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A. Overview

142.149 Ensure the justiciability of economic, social and cultural (esc) rights (South Africa) [supported]

1. Civil society organizations welcomed Canada's support for the recommendation from South Africa at its third UPR to ensure the justiciability of ESC rights but unfortunately, with the exception of the adoption of legislation to ensure access to justice for the right to adequate housing at the federal level, Canada has not implemented that commitment. Instead, it has continued to resist any access to justice for ESC rights and, moreover, has sought to deny access justice for rights to life, security of the person and equality under the *Canadian Charter of Rights and Freedoms* wherever these rights are interdependent with ESC rights such as the right to housing or the right to health care.
2. Access to justice for ESC rights in Canada relies on three key commitments:
 - i) the adoption of legislation by parliament or provincial territorial governments to provide the required protection of international human rights;
 - ii) a commitment by courts to interpret domestic law, and in particular the Canadian Charter of Rights and Freedoms (the Charter) based on the presumption that it provides at least the same level of protection as ratified international human rights treaties; and
 - iii) decision-making by authorities in all orders of government in a manner that is informed by and consistent with Canada's international human rights obligations.

B. Incorporating ESC rights into domestic legislation

i. National Housing Strategy Act (2019)

3. A positive step taken to implement ESC rights into domestic legislation was the [National Housing Strategy Act](#) (2019) (NHTSA), the first federal legislation to incorporate an ESC right as affirmed in international law. The NHTSA recognizes the right to adequate housing as a fundamental human right, commits the federal government to the progressive realization of this right as recognized in the ICESCR and provides access to independent reviews of systemic violations by a Federal Housing Advocate and hearings into systemic issues before a Review Panel.
4. In Canada's third UPR, Canada noted but did not support recommendation 142.162 from the Philippines to "adopt legislation that fully recognizes the right to housing and provide for effective remedies for violations for the right." This recommendation reflected concerns at that time from the UN

Special Rapporteur on the Right to Housing and among civil society organizations that in announced legislation, Canada intended to reduce this right to the status of a mere policy aspiration.¹

5. Indeed, when the legislation was first presented to parliament by the government, these concerns proved to be warranted. However, after concerted advocacy from civil society organizations and affected groups, and an [intervention](#) before a parliamentary Committee by the UN Special Rapporteur on the Right to Adequate Housing, the NHSA was amended to empower the Housing Advocate to conduct reviews into systemic issues and a Review Panel to hold hearings. Findings and recommendations from reviews and hearings are submitted to the Minister of Housing who must respond within 120 days. These accountability mechanisms are separate from the court system, however, and largely rely on the government's commitment to implementing the legislation in good faith.

6. As documented in other stakeholder submissions, serious concerns have emerged with respect to Canada's good faith compliance with the NHSA.

Recommendation Re National Housing Strategy Act and Rights

- 1. Ensure that the commitment to the progressive realization of the right to adequate housing under the *National Housing Strategy Act* (NHSA) is fully implemented and that findings and recommendations resulting from independent reviews and hearings into systemic violations of the right to housing are implemented in good faith.**
- 2. Ensure that provincial and territorial governments adopt legislation to implement the right to adequate housing and ensure access to justice in all areas of provincial/territorial jurisdiction over housing.**
- 3. Ensure that all municipal governments adopt charters to recognize the right to adequate housing and ensure access to justice and effective remedies.**

ii. Incorporating ESC rights in Provincial/Territorial Legislation and Inter-Governmental Agreements

7. Provinces and territories in Canada have predominant jurisdiction in many aspects of ESC rights, including housing, social services, education and health care. The UN CESCR has repeatedly recommended that Canadian provinces and territories adopt legislation to ensure the protection of ESC rights within their jurisdiction but these recommendations have been ignored. Provincial/territorial human rights legislation is largely restricted to the right to non-discrimination. Only Quebec has incorporate socio-economic rights in its human rights legislation, with very limited justiciability.

8. There is also a critical need for ESC rights to be recognized as shared obligations with Canada's federal structure. The [Social Union Framework Agreement](#) adopted by the First Ministers in 1999 includes no accountability measures and is now completely ignored.

9. Section 36(1) of the *Constitution Act, 1982* recognizes a joint commitment of federal and provincial governments to providing "essential public services of reasonable quality." In its *Core Document* Canada described section 36 as being "particularly relevant in regard to ... the protection of economic, social and cultural rights."² Unfortunately, section 36 has been largely ignored by courts and governments.

10. During the last round of constitutional negotiations in 1992, a [social charter](#) was proposed and endorsed by over forty national organizations as a means to provide enhanced accountability for ESC rights within the context of a renewed federalism. Constitutional reform has been rejected but a social charter could be adopted outside of the constitution.

Recommendation Re Legislative Incorporation of ESC Rights

4. **Ensure that ESC rights are adequately protected in all provinces and territories by legislation that provides for access to justice and effective remedies for any systemic violations.**
5. **Access to justice for ESC rights should be enhanced by ensuring that section 36 is considered justiciable by governments and courts.**
6. **Modernize the Social Union Framework Agreement to articulate shared commitments and obligations to realize ESC rights and provides for accountability and access to justice to address inter-governmental failures to progressively realize ESC rights.**

C. Interpreting Domestic Law Consistently with ESC Rights under International Law

i. *The Canadian Charter of Rights and Freedoms*

11. Canada confirmed in its acceptance of Recommendation 142.149 that remedies to violations of ESC rights are available by way of claims under the Canadian Charter. The broadly framed rights in the *Canadian Charter of Rights and Freedoms*, to life and security of the person (s. 7), and the equal benefit of the law (s.15) are the primary vehicle for the implementation of international human rights into domestic law in Canada. However, governments in Canada have consistently taken the position in litigation that ESC rights are NOT justiciable and that courts should NOT provide effective remedies to ESC rights through appropriate interpretations of rights to life, security of the person or equality.

12. In [Toussaint v Canada CCPR/C/123/D/2348/2014](#) the UN Human Rights Committee found that Canada had violated Nell Toussaint's right to life and non-discrimination by denying her access to essential health care and placing her life at risk. The Committee found that Canada must take necessary measures to ensure that irregular migrants have access to essential health care when their lives are at risk.

13. Canada has [refused](#) to implement the Committee's Views and continues to deny health care to irregular migrants. It stated that it is "unable to agree with the views of the Committee in respect of the facts and law in the communication and as such will not be taking any further measures to give effect to those views." Canada takes the position that the right to life does not apply to persons denied access to publicly funded health care to protect their lives because access to health care is a socio-economic right. Canada has argued that the right to life only ensures access to health care for those who can afford private health care, not for those who cannot afford private health care and who rely on "free health care."

14. After Canada refused to implement the Committee's Views, Ms. Toussaint sought a decision from domestic courts to assess how the right to life in the *Canadian Charter* should be interpreted in light of Canada's international human rights obligations, and to determine if Canada may have a constitutional obligation to ensure access to life-saving health care for irregular migrants. Canada [moved](#) to have the claim struck as non-justiciable. Canada insisted that Ms. Toussaint's claim was not really a claim to the right to life but rather a claim to "free health care." The Ontario Superior Court of Justice dismissed Canada's motion and was harshly critical of Canada's "unfair" and prejudicial mischaracterization of Ms. Toussaint's claim "as a claim for a purely socio-economic right which is outside the guarantees of the Canadian Charter."³ The claim was allowed to proceed to a hearing on the evidence.

15. Tragically, Ms. Toussaint passed away on January 9, 2023 so Canada's litigation tactics, described by the Superior Court as "land, sea, air, submarine, and celestial procedural attack" on Ms. Toussaint's claim succeeded in denying her access to justice in her lifetime.

Recommendation re *Charter* Interpretation

- 7. All governments in Canada should cease from arguing that socio-economic rights are non-justiciable or that rights to life or substantive equality may not impose positive obligations interdependent with ESC rights of access to housing, health care or income support.**
- 8. Canada should immediately implement the Views of the UN Human Rights Committee in *Toussaint v Canada* and ensure that victims of violations of human rights identified in the Views of human rights treaty bodies have access to courts to consider the impact of the Views on the interpretation of their rights under the Canadian Charter.**

ii. Human Rights Legislation

16. Canada's also noted when it supported recommendation 14.2.149, it remedies to ESC rights may be available through human rights legislation. However, human rights commissions, tribunals and courts in Canada have failed to provide effective remedies to systemic discrimination and inequality where it is tied to socio-economic rights violations, such as widespread homelessness among persons with disabilities.

17. In 2017, the Committee on the Rights of Persons with Disabilities noted in its Concluding Observations on Canada that persons with disabilities continue to be placed in institutions in many provinces because of inadequate programs to ensure access to housing and support in the community. This was challenged as discrimination under human rights legislation in the case of [Disability Rights Coalition v. Nova Scotia \(Attorney General\)](#), 2021 NSCA. Rather than acknowledging their obligation under article 19 of the Convention on the Rights of Persons with Disabilities, the Attorney General for Nova Scotia [argued](#) that international human rights have no relevance to the determination of the equality rights of persons with disabilities.

Recommendations Re Human Rights Legislation

16. **Consistently promote and adopt interpretations of human rights legislation that is informed by and consistent with Canada's international human rights obligations, so as to provides access to effective remedies to the unequal enjoyment of the rights to housing, services and work.**

D. Administrative Decisions Consistent with ESC Rights

18. In its important 2019 decision on the requirements of administrative decision-making in [Canada \(Minister of Citizenship and Immigration\) v. Vavilov](#), the Supreme Court stated that: "Since [The Supreme Court of Canada's decision in [Baker v. Canada \(Minister of Citizenship and Immigration\)](#), it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power." The Court held that "in some administrative decision-making contexts, international law will operate as an important constraint on an administrative decision maker."⁴

19. This means that any officials exercising statutory discretion or making decisions that may affect the enjoyment of ESC rights should give due consideration to Canada's international human rights obligations. However, administrative tribunals and decision-makers rarely comply with this requirement.

Recommendation Regarding Administrative Decision-Making

- 17. Ensure that administrative tribunals and government officials with authority to make decisions affecting the enjoyment of ESC rights are educated on Canada’s obligations with respect to ESC rights and required to give due consideration to these obligations.**

E. Grossly Inadequate Levels of Social Assistance for Persons in Need

20. Canada supported a number of recommendations in UPR3, including recommendations 142.156 and 142.154, committing to take all measures necessary to combat poverty more effectively while paying particular attention to vulnerable groups and individuals. However, while Canada will report reductions in the overall poverty rate, income support programs of last resort provided by the provinces and territories generally known as ‘social assistance’ remain at levels that deprive recipients of basic requirements.

21. The poverty line, also known as the ‘Market Basket Measure’ was [adopted into law in 2019](#) and is adjusted “to ensure that it reflects the up-to-date cost of a basket of goods and services representing a modest, basic standard of living in Canada.” Social assistance rates are monitored by a national non-profit organization (‘[Maytree](#)’) which assembles rates from all programs and compares those rates to the Official Poverty Line.

22. Canada has acknowledged that the Official Poverty Line fails to take into account *any* disability-related living expenses. As a result, while the normally higher total welfare incomes of persons with a disability appear to be ‘more adequate’, this does not account for the higher costs of living faced by persons with a disability.

23. In its most recent report on social assistance rates in Canada ([Welfare in Canada](#), Nov. 2022), Maytree reported that the total welfare incomes for *all* family scenarios and in *every* province in Canada surveyed “were below Canada’s Official Poverty Line.” In addition, 33 of the 41 example households receiving social assistance in the provinces — or 80 percent of households — were living in ‘[deep poverty](#)’ at less than 75% of the poverty line.

24. The situation of social assistance recipients has become even worse because most provinces have failed to increase already inadequate rates to adjust for inflation. The province of Nova Scotia is illustrative. In the recent Provincial Budget for that province, the government announced *no* increases in social assistance rates despite record high inflation over the past two years. As a result, the total welfare incomes for sample households (that is, the total of *all* provincial and federal income support payments) show the shockingly inadequate amounts of

support for those in need. Single social assistance recipients in Nova Scotia now receive, on average, less than one third of the official poverty line for single people and less than half of the 'deep poverty' line.⁵

Recommendations re Inadequate Social Assistance Rates

- 18. The federal government needs to exercise leadership in initiating an inter-governmental commitment to increasing social assistance rates to conform with the Poverty Line.**
- 19. Canada should formally recognize the right to adequate levels of social assistance for those in need as a component of the right to a dignified life and to substantive equality and ensure access to justice for anyone denied these rights.**

Endnotes

¹ Communication 22 Jun 2018 **Canada** OL [CAN 2/2018](#). Communication 16 May 2017 [AL CAN 1/2017](#).

² HRI/CORE/CAN/2013 at para 169.

³ Toussaint v. Canada (Attorney General) 2022 ONSC 4747. Online:
<<https://www.canlii.org/en/on/onsc/doc/2022/2022onsc4747/2022onsc4747.html>>.

⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at [para 114](#).

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Inadequacy of Social Assistance Incomes in Nova Scotia (March 2023)

Note: StatsCan considers people living at less than 75% of the poverty line to be living in '[deep poverty](#)'.

	Single Adult (Boarding)	Single Person Considered Employable (Owning or Renting)	Single Person With A Disability	Single Parent, One Child	Couple, Two Children
Total Income	\$8,376	\$9,312	\$12,512	\$21,642	\$33,683
Official Poverty Line Threshold (Halifax)	\$27,631	\$27,631	\$27,631*	\$38,683	\$55,261
Total Income Minus OPL Threshold	-\$19,255	-\$18,319	-\$15,119	-\$17,041	-\$21,578
Total Income as % of OPL (Last year's figure in brackets)	30.3% (31.7)	33.7% (35.2)	45.3% (47.3)	55.9% (56.5)	61.0% (61.3)