The Right to Effective Remedies

United Nations

Committee on Economic, Social and Cultural Rights

Review of Canada's Fourth and Fifth Periodic Reports
Under the ICESCR

(May 5th & 8th, 2006)

Submission of the Charter Committee on Poverty Issues

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Introduction

CCPI is a national committee which brings together low-income individuals, anti-poverty organizations, researchers, lawyers and advocates for the purpose of assisting poor people in Canada to secure and assert their rights under international law, the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), human rights legislation and other law in Canada.

CCPI has been granted leave to intervene in eleven cases at the Supreme Court of Canada and in a number of other cases before lower courts and tribunals to raise issues of importance to poor people under the *Charter* or other law and to promote interpretations of Canadian law consistent with the ICESCR. CCPI appeared before the CESCR in relation to Canada's second and third periodic reviews in 1993 and 1998 and before the HRC regarding Canada's fourth and fifth reviews in 1999 and 2005.

The focus of these submissions is on Canada's failure to ensure effective remedies to Covenant rights, with a particular focus on the right to an adequate standard of living.

Retrogressive measures with respect to the right to an adequate standard of living in Canada have been two-pronged. Not only have governments in Canada imposed unprecedented cuts to benefits and coverage in social assistance and other income support programs, they have also removed and denied effective remedies to violations of Covenant rights resulting from these cuts.

As noted by the CESCR in its 1998 review, the revoking of the *Canada Assistance Plan* ("CAP") in 1996 had a number of adverse consequences, including the loss of effective legal remedies. The Committee noted correctly

that CAP had “facilitated court challenges of federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act.” The Committee recommended a number of new measures to replace and improve upon the lost legal protections in CAP. None of these has been implemented. The Committee also expressed concern that when poor people had turned to the courts, governments had argued strenuously against interpretations of the *Charter* which would impose legal obligations on governments to ensure an adequate standard of living.

Governments in Canada have, in essence, sought to deny any effective remedy to violations of the right to an adequate standard of living. What is at issue in Canada’s manifest failure to respond constructively to the Committee’s concerns and recommendations from 1998 is not only the gross inadequacy of social programs in Canada and the unacceptable extent of poverty and homelessness, but also a critical assault on the status of the right to an adequate standard of living as a human right in Canadian society.

Part I: Economic and Social Overview: Market-Based Poverty Reductions and Indifference to the Plight of the Poor

At its last review Canada argued that unprecedented restructuring of social programs was necessary because of a financial deficit.

> Program expenditure reduction measures were critical in order to regain control over the finances of the Canadian government and to ensure the future financial viability of Canada's social programs. Failure to do so would have put these very programs in jeopardy. For example, in 1993-94 total federal spending reached $158 billion while total revenue was only $116 billion. [1]

The CESCR did not agree that Canada's fiscal situation in the 1990s justified the abandonment of the needs of the most disadvantaged members of society or the revoking of legislation such as the *Canada Assistance Plan Act*. Nevertheless, it is important, in considering Canada's Fourth and Fifth Periodic Reports, whether there are any fiscal impediments which may be invoked to justify continued failure to implement the Committee's recommendations that the right to an adequate standard of living be subject to effective legal remedies.

Canadian governments have argued before domestic courts and in international *fora* that fiscal decisions about allocation of resources ought to be the exclusive domain of legislatures. In effect, they wish to ensure that Canadian governments are free to allocate resources as they see fit, with no meaningful accountability to Covenant rights under Canadian law. Resource allocation decisions over the last five years, however, demonstrate that far more accountability is needed in this area.

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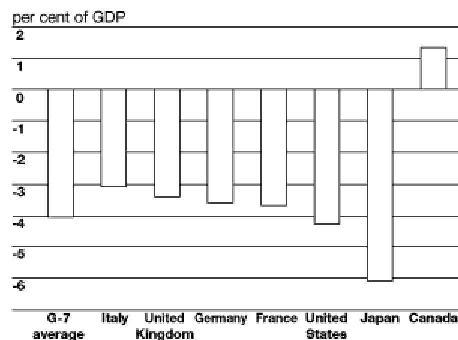
[1] Responses by the Government of Canada to the supplementary questions emitted by the United Nations Committee on Economic, Social and Cultural Rights (e/c.12/Q/CAN/1) on Canada's third report on the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add17) HR/CESCR/NONE/98/8 (October, 1998), Question #21.

Since the last review, Canada has enjoyed a period of unparalleled economic growth and fiscal health.

- At the time of the federal government budget in February 2005, the government of Canada posted its eighth consecutive budget surplus – “It marks the longest string of balanced federal budgets in Canadian history”;[2] “…we expect it to continue.”[3]

- “Canada finds itself in an enviable position, with an economic record that is, quite simply, unmatched in the world-leading Group of Seven (G-7) economies.”[4]….[Canada] is the only G-7 nation to record a surplus in 2002, 2003 and 2004 [and] will be the only G-7 country to record a surplus in both 2005 and 2006.[5]



- The share of the GDP taken in tax revenues has fallen significantly; “primarily reflecting the impact of the tax reductions announced in the

[2] The Economic and Fiscal Update (Minister of Finance, (Canada), November 2005) at page 3.
[3] The Budget Speech 2005, (Department of Finance, Canada), page 5
[4] The Budget Speech 2005, (Department of Finance, Canada), page 6
[5] The Budget Plan 2005 (Department of Finance, Canada) at page 284 (Chart created by Department of Finance (Canada) and appears in: *Annual Financial Report of the Government of Canada, Fiscal Year 2004-2005* at page 6

February 2000 budget and October 2000 *Economic Statement and Budget Update*."[6]

- "We have cut taxes each and every year since the federal budget was first balanced in 1997. We restored full indexation [of income-tax brackets], lowered rates and increased the amount Canadians can earn tax-free."[7]

- "Corporate profits now stand at 14 per cent of GDP—the highest level in over three decades." [8]

For some Canadians, economic prosperity has led to improved enjoyment of Covenant rights, including the right to work and the right to an adequate standard of living.

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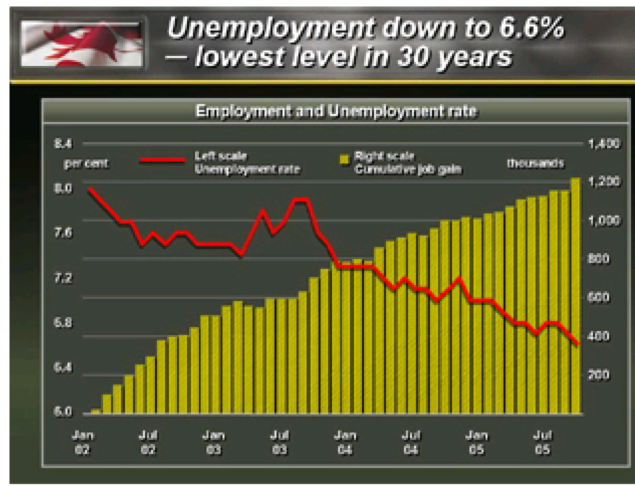
[6] Annual Financial Report of the Government of Canada, Fiscal Year 2004-2005, at page 5
[7] The Budget Speech 2005, (Department of Finance, Canada), page 15
[8] The Economic and Fiscal Update (Minister of Finance, (Canada), November 2005) at page 4. Graph created by Department of Finance (Canada)

- "Since 1997, Canada has had the best job creation record in all the G7 group of world-leading economies."[9]

- Canada's unemployment rate now stands at 6.6 per cent—its lowest level in 30 years.[10]



- "Canadians achieved steady improvements in their take-home pay. Real disposable income per capita—the amount left after taxes—was $2,700 higher on average in 2004 than in 1996, an increase of about 15 per cent. And living standards have risen more in the past *8* years (since we balanced the books) than they had in the previous *18* years."[11]

As Craig Scott has noted "Canadian governments have long invoked statistical averages and medians as adequate accounts of the state of human rights enjoyment in Canada, thereby showing just how little understanding (or

[9] The Economic and Fiscal Update (Minister of Finance, (Canada), November 2005) at page 3.
[10] The Economic and Fiscal Update (Minister of Finance, (Canada), November 2005) at page 4. Graph created by Department of Finance (Canada)
[11] *Ibid* at page 3.

sincere attempt to understand) there is of the very nature of human rights. …. That Canadians on average are not homeless, on average have adequate nutrition, on average go to adequate schools, or on average can raise their children in a dignified way says *nothing at all* about whose human rights are being respected and whose are being violated." [12]

The Plight of Disadvantaged Groups: Cutbacks and Indifference

*"*The Government of Canada is committed to a high and rising quality of life for all Canadians.*"—Canada's Fourth Periodic Report*[13]

With fewer unemployed and significant budgetary surpluses, Canadian governments have been in the enviable position since the last periodic review of being able to ensure that no one is denied the right to an adequate standard of living. However, the response to the new fiscal environment has been the opposite of this. Social programs on which disadvantaged groups rely have continued to be cut, even in the new environment of government surpluses. As a share of GDP, program spending at both levels of government has fallen sharply over the last decade.[14]

During the period described above, the one covered by Canada's 4th and 5th Reports under the ICESCR, the incomes of those relying on social assistance, the poorest of the poor, have either been cut in absolute terms or been severely eroded by inflation. The State party's own advisory body, the National Council on Welfare, in its most recent survey of welfare incomes says that Canadian welfare policy over the past 15 years has been an "**utter disaster**."[15]

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[12] Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?" (1999) 10(4) *Constitutional Forum* 97 at page 105.
[13] Canada's Fourth Periodic Report under the ICESCR, para 278
[14] The Budget Plan 2005 (Department of Finance, Canada) at page 280.
[15] National Council of Welfare, *Welfare Incomes 2004* at p. 87. During the course of the review of Canada's compliance with the ICESCR, the term "poverty line" will be used repeatedly. While there is no official poverty line in Canada, the Government of Canada, in its 5th Report under the

For single people who are reliant on social assistance, their total incomes, expressed as a percentage of the poverty line, have **decreased** by between 15% (Quebec) to 51% (Alberta) from their peak levels in the late 1980's or early 1990's.[16] Single mothers in receipt of social assistance have seen their total welfare incomes, expressed as a percentage of the poverty line, **drop** by between 10% (Quebec) to a shocking 31% (Ontario).[17]

The total income of a single person with a disability decreased by between 8% (Quebec) and 38% (New Brunswick), with most jurisdictions decreasing incomes by about 25-30%.[18] Measured in terms of how closely social assistance rates reach the poverty line, the report found that **none of the welfare incomes in any of the figures could be considered adequate or reasonable.**[19]

> Deliberate cuts from time to time, combined with the lack of annual cost-of-living adjustments in welfare rates, have resulted in falling incomes year after year. Many of the provincial and territorial benefits shown in the previous table for 2004 were all-time lows since the National Council of Welfare started doing calculations in 1986 and 1989.[20]

The report's conclusion is stark:

> Welfare incomes have never been adequate anywhere in Canada, but many of the provincial and territorial benefits reported in 2004 were modern-day lows. Welfare has long been the neglected stepchild of governments in Canada, and *Welfare Incomes 2004* shows that the neglect is continuing. Perhaps this year's dismal report will finally make people in public life sit up, take notice and do something to remedy the situation.[21]

ICESCR, states: "While Canada has no official measure of poverty, the Government of Canada typically uses Statistic Canada's after-tax low-income cut-offs (LICOs) as a proxy.", para. 121

[16] See *Welfare Incomes 2004*, table 5.2 on pages 69-70.

[17] *Ibid*, table 5.2 on pages 69-70.

[18] *Ibid*, table 5.2 on pages 69-70.

[19] *Ibid*, at p. 71.

[20] *Welfare Incomes 2004*, at p. 44.

[21] *Welfare Incomes 2004* at p. 87. More recently still, the government appointed advisory body appeared before a parliamentary committee and pleaded with the government: "In 2003, there were 4,917,000 poor people living in Canada….It is simply unacceptable in a country as rich as

The systematic neglect of social assistance programs is part of a larger pattern of cutting social programs on which the most disadvantaged rely, denying the most disadvantaged groups the benefits of economic prosperity in Canada.

In light of unparalleled economic growth, corporate profits and sustained surpluses, is there anything that stands in the way of the full implementation of the right to an adequate income, including the provision of effective legal remedies for this right? In CCPI's submission, there is not. If Canada does not have an obligation, in its present circumstances, to provide effective remedies to any violations of the right to an adequate standard of living, then it is difficult to see in what circumstances this obligation would apply.

Part II: The Provision of Effective Remedies for Covenant Rights Violations

One of the contentious issues in past reviews of Canada has been the issue of the "justiciability" of Covenant rights. At the last review at the Committee's 19th session (November 1998) the Canadian Head of Delegation voiced concern about what he considered the Committee's excessive focus on the availability of legal remedies to Covenant rights, suggesting that the review should focus on whether programs were in place to ensure the enjoyment of the rights. In the Delegation's view, it was up to Canada to decide whether to make Covenant rights justiciable – that legal remedies were optional under the Covenant, not required. A number of Committee members took exception to this statement.

Canada to leave this many people behind… Social inequality is increasing in Canada and in our view the benefits of any tax cuts in the federal budget for 2006 must be targeted to low-income citizens." National Council of Welfare Presentation to the Standing Committee on Finance for the 2005 Pre-Budget Consultations (October 27, 2005)

The obvious confusion about the nature of the obligations of States parties with respect to providing effective remedies inspired the Committee to draft and adopt, at the end of the 19th session, General Comment No. 9 on the Domestic Implementation of the Covenant. These combined fourth and fifth periodic reviews are the first occasion for the Committee to consider the issue of effective remedies in Canada since the adoption of that important General Comment.

The Committee's adoption of General Comment No. 9 provided a crucial clarification for advocates, courts and governments, particularly in "dualist" countries such as Canada, about the issues that had been so troublesome in the review of Canada. In our domestic advocacy for effective remedies, CCPI has consistently cited General Comment No. 9 to provide courts with guidance as to how the Covenant, as well as the jurisprudence of this Committee, should be used to interpret the *Canadian Charter of Right*s and other law.

The Committee was careful in the General Comment to leave room for variation from state to state as to how social and economic rights are protected within domestic legal systems, noting that: "the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide." But the Committee was also careful to clarify that flexibility does not permit states to simply decide not to provide any effective remedies at all for violations of Covenant rights. The Committee lays out two basic principles of compliance in these situations, based on the overriding duty to provide effective domestic remedies.

First, the means chosen by the state must be adequate to give effect to the rights in the *ICESCR*. In many cases, this includes judicial enforcement, particularly when it comes to protecting the most vulnerable. As the Committee explained:

> The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the

> principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

To satisfy the non-discrimination provisions of the *ICESCR*, judicial enforcement is, the Committee asserts, indispensable.

Second, protection for social and economic rights should be comparable to, and integrated with, the protection provided for civil and political rights. Where the means used to give effect to the *ICESCR* "differ significantly" from those used in relation to other human rights treaties, "there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights."

State parties to the *ICESCR* are thus required to provide for legal remedies in two ways: through consistent interpretation of domestic law, particularly in the area of equality and non-discrimination, and through the adoption of necessary legislative measures to provide legal remedies for violations of social and economic rights. Such remedies may, in some cases, be administrative rather than judicial, but they must be effective to permit people to vindicate their rights in the Covenant.

How, then, are we to apply these principles to Canada? Canada has chosen not to make the Covenant directly enforceable in its courts. In these circumstances, the Committee asserts in General Comment No. 9 that the means chosen for enforcement of Covenant rights are, themselves, subject to review by the Committee "as part of the Committee's examination of the State party's compliance with its obligations under the Covenant."[22]

[22] General Comment No. 9, para. 5.

A. The *Charter of Rights* as the Primary Vehicle for Protecting Social and Economic Rights in Canada

As noted by Justice L'Heureux Dubé of the Supreme Court of Canada,

> Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect (see Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; R. v. Keegstra, [1990] 3 S.C.R. 697). In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity.[23]

A critical aspect of Canada's compliance with the obligation to provide effective remedies to Covenant rights will therefore depend on the interpretation that is given to the broadly framed rights under the Charter. This Committee has repeatedly emphasized that, as a fundamental condition of compliance with the Covenant, governments in Canada ought to promote interpretations of the broadly framed rights in the *Canadian Charter of Rights and Freedoms* that will ensure effective remedies to violations of Covenant rights. The basis for these recommendations was clarified in General Comment No. 9.

The Committee points out in General Comment No. 9 that it is well established in international law that courts and tribunals must interpret and apply domestic law in a manner that is consistent with a state's international human rights obligations. This basic principle of the rule of law is not "optional" or a matter for the discretion of States parties. Whatever constitutional provisions are adopted, these must be applied consistently with international human rights law. As the Committee explains: "There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant."

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[23] R. v. Ewanchuk [1999] 1 S.C.R. 330 at para. 73.

> Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.[24]

The principles underlying the CESCR's statements in General Comment No. 9 find domestic expression in similar statements by the Supreme Court of Canada. Writing for the majority in *Slaight Communications*,[25] Chief Justice Dickson insisted on an interpretation of the *Charter* which provided protection of the right to work in article 6 of the Covenant, affirming that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada ratified." This "interpretive presumption" was reaffirmed in the Supreme Court of Canada case in *Baker* in which Justice L'Heureux-Dubé stated for the majority that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*." [26]

All of this jurisprudence, both international and domestic, provides governments in Canada ample basis for promoting effective remedies for Covenant rights by way of consistent interpretation of the expansive provisions of the *Charter* (provisions such as 'the right to life', to 'security of the person' and to 'equality') – precisely as recommended by this Committee. However, we are not aware of a single case in which the Government of Canada or any provincial or territorial government has suggested that its obligations under the Covenant to protect the right to an adequate standard of living (or any other Covenant right) should inform the interpretation of the *Charter*. Rights claimants and intervening parties have regularly referred to the Covenant, to the General Comments and to

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[24] General Comment No. 9, para. 15.
[25] *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1056.
[26] Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 70.

the jurisprudence of this Committee, but they have received no support from governments in promoting access to effective remedies under the Charter.[27]

The CESCR has appropriately raised the question as to whether governments in Canada, when they are involved in litigation, are themselves adopting, and encouraging courts to adopt interpretations of the *Charter of Rights* which are denying protection of Covenant rights, and with the provision of effective remedies.[28] In its formal response to the Committee's question, the State party states flatly: "There is nothing to suggest that governments in Canada have ever urged or encouraged the courts to adopt a position of the nature described in the question."[29]

However, in their pleadings in court cases, governments have continued to oppose interpretations of the *Charter* which would provide effective remedies to violations of the right to an adequate standard of living and other Covenant rights. It has become routine for governments in Canada, in response to claims advanced by poor people, to argue that courts ought not to interfere with what they characterize as governments' social and economic policy choices, even where these choices may have deprived vulnerable groups of the most basic necessities of life.

The following survey will make clear that, both through its litigation stance vis-à-vis *Charter* interpretation and its failure to take appropriate steps to create adequate alternative remedies, Canada is in violation of its fundamental

[27] It will be appreciated that this approach runs directly contrary to what the CESCR recommended in its Concluding Observations on Canada (December 1998), at para. 50: "The Committee urges the federal, provincial and territorial governments to adopt positions in litigation which are consistent with their obligation to uphold the rights recognized in the Covenant."
[28] List of Issues concerning Canada's Fourth Periodic Report under the ICESCR, questions 3 & 23.
[29] See response to Question #3 in the Responses to the List of Issues concerning Canada's Fourth Periodic Report under the ICESCR, re.

Covenant obligation to provide an effective means for people to obtain remedies for violations of their rights under the Covenant.[30]

B. Governments' Positions on *Charter* Interpretation Consistent with the Covenant

The Right to Life, Liberty and Security of the Person

Section 7 of the *Canadian Charter* reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

As noted by the High Commissioner for Human Rights, Section 7 of the *Canadian Charter*, "is particularly relevant in the context of "freedom from want".[31] The Supreme Court of Canada has consistently stated that the *Charter of Rights* is intended to protect the values of a free and democratic society, and that international human rights, including the CESCR, reflect those values.[32]

At the time of previous reviews before the CESCR and the Human Rights Committee, Canada stated that section 7 of the *Charter* can, in fact, protect the right to social security and the right to an adequate income in the Covenant.[33] At the last review, in its responses to the List of Issues, Canada stated: "that section 7 of the *Charter* may be interpreted to include the rights protected under the

[30] ICESCR, article 2, paragraph 1, General Comment No. 9, paras. 2 & 5.

[31] Louise Arbour, LaFontaine-Baldwin Lecture 2005: 'Freedom from Want' - From Charity to Entitlement (March 2005).

[32] *R. v. Oakes* [1986], 1 S.C. R. 103 (S.C.C.) at 120; Slaight Communications; at page 1056; Baker at para 70.

[33] United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, E/C.12/1993/SR.5 (25 May, 1993) at paras. 3, 21; Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8 (October, 1998); see esp. questions 16, 53.

Covenant."[34] In its Concluding Observations, the Committee noted "with satisfaction that the Federal Government has acknowledged, in line with the interpretation adopted by the Supreme Court, that section 7 of the *Charter* (liberty and security of the person) guarantees the basic necessities of life, in accordance with the Covenant."[35]

Canada has also emphasized in its reports that the Supreme Court of Canada has adopted an approach to equality rights which recognizes positive obligations of governments to address the needs of disadvantaged groups. In previous reviews, the Committee has welcomed interpretations of section 15 of the *Charter* by the Supreme Court of Canada which have resulted in the extension of security of tenure provisions to low income tenants, and required the allocation of resources to ensure the equal enjoyment of the right to adequate healthcare by people with disabilities:

> The Committee notes with satisfaction that the Supreme Court of Canada has not followed the decisions of a number of lower courts and has held that section 15 (equality rights) of the Canadian Charter of Rights and Freedoms (the Charter) imposes positive obligations on governments to allocate resources and to implement programmes to address social and economic disadvantage, thus providing effective domestic remedies under section 15 of the Charter for disadvantaged groups.[36]

Unfortunately, CCPI is unable to refer the Committee to any similar decisions since the last review. The role of the *Charter* in providing effective remedies to violations of Covenant rights has been seriously restricted since the last review. The following three recent cases are of particular concern with respect to the *Canadian Charter* receiving Covenant-consistent interpretation.

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[34] See response to question # 53 by the Government of Canada; Responses by Canada to the list of Issues posed by the CESCR (November 1998). See also the affirmative responses by Alberta, New Brunswick and Nova Scotia to question #53 which read: "In 1993 the Government informed the Committee that section 7 of the *Charter* at least guaranteed that people are not to be deprived of basic necessities and may be interpreted to include rights under the Covenant, such as rights under article 11. Is that still the position of all governments in Canada?"

[35] *Concluding Observations on Canada*, E/C.12/1/Add.31 (10 December 1998) at para. 5.

[36] CESCR, Concluding Observations, Canada 1998. at para 4.

i) Gosselin: The Right to an Adequate Standard of Living

The Gosselin[37] case was a *Charter* challenge to dramatically insufficient levels of assistance for people under the age of 30 in Québec who were not participating in 'workfare' programs. The Appellant, Louise Gosselin, had lived in abject poverty on a grossly inadequate entitlement of $170/month. She was homeless at time and had to live in an unheated apartment in the cold winter of Montreal. She argued that the differential treatment of welfare recipients under the age of thirty constituted discrimination on the ground of age, and that the denial of an adequate level of social assistance violated her right to security of the person under section 7 of the *Charter*.

This was the first case under Canada's *Charter* in which the Supreme Court considered the right to an adequate standard of living under section 7 of the Charter, anticipated widely as the most important decision in the Charter's history in relation to the scope of Charter and the right to an adequate standard of living. Ms. Gosselin and a large number of intervening organizations made extensive reference to the Covenant and to the Concluding Observations of the CESCR in arguing for an interpretation that would recognize the application of section 7 to the violations of the right to an adequate standard of living. In light of the Committee's concerns about whether governments in Canada have been promoting interpretations of the *Charter* which would provide for effective remedies, it is particularly instructive to review the pleadings of governments in this case in relation to section 7.

In its Responses to the List of Issues concerning Canada's Fourth Periodic Report, the State party candidly admits that, for example, the Attorney General of Québec argued that: "Section 7 of the *Charter* does not oblige the Government to guarantee security of the person, but rather not to deprive

[37] *Gosselin* v. *Canada*, [2002] 4 S.C.R. 429.

persons of that right…[it] does not guarantee economic rights or the right to require the Government to provide a specific level of assistance….[this is] not a constitutional issue but a political issue that falls within the purview of elected officials."[38]

The Government of Québec was reinforced in its position by a number of other provinces which appeared as interveners. The provinces of Ontario, Alberta and British Columbia all argued against an interpretation of the "right to life, liberty and security of the person in section 7 of the *Charter* that would impose any positive obligation on governments to provide adequate financial assistance to those in need. In response to pleadings from the appellant and interveners referring the Court to the General Comments and Concluding Observations of the CESCR, the Attorney General of Ontario argued that the Court "should reject the notion that the general commentaries of the CESCR could assist courts to establish minimum guaranteed income levels."[39] Despite acknowledging that the Supreme Court of Canada "did not rule out the possibility that some 'economic rights fundamental to human life or survival might fall within the ambit of s. 7,"[40] the Attorney General of Ontario, nonetheless, urged Canada's highest court to interpret the "right to life, liberty and security of the person" in section 7 of the *Charter* as "not including a justiciable guarantee of a minimum standard of living or minimum level of income, and in particular, that the right to security of the person in section 7 does not include a right to social assistance…" Ontario argued that "determining the definition of poverty and the amount of assistance required to meet basic needs is inherently a policy matter for determination by legislatures."[41] In its oral argument before the Supreme

[38] Responses to the List of Issues concerning Canada's Fourth Periodic Report under the ICESCR; response to question #23.
[39] Factum of the Attorney General of Ontario in *Gosselin*, at page 23, para. 55.
[40] The Supreme Court of Canada took this view in *Irwin Toy Ltd.* v. *Quebec*, [1989] 1 S.C.R. 927 at 1003.
[41] Factum of the Attorney General of Ontario in *Gosselin*, at page 6, para. 11 and page 13, para. 30.

Court in *Gosselin*, legal counsel for the Attorney General of Ontario told the Court that "what is being sought [by the Appellant] is, with respect, non-justiciable."[42]

Similarly, the Attorney-General of British Columbia argued that section 7 of the *Charter*:

> …does not create a constitutional right to income assistance[43] ….that the right to 'life, liberty and security of the person' does not include or protect economic interests *per se*, even where the economic interest may, as is argued in this case, tend to enhance "life liberty or security of the person."[44]…while the right to income assistance may be a matter of social and political importance, it is not a principle of fundamental justice.[45]

British Columbia warned the Supreme Court against the use of the Covenant to interpret the broadly worded rights in section 7 of the *Charter*, arguing, simply, that to rely on it to find a constitutionally protected right to social assistance would be "inappropriate."[46]

Fortunately, the Supreme Court of Canada, while finding against the Appellant in this case, did not embrace the positions advanced by provincial governments in relation to section 7 of the Charter. Justice Louise Arbour, supported by Justice L'Heureux-Dubé, found that the right to security of the person does impose positive obligations on governments to provide an adequate level of social assistance to those in need. The majority of the Court did not rule out such a "novel" application of section 7 of the *Charter* in a future case, but found that the facts of this case did not warrant such an application.

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[42] Transcript of the oral argument by the Intervener Attorney General for Ontario at page 93.
[43] Factum of the Attorney General of British Columbia filed with the Supreme Court of Canada in *Gosselin*, page 26, para. 85.
[44] Factum of the Attorney General of British Columbia filed with the Supreme Court of Canada in *Gosselin*, page 27, para. 87.
[45] Factum of the Attorney General of British Columbia filed with the Supreme Court of Canada in *Gosselin*, page 28, para. 91. It will be appreciated that this submission is in complete disregard for the CESCR's recommendation in its last *Concluding Observations on Canada*, E/C.12/1/Add.31 (10 December 1998) at para. 52.
[46] Factum of the Attorney General of British Columbia filed with the Supreme Court of Canada in *Gosselin*, page 29, para. 93.

The question of whether effective remedies will be available to violations of the right to an adequate standard of living remains an open question. In future cases, it will be important for courts and governments to give careful attention to the obligation to interpret the *Charter* in a manner which is consistent with the Covenant, and with the obligation to provide effective remedies.

ii) Chaoulli v. Québec (Attorney General)[47]: Right to Health

In the 2005 Supreme Court of Canada judgment in Chaoulli, the Supreme Court of Canada ruled on a *Charter* challenge brought by a doctor who was a long time campaigner for privatized healthcare and one of his patients. They argued that the right to life and personal security was violated by unreasonable wait times for certain procedures within Quebec's publicly funded health system, and asked the Court to declare the prohibition of private health insurance schemes in these circumstances unconstitutional. The Government of Quebec, argued that preventing a parallel system of healthcare for the more affluent by prohibiting private healthcare insurance was necessary to ensure that all Quebecers, including those who would be unable to afford private health insurance, have access to the highest standard of healthcare.

A four-person majority of the Court held that excessively long waiting lists in the public health care program violated the right to life and personal security in Québec's human rights legislation. Three members of the majority also found that waiting times violated section 7 of the Canadian *Charter*. To that extent, the Court's decision at least recognized that the right to life and security of the person includes a right to timely access to healthcare, which would be consistent with the Covenant. However, in the way the Court applied the right to health in the *Chaoulli* decision is completely inconsistent with the Covenant and with the

[47] *Chaoulli* v. *Quebec* (*Attorney General*), [2005] 1 S.C.R. 791, 2005 SCC 35.

recognition of the equal enjoyment of the right to health, as required under the Covenant.

At the same time as finding that waiting lists in the public healthcare system violated the right to life, the Court stated that "the *Charter* does not confer a freestanding constitutional right to health care."[48] In this way, the Court tried to restrict its role to one of preventing government interference with the right to health rather than one of protecting, facilitating and providing access to healthcare for all, without discrimination. The Court did not, as one would expect, require the government to solve any waiting-time problems in the public health care system in order to remedy violations of the right to life. Astonishingly, the Court found that the decision to allocate health resources in this way, though it violated the right to life, was a policy choice of governments in which courts would not interfere.

Rather than interpreting the 'right to life and personal security' consistently with the Covenant, as protecting the right to the highest attainable standard of health for all, including those unable to afford or qualify for private health care, the majority of the Court concerned itself only with the rights of the more advantaged not to be "forced" to wait for services with everyone else. Instead of ordering a remedy to the violations of the right to life of those who must rely on the public healthcare system, the Court declared that in these circumstances, the prohibition of *private* health insurance violated the rights of those who could secure quicker treatment by joining a private health insurance scheme. The Court ignored arguments from interveners for interpretations consistent with General Comment No. 14.

The *Chaoulli* decision represents a major setback to Covenant-consistent interpretation of the *Charter*. The Court abdicated any role in relation to the obligation to protect and to fulfill the right to health. By rejecting the idea that the

[48] *Chaoulli* at para. 104

court would impose obligations on the state to ensure adequate healthcare for all, the Court imposed upon itself a discriminatory role of protecting only those who have resources to secure private healthcare, and ignored the plight of the majority of Quebecers who could not afford private healthcare. The *Chaoulli* decision represents, sadly, a judicial attack on a right which Canadians have always held dear as a universal and inclusive right, which ought to be enjoyed regardless of ability to pay.

iii) Auton: Obligation to Meet Needs of Children with Autism

In the Auton[49] case, the Supreme Court dealt for the first time with the question of whether the right to equality under s.15 of the *Charter* imposes positive obligations to provide specialized treatment for autistic children. The parents of children with autism argued that that children with autism have unique needs and that a refusal by governments to meet those needs has a discriminatory consequence in terms of fundamental issues of dignity, security and human development. This was really the first case to explicitly challenge the Court to recognize that governments have an obligation to meet the unique needs of a clearly disadvantaged group. As such, it attracted ten governmental interveners – Canada and nine provinces, all of whom argued that the Court should not interfere with governments' decisions on how to allocate scarce resources in healthcare, and that the right to equality should not be interpreted so broadly as to impose this kind of obligation on governments.

The Chief Justice, writing for a unanimous Court, found no violation of the right to equality. Disregarding the Court's openness on earlier occasions to a broader paradigm of positive obligations consistent with the right to health and other Covenant rights, McLachlin, C.J. declared that the legislature "is free to target the social programs it wishes to fund as a matter of public policy, provided

[49] *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, [2004] 3 S.C.R. 657

the benefit itself is not conferred in a discriminatory manner."[50] The Court found that to establish a claim of discrimination, the petitioners would need to show differential treatment in comparison to a comparator group - "a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required."[51] Without a comparator, those with unique needs have no protection from inequality of benefits. The Chief Justice simply asserted that "there can be no administrative duty to distribute non-existent benefits equally."[52]

The Supreme Court was considering, in *Auton*, really for the first time, the constitutionality of doing nothing to meet the needs of an extremely disadvantaged group in society. It appears to have affirmed, in shocking fashion, the government's 'right' to do nothing. The Court made no reference to international human rights law, and made no effort to interpret the right to equality in a more substantive manner, consistent with this Committee's General Comment No. 9.

C. Summary of Charter Developments

As can be seen from the above cases, Governments in Canada have had considerable success in promoting what UN High Commissioner for Human Rights, Louise Arbour, has politely described as a "timidity" among Canadian courts about applying the *Charter* to address issues of poverty and other violations of Covenant rights.[53] Since Canada's last review, the prospects of effective remedies for Covenant rights under section 15 have considerably diminished. In the *Gosselin* case, the Court found that living in poverty in an

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[50] *Auton, supra,* at para. 41.
[51] *Auton, supra,* at para. 55.
[52] *Auton, supra*, at para. 46.
[53] Louise Arbour, LaFontaine-Baldwin Lecture 2005: 'Freedom from Want' - From Charity to Entitlement (March 2005).

affluent society such as Canada's does not engage the "dignity" interest as it is protected in section 15 equality rights. In *Auton*, the Court found that the most disadvantaged groups with unique needs may have no claim to the benefits they need. Section 7 of the *Charter* remains an open question, but the *Chaoulli* case suggests that the Supreme Court's timidity in relation to Covenant rights may increasingly translate into a discriminatory role of protecting the affluent from "interference" but not protecting the disadvantaged from governments' failures to act.

Not only have Canadian governments discouraged the provision of effective remedies under the *Charter*, but they have failed to address or respond to the critical question that faces poor people whose rights are being increasingly ignored. Where are they to go for a hearing and a remedy? If not the courts, why not? If not the *Charter*, then what other law? Where are the alternative means for accessing effective remedies?

Proposed Observation: The Committee is concerned that despite its previous recommendations in this regard, Canadian governments have failed to promote interpretations of *Charter* rights consistent with the Covenant in a number of important cases with significant implications for access to effective remedies for Covenant Rights under sections 7 and 15 of the *Canadian Charter*.

Proposed Recommendation: In light of the recognition by both the Supreme Court of Canada and by the State party in submissions before this Committee that the right to "life, liberty and security of the person" may be interpreted to include the right to an adequate standard of living, the right to healthcare and other Covenant rights, governments should be encouraging interpretations of section 7 of the *Charter* which are consistent with the Covenant, and making specific reference to the Covenant in their pleadings. In regard to the application of section 7 to the right to health, the Committee emphasizes that

any remedies must be inclusive of all, not just those who are able to pay for private healthcare.
Proposed Observation: In light of earlier equality jurisprudence from the Supreme Court of Canada, the Committee is concerned to learn that governments have urged the courts not to recognize positive obligations to provide for the unique needs of disadvantaged groups such as children with autism as derived from the right to substantive equality. The Committee is concerned to learn that the Supreme Court of Canada may have adopted, at the encouragement of governments, an interpretation of the right to equality which may deprive vulnerable groups with unique needs of any effective remedy to decisions to deny them services or benefits. **Proposed Observation:** The Committee is disappointed that in important judicial rulings on the application of the *Charter* to the right to an adequate standard of living and the right to health, neither governments, in their pleadings, nor the Supreme Court of Canada, in its decisions, have made any reference to the Covenant as a relevant and persuasive source for the interpretation of the scope of *Charter* rights. The Committed is concerned that in a number of cases, the result reached by the Court would appear to be incompatible with the provision of effective remedies for Covenant rights.
Proposed Recommendation: In light of the central importance of the Charter as a vehicle for giving domestic effect to Covenant rights, the Committee recommends that courts give more careful consideration to Covenant rights and the need for effective remedies for violations thereof. In this respect, the Committee draws the attention of the State party to General Comment No. 9 and the obligation to provide effective remedies to violations of all rights in the Covenant.

Proposed Observation: The fact that, apart from the *Charter*, there exits **no** legislation or program anywhere in Canada under which persons can obtain adequate remedies to Covenant violations of the right to an adequate income, leaves the State party not in compliance with its obligations under the Covenant, as elaborated in General Comment No. 9, para. 5

Proposed Recommendation: The Committee recommends that the State party adopt, preferably, a judicial mechanism with adequate jurisdiction to determine whether the rights in the Covenant have been implemented and to provide effective remedies for Covenant violations, including the right to an adequate income.

Part III: Human Rights Legislation

A. Failure to Protect Social and Economic Rights in Human Rights Legislation

In the CESCR's last Concluding Observations, it expressed clear disappointment regarding the absence of protection for violation of social and economic rights violations in human rights legislation in Canada and the failure of some jurisdictions, including the Federal Government, to provide protection from discrimination on the basis of poverty or "social condition". The Committee stated:

> The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all

> jurisdictions from discrimination because of social or economic status.[54]

Since the last review, the Canadian Human Rights Act Review Task Force, chaired by former Supreme Court Justice Gerard LaForest, held extensive consultations and commissioned research. The Task Force reported that it "heard more about poverty than about any other issue."[55] It recommended the inclusion of social condition in the Canadian Human Rights Act to prohibit discrimination on the ground of poverty and other related characteristics, and that the mandate of the Canadian Human Rights Commission be expanded to include review of compliance with international human rights instruments ratified by Canada. Neither of these recommendations has been acted upon.

With the exception of non-discrimination rights, there are no legal remedies to ESC rights violations, such as violations of the right to an adequate standard of living, in Canadian human rights regimes—or indeed any other legislation – with the exception of Quebec. Remedies for violations of the social and economic rights included in Quebec's *Charter of Human Rights and Freedoms* is limited to declaratory remedies, which have not proven effective since the adoption of the *Quebec Charter* thirty years ago.

Proposed Concern: The Committee is concerned that there has been no follow-up to the Committee's previous recommendation for expanded protection of Covenant rights in provincial, territorial and federal human rights legislation.

Proposed Recommendation: The Committee recommends that Canada and all provinces and territories revise human rights legislation so as to provide effective remedies to violations of Covenant rights and that human rights commissions be mandated and resourced to perform all of the functions identified in the Paris Principles.

[54] Para. 51 of the *Concluding Observations on Canada*, E/C.12/1/Add.31 (10 December 1998)

[55] The Panel's report: *Promoting Equality: A New Vision*

B. Denial of Right to Hearing and Adjudication of Human Rights Claims

At the time of its last review of Canada, the Committee's Concluding Observations addressed the concern that almost all human rights regimes in Canada involves a screening process by Human Rights Commissions which denies the vast majority of victims of discrimination any adjudication of their complaint on its merits.[56] The Canadian Human Rights Act and most provincial/territorial human rights legislation give human rights commissions a broad discretion to decide which complaints they will take forward to a hearing for adjudication. Where the Commission decides not to proceed to a hearing before the tribunal, the complainant has no access to either the tribunal or a court, and is left without any determination of whether a right has been infringed.[57]

This unique feature of Canadian human rights regimes has been criticized at the last two reviews of Canada by the UN Human Rights Committee as well. The State party informed the UN Human Rights Committee, which was also concerned about this issue, that a full review of the *Canadian Human Rights Act*—including the Commission's complaint screening or 'gatekeeper' role would take place.[58]

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[56] Para. 51 of the *Concluding Observations on Canada*, E/C.12/1/Add.31 (10 December 1998) stated: "Moreover, enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups."

[57] The only exception is in British Columbia where the Human Rights Commission has been abolished. The previous screening function of the Human Rights Commission in B.C. has been transferred to the tribunal without any change to the grounds on which complaints may be denied a hearing. Ontario recently introduced legislation which would maintain the Human Rights Commission but remove the "gatekeeping" provision, providing for access to adjudication of all complaints. The legislation has not yet been adopted and the type of representation provided to complainants has not been specified.

[58] The delegation's comments are found in paragraph 19 of the Committee's Summary Record of its 1738th meeting. It should be noted that in its recent review of Canada, the Human rights Committee stated that it "regrets that its previously expressed concern relating to the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant remains unaddressed. It is concerned that human rights commissions still have the power to refuse referral of a human rights complaint for adjudication and that legal aid for access to courts may not be available. [The HRC then set out the following recommendation:

The Canadian Human Rights Act Review Panel recommended the abolition of the gatekeeper or screening role and a recommended that all complainants have access to an adjudicative tribunal and be provided with adequate representation[59] The Review Panel stressed that under a direct access model, claimants must have access to the assistance of a specialized, publicly funded, advocacy clinic and/or legal aid.[60] Since the Review panel filed its final report in June 2000, the government of Canada has failed to formally respond to the report in any way.

It is submitted that this is suitable case for the Committee to exercise its supervisory role, to 'follow-up' on its earlier Concluding Observations. It is respectfully proposed that the Committee make very clear to the State party that its failure to ensure that human rights claimants in all jurisdictions in Canada have a right to an effective remedy amounts to a violation of article 2 of the Covenant.

Proposed Observation: The Committee is deeply concerned that the State party has failed to take action to implement the Committee's earlier Concluding Observation regarding the requirement to ensure that human rights claimants are guaranteed access to an adjudicative hearing with adequate representation. This failure amounts to a violation of its obligations under article 2 of the Covenant.

> The State party should ensure that the relevant human rights legislation is amended at federal, provincial and territorial levels and its legal system enhanced, so that all victims of discrimination have full and effective access to a competent tribunal and to an effective remedy.

[59] See recommandations 28 *et seq*. See Chapter 10 of the report. It is interesting that in coming to its ultimate recommendation to abolish the Commission's gatekeeper role and ensure direct claimant access, the Review Panel actually quoted the full text of the UN Human Rights Committee's Concluding Observation, which had recommended that claimant's be guaranteed access to an adjudicative hearing.

[60] Review Panel Recommendations # 80 & 85.

Proposed Recommendation: The Committee recommends that the State party take the necessary action to ensure that all human rights claimants have access to an adjudicative hearing along with access to effective legal representation.

Part IV: NAFTA and ESCRs in Canada

In its List of Issues, the Committee has asked Canada to report on how NAFTA tribunals ensure that in adjudicating investors' challenges to government measures under NAFTA, Covenant rights are given primary consideration.[61] In fact, NAFTA's investor-state adjudication provisions accord investors an unprecedented right to claim damages against Canada before *ad hoc* international tribunals for alleged expropriation or violations of their rights under the agreement. Disputes under the investor-state adjudication provisions relate to virtually any Canadian government measure, including legislation, regulations and other measures which may be required for compliance with the CESCR, such as environmental protection, delivery of universal public services, health promotion and the protection of the right to work of local communities or vulnerable groups.

Foreign investors have challenged health regulations concerning air pollution and groundwater contamination, municipal and state land use decisions, a ban on the use of a pesticide for certain agricultural purposes. In *Ethyl Corporation*, the individual investor challenged a ban on a fuel additive harmful to the environment and to human health, which the Canadian government subsequently repealed as part of a settlement of the dispute. Canada abandoned proposed plain packaging legislation, designed to reduce tobacco consumption and smoking-related illnesses and deaths, after cigarette companies threatened

[61] List of Issues concerning Canada's Fourth Periodic Report under the ICESCR, questions 19.

to launch a NAFTA challenge to recover "claims for compensation of hundreds of millions of dollars" in the event such a law was enacted.[62]

NAFTA reverses the obligation of progressive realization under the Covenant by essentially prohibiting any movement away from privatization. Steps to privatize health care funding or delivery, even if experimental, cannot later be reversed without risking Chapter 11 challenges by investors who may be adversely affected. Propose measures to expand the public system in areas such as home care or prescription drugs, in which foreign investment already exists, face the threat of costly Chapter 11 awards. The prospect of Chapter 11 challenges by drug insurance companies has been identified as a significant deterrent factor in relation to the introduction of a national pharmacare plan.[63]

Where an investor challenges a government measure such as tobacco advertising or packaging restrictions, as amounting to direct or indirect expropriation, there is no provision in NAFTA's investor-state dispute procedures enabling the government to justify the measure on the grounds that it is consistent with its Covenant and constitutional obligations to protect the health of

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[62] Schneiderman, *NAFTA's Takings Rule*, (1996) 46 U.T.L.J 499 at 523-526; Samrat Ganguly. *The Investor-State Dispute Mechanism and a Sovereign's Power to Protect Public Health* (1999) 38 Colum. J. Transnat'l L. 113

[63] Tracey Epps & David Schneiderman, *Opening Medicare to Our Neighbours or Closing the Door on a Public System? International Trade Law Implications of Chaoulli v. Quebec* in Collen M. Flood, Kent Roach & Lorne Sossin, eds., Access to Care, Access to Justice: The Legal Debate Over Private Health Care in Canada (Toronto: University of Toronto Press, 2005) at 377-78 [Epps & Schneiderman, "Opening Medicare"]; Jon R. Johnson, *How Will International Trade Agreements Affect Canadian Health Care? Discussion Paper No. 22* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) 16, 30-31; Tracey Epps & Colleen M. Flood, *Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of NAFTA for Medicare* (2002) 47 McGill L.J. 747 at paras. 64-67; Canada, *Commission on the Future of Health Care in Canada, Building on Values: The Future of Health Care in Canada – Final Report* (Ottawa: Comm., 2002) (Commissioner Roy Romanow) at 171, 189.

Canadians.[64] NAFTA tribunals do not consider of Covenant obligations or even constitutional rights in determining whether a government measure is justified.

It is grossly inconsistent for Canada to take the position in domestic courts and international *fora* that ESC rights ought not to be made legally enforceable because un-elected courts should not interfere with the social and economic policy function of legislatures when Canadian governments have conferred upon NAFTA tribunals the authority to order massive compensatory awards from public funds, enforceable in Canadian courts, and to review all manner of social and economic measures for compliance with investors' rights under NAFTA.

The issue raised by the Committee in its question to Canada about the protection of Covenant rights in NAFTA adjudication is at the heart of a constitutional challenge to the investor-state dispute procedures under NAFTA. CCPI, a party to that challenge, has argued that NAFTA adjudication violates the Charter of Rights and the rule of law by conferring upon NAFTA tribunals the authority to rule on individual investors' challenges to government measures affecting the enjoyment of fundamental human rights, without providing for any proper consideration or protection of human rights which are also engaged. "[65] In that case, the Government of Canada has argued that "domestic laws and constitutional requirements do not apply to the establishment or the proceedings of the international NAFTA tribunal" and that the monetary remedies ordered by NAFTA tribunals and enforced by Canadian courts "have no effect on domestic laws or government practices"[66] The Government of Canada has essentially

[64] Epps & Schneiderman, "Opening Medicare" supra, at 373; Jon R. Johnson, *How Will International Trade Agreements Affect Canadian Health Care? Discussion Paper No. 22* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at 14.

[65] See B. Porter, *Canadian Constitutional Challenge to NAFTA Raises Critical Issues of Human Rights in Trade and Investment Regimes* (2005) 2(4) *ESC Rights Law Quarterly;* Factum of the Respondent, January 20, 2005 at http://www.dfait-maeci.gc.ca/tna-nac/documents/FINAL%20FACTUM.pdf

[66] Factum of the Attorney General of Canada in *Council of Canadians et al. v. Canada* Ontario Superior Court Of Justice Court File No.: 01-CV-208141 at paras 35 and 60.

taken the position that it has no obligation to protect fundamental constitutional or international human rights, even when it gives full justiciability to investors' rights, and permits them to challenge government measures related to the obligations to protect and fulfill Covenant rights.

We urge the Committee to make it clear to Canada that under international law, human rights, including the rights in the Covenant must be given primacy over investors' rights. NAFTA investor-state adjudication has reversed that hierarchy, giving investor rights primary over human rights.

Proposed Concern: The Committee is concerned that NAFTA Chapter 11 adjudication procedures seem to have given investors primacy over Covenant rights. Government measures related to the right to health and other Covenant rights appear to have been adjudicated without adequate consideration of the obligations of the State party under the Covenant.

Proposed Recommendation: The Government of Canada should, along with its NAFTA partners, initiate a thorough review and renegotiation of the terms of NAFTA Chapter 11 investor-state dispute procedures to ensure that Covenant rights are fully considered and protected in the adjudication of any investor challenges to government measures under NAFTA Chapter 11. NAFTA tribunals should defer to domestic courts or international human rights treaty monitoring bodies with competence to consider issues of human rights.

Part V: Social and Economic Rights in the Covenant and 36(1) of the *Constitutional Act, 1982*

Section 36(1)(c) of the *Constitution Act, 1982* contains a constitutional "commitment" by both levels of government in Canada (federal and provincial) to the provision of "essential public services of reasonable quality to all Canadians."

In its Core Document (1998),[67] Canada stated that the provisions of s. 36: "are particularly relevant in regard to Canada's international obligations for the protection of economic, social and cultural rights."[68]

In its oral submissions to the CESCR's review during the review of Canada's second report under the ICESCR, the State party's delegation characterized the obligation arising under s.36 (1) in the following terms:

> The 1982 *Constitution Act* made it a duty of the federal government and all provincial and territorial governments to... provide essential services of reasonable quality to all Canadians (emphasis added).[69]

In light of Canada's own reliance in its reports on s. 36(1) of the *Constitution Act, 1982*, the Committee should strongly recommend to the State party that inter-governmental agreements be developed to give concrete expression and enforceability to these duties, and that governments and the Courts should rely on this provision to expand constitutional obligations to protect the rights in the Covenant.

Proposed Concern: The Committee is concerned that, in light of Canada's previous statements regarding the relevance of s. 36(1) of the *Constitution Act, 1982* to the implementation of the rights in the Covenant, this section of the Constitution does not seem to have functioned to provide effective remedies where governments fail to meet their obligations.

Proposed Recommendation: The Committee recommends that Federal-Provincial and Territorial governments develop enforceable agreements through which section 36(1) can be made more effectively implemented, and that Canada

[67] HRI/CORE/1/Add.91
[68] Core Document at para. 127
[69] Committee on Economic, Social and Cultural Rights, Eighth Session, Summary Record of the 5th Meeting E/C. 12/1993/SR.5 at p.2, para.3. When section 36 was first tabled for discussion in the Parliament of Canada, the then Justice Minister, the Honourable Jean Chrétien, said that, if adopted, s. 36 would constitutionally entrench an "obligation" to redistribute resources to disadvantaged people: *Debates of the House of Commons* (6 October 1980) at 3287.

should refer to the constitutional commitments in s. 36(1) of the *Constitution Act, 1982* in litigation as a means of enhancing the protection of the rights in the Covenant.

Part VI: The Social Union and ESC Rights

Prior to the repeal of the *Canada Assistance Plan* ("CAP") in 1995, Canada correctly informed the CESCR that CAP was one of the "major cornerstones of the social security system in Canada."[70] In the wake of CAP's repeal, and the loss of effective legal remedies that had been available under CAP, the Committee recommended that Canada:

> Consider re-establishing a national program with specific cash transfers for social assistance and social services that includes universal entitlements and national standards and lays down a legally enforceable right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another.[71]

The CESCR also recommended that Covenant rights be made "enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms."[72]

In its Fourth Periodic Report, and its responses to the List of Issues question on this topic,[73] and, specifically, whether the Committee's previously stated concerns[74] were taken into account in the design of the Canada Social Transfer, the State party sets out the following positions:

[70] *Canada Assistance Plan Annual Reports* for 1986-87, 1987-88, 1988-89, p. 7
[71] Concluding Observations re Canada (1998), para. 40.
[72] Concluding Observations by the CESCR on Canada (December 1998) at para. 52.
[73] See the List of Issues concerning Canada's Fourth Periodic Report (May 2005), question # 25
[74] Concluding Observations on Canada, E/C.12/1/Add.31 (10 December 1998) at para. 40.

- “In 1996, the Canada Health and Social Transfer (CHST) replaced the Canada Assistance Plan (CAP)….The block fund nature of the CHST allowed provinces and territories greater flexibility in the use of the funds.”[75]
- “The CHST is a block fund that the provinces and territories are free to spend in these areas largely as they see fit.”[76]
- The former CHST was restructured into the Canada Health Transfer and the Canada Social Transfer. The Canada Social Transfer is intended to “maintain the provinces’ and territories’ flexibility to allocate federal funding according to their respective priorities.”[77]

The State party has failed to take a single step in the restructuring of social transfers along the lines recommended by the CESCR so as to improve the enjoyment of Covenant rights for the poorest of the poor in Canada. Apart form the *Charter*, there are, in short no existing legal or administrative mechanisms to obtain effective remedies of the right to an adequate standard of living in Canada where social assistance rates fail to meet basic adequacy requirements.

The Charter Committee endorses the position advanced by FAFIA that the Canada social Transfer be restructured to ensure, *inter alia*, a legally enforceable right to adequate assistance when in need.[78]

[75] Canada’s Fourth Periodic Report under the ICESCR, para 35
[76] Government of Canada (Department of Finance web site: “Canada Health and Social Transfer”)
[77] The Budget Plan 2004,Government of Canada (Department of Finance) at page 94.
[78] See: *Strengthening the Canada Social Transfer: A Call to Account*” (2006) by Shelagh Day and Gwen Brodsky at pages 13-15.

Proposed Recommendation: The State party should act on the Committee's critical recommendations from 1998 for restoring mechanisms of accountability and effective remedies with respect to adequate income assistance, work freely chosen and other Covenant rights.

Proposed Recommendation: The Federal Government should also negotiate with the provinces/territories a national anti-poverty reduction strategy with a complaints mechanism and enforceable requirements for violations of Covenant rights.

Part VII: The Right to Housing: Article 11

Forced Evictions and Security of Tenure

The CESCR has recommended urgent attention to the causes of homelessness in Canada and improvements to security of tenure. However, thousands of households continue to be evicted every month without proper hearings, and with no consideration of whether the households will face homelessness.[79] Courts and tribunals regularly evict entire households for minimal arrears of rent without considering whether families have a place to go. In other instances, *ex parte* eviction orders are issued on mere suspicion or allegation of criminal activity.[80]

In its List of Issues concerning Canada's Fifth Periodic Report, the CESCR asks Canada what measures have been adopted to ensure that people who are forcibly evicted from their homes are provided with alternative

[79] In Ontario, 30,000 households, 60% of eviction applications – most for minimal arrears of rent—result in evictions without any hearing or mediation, or any consideration of the whether the result will be homelessness. Ontario Rental Housing Tribunal Workload Reports, 1998 to 2004.
[80] See Saskatchewan's *Safer Communities and Neighbourhoods Act*, S.S. 2004, c. S-0.1, as amended.

accommodation or compensation, in line with the Committee's General Comment No. 7 (1997) on the right to adequate housing.[81]

However, in its response, the State party fails to address situations where tenants are evicted for modest rental arrears or where, as a result of unsafe building conditions, landlords are ordered to close their premises—thereby forcing tenants into homelessness. Landlords' losses from non-payment of rent are relatively small, usually less than the average default costs associated with many other businesses. Landlord and tenant tribunals routinely order the repayment or arrears, and such orders are judicially enforceable through garnishment of income at source and other means. In the majority of circumstances in which tenants are evicted and potentially rendered homeless, landlords could reasonably have recovered arrears from tenants without the household being evicted. In fact, about half of evictions for arrears are ordered where the tenant owes less than a month's rent. While many municipalities have begun to institute eviction prevention programs to provide emergency assistance with rent, the obligations of governments to ensure that evictions do not lead to homelessness and to prevent evictions where possible are not included in security of tenure legislation in Canada.

Proposed Recommendation: Legislative measures must be adopted in all provinces and territories to ensure that any household threatened with eviction is provided a fair hearing and adequate representation. Any court or tribunal reviewing a requested eviction must consider whether there are alternative means for landlords to recover arrears, whether there is alternative accommodation to which the household can move and whether governments have a responsibility to address the needs of the household threatened with eviction, either for emergency assistance or for alternative accommodation.

[81] List of Issues concerning Canada's Fifth Periodic Report, question # 14.

Appropriate Community-Based Housing for People with Mental Disabilities

The Committee has raised the issue of the adequacy of provision of appropriate, community based housing for people with mental disabilities.[82]

This is a chronic situation in Canada and has recently been the subject of a critical observation by the UN Human rights Committee in its November 2005 concluding Observation on Canada.[83]

In many provinces and territories, there is a well-documented crisis in the area of government support for community-based supportive housing for people with mental disabilities. A startling dimension to this problem is the fact that many people remain under detention—either in forensic hospitals as a result of earlier criminal justice involvement or under civil commitment—even though there is no longer a medical or legal reason for their continued detention.[84]

This desperate situation has arisen because governments have simply failed to provide adequate funding for appropriate community-based housing. The problem is so severe that many provincial government reports and court cases have drawn attention to this flagrant abuse of liberty and called upon

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[82] List of Issues concerning Canada's Fourth Periodic Report, question # 35.

[83] See Concluding Observations on Canada, UN Human Rights Committee (November 2005) at para. 17:

> 17. The Committee is concerned about information that, in some provinces and territories, people with mental disabilities or illness remain in detention because of the insufficient provision of community-based supportive housing (arts. 2, 9, 26).
>
> > The State party, including all governments at the provincial and territorial level, should increase its efforts to ensure that sufficient and adequate community based housing is provided to people with mental disabilities, and ensure that the latter are not under continued detention when there is no longer a legally based medical reason for such detention.

[84] In one province, Nova Scotia, statistics from government officials reveal that, at any given time, there are about a dozen people detained at the province's main forensic hospital whose sole reason for being there is because they have no suitable housing. See Canadian Broadcasting Corporation coverage of this issue

governments to create additional housing so that people with mental disabilities will no longer be needlessly detained in forensic facilities or under civil commitment in psychiatric hospitals, not because they need to be detained for legal or medical reasons but solely for the reason that there is a lack of suitable, supportive housing in the community.[85]

In the province of Nova Scotia, a quasi-judicial tribunal with jurisdiction over civil commitment of people with mental disabilities stated in its annual report to the provincial legislature that the failure to make adequate provision for community-based housing was:

> A matter of serious concern in terms of fundamental human rights, including one's basic entitlement within parameters to the least restrictive living situation…It is also not likely the most cost effective arrangement for government to be utilizing costly hospital beds when many of these individuals could be living in the community if proper supervised facilities were available.
>
> - and, in the Board's conclusion -
>
> We call upon the government to provide effective community resources for mental health consumers to stem this extremely problematic and disturbing tide.[86]

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[85] A sample of these reports include: "Transitions in Care: Nova Scotia Dep't. of Health Facilities Review" (March 2000); *Psychiatric Facilities Review Board Annual Report*, 1998-1999 as well as those for 1999-2000, 2000-2001 and 2001-2002. A very similar situation was examined by the Court in a *habeas corpus* case in Yukon Territory; see *D.J.* v. *Yukon (Review Board)*, [2000] Y.J. No. 80. Other courts in Yukon have also dealt with the same problem: *R.* v. *Rathburn* (2004), 119 C.R.R. (2d) 44 (Y.T.T.C.). In the province of Prince Edward Island, the same problem of a lack of supportive housing—resulting in unnecessary detention—is discussed in: *R.* v. *Lewis* (1999), 132 C.C.C. (3d) 163 (Prince Edward Island Supreme Court, Appeal Division) In Ontario, ensuring the availability of adequate supports for people with mental disabilities—especially adequate supportive housing—was central to the plan of the Ontario Ministry of Health and Long Term Care. *Making It Happen* (1999) is the template for the implementation of mental health reform—including the provision of appropriate housing— across the Province of Ontario.

[86] *Psychiatric Facilities Review Board Annual Report*, 1999-2000, at pp. 5 and 6.

Proposed Observation: The Committee is deeply concerned that the failure by some governments in Canada to provide adequate funding for community-based supportive housing for people with mental disabilities and, in particular, for people who remain under detention solely for lack of appropriate housing represents a clear violation of their rights under articles 3 and 11 of the Covenant.

Proposed Recommendation: The Committee calls upon all governments in Canada to ensure that people with mental disabilities, and in particular, to those who remain under detention because of lack of access to appropriate, community-based housing be provided with such housing in their communities without delay.