CCPI

CHARTER COMMITTEE
ON POVERTY ISSUES

SRAC Social Rights Advocacy Centre

THE RIGHT TO EFFECTIVE REMEDIES FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN CANADA

SUBMISSION OF THE CHARTER COMMITTEE ON POVERTY ISSUES (CCPI) AND THE SOCIAL RIGHTS ADVOCACY CENTRE (SRAC) FOR THE SIXTH PERIODIC REPORT OF CANADA

January 31, 2016

Contents

A. INTRODUCTION

i. The Charter Committee on Poverty Issues (CCPI) and the Social Rights Advocacy Centre (SRAC)

The Charter Committee on Poverty Issues (CCPI) *is a national Committee (NGO) formed in 1988 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 human rights law, the Canadian Charter of Rights and Freedoms ("the Charter"), human rights legislation and other law in Canada. CCPI has appeared before a number of UN human rights treaty monitoring bodies, dating back to the 1993 review of Canada before the CESCR and has been granted leave to intervene in thirteen cases at the Supreme Court of Canada.*

The Social Rights Advocacy Centre (SRAC) *is a non-profit NGO formed in 2002 for the purpose of ensuring the equal enjoyment of economic, social and cultural rights through human rights research, public education and legal advocacy. SRAC has been the lead community organization in a ten year research project on social rights in Canada bringing together five universities and four NGOs. SRAC produces extensive research and publications on social rights and initiates and co-ordinates test cases in Canada.*

ii. The Focus of These Submissions: The Crisis of Effective Remedies in Canada

1. A central issue in the ongoing dialogue between Canada and the CESCR historically has focused on Canada's failure to promote or to ensure access to effective remedies as outlined by the Committee in General Comment 9. Canada's insistence in international fora and in domestic courts in recent years that ESC rights are policy objectives within the sole prerogative of legislatures is integrally related to the continued and growing violations of ESC rights in one of the richest countries in the world.

2. The continued crises of homelessness, poverty and denials of other Covenant rights are reflections of Canada's failure to recognize the equal status of ESC rights. CCPI/SRAC submits that for the purposes of the Committee's consideration of key issues to address in the present review, it is critical to focus on the right to effective remedies.

3. As Canada has taken an increasingly retrogressive stance in relation to access to effective remedies for ESC rights in recent years. Canada did not support the adoption of an Optional Protocol to the ICESCR and has refused to sign or ratify the Optional Protocol, voicing skepticism about the justiciability of rights under the ICESCR as a justification. These positions parallel the Government of Canada and provincial/territorial governments' concerted and systematic attempts within Canada to deny access to justice to social rights claimants. Canada is a constitutional democracy in which broadly framed rights to life, security of the person, and the equal benefit of the law can and should be interpreted as protecting ESC rights and ensuring access to justice for those living in poverty and homelessness. Recent governments, however, have tried vigorously to deny disadvantaged claimants access to justice under Canada's Charter on the grounds that ESC rights must never be adjudicated or enforced by courts in Canada – even where life and personal security are at stake.

4. Recently the newly elected government in Canada has expressed a commitment to reversing the above trends by reaffirming Canada's commitment to international human rights and reviewing the positions advanced in litigation to ensure that arguments advanced in court are consistent with Canada's fundamental values. The present review is an opportunity to ensure that Canada commits to addressing longstanding concerns about access to justice and effective remedies for Covenant rights under the Charter and other legislation in Canada. CCPI/SRAC rely on the submissions of Canada Without Poverty and other groups to address egregious violations of Covenant rights that have occurred in Canada since the last review in 2006. As was clear from the recent review of Canada by the UN Human Rights Committee, the last decade has been a very dark time for human rights in Canada. The present submissions will focus on information about key cases in which governments have encouraged courts to deny access to justice for claimants who have suffered violations of Covenant rights and which, in many cases, courts have rendered decisions in line with government submissions.

5. SRAC/CCPI encourages the Committee to emphasize in its dialogue with Canada that Covenant obligations extent to all branches of government, including the judicial branch. In the Canadian context, the obligation on the independent judiciary to interpret and apply the Canadian Charter and other law consistently with binding international human rights treaties is a critical component of the implementation of the Covenant.

iii. Previous Dialogue with Canada Regarding Effective Remedies

6. In past reviews of Canada the CESCR has consistently expressed concern about Canada's insistence on downgrading ESC rights to mere policy objectives of governments rather than recognizing them as human rights subject to effective domestic remedies. In earlier reviews, in response to questions from this Committee about the protection of ESC rights under the Canadian Charter, Canada has provided assurances that the rights to life, liberty and security of the person in section 7 at least guarantee that people are not to be deprived of basic necessities such as food, clothing and housing.[1] Yet Canada has advanced the opposite position before domestic courts.

7. At the last review of Canada the Committee accurately described how Canada's **restrictive interpretation of its obligations under the Covenant** and its position on the non-justiciability of ESC rights has resulted in the denial of effective remedies domestically, noting the **"lack of legal redress available to individuals when governments fail to implement the Covenant, resulting from the insufficient coverage in domestic legislation of economic, social and cultural rights … the lack of effective enforcement mechanisms … ; the practice of governments of urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights, and the inadequate availability of civil legal aid, particularly for economic, social and cultural rights;."**[2] The Committee recommended that "**federal, provincial and territorial governments promote interpretations of the Canadian Charter of Rights and other domestic law in a way consistent with the Covenant**."[3]

8. The record of Canada's dialogue with the Committee regarding the scope of the Charter and the Committee's recommendations have been relied upon by claimants and interveners in important

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[1] CESCR Concluding Observations on Canada (1993) 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 1998: questions 16 and 53.

[2] CESCR Concluding Observations: Canada, 2006 E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5CESCR [2006 Concluding Observations] at para 11 (a)(b)

[3] 2006 Concluding Observations at paras 39-41.

Charter cases and occasionally by courts. Governments in Canada have continued to urge upon courts interpretations of Charter rights that would deny protection of Covenant rights.

B. DOMESTIC IMPLEMENTATION

i. Protection of Covenant Rights Through Inclusive Interpretations of Rights under the Canadian Charter of Rights and Freedoms

9. As the Committee has recognized in General Comment 9, the requirement that domestic law be interpreted consistently with the ICESCR is of central importance to the domestic implementation of the Covenant. The importance of judicial interpretation of rights is different in various legal systems. In Canada, the role of courts in interpreting constitutional rights is of immense importance, and the interpretive principle of consistency is central to the right to effective remedies. The Canadian Charter was adopted in 1982, before the international trend toward the explicit inclusion of ESC rights in new constitutions took hold. The emphasis in the negotiation of the wording of rights in the Canadian Charter was on encourage courts to interpret Charter rights such as the right to "the equal benefit of the law" in s. 15 of the Charter or the rights to "life, liberty and security of the person" in section 7 in the context of Canada's strong attachment to international human rights and its prior ratification of both the ICCPR and the ICESCR. The rights to "life, liberty and security of the person" in section 7 of the Charter and of the right to substantive equality and the "equal benefit of the law" guaranteed in section 15 were understood to be particularly important in this regard.

10. 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".[4]

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

11. In its 1986 decision in *Irwin Toy*[5] the Supreme Court found that "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter" should not be excluded from the scope of section 7 at that early stage of Charter interpretation.[6] The issue was left open to be considered in future cases. Only one case has been heard by the Supreme Court of Canada since *Irwin Toy* to consider this central question. In the 2003 *Gosselin* case, dealing with reduced social assistance rates for recipients not enrolled in workfare, an important dissenting judgment by Justice Louise Arbour (supported by Justice L'Heureux-Dubé) found that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities. The majority of the Court left open the possibility of adopting this 'novel' interpretation of the right to security of the person in a future case.[78] Since the Gosselin case, the Supreme Court of Canada has not agreed to hear any cases in which this issue would be addressed. The question of the extent to which section 7 of the Charter may encompass obligations under the ICESCR and provide effective remedies to the ongoing violations of ESC rights in Canada still remains the central unresolved issue of Canadian Charter jurisprudence. The resolution of this question will largely determine the extent to which Canada complies with the obligation to ensure access to effective remedies to Covenant rights.

12. The question of the scope of the Charter's protections is particularly important in the context of the current review of Canada. As will be seen below, positions have been advanced in recent cases which are diametrically opposed to Canada's obligations under the Covenant. Governments have argued that health care necessary for life can be denied on the basis of immigration status and that governments have no positive obligations to take measures to address homeless, even where, as the UN Human Rights Committee has found, "homelessness has led to serious health problems and even to death."[9] All of these positions have been justified by government lawyers on the basis that ESC rights ought never to be considered or adjudicated in courts.

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[5] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

[6] *Ibid*. pp. 1003-4.

[7] *Ibid.*, at paras 82-83.

[8] *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429, at para 308.

[9] *Concluding observations of the Human Rights Committee: Canada* (1999), CCPR/C/79/Add105 at para 12.

13. The newly elected government has committed to reviewing the positions advanced by governments before courts in litigation. It is of critical importance that this review encompass a review of the positions being advance about the justiciability of ESC rights and other longstanding concerns of this Committee regarding Canada's failure to promote and ensure effective domestic remedies. A legal culture among lawyers for the federal and provincial/territorial government which has historically been hostile to ESC rights must be countered by enhanced political accountability for positions advanced in litigation to ensure that Canada's obligations under the Covenant are fully considered and that courts are made aware of their obligation of to ensure, wherever possible, access to effective remedies for Covenant rights.

Recommendation Re: Positions Advanced in Litigation

1. **All governments in Canada should put in place special procedures to ensure that government lawyers explain Canada's obligations under the ICESCR and promote interpretations of the Charter – in particular sections 7 and 15 – which are consistent with the Covenant and with General Comment 9.**

Recommendation Re: Promoting an Inclusive Human Rights Culture in Canada

2. **Governments in Canada should publicly promote inclusive interpretations of rights to life, security of the person and equality which provide equal protection to those who are deprived of access to basic necessities such as food, housing, adequate social assistance and access to health care and ensure that affected groups and individuals are ensured access to justice.**

ii. Section 36 of the *Constitution Act*, 1982 and the Federal Framework

14. Section 36(1) of the *Constitution Act, 1982* recognizes a joint commitment of federal provincial and territorial governments to providing "essential public services of reasonable quality." In its *Core Document* Canada described section 36 as being "particularly relevant in regard to ... the protection of economic, social and cultural rights."[10] Unfortunately, section 36 has been largely ignored by courts and

[10] HRI/CORE/CAN/2013 at para 169.

governments. The question of whether s.36 may be enforceable by courts remains an open question. In *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board*,[11] the Manitoba Court of Appeal accepted that "a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights."[12] However, in its decision in *Canadian Bar Association v British Columbia,* involving a *Charter* challenge to the inadequacy of provincial civil legal aid funding in the province (described below) the British Columbia Court of Appeal found that section 36 as a statement of commitment could not form the basis of a claim.[13]

15. In the context of Canadian federalism the implementation of Covenant rights often relies on collaborative and co-operative action and a joint commitment by all levels of government as described in s.36. Canada's federal structure has sometimes been referred to as an obstacle to the implementation of Covenant rights but it can in fact function as a vehicle, as long as the responsibilities of various actors are made clear and governments are held accountable not only for singular obligations but also for joint obligations. Rights claimants must be able to invoke their governments' obligations to work collaboratively to address issues such as hunger, homelessness and poverty, where relevant programs and policies engage all levels of government.

Recommendation re Section 36 of the *Constitution Act, 1982*

The Government of Canada and provincial/territorial governments should promote and adopt interpretations of section 36 in courts and in inter-governmental negotiations that are consistent with the role that section 36 can play in implementing Covenant rights. Access to justice for Covenant rights should be enhanced by ensuring that section 36 is considered justiciable.

[11] *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board* (1992), 91 DLR (4th) 554, 78 Man R (2d) 141.

[12] *Ibid* at para 10.

[13] *Canadian Bar Association v British Columbia*, 2008 BCCA 92 at paras 33, 53.

iii. A New Inter-Governmental Agreement or Social Charter

16. During the last round of constitutional negotiations in 1992, a social charter was proposed and endorsed by over forty national organizations as a means to provide enhanced accountability for ESC rights within the context of a renewed federalism. The social charter would have created a social rights tribunal and a social rights council through which governments could be held more accountable and made more responsive to systemic violations of ESC rights.[14] Constitutional changes proposed at that time, however, did not include a social charter but instead, as noted by the CESCR in its review the following year, would have downgraded ESC rights to mere policy objectives. The proposed changes did not come into effect, however, after the Charlottetown Constitutional Accord was defeated in a referendum.

17. There has been little appetite for constitutional reform in Canada since the referendum on he Charlottetown Accord. However, a social charter could be enacted through inter-governmental agreements, without constitutional amendment, built on the joint constitutional commitments in section 36 of the Constitution Act 1982 and the obligations of all governments in Canada under the ICESCR. The Social Union Framework Agreement negotiated in 1999 failed to provide for meaningful accountability or mechanisms to enforce Covenant rights. In the submissions of SRAC and CCPI, it is time for a thorough review of inter-governmental agreements and consideration of a new social charter for Canada which could provide for a renewed commitment to social rights and a more transparent and accountable form of cooperative federalism built on a joint commitment to ESC rights.

Recommendation re a Social Charter

1. **Canada should consider ways in which the earlier "social union framework agreement" could be revised and renegotiated so as to include a social charter or similar mechanism for the protection, monitoring, adjudication and implementation of joint strategies for the realization of Covenant rights.**

[14] See the Alternative Social Charter (1992) at http://socialrightscura.ca/documents/archive/Alternative%20Social%20Charter.htm#_ftn1.

iv. Federal and Provincial/Territorial Human Rights Legislation

18. Human rights legislation has always been a cornerstone of human rights protections in Canada. The Canadian Charter of Rights and Freedoms does not generally apply to private actors, so horizontal protection of human rights relies to a large extent in Canada on human rights legislation.

19. Provinces and territories in Canada have key responsibilities for implementing Covenant rights, so provincial territorial legislation is a critical source of protection of Covenant rights. The term "National Human Rights Institutions" in Canada should be understood to include both federal and provincial/territorial human rights commissions. At all previous reviews of Canada, the CESCR has raised concerns regarding the effective legal remedies for Covenant rights at the provincial/territorial level. The only province to have included ESC rights in provincial human rights legislation is Quebec, and even there, the enforcement of these rights have not been put on an equal footing with other rights.

20. The federal government and of most provincial/territorial governments have failed to ensure that that the mandate of human rights commissions is extended to include promotion and monitoring of the implementation of ESC rights. The exclusion of ESC rights from the mandates and activities of human rights commissions has perpetuated the lack of accountability for and attention to systemic violations of ESC rights in Canada.

21. It is critical for national human rights institutions in Canada, including both provincial/territorial human rights commissions and the Canadian Human Rights Commissions, and their associated tribunals, to be given broader mandates to provide effective remedies to violations of all human rights, including economic, social and cultural rights and to hold the different levels of government jointly accountable for the implementation of human rights. The mandate of most human rights institutions in Canada is restricted to non-discrimination and equality and does not extend to many other human rights under ratified human rights treaties. This limited mandate of Canada's national human rights institutions is incompatible with the Paris Principles.

Recommendations re National Human Rights Institutions

1. **Covenant rights should be enumerated for protection in federal, provincial and territorial human rights legislation and accorded equal status and enforceability with other human rights.**
2. **All human rights institutions in Canada should be accorded an explicit mandate to review and report on compliance with the ICESCR.**

v. Monitoring and Accountability: Parliamentary Budget Officer and the National Council on Welfare

22. Recent years have witnessed an unprecedented attack on democratic mechanisms of accountability for Covenant rights. The present review provides an opportunity for Canada to commit to both a restoration of meaningful accountability but also to address a longstanding neglect of ESC rights within accountability mechanisms. Two monitoring and accountability mechanisms of particular importance are the National Council of Welfare and the Parliamentary Budget Officer.

23. The National Council on Welfare, an independent statutory body was established in 1969 to advise the federal government on issues relating to poverty. The NCW provided rigorous and independent assessments of the adequacy of social assistance rates in all provinces and territories. The information and analysis was relied on not only by governments but also by civil society, courts and international human rights bodies, including the CESCR, to assess compliance with domestic and international human rights. The Council published "Welfare Incomes" which allowed interested parties to compare to poverty lines, the purchasing power of social assistance/welfare support levels in each province and territory and provided an invaluable basis for monitoring and accountability with respect to Covenant rights. The CESCR and Canadian Courts (including the Supreme Court of Canada) have relied on the Council's statistical information concerning poverty and social assistance in Canada.

24. After becoming critical of failures of the federal government to adequately address poverty, the government removed all federal funding for the NCW at the end of the fiscal year in March 2013 forcing the Council to cease to operate.

25. The Parliamentary Budget Officer, with a mandate to "provide independent analysis to the Senate and to the House of Commons about the state of the nation's finances, the estimates of the government and trends in the national economy" and to respond to requests from parliamentary committees has been treated with disrespect in recent years and has been denied access to important information. The new government has committed to ensuring that the Parliamentary Budget Officer is truly independent of the government, that the office is properly funded, and accountable only – and directly – to Parliament. It is important, however, that the PBO be directed to also consider Covenant obligations in his reviews and assessments. This could help to correct a long-standing failure of Canada to review budgets in light of Covenant obligations.

Recommendations re National Council on Welfare and Parliamentary Budget Officer

3. **The Committee should express concern about the elimination of funding for the National Council on Welfare and recommend that funding be restored to the Council or to a new statutory agency mandated to analyse the adequacy of social assistance programs, assess progress in alleviating poverty and monitor compliance with Covenant rights.**

4. **The Parliamentary Budget Officer should be accorded full independence, adequate resources and be directed to consider Canada's obligations under the ICESCR in all budgetary review and analysis.**

C. Access to Justice

i. Access to Legal Aid: Canadian Bar Assn. v. British Columbia, 2008 BCCA 92.

26. In this case the Canadian Bar Association sought to challenge continued cuts to civil legal aid, citing Canada's international human rights obligations to ensure access to justice for poor people as a source for the interpretation of the right to security of the person and the right to equality under the *Canadian Charter*. The Government of British Columbia argued that international human rights law is not enforceable by courts and ought therefore to be ignored in this case. The BC Court of Appeal dismissed the claim as being non- justiciable.

Recommendations re Access to Legal Aid

1. **The Committee should express concern about the use of Motion to Strike procedures in the case of *Canadian Bar Assn. v. British Columbia* and the position advanced by the government in that case that there is no constitutional obligation on governments to ensure access to justice by implementing an adequate system of civil legal aid.**
2. **The Committee should recommend that access to adequate civil legal aid be recognized by governments in Canada as a constitutional obligation and an obligation under the Covenant warranting a thorough review and overhaul of legal aid programs to ensure that access to justice is ensured for all Covenant rights.**

ii. Fees Barring Access to Administrative Justice: *Toussaint v. Canada (AG)* 2011 FCA 213).

27. The applicant sought humanitarian and compassionate review of an application for permanent residency under the *Immigration and Refugee Protection Act*. She requested that the government waive the fee of $550 because her poverty made it impossible to pay it. When the Government refused to consider the fee waiver, she challenged the denial as a violation of the constitutional principle of the

rule of law and access to justice and as discriminatory on the ground of socio-economic status.[15] Canada argued that socio-economic status should not be recognized as a ground of discrimination and that the principle of access to justice and the rule of law does not apply to access to discretionary administrative decision-making. The Federal Court of Appeal found in favor of the Government of Canada on the rule of law and constitutional issues but found that the request for fee waiver had to be considered under the Immigration and Refugee Protection Act as it was then worded. The federal government subsequently amended the Act so as to continue to prevent low income applicants from seeking consideration of fee waiver on humanitarian and compassionate grounds.

Recommendations re Administrative Fees

1. **The Committee should express concern at the position advanced by Canada with respect to fees applied to access to humanitarian and compassionate consideration by those unable to afford the fees in the case of *Toussaint v. Canada (AG)* 2011 FCA 213). As affirmed by the Committee in General Comment 9, administrative remedies should take account of the requirements of the Covenant should be accessible, affordable, timely and effective be accessible. Fees should never be permitted to act as a barrier to access to administrative justice for those living in poverty.**

iii. Cancellation of Funding for the Federal Court Challenges Programme

28. At Canada's last periodic review, the Committee expressed concern about inadequate support for low income claimants seeking access to courts for effective remedies. The Committee had previously recognized the value of the Federal Court Challenges Program which provided funding for test cases for disadvantaged groups advancing equality and language rights claims. The Committee recommended that the Program be extended to permit funding of challenges with respect to provincial/territorial legislation and policies.[16] Instead of implementing this recommendation, however,

[15] *Toussaint v. Canada (AG)* 2011 FCA 213

[16] *Ibid* at paras 42-43.

the federal government cancelled funding to the Court Challenges Program altogether in the fall of 2006. The Federal Government subsequently agreed to reinstate the language rights component of the program but has refused to reinstate the equality rights programme. This has meant that disadvantaged groups such as the Charter Committee on Poverty Issues have faced significant challenges in accessing courts to advance issues of equality and social rights.

29. The new government has committed to reinstating and updating the Court Challenges Programme. As previously noted by the Committee, many ESC rights cases arise under s.7 and provincial legislation and have previously been excluded from coverage under the program and the Committee has recommended extending the programme to cover cases engaging Covenant rights under provincial jurisdiction. It is also important that s.7 cases involving the rights of disadvantaged groups to life and security of the person be covered under the programme.

Recommendations re Court Challenges Programme

2. **The Committee should welcome Canada's commitment to update and reinstate the Court Challenges Programme and recommend that the scope of the programme be reviewed with respect to provincial/territorial challenges and challenges under s.7 when they engage Covenant rights of disadvantaged and marginalized individuals or groups.**

D. Non-Discrimination (Article 2(2))

i. Boulter v. Nova Scotia Power Incorporated, 2009 NSCA 17 [Whether failure to ensure access to utilities for poor households is prohibited discrimination under section 15 of the Charter]

30. In this case low income households unable to afford rising utilities rates challenged a statute prohibiting utilities companies from charging lower rates to low income households in order to provide more affordable rates. Differential utilities rates are required in many U.S. states in order to ensure

more affordable rates for low income households and the challenged legislation prevented such measures from being instituted in Nova Scotia. Claimants argued that preventing lower prices for poor households violated the right to equality and reasonable accommodation of the poor. They cited the CESCR's recognition of socio-economic situation as a ground of discrimination as a persuasive authority, encouraging the Court to ensure equivalent protection under the Canadian Charter. The Attorney General for Nova Scotia argued that poverty or socio-economic status should not be recognized by courts in Canada as a prohibited ground of discrimination because it is not an "immutable" personal characteristic. The Court of Appeal ignored international human rights law, held that discrimination on the ground of poverty is not prohibited under the Canadian Charter and found in favour of the Government. Leave to Appeal was denied by the Supreme Court of Canada.

Recommendation Re *Boulter v. Nova Scotia Power Incorporated* [Unequal Access to Utilities for Poor Households]

1. **All governments in Canada should encourage courts to recognize poverty (social condition or social and economic situation) as a prohibited ground of discrimination and courts should give full consideration of international human rights jurisprudence in this regard.**
2. **Necessary measures should be taken by all provinces and territories to ensure that utilities rates are affordable for low income households so as to ensure that all households have access to heat, electricity, water, sanitation and other services. Measures to ensure affordability and accessibility should be legally required of all service providers.**

ii. The 'Emerald Hall' Case: Failure to Provide Community Based Housing for Persons with Disabilities

31. This is a human rights complaint filed by three individual complainants with disabilities and an NGO, the Nova Scotia-based 'Disability rights Coalition', in 2014.

The three individual complainants have been wrongfully institutionalized in a locked psychiatric ward for years—for no medical or legal reason. Rather, they have been institutionalized because the Province of Nova Scotia has chosen not to provide suitable community-based housing. One of the complainants has

been living in the locked psychiatric ward for over 15 years---solely because she has not been offered supportive housing in the community.

The complaints are awaiting a hearing before a board of Inquiry called pursuant to Nova Scotia's Human Rights Act.

This is inconsistent with the rights of people with disabilities under articles 2 and 11 of the *International Covenant on Economic, Social and Cultural Rights* (as well as art. 19 of the CRPD).

Recommendation Re Community-Based Housing for People with Disabilities

1. **The Committee should express concern that people with mental and other disabilities have been and remain living in locked psychiatric wards and other institutions—in some cases for many years[1]—while they await supportive, community-based housing. The Committee should recommend that the Province of Nova Scotia, as well as any other provinces or territories where this problem exists, immediately cease the practice of housing people with disabilities in institutions and, instead, make available—with suitable accommodation as required—community-based housing. Access to justice and effective remedies in such cases should be ensured by courts and human rights institutions.**

E. Articles 6 and 8: The Right to Organize and Bargain Collectively and the Right to Strike

i. Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4. [Freedom of Association and the Right to Strike]

32. In the recent *Saskatchewan Federation of Labour*[17] case decided by the Supreme Court of Canada, the Appellants challenged retrogressive measures enacted by the Saskatchewan Government to restrict the right to strike within the public service. The appellants argued that the right to freedom of

[17] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

association in section 2(d) of the *Canadian Charter* should be interpreted consistently with the ICESCR and ILO Conventions so as to protect the right to strike where it is necessary to effective collective bargaining. The appellants relied on expert evidence reviewing the commentary of the CESCR to establish that "the CESCR has interpreted the right to strike …. in a manner that is broadly consistent with how it is understood by ILO bodies."[18]

33. The Government of Canada was not a direct party in this case but intervened before the Supreme Court of Canada to provide assistance to the court. Rather than promoting an interpretation of the right to freedom of association that would be consistent with article 8 of the ICESCR however, the Government of Canada argued in opposition to such an interpretation, noting that the ICESCR is not directly enforceable and urging the Court to rely on other sources for interpretation.[19]

34. Significantly, the Supreme Court of Canada in its decision rejected Canada's submissions and placed significant emphasis on interpreting Charter rights consistently with the ICESCR. The Court reaffirmed the principle of consistent interpretation as follows:

> LeBel J. confirmed in *R. v. Hape*, [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified". [20]

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[18] The Appellants' Factum SCC Docket Number 35423 online at < http://www.scc-csc.gc.ca/factums-memoires/35423/FM010_Appellant_Saskatchewan-Federation-of-Labour-et-al.pdf> at para 62.

[19] Factum of the Intervener Attorney General of Canada SCC Docket Number 35423online at <http://www.scc-csc.gc.ca/factums-memoires/35423/FM060_Intervener_Attorney-General-of-Canada.pdf> at paras 27-28.

[20] At para 64.

35. The Supreme Court held that the newly enacted restrictions on the right to strike violated the right to freedom of association, interpreted consistently with Canada's international human rights obligations, and is not justified as a reasonable limit under s. 1 of the *Charter*.

Recommendation re the *Saskatchewan Federation of Labour* case and the Right to Organize and Bargain Collectively

1. **The Committee should express concern that in the *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 the federal government as intervener did not encourage the Court to adopt interpretations of the right to freedom of association in the Canadian Charter that is consistent with article 8 of the ICESCR. The Committee should welcome the Supreme Court of Canada's reliance on the Covenant in its decision and encourage the government to promote similar interpretations in future cases.**

F. Right to Housing (Article 11)

i. Victoria (City) v. Adams [Challenge to bylaws preventing homeless from erecting temporary shelter from elements in parks]

36. In the case of *Victoria (City) v. Adams*[21] a group of homeless people living in a park challenged city bylaws that prevented them from erecting temporary shelter of cardboard or plastic to protect themselves from the weather as violations of their rights under under section 7 of the *Canadian Charter*. As aids to the interpretation of the scope of the right to security of the person under section 7 of the Charter, the applicants relied on the right to adequate housing under the ICESCR, on the Committee's concluding observations on Canada and on Canada's statements before the CESCR explaining that section 7 should be interpreted as guaranteeing access to basic necessities. The City of Victoria, supported by the Attorney General for British Columbia (AGBC) as an intervener, argued that the claim

[21] *Victoria (City) v. Adams* 2008 BCSC 136, *Victoria (City) v. Adams*, 2009 BCCA 563.

was not within the scope of section 7 of the Charter. The AGBC argued that the ICESR did not assist in this case, because "international agreements do not have a normative effect."[22]

37. The trial court rejected the AGBC submissions, relying extensively on the CESCR's commentary and concluding observations regarding homelessness in Canada. The following two paragraphs demonstrate the important role that Canada' dialogue with this Committee can and should play in Canadian courts:

> 98] The federal government has expressed the view that s. 7 of the *Charter* must be interpreted in a manner consistent with Canada's obligations under the Covenant to not deprive persons of the basic necessities of life, in its response to a question from the Committee on Economic, Social, and Cultural Rights: *Summary Record of the 5th Meeting*, ESC, 8th Sess., 5th Mtg., U.N. Doc. E/C.12/1993/SR.5 (25 May 1993). The question arose from the report submitted to the Committee by Canada in 1993, pursuant to its Covenant obligations. The federal government assured the Committee at para. 21 that:
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> > While the guarantee of security of the person under section 7 of the Charter might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life.
>
> [99] This position was again asserted in 1998: Government of Canada "Federal Responses", *Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social, and Cultural Rights* (November 1998) online: Canadian Heritage, Human Rights Program, <http://www.pch.gc.ca/progs/pdp-hrp/docs/cesc/responses/fd_e.cfm>. The Committee asked whether the answer given in 1993 was still the position of all Canadian governments. In reply, the federal government gave the following answer at Question 53:
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> > The Supreme Court of Canada has stated that section 7 of the Charter may be interpreted to include the rights protected under the Covenant (see decision of *Slaight Communications v. Davidson* 1989 CanLII 92 (SCC), [1989]1 S.C.R. 1038). The Supreme Court has also held section 7 as guaranteeing that people are not to be deprived of basic necessities (see decision of *Irwin Toy v. A. -G. Québec*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927). The Government of Canada is bound by these interpretations ofsection 7 of the Charter.

[22] *Victoria (City) v. Adams* 2008 BCSC 136 at para 93.

[100] I conclude that while the various international instruments do not form part of the domestic law of Canada, they should inform the interpretation of the *Charter* and in this case, the scope and content of s. 7. [Emphasis added]

38. The trial court concluded that the impugned bylaws were contrary to section 7 of the *Charter* and of no force and effect. On appeal, the British Columbia Court of Appeal upheld the trial decision with only minor changes, leaving it open to the City to re-apply to the British Columbia Supreme Court to vary the court order if the City can demonstrate that there are sufficient resources to shelter the homeless.[23]

Recommendation re *Victoria v Adams*

1. **The Committee should express concern at the position taken by the Government of British Columbia in the *Victoria v. Adams* in which the applicants relied on the CESCR and on undertakings made by Canada with respect to the scope of section 7 protections of ESC rights.**

2. **The Committee should welcome the court's recognition in Victoria v Adams that section 7 should be interpreted consistently with the right to adequate housing in the Covenant. However, the Committee should recommend that such protections of the right to housing under section 7 be extended beyond the right of homeless people to erect temporary shelter to protect themselves from the elements to encompass the right to adequate housing as described in the Committee's General Comment 4 and in recommendations made by the Committee in previous reviews of Canada.**

ii. Tanudjaja v. Canada (Attorney General) [Failure to implement a national strategy to address homelessness.]

39. In this historic case,[24] individual homeless people joined with the Centre for Equality Rights in Accommodation to challenge Canada's and Ontario's failure to implement housing strategies to address

[23] *Victoria (City) v. Adams*, 2009 BCCA 563.

[24] *Tanudjaja v. Canada* (Attorney General) 2014 ONCA 852.

the crisis of homelessness, as urgently recommended by the CESCR in its concluding observations of 1993, 1998 and 2006 as well as by the Special Rapporteur on Adequate Housing following a mission to Canada, by the UN Human Rights Committee and by a range of domestic human rights and parliamentary bodies. This was the first case under the Canadian Charter to consider the constitutionality of governments' failure to effectively address the crisis of homelessness. The issues raised in this case are thus of critical importance both to those affected by homelessness in Canada but and to Canada's compliance with international human rights law.

40. The claimants worked with volunteer experts and community organizations, to assemble a 16-volume record, totalling nearly 10,000 pages, containing 19 affidavits, 13 of which were from experts, (including Miloon Kothari, the former Special Rapporteur on Adequate Housing). Only after all of the evidence was filed did the governments of Canada and Ontario bring a motion to dismiss the case without a hearing and without any consideration of the evidence that had been prepared.

41. The two central arguments advanced by the governments in defence of the motion to strike were i) that governments have no positive obligation to address homelessness, even where life and personal security is at stake; and ii) that the right to adequate housing is non-justiciable.

42. These arguments were accepted both by the Ontario Superior Court and by two of three judges on the Ontario Court of Appeal. The Superior Court held that there are no positive obligations under sections 7 or 15 of the Canadian Charter to address homelessness even when it deprives those affected of life, health or personal security. The majority of the Ontario Court of Appeal held that the claim was non-justiciable because homelessness is caused by a wide range of policies and laws beyond the competence of courts. The majority of the Court of Appeal held that "To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity."[25]

[25] *Ibid*, at para 34.

Recommendations re *Tanudjaja v. Canada*

1. **In light of the importance of positive measures to address homelessness for compliance with Canada's obligations under the ICESCR and the Committee's emphasis on the need for a national housing strategy to address this human rights crisis in Canada, the Committee should express concern that homeless people were denied a hearing of the evidence in the *Tanjudjajja* case.**

2. **In past reviews Canada has referred the Committee to the Supreme Court of Canada's decisions in *Irwin Toy* and *Slaight Communications* to explain that section 7 should be interpreted consistently with the Covenant and that the right to security of the person ensures at least a right not to be deprived of basic necessities. The Committee should inquire whether the position of the Supreme Court of Canada of the government of Canada has changed regarding the scope of section 7 protections and if not, why homeless people should not receive a hearing into the effect of homelessness on life and health.**

3. **Canada and Ontario should be asked to clarify what other possible legal remedies would be available to claimants in the circumstances of those in the *Tanudjaja* case if they continue to be denied access to justice by courts on the basis of the non-justiciability of the right to housing and of claims linked to positive obligations of governments.**

G. Access to Health Care (Article 12)

i. Toussaint v. Canada (Attorney General) 2011 FCA 213; [Denial of access to health care necessary to protect right to life because of undocumented immigration status]

43. The case of *Toussaint v. Canada* raised for the first time the question of whether undocumented migrants in Canada can be denied access to health care necessary for the protection of their lives solely on the grounds of their immigration/citizenship status; and whether denying access to health care necessary for life is a permissible means of encouraging compliance with Canada's immigration laws.

44. After a number of years working as an undocumented migrant, and while in the process of seeking to obtain legal residency status, Nell Toussaint became ill with life-threatening medical conditions. She applied for coverage under the federal government's program to provide health care to immigrants - the Interim Federal Health Benefit Program (IFHP) but was denied on the basis of her immigration status.

45. Although she was intermittently able to obtain emergency health care from hospitals and some assistance from a community health service, there were serious delays in obtaining necessary treatment which put her life at risk and had long term health consequences.

46. Ms. Toussaint sought judicial review before the Federal Court of Canada, arguing that the decision to deny coverage was contrary to the protections of rights to life, to security of the person and to non-discrimination under sections 7 and 15 of the Canadian Charter and that the immigration officer had failed to apply domestic law consistently with the international human rights treaties ratified by Canada. She filed extensive expert evidence regarding stereotypes and discrimination against undocumented migrants showing that providing access to health care for undocumented migrants does not encourage illegal immigration and is cost effective, rational public policy.

47. After reviewing the expert medical reports filed by Ms. Toussaint, the Federal Court found that the evidence established a deprivation of Ms. Toussaint's right to life and security of the person that was caused by the denial of access to health care under the IFHP. However, the Federal Court found that denying health care to persons who have chosen to enter or remain in Canada illegally is consistent with fundamental justice and that the impugned policy was a permissible means to discourage defiance of Canada's immigration laws.

48. Canada argued before the courts in this case that the protection afforded by the Canadian Charter should be interpreted as being more restrictive than the right to health under international human rights:

> Canada has clearly and intentionally chosen to enact domestic legislation which grants access to her public healthcare system on a strictly defined and much more limited basis, specifically to those present in Canada who meet the defined eligibility criteria set out in

> her domestic laws. Where a nation's domestic law is incompatible with international law, domestic statutes prevail over international law, for the purposes of Canadian law.[26]

49. It is important to clarify that in this case, Ms Toussaint has at no time claimed that she had a right to remain in Canada in order to receive the health care she needed. Her claim has been restricted to her circumstances while in Canada attempting to legally secure permanent residency. Nor did she claim an unqualified right to access publicly funded health care that is available to permanent residents of Canada through provincial health insurance plans. At issue in this case was the denial of coverage of health care for immigrants without legal status who are ineligible for provincial health care insurance and who have no means to pay for the care themselves.

50. The Federal Court did not refer to any of the uncontested expert evidence showing that the assumptions behind Canada's arguments, that undocumented migrants would flood to Canada to take advantage of heath care and other programs, are unfounded discriminatory stereotype. The Court of Appeal upheld the finding of the Federal Court – that any violation of the right to life of irregular migrants resulting from the denial of heath care is justified. The Federal Court of Appeal further held that discrimination on the grounds of immigration or citizenship status does not qualify for protection as an "analogous ground" of discrimination under the *Canadian Charter*. The Court held that while international human rights law can be considered in interpreting the *Canadian Charter*, but that it was not relevant in this case. The Court held that government was under no obligation to provide health care and was free to target healthcare programs as a matter of public policy.

51. Ms. Toussaint sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, including as an exhibit a letter from the Office of the High Commissioner for Human Rights affirming the importance of the issues raised in relation to Canada's compliance with its international human rights treaty obligations. The application for leave to appeal was denied in 2012. Ms Toussaint has filed a petition under the Optional Protocol to the ICCPR, which Canada has ratified.

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[26] Factum of the Attorney General of Canada online at <http://www.socialrights.ca/litigation/toussaint/IFH%20APEAL/Respondent's%20memorandum%20of%20fact%20and%20law.pdf>

Recommendations Regarding *Toussaint v. Canada* [access to health care]

1. **Grave concern should be expressed regarding the finding of the Federal Court and the Federal Court of Appeal, urged upon them by the government of Canada, denying irregular migrants access to life-saving health care is a justifiable means of promoting compliance with immigration law.**
2. **Immigration status, regardless of documentation, recognized as a prohibited ground of discrimination under the Canadian Charter.**

ii. Canadian Doctors For Refugee Care v. Canada (Attorney general), 2014 FC 651 [Challenge to Denial of Access to Healthcare for Categories of Refugee Claimants]

52. As soon as leave to appeal the to the Supreme Court of Canada was denied in the *Toussaint* case above, the Federal Government brought in changes to the Interim Federal Health Program to exclude additional classes of migrants, ie. refugees from designated countries and failed refugee claimants. These changes were the subject of an additional constitutional challenge in which the Federal Court found the changes to constitute cruel and unusual treatment under s. 12 of the Canadian Charter and discrimination on the basis of place of origin.

53. The Federal Court was persuaded by Canada's submissions that "the Charter does not impose positive obligations on governments to provide social benefits programs such as health insurance in order to secure their life, liberty or security of persons."[27] The court held that the denial of health care necessary to life or security does not violate the right to life under section 7 because "section 7of the Charter's guarantees of life, liberty and security of the person do not include the positive right to state funding for health care."[28] In relation to the obligation to consider the right to health under the ICESCR in interpreting the scope of Charter rights, the Federal Court held, in line with arguments advanced by the Government of Canada, that:

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[27] *Canadian Doctors For Refugee Care v. Canada (Attorney general)*, 2014 FC 651, at para 511.

[28] Ibid, at para 570.

> This Court has confirmed in *Toussaint* (FC), above, that there is no right in Canada to health care based upon international law, either for citizens or non-citizens, that the scope of the international legal right to health is contested, and that claims to the right to health care based on alleged international law obligations cannot succeed on the basis of international conventions that Canada's Parliament has not expressly implemented through specific legislation: *Toussaint* (FC) at paras 67 and 70. See also *Toussaint* (FCA), above at para 99.[29]

54. On December 16th, the Minister of Citizenship and Immigration and the he Minister of Immigration, Refugees and Citizenship and the Minister of Justice and Attorney General of Canada announced that the newly elected government would withdraw the appeal to the Federal Court of Appeal that had been filed by the previous government. The ministers stated that ""Withdrawing this appeal is an important step toward fulfilling our commitment to review the government's litigation strategy to address positions that are inconsistent with our values."[30]

Recommendation Regarding the Right to Health Care and *Canadian Doctors For Refugee Care v. Canada*

1. **The Committee should welcome the decision of the new government of Canada to withdraw its appeal of the decision of the Federal Court in Canadian Doctors for Refugee Care v. Canada, to restore funding for health care for previously disqualified refugee claimants and to review positions advanced in litigation.**

2. **In future cases, governments should argue and courts should recognize that the right to health is not contested but is in fact well established under international human rights law; that the right to life and the right to health are interdependent and indivisible; that those whose right to life and health relies on publicly funded health care must be accorded equal protection as those who are able to afford privately funded health care; and that access to health care must be ensured without discrimination on the grounds of immigration status, regardless of documentation.**

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[29] Ibid, at para 469.

[30] See the Ministers' statement at http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1025029&crtr.tp1D=980.

H. Compiled Recommendations

i. Domestic Implementation

Recommendation Re Positions Advanced in Litigation

All governments in Canada should put in place special procedures to ensure that government lawyers explain Canada's obligations under the ICESCR and promote interpretations of the Charter – in particular sections 7 and 15 – which are consistent with the Covenant and with General Comment 9.

Recommendation Re Promoting an Inclusive Human Rights Culture in Canada

Governments in Canada should publicly promote inclusive interpretations of rights to life, security of the person and equality which provide equal protection to those who are deprived of access to basic necessities such as food, housing, adequate social assistance and access to health care and ensure that affected groups and individuals are ensured access to justice.

Recommendation re Section 36 of the Constitution Act, 1982

The Government of Canada and provincial/territorial governments should promote and adopt interpretations of section 36 in courts and in inter-governmental negotiations that are consistent with the role that section 36 can play in implementing Covenant rights within a federal system. Access to justice for Covenant rights should be enhanced by ensuring that section 36 is considered justiciable and facilitates claims which hold different levels of government jointly responsible.

Recommendation re a Social Charter

Canada should consider ways in which the earlier "social union framework agreement" could be revised and renegotiated so as to include a social charter or similar mechanism for the protection, monitoring, adjudication and implementation of joint strategies for the realization of Covenant rights.

Recommendations re National Human Rights Institutions

Covenant rights should be enumerated for protection in federal, provincial and territorial human rights legislation and accorded equal status and enforceability with other human rights.

All human rights institutions in Canada should be accorded an explicit mandate to review and report on compliance with the ICESCR.

Recommendations re National Council on Welfare and Parliamentary Budget Officer

The Committee should express concern about the elimination of funding for the National Council on Welfare and recommend that funding be restored to the Council or to a new statutory agency mandated to analyse the adequacy of social assistance programs, assess progress in alleviating poverty and monitor compliance with Covenant rights.

The Parliamentary Budget Officer should be accorded full independence, adequate resources and be directed to consider Canada's obligations under the ICESCR in all budgetary review and analysis.

ii. Access to Justice

Recommendations re Access to Legal Aid

The Committee should express concern about the use of Motion to Strike procedures in the case of *Canadian Bar Assn. v. British Columbia* and the position advanced by the government in that case that there is no constitutional obligation on governments to ensure access to justice by implementing an adequate system of civil legal aid.

Providing adequate civil legal aid where required for access to justice should be recognized by governments in Canada as a constitutional obligation as well as an obligation under the Covenant, warranting a thorough review and overhaul of provincial/territorial legal aid programs.

Recommendation re Administrative Fees

The Committee should express concern at the position advanced by Canada with respect to fees applied to access to humanitarian and compassionate consideration by those unable to afford the fees in the case of Toussaint v. Canada (AG) 2011 FCA 213) As affirmed by the Committee in General Comment 9, administrative remedies should take account of the requirements of the Covenant should be accessible, affordable, timely and effective be accessible. Fees should never be permitted to act as a barrier to access to administrative justice for those living in poverty.

Recommendation re Court Challenges Programme

The Committee should welcome Canada's commitment to update and reinstate the Court Challenges Programme and recommend that the scope of the programme be reviewed with respect to provincial/territorial challenges and challenges under s.7 when they engage Covenant rights of disadvantaged and marginalized individuals or groups.

iii. Article 2(2) Non-Discrimination

Recommendation Re *Boulter v. Nova Scotia Power Incorporated* [Unequal Access to Utilities for Poor Households]

All governments in Canada should encourage courts to recognize poverty (social condition or social and economic situation) as a prohibited ground of discrimination and courts should give full consideration of international human rights jurisprudence in this regard.

Necessary measures should be taken by all provinces and territories to ensure that utilities rates are affordable for low income households so as to ensure that all households have access to heat, electricity, water, sanitation and other services. Measures to ensure affordability and accessibility should be legally required of all service providers.

Recommendation Re Community-Based Housing for People with Disabilities

The Committee should express concern that people with mental and other disabilities have been and remain living in locked psychiatric wards and other institutions—in some cases for

many years1—while they await supportive, community-based housing. The Committee should recommend that the Province of Nova Scotia, as well as any other provinces or territories where this problem exists, immediately cease the practice of housing people with disabilities in institutions and, instead, make available—with suitable accommodation as required—community-based housing. Access to justice and effective remedies in such cases should be ensured by courts and human rights institutions.

iv. Articles 6 and 8 Right to Organize and Bargain Collectively

Recommendation re the *Saskatchewan Federation of Labour* case and the Right to Organize and Bargain Collectively

The Committee should express concern that in the *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 the federal government as intervener did not encourage the Court to adopt interpretations of the right to freedom of association in the Canadian Charter that are consistent with article 8 of the ICESCR. The Committee should welcome the Supreme Court of Canada's reliance on the Covenant in its decision and encourage the government to promote similar interpretations in future cases.

v. Article 11: Right to Adequate Hosing

Recommendations re *Victoria v Adams: Section 7 and the Right to Housing*

The Committee should express concern at the position taken by the Government of British Columbia in the Victoria v. Adams in which the applicants relied on the CESCR and on undertakings made by Canada with respect to the scope of section 7 protections of ESC rights.

The Committee should welcome the court's recognition in Victoria v Adams that section 7 should be interpreted consistently with the right to adequate housing in the Covenant. However, the Committee should recommend that such protections of the right to housing under section 7 be extended beyond the right of homeless people to erect temporary shelter to protect themselves from the elements to encompass the right to adequate housing as described in the Committee's General Comment 4 and encompassing recommendations made by the Committee in previous reviews of Canada to take positive measures to eliminate homelessness and ensure access to adequate housing.

Recommendations re *Tanudjaja v. Canada:* Obligation to Implement a Housing Strategy

In light of the importance of positive measures to address homelessness for compliance with Canada's obligations under the ICESCR and the Committee's emphasis on the need for a national housing strategy to address this human rights crisis in Canada, the Committee should express concern that homeless people were denied a hearing of the evidence in the *Tanjudjajja* case.

In past reviews Canada has referred the Committee to the Supreme Court of Canada's decisions in *Irwin Toy* and *Slaight Communications* to explain that section 7 should be interpreted consistently with the Covenant and that the right to security of the person ensures at least a right not to be deprived of basic necessities. The Committee should inquire whether the position of the Supreme Court of Canada of the government of Canada has changed regarding the scope of section 7 protections and if not, why homeless people should not receive a hearing into the effect of homelessness on life and health.

Canada and Ontario should be asked to clarify what other possible legal remedies would be available to claimants in the circumstances of those in the *Tanudjaja* case if they continue to be denied access to justice by courts on the basis of the non-justiciability of the right to housing and of claims linked to positive obligations of governments.

vi. Article 12: Right to Health

Recommendations Regarding *Toussaint v. Canada* [health care for irregular migrants]

Grave concern should be expressed regarding the finding of the Federal Court and the Federal Court of Appeal, urged upon them by the government of Canada, that denying irregular migrants access to life-saving health care is a justifiable means of promoting compliance with immigration law.

Immigration status, regardless of documentation, should be recognized as a prohibited ground of discrimination under the Canadian Charter.

Recommendation Regarding the Right to Health Care and *Canadian Doctors For Refugee Care v. Canada*

The Committee should welcome the decision of the Government of Canada to withdraw its appeal of the decision of the Federal Court in Canadian Doctors for Refugee Care v. Canada, to

restore funding for health care for previously disqualified refugee claimants and to review positions advanced in litigation.

In future cases, governments should argue and courts should recognize that the right to health is not contested but is in fact well established under international human rights law; that the right to life and the right to health are interdependent and indivisible; that those whose right to life and health relies on publicly funded health care must be accorded equal protection as those who are able to afford privately funded health care; and that access to health care must be ensured without discrimination on the grounds of immigration status, regardless of documentation.