CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND DISADVANTAGED MEMBERS OF SOCIETY: FINALLY INTO THE SPOTLIGHT?

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INTRODUCTION

The *International Covenant on Civil and Political Rights* (*ICCPR*) and the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) are the two central treaties within the United Nations' human rights system.[1] After the adoption in 1948 of the *Universal Declaration of Human Rights* (UDHR) by the UN General Assembly, Cold War politics and different ideologies of appropriate legal protection for human rights clashed over how the moral statements contained in the UDHR should be translated into binding treaty obligations.[2] In the result, states decided to apportion the holistic group of rights found in the UDHR (ranging from Article 3's classical 'liberal' "right to life, liberty and security of the person" to Article 25's "right to a standard of living adequate for . . . health and well-being") into these two separate treaties, the *ICCPR* and *ICESCR*. In so doing, they invented as much as recognized a distinction between so-called "civil and political rights" and so-called "economic, social and rights" that has ever since hovered like an albatross over the development of human rights protection.

For example, even as we approach the year 2000, it still remains something of an open question, for some in Canada's legal community, whether the right to life, liberty and security of the person in section 7 of the *Canadian Charter of Rights and Freedoms*[3] can be 'stretched' so far as to include rights to material assistance and support — a question still formally open even after the very recent judgment in the case of *Baker* v. *Canada* which some had hoped would be used by the Supreme Court of Canada as the opportunity to adopt such a reading of section 7.[4] For those inclined against

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1 *International Covenant on Civil and Political Rights*, adopted 19 December 1966, UN Doc. ST/DPI/246, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*] and *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, UN Doc. A/6316 (1966) 993 U.N.T.S. 3 (entered into force 3 January 1976) [hereinafter *ICESCR*].

2 *Universal Declaration of Human Rights*, adopted 10 December 1948, *reprinted* in 43 A.J.I.L. 127 (Supp. 1949).

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

4 Such an interpretation was left formally open by the Supreme Court of Canada in *Irwin Toy Ltd.* v. *Quebec (Attorney General)* [hereinafter *Irwin Toy*] in which it made clear that "economic" rights in the commercial and corporate context would not be protected by s.7 but that rights of a different "ilk" — those related to material human needs — were not affected by this conclusion: [1989] 1 S.C.R. 927 at 1003–1004. The extent to which such social rights could be interpreted as components of life, liberty and security of the person would be left for future cases. *Irwin Toy* had, however, to be read alongside of a case decided by the Court in the same year, *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1056–1057. Chief Justice Dickson, for a 4-2 majority, found that the *Charter* is to be interpreted in such a way as to give effect to a presumption that the *Charter* offers as least as much protection as rights Canada is bound to ensure under international human rights law; the right on which he placed some reliance in his reasoning (within his s. 1 analysis as to whether an employer's freedom of expression could be justifiably limited in order to protect a former employee) was the right to work as set out in (Article 6) of the International Covenant on Economic, Social and Cultural Rights. However, no Supreme Court case has specifically revisited that which *Irwin Toy* left open. Alongside s. 7, the interpretive evolution of s. 15 of the *Charter* has made it ideally suited to the kind of purposive interpretation that would help give full effect to the *Slaight Communications* presumption. In recent years, the Supreme Court has begun to interpret s. 15's equality rights in such a way that many aspects of "social, economic and cultural rights" should now receive protection in view of the Court's understanding of how the guarantee of equality in s. 15 relates to government responsibility to counteract social inequalities suffered by presumptively disadvantaged and vulnerable groups: *see* notably *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and the discussion of the implications of the *Eldridge* reasoning in Bruce Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend* " (1998) 1 Constitutional Forum 71. In two sets of oral arguments heard in November 1998, the Supreme Court was asked to follow this normative trajectory and confirm that ss. 7 and 15, in combination, should be invested with a content that robustly draws on Canada's international human rights obligations towards disadvantaged members of society: see *Baker* v. *Canada (Minister of Citizenship and Immigration)*, S.C.C. No.

such a broad interpretation, a formalistic conception of international human rights law can be invoked in support of their position. Not only are these two rights mentioned in separate articles of the UDHR (the above-noted Articles 3 and 25) but they are also located in two separate treaties, only one of which — the *ICCPR* — triggers the possibility of a claim procedure analogous to bringing a rights claim under the *Charter*.[5] Thus, so the (legalistic) legal mind might reason, the *Charter* cannot be intended to protect a "social and economic" right such as that to an adequate standard of living. The present comment is not the occasion to lay bare the problematic assumptions behind this line of reasoning.[6] Suffice it to point out that the evocative preamble of each of the sibling treaties sent a normative counter-signal from the moment of the joint adoption in 1966 of the two Covenants. The rights in the two treaties are interdependent in important respects and share the over-arching animus of the ideals that underpin the parent UDHR, as reflected in each Covenant's preamble:[7]

> Recognizing that, in accordance with the Universal Declaration of Human Rights, *the ideal of free human beings* enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, *as well as* his economic, social and cultural rights. . .

25823 and *Godin* v. *New Brunswick (Minister of Health and Community Services* et al.) S.C.C. No. 26005. On 9 July 1999, judgment in *Baker* was rendered: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 [hereinafter *Baker*]. The Court found it unnecessary to address the *Charter* issues, opting instead to decide the case on other grounds. However, L'Heureux-Dubé J., speaking for the entire Court on this point, took care to add something to the formulation of the *Slaight Communications* interpretive presumption by noting that "international human rights law . . . is . . . a *critical influence* on the interpretation of the scope of the rights included in the *Charter*:" *Baker* at para. 70 [emphasis added]. In his minority judgment (partly dissenting, but not on this point), Iacobucci J. (Cory J. concurring) referred to the "interpretive presumption, established by the Court's decision in *Slaight Communications* . . ., and confirmed in subsequent jurisprudence, that administrative discretion involving Charter rights be exercised in accordance with similar international human rights law:" *Baker*, para. 78. For a discussion of the fact situation and the principle stated by the Court in *Baker* about the independent interpretive effect of international human rights treaties on Canadian law without the need to invoke the *Charter*, see text *infra* note 13.

5 A supervisory body called the Human Rights Committee (HRC) is charged with monitoring state compliance through a "state report" procedure under the *ICCPR* itself; states like Canada periodically must submit a written report detailing their records of compliance with the *ICCPR*, defend that report orally before the eighteen-member HRC, and then receive the HRC's evaluation of compliance in the form of a set of conclusions known as *Concluding Observations*. But, this is not the only procedure for assessing compliance available under the *ICCPR* regime. States party to the *ICCPR* can also, by ratifying another treaty called the (First) Optional Protocol to the *ICCPR*, assign the HRC responsibility to receive and pass judgment on written communications received from individuals who claim that *ICCPR* rights have been violated by their state. The assessments handed down by the HRC — taking the form of "views" — look and function much like court judgments in domestic legal systems, setting out the alleged violation, the contending claims of the claimant and the state, the facts as the HRC determines them, a discussion of the law under the *ICCPR* on the point in question, and finally an assessment of whether the facts disclose a violation of that law and, if so, what remedy follows. A good percentage of the HRC's case law that has emerged from this communication procedure over the last twenty years has been generated by claims brought against Canada. In contrast, the *ICESCR* is overseen by its own eighteen-member monitoring body (the Committee on Economic, Social and Cultural Rights — the CESCR) whose authority is limited to issuing *Concluding Observations* on state reports. Although the CESCR has put forward a draft, states (operating through the UN's Commission on Human Rights) have not yet agreed to open negotiations on an Optional Protocol which would contain a communications procedure for that treaty which would parallel the procedure long available under the *ICCPR*: see Committee on Economic, Social and Cultural Rights, *Report to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Communications Concerning Non-Compliance with the International Covenant on Economic, Social and Cultural Rights*, (1998) 5 International Human Rights Reports 527. The World Conference on Human Rights which met in Vienna in 1993 instructed the UN to look into the possibility of such an optional protocol both for the *ICESCR* and for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): see UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, (1993) 32 I.L.M. 1661, Pt. II, para. 75 and para. 40. On 12 March 1999, the UN Commission on the Status of Women recommended to the UN General Assembly that it adopt and open for signature such a protocol for CEDAW: for the CSW's recommendatory resolution, *see* UN Doc. E/CN.6/1999/WG/L.3 (11 March 1999) and, for the Revised Draft Optional Protocol, see UN Doc. E/CN.6/1999/WG/L.2 (10 March 1999).

6 See Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 Osgoode Hall L.J. 769 and Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social, and Cultural Rights'" (1999) 21 Hum. Rts. Q. 633 (especially on "negative inferentialism" as a problematic interpretive method).

7 Third preambular paragraph of the *ICCPR*. [Italics added; underlined emphasis in original.] The corresponding preambular paragraph of the *ICESCR* conveys a similar message with some difference in word order and with the omission of the words "civil and political freedom:" "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights . . ." [emphasis added].

The promise of a normative interplay between the two Covenants such as suggested by this statement of purpose has, with time, more and more become reality as the *ICCPR*'s Human Rights Committee (HRC) and the *ICESCR*'s Committee on Economic, Social and Cultural Rights (CESCR) have forged overlapping interpretations of the two treaties' provisions, and not only in areas where there are facially similar or identically phrased rights.[8] The HRC has long made clear in its general summaries of jurisprudence, known as General Comments, that rights often thought to be the heritage of the classical liberal tradition (and the ongoing American constitutional tradition) — those based on protection from interference by the state, or 'negative rights' — place duties on the state to address those material conditions and associated inequalities that render those rights ineffective for some members of society. So, for instance, the HRC interpreted, very early on in its mandate, the "right to life" in Article 6(1) of the *ICCPR* as requiring that positive measures be taken, *inter alia*, to reduce infant mortality that results from inadequate health and nutritional conditions.[9] That committee soon also made clear that the right to equal protection of the law in Article 26 of the *ICCPR* places affirmative duties on states to address social and economic inequalities where treating certain groups of people the same as others (including by doing nothing) either causes or exacerbates the disadvantage of such persons.[10] Consistent with such an approach, the HRC, in its questioning of states on *ICCPR* compliance as part of the treaty's state report procedure, has not infrequently ventured into areas which formalists would treat as the exclusive preserve of a discrete category of "economic, social and cultural rights" and as thus being the sole responsibility of the committee overseeing the *ICESCR*, the CESCR. Yet these efforts have been relatively *ad hoc* and cross-pollination with the human rights norms found in the *ICESCR* has not, until now, been pursued on a sustained basis.

Within the space of less than half a year, however, a remarkable pair of events occurred as a result of Canada's state reports under each of the *ICESCR* and the *ICCPR* having been before the CESCR and the HRC. On 4 December 1998, the CESCR released its *Concluding Observations* after scrutiny of Canada's most recent state report under the *ICESCR* and, on 7 April 1999, the HRC did likewise.[11] These *Concluding Observations* represent an interlinked expression of concern about a host of failures by Canada to adhere fully to its international human rights obligations in the two treaties. Indeed, it is not an overstatement to describe the two sets of *Concluding Observations* as pathbreaking in their focused treatment of the overlapping and shared obligations which emanate from the two Covenants as a partly fused legal order. In particular, the rich potential meaning the HRC has already given to the right to life and the right to non discrimination in the above-mentioned General Comments has moved from the realm of potential to the realm of firm legal obligations vis-à-vis the less advantaged in an affluent state like Canada. Significantly, both committees' *Concluding Observations* also address a number of inadequacies in the opportunities for legal protection in Canada's legal system of Covenant rights in such a way that we cannot, if we act at all in good faith, relegate the committees' concerns to some rarefied international space. If taken

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[8] On facially similar provisions, compare, for example, Articles 10(1) and 10(3) of the *ICESCR* ("the widest possible protection and assistance should be accorded to the family, . . . particularly for its establishment and while it is responsible for the care and education of dependent children. . . . "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reason of parentage or other conditions.") and Articles 23 and 24 of the *ICCPR* ("The family . . . is entitled to protection by society and the State" and "[e]very child shall have, without any discrimination . . ., the right to such measures of protection as are required by his status as a minor"). Or see Article 8(1)(a) of the *ICESCR* ("the right of everyone to form trade unions and join the trade union of his choice") and Article 22(1) of the *ICCPR* ("the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests"), as well as Article 6(1) of the *ICESCR* ("the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts") and Article 8(3)(a) of the *ICCPR* ("No one shall be required to perform forced or compulsory labour.").

[9] See Human Rights Committee, General Comment No. 6/16, Right to Life (Article 6), reprinted in Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein/ Strasbourg/Arlington: N. P. Engel, 1993) at 851.

[10] See Human Rights Committee, General Comment No. 4/3, Gender Equality: General Comment No. 17/35, Rights of the Child; and General Comment No. 18/37, Non-Discrimination, in Nowak, *ibid.* at 850, 865 and 868.

[11] Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, 57th Session, UN Doc. E/C.12/ 1/Add.31 (4 December 1998) [hereinafter CESCR *CO* 1998] and Human Rights Committee, *Concluding Observations on Canada*, 65th Session, UN Doc. CCPR/C/79/Add.105 (7 April 1999) [hereinafter HRC *CO* 1999]. The full text of each of these *Concluding Observations* can be found on the web site of the Human Rights Directorate of Canadian Heritage, the federal department responsible for coordinating and preparing Canada's state reports to international human rights treaty bodies: see online: http://www.pch.gc.ca/ddp-hrd/ENGLISH/cesc/concobs.htm> (accessed 1 December 1999) for the CESCR's *Concluding Observations* and online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/Covenant.htm> (accessed 1 December 1999) for the HRC's *Concluding Observations*.

seriously within Canada, the two *Concluding Observations* could represent a legal landmark for the evolution of our statutory and constitutional protection of human rights.

At the very least, the interdependent approach to the content of the two Covenants now firmly demonstrated by the committees should have significant interpretive impact on the *Charter of Rights*. While this had already been made clear by the Supreme Court's *Slaight Communications* doctrine, that doctrine has, in the decade since its articulation, been little-invoked by the legal profession and little-applied by the lower courts.[12] With *Baker*, we have reaffirmation — indeed, in view of the words chosen by the Court, even a bolstering — of the *Slaight Communications* doctrine of constitutional reception of Canada's international human rights obligations.[13]

Baker dealt with the exercise of administrative discretion to deport a Jamaican woman who was a long-term, but illegal, resident of Canada. Her situation was such that her mental health could easily be detrimentally affected, as would the well-being of her four Canadian children. Her children had to 'choose' between either being separated from their mother (if they were to stay in Canada after her expulsion) or separated from their country (if they moved with her to Jamaica). In the appeal to the Court from the Federal Court of Appeal, the issue of sections 7 and 15 of the *Charter* operating as the primary sites of interpretive reception of Canada's international human rights obligations was raised.[14] The appellant, Mavis Baker, and three supporting intervenors asked the Court to understand the Charter to protect a range of associated rights found primarily in the UN Convention on the Rights of the Child (CRC or the Convention) but also in the *ICCPR* and the *ICESCR*.[15] Rather than decide on the extent to which these international human rights constrained the exercise of administrative discretion by virtue of being part of the *Charter*, the Court chose to find in favour of Ms. Baker on grounds of discriminatory and generally unreasonable consideration of her case by the immigration officials, consideration which had used her struggle with mental illness (post-partum psychosis), her status as a single mother with children, her recourse to the social assistance system, and a denigration of her contribution to Canadian society (by pointing to a lack of skills other than those of a domestic worker) as reasons to deny her the right to stay in Canada rather than reasons to look sympathetically on her case. In the course of the analysis of whether or not the refusal to allow her to stay exceeded the bounds of reasonableness, the Court addressed the issue that the trial judge in *Baker* had endorsed as a " certified question" to be dealt with on appeal, namely: were the immigration authorities' statutory powers to decide not to admit Ms. Baker to Canada limited by virtue of the constraining effect of the Convention on the Rights of the Child on the exercise of administrative discretion in accordance with the long-recognised principle of statutory interpretation that the legislature is presumed to have legislated in conformity with international law — despite the fact that the provisions of the Convention relevant to federal jurisdiction over immigration had not been formally implemented into Canadian law by Parliament? Here, the Court seized the moment to advance a robust understanding of this principle of statutory interpretation. The Court can be read as having embraced a cosmopolitan conception of the rule of law, one feature of which being that Canadian courts should show fidelity to the international legal order by seeking to harmonise domestic law with international law as much as interpretive space allows. The Court found, by a majority of 5–2, that the presumption of compliance with international law indeed includes to Canada's legal obligations under unincorporated treaties — i.e., treaties which Canada has ratified but which have not been legislatively transformed into Canadian law by Parliament or the provincial legislatures. In the course of her reasoning, Justice L'Heureux-Dubé had the following to say with respect to the impact of Canada's international human rights treaty obligations on the interpretive content of the *Charter*:[16]

> [T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on*

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[12] *Slaight Communications*, *supra* note 4.

[13] *Baker*, *supra* note 4. For ease of reference, the quotation found in note 4 will be reproduced again here: "International human rights law . . . is . . . a *critical influence* on the interpretation of the scope of the rights included in the *Charter*" [emphasis added].

[14] For the manner in which these issues were handled by Strayer J. A. of the Federal Court of Appeal, see *Baker* v. *(Canada) Minister of Citizenship and Immigration*, [1997] 2 F.C. 127.

[15] *ICCPR* and *ICESCR*, *supra* note 2. Convention on the Rights of the Child, adopted 20 Nov. 1989, G.A. Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) (entered into force 2 Sept. 1990), reprinted in (1989) 28 I.L.M. 1448 [hereinafter the CRC]. See factums on file with the Registry of the Supreme Court of Canada of the Appellant Mavis Baker and the intervenors Charter Committee on Poverty Issues, Canadian Council of Churches and Justice for Children and Youth.

[16] *Baker*, *supra* note 4 at para. 70 [emphasis by L'Heureux-Dubé J.].

the Construction of Statutes (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect those values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible therefore, interpretations that reflect these values and principles are preferred.*

Endorsement in these terms of the presumption of compliance with international law is especially relevant to the interaction of international human rights treaty law and Canadian domestic law given that the Court situates its invocation of the presumption within a broader value-laden web of "values and principles" which frame what is and is not reasonable administrative decision-making. Earlier in its judgment in *Baker*, the Court stated:[17]

> [T]hough discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

It seems, then, that it is not simply a rule-of-law concern with the formal legal status of Canada's international legal commitments that determines the depth of interpretive influence of international norms on statutory interpretation but also (and more so) those commitments' resonance with Canadian law and society's fundamental constitutive values and principles. In this respect, it is useful to remember how Chief Justice Dickson spoke about a circle of "values and principles" in the following terms:[18]

> Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself.

While the principle of statutory interpretation digested from Sullivan's *Driedger* is generally applicable to Canada's international commitments, the normative force of any given commitment being called in aid must vary with the subject matter of the international norms and with some appreciation of how the context in which it has been produced relates to our "free and democratic" ideals. In other words, *Baker* helps us understand how international human rights law has a special interpretive force within Canada's legal order(s).[19]

Having linked the significance of the two UN committees' findings to a deepening embrace by Canada's highest court of international human rights law, the remainder of this article will seek to: summarize the key common findings of the two committees; draw attention to some of the inconsistent, indeed disingenuous, conduct involved in Canada's professions of compliance with the two human rights treaties over the years; and, finally, discuss the concrete suggestions made by the committees on how Canada should remedy the structural and procedural deficits in protection of the Covenants' human rights by Canada's domestic legal order.

THE COMMITTEES' FINDINGS ON CANADA'S NON-COMPLIANCE WITH ONE OR BOTH OF THE COVENANTS

The following is a *précis* of only some of the findings made by the committees in the two *Concluding Observations*. Each Concluding Observation runs to several pages; this being so, the original documents must be consulted to gain a full appreciation of the range of concerns expressed by the committees. For ease of exposition, the selected findings will be presented in point form.[20]

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[17] *Ibid.* at para. 56.

[18] *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 750.

[19] On the question of why the special content of international human rights treaties should distinguish them from other kinds of treaties in terms of their effects within the Canadian legal order, see Alan Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) U.T.L.J. 219.

[20] After each point, I will indicate in parentheses the paragraph number in which a given committee made comments on the subject matter in question. For example, "HRC, para. #" refers to the *Concluding Observations* of 7 April 1999, of the Human Rights Committee with reference to rights in the *ICCPR* and "CESCR, para. #" refers to the *Concluding Observations* of 4 December 1998, of the Committee on Economic, Social and Cultural Rights with reference to rights in the *ICESCR*.

COMMON FINDINGS

Inadequacy of Remedies in Canada's Legal System for Violations of Rights in the Covenants

- Both committees emphasized the failure of Canada to fully implement the two human rights treaties. This failure results from the inadequate formal legal protection that currently exists in Canada's legal system for the human rights in the Covenants, as a combined result of recalcitrant interpretation of the *Canadian Charter of Rights and Freedoms* by many lower courts and failure of Parliament and the provincial legislatures to make all Covenant rights enforceable through enactment of appropriate legislation (HRC, para. 10; CESCR, paras. 51 and 52).

- Each committee also drew special attention to ineffective remedies for breaches of rights to non discrimination in the private sector due to the inadequacy of the avenues of redress provided by the provincial and federal human rights (non discrimination) codes. Each called for legislative amendments that would allow a human rights claimant to present her case before a "competent... tribunal" rather than continue to allow the various human rights commissions across the country to continue to play a gatekeeper role as to whether or not a person can access such a tribunal (HRC, para. 9; CESCR, para. 51).

Indigenous Rights

- The practice of Canadian governments of insisting that Aboriginal rights must be extinguished as part of settlement of Aboriginal claims should be abandoned (HRC, para. 8; CESCR, para. 18).

- The economic marginalization and material deprivations of Aboriginal peoples and persons constitute a serious failure by Canada to protect human rights guaranteed under both Covenants, including the right to self-determination found in common Article 1 (HRC, para. 8; CESCR, paras. 17, 18, 43).

- The recommendations of the Royal Commission on Aboriginal Peoples (RCAP) must be "urgent[ly]" implemented (HRC, para. 8; CESCR, para. 43).

Homelessness and Poverty in General

- Canada's failure to take adequate measures to prevent and respond to homelessness represents a failure to ensure rights to housing, health and life itself. Positive measures must be taken to tackle this combined rights violation (HRC, para. 12; CESCR, paras. 24, 28, 34, 46).

- Rights to non-discrimination have been breached by program cuts — including by the replacement of the federal Canada Assistance Plan (CAP) with the Canada Health and Social Transfer (CHST) and by cuts to provincial social assistance rates (e.g., 35 per cent for single people in Nova Scotia and 21.6 per cent across the board in Ontario) — that have worsened the situation of disadvantaged groups, in part by disproportionately exacerbating poverty of women and children dependent on them (HRC, para. 20; CESCR, paras. 19–21, 23, 25, 35, 40–42).

- Non-compliance with both Covenants' guarantee of the special rights of children to protection has resulted in treaty violations in those provinces where the new federal National Child Benefit (NCB) does not reach the children of parents on social assistance because the policy of most provincial governments is to deduct the NCB payment from the amount of social assistance received by the parents (HRC, para. 18; CESCR, paras. 22, 44).

Violation of Rights to Freedom of Association of "Workfare" Recipients

- Ontario's 1998 Act to prevent unionization[21] of "workfare" participants fails to comply with both Covenants' guarantee that workers may join a trade union and bargain collectively (HRC, para. 17; CESCR, paras. 31, 55).

These nine common findings represent a remarkable overlap of legal concern about human rights violations that simultaneously engage Canada's commitments in each treaty. The purpose of the two sub-sections which follow is to make mention of some specific findings of rights violations made by one committee that either was not replicated in the *Concluding Observations* of the other committee or was not phrased in as clear a fashion;

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21. *Prevention of Unionization Act*, S.O. 1998 c.17.

this catalogue represents only a portion of each committee's independent findings.[22]

Examples of Other Findings of *ICCPR* Non-Compliance by the Human Rights Committee

- The HRC called for the "elimination" of "increasingly intrusive measures" being taken in violation of the privacy rights of social assistance recipients, including what can only be called the Orwellian policy of some provincial governments of using fingerprinting and retinal scanning to identify such persons as a supposedly necessary means to root out welfare fraud (HRC, para. 16).

- Several paragraphs were devoted to policies and practices of the federal Immigration Department which, since the coming to power of the Liberal government, seem to have been planned and carried out oblivious to any real concern to respect Canada's international human rights obligations. The committee called Canada to account for invoking so-called national "security" rationales as justification for deporting aliens to countries where they may face a substantial risk of either torture or other cruel, inhuman or degrading treatment. It also criticized Canada's willingness to expel long-term residents of Canada who are not formally Canadian citizens without serious consideration being given to whether a breach of family rights and children's rights to care by their parents will be triggered by separation through deportation (HRC, paras. 13–15).

- As already noted, Article 1 of the *ICCPR* (which is identical to Article 1 of the *ICESCR*) guarantees the right of all peoples to self-determination. In a path-breaking interpretation which explicitly confirmed what many scholars and Aboriginal representatives have long contended to be the case, the Human Rights Committee held that this collective right is a right of Aboriginal peoples no less than of other peoples. Further, the committee also noted that the right to self-determination includes, *per* Art. 1(2) of both Covenants, the right of Aboriginal peoples to be able freely to dispose of their natural wealth and resources and not to be deprived of their means of subsistence (HRC, para. 8).

- The committee expressed "deep concern" about the failure of Ontario to hold a public inquiry into the possible role and responsibility of public officials (including the Premier of Ontario) in the shooting death of Aboriginal activist Dudley George at Ipperwash in 1995 (HRC, para. 11).

Examples of Other Findings of Non-Compliance with the *ICESCR* by the Committee on Economic, Social and Cultural Rights

- The CESCR discussed the material conditions of life of many Aboriginal people in terms of a "gross disparity" with the lot of the majority of Canadians, drawing specific attention not only to the shortage of adequate housing and endemic mass unemployment but also to what can only be called the Fourth World situation of lack of adequate and safe drinking water in some Aboriginal communities (CESCR, para. 17).

- Following up its earlier signalling of concern to Canada, as expressed in a letter sent by the committee to Canada in 1995, the committee discussed in some detail the repeal of the Canada Assistance Plan in terms that made clear this action triggered the prohibition on states taking retrogressive measures without adequate justification[23] (CESCR, para. 19). The committee then called for the re-establishment of a "national program with designated cash transfers for social assistance and social services which include

[22] It must of course be noted that, while the combined focus of both committees adds significantly to the seriousness of a given human rights violation, Canada is no less bound to respond to a finding of a rights violation limited to one Covenant.

[23] On the 1995 letter and the doctrine of non-retrogressive measures, see Craig Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1995) 6 Constitutional Forum 79 [hereinafter "Covenant Constitutionalism"], including the Appendix (at 87) in which the committee's letter to Canada is reproduced. Note that the committee's veiled reference in the last sentence of para. 19 of the *Concluding Observations* — "The committee also recalls in this regard paragraph nine of General Comment No. 3" — is to the doctrine of non-retrogressive measures. See Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States' parties obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23 (1990) at para. 9, reprinted in Asbjorn Eide, Catarina Krause, and Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 1st ed. (Dordrecht/Boston/London: Martinus Nijhoff, 1995) [2nd ed. forthcoming in 2000] [hereinafter CESCR, General Comment No. 3].

universal entitlements and national standards, specifying a legally enforceable right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another" (CESCR, para. 42).

- The committee is trenchant in its insight into the false success claimed for restrictions on unemployment insurance benefits (UIB) that have resulted in about half the previous number of people receiving UIB. The exclusions from coverage under the UI system are canvassed; attention is then drawn to the resulting inadequate protection that now exists for many disadvantaged groups: "[T]he fact is that fewer low-income families are eligible to receive any benefits at all" (CESCR, para. 20). The committee notes that this situation does not conform to the right to social security and calls for reform of the UI scheme "so as to provide adequate coverage for all unemployed workers" in terms of both benefit amount and duration of coverage (CESCR, para. 45).

- The decline in social assistance rates and the inadequacy of the minimum wage across Canada are dealt with in detail as being breaches of the right to an adequate standard of living: "These cuts appear to have had a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger . . . . The Committee urges the State Party . . . to establish social assistance at levels which ensure the realization of an adequate standard of living for all" (CESCR, paras. 21, 23, 25, 25, 32, 35, 40, 41, and 46; paras. 21 and 41 are quoted). The discussion shows a nuanced concern to pay special attention to the specific harms caused to certain groups like single mothers and to consider the interactive effects of the inadequacy of social assistance and lack of access to adequate housing. For example, the committee reasons:

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

THE CESCR CALLS CANADA ON A MIX OF DISINGENUOUS COMPLACENCY, INCONSISTENCY AND HYPOCRISY

It seems accurate to say that, as a society, we in Canada like to think we are committed to, and governed by, the rule of law. We also tend to be proud of a culture that takes human rights seriously, in close association with a commitment to healthy communities and an ethic of social inclusion. Furthermore, given our self-understanding of our country's Pearsonian tradition in international affairs, Canadians are just as quick to associate themselves with the ideal of the *international* rule of law, especially as regards the gradual evolution of human rights standards in the international legal order.

Our governments — at least our federal governments — have tended to piggyback on such general cultural dispositions and, over the years, have tried to portray Canada as a model country in their statements not only in the international arena but also before domestic audiences. To our federal government's credit, Canada has indeed been one of the main promoters and contributors to such bulwarks of international justice as the UN peacekeeping system and the UN human rights treaty order. Yet, somehow, with respect to scrutiny by UN human rights bodies of our own record of compliance with treaties, we have collectively displayed a remarkable apathy punctuated by American-style bouts of reactionary resentment: how dare upstart UN bodies (which include, by the way, experts from states with truly bad human rights records) compromise our sovereignty by challenging our self-image of purity on the human rights front? International human rights law in Canada has lived a life outside the spotlight of both legal scrutiny and political debate, matching the near invisibility and powerlessness of those members of society who would most benefit from having those rights taken more seriously by our legal and political orders.

In the face of such resistance, a significant number of nongovernmental organizations (notably in the anti-poverty, equality-seeking, aboriginal rights and migration sectors) have been trying, despite ever-dwindling resources, to take the international human rights process seriously. They have toiled, especially over the past decade, to have Canadian society pay attention when all eighteen members of a body such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights have reached a

consensus decision that Canada has fallen short of its international human rights commitments, especially to the less-privileged groups in society. To little avail. Instead, the discourse of international human rights promoted by governments and most mainstream nongovernmental organizations in Canada has very much been one which pays attention not to the "others" of Canadian society, but rather to those "other" state-societies where "real" human rights violations occur. Our governments have been getting away with a dubious discourse of which the central rhetorical plank has been various versions of the question: Given that others are, on the whole, worse at respecting human rights, how can *we* be criticized? Opposition parties, including the New Democratic Party, have been embarrassingly inept at making UN human rights treaty bodies' judgements about Canada's international human rights compliance part of the national political agenda. The news media's coverage is sporadic at best, amounting to sketchy and brief reports the day after a UN body states its concerns — and then nothing. All told, a combination of ignorance and apathy is probably an accurate description of the attitude of Canadian society as a whole to the international human rights treaty order's relevance to Canada itself. Canada has needed a normative kick in the pants for some time. And that is exactly what the two committees have given us. A politely diplomatic kick, but a kick nonetheless.

One rhetorical strategy highly favoured by federal governments warrants specific mention. How often have we seen a Canadian prime minister stand up in the House of Commons and invoke, in a virtual chortle, Canada's second-to-none ranking in the UN Development Program's Human Development Index (HDI) as a defence to Question Period queries from the opposition following UN criticism of Canada's human rights performance? The CESCR made clear how casuistic it views this defence when it stated, in noting positive aspects of Canada's record, that:[24]

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

[24] CESCR *CO* 1998, *supra* note 11 at para. 3 [emphasis added].

Canadian governments have long invoked averages and medians as adequate accounts of the state of human rights enjoyment in Canada, thereby showing just how little understanding (or sincere attempt to understand) there is of the very nature of human rights. The CESCR has, for almost a decade now, been clearly and firmly requiring governments to provide detailed information on the extent to which *all* individuals' social rights are being attended to. In order to do this, disaggregated information on the situation of those persons and social groups who fall below the median or average is indispensable. That Canadians on average are not homeless, have adequate nutrition, go to adequate schools, or can raise their children in a dignified way says *nothing at all* about whose human rights are being respected and whose are being violated.

Not only did the CESCR catch us out on our official failure to grasp the concept of rights but it went on, ever so gently, to point out the Kafkaesque situation produced by Canada's duplicitous claims with respect to those standards in Canada that come closest to tracking the incidence and nature of poverty in Canada:[25]

> While the Government of Canada has consistently used Statistics Canada's "Low Income Cut-Off" [known as LICOs] as a measure of poverty when providing information to the Committee about poverty in Canada, it informed the Committee that it does not accept the Low Income Cut-Offs as a poverty line, although this measure is widely used by experts to consider the extent and depth of poverty in Canada. *The absence of an official poverty line makes it difficult to hold the federal, provincial and territorial governments accountable to their obligations under the Covenant.*

In one fell swoop, Canada is exposed not only for acting with no small degree of hypocrisy but also for cutting international scrutiny off at the knees. We have, in effect, brazenly admitted that we have failed in the most primary of obligations under the *ICESCR*, namely that which requires states to put into place an official system of measurement and monitoring that allows each state to know the extent of poverty as the necessary first step in designing policies to address such poverty.[26] Five years earlier, in the CESCR's 1993 *Concluding Observations* on Canada, the committee was even more

[25] *Ibid.* at para. 13 [emphasis added].

[26] See CESCR, General Comment No. 3., *supra* note 23 at paras. 3–4.

direct in expressing a dismay which bordered on incredulous annoyance that Canada had appeared before the committee with no official figures or solid information on the numbers of homeless in Canada.[27]

In its 1998 *Concluding Observations*, the committee followed up diplomatic hints sent to Canada in a 1995 letter in which it had indicated that the abolition of the Canada Assistance Plan had consequences for Canada's compliance with the *ICESCR*.[28] The committee incisively (but, as always, in measured and non-polemical terms) took Canada to task for its hypocrisy — or, more euphemistically, its inconsistency:[29]

> The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that the CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living, and facilitated court challenges to federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, the CHST has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance.

The committee did not stop there. It carefully homed in on the structural double standards represented by the replacement of the CAP with the CHST:[30]

> [Canada] did, however, *retain national standards in relation to health* under CHST, thus denying provincial "flexibility" in one area, while insisting upon it in others [notably social assistance]. *The delegation provided no explanation for this inconsistency.*

Finally, the committee, joined by the Human Rights Committee, drew attention to conduct of Canada that draws into question the good faith of Canada's commitment to doing what is necessary to implement Covenant rights within the Canadian legal order.[31] Reproduction of the two committees' own words, on three issues, is adequate to the task of conveying the nature of the problem. On the issue of legislative reversals of *ICESCR*-sensitive interpretations of provincial human rights codes, the Committee on Economic, Social and Cultural Rights said:[32]

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

On the issue of deportations from Canada, the Human Rights Committee expressed its concern that the federal government has gone so far as to adopt a policy of having full discretion to deport someone to substantial risk of danger even in defiance of an "interim measure" request by international human rights bodies to Canada not to deport until the body has had a chance to consider the merits lest deportation result in irreversible harm:[33]

> The Committee expresses its concern that that the State party considers that it is not required to comply with requests for interim measures of protection [e.g. staying a deportation order] issued by the Committee. The Committee urges Canada to revise its policy so as to ensure that

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27 Committee on Economic, Social and Cultural Rights, *Concluding Observations* on Canada, UN Doc. E/1994/23 (1993) at para. 19 reprinted in (1995) 2 International Human Rights Reports 682 at 684.

28 Scott, "Covenant Constitutionalism" *supra* note 23 at 87.

29 CESCR *CO* 1998, *supra* note 11 at para. 19 [emphasis added]. Note that Canada, in its previous state reports and oral representations under the *ICESCR*, had proudly and prominently invoked the CAP not just descriptively (i.e.,as being, in the committee's words, "national standards for social welfare") but also normatively (i.e., as the basis on which Canada was in compliance with many of the *ICESCR* rights). By choosing not to point this discrepancy out in stronger terms, the committee has clearly chosen to be as deferential as possible without conceding the basic point it wishes to signal.

30 *Ibid.* [emphasis added]. See Scott, "Covenant Constitutionalism" *supra* note 23 at 80 for discussion of health being treated by the government as a middle-class right and how retaining protections for it but not for social assistance was, in effect, structural discrimination against economically disadvantaged groups.

31 See more generally Committee on Economic, Social and Cultural Rights, Comment No. 9, *The domestic application of the Covenant*, UN Doc. E/C.12/1998/24 (1 December 1998) reprinted in (1999) 6 International Human Rights Reports 289.

32 CESCR *CO* 1998, *supra* note 11 at para. 26 [emphasis added].

33 HRC *CO* 1999, *supra* note 11 at para. 14. One such case was the deportation of Tejinder Pal Singh by the federal immigration authorities in 1997, despite a request by the UN Committee Against Torture not to do so: Information from Barbara Jackman, Jackman, Waldman & Associates, Toronto.

> all such requests are heeded in order that implementation of Covenant rights is not frustrated.

Finally, on the stance taken by government lawyers in Canadian courts, the Committee on Economic, Social and Cultural Rights addressed submissions from NGOs that the committee should find it incompatible with the Covenant for a government to go into its country's courts and argue that Covenant rights are not judicially protected in Canada's legal order where either constitutional or statutory provisions are sufficiently broadly worded to be interpreted to protect those rights in accordance with the presumption recognized in most legal systems, including Canada's, that domestic law accords with international law. The committee first addressed a specific concern when it made the following significant criticism:[34]

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

It then stated clearly and unequivocally:[35]

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

The need for the committee to expressly state something which clearly follows from the basic duty of a state to give legal effect to its Covenant obligations is obvious to anyone who litigates before Canadian courts or administrative tribunals and attempts to invoke international human rights law as interpretive support for legal arguments. For example, the federal government's lawyers, especially those serving the Department of Immigration, have been zealous in marching into court on almost a daily basis and going so far as to argue that the Canadian *Charter of Rights and Freedoms* cannot be read to prohibit deporting someone where there is a substantial risk that the person will face torture after arrival at his destination — in the face of clear textual provisions and case law laying down such a prohibition emerging from the UN Convention Against Torture regime.[36] In the aforementioned *Baker* case, government lawyers appeared to be under instructions to stand before the Supreme Court of Canada and argue that rights in international human rights treaties that protect against family separation cannot be understood as being part of "life, liberty and security of the person" protected by section 7 of the *Charter*. But here, as in other areas, Canada has gone on record before an international body claiming — or at least giving the strong impression of — the opposite. The Court was asked in oral arguments by the intervenors to take note of one arm of the same federal executive saying one thing before an international legal audience and another thing before a domestic legal audience.[37]

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[34] CESCR *CO* 1998, *supra* note 11 at para. 14.

[35] *Ibid.* at para. 50.

[36] These arguments have tended to win the day in the Federal Court of Canada, where most refugee and immigration cases are adjudicated. For a leading example of judicial reasoning that is lacking in (international) human rights sensibilities, see the judgment of Tremblay-Lamer J. in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. 28 (Judgment of 16 January 1998). Compare to the reasons of Lane J. of the Ontario Court of Justice, General Division, who not only arrived at the opposite conclusion on the same facts but exercised his power to take jurisdiction over a case that had already been decided (by Tremblay-Lamer J.) in the Federal Court system: *Suresh* v. *Canada (Minister of Citizenship and Immigration)* (1998), 38 O.R. (3d) 267. These two contrasting judgments represent a rare opportunity to see how two trial judges can approach *exactly* the same case differently. In our study of judicial decision-making, we are usually limited to comparing the trial judge's reasons with those of courts on appeal in any given case.

[37] In 1995, a set of representations was made by Canada's delegation presenting Canada's state report to the Committee on the Rights of the Child — three separate times by three different spokespersons — that CRC rights are subject to protection under either or both of the *Charter* and statutory human rights codes combined: see Committee on Rights of the Child, Summary Record, 214th Meeting, 9th Sess., UN Doc. CRC/C/SR.214 (30 May 1995) p. 10/para. 40 (Mr. Duern [Canada]); p. 11/para. 47 (Mr. McAlister [Canada]); and p. 12/para. 49 (Ms. McKenzie [Canada]). In *Baker*, counsel for CCPI [the author] delivered oral arguments on this point relying on materials contained in the book of authorities prepared by another intervenor, Justice for Children and Youth: "Argument for the Intervenor Charter Committee on Poverty Issues," *Baker* v. *Canada (Minister of Citizenship and Immigration)*, Transcription of Cassettes, Wednesday, 4 November 1998, 09:46 hours, p. 32 at pp. 36–39. In its judgment in *Baker*, the Court did not allude to this problem of inconsistency of argument at the national and international levels.

LINK-UPS BETWEEN THE INTERNATIONAL AND THE NATIONAL: RECOMMENDATIONS THAT THE CANADIAN LEGAL AND POLITICAL SYSTEM TAKE PROFESSED COMMITMENTS TO INTERNATIONAL HUMAN RIGHTS OBLIGATIONS MORE SERIOUSLY

The preceding section discussed the linked problems of inconsistency and lack of commitment which plague the executive arms of Canadian governments. However, the committees also addressed the inadequate performance of the Canadian judiciary and Canadian legislatures. The CESCR deftly linked the Canadian executive's international representations to the lack of receptivity of Canadian lower courts in the following terms:[38]

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

The committee reiterates its recommendation that one part of rectifying this antipathy towards Covenant-sensitive adjudication is for the Canadian Judicial Council to "encourage training for judges on Canada's obligations under the Covenant."[39]

However, neither committee was under any illusion that a more active and sensitive judiciary could alone solve the problem of inadequate formal avenues of redress in Canadian law for seeking vindication of breached treaty rights. In this regard, rights in all categories are best understood as being a shared project amongst all branches of the state such that robust judicial protection cannot be fully achieved without a conducive legislative and regulatory environment.[40] Furthermore, on the question of the formal sources of rights protection in Canadian domestic law, the committees are not in a position to judge how far the protections of the *Charter of Rights* should or will go in including all or most human rights found in the treaties — apart, of course, from relying on representations made by Canada about those domestic law sources. Accordingly, they have no choice but to work from the assumption that some Covenant rights (or some dimensions of some rights) may not have constitutional counterparts and thus that legislatures must interact directly with the international legal order in order to put into place the necessary statutory protections to allow for conformity with the Covenant obligations. In any case, even if every Covenant right is protected by the *Charter* (notably by virtue of the combined operation of sections 7 and 15), the effective protection of human rights cannot rely on waiting for *ad hoc* court cases to be brought before legislatures which assume their self-standing responsibilities to protect human rights. Finally, neither courts nor legislatures, as currently constituted, have any

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[38] CESCR *CO* 1998, *supra* note 11 at para. 15 [emphasis added]. Some may see the last clause as potentially misleading. While it follows from *Irwin Toy* and *Slaight Communications* combined that the *Charter* "can" be interpreted to protect *ICESCR* rights, the Supreme Court had not yet, at the time of the committee's *Concluding Observations*, taken the step of positively affirming this interpretation. Indeed, with *Baker*, the Court has further declined to take the opportunity to close the loop, although it may well use *Godin* (*supra* note 4) for that purpose. International Court of Justice Judge (and former member of the Human Rights Committee) Rosalyn Higgins convincingly discusses the difference national judicial cultures make to the extent to which international law has a life in domestic law. In drawing attention to the "culture of resistance to international law," she notes that this culture tends to feed on the formal separation between domestic statutory law and international treaty norms in Westminster-style "dualistic" systems (like Canada's) that require *legislative transformation* of treaty norms before they can have the *direct* force of law in such systems: Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press: Oxford, 1994) at 206–207. In his trenchant critique of the standard approach to date of the English judiciary (at least prior to the new bill of rights act), Murray Hunt goes so far as to refer to "atavistic dualism" as being at the heart of the unwillingness of most English judges to employ the presumption that domestic law conforms to international law in order to give *indirect* effect to international human rights treaty norms through interpretive acts of *judicial transformation*: see Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing: Oxford, 1997) at 25–28.

[39] CESCR *CO* 1998, *supra* note 11 at para. 57. Note also the recommendation at para. 59: "The Committee recommends that the Federal Government extend the Court Challenges Programme to include challenges to provincial legislation and policies which may violate the provisions of the Covenant."

[40] On the notion of a shared burden of responsibility in the interpretation and implementation of human rights, see Amy Gutmann, "The Rule of Rights or the Right to Rule?" in J. Roland Pennock and John W. Chapman, eds., *Justification* (New York: NYU Press, 1987) 165 at 166 ("the unity of moral labour") and Craig Scott, "Social Rights: Towards a Principled, Pragmatic Judicial Role" (1999) 1 Economic and Social Rights Review 4 at 4 [hereinafter "Social Rights"].

necessary claim to be the best-suited institutions to monopolize the interpretation and operationalization of human rights. Various new institutional arrangements could be legislated to complement the functions of both courts and legislatures.

It is with all the foregoing in mind that we can fully appreciate the horizons that might be opened up by the following two recommendations by the Human Rights Committee and Committee on Economic, Social and Cultural Rights. The HRC suggests that some kind of interface institution might help bring Covenant norms into the legislative process(es):[41]

> The Committee . . . recommends measures to ensure full implementation of Covenant rights. In this regard, the Committee recommends the establishment of *a public body responsible for overseeing implementation of the Covenant and for reporting on any deficiencies.*

The CESCR inserts itself into the debate over how a new federal system of social rights protection should look by simultaneously insisting on the enforceability of its Covenant's rights and opening the door for pluralistic and creative institutional design:[42]

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

Tied closely to the concern of both committees to prod Canada to put into place domestic institutions that will translate Covenant law into Canadian reality is the flipside: ensuring that all relevant legislative jurisdictions are engaged in the process of justifying treaty performance at the international level. The HRC said:[43]

> The Committee expresses its appreciation for the presence of the large delegation representing the Government of Canada. . . . However, the Committee is concerned that the delegation was not able to give up-to-date answers or information about compliance with the Covenant by provincial authorities.

The CESCR was more direct:[44]

> While the Committee notes that the delegation was composed of a significant number of experts too many questions failed to receive detailed or specific answers. Moreover, in the light of the federal structure of Canada and the extensive provincial jurisdiction, the absence of any expert representing particularly the largest provinces, other than Quebec, significantly limited the potential depth of the dialogue on key issues.

CONCLUSION

The committees have thus, acting in efficient partnership, shone an international spotlight on substantive, attitudinal and institutional deficiencies in Canada's approach to its human rights treaty obligations. It is crucial that their combined judgment not become yet another occasion when considered and articulate evaluations of Canada's human rights system by authoritative human rights treaty bodies sink below the horizon of the Canadian radar screen. There must be a commitment from Canadian governments, especially the federal government, and ultimately Parliament and all the legislatures, to move from these two sets of *Concluding Observations* to a new human rights dispensation. Here, it is heartening that the dialogue generated by the international human rights process has pointed the way forward. The delegation that appeared before the Human Rights Committee in March 1999 was headed by federal Cabinet minister Hedy Frye. She gave undertakings before the committee, that Canada would move forward on ensuring that the Canadian legal and political orders are, in future, institutionally better designed to take Covenant rights seriously. Her undertakings were understood by the committee as follows:[45]

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41 HRC *CO* 1999, *supra* note 11 at para. 10 [emphasis added].
42 CESCR *CO* 1998, *supra* note 11 at para. 52 [emphasis added].
43 HRC *CO* 1999, *supra* note 11 at para. 2.
44 CESCR *CO* 1998, *supra* note 11 at para. 2.
45 HRC *CO* 1999, *supra* note 11 at para. 3.

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

Canada's promise cannot but hold good for the follow-up treatment of the *Concluding Observations* under the *ICESCR* as well.

The commitment by the Minister to "develop and improve [compliance] mechanisms" and to begin that process with a parliamentary committee has much potential. However, it will be crucial that this parliamentary consideration not be a token one-off affair. The movement toward a "public body" (HRC's language) and the "appropriate mechanisms" (CESCR's language) for enforcing Covenant rights can easily grind to a halt unless a special parliamentary standing committee is created to deal with the interface between Canada's human rights treaty obligations and its domestic order. At some point, this effort must fan out into other crucial institutional contexts such as the "social union" process and the legislative processes of each province. From the entirety of this effort, substantive and institutional changes must come about if Canada is not to side-step its promises to the Human Rights Committee.

At the centre of all this must be the groups from within civil society which have long taken the UN human rights treaty system seriously and without which it is unlikely the two committees would have come to understand the Canadian human rights map in the detail and with the sophistication that they have.[46] But, most of all, what is needed is a new state of mind in approaching the linking-up of the Canadian constitutional order and the international human rights order. Here I would like to rely on the evocative conceptualizations by two judges of the Supreme Court of Canada in two relatively recent speeches. Chief Justice Antonio Lamer affirmed in a keynote address at York University:[47]

> [T]he Charter should be, and has been, understood as part of the international human rights movement. . . . For international human rights law to be effective, . . . it must be supported by what I would term a "human rights culture," by which I mean a culture in which there is a firm and deep-seated commitment to the importance of human rights in our world . . . I turn now to the second aspect of what I have termed the "institutional moment" of international human rights law, the growth of institutional dialogue between international human rights bodies and national courts. Like any true dialogue, this dialogue depends on the willing participation of both parties. . . . [B]y looking to international treaties and the jurisprudence of international human rights bodies in the interpretation of domestic human rights norms[,] . . . judges raise the profile of those international treaties and further the creation of a human rights culture.

His former colleague on the bench, Justice Gérard La Forest, has spoken (generously, it must be said) about the cultivation of a certain cosmopolitan institutional orientation, or ethos, by the Canadian judiciary as a whole:[48]

> What is happening is that we are absorbing international legal norms affecting the individual through our constitutional pores . . . Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become more so as they continue to

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[46] For one account of Canadian NGO legal advocacy before the UN human rights treaty bodies, see Bruce Porter, "Socio-economic Advocacy — Using International Law: Notes from Canada" (1999) 2 Economic and Social Rights Review [forthcoming].

[47] The Rt. Hon. Antonio Lamer, Chief Justice of Canada, "Enforcing International Human Rights Law: The Treaty System in the 21st Century" (Address at York University, Toronto, 22 June 1997) at 3, 4 and 7.

[48] The Hon. Mr. Justice Gérard La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y. B. Int'l L. 89 at 98, 100–101. I say "generously" because the orientation which La Forest J. saw as already existing (or at least as quickly emerging) still applies much more to the Supreme Court than it does to most lower courts. As such, La Forest J. is as much speaking about a desirable orientation for the future as he is of any extant and widespread judicial ethos.

> rely on and benefit from one another's experience. Consequently, it is important that . . . national judges adopt an international perspective.

But, to return to an earlier theme and to revert to words I have used in another constitutional context (South Africa), "We should be cautious not to create the perception that rights are the domain of the courts alone."[49] Instead, "[w]e need a constitutional ethos to permeate all government decision-making."[50] In short, what is needed in the wake of the committees' *Concluding Observations*, as we grapple with the challenge of bringing the "international" into our "national" human rights culture, is not simply the ethic of judicial transformation advocated by Justices Lamer and La Forest (and now by *Baker*) but also a transformation in political ethics that eventually lead to a healthy interaction between the courts and other institutions which take international human rights law seriously.[51]❑

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[49] Scott, "Social Rights" *supra* note 40 at 4.

[50] *Ibid.*

[51] To that end, Canadian legislators would be well-advised to consult in addition to the Committee on Economic, Social and Cultural Rights' General Comment No. 9 on the domestic application of the Covenant, *supra* note 30, the committee's General Comment No. 10, *The role of national human rights institutions in the protection of economic, social and cultural rights*, UN. Doc. E/C.12/1998/12 (1 Dec. 1998). In addition, legislators may wish to consult the two most recent substantive General Comments of the committee, on rights to primary education and to food, in order to help get a sense of how diverse institutional roles might link up with the kinds of duties placed on states by substantive rights: see General Comment No. 11, Plans of action for primary education (Art. 14), UN Doc. E/C.12/1999/4 (10 May 1999) and General Comment No. 12, The right to adequate food (Art. 11), UN Doc. E/C.12/1999/5 (12 May 1999). See also General Comment No. 4, *The right to adequate housing (Art. 11(1))*, UN Doc. E/1992/23 (1992) reprinted in Eide *et al.*, *supra* note 22 at 446. Finally, consideration is being given to a general comment on the framework role of "benchmarks" for assessing progress in the realization of economic, social and cultural rights: for the current draft, see Committee on Economic, Social and Cultural Rights, Summary Record, 45th Meeting, 19th session, 26 November 1998, UN Doc. E/C.12/1998/SR.45 (30 November 1998) at paras. 68–69.