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HUMAN RIGHTS COMMITTEE
Eighty-third session
14 March – 1 April 2005

DECISION

Communication No. 939/2000

Submitted by:	Georges Dupuy (not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	4 November 1998 (initial submission)
Document references:	Special Rapporteur's rule 97 (old rule 91) decision, transmitted to the Sate party on 28 August 2000 (not issued in document form).
Date of decision:	18 March 2005

Subject matter: Failure to disclose a document during criminal proceedings

Procedural issues: Exhaustion of domestic remedies; substantiation of the complaint

Substantive issues: Right to a fair trial; rights in the preparation of the defence; right to be tried without undue delay

Articles of the Covenant: 2 (3), 3, 14 (3) (b) and 26

Articles of the Optional Protocol: 2 and 5 (2)

[ANNEX]

*Made public by decision of the Human Rights Committee.

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-third session

Concerning

Communication No. 939/2000**

Submitted by:	Georges Dupuy (not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	4 November 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Mr. Georges Dupuy, a Canadian citizen, born on 9 May 1947. The author claims to be the victim of violations by Canada of article 2, paragraph 3, article 3, article 14, paragraph 3 (b), and article 26 of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

Factual background

2.1 On 16 August 1991, Ms. Gascon, the author's then wife, lodged a complaint against the author for allegedly making death threats against her.

2.2 Following a preliminary investigation on 19 December 1991, the Criminal Court of Quebec convicted the author on 24 April 1992 of having deliberately threatened, by

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

telephone on or about 12 and 15 August 1991, to kill or seriously hurt Ms. Gascon. On 12 March 1993, the judge handed down a suspended sentence of two years with probation.

2.3 On 15 February 1994, the Quebec Court of Appeal refused to alter the verdict and on 11 August 1994 the Canadian Supreme Court rejected the author's application for leave to appeal. The author specifies that the decisions of the courts were based on the sole testimonies of Ms. Gascon and himself.

2.4 The author says that it was only in December 1994 that he saw a police report containing a written statement about him by Ms. Gascon dated 16 August 1991.

2.5 On 3 April 1995, under section 690 of the Criminal Code, the author requested the Minister of Justice to order a new trial on grounds of the non-disclosure of the above-mentioned statement during the trial.

2.6 On 14 December 1995, the author sued the Government of Quebec for what he alleged was the malicious conduct of the deputy Crown prosecutor handling the case for failing to submit the written statement of 16 August 1991 during the trial.

2.7 On 20 March 1996, the Superior Court of the district of Montreal allowed the deputy prosecutor's motion for dismissal and rejected the author's appeal. On 17 June 1997, the Court of Appeal held that certain allegations in the complaint of 14 December 1995 might warrant the reopening of the trial; it quashed the judgement of the trial court and ruled that the outcome of the present appeal depended initially on the decision the Minister of Justice would take on the author's application under section 690 of the Criminal Code and subsequently on the outcome of any new trial ordered by the Minister.

2.8 On 7 May 2001, the Minister of Justice rejected the author's application for a retrial.

The complaint

3.1 The author declares that he is innocent and that he was, in fact, sentenced on the basis of false accusations by Ms. Gascon so that she could obtain possession of the family home when the couple separated.

3.2 The author maintains that Ms. Gascon's written statement was deliberately and maliciously withheld from him during the trial in order to weaken his defence. The author considers that this statement constituted new evidence which would have enabled him to contest the complainant's version. The author thus asserts that he is the victim of a miscarriage of justice. He also emphasizes the delay in the decision of the Minister of Justice under section 690 of the Criminal Code.

3.3 The author explains that his case is the result of the Quebec Government's sexist policy of punishing men in matters of conjugal violence for the benefit of extremist feminist groups, thereby undermining the equality of marriage partners.

3.4 The author complains that because he has a criminal record it is difficult for him to find a job. He says that domestic remedies have been exhausted, as described above.

The State party's submission on admissibility and merits

4.1 In its submissions of 21 June 2002, the State party's principal assertion is that the communication is inadmissible. Firstly, it maintains that domestic remedies have not been exhausted with regard to the complaint of a violation of article 14, paragraph 3 (b). According to the State party, a decision under section 690 of the Criminal Code may be the subject of an application for judicial review before the Federal Court of Canada under article 18.1 of the Federal Courts Act. The Court may therefore strike down a decision and return the case to the judge for a new decision. The State party specifies that the Federal Court had in fact had to handle an application for judicial review following a refusal for a new trial in the case of an applicant who alleged that a document - the victim's medical report in this case - had not been made available to the accused before or during the trial. The Court refused to intervene, however, on the grounds that it had been established that the accused had known of the document's existence even before the trial started. The Federal Courts Act provides for a period of 30 days to submit an application for judicial review. The Court may, on request, extend this period. The decision of the Trial Division of the Federal Court may be appealed against before the Federal Court of Appeal. The latter decision may also be appealed against before the Supreme Court of Canada subject to the latter's granting of leave to appeal. The State party considers that the author of the present communication cannot be excused for not having exhausted domestic remedies because he did not observe the prescribed deadlines.

4.2 Secondly, the State party maintains that there was no prima facie violation of article 14 of the Covenant. It considers that the author is actually requesting the Committee to re-evaluate the Canadian courts' findings of fact and credibility. The State party recalls the Committee's jurisprudence according to which it is not for the Committee to question the assessment of the evidence by the domestic courts unless this assessment amounted to a denial of justice. According to the State party, the author has not established that justice was denied in the case in question, since his conviction is based on his testimony and the Court's assessment of it. The Court of Appeal of Quebec rejected the appeal against the conviction and the Supreme Court of Canada refused the application for leave to appeal against this decision. The State party stresses in this instance the importance of the doctrine of *res judicata.* The author furthermore took advantage of the application for mercy under section 690 of the Criminal Code after exhausting the rights of appeal and alleged that the trial was not fair, particularly in respect of article 14, paragraph 3 (b). According to the State party, the author cites the same grounds to the Committee as those put forward in support of his application for mercy, namely, that Ms. Gascon's statement should have been disclosed to him during the trial. The State party maintains that the approach to follow in the present case should be based on the *Stinchcombe* decision, in which the Supreme Court of Canada stated that in the event of a failure to disclose information, it had to be ascertained whether disclosing the information might have affected the outcome of the proceedings. In this connection, the State party also mentions the jurisprudence of the European Court of Human Rights and Canada.

4.3 The State party explains that the disclosure of the victim's statement to the author would not have influenced the result of the trial and that he did receive a fair trial. The State party specifies that a criminal conviction in Canada for threatening to kill or inflict serious injury is based on evidence beyond reasonable doubt brought by the deputy Crown prosecutor that threats were made (*actus reus*) and that the accused made these threats intentionally (*mens rea*). The State party recalls that the author was well aware of the facts

that gave rise to the charges against him at his trial on 24 April 1992 since on 19 December 1991 Ms. Gascon had testified and had been cross-examined on them during the preliminary investigation. The author had moreover admitted that he had made the two telephone calls to Ms. Gascon in which threats were allegedly made and that the words he had used might have been interpreted by Ms. Gascon as threats.

4.4 Although he denied making threats, the author admitted that he said the following during his telephone conversation with Ms. Gascon on 12 August 1991:

"That's why I called her again on the 12th, I mean, it was to tell her she had been violent when she was in the car with me. I mentioned her screams and her attitude. Then I said … I told her that there could be a fatal accident if it happened again, that sort of situation. … Perhaps she interpreted what I said as death threats, it's quite possible, I don't know. … Question by the Court: So you're telling us that what you said to her was that if ever she did that again, you might lose patience, you might grab the brake … Reply: Right. Question: … and that that could be fatal? Reply: Yes, it could cause an accident. Question: For whom? For whom? Reply: Well, both of us or … well, if there's a car accident, you don't know what might happen; I could die in the accident, or perhaps both of us …" (Annex B, transcript of the proceedings, testimony of Mr. Dupuy, pp. 34 and 35).

4.5 According to the State party, the Court considered that these words, indicating an intention to take action while Ms. Gascon was driving, constituted a threat and that he had said them intentionally. It was not necessary for the author to have intended to put his threats into effect and kill Ms. Gascon to establish that the offence had been committed.

4.6 With regard to the second threat to kill or injure her, which was made, according to the State party, during the telephone call of 15 August 1991, the author said that he did not recollect saying the words attributed to him by Ms. Gascon, that is, that when he left the hospital he was going to kill her. He said, however, that he thought he had said things that she had perhaps misinterpreted as threats. As the Court stressed in its judgement, the author hesitated for a long time before denying that he had made the remarks recounted by Ms. Gascon.

4.7 The State party maintains that the author's conviction is based first and foremost on the assessment of his credibility and the statements he made to the Court. The Court found that he had deliberately threatened Ms Gascon with serious injury or even death even if he had not had any intention of carrying out the threats. According to the State party, since the two elements of the offence - the intention to cause fear by intimidating language and the act of uttering such words - have been established, the reason for making the threats is not relevant. The State party maintains that Ms. Gascon's statement conveys no new or pertinent information on the elements of the crime and would not have had the impact the author claims. Moreover, according to the State party, the author claims that he would only have used the statement to cross-examine Ms. Gascon on two points, namely the motive for the crime and the month in which the events leading to the accusations took place, so as to undermine Ms. Gascon's credibility and thus obtain a different verdict.

4.8 The State party maintains that this cross-examination would not have had any effect. The author basically alleges that Ms. Gascon said in her written statement that the motive for

the crime was that she wanted to put an end to their relationship, but the author contests this and claims rather that she wanted to obtain ownership of their joint residence. The State party considers that the author appears to be confusing "motive for the crime" he is accused of committing and "motive for filing the complaint", in other words, Ms. Gascon's reasons for filing a complaint. According to the State party, even if it had been established that Ms. Gascon's desire to acquire ownership of the joint residence had been the reason for filing the complaint, this issue is completely separate from the concept of the "motive for the crime" and is not relevant to the author's being found guilty of deliberately making threats. Furthermore, the State party explains that, contrary to the author's allegations before the Committee, the "motive" for the offence is not relevant in terms of the intention required for a finding of guilt. Consequently, even if the victim's assessment of the facts did not prove correct, the "motive for the crime" is not an element of the offence in question and is of no relevance.

4.9 According to the State party, the author could not be unaware of the connection Ms. Gascon made between the separation she had announced and his threats against her. He had been informed of this during Ms. Gascon's testimony in the preliminary investigation. Furthermore, Ms. Gascon's testimony during the trial began with a reminder that she had announced her intention of leaving him at the end of June 1991 and she stated, during cross-examination, that it was on 12 August, when he first threatened her, that the author reproached her for this decision. According to the State party, the author's counsel endeavoured to establish from the start of the cross-examination that the spouses had had a dispute over the sale of the house, but Ms. Gascon replied that that was not the case since it had been mutually agreed to wait until the author was in better health before proceeding with the sale. The author's counsel therefore cross-examined Ms. Gascon, in Mr. Dupuy's words, on the "motive for the crime". During cross-examination at the trial, Ms. Gascon repeated her statement and the testimony she had given during the preliminary investigation concerning the dispute with the author. Since she was giving her interpretation of the facts and since the versions she gave did not differ, the State party considers that the cross-examination on this point could not possibly reveal any contradiction or incompatibility that might cast doubt on her credibility. Furthermore, during the author's testimony at the trial, he gave his version of the events that had preceded and given rise to the telephone calls, which he admitted making. According to the State party, the Court had not held against him the fact that he did not accept the break-up since it was not an element of the offence, contrary to the author's claim. In any case, the Court was able to assess the testimonies of the author and the victim with regard to the events that had preceded and given rise to the telephone calls in question and was in a position to draw the appropriate conclusions.

4.10 With regard to the inconsistency of the dates in Ms. Gascon's statement, which has been pointed out by the author, the State party considers that it should be noted that in the first reference in the statement to the events, the word "June" has been struck through and replaced by "August". The word "June", however, can be found in two other places in connection with the threats made by the author. According to the State party, the only additional remedy open to the author, if he had had the written statement in his possession during the cross-examination, would have been to ask Ms. Gascon why the rectification was incomplete. Even if Ms. Gascon had provided an incorrect explanation, the State party considers that the author, according to the law of evidence as cited in the decision of the Minister of Justice, would have been unable to prove the inaccuracy of her statement.

4.11 The State party maintains that although Ms. Gascon in her written statement had sometimes referred to the month of June rather than August, both in her testimony in the preliminary investigation and in the trial she had placed the events in August. The decisive factor is that at his trial the author was perfectly aware of the nature of the offence with which he was charged and the manner in which he allegedly committed it.

4.12 In view of the fact that Ms. Gascon's written statement shows only a partial inconsistency with regard to the dates of the events, does not contradict the content of her testimonies and adds only secondary evidence, and that the Court was able to assess the credibility of Ms. Gascon and the author, the State party considers that the disclosure of this document furnishes no additional arguments for the author's defence.

4.13 The State party adds that, with regard to the aforementioned developments, the author benefited from the presumption of innocence. According to the State party, the judge based his ruling on evidence beyond all reasonable doubt furnished by the deputy Crown prosecutor in respect of the various elements of the offence in question.

4.14 With regard to the complaint concerning the consequences of the conviction, namely the difficulty of finding a job, the State party points out that under the Criminal Records Act, a person who has been convicted of an offence under an Act of Parliament (including the Criminal Code) may apply to the National Parole Board for a pardon in respect of that offence. In the author's case, such application may be made five years after the legal expiry of the probation period. The Canadian Human Rights Act also prohibits discrimination, including in the field of employment, on grounds of sex or a conviction for which a pardon has been granted. "A conviction for which a pardon has been granted" means "a conviction of an individual for an offence in respect of which a pardon has been granted by any authority under law and, if granted or issued under the Criminal Records Act, has not been revoked or ceased to have effect". Any person who considers that he or she is the victim of discrimination by an employer or a body covered by federal legislation may lodge a complaint with the Canadian Human Rights Commission. Article 18.2 of the Charter of Human Rights and Freedoms stipulates, moreover, that "No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence."

Remedies are open to the author in the event of a violation of this article, in that he can lodge a complaint with Quebec's Commission des droits de la personne et de la jeunesse or take the case to the Human Rights Tribunal or to an ordinary court.

4.15 With regard to the complaint of the violation of article 2, paragraph 3, of the Covenant, the State party considers that this article does not constitute a substantive right as such but is appurtenant to the violation of a right guaranteed by the Covenant. In the State party's view, the author has not established the existence of a violation of this nature.

4.16 With regard to the complaint of violations of articles 3 and 26 of the Covenant, the State party maintains that there is no prima facie evidence of a violation. The State party points out that its policy is not discriminatory and is aimed at furthering equality between men and women. In addition, all actions by the police, the judiciary or other bodies in Quebec must observe the judicial rights and legal guarantees of all persons concerned, and in

particular the impartiality and independence of the judiciary, as stipulated in the Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms. In correspondence with a national who brought up this subject, the Commission des droits de la personne et des droits de la jeunesse in Quebec has already concluded that the policy is not discriminatory.

4.17 The State party maintains, subsidiarily, that the applicant's allegations are unfounded for the reasons set out above.

The author's comments on the State party's submissions

5.1 In his comments dated 30 August 2002, the author contests the State party's arguments of inadmissibility for failure to exhaust domestic remedies, on grounds of the undue delay in the decision of the Minister of Justice under section 690 of the Criminal Code, which was handed down on 7 May 2001 in respect of an application by the author dated 3 April 1995.

5.2 He also states that he is not seeking a re-evaluation of the Canadian courts' findings of fact and credibility, although he considers that the failure to disclose Ms. Gascon's statement, which was essential to his defence, can only be understood in the context of the trial. The author considers that the judge invented a scenario based on simple remarks made by the author during the trial which were subsequently used to support a trumped up charge, despite all the lies told by Ms. Gascon.

5.3 With regard to the non-disclosure of the document, the author contests the State party's arguments and points out that Ms. Gascon's written statement was essential for his full answer and defence. Unlike the State party, the author considers that the evidence of the defendant's criminal intent (*mens rea*) that emerges from this statement is relevant to the evaluation of his guilt. The author explains that while the complainant and the deputy prosecutor were able to prepare their strategies on the basis of the statement, the accused was deprived of this strategic information during the trial. The author explains that he would have been able to use the statement to cross-examine Ms. Gascon, not only on the "motive for the crime" and the dates of the events, but also on many other points, all of which, according to the author, would have been relevant in revealing the scope and gravity of Ms. Gascon's false accusations. Furthermore, in his opinion, even though the written statement contains the two accusations of death threats which led to his conviction, this in no way justifies the fact that the document was, as he alleges, concealed from him.

5.4 The author asserts that his case reveals an omnipresent sexism in Quebec's policy with respect to conjugal violence. As president of the association "Coalition pour la défense des droits des hommes du Québec" and vice-president of the Groupe d'entraide aux pères et de soutien à l'enfant, the author says that he has identified numerous cases of men who have been aggrieved, particularly by the non-disclosure of written statements by women complainants, and that this demonstrates how the courts treat men. The author considers that the judges acted maliciously in his case by not disclosing the aforementioned document, truncating the author's remarks and basing themselves on extreme feminist positions, under the overall protection of the Minister of Justice (who is a woman).

5.5 In his additional comments of 7 March 2003, 15 June 2003 and 26 October 2004, the author repeats his arguments concerning the exhaustion of domestic remedies, based

essentially on the excessive delay in the decision of the Minister of Justice under section 690 of the Criminal Code. He adds that the Criminal Code does not provide for a right of appeal against that decision. Lastly, he asserts that the jurisprudence concerning applications for judicial review stemming from the case *William R. v. The Honourable A. Anne McLellan, Minister of Justice and Attorney General of Canada* (see note 4) is practically unknown, is not indexed and is in contradiction with the Criminal Code.

Supplementary submissions by the State party

6.1 In its submissions of 11 August 2003, the State party reiterates its position that the communication is inadmissible and, subsidiarily, unfounded.

6.2 The State party specifies that although the decision of the Minister of Justice (see paragraph 5.6) cannot be appealed against, it is nevertheless subject to judicial review by the Federal Court, as is any decision taken by a "federal board, commission or other tribunal", as currently defined (since 1 February 1992) by the Federal Courts Act. A decision taken under section 690 of the Criminal Code may thus be the subject of an application for judicial review to the Federal Court of Canada under article 18.1 of the Federal Courts Act. The Court may strike down the decision and return the case to the judge for a new decision if one of the grounds justifying its intervention is established (see paragraph 4.1). According to the State party, this is a remedy which could have given the author satisfaction. The State party adds that the *Williams* case, which is available on the Internet, clearly establishes the existence of a domestic remedy, and that the author cannot be excused for not having exhausted that remedy.

Admissibility considerations

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the complaint of a violation of article 14, paragraph 3 (b) read together with article 2 (3), the Committee has taken note of the State party's arguments concerning inadmissibility for failure to exhaust domestic remedies (see paragraphs 4.1 and 6.2) and the author's comments in this regard. The Committee notes that the author admits that he did not submit an application for judicial review of the decision of the Minister of Justice of 7 May 2001 partly because of the excessive delay in taking the decision and partly because of the absence of public awareness of the jurisprudence in the *Williams* case, which the author further considers to be contrary to the Criminal Code (see paragraph 5.5). After examining the evidence in the file, the Committee considers, firstly, that the complaint concerning the excessive duration of the procedure under section 690 of the Criminal Code need not be addressed, since the author did not complain to the Minister of Justice about delays during the procedure. In addition, the Committee considers, , that the author has not effectively refuted the State party's submission that the application for judicial review to the Federal Court of Canada under article 18.1 of the Federal Courts Act was indeed an available and effective

remedy. The Committee also considers that the author's argument that he was unaware of that remedy is not a valid argument, and that the State party cannot be held responsible for that situation. The Committee consequently finds that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.4 Concerning the complaints of violations of articles 3 and 26 of the Covenant, the Committee considers that the author's allegations that his sentence and the non-disclosure of Ms. Gascon's statement were the result of Quebec's allegedly sexist policy have not been sufficiently substantiated, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the author's complaint of his difficulties in finding a job because of his criminal record, the Committee considers that the author has not exhausted domestic remedies with respect to this allegation of discrimination. Consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.1 The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
