; IRPA contains a privative clause, which prohibits judicial review of a designated judge's reasonableness finding by appellate courts. However, at common law the appellate courts have created exceptions to this rule by allowing appeals on questions involving constitutional and *Charter* challenges and jurisdictional questions.

PROHIBITION OF DISCRIMINATION, GENDER EQUALITY, EQUALITY IN AND BEFORE THE LAW (ARTICLE 2, 3, 26)

QUESTION 10: Does the Government intend to repeal section 67 of the *Canadian Human Rights Act* and what concrete steps does it envisage to take in this regard? Please also indicate what measures the State party intends to adopt on the issue of matrimonial real property on reserve lands (periodic report, paras. 14 and 29-31).

A) Does the Government intend to repeal section 67 of the *Canadian Human Rights Act* and what concrete steps does it envisage to take in this regard?

The government intends to repeal section 67 of the *Canadian Human Rights Act*. The repeal of section 67 (the *Indian Act* exception) has considerable support among government and several national aboriginal groups and has benefited from a significant amount of reflection. In recognition of the fact that section 67 of the *Canadian Human Rights Act* excludes a significant sector of the population from the protection of human rights, the Government introduced an amendment to the *Canadian Human Rights Act* to repeal the exclusion clause and include an interpretive clause allowing measures that take into consideration the needs and aspirations of Aboriginal communities. On June 14, 2003, such an amendment to the *Canadian Human Rights Act* was put before Parliament as a consequential amendment in Bill C-61, the *First Nations Governance Act* which died on the order paper.

The Government is collaborating with key departments in the legislative process for the repeal of section 67 to ensure that Aboriginal people, especially women receive the full protection of the law. The Government will be identifying an appropriate legislative vehicle to realize this objective.

In 2005, the Canadian Human Rights Commission mandated a special working group headed by Commissioner Russ to develop a recommendation on section 67. The Commission's report will be made public in the Fall 2005 and it is expected that the recommendation will be to repeal section 67.

B) Please also indicate what measures the State party intends to adopt on the issue of matrimonial real property on reserve lands. (Periodic report, § 14 and 29-31)

The federal government is committed to ensuring that Aboriginal women who live on reserves are treated fairly and equitably in regard to the division of matrimonial property on the break-up of their relationship.

The Standing Senate Committee on Human Rights undertook a study of on-reserve matrimonial real property in 2003 and made a number of interim recommendations ranging from amendments to the *Indian Act* to carrying out consultations to determine a long-term solution. In May 2005, it requested a Government Response to its latest report. As well, the Standing Committee on Aboriginal Affairs and Northern Development worked diligently on this issue, consulted with some key stakeholders, and in June 2005 tabled a report entitled "Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property". The report recommends short-term interim legislation, long-term substantive legislation; a review of section 67 of the *Canadian Human Rights Act* and requested a Government Response. The Government Response to the Standing Committee report was tabled in the House of Commons on October 6, 2005. The Response indicates that the Government of Canada is continuing a collaborative process with the Native Women's Association of Canada and the Assembly of First Nations as we move towards a legislative solution. The Government Response to the Senate Committee will be tabled later this month, when the Senate resumes sitting.

In keeping with the Political Accords signed by the federal government and each of the five National Aboriginal Organizations in May, 2005, officials have met with and will continue to work collaboratively with the Native Women's Association of Canada and the Assembly of First Nations to determine a legislative solution that balances individual and collective interests on reserve.

QUESTION 11: What actions have been adopted to assess the situation of the Afro-Canadian community in the areas of employment, habitat, health and education, as recommended by the Special Rapporteur on racism, racial discrimination, xenophobia and related intolerance?

Several studies have been done in Canada with respect to racial and ethnic minorities and which assist in assessing the situation of African-Canadians communities, and to address issues facing by these communities in the elaboration of policies and programs. For example:

- In Spring 2004, a Statistics Canada study shows that one-fifth of foreign-and Canadian-born Blacks of prime working age (25-54) has a university education which is the same proportion as other Canadian-born persons of the same age-group and, despite these similarities, there are disparities in earned income and employment rates[25];

- In April 2004, the Conference Board of Canada published a study on the contribution of visible minorities to Canada's economic growth[26];

- In September 2004, the Conference Board of Canada published another study in which it explores barriers facing visible minorities in the workplace and how they have managed to overcome these barriers to success[27];

- In February 2002, the Canada Mortgage and Housing Corporation published a study which documented the state of knowledge of housing discrimination in Canada[28].

- In 2003, Statistics Canada published the Ethnic Diversity Survey, which examines Canada's ethnocultural mosaic in 2002, providing a portrait of the different generations of Canadians who today make up this country[29].

- In 2001, Health Canada published a report "Immigration and Health" on research undertaken by the Centre for Women's Health at Sunnybrook and Women's College Health Sciences. This report reviewed research on the health and determinants of health of Canadian immigrants, including those who originated from Africa, and discussed the implications of this research for

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[25] Anne Milan and Kelly Tran, *Blacks in Canada: A Long History*, Canadian Social Trends, Spring 2004, Statistics Canada, 6 pages

[26] The Conference Board of Canada, *Making a Visible Difference: The Contribution of Visible Minorities to Canadian Economic Growth*, April 2004,

[27] The Conference Board of Canada, *The Voices of Visible Minorities: Speaking Out on Breaking Down Barriers*, September 2004, 10 pages

[28] Canada Mortgage and Housing Corporation, Housing Discrimination in Canada: The State of Knowledge, February 2002 the CMHC also published in 1995 a report entitled *The Survey of Issues Affecting Ethnic Minorities in the Housing Sector* which examines the housing needs of ethnic and racial minorities.

[29] *Ethnic Diversity Survey*, Statistics Canada, 2003

policy makers. http://www.hc-sc.gc.ca/sr-sr/pubs/hpr-rps/wp-dt/2001-0105-immigration/index_e.html

- In 2003, the Canadian Population Health Initiative (CPHI) published The Women's Health Surveillance Report, funded jointly by the CPHI and Health Canada. This report took the first comprehensive look at the health of Canadian women and highlighted the importance of enhanced monitoring and research on women's health. In 2004, the CPHI published a supplementary chapter on ethnicity and migration, including immigrant women from Africa. http://secure.cihi.ca/cihiweb/dispPage.jsp?cw_page=PG_29_E&cw_topic=29&cw_rel=AR_342_E

- The Atlantic Centre of Excellence for Women's Health, managed through Health Canada's Women's Health Contribution Program, uses social and economic inclusion as a research methodology to generate greater awareness of and responsiveness to issues of racial, ethnic, language, and cultural diversity as they affect the health and well-being of women and girls in Canada. Focussing on African Nova Scotian women living in rural and remote communities, the project will deepen the understanding of the relative impact of social, economic, cultural and political barriers to health and care.

On March 21, 2005, the Government of Canada launched *A Canada for All: Canada's Action Plan Against Racism*, a concerted approach to eliminate barriers to opportunities for Canadians of all ethnic, racial, religious, and linguistic backgrounds.

One component of the action plan is the *Racism-Free Workplace Strategy* to fight workplace discrimination and ensure that Aboriginal peoples and members of visible minorities, including Afro-Canadians, have equal labour market opportunities and fair treatment in the workplace. Although it does not target the Black population in particular, the Strategy contains measures that would benefit members of the community.

The Strategy promotes a fair workplace, free of discriminatory barriers to employment and to the advancement of designated groups under the *Employment Equity Act*. It focuses primarily on workplaces under federal jurisdiction including 1,400 organizations employing over 2 million workers across Canada.

Communities participating in the National Homelessness Initiative are encouraged to bring together a wide variety of homelessness service providers, stakeholders, partners and clients to create, assess, and update a community plan to address homelessness. Many communities involve ethnic and racial minorities, which may include the Afro-Canadian community, in this process. Halifax particularly notes African Nova Scotians as one of their target sub-populations, including them in the identification of needs, as well as consulting them in the setting of community plan objectives and priorities.

Provinces and Territories

Provinces and territories are actively working in this area. For example, in Alberta a grant was given to the Calgary Somali Community Association's Community Race Relations Project in 1999 to work with schools, the Calgary Police Services, parents in youth in order to identify barriers to participation and integration experienced by Somali youth. In 2002, grants were awarded to the Alliance Jeunesse-Famille de l'Alberta Society for educational programs on rights and responsibilities for Canadian women of African-Francophone origin in order to remove barriers to their participation in the workforce. In addition, the Sudanese community received a grant to develop workshops and educational materials to learn about cultural differences and expectations and in 2003, the Calgary Catholic Immigration Society received a grant to create a coalition of stakeholders concerned about difficulties that some immigrants from Africa are experiencing with regard to employment and training to undertake a consultation and information gathering process and then use this information to develop and implement strategies for action. In 2004, the Madeleine Sanam Foundation received a grant for a project on role playing that has specific reference to African culture and beliefs, a one-hour video/film has been produced to assist service providers and community organizations to bridge cultural beliefs and barriers related to HIV-AIDS education.

The province of New Brunswick marks February as Black History Month and is supportive of related initiatives that enhance community awareness of Canadians of African origin who have been contributing to the growth and development of our province and country. As well, since 1999, the NB Department of Training and Employment Development has conducted a full review of employment programs and services to better meet the needs of all recent immigrants and visible minorities, including African Canadians. As a result, modifications were made to the Administrative Guidelines of certain programs; and, appropriate training and information was provided to regional staff.

With regard to the province of Ontario, The Ontario Human Rights Commission (OHRC) has developed two major documents since 2003 that have broadened the concept of racial discrimination. The first document released in December 2003 was the result of an inquiry into racial profiling and was entitled "Paying the Price: The Human Cost of Racial Profiling" ("Inquiry Report"). The second document released in June 2005 was a comprehensive OHRC's policy statement entitled "Policy and Guidelines on Racism and Racial Discrimination" ("Policy Statement"). Both documents are on the OHRC's web site: http://www.ohrc.on.ca/english/index.shtml

The Office of African-Nova Scotian Affairs, was legislated as a government entity in January 2005. Its website was launched on July 14th, 2005 (www.ns.gov.ca/ansa). The Office has been involved in on-going discussions with the Africville Genealogy Society, Halifax Regional Municipality, Canadian Heritage and Atlantic Canada Opportunities Agency concerning recognition of the cultural and historical significance of the site of Africville.

Nova Scotia is continuing to support the growth of African-Nova Scotian businesses with another year of funding of $500,000 to the Black Business Initiative. The province has invested $4.85 million in BBI since its inception in 1996.

The Province announced on July 20, 2005 that $1 million is being invested in African Nova Scotian learners to give students more opportunities to upgrade their skills and provide them with more support in school. Among other initiatives, more student support workers will be hired and community college scholarships will be increased.

Over the past few years, the Gouvernement du Québec has adopted several measures in the field of cross-cultural relations to increase openness to cultural diversity by encouraging cross-cultural rapprochement and combating racial discrimination. With respect to black communities specifically, including communities of African origin:

- Financial and logistical support for Black History Month celebrations in February to recognize the contribution of black communities to Québec's development.

- In September 2005, following the adoption of the *Shared Values, Common Interests* action plan in 2003, Québec launched a broad, Québec-wide consultation on the "Full Participation of Black Communities in Québec Society." A consultation document has been prepared for the purposes of this consultation, which is being led by a Working Group consisting of four parliamentarians. The document paints an exhaustive and up-to-date portrait using statistics regarding the black community in Québec, and identifies challenges that can be met to sustain economic success, reinforce the social structure and support and develop the social conditions for these communities' success (www.micc.gouv.qc.ca).

RIGHT TO LIFE, AND PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT

(ARTICLES 6 AND 7)

QUESTION 12: According to certain information, Aboriginal women are five times more likely to experience a violent death than other Canadian women. It is reported that about 500 Aboriginal women have been murdered or reported missing over the past 15 years, and that these cases have not yet been solved. Please provide statistical data and indicate what measures have been adopted at the Federal, Provincial and Territorial levels to address this issue.

The Government of Canada recently announced support to the *Sisters in Spirit* initiative. Providing $5 million to Native Women's Association of Canada (NWAC) over five years (2005-2010) will enable NWAC to build the capacity necessary to collaborate with the Government of Canada and other Aboriginal (First Nations, Inuit and Métis) women's organizations to undertake a multi-pronged approach to address the issue of violence against aboriginal women, including:

- undertaking research to assess the extent and causes of racialized and sexualized violence against Aboriginal women to assess the extent of the problem and to monitor trends;
- implementing a national public education strategy targeting a range of policy-makers and stakeholders to increase knowledge and understanding of the impact and causes of violence against Aboriginal women;
- informing policy and program direction and development on issues relating to Aboriginal women's human rights and their socio-economic, political and legal status;
- exploring sustainability for continued work on issues relating to violence against Aboriginal women; and
- ensuring an independent evaluation in the third year to measure progress and modify timelines, priorities and next steps.

Family Violence Initiative (FVI) and program funding:

Within the Aboriginal Women's Program of the Department of Canadian Heritage, the funding for the Family Violence Initiative has assisted Aboriginal women's groups to

carry out activities that: (1) examine and address issues of violence in immediate and extended Aboriginal families, and (2) research and develop holistic and culturally-appropriate responses to family violence. In 2003, Status of Women Canada decided to devote its Family Violence Initiative allocation ($1 million over fours years, from 2003-2007) to support the work of Aboriginal women's organizations towards eliminating violence against Aboriginal women. Additionally, over the last two fiscal years, approximately $1.7 million in funding has been provided to Aboriginal women's organizations by Status of Women Canada's Women's Program.

Federal-provincial-territorial collaboration

Federal-Provincial-Territorial Ministers Responsible for the Status of Women concluded their 24th annual meeting in September 2005, and for the third year in a row; they have agreed to focus priority attention on violence prevention for Aboriginal women. To improve the situation of Aboriginal women, Ministers agreed to take joint and/or individual government action: on access to programs and services, public education and awareness, capacity-building and policy enhancement according to their respective priorities and needs.

On June 16, 2005, Status of Women Canada hosted an all day meeting with Aboriginal women's organizations to plan for a Policy Forum on Aboriginal women and violence as part of the work it does with the FPT Forum of Ministers Responsible for the Status of Women. The Policy Forum planned for February/March 2006 will showcase best practices and build on our collective capacity to further address violence against Aboriginal women.

Provinces and Territories

The provinces and territories are committed to fight against violence against Aboriginal women. A few examples of provincial initiatives are provided below. The province of Alberta has established the Project KARE to investigate missing persons and unsolved homicides of "high risk" females. While this does not target aboriginal women specifically, they represent a significant portion of those victims. Alberta has over 40 police officers assigned to the project, with a budget of over $3 million.

In Ontario, all police services are required to have in place comprehensive policies, processes and procedures for undertaking and managing investigations of missing persons and found human remains. The Ontario Police College provides specialized training in these areas in support of the police requirements. On a national level, Ontario contributes missing-persons data to the Canadian Police Information Centre and the "Safely Home" program. Also, Ontario and other provinces and territories are co-operating with the federal government in the development of a proposed Missing Persons Index (MPI) component of the National DNA Data Bank.

The Ontario Aboriginal Healing and Wellness Strategy (AHWS) which was established in 1994 to reduce family violence and improve Aboriginal health was renewed in 2004 for a five year term. The AHWS will direct $191.5 million over five years to a range of programs and services that promote improved health and family healing in Aboriginal communities including: Shelters for Aboriginal women and children seeking refuge from violence; Crisis intervention programs in 47 northern and remote First Nations to respond to risks to personal health or family well-being, such as youth suicide and family violence; Aboriginal Health Access Centres to provide primary health care and a range of other health services; Community wellness programs that promote individual and family health and healing, and work to reduce health and other risks to family and community well-being; Healing lodges for Aboriginal people looking for traditional healing and contemporary therapeutic approaches to treatment for sexual assault, addictions and family dysfunction; Treatment centres for Aboriginal youth with addiction problems; and Outpatient hostels, traditional Aboriginal midwifery and mental health.

Service providers include First Nations, provincial Aboriginal organizations, Friendship Centres, Métis locals, Native Women's groups, and other non-profit Aboriginal organizations. To date, over 250 community-based and regional Aboriginal programs have been established, including shelters for abused women and their children, and healing lodges and treatment centres that offer traditional approaches to treatment of sexual assault, physical abuse, addictions and family dysfunction.

In the area of violence against women within families, Québec adopted its 2004-2009 Government Action Plan on Domestic Violence in 2004. This action plan includes more than 72 commitments. Special attention has been paid to the development of measures that prioritize the safety and protection of the most vulnerable victims, including Aboriginal women, disabled women, immigrant women and women from cultural communities. See in particular http://www.scf.gouv.qc.ca/angl-autochtones.pdf.

In addition, in 2004, Québec enlarged its network of Crime Victims Assistance Centres (CAVACs) in various regions where Aboriginal communities live. The CAVACs dispense frontline services to all crime victims, their immediate families, and witnesses (http://www.cavac.qc.ca/english/index.html).

In Saskatchewan, the Commission on First Nations and Métis Peoples and Justice Reform, which released its final report in 2004, spoke to the issues of violence. The province of Saskatchewan is responding through continued support for eight Aboriginal family violence programs, support for the North Battleford Domestic Violence court, and the implementation of a Domestic Violence Court in Saskatoon this fall. In addition, several provincial government departments together provide support for the Saskatchewan Towards Partnership Solutions to Eliminate Violence (STOPS) to develop a community protocol model to help communities mobilize. STOPS is a partnership of community organizations, government and individuals working together to promote healthy relationships and eliminate violence and abuse. Finally, the province is continuing work on victim support services including work with a northern community on safety planning.

Under the Royal Canadian Mounted Police (RCMP) leadership, Saskatchewan municipal police services and major crimes units of the RCMP in Regina and Saskatoon created a file centre/database on known Saskatchewan missing person cases in 1998. They indicate that there are 180 unsolved missing person reports dating back to 1940, and 7 unidentified remains (3 of which are babies). Each police service has a coordinator for missing persons and cold case investigation resources.

In 2003, the RCMP in Alberta initiated a High Risk Missing Persons Project which includes links with the RCMP in Saskatchewan and the Saskatoon, Prince Albert and Regina Police Services. This project is to review cases of victims whose lifestyle placed them at extreme risk of violent crime. Their focus is 82 cases.

In New Brunswick, the *Ministers' Working Group on Violence Against Women* was established in December 2000 with a mandate to give advice to the Minister responsible for the Status of Women. The advice of the Group was substantially reflected in the three- year action plan entitled *Better World for Women* which resulted in the increase of funding to transition houses to 100% of approved operating costs, including increased funding to the provincial shelter for aboriginal women, Gignoo House.

In May 2005, a second action plan on violence against women, *A Better World for Women: Moving Forward*, was released by the Minister responsible for the Status of Women. This action plan, which reflects an investment of $7.6 M, includes: the phasing-in of province-wide sexual assault services; treatment and support for children exposed to violence; enhanced transitional support benefits; specialized court: more timely and responsive, better links between family and criminal court, monitoring of court-ordered offender interventions and sentencing conditions, risk assessment tool; outreach and crisis intervention; funding for existing Second Stage Housing (70% in year 2; 80% in year 3; 90% in year 4; 100% in year 5); increased funding to Domestic Legal Aid. All of these services are available to both aboriginal and non-aboriginal New Brunswick women.

QUESTION 13: It is reported to the Committee that nine people have died following the use of taser guns by police since April 2003. Please provide information on the results of any investigations conducted into these deaths. Please also indicate what the regulations are for the use of taser guns by police.

A) Please provide information on the results of any investigations conducted into these deaths.

The Royal Canadian Mounted Police (RCMP) is aware of some deaths in Canada following the use of the Conducted Energy Weapon (CEW), also known as the TASER. Six of these deaths occurred in RCMP jurisdictions. Coroner's inquests are completed for two of these cases and the CEW was not found to have played any role in the deaths.

The Coroner's Service, which has no affiliation to the RCMP, is an independent body responsible for investigating all sudden deaths. The Coroner's Service is legislated by provincial law and is a provincial government agency. The Coroner has the authority to make recommendations based on the findings of an investigation. These recommendations may be used by police forces or governing bodies to inform policy-making and training procedures.

Here is a synopsis of the investigations to date:

In April 2003 a 51 year old male in Burnaby, British Columbia died after a struggle with police. The autopsy showed cocaine use, cardiomyopathy and coronary disease. The Coroner's inquest has met with scheduling delays and has yet to take place.

In July 2003, a 33 year old male in Prince George, British Columbia, died two days after a lengthy struggle with police. The autopsy showed cocaine use and the Coroner's inquest found the CEW did not play a role in this death.

In September 2003, a 34 year old male in Whitehorse, Yukon died after being arrested by RCMP. Prior to apprehension, he ingested a lethal dose of cocaine. Autopsy results confirmed cocaine intoxication. The Coroner's inquest determined the CEW was not a factor in the death. The jury made no recommendations.

In May 2005, a 34 year old male in Codiac, New Brunswick, died after a struggle with police. According to the toxicology results, the deceased had a dosage of 827 ng/ml of an anti-psychotic drug in his system. The normal therapeutic range for this drug is reported to be less than 50 ng/ml. The investigation is ongoing and a Coroner's inquest has not been held.

In June 2005, a 41 year old male in Surrey, British Columbia, died after being arrested by police. The investigation revealed the deceased was using cocaine at the time of his death. The investigation is ongoing and a Coroner's inquest has not been held.

In July 2005, a 42 year old male in Digby, Nova Scotia died after a lengthy struggle with police. Autopsy revealed an enlarged heart. The investigation is ongoing and a Coroner's inquest has not been held.

On August 22, 2005, the Canadian Police Research Center (CPRC) released its final report after a comprehensive review of research and data available on the use of CEWs in law enforcement. This year-long study was conducted at the request of the Canadian Association of Chiefs of Police (CACP). The report found that definitive research or evidence does not exist that implicates a causal relationship between the use of [the CEW] and death. Existing studies indicate that the risk of cardiac harm to subject from a CEW is very low and the increased use of CEW is related to a decrease in the use of lethal force in some jurisdictions, and to substantial decreases in overall police officer and subject arrest-related injuries.

The CPRC study noted that a common factor in the deaths of a number of people following forcible restraint may be a medical condition known as Excited Delirium (ED). This medical condition may be linked to the use of illicit drugs and some psychiatric illnesses. The CPRC is spearheading a national study into this condition to help police and other emergency workers respond more safely and effectively to situations involving people who may be experiencing ED. The RCMP will participate in the study.

B) Please also indicate what the regulations are for the use of taser guns by police.

The use of the CEW by RCMP officers is governed by RCMP operational policy. RCMP policy states the CEW must be used in accordance with the principles of the RCMP's Incident Management/Intervention Model (IM/IM). Before using the CEW, RCMP officers are instructed to consider other possible intervention options.

The principles underlying the RCMP's IM/IM are:

Recognizing the inevitability of the volatility and stress involved in situations of potential violence; and recognizing that a number of factors ranging from the threatening behavior of some individuals to the vulnerability of potential victims may aggravate the stress involved in the situation, the following principles apply to determining whether and how to intervene in a policing situation:

- The primary objective of any intervention is public safety.
- Police officer safety is essential to public safety.
- The intervention model must always be applied in the context of a careful assessment of risk.

- Risk assessment must take into account: the likelihood and extent of life loss, injury and damage to property.
- Risk assessment is a continuous process and risk management must evolve as situations change.
- The best strategy is to utilize the least amount of intervention to manage the risk.
- The best intervention causes the least amount of harm or damage.

The CPRC report also stated that it would be unwise and counter-productive for any police service or government body to develop policies and procedures that explicitly specify in what kinds of circumstances a [CEW] may or may not be used. The CEW must be regarded as another option, based on individual circumstances, for police to use to maintain order and public safety.

The CEW has been effective in subduing violent persons. It has been used in situations where, without the CEW being available to them, officers may have had no choice but to resort to lethal force. It has therefore resulted in greater safety for the public and the police. It is important to note, however, that the CPRC report emphasized that CEWs have never been intended solely as an alternative for lethal force, and that their use in most non-lethal incidents has been appropriate. The CACP has endorsed the CPRC study and has committed to sharing it with all Canadian police forces.

On June 14, 2005, the Victoria Police Service released its final report on the CEW. This study confirmed that the CEW is an effective tool for police officers trying to maintain order and protect the public. These independent reviews are based on the best available science and research on CEWs. The information will be used to enhance the RCMP's training and policy-making processes.

Provinces and Territories

Some provincial police forces also use CEW weapons. Where they are in use there are strict operational policies and procedures in place that include strict reporting requirements and monitoring systems. For example, with regard to the rules and regulations that govern police use in Ontario, a CEW is classified as an "intermediate weapon", requiring ministerial approval before it can be used by police. Ontario has taken a cautious approach in the use of CEW – they were authorized for use by trained members of tactical units and hostage rescue teams in 2002, and this authorization was expanded to include front-line supervisors and preliminary perimeter control and containment teams in 2004. Under Ontario's Use of Force Model, CEW can be used in situations where a person is actively resistant or violent towards the efforts of law enforcement. Ontario's Special Investigations Unit and the public complaints process are in place to investigate the improper or illegal use of CEW by police.

It is the opinion of the Ontario Deputy Chief Coroner that none of the deaths in Ontario were related to the use of CEW guns, but were due to cocaine use. In Alberta, the majority of deaths appear to be more related to conditions such as excited delirium, where death can occur from simple restraint. In 2005 there have been four deaths following the use of a CEW – one each in British Columbia, Ontario, New Brunswick, and Nova Scotia. These four deaths are still under investigation and no firm conclusion regarding the role of the CEW has yet been established.

The British Columbia Police Act, Use of Force Regulation (B.C. Reg. 203/98), specifies the training, reporting, and use of intermediate weapons such as tasers. The Regulation requires that police officers satisfactorily complete an approved training course and be qualified to use the device. The Regulation also requires that each agency develop a Use of Force policy and submit regular reports about the use of force to the Director of Police Services.

To date, the Ministère de la Sécurité publique du Québec has not been notified of any deaths linked to the use of CEW by police organizations since April 2003. The Ministère de la Sécurité Publique is considering whether it is appropriate to issue a police practice that specifically addresses the use of Conductive Energy Devices, commonly known as "Tasers", for inclusion in the police practices guide. This follows the Canadian Police Research Centre's August 2005 report on CEW. In addition, a draft communiqué to police directors in Québec, setting out guidelines for the use of CEDs, was submitted to officials from the Ministère de la Sécurité Publique in early September 2005 and should be released soon. The Ministère de la Sécurité publique is also considering the possibility of creating a provincial directory, similar to the pepper spray directory, to gather all pertinent information following police operations in which a CEW is used.

CEW guns are not in use in the provinces of Newfoundland and Labrador in and Manitoba.

QUESTION 14: Please provide data on the extent of homelessness in Canada as compared with the situation in 1999, on the number of deaths of people living on the street since that date, as well as information on measures adopted to address this issue (previous conclusions, para. 12).

To date, no reliable method for counting the number of people who are homeless in Canada has been identified and therefore Canada does not have any accurate national statistics. The very nature of homelessness means that counting the people affected is difficult. Homelessness seems to have increased in visibility in urban centres, but no one is sure how many people live on the streets or in substandard shelter. The homeless population has no fixed address, is mobile and in many cases, hidden.

Since its creation in December 1999, the National Homelessness Initiative (NHI) has achieved the following:

- created over 10,000 new emergency, transitional and supportive housing beds for the homeless;
- funded over 900 projects for the purchase, construction or renovation of sheltering facilities;
- funded over 500 projects for the purchase, construction or renovation of support facilities, including food and clothing banks, drop-in centres and soup kitchens;
- funded over 1,200 projects to improve or establish new support services, including training, skills development, counselling, and the provision of materials, such as clothing and/or blankets, for homeless people and those at risk.

While progress has been achieved, the following challenges have been identified:

- Cooperation: Community service providers have voiced concerns about the lack of cooperation and coordination between the NGOs and the various levels of government.
- Funding concerns: Service providers are requesting a stable source of funding for their programs.
- Long-term strategies: The NHI's goal is to move beyond emergency relief and to focus on more long-term strategies for eradicating homelessness (improved housing, literacy, education, skills development, and mental health care).

During the first years of the Initiative (1999-2003), communities focused on the most pressing and urgent needs of their homeless populations. They invested primarily in emergency shelters, established new ones, renovated and upgraded others while

enhancing support services and facilities like food and furniture banks. Based on the successes and the lessons learned, consultations with stakeholders, Federal, Provincial and Territorial representatives, together with the continuing need to support homeless people, the Government of Canada extended the Initiative for an additional three years (2003-2006). The continuation of the Initiative will help communities continue their efforts to reduce and alleviate homelessness and thus allow them to increase support for homeless people and to focus on longer term solutions such as transitional and supportive housing.

The extension of the NHI will further support the efforts of communities to help more homeless individuals and families to move into more stable living environments and increase their access to the supports and interventions they need to achieve greater self-sufficiency and reduce their dependency on emergency shelter use.

Additional information on measures to address homelessness may be found on the NHI website at: http://homelessness.gc.ca.

QUESTION 15: Does the State party intend to revise its policy that, in exceptional circumstances, persons could be deported to a country where they would be at risk of torture or cruel, inhuman or degrading treatment (periodic report, para. 51; previous conclusions, para. 13)?

Compliance with all of its international obligations is a cornerstone of Canadian foreign policy and our values. Canada also has an obligation to protect the right to life and security of the person of those within its borders. Part of this responsibility is to take action against those individuals who are in Canada or attempt to enter Canada that present a risk to national security or the security of persons.

Upholding both article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and protecting the right to life and security of persons threatened by terrorists and serious criminals presents an important challenge for us.

It is in order to meet this challenge and with the goal of complying with article 7 of the ICCPR that Canada is considering augmenting the alternatives to removal that are currently at its disposal to address security concerns. Criminal prosecutions are a possibility, provided that available evidence can meet the standards applicable in criminal proceedings and that the safety of persons who might testify against the accused is not at risk. However, prosecution is only warranted where there is sufficient evidence that a crime has been committed. For that reason Canada is also looking into preventive options, including detention where permitted by law and subject to regular judicial reviews, and release with conditions of supervision.

In addition to the government's efforts to develop alternatives to address security concerns, two parliamentary committees, one in the Senate and one in the House of Commons, are also examining these issues, in the context of their current review of the Anti-terrorism Act of 2001.

Notwithstanding the fact that the individual could be determined to be at risk under the *Convention Against Torture* or ICCPR, the application for protection could be refused if it is concluded that Canada's national security interests outweigh the harm the person faces upon return to their country of origin. 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.

The Government of Canada supports the legal analysis found in the Supreme Court's *Suresh* decision, but it is important to note that the Supreme Court did not have to rule on issues of international law. The Court did note that removal to torture was contrary to international law but that was not the focus of its decision. The question decided by the Court was one involving domestic law: defining rights under the *Canadian Charter of Rights and Freedoms*, and specifically the right to life and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice. It is in that context that the Court found the balancing process to be appropriate and consistent with other constitutional jurisprudence.

With respect to what might be the exceptional circumstances where removal to torture might be justified under our Charter, the Supreme Court did not define the term in the *Suresh* case nor has the government of Canada accepted a definition at this time. The Court indicated that defining the ambit of "exceptional circumstances" would have to await future cases. However, it is anticipated that the interpretation and application of this term would be very narrow. The Court implied that exceptional circumstances might include wars and national emergencies.

With respect to the effectiveness of judicial review, the Federal Court may grant relief if it is satisfied that the federal board, commission or other tribunal (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record; (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; (e) acted, or failed to act, by reason of fraud or perjured evidence; or (f) acted in any other way that was contrary to law.

The Federal Court will examine if the decision-maker had regard to all the relevant evidence and whether its assessment of the evidence was not manifestly unreasonable. A significant number of administrative decisions is set aside every year pursuant to judicial review. Canada has an independent and vigilant judiciary. In the specific context of decisions to remove persons subject to security certificates, three removal decisions were recently set aside by the Federal Court where exceptional circumstances had been invoked. The Court found that the decision maker had not independently considered and tested all of the evidence relevant to the danger that the person to be removed actually posed to national security. These cases are now under re-examination.

RIGHT AND SECURITY OF THE PERSON, AND TREATMENT OF PRISONERS

(ARTICLES 9 AND 10)

QUESTION 16: P1ease be more specific about the provisions of the Youth Criminal Justice Act that enable "possible imprisonment of young persons with adults", and indicate whether Territorial and Provincial legislation provides for the same possibility. (Periodic report, § 74 and 76)

Canada has concerns about young people serving time with adults, and it is for this reason that we have strengthened the protections against this in the new youth justice legislation, the *Youth Criminal Justice Act*, which came into effect in 2003.

The clear rule is that a young person, anyone under eighteen, serving a youth sentence, would never serve it with adults; they must be kept separate and apart.

It is important to note that in the very exceptional case where a youth receives an adult sentence, the youth is not directed to serve the sentence in adult custody. The legislation provides that a young person with an adult sentence who is under eighteen should serve the sentence in youth facilities. Only if the judge is convinced that it would be in the best interests of the young person, or if keeping the young person in youth custody would jeopardize the safety of others (including other youth in youth custody), can a youth with an adult sentence be placed in adult facilities.

Exceptional circumstances must be taken into account, for youth in pre-trial detention who would otherwise be far from their home community, and youth with adult sentences who may be an unmanageable security risk to other youth in a youth facility. The rights and safety of other young people must be taken into consideration, as well as the best interests of the youth with an adult sentence.

It is important to look at this issue in the context of other significant changes in the new legislation that reduce the use of pre-trial detention, limit the use of custody for youth, and eliminate transfer to adult court.

The *Youth Criminal Justice Act* contains significant changes including:

- Transfer to adult court is eliminated. Instead, the youth court has the authority to impose an adult sentence where the test for an adult sentence is met.

- The hearing on the appropriateness of an adult sentence will occur only after a finding of guilt.

- The test for an adult sentence has been amended: the youth justice court must consider the purposes and principles of youth sentences, with specific direction to consider that the youth justice system is separate from that of adults and emphasizes fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity, before imposing an adult sentence on the basis that the length of sentence available in the youth system is not long enough. The youth court must consider all relevant factors including the age, maturity, character and background of the young person, and the seriousness and circumstances of the offence.

- The creation of a new YOUTH sentence: the intensive rehabilitative custody and supervision order. This is a therapeutic youth sentence for those who have committed the most serious violent offences, and might otherwise receive an adult sentence. This sentence, which will receive specially allocated federal funding, will allow youth with mental or emotional problems to remain in the youth system and to receive the best treatment possible to address their problems.

We are not aware of any young people under the age of eighteen who have received adult sentences under the YCJA and held with adults. As well, Correctional Services Canada has recently confirmed that there are no young people under the age of eighteen in federal adult correctional institutions.

The *Youth Criminal Justice Act* is federal legislation that governs the youth justice system throughout Canada. While the federal government is constitutionally responsible for the legislation, the provinces and territories are responsible for the operation and administration of the youth justice system in their own jurisdiction.

Provinces and Territories

As the *Youth Criminal Justice Act* allowed, the Quebec government adopted an order in council establishing 16 years of age as the requisite age for the application of the Act's provisions to the offences designated therein. The effect is that children under 16 years of age cannot be detained with adults.

QUESTION 17: Please provide more information on rules governing detention of irregular migrants in correctional facilities, at the Federal as well as Provincial and Territorial levels (periodic report, § 653). According to some information, there has been an increase in detention of unaccompanied minor migrants since 1999. Please report on efforts undertaken to ensure that detention is used as a last resort, on alternative measures to detention that have been developed, and on the counselling for asylum seekers in detention, including children.

Canada does not currently detain individuals for immigration purposes, whether asylum seekers or others, in federally operated correctional facilities. The Canada Border Services Agency (CBSA) operates three Immigration Holding Centers (IHC) across the country designed for the detention of low risk individuals. In areas which are not served by an IHC, or where there is an existing IHC but the individual is deemed to constitute a higher risk than that which an IHC is designated to respond to, the individual may be detained in a correctional or remand facility operated by a provincial or territorial jurisdiction. Although detention for immigration purposes falls under federal jurisdiction, in such cases the provisions of the statutory regime in effect for the care and treatment of inmates in that jurisdiction apply.

A Memorandum of Understanding (MOU) exists between Citizenship and Immigration Canada (CIC) and the Canadian Red Cross which establishes a protocol allowing the Red Cross to monitor detention conditions in the Immigration Holding Centers in Toronto, Ontario, Montreal, Quebec and Vancouver, British Columbia. The MOU allows for the addition of other institutions. In addition to the CBSA centers, the Red Cross monitors immigration detention in provincial institutions in British Columbia and in Quebec. Both CBSA and the Red Cross would like to expand the immigration detention program to all provincial jurisdictions. CBSA is consulting with both the Red Cross and its provincial partners to that end.

Negotiations are currently under way to restructure the existing MOU to recognize the transfer of detention authority from CIC to the CBSA and the coming into force of the *Immigration and Refugee Protection Act* in 2002 As part of the negotiations, CBSA is exploring with the Red Cross specific protocols under which the CBSA will notify immediately the Red Cross when a minor under age eighteen is detained. This applies to all persons detained, including asylum seekers. A similar protocol for other vulnerable persons, such as those are not mentally competent, is being considered.

It should be noted that there also exist protocols for representatives of the United Nations High Commission for Refugees (UNHCR) to monitor detention conditions for detainees who are seeking refugee status in Canada.

Detention is a serious matter which is only used when no other course of action will serve. The *Immigration and Refugee Protection Act* (IRPA) does not preclude the

detention of minors; however, in the case of minors, the IRPA specifically stipulates that detention is to be used as a last resort and the best interests of the child must be considered by decision makers. It must be stressed that minors, whether accompanied by family members, a guardian or unaccompanied, are detained in an environment where there is no commingling of immigration detainees with those detained for criminal reasons. All persons are entitled to due process under the IRPA. As a general rule this includes regular detention reviews within 48 hours of detention, followed by a review within seven days and then every 30 days thereafter.

Historical statistical data on the number of minors detained is not available prior to that for fiscal year 2004/05. During fiscal year 2004/05, 113 unaccompanied minors and 376 accompanied minors were detained. The average length of detention for all minors was six days. These figures include both minors seeking asylum and all other minors detained.

With respect to the counselling of asylum seekers in detention, the IRPA upholds both domestic and international standards for detainees. In Canada, asylum seekers who are subject to any proceeding before the Immigration and Refugee Board (IRB) have the right to seek counsel of their own choice and at their own expense. Currently, 6 out of 10 provinces, which include the major refugee-receiving provinces Ontario, Quebec and B.C., provide free legal assistance to asylum seekers in detention.

It is also worth noting that the IRB appoints a designated representative for all minors who are subject to any proceeding before the IRB. It is the responsibility of the designated representative to counsel minors with respect to IRB proceedings, to instruct and find counsel and to act as witnesses for minors, if required.

Provinces and Territories

Québec

When it is tied to an immigration issue, the detention of asylum-seekers or persons in violation of immigration laws in Québec is a matter that falls under federal jurisdiction. Although Canada has exclusive responsibility for processing refugee claims, Québec offers various government services to claimants within its territory, chiefly temporary lodging, legal aid, last-resort financial assistance, free preschool, primary and secondary education for children education, and social services. The cost of health services and medication is covered by the federal government, but the services are delivered by health and social service professionals from Québec's system. In addition, Québec takes responsibility for unaccompanied minors who have made a refugee claim.

RIGHT TO FREEDOM OF OPINION AND EXPRESSION, RIGHT OF PEACEFUL ASSEMBLY

(ARTICLES 19 AND 21)

QUESTION 18: According to some information, police forces, in particular in Montreal have resorted to massive preventive arrests of demonstrators. It is alleged that between 1999 and 2003, about 1,700 persons were arrested and detained in relation to involvement in political activities. Please comment.

The ability of the police in Canada to make large-scale preventative arrests of protesters is very limited.

In effect, the *Canadian Charter of Rights and Freedoms*[30] guarantees the right to liberty to all Canadian citizens as well as the right to protection against arbitrary detention and imprisonment. The Québec *Charter of Human Rights and Freedoms* also guarantees that no one can be deprived of his or her liberty or rights, except on grounds provided for by law and subject to statutory procedures[31].

Such being the case, under the provisions of the *Criminal Code* of Canada, the police do not have the power of preventative arrest of a person except with respect to terrorist activities where there are reasonable grounds to suspect that a person is about to commit a terrorist act. The person must first appear before a judge in order to receive the conditions of his or her supervision.

The exceptional provisions were granted to peace officers as part of the numerous amendments made to the *Criminal Code* as a result of the *Anti-terrorism Act* (R.S. 2001, c. 41) that was adopted following the events of September 11, 2001. Their application is restricted and cannot be applied to political activities, except where these are linked to terrorist activities. To our knowledge, the power of preventive arrest has never been used in Quebec.

Under Canadian law, an arrest may only occur when a police officer observes the commission of a criminal or penal offence.

The arrests made in Montreal that are referred to were based on the commission of offences, specifically, mischief[32] (Article 430 of the *Criminal Code*), attempt to commit a criminal act[33] (Article 463 of the *Criminal Code*), or unlawful assembly[34] (Article 63 of

[30] Articles 7 and 9.
[31] Article 24.
[32] Article 430 of the *Criminal Code*
[33] Article 463 of the *Criminal Code*
[34] Article 63 of the *Criminal Code*

the *Criminal Code*), which allows for the arrest of a person where he or she assembles with at least two or more individuals and there is reasonable grounds to assume, given the environment in question, that they will disturb the peace tumultuously.

The last ground was contested before the courts and found valid by the Québec Court of Appeal,[35] which found that the wording of the offence was not ill defined and the terminology of the section did not contravene the right to freedom of expression, of association and peaceful assembly guaranteed in the *Charter of Human Rights and Freedoms*.

Therefore, the arrests made by the Montréal police were not arbitrary as they were made, according to the information available, on a legal basis.

Finally, it is important to note that all persons that are arrested and have not been released must appear before a judge within 24 hours of the arrest. Where appropriate, this would subsequently lead to a conviction only if the person arrested pleaded guilty or if he or she was found guilty by a judge on the basis of the evidence given.

[35] *La Reine c. Lecompte*, (1999) 149 CCC (3d) 185. Leave to appeal to the Supreme Court of Canada was denied.

RIGHT TO FREEDOM OF ASSOCIATION

(ARTICLE 21)

QUESTION 19: Will certain legislative texts in different Provinces be amended in order to ensure the full enjoyment of the right of association, in genera1, and the right to engage in trade union activities in agriculture, as recommended in 2004 by the ILO International Labour Conference Committee on the Application of Standards and in 2003 by the ILO Committee of Experts on the Application of Conventions and Recommendations?

Some provinces such as Newfoundland and Labrador and Manitoba do not exclude agricultural workers in its Labor Relations Act. Some such as Alberta, continue to monitor the issue, but currently have no plans to include farm workers. Some provinces such as New Brunswick have raised concerns that the definition of the concept of collective bargaining applied by the ILO is too broad.

In Québec, agricultural workers are subject to the Labour Code except where there are less than three employees on a farm (Article 21 of the Labour Code (R.S.Q., c. C-27). Where there are three or more agricultural workers on a farm, these workers have the same association and negotiation rights as all other salaried workers. The minimum requirement of three salaried workers in the same establishment is aimed at ensuring viable bargaining units within the labour relations framework where there is a union monopoly and multi-employer accreditation is not permitted.

PROTECTION OF THE CHILD (ARTICLE 24)

QUESTION 20: Please indicate whether and how the State party ensures the provision of the National Child Benefit to all low-income families, regardless of Province, as recommended by the Committee.

The National Child Benefit (NCB) represents a key element of the Government of Canada's approach to address child poverty.

Through the NCB, the Government of Canada works in partnership with provincial and territorial governments to provide income support, as well as benefits and services, for low-income families and their children.

A key design element of the NCB is the flexibility it provides to provinces and territories to develop and deliver programs and services that best meet the needs and priorities of their communities. As part of this flexibility, provinces and territories may adjust social assistance or child benefit payments by an amount equivalent to the NCB Supplement. This has permitted families on social assistance to maintain at least the same level of benefits as before, while providing additional funds for new or enhanced provincial and territorial programs benefiting low income families with children. In all jurisdictions, no family receiving social assistance experiences a reduction in its overall level of income support as a result of the implementation of the National Child Benefit.

At the same time, it is important to note that, as the NCB has matured the majority of provinces and territories no longer recover increases to the NCB Supplement, so that the vast majority of children living in low income families are benefiting from current increases. They are also benefiting from the range of benefits and services. All provinces and territories provide through reinvestments totaling, in 2002-2003, $673 million in social assistance savings together with additional investments of $91 million.

Overall, this approach, which combines flexibility and partnering, has served to support the objectives of the NCB, and has helped to significantly reduce the number of children living in low-income families across Canada.

RIGHT TO TAKE PART IN PUBLIC AFFAIRS

(ARTICLE 25)

QUESTION 21: What are the concrete results of the Canadian Government's commitment to establish a representative and inclusive public service, which reflects the diversity of the Canadian population, including women and persons with disabilities? Please provide statistics. (periodic report §164-165)

The Government of Canada is committed to building a federal public service that is representative of all Canadians. Our most recent statistics show that women, Aboriginal peoples and persons with disabilities are employed in the federal public service at a higher rate than their participation in the overall labour force. However, despite continued gains, the representation of persons in visible minority groups continues to lag behind their labour market availability. (See table.)

There has been progress: Over 5,200 persons from visible minority groups have been added to the public service workforce between 2000 and 2004. The number of visible minority executives has more than doubled, from 103 to 208. The rate of external recruitment was 5.7% in 2000 and has increased to 10.1% in 2004. Overall, visible minority employees received 8.1% of all promotions in 2004, up from 6.3% in 2000.

Representation of Employment Equity Designated Group Members in the Public Service Workforce			
	Public Service Workforce		**Workforce Availability[3]**
	1996[1]	**2004[2]**	**2001**
Employment Equity Designated Groups	%		
Women	48.2	53.1	52.2
Aboriginal Peoples	2.3	4.1	2.5
Persons with Disabilities	3.1	5.7	3.6
Persons in Visible Minority Groups	4.5	7.8	10.4
1. Representation at the time the *Employment Equity Act* came into force. 2. Representation as of March 31, 2004. 3. Workforce availability as determined from the 2001 Census and the Participation and Activity Limitation Survey (Statistics Canada).			

Milestones

In 1996, the *Employment Equity Act* came into force. It applies to the federal public service as well as to private sector employers under federal jurisdiction and Crown corporations with 100 employees or more.

In 2000, the President of the Treasury Board endorsed, on behalf of the Government of Canada, an Action Plan prepared by a Task Force on the Participation of Visible Minorities in the Federal Public Service. The resulting Embracing Change Initiative is a focused effort to make the public service of Canada reflect the country's demographic reality with respect to diversity.

In 2003, the Public Service Human Resources Management Agency of Canada (the Agency) was created to ensure improvements in the management of human resources in the federal public service. This includes the establishment of a public service that reflects an increasingly diverse Canadian population.

In 2003, the Agency established the Employment Equity Fund, as a replacement for the Employment Equity – Embracing Change Support Fund that had been put in place for three years ending in 2003. The new Employment Equity fund continues the provision of support to departments and agencies in order that they can contribute to creating and maintaining a federal public service that reflects the diversity of the Canadian population it serves. The fund puts particular emphasis on the hiring and promotion of members of visible minorities, but is also accessible for initiatives with respect to the other three designated groups, particularly persons with disabilities.

RIGHTS OF PERSONS BELONGING TO MINORITIES

(ARTICLE 27)

QUESTION 22: According to various sources of information, the land of the Lubicon Lake Band continues to be compromised by logging and large-scale oil and gas extraction, while no comprehensive agreement on this issue has been reached with the Federal government. Please comment, bearing in mind the views adopted by the Committee on this case (Chief Bernard Ominayak and the Lubicon Lake Band, Communication 167/1984).

Land claim negotiations between the Government of Canada and the Lubicon Lake Indian Nation (LLIN) are currently at an impasse. The last face-to-face negotiation session between Canada, Alberta and the Lubicon took place on November 23, 2003, as part of a process which began in July, 1998. The Lubicon assert that Canada's mandate is not sufficient to meet their demands, especially as it relates to the issues of financial compensation and self-government.

On June 23, 2005, the Minister of Indian Affairs and Northern Development wrote to Chief Ominayak of the LLIN proposing a return to the negotiation table in regard to issues other than compensation and self-government, in order to continue progress towards a settlement agreement of the Lubicon land claim. That offer was rejected by Chief Ominayak.

QUESTION 23: Please provide information about any action adopted by the State party in order to remedy the discriminatory effects of the Indian Act against Aboriginal women and their children and in particular to address the issue of second and third generation loss of reserve membership if an Indian woman marries outside her community (Previous conclusions, § 19).

While there has been progress, the membership sections of the *Indian Act* remain unchanged over the course of the period covered by the fifth periodic report. Moreover, the reference to the issue of the "second and third generation" is misleading. The first part of the reference is most likely made to what is commonly called the second generation cut-off. It is not clear what is intended by the reference to a third generation cut-off.

In terms of progress, a consultative process with First Nations, Inuit and Metis has been under way over the past year, leading back to the April 2004 Canada-Aboriginal Peoples. Accomplishments since that time include the May 31, 2005 Policy Retreat between the Prime Minister, members of the Cabinet and leaders of the five National Aboriginal Organizations in Canada. The discussions were followed closely by the signing of joint accords with the Government of Canada setting out the terms for involvement in future policy development. While the instruments for change are in place, the existing situation will prevail until replaced.

The Act creates a system of registration of Indians for the purposes of determining who may be eligible for certain federal government programs and benefits. The amendments to the *Indian Act* in 1985 repealed provisions under which women lost their Indian status if they married a non-Indian, which precluded offspring of that marriage from having Indian status. The 1985 amendments reinstated those women and their children who had lost Indian status prior to the amendments. They also created rules for registration providing that after two successive generations of parenting between a registered Indian and a non-Indian, eligibility for registration does not continue for future generations. This is commonly referred to as the "second generation cut off." It affects male and female persons equally.

The 1985 amendments to the Act also created a separate system where Indian bands can, to a certain extent, define their own membership apart from the registration system. Bands can and do choose to define their membership on the basis of a cultural connection to their community rather than solely on the basis of registration as an Indian. Programs and benefits that are delivered to band members may be different than those delivered to registered Indians.

The split between registration and membership was designed to provide autonomy to bands in a move towards eventual self-government where First Nations can define their own citizens. Under the Indian Act bands may choose to create their own membership

rules. In addition, Canada continues to negotiate self-government agreements with First Nations wherein they can define their own citizenship.

Preliminary talks on registration and membership systems have been held between the Minister of Indian Affairs and Northern Development and the National Chief of the Assembly of First Nations. It is anticipated that more in-depth and conclusive discussions will soon be initiated.

QUESTION 24: What is the national strategy for the preservation, revitalization and promotion of Aboriginal languages and cultures, and what recommendations, if any, have been adopted by the task force of 10 Aboriginal people (periodic report, para. 197)?

Established in 1998, the Aboriginal Languages Initiative (ALI) supports community and home initiatives for the revitalization and maintenance of Aboriginal languages leading to an increased number of speakers, the expansion of the areas in which Aboriginal languages are spoken in communities and inter-generational transmission of the languages.

ALI is delivered through collaborative efforts of the Department of Canadian Heritage and three national Aboriginal organizations and their affiliates: the Assembly of First Nations, the Inuit Tapiriit Kanatami and the Métis National Council. Outputs of this initiative include language strategies; instruction; courses and teaching programs; resource materials; audio and video recordings; transcriptions, translations and other documentation; surveys and promotion materials.

In December 2002, recognizing the need for enhanced safeguards for First Nations, Inuit and Métis languages, the Government of Canada announced that it would contribute $172.5 million over 11 years to preserve, revitalize and promote Aboriginal languages and cultures. The three-phased action plan for this commitment included: extension of ALI, which will sunset in 2006; establishment of a Task Force on Aboriginal Languages and Cultures to make recommendations to the Minister of Canadian Heritage; and creation of a national Aboriginal languages and culture entity.

The Task Force completed its examination of a broad range of measures to renew and sustain Aboriginal languages within the context of a national strategy and presented its report to the Minister in June 2005. The report, entitled Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures, is available online at www.aboriginallanguagestaskforce.ca. The report contains 25 recommendations aiming at promoting and preserving the rich linguistic heritage of Aboriginal peoples, the key ones are: (1) reprofiled funding of the 160 million over five years to address the urgent state of decline of Aboriginal languages; (2) additional endowment to contribute to long-term, sustainable support for language needs; (3) creation of a languages and culture council; (4) parity with funding for minority official languages; (5) legislated recognition of Aboriginal languages in Canada; (6) federal government commitment to work with First Nations, Inuit and Métis to develop a long-term, comprehensive strategy to support language; and (7) support the Assembly of First Nations proposal for residential school compensation.

The Department of Canadian Heritage is seeking feedback from stakeholders, including provincial and territorial governments, with respect to the 25 Report recommendations to

support the preservation, revitalization and promotion of the languages and cultures of Aboriginal peoples of Canada.

The Aboriginal Affairs Branch (AAB) of Canadian Heritage has embarked on a program of evidence based research to better support the policy development of its related aboriginal language programs and initiatives. This include several research projects, which describe, monitor and examine issues pertaining to the state and vitality of Canada's Aboriginal languages. Of particular importance, AAB is developing an interactive web based tool that focuses on Canadian Aboriginal languages, living cultures and identities. This application is envisioned to disseminate various research findings and information on the state of Canadian Aboriginal languages, culture and identity to a broad audience including policy makers, researchers, schools and to the general public.

DISSEMINATION OF INFORMATION RELATING TO THE COVENANT

(ARTICLE 2)

25. P1ease indicate how the Canadian public bas been informed about the Committee's 1999 concerns and recommendations. Were these conclusions distributed to all members of Parliament, and bas a parliamentary committee held hearings on issues arising from the Committee'9 observations, as anticipated by the dc1egation? (Periodic report, § 4; Previous conclusions, § 3)

The Human Rights Program of the Department of Canadian Heritage informs the Canadian public about the Committee's concerns and recommendations by posting the Concluding Observations on its website at: http://www.pch.gc.ca/progs/pdp-hrp/docs/iccpr_e.cfm . In addition, the Program sends the Concluding Observations to federal, provincial and territorial governments for further distribution. The public is also informed about Canada's appearances before treaty bodies by posting the Head of Delegation statement on the website once it has been delivered. It is not general practice to distribute treaty body documents directly to members of Parliament. A Senate Standing Committee on Human Rights was established in March 2001 to look at issues pertaining to human rights and, *inter alia*, to review the machinery of government dealing with Canada's international and national human rights obligations. The Senate is also considering a bill that would in future require that Canada's reports to UN treaty bodies be tabled in Parliament for information to Parliamentarians. The bill is in first reading.