Session/Séance 6C: *Strengthening the Implementation of Canada's International Human Rights Obligations / Renforcer les obligations internationales du Canada en matière de droits de la personne*

Friday, November 4, 2016

9:00-10:30

Chair/Président
Dan Moore, Legal Counsel, Department of Justice (Canada), Human Rights Law Section

Speakers/Conférenciers
Leilani Farha, UN Special Rapporteur on Adequate Housing; Exec. Director Canada Without Poverty
Alex Neve, Secretary General Amnesty International Canada
Benoît Frate, Professor, Department of Urban Studies and Tourism, Université du Québec à Montréal

The purpose of the panel was to find solutions for how to bridge the gap between norms of international law and day-to-day practices in Canada. The Chair began with an acknowledgment that Canada is party to a comprehensive list of human rights conventions and treaties. The speakers were invited to identify how Canadian laws, practices and policies meet the standards that Canada adopted. The panel was also invited to provide comments on how Canada can improve its commitment to human rights and possible solutions to strengthen, if need be, the protection of the fundamental rights of Canadians.

As a preliminary remark, the Chair underscored that the composition of the panel offered a diversity of perspectives on Canada's accomplishments and failings in the sphere of international human rights law. There were representatives from civil society (Alex Neve from Amnesty International), government (Dan Moore from Justice Canada), international organizations (Leilani Farha, UN Special Rapporteur on Adequate Housing) and academia (Professor Benoît Frate from UQÀM).

The Chair, **Dan Moore**, in his capacity as a lawyer at the Department of Justice for the Human Rights Law Section, began the discussion by mentioning the challenges faced by his section in advising the government on any project to commit to an international convention on human rights.

Firstly, noting that Canada is a dualist country, he explained that treaties are not part of Canada's internal law automatically when ratified. It necessitates more work than simply enshrining a treaty through legislation or by regulation. It requires that measures, mechanisms and policies be adopted to ensure the ongoing compliance with international commitments. This includes the training and education of lawyers, cooperation between the human rights authorities of the Canadian provinces and the federal government (e.g. Canadian Council on Human Rights), which can include the sharing of best practices, and ensuring proper

collaboration with treaty bodies (e.g. UN Committee on Human Rights). Additionally, an important part of the work is to keep current on the content and scope of Canada's human rights commitments. Since human rights obligations are not in a static state and their interpretation and content can evolve over time, there is a need for a constant update and revision of the laws.

Secondly, he observed, constant work is required to foster a culture of human rights with frontline actors, such as public servants and litigators, when they interact with the public.

Thirdly, Mr. Moore argued that the "gaps" in the federalist system can create issues and complications in how a policy or mechanism is created to appropriately protect a right. Oftentimes, coordination and cooperation is required between the provinces and the federal government. Department of Justice lawyers must negotiate on issues ranging from determining who has the competence to protect the right and, where there is no clear-cut attribution of power, resource allocation.

Finally, the public service faces an operational challenge due to the constant, periodic reporting of UN treaty bodies and various human rights watchdogs. It was summarily explained that the government is often in a bind, having to choose where to spend its resources and energy. Due to the relatively limited means of the Department of Justice, operational decisions must be made whether to absorb the excess of input from the interveners and follow the evolution of human rights law or rather focus on the outcomes, namely making the appropriate changes to laws and policies.

Alex Neve, Secretary General at Amnesty International Canada, then offered his perspective on the accomplishments of Canada in protecting fundamental human rights and pinpoint areas where there is room for improvement. His presentation began with an assertion that, to make human rights "real", there is a need for practical mechanisms to enforce them. To do so, the government must be involved in three steps. First, the government must commit to an international convention through a positive act, such as the ratification of a treaty. Second, the government must implement and enshrine within its internal legal system the content of the convention that was ratified. The objective is to give force to the convention and allow for the international institutions to monitor and evaluate the steps taken to enforce the rights. Third, the government must communicate, inform and report to the public the actions that are taken to protect the right that were the subject of the adopted convention or rule.

Neve then commented that Canada has room for improvement on all three levels. He added that institutional factors present hurdles to the full realization of the human rights engagement of Canada. Indeed, Canada's political system complicated the process to adopt and enforce international human rights instruments. The fact that there are 14 different perspectives and agendas on human rights and policy priorities, from the provinces, territories and the federal government, complicates the negotiation and requires more efforts to sustain efficient collaboration. Moreover, the established system to supervise human rights originates from the 1970s and has not known great changes or reforms. It has not kept up with the changes in human rights instruments or the Canadian Charter, enshrined in 1982, and doesn't meet the needs of contemporary Canada

As to the three “steps” required to give practical effect to human rights commitments, Neve expressed his dissatisfaction that Canada has shortcomings on the three fronts. With regards to assuming obligations, he noted that there is no clarity on what and which international human rights instruments Canada has signed. For example, there is no single, comprehensive database on what protocols, treaties, conventions or declarations Canada is a party to. This is a regrettable state considering that this is a subject of considerable interest and vital consequence for millions of people in Canada. Second, on the issue of implementation, international supervisory bodies have the power to review Canadian records on the implementation of particular human rights. The complication arises at the step of providing recommendations to the government. The challenge is that ordinary Canadians have difficulties in informing themselves of the recommendations of the bodies. Also, there is no transparency on how those recommendations are considered by the government. Finally, on the last step, Parliament and legislations should be publicly engaged and provide accessible information to all Canadians on what rights they are owed and the level of protection they should benefit from. Yet, it is not currently the case. Neve suggested that anecdotally, it appears easier for an ordinary Canadian to access information about national security than on human rights. It was argued that it should not be the case, and that Canada should engage in creating the required mechanisms to inform Canadian citizens.

Subsequently, Mr Neve commented that Canada’s national standards are falling short and do not cover the entirety of international human rights obligations. Most importantly, he noted that economic, social and cultural rights, which would include the right to housing and to a standard of living, are not protected in Canadian law despite being as fundamental as other civil and political rights such as the right to life and freedom of expression. Moreover, human rights are applied differently nationally than what is required internationally, resulting in a disconnect between the international engagements of Canada on the global scene and what is concretely protected within Canada’s legal system. Neve used the example of torture, which is outright banned in all circumstances per international norms. However, in Canada, while torture is prohibited by law, there is still a discretionary power to do it “in some exceptional circumstances”. This situation is, in the opinion of the Secretary General, an inherent contradiction to a claim of outright and absolute ban. As a final point, Neve emphasized that international law is premised on the principle that the most important human rights are procedural and will have a practical impact in legislation. In other words, that there are remedies and sanctions for violating a norm or rule. However, he argued, this is not the case in Canada.

Mr Neve concluded his presentation by proposing various strategies to remedy those shortcomings and to allow Canada to be model to the world. While our federalist system gives way to a significant amount of finger-pointing between provinces and the federal government, it is no excuse for failing to meet the international standards. The solution is, in his opinion, legislative reform. He proposed the drafting of an International Human Rights Implementation Act which, once adopted, would cover more than information sharing, but provide information and reports on how Canada is faring in the implementation of its international commitments. Also, noting that 2017 will mark the 35th anniversary of the Canadian Charter of Human Rights, he proposed that it would be a good opportunity to organize an inter-ministerial summit on human rights, arguing that an intergovernmental meeting on this subject is long overdue.

The third panelist, **Leilani Farha**, UN Special Rapporteur on Housing, gave a sobering portrait of Canada's human rights engagement and the road to travel for the full protection of all rights. She expressed her concerns following the observations she made during the preparation of her thematic report on the right of housing.

The Rapporteur argued that Canada has a two-tiered human rights system and that Canada is an outlier on the international scene in the matter of offering less protection to social, economic and cultural rights [**SEC**]. She expressed dissatisfaction that those rights are barely enshrined in Canadian law. Conversely, she pleaded that human rights are indivisible and interdependent, and that it is artificial to separate civil and political rights (protected by the International Covenant on Civil and Political Rights) and economic, social and cultural rights (protected by the International Covenant on Economic, Social and Cultural Rights)

She commented that the problem with the two-tier system is not only institutional, but cultural. She observed that there is no true belief in Canada, at the higher echelon or in the public, that SEC are human rights. Apart from the people having their rights denied, such as the homeless, she asserted, the protection of those rights is not a widely-shared concern. As an example, she offered the recent work by the Honourable Jean-Yves Duclos, Minister of Families, Children and Social Development of Canada, on a housing strategy which makes no reference to housing as being a human right. She emphasized that governments should commit to all human rights, not commit selectively to some of them, such as democratic rights, at the expense of economic or social rights.

The Rapporteur also expressed her dissatisfaction at the mindset and attitude reflected by lawyers and litigators at the Department of Justice in Charter cases. She used the example of how section 7 of the Charter and the right to life is interpreted in Canada vis-à-vis other countries. In India, she explained, the right to life is more comprehensive and understood as a right to a quality of life, not restricted to bare survival. On the other hand, Canada, she argued, contorts itself to limit that right, giving rise to puzzling argumentative gymnastics. There should be a culture within the practitioners of the law in the public service that social, economic and cultural rights are also a part of the right to life.

Having identified those issues, Ms. Farha undertook to identify the reasons behind the limited view of what full protection of human rights entails. The source of the problem began, she explained, when the international community created two separate, rather than one, covenants on human rights. Arguably, there should not have been a separation between those two "domains". She contended that it gives a false appearance that they are two entirely separate regimes of rights, although they are interconnected. Secondly, she posited that there is a political fear to conflate social policies and human rights, which would potentially overexert the resources of the State. However, she contested, Canada is a rich country and there is clear language in the covenants giving leeway to states on how they manage their internal resources. It is doubtful in the first place, she said, that Canada is at the limit of its resources to protect those rights. Thirdly, there is also a fear that the recognition of SEC will give rise to the enforcement of remedies, an increase in litigation and the overload of courts with claims. The Rapporteur countered that courts are not the only method to assert the violation of a right, since

institutions such as ombudsmen can also play a role in monitoring and protect citizens. Finally, she argued that the prospect of litigation would remain hypothetical if Canada provides reasonable efforts to protect the full array of human rights.

The Special Rapporteur concluded her remarks by offering two solutions to resolve the identified problems. First, she recommended that all levels of governments should find new ways to collaborate in protecting human rights. Second, she suggested that more training and education should be given to lawyers, law students, bureaucrats and public servants on the interconnection of human rights to help in the evolution of mindsets and institutional culture. Those would be the first steps, she noted, to offer full and adequate protection of all human rights to Canadians.

The last panelist, Professor **Benoît Frate** of the Université du Québec à Montréal, gave an enlightening perspective on the role of cities and local governments in protecting fundamental human rights, which was framed as the methods to protect human rights at a local level. Specifically, he spoke and provided his observations on the 2006 Montreal Charter of Rights and Responsibilities[1] [**Charter**] and its impact since it was enacted.

The professor began by providing an overview of the creation of the Charter. In 2000, he explained, some European cities drafted and adopted the European Charter for the Safeguarding of Human Rights in the City[2], an initiative aimed at involving local governments and civil society in protecting human rights. The movement was not unnoticed on this side of the Atlantic and, following the amalgamation of the City of Montreal, public consultations took place to adopt a similar instrument. The Charter became law in 2006 and remains to this day quite innovative in the North American context.

Professor Frate subsequently spoke of the content of the Charter. Essentially, it is a municipal by-law which declares, on a local basis, the human rights of Montrealers, their responsibilities, and the corresponding obligations of the city in protecting and abstaining from infringing on those rights. The Charter cannot be invoked in a court of law, but the City's Ombudsman has powers of investigation and recommendation over it. The Ombudsman is also required to produce an annual report, a valuable source of information about the complaints dealt with under the Charter.

The Charter has known various phases of development through the years. As such, following requests from the City, the National Assembly of Québec amended the city enabling act, making it mandatory for the City to adopt a local human rights charter. The Charter was also completed by a new right of initiative, which grants the power to citizens to trigger a public consultation on a local issue.

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[1] Ville de Montréal, "Montréal Charter" (January 1st, 2006), online : < http://ville.montreal.qc.ca/pls/portal/docs/page/charte_mtl_fr/media/documents/charte_montrealaise_english.pdf>.

[2] UCLG Committee on Social, Inclusion, Participatory Democracy and Human Rights, "European Charter for the Safeguarding of Human Rights in the City", (2000) online: <http://www.uclg-cisdp.org/sites/default/files/CISDP%20Carta%20Europea%20Sencera_baixa_3.pdf>

However, Professor Frate commented, the Charter also has limitations that became apparent following a public consultation on the review of the Charter in 2010. Firstly, the Charter remains little known by the public, which is generally unaware of its content and of the recourses to make a complaint. Secondly, the recommendations of a structural nature made by the consultation body, such as making the Charter binding on the transportation corporation and the police department or making it mandatory for the City to provide annual implementation reports to the Ombudsman, were not implemented by the City.

Finally, Professor Frate recalled that human rights at a local level is a two-way street. While some local governments here and abroad have an explicit interest in human rights, they also have obligations and responsibilities in that regard, whether they have adopted a local charter or similar instrument or not. In fact, international human rights organizations expressed their dissatisfaction with regards to the actions of Montreal and its police department in relation to demonstrations at two occasions during the last ten years.

In conclusion, Professor Frate commented that the remarks made by Alex Neve on the failure of the three steps to give a practical effect to human rights apply to local initiatives as well: in the case of Montreal, there is a need to implement the 2010 recommendations. Professor Frate ended his presentation on a hopeful note: municipal authorities have shown an interest in being involved in protecting human rights, but a crucial question remains. How to guarantee human rights protection that is comprehensive and coordinated between all levels of government, including the local one?

The panel ended with a question period. It was noted by an audience member that discussions surrounding SEC human rights are often highly politicized, which is not favourable to reasonable discussion of the content of those rights. The panel suggested the Canadian judges, as neutral parties knowledgeable of the law, should be involved, rather than the legislator, in protecting more controversial human rights. While it could be perceived as encroaching on the power of the legislator, it is already observed that courts are becoming increasingly involved in recognizing internationally protected human rights from conventions to which Canada is a party. There remains, however, a reticence in the legal community in recognizing those rights.

It was nonetheless criticized that rulings on human rights, in cases such as *Victoria (City) v. Adams,* 2009 BCCA 563, about the right to housing, appears to be a “back door” method of offering protection. Additionally, the panel remarked, this method puts too much reliance on the discretion of judges and is not providing clear and comprehensive guidance on the full extent of the right and what it protects. It was emphasized that such a situation should not occur in a leading economic country and that there should be no timidity in fully protecting all human rights.

A question was asked on whether the system of federalism is, essentially, an unsurmountable obstacle to the full protection of human rights. The panel rather suggested that federalism can be a win-win situation, on the condition that cooperation prevails between

different orders of government. Also, it was remarked, federalism allows for the sharing of the burden of protecting a right and can offer a greater pool of resources to citizens.