

ARCH Disability Law Centre

Submission to Review of Canada's Accession to the United Nations Optional Protocol to the *Convention on the Rights of Persons with Disabilities*

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Introduction

In this submission, ARCH Disability Law Centre provides comments in response to the Government of Canada's public consultation on Canada's accession to the Optional Protocol to the *Convention on the Rights of Persons with Disabilities*.

About ARCH

ARCH Disability Law Centre (ARCH) is a specialty legal clinic dedicated to defending and advancing the equality rights of persons with disabilities in Ontario. ARCH is primarily funded by Legal Aid Ontario. For over 35 years, ARCH has provided legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. ARCH provides summary legal advice and referrals to Ontarians with disabilities; represents persons with disabilities and disability organizations in test case litigation; conducts law reform and policy work; provides public legal education to disability communities and continuing legal education to the legal community; and supports community development initiatives. More information about our work is available on our website: www.archdisabilitylaw.ca

ARCH has a longstanding history of representing parties and interveners before courts and tribunals in matters that raise systemic human rights issues. ARCH lawyers have appeared before the Canadian Human Rights Commission, the Canadian Human Rights Tribunal, the Human Rights Tribunal of Ontario, and all levels of court including the Supreme Court of Canada. ARCH has written several papers and organized a number of events on the *Convention on the Rights of Persons with Disabilities* (*Convention*). Along with a number of organizations representing persons with disabilities across Canada, ARCH participated in drafting a shadow report to the UN Committee on the Rights of Persons with Disabilities on Canada's implementation of the *Convention*.

Comments on the Obligations Contained in the Optional Protocol

The Optional Protocol (OP) is an important part of the *Convention on the Rights of Persons with Disabilities*. It provides for two procedures by which the UN Committee on the Rights of Persons with Disabilities can oversee the implementation of *Convention* rights. The first is an individual communication procedure, whereby individuals or groups of individuals who believe that Canada has violated their *Convention* rights may complain to the UN Committee. There are certain criteria that must be met before the UN Committee can consider the communication.¹ Communication with the UN Committee is permitted only after an individual or group has exhausted all domestic remedies. The UN Committee cannot consider communications that are anonymous, or are not supported by enough evidence. The UN Committee cannot consider

¹ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II, Article 2.

communications in which the same situation has or is being investigated by another international body. If a communication meets the required criteria, the UN Committee then raises the concerns outlined in the communication with Canada and engages in a dialogue regarding Canada's response to the concerns. The UN Committee may request that Canada take urgent action to avoid irreparable damage to the person(s) complaining.²

The second procedure is an inquiry procedure. The Committee may, in certain circumstances, conduct an inquiry about serious or widespread violations of *Convention* rights. If Canada agrees, the Committee may visit Canada in order to investigate.³ Inquiries are confidential and may only be conducted with Canada's cooperation.

Regardless of which procedure is engaged, the OP empowers the Committee to make recommendations, comments and suggestions to Canada for the purposes of addressing the concerns raised by the individual, group, or as a result of an inquiry.⁴ The Committee's recommendations, comments and suggestions are not legally binding on Canada.

Comments on the Potential Impact for Persons with Disabilities and Disability Communities if Canada were to Join the Optional Protocol

Canada's accession to the Optional Protocol can play a significant role in advancing the inclusion, participation and equality of persons with disabilities in our society. Canada's accession to the OP will provide persons with disabilities with important new mechanisms by which they can raise individual or group complaints if they believe that Canada has violated their *Convention* rights.

ARCH undertook a review of decisions of the Committee on the Rights of Persons with Disabilities. To date, the Committee has reported eleven cases that it has decided in response to complaints made by individuals or groups using the OP's communications procedure.⁵ Although this is a small number of cases, the cases illustrate that the Committee will make very specific, tangible recommendations to a State in order to remedy the complaint initiated under the OP. For example, a complainant from Austria was a blind consumer of public transportation. He made a complaint under the OP about a lack of train accessibility. He alleged that Austria was in violation of various articles of the *Convention*. The Committee agreed with the complainant and made several recommendations to Austria, including remedying the lack of accessibility, compensating the complainant for his legal costs, and taking measures to prevent future violations of a similar nature. The latter recommendation included specific suggestions to develop legislation, training and minimum standards to ensure accessibility. The

² *Ibid*, Article 4.

³ *Ibid*, Article 6.

⁴ *Ibid*, Articles 5, 6.

⁵ The Committee on the Rights of Persons with Disabilities website has a Jurisprudence Database section. See online: <<http://juris.ohchr.org/>>

Committee recommended that Austria respond in six months explaining what actions it had taken, and that it publish the Committee's views.⁶

To date the Committee has used the inquiry procedure to investigate systemic violations of *Convention* rights once, in the context of the United Kingdom.⁷ The inquiry found "grave and systemic" violations of the rights of persons with disabilities in the UK and provided numerous specific recommendations to government, many related to improving the legislative process.⁸

The cases illustrate that the recommendations, comments and suggestions made by the UN Committee are often concrete and specific, and most certainly will provide highly relevant information about additional steps that Canada must take to fully implement *Convention* rights. If implemented by Canada, these recommendations would almost certainly advance the inclusion, participation and equality of persons with disabilities in Canada.

It must be remembered that the UN Committee cannot resolve communication complaints or make legally binding decisions. Experience in Canada with Optional Protocols to other international treaties shows that Canadian courts generally will not order the Government of Canada to implement the recommendations of a UN Committee under an OP procedure.⁹ Canadian courts view the Government of Canada's response to the recommendations of an OP committee not as a legal decision

⁶ *F and Austria* "Communication No. 21/2014" (21 August 2015) online: United Nations Office of the High Commissioner for Human Rights Jurisprudence < <http://juris.ohchr.org/Search/Details/2087> >

⁷ Committee on the Rights of Persons with Disabilities, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention, Report of the Committee* (6 October 2016), online: United Nations Office of the High Commissioner for Human Rights Treaty Body Internet < http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f15%2fR.2%2fRev.1&Lang=en>

⁸ *Ibid.*

⁹ See, for example, *Ahani v. Canada (Attorney General)*, 2002 CanLII 23589 (ON CA) in which the appellant was a Convention refugee who the Ministry of Citizenship and Immigration determined was also a terrorist and therefore a danger to Canada. Canada ordered Ahani to be deported and he exhausted all avenues of appeal before filing a communication with the UN Human Rights Committee under the Optional Protocol to the *International Covenant on Civil and Political Rights*. The Committee made an interim measures request asking Canada to stay the deportation order while the Committee conducted its investigation. The Attorney General for Canada opposed the stay. The Court stated that, "The interim measures request is not binding ... To give effect to Ahani's position ... would convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result." Leave to appeal to the Supreme Court of Canada was refused.

See also *Dadar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 382 (CanLII) in which the applicant was ordered deported by Canada and initiated a communication, this time with UN Commission Against Torture (UNCAT). UNCAT found that the applicant could reasonably face torture and recommended Canada not deport him. Despite this recommendation, Canada confirmed its intention to deport the applicant. The Federal Court cited *Ahani* and commented that, "as in *Ahani*, this case demonstrates the proper role of the executive and the proper role of the judiciary. It is not for the judiciary to second-guess Canada's decision not to adopt the UNCAT decision. Rather, it is a matter for a "court of public or international opinion, not for a court of law".

which is enforceable or reviewable by a Canadian court, but rather as a political or policy decision by the Government of Canada, which is not subject to judicial oversight. As a result, Canadian courts generally will not require the Government of Canada to comply with UN Committee recommendations.

It is, therefore, important that the Government of Canada not only accede to the OP, but also commit to participating in the Committee's procedures and following through on the Committee's recommendations. Specifically, the Government of Canada must work co-operatively with the UN Committee, including, for example, permitting the Committee to visit Canada to conduct inquiries, and providing the Committee with all relevant information. The Government of Canada should publicize and implement to the greatest extent possible any recommendations, comments and suggestions made by the UN Committee. Further, the Government of Canada should ensure that it takes legal positions that do not undermine the role and recommendations of the UN Committee. These commitments will help to ensure that Canada's accession to the Optional Protocol plays a role in advancing the inclusion, participation and equality of persons with disabilities.