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# COVENANT CONSTITUTIONALISM AND THE CANADA ASSISTANCE PLAN<sup>1</sup>

Craig M. Scott

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A leading United Nations human rights body took an unprecedented step recently which Canadian society should know about. What follows is a commentary on the significance of that step for the passage of Bill C-76,<sup>2</sup> which will end the application of the law governing the Canada Assistance Plan (CAP)<sup>3</sup> as of April 1996 and replace it with something called the Canada Health and Social Transfer (CHST).<sup>4</sup> The message I wish to convey is that this is neither a fair trade nor a legal one from an international human rights law perspective.

Most Canadians almost certainly will not be aware that Bill C-76 will remove legal protection for national standards that we have associated with social assistance programmes for several decades (with the exception of standards related to residence requirements for entitlement to social assistance). Most will also not have realized that Bill C-76 will place Canada in a position of breaching international human rights law. The enactment of Bill C-76 will almost certainly result in a finding to that effect in 1996 by a U.N. human rights body of experts that has responsibility for monitoring the human rights in question.

On May 4, that body, the U.N. Committee on Economic, Social and Cultural Rights, sent a letter to Canada which strongly hints that this federal Government legislation, if enacted without necessary amendments, will breach an international human rights treaty to which Canada has been party since 1976.<sup>5</sup> That treaty, the International Covenant on Economic, Social and Cultural Rights (the Covenant),<sup>6</sup> is one of two treaties considered the pillars of the U.N. human rights system (the other

being the International Covenant on Civil and Political Rights).<sup>7</sup>

The decision to send the letter was not taken lightly by the 18-member Committee, made up of independent experts from around the world.<sup>8</sup> It had been presented with a detailed legal brief and oral arguments by representatives of three leading Canadian organisations, the National Anti-Poverty Organisation (NAPO), the Charter Committee on Poverty Issues (CCPI), and the National Action Committee on the Status of Women (NAC).<sup>9</sup> The Committee carefully considered whether to set such a precedent before unanimously deciding that it had a responsibility to signal its concerns to Canada about what some members termed "potentially dangerous" legislation.<sup>10</sup>

What international human rights protections does the U.N. Committee fear will be lost if Bill C-76 is not modified? This question can be answered by examining those protections currently mandated by the *Canada Assistance Plan Act* which no longer will be part of federal law under the CHST. By virtue of CAP, the federal government enters into agreements with each province to transfer payments in order to share in the costs of providing social assistance benefits to persons in need.<sup>11</sup> But, the transfer of federal funds is conditional on national standards that take the form of certain rights which must be explicitly guaranteed in each province.<sup>12</sup>

These guaranteed rights include: the right to financial assistance for persons in need;<sup>13</sup> the right to have the level of financial assistance take into account each individual's budgetary requirements;<sup>14</sup> the right

to legal appeal procedures to challenge denials of financial assistance;<sup>15</sup> and the right not to be forced to work as a condition for receiving financial assistance (what some call "workfare").<sup>16</sup> By virtue of the 1986 decision of the Supreme Court of Canada in *Finlay*,<sup>17</sup> any social assistance recipient has the right to go to court to challenge federal funding of a provincial social assistance programme which fails to respect these rights. All of these rights will disappear as of April 1, 1996, in terms of their status as nationally-mandated legal protections.

The need for these soon-to-be-lost rights is apparent as soon as one understands the harsh pressures the poor will be under as a result of the nature of the CHST which is to replace CAP. Unlike CAP, the CHST will not involve federal-provincial cost-sharing on a proportionate basis with levels of funding tied to the actual need for social assistance in each province, which goes up in recessions and down in better economic times. Rather, the amount of the CHST will be fixed in advance and therefore will not be sensitive to actual need. Not only will the level of federal funding be a set amount but also it appears that it will decrease by 15% of current levels over a three year period (about \$7 billion in total).<sup>18</sup>

The CHST will be a block funding mechanism. Not just social assistance, but also health, post-secondary education and other social services will be covered in one lump sum.<sup>19</sup> This means that no longer will there be earmarked funding for financial assistance to those in need. When one looks to current policies in Alberta or to the campaign promises of both opposition leaders in Ontario, it is not hard to imagine how poverty — and thus the poor — will get lost in the shuffle in favour of health and education.

Most voters see health and education in more 'universal' terms than they see social assistance. Despite new-found awareness of the arbitrariness of unemployment and blamelessness of the unemployed in the current economic order, the majority of 'us' still do not imagine ourselves as being in (or even potentially in) the same boat as the poor.

That such marginalisation (if not vilification) of the poor is likely to occur is made clear by Bill C-76 itself. In contrast to the repeal of CAP national standards, Bill C-76 maintains the national standards that have to date existed in the *Canada Health Act*. So, the current political agenda of deficit and debt reduction has not been invoked as a reason for a

frontal assault on the rights embedded in national health care standards which middle- and upper-class Canadians associate more closely with their own interests. This is plainly and simply discrimination against one of the most vulnerable groups in society — the poor.<sup>20</sup>

In manifold ways, Bill C-76 decrees that an unequal burden is to be placed on the poor as a result of the collective imperative to get our fiscal house in order. As laudable and necessary as fiscal responsibility is, austerity measures constitute discrimination, in law and not just morality, if those measures are either aimed at or clearly affect persons faced with poverty more severely than they affect better-off sectors of society. If Bill C-76 were to pass without modification in order to retain the equivalent of the current CAP protections, we would be witnessing a classic situation of the rights of a vulnerable minority being treated not as priorities but as dispensable privileges. It is worth recalling that it is when times are tough — and the majority's sense of threats to their values or material interests most acute — that respect for rights is most required.

An appreciation of the context within which the U.N. Committee sent its May 4 letter is important. Two years before the Committee's decision to demonstrate its concern, the Committee had issued, in May 1993, what it calls "Concluding Observations" in relation to a state report that had been presented to it by the Government of Prime Minister Mulroney.<sup>21</sup> The 1993 conclusions judged Canada to have fallen short of its international legal obligations under the Covenant due to our failure to achieve any "measurable progress in alleviating poverty over the last decade," particularly severe poverty among especially vulnerable groups.<sup>22</sup> The Committee at that time expressed its view on a number of specific practices that were contrary to Canada's legal promise to uphold the right to an adequate standard of living found in Article 11 of the Covenant.<sup>23</sup> The Committee urged "concerted action" to remedy two illegal situations: the reliance on food banks due to poverty-related hunger and discrimination in housing against both social assistance recipients and the working poor.<sup>24</sup>

In view of the fact that the occurrence of both of these situations is directly related to the inadequacy of social assistance, it was significant that the Committee's 1993 Concluding Observations also recorded its "particular concern ... that the Federal Government appears to have reduced the ratio of its

contributions to cost-sharing agreements for social assistance.”<sup>25</sup> This was a clear reference to CAP and can be understood as an implicit reference to the Committee’s existing jurisprudence that governments are under a general obligation not to take “deliberately retrogressive measures” with respect to existing protections of Covenant rights.<sup>26</sup> This obligation is the corollary of the obligation of governments to achieve “progressive realisation” of rights in the Covenant (including, apart from the right to an adequate standard of living, those to health, education, and opportunities to work), an obligation set out in Article 2(1) of the Covenant.<sup>27</sup>

The Committee ended these 1993 Concluding Observations by asking to be kept informed of “any developments or measures taken with regard to the issues raised and recommendations made” by the Committee.<sup>28</sup> To my knowledge, it does not appear that the government has done this, in general or with respect to Bill C-76 (a clear “development”). Two years later, the letter to the Liberal government carefully notes that the Committee was acting in the context of “its responsibility to keep under continuous review the various ‘concluding observations’ that it has adopted.”

In the discussions leading to the decision to send the letter, the Chairperson of the Committee made clear that even the action of sending a letter to Canada about Bill C-76 was not to be taken lightly. In the Chairperson’s words, a “threshold of concern” must be crossed “to warrant the Committee’s taking action” before the next report of a state is due for evaluation.<sup>29</sup>

The letter to Canada is judiciously worded. After the Committee outlines two options it had considered, namely requesting a special report from Canada and recommending the government refer the matter to the Supreme Court of Canada for its opinion on the compatibility of Bill C-76 with the Covenant, the Committee states in the letter that it is only because Bill C-76 is not yet law that “it would not be appropriate to make any specific recommendations to the Government on the issues raised.” In view of its constrained rôle vis-à-vis draft legislation, the Committee limited itself to “welcom[ing]” any observations by Canada in its next periodic report (due at the end of 1995, to be reviewed by the Committee in 1996) on the conformity of Bill C-76 with the Covenant, if it becomes law. The Committee’s cautious approach results from the

precedent-setting nature of having decided both that it had jurisdiction to signal concern about draft legislation and that it could do so between its scheduled consideration of reports.<sup>30</sup>

However, what is clear to those familiar with U.N. diplomatic language is that there *would* be recommendations to be made if the bill were law. Significant is the way in which the Committee draws the government’s attention to the 1993 Concluding Observations and then “underline[s] the importance that it attaches to the pursuit of policies and programs which comply fully with Canada’s obligations as a party to the Covenant.”

A final piece of context is required in order to interpret the signals being sent in the Committee’s letter of May 4. In 1993, the government of Prime Minister Mulroney reacted very negatively to the Committee’s critical Concluding Observations. The Conservative government weathered a brief firestorm of criticism in the Commons from both the Liberal and the New Democratic opposition and then proceeded to all but ignore the Committee’s conclusions.

Some observers based in Geneva who are familiar with the Committee take the view that the Committee’s very measured language can also be interpreted as an attempt to re-fashion a meaningful dialogue with a state that has behaved recalcitrantly in relation to the Committee. The hand of cooperation as opposed to antagonism is held out in the letter’s careful reference to the Committee’s appreciation of the “importance which the Canadian Government has consistently attached to the Covenant and of the Government’s strong support for the work of the Committee.”

Canadians and Parliamentarians should be under no illusions about the significance of the May 4 letter from the U.N. to Canada. Especially when viewed in the context of the Committee having commented in forceful terms in 1993 on the lack of progress in relief of poverty from 1983 to 1993, it is highly likely that the Committee will unambiguously judge the retrogressive measures contained in Bill C-76 to be in violation of the Covenant when Canada appears before the Committee in 1996 to present — and defend — its next report.<sup>31</sup>

At what point will the Committee understand the retrogressive measures in question to have taken

place in law? There are, it would seem, two main possibilities. The first possibility is that the Committee will understand the basic fact of removing legally existing federal legal protections as a retrogressive measure because this repeal of legal guarantees creates a significant risk that one or more provinces will not meet previous CAP standards. On this possibility, even if all provinces continue for the time being to respect the former CAP standards, the retrogressive measure in question is the creation of a legal vulnerability (a precarious and constantly contingent legal protection) that did not exist before.<sup>32</sup>

The second possibility is one that would require proof that the repeal of CAP has in fact resulted in less protection in (some) provincial law or practice than had been the case under CAP. Thus, on this second possibility, the duty not to take retrogressive measures will, at minimum, be determined to have been violated by the Committee if, at the time of the Committee's review of Canada at the end of 1996, there exists in any province of Canada any less protection for the above-indicated rights than found in CAP. My own interpretation of the duty not to take "deliberately retrogressive measures" is that such measures will have occurred no later than April 1, 1996, when Bill C-76 enters into force. I say "no later than" because there is a good argument that the violation will occur as soon as the legal vulnerability is assured (i.e. on the date Bill C-76 is passed).

Whichever interpretation the Committee adopts, it is absolutely crucial that Members of Parliament realise that Canada will not be able to plead a kind of legal devolution to the provinces as a defence; international treaty law does not allow domestic legal arrangements to justify what would otherwise be a breach of the treaty.<sup>33</sup> In specific respect to the second possibility, if any province begins to act in a way inconsistent with current CAP standards, it will be Canada, as represented by the federal Government, that will be accountable in international law. Federal Parliamentarians must realise that the repeal of CAP is in a certain sense a delegation of authority to the provinces to place Canada as a whole in breach of international law.

The international legal ratchet effect (about which I have been speaking in the preceding paragraphs) undoubtedly will be enhanced in the eyes of the Committee by the fact that Canada has consistently over the last 15 years invoked the CAP as an important plank in the legal protections accorded by

Canadian law to Covenant rights.<sup>34</sup> Thus, even without the obligation not to adopt retrogressive measures as a self-standing aspect of the Covenant obligation of progressive realisation, there would be a separate and strong legal argument that Canada has bound itself in good faith not to modify CAP in a way that lowers the protections it affords.

Furthermore, quite apart from this duty not to go back on achievements to date, it is important to be aware that the Committee would likely interpret some or even all of the rights protections currently in CAP agreements to be independently required by the Covenant whether or not they had previously existed in domestic law.

In particular, the Committee would be hard-pressed not to interpret the right to work in Article 6 of the Covenant as prohibiting being forced to work (what other treaties, including the International Covenant on Civil and Political Rights, call "forced labour").<sup>35</sup> Article 6 expressly states that the right to work is in relation to work which a person "freely chooses or accepts."

As well, comparative case law under the European Social Charter (applicable to some 25 European states) and the evolving views of the Committee make it likely that the Committee will interpret Articles 9 and 11 (social security and adequate standard of living) in tandem as generating a right to appeal (in a judicial or quasi-judicial forum) social assistance denials or reductions in terms of their adequacy in meeting needs.<sup>36</sup> Finally, Article 2(2) of the Covenant precludes discrimination which, as outlined earlier, Bill C-76 can be viewed as creating.<sup>37</sup>

Through its May 4 letter, the Committee has done the Government a service by acting in a spirit of cooperative dialogue. The message was very diplomatic but nonetheless loud and clear. Why place ourselves in the position of having to justify the legally unjustifiable on the world stage? The current Liberal Government's foreign policy on human rights, especially economic and social rights, does not have to be cut from the same cloth as that of the former Conservative Government.

Surely the measure of Canada's professed commitment to its international human rights obligations and to the rule of law generally is the willingness of our legislators to avoid passing legislation which fails to respect human rights. The

*Canadian Charter of Rights and Freedoms* is used consistently by governments across Canada as a measuring-stick for proposed legislation in a spirit of prevention of rights violations, not to mention avoidance of litigation. Canada's international human rights commitments should be taken no less seriously, especially since international human rights are one source of *Canadian Charter* (and, I would add, *Québec Charter*) rights.<sup>38</sup>

Bill C-76 has to be amended in a way that ensures that Canadians do not lose the human rights protections we — *all of us* — currently enjoy. □

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#### Endnotes

1. The following is the text of Craig Scott, "The Implications of U.N. Human Rights Body Signalling Concern vis-à-vis Repeal of Rights in Bill C-76: Letter to Canada Suggests that Bill C-76's Repeal of National Standards in the *Canada Assistance Plan Act* Will Breach International Treaty if Not Amended," Submission to the Standing Committee on Finance, House of Commons (March 8, 1995). The accompanying oral presentation to the Standing Committee was made on May 16, 1995. The text has been modified slightly in two respects. Firstly, minor corrections have been made to the May 8 written submission in order to remove inaccurate references with respect to dates on which legislative changes are to take effect. Secondly, references to Parliamentarians and Members of the Standing Committee on Finance as the intended readership have been removed in order to make the audience for these remarks Canadian society as a whole. In addition, endnotes have been added, some of which contain commentary that was added to the written submission of May 8 during the oral presentation of May 16.
2. Bill C-76 (First Session, Thirty-fifth Parliament, 42-43-44 Elizabeth II, 1994-95), *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 1995* (First Reading, March 20, 1995) [hereinafter Bill C-76].
3. *Canada Assistance Plan Act*, R.S., c.C-1 [hereinafter CAP].
4. Bill C-76 adds section 4.1 to CAP which reads:
  - 4.1. Notwithstanding any agreement made under this Act,
    - (a) no payment shall be made to a province under this Act in respect of any fiscal year commencing on or after April 1, 1996; and

(b) no payment shall be made to a province under this Act on or after April 1, 2000.

Section 32 of Bill C-76 goes on to repeal CAP on March 31, 2000. It can thus be seen that CAP ceases to have an effective existence as of April 1, 1996, in spite of the actual repeal of the law occurring some four years later.

The CHST is created by Bill C-76 as an amendment to the *Federal-Provincial Fiscal Arrangements Act*: Bill C-76, section 48. Part V of the *Federal-Provincial Fiscal Arrangements Act* is now devoted to the Canada Health and Social Transfer, with the lead section, section 13, now reading:

13. (1) Subject to this Part, a Canada Health and Social Transfer may be provided to a province for a fiscal year for the purposes of

(a) establishing interim arrangements to finance social programs in a manner that will increase provincial flexibility;

(b) maintaining the national criteria and conditions in the *Canada Health Act*, including those respecting public administration, comprehensiveness, universality, portability, accessibility, extra-billing and user charges; and

(c) maintaining national standards, where appropriate, in the operation of other social programs.

(2) The Canada Health and Social Transfer shall consist of

(a) a federal income tax reduction in favour of the provinces that would enable the provinces to impose their own tax measures without a net increase in taxation; and

(b) a cash contribution not exceeding the amount computed in accordance with section 14.

(3) The Minister of Human Resources Development shall invite representatives of all the provinces to consult and work together to develop, through mutual consent, a set of shared principles and objectives for the other social programs referred to in paragraph (1)(c) that could underlie the Canada Health and Social Transfer.

Section 14, referred to in section 13(2)(b), reads:

14. The cash contribution in respect of the Canada Health and Social Transfer that may be provided to a province for a fiscal year is an amount equal to the amount, if any, by which the total entitlement in respect of the Canada Health and Social Transfer applicable to the province exceeds the total equalized tax transfer applicable to the province for that fiscal year.

It should be noted that the CHST takes the form of a unilateral transfer of funds, unlike CAP which has taken the form of a federal-provincial agreement.

5. Letter from Philip Alston, Chairperson, Committee on Economic Social and Cultural Rights to His Excellency Ambassador Gerald Shannon, Permanent Representative, Permanent Mission of Canada to the United Nations Office in Geneva, dated 4 May 1995, Palais des Nations, Geneva (reproduced as Appendix I).
6. *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3.
7. *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171
8. For an overview of the Committee, see Philip Alston, "The Committee on Economic, Social and Cultural Rights" in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) 473.
9. *Re: The International Covenant on Economic, Social and Cultural Rights and Proposed Legislation by Canada (Bill C-76) to eliminate the Canada Assistance Plan (CAP)*, Presentation to the Committee on Economic, Social and Cultural Rights by Non-Governmental Organisations from Canada, May 1, 1995, Palais des Nations, Geneva. The May 4 letter from the Committee to Canada included, as an attachment, a copy of this written brief.

The oral presentations on behalf of NAC, CCPI and NAPO were made by Sarah Walsh, a low-income activist and Chairperson of CCPI, and Vincent Calderhead, a staff lawyer with the Public Interest Advocacy Centre in Vancouver. While the Covenant does not have a procedure for individual petitions (or communications) as exists under its sibling Covenant (the International Covenant on Civil and Political Rights and its Optional Protocol), the Committee has created some space for states' reports to the Committee to be evaluated in light of concrete situations and accompanying evidence of Covenant breaches. At its Eighth Session, the Committee adopted a decision changing its rules of procedure to provide for enhanced Non-Governmental Organisation (NGO) participation in the work of the Committee, including allowing the Committee to receive oral presentations from NGOs on the first afternoon of each of its sessions: Decision on NGO participation in the activities of the Committee, Committee on Economic, Social and Cultural Rights, *Report on the Eighth and Ninth Sessions*, UN ESCOR, 1994, Supp. No. 3, UN Doc. E/1994/23, E/C.12/1993/19 at 69. On the extent to which an unofficial petition procedure is evolving through written and oral submissions by NGOs, see Matthew Craven, "Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights" in Krzysztof Drzewicki, Catarina Krause & Allan Rosas, eds., *Social Rights as Human Rights: A European Challenge* (Turku/Abo, Finland: Institute for Human Rights/Abo Akademi University, 1994) 91.

10. See "U.N. Rights Body Decides to Act Regarding 'Potentially Dangerous' Federal Budget Legislation," Press Release of NAC, CCPI and NAPO, May 2, 1995.

The reaction reported in the NGO news release refers to the initial response by Committee measures after the oral presentation by the Canadian NGOs. The sessions during which NGO oral presentations are heard are not transcribed in the official records of the Committee. However, the provisional transcript, known in the United Nations as a Summary Record, of the Committee's subsequent official discussion (on May 3, 1995) of what action to take vis-à-vis Bill C-76 is found in U.N. Doc. E/C.12/1995/SR.5 at 1-6 (8 mai 1995) [French version].

11. *CAP*, sections 4, 11, and 15.
12. *CAP*, sections 6(2) and 15(3) for the standards, and sections 7 and 16 for the express statement that "payments are subject to the conditions specified in this Part and in the regulations and to the observance of the agreements and the undertakings in an agreement."
13. *CAP*, section 6(2)(a).
14. *CAP*, section 6(2)(b).
15. *CAP*, section 6(2)(e).
16. *CAP*, section 15(3)(a).
17. *Finlay v. Canada (Minister of Finance)*, [1988] 2 S.C.R. 607.
18. This is the interpretation placed on the Bill C-76 provisions dealing with the fiscal aspects of the CHST by the NGO presenters to the Committee in *Re: The International Covenant on Economic, Social and Cultural Rights*, *supra* note 10 at 6.
19. Bill C-76, section 25.
20. Article 2 of the International Covenant on Economic, Social and Cultural Rights, *supra* note 6, protects against discrimination and serves as one basis on which the Committee has interpreted the Covenant as requiring a priority of attention in policy-making and legislation to the most vulnerable and disadvantaged groups in any society. See Scott and Macklem, *infra* note 26 at 95.
21. Concluding Observations with respect to Canada, Committee on Economic, Social and Cultural Rights, *Report on the Eighth and Ninth Sessions*, UN ESCOR, 1994, Supp. No. 3, UN Doc. E/1994/23, E/C.12/1993/19 at 28. For easier access, it should also be noted that the Concluding Observations are also reproduced at 20 C.H.R.R. C/1.
22. *Ibid.* at 30.
23. Article 11(1) provides in part:

The State's Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food,

clothing and housing, and to the continuous improvement of living conditions ....

24. Concluding Observations with respect to Canada, *supra* note 21 at 30 and 31.

25. *Ibid.* at 30.

26. See General Comment No. 3, Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session*, UN ESCOR, 1990, Supp. No. 3, UN Doc. E/1991/23, E/C.12/1990/8 at 83, 85. See also Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 U.Pa.L.Rev. 1 at 80-81. Two Finnish scholars have discussed a similar normative ratchet in terms of a constitutional prohibition against "going back": Heikki Karapuu and Allan Rosas, "Economic, Social and Cultural Rights in Finland" in Allan Rosas, ed., *International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives* (Dordrecht: Martinus Nijhoff Publishers, 1995) 195, 208-209.

27. Article 2(1) provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

A set of interpretive principles for the Covenant drafted by a group of international legal experts meeting in Maastricht, the Netherlands, in June 1986, refers in Principle 72 to a violation of the Covenant being produced if, *inter alia*, the state "deliberately retards or halts the progressive realisation of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*": see "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Hum. Rts. Q 122 at 131.

28. Concluding Observations with respect to Canada, *supra* note 21 at 32.

29. Press Release, *supra* note 10. Again, these were the words of the Chairperson as reported from the day of the NGO presentations. During the formal consideration of the Canadian situation, on May 3, the Chairperson led off the Committee's discussion by noting:

It is necessary that the difficulty signalled [to the Committee about state compliance with Covenant obligations] be sufficiently worrying to justify the

Committee returning, as an exceptional matter, to a specific aspect of a report that it has already examined. The Committee must therefore establish very clearly that taking steps is justified in the case at hand.

E/C.12/1995/SR.5, *supra* at 1 [author's translation of the French].

30. Except for one, all Committee members who spoke during the Committee debate on Bill C-76 affirmed the power of the Committee to follow up on state reports at Committee sessions after the state in question has presented its report and received the Committee's concluding observations and when that state is not otherwise due to appear before the Committee. M. Texier, the Member from France and a sitting judge in that country, went even further by indicating that the Committee can follow the "situation" in a country throughout the year and not simply during the period in which the Committee is in session. He cited the precedents for this:

In effect, the Committee had moved over the past few years towards following the situation in States parties between sessions, for example concerning the right to housing in the Dominican Republic and in Panama (where the Committee had even conducted a visit), and, to a lesser extent, in the Philippines. It is therefore true that the Committee must strive to follow the situation in States parties throughout the year and not only at the time it is in session (*ibid.* at 3).

Thus, it is probably true to say that the precedent being set by the Committee related mostly to the question of drawing the attention of states to concerns about draft legislation. That being said, the sense of going somewhat beyond and building on the precedents listed by M. Texier (on the question of 'follow-up' jurisdiction,) was evident in the Chairperson taking note of the idea of adding an item to the Committee's standard agenda in order to formalise the follow-up of Committee observations (*ibid.* at 6).

It should finally be noted that the prudence of the letter is also tied to the fact that the Committee, treating the matter as one of some urgency, had not had the opportunity to receive representations from Canada on its view of the matter, although a lawyer-diplomat from the Canadian Mission to the U.N. in Geneva did observe the Committee sessions.

31. Such a finding would be an application of the Committee's view set out in General Comment No. 3 that the Covenant prohibits what the Committee calls "deliberately retrogressive measures," especially those that result in particularly vulnerable and disadvantaged groups being at greater risk than had been the case. See General Comment No. 3 and other citations, *supra* note 26.



32. This legal vulnerability consists not simply in the possibility that a province may modify current provincial laws and regulations or adopt harsher policies and practices. It is also due to the fact that there would no longer be any clear basis for challenging provincial failures by bringing suit against the federal government on the basis of the CAP agreement in question, as in the *Finlay* case (interacting with sections 7 and 16 of CAP). It is not simply that the CHST is not based on a federal-provincial agreement. It is also that the actions now specified in sections 20-24 of the *Federal-Provincial Fiscal Arrangements Act* for the Minister of Human Resources Development in response to provincial failure to meet the one national standard retained as part of the CHST in respect of social assistance (inter-provincial residential mobility in section 19 of the *Federal-Provincial Fiscal Arrangements Act*, as amended by Bill C-76, section 50) is so full of wide discretion that there would appear to be no real statutory duty on which to sue.

The so-called 'legal' vulnerability cannot be divorced from the particular race-to-the-bottom pressure placed on the adequacy of social assistance by the fact that only residential mobility rights are retained as national social assistance standards. It is not difficult to envisage scenarios according to which one province lowers its levels of social assistance in a way which causes some people to move to neighbouring provinces in the hope of being able adequately to attend to their needs. As section 19 prohibits the receiving province from treating newcomers differently, the result will be pressure on that province to lower its levels of assistance in order to match or come close to that of the emigrant-producing province and, thereby, stem the flow of new residents. Without an enforceable common national standard of social assistance adequacy, there is nothing to stop some provinces from exploiting and other provinces from having to conform to the pressures toward the lowest common denominator.

33. The *Vienna Convention on the Law of Treaties* provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...": *Vienna Convention on the Law of Treaties*, 23 May 1969, Can. T.S. 1980 No. 37, 8 I.L.M. 679, art. 27.

34. See the instances cited in the May 1, 1995, NGO presentation to the Committee, *Re: The Covenant on Economic, Social and Cultural Rights*, *supra* note 9 at 2-4.

35. Article 6(1) provides:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 8(3)(a) of the International Covenant on Civil and Political Rights, *supra* note 7, provides:

No one shall be required to perform forced or compulsory labour.

On the right to work, especially in relation to freedom from forced and compulsory labour, see Krzysztof Drzewicki, "The Right to Work and Rights in Work" in Asbjorn Eide, Catarina Krause and Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, the Netherlands: Martinus Nijhoff, 1995) 169, 175-178. For relevant International Labour Organisation (ILO) norms, see International Labour Conference, *Abolition of Forced Labour: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: International Labour Office, 1979).

36. Article 9 provides:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 11(1) is reproduced *supra* note 23.

For an account of the obligations in each of these two articles, see Asbjorn Eide, "The Right to an Adequate Standard of Living Including the Right to Food" and Martin Scheinin, "The Right to Social Security" in Eide, Krause, and Rosas, *ibid.* at 89 and 159. For a description with citations of relevant European Social Charter jurisprudence, see Scott and Macklem, *supra* note 26 at 102-104.

37. Article 2(2) provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

38. See especially *Slaight Communications Inc. v Davidson*, [1989] 1 S.C.R. 1038.

APPENDIX 1

OFFICE DES NATIONS UNIES A GENÈVE UNITED NATIONS OFFICE AT GENEVA

CENTRE POUR LES DROITS DE L'HOMME

CENTRE FOR HUMAN RIGHTS

Palais des Nations  
CH-1211 Genève 10

4 May 1995

Dear Ambassador Shannon,

I am writing to you on behalf of the Committee on Economic, Social and Cultural Rights, which is currently meeting in Geneva for its twelfth session.

The Committee has been presented with information relating to current developments in Canada by representatives of the National Anti-Poverty Organization, the Charter Committee on Poverty Issues and the National Action Committee on the Status of Women. A copy of the report presented to the Committee is attached. It alleges, inter alia, that draft legislation currently before the Canadian Parliament in Bill C-76 will, if enacted, result in serious contraventions of the International Covenant on Economic, Social and Cultural Rights, to which Canada is a party. The Committee has been requested to take various measures including requesting a special report from the Government and recommending that the Bill be referred to the Supreme Court for an opinion as to its compatibility with the Covenant.

The Committee has given careful consideration to this matter in light of its responsibility to keep under continuing review the various "concluding observations" that it has adopted. It notes in this regard the various provisions of its concluding observations relating to the second periodic report of Canada relating to articles 10 to 15 (E/1994/23, paras. 90-121). In view of the fact that the draft legislation has not yet been enacted, the Committee considers that it would not be appropriate for it to make any specific recommendations to the Government on the issues raised.

It wishes, however, in view of the importance which the Canadian Government has consistently attached to the Covenant and of the Government's strong support for the work of the Committee, to underline the importance that it attaches to the pursuit of policies and programs which comply fully with Canada's obligations as a party to the Covenant. In this regard, if the legislation in question is enacted, the Committee would welcome observations by the Government on the issue of its conformity with the Covenant in the context of Canada's next periodic report, due later this year.

Yours sincerely,

[SIGNED]

Philip Alston  
Chairperson  
Committee on Economic, Social  
and Cultural Rights

H.E. Ambassador Gerald Shannon  
Permanent Representative  
Permanent Mission of Canada to the  
United Nations Office in Geneva