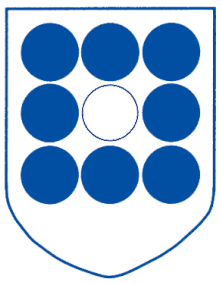
CANADIAN CIVIL LIBERTIES ASSOCIATION



ASSOCIATION CANADIENNE DES LIBERTES CIVILES

CANADIAN CIVIL LIBERTIES ASSOCIATION

REPORT TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

JANUARY 2016

Regarding List of Issues in Relation to the Sixth Periodic report of Canada (C/C.12/CAN/Q/6)

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I. CANADIAN CIVIL LIBERTIES ASSOCIATION ("CCLA")

1. The Canadian Civil Liberties Association submits this brief to the Members of the UN Committee on Economic, Social and Cultural Rights ("Committee"), in connection with the review of Canada's sixth periodic report. CCLA's briefing corresponds directly to the List of Issues set out by the Committee (E/C.12/CAN/Q/6). While CCLA has focused on select issues only, it is our view that *all* issues contained in the Committee's List of Issues are vital to the creation of conditions in Canada whereby all persons can enjoy their economic, social, and cultural rights as well as their civil and political rights.

2. The CCLA is an independent, non-governmental, non-partisan, non-profit, national organization, with thousands of supporters drawn from across the country. Founded in 1964, CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties, and to defend and foster the recognition of those rights and liberties. CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable action by public authority, and compliance with Canadian constitutional and international legal obligations. For fifty years, CCLA has consistently been granted leave to intervene in many important cases at all levels of courts across the country, including the Supreme Court of Canada and the Federal Courts.

3. CCLA acknowledges the important contributions of our staff, with substantive research provided for this report by: Emma McAuliffe, Laura Crestohl, Laura Berger, Cara Zwibel, Noa Mendelsohn Aviv, and April Julian. Sukanya Pillay and Brenda McPhail have further researched, written, and compiled this report.

II. CANADA AND THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS ("CESCR" or "Covenant")

4. The CCLA recognizes the interdependence and indivisibility of all fundamental rights and freedoms which consist of economic, social, and cultural rights, and civil and political rights. It is our view that in Canada, the deprivation, denial, or constraint of Covenant rights has had a corresponding negative impact upon other rights protected in international human rights law. In this regard:

    a. It is our view that the State must take action to protect, uphold, and fulfill all human rights, which includes the duty to refrain from actions which would unjustifiably deny or constrain such rights.

    b. Pernicious conditions such as food insecurity, poverty, discrimination, denials of health and cultural rights – among others – not only deny fundamental rights of the individual, but in turn, can prevent realization of other human rights, and can compromise the ability of the individual to meaningfully participate in the democratic life of the Canada which undermines democracy in Canada.

    c. Further, as will be described below, denials of social, economic and cultural rights can perpetuate a vicious cycle of rights violations, deprivations, exclusions, and powerlessness. For example, failures in the right to health not only have a disproportionate impact on individuals with mental health issues, they can and in Canada have resulted in denials of other rights to these individuals including increased and at times injurious interactions with police.[1]

III. GENERAL INFORMATION

The Committee has asked for a description of legislative measures taken by Canada to give full effect to the provisions of the Covenant in Canada's domestic legal order, with examples of cases in which the provisions have been invoked and applied by domestic courts, and follow up actions.

[1] See CCLA's submission to the Independent Review of the Use of Lethal Force by the Toronto Police Service (The Iacobucci Inquiry), available: https://ccla.org/cclanewsite/wp-content/uploads/2015/02/CCLA-Submissions-to-Iacobucci-Review.pdf.

5. Where rights have been unjustifiably violated, the CCLA argues that there must be legal recourse to a remedy.[2] CCLA is concerned that Canada has not yet fully implemented the recommendations of this Committee in its 2006 Concluding Observations of Canada's fourth and fifth periodic reports (E/C.12/CAN/CO/4E/C.12/CAN/CO/5), paragraph 12. In particular CCLA is concerned:

    a. By our observations of continued argument by Government for the Court to interpret the *Canadian Charter of Rights and Freedoms* ("*Charter*") as not necessarily protecting specific international human rights.

    b. By the cancellation of the Court Challenges Program[3], which cancellation was announced in 2006. CCLA notes however, that the new Federal Government elected in Canada in October 2015 has pledged to restore the program.[4] This is a welcome development as the Court Challenges Program can be an important avenue to access justice for *Charter* litigants, and CCLA will continue to monitor developments in this regard.

    c. By the continued disparities between members of the First Nations communities throughout Canada and the rest of the population. The CCLA further notes the disproportionate representation of Aboriginal persons, including women, in the criminal justice system and in prisons, and disproportionate violence committed against Aboriginal women. The CCLA has repeatedly called for an investigation

[2] See, as one example, CCLA's factum before the Supreme Court in *Vancouver (City) v Ward*, 2010 SCC 27, regarding the availability of money damages in cases of Charter rights violations. Available: https://ccla.org/cclanewsite/wp-content/uploads/2016/02/2010-R-v-Ward-CCLA-Factum.pdf.

[3] The Court Challenges Program was cancelled in September 2006, see Court Challenges Program of Canada, *Annual Report 2006-2007* (Department of Canadian Heritage, 2007), available at: http://www.ccppcj.ca/docs/CCPC-AR2007%28eng%29.pdf. We know, however, from an access to information request, filed and reported on by a CBC reporter, that the government continued to fund ongoing cases that had already been approved for CCP support: Steve Rennie, "Scrapped court challenges program still 5-7 years from winding down" (CBC News, 4 March 2015), available online at: http://www.cbc.ca/news/politics/scrapped-court-challenges-program-still-5-7-years-from-winding-down-1.2981837. In June 2008, the federal government created a new initiative – the Language Rights Support Program – which provides funding for test case litigation seeking to vindicate constitutional language rights. Unlike the former Court Challenges Program, the LRSP is independently administered by the University of Ottawa; moreover, it focuses on awareness and alternative dispute resolution, in addition to court cases. See Canadian Heritage, "Language Rights Support Program" (updated 4 June 2015), available at: http://www.pch.gc.ca/eng/1267738262259.

[4] Mandate letter from Prime Minister Justin Trudeau to the Minister of Justice and Attorney General of Canada, available online at: http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter; mandate letter to the Minister of Canadian Heritage, available online at: http://pm.gc.ca/eng/minister-canadian-heritage-mandate-letter.

into the root causes of such violence and disproportionate representation of Aboriginal persons in the criminal justice system[5], which we further argue is not unrelated to denials of Covenant rights. CCLA accepts the findings of the Inter American Commission on Human Rights and the Committee on the Elimination of Discrimination Against Women that the violation of social and economic rights, and socio-economic marginalization contributes to the root causes of violence against women and girls. The CCLA welcomes the new Federal Government's pledge to hold an inquiry into missing and murdered aboriginal women.[6] We also welcome pledges to implement the recommendations of the Truth and Reconciliation Commission, and directions to the new Minister of Justice and Attorney General to explore solutions to the overrepresentation of aboriginal persons in the criminal justice system and to address gaps in services in the justice system for Aboriginal people.

d. The CCLA remains seriously concerned about the disparities faced by African Canadians in the enjoyment of their rights under the Covenant. The CCLA has repeatedly expressed its serious concerns over the disproportionate overrepresentation of African Canadians in the criminal justice system, and in prisons, and the practice of "carding" or "street checks" which disproportionately affects African Canadian youth and is discussed below.[7]

e. The CCLA is concerned that discrimination against vulnerable and minority groups including African Canadians and First Nations persons, and economic disparities, result in greater violations of inter-related inter-dependent rights—including but not limited to housing inequality, racial profiling and discrimination, and discrimination in the criminal justice system, for example through the practice of unreasonable bail conditions and bail remand which disproportionately affect visible minorities and vulnerable groups.

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[5] See, for example, the CCLA's May 2012 submissions to the UN Committee Against Torture at paragraphs 30, 33 and 34, available online at: https://ccla.org/cclanewsite/wp-content/uploads/2015/05/FINAL-CCLA-UNCAT-MAY-20121.pdf. See also the CCLA's June 2015 submissions to the UN Human Rights Committee at pages 24-26, available online at: https://ccla.org/cclanewsite/wp-content/uploads/2015/07/CCLA-UN-Report.pdf.

[6] Mandate letter from Prime Minister Justin Trudeau to the Minister of Justice and Attorney General of Canada, supra, note 5; Susana Mas, "Missing and murdered indigenous women: 1st phase of public inquiry outlined" (CBC News, 8 December 2015), available online at: http://www.cbc.ca/news/politics/missing-murdered-inquiry-1.3355492

[7] Letter from the CCLA to Prime Minister-Designate Justin Trudeau (22 October 2015), available online at: https://ccla.org/mr-trudeau-time-for-real-change-in-human-rights-law-and-policy.

ISSUES RELATING TO GENERAL PROVISIONS OF THE COVENANT (arts. 1-5)

IV. ARTICLE 1 – Free disposal of natural wealth and resources

The Committee has asked for information on how the State is ensuring the advance, "free, prior and informed consent of indigenous peoples'" with respect to resource development projects.

6. CCLA informs the Committee that resource development projects frequently lead to conflicts between provincial/territorial governments, the federal government, private industry and indigenous people. This is demonstrated by the fact that such resource projects – including pipeline projects and exploration associated with hydraulic fracturing – have been frequently accompanied by protests by indigenous communities.[8] In many cases, these protests are prompted by insufficient consultation or collaboration with the indigenous communities affected by the projects, or the failure to appreciate the impact that the project will have on the indigenous communities. Moreover, CCLA has concerns that these protest activities have sometimes resulted in the laying of criminal charges and/or the imposition of civil injunctions which significantly hamper the meaningful exercise of freedom of expression and peaceful assembly by indigenous communities. These communities also face the reality of state surveillance.

7. CCLA reminds the Committee that in 2014 the UN Special Rapporteur on the rights of indigenous peoples, James Anaya, noted that the federal government "acknowledged that it lacks a consistent protocol or policy to provide guidance to provinces and companies concerning the level of consultation and forms of accommodation required by the constitutional duty to consult."[9] This continues to be the case and the model of free and informed consent has not been effectively implemented at various levels in Canada.

[8] Most of the major pipeline projects in Canada have been the focus of significant dissent. For example, the Energy East project has been protested by the Mikmaq Elsipogtog tribe, including an anti-fracking protest in 2013 which resulted in a number of injuries and arrests (http://www.globalresearch.ca/canada-anti-fracking-protests-first-nations-confront-harper-government/5354944). The Northern Gateway pipeline has been protested by British Columbia First Nations including the Heiltsuk peoples who are concerned in particular with risks to herring stocks in their traditional territory (http://vancouver.mediacoop.ca/events/10099). In January 2016, members of Treaty 8 have occupied a site in Rocky Mountain Fort to stop ongoing clearing for the Site C Dam (http://www.cbc.ca/news/canada/british-columbia/first-nations-land-occupation-aims-to-stop-site-c-1.3391).

[9] A/HRC/27/52/Add.2, at para. 74.

CCLA Recommendations:

Canada must consult, in advance, with indigenous groups and local communities affected by resource development projects. There must be meaningful, free and informed consent of indigenous communities for any State or third party (i.e. non-State) activities regarding resource development affecting these communities. Further, the consultation process should include preparation and dissemination of impact assessment studies (including impact upon rights). Peaceful protestors should not in any way be prevented from exercising their fundamental freedoms of expression, speech, opinion and association.

The Committee has asked for information on measures taken, including legislative, regulatory policies and guidance, to ensure that private companies respect economic, social and cultural rights throughout their operation including when operating abroad. The Committee has also asked for information on remedies available for victims and grievance mechanisms.

8. CCLA is concerned that where Canadian non-State actors (corporations) commit human rights violations abroad, there must be available legal recourse and legally enforceable remedies for victims. Anything less contributes to impunity for perpetrators.

9. CCLA calls for a human rights-centred approach to bilateral and multilateral trade and investment treaties, which specifically provide for the respect and protection of human rights by Canada/ Canadian non-state Actors operating abroad, and the provision for legal recourse and legally enforceable remedies for victims of rights violations committed by Canadian non-state actors. CCLA fights for accountability and the end of impunity in Canada, and this extends to the actions of Canadian companies operating abroad. We are further of the view that impact assessments must consider international human rights, and investor-state dispute agreements must not overlook or exclude local populations, but must consult with them and provide for the meaningful participation of local populations where activities will have an impact upon them.

10. CCLA notes that the 2014 Canadian Government's Corporate Social Responsibility initiative: "*Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*", is a development towards accountability and encouraging the adoption of international best practices in business and human rights, but falls short of legally enforceable mechanisms. The initiative continues the office of a Corporate Social Responsibility Counsellor, but CCLA is aware of reports that this office previously did not achieve cooperation with Canadian companies.

The new initiative has several measures in place to remove benefits to companies that do not cooperate with the CSR Counsellor, but these initiatives neither specify how such assessments will be fully carried out and importantly do not advance access to justice for victims. Further, the new initiative does not provide any independent investigative powers into complaints of human rights violations committed by Canadian companies in foreign jurisdictions.

11. CCLA also informs the Committee that foreign victims had encountered dismissal, often on the basis of *forum non conveniens*, in Canadian courts. However, CCLA wishes to bring the following cases to the attention of the Committee:

    (i) *Chevron Corp. v Yaiguaje*, 2015 SCC 42: The Supreme Court of Canada in 2014 held[10] that the Superior Court of Justice in Ontario had jurisdiction to hear an enforcement proceeding for awarded damages by Ecuadorian villagers regarding an Ecuadorian judgment against Chevron headquartered in the US, and Chevron Canada, a Canadian seventh-level subsidiary with a place of business in Ontario. Chevron and Chevron Canada filed a motion seeking to dismiss the Ontario action on the grounds that the Ontario court had no jurisdiction to hear the case. The Supreme Court of Canada upheld the decision of the Ontario Court of Appeal recognizing the jurisdiction of the lower court – on the grounds that the foreign court satisfied the jurisdictional tests of having a real and substantial connection with the litigants of with the subject matter of the dispute. With respect to the enforcing court (Ontario), the Supreme Court of Canada held that it was the act of service in Ontario which gave the Ontario court its jurisdiction, and no requirement of a real and substantial connection was required with respect to recognition and enforcement of a foreign judgment. The SCC went on to note that Chevron USA had attorned to the foreign jurisdiction, and with respect to Chevron Canada its physical office in Ontario, where it was served, provided the "traditional presence-based jurisdiction". This case may be helpful for future foreign judgment enforcement cases but would not necessarily be dispositive of a *forum non conveniens* argument.

    (ii) *Choc v Hudbay Minerals Inc.,* 2013 ONSC 1414: In 2013, the Ontario Superior Court ruled that three related actions against Canadian mining company Hudbay Minerals could proceed to trial. The cases involve allegations of liability for rapes and murders committed in Guatemala, allegedly by a wholly-owned subsidiary of Hudbay Minerals. While the decision to permit the cases to

[10] Chevron Corp. v. Yaiguaje, 2015 SCC 42, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15497/index.do. The case involved alleged actions of Texaco committed in Ecuador, following which Texaco had merged with Chevron, a US Corporation, against which damages were awarded.

proceed is welcome, the case is currently in the discovery stages only at a court of first instance, and accordingly, its precedential value for rights victims abroad is as yet unknown.

(iii) *Araya, Fshazion and Tekle v. Nevsun Resources*, No. 2-148932: in 2014, three Eritrean men brought an action in the Supreme Court of British Columbia, against Nevsun Resources Ltd., alleging the use of slave labour by a local contractor, at one of the company's mines in Eritrea. The Defendants motions were scheduled for hearing in January 2016, and included a challenge to the forum, motion to strike on the basis of the act of state doctrine, and a motion to deny the plaintiffs' action proceeding on a representative bases.

CCLA Recommendations:

CCLA calls for a commitment by Canada to end impunity for human rights violations committed abroad by Canadian companies; this would include commitments to ensure bilateral and multilateral trade agreements negotiated by Canada include adherence to international human rights law, and legal enforceable recourse and remedies for victims. Investor-state agreements should include dispute resolution mechanisms for local populations affected (i.e. potential human rights victims). In Canada, any government corporate social responsibility strategy must include an investigative mechanism in addition to a dispute resolution mechanism.
CCLA endorses the recommendation of the UN Human Rights Committee in 2015, in its concluding observations of Canada's state report, to "develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad". Justice requires the end of impunity, and the need for victims to access courts that are both able and willing to dispense justice.

V. ARTICLE 2, Para 2 – Non-Discrimination

The CCLA highlights for the Committee our specific concerns regarding certain State actions that have violated the right to enjoyment of the Covenant rights without discrimination with respect to:

a. Health Care for Refugees and Persons with Indeterminate Legal Status;
b. Police Stops and Recording of Information of Racialized Youth (referred to as "street checks" or "carding");
c. Criminal Justice System and Impacts upon vulnerable groups with focus on practices of
    i. Bail,
    ii. Mandatory Minimum Sentences,
    iii. DNA Sweeps in Canada,

iv. Uses of Conducted Energy Weapons by Law Enforcement Against Individuals with Mental Health issues;

d. Recommendations of the Truth and Reconciliation Commission
e. Genetic testing for purposes of employment or insurance provision
f. Rights on the Basis of Gender Expression and Gender Identity
g. Information Sharing Under the *Income Tax Act*.

a. Health Care for Refugees and Persons with Indeterminate Legal Status

12. In June 2012, the government of Canada significantly reduced the level of healthcare coverage available to individuals seeking asylum and protection in Canada. The Interim Federal Health Program had been in place for more than 50 years, and it provided comprehensive health insurance coverage to these vulnerable groups. The 2012 amendments resulted in four tiers of health coverage, with the lowest tier being individuals entitled to make a PRRA (tier 4) denied health coverage altogether, even where they pose a threat to public health or safety.[11] Generally, the result of the amendments was to "deny funding for life-saving medications such as insulin and cardiac drugs to impoverished refugee claimants from war-torn countries"[12] and "to deny funding for basic pre-natal, obstetrical and paediatric care to women and children"[13]. In a legal action challenging these cuts, the Federal Court held that the cuts were unconstitutional.[14] The federal government appealed this decision, but in December 2015, the appeal was dropped. At this time, significantly, the government also announced its intention to reverse the 2012 cuts, and restore healthcare for refugees, allowing time for logistical purposes. CCLA had previously written to the Minister of Citizenship and Immigration calling on him to restore refugee healthcare. At present, CCLA is looking forward to a speedy restoration of healthcare for refugees without delay.

b. Police Stops and Recording of Information of Racialized Youth

13. Racialized communities across Canada have complained for decades about racialized youth being stopped by police, questioned, and having their personal information recorded in police databases, in non-criminal encounters known as "carding" or "street

[11] *Canadian Doctors for Refugee Care v Canada (Attorney General*), 2014 FC 651, at para 4.
[12] *Ibid* at para 2.
[13] *Ibid* at para 3.
[14] *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651.

checks". This practice has been reported on by many groups, and in particular by African-Canadian youth in Toronto, Montreal and Halifax, by Aboriginal people in the prairie provinces, by South Asians in British Columbia, by temporary migrant workers, and generally in large and small communities across Canada. CCLA has argued that this practice is discriminatory and unjustified and violates constitutional, international and domestic rights.

14. This practice interferes with the freedom and liberty of racialized youth to go about their daily business. Furthermore, there are reports that such "street checks" by police have led to more damaging consequences and/or escalation, including for example tickets, arrests, assaults, or laying of criminal charges. The recording of these non-criminal encounters in police databases has also reportedly interfered with the ability of certain individuals to get jobs with police and/or other security-based positions.

15. Cities like Toronto[15], Ottawa[16], Montreal[17], and Regina[18] have recently been drawn into discussions around carding or activities aimed at addressing it. And the province of Ontario recently issued a draft regulation with the stated intention to 'end carding';[19] although the draft regulation includes some beneficial provisions, the regulation ultimately fails to prevent carding.

16. CCLA has engaged in many discussions with government and with concerned community groups, and respectfully asks the Committee to question Canada about its commitment to addressing and ending carding and racial profiling, and what programs and policies it has in mind to address the issue, including the creation of legislation, the establishment of suitable accountability measures including an independent, arms-length Monitor with

[15] Selena Ross, "Toronto Police Services Board restores stricter year-old carding policy", *The Globe and Mail* (18 June 2015), online: <http://www.theglobeandmail.com/news/toronto/toronto-police-board-unanimously-approves-older-carding-policy/article25026361/.
[16] Robert Sibley, "Ottawa chief worries new street-check rules will put extra burdens on police", *The Ottawa Citizen* (29 October 2015), online:< http://ottawacitizen.com/news/local-news/ottawa-chief-worries-new-street-check-rules-will-put-extra-burdens-on-police>; Kristy Hoffman, Patrick White and Danielle Webb, "Carding across Canada: Data show practice of 'street checks' lacks mandated set of procedures", *The Globe and Mail* (17 August 2015), online: < http://www.theglobeandmail.com/news/national/does-carding-occur-across-canada/article25832607/>.
[17] Kristy Hoffman, Patrick White and Danielle Webb, "Carding across Canada: Data show practice of 'street checks' lacks mandated set of procedures", *The Globe and Mail* (17 August 2015), online: <http://www.theglobeandmail.com/news/national/does-carding-occur-across-canada/article25832607/>
[18] CBC News," Saskatchewan carding policy needed, Regina police chief says", *CBCnews Saskatchewan* (11 December 2015), online: < http://www.cbc.ca/news/canada/saskatchewan/carding-policy-needed-troy-hagen-says-1.3361517>.
[19] RRO 1990, Reg 268/10.

full access to databases and relevant authority to audit and oversee compliance; and mandating that data on policing and race be recorded and analyzed.

c. Criminal Justice System and Impacts upon Vulnerable Groups

17. Canada has experienced significant changes to its criminal justice system, due to the passing into law of several concerning new statutes in the past decade. These include the *Truth in Sentencing Act,*[20] the *Abolition of Early Parole Act*,[21] and an omnibus statute known as the *Safe Streets and Communities Act*.[22] These changes disproportionately impact members of already disadvantaged and/or vulnerable groups, including Aboriginal peoples, individuals struggling with mental illness or addictions, and individuals who are homeless.

18. The CCLA highlights for the Committee our concerns regarding four issues currently of significant concern to us in the criminal justice system, which we believe violate non-discrimination rights and result in additional hardships: inequities arising from Canada's bail system, the use of mandatory minimum sentences, DNA Sweeps, and the use of Conducted Energy Weapons against individuals with mental health concerns or developmental disabilities:

i. Bail

19. In 2014, the CCLA released a report examining the nation-wide societal and personal costs of current practices in Canadian bail courts.[23] CCLA's report concluded that, across the country, Canada's bail system is failing to protect and uphold the constitutional rights to the presumption of innocence and to reasonable bail. Instead, Canada's bail system has become risk-averse and unduly punitive approaching accused with a seeming 'presumption of guilt', and holding people in remand or releasing them subject to unnecessary, disproportionate, and unduly onerous bail conditions, with the result that innocent people are drawn into the criminal justice system. Despite a steadily declining crime rate in Canada, there are more people in Canada's prison system and in remand

[20] SC 2009 c 29.
[21] SC 2011 c 11.
[22] SC 2012 c 1.
[23] Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (July 2014), available online at: https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf.

detention than at any time before.

20. Compounding these concerns is CCLA's findings that the inequities of the bail system have a disproportionate impact on vulnerable populations – including individuals from less advantaged socio-economic conditions, such as individuals living in poverty, with addictions, with mental illness, and/or with marginal social support. For example, experts have documented that a disproportionate number of people in pre-trial detention have mental health or addictions issues.[24] If such persons are released on bail, they are often subjected to disproportionate, unnecessary and onerous conditions of release – such as abstaining from drugs or alcohol, requirements to take medication, requirements to avoid certain public areas, and/or requirements to attend treatment or counselling. These conditions may be virtually impossible for an accused to comply with 100%, yet breaching a bail condition constitutes a criminal offence. There is also the role of police discretion in the reporting and charging of individuals who have breached their bail conditions. In this way, the bail system effectively criminalizes mental illness and addiction, as well as socio-economic inequities including poverty.[25]

21. An overarching concern of CCLA is that Canada's bail system entrenches and perpetuates systemic discrimination and marginalization. For example, in our aforementioned report CCLA recommended that the courts should refrain from imposing bail conditions that are likely to criminalize the symptoms of an underlying mental health or substance abuse problem and that courts should refrain from requiring accused to provide a fixed address or imposing residency conditions where the individual is homeless or has transitory living arrangements.[26] Deep-seated, nationwide reform in the courts system is necessary to alleviate the discrimination and ensuing harms experienced by a significant population of Canada's most vulnerable individuals.

ii. Mandatory Minimum Sentences

22. CCLA has historically challenged the use of mandatory minimum sentences as being unjust, unduly harsh, and devoid of any deterrent effect or salutary public safety

[24] John Howard Society of Ontario, *Reasonable Bail?* (2013), available online at: http://johnhoward.on.ca/pdfs/Reasonable%20Bail%20-%20JHSO%20Report%202013%20final.pdf.
[25] *Set Up to Fail, supra,* pages 72-73. See also John Howard Society of Ontario, *Unlocking Change: Decriminalizing Mental Health Issues in Ontario* (2015), available online at: http://www.johnhoward.on.ca/wp-content/uploads/2015/07/Unlocking-Change-Final-August-2015.pdf.
[26] CCLA, "Set up to Fail", Recommendations 8.1 and 8.3, page 89.

impact.[27] Canadian judges have indicated that mandatory minimum sentences prevent them from administering a just sentence[28] – notwithstanding the hearing of all evidence by judge and jury, mandatory minimum sentences override consideration of any mitigating circumstances, including the socio-economic conditions that can be conducive to the perpetration of a particular crime. Another unintended and unjust effect of mandatory minimums is that accused – who are constitutionally to be presumed innocent – have reportedly pleaded guilty to lesser related crimes to avoid the imposition of a mandatory minimum; a related concern of the CCLA is that already disadvantaged individuals are further negatively impacted in these scenarios.

23. The *Safe Streets and Communities Act* (or Bill C-10, introduced in 2011 and passed into law in 2012) introduced a wide range of amendments to Canadian criminal law. Among other changes, the *Act* added new mandatory minimum sentences to the *Criminal Code* and the *Controlled Drugs and Substances Act*. As a result, the number of mandatory minimum sentences in Canadian law has grown to nearly 100.[29] The Act also removed conditional sentences which CCLA had argued had frequently been used to allow impoverished single parents to remain at home with children, thereby negatively impacting both single parent homes and in particular, aboriginal communities.

24. CCLA argued against sentencing and mandatory minimum increases provisions in the omnibus Bill C-10, rejecting them as being "unjust, unnecessary and unconstitutional." CCLA appeared before both Parliamentary and Senate committees,[30] arguing that mandatory minimums strip judges of their discretion to craft an appropriate sentence for each individual offender, with the result that offenders would receive unduly harsh, punitive sanctions that are not proportionate to their situation, or the offence they committed.

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[27] For example, see 2006 CCLA testimony to the Canadian Parliamentary Standing Committee on Justice and Human Rights considering mandatory minimums in which CCLA argued that mandatory minimums result in injustice and do not deter crime nor protect public safety, available at http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=39&Ses=1&DocId=2555894.

[28] In an op-ed in Canada's National Post in 2008, CCLA's then General Counsel Alan Borovoy wrote, "This may explain why, in a survey a number of years ago, 90% of judges reported that minimum penalties sometimes restricted their ability to impose a just sentence", available at http://www.nationalpost.com/news/story.html?id=634d49cf-62f2-4627-8eaa-3fe49041533c

[29] Debra Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences," (2012) 56 *Supreme Court Law Review.*

[30] Canadian Civil Liberties Association, "Brief to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-10" (28 October 2011).

25. CCLA accepts the findings of the Canadian Bar Association, which in 2011, also opposed mandatory minimums in Bill C-10 stating instead that, "Decades of research and experience have shown what actually reduces crime: (a) addressing child poverty, (b) providing services for the mentally ill and those afflicted with fetal alcohol spectrum disorder, (c) diverting young offenders from the adult justice system, and (d) rehabilitating prisoners, and helping them to reintegrate into society. Bill C-10 ignores these proven facts."[31]

26. CCLA continues to argue that mandatory minimums have a disproportionately harsh impact on Canada's most vulnerable populations[32] – those living in poverty, and those with mental health needs, and Aboriginal peoples who are severely overrepresented in the criminal justice system.[33] Indeed, sentencing judges are required, under the *Criminal Code*, to respond to the unique circumstances of Aboriginal offenders.[34] However, mandatory minimum sentences of imprisonment curtail judges' ability to consider alternatives to incarceration and restrict their ability to craft proportionate, sensitive sentences for Aboriginal offenders.

27. CCLA is also concerned by an additional mandatory sanction known as the "victim surcharge," levied against all convicted offenders in Canada.[35] Under the Criminal Code, a monetary surcharge is added to any other sanctions an offender may receive at the time of sentencing. (The nomenclature "victim surcharge" arises from the fact that these moneys go to support services for victims of crime.) Currently, the surcharge is equivalent to 30% of any fine levied against the offender. If no fine is applied, the surcharge amounts to a minimum of $100 for each offence punishable by summary conviction or $200 for each indictable offence.[36]

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[31] For example, see op-ed of the President of the Canadian Bar Association, Trinda Ernst, 2011 in the Toronto Star, "10 Reasons to Oppose Bill C-10" available here: http://www.thestar.com/opinion/editorialopinion/2011/11/14/10_reasons_to_oppose_bill_c10.html .

[32] *Ibid*.

[33] According to the Correctional Investigator of Canada, more than a quarter (25.4%) of prisoners in federal custody are of Aboriginal ancestry. The overrepresentation of Aboriginal women in Canadian prisons is particularly dramatic: fully 36% of women in federal custody are Aboriginal. See CBC News, "Prison watchdog says more than a quarter of federal inmates are aboriginal people" (14 January 2016), available online at: http://www.cbc.ca/news/aboriginal/aboriginal-inmates-1.3403647.

[34] *Criminal Code*, RSC 1985 c C-46, section 718.2(e): "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

[35] *Criminal Code*, *supra*, section 737.

[36] *Criminal Code*, *supra*, subsections 737(2)(a) and 737(2)(b). Note that summary offences are generally considered less serious than indictable offences in Canadian criminal law.

28. In October of 2013, legislative changes came into effect making the surcharge mandatory for all offenders – regardless of their ability (or inability) to pay.[37] Whereas previously judges could waive the surcharge for indigent offenders, currently, courts have no discretion to go below the minimum amount. Because the fine applies to *each individual charge*, an individual convicted of multiple minor offences could easily incur hundreds of dollars in surcharges.

29. Since the victim surcharge became mandatory in 2013, the constitutionality of the provision has been the subject of dispute in courts across Canada.[38] In 2015, the CCLA was granted intervener status in one such case: *R v Michael,* which involved a 26-year-old Inuit man who was convicted of nine separate offences; as a result, he faced a total penalty of $900.[39] The offender was homeless, had a history of addiction, and lived off of a street allowance of only $250 per month. As such, a surcharge of $900 was well beyond his ability to pay. The judge in the original case found this charge disproportionate, but the Government filed an appeal. Although this appeal was abandoned shortly before the hearing date, the victim surcharge remains in place for others in the same position as Mr. Michael.

30. CCLA argues that victim surcharge effectively imposes harsher sentences on offenders who live in poverty or who experience other forms of marginalization (such as addiction, mental illness, or homelessness). Such offenders will experience disproportionate hardship in paying the surcharge, in comparison to affluent or middle-income individuals.[40] Moreover, to the extent that impoverished individuals do consecrate some money towards paying off the surcharge, this may cut into their ability to meet other basic needs. As such, the mandatory surcharge jeopardizes the already-fragile financial survival of low-income people caught in the criminal justice system. It delays an individual's reintegration into society and further perpetuates many of the inequities endemic to Canada's criminal justice system.

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[37] *Increasing Offenders' Accountability for Victims Act***,** S.C. 2013, c. 11, Assented to 2013-06-19. Available: http://laws-lois.justice.gc.ca/eng/annualstatutes/2013_11/page-1.html.

[38] *R v Michael*, 2014 ONCJ 360, and *R v Barinecutt*, 2015 BCPC 189, both found that the mandatory surcharge violated the *Charter*. By contrast, the courts in *R v Tinker*, 2015 ONSC 2284, *R c Larocque*, 2015 CSON 5407, and *R c Malouin*, 2015 QCCQ 14118, to mention only a handful of cases, all upheld the constitutionality of section 737.

[39] *R v Michael*, *supra*. The CCLA was granted leave to intervene in the appeal of the *Michael* decision to the Ontario Superior Court of Justice; as noted in the text above, however, the Crown abandoned the appeal shortly before the hearing date.

[40] As the judge in *R v Michael* concluded: "[The sum of $900], in relative hardship, is many multiples of what a moneyed offender would have to pay. Simply put, Mr. Michael is being treated more harshly because of his poverty than someone who is wealthy." *R v Michael*, *supra*, paragraph 88.

iii. DNA Sweeps

31. The collection, use, disclosure, and retention of DNA by Canadian law enforcement are issues of serious concern to CCLA. With respect to privacy rights and DNA testing, we have been involved in numerous court cases and public policy discussions regarding DNA and law enforcement, and have specifically questioned police tactics of DNA collection sweeps on a 'voluntary' basis in the past. In 2011 CCLA wrote to both the OPP and the Ontario Information and Privacy Commissioner to express our concerns about these practices. In 2014, CCLA made a presentation on Genetic Privacy and Civil Liberties at a conference funded by the Office of the Privacy Commissioner of Canada, and CCLA was consulted by media regarding so-called voluntary DNA sweeps in Windsor, Ontario.

32. CCLA argues that the concept of "voluntary consent" in police DNA sweeps is inherently problematic. While some individuals may be willing to provide samples in a DNA collection sweep, many others will understandably not wish to turn over highly personal and sensitive genetic information about themselves, in the absence of individualized suspicion or an evidence-based investigation against them that involves more than the colour of their skin. Indeed, multiple individuals who have been requested to provide DNA during past sweeps have contacted our organization to complain that, in the circumstances, they did not feel that they truly had a choice to decline the police request. In CCLA's view, it is inherently coercive to "ask" innocent individuals to hand their DNA over to the state, particularly when police indicate that the public has a "moral obligation" to cooperate in the investigation and that individuals with "nothing to hide" are expected to comply.

33. In one particularly troubling case, CCLA spoke out against the 'voluntary' DNA sampling of dozens of migrant workers during an investigation who, except for their skin colour, did not match the description of the suspect. Migrant workers are one of the most vulnerable groups in our society, and it is our belief that police actions in this case were profoundly discriminatory. Further, being implicated in this investigation had the potential to threaten the ongoing employment and access to housing that was linked to that employment.

iv. Use of Conducted Energy Weapons by Law Enforcement Officials Against Individuals with Mental Health Issues or Disabilities

34. CCLA is concerned by the use of conducted energy weapons in Canada, and in particular the effects upon individuals with mental health issues or with disabilities.

35. Currently, *The Guidelines for the Use of Conducted Energy Weapons*, published by Public Safety Canada, do not restrict the use of conducted energy weapons (CEWs) to situations of imminent harm. Rather, the Guidelines merely state that law enforcement officers should "use an appropriate and reasonable level of force, given the totality of the circumstances."[41] This language would authorize CEW use in circumstances falling short of an imminent risk of death or serious injury. The Guidelines do state: "Prior to using a CEW, officers should consider whether de-escalation techniques or other force options have not, or will not, be effective in diffusing the situation."[42]

36. CEW use has been linked to serious injuries and even deaths in Canada. In July 2013, a coroner's inquest found that CEW deployment was a "contributing factor" in the death of Aron Firman, who died following an incident with Ontario Provincial Police officers.[43] The inquest jury made numerous recommendations calling for greater reporting and study of the use of CEWs. Firman suffered from schizophrenia; his death raises serious concerns about the use of CEWs against individuals with mental health disabilities.

37. In October 2007, a traveler named Robert Dziekański died at Vancouver International Airport after law enforcement officers used a CEW against him. After being subdued and handcuffed, Dziekański died within minutes. The Braidwood Commission, which investigated Dziekański's death, developed sensible and prudent recommendations for the use of CEWs.[44]

38. The Braidwood standard would restrict the use of conducted energy weapons (CEWs) to situations where "the subject is causing bodily harm or the officer is satisfied, on reasonable grounds, that the subject's behaviour will imminently cause bodily harm." Even then, an officer should not deploy a CEW "unless satisfied, on reasonable grounds,

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[41] Guidelines for the Use of Conducted Energy Weapons, Public Safety Canada (modified 19 January 2016), available online at: http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/gdlns-cndctv-nrg-wpns/index-en.aspx. Note that Individual provinces and police forces are not required to abide by the Guidelines, but rather may consider them in the development of their individual policies and procedures.

[42] Ibid.

[43] *Firman (Re)*, 2013 CanLII 69541 (ON OCCO).

[44] Braidwood Commission on Conducted Energy Use. *Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons in British Columbia*, 18 June 2009, page 17. Available: http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/braidwoodphase1report.pdf; and *Part 2: Why? The Robert DziekanskiTragety: Braidwood Commission on the Death of Robert Dziekanski*. Available: http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/braidwoodphase2report.pdf

that no lesser force option would be effective, and de-escalation and/or crisis intervention techniques would not be effective."

39. Unfortunately, different jurisdictions across Canada currently authorize law enforcement to use CEWs in situations that fall short of the Braidwood standard. For instance, in 2013, the Ontario Ministry of Community Safety and Correctional Services authorized expanded CEW deployment amongst police forces in the province. Police services may now decide to equip all classes of officers with CEWs (not simply members of tactical units, hostage rescue teams and containment teams, as was previously the case).[45] However, the use-of-force threshold in Ontario is considerably lower than the Braidwood standard. CEWs are considered "intermediate weapons," and as such, may be used when an individual is displaying "assaultive" behaviour. Some police services do have more stringent requirements for CEW use. For instance, an RCMP Operational Manual provides that CEWs must only be used "when a subject is causing bodily harm, or the member believes on reasonable grounds, that the subject will imminently cause bodily harm as determined by the member's assessment of the totality of the circumstances."[46]

40. CCLA has also called for appropriate and effective training of police which would include training to educate police officers in de-escalation techniques, in recognizing characteristics and mannerisms of individuals in mental health crisis or with conditions such as being on the autism spectrum, that may for example be mannerisms that are self-soothing to such an individual but may be misinterpreted by an officer. CCLA has also called for related revisions to the use of force guidelines followed by police officers including use of CEWs.[47]

New Developments: Criminal Justice System

41. CCLA informs the Committee of certain positive developments – although still in nascent stages and CCLA will continue to monitor and advocate for implementation – discussed below.

42. In November 2015, Canada's newly-elected Prime Minister Justin Trudeau released publicly his mandate letters to members of his Cabinet. The Prime Minister's letter to

[45] Ontario Ministry of Community Safety and Correctional Services. "Policing: Summary of the expansion of Conducted Energy Weapon authorization in Ontario. Available: http://www.mcscs.jus.gov.on.ca/english/police_serv/ConductedEnergyWeapons/CEW_main.html

[46] Royal Canadian Mounted Police (RCMP), *Operational Manual – Conducted Energy Weapon* (amended 6 February 2012), section 3.1.1. Available: http://www.rcmp-grc.gc.ca/ccaps-spcca/cew-ai/operations-17-7-eng.htm

[47] Supra, Note 1.

newly appointed Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould) –mandated her responsibility for areas including criminal law, human rights law, public and private international law, constitutional law and Aboriginal Justice. The letter also mandated the need to assess and address the criminal justice system including the past decade's sentencing reforms, and to explore "**sentencing alternatives and bail reform**."[48]

43. The mandate letter also directed the Minister's review of the criminal justice system to include the objective to "reduce the rate of incarceration among Indigenous Canadians", to conduct an Inquiry into Missing and murdered Aboriginal Women and Girls[49] , addressed the need to reduce the incarceration rate among Aboriginal Canadians and the need to explore "sentencing alternatives and bail reform."

d. Recommendations of the Truth and Reconciliation Commission

44. The CCLA informs the commission that the new government of Canada, in December 2015, undertook to "fully implement the Calls to Action of the Truth and Reconciliation Commission."[50] In CCLA's report to the UN Human Rights Committee in July 2015, and domestically, we called upon Canada to implement the recently released recommendations of the Commission.

45. The Truth and Reconciliation Commission of Canada ("TRC") was established in 2008 under the terms of the Indian Residential Schools Settlement Agreement, the largest class-action settlement in Canadian history. The agreement budgeted $60 million over five years for the TRC. From June 2010, the TRC received over 6750 statements from witnesses about their experiences at government-funded and church-run Indian residential schools, including survivors' experiences of physical, sexual, verbal and emotional abuse.

46. On June 2, 2015, the TRC released an executive summary of its final report: Indian residential schools were established in the 1870s, with the last school closing in 1996 in Regina, Saskatchewan. An estimated 80,000 former students are still alive of around

[48] Minister of Justice and Attorney General of Canada Mandate Letter, available online at: http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter.

[49] CCLA has repeatedly called for a Federal Inquiry into the root causes of Missing and Murdered Aboriginal Women and Girls, including meaningful participation of Aboriginal individuals and communities. See footnote 6 regarding CCLA's previous submissions to the UNCAT and UNHCR in this regard.

[50] PMO statement re: TRC Report, Dec 15, 2015, Available: http://pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission#sthash.q7ibG4Gi.dpuf

150,000 First Nations children who passed through the residential school system. Chair of the Commission, Judge Murray Sinclair, estimated that at least 6,000 Aboriginal children died while in the residential school system. Records were poorly kept or destroyed, however, and the number of reported deaths is 3,201 according to the Commission report. The report includes "Calls to Action", which consists of 94 recommendations, outlining specific actions to redress the residential school legacy in Canada, improve the plight of Aboriginal peoples, and restore relations between them and other Canadians. The recommendations touch upon several issues, including child welfare, education, language and culture, health, justice, and reconciliation.

47. The TRC recommendations include calling for the adoption by the federal government of the United Nations *Declaration of the Rights of Indigenous Peoples* and for the establishment of a national inquiry into missing and murdered Aboriginal women and girls.

48. The CCLA argues that the legacy of the residential schools and the political and legal policies and mechanisms surrounding their history, have resulted in rights violations and harms that continue to be experienced to this day. This is reflected in the significant educational, income, health, and social disparities between Aboriginal people and other Canadians, as well as the intense racism some people harbour against Aboriginal people, and in the systemic and other forms of discrimination Aboriginal people regularly experience in Canada.[51]

49. The CCLA informs the Committee that the current Prime Minister's Office has publicly pledged that Government will work with leaders of First Nations, Métis Nation, Inuit, provinces and territories, parties to the Indian Residential School Settlement Agreement, and other key partners, to design a national engagement strategy for developing and implementing a national reconciliation framework, informed by the TRC's recommendations.

50. The CCLA welcomes the government's proposed adoption of the Calls to Action to redress the legacy of residential schools and advance the process of Canadian reconciliation to address the disparities between Aboriginal and non-Aboriginal populations. The CCLA requests that the Committee question the State Party about its timeline in implementing the Calls to Action and confirm its intention to work

[51] Truth and Reconciliation Commission of Canada (2015), "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada", p. 135, available online: http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.

respectfully, collaboratively, and inclusively with indigenous peoples as the implementation moves forward.

e. Genetic testing for purposes of employment or insurance provision

51. Genetic testing, by nature, can reveal highly sensitive information about the individual. Indeed, "**Genetic data is obtained from human beings and inherently necessitates an invasion (consensual or not) into the human body to obtain this information and the possibility that this information may be used to affect an individual's enjoyment of other rights**. In other words, the rights to privacy (in terms of obtaining the information, consent, and use of the information, including the right of an individual not to know the results) and the rights to equality and non-discrimination (inequality and discrimination may result from how the genetic data is used) are triggered."[52] (*emphasis added*)

52. Further, the amount of genetic information collected and stored in publicly funded biobanks is growing exponentially.[53] Canadians are against genetic information being used in unauthorised ways; in a survey published in 2011 by the Office of the Privacy Commissioner of Canada, 79% of Canadians surveyed were concerned that private sector companies collecting genetic information might use or disclose it inappropriately.[54] In a similar survey in 2009, 83% of Canadians were against employers using genetic information for hiring or promotion decisions.[55]

53. There are risks that employers or insurers will misunderstand the predictive value of genetic testing. Genetic testing can reveal an increased risk of developing a disease, but in most cases, a range of complex factors contribute to whether an individual will in fact develop it. While there is limited evidence of genetic discrimination in employment when one looks to the Courts, this does not mean that it is not happening behind the scenes, and as the technologies for genetic testing become ever more accessible and affordable, the risk increases. In the context of insurance, there is some evidence, including academic work and news articles, that individuals have been denied insurance

[52] N.J. King, S. Pillay, & G.A. Lasprogata, "Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States," *American Business Law Journal*, 2006, 43.1, p. 88.

[53] Trudo Lemmens, Daryl Pullman and Rebecca Rodal, "Revisiting Genetic Discrimination Issues in 2010: Policy Options for Canada," *Genome Canada Policy Brief No. 2* (15 June 2010). Available: http://www.genomecanada.ca/medias/pdf/en/GPS-Policy-Directions-Brief-2-EN.pdf.

[54] Office of the Privacy Commissioner of Canada, *2011 Canadians and Privacy Survey*. Available: https://www.priv.gc.ca/information/por-rop/2011/por_2011_01_e.asp#toc3d

[55] Office of the Privacy Commissioner of Canada, *2009 Canadians and Privacy Final Report*. Available: https://www.priv.gc.ca/information/por-rop/2009/ekos_2009_01_e.asp#sec4_10

coverage on the basis of genetic information.[56] The prospect of such discrimination may discourage individuals from going for genetic testing, even when this would have health benefits, for fear the results will compromise insurance or employment.

CCLA Recommendations:

Canada does not currently have legislation that specifically deals with genetic privacy and/or genetic discrimination. CCLA encourages the Government of Canada to strengthen existing human rights and privacy regimes to better protect genetic information, to consider regulating genetic testing, and to adopt sector-specific solutions for insurance that prevent discrimination based on genetic risk status.

f. Rights on the Basis of Gender Expression and Gender Identity

54. Attempts to create formal statutory recognition for trans rights in federal law have to-date been unsuccessful. Bill C-279 *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)* was a bill aimed at expanding the statutory rights of trans people to be free from discrimination. It would have amended the *Canadian Human Rights Act* to include gender identity and gender expression as prohibited grounds of discrimination. And it would have amended the hate crimes provisions of the *Criminal Code* to include gender identity and gender expression as distinguishing characteristics protected from hate crimes and as aggravating circumstances to be taken into consideration at sentencing. CCLA supported the bill, and appeared before Parliamentary and Senate Committees studying the bill. We continued our advocacy to ensure the Bill passed without amendments that we felt would undermine its objective. However, Bill C-279 did not pass the Senate, and the gap regarding protection of trans rights remains.

55. Private Member's Bill C-204[57], a substantially similar bill, was introduced in the current session of Parliament and passed first reading December 9, 2015. We support the goals of this bill and will continue to monitor its progress.

g. Information Sharing Under the *Income Tax Act*

[56] See for example CTV News, "Some Canadians suffering 'genetic discrimination'" (9 June 2009), available: http://www.ctvnews.ca/some-canadians-suffering-genetic-discrimination-1.406308; and Y. Bombard et al., "Perceptions of genetic discrimination among people at risk for Huntington's disease: a cross sectional study," *BMJ* 2009.

[57] Canada Bill C-204, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*, 1st Sess, 42nd Parl, 2015 (first reading 9 December 2015).

56. The CCLA highlights for the Committee an inter-governmental agreement between the United States and Canada that imposes privacy-invasive and potentially discriminatory tax reporting measures on a distinct group of Canadians. The CCLA has been contacted by dual Canadian/American citizens regarding allegations of discrimination in relation to this agreement, and we are currently considering its implications. In February 2014, the United States and Canada announced that they had signed an inter-governmental agreement, aimed at implementing that country's *Foreign Accounts Tax Compliance Act* (known as FATCA) in Canada. At the same time, Canadian implementing legislation was released. It received royal assent in June 2014 and is now codified in Part XVIII (*Enhanced International Information Reporting*) of the Canadian *Income Tax Act*.[58]

57. Under the amendments to the *Income Tax Act*, Canadian financial institutions are required to conduct due diligence to identify and report to the Canada Revenue Agency (CRA) all financial accounts that they hold for "US persons." The CRA will then share that information annually with American tax authorities, in accordance with the information-sharing arrangements under the existing Canada-US tax treaty.

58. In 2011, ahead of the negotiations between Canada and the United States, the CCLA addressed a letter to the Canadian Department of Finance raising concerns about the potential for privacy and rights violations.[59] We noted that the definition of "US persons" who could be affected by the agreement did not simply include US citizens, but also "former green-card holders [who] have permanently left the United States or even individuals who have spent a substantial amount of time in the US over a number of years."[60]

59. The information-sharing contemplated under the *Income Tax Act* may affect Canadians who were born in the United States but who were never American citizens or who have relinquished American citizenship. Such individuals may have difficulty demonstrating to their financial institutions that they are not, in fact, "US persons" as contemplated by the *Act*. Particularly as regards these Canadians, the *Income Tax Act* authorizes information-sharing in a manner that is overbroad and lacks sufficient protocols to protect individuals' privacy interests. It creates an arbitrary, arguably discriminatory distinction

[58] RSC 1985 c 1 (5th Supp.).
[59] Canadian Civil Liberties Association, "CCLA registers privacy concerns over ongoing Canada-US information exchange negotiations" (4 December 2011), available online at: https://ccla.org/ccla-registers-privacy-concerns-over-ongoing-canada-u-s-information-exchange-negotiations.
[60] *Ibid*.

among Canadians based on place of birth and subjects a subclass of Canadian citizens to privacy-invasive measures.

ISSUES RELATING TO THE SPECIFIC PROVISIONS OF THE COVENANT

VI. ARTICLE 3 – Equal Rights of Men and Women

60. The CCLA informs the Committee that over the past three decades, Canadian women have doubled their participation in workforce, earning half of all university degrees.[61] However, CCLA is concerned that women in Canada remain under-represented in professional leadership positions. According to recent data, only 3% of top Canadian CEOs are women [62], and only 14% of members of corporate boards are women.[63] Moreover, the CCLA informs the Committee of reports that nearly 40% of Canada's top-500 companies, and nearly half of publicly traded companies did not have women on their boards. [64] Overall, Canadian men continue the historic trend of outnumbering women amongst senior managers at a rate of two to one.[65]

61. Status of Women Canada (SWC) has reported that in 2011, women held majority ownership of 16% of small businesses in Canada and had sole-ownership of 14% of small businesses; noting that Canadian women are more likely to own small businesses than medium-sized ones[66], with women having sole-ownership of only 4% of medium-sized businesses.[67]

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[61] Status of Women Canada (2014) *Good for Business: More Women on Boards*, available online: http://www.swc-cfc.gc.ca/initiatives/wldp/wb-ca/intro-eng.html

[62] Mackenzie, Hugh (2014). *All in a Day's Work?: CEO Pay in Canada.* Ottawa: Canadian Centre for Policy Alternatives, as cited by Canadian Centre for Policy Alternatives, (2014*) Progress on Women's Rights: Missing in Action*

A Shadow Report on Canada's Implementation of the Beijing Declaration and Platform for Action, available online: http://www.leaf.ca/wp-content/uploads/2014/06/Beijing-20-Final-Eng-2.pdf

[63] 2011 Catalyst Census: Financial Post 500 Women Board Directors. Toronto: Catalyst Canada, as cited by Canadian Centre for Policy Alternatives (2014*), Progress on Women's Rights: Missing in Action*

[64] Status of Women Canada (2014) *Good for Business: More Women on Boards*

[65] 2011 National Household Survey. Ottawa: Statistics Canada, as cited by Canadian Centre for Policy Alternatives (2014*), Progress on Women's Rights: Missing in Action*

[66] Status of Women Canada, *Women's Economic Security and Prosperity – Fact Sheet: Economic Security*, available online: http://www.swc-cfc.gc.ca/initiatives/wesp-sepf/fs-fi/es-se-eng.html

[67] Status of Women Canada (2015) *Fact Sheet: Economic Security*

62. The CCLA informs the Committee that Canadian women's average annual earnings have been approximately 71% of men's since the early 1990s, and in 2011, women earned an average total annual income of $32,100 compared to $48,100 for men.[68] This figure includes both part-time and full-time workers. With respect to hourly wages, SWC reports that there has been a notable overall decline in the gender wage gap. [69] In 2012, 51% of professional business and financial positions were held by women, however, only 26.6% of senior management positions in these sectors were held by women.[70]

63. The CCLA informs the Committee that the *Employment Equity Act* legislates employment equity, and applies to federally regulated industries, Crown corporations and other federal organizations.[71] The *Act* encourages the establishment of working conditions that are free of barriers, and promotes the principle that employment equity requires special measures and the accommodation of differences for four designated groups in Canada: women, persons with disabilities, Aboriginal peoples, and members of visible minorities.[72]

64. According to the *2014 Employment Equity Act Report* [73] with respect to all employment sectors combined, more women left the federally regulated private-sector workforce than entered, and there was a net decrease of 34,427 employees in the federally regulated private sector from 2012 to 2013. Of these employees, 9,167 were women.[74] The representation of women increased in the transportation sector, decreased in the banking sector and remained unchanged in the communications and 'other' sectors.[75] The largest proportion of women in the federally regulated private sector continued to be in the banking sector (46.6%), followed by the communications (28.3%),

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[68] Status of Women Canada (2015) *Fact Sheet: Economic Security*

[69] In 1981, women aged 17 to 64 who were employed full-time had average hourly wages that were 77% of those of men. In contrast, in 2011, the corresponding figure was 87%. Source: Status of Women Canada (2015) *Fact Sheet: Economic Security*

[70] Status of Women Canada (2015), *Fact Sheet: Women in Non-Traditional Occupations*, available online: http://www.swc-cfc.gc.ca/initiatives/wesp-sepf/fs-fi/wnto-fetm-eng.html

[71] The *Act* applies to federal organizations with 100 employees or more, as well as portions of the federal public administration identified in Schedules I or IV and V of the ***Financial Administration Act*** and by order of the Governor in Council, which includes the Canadian Forces and the RCMP. Source: http://www.esdc.gc.ca/en/jobs/workplace/human_rights/employment_equity/index.page

[72] Government of Canada. (2015) *Employment equity in federally regulated workplaces*, available online: http://www.esdc.gc.ca/en/jobs/workplace/human_rights/employment_equity/index.page

[73] Government of Canada. (2014) Employment and Social Development Canada*, 2014 Employment Equity Act Report*. The *Report* outlines the progress made by federally regulated private-sector employers to achieve equality and fairness in the workplace, available online: http://www.esdc.gc.ca/en/reports/labour_standards/employment_equity_2014

[74] Government of Canada. (2014) *2014 Employment Equity Act Report*

[75] Government of Canada. (2014) *2014 Employment Equity Act Report*

transportation (19.5%) and 'other' sectors (5.6%).[76] In the transportation sector, more women entered the workforce in this sector than left it, while the banking, communications and 'other' sectors reported that the number of terminations exceeded the number of hires.[77]

65. The CCLA informs the Committee that the gender wage gap in Canada persists, as well well as the occupational segregation and earning opportunity by sex. The CCLA informs the Committee that the government of Canada has attributed this phenomenon to the prevalence of part-time work for women and labour market segmentation, which tends to concentrate women in lower-wage occupations.[78] Women in Canada are more likely to hold part-time employment positions and casual work than men.[79] For example, Status of Women Canada has reported that in 2013, 70% of part-time workers in Canada were women, a proportion that has not changed significantly over the past three decades.[80] In the same report, SWC indicates that the unemployment rate for women aged 15 and over, was slightly lower than men in the same age group.[81] However, the employment rate for women in the same age group was 57.3% compared to 65.5% for men.[82]

66. The CCLA informs the Committee that occupational segregation remains an economic trend in Canada and Canadian women continue to have low representation in the skilled trades and other traditionally male-dominated professions. SWC has indicated that women's employment is concentrated in the services sector; and in 2012, over half of all jobs in the services sector were occupied by women.[83] SWC indicates that in 2012, women aged 15 years and over were most likely to be employed in sales and service occupations (27.1%); business, finance and administration (24.6%); and education, law and social, community and government services (16.8%).[84] SWC also indicated that men were most likely to be employed in trades, transport and equipment operators and related occupations (25.5%); sales and service occupations (18.7%); and management

[76] Government of Canada. (2014) *2014 Employment Equity Act Report*
[77] Government of Canada. (2014) *2014 Employment Equity Act Report*
[78] Status of Women Canada (2015) *Fact Sheet: Economic Security*
[79] "Part Time employment positions" refer to less than 30 hours per week and "casual work" refers to hours that vary from one week to the next. Source: Status of Women Canada (2015) *Fact Sheet: Economic Security*
[80] Status of Women Canada (2015) *Fact Sheet: Economic Security*
[81] The rate of unemployment for women in this age group was 6.3% in 2014, versus 7.0% for men in the same year. Source: Status of Women Canada, (2015) *Fact Sheet: Economic Security*
[82] Status of Women Canada (2015) *Fact Sheet: Economic Security*
[83] 55% of all jobs in the services sector were occupied by women in 2012. Source: Status of Women Canada (2015) *Fact Sheet: Economic Security*
[84] Status of Women Canada, (2015) *Fact Sheet: Economic Security*

occupations (13.9%). [85] In contrast SWC indicates that in the same year, women represented only 4% of those in construction trades and 20% of primary industry positions, such as forestry operations, mining, oil and gas[86], and these figures have varied little since 2008. In 2010, women accounted for 3% of registrants in electrician apprenticeships but only 2% of all completions.[87] In 2009, women represented just 22.3% of those in engineering, mathematics and natural sciences occupations.[88]

67. The Prime Minister has mandated the new Minister of Employment, Workforce Development and Labour, the new Minister of Status of Women, and the Minister of Families, Children and Social Development to work together to improve workers' access to quality job training that provides Canadians with pathways to good careers through training and skills development programs,[89] to work to fulfill the government's commitments to provide more generous and flexible leave for caregivers and more flexible parental leave, and to take action to ensure that federal institutions are workplaces free from harassment and sexual violence.

VII. ARTICLE 7 – The Right to Just and Favourable Conditions of Work

68. CCLA highlights for the Committee our specific concerns regarding certain State actions that have impaired the rights to just and favourable conditions of work:

a. Workplace Discrimination and National Security
b. Workplace Privacy Legislation and Practices;
c. Record Checks
d. Legal Protection for Migrant Workers

a) Workplace Discrimination and National Security

[85] Status of Women Canada, (2015) *Fact Sheet: Economic Security*
[86] Status of Women Canada (2015), *Fact Sheet: Women in Non-Traditional Occupations*
[87] Ibid.
[88] Ibid.
[89] Rt. Hon. Justin Trudeau, P.C., M.P, Ministerial Mandate Letter to Rt. Hon. MaryAnne Mihychuk, available online: http://pm.gc.ca/eng/minister-employment-workforce-development-and-labour-mandate-letter#sthash.W1js8ZQe.dpuf. See also Ministerial Mandate Letter to Rt. Hon. Patty A. Hajdu, Minister of Status of Women, available at http://pm.gc.ca/eng/minister-status-women-mandate-letter.

69. CCLA recognizes that the right to work is a fundamental right, essential to realizing other human rights, and forms an inseparable and inherent part of human dignity, as this Committee has recognized in its General Comment 18. CCLA is concerned that Canadian employers or agencies might be 'importing discrimination', by blindly applying foreign, opaque, discriminatory standards regarding individuals to the detriment of Canadian employees.

70. In this regard, CCLA informs the Committee of its concerns that Canadian employers have applied the US *International Traffic in Arms Regulations* (ITAR) to discriminate against individuals who may have been born in, or have ties to, certain enumerated foreign countries. CCLA intervened in a case in which a Syrian-born Canada who had worked with a company for 23 years as an engineer, was subsequently asked to stay at home for long periods (i.e. months) of time or was subjected to wearing a large colour-coded card identifying him as being disallowed from accessing certain areas of the workplace – not only did this individual find the practices degrading and humiliating, CCLA intervened to argue that these practices were a violation of the Canadian Charter of Rights and Freedoms and of international human rights law. In this particular case, which ultimately settled, Canadian government policies were linked to the employers actions.

71. CCLA also intervened in another case, *Quebec v Bombardier*[90] before the Supreme Court of Canada, to argue that the US refusal of flight security clearance for a Pakistani-born Canadian pilot should not automatically be used by a Canadian company to deny that pilot training. CCLA argued that a foreign security program that is completely opaque to Canadian courts without any accountability cannot provide a defence to discrimination and we argued that expert evidence should be relied upon to determine whether racial profiling was used. The Supreme Court of Canada ruled against the pilot, citing insufficient evidence, but clarified that a connection (rather than the lower court reliance upon 'causality') was required to determine links between an act and its alleged discriminatory impact, and that its ruling did not mean that "a company can blindly comply with a discriminatory decision of a foreign authority".

b) Workplace privacy Legislation and Practices

72. Privacy laws that protect employees vary in Canada, but most employees are not covered by existing privacy legislation. Only British Columbia, Alberta and Quebec have enacted provincial privacy legislation of general application; these three provinces have

[90] Quebec (CDPDJ) v Bombardier Inc., 2015 SCC 39.

legislation that regulates the collection, use, and disclosure of employees' personal information.[91] In the rest of Canada, which is subject to federal private sector privacy legislation, there is a gap in legislative protection for the privacy rights of private sector employees.[92] The federal private sector privacy legislation, the *Personal Information Protection and Electronic Documents Act*[93] does not extend to provincially regulated private sector employer's collection, use or disclosure of employee's personal information. It does apply to federally regulated employers, and to those in the three Canadian territories. *This essentially creates two categories of workers in Canada—protected and unprotected--depending on the sector and/or province or territory in which they work.*

73. Workplace privacy is characterised by the tension between employee rights to privacy and dignity, and an employer's legitimate business purpose. The power imbalance between workers and employers also plays a significant role, particularly as technologies increasingly allow very fine-grained, real-time monitoring of employees actions at work. CCLA has intervened in cases to support employees' reasonable expectations of privacy in the workplace. For example, *R v Cole,* 2012 SCC 53, dealt with an employee's expectation of privacy in a laptop computer provided by his workplace. We argued that computers contain private, personal information that is worthy of *Charter* protection, regardless of whether the computer is provided by the employer. In this case the Supreme Court confirmed that the *Charter* does protect an employee's rights at work. In 2013, we intervened in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper Ltd.,* 2013 SCC 34. The case examined whether employers can impose random alcohol testing in a unionized workplace. We argued in our factum that employers have no right to access their employees' bodily substances and medical information …where it has no effect on their job performance, and that employees do not lose their rights to privacy by virtue of their status as employees. The Supreme Court confirmed that mandatory testing of all employees is unjustified and an affront to dignity and privacy.

74. Despite these favorable rulings, CCLA continues to receive calls from people reporting workplace privacy violations. CCLA believes that all employees across Canada should have a right to privacy for their personal information. We encourages the Committee to

[91] *An Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q. c. P-39.1 [Quebec Act]; *Personal Information Protection Act*, S.A. 2003, c. P-6.5 [Alberta PIPA]; and *Personal Information Protection Act*, S.B.C. 2003, c. 63 [B.C. PIPA].
[92] Patrick Flaherty and Sarah Whitmore, "Privacy Protection in the Digital Workplace," Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age, Law Society of Upper Canada. P. 2.
[93] S.C. 2000, c. 5 [PIPEDA]

ask the State Party of Canada if they will act to formalise these rights, and amend federal private sector privacy legislation to provide appropriate protection for employees' privacy, equivalent to the protection provided to workers covered by legislation in B.C., Alberta, and Quebec.

c) Record Checks

75. CCLA informs the Committee that we have documented an increasing trend in Canada: employers, volunteer managers, educational institutions, licensing bodies and governments are incorporating police record checks into their hiring and management practices.[94] A record check, also known as a police background check, is a process by which hiring organisations may request police forces to provide information that they have about an individual to assist in hiring decisions. The information revealed in these background checks is not limited to criminal convictions. A wide range of "non-conviction" records can be disclosed, including information about criminal charges that were withdrawn, cases where an individual was found not guilty, or even complaints where charges were never laid. Even non-criminal interactions, such as experiences with the police due to mental health needs, are recorded in police databases and may show up on background checks.[95] Further, it is increasingly common for organisations to require such checks as a condition of employment for jobs where it is arguably unnecessary from a safety perspective.

76. CCLA continues to argue that the overuse of record checks leads to discriminatory, stigmatizing exclusion from employment, education and community opportunities. Employers who receive negative record checks may not understand the distinctions between different types of police information, creating a significant risk that non-conviction records will be misconstrued as a clear indication of criminal conduct. In the case of mental health records, this information may lead to discrimination against those with mental health issues or mental disabilities.

77. CCLA further argues that the use of record checks has a disproportionate impact on youth and on groups already overrepresented in the criminal justice system, including

[94] Canadian Civil Liberties Association, *False Promises, Hidden Costs: The Case for Reframing Employment and Volunteer Record Check Practices in Canada* (May 2014), available online at: https://ccla.org/recordchecks/doc/Records-check-final-20140516.pdf.

[95] This information is based on our record checks project website, https://ccla.org/recordchecks/, and our reports, *Presumption of Guilt? The Disclosure of Non-Conviction Records in Police Background Checks* (https://ccla.org/oldsite/wp-content/uploads/2012/09/CCLA-NCD-Report.pdf) and False Promises, Hidden Costs (https://ccla.org/recordchecks/doc/Records-check-final-20140516.pdf).

Aboriginal and racialized communities.[96] For instance, research shows that a criminal record can reduce one's chances of employment by 50%; for individuals from racialized populations, the effect on job prospects is even more deleterious.[97] Moreover, many provinces and territories in Canada do not prohibit discrimination in employment based on an individual's criminal or police record.[98]

CCLA Recommendations:

CCLA calls for legislative and policy change to redress this inequitable situation, and we would ask the Government of Canada to commit to action in this regard. Specifically, we recommend:

- Governments should legislatively prohibit the disclosure of non-conviction records for criminal record and police information checks;
- Governments should introduce legislation based on British Columbia's *Criminal Records Review Act*, establishing centralized bodies to conduct vulnerable sector screening and evidence-based risk assessments. These bodies should provide screening services for all positions that would qualify for a vulnerable sector check;
- Human rights statutes across the country should be amended to clearly prohibit discrimination on the basis of police contact, non-conviction records and criminal records of conviction;
- Provincial and territorial privacy statutes across the country should be amended to provide privacy protection for applicants, employees and volunteers not already covered by existing provincial or federal privacy statutes;
- It is in the public interest for individuals with a criminal record to have the fullest opportunity for employment. Governments should critically review legislative provisions that permit or require police record checks, as well as government grants and contracts that require the recipient organization to conduct police record checks.

b. Legal Protection for Migrant Workers

78. CCLA is concerned that the Temporary Foreign Worker program creates serious gaps in legal protections wherein subject individuals are at a heightened risk of exploitation and human rights abuses including trafficking risks; and lack meaningful access to justice and other remedies; can lack effective access to health care services; can be deprived of the

[96] John Howard Society of Ontario, *Help Wanted: Reducing Barriers for Ontario's Youth with Police Records* (May 2014), available online at: http://johnhoward.on.ca/wp-content/uploads/2014/07/johnhoward-ontario-help-wanted.pdf.
[97] Michelle N. Rodriguez and Maurice Emsellem, "65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks" (New York: The National Employment Law Project, 2011).
[98] *False Promises, Hidden Costs, supra*, pages 27-29.

rights to freedom of association including the right to collectively bargain as an essential tool of not only guarding against exploitation but also preserving inherent human dignity. CCLA was granted intervener status in *Espinoza v Tigchelaar Berry Farms*, a case that challenged the constitutionality of the operation of the program, but the case did not proceed to a hearing.

CCLA Recommendations:

Greater statutory protections for workers' labour, health, and safety rights are needed, in particular for temporary agricultural workers. Information about protections and services and access to them should also be ensured, and meaningful investigative and enforcement mechanisms are required.

VIII. ARTICLE 8 – Trade Union Rights

79. CCLA advises the Committee that a number of significant judicial decisions have resulted in the development of a body of jurisprudence that considers trade union rights, including the right to strike, as a matter of constitutional law under the *Canadian Charter of Rights and Freedoms*. While much of this jurisprudence has resulted in increased protection for labour rights, changes in conditions for workers on the ground may not be keeping pace. To provide but two examples, CCLA notes the following:

    a. In September 2012, the Ontario legislature passed Bill 115, the "Putting Students First Act" which imposed two-year contracts on public school teachers and other school staff if bargained deals weren't reached within a particular timeframe. While the Bill was repealed in January 2013, contracts that had been imposed on teachers under the legislation remained in place. The legislation has subsequently been challenged in court; the hearing began December 14, 2015 in the Ontario Superior Court of Justice, and CCLA will be monitoring the outcome.

    b. In 2002 the government of British Columbia enacted legislation that dealt with collective agreements for public sector education workers and effectively stripped some collective bargaining rights. The legislation was found unconstitutional by the Supreme Court of B.C. in 2011 however, the B.C. government subsequently enacted new legislation that included some sections that had been declared unconstitutional. While the matter is still before the

courts, the government response to the court's decision is cause for some concern.

80. CCLA has intervened in many of the important cases related to labour rights including *Ontario (Attorney General) v. Fraser*[99] and *Mounted Police Association of Ontario, et al. v. Attorney General of Canada.*[100] In *Fraser,* the CCLA was disappointed with the Supreme Court of Canada's determination that Ontario's *Agricultural Employees Protection Act,* 2002, did not unreasonably restrict freedom of association. CCLA was of the view that the scheme in place for agricultural workers did not effectively protect their rights to organize and bargain collectively. Since agricultural workers are often particularly vulnerable, as many work on a temporary basis and do not have permanent residence in Canada, this decision was particularly concerning.

81. In *Mounted Police Association* the Court considered whether the federal legislation that sets out processes for members of the Royal Canadian Mounted Police (RCMP) to address labour issues constituted a violation of the freedom of association. The Court concluded that the scheme, which effectively prohibited RCMP members from forming an independent employee association, was an unreasonable restriction on the freedom to associate. CCLA applauded this decision but notes that the government has still not responded to the Court's decision with new legislation and their time for doing so has been extended until May 2016. CCLA is concerned about the delay in implementing this decision.

82. CCLA further advises the Committee that the Supreme Court's decision in *Saskatchewan Federation of Labour v. Saskatchewan,*[101] recognized that the right to strike is protected under the *Canadian Charter* and is a watershed decision for trade union rights in Canada. It remains to be seen, however, how the right to strike will be meaningfully protected by provincial/territorial legislatures and, where applicable, the federal Parliament.

IX. ARTICLE 10 – Protection of Family, Mothers and Children

83. **CCLA highlights for the Committee our specific concerns regarding certain State actions that have affected the protection of family, mothers and children** with respect to:

[99] 2011 SCC 20.
[100] 2015 SCC 1.
[101] 2015 SCC 4.

a. Missing and Murdered Indigenous Women and Girls;
b. The *Youth Criminal Justice Act*
c. Indigenous Children in Care

a. Missing and Murdered Indigenous Women and Girls

84. CCLA is seriously concerned about the disproportionately high percentage of aboriginal women in Canadian prisons. It is reported that although aboriginal people make up only 3% of the population, over 30% of federal sentenced women are aboriginal women. CCLA is concerned by these disproportionate statistics[102] of the criminalization of aboriginal women, and the corresponding impacts upon aboriginal women, families, and communities. At the 2012 UNCAT review of Canada, at the 2012 UPR, and at the 2015 UN HRC Review of Canada, CCLA called for an investigation into the root causes of this violence.[103]

85. CCLA is also concerned about the alarmingly high rates of violence and death reported among Aboriginal women. CCLA repeatedly called for Canada to investigate and address the root causes of disproportionately high rates of violence, and high rates of incarceration of aboriginal women. Efforts to investigate, remedy or provide redress to Aboriginal women – including inquiries into murders or disappearances such as the British Columbia inquiry – must provide meaningful participation to the Aboriginal communities and in particular to Aboriginal women.

86. CCLA welcomes the undertaking of the new Government to hold an Inquiry into Missing and Murdered Aboriginal Women and Girls.On December 8, 2015, the government of Canada announced that there will be a National Inquiry into the high rates of missing and murdered Indigenous women and girls in this country.[104] As part of the pre-Inquiry design process, the CCLA informs the Committee that the newly appointed federal

[102] See http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.htm
[103] See CCLA's May 2012 submissions to the UN Committee Against Torture at paragraphs 33-34, available online at: https://ccla.org/cclanewsite/wp-content/uploads/2015/05/FINAL-CCLA-UNCAT-MAY-20121.pdf; the CCLA's March 2013 submissions to the pre-session of the second universal periodic review of Canada, available: https://ccla.org/cclanewsite/wp-content/uploads/2015/03/STATEMENT-OF-CCLA-UPR-2013-Pre-Session.pdf, paragraphs 42-43; and the CCLA's June 2015 submissions to the UN Human Rights Committee at pages 24-26, available online at: https://ccla.org/cclanewsite/wp-content/uploads/2015/07/CCLA-UN-Report.pdf.
[104] Government of Canada, Indigenous Affairs and Northern Development Canada, *National Inquiry Into Missing and Murdered Indigenous Women and Girls,* available online: http://www.aadnc-aandc.gc.ca/eng/1448633299414/1448633350146

Indigenous Affairs Minister is currently touring the country to meet with families, survivors and Indigenous representatives as well as national, provincial, territorial representatives and front-line organizations to seek their views on the design and scope of the Inquiry.[105]

87. In 2008, CEDAW reported that hundreds of Indigenous women in Canada have gone missing or been murdered in the past two decades have neither been fully investigated nor attracted priority attention with the perpetrators remaining unpunished.[106] Some advocates have indicated that the number of missing and murdered Indigenous women and girls is much higher.[107] In the same year, CEDAW recommended Canada examine the reasons for the failure to investigate the cases, and to take the necessary steps to remedy the deficiencies in the system.[108] CEDAW also urged Canada to carry out an analysis of those cases in order to determine whether there is a racialized pattern to the disappearances and take measures to address the problem if that is the case.[109]

CCLA Recommendations:

The CCLA has consistently argued that the root causes of violence against Indigenous women should be addressed. As previously noted in this document, the new government has pledged to undertake an inquiry of this nature, which we believe should also address the root causes of violence and the effects of residential schools.[110] The CCLA recommends that Indigenous women and their communities, as a prerequisite, must be provided opportunities for meaningful participation and direction in such efforts. Inquiries or investigations that do not meaningfully include Indigenous women and their

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[105] Government of Canada, Indigenous Affairs and Northern Development Canada, *National Inquiry Into Missing and Murdered Indigenous Women and Girls: Pre-Inquiry Design Process*, available online: http://www.aadnc-aandc.gc.ca/eng/1449240082445/1449240106460

[106] Committee on the Elimination of Discrimination against Women, forty-second session, "Concluding Observations of the Committee on the Elimination of Discrimination against Women: Canada" (2008), available online: http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-CAN-CO-7.pdf

[107] Liberal Party of Canada Website (2016), has a dedicated webpage on this topic entitled, *Missing and Murdered Indigenous Women and Girls*, which indicates that there are 1200 missing and murdered indigenous women and girls in Canada, available online: http://www.liberal.ca/realchange/missing-and-murdered-indigenous-women-and-girls/

[108] Committee on the Elimination of Discrimination against Women (2008)

[109] Ibid. The CCLA agrees with the recommendations on this issue of CEDAW, which called for ensuring that outstanding cases are investigated and prosecuted; ensuring standardized policing and investigative policies; introducing more awareness campaigns; establishing a National Missing Persons Office; ensuring more systematic disaggregated data collection; and the development of long-term anti-poverty, housing, shelter and support services for victims of violence, education, employment and food security strategies aimed at helping women in the Aboriginal communities. CCLA requests the Committee to question the State Party on these crucial issues.

[110] See paragraphs 3(c) and generally, paragraphs 40-46. See also Government of Canada (2015), Indigenous Affairs and Northern Development Canada, *National Inquiry Into Missing and Murdered Indigenous Women and Girls: Pre-Inquiry Design Process*, http://www.aadnc-aandc.gc.ca/eng/1449240082445/1449240106460

communities are counter-productive and further their marginalization, and in turn, their exclusion and disenfranchisement. A National Inquiry, and any related investigations must be effective, and must also produce meaningful results that can help Aboriginal persons and the country and the Government to forge the way forward.

b. The *Youth Criminal Justice Act*

88. The CCLA is concerned about the standard of proof applicable when determining whether an adult sentence should be imposed on a young offender according to the *Youth Criminal Justice Act* (*YCJA*). A previously proposed bill had stated that "[t]he youth justice court shall order that an adult sentence be imposed if it is satisfied *beyond a reasonable doubt* that…" a number of factors are present. However, the YCJA was amended to state simply that ""The youth justice court shall order that an adult sentence be imposed if it is satisfied that…" the factors are present. The CCLA contends that this failure to indicate the standard might imply that a lower burden of proof applies. Such a provision is an unjustifiable infringement of section 7 of the *Charter* and fails to adequately protect the rights of youths in Canada.

CCLA Recommendation:

The CCLA recommends that the reference to proof beyond a reasonable doubt be re-inserted into section 72(1) of the *YCJA*.

c. Indigenous Children in Care

89. The CCLA informs the Committee that statistics of Indigenous children in childcare remain higher than the national average despite official government policy to reduce the frequency of removing indigenous children from their parental home and communities. The CCLA informs the Committee that Indigenous children are more frequently placed them in foster care and group homes, than their non-Indigenous peers. The National Collaborating Centre for Aboriginal Health, cites Statistics Canada data from 2013, to indicate that 48% of 30, 000 children in foster care are Aboriginal children.[111] For every 1,000 First Nations children there were 13.6 formal out-of-home children welfare placements compared to only 1.1 per 1,000 for non-Aboriginal children place out-of-

[111] Statistics Canada *National Household Survey* (2013) as cited by the National Collaborating Centre for Aboriginal Health (2013*), First Nations and Non-Aboriginal Children in Child Protection Services*, available online: http://www.nccah-ccnsa.ca/Publications/Lists/Publications/Attachments/7/protective_services_EN_web.pdf

home.[112] In the same report, it is indicated that in 2013 the most common type of out-of-home care for First Nations children is informal kinship care (42.0%) followed by family foster care at 37%.[113] The CCLA believes that all children in government care, a disproportionate number of whom are indigenous, require adequate resources, care and housing and the CCLA asks that the government facilitate family preservation, and preventative programs to promote children's safety and well-being while reducing or eliminating the need for further child welfare interventions.

90. According to a 2015 report by the Aboriginal Child Welfare Working Group of the Council of the Federation of Canada's Premiers, there is "strong evidence indicating that access to a range of culturally relevant prevention and early intervention programs is highly effective in mitigating other factors that contribute to Aboriginal children coming into care".[114] The same report reads that "these preventative services can include home visiting, mental health and substance abuse treatment, early childhood education, family counseling and violence deterrence".[115]

91. The CCLA informs the Committee that the federal government controls the nature and extent of First Nation child welfare delivery on reserves, through a variety of policies, programs and funding regimes. On January 26, 2016, the Canadian Human Rights Tribunal (CHRT) released its judgement in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada).*[116] The case was brought forth by First Nations Child and Family Caring Society of Canada and the Assembly of First Nations alleging that First Nations children and families living on reserve and in the Yukon are denied equal child and family services and/or differentiated adversely in the provision of child and family services.[117] At para. 404 the CHRT judgement reads:

> The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's [Aboriginal and Northern Development Canada] FNCFS [First Nations Child and Family Services] Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the

[112] National Collaborating Centre for Aboriginal Health (2013*)*
[113] National Collaborating Centre for Aboriginal Health (2013*)*
[114] Aboriginal Child Welfare Working Group of Council of the Federation of Canada's Premiers (2015), *Children in Care Report to Canada's Premiers,* available online: *http://www.canadaspremiers.ca/phocadownload/publications/aboriginal_children_in_care_report_july2015.pdf*
[115] Aboriginal Child Welfare Working Group of Council of the Federation of Canada's Premiers (2015)
[116] First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada) (2015), 2015 CHRT 1, available online: http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do
[117] *Summary of Findings*, 2015 CHRT 1

Residential Schools system.

92. The Canadian Human Rights Tribunal ordered the federal government to take immediate action to end the discriminatory underfunding of child and family services for First Nations children on reserves and in the Yukon. The CCLA asks that the Committee question the government of Canada on any plans to implement the recommendations by the CHRT.

93. The CCLA informs the Committee that the government of Canada has previously made undertakings to this Committee, to improve the outcomes on Canadian First Nation child welfare issues. The CHRT speaks directly to the *International Covenant on Economic, Social and Cultural Rights*[118], at paras 441 – 443:

> [443] In a report to [the Committee on Economic Social and Cultural Rights] outlining key measures it adopted for the period of January 2005 to December 2009 to enhance its implementation of the *ICESCR*, Canada reported on the FNCFS Program [First Nations Child and Family Services Program] and declared that "[t]he anticipated result is a more secure and stable family environment and improved outcomes for Indian children ordinarily resident on reserve" (see *Canada's Sixth Report on the United Nations' International Covenant on Economic, Social and Cultural Rights* (Minister of Public Works and Government Services, 2013) at para. 103). Canada also reported that it had begun transitioning the FNCFS Program to a more prevention based model, the EPFA[119], "…on a jurisdiction-by-jurisdiction basis with ready and willing First Nations and provincial/territorial partners […] with the goal to have all jurisdictions on board by 2013" (at paras. 105-106). While the Government of Canada made this undertaking, the evidence is clear that this goal was not met.

94. In the same judgment, the CHRT indicates that the declarations made by Canada in its periodic reports to the various monitoring bodies (including the Committee) "clearly show that the federal government is aware of the steps to be taken domestically to address these issues."[120] The CHRT indicates that Canada's statements and commitments, "whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric". [121]

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[118] *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3

[119] The First Nations Child and Family Services (FNCFS) Program, applies to most of the FNCFS Agencies in Canada, and uses two funding formulas: Directive 20-1 and the Enhanced Prevention Focused Approach (the EPFA). Source: First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada) (2015), 2015 CHRT 1

[120] Para 454, 2015 CHRT 1

[121] Para 454, 2015 CHRT 1

95. The CCLA argues that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to Canadians off-reserve, and further asks that these services are sufficiently funded to meet the real needs of First Nations children and families, and do not perpetuate historical disadvantage and discrimination and inequities and harms.

X. ARTICLE 11 – The Right to an Adequate Standard of Living

96. CCLA recognizes the interdependence of the right to life, the right to an adequate standard of living, and the right to food including food sovereignty and food security. CCLA agrees with the concerns itemized by then Special Rapporteur on the Right to Food Olivier de Schutter that resources allocation decisions have contributed to food insecurity in certain regions of the country, and have disproportionately, negatively impacted certain socio-economic populations throughout the country. The CCLA urges the State to fulfil its duties regarding the right to food including to respect, protect, and fulfil the right.

97. CCLA recognizes this Committee's affirmation of the importance of the right to food in its General Comment 12, as being essential to the right to life and dignity, and necessary for the enjoyment of all other human rights, and includes "physical and economic access at all times to adequate food or means for its procurement."

98. CCLA is concerned that there continues to be significant disparities in food security between Canada's North and Southern regions. Below, we briefly summarize the current situation and specific issues that must be addressed by the government of Canada, in consultation with local governments and indigenous communities.

99. CCLA informs the Committee that according to Statistics Canada, 36%122 of Nunavut households experience food insecurity compared to 8.3% of other Canadian households.[123]

[122] The rate of hunger in Nunavut is believed by some researchers to be much higher. A study published in the Canadian Medical Association Journal, "Food insecurity among Inuit preschoolers: Nunavut Inuit Child Health Survey, 2007-2008" and cited by the Nunavut Food Security Coalition indicates that 70% of children in Nunavut lived in food insecure households in 2008. Source: Nunavut Food Security Coalition, "Nunavut Food Security Strategy and Action Plan 2014-16", (2014) available online: http://www.nunavutfoodsecurity.ca/soverview

[123] Statistics Canada (2012), available online at: http://www.statcan.gc.ca/pub/82-624-x/2015001/article/14138-eng.htm

100. A large number of families in the North rely on social assistance as a primary income[124], and as a result, hunting, trapping and fishing activities can be prohibitively expensive.[125] In addition, climate change is impacting food sources in the North, through related changes in wildlife migration patterns, and access to hunting territories and fishing grounds, as well as lowering stocks of wildlife and fish, all of which have reduced the availability of local, culturally appropriate and nutritious food.[126] The effects of colonial policies, including the Residential School legacy and resettlement policies of indigenous populations in the North, have contributed to the loss of traditional knowledge and skills of hunting, trapping, fishing.[127] The Nunavut Food Security Coalition's "Nunavut Food Security Strategy and Action Plan 2014-16" indicates that food is central to Inuit culture, which relies on the use of language to transfer traditional knowledge related to harvesting, sharing, preparing and consuming food.[128] Those who do not have the financial means, or traditional knowledge to acquire "country foods", must rely on high-priced grocery store items, all of which must be shipped by air.

101. CCLA informs the committee that the Government of Canada has an existing subsidy program, Nutrition North Canada (NNC), which aims to provide Northerners in isolated communities with improved access to perishable nutritious food.[129] However, the Auditor General of Canada indicated in 2014, that there are issues of transparency and accountability with NNC, and also found that the program had minimal impact on food costs.[130] In the same report, the Auditor General found that dozens of eligible communities facing food security issues are not included in the NNC program. The Auditor General also indicated that "Aboriginal Affairs and Northern Development Canada, has not identified eligible communities on the basis of need. This finding is important because it is essential that subsidized foods be healthy and that

[124] In 2011, four in ten people in Nunavut received social assistance. Source: Caledon Institute for Social Policy, "Poverty and Prosperity in Nunavut" (2013), available online: http://www.caledoninst.org/Publications/Detail/?ID=1027

[125] Nunavut Food Security Coalition, (2014) "Nunavut Food Security Strategy and Action Plan 2014-16"

[126] Inuit Tapiriit Kanatami, et al, "Unikkaaqatigiit: Perspectives from Inuit in Canada" (2005), available online: https://www.itk.ca/publication/canadian-inuit-perspectives-climate-change-unikkaaqatigiit

[127] Nunavut Food Security Coalition, (2014) "Nunavut Food Security Strategy and Action Plan 2014-16"; Caledon Institute for Social Policy, (2013) "Poverty and Prosperity in Nunavut"

[128] Nunavut Food Security Coalition, (2014) "Nunavut Food Security Strategy and Action Plan 2014-16"

[129] Government of Canada, Nutrition North Canada, available online: http://www.nutritionnorthcanada.gc.ca/eng/1415385762263/1415385790537

[130] Canada, Office of the Auditor General, *Fall Report of the Auditor General of Canada, Chapter 6—Nutrition North Canada—Aboriginal Affairs and Northern Development Canada*, (Ottawa: Office of the Auditor General, 2014) available online: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201411_06_e_39964.html

communities in need benefit from the subsidy."[131]

102. CCLA is aware that a national food strategy and effective food support programs are necessary for the wellbeing of isolated communities. In January 2016, the Minister of Indigenous and Northern Affairs, Carolyn Bennett, held a meeting with the Parliamentary Secretary, representatives from First Nations, Métis and Inuvialuit communities, a Member of Parliament for the Northwest Territories, and registered NNC retailers.[132] Bennett indicated the purpose of the meeting was to "begin preliminary discussions on how to work together and ensure that isolated northern families have access to affordable healthy food." Bennett made specific reference to "expand and improve the NNC program"[133] and to also "ensure that the program is more transparent, effective, and accountable to Northerners and other Canadians."[134] Bennett said that public engagement meetings would be held in coming months, where stakeholders will be "exploring and developing solutions developed by Northerners for Northerners."[135] In his report following his mission to Canada in 2012, the UN Special Rapporteur on Food, Olivier De Schutter, recognized the unique position of indigenous peoples with respect to food in light of their relationship to traditional lands and natural resources. He noted that their access to traditional or "country foods" has been disrupted and, in some cases, devastated, by policies and practices that remove control over land and resources. CCLA strongly agrees with the Rapporteur's comment that "Access to country foods represents more than increased nutrition and physical accessibility; it also has significant cultural importance."[136] Food security efforts and initiatives must be culturally appropriate.

103. CCLA recognizes the complex issues contributing to Northern food insecurity, and supports the government's commitment to improving food security services provided that it is done with full consultation and in genuine partnership with the affected communities and their leadership. The CCLA is concerned about the proposal to "expand" NNC, in light of its inadequacies in alleviating food insecurity in Northern Canadian communities.

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[131] Canada, Office of the Auditor General, *Fall Report of the Auditor General of Canada, Chapter 6—Nutrition North Canada—Aboriginal Affairs and Northern Development Canada*, (Ottawa: Office of the Auditor General, 2014)
[132] Canada, Indigenous and Northern Affairs, *Statement by the Honourable Carolyn Bennett Following Nutrition North Canada Meeting in Northwest Territories* (Jan 9, 2016) available online: http://news.gc.ca/web/article-en.do?nid=1027119&tp=980
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] A/HRC/22/50/Add.1 (24 December 2012) and the quote is from para. 65, p. 19. Traditional/country foods are discussed in paras. 62-65, p. 18-19.

CCLA Recommendations:

Canada should establish a national food strategy that addresses disproportionate food insecurity in Northern indigenous households and takes into account the 2014 Fall Report of the Auditor General of Canada regarding Nutrition North Canada program, as well as the Nunavut Food Security Coalition's four components of food security: availability, accessibility, quality and use.[137] Canada's future food security strategies should identify eligible communities on the basis of need, and address the loss of traditional indigenous knowledge through life skills programming.[138] Future strategies should also address the effects of climate change, and support community-based grassroots initiatives to promote access to culturally appropriate, nutritious food for all Canadians.

XI. ARTICLE 12 – The Right to Physical and Mental Health

104. **CCLA highlights for the Committee our specific concerns regarding certain State actions that have affected the right to physical and mental health with respect to:**

a. Reproductive Rights;
b. Mental Health and Involuntary Detention
c. Segregation and Solitary Confinement

a. Reproductive Rights

105. Women in Canada face barriers to accessible abortion services in rural and remote locations, in Canada's northern territories, in the province of New Brunswick, and in particular in the province of Prince Edward Island (PEI). The province of New Brunswick has removed certain barriers to accessing abortion services, by amending a regulation[139] whose requirements had included that two physicians must certify that the procedure is medically required, and it must be performed by a specialist. The amended regulation

[137] "Availability" refers to enough wildlife on the land or groceries in the shops. "Accessibility", refers to adequate money for hunting equipment or store bought food, and the ability to obtain it. "Quality" refers to healthy food that is culturally valued. "Use" refers to traditional knowledge about how to obtain, store, prepare, and consume food. Source: Nunavut Food Security Coalition, "Nunavut Food Security Strategy and Action Plan 2014-16"
[138] Nunavut Food Security Coalition, (2014) "Nunavut Food Security Strategy and Action Plan 2014-16"
[139] New Brunswick B.B. reg. 84-20, Sch. 2.

eliminates the above requirements, and requires instead that the abortion be performed in a hospital facility approved by the jurisdiction in which the hospital facility is located. In PEI, surgical abortion services continue to be unavailable and women must leave PEI in order to secure this medical care. An offer by doctors to fly-in in order to provide surgical abortion care in-province was rejected. Recently, a group of local activists for abortion access in PEI (Abortion Access Now) announced their intention to file a constitutional challenge of PEI's abortion policy,[140] and of subsections 1(c)(iv) and 6(1)(c) of the *Health Services Payment Regulation* in this regard.[141]

b. Mental Health and Involuntary Detention

106. The current state of mental health law in certain jurisdictions across Canada,[142] includes the following harmful effects and forms of discrimination: the law may allow for the involuntary long-term detention of individuals in mental health facilities without adequate procedural safeguards to ensure their liberty; individuals may be held against their will when they do not pose a danger to others or to themselves; and mandatory medical treatment in the community interferes with individuals' liberty while forcing on them medication with potential adverse medical and mental health effects.

107. In the province of Ontario, there have been a few recent developments in these areas. An Ontario Court of Appeal Decision from December 2014[143] struck down provisions of the province's *Mental Health Act*[144] in a case involving a deaf individual who had been held involuntarily for 19 years with "no apparent end in sight." The Court found that the law as then drafted had allowed for indeterminate detention without adequate procedural recourse. The Ontario Legislature amended the Act a year later, but did not adequately remedy the procedural and substantive deficiencies in the law. Recommendations by CCLA and others on how to correct these deficiencies were not implemented.

108. In addition, a constitutional challenge to two significant portions of Ontario`s *Mental Health Act* is now on appeal. The challenge addressed two regimes within the law. One permits the involuntary detention of individuals who do not present a danger to

[140] Resolution 17, passed in 1988, remains the Province's guiding statement of position on abortion. The Resolution announced that the Legislative Assembly opposed the performing of abortions, and that any policy that permits abortion is unacceptable except to save the life of the mother.
[141] The subsection excludes abortions from eligible "basic health services" and give the Minister discretion to decide whether an abortion is "medically required".
[142] See, for example, *Mental Health Act*, RSA 2000, cM-13, ss. 2, 9.1.
[143] *P.S. v Ontario*, 2014 ONCA 900.
[144] *Mental Health Act*, R.S.O. 1990, c. M.7 ss. 15(1), 15(1.1), 16(1.1), 17, 20(1.1), 33.1, 33.4, 33.3, 33.9

themselves or to others, but are held against their will for the purpose of "improved treatment." The other uses this same justification to permit a coercive scheme of mandatory medical treatment and medication for individuals in the community who do not present a danger to themselves or others. The medication prescribed can have harmful side effects. And the coercive nature of the mandatory orders can have various adverse mental health effects, including individuals' not seeking treatment. The legal challenge was unsuccessful at first instance, however CCLA respectfully submits that there were errors in the lower court's decision, and is in the process of seeking leave to intervene in the appeal.

109. CCLA is also extremely concerned by reports that the Canadian Border Services Agency ("CBSA") has put refugees with mental health issues into prolonged detention, including prisons and the use of solitary confinement. CCLA testified in this regard to the Canadian Senate Committee on National Security and Defence in March 2014.[145]

110. Pursuant to the Immigration and Refugee Protection Act ("IRPA"), the CBSA is responsible for detention and the conditions of detention even when detention occurs at corrections facilities. The CCLA is seriously concerned by the treatment of individuals held in Immigration Holding Centres including the barbed wire fences, the separation of families, the detention of children and the separation of children from one parent.

111. We would like to highlight for the Committee reports that refugee claimants who are detained and who are experiencing mental health issues, are being segregated for prolonged periods, and/or that adequate mental health treatment is not available to them. The CCLA has a long-standing record of speaking out against the deleterious consequences of segregation for any individual, and particularly for individuals experiencing mental health issues. We are aware of a disturbing example of a criminally inadmissible person in detention who suffered severe mental health issues and had deteriorated to being "catatonic" and consuming his own waste –it took a team of lawyer and a psychiatrist to have this individual removed from the prison and into a psychiatric hospital. One lawyer told us "I frequently represent people in detention under the (IRPA) who suffer serious mental health issues". The CCLA is concerned about the conditions of detention for all individuals, and in particular the treatment of those with mental health issues.

[145] CCLA Submissions to the Senate Committee on National Security and Defence. Available: https://ccla.org/cclanewsite/wp-content/uploads/2015/06/Submissions-to-the-Senate-Committee-on-National-Security-and-Defence.pdf.

c. Segregation and Solitary Confinement

112. CCLA is seriously concerned about the overuse of solitary confinement (often called "segregation" in Canadian law) in Canadian jails, particularly regarding mentally ill persons, and failures of review processes that compound the potential for abuse. We share these concerns with the federal Office of the Correctional Investigator who is similarly concerned that there is an overuse of segregation in Canadian jails to deal with mentally ill persons.

113. In January 2015, CCLA filed an application in the Ontario Superior Court, challenging the constitutionality of federal legislation that permits solitary confinement (Corrections and Conditional Release Act) across the country. It is CCLA's position that prolonged solitary confinement constitutes a violation of the right to be free from torture and cruel, inhuman and degrading treatment. Our challenge is based, in part, on the concern that solitary confinement is a risk to physical and mental health, causing both psychological and physiological harm. The absence of human contact reduces social stimuli and deprives the inmate of necessary interaction. The consequences may include insomnia, hallucinations, psychosis, and self-harm, among others. Negative health effects can develop after a relatively short period in solitary confinement, and the severity of these adverse outcomes increases with the passage of time. Solitary confinement is detrimental to the psychological wellbeing of inmates who do not suffer from mental illness, and it worsens the mental health of those who do.

114. CCLA has argued against the use of segregation except in the most exceptional cases, and then only for the shortest time absolutely required to address any exigent circumstances. CCLA is accordingly concerned by the uses of segregation including so-called 'administrative detention', and the overuses of segregation in prisons. In the fiscal year of 2014, data collected by the Office of the Correctional Investigator suggests that within a prison population of approximately 14,500, 8,300 placements were made to segregation.[146] In January 2015, CCLA brought a constitutional claim before the Ontario Superior Court, challenging the federal legislation that permits solitary confinement (*Corrections and Conditional Release Act*).

115. Administrative segregation is commonly used to manage mentally ill offenders, self-injurious offenders, and those at risk of suicide. The Correctional Investigator also found that inmates in administrative segregation are twice as likely to have a history of self-

[146] Office of the Correctional Investigator, Administrative Trends in Segregation in Federal Corrections: 10 Year Trends. Available: http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20150528-eng.pdf

injury and attempted suicide, and 31% more likely to have a mental health issue. There are also reports of the abusive use of "administrative detentions", a form of detention which, CCLA would like to note for the Committee, is not subject to any regulatory framework.

116. The same statistical report shows that over-reliance on segregation is not uniform; certain incarcerated groups are more affected than others, including federally sentenced women with mental health issues, Aboriginal and African Canadian inmates. Aboriginal inmates continue to have the longest average stay in segregation compared to any other group.

117. Previous reforms to the use of segregation suggested by the Arbour Commission in 1996 were not implemented.[147]

118. Overcrowding in correctional institutions is also a critical concern. Over half of Canada's provincial and territorial prison population on any given day has not been convicted of any crime.[148] Recent reports indicate that double- and triple-bunking in cells built and designed for one person is increasingly common, and new criminal law measures are likely to greatly increase incarcerated populations.[149] The then Public Safety Minister's 2012 comment that "double bunking is appropriate" is particularly concerning, and contrary to Canada's obligations under the UN's Standard Minimum Rules for the Treatment of Prisoners.[150]

119. In June 2015 and in May 2012, CCLA made submissions to the UN Human Rights Committee[151] and to the UN Committee Against Torture (CAT/C/CAN/6)[152], respectively, identifying our concerns regarding segregation. The UNCAT's concluding observations noted their concern that the use of solitary confinement was "often extensively prolonged, even for persons with mental illness" and included the explicit recommendation that Canada should "Abolish the use of solitary confinement for

[147] Louise Arbour, Commissioner, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Public Works and Government Services Canada, 1996), available online, Canadian Association of Elizabeth Fry Societies: http://www.caefs.ca/wp-content/uploads/2013/05/Arbour_Report.pdf.

[148] See: http://www.statcan.gc.ca/pub/85-002-x/2011011/article/11440-eng.htm.

[149] See: http://www.rcinet.ca/english/daily/reports-2012/15-29_2012-08-28-prison-overcrowdingcausing-violence/

[150] UN Human Rights Office of the High Commissioner, *Standard Minimum Rules for the Treatment of Prisoners*. Available: http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx

[151] See footnote 6 for full references and links to these reports.

[152] CCLA, Report to the UN Committee Against Torture, 48th Session, May 2012. Available: https://ccla.org/cclanewsite/wp-content/uploads/2015/05/FINAL-CCLA-UNCAT-MAY-20121.pdf

persons with serious or acute mental illness."[153] To -date, this recommendation has not been acted upon by the Canadian government.

120. CCLA also participated in the Ashley Smith Inquest. Ms. Smith was a mentally ill young woman subjected to repeated segregation who died by her own hands in prison, by ligature strangulation and asphyxiation, as correctional staff watched but did not intervene. The inquest jury returned a verdict of homicide and made a series of recommendations, most of which were rejected by the past government. The current government has indicated in the mandate letter for the Justice Minister that it will move to implement these recommendations. CCLA is encouraged by this statement, but would like to see firm commitment to the following recommendations.

CCLA Recommendations:

- As recommended by the United Nations Special Rapporteur on Torture and Other Cruel and Inhuman Treatment in 2011, and by the UN Committee on Torture in 2012, there should be an immediate and absolute prohibition on the placement of individuals with mental health disabilities in segregation**.**
- There should be an absolute prohibition on the practice of placing federally sentenced women in conditions of long-term clinical seclusion, isolation, observation or segregation.
- Segregation should not be used except in rare and exceptional circumstances, as a last resort, and for the shortest time possible and should serve a particular purpose.
- It is recommended that Correctional Services Canada (CSC) adopt a policy that requires **independent adjudication of the use of segregation for longer than 5 days**. If segregation continues for longer than 5 days, an independent, impartial, legally trained adjudicator must convene a hearing to determine if continued segregation is justified. The burden at such a hearing shall be on CSC to justify the ongoing use of segregation and to present a plan of care for the immediate elimination of the use of segregation. The segregated inmate shall have counsel at the hearing.
- It is recommended that *Corrections and Conditional Release Act* be amended to **prohibit the use of long-term segregation**. Long-term segregation should be defined as confinement in segregation for 15 days or more, in accordance with the Report of the United Nations.
- CCLA calls for the immediate implementation of the recommendations of the Arbour Commission, investigation by the Federal Government, and a strengthening of oversight mechanisms for prison guards.

[153] CAT/C/CAN/CO/6 Committee against Torture, 48th session, 7 May to 1 June 2012, Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture, Canada, point 19(d).

We also note for the Committee that CCLA is proceeding with its constitutional challenge in the Ontario Superior Court against the federal legislative provisions permitting the practice of segregation.

XII. ARTICLES 13 and 14 – The Right to Education

CCLA would like to address issue 27 as specified by the Committee, and to highlight the higher educational drop-out rates of Indigenous students, with regards to the Covenant right to education under the Covenant.

Issue 27. Please provide information on the access of children with disabilities to inclusive education, as well as the availability of sufficient qualified staff and teachers, including in isolated and rural areas.

121. Since education falls under provincial jurisdiction in Canada, the funding and availability of special education supports and school programing for students with disabilities varies from province to province. It has been recognized that there is currently very little research looking at the state of special needs education Canada-wide due to the difficulty of collecting data consistently from multiple jurisdictions. CCLA is aware of the following specific issues relating to the quality and accessibility of inclusive special education in the provinces of Alberta and Ontario.

122. In Ontario, 17% of students and 23% of students receive special education support in elementary schools and high schools, respectively. Both elementary and secondary school principals report that an increasing number of students do not have timely access to special education supports because they remain on waiting lists for services or are awaiting assessments in order to determine what supports are needed. Moreover, even when students have undergone assessments, 22% of elementary schools and 19% of high schools report that not all identified students actually receive the recommended supports. Principals across Ontario have also expressed concerns about the steady increase in the ratio of students with special needs to available qualified special education teachers. 83% of students with special needs are fully integrated in “regular”

classrooms for at least half of the school day.[154]

123. According to a report on special education in Northern remote areas of Alberta, 100% of school divisions reported inadequate access to professional services and treatments for students with special needs. In most cases, these students are required to travel to city centres for treatments that are necessary to support their learning, which creates further barriers to inclusive education and integration with their peers. Furthermore, the problems associated with a lack of adequate on-site special education resources are compounded by the fact that the ratio of students with special needs in the northern remote areas is generally higher than the provincial average.[155]

124. In addition to the research above, CCLA advises the Committee that it is aware of concerns about the education offered to students in the Province of Ontario's schools for the deaf. In particular, CCLA notes that some students have expressed concerns that certain classes – particularly those that may help prepare for university – are not available to students at their own school and that accommodations made to allow them to attend classes elsewhere may create barriers to learning. Some students have also expressed concerns that their teachers are not adequately fluent in American Sign Language (ASL) or that they choose not to speak ASL in some instances. CCLA is also aware of allegations of historical abuse of students at schools for the deaf in Ontario and in Nova Scotia. These allegations are the subject of litigation that is currently before the courts.

f. Higher Drop-Out Rates of Indigenous Students

125. CCLA informs the Committee, that Indigenous people consistently have lower literacy levels than other Canadians.[156] We are concerned about stark disparities in levels of educational attainment, with 60% of on-reserve students dropping out of high school, compared to 9% of other Canadians.[157] CCLA informs the Committee that Indigenous

[154] People for Education (2015). Ontario's schools: "The gap between policy and reality (Annual Report on Ontario's Publicly Funded Schools 2015)". Toronto: People for Education.
[155] Northern Alberta Development Council (2010). "Rural and Remote Education Report." Available: http://www.nadc.gov.ab.ca/Docs/rural-remote-education.pdf
[156] Literacy scores in Canada are generally lower for Indigenous populations than for non-Indigenous populations, the disparity is less marked for the urban Indigenous populations than for the populations in the territories. Source: Employment and Social Development Canada (2012), available online at: http://well-being.esdc.gc.ca/misme-iowb/.3ndic.1t.4r@-eng.jsp?iid=31.
[157] National Household Survey, Statistics Canada (2006), as cited by the Martin Education Initiative, available online: http://www.maei-ieam.ca/current_initiative.html

people are the youngest[158] and fastest growing segment [159] of Canada's population.

126. CCLA informs the Committee that Indigenous students have much higher levels of poverty and special needs than non-Indigenous students, and that the same students are more likely to change schools frequently, and to have lower academic achievement levels.[160] CCLA is concerned, that despite a high need for resources to address such issues, Indigenous students in First Nation schools are allocated considerably less funding than students in non-reserve schools.[161]All Canadian students require adequate resources and programming to achieve academic success, and to subsequently promote employment options, and greater economic opportunities as adults. CCLA asks that the government of Canada implement a funding model for First Nation education, that is comparable to non-reserve schools, and takes into account the higher needs of many students on-reserve. Such a model should also include robust funding for school libraries, vocational training, and Indigenous languages, which are not included in the current funding model.[162] Literacy and education is critical to improving the social and economic strength of Indigenous people. CCLA asks that the government of Canada establish a plan to address the 60% student drop-out rates of Canada's First Nation children living on-reserve, and to sufficiently promote academic success of indigenous students through financial investment in educational programming.

CCLA Recommendations:

The CCLA asks that the government of Canada implement "necessary funding" to Indigenous schools to utilize Indigenous knowledge and teaching methods in the

[158] According to the 2011, National Household Survey by Statistics Canada, the median age of the Indigenous population was 28 years; 13 years younger than the median of 41 years for the non- Indigenous population. The same survey showed that there were 392,105 Indigenous children aged 14 and under in Canada, representing 28.0% of the total Indigenous population. Source: Statistics Canada (2011), available online at: http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm

[159] The Indigenous population increased by 232,385 people, or 20.1% between 2006 and 2011, compared with 5.2% for the non- Indigenous population. Source: Statistics Canada (2011), available online at: http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm

[160] Martin Education Initiative, available online: http://www.maei-ieam.ca/current_initiative.html

[161] Assembly of First Nations (AFN) indicates in a 2012 publication that there are funding discrepancies between Indigenous students attending First Nation schools, and those attending provincial schools. AFN cites Indian and Northern Affairs Canada, Financial information (1996-2011), indicating First Nations students on-reserve have received an average of $3,500 less per-student than provincial schools. Source: Assembly of First Nations – Chiefs Assembly on Education, Gatineau, Quebec (October 2012), available online: http://www.afn.ca/uploads/files/events/fact_sheet-ccoe-8.pdf

[162] Source: Assembly of First Nations – Chiefs Assembly on Education, Gatineau, Quebec (October 2012), available online: http://www.afn.ca/uploads/files/events/fact_sheet-ccoe-8.pdf

classroom, as stated in section 62.iii) of the Truth and Reconciliation Commission's Calls to Action.[163]

XIII. ARTICLE 15 – Cultural Rights

CCLA will address issue 30 in this section (see d, below) and further highlights for the Committee our specific concerns regarding certain State actions that have affected the right to cultural rights with respect to:

a. Participating in Public Protest
b. Funding Culture
c. Funding Scientific Research and Facilities
d. Affordable Access to the Internet and the Right to Benefit Equally from Scientific Progress and Applications

a. Participating in Public Protest

127. CCLA's position is that individuals have the right to participate in peaceful protest. The right to protest implicates a number of basic civil liberties including freedom of expression, freedom of association and freedom of peaceful assembly, all of which are essential to a democratic society like Canada. In recent years, we have seen the police forces impede on this right, including during the G20 meeting in Toronto in 2010, student protests in Quebec and Occupy protests across the country. We encourage the government to commit to protecting the right of Canadians to protest and to strongly condemn any use of less lethal weapons for crowd control in such circumstances.

128. **CCLA has expressed concerns on a number of occasions that the right to peaceful protest is being eroded.** CCLA notes that international law requires police to protect and facilitate enjoyment of the right to peaceful protest. The right to peacefully protest is an integral part of a democratic order and is as important as the right to vote. The government and security responses to the exercise of freedom of peaceful assembly is a test of whether a government is a democracy. Violent disruptions of peaceful protests

[163] The Truth and Reconciliation Commission's Calls to Action speak to the need for funding for culturally responsive programing:

> S. 62) We call upon federal, provincial, and territorial governments, in consultation and collaboration with Survivors, Aboriginal peoples and educators, to:
>
> > iii) Provide the necessary funding to Aboriginal schools to utilize Indigenous knowledge and teaching methods in the classroom

are unacceptable no matter where they occur.

129. The G20 protests in Toronto during the summer of 2010 saw the use of kettling, mass arrests, and rubber bullets. The federal government refused to conduct a national inquiry into the events of the G20 and various other accountability mechanisms are at different levels of completion. On the whole, however, the accountability framework has been inefficient and many of the G20 complaints remain ongoing, almost five years later. The accountability framework is completely inefficient where complaints for the G20 have not yet been properly addressed. This situation creates a vacuum that does not appear to respect the rule of law as constitutional violations and illegal actions on the part of the authorities remain unpunished. We urge the Committee to ask Canada to provide an account of its policing accountability mechanisms and their efficiency.

130. In Montreal, student protests in the summer of 2012 and more recently have seen the repeated use of tear gas and excessive use of force against protesters. In March of 2015, protesters in Montreal and Quebec City engaged in large demonstrations to protest the province's spending cuts. Police were quick in many cases to declare these protests "illegal" and shut them down based on municipal bylaws that have questionable constitutional validity. For example, a Montreal protest was declared illegal on the basis that protesters had not provided the police with an itinerary of their demonstration. This is contrary to bylaw P-6, which is the subject of a constitutional challenge that is still pending before the courts of Quebec. Police have used tear gas on protesters and in one case during a protest in Quebec City, a woman was shot in the face with a tear gas canister from an estimated distance of only two metres away. Many protesters were also given tickets (for more than CDN $200/each) for failing to disperse. Some of the Spring 2015 Quebec student protests were also directed at universities, with some students engaging in a student "strike" and attempting to block other students' access to their classes. One university (Université de Québec à Montréal – UQAM), obtained an injunction against student protesters from blocking other students' access to classes. It appears that some students may have breached this injunction, occupied parts of the university, disrupted classes, and engaged in vandalism. A police riot squad forcefully removed these students from the university.

131. **CCLA is concerned about reported restrictions on the protest activities of aboriginal groups and environmental groups.** Aboriginal protests in various parts of the country have also been met with force in some instances, including protests in New Brunswick related to hydraulic fracturing (i.e. fracking) and Aboriginal groups opposed to the

Northern Gateway pipeline in British Columbia.[164] In New Brunswick, police enforced an injunction that had been obtained by the corporation engaged in seismic testing. There were reports of protesters being pepper-sprayed and approximately forty arrests were made in one day for a range of offences including threats, intimidation, mischief and breach of the injunction. Aboriginal protests related to the problem of missing and murdered Aboriginal women have also happened frequently in Canada in recent years and the Idle No More movement has been strong in Canada, with largely peaceful protests taking place across the country in late 2012 and throughout 2013. In many cases, the policing of these protests was appropriate and facilitation of peaceful protest activities occurred.[165]

132. Protests related to environmental issues are common in Canada, and are increasingly directed not only at government policy-makers, but also at private corporations that are engaged in exploration, resource extraction or development (e.g. pipeline, fracking, etc). Environmental protests are often linked to or related to Aboriginal protests (as discussed above). In these kinds of protests, police involvement may arise in part to enforce civil injunctions obtained by private corporations. For example, protests against the proposed Kinder Morgan Pipeline in Burnaby, British Columbia resulted in over 100 arrests, many for breaching a civil injunction.

133. **CCLA has also been concerned about the use of private lawsuits against protesters as a means to silence critical expression**, and has promoted the passage of anti-SLAPP legislation at the provincial level. Such legislation has been introduced in Ontario and appears likely to pass by the end of 2015.

b. Funding Culture

134. CCLA also urges the Canadian Government to provide adequate funding for cultural institutions, including the *Canadian Broadcasting Corporation* (CBC). These institutions serve all Canadians and are vital in enabling individuals to participate in Canadian culture.

c. Funding Scientific Research and Facilities

135. CCLA advises the Committee that in recent years the federal government has significantly cut funding that supports scientific research and facilities. For example, in

[164] See also paragraph 7 of this report on this topic.
[165] This issue links to previous discussions in this report; see also section III, para. 4; section IV, para. 5.

2013 seven research libraries affiliated with the Department of Fisheries and Oceans were closed and, in some cases, the material from the libraries was discarded. A number of research centres have also been closed due to funding cuts.

d. Affordable Access to the Internet

Issue 30. Please indicate the measures taken by the State party to facilitate affordable access to the Internet by disadvantaged and marginalized individuals and groups, as well as in remote areas.

136. Increasingly in contemporary Canadian society, the internet provides the essential infrastructure for learning of, experiencing and participating in cultural life, while being both a tool for, and a product of, scientific progress. At the same time, a recent report from the World Bank highlights the fact that globally there remains a significant digital divide, where "the better educated, well connected, and more capable have received most of the benefits,"[166] of the internet, a concern that the CCLA believes holds true in Canada.

137. CCLA notes that there are three areas to be examined when considering effective and equitable internet access in Canada: setting adequate technical thresholds to provide service levels sufficient for full online functionality; ensuring affordable and equitable access for disadvantaged and marginalised peoples in all regions of Canada, including support for infrastructure and services to remote areas of the country; and creating appropriate regulations that support inclusive access, foster economic activity, encourage skills training and hold infrastructure and service providers accountable for the ways in which they collect, use, and profit from citizen data.

138. Broadcasting and telecommunications are regulated and supervised in Canada by the Canadian Radio-television and Telecommunications Commission (CRTC), an independent administrative tribunal reporting to the Minister of Canadian Heritage. The CRTC is tasked with ensuring that policy objectives in the *Broadcasting Act*, the *Telecommunications Act*, and Canada's anti-spam legislation are fulfilled.

139. Through the CRTC, the Canadian government sets minimum standards for service provision and issues, renews and amends broadcasting licenses to corporate actors who

[166] World Bank Group. Digital Dividends: World Development Report 2016, p. 5. Available: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2016/01/13/090224b08405ea05/2_0/Rendered/PDF/World0developm0000digital0dividends.pdf.

provide fee-based, for- profit services to Canadian customers. The private sector consequently has a great deal of control over telecommunications, including internet access in Canada, as they provide the majority of infrastructure investment, which is primarily driven by market demand and the potential for return on investment. Affordability is also to a large extent in the hands of the private sector marketplace, with a relatively small number of companies controlling the majority of telecommunications networks in Canada—according to data collected by the Canadian Radio-television and Telecommunications Commission, 84% of the revenue share from telecommunications services in Canada goes to five core companies.[167]

140. While wireline and wireless networks are said to reach over 99% of Canadians[168] there are significant differences in the levels of service available in urban and rural/remote regions, and similar differences in affordability, which may leave vulnerable populations underserved even when infrastructure exists. The CRTC is currently reviewing its basic telecommunications services standards, a process initiated in April 2015 and engaging in public consultation regarding citizen needs. Basic services currently include the capability to connect to the internet via low-speed data transmission at local rates. The CRTC review is examining which telecommunication services Canadians require to participate meaningfully in the digital economy and to access essential services, and the role the Commission should play in ensuring affordable basic service is available to all in Canada. Thus, any **recommendations from the United Nations Committee on Economic, Social and Cultural Rights regarding the importance of ensuring meaningful access for marginalized and vulnerable populations, and those in remote or rural areas, that result from this sixth periodic review of Canada, will be both timely and potentially impactful**.

141. *Technological sufficiency in infrastructure and service levels*

Canada is a large, geographically diverse nation. While a large portion of the population is clustered in relatively large urban centres, where there has been substantial private-sector investment in internet infrastructure, there remains a significant number of Canadians living in rural and/or remote areas who are less likely to have the same access to fast, reliable internet. Broadband internet is not part of the basic service standards mandated by the CRTC. Instead, broadband access is currently provided through a combination of market forces in urban areas and some targeted funding programs or private/public partnership programs, particularly in remote areas. Target goals for

[167] CRTC. Communications Monitoring Report 2015: Telecommunications sector overview. Available: http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2015/cmr5.htm#a53
[168] CRTC, Telecom Notice of Consultation CRTC 2015-134

connection speeds were set, however, in an attempt to ensure some uniformity of service; these goals are currently set at 5 Mbps for downloads and 1 Mbps for uploads, a standard well below the current norm for many of the world's developed and even developing nations. A recent assessment of Canada's upload speeds actually suggests that the average upload speed already exceeds this standard at 5.67 Mbps, a rate which nonetheless leaves Canada ranking 53rd in the world behind such nations as Mongolia and Kazakhstan.[169] In part this low average reflects the dramatically varying rates across the country. In the province of Manitoba, where one major service provider has a firm monopoly, the maximum speed available for any price is 5 Mbps while the average is a mere 2.37 Mbps; in Canada's north, the same holds true with an average of 2.29 Mbps.[170] There is thus a significant discrepancy in data speed across the country, while targets lag well behind both technological actuality and potential, rendering them relatively unhelpful for their stated policy purposes.

142. Concrete problems caused by this lack of high-speed internet access include difficulties encountered in deploying information communication technologies in the aid of improved service provision to remote areas, particularly distance education and electronic health applications.[171]

143. CCLA notes that research suggests a key component of infrastructure finance is the distribution of roles and responsibilities. While most infrastructure development in Canada is undertaken and paid for by private sector actors, in depth research by the Conference Board of Canada, an independent, not-for-profit research body, finds that "there remains an important social equity argument to be made for strong public leadership roles in infrastructure finance, particularly in remote Northern regions, where market failures related to sparse populations and other geographic challenges act as disincentives for private investment."[172] CCLA agrees and would like to stress for the Committee the need for active and sustained government engagement in ensuring that both the technological and social infrastructures necessary for meaningful and affordable internet access are available in all parts of the country, however remote.

144. *Affordable, equitable access for all Canadians*

[169] Peter Nowak, CBC News, "Why internet upload speed in Canada lags behind world average," March 20, 2014. Available: http://www.cbc.ca/news/technology/why-internet-upload-speed-in-canada-lags-behind-world-average-1.2578682
[170] Ibid.
[171] Conference Board of Canada, *Building a Resilient and Prosperous North*, A. Jeffrey, A. Fiser, N. Brender. & B. Dowdall. April 2015, p. 15.
[172] *Building a Resilient and Prosperous North*, p. 47

As the CRTC states, "Canadians rely on telecommunications in their everyday lives. Thanks to broadband Internet services, Canadians have access to a range of important online services, such as e-health, e-learning, banking and government services."[173] To this list CCLA would add access to the cultural products of Canada and the global community. Independent research conducted in relation to the necessity of telecommunications access for remote areas in Canada reinforces this assertion that the internet is increasingly necessary for economic and cultural inclusion, documenting the ways in which this infrastructure "is a critical enabler of both economic opportunity and social cohesion. Canada's Northern communities require critical connectivity infrastructure that is reliable, scalable, and supportive of locally affordable services." [174]

145. Many remote communities, where roads and terrestrial telecommunications facilities are non-existent, rely on satellite services for internet access. These include small, geographically dispersed communities in Nunavut, the Northwest Territories, Yukon, and remote areas of British Columbia, Saskatchewan, Manitoba, Ontario and Quebec. In 2014, the CRTC appointed Commissioner Candice Molnar to investigate the satellite service market; in her report, she states that there were 89 remote communities reliant on satellite services for internet access, the majority of which rely on one primary network, Telesat, for service. [175]

146. The Commissioner found that:

> … Internet speeds in satellite-dependent communities are well below those available in communities served by terrestrial facilities, and are, in most cases, below the Commission's target speeds of 5 megabits per second (Mbps) download and 1 Mbps upload. Mobile wireless services offered in satellite-dependent communities, if available, typically use older, less advanced technology with low data speeds compared to what is available elsewhere in Canada.[176]

147. CCLA notes that this discrepancy in service levels compared to the rest of Canada disproportionately affects indigenous peoples. The Conference Board of Canada estimates that 85% of Inuit communities are serviced only by satellite, while 43% of First Nation/Metis settlements, 39 per cent of First Nation reserves and only 18 per cent of

[173] See: http://news.gc.ca/web/article-en.do?nid=960029
[174] *Building a Resilient and Prosperous North*, p. 45.
[175] Satellite Inquiry Report, October 2014, p. 8. Available: http://www.crtc.gc.ca/eng/publications/reports/rp150409/rp150409.pdf
[176] Ibid.

non-Aboriginal settlements are in the same position.[177] In a report entitled "Mapping the Long-Term Options for Canada's North: Telecommunications and Broadband Connectivity," Dr. Adam Fiser found that "the high cost of personal telecommunications and high-speed Internet access is constraining consumer uptake of knowledge-based services and new media and limiting the ability of regional economies to diversify."[178] His research suggests that not only is internet access slower and more tenuous in Canada's remote north, but that northern consumers also pay more than other Canadians for that access, even when government subsidies are available and taken into account. He concludes that the diffusion of new information and communications technologies is dependent on either targeted government funding or public/private investment partnerships.

148. CCLA believes that these partnerships, too, require a strong government commitment to inclusion and consultation with local communities. In 2012, the National Aboriginal Economic Development Board (NAEDB) found that financing options for infrastructure serving Canada's on-reserve First Nations—many of which are remote—were not sufficiently flexible to meet the specific needs and situations of individual communities, and needed to be integrated into more comprehensive, long-term community planning.[179] CCLA encourages the government to commit to stable funding for infrastructure development in remote and rural areas of Canada, to be used for projects identified by local communities as high priority and in keeping with local goals and needs, with the clear and primary goal of ensuring affordable, universal internet access for all Canadian communities regardless of geographic location.

149. *Creating appropriate regulations*

As noted previously, the CRTC is responsible for regulation and enforcement in relation to telecommunications policy in Canada. To the extent that the CRTC determines market forces are effective in ensuring competition and meeting basic thresholds for access and cost, the market is then left alone. As the internet is increasingly becoming a critical platform for economic and social inclusion in Canadian society, however, it is reasonable to ask whether there are policy goals the government might wish to support that are unlikely to be served by for-profit service providers without regulatory incentives and strong enforcement. It also means that the decisions of the CRTC are increasingly important to the lives of everyday citizens. These conclusions are supported by the

[177] Adam Fiser, Conference Board of Canada, 2013. "Mapping the Long-Term Options for Canada's North: Telecommunications and Broadband Connectivity." P. 7.
[178] Adam Fiser, P. ii.
[179] National Aboriginal Economic Development Board, Recommendations on Financing. Cited in *Building a Resilient and Prosperous North*, p. 47.

recent World Bank report, which puts forward the conclusion that digital strategies are not just about technology, but about creating the favorable conditions for technology to be effective in the hands of citizens.[180]

150. CCLA is encouraged that the CRTC in large part seems to be acting responsibly and consultatively, with respect to its mandate. For example, it is currently engaged in a nation-wide study to examine actual broadband network performance across all major carriers. Almost 28,000 Canadians expressed interest in taking part in the broadband performance measurement project, a remarkable number given the requirement to install technology to monitor all of their internet interactions over a significant time period, and reflective of the high degree of interest and concern Canadians have in ensuring their broadband service is of high quality and appropriately regulated. 4500 participants were selected from this pool.[181] In a similar show of intense interest, 15,000 responded to an online survey asking Canadians what their priorities are for internet access within the first four days of its release.[182]

151. The CRTC also, in a decision made in July 2015, moved to improve affordability and choice for Canadians, in a ruling that requires large incumbent telecommunications companies to sell wholesale access to their fibre networks (high-speed infrastructure) to independent internet service providers, to encourage healthy levels of competition amongst a larger number of providers. However, CCLA would like inform the Committee that Bell, one of the largest ISPs in Canada, is appealing the ruling not just to the CRTC, but directly to the Canadian government via a petition to the Governor in Council. CCLA encourages the Government of Canada to consider the Covenant rights of Canadians, to enjoy the benefits of the applications of scientific progress fairly and equitably, in weighing the issues raised by this appeal.

CCLA Recommendations:

- Affordable broadband Internet access should be available to all Canadians, regardless of geographic location.
- Thresholds for upload and download speeds and quality should be equivalent to Canada's international counterparts. The U.S. recently defined broadband at 25 megabits per second down, and 3 megabits per seconds up.[183] Our targets, currently

[180] World Bank Group, p. 5.
[181] See http://news.gc.ca/web/article-en.do?nid=1021069
[182] See http://news.gc.ca/web/article-en.do?nid=1028329
[183] See https://unblockcanada.ca/

5mbps and 1 mbps up and down respectively, should be revised upwards to reflect the vital role the internet plays in Canadians' ability to exercise their economic and social rights in the 21st century.

- Government should continue to explore and expand public/private partnerships to create infrastructure and support sustainable access to affordable, reliable, and equitable internet access for Canada's remote communities and marginalised populations. These partnerships must take into account specific community needs and be negotiated with, and not just for, the communities they are designed to support.
- The Canadian Government and its regulatory bodies granted authority through acts of Parliament should include Covenant Rights as an element of their decision-making processes when determining appropriate regulations affecting Canadians ability to experience the important economic and cultural benefits the internet provides.