

Poverty and the Denial of Effective Remedies: Submission of the Charter Committee On Poverty Issues For the UPR of Canada

A. Introduction

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

CCPI has appeared before a number of UN Human Rights treaty monitoring bodies and has been granted leave to intervene in twelve cases at the Supreme Court of Canada.

Two key points that CCPI wishes to focus on are:

- 1. The violations of the right to an adequate standard of living**, leading to widespread hunger and homelessness in one of the most affluent countries in the world, represent serious contraventions of both economic, social and cultural (ESC) and civil and political rights. These violations have been the repeated subject of concerns and recommendations from human rights treaty monitoring bodies, yet no action has been taken to remedy them.
- 2. A critical component of violations of the right to an adequate standard of living in Canada is the violation of the right to effective remedies.** Judicial and other remedies that were previously available to those denied assistance to cover basic requirements, have been revoked. Potential remedies under the *Canadian Charter of Rights and Freedoms* have been consistently opposed by governments in Canada, funding for constitutional challenges has been eliminated, and the mandate of national human rights institutions has remained restricted, in non-compliance with the Paris Principle. Despite repeated recommendations from treaty monitoring bodies for specific measures to provide effective remedies, there is still no place for someone who is denied adequate housing, adequate food or adequate income to go for a hearing and an effective remedy.

B. Violations of the Right to an Adequate Standard of Living

Violations of the right to an adequate standard of living under the ICESCR are to be assessed in relation to the reasonable allocation of available resources. Canada is the richest country of its size on the Human Rights Council. Only the Netherlands and Qatar have higher gross domestic products per capita measured in purchasing power. Canada has an advanced domestic legal system, and a long history of protecting and promoting human rights both domestically and internationally. The UPR of Canada, therefore, will be a key test of whether the Human Rights Council will apply the standards of international human rights law to developed and affluent countries where homelessness, hunger and poverty are clearly matters of choice, rather than of scarcity of resources.

Canada's envied economic growth and relative affluence has in recent years been accompanied by increasingly widespread homelessness, hunger and poverty – particularly among groups such as women (single mothers in particular), Aboriginal people, people with disabilities, newcomers, racialized groups and youth.

Canada has led the G8 in economic growth in recent years, and it is the only country among the G8 to have posted a decade of consecutive budget surpluses. At the same time, Canada has implemented some of the most dramatic cuts to social programs.

Concerns about the effects of these retrogressive measures on the enjoyment of fundamental human rights of the most vulnerable groups have been central to reviews of Canada by a number of treaty monitoring bodies over the last fifteen years. In its 1993 review of Canada, the CESCR first sounded the alarm about the extent of poverty and the emerging problem of homelessness. It expressed heightened concern in 1998 when it learned that the problems had become significantly worse. In its 2006 review of Canada the CESCR found that even after significant economic growth and reduced unemployment, homelessness and hunger had increased. The CESCR noted that:

- **in most provinces and territories, social assistance benefits are lower than a decade ago, that they do not provide adequate income to meet basic needs for food, clothing and shelter, and that welfare levels are often set at less than half the Low-Income Cut-Off. (par. 21)**
- **low income parents may be forced to relinquish their children into foster care because of inadequate housing, particularly single mothers and Aboriginal and African Canadian families(CESCR 2006 par. 24)**
- **more than 2 million people, or more than 7% of the population suffers from food insecurity (par. 27)**
- **the estimated number of homeless in Canada ranges from 100,000 – 250,000 and more than 13% are in core housing need (par. 28)**

These concerns have increasingly dominated reviews by other treaty monitoring bodies as well. The UN Human Rights Committee has pointed out that homelessness in Canada has severe health consequences and may even lead to death, concluding that the obligation to protect the right to life includes an obligation to take positive measures to address homelessness.¹ The Human Rights Committee has also echoed the concern of the CESCR about the discriminatory consequences of social program cuts on disadvantaged groups such as women, children, people with disabilities and indigenous people.² Other treaty monitoring bodies – the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee on the Rights of the Child (CRC) and the Committee on the Elimination of Racial Discrimination (CERD) – have echoed the same alarm about the disparate effects which attacks on social programs have had on vulnerable groups.

Treaty monitoring bodies have made important, concrete and realistic recommendations for addressing the crisis of poverty, homelessness and hunger in Canada, including the following:

- **ensure that minimum wages are increased throughout Canada to a level enabling workers and their families to enjoy a decent standard of living (CESCR 2006 par 47);**
- **address the needs of part-time and temporary workers for unemployment insurance and improved labour protections (CESCR 2006, par. 48)**
- **establish social assistance at levels which ensure the realization of an adequate standard of living for all, reviewing all retrogressive measures taken in social assistance programs since 1995 (CESCR 2006 pars. 52, 53)**
- **address homelessness and inadequate housing as a national emergency by reinstating or increasing, where necessary, social housing programmes for those in need, improving and**

¹ Human Rights Committee (1999) *Concluding Observations of the Human Rights Committee: Canada* UN Doc CCPR/C/79/Add.105 (7 April 1999) para. 20.

² Human Rights Committee, *Concluding Observations on Canada* CCPR/C/CAN/CO/5 (2006) paras. 17, 24.

properly enforcing anti-discrimination legislation in the field of housing, increasing shelter allowances and social assistance rates to realistic levels, and providing adequate support services for persons with disabilities (CESCR 2006 par 62).

None of these critical recommendations has been implemented. None has been the subject of focused consideration by a parliamentary committee or put on the agenda of a federal-provincial-territorial inter-ministerial meeting. Government officials have largely dismissed the critiques of the CESCR. As Professor Craig Scott has observed, the Federal Government's reactions to criticisms from UN treaty monitoring bodies has been a "mix of disingenuous complacency, inconsistency and hypocrisy."³ The UPR is an ideal opportunity for the Government of Canada to take full consideration of these and other recommendations in order to address the unacceptable levels of poverty, homelessness and hunger among vulnerable groups in Canada.

C. The Denial of Effective Legal Remedies

Much of the potential benefit of the UPR in Canada would be lost if the focus were restricted to the need for program and policy changes without also addressing the fundamental changes needed in Canada to ensure access to effective remedies for violations of economic, social and cultural rights and violations of the right to life and the right to equality linked to hunger, homelessness and loss of custody of children because of poverty.

There has been considerable conflict between Canada and treaty monitoring bodies, particularly the CESCR, regarding the principle of effective remedies. As was clear in the recent Working Group for the Optional Protocol to the ICESCR, Canada stands behind a minority view at the UN, remaining skeptical that progressive realization of ESC rights, linked to resource allocation decisions, ought to be the subject of judicial review or to an international complaints procedure. Canada remains a dualist country such that international human rights treaties are not directly enforceable before Canadian courts and has argued that it is under no obligation to make ESC rights justiciable within its domestic legal system.

Partly in response to this issue arising in the review of Canada in 1998, the CESCR adopted General Comment No. 9 on the Domestic Implementation of Covenant Rights in order to clarify the obligations of states parties with respect to domestic implementation of the ICESCR. In General Comment No. 9 the CESCR clarifies that while Canada and other States parties have some leeway under international human rights law to determine the appropriate means of providing for effective remedies to violations of ESC rights – be they judicial or administrative – they cannot exempt itself from the overall obligation to provide for effective domestic remedies. The means chosen by the state must be adequate to give effect to the rights in the *ICESCR* and in many cases must include some component of judicial review. The CESCR clarified that the protection for social and economic rights should be comparable to, and integrated with, the protection provided for civil and political rights. States parties are thus required to promote and ensure consistent interpretation of domestic law, particularly in the area of equality and non-discrimination, and through the adoption of necessary legislative measures, in order to provide for effective remedies to ESC rights.

Retrogressive measures with respect to the right to an adequate standard of living in Canada have been two-pronged. Not only have governments in Canada imposed unprecedented cuts to benefits and

³ Scott, C. 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?', *Constitutional Forum*, Vol. 10, No. 4 (1999), pp. 97-111

coverage in social programs, they have also removed and denied effective remedies to violations of Covenant rights resulting from these cuts.⁴

As noted by the CESCR in its 1998 review, the revoking of the *Canada Assistance Plan* (“CAP”) in 1996 removed the ability of the poor in Canada to take forward court challenges of provincial social assistance programmes for failing to cover basic requirements including food, clothing, housing and other necessities (CESCR 1998 par. 19). The CESCR recommended, in its 1998 review, measures to restore effective domestic remedies for violations of the right to adequate assistance for food, clothing and housing, including a “legally enforceable right to adequate assistance for all persons in need.” (1998, par. 40). In 2006, noting the absence of any follow-up to this and other crucial recommendations for effective domestic remedies, the CESCR reiterated its concern about “[t]he absence of a legally enforceable right to adequate social assistance benefits for all persons in need on a non-discriminatory basis ...” (2006, par. 11).

The CESCR has become increasingly frustrated with Canada’s recalcitrant insistence that it may simply choose, on the basis of an assertion that ESC rights are non-justiciable, to deny those living in hunger or even dying on the cold streets of Canada’s cities, any effective domestic remedies. The CESCR noted the negative effects of the **“State party’s restrictive interpretation of its obligations under the Covenant, in particular its position that it may implement the legal obligations set forth in the Covenant by adopting specific measures and policies rather than by enacting legislation specifically recognizing economic, social and cultural rights ...” and the resulting “lack of legal redress available to individuals when governments fail to implement the Covenant, resulting from the insufficient coverage in domestic legislation of economic, social and cultural rights.”** (CESCR 2006, par. 11)

In effect, the Canadian position would immunize resource allocation decisions in one of the richest countries in the world from any meaningful accountability to ESC rights. It will be critical to the integrity of international human rights norms that the Human Rights Council affirm in unambiguous terms that governments in affluent countries such as Canada must be held equally accountable to economic and social rights as to civil and political rights, such that effective remedies are ensured to all human rights.

The Canadian Charter of Rights and Freedoms

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

Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect ... In particular, s. 15 [the equality provision] and s. 7 [which guarantees the right to life, security and liberty of the person] embody the notion of respect of human dignity and integrity.⁵

Louise Arbour, the former UN High Commissioner of Human Rights and a former Justice of the Supreme Court of Canada agrees that ‘the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law.’⁶

⁴ Porter, B. “Claiming Adjudicative Space: Social Rights, Equality and Citizenship” in M. Young, S. Boyd, G. Brodsky, S. Day eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: U.B.C. Press, 2007) 77-95.

⁵ [R. v. Ewanchuk](#) [1999] 1 S.C.R. 330 at para. 73.

⁶ L. Arbour, “‘Freedom From Want’ – From Charity to Entitlement”, LaFontaine-Baldwin Lecture, Quebec City (2005), p. 7, available at: www.unhchr.ch/hurricane/hurricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument

The extent to which effective domestic constitutional remedies are available for ESC rights in Canada largely depends on the interpretation of the expansive provisions of the *Canadian Charter of Rights and Freedoms*. However, while rights claimants routinely refer to the ICESCR and other international human rights treaties to guide the interpretation of the Canadian Charter, Canadian governments have consistently opposed interpretations of the provisions of the Charter which would provide remedies to homelessness, hunger or other violations of the right to an adequate standard of living.

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) Not only have governments in Canada continued to oppose interpretations of the Charter rights that would provide remedies to hunger or homelessness, they have also taken further retrogressive measures to deny access to the courts to advance such claims. 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 under the Canadian Charter, 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 since settled a legal challenge by reinstating funding for language rights cases, but has refused to reinstitute funding for Charter cases based on equality rights, despite recommendations from the parliamentary committee on human rights.

Human Rights Legislation

Another area of ongoing concerns among treaty monitoring bodies has been the inadequate protections of ESC rights in Canada under federal and provincial/territorial human rights legislation. Only in Quebec are ESC rights included in human rights legislation, and there ESC rights are not subject to the complaints procedure as other human rights. The CESCR has been recommending since 1993 that all human rights legislation in Canada be extended to include ESC rights. In its 2006 Concluding Observations, the CESCR again urged “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.”⁷

D. Conclusion

Because of longstanding engagement of civil society in the treaty monitoring review process, the jurisprudence emanating from periodic reviews of Canada has been increasingly thorough and rigorous. The concrete and realistic recommendations emanating from these reviews are widely respected by experts and advocates, and frequently referred to in Canada. What has been lacking, however, has been follow-up to concerns and implementation of recommendations by the relevant levels of government.

Disadvantaged groups in Canada are hoping that in the context of the 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

⁷ Para. 51 of the [Concluding Observations on Canada, E/C.12/1/Add.31](#) (10 December 1998)