

Interim Report in follow-up to Canada's review before the United Nations Committee on the Elimination of Racial Discrimination

Introduction

1. On August 14 and 15, 2017, Canada appeared before the United Nations Committee on the Elimination of Racial Discrimination, for the review of its combined twenty-first to twenty-third periodic report on the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). The Committee issued its Concluding Observations for Canada on September 13, 2017.¹
2. At paragraph 40 of its Concluding Observations, the Committee requested that Canada submit, within one year, information in response to the recommendations made in paragraphs 20 (e) and (f) and 34 (a), (b) and (d). Canada provides the following information in response.

Recommendations 20 (e) and (f)

Recalling its general recommendation No. 23 (1997) on the rights of indigenous peoples and reiterating its previous recommendation (see CERD/C/CAN/CO/19-20, para. 20), the Committee recommends that the State party:

- (e) Immediately suspend all permits and approvals for the construction of the Site C dam. Conduct a full review in collaboration with indigenous peoples of the violations of the right to free, prior and informed consent, of treaty obligations and of international human rights law from the building of this dam and identify alternatives to irreversible destruction of indigenous lands and subsistence, which will be caused by this project;*
- (f) Publicly release the results of any government studies of the Mount Polley disaster and the criminal investigation into the disaster, before the statute of limitations for charges under the relevant acts expires.*

Site C dam

3. On December 14, 2018, Canada received a request from the CERD under its Early Warning Urgent Action Procedure (CERD/EWUAP/Canada-Site C dam/2018/JP/ks) for information on the Site C dam. Given the similarity of the concerns raised and information requested on the Site C dam for both the Interim Report and the EWUA, Canada will defer providing information on the Site C dam in this report. Canada will provide a fulsome response to the Site C issues in its response to the CERD EWUA request.

Mount Polley disaster

4. On August 18, 2014, the Government of British Columbia, through the provincial Ministry of Energy and Mines (MEM), established an Independent Expert Engineering Investigation and

¹ CERD/C/CAN/CO/21-23 (adopted by the Committee August 24, 2017).

Review Panel to investigate and report on the tailings pond breach. Their report was released January 30, 2015. The Panel concluded that the dominant contribution to the failure resides in the design of the Tailings Storage Facility (TSF). “The design did not take into account the complexity of the sub-glacial and pre-glacial geological environment associated with the perimeter embankment foundation” (Panel, 2015).² This resulted in a failure to identify attributes and elements within the area of the breach that were susceptible to failure when subject to certain stresses. The Panel found the regulatory staff were well qualified to perform their responsibilities and that additional MEM inspections of the TSF would not have prevented the failure.

5. The Chief Inspector of Mines (CIM) also conducted an extensive investigation and submitted a report dated November 30, 2015 to the former Minister of Energy and Mines. The CIM reached similar conclusions regarding the mechanism of failure of the TSF. The CIM criticized certain actions of the owner Mount Polley Mining Corporation (MPMC) and the engineers of record (AMEC and Knight Piesold), but did not find a breach of the *Mines Act*, the *Health, Safety and Reclamation Code for Mines in British Columbia* or the Mine’s permits.
6. Finally, the British Columbia Auditor General conducted an investigation and issued an audit report in May 2016. The Auditor General’s report criticizes the Government of British Columbia though some of the report’s conclusions appear inconsistent with the findings of the independent panel.³
7. Numerous court proceedings have been filed in relation to the breach, including a private prosecution filed in October 2016 that has been stayed. A second private prosecution was filed on August 4, 2017, by a member of the Soda Creek Band against the mining company. That matter has also been stayed. Both matters were handled independently of government by Crown counsel.
8. The Federal Crown continues to investigate the TSF breach.
9. The civil proceedings include:
 - Three First Nations (St’at’imc Chiefs Council; Tsilhqot’in National Government; and Williams Lake Indian Band) filed notices of civil claim (NOCC) against the Government of British Columbia and the corporate defendants in July and early August, 2016. These actions are in informal abeyance while other litigation is ongoing.
 - Two NOCCs have been filed by guide-outfitters and tour operators (Northern Lights Lodge Ltd. and Cariboo Mountains Fishing and Outdoor Adventures Ltd.), naming MPMC, Imperial Metals, the engineers AMEC and Knight Piesold, and the Government of British Columbia. These actions are in abeyance.

² Panel, I. E. (2015). *Report on Mount Polley Tailing Storage Facility Breach*. Province of British Columbia.

³ The Chief Inspector of Mines’ report and the British Columbia Auditor General’s report are both publicly available.

- In early July 2016, MPMC commenced an action in negligence and breach of contract against the two engineering firms, AMEC and Knight Piesold. Although Mount Polly did not sue the provincial government, AMEC and Knight Piesold have issued third party proceedings against the Government of British Columbia.
10. At the federal level, in February 2018, the Government of Canada introduced legislation (Bills C-68 and C-69) that would put in place better rules to protect Canada's environment, fish and waterways, respect Indigenous rights, and rebuild public trust in how decisions about resource development are made. If the legislation is adopted, the proposed measures would include early and regular engagement with Indigenous peoples based on the recognition of their rights and interests, working in partnership with Indigenous peoples for project reviews, and mandatory consideration of Indigenous knowledge as part of the impact assessment process.
 11. At the provincial level, British Columbia's new *Environmental Assessment Act*, S.B.C. 2018, c. 51, received Royal Assent on November 27, 2018, and is anticipated to come into force in the fall of 2019. The goals of the revitalized environmental assessment process are to enhance public confidence, advance reconciliation with Indigenous nations, and protect the environment while offering clear pathways to sustainable project approvals. Indigenous knowledge is to be considered in decision making, as well as whether a participating Indigenous nation issues notice of consent to the project proceeding. The Province is required to seek to achieve consensus with participating Indigenous nations throughout the environmental assessment process, with the goal of aligning the decisions of provincial ministers and participating Indigenous nations.

Recommendations 34 (a), (b) and (d)

In light of its general recommendations No. 22 (1996) on article 5 of the Convention on refugees and displaced persons and No. 30 (2004) on discrimination against non-citizens, the Committee recommends that the State party:

- (a) Undertake planned immigration detention reforms. Ensure that immigration detention is only undertaken as a last resort after fully considering alternative non-custodial measures. Establish a legal time limit on the detention of migrants;*
- (b) Immediately end the practice of detention of minors;*
- (d) Rescind or at least suspend the Safe Third Country Agreement with the United States of America to ensure that all individuals who attempt to enter the State party through a land border are provided with equal access to asylum proceedings.*

Immigration detention

12. Canada's immigration detention policy is based on the principle that immigration detention be used only as a measure of last resort, in limited prescribed circumstances and only after alternatives to detention have been considered.

13. Individuals who are detained for immigration purposes are protected from arbitrary detention, and have access to effective remedies, including the ongoing reviews of their detention. The Immigration Division (ID) of the Immigration and Refugee Board is mandated to review detentions within the first 48 hours, after seven days, and every 30 days thereafter. An early detention review may also be requested by the detainee or Minister at any time if there is new evidence or a change in circumstances. Each of these decisions can be judicially reviewed before the Federal Court. Immigration detention is exercised to ensure the integrity of the immigration system and Canada's public safety. Factors to be considered when determining whether to detain an individual include, but are not limited to:
 - risk of flight;
 - danger to the public; or
 - identity not established.
14. In very limited circumstances, the Minister may also designate a foreign national who is 16 years or older as part of an irregular arrival. Whenever individuals are arrested or detained, the *Canadian Charter of Rights and Freedoms* requires that a Canada Border Services Agency (CBSA) officer inform individuals of the reasons for their arrest or detention, their right to legal representation and their right to notify a representative of their government that they have been arrested or detained.
15. The *Immigration and Refugee Protection Act* does not include a time limit on immigration detention. Canada's Supreme Court has concluded that the absence of a time limit does not constitute "indefinite detention" because of the meaningful process for ongoing review of detention, which takes into account the circumstances of each individual case.
16. In 2016, Canada launched a new National Immigration Detention Framework. The Framework aims to reduce, to the greatest extent possible, the number of minors, vulnerable persons and long-term detainees in detention, while ensuring improved detainee well-being.
17. The Framework includes funding to improve immigration detention infrastructure, provide better medical and mental health services at CBSA Immigration Holding Centres, and expand the alternatives to detention, which is a key pillar of the framework.
18. The National Immigration Detention Framework has lowered the number of daily detentions. In 2017-2018, the total number of detention days decreased by 8.3% compared with 2016-2017 (130,538 days to 119,712 days) despite a 5.3% increase in entries by foreign nationals to Canada during the same time (33.8M to 35.6M entries).
19. By implementing the framework, the Government of Canada is taking concrete steps to commit to a better, fairer immigration detention system that supports the humane and dignified treatment of individuals while protecting public safety.
20. Canada's federal agency responsible for border management, including immigration enforcement, is the CBSA. In July 2018, the Government of Canada unveiled the Alternatives to Detention (ATD) Program of the CBSA, which is a key pillar of the National Immigration Detention Framework. The new ATDs were developed in close consultation

with stakeholders, including the United Nations High Commission for Refugees (UNHCR) in Canada and the Canadian Council for Refugees.

21. With the implementation of the ATD Program, the CBSA has established an expanded set of tools and programs that enable officers to more effectively release individuals into the community, while achieving balanced enforcement outcomes. In addition to release on reporting conditions (i.e., in-person reporting), cash deposit or the establishment of a bondsperson, the new mechanisms of release now include the following:
- **Community Case Management and Supervision (CCMS):** This alternative offers in-community tailored case management services to individuals released from detention. The CBSA is contracting with service providers across Canada to provide community supervision and provide specific programming intended to address factors that may impact an individual's ability to maintain a stable community living situation, which aims to subsequently increase compliance with immigration requirements and conditions.
 - **Voice Reporting (VR):** VR allows individuals to report to the CBSA via telephone using an automated system that confirms their identity using biometric voiceprint technology and records their location when calling in from a cellular phone or a landline. This will provide additional options for reporting for people in remote locations or those who would otherwise need to travel long distances to fulfill CBSA reporting requirements.
 - **Electronic Monitoring (EM):** EM will be executed in the Greater Toronto Area as a pilot project until March 31, 2020. EM, through the use of an ankle bracelet, may be used as an alternative to detention when coupled with other ATDs (e.g. CCMS, VR), for individuals who require a higher level of monitoring to ensure that the risks they present, if released into the community, are properly mitigated. EM may be appropriate for cases where an individual is unlikely to appear, there are identity concerns, or there is serious criminality. The necessary EM technology, including the ankle monitors, are being provided to the CBSA by the Correctional Service of Canada through a Memorandum of Understanding.

Detention of minors

22. The Government of Canada is committed to keeping minors out of immigration detention as much as possible and keeping families together. In November 2017, the Minister of Public Safety issued a Ministerial Direction to the CBSA directing the Agency on how immigration detention decisions involving a minor child should be handled going forward.
- In alignment with the Ministerial Direction, the CBSA issued a National Directive for the Detention or Housing of Minors for operational use. The National Directive reinforces the principle that the detention of minors is always used as a last resort, in extremely limited circumstances, and only after appropriate alternatives to detention are determined to be unsuitable or unavailable. The best interests of the child (BIOC) is a primary consideration for determining whether a minor may be detained or housed with their detained parent or legal guardian. The CBSA conducts the BIOC

assessment in consultation with the parent or legal guardian and takes into account the minor's level of dependency, their physical, mental and emotional needs, and the care, protection and safety of the child.

- It is anticipated that amendments to the *Immigration and Refugee Protection Regulations* will come into effect in spring 2019 to ensure that:
 - The best interests of a non-detained minor child will be considered any time that a child is directly affected by a decision to detain their parent or legal guardian. This proposal seeks to codify decisions of the Federal Court of Canada into the regulations; and
 - All decision makers take into account a non-exhaustive list of factors when making a determination of what is in a minor child's best interests. These factors will apply to both children in detention and those who are not detained.

Safe Third Country Agreement

23. The Canada-United States (U.S.) Safe Third Country Agreement (STCA) is premised on both countries maintaining a human rights record, policies and practices that reflect their obligations as parties to *1951 Refugee Convention* and *the Convention Against Torture*, which include an obligation of non-refoulement. The STCA supports the orderly handling of refugee claims along the Canada-U.S. border based on the principle that individuals must claim asylum in the first safe country in which they arrive.
24. Canada is obligated to monitor circumstances in the U.S. according to the factors set out in the *Immigration and Refugee Protection Act* on a continuing basis. Canada is continually monitoring conditions to ensure that the U.S. continues to meet the requirements that led to its designation as safe third country.
25. The U.S. is the only country designated by the Regulation as a safe third country for the purposes of the Act.
26. The information consulted is drawn from a number of sources, including international human rights organizations, government agency reports, statistical records and policy announcements, as well as media reports.
27. Reviews conducted by Canada have considered circumstances in the U.S. The U.S. continues to satisfy the criteria upon which it was designated as a safe third country. This is consistent with findings from the United Nations High Commissioner for Refugees.
28. Canada will continue to monitor conditions to ensure that the U.S. continues to meet the requirements for safe third country designation.
29. The STCA remains an important tool for Canada and the U.S. to work together on the orderly handling of refugee claims made in our countries.