

Is our house in order?: Canada's implementation of international law

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Economic and Social Rights in an Era of Governance and Governance Arrangements in Canada: The Need to Re-visit the Issue of the Implementation of International Human Rights Law

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This chapter is not about the “legal” nature of social and economic rights, despite its title. It will nevertheless take as a basis of discussion the United Nations International Covenant on Economic, Social and Cultural Rights (CESCR), which Canada ratified in 1976,¹ while keeping in mind that all human rights are interdependent, indivisible, and guaranteed by different international human rights instruments.² Generally acknowledging the indivisibility of all human rights, as well as of the legal nature of economic and social rights, is not the same as saying that the domestic implications of such recognition are well understood by the courts or by the governments in Canada. In that regard, Canadian and foreign academics have written excellent pieces both about the legal nature of economic and social rights and its consequences³ and about the *Charter* implications of the CESCR ratification by Canada.⁴ The time to revisit the consequences of what was probably the most unnoticed Canadian commitment at the time of signature, ratification, and acceptance by provinces – namely, the CESCR and its obligations in practice – has now come about. Despite three decades of Canadian adherence to the UN human rights framework, including the International Bill of Rights and its associated instruments, no one can seriously pretend that Canadians are better off today. In fact, data shows the exact opposite.⁵

Civil society's organizations are better informed today about the role of governments as "duty holders"⁶ in respect of human rights and are active at the international level, notably when the time has come for the UN Experts' Committee to assess the domestic implementation of economic and social rights guaranteed under the CESCR.⁷ As a consequence of civil society intervention, the committee is being more and more critical of Canadian governments' poor understanding of their international obligations – whether at the federal, territorial, or provincial level. Obviously, in this regard our house is not seen to be in order.

That said – and the problem has been written about extensively by other authors – I want to raise some issues that make the architecture of this "house" even more complex in an era of decentralization, privatization, and new governance arrangements. Until quite recently, accountability concerning international human rights was restricted to judicial accountability. The expectation seemed to be that the proper levels of government would implement internationally guaranteed economic and social rights by adopting appropriate legislation in conformity with the *Canadian Charter of Rights and Freedoms*. But times are changing.

In the first section of this chapter I intend to re-visit some assessments of the implementation of CESCR made by the UN Experts' Committee regarding Canada, in order to illustrate some unspoken challenges that these assessments raise in the context of the Canadian federation. In addition, I would like to underline that the committee's observations do not necessarily provide useful guidance concerning the challenges raised by the context of the Canadian federation.

The second section will address the modern notion of governance, as opposed to a more classical reading of jurisdictional issues as related to social law and social rights in Canada. Increasingly, the "international personality" of Canada is challenged by the international action of provinces and subordinate-level agencies of governments. If we accept a broad definition of social rights, it is possible to maintain that such actors are now playing a decisive and autonomous role in respect of them, although this behaviour is sometimes uncontrolled and contradictory.

The third section will raise questions related to the notion of accountability in the context of new governance arrangements. What can we really expect from the classical actors in the Canadian federative regime as they outsource in a more systematic manner their

obligations in the field of economic and social rights? Using some on-going research in Quebec,⁸ I will offer examples to illustrate the point. At their core, the questions I raise concern as much the role of non-state actors and public subgovernmental actors as federal and provincial governments in the same role. Accordingly, putting our house in order may require renewed attention and a renewed framework.

ECONOMIC AND SOCIAL RIGHTS IN CANADA:
THE MYSTERIES OF A FEDERAL STATE

Hugo Cyr argues that the *Labour Conventions*⁹ case of 1937 rightly concluded that a distinction should be made between the federal government's treaty-making power and the implementation process of a treaty in the context of Canadian federalism. He proposes that such a distinction respects the jurisdictional powers of provinces as provided for by the *Constitution Act*, instead of subordinating them to the Canadian Parliament.

Cyr's analysis seems to me to be incomplete in regard to social law and social rights in Canada. In fact, for a long time provincial and federal jurisdictions had been more in a cooperative than in a competitive relationship in regard to social law, something that ended in the 1990s when the Liberal government started to off-load social responsibilities onto the provinces in a unilateral manner.¹⁰ The fact that the Supreme Court of Canada's decision in *Reference re Employment Insurance Act (2005)*¹¹ was followed by an agreement between Quebec and the federal government¹² confirms – rather than denies – this harsh reality. After all, this was about Quebec!

Social law in Canada today is indeed a complex amalgam of cooperation, confrontation, transfer of tax points, debate about national standards, and off-loading onto the provinces.¹³ But as complex as it may be, the current state of social law needs to be assessed against the fact that Canada's ratification of the CESCR in 1976 proceeded with absolutely no provincial opposition. The *Labour Conventions* case thus becomes more or less irrelevant. What really matters is the implementation of international human rights law in a federated state such as Canada in light of the systematic and generally resistant attitude of the provinces. In other words, although it sounds reasonable to promote the distinction made between treaty-making and treaty implementation in the *Labour Conventions* case, it seems that provincial governments chose the opposite approach when

confronted by issues related to the international monitoring of their commitments under the CESCR. What I will assert is that they habitually ignore the monitoring process and behave as though treaty-making and treaty implementation in respect of social obligations are *both* a federal issue.

In the last decade various provinces have been asked by various UN committees, and in particular by the CESCR Experts Committee, to properly implement economic and social rights guaranteed under the CESCR. These demands normally are consolidated in the concluding observations that the committee adopts after having examined periodic implementation reports produced by Canada. Here it is important to recall that CESCR article 28 states that the provisions of the covenant shall extend to *all* parts of federal states, without limitation or exception.¹⁴

For this reason, the CESCR committee occasionally has expressed itself in a double-aspected manner. When adopting its concluding observations in 1998, the committee spoke directly to the provinces:

The Committee notes with concern that at least six provinces in Canada (including Quebec and Ontario) have adopted “workfare” programmes that either tie the right to social assistance to compulsory employment schemes or reduce the level of benefits when recipients, who are usually young, assert their right to choose freely what type of work they wish to do. In many cases, these programmes constitute work without the protection of fundamental labour rights and labour standards legislation. The Committee further notes that in the case of the Province of Quebec, those workfare schemes are implemented despite the opinion of the [Quebec] Human Rights Commission and the decisions of the Human Rights Tribunal that those programmes constitute discrimination based on social status or age.¹⁵

However, in its conclusion the committee recommended specific changes directed at the federal government: “The Committee, as in its review of the previous report of Canada, reiterates that economic and social rights should not be downgraded to ‘principles and objectives’ in the ongoing discussions between the Federal Government and the provinces and territories regarding social programmes. The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal

obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.”¹⁶

In 2006 the committee appeared to return to an understanding of international law that conceives of Canada as a federal state with shared responsibility for Canada’s obligations in the sense that is reiterated in its 1998 recommendation. On the other hand, it also tried to avoid the problem of overreaching by proposing what may look more like a “unitarian state” solution to the case of Canada: “The Committee reiterates its concern that federal transfers of social assistance and social services to provinces and territories still do not include standards in relation to some of the rights set forth in the Covenant.”¹⁷ The committee seems to be hereby insinuating, without more analysis or justification, that the only means of guaranteeing respect for the CESCR in a federated state is to ask the federal government to control such matters by adopting national standards.

It is true that national standards had been a preferred way of controlling federal expenses and transfers to provinces in the field of social rights. The classic example is the original *Canada Assistance Act*¹⁸ (until its abrogation) and now the *Canada Health Act*.¹⁹ Some may believe that the “national standards” approach may represent the most efficient way politically to implement the CESCR in Canada. But a political solution is not a legal answer to the complex issue of the relationship between the provincial and federal governments in Canada and the question of responsibility for international human rights. It is quite clear that Quebec, for example, would disagree with a “unitarian state” approach to the problem.

The CESCR Experts Committee also operates under the impression that an institutional mechanism called the Federal-Provincial-Territorial (FPT) Human Rights Committee is an existing and valid procedure in Canada. Yet in a public presentation at the University of Ottawa in March 2007, former Liberal justice minister Irwin Cotler quite rightly reminded the public that he regretted not having had the time during his mandate to revitalise the committee – a committee that has not seriously met for the last seventeen years!

Quite clearly, the question of the implementation of economic and social rights in Canada goes beyond the scope of the constitutional debate: provinces simply do not care about economic and social rights and find an “anti-*Labour Conventions*” approach convenient

as a means of cloaking the issue of their responsibility for international human rights obligations. Would the revival of the FPT Human Rights Committee fix it? An unqualified "yes" could be dangerous, since the provinces are otherwise more and more assertive on the international stage, but my point is here that they are assertive precisely when they want to be. When they do not want to be, then responsibility is another matter.

INTERNATIONAL LAW
AND THE PROVINCES: "OUTCOME"?

The case of Quebec is undoubtedly the most interesting when we look at the assertion of international personality by Canadian provinces. The following statement by the government of Quebec speaks for itself:

Increasing numbers of norms and standards resulting from international conventions and agreements have a direct impact on the responsibilities of the Government of Quebec. Its ability to make collective decisions, enact legislation, and adopt regulations is now influenced by these international norms. The government can either be subjected to these changes or strive to influence events in a direction favourable to its interests and the values of Quebec's society. Quebec has opted for the second alternative. In order to achieve this, it must be able to join the networks responsible for setting the norms, have access to foreign decision-makers, and avail itself of every possible means in order to have a real influence in the international arena.²⁰

Two priorities flow from this position: (1) the government of Quebec wishes to increase its presence and participation in international organizations, as well as in negotiations and discussions dealing with Quebec's interests, and (2) the government of Quebec wishes to intensify relations with political and economic decision makers of countries, federated states, and regions having shared interests with Quebec.

As can be seen from the Quebec Department of International Relations website, Quebec wants the government of Canada to recognize the legitimate role of non-sovereign entities in international relations. In fact, the province, alone or in conjunction with other neighbouring provinces and states, has been acting as a sovereign

entity or as a quasi-sovereign entity in regard to a number of different subjects. It concluded environmental cooperation agreements with New England states and has participated, within the framework of the New England Governors' Conference and the Eastern Canadian premiers, in a number of action plans that deal with concerns shared by all members: acid rain, cross-border atmospheric pollution, mercury, and climate change.²¹ In 2004, Quebec and New Hampshire signed a bilateral agreement on security. The agreement aims to increase the sharing of information, particularly on possible terrorist threats on both sides of the border. Quebec and New Hampshire are presently working together on security matters as part of the Canada-United States Cargo Security Project, and they previously concluded two agreements concerning trans-boundary environmental impacts and cultural cooperation.²²

Some observers might see these "soft" international activities with provinces or neighbouring states (that are not, strictly speaking, convention- or treaty-making) as business as usual. After all, Canada's provinces signed the Agreement on Internal Trade in 1984,²³ and this agreement respects their jurisdictional autonomy. But from a human rights perspective, such a conclusion would be a bit simplistic for at least two reasons: first, provinces are increasingly involved in activities that could potentially threaten or infringe human rights, as in the field of border security, for example. Second, the provinces tend to act as quasi-sovereign actors – if not states – in several respects, thereby blurring the classic division in international law between state and substate entities.

If my view is right, it then indicates that Canada has come a long way since the *Labour Conventions* case. Because the implementation of international commitments has often been described as "the" constitutional issue in the Canadian context,²⁴ it is possible to wonder how Canada and Canadians intend to approach the auto-determination by provinces of the extent of their human rights commitments without paying substantive or explicit attention to the International Bill of Human Rights? One of two things could result: either *Labour Conventions* would need to be revisited in the light of increasing international activity by the provinces, or all provincial activities would need to be submitted to a federal state-centric control mechanism aimed at protecting human rights. Is this last option viable in contemporary international society, where we seem to like to recall that "the global is also the local"?

Other approaches emphasizing the “role of non-sovereign entities in international relations” can be derived from governance theory. In a recent book, Harvey Lazar and Christian Leuprecht propose the following definition of governance theory, which they also describe as a case of multilevel governance: “a condition of power and authority that is shared in institutional relationship in which the scope of public policy and the mechanisms of policy making extend by necessity beyond the jurisdiction of a single government.”²⁵

According to human rights theory, it is the state that is ultimately accountable for implementing treaty and non-treaty obligations in the field of human rights. This does not imply that the state, as an international sovereign entity, is the *only* actor responsible for the appropriate policy-making process. At the moment that some rights, such as social and economic rights, require more than legislative implementation, the issue then becomes one of mainstreaming in a cohesive manner all public actors' decisions in a way that is compatible with the rights' requirements and their authentic realization. Consequently, governance and governmental responsibility are not incompatible if a dialogue about human rights as a process is promoted.

This aspiration to dialogue is obviously not the case in Canada at present. The presence of numerous non-classic actors in the landscape of inter-regional, provincial, and local agreements and protocols constitutes a twin challenge: on one hand, such actors are less concerned about the limits of their constitutional or statutory jurisdiction, while on the other they are not called upon to account for human rights. This division applies with a vengeance in the field of human rights, where many different ways of implementation are provided for and are necessary, as is recognized under the CESCR.

Municipalities comprise another level of international actors in global governance.²⁶ In this case, the puzzle of power and responsibility is still more profound, since under Canadian administrative law municipalities are provided with only the powers set out in their constitutive charters. Two examples will illustrate the issue I am pointing to here. In 2000, at the invitation of the UN mayors from all over the world gathered in Venice to constitute the UN Advisory Committee of Local Authorities, a new advisory organism. The Declaration of Venice was followed by the creation of the United Nations Human Settlements Programme (UN Habitat)²⁷ and in 2004 by a high-level Group of Experts on Decentralization (AGRED), whose mission is to guide international dialogue on decentralization and

urban life. According to UN Habitat, decentralization is a process that reflects the interdependence of various spheres of governance. In the course of its recent work the Governing Council of UN Habitat has referred to the principle of subsidiarity as the underlying rationale for the process of decentralization and has noted, “according to this principle, public responsibilities shall be exercised by those authorities which are closest to the citizens.”²⁸ The explicit connection between citizenship, human rights, and decentralized governance is perhaps the most striking aspect of this approach.

Mayor Yves Ducharme of Gatineau, Quebec, co-chaired AGRED from 2004 to 2007. When reviewing a speech Ducharme delivered in 2004 in the context of the founding meeting of AGRED, one can see how Canadian municipalities are being anything but shy about their contribution to “Canada’s place in the world”: diplomacy, peace-building and international relationships, economic development and trade, and overseas development assistance were all identified as important issues.²⁹ Clearly, municipalities, as subsidiary public actors, intend to share the load of Canada’s Department of Foreign Affairs and International Trade, mainly because they represent citizens that see themselves as part of a networked world and, in addition, because they can indeed be significant actors in international cooperation. Thus, municipalities can also be seen as “actors” in global governance and “duty holders” in matters related to human rights.

If the example of municipalities as international actors reinforces the classical paradigm of international relations, the following one may extend it a bit further. The Montreal Charter of Rights and Responsibilities (MCRR)³⁰ came into force in January 2006. It is the first charter of its kind adopted by a major Canadian city. The MCRR covers the main sectors of municipal activity: democracy, economic and social life, cultural life, recreation, physical activities and sports, environment and sustainable development, security, and municipal services. It is an ordinary bylaw that provides for the designation of Montreal’s ombudsman to promote mediation, and it looks for solutions when citizens and the city or boroughs disagree on issues covered by the charter.

The MCRR is a transposition of the European Charter for Safeguarding Human Rights in the City Initiative (2002),³¹ whereby large municipalities commit themselves to guarantee human rights in

urban areas. The preamble to the MCRR emphasizes the connection between the MCRR and international human rights law in clear terms:

Whereas citizens enjoy the rights and freedoms proclaimed and guaranteed by the *Universal Declaration of Human Rights* of December 10, 1948 and under international and inter-American human rights conventions ratified by Canada and to which Quebec has declared itself a party;

Whereas all basic rights are indivisible, interdependent and interrelated under the *Vienna Declaration* issued by the *World Conference on Human Rights* (1993);

Whereas citizens enjoy the basic rights under the *Quebec Charter of Human Rights and Freedoms* (1975) and the *Canadian Charter of Rights and Freedoms* (1982).

Clearly, the city of Montreal ombudsman will eventually be asked to interpret human rights in accordance with international standards. Such action may or may not be compatible with the position of Canada at the international level. Access to water presents an interesting case study. Chapter 2 of the MCRR, entitled "Economic and Social Life" (articles 17–18) states that the city of Montreal is committed to providing citizens with access to sufficient quantities of quality drinking water (article 18(f)) and to ensuring that no citizen is denied a supply of drinking water for economic reasons. Yet in 2002 Canada was the only country to vote against a UN resolution entitled Promotion of the Realization of the Right to Drinking Water and Sanitation, which was adopted by the former Sub-Commission on the Promotion and Protection of Human Rights.³² The Canadian government has since then declared that water is an important issue but maintains that countries are responsible for ensuring that their own populations have access to it. Canada has clearly stated that it does not believe that international law should recognize the existence of a right to water.³³ Canada also does not support the CESCR Experts Committee General Comment No. 15, entitled *The Right to Water*,³⁴ although such a right is implicitly contained in the CESCR.

In the light of the above, this "local" stewardship of an internationally recognized right may provide effective remedies for the population, even if the right to water is not guaranteed either by the

Canadian Charter or by the *Quebec Charter*. The drafters of the MCRR took great care in expressing the soft nature of the document. But no one can predict how courts will eventually consider such a by-law in the process of adjudication.

Consequently, the MCRR is a clear case where a local government acts in the realm of local or urban governance and attempts to actualize human rights for rights holders, although this may have unpredictable results in the future. From that standpoint, it does not really matter that the city of Montreal is acting within the limits of its jurisdiction or that the province of Quebec holds jurisdictional power over water. Since the city of Montreal evidently took inspiration from the international law of human rights in proposing and adopting the MCRR, experience with the document suggests that the debate over the implementation of Canada's international commitments towards human rights soon may turn. We see movement towards the search for accountability mechanisms at the sub-provincial level and at other levels where human rights standards find an institutional framework for the purpose of policy-making. Historically, municipalities were described more as "policy-takers" than as policy-makers. The era of multi-level governance may change the big picture in that regard. Ultimately, the above examples raise the point about the subsisting treaty-making power of the federal government, since initiatives taken by other levels of governments point in different directions and in a manner unrelated to the theory of powers as provided for under the Canadian Constitution.

So far, the examples and discussion in this chapter have remained focused on the realm of public actors' behaviour. However, when social and economic human rights are concerned, the portrait is largely incomplete if no account is taken of the phenomena of the outsourcing of state activities and the place of non-state actors in the same context. The point I would like to make in the last section of my contribution concerns the capacity of non-state actors in modern governance arrangements to redesign and redefine the limits and the scope of recognized human rights for which Canada holds international responsibility. Are non-state actors new duty holders in regard to human rights or new unaccountable actors?³⁵ The case of Quebec, where community actors have long claimed a right to act autonomously in the delivering of social

goods, will be briefly examined. Since Quebec is often described as the most “social” province of Canada, it makes for an interesting case study.

NEW PUBLIC MANAGEMENT, GOVERNING
ARRANGEMENTS, COMMUNITY ACTORS
AND HUMAN RIGHTS IN QUEBEC:
A SUSTAINABLE BOUILLABAISE?

New Public Management (NPM) is a management philosophy that has been used by governments since the 1980s to “modernize” the public sector. Based on the idea of public choice and on the managerial school of thought, NPM seeks to enhance the efficiency of the public sector and the control that government has over it. The main hypothesis of NPM and the wave of reform that it has created is that more market orientation in the public sector will lead to greater cost efficiency for governments, without having negative side effects on other objectives and considerations. NPM reflects a change in attitude: the idea is to make the public system function like the private sector. Some modern authors define NPM as a combination of disaggregation (splitting large bureaucracies into smaller, more fragmented ones), competition (between different public agencies and between public agencies and private firms), and incentivization (along more economic/pecuniary lines).³⁶ In Canada, experience with NPM was patterned on previous experience in New Zealand, Australia, and the United Kingdom.³⁷

The most distinctive organizational innovations of NPM in the Canadian public sector go under the rubric of “alternative service delivery,” which has been defined as a process of public sector restructuring that improves the delivery of services to clients by sharing governance functions with individuals, community groups, and other government entities.³⁸

The province of Quebec has distinguished itself by strong governance arrangements with community groups known as PCPS (Public Community Partnerships). A PCP is based, on one hand, on parameters promoted by the 2000 *Public Administration Act*³⁹ and, on the other, by a policy introduced in 2001 named *Community Action: A Crucial Contribution to the Exercise of Citizenship and the Social Development of Quebec*,⁴⁰ supplemented by the 2004 *Cadre de référence en matière d'action communautaire*.⁴¹

With these documents in mind, the Quebec government has recently been active in concluding PCP agreements and even in adopting laws that provide for the terms of such agreements. The case of the Chagnon Foundation is illustrative.⁴² In June 2007 the Quebec National Assembly assented to the *Act to Establish the Fund for the Promotion of a Healthy Lifestyle*.⁴³ The adoption of this act is in line with the creation of a partnership between the government and the Chagnon Foundation aimed at fostering healthy nutrition and active lifestyles.

The minister of employment and social solidarity and the Chagnon Foundation also signed an agreement in June 2007 to increase the support provided to family daycare providers in underprivileged communities. This three-year, \$12.6 million agreement will be used to foster child development, improve underprivileged children's chances of school success, and facilitate social integration. Such agreements and dedicated legislation are the result of the adoption in 2002 of Quebec's *Act to Combat Poverty and Social Exclusion*,⁴⁴ article 11 of which states that "actions to promote the involvement of society as a whole must provide for the inclusion of stakeholders representative of the broader Quebec community. For that purpose, such actions must, in particular ... recognize the social responsibility of enterprises and include the labour market partners; and recognize the contribution of volunteer and community action." An update provided by the Community Action Secretariat of the Quebec Government for 2004–5 states that in that year approximately \$630 million was distributed to some five thousand community groups for PCP contracts under seventy-five different government programs.⁴⁵ The provincial ministries of Labour, Family, and Social Services were the main providers of such contracts.

New governance arrangements in this "land of social service delivery" highlight not only the "contractualization" of government functions but also new accountability models anchored in the "result-based management" approach promoted by the Quebec *Public Administration Act*. Accountability mechanisms cover different types of protocols, agreements, and regional frameworks that structure the relation between the state and the community services providers. But analysis of such documents reveals a general silence around the "user's rights," confined to the cluster of customer's rights. In other words, the mixture of NPM and governance arrangements termed "PCP" seems to confuse two issues: one related to what the

state commits itself to deliver and the other that requires an assessment of the correlation between what *is* delivered and what *has to be* delivered in order to promote and protect the “consumer’s” or the “client’s” human rights.

Many questions in this regard will require serious exploration in years to come. Some paths of inquiry are offered in the growing literature in this field, since different expressions are used to describe the PCP process: governance by contract;⁴⁶ privatization, deregulation, outsourcing, or downsizing;⁴⁷ or privatization of the state.⁴⁸ Basically, the literature explores the question of the nature of such contracts and their qualification in the light either of public administrative law⁴⁹ or the international law of human rights.⁵⁰

The United Kingdom is even more sensitive to the potential for a clash between NPM-inspired service delivery and human rights because of the passage in 1998 of its *Human Rights Act* and of the continuing privatization process begun under the Thatcher government.⁵¹ The U.K. Charity Commission felt the need to explain that the *Human Rights Act* applies only to those charities that undertake public functions (for example, functions that a charity undertakes for, or instead of, a central or local authority) and that even where it does apply to a charity, the act relates only to its public functions and not to any functions that are of a private nature (for example, charitable purposes that are not undertaken pursuant to a statutory mandate).⁵²

The closest that Canadian law comes to this sort of situation was reflected in the Supreme Court of Canada's decision in *Eldridge*,⁵³ in which a deaf patient was denied sign language interpretation when giving birth in a Vancouver hospital. One of the issues at stake was summarised as follows by La Forest J.: “Legislatures have created many other statutory entities, however, that are not as clearly autonomous from government. There are myriad public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy. When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the Charter, it must be established that the entity, in performing that particular action, is part of “government” within the meaning of s. 32 of the Charter.”⁵⁴

La Forest J. concluded that a “private” hospital in Vancouver was clearly an agent of the government for the purpose of the *Hospital*

Insurance Act and that accordingly, s. 15 of the *Canadian Charter of Rights and Freedoms*, which sets out a standard of substantive equality, applied to the hospital's provision of health services:

in the present case there is a "direct and ... precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination – the failure to provide sign language interpretation – is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the Charter to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the Charter.⁵⁵

It is precisely this strong link between government and agent that NPM-inspired governance arrangements erode. NPM governance privatizes relations between the citizen-client and the provider of many different kinds of social services. As a result, many human rights abuses will be excluded from the scope of existing human rights protections against government and be confined, at best, to the scope of federal and provincial human rights codes.

In the case of Quebec's PCP it could be said that the method of service delivery, which is designed to regulate, among other things, private contractual relations, is made questionable by its introduction of alternate resolution mechanisms in the case of abuse: ethics committees, ombudspersons, and even express ethical commitments embedded in the contract between the state and the not-for-profit community service provider. Clearly, Quebec is working at transforming the nature of what La Forest J. termed in *Eldridge* "government's entities" in the execution of a public mandate. This attempt constitutes a convincing case of the privatization of international human rights standards.

An additional point to remember is that community service providers are often small not-for-profit entities that come and go. In

comparison with charities, the size of their activities and the specifics of their model of governance (often membership-driven) do not permit a clear distinction between their community mission and the service delivery component of their activities. This reality reveals that PCP constitutes a form of "privatisation by stealth." Furthermore, community groups often do not see themselves as providing public services. In certain cases they will assert their autonomy, even when providing public services. Consequently, the PCP looks more like a *bouillabaisse* than like a chosen *virage*, or departure, from the public to the private. The frontier between the not-for-profit private sector and the for-profit one is becoming more blurred and looks surprisingly like a form of conflation prescribed by the NPM theory.

This raises the issue of the accountability for human rights of non-state community actors that deliver a myriad of different social services. Let us use a hypothetical – or perhaps not so hypothetical – example. A not-for-profit community group provides social housing and manages housing units for the benefit of mentally challenged adults. Users participate in the management of the group but are deprived of the benefit of a lease, notwithstanding the number of years of residence, normally as a form of user protection in order to prevent the imposition of tenancy requirements on a vulnerable population. A user, experiencing a severe depression, develops disturbing behaviour. The group's administrators decide to expel him from his housing unit without any regard for the provincial tenancy law. This is because in the PCP contract between the Ministry of Social Services and the not-for-profit community group there is no reference to the requirement of the not-for-profit community group to respect the tenancy law. Instead, the purpose of the contract is described as being to provide for results-based monitoring of a client's autonomy. Consequently, the disturbed resident has no legal security of tenure. The net result of this three-way arrangement is to restrict the tenant to seeking recourse against the administrators and to eclipse any liability of the province as a duty holder in regard to the right to housing.

Results-based contracts increasingly dominate the Quebec scene. Is it therefore time to demand the inclusion of a contractual clause providing for the duty of non-state actors executing statutory obligations to protect the human rights of users? Or should we simply continue to recall the accountability of provinces in the field of human rights, notwithstanding the fact that this is increasingly diluted by contract law?

DISCUSSION AND CONCLUSION

Multi-level governance and new governance arrangements are altering discussion about the implementation of human rights treaties in Canada. Social and economic rights usually fall within the jurisdiction of the provinces, which have traditionally hidden behind the responsibility of the federal government at the international level. Notwithstanding this behaviour, it is the responsibility of provinces in large part to make such rights *real*. This explains why the model of a federal-provincial-territorial ministerial committee on human rights is normally pointed to as the solution to the complex case of federated states and their responsibility under international law. In the context of governance and governance arrangements, all actors – public and private – may decide to commit themselves internationally to realize human rights by various methods. Alternatively, they may ignore human rights and at the same time be the real actors in human rights' implementation through the delivery of social goods as a result of results-based contracting.

Increasingly, the implementation of social and economic rights in Canada relies on the private law of contract. At the same time, sub-governmental and public actors are behaving as “non-sovereign entities engaged in international relations” of a different kind. International relations driven by those entities, as well as private law, are somehow developing in a chaotic or anarchic manner, but with state approval under the influence of the new public management theory.

Is our house in order? In respect of internationally protected social and economic rights, of course not. And why should we proceed to make order? Because the beneficiaries of those rights still have them!

It becomes clearer and clearer that only a proposal aimed at promoting the liability of “other” actors, such as municipalities or non-state actors, in regard to human rights can provide an appropriate answer to the growing disconnect between duty holders and rights holders. Such a proposal could take inspiration from the UN's efforts to articulate Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.⁵⁶ It is not only transnational corporations investing abroad that are concerned with the implementation of human rights and that have obligations. According to the emerging theory of the horizontal duty of actors that do not make treaty law,⁵⁷ non-state actors at least have the duty not to violate human rights. Some entities,

such as sub-governmental actors, seem to want to do more internationally, while others, such as community groups, seem to believe that the sole fact of their being “good intentioned” will suffice for them not to violate such rights. To whom and how should they both be held accountable? This question raises more fundamental ones that deserve serious attention: how much of human rights standards should belong to the law of contract? Is the distinction between public and private agents still a sustainable one? Which actors have the legal legitimacy to take on the implementation of international human rights standards?

Such questions are not simple, and they evolve differently from one part of Canada to others. For sure, though, they highlight the urgent need to move beyond the classical Canadian academic debate based on the *Labour Conventions* (treaty-making power) case and focus more and more on different ways, loci, and methods of insuring the respect of social rights in Canada (implementation). They touch on issues related to multi-level governance, human rights mainstreaming at all relevant levels of policy-making, and the relationship between contract law and human rights. If I am allowed a short wish list to close this chapter, it would go this way:

- 1 In the context of the well-acknowledged need for an efficient federal-provincial-territorial human rights committee to be activated in Canada, governments should consider putting municipalities on board as well.
- 2 When contracting out social services delivery to private or community partners, governments should develop as a best practice an explicit “human rights respect” clause.
- 3 Finally, and considering the wide variety of emerging multi-level governance arrangements, public actors, as well as private ones, should promote a human rights impact assessment methodology embedded in such arrangements.

NOTES

- 1 *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 368 (entered into force 3 January 1976).
- 2 See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (1993), reprinted in (1993) 32 I.L.M. 1661.

- 3 See C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10 Const. Forum 97; C. Scott, "Reaching beyond (without Abandoning) the Category of 'Economic, Social and Cultural Rights'" (1999) 21(3) Hum. Rts Q. 633; C. Scott, "Social Rights: Towards a Principled, Pragmatic Judicial Role" (March 1999) 1:4 Econ. & Soc. Rts. Rev. 4; M.M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research Series No. 18 (Antwerp: Intersentia 2003). See also L. Lamarche, *Perspectives occidentales du droit international des droits économiques de la personne* (Brussels: Bruylant 1995).
- 4 The author is a co-researcher member of the Social Rights Accountability Project (www.srap.ca). SRAP is funded by the Social Sciences and Humanities Research Council of Canada as a Community University Research Alliance project. The SRAP website makes available the best of academic writings on this topic. See B. Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in S. Boyd et al., eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press 2007) 77; M. Jackman, "Canadian Charter Equality: Reflections of a Card-Carrying Member of the Court Party" (December 2005 – January 2006) 27:1 *Policy Options* 72.
- 5 National Council of Welfare, *Solving Poverty: Four Cornerstones of a Workable National Strategy for Canada*, 2007, available at <http://www.ncwcnbes.net/en/research/antipoverty-antipauvrete.html>.
- 6 I borrow this expression from the former UN special rapporteur on the right to development Arjun Sengupta. See A. Sengupta, "On the Theory and Practice of the Right to Development" (2002) 24:4 Hum. Rts. Q. 837.
- 7 Section 16(1) of CESCR provides that the States Parties to the CESCR undertake to submit reports on the measures that they have adopted and the progress they have made in achieving the observance of the rights recognized under the convention. The Experts Committee on Economic, Social and Cultural Rights has been created to receive and scrutinise such reports. See <http://www.ohchr.org/english/bodies/cescr/index.htm>.
- 8 Ligue des droits et libertés du Québec and Université du Québec à Montréal, 2007–9, Ministère de l'éducation, des sports et des Loisirs, *Le citoyen-usager et ses droits dans le contexte des partenariats publics/communautaires: de nouveaux enjeux pour la responsabilité étatique* (on file with the author).
- 9 *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 [*Labour Conventions case*].

- 10 See B. Cameron, "The Social Union, Executive Power and Social Rights" (2004) 13 *Canadian Women Studies*, available at www.srap.ca.
- 11 *Reference re Employment Insurance Act* [2005] 2 S.C.R. 669. This decision concerns the Paid Parental Leave regime adopted by the government of Quebec and incorporated in the *Act Respecting Parental Insurance*, R.S.Q., c. A-29.011.
- 12 See Government of Québec, Secrétariat aux affaires intergouvernementales canadiennes, Agreement 2007-60, *Entente finale Canada - Québec sur le régime québécois d'assurance parentale*. Available at http://www.cgap.gouv.qc.ca/publications/pdf/CGAP_RQAP_entente.pdf; following Agreement 2004-029: *Entente de principe Canada-Québec sur le régime d'assurance parentale*. Such technical agreements were designed to avoid the problem that contributions from Quebec residents to the Employment Insurance Fund would increase or double because of the autonomous administration of the Régime de congé parental du Québec.
- 13 A useful compilation of the history of social law in Canada can be found in D. Guest, *The Emergence of Social Security in Canada*, 3d ed. (Vancouver: UBC Press 1997).
- 14 To limit Canada's liability where a treaty, even partially, concerns an area of provincial legislative jurisdiction, that treaty usually contains a "federal clause." To varying degrees, depending on the purpose of the treaty and the wording of its articles, the federal clause informs all the parties that the government of Canada may have certain difficulties in implementing the treaty because to do so it will have to secure the cooperation of the Canadian provinces. The inclusion of this clause limits the responsibility of the government of Canada should even one province refuse to pass or amend its legislation in accordance with the provisions of a treaty. The effect of the federal clause is ambiguous, however. On the one hand, it might be claimed that it constitutes an "obligation of means" for the government of Canada, but on the other hand, it might be claimed that it constitutes an "obligation of result." See Government of Canada, Law and Government Division, *International Treaties: Canadian Practice* (April 2000), available at [http://dsp-psd.pwgsc.gc.ca/Collection-R/LOPBDP/BP/prbo004-e.htm#PARTICIPATION%20BY%20THE%20PROVINCES\(txt\)](http://dsp-psd.pwgsc.gc.ca/Collection-R/LOPBDP/BP/prbo004-e.htm#PARTICIPATION%20BY%20THE%20PROVINCES(txt)). The CESCR presents, to say the least, a very weak federal clause, which does not make the life of the CESCR Experts Committee easier.
- 15 U.N. Doc. E/C.12/1/Add.31, para. 30 (10 December 1998).
- 16 *Ibid.*, para. 52.
- 17 *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on*

Economic, Social and Cultural Rights: Canada, U.N. Doc. E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5, para. 20 (22 May 2006).

- 18 *Canada Assistance Plan*, R.S.C., 1985, c. C-1.
- 19 *Canada Health Act*, R.S.C. 1985, c. 6.
- 20 See Government of Quebec, Department of International Relations, *International Policy*, available at http://www.mri.gouv.qc.ca/en/politique_internationale/capacite_action/index.asp.
- 21 See, for example, 28th Annual Conference of the New England Governors and the Eastern Canadian Premiers: Resolutions and Reports (7–9 Sept. 2003), available at <http://www.negc.org/28thConference.html>. See similar resolutions in 2006 and 2007, available at the same website.
- 22 For a detailed review of the North American legal context in regard to environment and impact assessment, see N. Craik, “Deliberation and Legitimacy in Transnational Environmental Governance,” Institute for International Law and Justice Working Paper 2006/10 (Global Administrative Law Series).
- 23 For a consolidated version of the 1995 Agreement on Internal Trade and its seven Protocols see http://www.ait-aci.ca/index_en/ait.htm. AIT Art. 300 states that “Nothing in this Agreement alters the legislative or other authority of Parliament or of the provincial legislatures or of the Government of Canada or of the provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.”
- 24 See J.-Y. Morin, “La conclusion d’accords internationaux par les provinces canadiennes à la lumière du droit comparé,” *Canadian Yearbook of International Law*, vol. 3, 1965, 126; Jean-Yves Grenon, “De la conclusion des traités et de leur mise en œuvre au Canada,” *Canadian Bar Review*, vol. 40, 1962, 151; Anne-Marie Jacomy-Millette, *L’introduction et l’application des traités internationaux au Canada*, LGDJ, Paris, 1971, 118–28, and more generally A.E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths 1968) 15–17.
- 25 H. Lazar & C. Leuprecht, eds., *Spheres of Governance: Comparative Studies of Cities in Multilevel Governance Systems* (Institute of Intergovernmental Relations, School of Policy Studies, Queen’s University 2007) 3. See also L. Hooghe & G. Marks, “Unravelling the Central State, but How? Types of Multilevel Governance” (2003) 97:2 *Am. Pol. Sci. Rev.* 233.
- 26 It is estimated that 80 percent of Canadians live in the four largest Canadian cities and that 90 percent of immigrants live in urban areas in Canada. See also N. Brenner, *New State Spaces: Urban Governance and the Rescaling of Statehood* (Oxford: Oxford University Press 2004).

- 27 Pursuant to UN Habitat Governing Council Resolution 19/12. See also Governing Council of the United Nations Human Settlements Programme, "Dialogue on Effective Decentralization and the Strengthening of Local Authorities: Report of the Executive Director," UN Doc. HSP/GC/20/7 (17 November 2004).
- 28 *Ibid.* See also UN Habitat, available at <http://www.unhabitat.org/content.asp?typeid=19&catid=366&cid=411>.
- 29 See Federation of Canadian Municipalities, available at http://www.icmd-cidm.ca/ev.php?URL_ID=3021&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1080161056.
- 30 See Ville de Montréal, available at http://ville.montreal.qc.ca/portal/page?_pageid=3036,3377687&_dad=portal&_schema=PORTAL.
- 31 A copy of the charter is available at <http://www.comune.venezia.it/flex/cm/pages/ServeBLOB.php/L/EN/IDPagina/2198> (18 May 2000).
- 32 UN High Commissioner for Human Rights, Sub-Commission on Human Rights, Res. 2000/8.
- 33 On the other hand, the Canadian government also states that "All of Canada's international trade obligations clearly preserve Canada's ability to deliver drinking water to its citizens by municipal, regional or provincial governments, or by these governments through procurement of water distribution services from private sector firms" and that "Canada has no GATS commitments in respect of water collection, purification and distribution services and has no plans to make any." Finally, Foreign Affairs and International Trade Canada affirms that "the GATS (WTO General Agreement on Trade in Services) services sectoral classification list, on which the majority of WTO Members' commitments, including Canada's, are based, explicitly excludes collection, purification and distribution services of potable water" and that "Nothing in the GATS, or any other trade agreement, prevents governments from setting standards to ensure that Canadians have access to safe drinking water." See Foreign Affairs and International Trade Canada, WTO Trade in Services, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/services/gats_agcs/faq/faq-environment.aspx?lang=en (November 2007). The government of Canada also recently stated that "In so far as trade in goods is concerned, the NAFTA and the WTO do not impose disciplines on the ability of governments to regulate the extraction of water from its natural state, nor do they create obligations that would compel Canada or any province to allow the extraction of bulk water, including for export, without any limits. Because the proposed Accord relates to water in its natural state, it would not be subject to the provisions of these trade agreements

with respect to trade in goods. Furthermore, as long as regulations governing the extraction of water from its natural state do not discriminate among NAFTA investors, or investments of investors, in like circumstances, on the basis of nationality, such regulations will be consistent with the national treatment obligation of Chapter 11 of the NAFTA. Also, such measures, if properly implemented, should not constitute an expropriation under the NAFTA.” See Government of Canada, *Paper on Bulk Water Removal and International Trade Considerations*, July 2008, available at http://www.canadainternational.gc.ca/san_francisco/bilat_can/bulkwater-massifs_deau.aspx?lang=eng. Consequently, the trade dimension of the human right to water should not be seen as the “legal” reason why Canada resists international acknowledgement of the human right to potable water.

- 34 U.N. Doc. E/C.12/2002/11 (January 2003); *The Right to Water*, General Comment No. 15, U.N. Doc. E/C.12/2002/11 (20 Jan. 2003).
- 35 Interestingly enough, the question of the accountability of non-state actors in regard to human rights has been limited so far to foreign investors and human rights protection abroad. See, for example, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
- 36 See P. Dunleavy et al., “New Public Management Is Dead – Long Live Digital-Era Governance” (2006) 16:3 J. Pub. Adm. Research & Theory 467.
- 37 See J. Boston, “Organizing for Service Delivery: Criteria and Opportunities” in B. Guy Peters & D. Savoie, eds., *Governance in the Twenty-first Century: Revitalizing Public Services* (Montreal: McGill-Queens University Press 2000) 281; see also J. Boston, P. Dalziel & S. St John, eds., *Redesigning the Welfare State in New Zealand* (Auckland: Oxford University Press 1999).
- 38 See S. Borins, “New Public Management, North American Style” in K. McLaughlin, S. Osborne & E. Ferlie, eds., *The New Public Management: Current Trends and Future Prospects* (London: Routledge 2000). See also R. Ford & D. Zussman, eds., *Alternative Service Delivery: Transcending Boundaries* (Toronto: KPMG and IPAC 1997).
- 39 L.R.Q. c. A-6.01, Art. 1 of which reads, “This Act affirms the priority given by the Administration, in developing and implementing the rules of public administration, to the quality of the services provided to the public; thus, it establishes a results-based management framework centred on transparency.”

- 40 Government of Quebec, *Community Action: A Crucial Contribution to the Exercise of Citizenship and the Social Development of Québec*, available at <http://www.mess.gouv.qc.ca/saca/action-communautaire/politique-reconnaissance-soutien_en.asp>.
- 41 Government of Quebec, *Plan d'action gouvernemental et cadre de référence en matière d'action communautaire*, available in French only at <http://www.mess.gouv.qc.ca/saca/action-communautaire/politique-reconnaissance-soutien_en.asp>.
- 42 For more information see <<http://www.fondationchagnon.org>>.
- 43 S.Q. 2007, c. 1.
- 44 R.S.Q., c.L-7.
- 45 See Government of Quebec, Update on Government Activity related to Community Action (March 2006), available in French only at <http://www.mess.gouv.qc.ca/saca/action-communautaire/etat-situation.asp>>.
- 46 See D. Guttman, "Governance by Contract: Constitutional Visions; Time for Reflection and Choice" (2003-2004) 33 *Pub. Cont. L.J.* 321; A.C.L. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford: Oxford University Press 2001) [Davies].
- 47 See D. Mullan & A. Ceddia, "The Impact on Public Law of Privatization, Deregulation, Outsourcing and Downsizing: A Canadian Perspective" (2003) 10:1 *Ind. J. Global Legal Stud.* 199, 200 [Mullan & Ceddia].
- 48 See B. Hibou, *Privatizing the State* (New York: Columbia University Press 2004).
- 49 See Davies, note 44 and Mullan & Ceddia, *supra* note 47.
- 50 See K. De Feyter & F. Gomez Isa, eds., *Privatisation and Human Rights in the Age of Globalisation* (Antwerp: Intersentia 2005); J. Delbruck, "Transnational Federalism: Problems and Prospects of Allocating Public Authority beyond the State" (2004) 11:1 *Ind. J. Global Leg. Stud.* 31; and the well-known study by Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press 1996).
- 51 See C. Saunders & K. Yam, "Government Regulation by Contract: Implications for the Rule of Law" (2004) 15:1 *Pub. L. Rev.* 51.
- 52 This distinction is taken from the U.K. Charity Commission website <<http://www.charity-commission.gov.uk/supportingcharities/ogs/go71b003.asp#a10>>.
- 53 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
- 54 *Ibid.*, para. 36.
- 55 *Ibid.*, para. 51.
- 56 *Supra* note 33.
- 57 See, for example, the case of corporate actors: John Gerard Ruggie, "Business and Human Rights: The Evolving National Agenda" (October

2007) *American Journal of International Law* 101.4 819–40; or in humanitarian law: Marco Sassoli, “L’effet horizontal des droits humains dans le contexte de la mondialisation,” in Gorghi & Meyer Bisch, eds., *Société civile et indivisibilité des droits de l’homme* (Fribourg 2000), 341–64; and more recently, the case of non-state actors in the fight against global poverty: Margot E. Salomon, *Global Responsibility for Human Rights, World Poverty and the Development of International Law* (Oxford: Oxford University Press 2007).