David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

Brief on Bill C-5: *An Act to amend the International Transfer of Offenders Act*

Submitted by: the David Asper Centre for Constitutional Rights
To: The Standing Committee on Public Safety and National Security

Prepared by the Working Group on International Prisoner Transfers

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Faculty of Law, University of Toronto
39 Queen's Park Cres. East
Toronto, ON M5S 2C3
Tel: 416-978-0092
Web: www.aspercentre.ca

Contributors:
Stoney Baker, Katherine Dalgleish, Anu Koshal, Ryan Lax, Tatiana Lazdins, Esther Oh, Katherine Robertson, Sean Tyler, Professor Audrey Macklin, Executive Director Cheryl Milne

About the Centre

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education in the area of constitutional rights in Canada. The Centre houses a unique legal clinic that brings together students, faculty and members of the legal profession to work on significant constitutional cases. Through the establishment of the Centre the University of Toronto joins a small group of international law schools that play an active role in constitutional debates of the day. It is the only Canadian Centre in existence that attempts to bring constitutional law research, policy, advocacy and teaching together under one roof. The Centre aims to play a vital role in articulating Canada's constitutional vision to the broader world. The Centre was established through a generous gift to the law school from U of T law alumnus David Asper (LLM '07).

Our Mission: Realizing Constitutional Rights through Advocacy, Education and Research.

Our Objectives:

- To make a significant contribution to the quality of constitutional advocacy in Canada
- To be an expert resource on constitutional rights in Canada
- To increase the awareness and acceptance of Canadian constitutional rights

Executive Summary

Background

The purpose of the *International Transfers of Offenders Act* (the *Act*) is "to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals." However, Bill C-5's proposed amendments (which serve to increase the Public Safety Minister's discretionary powers in rejecting transfer requests) would undermine this very purpose. The focus of this brief will be on the following shortcomings:

- lack of rational justification between the *Act*'s purpose and the Minister's broad discretion,
- violation of offenders' mobility rights as Canadian citizens under s. 6 of the *Canadian Charter of Rights and Freedoms*,
- the *Act*'s negative implications for Canada's bilateral and international treaty obligations and international reputation.

The *Charter* Rights of Canadian Offenders Abroad

S. 6(1) of the Charter provides Canadian citizens with "the right to enter, remain in and leave Canada". If a sending state approves a prisoner transfer, unilateral rejection of the prisoner transfer by the government of Canada would amount, in our view, to a prima facie breach of the Canadian's mobility right. The breach of a *Charter* right requires justification. The stated purpose of the amended *Act* – "to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals" – militates in favourof the return of offenders to Canada rather than their continued detention abroad.

The proposed change to the purpose of the *Act* would expand it to include "enhancing public safety". Yet.the purpose of increased public safety cannot possibly justify preventing Canadian prisoners abroad from completing their sentences in Canadian prisons unless a detriment to public safety arises when offenders are detained within Canada's prison systems as opposed to being detained within a prison abroad. If Canada's prison system cannot keep the public safe from offenders, breaching the mobility rights of a limited number of offenders by forcing them to serve their sentence abroad surely cannot correct the problem.

Furthermore, in rejecting transfer requests, the offender is excluded from participating in Canadian reintegration programs and being registered as an offender in Canadian prison records. The result would be that Canadian offenders would complete their sentences in international prisons and be deported back to Canada without any constraints, cannot be construed as enhancing public safety.. With the proposed revisions to the *International Transfer of Offenders Act*, there is an increased likelihood that an offender's section 6 rights would be unjustifiably violated because the Act's purpose is not rationally connected to its actual implementation.

International Considerations and Implications

Bill C-5's proposed changes do not align with Canada's treaty obligations on both a bilateral and international level. Bilateral treaties on the international transfer of prisoners were formed on the basis of cooperation between both the sending and receiving state, and with the intent to reintegrate offenders into society. Bill C-5 diminishes the spirit of reciprocity that is crucial to the operation of bilateral arrangements and so has the potential to hinder Canada's reputation as a good faith partner with positive international relations. The proposed amendments also ignore the intent of the prisoner transfer treaties as they obstruct, rather than facilitate, effective reintegration.

Recommendations

Public safety is served by facilitating prisoner transfers to Canada. Indeed, adding public safety to the list of the statutes purposes is superfluous. The broader discretion afforded to the Minister under Bill C-5 to refuse such transfers, ostensibly in the name of public safety, actuallysubverts rather than advances attainment of this objective. We recommend rejection of Bill C-5.

Background

The *International Transfer of Offenders Act* (the *Act*), which came into force on October 29, 2004, updates the *Transfer of Offenders Act,* which was proclaimed in 1978. The legislated purpose of the *Act* is "to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals." The Public Safety Minister is responsible for the administration of the *Act*.

The ability of all Canadians to enter and remain in Canada is protected by s. 6 of the *Canadian Charter of Rights and Freedoms*. Given its focus on constitutional rights, the Centre's submissions will focus on analysis and recommendations in two key areas. First, we explain how the impact of restricting prisoner transfers on the *Charter* rights of Canadian offenders imprisoned abroad would render the *Act* unconstitutional. Secondly, we examine the broader systemic implications of Bill C-5 in relation to Canada's international obligations under multilateral conventions and bilateral treaties.

The Unjustifiable Breach of the Mobility Rights of Canadian Offenders Abroad

Section 6(1) of the *Canadian Charter of Rights and Freedoms addresses* the mobility of Canadian citizens. It states that "[e]very citizen has the right to enter, remain in and leave Canada."[1] The proposed legislation in Bill C-5, which increases the discretionary power of the Minister of Public Safety over the transfer of imprisoned offenders abroad to Canada, is likely to lead to *prima facie* violations of the offender's s. 6(1) right to enter Canada. These violations cannot be justified under section 1 of the *Charter*.

Federal courts are divided on whether the *International Transfer of Offenders Act* engages the s. 6(1) mobility rights of offenders. In *Van Vlymen v Canada*, the Federal Court found that the offender's mobility rights were active once the foreign country agreed to let transfer him to Canada.[2] Justice Harrington ruled otherwise in two cases, also at the Federal Court. He found that because the offender was incarcerated, his mobility rights had been justifiably restricted and were not engaged.[3] The Federal Court agreed with Justice Harrington in *Getkate v Canada*.[4] We acknowledge that the detaining state and not Canada, is responsible for the deprivation of an offender's liberty. However, the offender's right to enter Canada provided in s. 6 is *prima facie* violated if the Minister of Public Safety exercises government power to reject the prisoner transfer when the foreign detaining state has already approved the transfer. In such circumstances, the offender is denied his/her right to enter Canada on account of Canadian government action alone.The foreign state deprives the offender of his or her liberty, but does not prevent the transfer of the offender into Canadian custody. The offender is

[1] *Canadian Charter of Rights and Freedoms*, s 6, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] *Van Vlymen v Canada (Solicitor General)*, 2004 FCJ 1288 at paras 97 and 100 ["*Van Vlymen*"].
[3] *Kozarov v Minister of Public Safety*, 2007 FCJ 1132 at para. 32; *Divito c Le Ministre de la Sécurité Publique et de la Protection Civile* 2009 CF 983 at para 18 [This case is currently before the Federal Court of Appeal, which has reserved its decision.].
[4] *Getkate v. Canada*, 2008 FC 965, [2009] 3 FCR 26

prevented from entering Canada for no other reason than the decision of the Minister to reject the transfer, thereby engaging mobility rights set out in s. 6(1) of the *Charter*. Such decisions must be justified under s. 1.

Granting greater discretion to the Minister of Public Safety to approve or reject prisoner transfers increases the likelihood that the offender's s. 6 rights are violated in a manner that cannot be justified under s. 1. Under the proposed legislation, Clause 3 makes "the Minister's consideration of all factors under section 10 of the Act discretionary ('the Minister may consider'), rather than mandatory ('the Minister shall consider'), thereby amplifying the potential for the unconstitutional abuse of discretion. ."[5] Following the standard set in *R. v Oakes*, two criteria must be met to justify a violation of a *Charter* right under section 1.[6] First, the government's objective must be "pressing and substantial." Second, the means employed by the government must be "reasonable and demonstrably justified" in a democratic society. To satisfy this second criteria, the government bears the burden of meeting three criteria: 1) that the means employed are rationally connected to the government's objective; 2) that the means impair the claimant's rights as little as possible; 3) and that the positive effects outweigh the negative effects. In order for the Minister to refuse a transfer, he must satisfy all of these criteria.

We agree that the government's objective, to ensure public safety and help rehabilitate and re-integrate offenders into Canadian society, is sufficiently pressing to override a *Charter* right. Where the Minister's actions fail constitutional muster is at the next stage of the *Oakes* test. Simply put, there is no rational connection between denying a transfer and either enhancing the public safety of Canadians or rehabilitating offenders into Canadian society.

Consider first the public safety of Canadians. Offenders transferred to Canada under the terms of the *Act* are not released early or given lighter sentences than offenders already serving their sentence in Canada. They simply serve their sentences in Canadian prisons under the auspices of Canadian authorities. There is no reason to believe that offenders imprisoned in Canada pose more of a threat to the public safety of Canadians than offenders imprisoned elsewhere.

Second, offenders imprisoned in Canada are subject to Canadian correctional and rehabilitation programs. These programs are designed to reduce their chance of re-offending and help reintegrate them back into Canadian society. If Canadian authorities find that an offender is a risk to re-offend, they can guide his rehabilitation to minimize this risk. These services are not available if a transfer is denied. As stated by the Correctional Service of Canada, if Canadian offenders are not transferred to Canada "they may ultimately be deported to Canada at the end of their sentence, without correctional supervision/jurisdiction and without the benefit of programming."[7] Thus denying a transfer is actually counterproductive to the public safety of Canadians, and it directly contradicts the second aim of the *Act*: to rehabilitate and re-integrate the offender back into Canadian society.

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[5] House of Commons, Legislative Summary, *Bill C-5: An Act to Amend the International Transfer of Offenders Act* (March 2010) at 8.
[6] *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*]
[7] Correctional Service Canada, *International Transfers Annual Report* 2006-2007, (Ottawa: Correctional Service Canada, 2008) at 1.

There is, therefore, no rational connection between refusing to transfer a Canadian offender back to Canada and the stated purpose of the legislation. For this reason, the Center believes that actions taken by the Minister under the proposed legislation are likely to fail a constitutional challenge.

International Considerations and Implications

Canada's participation in international prisoner transfer agreements serves to facilitate the rehabilitation of offenders by allowing them to serve their sentences in their country of citizenship.[8] The benefits of permitting prisoners to serve their sentences in their home countries are well documented by international and Canadian sources.[9] By transferring offenders, Canada is enhancing the administration of justice throughout the world by improving the chances for rehabilitation. Serving a sentence in a country other than one's own is an isolating experience for offenders, as linguistic, cultural, and institutional barriers are major impediments to rehabilitation.[10]

Foreigners may not be subject to the same treatment as the country's nationals they serve alongside. In the United States for example, US citizens are generally settled within 500 miles of their families to facilitate visitation; Canadians are afforded no such consideration and may be used to help balance the prison population in under-populated prisons. As a result, Canadians may serve on the opposite side of the continent from their families.[11] Additionally, countries may be less motivated to fund foreign prisoner rehabilitation as foreign nationals serving out their sentences are almost inevitablydeported upon completion. In the US prison system, foreign nationals cannot serve in minimum-security facilities and may not be able to participate in drug rehabilitation programs – which can yield both improved rehabilitation and a reduced sentence.[12] Finally, when foreign prisoners have not been transferred to serve their time in their home country, they may spend weeks or months in custody after the completion of their sentence awaiting the conclusion of deportation proceedings, essentially extending their sentence.[13]

Canada has a strong record of transferring offenders, having brought over 1504 Canadians to serve out their sentences at home, and sending 126 foreign nationals to their countries of citizenship since the program's inception in 1978.[14] Between 1998 and 2005 the Minister of Public Safety approved every transfer request received from a Canadian serving a sentence abroad.[15] Since then, however, the Minister has denied roughly 1 in 4 applications for Canadians to return home, primarily under sections

[8] Correctional Service Canada, *International Transfer of Offenders: Legislation and Policy*, online: Correction Service Canada <http://www.csc-scc.gc.ca/text/prgrm/inttransfer/legpol-eng.shtml>.
[9] See for example: Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Report prepared by the Secretariat, United Nations Document A/CONF.121/22/Rev.1 (New York, 1986) at p. 53.
[10] Michal Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Freiburg: MPI, 2003).
[11] Sylvia Royce, "International Prisoner Transfer" (2009) 21(3) Federal Sentencing Reporter 186 at 187.
[12] *Ibid*.
[13] *Ibid*.
[14] Correctional Service Canada, *International Transfers Annual Report 2008-2009*, (Ottawa: Correctional Service Canada, 2010) at 4.
[15] *Ibid* at 8.

10(a) and 10(b) of the *International Transfer of Offenders Act*.[16] Often, the transfer application was approved by the country where the offender was sentenced while Canada prevented them from serving the remainder of their sentence and beginning rehabilitation in Canada by rejecting the application.

In a recent article, the former head of the International Prison Transfer Program at the US Department of Justice criticized the Canadian government's conduct. She wrote that that since 2005, "the Correctional Service of Canada has introduced many new criteria for transfer which have caused lengthy delays in processing; indeed, some Canadians who have managed to run the whole gauntlet in the United States to a Department of Justice approval have been denied the right to return."[17]

The successful operation of international prisoner transfers requires the cooperation of both the sentencing (and sending) state and the enforcing (or receiving) state. Under Canada's international treaties, approval by the sending state does not obligate Canada to accept the offender's application. The treaties do, however, impose an obligation to provide the "widest measure of co-operation,"[18] and this has been interpreted to suggest that co-operation was intended to be motivated by the common goal of offender rehabilitation rather than individual interests of states party to the treaty.[19]

The treaties also require that governments inform the sentenced person and the state where they are detained about what decision has been reached.[20] The *Inter-American Convention on Serving Criminal Sentences Abroad imposes a duty to give reasons for refusing a request* wherever "possible and appropriate" states explain the reasons for refusal.[21] While the proposed changes to the *International Transfer of Offenders Act* will change the way Canada evaluates who should be accepted to return, our international responsibilities will remain the same.

The proposed changes to the *International Transfer of Offenders Act* run contrary to the bilateral treaties that Canada has signed with 15 nations concerning the international transfer of offenders. The treaties with Argentina, Brazil, Cuba, the Dominican Republic, Egypt, Mongolia, the United States and Venezuela all contain clauses stating that the parties to the treaty "...*shall* consider all factors that may contribute to the offender's social reintegration"[22] or a slight variation thereof. The treaties with Bolivia, Mexico, Peru and Thailand contain clauses that not only state that the relevant Minister shall consider factors pertinent to the transfer of the offender, but specifically mention the factors that the Minister shall consider, such as seriousness of the crime, previous criminal record, health status, and ties the offender may have with the society of either signatory nation. The proposed change to the requirement of consideration in the *Act* from "shall" to "may" contravenes the aforementioned treaties.

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[16] *Ibid* at 9.
[17] Royce, *supra* note 14 at 188.
[18] Council of Europe, Convention on the Transfer of Sentenced Persons, Article 2.
[19] Council of Europe, PA, 2001 Ordinary Sess (Third Part), *Operation of the Council of Europe Convention on the Transfer of Sentenced Persons – critical analysis and recommendations*, Doc 9117 (2001) at para 15.
[20] Council of Europe, Convention on the Transfer of Sentenced Persons, Article 4 and 5.
[21] *Inter-American Convention on Serving Criminal Sentences Abroad*, A-57, Article 6. Managua, June 9, 1993. Signed by Canada July 8, 1994. Ratified by Canada June 4, 1995. In Force for Canada April 13, 1996.
[22] The text of the bilateral treaties is to be found on the Correctional Service Canada website at http://www.csc-scc.gc.ca/text/prgrm/inttransfer/bilateral-eng.shtml

The proposed changes also undermine the intent of the treaties. The preambles of every multilateral treaty specifically mention the social reintegration of offenders as the essential purpose of the treaties. The proposal to expand the *Act*'s purpose to include "enhancing public safety" is either superfluous, once one realizes that social reintegration serves public safety, or incoherent if predicated on the idea that offenders inside Canadian prisons pose a threat to public safety while they are imprisoned. In order to realize the aims of the *International Transfer of Offenders Act*, as well as the international treaties Canada is party to, we must rely on relationships of respect and reciprocity with other states. Ensuring Canada is a cooperative partner in the prisoner transfer process serves Canadian interests in two ways. Firstly, allowing Canadians incarcerated abroad to serve out their sentences provides a better opportunity for them to integrate into Canadian society.[23] This fulfills the fundamental purpose of the treaties and enhances the administration of justice and public safety. Secondly, the reciprocity inherent in a system of cooperating states suggests that Canada participating as a good faith partner may assist in returning foreigners serving in Canadian prisons. Canada has a very good correctional system. The disparity between our own and the correctional systems Canadians are subject to in foreign countries is clearly demonstrated through the number of transfers. Canada has transferred many more offenders home than they have sent abroad. In comparison to the US, for example, "Sentencing disparities and stark differences in conditions of confinement have meant that almost no U.S. citizens seek to transfer home, while substantial numbers of Canadians seek transfer from the United States."[24]

Conclusions

The potential harms arising from Bill C-5's proposed amendments must be taken into consideration. The modifications to the Act would neglect not only the offender's best interests, but society's as a whole. The Centre finds that unjustifiable rejections of transfer requests arising from the Minister's broad discretionary powers are inconsistent and not rationally connected to the Act's purposes; eventually, the proposed changes are likely to be declared of no force and effect . The Centre further concludes that regardless of whether or not the Act is rationally connected to its purpose, a rejected transfer would constitute a prima facie breach of s. 6 rights, requiring remedy under s. 24(1). Canada must also be sensitive to its treaty obligations; the proposed changes do not reflect the agreements and intent outlined in its bilateral and international treaties.

Recommendations

Properly interpreted, insertion of a public safety purpose into the Act is superfluous. The expansion of Ministerial discretion will invite breaches of Canada's international and Charter obligations. It will also damage Canada's relationship with other states and its international reputation. The Asper Centre recommends that Bill C-5 be rejected.

[23] Lucie McClung, "Transcending Barriers: the 25th Anniversary of the International Transfer of Offenders Program" (address delivered at the Transcending Barriers conference, Ottawa, May 23, 2003), <http://www.csc-scc.gc.ca/text/media/spchscommis/2003/03-05-23-eng.shtml>.
[24] Royce, "International Prisoner Transfer," p.188.