CCPI

CHARTER COMMITTEE ON POVERTY ISSUES

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SRAC Social Rights Advocacy Centre

www.socialrights.ca

ACCESS TO JUSTICE AND EFFECTIVE REMEDIES FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN CANADA

SUBMISSION OF THE CHARTER COMMITTEE ON POVERTY ISSUES (CCPI) AND THE SOCIAL RIGHTS ADVOCACY CENTRE (SRAC) FOR THE LIST OF ISSUES PRIOR TO CANADA'S 7TH PERIODIC REPORT

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1. INTRODUCTION

i. Who we are:

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 people living in poverty 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 many 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 fourteen cases at the Supreme Court of Canada.*

The Social Rights Advocacy Centre (SRAC) *is a non-profit NGO formed in 2002 for the purpose of ensuring the equal enjoyment of economic, social and cultural rights through human rights research, public education and legal advocacy. SRAC produces extensive research and publications on social rights.*

ii. Overview. Domestic Implementation of the Covenant in the Canadian Legal System.

1. Canada is a dualist country and a constitutional democracy. Access to justice for ESC rights relies on the interpretation and application of domestic law, particularly the Canadian Charter of Rights and Freedoms (Canadian Charter) consistent with international human rights ratified by Canada. This interpretative obligation of courts, as described by the CESCR in General Comment No. 9, has been affirmed by the Supreme Court of Canada, first in the case of *Slaight Communications v Davidson* in relation to the ICESCR[1] and in many subsequent decisions. The Court has stated that: "In interpreting the scope of application of the Charter, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."[2]

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[1] *Slaight Communications v Davidson* [1989] 1 S.C.R. 1038, 1056-57.

[2] *R. v. Hape,* [2007] 2 S.C.R. 292, 2007 SCC 26 para 56.

2. Broadly framed rights in the Canadian Charter to life and security of the person (s. 7) and to equality (s.15) can and should be interpreted so as to ensure compliance with the ICESCR, by providing effective systemic remedies when life or personal security is placed at risk because of homelessness, hunger or denial of access to health care.[3] However, Canadian governments and courts have opposed interpretations of the Charter that would provide remedies to violations of ESC rights. They have asserted that ESC rights are non-justiciable and therefore Charter claims to positive measures to ensure access to housing or health care as component of the right to life or equality must be dismissed as non-justiciable. Rather than adopting interpretations of the right to life and equality consistent international human rights obligations under both the ICESCR and the ICCPR, governments have urged courts, with considerable success, to treat the two categories of rights as entirely separate.

3. It is hoped that the upcoming review of Canada will provide an occasion for a serious review of Canada's position on the justiciability of ESC rights and the interpretation of the Canadian Charter in cases involving the interdependence of rights to life, security of the person and equality with ESC rights such as the right to housing, food, social security, health and an adequate standard of living.

4. In accordance with Article 28 of the Covenant, we suggest that the Committee should, in its list of issues, engage directly with the obligations of all levels of government, including provincial/territorial governments, and all branches of government, including the judiciary. Canada's federal structure places key obligations for the implementation of ESC rights on provinces and territories, with significant responsibilities also delegated by provinces and territories to municipalities. If the review does not address the obligations of provinces and territories, particularly with respect to access to justice, it will not be effective.

5. Similarly, because Canada's dualist legal system relies on the independent judiciary to ensure access to effective remedies through appropriate interpretations of domestic law, an effective review must engage with the judiciary and with administrative tribunals. We encourage the Committee to request information not only from the federal government but also, through the federal government, from provinces and territories, as well as from courts and administrative tribunals.

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[3] Martha Jackman and Bruce Porter, "Social and Economic Rights", in Peter Oliver, Patrick Maklem & Nathalie DesRosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 843-861.

2. ENSURING ACCESS TO JUSTICE AND EFFECTIVE REMEDIES FOR ESC RIGHTS UNDER THE CANADIAN CHARTER

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

1. In its 2016 Concluding Observations on Canada, the CESCR reiterated previous concerns about the position taken by governments in Charter cases in which litigants have sought remedies to violations of Charter rights to life, security of the person, or equality resulting from homelessness or denials of health care. Canada had previously informed the Committee that the Supreme Court of Canada has recognized that the rights to life and security of the person could be interpreted to include ESC rights. Canada referred the Committee to the Supreme Court's 1986 decision in *Irwin Toy*[1] in which the Court found that "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter" should not be excluded from the scope of section 7 at an early stage of Charter interpretation.[2]

2. The only case in which the Supreme Court has addressed the question left open in the *Irwin Toy* decision was the 2003 *Gosselin*[4] case, dealing with dramatically reduced social assistance rates for recipients under the age of thirty and not enrolled in workfare. Justice Louise Arbour, in dissent, found in that case that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities. The majority of the Court was not prepared to decide that issue on the basis of the evidence in that case but left open the possibility of adopting this 'novel' interpretation of the right to security of the person in a future case.[3] Since the *Gosselin* case, the Supreme Court of Canada has not granted leave to appeal in any cases in which this issue would be addressed.

3. Lower courts have assumed that section 7 of the Charter should not be interpreted to include ESC rights, but in fact the question remains a central unresolved issue of Canadian Charter jurisprudence. The eventual resolution of this question by the Supreme Court of Canada will significantly determine the extent to which Canada is able to comply with the obligation to ensure access to effective remedies to ESC rights.

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[4] *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84

Interpretation of the Charter Consistent with the ICESCR

1. **We recommend that the Committee request information from the federal government and from each provincial and territorial government about whether they promote interpretations of sections 7 and 15 of the Charter consistent with the interdependence of human rights, so as to ensure access to effective remedies for Covenant rights, as outlined in General Comment No. 9. All governments should be asked to provide information about any Charter cases heard since 2016 in which claimants have cited the ICESCR as an aid to interpreting the Charter, explaining what positions were taken by governments regarding the application of the Covenant in those cases.**

ii. Principles Guiding the Attorney General of Canada in Charter Litigation

4. The CESCR, in its 2016 Concluding Observations, referred to "promising developments and the Government's commitment to review its litigation strategies, economic, social and cultural rights." (para 5). The Committee was referring to the fact that after being elected in 2016, Prime Minister Trudeau had stated in his mandate letter to the Attorney General that she should "review our litigation strategy. This should include early decisions to end appeals or positions that are not consistent with our commitments, the Charter or our values." The Committee recommended in 2016 that Canada "implement its commitment to review its litigation strategies in order to foster the justiciability of the economic, social and cultural rights. The State party should engage civil society and organizations of indigenous peoples in that revision, with a view to broadening the interpretation of the Canadian Charter of Rights and Freedoms , notably sections 7, 12 and 15, to include economic social and cultural rights, and thus ensure the justiciability of Covenant rights."

5. On December 10, 2018, without any engagement with civil society that we are aware of, the Minister released the *Principles guiding the Attorney General of Canada in Charter litigation*. We were shocked to see that there is not a single reference to the "values" referred to in the Prime Minister's mandate letter, or to the obligation to interpret the Canadian Charter consistently with international human rights ratified by Canada, as affirmed by the Supreme Courta. While affirming a commitment to the rule of law, the Guidelines do not reference any broader rule of law obligations with respect to international human rights as described in the CESCR's General Comment No. 9. The Guidelines authorize Justice lawyers to make "any viable argument" to defend against Charter challenges, with little or no accountability to Charter or international human rights values.

Revising the *Principles guiding the Attorney General of Canada in Charter litigation*

2. The Committee should request information from the federal government about how it implemented the Committee's recommendation in paragraph 6 of the 2016 Concluding Observations in its review of litigation strategies under the Charter. Canada should be asked if the current Attorney General will consider revising the *Principles guiding the Attorney General of Canada in Charter litigation* adopted by the previous Attorney General, to include references to values such as respect for the inherent dignity of the human person, commitment to social justice and equality, and to Canada's commitments to international human rights, including ESC rights.

iii. Accountability of the independent judiciary and administrative tribunals regarding the domestic implementation of the Covenant

6. Canada's commitments to implement the ICESCR apply to all parts of the State, including the judiciary. As noted by the Committee in General Comment No. 9, the obligation of the judicial branch with respect to the interpretation of domestic law in conformity with binding international human rights law is critical to a State's compliance with the Covenant. This is particularly true in Canada, where access to effective remedies relies on interpretation of broadly framed rights in the Charter and of other law. In its 2016 Concluding Observations the Committee recommended that Canada "improve human rights training programmes in order to ensure better knowledge, awareness and application of the Covenant, in particular among the judiciary and law enforcement and public officials."

Accountability of the Judicial Branch and Public Officials

3. Canada should be asked whether its recommendation in paragraph 6 of the 2016 Concluding Observations, to ensure better knowledge, awareness and application of the Covenant among the judiciary, law enforcement and public officials, was referred to the National Judicial Institute, to the courts or to administrative tribunals or to other oversight bodies. If not, could Canada suggest how courts and tribunals could be apprised in future of concerns with respect to the responsibilities of the judicial branch, as described in General Comment No. 9, while fully respecting the independence of the judiciary.

iv. The protection of the right to life in access to private and public health care

7. In *Chaoulli v Quebec* the Supreme Court of Canada considered a claim on behalf of relatively affluent health care consumers, challenging legislation that prevented them from accessing private health care plans, to avoid waiting times for certain essential services in the public health care system.5 In upholding their claim, the Chief Justice explained, that 'the [Canadian] Charter does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the Charter.'6

8. The Chief Justice's statement has been relied upon (incorrectly) by lower courts to suggest that there is no obligation to ensure access to publicly funded health care, een where necessary to protect the right to life. In the case of *Toussaint v. Canada*[7] the courts found that Ms. Toussaint's life placed at sesrious risk, with long term adverse health consequences, after she was denied access to a federal health care programme because of her undocumented status. The Court of Appeal cited the Chief Justice's statement in *Chaoulli* and concluded that to require the State to provide Ms. Toussaint with health care necessary to protect her life would "expand the law…so as to create a new human right to a minimum level of health care."[8]

9. In a subsequent case, challenging targeted restrictions on access to health care for refugees from designated countries, (implemented after the Federal Court of Appeal's decision in *Toussaint*), the Chief Justice's statement was again relied upon to affirm that 'the current state of the law in Canada is that section 7 of the Charter's guarantees of life, liberty and security of the person do not include the positive right to state funding for health care'.[9]

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[5] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791

[6] Ibid para 104.

[7] *Toussaint v. Canada (Attorney General), 2011 FCA 213*.

[8] Ibid, paras 76 – 79.

[9] *Canadian Doctors for Refugee Care v. Canada (Attorney general),* 2014 FC 651.

10. The "current state of the law" within lower courts, is. surprisingly such that the right to life protects access to health care for those who can afford private care, but does not protect the very same interest for those who cannot afford private care and rely on the public health care system. For the rich, the right to life includes access to essential health care but not for the poor.

The right to life and access to health care

4. We recommend that the Committee request clarification from the government of Canada and from provincial governments of their position on whether the right to life should be interpreted to ensure access to health care where necessary for the protection of life, regardless of income, and whether there should be a difference between the protections of the right to life for those who can afford access to private health care and those who rely on public health care.

v. Reconsidering Canada's Response to the Decision of the Human Rights Committee in Nell Toussaint v Canada

11. After being denied leave to appeal to the Supreme Court of Canada, Nell Toussaint filed a petition before the Human Rights Committee. She alleged that the denial of essential health care because of her immigrations status, placing her life at serious risk, violated articles 6 (right to life) and 26 (right to non-discrimination) of the ICCPR.

12. Canada responded very much as it had responded to Ms. Toussaint's Charter claim, pointing out that the right to health is not contained in the ICCPR, and arguing that the right to life under the ICCPR should not be confused with the right to health under the ICESCR.[10] The Human Rights Committee answered this argument by stating that 'the author has explained that she does not claim a violation of the right to health, but of her right to life, arguing that the state party failed to fulfil its positive obligation

[10] Submission of The Government Of Canada on the Admissibility and Merits of the Communication to the Human Rights Committee of Nell Toussaint Communication No. 2348/2014' (2 April 2015) paras 21, 95. <http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Canada%20-%20Submissions%20on%20Merits.pdf>

to protect her right to life which, in her particular circumstances, required provision of emergency and essential health care.'[11]

13. In its decision on the merits, the Human Rights Committee found that Canada had violated the right to life and the right to non-discrimination by denying access to essential health care to Ms. Toussaint on the basis of her irregular immigrations status.[12] The Committee stated that Canada must act to prevent ongoing violations of the rights of undocumented migrants by "reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."[13]

14. In response to the Human Rights Committee's decision, Canada submitted a Letter to the UN Human Rights Committee informing the Committee that Canada would not implement the Human Rights Committee's decision because it does not agree with it. Canada argued that "the Committee's views conflate the right to life with an economic and social right. Moreover, the Committee's views fail to distinguish between providing access to health care and providing state-funded health care coverage."

Implementing the Remedy in Toussaint v Canada.

5. We recommend that the Committee request that Canada explain its refusal to implement the remedy requested by the UN Human Rights Committee in *Nell Toussaint v Canada* Communication No. 2348/2014 and ask if that response might be reconsidered, since lives may be at stake and Canada's views are clearly at odds with international human rights norms. The Committee should additionally inquire if courts have been informed about the Human Rights Committee's decision in the Toussaint case.

3. FEDERAL AND PROVINCIAL/TERRITORIAL HUMAN RIGHTS LEGISLATION

i. ESC rights in human rights legislation

[11] *Nell Toussaint v Canada* Communication No. 2348/2014 (2 April 2015) CCPR/C/123/D/2348/2014 para 10.9.

[12] Ibid, para 10.9.

[13] *Nell Toussaint v Canada* Communication No. 2348/2014' (2 April 2015) para 13.

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

16. Provinces and territories in Canada have key responsibilities for implementing ESC rights, so provincial territorial legislation is a critical source of protection of these rights. The only province to have included ESC rights in provincial human rights legislation is Quebec, and even there, the enforcement of ESC rights has not been put on an equal footing with other rights.

17. Even under the current mandates of human rights commissions and tribunals in Canada, focused on non-discrimination and equality, there is still significant scope for providing effective remedies for violations of ESC rights. However, when such claims have been advanced, they have met with significant opposition from governments. A particularly concerning example is the response by the federal government to the historic decision of the Canadian Human Rights Tribunal upholding the complaint filed by the *First Nations Child and Family Caring Society of Canada*[14] described in their submissions to the Committee, which we endorse.

Human Rights Legislation and ESC rights

6. Canada should be asked to report on cases brought before human rights tribunals in which the Covenant has been applied to interpret provincial /territorial or federal human rights legislation in accordance with General Comment No. 9, para 15. Canada should be requested to provide information on whether federal or provincial/territorial governments have made changes or are contemplating making changes to human rights legislation to ensure access to justice and effective remedies to violation of ESC rights. Canada should report on actions by human rights commissions or other agencies to deal with ESC violations resulting from activities of businesses or private actors in the area of housing, extractive industries, pharmaceutical industries, agriculture or other areas

[14] *Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* (26 January 2016), online: CHRT <canlii.ca/t/gn2vg>.

ii. Failure to Provide Effective Systemic Remedies when Adequate Supports and Services for Persons with Disabilities for community living are not Provided.

18. In Nova Scotia, following the Province's decision to impose a decades-long freeze on the creation of new community based options for people with disabilities, three individual complainants were institutionalized in a locked psychiatric ward and other large congregate care facilities —for no medical or legal reason ---solely because the supports and services they required to live in the community were not available. The individuals' experiences reflect the Province's treatment of persons with disabilities generally, continuing to affect the lives of thousands of persons with disabilities over the course of three decades.

19. The three individual complainants with disabilities and an NGO, the 'Disability Rights Coalition', filed complaints under the Nova Scotia Human Rights Act alleging discrimination based on the grounds of disability and source of income, in being denied accommodative social assistance to live in the community, resulting in unnecessary institutionalisation, homelessness and other inappropriate living situations. The Disability Rights Coalition is seeking a systemic remedy against the Province that requires the development and implementation of an integrated plan, that includes benchmarks, goals and timeframes, to provide accommodative supports and services to all those persons with disabilities in institutions and on the Disability Supports Program waitlist who are seeking a community based option, including a small option home in the community. The remedy sought includes the enactment of legislation to codify an enforceable right to accommodative supports and services for persons with disabilities, in accordance with the UN Convention on the Rights of Persons with Disabilities, with the Nova Scotia Human Rights Commission monitoring and maintaining supervision over the implementation of the remedy in consultation with stakeholders.

20. Rather than acknowledging their obligation under article 19 of the CRPD and articles 2 and 11 of the ICESCR to accommodate the differential needs of persons with disabilities to live and participate fully in their communities, the Attorney General for Nova Scotia argued that there is no constitutional guarantee to a right to housing, and that failing to provide housing in the community with supports to persons with disabilities does not constitute discrimination. The Tribunal dismissed any interpretive role of the right to independent living under international human rights law in interpreting the scope of the protections in the Nova Scotia Human Rights Act.[15] Instead, the Tribunal interpreted equality protections as being restricted to the provision of individual remedies to discrimination, dismissing the claim advanced

[15] *MacLean v. Nova Scotia (Attorney General)*, [2019] N.S.H.R.B.I.D. No. 2 paras 469-475.

by the Disability Rights Coalition for a remedy that would require the Province to provide adequate community housing with supports for the more than 1500 people on the waiting list for housing with supports. The case is under appeal to the Nova Scotia Court of Appeal with the hearing scheduled for May 2020.

Recommendation Re Community-Based Supportive Housing for People with Disabilities

7. Canada should be asked to explain whether the Province of Nova Scotia, as well as other provinces or territories and the federal government, acknowledge that failure to ensure access to the supports and services necessary for community living, resulting in institutionalization of persons with disabilities, violates the rights of persons with disabilities, and explain whether effective systemic remedies are available in such cases. The Province of Nova Scotia should be asked to explain how the position advanced in the Emerald Hall case (*MacLean v. Nova Scotia (Attorney General),* [2019] N.S.H.R.B.I.D. No. 2) conforms with its obligations as described in General Comment No. 9, para 15.

4. INTER-GOVERNMENTAL INITIATIVES AND FRAMEWORKS FOR ACCESS TO JUSTICE

i. Follow-up to Inter-Ministerial Meeting of December 11-12, 2017

21. In 2017 the federal government convened the first inter-ministerial conference on human rights in 29 years. One of the three topics on the agenda was the justiciability and implementation of ESC rights. In the Statement released at the end of the Conference, the Ministers expressed their commitment to strengthening Canada's implementation of ESC rights and to their progressive realization.[16]

[16] Federal-Provincial-Territorial Meeting of Ministers Responsible for Human Rights, Media Statement (December 12, 2019) online https://scics.ca/en/product-produit/news-release-federal-provincial-and-territorial-ministers-from-across-the-country-gather-to-discuss-human-rights/

Follow up to the Federal/Provincial/Territorial Inter - Ministerial Meeting and the commitment to strengthen ESC rights

8. We recommend that the Committee recognize the convening of the first Federal/Provincial/Territorial inter-ministerial meeting on human rights in 29 years, on December 11, 2017, as a positive development, noting also that the justiciability of ESC rights was one of four key issues on the agenda. The Committee should, however, request information about how the commitment to strengthen the implementation of ESC rights, made at the conclusion of the FPT meeting, is being implemented.

ii. Mechanisms for Implementing Covenant rights and following-up on Concluding Observations

22. Another longstanding concern of the Committee has been the ineffectiveness of FPT mechanisms to implement the Covenant and to follow up on concerns and recommendations. The 2017 Inter-Ministerial meeting committed "to enhance FPT collaboration through a senior level mechanism. They also agreed to modernize the mandate of the intergovernmental Continuing Committee of Officials on Human Rights. This entails developing a protocol for following up on the recommendations that Canada receives from international human rights bodies and a stakeholder engagement strategy."

23. To date, however, there has been no evidence of any follow-up to this commitment. What is needed is legislation governing the implementation of international human rights, providing for ongoing monitoring of compliance, hearings into systemic issues, meaningful engagement with stakeholders, provisions for follow-up on concluding observations and implementation of decisions in optional protocol cases.

Implementation Mechanisms

9. We recommend that the Committee request information regarding how the Government of Canada is implementing the commitment made at the 2017 FPT meeting on human rights, to enhance FPT collaboration through a senior level mechanism, to develop a protocol for following up on treaty body recommendations and to develop a stakeholder engagement strategy. The Committee should ask Canada if it would consider adopting legislation to provide for more adequate mechanisms through which to ensure ongoing compliance with the Covenant and to follow up on concerns, recommendations or decisions under the Optional Protocol.

iii. Ensuring Access to Effective Systemic Remedies Through Rights Based Strategies

24. An important positive development in access to justice was the passing of the *National Housing Strategy Act (2019) (NHS Act.)* As described in the submissions of the National Right to Housing Network, the NHS Act affirms, for the first time in Canadian law, that the Canadian government recognizes the right to housing is a fundamental human right and commits to its progressive realization. While the *NHS Act* includes all of the components previously identified by the CESCR as components of a rights-based strategy (goals and timelines, independent monitoring, complaints procedure with access to hearings, provision for remedial responses). Affected groups can make submissions regarding systemic issues to the Federal Housing Advocate and selective systemic issues are referred to a Review Panel for hearings. The government must respond to any remedial recommendations within 120 days. The NHS Act does not provide for judicial remedies, but the alternative accountability mechanisms provided for should complement and reinforce access to judicial remedies under the Canadian Charter and should not be considered a substitute for such remedies.

Access to Justice through legislated rights-based strategies

10. The NHS Act should be recognized as a very positive advance in the implementation of the ICESCR within federal jurisdiction. We recommend that Canada be asked to provide information about co-ordination of goals and timelines and other commitments with provinces and territories, and about whether each province and territory plans to adopt, or has adopted, similar legislation to ensure accountability to the right to housing or other ESC rights. The Committee should also inquire whether Canada intends to adopt similar legislation to implement the right to food security, the right to social security/freedom from poverty, the right to education and other Covenant rights.

iv. Inter-Governmental Framework Agreement to Guarantee ESC rights

25. During the last round of constitutional negotiations in 1992, a social charter was proposed and endorsed by over forty national organizations as a means to provide enhanced accountability for ESC rights within the context of a renewed federalism. There has been little appetite for constitutional reform in Canada since that time and such reform is not on the agenda at present. However, a social charter along the same lines could be enacted through legislation and inter-governmental agreements, without constitutional amendment, built on the joint constitutional commitments in section 36 of the Constitution Act 1982 and the obligations of all governments in Canada under the ICESCR and other international human rights law.

26. In 1999 the Canada's first ministers adopted "A Framework to Improve the Social Union for Canadians".[17] However, the Agreement lacked any accountability mechanisms and has been largely ignored in recent years. 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."[4] Section 36 commitments have been largely ignored by courts and governments.

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[17] Online at https://scics.ca/en/product-produit/agreement-a-framework-to-improve-the-social-union-for-canadians/

Social Union Framework Agreement and a Social Charter

10. The Committee should ask Canada to provide information on whether the "Social Union Framework Agreement" of 1999 needs to be replaced with a more rights-based inter-governmental framework for the implementation of ESC rights. Such a framework would provide for monitoring, adjudication and implementation of ESC rights through federal/provincial/territorial agreements and facilitating joint strategies for the realization of ESC rights. The Committee could also ask if consideration has been given to the idea of a 'social charter' to promote the implementation the Covenant within Canada's federal system, in line with section 36(1) of the Constitution Act, 1982, which Canada has described as being particularly relevant to the protection of ESC rights.

5. CIVIL LEGAL AID, TEST CASE FUNDING AND THE COURT CHALLENGES PROGRAM

27. In *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, the Canadian Bar Association sought to challenge continued cuts to civil legal aid that resulted in unacceptable restrictions on access to justice by people living in poverty, particularly women. The applicants cited Canada's international human rights obligations to ensure access to justice for poor people as a source for the interpretation of the right to security of the person and the right to equality under the *Canadian Charter*. The Government of British Columbia argued that international human rights law is not enforceable by courts and ought therefore to be ignored in this case. The BC Court of Appeal dismissed the claim as being non- justiciable. Access to civil legal aid has been severely restricted in many provinces in Canada. Ontario imposed a cut of $133 million to the legal aid budget in 2019. Funding for test case litigation to assert ESC rights is particularly scarce. The test case funding program of Ontario Legal Aid has been dramatically cut.

28. The Federal Court Challenges Program, which had been cancelled by the previous government, has now been reinstated and extended to include challenges under additional sections of the Charter, including section 7. However, contrary to recommendations from the Committee in earlier reviews, Charter challenges other than language rights challenges under section 23 against provincial or territorial government are ineligible for funding. This means that most cases involving ESC rights are ineligible for funding. In addition, where domestic remedies are exhausted, funding is not provided to file petitions with international human rights bodies.

Access to Justice and Legal Aid

11. The Committee should welcome the federal government's reinstatement of the Court Challenges Programme but ask Canada if it will consider extending funding under the human rights program to include challenges to provincial/territorial law or policy where the case is of national importance. The Committee should inquire whether the program funds follow-up litigation before international human rights bodies when effective remedies have been denied under the Charter. All governments should be asked to provide information on barriers to access to justice for low income persons and to describe measures taken to improve access to civil legal aid.

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

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

[3] *Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84* at paras 82-83.

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