

**CCPI**

**CHARTER COMMITTEE**  
**ON POVERTY ISSUES**



**Implementing Effective Remedies in Canada**

**Submission of the Charter Committee On Poverty Issues (CCPI)**

**and the Social Rights Advocacy Centre (SRAC)**

**For the Second UPR of Canada**

**October 9, 2012**

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

The Charter Committee on Poverty Issues (CCPI) is a national Committee (NGO) formed in 1988 which brings together low-income individuals, anti-poverty organizations, researchers, lawyers and advocates for the purpose of assisting poor people in Canada to secure and assert their rights under international human rights law, the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), human rights legislation and other law in Canada. CCPI has appeared before a number of UN human rights treaty monitoring bodies, dating back to the 1993 review of Canada before the CESCR and has been granted leave to intervene in thirteen cases at the Supreme Court of Canada.

The Social Rights Advocacy Centre (SRAC) is a non-profit NGO formed in 2002 for the purpose of relieving poverty and improving access to adequate food, clothing, housing, education, through human rights research, public education and legal advocacy. SRAC is the lead community organization in a major 5 year research project on social rights in Canada bringing together five universities and four NGOs. SRAC assists in co-ordinating the ESCR-Net Caselaw database, helps to co-ordinate an international Strategic Litigation Initiative, provides research, expertise and co-ordination of test cases in Canada and frequently participates in expert consultations at the United Nations.

## **B. Homelessness, hunger and poverty in Canada and the Right to Effective Remedies**

CCPI made submissions for Canada's first UPR in 2008. At that time we noted that widespread hunger, homelessness and poverty had become the most critical human rights issues in Canada. These violations were identified as priority concerns in meetings with over 200 civil society and Indigenous peoples' organizations prior to Canada's first UPR. Poverty, hunger and homelessness have also been identified by the CESCR, HRC, CRC, CEDAW and CERD as issues requiring urgent attention in Canada. These human rights treaty monitoring bodies have also drawn attention to the disproportionate effect of poverty, homelessness and food insecurity on women, people with disabilities, migrants, children, the elderly and racialized groups in Canada. They have expressed concern that social assistance rates; minimum wage, employment insurance, subsidized housing and other forms of income security measures have been eroded since the mid-1990s in Canada such that Canada now has unacceptable levels of homelessness, poverty and food insecurity. Such widespread deprivation and inequality is particularly unacceptable in Canada in light of its relative economic prosperity and available resources.

Whereas in earlier years Canada played a key role in promoting international human rights, in recent years, Canada has been much less supportive of advances in human rights, and particularly where these might lead to criticism of Canada's own record. As Canada has come under increasing international criticism for the extent of poverty, homelessness and hunger in so affluent a country, it has stopped supporting advances in the field of economic, social and cultural (ESC) rights. Canada did not support the adoption of an Optional Protocol to the ICESCR and has refused to sign or ratify that Optional Protocol. While Canada supported the adoption of the CRPD and has ratified it, Canada has not addressed the need to ensure effective remedies under the CRPD. It has not ratified the Optional Protocol to the CRPD and has not designated national institutions or focal points for the implementation of the CRPD as is required by article 33 of that Convention. For many years Canada opposed the recognition of the right to water and sanitation.

Canada's opposition to ensuring effective remedies to ESCR internationally parallels concerted and systematic measures within Canada to deny rights claimants access to justice to address human rights violations affecting those living in poverty in Canada. The CESCR has expressed concern about Canada's

insistence on downgrading ESC rights to mere policy objectives of governments rather than recognizing them as human rights which must be subject to effective domestic remedies. Until Canada recognizes ESC rights as equally subject to effective remedies, and makes efforts to ensure that people living in poverty have access to justice to address and remedy systemic violations of human rights linked to widespread poverty, hunger and homelessness in Canada, these human rights violations will continue.

CCPI and SRAC are therefore focusing our submissions for Canada's Second Periodic Review on Canada's continued and increasingly adamant refusal to acknowledge that poverty, homelessness and hunger in so affluent a country as Canada are fundamentally human rights problems that must be addressed through human rights-based approaches and strategies. We urge the Human Rights Council to draw attention during Canada's second UPR to the urgent need to ensure effective domestic remedies to violations of human rights in Canada, particularly violations of ESC rights, and to ensure access to justice for people living in poverty who seek to claim and enforce their rights.

### **C. Follow-up to Canada's First UPR Regarding Effective Domestic Remedies to ESCR**

Canada's responses to recommendations related to effective remedies during its first UPR in 2008 were disappointing on two fronts. First, Canada refused to accept some of the key recommendations that would have provided a framework for concerted efforts to address poverty, hunger and homelessness within a human rights framework. And second, in the rare instances where Canada did accept recommendations related to ESC rights, there has been no effective follow-up or implementation of the recommendations and no engagement with relevant stakeholders.

#### **Key Recommendations Not Accepted at Canada's First UPR**

##### **i) Recognize that ESCR must be subject to effective remedies**

A key recommendation in Canada's first UPR was to "recognize the justiciability of social, economic and cultural rights, in accordance with the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Brazil); ensure legal enforcement of economic, social and cultural rights in domestic courts (Pakistan); grant the same importance to and treat equally civil, political, economic, social and cultural rights, in its legislation at all levels (Mexico). Ensure that any complaint of violations of international human rights obligations can be examined in Canadian courts and effective adequate remedies will be provided to victims. (Portugal).

Canada declined to accept these recommendations on the basis that it does not agree that all aspects of ESC rights should be subject to judicial review or legislative protection. What needs to be clarified at the Second UPR is that while Canada may not be obliged to make all aspects of ESC rights justiciable before courts, Canada is nevertheless obliged to ensure access to effective remedies to ESC rights, providing ultimate recourse to courts and to adopt appropriate legislative measures. The result of Canada's refusal to accept the package of recommendations related to providing effective remedies and judicial review of ESC rights at its first UPR has led to further erosion of access to effective remedies for victims of violations of ESC rights in Canada and more widespread violations.

**Recommendation:** *Canada should commit to ensuring that all human rights, including economic and social rights, are subject to effective remedies and independent review and oversight by courts and other independent bodies. Canada should commit to a public review of available remedies for economic, social and cultural rights before courts, administrative bodies, national human rights institutions, human rights tribunals and other fora.*

*Canada should commit to developing legislative strategies at both federal and provincial/territorial levels to ensure access to effective remedies for all human rights. Federal and provincial/territorial human rights legislation should be amended to cover all areas of international human rights, including economic and social rights, providing for complaints mechanisms and hearings before independent human rights tribunals.*

## **ii) Anti-Poverty and Food Security Strategies: The Need for Framework Legislation**

Another key recommendation which Canada declined to accept at its first UPR was to adopt a national rights-based strategy to reduce and eliminate poverty and to integrate economic and social rights into its poverty reduction strategy. Canada's refusal of this recommendation was surprising since this has also been a central recommendation of the CESCR in the last two reviews of Canada, subsequently supported by the Special Rapporteurs on Adequate Housing and on the Right to Food after their missions to Canada. In addition, a Senate Sub-Committee and a House of Commons committee looking at the role of the Federal Government in relation to poverty and homelessness have also recommended a national strategy to eliminate poverty, emphasizing that such a strategy should include framework legislation which integrates economic and social rights.<sup>1</sup>

**Recommendations:** *Concern should be expressed about Canada's failure to adopt national and provincial/territorial rights-based strategies to reduce and eliminate poverty. Canada should commit to adopting a strategy to reduce and eliminate poverty which ensures access to effective complaints, monitoring and enforcement procedures and includes enforceable targets and timelines.*

*A national strategy to implement the right to food is also urgently required. This was a core recommendation included in the End-of-Mission Report of the Special Rapporteur on the right to food at the end of his May 2012 mission to Canada. Canada should commit to developing, in consultation with stakeholders, an effective right to food strategy, implemented through both federal and provincial/territorial framework legislation.*

## **Two Key Recommendations Accepted by Canada's at its First UPR but Not Implemented**

### **i) Better Ensure the Right to Adequate Housing**

One recommendation which Canada did accept during its first UPR in relation ESC rights was to better ensure the right to adequate housing and to consider taking on board the recommendations of the Special Rapporteur on Adequate Housing following his 2008 mission to Canada. However, there has been little or no meaningful follow-up to this accepted recommendation. A central component to any action to address homelessness and to better ensure the right to adequate housing in Canada is the adoption of a national housing strategy based on the right to adequate housing. The UN Human Rights Committee has stated that positive measures are required to address the homelessness crisis in Canada in order to comply with the right to life under the ICCPR and that particular attention must be directed to the need for housing with supports for persons with mental disabilities. The CESCR and other treaty monitoring bodies have emphasized the urgency of adopting a rights-based strategy to address homelessness and inadequate housing. The Special Rapporteur

---

<sup>1</sup> Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009); House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (November 2010) (Chair: Candice Hoepfner).

on Adequate Housing noted that Canada is one of the only developed countries to have no national housing strategy. He recommended the adoption of a rights-based strategy including complaints mechanisms, independent monitoring and enforceable goals and timetables. Through a private member's bill, C-400, framework legislation has been introduced in the Parliament of Canada. Bill C-400 would implement all of the key recommendations for a rights-based housing strategy made by the CESCR and by the Special Rapporteur on Adequate Housing as well as implementing Canada's UPR commitment. However, while Bill C-400 has the support of all of the opposition parties, the Government of Canada has refused to support it.

**Recommendation:** *Canada's should follow up on its commitment made during the first UPR to address widespread homelessness throughout the country and to better ensure the right to adequate housing. The Government of Canada should commit to supporting Bill C-400 and to working with provinces and territories to develop joint strategies to implement the right to adequate housing. Such strategies should ensure access to effective remedies for violations of the right to adequate housing, provide for hearings before independent bodies and effective monitoring of progress.*

## **ii) Ensure better accountability to international human rights mechanisms and improved follow-up to concerns and recommendations**

Another important recommendation accepted by Canada at its First UPR was to improve existing mechanisms and procedures related to the implementation of international human rights obligations and to ensure meaningful participation by civil society in these mechanisms. This commitment was also made in relation to follow-up to the concerns and recommendations from the First UPR. Sadly, Canada has not only failed to improve its follow-up to concerns and recommendations but has in fact moved dramatically backward in its responses to concerns and recommendations from UN bodies in recent months.

Canada has refused to be held accountable in any meaningful way to the obligation under 2(1) of the ICESCR to take reasonable measures, to the maximum of available resources, to implement economic, social and cultural rights. Rather than accept that an affluent country such as Canada has unique obligations to fully realize ESC rights to the maximum of available resources, Canada has begun to assert the opposite. The Federal Government has claimed what amounts to an immunity for affluent countries from any accountability for its resource allocation decisions. Canada insists that its budgetary decisions and social policy choices are purely "political" matters that are immune from human right review or effective remedies. As a result, it has lashed out at UN human rights bodies which attempt to apply international human rights norms to Canada.

This was made particularly clear when the Special Rapporteur on the right to food accepted an open invitation from Canada to conduct a mission to Canada. At the end of his mission in May 2012 the Special Rapporteur expressed concern about the fact that over 900,000 individuals in Canada now rely on emergency food aid through food banks and over 2 million people in Canada lack an income sufficient to provide a nutritional diet. The federal government's response was to attack Mr De Schutter publicly for coming to so wealthy a country as Canada. The Minister of Citizenship and Immigration stated that "It would be our hope that the contributions we make to the United Nations are used to help starving people in developing countries, not to give lectures to wealthy and developed countries like Canada and I think this is a discredit to the United Nations." The Minister of Health stated that "Our government is surprised that this organization [the UN] is focused on what appears to be a political agenda rather than on addressing food shortages in the developing world. By the United Nations' own measure, Canada ranks sixth best of all the world's countries on their human development index."

Government representatives made similarly dismissive remarks when concerns were raised by the UN Special Rapporteur on the rights of Indigenous Peoples about terrible housing conditions on the Attawapiskat

First Nations reserve in December 2011, describing his intervention a mere “publicity stunt”. When the Committee on the Rights of the Child expressed concerns about violations of children’s rights in Canada during its recent review of Canada, the response of the Parliamentary Secretary for Foreign Affairs in parliament was to suggest that because one of the members of the Committee is a citizen of Syria, “This is no doubt to distract from the atrocities that Syrian children are currently facing every day.”

A fundamental change has occurred in governance in Canada such that Canada’s historic commitment to human rights within Canada and to participation in international mechanisms to safeguard and protect rights is in serious jeopardy. Canada’s Second Periodic Review thus comes at a critical moment. Whereas Canada previously recognized that as an affluent country, it had unique obligations to progressively realize economic social and cultural rights according to available resources, it now takes the position that the obligations described in article 2(1) of the ICESCR are entirely discretionary and unenforceable policy aspirations that should not be subject to complaints procedures judicial remedies or even, apparently, review by special procedures mandate holders. Within Canada, the Federal Government has launched a concerted assault on independent human rights scrutiny by civil society and Indigenous Peoples’ organizations, eliminating funding that was previously available for independent human rights monitoring, public education, advocacy and access to the courts to take forward human rights cases. This has been reflected in the procedures put in place for the Second UPR. While some funding was provided prior to the first UPR for engagement with NGOs and Indigenous Peoples’ organizations across Canada, the Federal Government has declined to provide any similar funding for Canada’s Second UPR.

More than in most other countries, hunger, homelessness and poverty in Canada result from governments’ choices. These choices are not the result of resource scarcity. In fact, it has been documented in recent years that the healthcare costs resulting from poverty, homelessness and malnourishment in Canada exceed the costs of ensuring access to adequate housing and food. People living with poverty and homelessness in Canada have been increasingly stigmatized, criminalized and denied access to justice or rights. They are victims of discriminatory policy and of growing socio-economic inequality. While hunger and homelessness in Canada is less severe than in impoverished countries, the fact that these deprivations of dignity and security and sometimes of life itself result from governmental choice and discriminatory policies which stigmatize those who are poor or homeless rather than from scarcity of resources must be cause for heightened concern in a human rights review.

**Recommendation:** *Concerns should be raised during Canada’s UPR about evidence of a diminished commitment to constructive dialogue and meaningful accountability to human rights standards, both to stakeholders within Canada and to international human rights monitoring bodies and special procedures. Canada should be asked whether it is prepared to recommit to meaningful and constructive dialogue with UN human rights bodies and to recognize and support the critical role of independent human rights advocacy by civil society and Indigenous Peoples’ organizations.*

*Canada should be asked to confirm that affluent countries are accountable for violations of economic, social and cultural rights as are developing countries, that compliance must be assessed relative to resources available and that at a minimum, Canada should immediately put in place rights-based strategies and develop framework legislation to address homelessness, hunger and inadequate income.*

#### D. Provincial/Territorial Accountability

In its responses to recommendations in its first UPR, Canada invoked jurisdictional divides in a manner which erodes meaningful accountability of the State Party as a whole. In refusing to accept the recommendation for a national strategy to reduce poverty, Canada stated that “Provinces and territories have jurisdiction in this area of social policy and have developed their own programs to address poverty.” However, as was well documented by the House of Commons Committee considering the Federal role in addressing poverty, the Federal Government must play a significant role in any poverty reduction strategy, through such programs the Canada Pension Plan (CPP), the Old Age Security (OAS) program, the Guaranteed Income Supplement (GIS), the Canada Child Tax Benefit (CCTB) and the National Child Benefit Supplement (NCBS), Employment Insurance (EI), investments in early learning and child care, affordable housing, disability-related income support programs, and Aboriginal programming. Provinces and territories must also play an important role in directly administering housing and income support programs. These complementary and overlapping roles and strategies require co-ordination.

CCPI and SRAC have supported joint submissions from civil society and Indigenous Peoples’ organizations regarding the need for improved federal-provincial-territorial mechanisms for the implementation of human rights through joint rights-based strategies as well as more effective follow-up to concerns and recommendations of UN treaty monitoring bodies. The current mechanism through the Continuing Committee of Officials on Human Rights is completely inadequate. Federal framework legislation is required to implement new co-ordination and leadership. It is also critical for national human rights institutions in Canada, including both provincial/territorial human rights commissions and the Canadian Human Rights Commissions, and their associated tribunals, to be given broader mandates to provide effective remedies to violations of all human rights, including economic, social and cultural rights and to hold the different levels of government jointly accountable for the implementation of human rights. The mandate of most human rights institutions in Canada is restricted to non-discrimination and equality and does not extend to many other human rights under ratified human rights treaties. This limited mandate of Canada’s national human rights institutions is incompatible with the Paris Principles.

Section 36(1) of the *Constitution Act, 1982* recognizes a joint commitment of federal provincial and territorial governments to providing “essential public services of reasonable quality.” In its *Core Document* Canada described section 36 as being “particularly relevant in regard to ... the protection of economic, social and cultural rights.”<sup>2</sup> A new framework of shared governmental commitments to implementing and progressively realizing social rights in Canada is necessary to replace the existing Social Union Framework Agreement, and to ensure more effective implementation of Canada’s international human rights obligations in the context of Canadian federalisms.

**Recommendation:** *Canada should be asked to recommit to more effective mechanisms for ensuring meaningful accountability of all levels of government to the implementation of human rights. This will require, among other things, new framework legislation at the national level to ensue implementation of human rights; procedures for legislative and parliamentary hearings to follow up on concerns and recommendations from UN human rights bodies; expanded mandates for national (both provincial/territorial and federal) human rights institutions, and assigning parliamentary and legislative committees responsibility for implementation of international human rights obligation.*

---

<sup>2</sup> Canadian Heritage, *Core Document forming part of the Reports of States Parties: Canada* (October 1997), online: Canadian Heritage <<http://www.pch.gc.ca/ddp-hrd/docs/core-eng.cfm>>. The document was submitted by Canada pursuant to HRI/CORE/1 sent to States parties by note verbale of the Secretary General, G/SO 221 (1) of 26 April 1991.

*A new federal/provincial/territorial framework agreement should be negotiated to replace the Social Union Framework Agreement. The new agreement should explicitly recognize a shared commitment of all levels of government to implementing social rights in Canada. Governments should promote the recognition of section 36 of the Constitution Act, 1982 as an enforceable constitutional commitment of all governments in Canada to ensure fundamental social rights within the context of Canadian federalism.*

#### **E. Judicial Accountability for the Provision of Effective Remedies**

Canada is a dualist country. Rather than incorporating human rights treaties directly into domestic law, Canada relies primarily on its domestic constitutional, human rights and statutory law to provide for effective domestic remedies for violations of rights contained in ratified human rights treaties. Prior to ratifying a human rights treaty, federal and provincial governments undertake reviews of legislation and policy and where necessary, amend domestic legislation to ensure conformity with ratified international human rights treaties. Periodic reviews and optional complaints procedures provide ongoing assessments of compatibility of domestic law with international human rights law.

Conformity of domestic law in Canada with ratified international human rights law relies heavily on a central interpretative principle that is fundamental to the rule of law in dualist countries such as Canada, and which has been affirmed by the Supreme Court of Canada. The Supreme Court has affirmed that the *Canadian Charter of Rights and Freedoms* (the *Charter*) and all domestic laws and regulations must, wherever possible, be interpreted by courts, governments and decision-makers, in a manner consistent with international human rights law. As Justice L’Heureux-Dubé noted for the majority of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”<sup>3</sup>

The *Canadian Charter* is the preeminent guarantee of human rights in Canada and, thus, the primary vehicle for the implementation of Canada’s international human rights obligations.<sup>4</sup> The Supreme Court of Canada in *Slaight Communications v Davidson*<sup>5</sup> affirmed that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”<sup>6</sup> In that case the Court pointed to Canada’s ratification of the *ICESCR* as evidence that the right to work must be considered a fundamental human right, to be balanced with the right to freedom of expression explicitly guaranteed under the *Canadian Charter*.<sup>7</sup> While the *Canadian Charter* does not contain explicit protections of most economic, social and cultural rights, the Supreme Court of Canada has recognized that broadly framed rights such as the right to life, to security of the person and to the equal benefit of the law may be interpreted as including economic and social rights such as the right to housing, food and an adequate standard of living.

As noted by the CESCR in its General Comment 9 on the domestic implementation of the Covenant, effective remedies may be provided in many different types of administrative fora as well as in courts. Administrative remedies, however, must conform with principles of accessibility, affordability, timeliness,

---

<sup>3</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71.

<sup>4</sup> *Ibid* at para 70; *R v Ewanchuk*, [1999] 1 SCR 330 at para 73.

<sup>5</sup> *Slaight Communications v Davidson*, [1989] 1 SCR 1038.

<sup>6</sup> *Slaight Communications*, *supra* note 5 at 1054 citing *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 59 [*Alberta Reference*].

<sup>7</sup> *Ibid* at 1056-7.



effectiveness and independence. Administrative decision-makers, like courts, must take into account international human rights obligations.

In this context, it is critical that Canadian governments promote interpretations of domestic law that ensure effective remedies to violations of ratified international human rights law. Rather than promoting decision-making informed by international human rights values, however, Canadian governments have done the opposite. They have argued before courts and administrative bodies that international human rights are not enforceable and are irrelevant in interpreting the *Canadian Charter*. The CESCR has emphasized its ongoing concern about **“the practice of governments of urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights, and the inadequate availability of civil legal aid, particularly for economic, social and cultural rights.”** (CESCR 2006., par. 11) The CESCR has accurately described how Canada’s position on the non-justiciability of ESC rights has resulted in the denial of effective remedies domestically: **“The State party’s restrictive interpretation of its obligations under the Covenant, in particular its position that it may implement the legal obligations set the Covenant by adopting specific measures and policies rather than by enacting legislation specifically recognizing economic, social and cultural rights ...”** has resulted in a **“lack of legal redress available to individual when governments fail to implement the Covenant, resulting from the insufficient coverage in domestic legislation of economic, social and cultural rights.”** (CESCR 2006, par. 11)

The Federal Government has also sought to deny access to the courts to advance important rights claims under the *Canadian Charter*. After informing the CESCR, in its May 2006 review, that the Federal Court Challenges Program provides important support for disadvantaged Canadians to take forward legal challenges to clarify government obligations, noting that funding had been extended to 2009, the Federal Government proceeded, in November, 2006, to cancel **all** funding to the program. The Federal Government has reinstated funding for language rights cases, but has refused to reinstitute funding for Charter cases based on equality rights.

Since Canada’s first UPR, access to justice for those living in poverty has suffered further setbacks. The following are some of the more important cases:

**Challenge to inadequate legal aid ruled non-justiciable:** The Canadian Bar Association sought to challenge continued cuts to civil legal aid for poor people, citing Canada’s international human rights obligations to ensure access to justice for poor people as a source for the interpretation of the right to security of the person and the right to equality under the *Canadian Charter*. The Government of British Columbia argued that international human rights law is not enforceable by courts and ought therefore to be ignored. The Court dismissed the claim as being non-justiciable. (*Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92)

**Discrimination on the Ground of Socio-Economic Status (poverty) permitted in access to utilities:** (*Boulter v. Nova Scotia Power Incorporated*, 2009 NSCA 17) Low income households unable to afford rising utilities rates challenged a regulation prohibiting utilities companies from charging lower rates to low income households in order to provide more affordable rates. Claimants argued that preventing lower prices for poor households violated the right to equality and reasonable accommodation of the poor. They cited the CESCR’s recognition of socio-economic situation as a ground of discrimination as a persuasive authority encouraging the Court to ensure equivalent protection under the Canadian Charter. However, the Attorney General for Nova Scotia argued that poverty or socio-economic status should not be recognized by courts in Canada as a prohibited ground of discrimination because it is not an “immutable” personal characteristic. The Court of Appeal ignored international human rights law and found in favour of the Government. Leave to Appeal was denied by the Supreme Court of Canada.

**Fees permitted to discriminate against the poor in access to justice.** (*Toussaint v. Canada (AG)* 2011 FCA 213). An impoverished undocumented migrant seeking humanitarian and compassionate review of an application for permanent residency under the *Immigration and Refugee Protection Act* challenged the Federal Government's refusal to consider waiving the fee of \$550 in circumstances where poverty made it impossible to pay it. The Government of Canada argued that international human rights law recognizing socio-economic status as a ground of discrimination should be ignored and that discrimination on the ground of poverty and denial of access to justice on the basis of poverty is permitted under the *Canadian Charter*.<sup>8</sup> The Federal Court of Appeal found in favor of the Government of Canada on the constitutional issues. Leave to appeal was denied by the Supreme Court of Canada

**Undocumented Migrants denied access to healthcare necessary for life on the basis of immigration status.** (*Nell Toussaint v. Attorney General of Canada*, 2011 FCA 213) An undocumented migrant was denied coverage for healthcare under the Federal Government's Interim Federal Health Program because of her undocumented immigration status. Her life was placed at serious risk by the denial of healthcare. The Federal Court found that her right to life had been violated but that it is in accordance with principles of fundamental justice and thus permitted under section 7 of the *Canadian Charter* to deny healthcare to those who remain in Canada illegally to work. The Court also held that discrimination on the grounds of immigration status is not prohibited under the *Canadian Charter*. The Court declined to interpret the *Canadian Charter* consistently with international human rights law which prohibits violations of the right to life in such circumstances and also prohibits discrimination on the ground of immigration status in access to healthcare. Leave to Appeal to the Supreme Court of Canada was denied. Following on this shocking decision of the Federal Court of Appeal, the Federal Government has now changed its policy in order to deny *additional* classes of migrants access to healthcare, including refugee claimants from designated countries.

**Recommendation:** *Canadian governments should be urged to implement the recommendations of the CESCR to promote rather than oppose judicial interpretations of the Canadian Charter and other domestic law consistent with international human rights. In particular, governments should promote interpretations of the right to life and security of the person and "principles of fundamental justice" under section 7 of the Charter which are consistent with the provision of domestic remedies to violations of the right to adequate housing, the right to food and the right to health under international human rights law. Governments should promote judicial acceptance of prohibited grounds of discrimination under the Canadian Charter consistent with evolving international human rights norms, including protection from discrimination on the grounds of socio-economic status and immigration or citizenship status.*

*The independent judicial arm of governments in Canada must also recognize their obligations under international human rights law to interpret and apply Canadian law so as to ensure, wherever possible, that domestic remedies are provided to violations of international human rights. The Supreme Court of Canada should play a more decisive leadership role and ensure that critical issues of related to the scope of the Charter's protection from poverty and homelessness are not continuously denied leave to appeal. The National Judicial Institute, responsible for judicial training, should provide further training of judges in their responsibilities to consider international human rights law. Tribunals and administrative decision-makers should be better trained in their obligations to consider and apply international human rights in the reasonable exercise of discretion.*

*The Government of Canada should be asked to commit to immediately restoring healthcare coverage to all immigrants who otherwise lack access to healthcare and have no means to pay for it themselves. Discrimination on the grounds of immigration status in access to healthcare should be eliminated.*

---

<sup>8</sup> *Toussaint v. Canada (AG)* 2011 FCA 213

*Appropriate measures should be taken to ensure differential pricing of utilities so as to ensure access to heat and electricity by low income households.*

*Canada should be asked to ensure that fee waiver is available to those who are unable to afford fees charged for accessing any administrative or judicial procedures in order to ensure equal access to justice and the rule of law. Access to civil legal aid or funded counsel must be ensured for those in poverty wherever human rights are at stake in judicial or administrative procedures.*

## **F. Conclusion**

Disadvantaged groups in Canada are hoping that in the context of the Second UPR of Canada, the Human Rights Council will affirm in no uncertain terms the obligations of affluent countries to fully implement ESC rights, through both adequate programs, and effective remedies. If the standards of “the maximum of available resources” and “by all appropriate means, including legislative measures” in article 2(1) of the ICESCR are to mean anything, these standards must surely mean that a country like Canada is obliged to design programs that provide adequately for those in need of food, clothing and housing, and design its domestic legal system to ensure effective remedies.

Civil Society and Indigenous Peoples in Canada have always placed high hopes and expectations on UN procedures. Canada’s historic commitment to international human rights has made it possible, in the past, to ensure that Canada is held to a high standard, based on its economic prosperity and its traditional strengths in the field of human rights. As noted above, the present government in Canada is calling into question the integrity of Canada’s commitments to universal human rights accountability. It is hoped that Canada’s Second Periodic Review will provide an occasion for Canada to restore its historic commitment to international human rights and to engage in a more constructive manner with international human rights review. Canada has the opportunity to use this UPR to commit to designing and implementing an effective human rights framework for addressing serious human rights concerns and to put in place long term mechanisms for effective domestic accountability and remedies. We hope the opportunity will not be missed.