

Closing the Implementation Gap: Federalism and Respect for International Human Rights in Canada

Alex Neve



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ABOUT THIS STUDY

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Highlights

Canada has long enjoyed an international reputation for having a stellar human rights record. Looking closer at Canada's domestic record of human rights implementation presents a murkier picture of a country that is often reluctant to incorporate international human rights treaties and recommendations at home. There is an upcoming opening, however, to make progress on that front. The inaugural meeting of the Forum of Ministers on Human Rights, expected in 2023, offers an opportunity to strengthen the implementation of international human rights obligations at the federal, provincial and territorial levels.

This study sets out a comprehensive agenda for advancing reforms, to help shape the work of the forum and address the implementation gap.

The author identifies five key reasons behind Canada's implementation gap. First, federalism presents the most significant barrier to the effective implementation of international human rights obligations. The division of powers means that responsibility for implementing human rights standards overlaps between orders of government. This results in ambiguity, turf guarding, buck passing and finger pointing.

Second, on the judicial side, Canada takes a dualist approach to international law, meaning human rights treaty obligations are not directly enforceable until they have been explicitly incorporated into Canadian law, which rarely happens. It's left to the courts to interpret the *Charter* consistently with international human rights norms when crafting decisions, but this yields variable results.

Third, lack of clarity around exactly who is responsible for human rights within each order of government complicates accountability by dispersing responsibility across departments and agencies. Responsibility rests everywhere, meaning it effectively rests nowhere.

Fourth, governments in Canada have resisted interpretations of the *Charter* and domestic laws that ensure access to economic, social, and cultural rights.

Finally, there has been little consideration of the important role that both Indigenous and municipal governments can and must play in implementing Canada's human rights obligations despite these governments being at the front line of many of the country's most pressing human rights challenges.

All these factors, taken together with the variable views governments in the country hold about the standing of international human rights obligations, create a complex environment for human rights implementation.

The author argues that a national framework for international human rights implementation is needed. The framework would be grounded in the principles of co-operative

federalism and the national concern doctrine to strengthen intergovernmental mechanisms for consistent international human rights implementation. The proposed recommendations for the national framework range from advancing incremental changes to adopting new legislation, and include recommendations to do the following:

- Commit publicly and explicitly to ensuring that all policies and actions taken by federal, provincial and territorial governments conform to international human rights obligations
- Strengthen existing laws, policies and processes to support implementation of international human rights obligations
- Enact comprehensive legislative reform, including adoption of international human rights implementation laws by federal, provincial and territorial governments
- Ensure an enhanced role for Indigenous governments in implementing international human rights obligations, in keeping with the *UN Declaration on the Rights of Indigenous Peoples*
- Formalize the role of municipal governments in implementing international human rights obligations
- Enhance stakeholder and public engagement to improve the capacity of stakeholders to contribute to and monitor the implementation of human rights in Canada
- Establish a dedicated secretariat equipped with long-term funding, including for Indigenous People's organizations and civil society groups, to support all aspects of the national framework

Faits saillants

Le Canada jouit depuis longtemps d'une bonne réputation internationale en matière de droits de la personne. Mais un examen plus minutieux du bilan du pays en matière de mise en œuvre de ces droits montre une image moins reluisante d'un pays souvent réticent à signer les traités internationaux et à appliquer les recommandations sur son propre territoire. Un événement à venir offre cependant la chance de faire des progrès sur ce front. La réunion inaugurale du Forum des ministres responsables des droits de la personne offre l'occasion de renforcer la mise en œuvre des obligations internationales aux niveaux fédéral, provincial et territorial.

La présente étude livre un programme complet pour faire avancer les réformes, programme qui devrait façonner le travail du Forum et contribuer à combler les lacunes en matière de mise en œuvre de ces droits.

L'auteur identifie cinq raisons principales qui expliquent le déficit de mise en œuvre au Canada. Premièrement, le fédéralisme constitue l'obstacle le plus important à la mise en œuvre effective des obligations internationales en matière de droits de la personne. La division des pouvoirs signifie que la responsabilité de la mise en œuvre des normes en la matière se chevauche entre les différents niveaux de gouvernement. Il en résulte des ambiguïtés, des conflits de compétences, des renvois de la balle, voire même des accusations.

Deuxièmement, sur le plan judiciaire, le Canada adopte une approche dualiste du droit international, ce qui signifie que les obligations découlant des traités relatifs aux droits de la personne ne sont pas directement applicables tant qu'elles n'ont pas été explicitement incorporées dans le droit canadien, ce qui est rarement le cas. Il appartient aux tribunaux d'interpréter la *Charte* de manière cohérente avec les normes internationales en matière de droits de la personne lorsqu'ils rendent des décisions, mais cela donne des résultats variables.

Troisièmement, le manque de clarté quant à la responsabilité en matière de droits de la personne au sein de chaque ordre de gouvernement complique l'obligation de rendre des comptes en dispersant la responsabilité entre les ministères et les agences. Comme cette responsabilité est répartie un peu partout, en réalité, elle ne repose nulle part.

Quatrièmement, les gouvernements du Canada ont résisté aux interprétations de la *Charte* et des lois nationales qui garantissent l'accès aux droits économiques, sociaux et culturels.

Enfin, le rôle important que les gouvernements autochtones et municipaux peuvent et doivent jouer dans la mise en œuvre des obligations du Canada en matière de droits de la personne n'a guère été pris en compte, bien que ces gouvernements soient en première ligne face à la plupart des défis les plus pressants du pays en la matière.

Tous ces facteurs, combinés aux opinions variables des différents gouvernements face aux obligations internationales créent un environnement complexe pour la mise en œuvre des droits de la personne.

L'auteur affirme qu'un cadre national pour la mise en œuvre des droits de la personne tels qu'ils existent dans les instances internationales est nécessaire. Ce cadre serait fondé sur les principes du fédéralisme coopératif et de la doctrine de l'intérêt national afin de renforcer les mécanismes intergouvernementaux pour une mise en œuvre cohérente des droits de la personne. Les recommandations proposées pour le cadre national vont de l'introduction de changements progressifs à l'adoption de nouvelles lois :

- S'engager publiquement et explicitement à veiller à ce que toutes les politiques et actions menées par les gouvernements fédéral, provinciaux et territoriaux soient conformes aux obligations internationales en matière de droits de la personne.
- Renforcer les lois, les politiques et les processus existants pour soutenir la mise en œuvre des obligations internationales en matière de droits de la personne.
- Mettre en œuvre une réforme législative complète, y compris l'adoption de lois de mise en œuvre des droits de la personne internationaux par les gouvernements fédéral, provinciaux et territoriaux.
- Veiller à ce que les gouvernements autochtones jouent un rôle accru dans la mise en œuvre des obligations internationales en matière de droits de la personne, conformément à la *Déclaration des Nations unies sur les droits des peuples autochtones*.
- Formaliser le rôle des gouvernements municipaux dans la mise en œuvre des obligations internationales en matière de droits de la personne.
- Renforcer l'engagement des parties concernées et de la population afin d'améliorer leur capacité à contribuer à la mise en œuvre des droits de la personne au Canada et à en assurer le suivi.
- Mettre en place un secrétariat spécialisé doté d'un financement à long terme, notamment pour les organisations des peuples autochtones et les groupes de la société civile, afin de soutenir tous les aspects du cadre national.

CANADA, THE LAND OF HUMAN RIGHTS?

Over nearly 75 years, beginning with the adoption of the *Universal Declaration of Human Rights* in 1948, states have developed and committed to an expansive and comprehensive array of crucial international human rights norms, touching on almost all aspects of human existence. The Canadian government and Canadians have frequently played key roles in developing those standards and establishing international oversight mechanisms to encourage compliance. That mirrors national level developments such as the adoption of the *Canadian Bill of Rights* in 1960, the *Charter of Rights and Freedoms* in 1982 and human rights laws, commissions and tribunals in federal, provincial and territorial jurisdictions.

Along the way, Canada has garnered an international reputation in the minds of many as being an almost fabled “land of human rights” (A. Neve, personal communication, March 24, 2001). That is also, in many respects, how Canadians tend to see themselves. There is some truth to this – but only to a certain extent. For Canada’s human rights record also tells a starkly different story.

The grim reality of human rights in this country has become abundantly clear as Canadians have finally begun to come to terms with the widespread and systematic violations of the rights of Indigenous Peoples. That includes reckoning with the fact that Canada is a country founded on genocide, a grave legal indictment that has been made more and more frequently, including by the Truth and Reconciliation Commission (2015), the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019a), the former chief justice of the Supreme Court of Canada, Beverley McLachlin (Fine, 2015) and the House of Commons (Raycraft, 2022).

Canada’s human rights shortcomings are also apparent in the lengthy list of unimplemented recommendations, findings and decisions by numerous United Nations (UN) human rights bodies, across a wide range of issues, including Indigenous Peoples, racism, gender equality, refugees and migrants, disability, housing, law enforcement, national security practices and corporate accountability. There has been increased frustration that Canada, a prosperous country with a professed commitment to international human rights, falls short when it comes to taking steps to ensure compliance.

Canada failed to act when the UN recommended that construction of pipelines and dams be halted without the consent of the Indigenous Peoples whose lands and territories are impacted (United Nations Committee on the Elimination of Racial Discrimination, 2019). Canada refused to comply with a decision of the UN Human Rights Committee requiring that life-saving health care be made available to everyone in the country, regardless of immigration status (United Nations Human Rights Committee, 2018). Canada regularly rejects UN requests to put deportations on hold when independent experts need extra time to assess credible concerns about human rights violations that may occur (United Nations Committee against Torture, 2018). And the list continues. The disconnect between Canada’s international human rights reputation on the one hand and a failure to enforce and comply with those obligations domestically, on the other, is undeniable.

To a certain extent there is nothing surprising about that disconnect. Governments around the world are notorious for paying lip service to human rights, and then failing to live up to what they have promised. Politics, greed, history, disinterest, armed conflict and other impediments always seem to stand in the way.

But is that a sufficient explanation for why Canada, a prosperous country that enthusiastically champions the international human rights system in its relations with other countries and at the United Nations, falls short when it comes to implementing and respecting those obligations at home?

The reasons for Canada's implementation gap are broadly fivefold:

- *Federalism and the division of constitutional powers* among federal, provincial and territorial governments undeniably complicate implementation. Federalism is not, however, inherently bad for human rights protection. To the contrary, it offers many potential advantages. Yet for decades a misplaced and largely unchallenged assumption has effectively prevailed that the complexities of federalism mean that Canada cannot do better at implementing international human rights obligations. As a result, all orders of governments have failed to pursue creative and meaningful reforms to ensure that international human rights are consistently respected and upheld across the country.
- Canada maintains what is known as a *dualist approach to international law*, including international human rights law. That means that international treaty obligations are not directly enforceable in the courts unless they have been explicitly incorporated into Canadian law by Parliament or legislatures. Yet very few international human rights treaty provisions have found their way into Canadian legislation. However, this should not be an impediment to effective implementation of international human rights obligations and can ensure that they are brought to life in domestic law.
- There is a *lack of clear and accountable human rights leadership* and responsibility within the different orders of governments. No jurisdiction, for example, has a minister of Human Rights, or a minister of Justice and Human Rights.
- Governments in Canada have shown particular *resistance toward implementing economic, social and cultural rights*, such as the rights to health, housing and an adequate standard of living; and have opposed interpretations of the *Charter* and other domestic laws that would ensure access to justice for these human rights, insisting that they are mere budgetary considerations related to social policy goals beyond the purview of the courts. Quebec is the only province that has provided strong legal recognition of economic, social and cultural rights, enshrined in its *Charter of Human Rights and Freedom*.
- There has been *very little consideration of the important role that Indigenous and municipal governments can and should play* in ensuring the effective implementation of Canada's international human rights obligations. After all, these governments are frequently at the frontline of some of the country's most pressing human rights challenges.

After decades of little to no progress, there may be an opening. Following meetings of federal, provincial and territorial ministers “responsible for human rights” that were held in 2017 and 2020 – the first such meetings to be convened since 1988 – steps are being taken to strengthen the system and mechanisms for co-ordinating international human rights implementation among those 14 governments (Government of Canada, 2020). The federal government is also rolling out a federal human rights implementation framework to strengthen the approach taken to implementing international human rights obligations within and across federal departments and agencies.

However, so far the changes lack transparency and public reporting, fail to institute any clear mechanism for collective decision-making and do not carry meaningful accountability measures. The quality of engagement with civil society and consultation with Indigenous Peoples remains notably deficient. Much more is needed.

A recent decision to establish a Forum of Ministers on Human Rights, which is anticipated to have its first official meeting in late spring of 2023, may offer potential for progress. There is not yet any information available about the forum’s mandate, resources, degree of transparency or whether it will be a decision-making body. All that will be key.

In many respects, a collective embrace of human rights should lie at the very heart of federalism, as it touches on virtually all aspects of public policy and governance. Meaningful implementation of Canada’s international human rights obligations would go far in addressing many of the most significant challenges the country faces and would do so in a just and sustainable manner. Embracing human rights collectively also requires, of course, that federal, provincial and territorial governments commit to upholding international human rights within their own areas of sole jurisdiction.

Canada’s implementation gap also has vital international significance. At a time when states frequently skirt their obligations and violate international human rights norms with impunity, Canada’s reticence simply offers more of the same on the world stage. Canada can hardly exert pressure on other governments to comply with their obligations and to respect recommendations from UN human rights experts, when its own record is patchy at best.

This study examines the nature and the implications of Canada’s international human rights implementation gap. It proposes an agenda for initiating reforms, including many that should shape the work of the Forum of Ministers on Human Rights, leading to an effective new approach involving the federal, provincial, territorial and municipal governments, Indigenous governments, Indigenous Peoples’ organizations and civil society.

What is needed is a national framework for international human rights implementation. Such a framework would include an explicit legislated commitment across all orders of governments singularly and collectively to implement the country’s international human rights obligations and to work with Indigenous Peoples’ organizations and civil society to develop guiding principles to shore up that commitment. The framework

would also make better and more innovative use of laws and processes that already exist. An example would be to require compliance assessments of laws when Canada ratifies international human rights treaties and to mandate that existing laws be interpreted in keeping with those international obligations.

A national framework would be grounded in the constitutional principles of co-operative federalism and the national concern doctrine, and would strengthen the country's inter-governmental mechanisms for consistent international human rights implementation. And it would certainly require an explicit role for Indigenous and municipal governments, more meaningful engagement with Indigenous Peoples' organizations and civil society, and greater transparency and public accessibility.

UNPACKING CANADA'S HUMAN RIGHTS DISCONNECT

Very few Canadians could describe what measures their governments take to implement international obligations that protect their rights. They would be hard pressed to find public information that provides background and charts progress. They would certainly be concerned to learn that respect for those vital obligations differs depending on their own provincial or territorial government's attitude about international human rights. They would come to see that there is a notable disconnect between Canada's global stance and its domestic record when it comes to international human rights.

Global champion

Canada is often perceived globally as an international human rights champion, a reputation for which many Canadians are rightly proud. There are many well-deserved reasons for that reputation. Canada has actively engaged with the international human rights system over many decades and has frequently championed the development of UN norms and institutions that enumerate human rights obligations and advance their protection.

Canada has been a key player in strengthening international standards regarding women's rights, including sexual and reproductive rights, the rights of LGBTQ+ individuals and mechanisms for refugee resettlement. Canada was a leader in banning land mines, strengthening protections for child soldiers, establishing the International Criminal Court, developing the Responsibility to Protect doctrine and contributed significantly to efforts to attempt to make the UN Human Rights Council a more effective body than its predecessor, the Commission on Human Rights.

For years Canada has sponsored a regular resolution at the UN Human Rights Council dealing with violence against women (United Nations Human Rights Council, 2021) and a resolution at the UN General Assembly dealing with Iran's abysmal human rights record (United Nations General Assembly, 2022). Canada provides significant financial support to the Office of the High Commissioner for Human Rights, as one of the top-10 supporters (Office of the High Commissioner for Human Rights, n.d.a). Canada

also makes use of international human rights institutions and processes to address grave concerns in certain countries, such as repression in Venezuela, accountability for war crimes committed by Russian forces in Ukraine and widespread torture in Syria. In 2021, Canada initiated a process against Syria under the *UN Convention against Torture* (Government of Canada, 2021b).

Individual Canadians have also played important roles, including John Humphrey's contributions to drafting the *Universal Declaration of Human Rights*, Lester Pearson's efforts to establish UN peacekeeping, Flora MacDonald's role in the resettlement of Indochinese refugees, Lloyd Axworthy's leadership around the International Criminal Court and the land mines treaty, Roméo Dallaire's work to protect child soldiers, and Louise Arbour's terms as prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda, and as UN High Commissioner for Human Rights.

This is not to suggest that Canada's global human rights record is unblemished. There is, for example, ample room for criticism when it comes to positions taken with respect to war crimes and crimes against humanity committed against Palestinians by Israeli security services, a tendency to put commercial interests ahead of human rights in China and Saudi Arabia, policies that have failed to ensure the human rights accountability of Canadian extractive companies operating around the world, and opposition to critical advances at the UN to ensure access to justice for economic, social and cultural rights. But overall Canada has made important contributions to advancing human rights globally.

Canada's international human rights implementation gap

That is on the world stage. Things are less impressive on the home front. International human rights do undeniably apply to Canada. There is, however, a notable disconnect between the role Canada plays in strengthening the international human rights system when it comes to other countries' human rights records and its readiness to apply those international obligations domestically.

Canada has ratified and acceded to a significant number of United Nations human rights treaties, although by no means all of them. For the past 20 years, for example, Canada has declined to sign on to an important UN torture prevention treaty, the *Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Canada has also yet to ratify or accede to any of the Organization of American States' human rights treaties, most notably the *American Convention on Human Rights*. Appendix A summarizes Canada's record of adhering to international human rights treaties and provides other examples of Canada's nonparty status.

Canada actively engages in the review processes associated with those treaties, as well as other multilateral human rights procedures such as the UN Human Rights Council's Universal Periodic Review, scrutiny by the council's Special Procedures and the Inter-American Commission on Human Rights.

But what measures ensure that these obligations are met, and that the outcomes of the reviews are acted upon? That is where things fall apart. There are no explicit domestic legal obligations or clear processes and next to no transparency to ensure coherent implementation nationally of what is required of Canada internationally.

The problems arising with respect to international human rights implementation reflect deficiencies and obstacles at two levels. The first is the repeated failure of federal, provincial and territorial governments to take steps on their own to address international human rights concerns that fall entirely within their own areas of jurisdiction. The second is an overarching failure to take effective action collectively to respond to concerns that are national in scope and fall jointly within the jurisdiction of federal, provincial and territorial governments.

There are broadly five reasons for this shortcoming: the complication of federalism; the failure of Canadian courts to meet their obligations within a dualist legal system; diffuse political responsibility for human rights; resistance to recognizing economic, social and cultural rights; and the failure to recognize the role of Indigenous and municipal governments.

Federalism

Federalism poses what is perhaps the greatest barrier to effective and meaningful implementation of international human rights obligations. That is not because federalism is inherently hostile to international obligations or to human rights; but rather that as federalism has developed in Canada, governments have failed to take this on in a meaningful and effective manner. In fact, federalism offers considerable openings for robust human rights protection.

The challenges are undeniable, however, largely arising from the constitutional division of powers dating back to the 1867 *British North America Act*. Matters covered in international human rights standards may fall expressly within federal jurisdiction; in provincial and territorial jurisdiction; may overlap between the two orders of government; or, given that these constitutional provisions were drafted more than 150 years ago, may not be mentioned in the *Constitution* at all. That leaves much room for jealously guarded turf, ambiguity, uncertainty and considerable buck passing and finger pointing.

Federal, provincial and territorial governments have, on their own, been reticent to ensure that the country's international human rights obligations guide them while enacting laws, policies and decisions. That is amplified exponentially with respect to their collective responsibility to uphold those obligations. With no process in place to bring those governments together to resolve tensions and reach collective decisions, implementation suffers. In that context, it is also inevitable that international human rights norms will be interpreted and applied differently and inconsistently across the country, which may in itself amount to a violation of international law.

Complication is by no means an excuse for inaction. The *Vienna Convention on the Law of Treaties*, which governs the status and application of treaties, is clear that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (*United Nations Vienna Convention on the Law of Treaties 1969*, art. 27).

There are few areas in public policy in Canada that are not made more challenging by federalism. And many of those other concerns receive considerable attention and resources, including regular first ministers meetings. That has not historically been the case when it comes to international human rights implementation.

Dualism and the role of the courts

International human rights obligations are a matter of law. As such, the degree to which Canada's courts can be counted on to ensure compliance with the country's international obligations is a key consideration. Only customary international law is automatically enforceable in Canadian courts. Treaty obligations are enforced only to the extent they have been expressly incorporated into domestic law. That principle has been frequently reiterated by the Supreme Court of Canada, such as the following from former justice Claire L'Heureux-Dubé in dealing with the status of Canada's obligations under the *Convention on the Rights of the Child*: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute" (*Baker v Canada* 1999, para. 69). She went on to stress that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review" (para. 70). She drew significantly on the *Convention on the Rights of the Child* in interpreting the humanitarian and compassionate provisions of the *Immigration Act*.

Explicit statutory implementation seldom occurs. The example with perhaps the most impact is the incorporation of the definition of a refugee from article 1 of the *UN Convention Relating to the Status of Refugees* into Canada's *Immigration and Refugee Protection Act* (2001). The two most recent examples are the *UN Declaration on the Rights of Indigenous Peoples Act* (2021) and the *National Housing Strategy Act*, adopted in June 2019, which establishes in section 4 that, "It is declared to be the housing policy of the Government of Canada to (a) recognize that the right to adequate housing is a fundamental human right affirmed in international law; ... (d) further the progressive realization of the right to adequate housing as recognized in the *International Covenant on Economic, Social and Cultural Rights*."

Incorporation aside, Canada's dualist approach to international human rights law accords a significant role to the courts to ensure compliance. It has sometimes been described as "quasi-dualist" or "dubious dualism" because it relies on the courts to interpret and apply domestic law in a manner that ensures, wherever possible, that Canada complies with its binding international human rights obligations. International human rights law binds all branches of government, including the judicial branch, and in Canada's system, the judicial role of interpreting and applying domestic law in accordance with international law is critical. There is extensive jurisprudence that establishes that the *Charter of Rights and Freedoms* should be interpreted to provide, at a minimum, the same degree of human rights protection as is provided under relevant international human rights treaties. In early Supreme Court jurisprudence shortly after the *Charter* was adopted, former chief justice Brian Dickson wrote, "I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*Slaight Communications Inc. v. Davidson*, 1989).

Many rulings, including numerous Supreme Court judgements, have subsequently made it clear that international human rights standards should influence the interpretation of the *Charter of Rights* and other domestic laws, even when those standards have not been expressly enacted through a domestic statute. For example, in *R v Hape* (2007), former justice Louis LeBel wrote for the majority that: “This Court has also looked to international law to assist it in interpreting the *Charter*. Whenever possible, it has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other.”

That is certainly the case with civil and political rights, as many *Charter* provisions draw upon similar wording in the *International Covenant on Civil and Political Rights*. But the courts in Canada have, to date, been less receptive to those arguments when it comes to economic, social and cultural rights.

Central to international human rights is the recognition that they are “indivisible and interdependent and interrelated” (Office of the High Commissioner for Human Rights, 1993). The rights to life and equality, in particular, require states to take positive measures to ensure access to housing, health care, food security and protection of the environment (United Nations Human Rights Committee, 2019a).

Instead of interpreting the *Charter* consistently with international human rights norms, however, a number of lower courts in Canada have found that the rights to life and equality do not apply to those experiencing homelessness or in need of publicly funded health care because the rights to housing and health care are not included in the *Charter* as freestanding rights, leaving a large swath of Canada’s international human rights obligations largely outside judicial scrutiny (see *Tanudjaja v Canada [Attorney General]* 2014 as an example). UN treaty bodies have expressed concern that governments in Canada have consistently urged courts to interpret the *Charter* so as to deny effective remedies to economic, social and cultural rights violations, contrary to Canada’s obligation to ensure access to justice for these rights (United Nations Committee on Economic, Social and Cultural Rights, 1998).

There does appear to be a growing willingness on the part of many judges to take international human rights standards into account and more lawyers are arguing international human rights law in court. However, there is a common misunderstanding of dualism that suggests Canada can somehow choose to deny access to effective remedies for rights in ratified treaties. This has become a roadblock in ensuring the reliable implementation and enforcement of the country’s international human rights obligations. This misunderstanding also focuses on implementation after violations have occurred, rather than proactively ensuring governments are enacting laws and policies in compliance with international human rights obligations from the outset.

A robust understanding of dualism ensures Canada’s international human rights obligations are more effectively brought to life in domestic law. By ratifying UN treaties, Canada commits to implementing their provisions through domestic law and making the changes required to ensure access to effective remedies for any violations of these

rights (Government of Canada, 2019a). The *Charter* is a primary vehicle for implementing those rights and Canada's Supreme Court has determined that it should be presumed to provide at least the same level of protection as ratified treaties. All domestic law, in fact, should be interpreted and applied by decision-makers in accordance with Canada's international commitments.

Notably, there is one international level human rights court, the Inter-American Court of Human Rights, that could have jurisdiction over Canada, which could play a significant role in improving Canada's compliance with international human rights obligations. However, despite having joined the Organization of American States in 1990, Canada has yet to accede to the *American Convention on Human Rights* and accept the jurisdiction of the Inter-American Court.

Diffuse political responsibility for human rights

There is a lack of clear human rights leadership within individual governments in the country. Responsibility instead is dispersed across departments and agencies. In the process, accountability dissipates. No government has instituted a human rights ministry and none have an expressly empowered voice in Cabinet, expected to raise human rights questions and ensure that government decisions take account of and comply with international obligations. Instead, responsibility and accountability rests everywhere, meaning, effectively, that it rests nowhere.

Federally, the Department of Justice leads with respect to legal interpretation and application of international norms, the Department of Global Affairs is responsible for direct engagement with the United Nations and international bodies, and the Department of Canadian Heritage is in charge of co-ordinating among federal, provincial and territorial governments, and with civil society groups and Indigenous Peoples' organizations, when it comes to Canada's reports to and engagement with international human rights review processes.

Other federal departments are also involved when the international obligations relate to their areas of responsibility. That is very much the case, for instance, with the ministries of Immigration, Refugees and Citizenship, Crown-Indigenous Relations and Indigenous Services, Women and Gender Equality, International Development, International Trade, Public Safety, Environment and Climate Change, Families, Children and Social Development, Housing and Diversity and Inclusion, and National Defence. However, the role of these departments when it comes to ensuring compliance with international human rights obligations is more implicit than explicit.

Arguably the Prime Minister might be counted upon to carry overall responsibility. However, prime ministers generally divert questions about human rights accountability to ministers rather than assume responsibility for responding directly. The same could be said about provincial and territorial premiers.

This study does not explore whether a human rights ministry would be advisable or practicable, within any order of government. There are arguments for and against it. It

is clear, however, that given the many other impediments to effective implementation, the lack of explicit political responsibility and accountability contributes significantly to that deficit.

Resistance to recognizing economic, social and cultural rights

Governments in Canada have shown particular resistance to embracing economic, social and cultural (ESC) rights as human rights, subject to the requirement of access to justice and effective remedies. Canada was one of the few countries to speak against the historic adoption of an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* by the UN General Assembly in 2008 to ensure equal access to justice for ESC rights, an initiative that had been spearheaded by the Canadian UN High Commissioner for Human Rights at the time, Louise Arbour.

Canada's adherence to an outdated cleavage between the two categories of rights is perhaps most acutely manifested in opposition to efforts to ensure that ESC rights can be judicially enforced and that effective remedies are available when they are violated. Governments have, for example, strenuously opposed legal arguments that the right to life, liberty and security of person, in section 7 of the *Charter of Rights*, should be interpreted to include access to essential health care (*Toussaint v Canada [Attorney General]* 2011), or adequate housing (*Tanudjaja v Canada [Attorney General]*, 2014).

These rights are therefore particularly vulnerable as a result of Canada's international human rights implementation gap. That is well illustrated by the case of Nell Toussaint, who launched a legal challenge in Canadian courts when she was denied access to essential public health care because she was an undocumented migrant, in clear contravention of Canada's international human rights obligations. The Federal Court and Federal Court of Appeal both ruled against her, refusing to provide her with a human rights remedy. She subsequently brought an individual petition to the UN Human Rights Committee, which ruled in her favour in 2018. The Canadian government has, however, refused to comply with the Human Rights Committee's Views.

Nell Toussaint then turned again to the Canadian courts, arguing that while the committee's ruling is not directly enforceable by the courts, Canada's decision to not implement the ruling is nevertheless subject to *Charter* review, and should be reversed by the courts because continuing to deny irregular migrants access to health care, in direct contravention of the committee's ruling, now violates the *Charter*, interpreted in light of the committee's decision. Canada's motion to strike Toussaint's claim, on the basis that she was claiming a self-standing socio-economic right to health care, was dismissed by the Ontario Superior Court for relying on a discriminatory mischaracterization of her claim to the rights to life and equality (*Toussaint v Canada [Attorney General]*, 2022). Sadly, while the case was still pending, Nell Toussaint passed away in January 2023, leaving the status and future of her legal challenge uncertain at time of writing (Keung, 2023).

The reticence about ESC rights may be starting to give way. The recent explicit recognition of the right to adequate housing in the *International Covenant on Economic,*

Social and Cultural Rights, as a key component of the *National Housing Strategy Act*, passed by Parliament in 2019, is a notable development. The act recognizes the need for access to justice for the right to housing, providing for reviews of systemic violations of the right by the Federal Housing Advocate and hearings into systemic issues before a review panel. The Minister of Housing is required to respond to findings and recommendations within 120 days. However, the provision of housing falls within provincial constitutional jurisdiction, which means this federal legislation will likely face complications due to federalism, as previously discussed.

The role of Indigenous and municipal governments

There has been very little consideration of the important role that Indigenous and municipal governments must play in ensuring effective implementation of the country's international human rights obligations. With respect to Indigenous Peoples, efforts have focused on reaching out to Indigenous organizations, leaders, academics and activists for consultations, largely seen by those groups and individuals as cursory and inadequate, when Canada's human rights record is being reviewed internationally. That is entirely different than acknowledging the responsibilities and opportunities for human rights implementation inherent in the sovereignty of Indigenous governments.

Also overlooked is the degree to which many municipal governments are pursuing innovative human-rights based programs, particularly when it comes to social policy (Dragicevic & Porter, 2020). Municipal governments are at the frontlines of confronting some of Canada's most serious human rights challenges, such as homelessness and inadequate housing. Yet there is little co-ordination between municipal governments and federal, provincial and territorial governments with respect to international human rights implementation, let alone a seat at the table when governments gather to discuss the country's international human rights obligations.

FEDERALISM AND INTERNATIONAL HUMAN RIGHTS IMPLEMENTATION

The architecture

Federal, provincial and territorial governments have invested little political capital or resources into developing what might be considered international human rights implementation architecture. That has been the case both with respect to individual governments and, most significantly, a lack of meaningful collective processes and bodies to oversee consistent nationwide compliance across federal, provincial and territorial governments.

After decades of no transparent institutional oversight within any of the 14 federal, provincial and territorial governments, the federal government has recently taken some steps in that direction in areas within its own jurisdiction. A Federal Human Rights Implementation Framework (Government of Canada, 2023), applicable to federal departments and agencies, is being developed, which is composed of the following elements:

- The Director General International Human Rights Forum, launched in 2022 and co-chaired by Canadian Heritage and the Department of Justice, through which senior officials from federal departments and agencies consider follow-up to international human rights recommendations
- The Network of Focal Points on International Human Rights, also co-chaired by Canadian Heritage and the Department of Justice, made up of policy experts who will meet quarterly to discuss Canada's international human rights obligations
- The Core Interdepartmental Working Group on International Human Rights will serve as a secretariat that supports the work of the framework's other committees
- Advisory Committees on International Human Rights, composed of key outside stakeholders, may be established to provide advice and collaborate with the other committees

This is yet to be fully operational. There is no equivalent framework within any provincial or territorial government.

Given the complexities of federalism, there is clearly a need for mechanisms that bring different orders of government together to work through the responsibility for and challenges of implementation. But governments have given this very little collective attention. Since 1988 there have been only three meetings of federal, provincial and territorial ministers responsible for human rights. There was a disconcerting 29-year gap between meetings from 1988 to 2017; and the third meeting, held in November 2020, was significantly scaled back and held online due to COVID-19.

Until recently, the only mechanism to bring federal, provincial and territorial governments together to co-ordinate the implementation of the country's international human rights obligations has been the mid-level Continuing Committee of Officials on Human Rights (CCOHR). The CCOHR was established after Canada acceded to the two International Covenants in 1976, and for more than four decades has largely operated as a behind-closed-doors, information-sharing forum. Its meetings have only recently included limited exchanges with civil society groups and Indigenous Peoples' organizations. There are no public records of their discussions.

More recently, two additional bodies have been established. The Federal, Provincial and Territorial Senior Officials Committee Responsible for Human Rights (SOCHR), made up of representatives at the assistant deputy minister level, was established in 2017. Like the CCOHR, the SOCHR does not meet or report publicly and has limited engagement outside of government. Neither group is empowered to make decisions. Following the most recent ministerial meeting in 2020, a Forum of Ministers on Human Rights was established (Government of Canada, 2020). The forum will meet every two years. Given that ministers are likely to come and go as a result of cabinet shuffles and elections, institutional support to ensure continuity in advancing the forum's agenda will be key. The forum's mandate or working methods, institutional structure and resources have not been made clear and it is not known whether it will serve as a venue in which ministers collectively make decisions about Canada's

international human rights obligations. The forum has not yet met, but is expected to do so in the spring of 2023.

From 2018 to 2020, the CCOHR and SOCHR worked on developing two documents intended to improve the approach taken by federal, provincial and territorial governments to implementing Canada's international human rights obligations. The first, a *Protocol for Follow-up to Recommendations from International Human Rights Bodies* (Government of Canada, n.d.a.), does little to ensure consistency across the country, still leaving it to individual governments to determine, "according to the mechanism it deems appropriate, the recommendations that could be prioritized and implemented in its jurisdiction." The protocol also does not provide any mechanism for collective decision-making. The government of Alberta did not endorse it because it asserts that the province is not "bound to report on international instruments/mechanisms to which it is not a Party" (Government of Canada, n.d.a.).

The second, an *Engagement Strategy on Canada's International Human Rights Reporting Process*, aims to improve the process of engagement with "individuals and groups interested in Canada's international human rights commitments, including representatives of civil society, including nongovernmental organizations and researchers; independent bodies such as human rights commissions and ombudspersons; and Indigenous representatives and groups" (Government of Canada, n.d.b.). The strategy lays out principles but does not establish clear obligations with respect to engagement and fails to recognize the different legal and constitutional responsibilities inherent in processes of "engagement" with Indigenous Peoples. While various roles are identified for both the CCOHR and the SOCHR, it does not explicitly enumerate actions to be taken directly by different orders of government. As with the protocol, Alberta refused to sign.

There has been no indication these minimal changes have led to any significant, substantive improvements. Groups involved in recent consultations when Canada's record was to be reviewed by the UN Committee on the Rights of the Child describe it still being a one-way exchange, with concerns and suggestions presented by civil society participants but minimal response or engagement from the various government representatives present. Notably, the UN committee's recommendations continue to reflect the need for significant reforms when it comes to compliance, including a significant number that are focused on implementation, co-ordination, monitoring, resources and dissemination (United Nations Committee on the Rights of the Child, 2022).

The attitudes

Aside from the challenges of federalism, views about international human rights obligations vary among federal, provincial and territorial governments, making efforts to co-ordinate even more difficult. Those attitudes change as governments change.

Federally, between 2006 and 2015 the Stephen Harper government made it clear that they considered UN human rights experts were wasting their time in scrutinizing Canada's

human rights record. That included public rebukes of the UN Special Rapporteur on the rights of Indigenous Peoples, the UN Special Rapporteur on the right to food, the UN Committee against Torture, the UN Committee on the Rights of the Child, and the UN High Commissioner for Human Rights for reviews, statements or comments highlighting human rights concerns in Canada (United Nations Human Rights Council, 2012).

At the provincial level, some governments have taken international human rights obligations more seriously. For instance, in a 2017 policy document the government of Quebec notes:

The implementation of international human rights treaties is first and foremost a matter of domestic law, responsibility for which lies mainly with the provincial governments. As a party to these texts, Québec has a duty to enforce them within its borders and to report on compliance to the competent United Nations human rights bodies. (Government of Quebec, 2017).

Other provinces have limited capacity to engage, have shown disinterest or have explicitly asserted that international human rights obligations are not relevant.

Alberta, as previously discussed, has not signed on to the protocol or engagement strategy. The province's position misconstrues the nature of international obligations. These obligations do not apply only to the federal government as signatory and excuse other orders of government. They apply to the country as a whole and are explicitly binding on all parts of government with a collective responsibility for compliance. Indeed, both the *International Covenant on Civil and Political Rights* (1966, art. 50) and the *International Covenant on Economic, Social and Cultural Rights* (1966, art. 20) state explicitly that their provisions "shall extend to all parts of federal States without any limitations or exceptions."

The differences in attitudes and levels of adherence to these obligations are not surprising, however, given that they are not enshrined in legislation by any government.

Calls for improvement

There have been numerous calls for reform of Canada's approach to international human rights implementation. So far, little has changed.

UN human rights treaty bodies have made repeated recommendations to Canada to substantially reform and strengthen the mechanisms for ensuring effective implementation of international human rights obligations (see Appendix B).

Concerns about Canada's ineffective approach have received attention from other countries as well, several of which have made relevant recommendations to Canada as part of the UN Human Rights Council's Universal Periodic Review process (UPR) (see Appendix C). Notably, Canada was a strong champion of the creation of the UPR process when the Human Rights Council was established in 2006, but has failed to engage meaningfully in the outcomes of the reviews of its own record.

Concern about Canada’s approach has also been taken up in Parliament many times. In 2001, the Standing Senate Committee on Human Rights noted that:

Signature and ratification of international human rights treaties carries with it an obligation to submit to international scrutiny. But, in addition, we have an obligation to effectively implement the rights within Canada, in a manner that goes beyond mere reliance on the Charter. International human rights are not simply promises we make to other countries or to the international community as a whole. They are rights that all people have and that we have pledged to respect and implement in our country. Human rights belong to the people, not to the states who ratify the treaties. Part of the problem in Canada is that the domestic/international dichotomy that is so firmly embedded in our legal system pervades our thinking outside the courts as well. (Senate of Canada, 2001)

The Senate committee made several recommendations and these were repeated and further elaborated upon in subsequent reports (Senate of Canada, 2007, 2008, 2009).

Finally, as part of the examination of Canada’s human rights record through the UPR in 2009, 48 Canadian civil society groups and Indigenous People’s organizations (United Nations Human Rights Council, 2009a) and, again in 2013, 62 groups (United Nations Human Rights Council, 2012) made joint submissions highlighting their concerns. The latter submission asserted that it was time for legislative reform, recommending that an “International Human Rights Implementation Act should be developed through a process of extensive consultation with provincial and territorial governments, Indigenous Peoples and organizations and civil society groups.” They made similar recommendations to the 2017 meeting of federal, provincial and territorial ministers responsible for human rights meeting in 2017 (Amnesty International, 2017) and in the lead up to a follow-up 2020 ministerial meeting.

THE IMPLICATIONS OF CANADA’S INTERNATIONAL HUMAN RIGHTS GAP

These shortcomings are not just of theoretical interest. There are serious consequences that, at best, miss opportunities to adopt stronger human rights measures and, at worst, fail to prevent, end and redress human rights violations. And whenever Canada exhibits disdain for international human rights domestically it undermines international human rights implementation globally.

Ratifying new treaties

The dysfunction is evident in making decisions about ratifying or acceding to international human rights treaties in the first place. While the federal government is committed to consulting with provincial and territorial governments before adhering to treaties that touch on their areas of jurisdiction, the modalities of that consultation process and opportunities for public input, are not at all clear. It is also uncertain how decisions to consult are reached, and by whom.

One glaring example is the complete lack of clarity and transparency that has marked Canada's failure to accede to an important torture prevention treaty, the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), which was adopted by the United Nations more than 20 years ago. There are indications that federal, provincial and territorial governments have actively considered becoming a party to OPCAT since 2016, but there is no publicly available information on the status of discussions (see Appendix D).

UN human rights reviews

The implications of the implementation gap are evident in the number of recommendations that have been made to Canada over the decades by UN experts and independent committees that monitor treaty compliance. Those recommendations, dealing with pressing human rights concerns such as violence against Indigenous women and girls, solitary confinement, homelessness and inadequate housing, along with many other matters, have been ignored.

Even when progress has occurred, it has taken years. The Human Rights Committee, for instance, called on Canada to “fully address the root causes” of violence against Indigenous women in 2006 (United Nations Human Rights Committee, 2006). However it was not until 2016, following a change in government from the Conservatives to the Liberals, that the National Inquiry into Missing and Murdered Indigenous Women and Girls commenced. An action plan, characterized as inadequate by many stakeholders (Native Women's Association of Canada, 2021), was not instituted until 2021 (Missing and Murdered Indigenous Women, Girls and 2SLGBTQQIA+ 2021).

Individual complaint processes

Canada's implementation gap is also obvious in how frequently the country ignores the decisions, or “Views,” of UN human rights treaty bodies regarding complaints brought under individual petition procedures. Such cases are not numerous as individuals must first exhaust effective domestic remedies within Canada before turning to the international system. Yet Canada has contravened rulings requesting that a deportation be suspended while allegations of *refoulement* to torture were examined (United Nations Committee against Torture, 2018). Canada ignored a finding that funding some religious schools in Ontario to the exclusion of other religions was discriminatory (United Nations Human Rights Committee, 1996). Similarly, Canada did not act on a decision that concluded that denying access to essential health care on the basis of immigration status violated the right to life.

Over the course of 40 years, the federal government has ignored or been very slow to act on rulings dealing with individual complaints about sex discrimination in provisions of the *Indian Act* that deny status to First Nations women who marry non-status individuals or limit their ability to pass on their status to subsequent generations. That includes Views of the UN Human Rights Committee (1981) in the case of Sandra Lovelace and in the case of Sharon McIvor (2019b), and of the UN Committee on the Elimination of Discrimination against Women in the case of Jeremy Matson (2022).

UN human rights investigations

Canada rejected the outcome of a major investigation carried out by a UN treaty body. The Committee on the Elimination of Discrimination against Women is empowered to conduct inquiries into reports of “grave or systematic violations” of the *Convention on the Elimination of All Forms of Discrimination against Women*. An inquiry was launched into concerns that, “aboriginal women and girls experience extremely high levels of violence in Canada, as shown by the high number of disappearances and murders of aboriginal women in particular” leading to a report in March 2015 with five pages of detailed recommendations (United Nations Committee on the Elimination of Discrimination against Women, 2015).

In response, the federal government reiterated previously announced programs, measures and funding to address violence against Indigenous women and girls in the country and, in general, rejected the conclusion that Canada was responsible for grave violations of the *Convention* (United Nations Committee on the Elimination of Discrimination against Women, 2015).

With a change in government later that year, the National Inquiry into Missing and Murdered Indigenous Women and Girls was established. The final report of the national inquiry in 2019 provided extensive evidence of Canada’s widespread failures to uphold the rights of Indigenous women, girls and two-spirit people relying, in part, on Canada’s international obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women* and other international human rights instruments as the analytical framework (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019b). Notably, a subsequent public inquiry in Quebec, the *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec* (Government of Quebec 2019), recommended that the *United Nations Declaration on the Rights of Indigenous Peoples* be implemented in the province, including by enacting legislation.

Special Procedures reviews

Canada’s human rights record is also regularly reviewed by independent special procedures experts appointed by the UN Human Rights Council. These experts carry out extensive in-country visits and investigations. The findings and recommendations of special rapporteurs and working groups that have conducted substantial reviews of human rights concerns in Canada have, similarly, largely been ignored or overlooked (see Appendix E).

MAKING FEDERALISM WORK FOR HUMAN RIGHTS

Federalism itself is not inherently or necessarily an impediment to protecting human rights or to complying with international obligations. In fact, it offers avenues through which human rights protection might be maximized. Simplistically put, in a Canadian

context, if 14 governments are actively and in good faith seeking to advance human rights protection, intuitively that offers greater possibility than when one government is doing so on its own.

Eva Maria Belser criticizes the temptation to “blame and shame federalism for insufficient human rights implementation.” She notes that “multilevel human rights implementation” and “the assets federalism and other forms of autonomy have to offer” with respect to human rights protection, while complex, are underexplored (2021, p. 62).

While agreeing that federalism “may slow down the implementation of international human rights treaties,” Johanne Poirier and Colleen Sheppard (2022, p. 249) highlight the ways that human rights protection may in fact be amplified in a federal state. They point out that federalism “allows for local innovation and experimentation, both of which have proven critically important for advancing rights and freedoms” and that “[m]ulti-layered protection offers multiple venues and instruments for securing rights that may have a positive cumulative effect” (p. 251). They suggest that “conceived within a multiscale framework, the diversity and innovation that flow from the division of powers and the granting of jurisdiction to diverse groups may in fact enrich rights protection” (p. 265).

Poirier and Sheppard rightly observe that at the end of the day, however, the potential benefit offered by federalism “does not necessarily maximize rights protection; it all depends on the rights policies actually put in place by the multiple powerholders” (2022, p. 265).

José Woehrling points to two advantages federalism offers when it comes to human rights protection. First, federalism “divides and diffuses – and consequently limits – power, at the same time as it allows people to participate more actively in political affairs within smaller political units.” This may guard against some excesses of the majority repressing a minority. Second, “federalism allows for the existence of two layers of constitutional or quasi-constitutional instruments for the protection of human rights that will complement each other and together provide more comprehensive protections.” Notably, like Poirier and Sheppard, Woehrling recognizes that a federal system can also “hamper the protection of rights and freedoms, especially in creating difficulties for the ratification and implementation of international human rights conventions” (2014, p. 105).

Federalism itself does not stand in the way of protecting human rights, although it may make it more difficult to implement international human rights obligations effectively. The challenges lie, rather, in the approach to human rights taken by the various governments that make up the Canadian federation, and the willingness of those governments to co-ordinate their efforts. That is where Canada’s shortcomings arise.

While much of this study focuses on the need for improved collective mechanisms, there has also been consideration of the ways that individual governments, within areas of their sole jurisdiction, fail on their own accord to take international human

rights obligations seriously and commit to their implementation. As Poirier and Shepard stress, at the end of the day it all comes down to the actual rights policies put in place by the federation's powerholders. The fact that they fail both singularly and collectively is indicative of the comprehensive reforms that are required.

Though it does pose a challenge, federalism most certainly does not serve as a legal justification for Canada's failure to meet its international human rights obligations. The solutions to meeting the challenge lie in part in two constitutional principles that have evolved over the decades: co-operative federalism and the national concern doctrine. While one is premised on collaborative efforts among governments and the other envisions a forceful lead role for the federal government, blending the two ideas offers the most effective option for strengthened and consistent implementation of Canada's international human rights obligations.

Co-operative federalism

Embracing co-operative federalism intuitively provides a strong framework for meeting Canada's international human rights obligations. If done constructively it offers the possibility of benefiting from the collective efforts of not just one, but 14 governments.

Shortcomings in intergovernmental co-ordination with respect to many areas of public policy are commonplace. For decades, encouraging and bolstering co-operation has generally been the preferred strategy for resolving those tensions. Since 1993, a federal minister of intergovernmental affairs has played a central role in navigating the jurisdictional complexities of those relationships, reinforcing the Prime Minister's own efforts. The most recent mandate letter for the current minister, Dominic LeBlanc, calls on him to maintain open and collaborative relationships with every province and territory (Government of Canada, 2021a).

Most provinces and territories have ministers responsible for dealing with the federal government as well. In many cases, the premier is responsible for that portfolio.

Over time, first ministers meetings have become a regular occurrence, supported by the Canadian Intergovernmental Conference Secretariat established in 1973. In the first two months of 2022 alone, the secretariat serviced meetings of ministers or deputy ministers in the areas of fisheries and aquaculture, social services, seniors, housing, tourism, sport, finance, transportation, status of women, education, emergency management, justice and public safety, and labour. Some of those officials met more than once in that period. Many of these meetings happen regularly and some meet several times per year.

The nature of the co-operation between governments in Canada has shifted over time, often in relation to the social policy agenda of the government in power in Ottawa. Stephen Harper, in power from 2006 until 2015, moved away from a collaborative approach in favour of a more decentralized style that became known as open federalism. He tended to avoid high level meetings with the premiers collectively and pursued

relationships bilaterally with individual governments instead when that was necessary. Prime Minister Justin Trudeau, elected in 2015, returned to a more collaborative approach to intergovernmental relations in large part because some of his flagship policies required important provincial buy in. For instance, one of the Trudeau government's most notable successes has been the national child-care agreements reached bilaterally with the 13 provincial and territorial governments, which built on the federal government's pan-Canadian vision for child care. That is a common approach used to advance programs in various areas, including immigration, housing and support for linguistic rights.

Any effort to ensure the implementation of Canada's international human rights obligations will necessarily depend on collaborative action. Resolving disagreements that may arise will rely significantly upon what the courts in Canada have come to term co-operative federalism, which has been advanced and upheld in a series of Supreme Court judgements (Adams, 2016).

As an interpretive doctrine, co-operative federalism has been described as an approach "which favours, where possible, the concurrent operation of statutes enacted by governments at both levels" (*Rogers Communications Inc. v Châteauguay [City]*, 2016). As such, it "reflects the realities in society that often require the federal and provincial governments to establish coordinated efforts" (Chen, 2019). The Supreme Court has repeatedly ruled that a rigid approach to the constitutional division of powers between governments should be avoided in favour of interpretations that both permit and advance co-operation.

Co-operative federalism reflects the realities of an increasingly complex society that requires the enactment of co-ordinated federal and provincial legislative schemes to better deal with the local needs of unity and diversity. (Quebec [Attorney General] v Canada [Attorney General], 2015).

A unanimous Supreme Court noted in the *Securities Act Reference* that its jurisprudence has "moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental co-operation" (*Reference re Securities Act*, 2011). Most recently, the importance of co-operative federalism was again reinforced by the Supreme Court in its judgement in *References re Greenhouse Gas Pollution Pricing Act* (2021), noting that, "this Court has favoured a flexible view of federalism – what is best described as a modern form of cooperative federalism – that accommodates and encourages intergovernmental cooperation."

Co-operation is desirable because it offers the most effective framework for pursuing collaborative approaches to implementing international human rights obligations consistently across the country. While that will inevitably entail overlapping, complementary and even conflicting spheres of constitutional jurisdiction, the Supreme Court's co-operative federalism jurisprudence will likely support such efforts by governments.

However, wishing for co-operation does not make it so. That is certainly apparent in the slow progress in fostering truly collaborative international human rights

implementation. And it does not take account of how to deal with explicit refusal to co-operate as was the case with Alberta in 2020.

Deliberate and focused leadership is needed to ensure that the measures adopted, and actions taken, are consistent across the country. Consistency does not connote that identical human rights laws and programs must be adopted within all jurisdictions, stifling innovation and responsiveness. Far from it. Consistency does require, however, that all jurisdictions are acting in ways that, at a minimum, comply with the country's international obligations. That is not presently the case. Logically we look to the federal government to play that role. This means turning to the national concern doctrine.

A matter of national concern

Over the decades there have been many instances in which the federal government has asserted jurisdiction over a pressing public policy concern and faced opposition from provincial or territorial counterparts that viewed it as an unconstitutional intrusion into matters under their jurisdiction. In some of these cases, resolution of the question as to the validity and scope of federal jurisdiction has turned on the opening words of section 91 of the *Constitution*, namely that Parliament is empowered to “make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.” Referring to this as the “POGG power,” the Supreme Court indicates that, “according to the doctrine, the federal government has jurisdiction over matters that are found to be of inherent national concern” (*References re Greenhouse Gas Pollution Pricing Act*, 2021, para 89).

Governments have jurisdiction to enact laws, develop policies and allocate budgets to comply with international human rights obligations relevant to their areas of constitutional jurisdiction, and to do that as co-operatively and collaboratively as possible. However, does the importance of ensuring consistent nationwide compliance support a directive federal power to require all governments to meet those obligations and to set binding mechanisms toward that goal? Is this enough of a national concern?

Courts have been cautious in recognizing and applying the national concern doctrine, especially when it intrudes upon areas of provincial jurisdiction. The Supreme Court notes that, “the test for finding that a matter is of national concern is an exacting one” (*References re Greenhouse Gas Pollution Pricing Act*, 2021, para. 208). That is particularly so when it comes to “the significant place of s. 92(13), the provincial power over ‘Property and Civil Rights,’ in the Canadian constitutional order.” The Supreme Court notes that “this head of power serves as a means to accommodate regional and cultural diversity in law, and that it is of particular importance in this regard to the province of Quebec” and that “this Court has continued to affirm that this provincial power should be carefully protected.” The Court emphasizes that this is why, “the rigorous national concern test represents a meaningful constraint on federal power” (*References re Greenhouse Gas Pollution Pricing Act*, 2021, para. 210).

In the Supreme Court's *References re Greenhouse Gas Pollution Pricing Act* (2021, paras. 163-165) judgement, the majority laid out three steps to the national concern analysis:

First, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. This question arises in every case, regardless of whether the matter can be characterized as historically new. If Canada discharges its burden at the step of this threshold inquiry, the analysis will proceed.

*Second, the court must undertake the analysis explained in *Crown Zellerbach* through the language of "singleness, distinctiveness and indivisibility." More important than this terminology, however, are the principles underpinning the inquiry. The first of these principles is that, to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.*

If these two principles are satisfied, the court will proceed to the third and final step and determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers.

The Court considers the implications of the existence of international agreements within the national concern analysis, in connection with the second part of the test requiring "singleness, distinctiveness and indivisibility." The Court notes that, "[i]nternational agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern" and underscores that:

The existence of treaty obligations is not determinative of federal jurisdiction: there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers... Treaty obligations and international agreements can be relevant to the national concern analysis, however. Depending on their content, they may help to show that a matter has an extraprovincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern. (2021, para. 149).

The Court references *Gib van Ert's* examination of the role of treaties in the national concern analysis. *Van Ert* draws on the Supreme Court's decision in *Zellerbach*, noting that "[t]reaties may tend to support (or seemingly negate) claims that the Act's matter possesses the "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" (van Ert, 2020, p. 921).

This study does not include a comprehensive consideration of the validity of the national concern doctrine. However, a reasonable case can be made for its meriting serious discussion and consideration by governments. Arguably, the possibility that the doctrine might be invoked could convince some governments to engage more robustly and meaningfully in co-operative efforts to implement international human rights.

Is consistent adherence to international human rights norms of sufficient concern to the country? The answer must surely be yes. International human rights norms touch on virtually all aspects of human dignity, integrity and well-being. That is the case in longstanding challenges such as respect for the rights of Indigenous Peoples and newer concerns such as the grave human rights implications of the global climate crisis. It should be of national concern for norms to be upheld for all people in Canada. Certainty about human rights protection cannot depend on which province or territory people live in.

Canada as a whole should project the strongest possible example of compliance globally. This is central to the country's commitment to advancing universal human rights everywhere. It is in keeping with Canada's values and interests that there be progress in improving international human rights worldwide. Ensuring that our own approach to implementation is as strong as possible serves that goal.

Likely the most disputed piece of the national concern analysis will lie in the second component of the test, examining the "singleness, distinctiveness and indivisibility" of an asserted federal power to establish binding mechanisms for implementation.

Neither international law nor human rights appear explicitly in the division of powers between federal and provincial governments in the areas of legislative authority provided for in the *Constitution*, although provinces are given jurisdiction over civil rights. Clearly many of the areas that are specified are directly related to or impacted by human rights, including federal jurisdiction in the areas of "Indians, and lands reserved for Indians," "Naturalization and Aliens" and "Criminal Law," and provincial authority with respect to the "Establishment, Maintenance and Management of Hospitals," "Property in the Province" and "Education."

With such disparate jurisdiction, at first blush there would appear to be nothing close to the singleness, distinctiveness and indivisibility required by the national concern analysis. This is where turning to obligations arising in treaties binding on Canada as well as through customary international law becomes key.

As previously noted, it has been well established in Canadian law that there is no freestanding federal jurisdiction to enact legislation related to international treaties. Parliament is only entitled to implement treaties that deal with federal jurisdiction.

But that is not what is proposed here. It is not, for example, envisioned that Parliament would enact detailed federal legislation as to how obligations with respect to the right to an adequate standard of living, binding on Canada pursuant to article 11 of the

International Covenant on Economic, Social and Cultural Rights, will be delivered in a particular province or territory. Rather, Parliament would establish in law, a process or mechanism that requires all provincial and territorial governments to take steps to meet that obligation and all international human rights obligations and, ideally, facilitates co-operative and co-ordinated action across all governments toward that end. The assertion of federal jurisdiction would be limited to ensuring that applicable laws, policies and programs set by provincial and territorial governments comply with the requirements of article 11 of the *Covenant* as a minimum; and that when such laws, policies or programs do not exist, the federal government will act.

For that same reason, the third element of the national concern test, requiring minimal intrusion into provincial jurisdiction, is also likely met. Depending on how international human rights implementation is taken up as a matter of national concern, there are likely similarities to the *Greenhouse Gas Pollution Pricing Act* (2018) scheme, which the Court found to be sufficiently circumscribed and not an extensive intrusion into provincial jurisdiction. Many of the same conclusions could apply with respect to international human rights implementation. Provinces and territories would retain substantive authority to legislate in all relevant areas falling within their constitutional jurisdiction, either on their own accord or co-operatively with the federal government but would be expressly required to do so in a manner that meets the country's international human rights obligations. As with the climate crisis, the irreversible and disproportionate harm, particularly on vulnerable communities, of failing to meet those international human rights obligations, justifies that limited intrusion.

This is not to suggest that the federal government has a commendable record on international human rights and only the provincial and territorial governments need to be brought into line. The list of examples of federal government failure to comply in areas within federal jurisdiction is a long one. As noted previously, steps are being taken that may improve the understanding of and compliance with international human rights across the federal government (Government of Canada, 2023). Clearly, looking to and relying upon the federal government to play a leadership role in fostering international human rights compliance across the country will be undermined if its own record remains deficient.

Blending constitutional principles

So, what we are faced with is the need to ensure that all orders of government enact laws, set policies and make decisions in ways that comply with the country's international human rights obligations. That does not mean that the actions will be identical in all jurisdictions. Solutions tailored to regional needs and realities provide the strongest basis for advancing human rights. The only requirement is to comply with international human rights norms.

Might a dose of co-operative federalism, directed and, even paradoxically, enforced by the federal government due to this being a matter of national concern, provide the way forward?

Existing mechanisms, specifically the long-established Continuing Committee of Officials on Human Rights, and the more recently constituted Senior Officials Committee Responsible for Human Rights and Forum of Ministers on Human Rights, provide potential venues for co-operation.

Civil society groups and Indigenous Peoples' organizations have previously proposed that the federal government enact an International Human Rights Implementation Act (United Nations Human Rights Council, 2012). This could rely on the federal government's constitutional authority to legislate with respect to a matter of national concern, even though it touches on matters falling within both federal and provincial jurisdiction.

Much like the recognition that the *Greenhouse Gas Pollution Pricing Act* (2018, para. 206) did not "limit the provinces' freedom to legislate" but did "partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets," an International Human Rights Implementation Act need not limit provincial freedom (and responsibility) to legislate substantively with respect to human rights matters falling within their jurisdiction. Rather it would curtail their ability to legislate in a manner that falls below international human rights standards.

What inducement or coercive action could the federal government take in order to enforce provincial and territorial compliance?

One, no doubt challenging, possibility is financial, making use of the fiscal transfers from the federal government to provincial and territorial governments under the Canada Health Transfer, Canada Social Transfer, the *Federal-Provincial Fiscal Arrangements Act*, and section 36(2) of the *Constitution Act*. The *Constitution* requires that there be "reasonably comparable levels of public services" across the country. An International Human Rights Implementation Act could specify that "reasonably comparable levels" includes, first and foremost, a requirement to meet international human rights standards.

The other possibility would be that the federal government intervene directly to enact legislation or regulations needed to implement international human rights obligations when provincial or territorial governments fail to do so. That is akin to the model used in the *Greenhouse Gas Pollution Pricing Act*, although it would likely be a significantly more complicated and controversial endeavour as it might extend across a wide variety of areas of public policy falling within provincial and territorial jurisdiction. It would not be without challenge, but ultimately might prove necessary.

In the spirit of co-operative federalism, it would be crucial for provincial and territorial governments to enact companion international human rights implementation legislation within their respective jurisdictions.

ADVANCING A REFORM AGENDA

After decades of little progress, there have been some steps taken to strengthen international human rights implementation in the country. The secrecy that has long marked intergovernmental discussions and action with respect to Canada's international human rights obligations has given way slightly, and there is a greater level of engagement with stakeholders, particularly with the Continuing Committee of Officials on Human Rights. The federal government provides a certain amount of public information about the country's international human rights obligations, including updates on the outcomes of UN reviews of the country's record (Government of Canada, n.d.c).

The federal government is also taking steps to improve international human rights awareness and compliance within and across federal departments and agencies, with a new Federal Human Rights Implementation Framework. It remains in very early stages, with much yet to roll out and no clarity as to the degree to which its various components will be publicly accessible and accountable.

As indicated earlier, a new Forum of Ministers on Human Rights is to meet in the late spring of 2023. There has never been a more optimal time to develop and advance a strengthened approach to international human rights implementation in the country. Developing that new approach should build on constitutional norms of co-operative federalism and the national concern doctrine, take incremental steps that draw on existing mechanisms and processes and ultimately advance an innovative national framework for international human rights implementation.

Incremental steps

Progress will come not only through substantial reform initiatives but with existing laws, policies and principles that offer openings for significant incremental impact.

Amending interpretation legislation to include a provision requiring that statutes and regulations be interpreted in a manner consistent with Canada's international human rights obligations is one option. The *Interpretation Act* (1996) in British Columbia includes such a provision intended to give effect to the province's incorporation of the *UN Declaration on the Rights of Indigenous Peoples* into provincial law, requiring that all acts and regulations in the province be "construed as being consistent with the Declaration."

Federally, the *Department of Justice Act* (1985) has been amended so as to obligate the department to table a "Charter Statement" in Parliament with respect to any proposed bill introduced in the House of Commons or the Senate, "indicating potential effects of the Bill on the rights and freedoms that are guaranteed by the Canadian Charter of Rights and Freedoms." A similar amendment with respect to the country's international human rights obligations could give rise to a requirement to table an "International Human Rights Statement."

Also at the federal level, principles have been adopted to guide the government's litigation strategy in cases involving Indigenous Peoples and cases involving the *Charter of Rights and Freedoms*. The *Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* (Government of Canada, 2018) is guided by the *UN Declaration on the Rights of Indigenous Peoples*. The directive was adopted before the declaration was formally incorporated into federal law and should be amended now to make clear that the federal government's litigation strategy must not only be guided by, but be consistent with, the declaration.

The *Principles guiding the Attorney General of Canada in Charter litigation*, adopted in 2017, set out six principles: constitutionalism and the rule of law; parliamentary democracy; adjudication; continuity; consistent application of the *Charter*; and access to justice (Government of Canada, 2017). A seventh principle could be added with respect to international legal obligations, particularly human rights.

The *Policy on Tabling of Treaties in Parliament*, adopted by Stephen Harper's government, requires that treaties be tabled in the House of Commons "for at least twenty-one sitting days before taking any action to bring the agreement into force" and that a "brief Explanatory Memorandum" be introduced at that same time (Government of Canada, n.d.d). The explanatory memorandum is to explain why becoming a party to the treaty is in Canada's national interest, the advantages and disadvantages of doing so, any obligations that would arise, the likely economic, social, cultural, environmental and legal effects and impacts, and the costs of compliance.

The substance of the explanatory memorandum is to include, among other matters, a description of the treaty's main obligations and the reasons why Canada should become a party. The policy does not currently require the federal government to disclose what consultations have been conducted with provincial and territorial governments about the treaty in question, information that would be useful at later stages when assessing provincial and territorial compliance (Government of Canada, n.d.d).

All of this information would be helpful in understanding the standing and ramifications of treaties that have been ratified by Canada. However, these explanatory memorandums are not easily accessible to the public and do not appear to be published on any government or parliamentary websites. They should be.

National framework for international human rights implementation

The Forum of Ministers on Human Rights is in many respects a response to long-standing demands for ministers to meet regularly and be more transparent and accountable with respect to implementing Canada's international human rights obligations. It will meet biennially. Beyond an indication that it will "give direction" to the CCOHR and the SOCHR (Government of Canada, 2020), no details about its mandate, institutional support, resources, working methods or decision-making powers are yet available.

The advent of the forum offers an opportunity to set out an ambitious and comprehensive reform agenda, the end goal of which should be an adequately resourced and supported national framework for international human rights implementation. This is in keeping with the recommendation, adopted unanimously by states at the time of the 1993 World Conference on Human Rights, urging every state to develop “a national action plan identifying steps whereby that State would improve the promotion and protection of human rights” (Office of the High Commissioner for Human Rights, 1993).

Many jurisdictions have adopted national human rights action plans, and have explicitly committed to effective implementation of their respective international human rights obligations in those plans. For instance, the Scottish Human Rights Commission has instituted a comprehensive human rights-based approach, committed to “making sure that people’s rights are put at the very centre of policies and practices,” which is explicitly linked to Scotland’s international human rights obligations (Scottish Human Rights Commission, n.d.).

RECOMMENDATIONS FOR A NATIONAL FRAMEWORK

At its inaugural meeting, the Forum of Ministers on Human Rights should take the following steps toward a national framework for international human rights implementation:

- Commit publicly to international human rights implementation
 - Make explicit individual and collective commitments that laws adopted, policies enacted and actions taken by all orders of government in Canada will conform to the country’s international human rights obligations

- Strengthen existing policies and processes
 - Make the Federal Human Rights Implementation Framework publicly accessible and accountable
 - Improve the standing of international human rights obligations in existing legislative and litigation processes by the following measures:
 - reforming interpretation legislation to require that statutes and regulations be construed consistently with international human rights obligations
 - tabling “International Human Rights Statements” when proposing new statutes
 - updating government litigation principles and strategies to require conformity with international human rights obligations
 - ensuring that the explanatory memorandums that are prepared when the federal government tables international human rights treaties in Parliament are publicly accessible,
 - releasing information about discussions held among federal, provincial and territorial governments before the federal government ratifies or accedes to international human rights treaties

- Pursue comprehensive legislative change
 - Work co-operatively to elaborate guiding principles for international human rights implementation legislation, grounded in proposals developed by Indigenous Peoples' organizations and civil society (see Appendix F for examples)
 - Develop and adopt international human rights implementation legislation at federal, provincial and territorial level, which would include the following:
 - an enhanced role in international human rights implementation for Indigenous governments, consistent with the *UN Declaration on the Rights of Indigenous Peoples*
 - an obligation to develop collective decision-making protocols grounded in co-operative federalism
 - recognition of federal government authority to act to ensure international human rights compliance by provincial and territorial governments, as appropriate and necessary, under the national concern doctrine
 - specification that the requirement under section 36(2) of the *Constitution* for "reasonably comparable levels of public services" across the country be interpreted to ensure consistent nationwide compliance with international human rights obligations, which will in turn guide fiscal transfers under the Canada Health Transfer, Canada Social Transfer, and the *Federal-Provincial Fiscal Arrangements Act*
 - explicitly designated ministerial accountability for international human rights within federal, provincial and territorial governments
 - requirements to report publicly on international human rights implementation to federal, provincial and territorial parliamentary and legislative bodies
 - enhanced accountability and rights-claiming mechanisms within Canada, similar to UN treaty body review and complaints procedures and more comprehensive than current mandates of the country's human rights commissions, through which critical systemic human rights issues can be brought before independent experts for findings and recommendations

- Enhance stakeholder and public engagement
 - Recognize the obligation to consult about relevant international human rights matters with Indigenous Peoples' organizations in keeping with the *UN Declaration on the Rights of Indigenous Peoples*
 - Develop clear processes for timely and meaningful engagement about international human rights implementation with civil society organizations
 - Recognize and formalize the role of municipal governments in implementing international human rights obligations
 - Strengthen the powers of federal, provincial and territorial human rights commissions in monitoring implementation of international human rights obligations
 - Develop a comprehensive public education and awareness strategy and action plan with respect to the country's international human rights obligations, including regular and accessible public reporting of progress in implementation

- Ensure sustained support
 - Establish a dedicated secretariat and provide adequate, long-term funding, including for Indigenous Peoples' organizations and civil society groups, to support all aspects of the framework

CONCLUSION

While discussions about federalism and processes for implementing international obligations may seem technical and legalistic, what is at stake is the essential promise of the United Nations *Universal Declaration of Human Rights* (1948, art. 1) that “all human beings are born free and equal in dignity and rights.” Every step taken by federal, provincial and territorial governments individually and collectively to ensure compliance with the country’s international human rights obligations helps to better deliver that promise both nationally and globally. Every failure to do so sets back that vital vision.

Over the course of more than 45 years since Canada ratified the two international covenants and assumed those binding international human rights obligations, the mechanisms in place domestically to enable and ensure implementation of those obligations – and to do so consistently across the country – have remained ineffective and inadequate. There has been a failure to put in place effective remedies for human rights violations, particularly of economic, social and cultural rights. Canada’s dualist approach to international law has been incorrectly relied upon by governments and courts to somehow absolve Canada of the obligation to ensure that international human rights are fully implemented in domestic law to ensure access to justice and effective remedies, and to ensure domestic law is consistently interpreted and applied in light of these overarching obligations. Rigid interpretations of constitutional jurisdiction have impaired collaborative decision-making among orders of governments. Parliament and legislative assemblies have not held governments accountable. And excessive secrecy has undermined meaningful engagement with civil society and Indigenous Peoples’ organizations, as well as broader public awareness of respect for international human rights in the country.

There have been repeated calls for Canada to do better. The establishment of a Forum of Ministers on Human Rights provides an important opportunity to do just that, by working co-operatively to develop and institute a national framework for international human rights implementation.

Federalism provides a robust framework for taking up international obligations and advancing human rights. Some of the key human rights gains in the country began with provincial-level initiatives that were eventually adopted nationwide, such as Saskatchewan’s decision to institute publicly funded health care in the province in 1961, and Quebec’s move to prohibit discrimination on the basis of sexual orientation in 1977. Making federalism work for human rights regularly and reliably needs a nationwide

framework, backed up by legislation and other measures designed to ensure that the laws, policies and decisions of all orders of government, singularly and collectively, comply, at a minimum, with international human rights obligations.

Doing better is above all the individual responsibility of each and every one of the federal, provincial and territorial governments in the country. In short, they need to get their own houses in order when it comes to respecting international human rights within their respective areas of jurisdiction. That extends beyond platitudes. It requires measures that formalize a commitment to international human rights in all aspects of law-making, policy-setting and decision-making within and across each government.

Doing better, however, is also very much about those governments coming together collectively to ensure that federalism lives up to that potential. That too requires much more than platitudes. Developing and advancing a strong and effective national framework for international human rights implementation would set the Canadian federation on the right path.

Canada is respected around the world as a country committed to human rights. Getting serious about international human rights at home will help ensure we earn and deserve that respect.

APPENDICES

Appendix A. Canada's record of adhering to international human rights treaties

Main UN Human Rights Instruments

Treaty	Year instrument adopted	Year Canada adopted instrument
Convention on the Elimination of All Forms of Racial Discrimination	1965	1970
International Covenant on Civil and Political Rights	1966	1976
Optional Protocol to the International Covenant on Civil and Political Rights	1966	1976
International Covenant on Economic, Social and Cultural Rights	1966	1976
Convention on the Elimination of All Forms of Discrimination against Women	1979	1981
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1984	1987
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	1989	2005
Convention on the Rights of the Child	1989	1991
Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	1990	N/A
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	1999	2002
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	2000	2000
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	2000	2005
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	2002	N/A
Convention on the Rights of Persons with Disabilities	2006	2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities	2006	2018
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	2008	N/A
Convention for the Protection of All Persons from Enforced Disappearances	2010	N/A
Optional Protocol to the Convention on the Rights of the Child dealing with individual petitions	2011	N/A

Appendix A. Canada's record of adhering to international human rights treaties (cont.)

Main Inter-American Human Rights Instruments

Treaty	Year instrument adopted	Year Canada adopted instrument
American Convention on Human Rights	1969	N/A
Inter-American Convention to Prevent and Punish Torture	1985	N/A
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador"	1988	N/A
Protocol to the American Convention on Human Rights to Abolish the Death Penalty	1990	N/A
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belem do Pará"	1994	N/A
Inter-American Convention on Forced Disappearance of Persons	1994	N/A
Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities	1999	N/A
Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance	2013	N/A
Inter-American Convention Against All Forms of Discrimination and Intolerance	2013	N/A
Inter-American Convention on Protecting the Human Rights of Older Persons	2015	N/A

Sources: United Nations, Organization of American States.

Appendix B: UN treaty body concerns

The committees responsible for overseeing the seven principal treaties to which Canada is a party carry out regular reviews of Canada's record.¹ The committees examine a report from Canada, materials from other UN bodies, experts and processes, and submissions from civil society groups, Indigenous Peoples' organizations and the Canadian Human Rights Commission. At the time of the review, committee members question government officials and have a separate meeting with civil society and Indigenous representatives. The outcome document, termed Concluding Observations, highlights areas of progress and concern, and enumerates recommendations.

Concerns about the inadequacy of Canada's approach to implementing international human rights obligations and, specifically, following through on the recommendations from these regular reviews, have been noted by all treaty committees whose jurisdiction extends to Canada.

The Committee recalls its previous concluding observations and recommends that the State party adopt a national strategy that provides a comprehensive implementation framework for the federal, provincial and territorial levels of government spelling out as is appropriate the priorities, targets and respective responsibilities for the overall realization of the Convention and that will enable the provinces and territories to adopt accordingly their own specific plans and strategies. The Committee further recommends that the State party allocate adequate human, technical and financial resources for the implementation, monitoring and evaluation of this comprehensive strategy and related provincial and territorial plans. (UN Committee on the Rights of the Child, 2022, para. 8)

The State party should reconsider its position in relation to Views and Interim Measures adopted by the Committee under the First Optional Protocol. It should take all necessary measures to establish mechanisms and appropriate procedures to give full effect to the Committee's Views so as to guarantee an effective remedy when there has been a violation of the Covenant. (UN Human Rights Committee, 2015, para. 5)

The Committee recommends that the State party take the legislative measures necessary to give full effect to the Covenant rights in its legal order and ensure that victims have access to effective remedies. The Committee recommends that the State party implement its commitment to review its litigation strategies in order to foster the justiciability of the economic, social and cultural rights. (UN Committee on Economic, Social and Cultural Rights, 2016, para. 6)

¹ Regular reviews of Canada's record are conducted by the Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women, Committee against Torture, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities. Depending on resources, workload and other demands, the reviews are held at intervals ranging roughly between four and 10 years.

The Committee requests detailed information on the work of the intergovernmental committee on supporting domestic implementation of the Convention and its efforts to ensure the equal application of the Convention at the federal, provincial and territorial levels. The Committee recommends that the State party create an accountability mechanism and ensure equal distribution of resources for the implementation of the Convention at the federal, provincial and territorial levels. (UN Committee on the Elimination of Racial Discrimination, 2017, para. 8)

The Committee recommends that the State Party take leadership in convening provinces and territories in order to ensure a pan-Canadian approach to implementation and enact a comprehensive national action plan for implementing the Convention in collaboration with provincial and territorial governments and in consultation with persons with disabilities through their representative organizations. The State party should ensure that such an action plan includes benchmarks and a time frame for its implementation. (UN Committee on the Rights of Persons with Disabilities, 2017, para. 10)

The Committee, taking into account the legal responsibility and leadership role of the federal Government in the implementation of the Convention, reiterates its previous recommendation that the State party establish an effective mechanism aimed at ensuring accountability and the transparent, coherent and consistent implementation of the Convention throughout its territory. (UN Committee on the Elimination of Discrimination against Women, 2016, para. 11)

The Committee recommends that the State party find the appropriate constitutional path that will allow it to have in the whole territory of the State party, including its provinces and territories, a comprehensive legal framework which fully incorporates the provisions of the Convention and its Optional Protocols and provides clear guidelines for their consistent application. (UN Committee on the Rights of the Child, 2012, para. 11)

The State party should take further steps in ensuring a well-coordinated, transparent and publicly accessible approach to overseeing implementation of Canadian obligations under the United Nations human rights mechanisms, including the Convention. (UN Committee against Torture, 2012, para. 24)

The State party should establish procedures, by which oversight of the implementation of the Covenant is ensured, with a view, in particular, to reporting publicly on any deficiencies. Such procedures should operate in a transparent and accountable manner, and guarantee the full participation of all levels of government and of civil society, including indigenous peoples. (UN Human Rights Committee, 2006, para. 6)

This frustration reflects the fact that these committees have found that numerous recommendations made to Canada have not been implemented over many years, and that there is usually very little explanation, let alone acceptable justification, for that failure.

For instance, Canada's record was reviewed by the Committee against Torture in November, 2018. The Committee noted that it "remains concerned" about Canada's failure to legislate an absolute prohibition on *refoulement* to a risk of torture and called on Canada "ensure that no one may be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would run a personal and foreseeable risk of being subjected to torture" (UN Committee against Torture, 2018, paras. 24-25).

The Committee against Torture previously made that same recommendation to Canada in 2000 (UN Committee against Torture, 2000, paras. 58(e) and 59(a)), 2005 (UN Committee against Torture, 2005, paras. 4(a) and 5(a)) and 2012 (UN Committee against Torture, 2012, paras. 9-10), as did the UN Human Rights Committee in 1999 (UN Human Rights Committee, 1999, para. 13), 2005 (UN Human Rights Committee, 2006, para. 15) and 2015 (UN Human Rights Committee, 2015, para. 13). Despite the fact that these two committees have, on seven occasions over the span of nearly 20 years, called on Canada to amend immigration legislation to incorporate the absolute prohibition on *refoulement* to a risk of torture, no such action has been taken and no acceptable explanation has been offered to either committee.

Appendix C: Recommendations from other States

When the Human Rights Council was established in 2006, replacing the Commission on Human Rights, Canada actively championed the institution of a new Universal Periodic Review to ensure that the human rights record of every member of the UN would be regularly examined regardless of which human rights treaties a country had ratified. Unlike other UN human rights review processes, such as those carried out by treaty bodies, this review is carried out by governments. While that brings politics into the process, it also potentially increases the pressure on states to comply, as the recommendations come from peers.

Each country has a short amount of time to intervene in the review, often only two minutes. As such, governments can only make a small number of recommendations. The country under review subsequently reports back to the council indicating which recommendations they accept. That list of accepted recommendations constitutes the final outcome of the review. Canada's record has been examined three times under the UPR in 2009, 2013 and 2018. It will be reviewed for the fourth time in November 2023.

Notably, alongside recommendations about specific human rights concerns, numerous governments have recommended that Canada strengthen implementation of the country's international human rights obligations:

- Paraguay (2018): Strengthen national mechanisms for monitoring implementation of the international human rights recommendations received by the State (UN Human Rights Council, 2018, para. 142.35).
- Norway (2018): Strengthen the co-ordination on human rights implementation across levels of government in order to ensure better implementation domestically (UN Human Rights Council, 2018, para. 142.36).
- France (2018): Establish a mechanism to follow up and implement human rights at all levels of government (UN Human Rights Council, 2018, para. 142.37).
- Ireland (2013): That relevant civil society groups are consulted in implementation of recommendations by treaty monitoring bodies and that their views are given due consideration (UN Human Rights Council, 2013, para. 128.28).
- Portugal (2013): Analyze each of the United Nations treaty bodies recommendations in close co-operation with civil society to implement them or to report publicly on the reasons why it considers their implementation not appropriate (UN Human Rights Council, 2013, para. 128.29).
- United Kingdom (2013): Continue to engage with civil society groups and demonstrate that challenges presented by relationships between its federal, provincial and territorial governments do not present unnecessary obstacles to ensuring implementation of its international human rights obligations (UN Human Rights Council, 2013, para. 128.30).
- Portugal (2009): Create or reinforce a transparent, effective and accountable system that includes all levels of the government and representative of the civil society, including Indigenous people, to monitor and publicly and regularly

report on the implementation of Canada's human rights obligations (UN Human Rights Council, 2009b, para. 14).

- Mexico (2009): Establish a mechanism that will meet regularly with the effective participation of civil society organizations and Indigenous Peoples, and have national reach to implement all Canada's international obligations and facilitate the acceptance of pending commitments (UN Human Rights Council, 2009b, para. 14).
- Slovakia (2009): Consider measures to make the Continuing Committee of Officials on Human Rights more operational, ensure its better accessibility for the civil society enabling thus a permanent dialogue process on international human rights obligations including those from the Universal Periodic Review (UN Human Rights Council, 2009b, para. 14).

Appendix D: Canada and the Optional Protocol to the Convention against Torture

The *Optional Protocol to the Convention against Torture* (OPCAT), adopted by the UN in December 2002, seeks to prevent torture through national and international inspections of detention centres.

Canada promised to “consider” ratification of OPCAT in 2006, as part of the pledge the country made when standing for election to the UN Human Rights Council (Commonwealth Human Rights Initiative, 2006, p. 109). Canada was elected, but there was no progress toward accession to OPCAT during a three-year term on the council.

When Canada’s human rights record was scrutinized during the 2009 and 2013 Universal Periodic Reviews at the Human Rights Council, becoming a party to OPCAT emerged as one of the most common recommendations, proposed by nine states in 2009 (UN Human Rights Council, 2009c, para. 86.2) and 16 in 2013 (UN Human Rights Council, 2013a, para. 128.2). Canada’s responses indicated that, in 2009 the government was “conducting the required analysis of its domestic legislation and policies in considering the possible signature/ratification of... the OP-CAT” (UN Human Rights Council, 2009c, para. 7) and, in 2013 the less encouraging announcement that Canada accepted the recommendation “in principle... but ha[d] no current plan to ratify” (UN Human Rights Council, 2013b, para. 5).

At no time was there any further information available. There were no public reports describing what processes were underway, what issues were being discussed, how extensively provincial and territorial governments were being consulted and whether any particular objections had arisen. There was no detailed explanation of the 2013 position that there was no current plan to ratify. Complete secrecy with respect to something as uncontroversial as preventing torture prevailed.

There was potentially significant progress in May 2016. At an event on Parliament Hill sponsored by Amnesty International, then minister of Foreign Affairs Stephane Dion announced that the Optional Protocol would no longer “be optional” (Amnesty International, 2016) for Canada. The government subsequently confirmed that “the minister just announced that we agree that the government of Canada should join this important protocol. We are taking the first step towards doing so by beginning formal consultations on the optional protocol with provincial and territorial governments” (Maclean’s, 2016).

Not surprisingly, an increased number of governments, from 27 countries, pressed Canada about OPCAT during the country’s third round through the Universal Periodic Review in 2018 (UN Human Rights Council, 2018, paras. 142.8 – 142.20). In response, repeating largely the same position as 2006, 2009 and 2013, Canada indicated that “FTP government are currently considering the potential accession to the OP-CAT” (United Nations, 2018, para. 6). There has been no further public reporting since. It is not even clear which federal minister is taking the lead: Justice, Foreign Affairs, Canadian Heritage or, given OPCAT’s focus on detention centres, Public Safety.

Meanwhile, 91 countries are now party to OPCAT. That includes nearly all of Canada's closest allies in Europe and Latin America, as well as Australia and New Zealand (Office of the High Commissioner for Human Rights, n.d.b). It also includes many federal states. For instance, Australia, Austria, Brazil, Germany, Mexico, Nigeria, South Africa and Switzerland, all federal states, are party to OPCAT.

Preventing torture should not be contentious for Canada. Yet the secrecy surrounding the discussions about becoming a party to OPCAT make it impossible for Canadians to ascertain and assess the positions of federal, provincial and territorial governments on this important issue. That undermines accountability.

Appendix E: Canada and the Special Procedures

The UN Human Rights Council appoints independent experts, known as Special Rapporteurs, Working Groups or Independent Experts, with specific mandates to report to and advise the council on thematic areas of concern and a select number of countries. At the present time there are 45 thematic and 14 country-specific Special Procedures (Office of the High Commissioner for Human Rights, n.d.b). Most of the thematic Special Procedures mandate holders choose two or three countries to focus on per year, carrying out in-depth research and generally conducting an extensive country visit. Comprehensive reports, including a set of recommendations, are then tabled at the Human Rights Council. Over the past decade there have been a number of such reviews of Canada by various Special Procedures.

- Special Rapporteur on the rights of Indigenous Peoples in 2023
- Special Rapporteur on the implications for human rights of environmentally sound management and disposal of hazardous substances and wastes in 2019
- Special Rapporteur on the rights of persons with disabilities in 2019
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in 2018
- Special Rapporteur on violence against women, its causes and consequences in 2018
- Working Group on the issue of human rights and transnational corporations and other business enterprises in 2017
- Working Group of Experts on People of African Descent in 2016
- Special Rapporteur on the rights of Indigenous Peoples in 2013
- Special Rapporteur on the right to food in 2012

Each of these Special Procedures experts or bodies visited Canada, met with government officials, Indigenous Peoples' and civil society organization representatives, communities and individuals experiencing rights violations, academics and other experts, and prepared comprehensive reports with a range of recommendations. While the federal government does generally provide a compilation of comments from federal, provincial and territorial governments at the time the report is issued, those are generally limited to suggestions around wording and clarifying questions.¹ Federal, provincial and territorial governments do not table an official public response to those reports, nor do they report publicly on the progress of implementing the recommendations.

¹ For instance: *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (Advance Unedited Version) – Comments from Canadian authorities*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/225/34/PDF/G2022534.pdf?OpenElement>; *Report of the Special Rapporteur on the rights of persons with disabilities on her visit to Canada Comments by the State*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/353/18/PDF/G1935318.pdf?OpenElement>.

Appendix F: Guiding principles for strengthened international human rights implementation

Recommendations from civil society and Indigenous Peoples' organizations, including in submissions to UN human rights bodies and review processes as well as at the time of the 2017 ministerial human rights meeting, offer guiding principles to ensure that reforms to Canada's approach to international human rights implementation are responsive to what is actually needed.

Key themes that emerge from those submissions, which are briefly described below, are that implementation be prioritized, principled, consistent, effective, informed, transparent, accountable and meaningful (Canadian Council for Refugees, 2017). Further elaboration of guiding principles for international human rights implementation, developed in collaboration with Indigenous Peoples' organizations and civil society groups, should be one of the first priorities for the Forum of Ministers on Human Rights.

- *Prioritization* of international human rights obligations must be recognized across all aspects of law-making, policy setting and government operations.
- *Principled* implementation should be grounded in a human rights-based framework which does the following:
 - recognizes and respects the rights of Indigenous Peoples, guided by the *UN Declaration on the Rights of Indigenous Peoples*
 - adopts a feminist approach
 - applies racial equity impact and disability-based inclusion lenses
 - commits to substantive equality to address systemic discrimination and marginalization
 - addresses intersecting forms of sexism, racism, ableism and other forms of discrimination
 - acknowledges that the fulfillment of economic, social and cultural rights is a threshold requirement for the enjoyment of civil and political rights, particularly for those groups that are most disadvantaged, and that all human rights are universal and interdependent
- *Consistent* implementation must ensure that Canada's international human rights obligations are upheld equally in all parts of the country.
- *Effective* implementation requires co-ordination among all levels of government, including federal, provincial, territorial, municipal, First Nations, Métis and Inuit governments, through mechanisms that establish agreed timelines and enable collaborative decision-making.
- *Informed* implementation necessitates genuine, timely and ongoing input from and consultations with Indigenous Peoples' organizations, civil society groups, and federal, provincial and territorial human rights commissions and tribunals.
- *Transparent* implementation requires accessible public reporting regarding progress in complying with international human rights recommendations, including data disaggregated with respect to sex and gender, Indigenous, racial and ethnic identity, disability and other characteristics relevant to identifying, understanding and addressing patterns of human rights abuse.

- *Accountable* implementation must include an oversight role for Parliament, and provincial and territorial legislatures.
- *Meaningful* implementation must ensure access to justice and effective remedies for violations of all international human rights obligations, including economic, social and cultural rights.

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