

THE CANADIAN EXPERIENCE IN THE INTERNATIONAL
TRANSFER OF CONVICTED OFFENDERS

Memorandum by
THE GOVERNMENT OF CANADA

At the last Meeting of Law Ministers in 1980, Canada reported that it had two treaties in force for the transfer of convicted offenders, with the United States and with Mexico. At that time, the procedure was running smoothly, but some difficulties have been encountered since.

2. Canada now has a treaty with Peru, which came into force on 23 July 1980 and one with Bolivia, which is not yet in force. So far, only two Canadian offenders have been returned to Canada under the treaty with Peru. These treaties follow very closely the text of the treaties with the United States and Mexico, and consequently we have no reason to anticipate any difficulties in their implementation.

3. Of greatest interest to this gathering will be Canada's progress in a treaty with Thailand - the success of which demonstrates that it is possible to reach such an accord with a country whose perception of the purpose of criminal punishment is markedly different from ours - and our progress as participants in the development of the Council of Europe Convention for the Transfer of Offenders. The very fact that the Council of Europe member States have been able to work out a multilateral convention in this area augurs well for a Commonwealth scheme, where, by virtue of our common heritage, the differences among our judicial systems are less pronounced than among the European States.

4. All our treaties, including those not yet in force, embody a number of principles which may be stated succinctly:

- (i) The offender and both States must all consent to the transfer. There are no restrictions on the grounds for withholding consent.
- (ii) Dual criminality: An offender will be transferred only where the offence for which he has been sentenced is of a nature which would be punishable under the laws of the receiving State as well. Certain offences, such as military offences, may not be within the scope of the treaty, but such excluded offences are kept to a minimum.
- (iii) The offender must be a national of the receiving State. Either State may, however, refuse a proposed transfer if it considers that the offender is more closely connected with the sentencing State and his rehabilitation and reintegration into society would not best be served by the transfer. In our treaty with Mexico it is provided that an offender may not be transferred if he is domiciliary of the sentencing State - a person who has resided in that State for at least five years with an intent to remain permanently therein. (Presumably the test applies to the period before conviction and sentencing. After sentencing it is unlikely that the intention to reside in the sentencing State permanently could be ascribed to a prisoner in the sentencing State.)
- (iv) Bar against double jeopardy: In Canada's case its Transfer of Offenders Act deems that the foreign conviction and sentence were imposed by a court of competent jurisdiction in Canada, and so the offender cannot be tried again in Canada for the same offence.
- (v) The sentence continues to be served in the receiving State, with credit given for any portion of it served or any remission of sentence awarded in the sentencing State. Only sentences of imprisonment, probation or other deprivation of liberty are enforced. If a fine has been levied upon the offender, it is up to the sentencing State to collect the fine before the transfer.

- (vi) Enforcement of the sentence after transfer is looked after by the receiving State, but the offender cannot be kept under sentence in the receiving State beyond the point where his sentence would otherwise have expired in the sentencing State. The law and procedures for parole of the receiving State apply.
- (vii) The sentence must not be under appeal at the same time of transfer; however, any judicial variation of the sentence made by the sentencing State after transfer has taken place will be given effect by the receiving State. An appeal of the conviction or sentence may not be entertained by the courts of the receiving State.
- (viii) Either State may grant a pardon or amnesty following transfer, and the offender will be given the benefit in the receiving State.

5. Responsibility for the costs involved has been worked out by a relatively simple formula. From the time that the receiving State takes custody of the offender, it is responsible for the costs of transportation and continued incarceration. If the countries wish, the sentencing State may surrender custody of the offender at the embassy of the receiving State in the territory of the sentencing State.

6. The only major difficulties which Canada has experienced in the case of Canadian offenders brought back home has been in the enforcement of sentences, more particularly, the eligibility for parole. As originally enacted, Canada's Transfer of Offenders Act provided that an offender transferred to Canada serving a sentence for the Canadian equivalent of first or second degree murder would not be eligible for parole until he had served 15 or 10 years of his sentence respectively. This created a problem for Canada in the case of a Canadian citizen who was transferred from Mexico serving a sentence for murder for which he had received only eight years. The legislation was promptly amended, with retroactive effect, to restrict the special parole provisions to sentences of life imprisonment.

7. In the United States the criminal law jurisdiction is shared by the Federal and many State authorities, and the variety of the types of sentences which must be dealt with following transfer to Canada has led to special problems.

8. In some States, an offender may be sentenced to a definite and indefinite term of imprisonment; for example, to a term of five to 20 years. Generally, the significance of such a sentence is that the offender will be eligible for parole after five years, and 20 years is the maximum duration of his sentence should he fail absolutely to earn any time off for good behaviour or work done in the prison.

9. Upon transfer to Canada, a number of offenders have complained that they understood that the definite portion of their sentence was the full sentence which was required to be served in Canada and the indefinite portion should be ignored. Others, apparently less convinced that such a plea would be well received, complained that they understood that only the minimum portion was required to be served before parole eligibility in Canada. Investigation of these complaints failed to satisfy the Canadian authorities that offenders had truly been misled, but in order to forestall any further complaints, Canada has adopted a policy of presenting all applications for transfer to the legal advisors of the Canadian Parole Board in order that the applicant for transfer may be advised, before arrangements are made final, just how long a sentence he will be required to serve and when he will be eligible for parole of temporary absence in Canada.

10. In some instances time spent in confinement before sentencing will count as part of the sentence imposed (although this is not the normal rule in Canada) and the legal advisors will determine this in advance of the transfer as well.

11. Canada has negotiated a treaty with Thailand which was just signed earlier this year and is expected to be ratified shortly - just as soon as the Thai Government is able to bring into force domestic legislation to implement the arrangement. This treaty includes a number of novel features without which, we have been told, the treaty would have been unacceptable to the Thai people. The treaty does not apply in respect of a Canadian citizen who has committed an offence against the Head of State of Thailand or his family or who has committed an offence against laws protecting national art treasures. These offences are so sensitive to the Thai people, that,

notwithstanding the absolute right each country has to veto an application for transfer, failure to exclude these specific offences from the treaty would render it unpalatable.

12. As well, the Thais insisted that no offender will be transferred until he has served a minimum period of time in the sentencing State, as its law may provide. We have been informed, and indeed the text of the treaty was agreed to, on the footing that legislation in Thailand will require that a prisoner serve the lesser of one-third of his sentence of four years in Thailand before transfer. Again, Thai notions of denunciation required that such a provision be expressly included in the treaty.

13. The Council of Europe Convention on the transfer of sentenced persons is radically different in its scope. It includes the fundamental principles outlined earlier, but in all other respects its operation is left virtually wide open. For example, so long as the dual criminality rule is met, there are no restrictions on offences coming within the ambit of the Convention. There is provision stating that the Convention does not apply where an offender has less than six months to be served on his sentence - and another provision permitting contracting States to waive this rule. The Convention is restricted to apply to "nationals" of the receiving State, but each State may define who, so far as it is concerned, is a national. Responsibility for enforcement of the sentence shifts to the receiving State as soon as it takes the offender in its charge, and from that point it is responsible for all costs involved.

14. Because of the differences in the laws of the participating States, the Council of Europe Convention provides for two modes of enforcement of the sentence in the receiving State. The receiving State may opt for continued enforcement of the sentence imposed, with minor adaptations which do not alter substantially the nature of the sentence. Or, under the convention of sentence mode, the receiving State may re-sentence the offender, being bound by the findings of fact of the court of the sentencing State. In neither case may the receiving State aggravate the offender's sentence, and he must be given credit for time already served in the sentencing State.

15. So far as matters not covered by the Convention are concerned, individual contracting States are permitted on a bilateral basis, to make their own arrangements, and where such contracting States have already concluded a treaty or otherwise have established their relations in the matter, they are entitled to apply those other arrangements in lieu of the Convention.

16. In view of Canada's substantial participation in the development of the Council of Europe Convention, we have been accorded a special status and may ratify the Convention immediately upon its coming into force. Other countries which are not members of the Council of Europe may be invited by the Council of Europe to ratify the Treaty, providing those States which have, at the relevant time, already ratified the Treaty agree to their being included.

17. To conclude, Canada is ready to enter into negotiations with Commonwealth countries for the transfer of offenders, on either a bilateral basis or by way of a multilateral treaty. As well, we remain prepared to assist our Commonwealth neighbours with arrangements which they may be considering with countries not represented at this meeting in whatever way we can.