Canada[1]

IHF FOCUS: freedom of expression and peaceful assembly; freedom of association; fair trial and detainees' rights; intolerance, xenophobia, racial discrimination and hate speech; asylum seekers; international humanitarian law.

The 11 September 2001 terrorist attacks in the United States (US) moved also the Canadian government to take anti-terrorism measures. A new Anti-Terrorism Act[2] was drafted shortly after the September 11 events and adopted by parliament in December 2001. Its adoption led to legal amendments some of which were questionable in the light of basic human rights standards, and negatively affected, for example, the rights to freedom of expression and association and privacy as well as fair trial standards.

In addition, the Canadian Helsinki Watch Group focused on the duty to prohibit incitement to hatred, the protection of refugees, and the failure to convict war criminals. Concerning incitement to hatred, the Group proposed a number of changes to the law to expedite proceedings. Regarding asylum issues, it gave recommendations for changes to the regulations for implementation of the US-Canada Agreement of Refugee Claims.

Freedom of Expression and Assembly[3]

The 2001 Anti-Terrorism Act amended the Criminal Code by establishing criminal liability for a number of terrorist offences, including the financing, facilitation and instigation of terrorism. These provisions were based on a definition of "terrorist activity," several of whose elements were vaguely worded. For example, the expressions "intimidating the public, or a segment of the public, with regard to […] its economic security" and "a serious risk to the health […] of the public or any segment of the public" were not defined in the text of the law and were therefore open to varying interpretations and potentially to arbitrary enforcement.

The act included a protective clause, which provided that certain acts covered by the definition did not fall under the definition if it was "a result of advocacy, protest, dissent or stoppage of work." Under the draft law, only "lawful" forms of protest activities were covered by the protective clause. However, while human rights groups welcomed this amendment, they were concerned that the protective clause was still subject to various interpretations and may not under all circumstances offer sufficient protection for the legitimate exercise of fundamental freedoms such as freedom of expression, conscience, assembly and association.[4]

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[1] Unless otherwise noted, based on the Canadian Helsinki Watch Group, *Annual Report 2002*, December 2002, by David Matas, co-chair of the Canadian Helsinki Watch Group.

[2] Bill C-36 - an Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, at http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=C&StartList=2&EndList=200&Session=9&Type=0&Scope=I&query=2981&List=toc-1

[3] Based on IHF, *Anti-Terrorism Measure, Security and Human Rights– Developments in Europe, Central Asia and North America in the Aftermath of September 11,* April 2003, at www.ihf-hr.org

[4] Comment by Alex Neve, secretary general of the English-speaking branch of Amnesty International Canada, per telephone, April 2003.

Freedom of Association

The Canadian Helsinki Watch Group expressed its concern about the separation by the Canadian government of the terrorist group Hezbollah[5] into two wings. One wing was allowed to raise funds in Canada, the other was not. The view of the Helsinki Watch Group was that neither wing should be allowed to raise money in Canada, because it was obvious that money officially raised for social or political purposes could be used by the military wing. The Group stressed that Hezbollah as a whole was a terrorist organization, not just its military wing. The government, at the end of the year, changed its regulations and listed Hezbollah in its entirety in the regulations.

Fair Trial and Detainees' Rights[6]

The Anti-Terrorist Act's suspension of fair trial standards in relation to some terrorist investigations raised concerns about due process rights for persons suspected of terrorism.[7]

The most troublesome amendment was contained in clause 4 of the legislation, which created a new form of judicial proceeding known as an "investigative hearing," during which a judge was empowered to conduct an investigation into alleged terrorist activity.[8] Under a new subsection 83.28(10) in the Criminal Code, the general right to refuse to testify or otherwise to provide evidence on the grounds of self-incrimination was waived in respect of any terrorism prosecution resulting from that investigation.[9] Notwithstanding its narrow application, this clause of the Anti-Terrorism Act clearly violated the rule against self-incrimination contained in the ICCPR.

Further, the Act amended, for example, the Criminal Code[10] and the Canada Evidence Act,[11] to permit a judge to restrict public access to a court hearing if it was "necessary to prevent injury to international relations" and the attorney general was permitted to issue a certificate ordering non-disclosure at any time "for the purpose of protecting international relations or national defence or security." However, international law does not invoke "international relations" as grounds for restricting access to trials.[12] The amendments appeared to create a presumption against public access, where the contrary should have been the case, and thus to contravene fair trial standards.

Intolerance, Xenophobia, Racial Discrimination and Hate Speech

Anti-Terrorism[13]

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[5] Hezbollah was founded in Lebanon in 1982 with the help of Iranian Revolutionary Guards. According to its 1985 platform, "The conflict with Israel is viewed as a central concern... the complete destruction of the State of Israel and the establishment of Islamic rule over Jerusalem is an expressed goal." According to the Anti-Defamation League of B'nai Brith Canada, Hezbollah is believed to be responsible for a number of terrorist incidents in the Middle East, Western Europe and Asia, including two bombings in Buenos Aires: the 1993 bombing of the Israeli embassy and the 1994 bombing of the Jewish community building.

[6] Based on IHF, op.cit.

[7] For a detailed discussion of the human rights impact of the act, see Amnesty International Canada, op.cit.

[8] Investigative hearings are subject to a sunset clause in five years unless both houses of parliament agree to renew them for another five years.

[9] Anti-Terrorism Act, clause 4.

[10] Clause 34 of the Act, amending subsection 486(1) of the Criminal Code.

[11] Clause 43, adding subsections to the Canada Evidence Act.

[12] Amnesty International Canada, op.cit.

[13] Based on the IHF, op.cit.

A wave of hate crimes against Muslims and Arabs was documented in Canada in the aftermath of September 11, 2001. People belonging or believed to belong to these groups were insulted, threatened and subjected to bias and intolerance in schools, at the workplace and in public places. Physical assaults as well as acts of vandalism and attempted arson against mosques and other Islamic institutions also took place.[14] According to survey results released by the Canadian Council of American-Islamic Relations (CAIR) in May 2002, 60% of Canadian Muslims had experienced bias or discrimination following September 11, while 82% knew of at least one fellow Muslim who had experienced intolerance.[15] Although no official nationwide figures on crimes related to September 11 were available, a considerable increase in hate crimes after the terror attacks in the US was reported by police.

Shortly after September 11, Canadian Premier Minister Jean Chrétien strongly condemned intolerance and hatred and stated that the full force of Canadian legislation would be used against such expressions.[16] In a positive development, the Anti-Terrorism Act also introduced amendments to strengthen the country's legislation on hate crimes, including by creating a new criminal offence of mischief against property primarily used for religious worship, motivated by racial or religious bias, prejudice or hate.[17]

However, there were reports of the government engaging in activities that reinforced negative attitudes toward people of Arab descent and Muslim faith by *inter alia* increasing the use of racial profiling and singling out Muslims and Arabs for interrogations and security checks because of their ethnicity and religion.[18]

Hate Speech[19]

The UN Committee on the Elimination of Racial Discrimination (CERD) established under the Convention against All Forms of Racial Discrimination considered in 2002 the report of the government of Canada under article 4 of the convention.[20]

To assist the committee in the consideration of the Canadian government report, the Canadian Helsinki Watch Group made a number of comments and recommendations. It recommended that three of the four Criminal Code defenses for the offence of wilful promotion of hatred be removed. Two of those offences related to truth: an accused could be acquitted under Canadian law if he/she "establishes that the statements communicated were true" or "if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true."

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[14] Council on American-Islamic Relations Canada (CAIR Canada), "CAIR-CAN releases interim report card on anti-Muslim hate, warns of racial profiling under Bill C-36," November 20, 2001; and Canadian Arab Federation, "Arab Canadians condemn the attacks on the Unites States and are alarmed by hateful incidents and Arab and Muslim Bashing," September 2001, at www.caf.ca/newsrelease/hatefulincidents.htm See also, CAIR Canada, op.cit.; and the Canadian Race Relations Foundation, "Recognizing and reacting to hate crime in Canada today," at www.crr.ca/EN/Publications/EducationalTools/RecognizingandReacting.htm

[15] CAIR Canada, "Survey: more than half of Canadian Muslims suffered post 9/11 bias," May 9, 2002.

[16] Amnesty International Canada special 11 September coverage, at www.amnesty.ca/sept11/index.html

[17] See Amnesty International Canada, Protecting Human Rights and Providing Security – Comments with respect to Bill C-36.

[18] The Canadian Arab Federation, the Muslims Lawyers Association and the National Anti-racism Council of Canada, "Arab, Muslim and Anti-racism groups call for an end to discrimination," September 9, 2002.

[19] Based on the Canadian Helsinki Watch Group, *Annual Report 2002*, December 2002.

[20] See www.unhchr.ch/tbs/doc.nsf/(Symbol)/a6ced60ebefe314dc1256c6f00594c92

The Supreme Court of Canada held that the offence of hate propaganda in the Criminal Code was not in contravention of the Constitution and that the defense of truth was not necessary for the offence to remain constitutional.

Canadian Helsinki Watch Group also stated that the defense relating to religious beliefs should be removed, because, if retained, the defense could in good faith, express or attempt to establish by argument an opinion on a religious subject. It emphasized that religion should not be used as a cornerstone for the hatred and to condone the prejudice.

The Helsinki Watch Group also noted that the Criminal Code offence required an amendment to make clear that Holocaust denial is a crime. The majority in the Zundel case at the Supreme Court of Canada, in the course of striking down the provision under which Ernst Zundel (a war criminal of WWII) was convicted, willfully and knowingly spreading false news causing public injury, referred to the German offence of Holocaust denial and said that it was "a much more finely tailored provision (than the Canadian Code false news provision) to which different considerations might well apply."[21]

The 1995 sentencing guidelines provided,[22] *inter alia*, that racial hatred as a motivation to a crime was to be considered an aggravating factor for sentencing purposes. As a result, a crime of violence motivated by racial hatred was more likely to receive a substantial sentence. However, the problem remained of imposing substantial sentences for hate speech offenses alone. Despite this fact, the Helsinki Watch Group noted that sentencing for hate crimes was too lenient to provide an effective deterrent to the crime. The sentences handed down to all those convicted in Canada for incitement to hatred had been light.

The Canadian Helsinki Watch Group also demanded that all the major police forces in Canada should have dedicated hate crimes units. This was necessary because prosecution for the Criminal Code offence required the consent of the Attorney General to acquire the evidence or to be sensitive to the nature of the problem. Private hate crime prosecutions were impossible.

Moreover, the Group said that racist organizations should be prohibited in Canada. It said that the failure to do so put Canada in violation of Article 4(b) of the UN Convention against all Forms of Racial Discrimination.

It further urged that civil federal hate speech jurisdictions be consolidated because in 2002 hate speech propagated by telephone and the internet, TV and radio and by post, etc. remained under different jurisdictions. The Group said that the Canadian Human Rights Commission should have jurisdiction over all cases of hate speech regardless of the form of media involved, and all provincial human rights codes should prohibit the publication of hate material. In 2002 this was the case only in Saskatchewan. In addition, the federal law on the scope of hate speech legislation needed expansion: it should cover religion, creed, marital status, family status, sex, sexual orientation, disability, age, color, ancestry, nationality, place of origin, race or perceived race, and receipt of public assistance, as the law in Saskatchewan did.[23]

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[21] *R. v. Zundel* (1992) 2 S.C.R. 731.
[22] 1995 Statutes of Canada, chapter 22 adding section 718.2 to the Criminal Code.
[23] Section 2(1)(m.01)

Asylum Seekers[24]

In 2002, Canada introduced a new Immigration and Refugee Protection Act. The act provided for the removal of some claimants without any form of risk assessment. One group was those who came to Canada through a designated "safe third country." A second group included those who either had been rejected as refugees; had been found ineligible to make a claim; had abandoned a claim; or had withdrawn a claim; those who had left Canada and then returned. People belonging to the last group could not apply for refugee determination or for pre-removal risk assessment where the return was within six months of the departure.

However, as the Canadian Helsinki Watch Group pointed out, there are many situations in which risk review that was excluded would be essential. For example, a person may withdraw a refugee claim in order to go back home to visit a dying parent after which he/she will return to Canada. Or, a refugee claim has been rejected and the person has returned home, but, following a coup, has to flee to Canada for a second time. In both of these cases, if the person returns to Canada within six months, some form of risk review should be available before removal.

US-Canada Agreement of Refugee Claims

In 2002, Canada entered into an agreement with the US to allocate responsibility for determination of refugee claims. The guiding principle was that a refugee had to make his/her claim in the country of first entry. The Canadian Helsinki Watch Group opposed the agreement, and called for a number of changes in the proposed regulations implementing the agreement.

The group recommended that the regulations should include a provision (as article 6 of the agreement did) to allow any party at its own discretion to examine any refugee status claim if it determines that it is in the public interest to do so. In addition, the regulations should include a provision for *de facto* family members, referring to persons not necessarily related by blood, but who are a *de facto* part of the family, by reason of financial or emotional dependency.[25] Particularly, the best interests of children should be taken into account.

The US-Canada Agreement provided that unaccompanied minors were exempted from the rule that the refugee claim should be determined in the country of last presence.[26] In the proposed regulations, the term "unaccompanied minor" is defined more narrowly than in the Agreement as a person who is not accompanied by any person who has attained the age of 18 years. Accordingly, a child accompanied by any 18-year-old or older would no longer be able to claim exemption from the requirement that his/her refugee claim be made in the US.

The US-Canada Agreement provided that, exceptionally, a minor with one or both parents in Canada was able to join his or her parents in Canada also in cases where their asylum claim had been rejected. However, the proposed regulations fail to provide these exceptions.

The Immigration and Refugee Protection Act distinguished between a "claim" for refugee protection and an "application" for refugee protection, with two different agencies dealing with them. The proposed regulations provide for better protection for family members in the cases of "claims" for refugee protection than in cases of "applications" for refugee protection. In the opinion of the Helsinki Watch Group, the protection should be equal in both cases.

[24] Based on the *Annual Report 2002* of the Canadian Helsinki Watch Group.
[25] See Overseas Processing, chapter 4, Processing Applications under section 25 of the IRPA, section 8.3.
[26] Article 4(2)(c)

Due to differences in legislation in the US and Canada, the group also recommended that from the "safe third country" ineligibility provision the following categories should be exempted: all those eligible to make a claim in Canada later than one year after arrival but ineligible to do it in the US because of the one-year rule; asylum seekers subject to detention in the US but not in Canada[27]; and on the basis of different refugee definitions between Canada and the US which impact the outcome of an asylum process.[28]

The US had a two-tier system, including an expedited process (an expedited administrative interview) and a full hearing. An adult or child who failed at the expedited stage could not benefit from judicial review, was subject to detention and was not able to invoke the due process guarantee in the US Constitution. The Canadian Helsinki Watch Group recommended that a person who has failed in the expedited process in the US and enters Canada should not be sent back to the US because an expedited process cannot be considered to be a sufficient refugee hearing.

Furthermore, it would be consistent with the official language status of French in Canada to allow French speakers to come forward to make their refugee claims in Canada.

Finally, the group recommended that both parties to the agreement be granted the power to reconsider any decision in order to qualify a person for an exception under the Agreement in limited circumstances.

International Humanitarian Law

Accountability for War Crimes

The Fifth Annual Report of Canada's Crimes against Humanity and War Crimes Program, issued by the Department of Justice, noted that the program had initiated only three new sets of judicial proceedings against alleged war criminals of WW II, rather than the target of 14 initially set for the year 2001-2002. One was commenced subsequently.

The Canadian effort to bring World War II war criminals in Canada to justice has been plagued by inordinate, inexplicable delays in the pending cases. Six of the subjects died during the 1990s before revocation of citizenship or deportation proceedings against them were completed: Wasily Bogutin, Serge Kisluk, Erichs Tobiass, Ludwig Nebel, Josef Nemsila, and Antanas Kenstavicius. In addition, two criminal proceedings were stopped upon the death of the defendants: Radislav Grujicic died before the proceedings were completed, and the Crown dropped charges against Stephen Reistetter because of the deaths of two witnesses.

Several other cases were pending as of the end of 2002 but they were making slow progress.

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[27] Section 31 of the Geneva Convention provides: "(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country." Canada and the US had different approaches; for example, Canada would not detain children which the US did.

[28] For example, the two countries had different approaches to the treatment of claims based on gender-based persecution and in relation to those who arrive without appropriate documents.

- The case of Vladimir Katriuk began in August 1996. The Federal Court found him guilty in January 1999, but over three years later, the cabinet had yet to make a decision on the revocation of his citizenship. As of this writing, Katriuk had been in Canada over six years since the commencement of proceedings, and had gone through only the first stage.

As of the end of 2002, a cabinet decision on the revocation of citizenship was overdue also in the cases of Wasyl Odynsky (commenced in September 1997, with a Federal Court ruling against him in March 2001); and Michael Baumgartner (commenced in September 1997, with a Federal Court ruling in August 2001).

Cases have not necessarily proceeded more speedily even after revocation of citizenship.

- Helmut Oberlander's case began in January 1995, and the Federal Court found him guilty in February 2000. The Supreme Court remarked that the delays were "inordinate and arguably inexcusable" and that the dilatory nature of the case "defies explanation." The governor in council revoked Oberlander's citizenship in August 2001. As of the end of 2002, Oberlander was still in Canada fighting deportation proceedings, close to eight years since those proceedings began.

In 2002, there were cases pending at initial stages in which delays were already giving cause for concern.

- The government began proceedings against Jacob Fast in September 1999 and against Walter Obodzinsky in August 1999. More than three years later, the Federal Court had yet to make a ruling on their cases. In the Fast case, all evidence had been heard. A decision on the revocation of citizenship of Michael Seifert was also pending as of the end of 2002, begun over a year ago in November 2001.

Only two World War II criminals were recently removed from Canada – Konrads Kalejs and Arthur Rudolph – but since neither had any permanent status in Canada, their cases were not characteristic. Two others left Canada: Ladislaus Csizsik-Csatary and Mamertas Roland Maciukas, both of whom initially contested proceedings and then dropped their opposition.

Only one case of contested revocation of citizenship has led to a removal:

- Proceedings for revocation of citizenship were initiated against Jacob Luitjens in January 1988. Luitjens was removed to the Netherlands in November 1992, almost five years later.

Bill C-18, submitted by the government to parliament in October 2001, would speed up procedures somewhat, but in the view of the Canadian Helsinki Watch Group, would not sufficiently improve the delays recorded in such cases. The bill proposes a consolidation of a finding on misrepresentation and revocation of citizenship in the Federal Court, and stripping the cabinet of the power to revoke citizenship. The bill further proposes that appeals be heard by Federal Court of Appeal rather than the Federal Court Trial Division as at present.

The Canadian Helsinki Watch Group proposed that appeals to the Federal Court of Appeal should be by leave (discretionary permission of the court) rather than by right. This means that if an applicant to the Federal Court of Appeal has a weak case for appeal, leave would be dismissed and the person would be removable more quickly than under the bill, with an appeal as of right.

The bill further proposes consolidation of revocation proceedings and removal proceedings in the Federal Court. However, it does not provide for consolidation in all removal proceedings, but only for those proceedings based on war crimes, crimes against humanity or genocide. Removal proceedings based on misrepresentation remain unconsolidated, i.e., the bill does not cover cases in which a person has lied about his war crimes past. The Canadian Helsinki Watch Group recommended consolidation of misrepresentation removal proceedings in order to ensure that a person who has lied about his past as a war criminal faces consequences for having done so.