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 0n Poverty Issues (CCPI)

and the Social Rights Advocacy Centre (SRAC)

For the Pre-Sessional Working Group of the Committee on Economic, Social and Cultural Rights Considering the List of Issues for the Sixth Periodic Report of Canada For the CESCR's 55th Session

February 2015

Contents

A. 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 assisted in co-ordinating the work of the NGO Coalition for the OP-ICESCR participating in the Open Ended Working Group on the OP-ICESCR and continues to participate in the promotion of the OP; assists in co-ordinating the ESCR-Net Caselaw database; helps to co-ordinate ESCR-Net's International Strategic Litigation Initiative; produces extensive research and publications on social rights and initiates and co-ordinates test cases in Canada.*

B. Focus of These Submissions: The Right to Effective Remedies

1. A key issue in the ongoing dialogue between Canada and the CESCR historically has been Canada's failure to promote or to ensure access to effective remedies as outlined by the Committee in General Comment 9. Canada's refusal to recognize its obligations to ensure effective legal remedies for ESC rights is integrally related to the continued and growing violations of ESC rights in Canada in law and policy. Canada treats ESC rights as mere policy issues rather than as human rights. This position is reflected in Canada's Periodic Report, which focuses on policies and programs but ignores the need to recognize Covenant rights as human rights. 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 List of Issues it is critical to focus on the right to effective remedies.

2. As Canada has come under increasing international criticism for the extent of poverty, homelessness and hunger in so affluent a country, it has also taken an increasingly retrogressive stance in relation to access to effective remedies for ESC rights. 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 for its skepticism. 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 by bringing

motions to dismiss such claims as non-justiciable before courts and arguing that claims based on inter-dependence of ESC rights with civil and political rights are non-justiciable.

C. Dialogue with Canada and Concerns and Recommendations Regarding Effective Remedies in Previous Reviews

3. 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 as will be seen from the cases described below, Canada has advanced the opposite position before domestic courts.

4. 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]

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

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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.

D. Legal Context: The Requirement of Inclusive Interpretations of Rights under the Canadian Charter of Rights and Freedoms

6. As the Committee has recognized in General Comment 9, in states in which Covenant rights do not have direct effect in domestic law, the requirement that domestic law be interpreted consistently with the ICESCR is of central importance. Canada is a leading example of a state in which the interpretive principle 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 and thus contains no explicit reference to rights in the ICESCR such as a right to an adequate standard of living, to housing or to food. However, rights in the Canadian Charter were framed in expansive terms so as to be inclusive of obligations undertaken by Canada in its earlier ratification of 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.

7. 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]

8. In its 1986 decision in *Irwin Toy*[5] the Supreme Court found that corporate commercial economic rights were not within the scope of section 7 of the Charter but the Court was careful not to exclude "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter" from the scope of section 7.[6] 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.[7] 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.[8] The question of the extent to which sections 7 and 15 and other constitutional provisions 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.

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[4] *R. v. Ewanchuk* [1999] 1 S.C.R. 330 at para. 73.
[5] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.
[6] *Ibid*. pp. 1003-4.
[7] *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429, at para 308.
[8] *Ibid.*, at paras 82-83.

9. CCPI/SRAC submits that it is particularly important in the context of the current review of Canada that the Government of Canada as well as provincial/territorial governments be encouraged to review the positions being advanced in important cases in relation to the justiciability of ESC rights and their interpretive effect on Charter rights, as well as to follow up on other longstanding concerns of this Committee regarding Canada's failure to promote and ensure effective domestic remedies.

E. Right to Organize and Bargain Collectively and the Right to Strike (Articles 6, 8)

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

10. In the recent *Saskatchewan Federation of Labour*[9] case decided by the Supreme Court of Canada, the Appellants challenged retrogressive restrictions enacted by the Saskatchewan Government to restrict the right to strike within the public service. The appellants argued that the right to freedom of 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."[10]

11. 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, that there are other sources for interpretation of the *Canadian Charter* other than international human rights law on which the court should rely and that the protection of the right to strike in article 8 of the ICESCR is at any rate limited to circumstances where the rights are exercised in conformity with domestic law.[11]

12. 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

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

[10] 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.

[11] 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.

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".

13. 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. 1of the *Charter*.

Question re Right to Organize and Bargain Collectively

1. **Please explain the rationale behind the position taken by the Government of Canada as an intervener in the case of *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 in relation to the obligations of the State Party outlined in GC 9, to promote interpretations of the Canadian Charter consistent with the ICESCR.**

F. Right to Housing (Article 11)

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

14. In the case of *Victoria (City) v. Adams*[12] 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 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."[13]

15. 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

[12] *Victoria (City) v. Adams* 2008 BCSC 136, *Victoria (City) v. Adams*, 2009 BCCA 563.
[13] *Victoria (City) v. Adams* 2008 BCSC 136 at para 93.

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:

> 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:

> 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.

[Emphasis added]

[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.

16. 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 British Columbia Supreme Court to vary the court order if the City can demonstrate that there are sufficient resources to shelter the homeless.[14]

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

Questions re *Victoria v Adams*

1. **In relation to the obligations of the State Party outlined in GC 9, to promote interpretations of the Canadian Charter consistent with the ICESCR, please explain the position taken by the Government of British Columbia in response to the applicants' reliance in that case on the ICESCR in this *Victoria v Adams* and in subsequent cases raising similar issues.**

2. **Explain what measures have been taken by the Government of British Columbia subsequent to the decision in *Victoria v Adams* case to address the violations of the right to adequate housing documented in that case.**

ii) Tanudjaja v. Canada (Attorney General)[15] **[Whether failure to address homelessness crisis violates rights to life, security of the person and equality.]**

17. In this historic case, 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 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.

18. 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, on the grounds that the claim as described in the Notice of Application served at the commencement of the action is non-justiciable and has no reasonable chance of success.

19. Ontario and Canada argued that the applicants' claims to violations of the rights to life, security of the person and equality linked to homelessness were non-justiciable because the Canadian Charter should not be interpreted to impose positive obligations on governments in general, and should not be interpreted to impose positive obligations to ensure access to adequate housing. Canada argued as follows:

> 40. The Applicants cite international law as a source of the right to housing, but it is plain and obvious that this allegation must fail. It is trite law that international treaties do not

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

> create unique domestic-law entitlements. The entitlement must first be specifically incorporated into domestic law. While international law binding on Canada may be a relevant and persuasive source for interpreting the Charter, it cannot be used to rewrite the text of the constitution to add new rights.
>
> 41. As adequate housing is not a benefit conferred by domestic law, the Applicants' claim has "no reasonable chance of succeeding".

20. 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 premised on a self-standing right to housing which did not exist under the Charter and is 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 "Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. 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."[16]

Questions 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, can the Governments of Canada and Ontario please explain why they did not support having the claim advanced in the *Tanjudjajja* case considered at a full evidentiary hearing on the basis of the extensive evidentiary record compiled by the applicants.**

2. **Please clarify whether Supreme Court of Canada jurisprudence regarding the potential scope section 7 to include positive obligations related to socio-economic rights has changed since previous reviews and explain whether the position of the Government of Canada has changed since it informed this Committee that section 7 may be interpreted to include the rights protected under the Covenant and at least guarantees that people are not to be deprived of basic necessities.**

3. **Please outline what other possible legal remedies would be available to claimants in the circumstances of those in the *Tanudjaja* case if the decision of the Ontario Court of Appeal is not overturned.**

[16] *Ibid*, at para 34.

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]

21. The case of *Toussaint v. Canada* case 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.

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.

22. 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.

23. 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, inter alia, that providing access to health care for undocumented migrants does not encourage illegal immigration and that providing access to health care without discrimination because of immigration status is cost effective and rational public policy. 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 her exclusion from the IFHP. However, the Federal Court found that denying financial coverage for 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.

24. Canada argued before the courts in this case that "while international agreements might recognize "an international right to health", that does not equate, in either international or domestic law, to an unlimited right to all available health services by everyone in Canada, at government expense." Canada additionally argued that its domestic law was intentionally non-compliant with international law:

> 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.[17]

25. 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.

26. The Federal Court did not refer to any of the uncontested expert evidence showing that denying access to health care is not an effective means to promote compliance with immigration laws and that the notion that undocumented migrants enter countries to take advantage of heath care and other programs is simply based on unfounded discriminatory stereotype. The Court upheld the finding of the Federal Court and 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*, it is not relevant in this case.

27. 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.

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

1. **Please explain the intended inconsistency between Canadian law and the requirements of the ICESCR referred to in Canada's submissions in the case of *Toussaint v Canada*. To what extent are non-citizens protected from discrimination in access to health care under the Canadian Charter?**
2. **Explain any discrepancy between protections from discrimination on the basis of citizenship or immigration under the Canadian Charter and this Committee's General Comments 14 and 20 with respect to ensuring equal enjoyment of the right to health without discrimination because of immigration status, regardless of documentation.**

[17] 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>

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]**

28. As soon as leave to appeal the to the Supreme Court of Canada was denied in the *Toussaint* case, the Federal Government brought in changes to the Interim Federal Health Program to exclude additional classes of migrants, including refugees from designated countries and failed refugee claimants. These changes have been 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.

29. 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."[18] 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."[19] 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:

> 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.[20]

Questions Regarding Domestic Remedies for the Right to Health Care

1. **Does the Government of Canada agree that with the summary of the state of domestic and international law in Canada in relation to the status of the right to health at paragraph 469 of the decision of the Federal Court in in *Canadian Doctors For Refugee Care v. Canada (Attorney genera*l), 2014 FC 651. If so, please explain on what basis the right to health under international human rights law is considered "contested" in Canada.**

[18] Ibid, at para 511.
[19] Ibid, at para 570.
[20] Ibid, at para 469.

Questions Regarding Domestic Remedies for the Right to Health Care (cont'd)

2. **How does Canada reconcile the Supreme Court's finding in the case of *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 that those who can afford access to private health insurance have a constitutional right not to be deprived of such access when it is necessary to protect the right to life and health with the position taken by Canada in relation to access to health care by immigrants who are unable to afford private health care insurance?**

H. 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 probited form of discrimination]**

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. 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. However, 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 and found in favour of the Government. Leave to Appeal was denied by the Supreme Court of Canada.

Question Regarding *Boulter v. Nova Scotia Power Incorporated* [Unequal Access to Utilities for Poor Households not Discriminatory]

1. **In relation to the obligations of the State Party outlined in GC 9, to promote interpretations of the Canadian Charter consistent with the ICESCR, please explain how the position of the Attorney-General of Nova Scotia that the social condition of "poverty" was not a prohibited ground of discrimination under s. 15 of the Canadian Charter is consistent with its obligations under the ICESCR?**

I. Access to Justice

***i) Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92. [Systemic challenge to inadequate legal aid.]**

31. In this case the Canadian Bar Association sought to challenge continued cuts to civil legal aid for poor people, 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. The BC Court of Appeal dismissed the claim as being non- justiciable.

***ii) Toussaint v. Canada (AG)* 2011 FCA 213)**. [**Challenge to refusal to waive fees for access to humanitarian and compassionate consideration on basis of poverty**]

32. Prior to her illness and her challenge to being denied access to health care, Ms. Toussaint sought humanitarian and compassionate review of an application for permanent residency under the *Immigration and Refugee Protection Act*. She requested that the Government consider waiving the fee of $550 in circumstances where 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.[21] 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 Government subsequently amended the Act so as to prevent low income applicants from seeking consideration of fee waiver on humanitarian and compassionate grounds.

iii) Cancellation of Funding for the Federal Court Challenges Programme

33. 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.[22] Instead of implementing this recommendation, however, 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.

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

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

Questions re Access to Justice

1. **In light of the successful Motion to Strike the claim in the case of *Canadian Bar Assn. v. British Columbia,* please explain where those who are denied access to justice by systemic inadequacies in the legal aid system would go for a hearing and an effective systemic remedy to this ongoing problem**

2. **Since access to effective remedies to Covenant rights frequently relies on access to administrative decision-makers, how is the position advanced by Canada with respect to fee waiver and access to humanitarian and compassionate consideration by those unable to afford the fees consistent with obligations under the Covenant?**

3. **With the cancellation of the Federal Court Challenges Programme, what financial support is provided by the Federal Government for disadvantaged claimants and for equality seeking groups to take forward test cases under the Charter?**

J. Provincial/Territorial Human Rights Legislation

34. Provinces and territories in Canada have key responsibilities for implementing Covenant rights. At all previous reviews of Canada, the CESCR has raised concerns regarding the effective legal remedies for Covenant rights at the provincial/territorial level.

35. 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.

Question re Provincial/Territorial Human Rights Legislation

1. **To what extent are Covenant rights protected in provincial and territorial human rights legislation? Please provide information on any changes made or under consideration for enhanced protections of ESC rights in human rights legislation in Canada.**

K. Section 36 of the *Constitution Act*, 1982.

36. 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."[23]

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

1. **Could the Government of Canada and provincial/territorial governments please provide further explanation as to how section 36 of the *Constitution Act, 1982* protects Covenant rights and clarify whether the constitutional commitment to essential public services of reasonable quality is subject to effective remedies for individual claimants.**

L. Monitoring and Accountability of Social Assistance Rates

i) Cancellation of funding for the National Council on Welfare

37. At its previous review, the Committee expressed concern regarding the continued inadequacy of social assistance rates in Canada, based on analysis of the National Council on Welfare. Over many decades the National Council of Welfare was a federal agency constituted to advise to federal Ministers. 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.

38. The report on Welfare Incomes took many person months to prepare because it began with the published welfare benefit rates but then gathered reams of detailed administrative regulations to allow a proper comparison of the income and asset regulations of provinces. The National Council of Welfare was able to gather statistical and administrative information from provinces on a government to government basis. Something that no NGO would be in a position to do.

39. In 2012, the government of Canada abolished the National Council of Welfare, making the data that it had published either inaccessible or accessible only at great expense or with great difficulty. No organization outside of government is able to gather the comparable data on the administrative details of social assistance.

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

Questions re Cancellation of the National Council on Welfare and Adequacy of Social Assistance Rates

1. **Is the Government of Canada able to provide an assessment of the adequacy of welfare incomes in each province and territory comparable to that which was available in previous reviews of Canada from the National Council on Welfare?**

2. **Apart from possible challenges to alleged discriminatory aspects of social assistance legislation, what legal remedies are available in Canada to ensure the adequacy of social assistance rates?**