



Human Rights Accountability in National Security Practices

A Special Report to Parliament



November 2011





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CANADIAN HUMAN RIGHTS
COMMISSION

COMMISSION CANADIENNE
DES DROITS DE LA PERSONNE

Acting Chief Commissioner

Président par intérim

November 28, 2011

The Honourable Noël A. Kinsella
Speaker of the Senate
The Senate
Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

Pursuant to section 61(2) of the *Canadian Human Rights Act*, I have the honour of transmitting to you for tabling in the Senate, our Special Report to Parliament: *Human Rights Accountability in National Security Practices*.

Yours sincerely,

David Langtry

Encl.

c.c.: Mr. Gary W. O'Brien
Clerk of the Senate and Clerk of the Parliaments



CANADIAN HUMAN RIGHTS
COMMISSION

Acting Chief Commissioner

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DES DROITS DE LA PERSONNE

Président par intérim

November 28, 2011

The Honourable Andrew Scheer, M.P.
Speaker of the House of Commons
House of Commons
Ottawa, Ontario K1A 0A6

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Sincerely,

David Langtry

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Clerk of the House of Commons



Highlights

Ten years after the 9/11 attacks, the question of how best to ensure collective safety while respecting the rights of individuals remains on the minds of many Canadians, especially those who travel frequently by air.

Many of us associate this issue with our own experiences at airports. News reports regularly tell stories of air travelers who say they experienced discrimination during a security screening on account of their race, ethnicity, religion, or disability.

Over the past decade, the Canadian Human Rights Commission has conducted extensive research on national security and human rights in the Canadian context. It has consulted with organizations responsible for national security in Canada. And it has studied and analyzed court cases, inquiries into individual experiences, and the work of Parliamentary Committees.

The Commission has learned that many organizations have policies designed to prevent discrimination, but few can demonstrate whether or not their policies are actually effective in practice. For example, national security organizations have stated that they do not use racial or ethnic profiling. However, without clear methods to monitor practices and demonstrate that profiling is not taking place, an organization leaves itself open to criticism and the loss of public trust.

This Special Report to Parliament argues that good policy is not enough. Accountability is also necessary to ensure that national security organizations respect human rights in practice. Consequently, the Report recommends that Parliament amend existing legislation or create new legislation that requires national security organizations to track their human rights related performance and account publicly for that performance.

Table of Contents

● Introduction	1
● Environment	3
● Bridging the Gap Between Commitment and Practice	6
● Establishing Structures for Human Rights Accountability	8
● Recommendation	10
● Conclusion	12
● Annex	15



Introduction

The Government of Canada's national security organizations operate in a challenging environment. They must protect Canada from complex domestic and foreign threats that evolve constantly. At the same time, they must respect human rights as they are defined in the *Canadian Human Rights Act* and the *Canadian Charter of Rights and Freedoms*.

The effectiveness of these organizations depends in part on their capacity to earn and maintain the trust of the general public. Respect for human rights is not just a legal obligation; it is critical to earning that trust.

National security and human rights objectives must not be pursued with an either/or approach. The challenge is to find an appropriate balance. This fact has been acknowledged by the government, Parliament, the courts and national security organizations themselves. Yet, national security organizations have faced questions about the extent to which they respect human rights in the course of their work in Canada, and internationally.

Concerns have been raised about issues such as the profiling of individuals on grounds that are prohibited under the *Canadian Human Rights Act* (the Act). Such concerns were reported as recently as March 2011, by the Special Senate Committee on Anti-Terrorism.¹ Specific cases have linked Canadian officials and security organizations to human rights abuses involving Canadians at the hands of governments in other countries.²

Since 2001, the Canadian Human Rights Commission (the Commission) has produced research papers on national security and human rights. This research has brought together contemporary evidence and analysis to help inform Parliamentary and public debate.

The Commission has looked at issues such as Canada's national security environment and human rights; racial or ethnic profiling; and how Canadian security organizations report on human rights issues in their work.

Several research papers have informed this special report:

- *National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post—9/11 Environment*³
- *Human Rights Issues in National Security: An Inventory of Agency Considerations*⁴
- *The Effectiveness of Profiling from a National Security Perspective*⁵
- *Identity Certification and the Protection of Human Rights*⁶
- *National Security and Human Rights*⁷

In addition, the Commission's research has been complemented by material from judicial proceedings and inquiries into specific security cases, as well as the work of review bodies such as the Security Intelligence Review Committee.

Analysis of a decade of research clearly shows that there are no means to assess the human rights performance of Canada's national security organizations. Not only is there no accountability framework in place, national security organizations are not required to collect and report data on human rights performance in practice.

This Report recommends that Canada's national security organizations be required to demonstrate, with the support of evidence, that they are committed equally to the protection of national security and the respect for human rights, not just in word, but in practice.



Environment

National security and the personal security of citizens are fundamental government responsibilities. Over the course of just one generation, the environment influencing these responsibilities has shifted dramatically. International terrorist groups and their domestic supporters have replaced foreign states as the most direct security threat to Canada and its international partners.

This shift has been matched by changes in the Government of Canada's approach to national security. It has led to the establishment of new organizations and changes to the departments and agencies that already held national security responsibilities. The Government of Canada departments, agencies and institutions with the greatest responsibilities for security are:

- Canada Border Services Agency;
- Canada Revenue Agency;
- Canadian Air Transport Security Authority;
- Canadian Security Intelligence Service;
- Citizenship and Immigration Canada;
- Communications Security Establishment;
- Foreign Affairs and International Trade Canada;
- National Defence and Canadian Forces;
- Public Safety Canada;
- Royal Canadian Mounted Police (RCMP); and,
- Transport Canada.

National security organizations must continue to manage strategies and actions within established legislated frameworks in this shifting environment. While the nature of threats may have changed, the ground rules of democracy have not. Those ground rules include oversight from bodies that are mandated to provide external assessments of policies, practices and impacts.⁸ Examples of these bodies include the Security Intelligence Review Committee and the Commission for Public Complaints against the RCMP.

The ground rules also include a strong human rights framework. The *Canadian Charter of Rights and Freedoms* (1982) provides the foundation for a broad range of human rights in Canada. Section 7 protects the fundamental rights of life, liberty and security of person.⁹ Equality rights are protected under section 15 of the Charter. Section 15 strengthens the application of the *Canadian Human Rights Act* (1977), which was created to prevent and remedy discrimination in matters under federal jurisdiction. Both the Charter and the Act have general application to all federal laws, except where an explicit exception has been made.¹⁰

In essence, through the Charter and the Act, the Government of Canada is committed to ensuring that its laws, policies and practices respect human rights. Beyond its impact on federal organizations, the Act applies to the actions and decisions of Government of Canada officials at home and abroad.¹¹ Its reach extends to federally regulated services such as the passenger screening that private firms provide on behalf of the Canadian Air Transport Security Authority.

In a number of instances Canadian courts have been called on to consider what balance the Government of Canada and its officials must strike between protecting national security and respecting human rights. In general, under the Charter, Canadian courts have allowed some reasonable and justified constraints on human rights in the context of government efforts to protect national security. They have generally accepted the importance of managing risk, protecting confidential sources and preventing disclosure of information or evidence that may jeopardize the security of Canadians.¹² However, the Supreme Court of Canada and lower courts have developed and refined a body of jurisprudence that requires the Government to demonstrate that where a right is constrained, the constraint is rational and justified.¹³ In general, the courts' decisions have established that human rights protection is critical. These decisions suggest that it is necessary to integrate respect for human rights into national security systems, policies and practice.

When the Supreme Court of Canada was asked, specifically, to consider the relationship between national security, human rights and the rule of law, its response was clear:

[T]he challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.¹⁴

The Court has reinforced this perspective in subsequent decisions, such as Charkaoui:

*The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7 [of the Charter on “life, liberty and security of the person”], meaningful and substantial protection there must be.*¹⁵

This perspective on respecting human rights has been echoed by national security oversight bodies. For its part, the Security Intelligence Review Committee noted that the operational policies of the Canadian Security Intelligence Service, “some of which are sensitive and potentially intrusive, must comply with ... *the Canadian Human Rights Act*.”¹⁶ This commitment to respect human rights has also been reinforced by Parliamentarians in the course of the many House of Commons and Senate reviews of security and human rights issues.

As the Special Senate Committee on the *Anti-terrorism Act* noted, “[e]ven in extraordinary times and in response to extraordinary threats, the normal principles of non-discrimination must continue to be followed.”¹⁷ Further support for the value of ensuring full attention to human rights considerations in national security comes from the lessons learned in Canada and from international experience.

A study by the Commission, entitled *The Effectiveness of Profiling from a National Security Perspective*, assessed Canadian and international evidence on the use of profiling in security operations. It found no evidence to support the use of racial and ethnic profiling in helping to identify terrorists.¹⁸ The 2011 interim report of the Special Senate Committee on Anti-terrorism also considered this issue. It found that members of ethnic or religious communities believe that they were singled out or profiled, which created “distrust and resentment.”¹⁹



Bridging the Gap Between Commitment and Practice

It is important to underline that Canada's national security organizations have indicated that they are committed to ensuring that their policies and programs respect Canadian human rights law. For example, a report from the Canadian Security Intelligence Service noted that it was pursuing strategies designed to sensitize its employees on human rights issues as early as the 2004-2005 fiscal year.²⁰

Many of these initiatives have taken place following instances of human rights violations. Evidence, testimony and other findings in cases before Canadian courts, in judicial inquiries into the treatment of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin [Iacobucci Inquiry]²¹, and in the ongoing work of the Security Intelligence Review Committee have revealed issues with front line activities. Among these issues was the belief that:

- security imperatives overrode human rights considerations; or
- human rights were not relevant to security operations, particularly those taking place in other countries.²²

As the Honorable Frank Iacobucci stated in reference to the personal responsibility of individuals in security organizations to ensure protection of human rights, “[N]o Canadian officials should consider themselves exempt from this responsibility.”²³

The Commission does not assume that cases where national security activities did not respect human rights were representative of the overall views and activities of the organization in question at that time. Nor does it assume that those gaps are representative of the current environment. However, the public attention generated by these cases is important because of its impact on public trust. In the view of at least one well-known expert on public accountability, Canadians' trust in institutions and their leaders is in decline. Canadians are increasingly sceptical about verbal assurances from organizational leaders and expect consistent and credible proof.²⁴

This need for proof represents a challenge for national security organizations. By their very nature, they operate in an environment where transparency may not be appropriate. Without an effective approach to assessing and demonstrating that they are meeting human rights standards, these organizations will remain open to criticism.

One way to deal with this challenge is to develop and promote initiatives that integrate human rights responsiveness and respect into operational culture. Doing so provides the foundation for preventing discrimination.

The Commission has worked with national security organizations to make these changes to their operational culture. It has published *The Human Rights Impact Assessment for Security Measures*, which is appended to this report. The guide provides national security organizations with direction on what to do throughout a security measure's lifecycle to ensure that security standards, policies, and practices are both effective and respectful of human rights.

Another means of assessing and demonstrating results is through the efforts of national security oversight bodies. For example, the Security Intelligence Review Committee is an independent, external review body that reports to Parliament on the operations of the Canadian Security Intelligence Service. The Commission for Public Complaints against the RCMP seeks to ensure that complaints about the conduct of RCMP members are examined fairly and impartially. When these bodies deal with human rights issues, as they sometimes do, it is on an ad hoc basis. This approach does not provide a comprehensive look at potential human rights trends or issues.



Establishing Structures for Human Rights Accountability

National security organizations have stated that they do not use racial or ethnic profiling in their work.²⁵ However, without data collection and public reporting to demonstrate that they are meeting their human rights obligations, such assertions are easily challenged.

For example, the United Nations (UN) independent expert on minority issues recently reported, following a mission to Canada, that members of many ethnic communities believe that they are singled out disproportionately by the staff of government security organizations. They believe that this amounts to racial or ethnic profiling,²⁶ which is not permitted under the *Canadian Human Rights Act*.

Effective accountability structures would ensure that national security organizations can demonstrate that they actually do take human rights into account in practice. The external perspectives of national security oversight bodies and the presence of operational guides, while important, will not have the same effect as codifying human rights into an organization's very way of working.

The Commission believes that Canada's national security organizations would benefit from developing and implementing human rights accountability structures. This would require national security organizations to report on the impact of security measures on human rights to the appropriate authority. To do so, these organizations would need to collect data.

Collecting and analyzing data that is disaggregated based on race, disability, ethnic origin or other grounds can be done in a manner consistent with the *Canadian Human Rights Act* and the *Privacy Act*. Through data collection, national security organizations would be able to:

- show that decisions are based on objectively justifiable criteria and not discriminatory factors;
- prevent or address systemic barriers, for example, the barriers that certain types of technology may pose for people with disabilities;
- improve service delivery; and
- demonstrate a measure's effectiveness and soundness if it is challenged.

Several issues, including how to measure human rights performance and achieving the right transparency, would need to be considered and addressed in defining, developing and implementing an effective accountability structure.

The Commission has experience working with organizations to develop these processes. Its guide on how to perform a human rights impact assessment, appended to this report, is one example of this type of work.

The Commission also has experience working with organizations to create institutional frameworks for human rights issues.²⁷ These frameworks have helped organizations improve their human rights performance, while also demonstrating progress to outside audiences.

A legislated accountability structure would:

- enable national security organizations to assess respect for human rights legislation, principles and policies in their operations;
- identify the most relevant and appropriate means of measuring human rights performance and to deal with specific complaints or situations;
- provide a basis for senior leaders of those organizations to identify strengths and areas for improvement in organizational practice;
- enable ongoing dialogue and cooperation between each organization, the Commission, Parliamentarians and stakeholders on human rights issues; and
- demonstrate results to the Canadian public.



Recommendation

The Canadian Human Rights Commission recommends that Parliament introduce legislation that requires national security organizations to have accountability structures to track their human rights-related performance and account publicly for that performance.

Most legislation that provides the legal authority for Canada's federal organizations with national security responsibilities is silent on human rights issues. The Commission recommends that Parliament establish specific, legislated obligations to ensure that national security organizations operate within a human rights framework that is measurable, consistent and transparent.

There are two ways to proceed with this recommendation:

Amendments to individual pieces of legislation

The Government could propose amendments to individual pieces of legislation such as the *Canadian Security Intelligence Service Act* or the *Royal Canadian Mounted Police Act*. This could be done in tandem with Parliament's review of the enabling legislation for each individual national security organization. In each case, amended legislation would include a new section that would:

- Underline the importance of respect for human rights in the policies, programs and operation of that organization;
- Require the organization to have a human rights accountability structure in place that would enable it to gather data, measure institutional performance and take action to improve that performance as appropriate; and
- Require the organization to report publicly and regularly on its human rights performance.

A legislative solution

A new law could establish the same requirement across the Government. The proposed Act would include a schedule of the departments, agencies and institutions that would be required to have human rights accountability structures and reporting.

It is important to note that this legislative approach would clarify, codify and make transparent an adherence to human rights laws for all national security organizations. It would establish a consistent way for these organizations to document their performance and share that information with Canadians, thereby reinforcing their trust.

The Commission recognizes that Parliamentary committees have recommended a more effective oversight role for Parliament in the work of national security organizations. In 2011, the Special Senate Committee on Anti-terrorism recommended:

(16) That, consistent with the practices in the United Kingdom, Australia, France, the Netherlands, and the United States, the federal government constitute, through legislation, a committee composed of members from both chambers of Parliament, to execute Parliamentary oversight over the expenditures, administration and policy of federal departments and agencies in relation to national security, in order to ensure that they are effectively serving national security interests, are respecting the Canadian Charter of Rights and Freedoms, and are fiscally responsible and properly organized and managed.²⁸

The Commission is of the view that its recommendation could be implemented through the structure recommended by the Special Senate Committee or by any other structure, including independent reporting by the organizations in question.

The key is the accountability process for adherence to human rights obligations. It should be supported by the data collection and reporting necessary to make that accountability transparent to Canadians and to the people within those organizations.

The Commission is prepared to work with these organizations as partners in an effort to design effective accountability structures, much as it has worked with them in the past. Based on experience, the Commission believes that it is possible to identify appropriate measures to track performance and develop reporting vehicles that will meet the needs of Canadians as well as the organizations themselves.



Conclusion

Canadians expect to be protected, but they do not expect that protection to come with a wholesale loss of rights and freedoms. They expect human rights to be respected in the course of those actions. That expectation is not simply a public preference; it is anchored in the *Canadian Human Rights Act* and the *Canadian Charter of Rights and Freedoms*.

Leaders of national security organizations have committed to improvements. While there is evidence of action and no reason to doubt the good faith behind those commitments, the introduction of a clear accountability structure in relation to human rights performance would enable those organizations to build and sustain the public trust that they require to carry out challenging responsibilities. This is especially critical to building and maintaining trust among members of ethnic, racial and religious communities. Creating an accountability structure would benefit both Canadians and the organizations that protect them.

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 2. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Report of the Events Relating to Maher Arar: Analysis and Recommendations (Ottawa: Public Works and Government Services Canada, 2006), online: <http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf>.
 3. Wesley K. Wark, "National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post—9/11 Environment" (Ottawa: Canadian Human Rights Commission, 2006), online: <http://www.chrc-ccdp.ca/research_program_recherche/ns_sn/toc_tdm-eng.aspx>
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 5. Jimmy Bourque et al, "*The Effectiveness of Profiling from a National Security Perspective*" (Ottawa: Canadian Human Rights Commission, 2009), online: <http://www.chrc-ccdp.ca/research_program_recherche/profiling_profilage/toc_tdm-eng.aspx>
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7. Pearl Eliadis, "National Security and Human Rights" (Ottawa: Canadian Human Rights Commission, 2011), online: <http://www.chrc-ccdp.gc.ca/research_program_recherche/ns_2011_sn/toc_tdm-eng.aspx>
8. The mandate of SIRC is set out in its website: <http://www.sirc-csars.gc.ca/abtprp/index-eng.html>. The mandate of the CPC is set out in its website: http://www.cpc-cpp.gc.ca/wwa/aus_notre-eng.aspx 14 Canadian Human Rights Commission
9. *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
10. *Canadian Human Rights Act*, RSC, 1985, c H-6.
11. Section 40(5) of the *Canadian Human Rights Act* bars the Commission from dealing with complaints about incidents that occur outside Canada where the person concerned is not Canadian or a permanent resident. However, where the circumstances provided by s. 40(5) do not apply, the Canadian Human Rights Tribunal has noted that Foreign Service officers posted in other countries are representatives of Canada and there "is no reason why the principles of the [*Canadian Human Rights Act*] should not apply to their activities." *Naqvi Canada (Employment and Immigration Commission)*, [1993] CHR 2 (CHRT) at 40-41.
12. *Wark Report*, *supra* note 3, and *Harkat (Re)* 2010 FC 1242.
13. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 at para 22-23.
14. *Application under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 SCR 248 at para 7
15. *Charkaoui*, *supra* note 13 at para 27.
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22. These include cases of “extraordinary rendition,” arbitrary detention, torture and cruel treatment: see Iacobucci Inquiry, Final Report, (Ottawa Public Works and Government Services Canada, 2008), (the actions of Canadian officials were deficient and contributed to the torture of Canadian citizens) at 363-367, paras 60-75, online: < http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf>; Arar Commission of Inquiry, *supra* note 2; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44; *Almrei (Re)*, 2009 FC 1263, at para 486 ff.
23. *Iacobucci Report, Supplement*, *supra* note 21 at para 5.
24. Donald J Savoie, *Court Government and the Collapse of Public Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008).
25. The Royal Canadian Mounted Police states that it does not conduct racial profiling: see RCMP, *Departmental Performance Report for the Period ending March 31, 2005* (Ottawa: Public Works and Government Services Canada, 2005).
26. United Nations, *Report of the independent expert on minority issues: Mission to Canada*, 2010 at paras 62-63, online: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.23%20Add.2_en.pdf>
27. For example, the Commission has developed the Human Rights Maturity Model, http://www.chrc-ccdp.gc.ca/hrmm_mmdp/default-eng.aspx.
28. *Senate, Special Senate Committee on Anti-terrorism*, *supra* note 1, p. 45



Annex

The Human Rights Impact Assessment for Security Measures