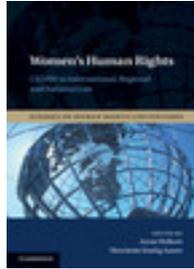


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## The Canadian experience with the CEDAW: all women's rights are human rights – a case of treaties synergy

LUCIE LAMARCHE

*[I]nequality in economic, social and cultural rights undermines women's ability to enjoy their civil and political rights, which then limits their capacity to influence decision and policy-making in public life ... equality in civil and political rights is undermined unless equality in the exercise and enjoyment of economic, social and cultural rights is secured.*

Montreal Principles, 2002<sup>1</sup>

### 1 Introduction

It is often said that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) carries a promise of substantive gender equality as it promotes the elimination of all forms of discrimination against women beyond the enumeration of rights it specifically guarantees. That includes civil and political rights as well as economic, social and cultural ones. In relation to accountability – the corollary proposal to effective rights – the editors of this book suggest that the CEDAW builds the parameters of a gender equality regime over time. We agree with such a proposal.

When it comes to the case of Canada, we believe the situation of the last decade shows that women and women's groups are trying to build such a gender equality regime by using all possible means and protections of rights offered by different international human rights treaties. This chapter wishes to demonstrate the specific synergy between two treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the CEDAW.

<sup>1</sup> 'Montreal Principles on Women's Economic, Social, and Cultural Rights', 2002 (2004) 26 HRQ 760.

The recourse to the practice of shadow reporting to the UN human rights treaty bodies by the Canadian women's movement followed a moment of exuberance where the gender equality seekers relied on the Canadian Charter of Rights and Freedoms and its equality provision to encourage (blame and shame) the Canadian government to comply with international law. Unfortunately, this advocacy exercise revealed that domestic legal gains are influenced by global economic changes that also deeply affect the gender equality regime in relation to economic and social rights. While it is impossible for us to claim that international human rights instruments are by themselves transformative when we consider the quest for gender equality, it is clear they contribute (at least, in regressive times) to the demand for more political accountability.

This chapter is divided into two sections. The first section explores the Canadian constitutional landscape and addresses the particularities of Canada as a dualist federated State of the Americas. In such a context, there always seems to be room to transfer the responsibility for the economic security of women to another level of government. In addition, Canada is also regionally isolated as it is not seriously committed to the positively evolving regime of human rights created over time by the Organization of American States (OAS). It appears, though, that the UN treaty monitoring system recently decided to put an end to the accountability limits of a federated State such as Canada and that the CEDAW Committee contributed to such progress.

The second section, using mostly empirical data and relying on legal-textual analysis, examines the Canadian experience of intertwined reporting and shadow reporting to UN treaty bodies, including the CEDAW Committee. The last decade of such experience reveals that the Canadian women's movement succeeded in crafting a gender equality regime based on different instruments by using all possible synergies between treaties in order to promote an interdependent reading of women's rights and of gender equality. The fight against the increasing poverty of women is an example of this effort as the movement believes that the protection of economic and social rights is an essential component of any human rights accountability system.

We would wish to conclude on a positive note. However, the current political reality dictates more pragmatism. It seems that the better the understanding of substantive gender equality gets on the part of the CEDAW, the less the Canadian government, including provincial and territorial components of the federation, is willing to acknowledge the encompassing scope of its international commitments.

In the meantime, the Canadian women's movement does not appear to intend to change its strategy. It may even export its litigation capacity by presenting before some UN human rights committees, including the CEDAW Committee.

## 2 Women's rights in context: the Canadian landscape

After a quick survey of Canada's international and regional commitments with regard to women's rights (2.1 and 2.2), this section will summarise the domestic struggle for gender equality that followed the adoption of the Canadian Charter of Rights and Freedoms. After some significant gains, we nevertheless have to conclude that the ambient neoconservative ideology, on top of a wave of budget cuts, is producing diminishing returns for Canadian women (2.3). Finally, the human rights landscape will be examined in the context of federalism. It seems that it is almost always convenient for jurisdictions that are first responsible for social policies to hide behind the veil of the federal treaty-making power (2.4). This dynamic is intimately linked to the decision of the women's movement to move their struggle for equality to the international level.

### 2.1 *International commitments concerning human rights and women's rights: an overview*

Canada has ratified the core UN human rights treaties. It became party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in October 1970; it ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976. It also ratified the CEDAW in 1981 (without reservation), the Convention against Torture (CAT) in 1987 and the Convention on the Rights of the Child (CRC)<sup>2</sup> in 1991. In April 2010 Canada ratified the Convention on the Rights of Persons with Disabilities (CRPD).<sup>3</sup> It does not seem, though, that the Canadian government wishes to become party to the Convention on Migrant Workers (CMW).

<sup>2</sup> In the case of the CRC, Canada registered two reservations. One concerns Article 21 of the treaty and the respect of customary forms of care among Aboriginal people in Canada. The other provides for the protection of domestic policies aimed at separating children from adults when in detention.

<sup>3</sup> In the case of the CRPD, the Canadian government registered a reservation against Article 12(4), promoting an interpretation that provides for the right to continue

Canada ratified the First Optional Protocol to the ICCPR in 1976,<sup>4</sup> but only acceded to the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty in 2005.<sup>5</sup> In addition, it ratified the Optional Protocol to the CEDAW in 2002<sup>6</sup> and both the Optional Protocol to the CRC on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography in 2005.<sup>7</sup> The Canadian government states repeatedly that it does not wish to ratify the recent Optional Protocol to the ICESCR,<sup>8</sup> adopted in 2008.

Finally, Canada ratified thirty-two International Labour Organization Conventions. Among them are Convention No. 87 on freedom of association and protection of the right to organise (1948),<sup>9</sup> Convention No. 100 on equal remuneration for men and women workers for work of equal value (1951)<sup>10</sup> and Convention No. 111 concerning discrimination with respect to employment and occupation (1948).<sup>11</sup> Those conventions were ratified in 1972 except for Convention No. 111, which Canada ratified in 1964.

## 2.2 *Regional commitments*

Canada joined the Organization of American States (OAS) in 1991 and is thereby bound to respect the 1948 Charter of the OAS, as amended by

the use of substitute decision-making arrangements in accordance with the law. Also, the Government of Canada interprets Article 33 (2) of the CRPD as accommodating the situation of federal States where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.

<sup>4</sup> Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 302, entered into force 23 March 1976.

<sup>5</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1642 UNTS 414, entered into force 11 July 1991.

<sup>6</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, entered into force 22 December 2000.

<sup>7</sup> Optional Protocol to the CRC on the involvement of children in armed conflict, 2133 UNTS 161 and Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, 2171 UNTS 227, entered into force 12 February 2002.

<sup>8</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. A/63/435, 11 December 2008, not yet in force.

<sup>9</sup> ILO Convention No. 87 concerning freedom of association and protection of the right to organise, entered into force 4 July 1950.

<sup>10</sup> ILO Convention No. 100 concerning equal remuneration for men and women workers for work of equal value, entered into force 23 May 1953.

<sup>11</sup> ILO Convention No. 111 concerning discrimination in respect of employment and occupation, entered into force 15 June 1960.

the Protocol of Buenos Aires,<sup>12</sup> as well as the American Declaration on Rights and Duties of Man (1948).<sup>13</sup> Canada did not ratify the American Convention on Human Rights (Pact of San Jose)<sup>14</sup> nor, of course, the Additional Protocol on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)<sup>15</sup> or the Protocol to Abolish the Death Penalty.<sup>16</sup> Canada also did not ratify the Inter-American Convention to Prevent and Punish Torture,<sup>17</sup> the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará)<sup>18</sup> or the recent Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.<sup>19</sup> Of this long list of non-ratifications, the most striking abstention concerns the Convention of Belém do Pará, adopted in preparation for the Fourth World Conference on Women of 1995, in which the Canadian government was actively involved.

When joining the OAS, Canada preferred to ratify the 1933 Convention on the Nationality of Women,<sup>20</sup> and both the 1949 Convention of the Granting of Political Rights to Women<sup>21</sup> and the Convention on the Granting of Civil Rights to Women,<sup>22</sup> which entered into force in 1933 and

<sup>12</sup> Charter of the Organization of American States, 119 UNTS 3, entered into force 13 December 1951; amended by the Protocol of Buenos Aires, 721 UNTS 324, entered into force 27 February 1970.

<sup>13</sup> American Declaration on the Rights and Duties of Man, 1948, Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Basic Documents, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

<sup>14</sup> American Convention on Human Rights, 1144 UNTS 123, entered into force 18 July 1978.

<sup>15</sup> Inter-American Convention Additional Protocol in the Area of Economic, Social and Cultural Rights, OAS Treaty Series A-52, entered into force 16 November 1999.

<sup>16</sup> Protocol to the American Convention to Abolish the Death Penalty, OAS Treaty Series A-53, not yet in force.

<sup>17</sup> Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series A-67, entered into force 28 February 1987.

<sup>18</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 9 June 1994, I.L.M. No. 1534, Vol. 33, entered into force 5 March 1995.

<sup>19</sup> Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, OAS Treaty Series A-65, entered into force 14 September 2001.

<sup>20</sup> Convention on the Nationality of Women, OAS, Treaty Series No. 4, 38, entered into force 29 August 1934. The only right granted by this Convention reads as follows: 'Article 1 There shall be no distinction based on sex as regards nationality, in their legislation or in their practice.'

<sup>21</sup> Convention of the Granting of Political Rights to Women, 1438 UNTS 63, entered into force 17 March 1949. Article 1: 'The High Contracting Parties agree that the right to vote and to be elected to national office shall not be denied or abridged by reason of sex.'

<sup>22</sup> Inter-American Convention on the Granting of Civil Rights to Women, 1438 UNTS 51, entered into force 17 March 1949. Article 1: 'The American States agree to grant to women the same civil rights that men enjoy.'

1949, respectively. Those Conventions were adopted by the International Conference of American States, which later became the Organization of American States. They promote an approach of formal equality toward women's rights.

As an OAS Member State, Canada is in the odd position of being needed for contributions and support without being expected to respect the basic human rights treaties adopted by the organisation, as interpreted. For example, Canada claims that it does not have to consider itself bound by the recent Inter-American Court of Human Rights decision in the *Cotton Field* case,<sup>23</sup> also known as the *feminicidas* case or the case of the disappeared women of Ciudad Juárez, Mexico. This decision shows many similarities with the unacceptable reality of the disappearance of indigenous and Aboriginal women in Canada.<sup>24</sup> In the *Cotton Field* case the Inter-American Court of Human Rights concluded that the State has a positive obligation to protect women against violence conducted and committed by private actors. The Court then considered the context of systemic violence against women and of structural discrimination, and found that gender-based violence constitutes gender discrimination. Accordingly, a broad range of remedial measures were ordered by the Court. This decision echoes, contextualises and even enriches General Recommendation No. 19 adopted by the CEDAW Committee in 1992.<sup>25</sup>

### 2.3 *The Canadian standard of equality*

The Canadian Constitution was supplemented by new provisions in 1982. Feminists lobbied for the constitutional recognition of women's

<sup>23</sup> *Case of González et al. ('Cotton Field') v. Mexico*, 16 November 2009, Inter-Am. Ct. H.R. (Sér. C) No. 205.

<sup>24</sup> In December 2011 the CEDAW Committee decided to conduct an inquiry into the murders and disappearances of Aboriginal women and girls across Canada. The Committee's decision was announced in Canada by Jeannette Corbiere Lavell, President of the Native Women's Association of Canada (NWAC), and Sharon McIvor of the Canadian Feminist Alliance for International Action (FAFIA). See also Amnesty International, Canada, *Stolen Sisters, A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada*, 2004 at 37, available at: [www.amnesty.ca/sites/default/files/amr200032004enstolensisters.pdf](http://www.amnesty.ca/sites/default/files/amr200032004enstolensisters.pdf) (last accessed 25 February 2013)

<sup>25</sup> CEDAW Committee, General Recommendation No. 19, Violence against Women, 1992, UN Doc. HRI/GEN/1/Rev.9/ (Vol. II). See para. 24 for a detailed explanation of the State duty to act, which derives from the acknowledgement of the State's positive responsibility toward violence against women.

constitutional rights.<sup>26</sup> As a result, two sex equality provisions, section 15 and section 28, were included in the Canadian Charter of Rights and Freedoms (the 'Charter').<sup>27</sup> Section 15 prohibits discrimination based on enumerated and on analogous grounds, and section 28 deals with sex equality and provides that notwithstanding anything in the Charter, the rights and freedoms referred to are guaranteed equally to male and female persons. Section 35(4) echoes section 28 of the Charter. This section guarantees to male and female persons the Aboriginal and treaty rights provided for by the Charter. As opposed to section 28, section 15 of the Charter is submitted to the limitation of rights provision provided for in section 1.

Although the Canadian feminist campaign for an effective constitutional equality standard gained momentum at almost the same time that the CEDAW was adopted by the UN in 1979, almost no attention was given to this important international development. In fact, Canadian feminists were domestically absorbed by two concerns: the failures of the then Canadian Bill of Rights in relation to women's rights,<sup>28</sup> and the lessons learned from litigating discrimination based on sex in the context of ordinary anti-discrimination and human rights codes adopted at the federal, provincial or territorial levels. In that context, it is important to highlight the connection between the litigating strategy aimed at promoting the adverse impact argument of discrimination and section 15 of the Canadian Charter, which reads as follows: 'every individual is equal before and under the law and has *the right to the equal protection and equal benefit of the law* without discrimination' (author's emphasis).

As the CEDAW is seen as the international legal foundation for a gender equality regime,<sup>29</sup> section 15 of the Canadian Charter was seen until quite recently as the almost exclusive foundation of a domestic women's rights regime in Canada.<sup>30</sup> Bev Baines presents an inventory of the first

<sup>26</sup> P. Kome, *The Taking of Twenty Eight: Women Challenge the Constitution* (Toronto: Women's Educational Press, 1983).

<sup>27</sup> Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), c. 11.

<sup>28</sup> Canadian Bill of Rights, S.C. 1960, c. 44.

<sup>29</sup> See L. Farha, 'Committee on the Elimination of Discrimination against Women' in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) 553–68, at 553.

<sup>30</sup> The other rights litigated with success by women in Canadian courts are: the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice provided for by section 7 of the Charter. See *Morgentaler v. the Queen* [1988] 1 R.C.S. 30.

two decades of women's judicial struggle for equality and organises gains for women in the following categories: athletics, reproduction, crime, family and employment.<sup>31</sup>

A rapid survey of the main constitutional battles for women's rights in Canada indeed shows important victories for women. In *Blainey*,<sup>32</sup> it was decided that the Charter applies to provincial human rights codes, which cannot exclude sex discrimination from complaints against sports organisations. In *Falkiner*,<sup>33</sup> the Ontario Court of Appeal struck down the Ontario government's 'spouse in the house' rule for welfare eligibility as discriminatory. At issue was whether amendments to Ontario's social assistance regulations, which significantly change the definition of 'spouse' for the purpose of receiving social assistance, violated section 7 (security of the person) and section 15 (equality) of the Charter. In *Brooks*,<sup>34</sup> the Supreme Court of Canada broke grounds in deciding that gender equality requires access to an employer's health benefits plan for women who have just given birth. In *Daigle*,<sup>35</sup> the Supreme Court, interpreting the Civil Code of Québec, decided that a woman does not need her husband's permission to be given access to abortion services. In the *Baby R* case,<sup>36</sup> it was decided that a foetus is not a child in need of protection against her mother's behaviour.

*Janzen* is seen as the leading case for recognising sexual harassment as gender discrimination.<sup>37</sup> In addition, *Lavallée* is the first Canadian case where the battered wife syndrome (when a wife kills her husband) was accepted as a ground of legitimate defence.<sup>38</sup> The *Moge* decision is still relevant today.<sup>39</sup> In *Moge*, the fact that a woman took primary responsibility for child rearing and household work was seen as a long-term economic disadvantage on separation and as a basis for long-term support. In *Seaboyer and Game*,<sup>40</sup> the Supreme Court confirmed that in the course

<sup>31</sup> B. Baines and R. Rubio-Marin, *The Gender of Constitutional Jurisprudence* (Cambridge University Press, 2005) 54–66.

<sup>32</sup> *Re Blainey and Ontario Hockey Association et al.* 58 O.R. (2d) 274 (1986).

<sup>33</sup> *Sandra Falkiner et al. v. Director of Income Maintenance Branch of the Ministry of Community and Social Services*, Ontario Court of Appeal, May 2002, Docket C35052, C34983.

<sup>34</sup> *Brooks v. Canada Safeway Ltd* [1989] 1 S.C.R. 1219.

<sup>35</sup> *Tremblay v. Daigle* [1989] 2 S.C.R. 530.

<sup>36</sup> *Re Baby R* (1988), 15 R.F.L. (3d) 225, 53 D.L.R. (4th) 69 (B.C.S.C.)

<sup>37</sup> *Janzen v. Platy Enterprises Ltd* [1989] 1 S.C.R. 1252.

<sup>38</sup> *R. v. Lavallée* [1990] 1 S.C.R. 852.

<sup>39</sup> *Moge v. Moge* [1992] 3 S.C.R. 813.

<sup>40</sup> *R. v. Seaboyer; R. v. Gayme* [1991] 2 S.C.R. 577.

of a sexual assault trial, the focus must be kept on the violent acts of the accused, rather than the behaviour of the woman.

To date, the Supreme Court of Canada has rarely explicitly relied on international human rights generally, and the CEDAW in particular, to articulate women's rights to equality in Canada. It did so only in *Ewanchuk* (sexual assault and reference to General Recommendation No. 19 adopted by the CEDAW Committee),<sup>41</sup> *Chan* (refugee claim and risk of forced sterilisation as a form of persecution)<sup>42</sup> and in *Canadian Foundation for Children* (reasonable use of force by way of correction by parents and teachers against children in their care).<sup>43</sup>

Notwithstanding this impressive list of successes, the gender equality standard guaranteed by the Canadian Charter recently suffered from a sustained feminist critique. Margot Young proposes three reasons why Canadian women are experiencing a de facto deficit of equality.<sup>44</sup> First, she says, the courts are unwilling to recognise the full range of norms that pattern sex discrimination. Then, as economic and social rights are not benefitting from explicit constitutional protection in Canada, courts as well as policy-makers promote a restrictive understanding of the government's obligations under rights provisions. Finally, the demand for gender equality finds itself fighting with the discourse of judicial legitimacy in an era of neoconservative ideology and budget cuts.<sup>45</sup> In other words, claims Young, section 15 of the Canadian Charter nowadays promotes a series of uncritical ways of understanding the relationship between equality rights, individuals and the State. As a result, equality law has difficulty dealing with the inequality of those most marginalised and most neglected in society because the further an individual or group sits from what counts as the norm, the more it looks like the inequality complained of is simply idiosyncratic and not a part of the larger patterns of social exclusion.<sup>46</sup>

The increasing level of social exclusion suffered by women who are victims of multiple forms of discrimination sheds a new light on an

<sup>41</sup> *R. v. Ewanchuk* [1999] 1 S.C.R. 330.

<sup>42</sup> *Chan v. Canada (Minister of Employment and Immigration)* [1995] 3 S.C.R. 593.

<sup>43</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 S.C.R. 76.

<sup>44</sup> M. Young, 'Blissed out: section 15 at twenty' in S. McIntyre and S. Rodgers (eds.), *Diminishing Returns Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis Butterworths, 2006) 45–69.

<sup>45</sup> *Ibid.* at 50. <sup>46</sup> *Ibid.* at 63.

old topic: the treaty-making power of the federal government and the implementation of treaties.

#### 2.4 *Canadian federalism and the division of powers in Canada: a closer look at economic, social and cultural rights (ESCR)*

In the *Labour Conventions* case of 1937,<sup>47</sup> the Privy Council of London suggested that a distinction should be made between the federal government's treaty-making power and the implementation process of a treaty in the context of Canadian federalism. Such a distinction respects the equal and distinct jurisdictional powers of provinces (and territories), as provided for by the Constitution Act, that are not subordinated to the Canadian Parliament. Property and private law (the jurisdictional sources of social legislation and of social law) are clearly under provincial jurisdiction. Needless to say, there exists a very strong connection between social spending and the realisation of women's rights.

Social law in Canada is a complex amalgam of cooperation, confrontation, transfer of tax points, debate about national standards and transferring on to the provinces.<sup>48</sup> But as complex as it may be, the current state of social law needs to be assessed against the fact that Canada's ratification of the ICESCR in 1976 proceeded with no provincial opposition. The *Labour Conventions* case then becomes almost irrelevant. What really matters is the systematic and generally resistant attitude of the provinces toward the protection, promotion and implementation of economic and social rights as provided for by international human rights treaties such as the ICESCR.<sup>49</sup>

Against the distinction made between treaty-making and treaty implementation in the *Labour Conventions* case, provincial governments seem to be choosing the opposite approach when confronted with the respect and monitoring of international commitments.<sup>50</sup> In fact, they usually

<sup>47</sup> *Canada (A.G.) v. Ontario (A.G.)* [1937] A.C. 326 (hereinafter *Labour Conventions* case).

<sup>48</sup> A useful compilation of the history of social law in Canada can be found in D. Guest, *The Emergence of Social Security in Canada*, 3rd edn (Vancouver: University of British Columbia Press, 1997). See also B. Cameron, 'The social union, executive power and social rights', *Canadian Woman Studies* 23 (2004) 49–56. Also available at: [www.srap.ca/](http://www.srap.ca/).

<sup>49</sup> L. Lamarche, 'Economic and social rights and the era of governance and governance arrangements in Canada: the need to revisit the issue of the implementation of international law of human rights' in C. Carmody and V. Oosterveld (eds.), *Is Our House in Order? Canada's Implementation of International Law* (Montreal: McGill-Queen's University Press, 2010) 116–38.

<sup>50</sup> Article 28 of ICESCR states that the provisions of the Covenant shall extend to *all* parts of federal States, without limitation or exception.

ignore the monitoring process and behave as though treaty-making and treaty implementation with respect to social and economic rights are *both* a federal issue, unless they serve a certain political rhetoric, as in the case of the Province of Québec. Not only is the Province of Québec the land of a distinct society, but it is also the territory that shows a stronger commitment to social rights and to women's rights.

The constitutional imbroglio about the implementation of international human rights standards turned into a domestic cause for concern for Canadian women's groups. Not surprisingly, the CEDAW Committee, as well as other human rights committees, is constantly asked to elucidate upon this issue, without any probing results as yet.

Learning to understand the use of the CEDAW in Canada is a process that has much to do with recognising a growing disenchantment with the Canadian Charter and its equality standard, namely over social rights. After hitting a wall, the women's movement then considered the use of international law of human rights and women's rights as a useful strategy. According to Waldorf and Bazilli,<sup>51</sup> only in 2000 did the political strategy of the Canadian feminist movement become clear. Within the context of budget cuts came a transformation of social laws where the statutory *right to ...* became more and more rare, keeping poor women away from claiming and litigating their rights.<sup>52</sup> The UN human rights machinery, including the CEDAW, was then elevated to the rank of the best strategy.

Clearly, by the end of the twentieth century the Canadian women's movement was in search of an effective global women's rights regime. By global, we mean that the recourse to the UN treaty system machinery was based on two assumptions. First, the Canadian women's movement could influence the interpretation of treaties such as the CEDAW or the ICESCR in order for the equality standard to promote substantive equality for women in the context of growing social exclusion. Second, such interaction would increase the level of accountability toward all women's

<sup>51</sup> L. Waldorf and S. Bazilli, *The First CEDAW Impact Study*, International Women's Rights Project (IWRP), 2000 at 35. Also available at: [www.iwrp.org/projects/cedaw/](http://www.iwrp.org/projects/cedaw/). Interestingly, Waldorf and Bazilli recall that the dynamic at the time was more about denouncing government lip service to the CEDAW and to the CEDAW Committee than about *making sense* of the CEDAW at the domestic level.

<sup>52</sup> For an analysis of the *Gosselin* case (this case was about women under 30 years of age being deprived of the basic social assistance unless they subscribe to a workfare (work for welfare) programme. The law was not seen as discriminatory on the basis of age by the Supreme Court of Canada. *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429), see G. Brodsky, 'Gosselin v. Québec (Attorney General): autonomy with a vengeance', *Canadian Journal of Women and the Law* 15 (2003) 194–214.

rights (including their economic and social rights) at the domestic level. In order to do so, the movement decided not to privilege the CEDAW as a women's rights instrument but to use all possible ways of reporting about the violations of women's rights in Canada by keeping the focus on the fact that women's poverty is a complex set of rights' violations.

The next section will assess the results of this strategy over a decade (1998–2008), closing with the more recent experience of shadow reporting in front of the Human Rights Council in the context of the Universal Periodic Review (UPR).

### 3 Using the CEDAW as part of a strategy of shadow reporting in front of UN Human Rights Committees: assessing the first decade

When conducting interviews in 1995, Stienstra and Roberts discovered that, until 1993, there was almost no knowledge of the CEDAW or of international human rights among women's groups in Canada.<sup>53</sup> As they were, between 1993 and 1995, trying to collect from ministries and agencies – federal, provincial and territorial – information about women's rights, implementation of the CEDAW and the Nairobi FLS (Forward Looking Strategy 1995), Stienstra and Roberts realised that government representatives also had trouble tracking and collecting the relevant information. Some women's groups, though, had been aware of the FLS follow-up process, but they clearly represented a small and well-informed minority who attended the Women's Conferences of Copenhagen in 1980 and Nairobi in 1985.

At the domestic level, violence against women has been at the centre of many federal, provincial and territorial governmental strategies and plans of action since the beginning of the 1980s.<sup>54</sup> Not surprisingly,

<sup>53</sup> With the exception of the National Action Committee (NAC – a national women's organisation) 1990 pioneer shadow report in response to Canada 2nd Periodic Report submitted to the CEDAW Committee in 1988. This shadow report was largely inspired by the then recent Supreme Court ruling about the constitutional standard of equality, which focused on impact of discrimination and on adverse effect, thereby departing from the norm of formal equality. See *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143. D. Stienstra and B. Roberts, *Strategies for the Year 2000 – A Women's Handbook* (Halifax, NS: Fernwood Publishing, 1995).

<sup>54</sup> See namely Canada, Minister of Supply and Services, *Final Report of the Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence – Achieving Equality*, 1993; L. Hanvey and D. Kinnon, *The Health Care Sector's Response to Woman Abuse* (Ottawa: National Clearinghouse on Family Violence, Family Violence Prevention

Canada considered that it was well positioned to promote and co-sponsor the 1993 UN General Assembly Resolution 48/104 named the Declaration on the Elimination of Violence against Women.<sup>55</sup>

In 1993 we also saw the beginning of a global campaign claiming that women's rights are human rights.<sup>56</sup> It is in fact in Vienna that a north-south women's global network realised not only its power, but also its capacity to empower itself even more so through human rights instruments such as the CEDAW. In Canada this experience, attended by many, led to an inclusive understanding of the Convention. The Canadian women's movement joined the international network for the interdependence and the indivisibility of all human rights, and discovered through fast-track experimentation the UN system and its mysteries. The fact that the Canadian anti-poverty movement awakened to the international law of economic and social rights as the women's movement was digesting Beijing,<sup>57</sup> created positive conditions of synergy between treaties and between rights. From that perspective, the Vienna Conference has probably been as instrumental for Canadian women as was the Beijing 4th World Conference on Women.

The first UN treaty body to address contemporary and factual women's economic exclusion (although using the term *mothers*) was the ICESCR in its 1993 Concluding Observations.<sup>58</sup> The anti-poverty

Division, Health Programs and Services Branch, Health Canada, 1994); T. Day, *The Health-Related Costs of Violence Against Women in Canada: The Tip of the Iceberg* (London, ON: Centre for Research on Violence against Women and Children, 1995); Statistics Canada, *Family Violence in Canada: A Statistical Profile*, 1998.

<sup>55</sup> Article 2 of UNGA Resolution 48/104 is a benchmark statement as it calls upon States as duty bearers of positive responsibilities in regard to gender and domestic violence eradication.

<sup>56</sup> World Conference on Human Rights, 1993, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, 12 July 1993.

<sup>57</sup> This movement developed a sustainable working relation with the ICESCR Committee over time.

<sup>58</sup> UN Doc. E/C.12/1993/5, July 1993, paras. 12 and 13: 'In particular the Committee is concerned about the fact that, according to information available to it, more than half of the single mothers in Canada, as well as a large number of children, live in poverty. The State party has not outlined any new or planned measures to remedy this situation. Of particular concern to the Committee is the fact that the federal Government appears to have reduced the ratio of its contributions to cost-sharing agreements for social assistance.' See also UN Doc. E/C.12/1/Add.31, 10 December 1998, where 15 per cent of the sixty paragraphs of Concluding Observations concern women's rights.

movement, entering the experience of the ICESCR, offered to women an opportunity to become acquainted with the UN system by bringing information about women's poverty to the attention of the Committee. Women's equality-seeking organisations seized this opportunity, which may have been reinforced by a lingering perception that the CEDAW was mainly concerned with domestic violence against women.

More recently, the Canadian feminist movement has been promoting the idea that the CEDAW is also about looking for the causes and the consequences of women's poverty, social exclusion and commodification in a globalised world. In doing so, it departed from a definition of violence restricted to the domestic, to an understanding of violence that includes the negative impact of poor public policies on women. This approach is now understood in Canada as a meaningful way of promoting in front of all human rights treaty bodies the interdependency of all women's rights. Violence against women, as much as indirect and systemic discrimination or poverty, was described as causes and consequences of the violation of all women's rights.

This section focuses on the inputs, that is, the proposals made in the process of shadow reporting by the Canadian women's movement to the CEDAW Committee over the decade 1998–2008 and the outputs – the assessment of the dialogue between Canada and the CEDAW Committee and of the Concluding Comments that followed. Each subsection examines a cycle of reporting (1998, 2003 and 2008) and the last subsection provides information about the new reporting mechanism designed by the Human Rights Council: the Universal Periodic Report (UPR). We conclude by saying that, clearly, this process contributed to the unpacking of the requirements of a gender equality regime in Canada, including with regard to provincial and territorial accountability toward all women's rights. We also conclude that the recourse to the inter-committees synergy, namely between the CEDAW and the ICESCR, contributed to such success as, increasingly, one echoes the other. But we also stress the risk of getting caught by *la saveur du jour*, as there were moments when processes, in relation to accountability namely, mattered more than rights themselves. Sadly though, we come to the conclusion that nowadays neither legal nor political accountability, as components of an international gender equality regime, seem to move the current Conservative government.

### 3.1 *The 1998 dialogue with the CEDAW Committee: from formal gender equality to gender impact analysis of policies*

The consideration by the CEDAW Committee of the third and fourth Canada Periodic Reports happened in April 1998.<sup>59</sup> The third Report covers the period of 1987–90 and the fourth, the one of 1991–4. The 1998 examination of the Canada Reports by the CEDAW Committee suffered from contextual confusion. On one hand, the Canadian government was promoting, as a follow-up to Beijing, a Federal Plan for Gender Equity,<sup>60</sup> as on the other hand it was implementing an economic austerity strategy aimed at fighting against public deficits.<sup>61</sup> In 1997 a Canadian women's NGO coalition brought to the attention of the CEDAW Committee a shadow report with an introductory statement that reads as follows:

inequality for women is entrenched in every facet of Canadian life ... and the situation for women has been getting progressively worse in all areas of social economic and political life. Every indicator shows that there has been a growth of women's inequality as a direct result of policies and of political choices made by the government of Canada. We want the CEDAW Committee to note the impact on women of the decreasing responsibility and accountability of the Canadian government for social programs and well being and the effects that cuts to social programs ... have on women's life.<sup>62</sup>

<sup>59</sup> UN Doc. CEDAW/C/CAN/3, 1992 and UN Doc. CEDAW/C/CAN/4, 1996; UN Doc. CEDAW/C/SR.329 and SR.330, 27 March and 6 April 1998. See also UN Doc. A/52/38/Rev.1 (1997) paras. 306–344 for Concluding Observations. For a critique of the format and of the moment of submission of reports by Canada, see Expert H. B. Schöpp-Schilling's comments, at UN Doc. CEDAW/C/SR.329, para. 27. The Expert reminds the Canadian government that it would have been useful to move from description to impact analysis. See also para. 28 for a request for information from Member Schöpp-Schilling about constitutional relations between federal and provincial and territorial governments. Such critique illustrates the relevance of the 2001 *Guidelines for Reporting* (see UN Doc. HRI/GEN/2/Rev.1, Ch. 5, May 2001, 41ff.). For a general discussion on the evolution of CEDAW reporting guidelines and about the UN Treaty Body Reform and the CEDAW, see H. B. Schöpp-Schilling, 'Treaty body reform: the case of the Committee on the Elimination of Discrimination against Women' 7:1 (2007) *Human Rights Law Review* 201–24.

<sup>60</sup> This Plan, presented at the 4th World Conference on Women in Beijing, promised that the government would embark on a comprehensive strategy to ensure women's economic autonomy and wellbeing, a reduction in violence against women, and the promotion of gender equality for workers in federal departments and agencies.

<sup>61</sup> Canadian Council for Social Development, *Maintaining a National Social Safety Net*, 1996, available at: [www.ccsd.ca/pr/pos\\_chst.html](http://www.ccsd.ca/pr/pos_chst.html) (last accessed 14 February 2013). See also T. Scarth (ed.), *Hell and High Water, An Assessment of Paul Martin's Record and Implications for the Future* (Ottawa: Canadian Centre for Policy Alternatives, 2004).

<sup>62</sup> See paras. 321, 331 and 336 of 1998 CEDAW Concluding Observations in the case of Canada at UN Doc. A/52/38/Rev.1.

In fact, this shadow report was largely a poverty report with an emphasis on the recent Canadian economic and social policies. Violence against women was therein understood and described as including economic (market) violence for which the equality jurisprudence has stopped providing effective answers.

In the context of the examination of Canada's third and fourth Periodic Reports submitted to the CEDAW Committee, twelve of the CEDAW Committee experts took the floor and addressed questions to the Canadian government's delegation. Ms Abaka talked about the need to assess impact of potential privatisation of healthcare; Ms Bustelo Garcia Del Real talked about the need to investigate the reality of women who are victims of violence, prostitution and trafficking. The most inquisitive intervention was the one of the late Ms Schöpp-Schilling, who said categorically to the Canadian delegation that too much information would not compensate for not enough gender impact analysis.<sup>63</sup> In addition, she raised issues that would gain relevancy in relation to State reporting to UN human rights committees in Canada: the binding effect of the CEDAW on provinces and territories and the need for an effective consultation of women's groups. Schöpp-Schilling also expressed strong concern about women's increasing poverty in Canada as a potential consequence of numerous women's rights violations.

In 1998 and 1999 all ICCPR, ICESCR and CEDAW Committees echoed the need for a gender impact economic analysis of Canadian policies.<sup>64</sup> Multiple factors shifted the focus of the 1998 dialogue between the CEDAW Committee and the Canadian government from the requirement of the inclusion of rights in domestic legislation to the need for assessing the impact on women of legal, political and economic transformations and policies, namely the follow-up to the Beijing Platform and the growing significance of results-based management in public administration and the economic reality in Canada. Such a strong departure from the formalistic examination of the legal framework to a gender impact analysis approach of policies on women was promoted and largely crafted by women's interventions and transmission of shadow reports. In fact, the Canadian government's representatives also promoted a more evaluative approach of the exercise in their oral statements. From plans of action

<sup>63</sup> UN Doc. CEDAW/C/SR.330, paras. 325–331.

<sup>64</sup> See, for example, the HRC Concluding Conclusions at UN Doc. CCPR/C/79/Add.105, para. 20, April 1999: 'the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups'.

(federal and provincial or territorial and even regional) to planned ministerial gender mainstreaming of policies,<sup>65</sup> to gender-based analysis,<sup>66</sup> and even to budget gender mainstreaming, it would not be very long before the women's movement would claim a domestic participative accountability framework in relation to women's rights.<sup>67</sup>

### 3.2 *The 2003 dialogue: from impact analysis to accountability*

The fifth Periodic Report of Canada was submitted to the CEDAW Committee in 2002,<sup>68</sup> a peculiar moment. Indeed, and as acknowledged by government representatives, 2002 witnessed an economic pick-up in Canada. The fifth Report covers the period 1994–8 (the negative period) but is enriched by an update Addendum of 2002 (the so-called positive period).<sup>69</sup>

According to a Canadian government representative, the Report was submitted late because of the complex federal–provincial consultation procedure in Canada managed by the *mysterious*<sup>70</sup> Continuing Committee of Officials on Human Rights.<sup>71</sup> That being said, the Report, again, does not respect the CEDAW Reporting Guidelines adopted in 1996,<sup>72</sup> which

<sup>65</sup> See, for example, UN Doc. CCPR/C/SR.1738, 7 March 1999, where a Canadian government representative (Ms Fry, Canada former Secretary of State of the Department for the Status of Women) affirms that a gender analysis of all policies affecting women's economic status was being carried out. In that regard, Health Canada Gender-Based Analysis was considered a model. Available at [www.hc-sc.gc.ca/hl-vs/pubs/women-femmes/gender-sexes-eng.php](http://www.hc-sc.gc.ca/hl-vs/pubs/women-femmes/gender-sexes-eng.php) (last accessed 14 February 2013).

<sup>66</sup> See UN Doc. A/52/38/Rev.1, para. 326: the Committee also noted with satisfaction that Canada continues to strengthen and refine its gender mainstreaming efforts at all levels. See also G. Steinsky-Schwartz, D. Rowan-Campbell and L. Langevin, *Equality for Women – Beyond an Illusion – Expert Panel on Accountability Mechanisms for Gender Equality Final Report*, Status of Women Canada, December 2005.

<sup>67</sup> See as an example the impressive work of FAFIA (Feminist Alliance for International Action) at: <http://fafia-afai.org/>.

<sup>68</sup> UN Doc. CEDAW/C/CAN/5, April 2002. A majority Liberal government was then governing Canada and would continue to do so until 2006.

<sup>69</sup> UN Doc. CEDAW/C/CAN/5/Add.1, 30 December 2002.

<sup>70</sup> Mysterious, because none of the human rights extended community members ever met a member of this committee. See Senate of Canada, *The Silenced Citizens – Effective Implementation of Canada's International Obligations with Respect to the Right of Children, Final Report of the Standing Senate Committee on Human Rights*, 21 April 2007.

<sup>71</sup> UN Doc. CEDAW/C/SR.603, para. 52, February 2003.

<sup>72</sup> UN Doc. CEDAW/C/7/Rev. 3, July 1996.

were about to be replaced in 2003.<sup>73</sup> The 1996 Guidelines provided for the need to report on progress and difficulties encountered since the consideration by the CEDAW Committee on the previous report.<sup>74</sup>

The first part of the 2002 Report enumerates a list of reports and programmes relating to women's rights including the Statistical Profile 1998–2005 of family violence in Canada; the Statistical Report on women in Canada; the production of the report *Women and Men in Canada – Statistical Glance*; the Federal Plan for Gender Equality 1995, replaced by the 2000 Agenda for Gender Equality (AGE); the Guide for Gender-Based Analysis Policy Making 1996; the Gender Equality Indicators; the Diversity and Justice Gender Perspectives Initiative; the Women's Health Strategy; the creation of CIDA (Canadian International Development Agency) and Foreign Affairs Gender Equality Divisions; the Gender Analysis Initiative adopted by Indian Affairs; and the Social Context Educational Project implemented with the support of the National Justice Institute.<sup>75</sup>

FAFIA (the Canadian Feminist Alliance for International Action) coordinated the production of a very strong and extensive shadow report, positioning itself, from a knowledge-based perspective, as the expert NGO Canadian interlocutor to the CEDAW Committee. But it is the Province of British Columbia CEDAW Group that challenged the seemingly opaque and exclusive federal government's responsiveness at the international level by producing a provincial shadow report.<sup>76</sup> This report strongly emphasises the intersectional reality of discrimination against women and women's exclusion.<sup>77</sup>

The 2003 discussion on the consideration of Canada's fifth Periodic Report led to some difficult exchanges between government representatives and the CEDAW Committee Experts. Schöpp-Schilling came back to the issue of the quality and usefulness of the Report: could Canada present a balanced account of the challenges it faced? Could it present the methods chosen to overcome problems and assess them?<sup>78</sup> And for the first time in the case of Canada, some other experts clearly referred to

<sup>73</sup> UN Doc. CEDAW, A/57/38 (2002), Chapter VI, *Ways and Means of Expediting the Work of the Committee*.

<sup>74</sup> UN Doc. CEDAW/C/7/Rev. 3, Articles 12 and 13.

<sup>75</sup> See also UN Doc. CEDAW/PSWG/2003/I/CPR.2/Add.1, 2 and 3, *Canada List of Issues and Government Responses*.

<sup>76</sup> See *B.C. CEDAW Report: British Columbia Moves Backwards on Women's Equality* (January 2003) available at: <http://povertyandhumanrights.org> (last accessed 14 February 2013).

<sup>77</sup> *Ibid.*, para. 98.

<sup>78</sup> UN Doc. CEDAW/C/SR.603, para. 14.

information received and taken from grass-roots organisations.<sup>79</sup> Many questions expressed deep concern about women's poverty, and even more about Aboriginal women's poverty. Often, issues relating to prostitution, trafficking, violence and family law were introduced in a poverty framework.

On the issue of the federative structure and provincial autonomous jurisdiction over social programmes, the CEDAW Committee decided to offer a lesson of international public law to Canada:

The Committee recommends that the State party search for innovative ways to strengthen the currently existing consultative federal–provincial–territorial Continuing Committees of Officials for human rights as well as other mechanisms of partnership in order to ensure that coherent and consistent measures in line with the Convention are achieved. The Committee also recommends that the existing mechanisms be used to introduce best practices in order to achieve substantive equality of women with men in the enjoyment of their human rights under all governments.<sup>80</sup>

The output of the 2003 review pushed the idea of public accountability in matters relating to human and women's rights to the forefront of the political agenda in Canada. As a consequence, in 2004 the federal government created the Standing Committee on the Status of Women, which was mandated to review the particular areas of federal policy relating to the status of women. The Committee also has the power to initiate studies without a referral from the House; that is, it may examine and report on all subjects connected to its mandate. The Standing Committee on the Status of Women undertook an extensive consultation with national and regional women's organisations when it was first established in autumn 2004. Up to now, the Committee has adopted twenty very useful reports,<sup>81</sup> which often serve as follow-up material to the CEDAW's Concluding Comments and observations addressed to Canada. Clearly, the Standing Committee (comprising twelve elected MPs) contributes to the repoliticisation of women's rights in Canada when compared to the array of technocratic initiatives that were adopted before.

The 2003 exercise says a lot about the challenge of multileveled accountability claims in the domain of human rights. The precedence of gender mainstreaming strategies adopted by both the federal and

<sup>79</sup> *Ibid.* para. 20 (Ms Shin).

<sup>80</sup> UN Doc. A/58/38 (2003), paras. 349 and 350.

<sup>81</sup> See for example: Report 19 – *Proactive Pay Equity Legislation* (Adopted by the Committee on 10 May 2007; Presented to the House on 16 May 2007); Report 16 – *Restoration of*

provincial governments in Canada stands as an answer to the increased pressure put on them by more efficient UN human rights treaty bodies, including the CEDAW Committee, and domestic civil society. But it also raises interesting questions that resonate with what the critics have said about the Beijing outcome, as sometimes it seems that process matters more than results.<sup>82</sup> Indeed, the Canadian women's movement became frustrated at being offered either more mainstreaming of women's rights or more gender analysis. Although processes and accountability tools are acknowledged as essential to the protection and the promotion of women's rights, it was clear by then that the substance of rights and processes do not always go hand in hand, and that more processes do not necessarily result in better rights or less poverty.

### 3.3 *The 2008 dialogue: the terms of the equality regime as understood by the CEDAW Committee ... only!*

The year of 2006 was a harsh one for the Canadian feminist movement.<sup>83</sup> The Equality Rights component of the Court Challenges Program was cancelled. Funding for major women's advocacy organisations was reduced or removed and the Status of Women Canada research fund was eliminated. In addition, an estimated eight billion dollars in federal transfers, which benefitted provincial social programmes, was cut between 1995 and 1998 and was never re-established.<sup>84</sup> There was no doubt that the

*Court Challenges Program* (Adopted by the Committee on 29 March 2007; Presented to the House on 18 April 2007; Concurred in by the House on 1 May 2007); Report 14 – *Eliminating Discrimination against Women in the Employment Insurance Program* (Adopted by the Committee on 1 March 2007; Presented to the House on 21 March 2007); Report 7 – *Matrimonial Real Property Rights on Reserves* (Adopted by the Committee on 20 June 2006; Presented to the House on 21 June 2006); Report 5 – *Interim Report on the Maternity and Parental Benefits Under Employment Insurance: The Exclusion of Self-Employed Workers* (Adopted by the Committee on 24 November 2005; Presented to the House on 28 November 2005), all available at: [www.parl.gc.ca/committeebusiness/ReportsResponses.aspx?Cmte=FEWO&Language=E&Mode=1&Parl=39&Ses=1](http://www.parl.gc.ca/committeebusiness/ReportsResponses.aspx?Cmte=FEWO&Language=E&Mode=1&Parl=39&Ses=1) (last accessed 14 February 2013).

<sup>82</sup> See M. Daly, 'Gender mainstreaming in theory and practice', *Social Politics* 12:3 (2005) 433–50. See also D. Otto, 'The exile of inclusion: reflections on gender issues in international law over the last decade', *Melbourne Journal of International Law* 10 (2009) 11–26.

<sup>83</sup> The Conservative government was elected in January 2006. The election of May 2011 secured its majority in Parliament. It also benefits from a majority in the Senate, a non-elected body.

<sup>84</sup> Council of the Federation, *Reconciling the Irreconcilable? Addressing Canada's Fiscal Imbalance*, 2006, available at: [www.councilofthefederation.ca/pdfs/Report\\_Fiscalim\\_Mar3106.pdf](http://www.councilofthefederation.ca/pdfs/Report_Fiscalim_Mar3106.pdf) (last accessed 14 February 2013).

gender-specific consequences of the new neoliberal economic agenda in Canada was prejudicial toward women and even more to some groups of women such as Aboriginal and immigrant women.

With a clearly diminished equality return at home – limited access to justice, social protection and services and decent jobs; increased domestic and economic violence – the women's and the anti-poverty movements decided to maintain the strategy of systematically informing the UN human rights Committees about the Canadian situation.

In this context, the Canadian women's movement found itself confronted with a difficult challenge because fewer resources were available for litigation and for advocacy at the local and international level. The movement was also aware of both the adoption by the CEDAW Committee of General Recommendation No. 25 about Article 4(1) of CEDAW (2004)<sup>85</sup> and of the adoption by the ICESCR Committee of General Comment No. 16 (2005) about Article 3 of the Covenant.<sup>86</sup> Would the understanding of equality between men and women by both Committees echo the Canadian feminist campaign for substantive economic equality? Would women's rights and needs be understood only as requiring temporary special measures? Would women's rights be mainly conceptualised in comparison with men's conditions?

The norm of substantive equality in Canada clearly required an interpretation promoting not only the proactive role of the State, but also the need for specific policies aimed at protecting the rights of a growing percentage of vulnerable women experiencing inter-sectoral forms of discrimination.<sup>87</sup>

Paragraph 28 of CEDAW General Recommendation No. 25 suggests an increased sensitivity of the Committee to the use of different types of measures aimed at guaranteeing women's rights, including specific measures or programmes that would not only be temporary or special:

<sup>85</sup> *Compilation of General Comments Adopted by Human Rights Treaty Bodies, Vol. II*, UN Doc. HRI/GEN/1/Rev.9, 2008, CEDAW General Recommendation No. 25 (2004) about Article 4(1) on temporary special measures, at 365.

<sup>86</sup> *Compilation of General Comments Adopted by Human Rights Treaty Bodies, Vol. I*, UN Doc. HRI/GEN/1/Rev.9, 2008; CESCR General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3), 113. See also General Comment No. 20: Non Discrimination in Economic, Social and Cultural Rights (Article 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, July 2009.

<sup>87</sup> For more information, see S. Gavigan and D. E. Chunn (eds.), *The Legal Tender of Gender: Welfare, Law and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010).

States parties should explain the reasons for choosing one type of measure over another; the justification for applying such measures should include a description of the actual life situation of women, including the conditions and influences which shape their lives and opportunities – or that of a specific group of women, suffering from multiple forms of discrimination – and whose position the State party intends to improve in an accelerated manner with the application of such temporary special measures; the relationship between such measures and general measures and efforts to improve the position of women should be clarified.

In 2007 the Canadian women's movement also placed modest hope in the new UN consolidated reporting Guidelines. Would it positively influence the presentation to the CEDAW Committee by Canada of its next Periodic Report if such Guidelines ask for shorter, more-targeted and better-organised information? Would they provide a robust incentive for Canada to abandon the usual format of its Reports, which was a source of great irritation to some members of the CEDAW Committee?<sup>88</sup> Would they emphasise the need for an effective monitoring of all Committee's Concluding Comments?

The 2008 consideration of Canada's sixth and seventh combined Periodic Reports to be submitted to the CEDAW Committee cannot be analysed in a nutshell. In 2005 FAFIA, on behalf of a coalition of women's groups in Canada, submitted to the Human Rights Committee a very detailed brief where the erosion of social programmes and women's poverty were introduced as causes and consequences of the violation of women's rights to equality in Canada.<sup>89</sup> In April 2006 the HRC adopted Concluding Observations with regard to Canada, putting at the forefront the unacceptable situation of Aboriginal women and, maybe surprisingly, considering the usual style and content of HRC Observations, underlying the detrimental effects of cuts in welfare programmes on women and children,<sup>90</sup> especially Aboriginal people and Afro-Canadian women.<sup>91</sup>

<sup>88</sup> See UN Doc. HRI/MC/2006/3, para. E.1.at 68.

<sup>89</sup> FAFIA – Canadian Feminist Alliance for International Action, *Submission to the United Nations Human Rights Committee on the Occasion of its Review of Canada's 5th Report on Compliance with the International Covenant on Civil and Political Rights* (September 2005), paras. 3 and 4 (on file with the author).

<sup>90</sup> UN Doc. CCPR/C/CAN/CO/5, 26 April 2006, paras. 22, 23 and 24.

<sup>91</sup> See also CCPR/C/85/L/Can, List of Issues, 25 July 2005, para. 11: 'What actions have been adopted to assess the situation of the Afro-Canadian community in the areas of employment, habitat, health and education, as recommended by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance?' Also see para. 21 about Aboriginal women.

In 2006 the same coalition submitted a report for the attention of the ICESCR Committee on the occasion of its review of Canada's fourth and fifth Periodic Reports.<sup>92</sup> Following an important consultation, the FAFIA brief focused on social programmes, Aboriginal women, access to justice, abolition of the Court Challenges Program, pay equity, the Live-in Caregiver Program, childcare, employment insurance, welfare assistance and many others areas.

The consultation of the UN High Commissioner for Human Rights Website database reveals twelve identified women's NGOs that submitted a shadow report to the CEDAW Committee in the context of the consideration of Canada's sixth and seventh Reports. It includes associations representing Aboriginal women, immigrant and Afro-Canadian women, and women in prison. In its own submission,<sup>93</sup> FAFIA acknowledged the contributions of a long list of women's groups.

The CEDAW Committee List of Issues was published in March 2008 and contains twenty-nine paragraphs expressing requests for updated and detailed information from the Canadian government.<sup>94</sup> It covers different areas organised according to the sequence of rights guaranteed by the CEDAW: constitutional rights, legislative and institutional frameworks, stereotypes and education, violence against women, trafficking and exploitation, participation in public affairs, employment, health, women in vulnerable situations, minorities, immigrants and refugees. A last section tackles the issue of poverty. Among the list of requests, the Committee shows a sustained preoccupation with Aboriginal women, including the issue of matrimonial property and of Aboriginal women in prisons. Finally, attention is also paid to the dynamic between women and care, including home care and childcare.

It seems to us that the very last paragraph of this List of Issues is worthy of comment. Under the Heading *Marriage and family life*, paragraph 29 reads as follows:

The Committee on Economic, Social and Cultural Rights, in its concluding observations of 22 May 2006 on the State party's combined fourth and

<sup>92</sup> FAFIA, available at: [www2.ohchr.org/english/bodies/cescr/docs/info-ngos/canadian-feminist.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/canadian-feminist.pdf) (last accessed 25 February 2013).

<sup>93</sup> FAFIA, *Women's Inequality in Canada, Submission to the UN Committee on the Elimination of Discrimination against Women on the Occasion of the Committee's Review of Canada 6th and 7th Reports*, September 2008 at 13, available at: <http://socialrightscura.ca/documents/CEDAW/FAFIACanadaCEDAW2008.pdf> (last accessed 25 February 2013).

<sup>94</sup> UN Doc. CEDAW/C/CAN/Q/7, 6 March 2008.

fifth periodic report, noted with concern that single-mothered families were over represented in families whose children were relinquished to foster care. The Committee was also concerned that women continued to be forced to relinquish their children into foster care because of inadequate housing. Please indicate what measures have been taken.

Clearly, this reference to another UN human rights treaty body's assessment of Canada's compliance with human rights instruments shows the capacity of the Canadian women's movement to link different analyses produced by such Committees. Abundantly informed of the Canadian situation by Canadian civil society coalitions, which the women's movement joined or initiated, the CEDAW Committee, now also enriched by the functional Reporting Guidelines and rules of procedure, did not fall short of conclusions that should have alerted Canada in the process of the production of its sixth and seventh Reports.<sup>95</sup>

Paragraph 9 of the CEDAW Committee 2008 Concluding Observations talks about areas requiring Canada's priority attention in the future. This paragraph exhibits an attitude of both confidence and exasperation toward Canada as a State Party. In addition, paragraph 10 of the same document strongly suggests Canada invite provincial and territorial structures to take appropriate steps in order to implement the adopted Observations. This invitation, as we explained before, challenges the status of provinces and territories as being *untouchables* in international human rights law.

The CEDAW Committee was equally confident when it ventured into the land of national minimum social standards as a legal requirement.<sup>96</sup> This has been a constant demand from civil society, excluding Québec (a province where the opting-out of national standards with appropriate compensation is preferred because of the distinctiveness of Québec society), but is also an important domestic issue as on many occasions UN human rights committees, and namely the ICESCR Committee, insisted on the distinction between the protection of rights and the multiple ways of reaching such goals in accordance with domestic traditions. In the present case, the CEDAW Committee clearly decided to support the domestic position of Canadian women's groups.

The CEDAW Committee 2008 Concluding Observations can be grouped into seven main different topics: access to justice (paragraph 22); violence against women and Aboriginal women (paragraphs 30–2); support for

<sup>95</sup> UN Doc. CEDAW/C/CAN/CO/7 and CEDAW/C/CAN/CO/7/Add.1 and Add.1/Corr.1, 7 November 2008.

<sup>96</sup> *Ibid.* paras. 14 and 18.

civil society women's associations (paragraph 28); over-incarceration of Aboriginal women (paragraph 34); participation in public life (paragraph 36); women and the labour market (paragraph 38); and finally, childcare (paragraph 40).

The 2008 consideration of Canada's sixth and seventh Periodic Reports by the CEDAW Committee shows interesting progress from the standpoint of Canadian women's rights and gender equality, as the debate has moved back to substance over processes. But the most interesting point is expressed in paragraph 53 of the 2008 CEDAW Concluding Observations. It requests from Canada a follow-up (one year) report on two specific issues identified as priority issues: national minimum social standards and the investigation of an unacceptable number of murdered and disappeared Aboriginal women.

In February 2010 Canada submitted an answer to this follow-up request to the CEDAW Committee.<sup>97</sup> Canada's answer to the CEDAW Committee is clearer and stronger than on previous occasions, as it raises the point of the alleged limited capacity of the federal government to interfere in fields of provincial jurisdiction, such as in the case of social programmes. Are we back to the *Labour Conventions* case paradigm?<sup>98</sup>

### 3.4 *And now the Universal Periodic Review (UPR)*

The experience of shadow reporting by the Canadian feminist movement recently expanded as more than fifty associations, representative of civil society, submitted briefs for the attention of the Human Rights Council in the context of the Universal Periodic Review (UPR) procedure in 2009.<sup>99</sup> Again, the more significant submission concerning non-Aboriginal women was the one from FAFIA.<sup>100</sup> This brief covered a wide area of women's rights and violations of such rights including inadequate social assistance, housing, imprisoned women, healthcare, education, civil participation, employment, access to justice, immigration and the trafficking of women.

The Report adopted by the Human Rights Council Working Group carries eighty-eight Conclusions and Recommendations.<sup>101</sup> As far as

<sup>97</sup> UN Doc. CEDAW/C/CAN/CO/7/Add.1, February 2010.

<sup>98</sup> *Supra* note 47.

<sup>99</sup> UN Doc. A/HRC/WG.6/4/CAN/3, 24 November 2008.

<sup>100</sup> FAFIA, *A Failing Grade on Women's Equality – Canada's Human Rights Record on Women*, September 2008, at 13, available at: [www2.ohchr.org/english/bodies/cedaw/docs/ngos/FAFIAUPRSeptember8final\\_3.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/FAFIAUPRSeptember8final_3.pdf) (last accessed 14 February 2013).

<sup>101</sup> UN Doc. A/HRC/11/17, 9 October 2009.

women's rights are concerned, those Conclusions mostly focus on violence against women, using a language quite close to the 1993 Declaration on the Elimination of Violence against Women.<sup>102</sup> It gets even stronger in the case of Aboriginal women's rights and of women's rights to be protected against all forms of gendered violence. Recommendations 10, 41 and 45 are those in which the Canadian women's movement rests most of their hopes. They concern the justiciability of economic, social and cultural rights and the necessity to provide effective domestic remedies in case of their violation and to integrate the normative content of such rights into poverty reduction strategies. The Canadian government gave clear signals that it does not acknowledge the justiciability of economic and social rights and has refused relevant Recommendations adopted by the HRC.<sup>103</sup>

Such statements raise a point of unresolved tension in Canada. As the Canadian government's answer to the UPR Recommendations echoes the domestic case law about women's social rights, which is not positive, shall we still rely on the equality regime promoted by the CEDAW (the prohibition of all forms of discrimination against women) to indirectly protect those rights? If so, the next logical step will be to rely on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women that Canada ratified. The synergetic effect of cross-treaty analysis will not work this time as the Canadian federal government does not intend to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which will come into force on 5 May 2013.

#### 4 Conclusion

The analysis of the Canadian experience with the CEDAW confirms one of the hypotheses submitted by the editors of this book. Indeed, the CEDAW contributes to the development of a domestic gender equality regime, at least in a theoretical sense. Interestingly, the transformative effect, analysed over a decade of experimentation by the Canadian women's movement, cannot be measured by the usual standards, which would include constitutional incorporation and judicial interpretation. But it is

<sup>102</sup> *Supra* note 55.

<sup>103</sup> Government of Canada, Canadian Heritage, *Canada's Universal Periodic Review Response to the Recommendations*, June 2009, available at: [www.pch.gc.ca/pgm/pdp-hrp/inter/101-eng.cfm](http://www.pch.gc.ca/pgm/pdp-hrp/inter/101-eng.cfm) (last accessed 14 February 2013).

clear that the CEDAW now belongs to the foundational repertoire of normative thinking on gender equality in Canada.

A decade is a very short period of time in the world of international human rights law. And the point here is not to predict the future. But a decade is enough time to raise the following three questions. The first one brings us back to Margot Young's concern about the need for an understanding of the relationship between gender equality and the State, when the State resists acknowledging the real value of economic and social rights as human rights and women's rights.<sup>104</sup> In that regard, it seems that there is a need in Canada to test the Optional Protocol to the CEDAW in order to promote a comprehensive approach to gender equality that does not avoid the market aspect of discrimination based on gender.

The second question is being raised repeatedly in Canada. As this chapter addressed the synergetic relation between treaties (CEDAW and ICESCR), one can wonder if it is enough to transform the domestic legal landscape. In other words, can the CEDAW serve as a substitute for constitutionally unprotected rights such as social and economic rights? The answer seems to vary according to the ideological standpoint of the government and it shows the relative vulnerability of a comprehensive gender equality regime relying firstly on the CEDAW.

Finally, the Canadian experience with the CEDAW confirms that multiple legal and judicial entry points to gender equality, both domestic and international, complement each other and contribute in different ways to the construction of a gender equality regime. In Canada, it is clear that it is the women's movement, and not the State Party to the CEDAW, that nurtures such a dynamic.

<sup>104</sup> Young, 'Blissed out'. *Supra* note 44.