

Implementing international human rights into domestic law & policy : The Canadian experience

Fair Trial Rights

Training for Taiwanese officials
October 2012

Erin Brady and Laurie Sargent
Department of Justice Canada



Presentation Outline

- Fair trial rights at international law
- How Canada implements fair trial rights – General
- How Canada implements fair trial rights – case study (right to an interpreter)

Fair trial rights at international law

Fair trial rights - Purpose

- Aimed at ensuring procedural justice between the parties.
- Lie at the heart of the proper administration of justice and the rule of law, and at the core of judicial expertise.
- Where fair trial rights are not respected, the legitimacy of the justice system and decisions rendered by the courts may well be called into question. This can have a very negative impact on social cohesion and stability.
- Similarly, a public perception that the justice system is too heavily weighted toward the protection of the rights of criminals relative to those of victims and society can create problems.
- Fair trial rights therefore involve a delicate balance between individual and public interests.



Fair trial rights at international law - interpretation

- Fair trial rights are set out in a number of treaties, including the *International Covenant on Civil and Political Rights* (ICCPR).
- Treaty provisions are often general and sometimes ambiguous – they require interpretation in good faith and in accordance with their “ordinary meaning” in their context and in light of the treaty’s object and purpose.
- Where can we look for more guidance about what a treaty provision means?
 - Periodic reports by States parties on how they’re implementing the provisions (may establish agreement of parties on proper interpretation);
 - Decisions of international or domestic courts interpreting the provision in question or a similar provision; also expert academic commentary;
 - General Comments of the Human Rights Committee (e.g. HRC General Comment 32 on ICCPR Article 14) (non-binding) ;
 - Views of the Human Rights Committee in individual communications (non-binding);
 - International declarations, resolutions, etc. and commentary of other UN expert mechanisms (e.g. UN Special Rapporteurs, etc.) (non-binding).

Fair trial rights at international law

ICCPR Article 14(1):

*In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a **fair and public hearing** before a competent, **independent and impartial** tribunal established by law. [...]*

- There are many elements of fair hearing (including fair criminal trial) rights protected by Art. 14 and 15 of the ICCPR, among other provisions, including a number of detailed protections applicable to criminal trials and a specific provision respecting youth accused of criminal offences.
- Due to time constraints, we will look at just a few of the key rights that participants indicated they wanted to hear more about, including:
 - Judicial independence and impartiality;
 - The importance of the public hearing, and the scope of justifiable limits on this guarantee;
 - The role of interpreter in ensuring a fair trial.

Independent and impartial tribunal

- **Independent** – There must be clear procedures adopted by law for the appointment of judges; objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of members of the judiciary and any disciplinary sanctions taken against them; legislated guarantees of security of tenure (term in office); the judiciary must not be the subject of political interference by the executive branch and legislature.
- **Impartial** - judges must not be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor improperly favour one party over another; the tribunal must also appear to a reasonable observer to be impartial. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. Concerns arise where “special courts” are set up to try particular categories of persons (e.g. terrorists); while Art. 14 does not prohibit military courts, they should only be used to try civilians in exceptional and justified circumstances and Art. 14 guarantees should still apply.

Fair hearing

- The specific guarantees found in paras. 14(2) and (3) are the minimum guarantees required for a fair criminal trial.
- The right to a fair hearing also means:
 - There should be no undue public pressure or influence on the court or jury.
 - Court proceedings must not be unduly delayed or long, for example due to a systemic lack of resources for the courts.
 - The overarching guarantee of equality and non-discrimination must be taken into account to ensure that “all persons shall be equal before the courts and tribunals” (Art. 14(1)) => no legal impediments to access by women, or on the basis of race, national or ethnic origin; barriers to access to the courts for persons with disabilities must be eliminated; court fees must not be excessive; regarding children, see Art. 12 CRC.
 - “Fair hearing” also encompasses the concept of “equality of arms” between the parties – while it does not require that parties be treated identically in all cases (e.g. there may be legitimate differences in procedural rules applicable to the prosecution and defence), there must be an equal opportunity to review and challenge evidence (disclosure).

Public hearing

- Public hearings ensure the transparency of legal proceedings, which safeguards the interest of the individual and of society at large. Access by the media and interested members of the public should be facilitated by providing notice of the time of hearings and adequate facilities for the public to attend.
- **Exceptions:** Art. 14(1) acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.
- Even where access to the trial is limited, the judgement, including essential findings, evidence and legal reasons must be made public, except where the privacy interest of children or persons engaged in matrimonial disputes are engaged.

Right to free assistance of an interpreter

ICCPR – Article 14(3)(f) – right of the accused in a criminal trial “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

HRC General Comment 32:

- This right applies to aliens as well as to nationals brought before the courts.
- It is a component of the right to equality before the courts and is of basic importance in cases in which difficulty in understanding the language used by the court may constitute a major obstacle to the right of defence.
- However, persons whose mother tongue is different from that used by the court are not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.

Summary of fair trial rights (criminal context)

Persons charged with criminal offences, including terrorism-related crimes, are entitled to the usual series of specific due process rights, including that all persons should be equal before the courts and tribunals, the right to be presumed innocent, the right to a hearing with due process guarantees, to be tried within a reasonable time, to be tried by a competent, independent and impartial court or tribunal, and a right to have a conviction and sentence reviewed by a higher court or tribunal in conformity with international human rights law. Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which both aim at ensuring the proper administration of justice, set out the bedrock norms applicable in all trials, whether of alleged terrorists or otherwise.

United Nations Counter-Terrorism Implementation Task Force website

How Canada implements fair trial rights – General

How Canada approaches implementation of fair trial rights - General

Constitutional protections:

- **“Unwritten constitutional principles”** – Judicial independence and access to the courts have been recognized as constitutional principles that will guide all decisions (e.g. recent decision finding that imposing significant court fees is unconstitutional).
- **Charter section 2(b)** – Right to freedom of expression – also protects the “open court principle” which requires any limits on access by the public or the media to be justified as proportionate to an important state purpose (e.g. protecting privacy, national security, and preserving order).
- **Charter section 7** – Overarching constitutional guarantee of 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 – applies to criminal trials and civil proceedings where life, liberty or security of the person is at stake (e.g. certain immigration proceedings involving detention). These include principles of procedural fairness/due process, including the right to a fair hearing before an independent tribunal, the right to know the case against you (including access to the evidence to be presented/disclosure), the right to present evidence, the right to written reasons that articulate and rationally sustain the decision, the right to State-funded counsel where circumstances require it to ensure an effective opportunity to present one’s case, etc.



How Canada approaches implementation of fair trial rights - General

Constitutional protections, cont'd

- **Charter section 11** – specific fair trial rights applicable during criminal proceedings, including: right to be tried within a reasonable time; protection against compelled testimony; right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; right not to be denied reasonable bail without just cause; right to trial by jury where the maximum punishment is five years or more (except for offences under military law tried before a military tribunal); etc.
- **Charter section 14** – Right to assistance of an interpreter where a party or witness “in any proceedings” doesn’t understand or speak the language in which the proceedings are conducted or is deaf.



How Canada approaches implementation of fair trial rights - General

Other means of implementation:

- **Legislation establishing courts** – Judicial independence is guaranteed in part by laws establishing courts, including provincial superior courts, the Supreme Court of Canada and other statutory courts. Constitutional guarantees may be used to challenge the validity of these laws if they are alleged to violate judicial independence (e.g. recent cases about security of tenure for judges of courts martial; challenges to the process for establishing judicial compensation).
- ***Criminal Code*** – In addition to setting out substantive criminal offences, the Code also sets out many procedural rules governing criminal trials, sentencing hearings, etc. The *Code* also allows the judge to order testimonial aids to assist vulnerable victims and witnesses in providing their testimony in criminal court.
- ***Canada Evidence Act*** – The CEA applies to all criminal proceedings and civil proceedings within federal jurisdiction. It deals with matters including: capacity of witnesses to testify; protection against self-incrimination; and the protection of certain types of privileged information (e.g. defence or national security information) from disclosure in public trial.



How Canada approaches implementation of fair trial rights - General

Other means of implementation, cont'd:

- **Youth Criminal Justice Act** – This Act sets out particular rules applicable to criminal proceedings against young offenders. These rules take account of the reduced level of maturity of such offenders, the need for heightened procedural protections, the emphasis on rehabilitation and reintegration of young offenders, and the need to hold young offenders accountable through interventions that are fair and in proportion to the seriousness of the offence committed. See: <http://www.canada.justice.gc.ca/eng/pi/yj-ij/ycja-lsjpa/ycja-lsjpa.html>.
- **Legal aid programs** – There is both criminal and civil legal aid available in Canada for persons who are unable to afford legal representation. The federal government is involved primarily in funding criminal legal aid, which is administered by the provinces and territories, who determine eligibility criteria (see: <http://www.canada.justice.gc.ca/eng/pi/pb-dgp/arr-ente/lap-paj.html>). Civil legal aid is generally only available for certain types of cases (e.g. family law matters).



How Canada approaches implementation of fair trial rights - General

Implementation of fair hearing rights generally:

- **Rules of civil procedure** – All civil court proceedings in Canada are governed by rules of civil procedure, generally set out in a combination of legislation and rules adopted by the courts. They are intended to ensure fairness between the parties. Recently, issues of electronic disclosure and “proportionality” in disclosure in civil trials has been a focus of reform efforts.
- **Common law principles of procedural fairness** – Even where the *Charter* doesn't apply, common law rules of procedural fairness require basic fairness in all administrative decisions affecting the rights or interests of a person e.g. disclosure of the basis for the decision, the opportunity to present one's case, the requirement that reasons for the decision be given.
- ***Immigration and Refugee Protection Act (IRPA)*** – The IRPA sets out procedural rules governing a number of different types of proceedings (e.g. refugee hearings, detention review, security certificate proceedings for non-citizens found to pose a threat to national security, etc.). Many of these proceedings are administrative in nature, but may be (and in some cases must be) subject to judicial review.



How Canada implements fair
trial rights – case study
(right to an interpreter)

Case study – the right to an interpreter in Canada

FACTS: Mr. T., a native of Vietnam, was charged with sexually assaulting a 15 year-old girl. His first language was Vietnamese. It was clear to the judge he did not understand English very well, so the judge appointed an interpreter. There was an issue regarding the victim's identification of the accused (she first said to the police he was "fat", but at trial he appeared thin). Over the course of the trial, the interpreter at times only summarized evidence in Vietnamese on this point and did not interpret one exchange between a witness and the trial judge at all. The accused was convicted. He appealed his conviction on the grounds that the identification evidence was flawed and that problems with the translation of the evidence violated his right to an interpreter, as guaranteed by s. 14 of the Canadian Charter of Rights and Freedoms.



Case study – the right to an interpreter in Canada

- Section 14 of the *Charter* guarantees the right to assistance of an interpreter where a party or witness “in any proceedings” doesn’t understand or speak the language in which the proceedings are conducted or is deaf.
- Canadian courts have said this right is an important aspect of trial fairness.
- It applies in criminal and civil proceedings where the court is required to observe the rules of natural justice.
- Section 14 is engaged where the accused does not understand or speak the language in which the proceedings are conducted.
- It is not engaged where the accused speaks and understands the language, but has some difficulty because of an accent or limited communications skill or some other similar reason, in understanding or answering questions.
- Courts and counsel have a responsibility to ensure that this right is being respected where they become aware of an issue.

Case study – the right to an interpreter in Canada, cont'd

- **Standard of interpretation:** the interpretation of legal proceedings must be continuous, precise, impartial, competent and contemporaneous. The standard is not one of perfection, but it must be of a high enough quality that justice will be done and will be seen to be done.
- **Costs of interpretation:**
 - In criminal cases, interpreter fees are generally borne by the State.
 - In civil matters between private individuals, where s. 14 has been found to apply, it is primarily up to the parties who need an interpreter, and not the Crown, to pay for the interpreter.
 - In immigration proceedings, the question whether s. 14 obliges the Crown or the courts to bear the costs of an interpreter in the event the person requesting an interpreter cannot afford one has been left open. It will likely depend on the importance of the individual rights at stake.
- **Outcome of Mr. T's case?** If the quality of interpretation during a trial does not meet the guaranteed standard, and has more than a trivial impact on trial fairness, this will generally result in the appeal being allowed and a new trial ordered.

Resources

- Canada's reports to UN treaty bodies, including on ICCPR: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>.
- *R. v. Tran*, [1994] 2 S.C.R. 951 (re: right to an interpreter in Canada): <http://scc.lexum.org/en/1994/1994scr2-951/1994scr2-951.html>
- Human Rights Committee, General Comment 32: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>
- M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2d ed.), 2005 – available in Chinese (2009 translated edition).