SOURCEBOOK
for the

HUMAN RIGHTS LINKAGES INITIATIVE / INITIATIVE DE LIAISON EN MATIÈRE DES DROITS DE LA PERSONNE
Fall 1999 National Consultation /
Consultation nationale, automne 1999

LIVRET DE RÉFÉRENCE

Friday November 26 and Saturday November 27, 1999
Centre Block, Parliament of Canada, Ottawa

Le vendredi 26 novembre et te samedi 27 novembre 1999
Édifice du Centre, Parlement du Canada, Ottawa

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Convened by / convoquée par

The Very Reverend, the Hon. Lois M. Wilson, the Senate of Canada
La Très Révérende, l'hon. Lois M. Wilson, Sénat du Canada

in collaboration with / en collaboration avec

Iris Almeida, International Centre for Human Rights and Democratic Development / Centre international des droits de la personne et du développement démocratique,
Tom Clark, Inter-Church Committee for Refugees / Comité inter-églises pour les réfugiés,
Bruce Porter, Centre for Equality Rights in Accommodation, and / et
Laurie Wiseberg, Human Rights Internet.

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the International Centre for Human Rights and Democratic Development / le Centre international des droits de la personne et du développement démocratique.

SOURCEBOOK for the
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PROGRAMME

Friday November 26th

a.m.: Plenary session (Room 160-S, Centre Block, Parliament)

9:30 Security clearance in the front lobby of Centre Block

10:00 Welcome and Opening Remarks – Hon. Lois M. Wilson

10:15 Objectives and Methodology -- Tom Clark

10:30 Introduction of participants and establishment of Working Groups

12:00 Lunch on site

p.m.: Working Group sessions

13:00 Working Groups – Session I

14:30 Break

15:00 Working Groups – Session II

16:30 Plenary

17:30 Dinner on site

19:00 – 21:00 Panel
"The Role of Parliamentarians in Implementing Human Rights Domestically"

Saturday November 27th

9:30 Working Groups – Session III

12:00 Lunch on site

13:30 - 17:00 Concluding Plenary

Hospitality courtesy of **Gowlings** and **NelliganPower.**

PROGRAMME

Vendredi 26 novembre 1999

Avant-midi : Séance plénière (Salle 160-S, édifice du Centre, édifices du Parlement)

9 h 30 Vérification de sécurité dans le hall principal de l'édifice du Centre.

10 h Bienvenue et mot d'ouverture – L'hon. Lois M. Wilson.

10 h 15 Objectifs et déroulement – Tom Clark.

10 h 30 Présentation des participants et formation des groupes de travail.

12 h Déjeuner servi sur les lieux.

Après-midi : Ateliers

13 h Groupes de travail – Atelier I.

14 h 30 Pause.

15 h Groupes de travail – Atelier II.

16 h 30 Plénière.

17 h 30 Dîner servi sur les lieux.

19 h à 21 h Discussion.
« Application des droits de la personne au pays : Le rôle des parlementaires »

Samedi 27 novembre

9 h 30 Groupes des travail – Atelier III.

12 h Déjeuner servi sur les lieux.

13 h 30 à 17 h Séance plénière de clôture.

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Hospitalité offerte gracieusement par **Gowlings**, **NelliganPower**.

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THE PROTECTION OF SOCIAL AND ECONOMIC RIGHTS UNDER THE *CANADIAN HUMAN RIGHTS ACT*[1]

© Martha Jackman and Bruce Porter

Introduction

In 1997, on the eve of the fiftieth anniversary of the *Universal Declaration of Human Rights*, the Canadian Human Rights Commission acknowledged for the first time that poverty is a fundamental human rights issue in Canada, inextricably linked with violations of the right to equality guaranteed under the *Canadian Human Rights Act* (*CHRA*).[2] As Chief Commissioner Michelle Falardeau-Ramsay stated in the Commission's *Annual Report*: "The international community has recognized for some time that human rights are indivisible, and that economic and social rights cannot be separated from political, legal or equality rights. It is now time to recognize poverty as a human rights issue here at home as well."[3] While the Commission rejected the suggestion that poverty issues are completely beyond its legislated mandate, it called for a review of the narrow scope of human rights protections under the *CHRA*, asking in particular: "whether the Canadian human rights system is based on a definition of "human rights" which is too restrictive."[4]

The Canadian Human Rights Commission is not alone in identifying violations of social and economic rights of women and other disadvantaged groups as one of the most critical equality issues of our time, nor in recommending the inclusion of social and economic rights within federal human rights legislation. In its 1999 review of Canada's compliance with the *International Covenant on Civil and Political Rights* (*ICCPR*),[5] the Human Rights Committee underlined the discriminatory effects of poverty and social program cuts in Canada.[6] The Committee also criticized the lack of effective remedies for human rights violations in Canada, recommending that "relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination."[7] It pointed to gaps between protections under the *ICCPR* and those available under the Canadian *Charter* and other domestic human rights statutes, recommending "that consideration be given to the establishment of a public body responsible for overseeing implementation of the *Covenant* and for reporting on any deficiencies."[8] When, during oral questioning of the Canadian delegation, the Human Rights Committee asked about the gaps between

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[1]This paper is an abridged version of "Women's Substantive Equality and the Protection of Social and Economic Right Under the *Canadian Human Rights Act*", published by Status of Women Canada, October, 1999, online at www.swc-cfc.gc.ca.

[2]R.S.C. 1985, c. H-6.

[3]Canadian Human Rights Commission, *Annual Report 1997* (Ottawa: Canadian Human Rights Commission, 1998) 2.

[4]*Ibid.* at 8.

[5]*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[6]United Nations Human Rights Committee, *Consideration of Reports Submitted by Sates Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Canada)*, Geneva, 07 April 1999, CCPR/C/79/Add. 105 (1999) at paragraph 20 [hereinafter *Concluding Observations, 1999*].

[7]*Ibid.* at paragraph 9.

[8]*Ibid.* at paragraph 10.

domestic and international human rights protections, and the lack of domestic mechanisms for reviewing compliance with human rights treaty obligations, the head of the Canadian delegation, the Honourable Heddy Fry, referred to the upcoming review of the *CHRA*. Minister Fry stated that she would recommend, in the context of that review, that the mandate of the Canadian Human Rights Commission be expanded to include issues of compliance with international human rights treaties ratified by Canada.[9]

In the *List of Issues* it submitted to Canada prior to its 1998 review of Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*),[10] the Committee on Economic, Social and Cultural Rights asked whether the Canadian government would be "acting on the recommendation of the Canadian Human Rights Commission that the ambit of human rights protections in Canada be expanded to include social and economic rights."[11] In answer, the government stated that: "the Government of Canada will consider this recommendation as part of its comprehensive review of the *Canadian Human Rights Act,* which is scheduled to commence shortly" and that it was "inappropriate to make any commitment to amend the legislation without such analysis as well as without consulting with other organizations and interested citizens."[12] During oral questioning, the Committee pressed the Canadian delegation to explain the federal government's continued failure to amend the *CHRA*, suggesting that the reference to the upcoming review of the *Act* did not explain why no action had been taken over the five years since the Committee's last review. The Canadian delegation again assured the Committee that the matter would be considered in the upcoming review of the *CHRA*.[13]

In its *Concluding Observations*, the Committee noted as a "positive measure" the "Canadian Human Rights Commission's statement about the inadequate protection and enjoyment of economic and social rights in Canada and its proposal for the inclusion of those rights in human rights legislation, as recommended by the Committee in 1993."[14] In its list of recommendations, the

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[9]Summary Records for the review of Canada are not yet available, but Minister Fry's verbal commitment was recorded by a number of the NGOs present at the meeting, including by one of the authors of the present paper.

[10]*International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 August 1976) [hereinafter *ICESCR*].

[11]Committee on Economic, Social And Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, *List of issues to be taken up in connection with the consideration of the third periodic report of Canada concerning the rights referred to in articles 1_15 of the International Covenant on Economic, Social and Cultural Rights* (E/1994/104/Add.17) E/C.12/Q/CAN/1 (10 June 1998), paragraph 8, page 2 [hereinafter *List of Issues]*.

[12]*Review of Canada's Third Report on The Implementation of The International Covenant on Economic, Social And Cultural Rights: Responses to the supplementary questions emitted by the United Nations Committee on Economic, Social and Cultural Rights* (E/C/12/Q/CAN/1) *on Canada's third report on the International Covenant on Economic, Social and Cultural Rights* (E/1994/104/Add17) [hereinafter *Responses to Supplementary Questions*].

[13]Nations Unies Conseil économique et social, Comité des Droits Économique, Sociaux et Culturels, *Compte Rendu analytique de la 48ème seance: Canada*, Geneve 27 novembre 1998, E/C.12/1998/SR.48 at paragraphs 12, 13, 15, 22 and 24.

[14]United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, 10 December 1998, E/C.12/1/Add.31 at paragraph 9 [hereinafter *Concluding Observations, 1998*].

Committee repeated its call for reform of Canadian human rights laws: "to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status." The Committee further insisted that "enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups."[15]

The obligation to provide effective remedies for social and economic rights violations

In 1998, the Committee on Economic, Social and Cultural adopted two *General Comments* which directly address the issue of justiciability and the provision of legal remedies for social and economic rights violations through domestic human rights legislation.[16] In its *General Comment No. 9,* on the domestic application of the *ICESCR*, the Committee rejects the notion that social and economic rights are inherently unsuitable for judicial enforcement and adopts a rigorous standard which states are required to meet to justify the denial of legal remedies in the social and economic rights area. The Committee asserts that state parties to the *ICESCR* are required to provide for legal remedies in two ways: through consistent interpretation of domestic law, particularly in the area of equality and non-discrimination, and through the adoption of legislative measures to provide legal remedies for violations of social and economic rights.[17]

The Committee is careful to leave room for variation from state to state as to how social and economic rights should be protected within domestic legal systems, noting that "the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide."[18] Nevertheless, the Committee lays out three basic principles of compliance, based on the overriding duty to provide effective domestic remedies for social and economic rights violations. First, the means chosen by the state must be adequate to give effect to the rights in the *ICESCR*. To satisfy the non-discrimination provisions of the *ICESCR*, judicial enforcement is, the Committee asserts, indispensable.[19] Second, protection for social and economic rights should be comparable to, and integrated with, the protection provided for civil and political rights. Where the means used to give effect to the *ICESCR* "differ significantly" from those used in relation to other human rights treaties, "there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights."[20] Third, the Committee suggests that direct incorporation

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[15] *Ibid.* at paragraph 51.

[16] United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 9 The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights,* Geneva, 16 November - 4 December 1998, E/C.12/1998/24 [hereinafter *General Comment No. 9]*; United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 10 The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, Geneva, 16 November - 4 December 1998 E/C.12/1998/25 [hereinafter *General Comment No. 10*].

[17] *General Comment No. 9, ibid.* at paragraph 3.

[18] *General Comment No. 9 supra* note16 at paragraph 5.

[19] *Ibid.* at paragraph 9.

[20] *Ibid.* at paragraph 7.

of *ICESCR* rights into domestic law, though not absolutely required, is desirable in order to enable individuals to invoke *Covenant* rights directly through court action[21]

The Committee's *General Comment No. 10,* on the role of national human rights institutions in the protection of social and economic rights, flows directly from the principles laid out in *General Comment No. 9*. It is clearly incompatible with the fundamental principle of the interdependence and indivisibility of all human rights for domestic human rights institutions to focus solely on civil rights. The Committee notes that, while national human rights institutions "have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights," this role has too often been neglected. In the Committee's view it "is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions."[22] *General Comment No. 10* outlines a number of possible roles for human rights institutions with respect to social and economic rights. These include reviewing legislation and administrative practice for compliance with social and economic rights; promoting public education and information programs; investigating complaints of violations; and holding inquiries into the realization of social and economic rights within the country as a whole, or within particular vulnerable constituencies.[23]

Why the *CHRA* is the appropriate place to begin in Canada

Adding social and economic rights to the *CHRA* would not provide a remedy for all social and economic rights violations in Canada. The Committee on Economic, Social and Cultural Rights has recommended the inclusion of social and economic rights in both provincial and federal human rights legislation. Indeed, many of the most important social rights claims of women and other disadvantaged groups fall within areas of provincial jurisdiction. And, inclusion of social and economic rights in human rights legislation is itself only part of the solution. In addition to incorporating social and economic rights in human rights statutes, the Committee has recommended a more expansive interpretation of *Charter* rights; a shared cost program for social assistance which restores a legally enforceable right to adequate financial assistance; and the protection of social and economic rights through the Social Union framework.[24] Thus, the incorporation of social and economic rights in the *CHRA* would represent only a partial fulfillment of Canada's overall obligation, under the *ICESCR,* to integrate social and economic rights into the domestic legal framework.

For a number of reasons, however, the *CHRA* is an ideal place to start the process of developing an approach to human rights in Canada that is more consistent with our international obligations, and more responsive to the needs and human rights claims of Canada's most disadvantaged constituencies. First, including social and economic rights within the *CHRA* affirms their inherent connection with equality rights. Such a reform will encourage an interdependent

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[21] *Ibid.* at paragraph 8.
[22] *General Comment No. 10, supra* note16 at paragraph 3.
[23] *Ibid.*
[24] *Concluding Observations, 1998, supra* note 14.

approach to equality and social and economic rights in other areas, such as under the *Charter* and provincial human rights legislation. While the protection of social and economic rights through federal-provincial/territorial agreements is also important, such agreements are less likely to situate social and economic rights squarely within an equality rights framework. The Supreme Court of Canada has taken significant guidance from human rights tribunals on the proper approach to equality. One of the difficulties in advancing social rights claims under the *Charter* has been the lack of human rights jurisprudence to guide the courts on applying equality rights in a manner that is consistent with social and economic rights. Including social and economic rights in the *CHRA* will promote the development of an equality jurisprudence that can be carried over to *Charter* claims within the social and economic sphere.

Second, including social and economic rights in the *CHRA* will encourage provincial human rights commissions and tribunals to more effectively address the social and economic rights claims of women and other disadvantaged groups under existing provincial human rights legislation. A dominant theme at the most recent meeting of the Canadian Association of Statutory Human Rights Agencies was that all human rights commissions in Canada should be devoting more attention to issues of poverty and social and economic rights.[25] The Québec Commission has an express mandate to address social and economic rights under the Québec *Charter*.[26] Other commissions have the ability to address poverty issues, at least insofar as they intersect with anti-discrimination guarantees and, under some provincial codes, with protection against discrimination based on receipt of public assistance, source of income, or social condition.[27] Considerable work can therefore be done by all human rights commissions to develop policies on the positive measures which are required to ensure equality for social assistance recipients, single mothers and other low income persons. Providing a clear mandate under the *CHRA* with respect to social and economic rights would promote such a collective effort.

Third, including social and economic rights in the *CHRA* as rights, which are subject to the complaints and adjudication procedure under the *Act*, will ensure that they are not, in the words of the Committee on Economic, Social and Cultural Rights, "downgraded to principles and objectives."[28] The latter approach is more likely to prevail if social and economic rights are recognized only under federal-provincial/territorial agreements. As the repeal of *CAP* has shown, there is already a tendency in Canada to replace enforceable social program entitlements with unenforceable "shared principles and objectives."[29] This trend,[30] which has a particularly harmful

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[25]See *Resolution on Economic and Social Rights*, Res. No. 10.1 (DRAFT), Canadian Association of Statutory Human Rights Agencies, 1999 Annual Meeting, Montreal, May 31, 1999.

[26]*Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. For a discussion of social and economic rights provisions of the Quebec *Charter*, see P. Bosset, "Les droits économiquess et sociaux: parents pauvres de la Charte québécoise?" (1996) 75 *Canadian Bar Review* 583.

[27]See generally R.W. Zinn & P.P. Brethour, *The Law of Human Rights in Canada*, looseleaf (Aurora, Ontario: Canada Law Book, 1997).

[28]*Concluding Observations, 1998, supra* note 14 at paragraph 52.

[29]See generally Provincial/Territorial Council on Social Policy Renewal, *Progress Report to Premiers - Report No. 3* (August 1998); Provincial/Territorial Council on Social Policy Renewal, *New Approaches to Canada's Social Union: An Options Paper* (April 1997); Provincial/Territorial Council on Social Policy Renewal, *Progress Report to Premiers*

impact on women,[31] would be reversed by incorporating social and economic rights into the *CHRA*.

Fourth, a procedure for claiming social and economic rights must respond to the needs of the most disadvantaged members of society. Human rights tribunals are more accessible, less expensive and less tied to legal procedures than are the courts. Advocates before human rights tribunals do not need to be lawyers, and tribunal members can be chosen for their expertise in human rights, without the requirement that they have formal legal training or accreditation. Racialized women, women with disabilities, and other members of equality seeking groups are better represented on human rights tribunals than on courts. Human rights tribunals will therefore provide a more accessible and responsive forum for the consideration of social and economic rights claims, and the development of a social and economic rights jurisprudence, particularly in the early stages of their evolution.

Fifth, the Canadian Human Rights Commission is Canada's "national human rights institution" with corresponding responsibilities and obligations.[32] The fact that the Commission's mandate has historically been restricted to non-discrimination rights is no defense to a failure to establish a national human rights institution in conformity with international norms. In 1991, a series of principles establishing minimum standards for national human rights institutions were adopted by a U.N. sponsored meeting of representatives of national human rights institutions in Paris. The *Paris Principles* were subsequently endorsed by the United Nations Human Rights Commission and the General Assembly, including Canada.[33] The *Paris Principles* provide that a national human rights institution shall have "as broad a mandate as possible" with particular responsibility "to promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation."[34] Including social and economic rights in the *CHRA*, and expanding the mandate of the Canadian Human Rights Commission, is therefore necessary if the Canadian Human Rights Commission is to conform with the *Paris Principles*, as well as with the requirements of the

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- *Report No. 2* (July 1997); and 1996 APC Provincial-Territorial Working Group on Social Policy Reform and Renewal, *Issues Paper on Social Policy Reform and Renewal: Next Steps* (August 1996).

[30]For a description of this trend, see National Anti-Poverty Organization, *Poverty and the Canadian Welfare State: A Report Card* (Ottawa: National Anti-Poverty Organization, June 1998); C. Girard & L. Lamarche, "Évolution de la sécurité sociale au Canada: Le mise à l'écart progressive de l'état providence Canadien" (1998) 13 *Journal of Law & Social Policy* 95; R. Ellsworth, "Squadering Our Inheritance: Re-Forming the Canadian Welfare State in the 1990s" (1997) 12 *Journal of Law & Social Policy* 259.

[31]See M. Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8 Canadian Journal of Women and the Law 371; S. Day & G. Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998).

[32]United Nations General Asembly, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 14-25 June 1993, UN Doc. A/CONF.157/23 (12 July 1993) at paragraphs 36-37.

[33]*National Institutions for the Promotion and Protection of Human Rights*, GA Res. 48.134, UN GAOR, 48th Sess., 8th Plenary Mtg, UN Doc. A/RES/48/134 (20 December 1993); *National Institutions for the Promotion and Protection of Human Rights*, Res. 1994/54, UN HRC, 56th Meeting, UN Doc. E/CN.4/RES/1994/54 (4 March 1994) [hereinafter *Paris Principles*].

[34]*Ibid.* at paragraphs 2 and 3(b).

ICESCR, as outlined in *General Comment No. 10* with respect to national human rights institutions.[35]

Sixth, expanding the ambit of the *CHRA* and the role of the Canadian Human Rights Commission and Tribunal would ensure a better integration of domestic and international human rights review procedures, and a more coherent domestic response to the concerns of international human rights treaty monitoring bodies. The Committee on Economic, Social and Cultural Rights,[36] the Committee on the Elimination of Discrimination Against Women,[37] and the Human Rights Committee[38] have identified a number of critical issues of discrimination against social assistance recipients and low income women in Canada.[39] These include: restricted access to civil legal aid; the claw-back of the National Child Benefit from social assistance recipients; minimum income criteria, which disqualify low income women and social assistance recipients from rental housing and mortgages; workfare, and the denial of the protections of labour relations law to workfare participants; direct payment of social assistance to landlords; and the damaging effect of welfare rate cuts, including on access to housing. While only some of these issues fall squarely within federal jurisdiction, most engage the federal government at least as a joint actor. The Canadian Human Rights Commission could, with the appropriate mandate, encourage joint responses by federal, provincial and territorial human rights commissions to the concerns of international treaty monitoring bodies. Some of the issues identified by the U.N. Committees have been the subject of domestic human rights complaints and tribunal rulings. However, there has been no coherent response by Canadian human rights commissions in relation to review and petition procedures at the international level, and human rights tribunals in Canada have generally ignored the fact that many of the issues raised in the poverty-related claims brought before them have also been the subject of concern at the international level.[40]

Seventh, adding social and economic rights to the *CHRA* will couple legal remedies for rights violations with institutional mechanisms for supporting and promoting these rights. Through its monitoring, investigation and education functions under the *CHRA*, the Canadian Human Rights

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[35] *Supra* note 16 at paragraph 3 .

[36] *Concluding Observations, 1998*, *supra* note 14 at paragraphs 16, 21, 22, 26, 31, 32, 46.

[37] United Nations Committee on the Elimination of Discrimination Against Women, *Adoption of the Report of the Committee on the Elimination of Discrimination Against Women on its Sixteenth Session: Concluding Observations of the Committee on the Elimination of Discriminations Against Women* (Canada), 29 February 1997, A/52/28/Rev.1 at paragraph 306-343.

[38] *Concluding Observations, 1999*, *supra* note 6 at paragraph 17, 18.

[39] See generally, C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight" (1999) 10 *Constitutional Forum* (forthcoming).

[40] On the issue of workfare, see *Louise Gosselin* v. *Procureur Général du Québec* (6 April 1999) Montreal 500-09-001092-923 (C.A.); [1992] R.J.Q. 1657 (C.S.) and *Lambert* v. *Québec (Ministère du Tourisme),* [1996] J.T.D.P.Q. No. 42 ; on direct payment of rent, see *McEwen v.Warden Building Management Ltd. and V.I.P. Property Mangement Ltd.* (14 November, 1993) (O.H.R.T.) [unreported]; on minimum income criteria, see *Quebec (Comm. des droits de la personne)* v. *Whittom* (1993), C.H.R.R. D/349 and *Kearney et al.* v. *Bramalea Limited et al.*, [1998] 21 O.H.R.B.I.D., Decision No. 98-021. In both the *Whittom* and *Kearney* cases, international human rights provisions relating to the right to adequate housing were argued, but were not addressed in the tribunals' decisions. See, for example, the expert report submitted in *Kearney*, Exhibit 42, Scott Leckie, "Income Discrimination in Rental Housing and Canada's International Human Rights Obligations" (March, 1995).

Commission can provide a degree of institutional support which does not exist in the case of social and economic rights under federal/provincial/territorial agreements or in relation to the *Charter*. This institutional support will be particularly important at the early stages of integrating social and economic rights into Canadian law. As noted above, social and economic rights violations are inherently connected to discriminatory attitudes toward poor people, and toward poor women in particular. Promoting compliance with social and economic rights guarantees thus requires promotion of public attitudes which respect the dignity and equality of people living in poverty, and public education campaigns to combat stereotypes and prejudice. These are the traditional roles of human rights commissions. It is a significant advantage that the Canadian Human Rights Commission has recognized the importance of furthering protection for social and economic rights. The current Chief Commissioner has shown a strong interest in this area,[41] and would be committed to initiating the necessary institutional transformations required to make the Commission effective.

Finally, while it is true that many social and economic rights issues fall within provincial jurisdiction, the *CHRA* is the appropriate place to begin to break down the jurisdictional divides that have become an increasingly serious obstacle to ensuring compliance with social and economic rights in Canada. The *CHRA* is the legislative statement of what are deemed to be the most fundamental human rights in Canada. The fact that housing, health care services and income assistance fall primarily within provincial jurisdiction does not absolve the federal government of responsibility for violations of social and economic rights in these areas, and there is no reason for our national human rights legislation to exclude rights to housing, health care and an adequate standard of living. Complaints and legal remedies to social and economic rights violations under the *CHRA* will, of course, be limited to areas in which the federal government is constitutionally permitted to act. Section 36 of the *Constitution Act, 1982*, makes it clear that federal and provincial governments both have a responsibility to ensure the equal enjoyment of social and economic rights in Canada, and the courts have held that the federal government is within its jurisdiction when it establishes enforceable standards in cost-shared social programs within provincial jurisdiction.[42] Increasingly, social and economic policy is developed jointly by federal, provincial and territorial governments through such bodies as the Federal/Provincial/Territorial Council. Any coherent approach to promoting and protecting social and economic rights in Canada will need to hold the federal government accountable to human rights standards in joint federal-provincial/territorial undertakings. Including social and economic rights under the *CHRA* will ensure that this federal responsibility is no longer ignored.

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[41]Canadian Human Rights Commission, *Annual Report 1997*, *supra* note 3.

[42]*Reference Re Constitutional Questions Act (B.C.)*, [1991] 2 S.C.R. 525; *Eldridge* v. *British Columbia (Attorney General)* [1997] 3 S.C.R. 624 [hereinafter *Eldridge*]. Section 36 entrenches an express commitment by the federal government and the provinces to: "promoting equal opportunities for the well-being of Canadians"; "furthering economic development to reduce disparity of opportunities"; and "providing essential public services of reasonable quality to all Canadians." This provision represents a constitutionally binding undertaking on the part of the federal and provincial governments to promote equal opportunities for the welfare of women and men living in all parts of the country, and to provide basic public services of reasonable and comparable quality to all Canadians.

Requisite changes to the Canadian Human Rights Commission

The current mandate of the Canadian Human Rights Commission under section 27 of the *CHRA* includes most of the activities which are necessary for the effective promotion of social and economic rights at the federal level. Transforming the role of the Commission with respect to poverty and social and economic rights is therefore primarily a matter of expanding the ambit of the rights which are protected under the *CHRA*, rather than redefining the powers, duties and functions of the Commission. In addition to its duties under Part III of the *Act* with respect to complaints, the Commission currently has the mandate to engage in public education and research on issues of compliance with the *CHRA*; establish close liaison with provincial human rights commissions to foster common policies and deal with areas of overlapping jurisdiction; consider and comment on recommendations concerning human rights from any source;[43] conduct studies; and issue recommendations.

Two changes would be required to the present mandate of the Commission, however, in order to enable it to meet the requirements of the *Paris Principles* and to carry out the duties of a national institution under the *ICESCR*. Both the *Paris Principles* and *General Comment No. 10* require the Commission to have an explicit mandate to review legislation.[44] As it is presently formulated, the *CHRA* permits the review of "regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament" but does not expressly provide for review of legislation or draft legislation. In addition to the power to review domestic legislation, both the *Paris Principles* and *General Comment No. 10* require that the Commission have the mandate to consider domestic compliance with international human rights treaties which Canada has ratified.[45] While the Commission's current mandate under section 27 of the *CHRA* could be read as including this power, the Commission's role in reviewing Canada's compliance with human rights treaties should be explicitly included among the Commission's duties and functions.

The *Paris Principles* also suggest that national human rights institutions may play a role in the reporting process before U.N. treaty monitoring bodies, although the precise nature of that role is not clearly set out.[46] The Committee on Economic, Social and Cultural Rights does not include this as one of the required activities of a national human rights body under *General Comment No. 10*. In view of the increasingly "adjudicative" approach of the Committee to state party review under the *ICESCR*, it would be inappropriate for the Human Rights Commission to represent, or to speak on behalf of, the Canadian government. Submitting an independent opinion on matters of compliance would be more appropriate. However, it is essential that the Commission remain independent of government in the treaty monitoring review process. In its 1998 review of Canada's performance under the *ICESCR*, the Committee requested the independent opinions of federal and provincial human rights commissions on a number of matters within their area of expertise, including on the question whether workfare programs discriminate against welfare recipients; on the

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[43]This would include the *Concluding Observations* of treaty monitoring bodies.

[44]*Paris Principles*, *supra* note 3 at paragraph 3(b); *General Comment No. 10*, *supra* note 16 at paragraph 3(b).

[45]*Paris Principles*, *ibid.* at paragraph 3 (b)(c); *General Comment No. 10*, *ibid.* at paragraph 3(b).

[46]*Paris Principles*, *ibid.* at paragraph 3(d).

effect of changes to the Ontario *Human Rights Code* which permit income discrimination; and on whether social condition should be added as a prohibited ground of discrimination under Canadian human rights statutes.[47]

Rather than simply adding to the already heavy responsibilities of the Human Rights Commission, a special sub-committee with responsibility for promoting compliance with social and economic rights should also be established.[48] The creation of a specialized sub-committee of the Commission would have the advantage of enabling the Commission to draw on specific expertise in the social and economic rights area, and of ensuring that a specialized unit within the Commission can focus on social and economic rights exclusively. Such a sub-committee should not play a role in relation to the filing of complaints. Rather, complaints which did not fall within the anti-discrimination provisions of Part III of the *CHRA* should be submitted directly to the Tribunal. The sub-committee should have the right to intervene in any case that is heard before the Social Rights Tribunal, but should not have the power to screen complaints, or to decide which complaints should go forward to the Tribunal. In the area of social and economic rights in particular, the entity which is responsible for promoting compliance with social and economic rights obligations must be free from any requirement to remain neutral with respect to the outcome of complaints. The duties and functions of the sub-committee would include effective liaison with non-governmental organizations who may also be parties under the complaints procedure. It is important that the sub-committee be liberated from the constraints which go with any role in the evaluation or processing of complaints, in order to be an effective social and economic rights advocate within the Commission, within government and at a broader public level.

Conclusion

Including social and economic rights in the *CHRA* is not simply a question of achieving compliance with international human rights law, or greater consistency with the approach to *Charter* interpretation advocated by the Committee on Economic, Social and Cultural Rights and increasingly accepted by the Supreme Court of Canada.[49] Nor is it simply a matter of bringing our national human rights institution into closer conformity with the *ICESCR* and the *Paris Principles*. Rather, it is about creating a federal human rights regime that recognizes and validates the substantive claims to dignity and equality advanced by the most disadvantaged members of Canadian society.

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[47] *List of issues, supra* note 11 at paragraphs 12 - 14.

[48] The Social Rights Sub-committee is modeled, in part, on the provisions the *Alternative Social Charter*, which the authors of this paper participated in drafting. The *Alternative Social Charter* was endorsed by a national coalition of anti-poverty and equality seeking groups during the constitutional negotiations leading up to the *Charlottetown Accord* Referendum in 1992. The *Alternative Social Charter* is discussed and reproduced in J. Bakan & D. Schneiderman, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) Appendix I at 155.

[49] See for example the Supreme Court's recent decision in *Baker* v. *Minister of Citizenship and Immigration*, [1999] S.C.J. 39, where the Court ruled that federal laws must be applied consistently with the international human rights treaties ratified by Canada.

The *Consultation Paper* prepared by the *CHRA* Review Panel to identify possible issues for review does not refer to the inclusion of social and economic rights, but does ask whether reference should be made to Canada's international human rights obligations.[50] Nevertheless, this issue is clearly central to the Review Panel's terms of reference, to examine "the purpose and grounds, including social condition, to ensure that the Act accords with modern human rights and equality principles" and to determine "the adequacy of the scope and jurisdiction of the Act." [51] Moreover, the Canadian government has made an explicit undertaking to include this issue in the current *CHRA* review, and to consult "with other organizations and interested citizens."[52] The inclusion of social and economic rights in the *CHRA* would create a legislative and institutional framework which would allow some of the most pressing and fundamental human rights claims in Canada to move from the margin to the centre of human rights discourse. We hope that the Human Rights Review Panel will support and encourage further efforts and discussions on this crucial issue, in order to ensure that the current *CHRA* review process results in a federal human rights regime which better meets the goal of promoting the dignity and substantive equality for all Canadians.

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[50] *Canadian Human Rights Act Review Panel Consultation Paper* (Ottawa: *Canadian Human Rights Act* Review Panel, July, 1999), online at www.chrareview.org.

[51] Canadian Human Rights Act Review Panel: Terms of Reference, online at www.chrareview.org.

[52] *Responses to Supplementary Questions*, *supra* note 12.

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CIVIL SOCIETY PARTICIPATION IN THE PROCESS OF REPORTING AND MONITORING IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS : THE DOMESTIC DIMENSION

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The opinions expressed in this document
are strictly personal.

INTRODUCTION

" The basic compact of coexistence between states", wrote Hedley Bull, "implies a conspiracy of silence entered into by governments about the rights and duties of their citizens".[1] It is against this conspiracy of silence that the contemporary human rights movement has been fighting since 1945. In spite of the inherent tendency of states to look the other way, less and less violations of human rights go unreported. To a very large extent, this can be attributed to the growing capacity of the human rights movement to mobilise the attention of the international community.[2]

The emerging role of the human rights movement has helped challenge the conventional view of world politics. Classical theory held that states were the sole actors in international relations. Contemporary theory now also recognises non-state entities as legitimate actors.[3] Thus, issue-oriented groups and individuals are able to influence state behaviour, gradually ingraining a concern for what Bull called human justice[4] into the very fabric of international relations.

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1 H. BULL, *The Anarchical Society. A Study of Order in World Politics*. London, Macmillan, 1977, p. 83.

2 Non-governmental organisations (NGOs) have been described as unofficial ombudsmen safeguarding human rights against governmental infringements, by such techniques as diplomatic initiatives, reports, public statements, efforts to influence the deliberations of human rights bodies established by intergovernmental organisations, campaigns to mobilise public opinion, and attempts to affect the foreign policy of certain countries with respect to their relations to states which are responsible for human rights violations: D. WEISSBRODT, "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights", in T. Meron (ed.), *Human Rights in International Law. Legal and Policy Issues*. Oxford, Clarendon Press, 1984, pp. 403-404.

3 R.O. KEOHANE and J.S. NYE, *Power and Interdependence. World Politics in Transition* (Boston, Little Brown, 1977). In the pluralist paradigm of international relations, the state is no longer seen as a rational, unitary actor, and its central role in world politics is questioned. Competing actors include transnational corporations, pressure groups, even terrorist movements. See, *e.g.*, P. WILLETTS (ed.), *Pressure Groups in the Global System. The Transnational Relations of Issue-Orientated Non-Governmental Organizations* (London, Frances Pinter, 1982). Pluralism also allows for individual action on the conduct of international relations: C.F. ALGER, «Foreign Policies of U.S. Publics», *International Studies Quarterly*, vol. 21 (1977), pp. 277-293.

4 As opposed to inter-state justice : H. BULL, *op. cit.*, 78-86.

In 1993, the World Conference on Human Rights formally acknowledged the contribution of NGOs to the promotion and protection of human rights at the national, regional and international levels.[5] At the UN level, various arrangements (currently under review) do exist for NGO participation. Through oral or written statements, as well as the submission of information regarding allegations of human rights violations, NGOs have made a substantial contribution, in particular, to the work of subsidiary organs of the Economic and Social Council directly concerned with human rights.[6] In addition, NGOs are allowed to take part in the work of a number of treaty-based organs, notably by submitting counter-reports to the official reports of state parties.[7]

In Canada, formal policy statements acknowledge the important contribution of NGOs to the international advancement of human rights. The Foreign Affairs Minister, speaking at the NGO Global Forum on the Five-Year Review of the Vienna Conference on Human Rights, held in Ottawa in 1998, spoke in glowing terms of a "new kind of coalition", united in the defence of international human rights around "a common set of core principles". The "new diplomacy" of human rights, he told the Forum, was based on a "partnership of equals" between "like-minded governments and civil society".[8]

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5 WORLD CONFERENCE ON HUMAN RIGHTS, *Vienna Declaration and Programme of Action*, General Assembly Document A/CONF.157/23, 12 July 1993, para. 38.

6 NGOs have been particularly involved in the work of the Commission on Human Rights, the Subcommission on the Prevention of Discrimination and Protection of Minorities, and the Working Group on Indigenous Populations. See: SECRETARY-GENERAL OF THE UNITED NATIONS, *Arrangements and Practices for the Interaction of Non-governmental Organizations in All Activities of the United Nations System*, General Assembly Document A/53/170, 10 July 1998, para. 8.

7 On the reporting process generally, see: UNITED NATIONS CENTRE FOR HUMAN RIGHTS, *Manual on Human Rights Reporting*, UN Document HR/PUB/91/1 (1992). Six organs are currently responsible for the examination of state reports under various human rights instruments. Five are treaty-based : the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of the Child. The sixth organ, the Committee on Economic, Social and Cultural Rights, was created pursuant to a resolution of the Economic and Social Council.

8 Quoting notes for an address by The Honourable Lloyd Axworthy to the NGO Global Forum on the Five-Year Review of the Vienna Conference on Human Rights, Ottawa, 23 June 1998 (http://www.dfait-maeci.gc.ca/english/news/statements/98).

With respect to NGO participation in the process of reporting and monitoring the *domestic* implementation of Canada's international human rights obligations, however, no institutional mechanism exists. Generally speaking, NGO participation in Canada is limited to consultations prior to the drafting of government reports, and, much later in that particular process, to the submission of parallel reports to the competent UN organ.

It is important to point out that civil society participation need not be limited to the process of submitting periodic counter-reports to the UN. While the examination of a report at the UN provides a unique opportunity to review the progress made since the previous report, civil society participation should be an ongoing process, allowing for monitoring and assessing Canada's performance on a permanent basis, even when no report to the UN is due.

This paper discusses ways of enhancing the participation of "civil society" in the reporting and monitoring of Canada's implementation of its international human rights obligations. Part I sets out the legal framework for civil society participation. Part II describes current Canadian practice. Part III addresses the issue of reform. It argues that effective civil society participation requires a balancing of two potentially conflicting requirements, *i.e.*, the need for adequate resources to ensure credible reporting and monitoring, and the necessity of preserving NGO autonomy in the process of reporting. It also explores possible institutional channels for civil society participation.

The use here of the concept of civil society implies no endorsement of the appropriateness of that concept in the context of monitoring and reporting on the implementation of international human rights. A concept encompassing such a wide variety of actors may not adequately reflect the specific status of NGOs in international and domestic law.[9] The concept of civil society may not be totally appropriate, either, in

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[9] NGOs with consultative status have special recognition under Article 71 of the UN Charter. The indiscriminate use of the concept of "civil society" has been criticised a a negation of that status (see: CONFERENCE OF NON-GOVERNMENTAL ORGANIZATIONS IN CONSULTATIVE RELATIONSHIP WITH THE UNITED NATIONS, *Comments on the Report of the Secretary-General*, http://www.hri.ca/ngoaccess/congo). In Canada several human rights commissions have a legal duty to co-operate with NGOs and to receive NGO-initiatied complaints.

the context of the relations between First Nations and states. It should therefore generally be used with caution.

I. THE LEGAL FRAMEWORK FOR CIVIL SOCIETY PARTICIPATION

In a broad sense, the idea of civil society participation in the process of reporting and monitoring the domestic implementation of international human rights derives from the UN Charter, and its lofty opening words: "We, the Peoples of the United Nations…",[10] which imply the existence of a world civil society, upon which the legitimacy of states is based. However, civil society is largely absent from the rest of the Charter, and from the text of most human rights treaties. Apart from the states themselves, international human rights instruments generally recognise as actors only the UN and its specialised agencies (as intergovernmental organisations), and the individual (as a potential provider of "communications" on alleged violations).

UN recognition of the need for civil society participation in reporting and monitoring exists in a number of policy statements. As noted above, the World Conference on Human Rights in 1993, recognising the work of NGOs, also called for dialogue between governments and NGOs on the subject of human rights.[11] Dialogue at the national level is specifically listed by the competent organ as one of the objectives to be pursued when preparing reports under the *International Covenant on Economic, Social and Cultural Rights*, a major instrument ratified by Canada.[12] According to the Committee on Economic, Social and Cultural Rights, reporting under the Covenant should provide opportunities for public assessment of national policies; it should also encourage the economic, social and cultural constituencies of civil society to participate in the drafting,

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[10] Charter of the United Nations, (1946-1947) *United Nations Treaty Series*, p. xvi (Preamble).

[11] *Vienna Declaration and Programme of Action*, para. 38.

[12] *Covenant on Economic, Social and Cultural Rights*, (1976) *United Nations Treaty Series* 13. Canada ratified the Covenant on 19 May 1976.

implementation and review of those policies.[13] All UN organs responsible for examining reports currently require states to indicate whether the contents of reports have been publicly debated.[14] The participation of civil society, noted the Committee on Economic, Social and Cultural Rights, is "at least equally useful" as UN review of the report itself.[15]

The *Declaration on Human Rights Defenders*, recently adopted by the UN General Assembly,[16] provides a broad framework for the active involvement of civil society institutions in the advancement of human rights, including monitoring and reporting on the implementation of international human rights. The Declaration acknowledges "the valuable work" of civil society in contributing to the effective elimination of all violations of human rights and fundamental freedoms.[17] It also states that promoting respect for human rights at the national and international levels is a right (and indeed a responsibility) for groups, associations and individuals.[18] Insofar as civil society participation is concerned, the most salient provisions of the Declaration, perhaps, are those which spell out the right of everyone, "individually and in association with others", to pursue certain domestic activities, while imposing corresponding obligations on states. Article 6 provides that:

> "6. Everyone has the right, individually and in association with others:
>
> (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

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13 U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment (No 1) on Reports Submitted by State Parties*, Economic and Social Council Document E/1989/22, para. 5.

14 *General Guidelines on Part I of Reports Submitted by State Parties*, in *Manual on Human Rights Reporting* (*supra*, note 7), para. 4

15 U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* (note 13).

16 The Declaration is the mercifully abbreviated name of a document officially called *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, General Assembly Resolution 53/144, U.N. Doc. A/RES/53/144.

17 Declaration on Human Rights Defenders (Preamble, 4th paragraph).

18 *Id.* (Preamble, 8th paragraph).

> (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
>
> (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters."

Article 8 deals with the conduct of public affairs:

> "8. 1) Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.
>
> 2) This includes, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms."

Article 14 imposes duties on states regarding access to international human materials by civil society:

> "14. 1) The State has the responsibility to take legislative, judicial, administrative or other appropriate measures to promote the understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights.
>
> 2) Such measures shall include, *inter alia*:
>
> [...]
>
> (b) Full and equal access to international documents in the field of human rights, including the periodic reports by the State to the bodies established by the international human rights treaties to which it is a party, as well as the summary records of discussions and the official reports of these bodies."

As a resolution of the General Assembly, the Declaration carries no legal weight of its own. However, the Declaration clearly contemplates participation in reporting and monitoring as a legitimate and even desirable NGO activity. When read in conjunction with the growing body of practice and statements on the matter, the Declaration indicates

a gradual legal recognition of the autonomous role civil society institutions must play in the process of reporting and monitoring the implementation of states' international obligations.

II. CURRENT CANADIAN PRACTICE

In certain countries, various participatory mechanisms, such as advisory councils composed of NGOs, members of Parliament and human rights experts, have been set up to advise on the preparation of UN reports.[19] However, in Canada no institutional mechanism exists for civil society participation in monitoring and reporting on the domestic implementation of international human rights standards. Canadian practice can best be described as being based on a limited degree of governmental consultation with NGOs, and on *ad hoc* assistance being given to certain organisations involved in independent monitoring and reporting. As will be seen, however, the situation may vary from province to province, and especially between provinces and the federal government.

At the federal level, the practice is to solicit the views of NGOs early in the process of drafting government reports, *i.e.*, every two to five years, depending on the instrument concerned.[20] NGOs with interest in the subject-matter covered by the instrument are invited to submit their views on the issues to be addressed in the official Canadian report. Those views are then transmitted to each contributing governmental department or agency, which ultimately decides whether or not to include them in the official report. The next opportunity for civil society input comes at the very end of the process. Human

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19 C. BERNARD, "Préparation et élaboration d'un rapport national", in *Manuel relatif à l'établissement des rapports sur les droits de l'homme*, Centre des Nations Unies pour les droits de l'homme, U.N. Doc. HR/PUB/91/1, p. 21.

20 Reporting cycles range from 2 years in the case of the *International Convention on the Elimination of All Forms of Racial Discrimination*, to 5 years under the *Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child*. The *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments* each provide for a 4-year cycle.

rights NGOs have the possibility of submitting "counter-reports" to the competent UN organ (or, on an informal basis, to individual members[21]). Counter-reports are usually valued for the balance they bring to the normally benign view of laws, programmes and policies presented in the official report. Canadian NGOs have made strategic use of the possibility of submitting counter-reports in the past. The presentation of these parallel reports - with NGO representatives being officially or unofficially present at certain committee sessions - have influenced the examination of Canada's reports and, in some well-publicised cases, a committee's concluding observations and comments.[22]

Public funding for independent monitoring does exist, but so far only with respect to the United Nations *Convention on the Rights of the Child*, ratified in 1991 by Canada.[23] Three federal departments contribute financially to a project initiated by the Canadian Coalition for the Rights of Children to monitor the implementation of the Convention in Canada. The objective of the project is to encourage broad social participation in the development of a monitoring framework.[24] In the course of the project, the Coalition is expected to submit a counter-report[25] to Canada's second official report, due to be examined at the UN in the year 2000.

Provincial jurisdictions seem to lag behind in terms of encouraging civil society participation. No formal solicitation of NGO views is made prior to the preparation of reports - despite the fact that provincial laws, policies and programmes are just as susceptible of being criticised at the UN as their federal equivalents. As far as could be

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21 Only the Committee on Economic, Social and Cultural Rights and the Committee Against Torture officially solicit the views of NGOs.

22 See, *e.g.*, the Concluding Observations of the Committee on Economic, Social and Cultural Rights, following the examination of Canada's third periodic report under the Covenant (Economic and Social Council Document E/C.12/1/Add.31, 4 December 1998).

23 *Convention on the Rights of the Child* (1989), A/RES/44/25.

24 CANADIAN COALITION FOR THE RIGHTS OF CHILDREN, *Canada and the UN Convention on the Rights of the Child: Developing a Monitoring Framework* (1997).

25 The Coalition has announced 18 November 1999 as the launching date.

ascertained, no funding programme for independent monitoring and reporting currently exists in the provinces.

III. IMPROVING CIVIL SOCIETY PARTICIPATION: SOME BASIC ISSUES

Recent NGO successes in raising the issue of Canada's compliance with its international human rights obligations at UN meetings have highlighted the points of intersection between the domestic and international dimensions of human rights. Interest in Canada towards civil society participation in the reporting and monitoring process is likely to grow, especially in areas such as economic and social rights, where existing constitutional and legislative provisions are clearly inadequate.[26]

A typical example of the growing interest in reporting and monitoring is the Joint Statement on Human Rights,[27] issued by approximately 30 Québec NGOs on the occasion of the fiftieth anniversary of the *Universal Declaration of Human Rights.* The Statement, a comprehensive document on contemporary human rights issues, calls for the establishment in Québec of a "permanent watchdog, independent from governments", that would "periodically and publicly assess government and corporate action" in relation to economic and social rights, "in view of the *Universal Declaration* and its related instruments", while also "advising governments, parliaments and citizens on necessary changes".[28]

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[26] Economic and social rights enjoy no specific protection under the *Canadian Charter of Human Rights and Freedoms*. (See *Reference on Ss. 193 and 195(1) of the Criminal Code (Man.)*, (1990) 1 S.C.R. 1123, pp. 1172-1175.) Québec is the only jurisdiction where human rights legislation specifically recognises economic and social rights: see P. BOSSET, "Les droits économiques et sociaux, parents pauvres de la Charte québécoise?", (1996) 75 *Canadian Bar Review* 583-603, and ss. 39-48 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

[27] *Tous les droits humains pour toutes et tous, un idéal à poursuivre avec détermination. Déclaration commune.* Joint Statement by the Ligue des droits et libertés and 28 other Québec NGOs (1998).

[28] "Nous exigeons [...] la création d'un observatoire québécois permanent, indépendant des gouvernements, chargé d'évaluer, périodiquement et publiquement, l'action gouvernementale de

The Joint Statement correctly identifies the need for institutional channels of participation by civil society.[29] However, the document also reflects an inherent tension between two potentially conflicting requirements to effective reporting and monitoring, *i.e.* adequate resources, on the one hand, and autonomy vis-à-vis the public authorities, on the other hand. NGOs facing the issue of resources must find ways of developing an adequate capacity for monitoring and reporting, without losing their autonomy in the process. How this potential conflict is resolved is likely to have a significant impact on the effectiveness and credibility of civil society participation.

A key factor affecting the capacity of civil society institutions to participate effectively in the monitoring and reporting process is the availability of adequate technical resources. Effective reporting and monitoring requires a judicious selection of reference materials.[30] It also calls for advocacy skills and for legal, social and/or scientific expertise.[31] Finally, monitoring and reporting requires a good working knowledge of the UN system. NGOs with limited resources may experience difficulties in meeting all of these requirements. Other factors, such as occasional organisational weaknesses, or the fragility of certain grass-roots organisations, may further compromise the capacity of NGOs to conduct effective monitoring and reporting.[32]

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même que celle des entreprises en matière de reconnaissance et de protection des droits économiques, sociaux et culturels des Québécoises et Québécois à la lumière de la *Déclaration universelle* et de ses principaux instruments d'application et de conseiller à la fois les gouvernements et parlements et les citoyennes et citoyens sur les redressements à opérer." Joint Statement, p. 7.

29 The Joint Statement refers to economic and social rights only. However, civil society participation should be encouraged *per se*, as a matter of public policy. It should therefore apply to reporting and monitoring under any international human rights instrument.

30 L. WISEBERG, "Information et documentation relatives aux droits de l'homme", in *Manuel relatif à l'établissement des rapports sur les droits de l'homme, op. cit.* (note 19), p. 27.

31 In 1998 the NGO Global Forum pointed out the need for additional fields of expertise, especially in regard to financial analysis: GLOBAL NGO FORUM ON HUMAN RIGHTS, *Final Document* (http://www.hri.ca/vienna+5/final-report), p. 22.

32 The same weaknesses may also impact on NGO interaction with the UN: SECRETARY-GENERAL OF THE UNITED NATIONS, *op.cit.* (note 6), para. 34.

Building bridges with partners, within or outside the human rights movement, is a necessary step towards overcoming the problem of resources. Bridge-building may take the form of networking, and the sharing of information, expertise and advocacy skills, between NGOs.[33] Partnerships with non-state actors in the institutional sphere may also be looked for. In the past, NGOs have benefited, for instance, from individual contributions by experts and academics. Formal research and training alliances between NGOs and the academic community may help institutionalise that contribution in the future.[34]

Co-operation with human rights commissions is a further way of building bridges with potential partners.[35] In Canada, human rights commissions are concerned chiefly with the application of domestic human rights legislation. However, their mandate is, in certain cases, broad enough to include the possibility of assisting civil society in monitoring and reporting on the implementation of international standards. Typical assistance measures include analysing the legal implications of a human rights treaty,[36] giving access to documentation and/or research facilities, and publicising a commission's views on the compatibility of laws, policies and programmes with international standards.[37] A significant scope for co-operation between NGOs and human rights

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33 GLOBAL NGO FORUM ON HUMAN RIGHTS, *op. cit.* (note 31), p. 22.

34 The Social Sciences and Humanities Research Council of Canada (SSHRC) has recently established a programme to foster research alliances between universities and the community movement. This type of programme may provide a framework for institutional co-operation with NGOs.

35 The UN has identified monitoring compliance with international human rights, and reporting thereon to civil society, as one of the activities that can be undertaken by national human rights commissions: U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment (No 10) on The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, (Economic and Social Council Document E/C.12/1998/25, 10 December 1998), para. 3(f).

36 See, *e.g.*: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Analyse de certaines revendications du mouvement étudiant en fonction du Pacte international relatif aux droits économiques, sociaux et culturels* (P. Bosset, Research Department), 22 August 1997.

37 See, *e.g.*: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Mémoire à la Commission de l'économie et du travail sur le Document de réflexion sur le travail des enfants* (M. Coutu, Research Department), March 1998.

commissions definitely exists – although insufficient resources, especially in the field of research, currently hamper the capacity of even the larger commissions to effectively respond to all the potential needs of NGOs in this field.

The monitoring and reporting work by the Canadian Coalition for the Rights of Children shows another way of dealing with the issue of resources: external financing. The possibility of soliciting, receiving and utilising funds is central to NGO activity, and is mentioned as such in the *Declaration on Human Rights Defenders*.[38] External (especially, public) funding can be made to good use, as shown by the Coalition. However, direct funding from the state also raises inherent issues of independence and autonomy vis-à-vis the state. While reporting and monitoring need not necessarily be adversarial (dialogue with the national authorities, not confrontation, is the aim of the process), the capacity of NGOs to take an independent stand remains what distinguishes them from public authorities, and must be preserved. Perhaps the time has come to take a second look at the practice of subsidising reporting and monitoring on an *ad hoc* basis, and to contemplate innovative institutional mechanisms. The involvement of civil society in the management of public funds dedicated to reporting and monitoring might be a good way of ensuring a greater degree of respect for NGO autonomy.[39]

CONCLUSION

Civil society has yet to find a way of participating effectively in the process of reporting and monitoring Canada's implementation of its international human rights commitments. While civil society and the state are officially "equal partners" in the promotion and defence of human rights abroad, at home civil society institutions and public authorities deal with each other on different terms.

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38 Article 13: "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with [domestic law]."

39 The Canadian Court Challenges Programmes might serve as an inspiration for such mechanisms.

New mechanisms must be found to encourage the participation of civil society in the reporting and monitoring process. However, it is equally important for NGOs to keep some distance from the official reporting and monitoring process. The challenge of civil society participation lies perhaps, not so much in finding ways of allowing NGO involvement in the drafting of government reports, but in developing, through institutional means, the capacity of NGOs to conduct reporting and monitoring on their own terms. While clearly desirable, the involvement of human rights NGOs in the process of drafting government reports does not mean the end of civil society participation, but only the beginning.

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Implementing International Human Rights Commitments: The Difficulties of Divided Jurisdiction

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Implementing International Human Rights Commitments: The Difficulties of Divided Jurisdiction

David Schneiderman[1]

"Our associational life is something that has to be argued about. . ."
Michael Walzer, 1992

Introduction

This paper addresses the difficulty of adhering to international human rights standards where jurisdiction is divided between two levels of government. According to Canada's constitutional regime, those commitments which Canada has made internationally require implementation domestically. As jurisdiction is divided, the implementation of these commitments turns on which level of government -- federal or provincial -- has been allocated authority under the constitution (both its text and its interpretation by courts).

So far as the rest of the world is concerned, the difficulty of divided jurisdiction should pose no problem as it concerns human rights. Both levels of government are expected to adhere to international human rights commitments -- the internal organization of the domestic state is no defence to a breach of international treaty law (Scott 1995: 82). The Committee on Economic, Social and Cultural Rights in its Concluding Observations acknowledged the argument that Canada's "complex federal system presents obstacles to implementing the Covenant." The Committee, sensitive to this fact, recommended nonetheless that both federal and provincial governments coordinate their activities and fulfill their human rights obligations in so far as they fell within their respective areas of competency.

The fact of federalism is complicated by the unruly presence of what we call "globalization." The interconnectedness of the world and apparent diminution in state sovereignty have made implementing international human rights commitments more urgent yet more difficult. New mechanisms of international oversight, like the United Nations Committee on Economic, Social and Cultural Rights and the Committee on Civil and Political Rights, ask countries to account for their compliance (or lack of compliance) with international human rights instruments. Yet living up to human rights commitments, particularly socio-economic rights, is made more difficult by the fact that states are limiting their ability -- in regional trade agreements like the North American Free Trade Agreement (NAFTA) -- to initiate legislation as regards economic matters. The redistributive capacity of states is undermined, and their ability to guarantee adequate and minimal standards of living is impaired.

The almost unanimous response of governments in Canada to the challenges posed by economic globalization -- spending reductions, repeal of national standards, privatization, and the withdrawal of the state -- suggests that federalism is not quite the impediment to coordinated

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action. The problem of divided authority does not seem to have posed so much of a problem, once a consensus around a set of national goals has been identified (precipitated by federal "leadership" by cutting transfer payments to the provinces). Why not generate a similar consensus around the values of human rights? In asking this question, we should not be tempted to equate economic with social concerns. Rather, the object is to challenge the seeming difficulty posed by federalism in the realm of human rights when these same difficulties appear to dissipate (or are lessened) when it comes to achieving goals consistent with economic globalization and enhancing Canada's competitiveness abroad.

The first part of the paper outlines the division of legislative powers in Canada. This section suggests that, though federalism is not ordinarily concerned with human rights protections, there are features in the design that promote values consonant with a human rights approach. The next part addresses the impact of the Canadian Charter of Rights and Freedoms and the constitutional recognition of Aboriginal and Treaty rights in establishing more uniformity in the area of human rights. Having reviewed some of the difficulties of divided jurisdiction, the next section considers the compounding challenges and obstacles posed by economic globalization. The paper concludes with a discussion of some mechanisms with which to respond (or at least better cope) with some of these challenges. Throughout, the phrase "international human rights commitments," "standards," or "obligations" is taken to refer to the cluster of rights, civil, political, economic, and social, that are the subject of the primary international documents in human rights.

The Constitutional Division of Powers

Fragmenting Power

Dividing legislative authority fragments political power. This makes social change through legislation difficult. Key areas of jurisdiction -- like health, education, welfare, or the uses to which private property are put -- fall primarily under the authority of provincial governments. This means that policy responses to complex and common problems are fragmented, incremental, and often local. But federalism also accommodates social change, as it promotes diversity in social policy responses and encourages experimentation. Both levels of government can pursue similar or differing political agendas, with no one political grouping necessarily capturing all political power. Divided authority blunts the impact of political "extremism" – on both the left and the right – and probably has helped to "anchor" Canadian politics near the middle of the political spectrum (Noel, Boismenu, and Jalbert 1993: 186).

Federal powers concern matters national in scope, like international trade, banking, fisheries, and the criminal law. The fiscal strength of the federal government (with the power to tax and spend) cannot ordinarily be used to tread into provincial spheres -- at least not without consent and cooperation. This rigid division of lines of authority means that only through the sharing of political power -- through collaboration and cooperation -- can there be progress in regard to the establishment of national programs and standards that fulfill international human rights obligations. The difficulty of coordinating this kind of collective action would discourage even the most optimistic policy activist.

Federal Power

Some commentators believe that the federal government can solve this difficulty by seizing authority it has been denied through judicial interpretation. In 1949 McGill law professor F.R. Scott wrote that the problem is not that there is too little jurisdiction for the federal government to protect fundamental freedoms and human rights, but that "there is so much" (Scott 1977: 240). Scott was dismayed by the denial of federal authority in the series of cases implementing Bennett's New Deal – federal legislation establishing national standards in regard to maximum hours of work, minimum wages, employment insurance, and the like. These initiatives were an attempt, however cynical and late in the day, to live up to international covenants adopted by the International Labour Organization and ratified by Canada. All of these matters, the Privy Council ruled, were in the realm of provincial authority -- all that could be done to implement them was to cooperate (*Labour Conventions*). Professor Scott's reading of federal constitutional authority to implement human rights may have been excessive, but he was correct to suggest that some authority resided in the federal government -- all that is needed is the political will and a desire to cooperate.

Divided authority does not so much bar governments from acting, as much as it delays the taking of swift government action (Banting 1982: 68). In their study of intergovernmental cooperation, Fletcher and Wallace conclude that "governments have found ways and means to accomplish many, perhaps most, of their objectives." Rather than barring social policy development, the experience under Canadian federalism "has been more one of delay and frustration that of paralysis ... the system rarely frustrates the popular will" (Fletcher and Wallace 1985: 132-33).

Origins

The 1867 Constitution mostly is silent in regard to the values we associate with human rights. As the political scientist Arthur Lower writes, "in the 1860s everyone took freedom for granted: there was hardly a cloud in the sky" (Lower 1958: 18). Though the Act mentions provincial authority over "property and civil rights" resides with the provinces, the phrase "civil rights" does not mean to capture the kind of rights we associate with the phrase in the modern era. Rather, the phrase is traceable back to section 8 of the *Quebec Act* of 1774, where the *Canadiens* (now Quebecers) were granted the legal capacity to make laws regarding property and civil rights; that the Civil Code would govern legal relations between individuals in the so-called "private sphere."

This is not to say that the 1867 Constitution Act did not at all contemplate protections for minority rights. There are numerous provisions in the Act we would want to include under the rubric of international human rights obligations, particularly those protections accorded to minorities vulnerable to having their rights overridden by the majority. Provisions regarding denominational education had the effect of shielding linguistic minorities in Quebec and Ontario from discriminatory provincial laws. Responsibility for "Indians and Lands reserved for Indians" was allocated to the federal government, in part, to shield Aboriginal peoples from the aggressive intentions of provincial governments (this also was reflected in the Royal Proclamation of 1763, where negotiations between the Crown and Aboriginal peoples in North America were expected to precede any settlement of Aboriginal lands by colonial settlers). Of course, the federal design of the constitution itself ensures the flourishing of the Francophone population of Quebec by granting it control over matters crucial to the survival of the French language and culture in North America (Kymlicka 1998, 135). The recognition that "property and civil rights" resides in

provincial jurisdiction is rights-protecting by granting self-government over culture, language, and the local economy to Quebec.

Judicial Review

Judicial interpretation of the division of legislative responsibilities found that the allocation implied certain restrictions on provincial power when it came to civil liberties. In a series of famous cases in the 1950s, Justice Ivan Rand of the Supreme Court of Canada developed the idea of an "implied bill of rights." The bill of rights implied by the division of powers shielded individual rights like freedom of speech from provincial incursions. In light of the Canadian Charter of Rights and Freedoms, it is questionable whether this series of precedents has had any lasting impact. Overall, though, we can conclude that the Canadian constitution and its interpretation by the judiciary did not accord high priority to human rights -- the question for courts and governments was: who had the power to do what, not whether they should (Swinton 1990: 186).

The Spending Power

Canadians have overcome some of the difficulties of divided jurisdiction through mechanisms of inter-governmental cooperation, like delegation to administrative agencies and the rise of the federal "spending power." Though not explicitly mentioned among the list of federal powers, the spending power emerged as an important mechanism by which the federal government could exercise leadership in the promotion of human rights values, like rights to health and education. The federal power to spend monies collected through taxation has enabled the establishment of national social programs considered ordinarily within areas of provincial jurisdiction. Federal monies are transferred to individuals (as in family allowances), to provinces conditional on the delivery of certain provincial services (like education or health under the Canada Health and Social Transfer), and to provinces for spending in any area (under equalization payments). The use of these financial incentives has been controversial with certain of the provinces, though most of them are recognized in section 36 of the 1982 Constitution. With the signing of a Social Union framework in February 1999, it seems to remain controversial only for the Government of Quebec.

Failure of the Nerve

Intergovernmental cooperation requires governmental will and, on some matters, this has been more absent than present. Abandoning conditionality in federal transfers to the provinces for the purposes of welfare -- requiring minimum levels of assistance, services, and availability of appeals -- has resulted in provincial reforms that are, in Martha Jackman's words, "highly regressive and discriminatory in their impact" (Jackman 1995, 378). Similarly, the federal government has capped social program expenditures related to Aboriginal on-reserve social services, while squeezing entitlements to Aboriginal peoples off-reserve. As jurisdiction over "Indians, and Lands reserved for the Indians" is allocated to the federal government, provincial governments have been reluctant to step in while Aboriginal people have been hesitant to have provinces take up responsibility for social services in regard to matters related to treaty rights. The Royal Commission on Aboriginal Peoples observed that this results in social policy vacuums where social services for status Indians living off-reserve are imperiled (RCAP 1996, 544-45).

In this same period, intergovernmental cooperation has been achieved on other fronts. The Agreement on Internal Trade (AIT), for instance, has as its object the removal of non-tariff barriers to interprovincial trade. This entails both "negative integration" (prohibiting certain practices) and "positive integration" (requiring certain steps be taken to harmonize provincial laws and standards). Criticism has been leveled at the non-binding character of the AIT, and the sluggish movement toward full implementation, but it does represent an innovative mechanism for achieving uniformity in provincial policy areas. The 1999 Social Union framework agreement suggests that cooperation also can be secured around social policy goals. But the skeletal nature of the agreement, together with the circumstances in which it was completed, suggest that it may be a lesser commitment than the one made by First Ministers to the economic union. I return to the subject of the Social Union agreement below.

Federal or Provincial?

Provinces are as fully capable of respecting international human rights norms as the federal government, and as fully culpable for having ignored those norms as has the federal government. The province of Saskatchewan, for instance, was the first to enter the human rights field with the Saskatchewan Human Rights Code. The Quebec Charter of Human Rights and Freedoms perhaps led the way in rights-protections by being the first Canadian jurisdiction to include sexual orientation and social condition as prohibited grounds of discrimination, and to include some protection for social rights. Provincial human rights codes are key elements in a regime for the protection and promotion of human rights. Provincial human rights regimes catch those day-to-day acts of discrimination in the marketplace -- discriminatory treatment in regard to services, public facilities, employment, and housing, for instance. Though some degree of variation in these regimes continues to exist, diversity is giving way to uniformity as a result of the Canadian Charter of Human Rights and Freedoms.

In contrast to this provincial activity, the federal government was the last authority to establish a human rights agency. The Act covers the federal government and federally-regulated businesses like banks, railways and telecommunications (Greschner and Prescott 1999: 6).

If provinces have been key in the development of human rights in Canada, they also have been central to the development of new social policy initiatives. The reign of the Co-operative Commonwealth Federation (forerunner to the New Democratic Party) in Saskatchewan, beginning in 1944, is the oft-cited example. This one government enacted occupational health and safety legislation, minimum wage laws, automobile insurance, human rights legislation, and universal health insurance. But it also is the case that, but for health care in Saskatchewan, the federal government "was the initiator of virtually every new social measure, from the first old age pensions in 1927 through family allowances in 1945 and to major programs put in place during the 1960s and early 1970s," (Kroeger 1995: 3). For this reason, some commentators have been unwilling to see the federal government give up its spending power, or place any limitations on its availability (Monahan 1998). Albert Breton goes so far as to argue that cooperative federalism itself is an unreasonable limitation on federal constitutional power, an attempt to deny the fact of federalism altogether (Breton 1989: 466).

International Treaty-Making Authority

Under the division of powers, authority over international treaty making resides with the federal government. Though the proposition has been contested by some of the provinces, the federal executive appears to have exclusive authority to enter into international treaties, and thereby has the exclusive responsibility to commit Canada to international obligations. The treaty making power does not confer on the federal government the power to implement these obligations, however. Implementation requires the participation of the level of government authorized to make laws regarding the subject matter of the treaty (*Labour Conventions*).

Generally speaking, many of the international obligations concerning human rights will fall under the authority of both levels of government. Consequently, the participation of the provinces is essential to their performance. Indeed, the provinces have played an active role in the international arena in the modern era. Provincial governments actively cultivate economic, political, and cultural ties internationally - they really are "international actors" (Feldman and Feldman 1990, 176). Provinces also have been consulted by the federal government in the course of international trade negotiations (Brown 1993) and have participated with the federal government in the promotion of trade and economic development (through Team Canada missions). The Governments of Quebec and New Brunswick are participants in La Francophonie and Quebec has announced it will begin pressing for an even greater role on the international stage. In its March 1999 declaration, the Government of Quebec announced that it would seek an independent presence and voice in all international forums dealing with "education, language, culture and identity."

Legislating Compliance

An interesting question concerns the ability of the federal government unilaterally to force provinces to comply with international trade and investment agreements -- commitments made, for instance, in the North American Free Trade Agreement (NAFTA) and the Uruguay round General Agreement on Tariffs and Trade (WTO). The concern is that, in so far as these commitments affect provincial jurisdiction, a provincial government may refuse to comply with either the terms of the treaty or the decision of a dispute panel, giving rise to retaliatory measures that will harm Canadian economic performance abroad. In such a situation, it has been argued, Canadian authority under the division of powers - under the "trade and commerce" power and under the general authority to make laws for the "peace, order, and good government of Canada" ('pogg') -- would entitle the federal government to enact laws to enforce provincial compliance (Howse 1994). For the most part, this argument has been confined to trade matters. I discuss below what relevance it may have in so far as it concerns compliance with international human rights commitments.

Charter of Rights and Freedoms

If Canada's constitutional regime largely sidelined human rights considerations, things changed drastically in 1982. The Charter gives voice to the post World War II consensus around human rights, as expressed initially in the Universal Declaration of Human Rights (Weinrib 1999). The Charter binds both levels of government equally; they are prohibited from infringing certain human rights and fundamental freedoms unless those limitations are reasonable and demonstrably justifiable in a free and democratic society. To some extent, then, the problem of adhesion to international human rights norms by national and sub-national governments in

Canada has been made easier by the establishment of the Charter as the fundamental law of Canada.

Room to Manoeuvre

The structure and substance of the Charter reveals, however, that a degree of legislative policy priority is preserved. First, governments can supercede human rights in those cases where they can demonstrate that a limitation is reasonable (s.1). Second, governments may override certain Charter rights and freedoms under the notwithstanding clause (s.33). Both considerations allow for some degree of policy difference across provincial boundaries in so far as they impact on human rights.

Concern has been expressed, particularly but not exclusively from within the province of Quebec, that the Charter, by imposing national standards in the area of human rights, also requires homogenization of social policy whenever it touches on Charter-protected human rights or freedoms. This resulting uniformity undermines federalism, it is argued, which is designed to enable diversity and experimentation in social policy. The range of social policy choices is narrowed and national standards (meaning those pronounced by the Supreme Court of Canada), are then imposed on provincial legislatures by the Charter's "roving normativism."

There is reason to doubt the strength of this claim. First, the judiciary has not been inclined to accord social rights any recognition under the Charter (Jackman 1993, 1994), though this attitude may be changing (see, for example, *Eldridge*). Second, as mentioned, the limitations analysis enables courts to take into account the value of federalism (such factors as diversity and provincial autonomy) in determining whether a right or freedom is justifiably abridged (Swinton 1990: 342). In my study of cases concerning social and economic rights (both of which ordinarily fall within provincial spheres of jurisdiction), the Supreme Court of Canada appeared to be reluctant to interfere with provincial legislative choices when they concerned social policy (like the receipt of benefits). In these cases, the Court gave priority the value of federalism. In cases concerning the economic union (like mobility rights) the Court was more protective of economic citizenship and accorded a lower priority to the value of federalism. Yet federalism is viewed as an impediment to achieving the full realization of both Canada's social and economic union (Schneiderman 1999). Courts, in this way, issue decisions consonant with the dominant view of the state in an era of globalization -- that there are economic forces, beyond the ability of the nation state to constrain, which mandate a state policy facilitative of the economic productivity at the expense of the social state (Schneiderman 1998b).

Degrees of Uniformity

It also is evident that, in at least some areas, homogenization of social policy will result. To what extent, for instance, may provincial governments pursue a human rights policy independent of that mandated by the Charter? Grounds of discrimination afforded to individuals and groups under provincial human rights codes must now be expected to accord, to some degree, with Charter standards (Greschner and Prescott 1999: 18). As a result of the decision in *Vriend*, for instance, the Alberta Human Rights Code must now be read to prohibit discrimination on the ground of sexual orientation, despite the Alberta legislature having chosen to exclude this ground from the provincial human rights regime. Following a recent decision of the Supreme Court of Canada, as regards the provision of legal aid, provinces are expected to provide legal counsel

where liberty or security interests are at stake and the legal issues complex and serious. In that instance, the province should have provided state-funded counsel where a custodial parent was facing proceedings for the removal of children from the home (*J.G.*). These kinds of subjects -- provincial human rights codes, the administration of justice, and the apprehension of children at risk -- are ones that ordinarily fall within provincial jurisdiction. But provinces are now expected to live up to the national standards established by the Charter as the fundamental law. The Charter, in other words, mandates not only negative, but some positive integration. The degree to which courts will tolerate deviation from these standards remains to be seen; in other words, there may yet be some room to manouevre for provincial governments.

Government Action

One option for provincial governments may be simply not to act. According to the Supreme Court of Canada, the Charter applies to government action and delegated authority (like administrative agencies) over which the government has some control. Can governments escape responsibility under the Charter simply by refusing to enact statutory protections?

The spectre of a provincial government repealing its human rights code so as to avoid Charter application arose recently in Alberta. Premier Ralph Klein responded to Justice Anne Russell's trial decision in the *Vriend* case by floating the idea that Alberta would do away entirely with its human rights regime. Albertans would be left with the Charter as their sole rights-protecting instrument. The Charter, the Premier suggested, would do all of the work necessary to promote human rights in Alberta. But this could not be true. Without a government connection, the Charter does not ordinarily apply to market-place acts of discrimination. In fact, the Supreme Court of Canada has developed this doctrine -- that the Charter does not ordinarily apply to "private conduct" -- partly relying on the fact that every province has some statutory regime in place to address human rights in the market (*Dolphin Delivery*).

Justice Major's dissent in regard to remedy in the *Vriend* case expressly invited the government of Alberta to choose the option of doing away with the provincial human rights code. This would have placed Canada, argues Bruce Porter, "in clear violation of virtually *every* international human rights treaty we have ratified" (Porter 1998: 81). It may be, as Porter suggests, that the Charter requires the presence of provincial human rights codes -- that it mandates positive measures even in the absence of government action (Porter 1998: 79). In the cases of *Vriend* and *Eldridge*, however, it was not the case that government had not acted -- a human rights code was at issue in one and the definition of health care benefits in the other -- it was just that, having acted, they failed to live up to the Charter's requirements.

Aboriginal and Treaty Rights

National norms also are being established as regards "existing Aboriginal and treaty rights," those rights recognized in section 35 of the 1982 Constitution. These guaranteed rights are found in a part of the constitution different from that of the Charter. As a result, the Charter's notwithstanding clause is not available to governments, though the Supreme Court of Canada has held that these rights can be limited where a government can prove the limitation is justifiable: the law must further a "compelling and substantial objective" and must be "consistent with the special fiduciary relationship between the Crown and Aboriginal peoples"(*Sparrow* and

Gladstone). The pertinent question here is: to what extent are provinces entitled to limit Aboriginal and treaty rights?

The Supreme Court of Canada has declared that provinces have no authority to extinguish Aboriginal rights. This is so, in part, because the provinces have no constitutional capacity to do so: the subject matter "Indians, and Lands reserved for the Indians" is allocated to the federal government. But in an unfortunate passage in *Delgamuukw*, Chief Justice Lamer declared that provincial laws, like federal ones, could limit Aboriginal rights and that, in both instances, the same test of justification applies. As some commentators have argued, this cannot be right according to the division of powers, and that provinces have no authority to limit or extinguish Aboriginal rights (McNeil 1998; Wilkins 1999). If the commentators are correct, then provinces should be expected to respect, without qualification, obligations arising under Aboriginal and treaty rights.

International Human Rights

There is no requirement on the part of the Courts, when interpreting the Charter or the Aboriginal rights clause, to consider international human rights norms or comparative constitutional law (but see the new South African Constitution). Nevertheless, Canadian Courts often have taken these considerations into account. According to former Supreme Court Justice Gerard La Forest, the Court has applied international human rights principles "consistently, with an international vision and on the basis of international experience" (La Forest 1996, 100).

In a series of decisions, the Supreme Court has strengthened its commitment to interpreting the Charter in light of international human rights principles. These principles, the Court stated, should inform the meaning given to the content of Charter rights and freedoms (*Re Public Service Employee Relations Act*), and in determining when limitations on rights and freedoms are justifiable (*Slaight*: 1056-57). The Court suggested that the Charter provides protection "at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*Re Public Service Employee Relations Act*: 349). In the recent *Baker* case, a majority of the Supreme Court extended this reasoning even where international law has not been incorporated into domestic law by Parliament or the provinces (*Baker* para.70, and see discussion in Scott 1999).

Globalization and Human Rights

Globalization is understood as something that is happening to us, as a "fact," as something entirely beyond our control. In the globalized world, states appear as "hollowed out" and cease to play any relevant regulatory role -- relevant, that is, to the mass of people. Political power moves away from the national state to supranational institutions like the United Nations and the WTO, to regional institutions, like the Inter-American Court of Human Rights or the European Union, to centres of local administration, cities such as London, New York, and Tokyo, and to private actors entirely outside the control of the state system. It is not my object here to question the magnitude of globalization. Rather, I want to connect claims about globalization to the difficulty of promoting human rights in a federal state.

Ambiguities

It is probably correct to claim that globalization "presents new opportunities as well as unparalleled risks" (Bohman and Lutz-Buchmann 1997, 8). The heightened authority of multilateral institutions to intervene within national states to protect human rights is not, for instance, an entirely bad thing (though it certainly can lead to bad results). The formation of a transnational "civil society" comprising non-governmental groups working for human rights, the environment, or women's rights, place further pressures on states to conform to human rights norms. The mobilization of an international indigenous rights movement has enlarged the political space for indigenous peoples to fight for decolonization, and these are claims that otherwise have been marginalized settler societies (see Martinez 1999). But it also is the case that globalization, particularly in its economic guise, has generated significant constraints on the ability of national states to promote and protect human rights. This is clearly so as regards those rights to basic social assistance, like food, clothing and shelter, that require the pooling and sharing of risks -- the redistribution of wealth -- through the welfare state.

NAFTA

In North America, globalization often is associated with the disciplines imposed by the North American Free Trade Agreement. NAFTA concerns the free movement of good, persons, services, and investments across the borders of Canada, the United States, and Mexico. NAFTA institutionalizes free trade and privileges economic over political life. It is not just about the free movement of goods; it also is about disabling state capacity to regulate economic activity. Numerous techniques of state regulation are prohibited (performance requirements and technology transfers, for instance) and state measures that impose burdensome limitations on foreign investment are caught by NAFTA's expropriations clause. We have seen this clause invoked repeatedly by American transnational corporations. It has been used to attack public auto insurance in Ontario, mandatory plain packaging of cigarettes across Canada, nullification of contracts to privatize Terminal 2 at Toronto's Pearson airport, prohibitions on the import or export of the toxic gasoline additive MMT, temporary stoppage in the export of hazardous waste to the United States, and the curtailing of water exports from British Columbia. In a number of these instances, large American corporations have threatened to sue for hundreds of millions of dollars in compensation for the impairment of their investment interest protected by NAFTA. Whatever may be the economic benefits, Canada's short experience under NAFTA reveals how political life is sacrificed at the altar of competitiveness and "economic well being."

There are provisions in NAFTA concerning labour and the environment, but these clauses are not enforceable as are the investment protection provisions of NAFTA. There is, in other words, no equivalency between the economic rights of foreign investors and the social rights of ordinary citizens to a clean and safe environment and to healthy and safe working conditions. Nor are meaningful social protections available in the World Trade Organization, rather, that body functions to protect and promote the rights of states as economic actors.

As a consequence, schemes that helped to generate pan-Canadian social solidarity are under threat by economic globalization. Seemingly lacking in the capacity to regulate or tax economic actors residing within the geographic boundaries of the state -- firms simply flee any jurisdiction, it is feared, where rogue governments attempt to extract rents -- political actors have far less capacity to deliver those social programs that helped to forge Canadian national identities (Graves, Dugas, and Beauchamp 1999).

Fighting Back

It remains the case, however, that the national state is the focal point to mobilize resistance to the forces of globalization. Indeed, it is often state actors themselves who commit to the binding rules and institutions that make up globalization. The negotiations leading to the completion of Multilateral Agreement on Investment (MAI) (investment rules like those found in NAFTA) that began in 1995 eventually were scuttled by the withdrawal of France from the bargaining table in late 1998. It is through the agency of the state, then, that opposition to the excesses, if not some of the underlying ideological assumptions, of globalization can be expressed.

In a federal state, which level of government is best situated to perform this countervailing or checking function? The federal government represents Canada on the global stage, and so it is the national government that is best situated to perform this function. Provinces increasingly are consulted regarding the substance of international negotiations, are called upon to implement commitments made in international agreements, and are insisting upon an enhanced and independent role in international forums. There also clearly is a role for provincial governments to play in helping to reshape globalization discourse in more positive directions.

Some Options

This concluding section -- necessarily brief -- explores some of the options available to respond to the challenges posed by federalism and globalization. The focus is particularly on the role of Parliament in securing human rights commitments made internationally. They appear in no particular order.

Human Rights Audit

In order to ensure adhesion to international human rights commitments it would be appropriate for Parliament to ensure that all governments in Canada honour the commitments made in international human rights instruments. The federal government has jurisdiction over Aboriginal issues and has a financial stake in numerous programming areas that honour these commitments. The federal government also reports periodically to international bodies regarding Canada's performance. Particularly in the absence of provincial representation before these panels (in the case of the Committee on Economic, Social and Cultural Rights, no provinces other than Quebec made submissions) an enhanced federal role would be appropriate. This auditing function would be more credible, however, if it were performed by an independent arms-length reporter, like the Canadian Human Rights Commission. This appears to be analogous to the proposal made by Martha Jackman and Bruce Porter to establish a special social rights sub-committee in the Commission "with responsibility for promoting compliance with social and economic rights" (Jackman and Porter 1999, 83). All of this is consistent with the recommendation made in the U.N. Human Rights Committee's concluding observations concerning Canada: that "consideration be given to the establishment of a public body responsible for overseeing the implementation of the Covenant and for reporting on any deficiencies" (par. 10).

It remains a delicate matter to have an auditor, even independent of the federal government, reporting on provincial performance. It may be preferable to coordinate this auditing function with provincial human rights agencies that may wish to report on compliance or establish similar

reporting bodies themselves. If provinces remain uncooperative, it would then be appropriate to solicit the assistance of credible, local non-governmental human rights organizations.

The Social Union framework agreement, discussed next, commits governments to monitoring and measuring "outcomes" of their social programs, sharing that information with the public, and using third parties, "where appropriate, to assist in assessing progress on social priorities." This commitment, together with its monitoring mechanism and consultative orientation, provides an opportunity to discuss with the provinces a wider audit of programs so far as they impact on international human rights commitments.

One of the problems with the Social Union agreement, according to Barbara Cameron, is the inadequate reporting mechanism to Parliament and to the legislatures. One gets the impression, she writes, that the framers of the agreement "hoped to depoliticize the fundamentally political conflicts surrounding social programmes by recasting them as technical or adminstrative issues" (Cameron 1999). The intention of the auditing mechanism proposed here, in contrast, is to politicize government's human rights records. Information collected under the auspices of the audit would form part of a permanent record, tabled in each provincial legislature and Parliament. In this way, these reports become part of the public record, and those governments that have failed to live up to international human rights commitments may be censured in the public sphere. Reports of non-compliance also could help generate a record for a human rights complaint or Charter challenge. To further that effort, a fund, along the lines of the Charter Challenges Programme, could be instituted (also a recommendation of the U.N. Committee on Economic, Social and Cultural Rights, para. 59).

The Social Union

The Social Union framework agreement proposes an intergovernmental vehicle for the promotion of the Canadian social union. The agreement was signed by the Prime Minster of Canada and nine Premiers, excluding the Premier of Quebec, in February 1999. At the same time as they hammered out the framework agreement, all of the Premiers accepted $6 billion in federal funding over three years for spending in the areas of health and education. Either the Social Union agreement is an act of high-minded statesmanship, with implications for future federal-provincial cooperation, or simply is an instance of crass provincial self-interest dictating consensus around a number of hollow commitments.

In the framework agreement, the Premiers (outside of Quebec) acknowledge the validity of the federal spending power -- the power to spend money in areas of provincial jurisdiction. The federal government commits to consult with the provinces in the development of any new Canada-wide spending initiatives and undertakes not to introduce new programs without the agreement of a majority of the provinces. Provinces accepting these new federal transfers will satisfy agreed upon Canada-wide objective and accountability mechanisms. The federal government also agrees to consult with the provinces whenever it wishes to direct spending to individuals or organizations, rather than provide services through provincial agencies.

The operative mechanisms of this framework agreement have yet to be made public. There is provision made for "full review of the Agreement and its implementation" in February 2002. The Agreement states that this review "will ensure significant opportunities for input and feed-back

from Canadians and all interested parties, including social policy experts, private sector and voluntary organizations."

The fact of its completion together with popular discourse around "reinvestment," suggests that the Social Union may yet prove to be an important vehicle through which to implement international human rights commitments. The Committee on Economic, Social and Cultural Rights called on the federal government to reestablish national standards with respect to social assistance and adequate levels of support for child care, housing, and other redistributive measures. The Committee also admonished Canada for failing to alleviate the "gross disparity between Aboriginal peoples and the majority of the Canadian public with respect to the enjoyment of Covenant rights." The Social Union could be the vehicle for enhanced cooperation between governments to address social conditions for Aboriginal peoples living off-reserve. Were the federal government to have the political and fiscal will, all of this could be done, outside the province of Quebec, through the Social Union framework agreement.

Federal Legislation

As mentioned above, there is a lively academic discussion about the ability of the federal government to force provincial compliance with international trade obligations. If the federal government has the constitutional capacity to enforce the terms of the economic union, why not also the social union? We should be wary of drawing equivalencies between the economic and the social realms, but there is merit to the argument. Fewer federal powers would be available in which to ground federal authority, though it could be a matter of concern for the country as a whole that it falls under the federal authority to make laws for the peace order and good government of Canada (pogg). Certainly, the federal government could exercise the jurisdiction it already possesses to address housing and poverty in Aboriginal communities.

A unilateral federal initiative around human rights would force provincial governments to declare their interests in the project. But a strategy of unilateralism also could backfire. My own work in the area suggests that, given the significant levels of distrust that exist across Canada's political communities, it is preferable to have these communities themselves involved in defining and reconstructing Canada's national human rights regime (Schneiderman 1998a).

International Agreements

During the debate around the MAI, there were calls to add labour and environment clauses to the agreement. The intention was to buffer the effects of undisciplined global capital on the local lives of citizens. The strategy appears to accept as inevitable the kinds of constraints on state action that are imposed by rules to protect and promote foreign investment.

The preferable option may be to insist that the Government of Canada not enter into these agreements without first consulting with important stakeholders and NGOs with knowledge and expertise in the area. It also would be preferable to have the Government of Canada negotiate international agreements that control or place restraints on global capital. The Government of Canada is beginning such an initiative in regard to cultural measures. Similar initiatives could be undertaken in regards to a wider number of important human rights issues.

Charter Litigation

For individuals and social movements, there remains the possibility of litigation under the Canadian Charter. Despite seeming judicial reluctance to recognize rights for the poor (Jackman 1994) and a preference for rights that promote the economic union rather than Canada's social union (Schneiderman 1999), the Supreme Court of Canada recently has signaled an openness to claims made on behalf of the socio-economically disadvantaged. In the cases of *Eldridge* and *Vriend*, the Court held that deliberate exclusion of groups distinguished on enumerated or analogous grounds -- treating vulnerable groups as 'outside' of the penumbra of concern -- will be constitutionally suspect. This will be so even when the exclusion is a manifestation of provincial social policy, namely, balancing the claims of competing groups for scarce government resources. The Court also has signaled that the baseline for government action triggering Charter review is, at a minimum, any legislative choice that impacts on Charter Rights and Freedoms. On this basis decisions, such as the one in *Masse*, that government action reducing dramatically the level of benefits available to poor people in Ontario is not sufficient to trigger Charter review, are wrongly decided.

In the recent case of *G.(J.)*, the Supreme Court found an unconstitutional denial of Charter rights where government refused to provide free legal assistance to those who could not afford it in circumstances where serious personal security issues were at stake. Taken together, this new openness on the Court suggests that litigation for "poor rights" may have a little more success in the future. There should remain, however, every expectation that judges, particularly in lower courts, will use various techniques to resist these developments.

Conclusion

Just as divided jurisdiction has complicated social policy development in Canada, so it has made complicated the implementation of human rights commitments Canada has undertaken internationally. For jurisdictions with divided authority, what is needed is coordinated collective action by provinces and the federal government. This should be seen as non-controversial, at least as concern many norms of international human rights law. But to the extent that these norms are general and abstract, requiring interpretation and implementation, they will be somewhat controversial so far as both levels of government are concerned. What is required is the same kind of determination to deliver on these commitments that governments have shown when it comes to institutionalizing the values and norms associated with economic globalization -- an unlikely prospect without coordinated action by and pressure from we in civil society.

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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT

Concluding observations of the Committee on Economic, Social and Cultural Rights

CANADA

1. The Committee considered the third periodic report of Canada on the rights covered by articles 1 to 15 of the Covenant (E/1994/104/Add.14) at its 46th to 48th meetings, held on 26 and 27 November 1998, and adopted, at its 57th meeting, held on 4 December 1998, the following concluding observations.

A. Introduction

2. The Committee expresses its appreciation to the Government of Canada for the submission of its

detailed and extensive report, which generally follows the Committee's reporting guidelines, and for the comprehensive written answers to its list of issues. The Committee notes that, while the delegation was composed of a significant number of experts, too many questions failed to receive detailed or specific answers. Moreover, in the light of the federal structure of Canada and the extensive provincial jurisdiction, the absence of any expert particularly representing the largest provinces, other than Quebec, significantly limited the potential depth of the dialogue on key issues. The Committee notes with satisfaction that the Government of Canada engaged in extensive consultation with non-governmental organizations (NGOs) in the preparation of the report, that it submitted a core document (HRI/CORE/1/Add.91) and that it provided supplementary information during the consideration of the report.

B. Positive aspects

3. The Committee notes that, for the past five years, Canada has been ranked at the top of the United Nations Development Programme's Human Development Index (HDI). The HDI indicates that, on average, Canadians enjoy a singularly high standard of living and that Canada has the capacity to achieve a high level of respect for all Covenant rights. That this has not yet been achieved is reflected in the fact that UNDP Human Poverty Index ranks Canada tenth on the list of the industrialized countries.

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

5. The Committee notes with satisfaction that the Federal Government has acknowledged, in line with the interpretation adopted by the Supreme Court, that section 7 of the Charter (liberty and security of the person) guarantees the basic necessities of life, in accordance with the Covenant.

6. The Committee notes with satisfaction that the Human Rights Tribunal in Quebec has, in a number of decisions, taken the Covenant into consideration in interpreting Quebec's Charter of Rights, especially in relation to labour rights.

7. The Committee notes that, in recognition of the serious issues affecting Aboriginal peoples in Canada, the Government appointed the Royal Commission on Aboriginal Peoples (RCAP), which released a wide-ranging report in 1996 addressing many of the rights enshrined in the Covenant.

8. The Committee welcomes the reinstatement by the Federal Government of the Court Challenges Program, as recommended by the Committee while reviewing the State Party's previous report.

9. The Committee welcomes the Canadian Human Rights Commission's statement about the inadequate protection and enjoyment of economic and social rights in Canada and its proposal for the inclusion of those rights in human rights legislation, as recommended by the Committee in 1993.

10. The Committee views as a positive development the high percentage of women attending university and their increasing access to the liberal professions traditionally dominated by men. The Committee notes that Canada has one of the highest percentages of population having completed

post-secondary education and one of the highest percentages of GDP devoted to post-secondary education in the world.

C. Factors and difficulties impeding the implementation of the Covenant

11. The Committee notes that since 1994, in addressing the budget deficits by slashing social expenditure, the State Party has not paid sufficient attention to the adverse consequences for the enjoyment of economic, social and cultural rights by the Canadian population as a whole, and by vulnerable groups in particular.

12. The Committee heard ample evidence from the State Party suggesting that Canada's complex federal system presents obstacles to the implementation of the Covenant in areas of provincial jurisdiction. The Committee regrets that, unless a right under the Covenant is implicitly or explicitly protected by the Charter through federal-provincial agreements, or incorporated directly in provincial law, there is no legal redress available to either an aggrieved individual or the Federal Government where provinces have failed to implement the Covenant. The State Party's delegation emphasized the importance of political processes in this regard, but noted that they were often complex.

13. While the Government of Canada has consistently used Statistics Canada's "Low income cut-off" as a measure of poverty when providing information to the Committee about poverty in Canada, it informed the Committee that it does not accept the low income cut-off as a poverty line, although it is widely used by experts to consider the extent and depth of poverty in Canada. The absence of an official poverty line makes it difficult to hold the federal, provincial and territorial governments accountable with respect to their obligations under the Covenant.

D. Principal subjects of concern

14. The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.

15. The Committee is deeply concerned at the information that provincial courts in Canada have routinely opted for an interpretation of the Charter which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights.

16. The Committee is also concerned about the inadequate legal protection in Canada of women's rights which are guaranteed under the Covenant, such as the absence of laws requiring employers to pay equal remuneration for work of equal value in some provinces and territories, restricted access to civil legal aid, inadequate protection from gender discrimination afforded by human rights laws and the inadequate enforcement of those laws.

17. The Committee is greatly concerned at the gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people. In particular, the Committee is deeply concerned at the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth, in the Aboriginal communities. Another concern is the failure to provide safe and adequate drinking water to Aboriginal communities on reserves. The delegation of the State Party conceded that almost a quarter of Aboriginal household dwellings required major repairs and lacked basic amenities.

18. The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP, and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. The Committee is greatly concerned that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation.

19. The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living and facilitated court challenges of federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, CHST has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance. It did, however, retain national standards in relation to health, thus denying provincial "flexibility" in one area, while insisting upon it in others. The delegation provided no explanation for this inconsistency. The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced. The Committee also recalls in this regard paragraph 9 of General Comment No. 3.

20. The Committee is concerned that newly-introduced successive restrictions on unemployment insurance benefits have resulted in a dramatic drop in the proportion of unemployed workers receiving benefits to approximately half of previous coverage, in the lowering of benefit rates, in reductions in the length of time for which benefits are paid and in increasingly restricted access to benefits for part-time workers. While the new programme is said to provide better benefits for low-income families with children, the fact is that fewer low-income families are eligible to receive any benefits at all. Part-time, young, marginal, temporary and seasonal workers face more restrictions and are frequently denied benefits, although they contribute significantly to the fund.

21. The Committee received information to the effect that cuts of

about 10 per cent in social assistance rates for single people have been introduced in Manitoba; 35 per cent in those for single people in Nova Scotia; and 21.6 per cent in those for both families and single people in Ontario. These cuts appear to have had a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger.

22. The Committee notes with concern that, in all but two provinces (New Brunswick and Newfoundland), the National Child Benefit (NCB) introduced by the Federal Government, which is

meant to be given to all children of low-income families, is in fact only given to children of working poor parents since the provinces are allowed by the Federal Government to deduct the full amount of NCB from the amount of social assistance received by parents on welfare.

23. The Committee notes with grave concern that with the repeal of CAP and cuts in social assistance rates, social services and programmes have had a particularly harsh impact on women, in particular single mothers, who are the majority of the poor, the majority of adults receiving social assistance and the majority among the users of social programmes.

24. The Committee is gravely concerned that such a wealthy country as Canada has allowed the problem of homelessness and inadequate housing to grow to such proportions that the mayors of Canada's 10 largest cities have now declared homelessness a national disaster.

25. The Committee is concerned that provincial social assistance rates and other income assistance measures have clearly not been adequate to cover rental costs of the poor. In the past five years, the number of tenants paying more than 50 per cent of their income towards rent has increased

by 43 per cent.

26. The Committee is concerned that in both Ontario and Quebec, governments have adopted legislation to redirect social assistance payments directly to landlords without the consent of recipients, despite the fact that the Quebec Human Rights Commission and an Ontario Human Rights Tribunal have found this treatment of social assistance recipients to be discriminatory.

27. The Committee expresses its grave concern at learning that the Government of Ontario proceeded with its announced 21.6 per cent cuts in social assistance in spite of claims that this would force large numbers of people from their homes.

28. The Committee is concerned that the significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles to women escaping domestic violence. Many women are forced, as a result of those obstacles, to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other.

29. The Committee notes that Aboriginal women living on reserves do not enjoy the same right as women living off reserves to an equal share of matrimonial property at the time of marriage breakdown.

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

31. The Committee notes that Bill 22, entitled "An act to prevent unionization", was adopted by the Ontario Legislative Assembly

on 24 November 1998. The Act denies to workfare participants the rights to join a trade union, to bargain collectively and to strike. In response to a request from the Committee, the Government provided no information in relation to the compatibility of the Act with the Covenant. The Committee considers the Act to be a clear violation of article 8 of the Covenant and calls upon the State Party to take measures to repeal the offending provisions.

32. The Committee is concerned that the minimum wage is not sufficient to provide an adequate standard of living for a worker and his or her family.

33. The Committee is perturbed to hear that the number of food banks almost doubled between 1989 and 1997 in Canada and that they are able to meet only a fraction of the increased needs of the poor.

34. The Committee is concerned that the State Party did not take into account the Committee's 1993 major concerns and recommendations when it adopted policies at federal, provincial and territorial levels which exacerbated poverty and homelessness among vulnerable groups during a time of strong economic growth and increasing affluence.

35. The Committee is concerned at the crisis level of homelessness among youth and young families. According to information received from the National Council of Welfare, over 90 per cent of single mothers under 25 live in poverty. Unemployment and under-employment rates are also significantly higher among youth than among the general population.

36. The Committee is also concerned about significant cuts in services on which people with disabilities rely, such as cuts in home care, attendant care and special needs transportation systems, and tightened eligibility rules for people with disabilities. Programmes for people who have been discharged from psychiatric institutions appear to be entirely inadequate. Although the Government failed to provide to the Committee any information regarding homelessness among discharged psychiatric patients, the Committee was told that a large number of those patients end up on the street, while others suffer from inadequate housing, with insufficient support services.

37. The Committee views with concern the plight of thousands of "Convention refugees" in Canada, who cannot be given permanent resident status for a number of reasons, including the lack of identity documents, and who cannot be reunited with their families for a period of five years.

38. The Committee views with concern that 20 per cent of the adult population in Canada is functionally illiterate.

39. The Committee is concerned that loan programmes for post-secondary education are available only to Canadian citizens and permanent residents and that recognized refugees who do not have permanent residence status, as well as asylum seekers, are ineligible for these loan programmes. The Committee views also with concern the fact that tuition fees for university education in Canada have dramatically increased in the past few years, making it very difficult for those in need to attend university in the absence of a loan or grant. A further subject of concern is the significant increase in the average student debt on graduation.

E. Suggestions and recommendations

40. The Committee recommends that the State Party consider re-establishing a national programme with specific cash transfers for social assistance and social services that includes universal entitlements and national standards and lays down a legally enforceable right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another.

41. The Committee urges the State Party to establish officially a poverty line and to establish social assistance at levels which ensure the realization of an adequate standard of living for all.

42. The Committee recommends that federal and provincial agreements should be adjusted so as to ensure, in whatever ways are appropriate, that services such as mental health care, home care, child care and attendant care, shelters for battered women and legal aid for non-criminal matters, are available at levels that ensure the right to an adequate standard of living.

43. The Committee calls upon the State Party to act urgently with respect to the recommendations of RCAP. The Committee also calls upon the

State Party to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture.

44. The Committee recommends that the National Child Benefit Scheme be amended so as to prohibit provinces from deducting the benefit from social assistance entitlements.

45. The Committee recommends that Canada's Employment Insurance Programme be reformed so as to provide adequate coverage for all unemployed workers in an amount and for a duration which fully guarantees their right to social security.

46. The Committee recommends that the federal, provincial and territorial governments address homelessness and inadequate housing as a national emergency by reinstating or increasing, as the case may be, social housing programmes for those in need, improving and properly enforcing anti-discrimination legislation in the field of housing, increasing shelter allowances and social assistance rates to realistic levels, providing adequate support services for persons with disabilities, improving protection of security of tenure for tenants and improving protection of affordable rental housing stock from conversion to other uses. The Committee urges the State party to implement a national strategy for the reduction of homelessness and poverty.

47. The Committee calls upon the State party, in consultation with the communities concerned, to address the situation described in paragraph 29 with a view to ensuring full respect for human rights.

48. The Committee recommends that the Government of Canada take additional steps to ensure the enjoyment of economic and social rights for people with disabilities, in accordance with the Committee's General Comment No. 5.

49. The Committee urges the Government to develop and expand adequate programmes to address the financial obstacles to post-secondary education for low-income students, without any

discrimination on the basis of citizenship status.

50. The Committee urges the federal, provincial and territorial governments to adopt positions in litigation which are consistent with their obligation to uphold the rights recognized in the Covenant.

51. The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status. Moreover, enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups.

52. The Committee, as in its review of the previous report of Canada, reiterates that economic and social rights should not be downgraded to "principles and objectives" in the ongoing discussions between the Federal Government and the provinces and territories regarding social programmes. The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.

53. The Committee encourages the State Party to adopt the necessary measures to ensure the realization of women's economic, social and cultural rights, including the right to equal remuneration for work of equal value.

54. The Committee also recommends that a greater proportion of federal, provincial and territorial budgets be directed specifically to measures to address women's poverty and the poverty of their children, affordable day care, and legal aid for family matters. Measures that will establish adequate support for shelters for battered women, care-giving services and women's non-governmental organizations should also be implemented.

55. The Committee urges the federal, provincial and territorial governments to review their respective "workfare" legislation in order to ensure that none of the provisions violate the right to work freely chosen and other labour standards, including the minimum wage, rights which are not only guaranteed by the Covenant but also by the relevant ILO conventions on fundamental labour rights and labour standards.

56. The Committee calls upon the federal, provincial and territorial governments to give even higher priority to measures to reduce the rate of functional illiteracy in Canada.

57. The Committee recommends that the State Party request the Canadian Judicial Council to provide all judges with copies of the Committee's concluding observations and encourage training for judges on Canada's obligations under the Covenant.

58. The Committee also recommends that since there is generally in Canada a lack of public awareness about human rights treaty obligations, the general public, public institutions and officers at all levels of Government should be made aware by the State Party of Canada's human rights obligations under the Covenant. In this regard, the Committee wishes to make specific reference to its General Comment No. 9 on the domestic application of the Covenant.

59. The Committee recommends that the Federal Government extend the Court Challenges Programme to include challenges to provincial legislation and policies which may violate the provisions of the Covenant.

60. Finally, the Committee requests the State Party to ensure the wide dissemination in Canada of the present concluding observations and to inform the Committee of steps taken to implement these recommendations in its next periodic report.

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Human Rights Committee
Sixty-fifth session

Consideration of reports submitted by
States parties under article 40 of the Covenant

Concluding observations of the Human Rights Committee

Canada

1. The Committee considered the fourth periodic report of the Government of Canada (CCPR/C/103/Add.5) at its 1737th and 1738th meetings (CCPR/SR.1737-1738), held on 26 March 1999, and adopted the following concluding observations at its 1747th meeting (CCPR/C/SR.1747), held on 6 April 1999.

A. Introduction

2. The Committee welcomes the comprehensive fourth periodic report as well as the additional written information covering the period since the submission of that report. The Committee expresses its appreciation for the presence of the large delegation representing the Government of Canada and for the frank and forthright replies furnished by the delegation to the issues raised by the Committee. However, the Committee is concerned that the delegation was not able to give up-to-date answers or information about compliance with the Covenant by the provincial authorities.

B. Principal positive aspects

3. The Committee welcomes the delegation's commitment to take action to ensure effective follow-up in Canada of the Committee's concluding observations and to further develop and improve mechanisms for ongoing review of compliance of the State party with the provisions of the Covenant. In particular, the Committee welcomes the delegation's commitment to inform public opinion in Canada about the Committee's concerns and recommendations, to distribute the Committee's concluding observations to all members of Parliament and to ensure that a parliamentary committee will hold hearings of issues arising from the Committee's observations.

4. The Committee welcomes the final report of the Royal Commission on Aboriginal Peoples and the declared commitment of federal and provincial governments to work in partnership with aboriginal peoples to address needed reforms.

5. The Committee commends the Government of Canada in regard to the Nunavut land and governance agreement of the eastern Arctic.

6. The Committee welcomes the implementation of the Employment Equity Act, which entered into force in October 1996, establishing a compliance regime that requires federal departments to ensure that women, persons belonging to aboriginal and visible minorities and disabled persons constitute a fair part of their workforce.

C. Principal areas of concern and recommendations

7. The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 of the Covenant in its next periodic report.

8. The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia,* that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

9. The Committee is concerned with the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant. The Committee recommends that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination.

10. The Committee is concerned that gaps remain between the protection of rights under the Canadian charter and other federal and provincial laws and the protection required under the Covenant, and recommends measures to ensure full implementation of Covenant rights. In this regard the Committee recommends that consideration be given to the establishment of a public body

responsible for overseeing implementation of the Covenant and for reporting on any deficiencies.

11. The Committee is deeply concerned that the State party so far has failed to hold a thorough public inquiry into the death of an aboriginal activist who was shot dead by provincial police during a peaceful demonstration regarding land claims in September 1995, in Ipperwash. The Committee strongly urges the State party to establish a public inquiry into all aspects of this matter, including the role and responsibility of public officials.

12. The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem.

13. The Committee is concerned that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refers to its General Comment on article 7 and recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk.

14. The Committee expresses its concern that the State party considers that it is not required to comply with requests for interim measures of protection issued by the Committee. The Committee urges Canada to revise its policy so as to ensure that all such requests are heeded in order that implementation of Covenant rights is not frustrated.

15. The Committee remains concerned about Canada's policy in relation to expulsion of long-term alien residents, without giving full consideration in all cases to the protection of all Covenant rights, in particular under articles 23 and 24.

16. The Committee is concerned about the increasingly intrusive measures affecting the right to privacy, under article 17 of the Covenant, of people relying on social assistance, including identification techniques such as fingerprinting and retinal scanning. The Committee recommends that the State party take steps to ensure the elimination of such practices.

17. The Committee notes with concern that the State party has not secured throughout its territory freedom of association. In particular, the Act to Prevent Unionization with respect to Community Participation under the Ontario Works Act, passed by the Ontario legislature in November 1998, which denies participants in "workfare" the right to join a trade union and to bargain collectively, affects implementation of article 22 of the Covenant. The Committee recommends that the State party take measures to ensure compliance with the Covenant.

18. The Committee is concerned that differences in the way in which the National Child Benefit Supplement for low-income families is implemented in some provinces may result in a denial of this benefit to some children. This may lead to non-compliance with article 24 of the Covenant.

19. The Committee is concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee's Views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstituted, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community. The Committee

recommends that these issues be addressed by the State party.

20. The Committee is concerned that many women have been disproportionately affected by poverty. In particular, the very high poverty rate among single mothers leaves their children without the protection to which they are entitled under the Covenant. While the delegation expressed a strong commitment to address these inequalities in Canadian society, the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups. The Committee recommends a thorough assessment of the impact of recent changes in social programmes on women and that action be undertaken to redress any discriminatory effects of these changes.

21. The Committee sets the date for the submission of Canada's fifth periodic report as April 2004. It urges the State party to make available to the public the text of the State party's fourth periodic report and these concluding observations. It requests that the next periodic report be widely disseminated among the public, including to non-governmental organizations operating in Canada.

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NATIONAL POST
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Tuesday, September 28, 1999

Noble words -- and not much else

The Convention on the Rights of the Child does little for those it purports to protect

Jeffery Wilson
National Post

On Sept. 30, at the Palais des Nations in Geneva, the United Nations' Office of the High Commissioner for Human Rights and the Committee on the Rights of the Child will be hosting a commemorative 10th anniversary meeting on the matter of the Convention on the Rights of the Child. In less than 10 years, all of the UN member nations but Somalia and the United States have ratified the convention. UNICEF proclaims the convention's "... uniqueness stems from the fact that it is the first legally binding international instrument to incorporate the full range of human rights -- children's civil and political rights as well as their economic, social and cultural rights -- thus giving all rights equal emphasis."

For example, Articles 3 and 12 of the convention require that in all legal decisions affecting a child, her best interests shall be given primary consideration and that she be heard in respect of any legal process that might affect her interests. Article 22 requires that member states ensure that all children of refugee parents receive appropriate protection and humanitarian assistance consistent with the convention and other international human rights instruments. Article 32 stipulates that member states must respect the right of a child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, and to take whatever legislative measures are needed to see that this occurs.

Canada, like the other member states, is bound by Article 4 which requires our country to take all appropriate legislative, administrative, and other measures, to the maximum extent of its available resources, for the implementation of the rights recognized in the convention.

But, like the experience of the child who dared to declare the emperor to have no clothes, children's rights advocates and children are seeing through the rhetoric. They have observed the convention to be a hollow and weak authority that offers little precedent for change, or remedy to the injustices around them.

Consider a few encounters with the convention within Canada:

- Consistent with the convention's Article 28 requirement that all children receive an education, Ontario's Education Act states that a child who is otherwise admitted to attend school shall not be

refused admission because her parents may be unlawfully in Canada. The Canadian Council for Refugees raised the issue with the provincial government's enforceability of this right. The Education Minister answered in a June 24, 1998 letter, advising that, "... if a parent thinks a board is not complying with the Education Act, the parent should bring the situation to the attention of the school board's trustees." Just how is a parent living unlawfully in Canada and likely living in hiding to come forward and speak to school board trustees? More importantly, how is this a response in fulfillment of our undertaking to use all resources to ensure that every child receives an education?

- The Federal Court of Canada has ruled that the convention has no applicability to Canadian law, including the Charter of Rights and Freedoms. That court has rejected the convention as having any legal effect on the rights of Canadian children of deportees. Recently, the Supreme Court of Canada upheld that conclusion. The court said that while the convention has no direct application within Canadian law, it is an international human rights law and its values may help "inform the contextual approach to statutory interpretation and judicial review." Obviously, more rhetoric, because in at least one decision since the Supreme Court's ruling, the Federal Court has repeated the assertion that children have no charter or other rights of action when their parent is subject to a deportation proceeding. What exactly are children to make of Articles 3, 9, 12, and 27 of the convention that, by any reading, would suggest otherwise?

- Under the convention, children are to be spared the rod. Provincial child protection laws and measures taken by school boards throughout Canada rid the use of corporal punishment from the measures of appropriate discipline to be invoked by a parent or teacher. Nonetheless, Canada clings to Section 43 of the Criminal Code. Under that section, a mother who struck her 11-year-old child 10 times causing contusions and swelling on her buttocks received an absolute discharge in 1992. The presiding judge said that, "Parents are entitled to use a belt ... far be it from this court to say when a parent can and cannot use a belt. There are welts, but I guess you expect to find welts when you use a belt."

- Children, under the convention, are to be spared economic exploitation. A Canadian anti-slavery group located in Burns Lake, B.C., thought this was important enough to warrant a 1995 letter to the government about the importation into Canada of carpets made with child slave labour, pointing out the Canadian law that, if invoked, could stop this. Our government's response was to ignore the convention, applaud the group's initiative, and conclude nothing would be done under that section of the Customs tariff so as to prohibit the importation of goods into Canada that were the product of exploitative and forced labour.

- Children, under the convention, are to be spared cruel, inhumane or degrading treatment. Cast your attention, if you might, to the young Chinese children recently plastered on the pages of our newspapers and whose hands were shackled when removed from the boat that illegally harboured and left them in Canada.

- Most authorities are unaware of the convention. Immigration officials put forward by the Minister of Immigration in court cases in 1993 and 1997 involving the interests of children had no knowledge of the fact, let alone the content of the document. This, in spite of Article 41 which requires Canada "... to make the principles and provisions of the convention widely known, by appropriate and active means, to adults and children alike."

The imbalance between the interests of children and adults is best portrayed by the fact that there is no remedy under the convention when its provisions are contravened or ignored.

Unlike other international conventions, the child is denied the right to petition an international tribunal for relief or refuge when all other avenues have been exhausted within her country. In this respect, the convention, in its essence, discriminates against children. It is an adult-authored document that allows adults to wear the clothes of concern and care. That is its real problem.

The next time a not so properly attired green-purple-pink haired, nose-tongue-ear-belly-ringed squeegee youth invades your space and asks to wash your window, let her. Give her a buck. That's the least we owe.

Jeffery Wilson is a family law lawyer and will be an NGO representative for Canada at the upcoming 10th anniversary meeting.

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