BRINGING POVERTY INTO THE SCOPE

OF HUMAN RIGHTS PROTECTIONS IN CANADA

Submissions of the Charter Committee on Poverty Issues

to the Canadian Human Rights Act Review Panel

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A. CCPI's Background and Priority Concerns

i) What is CCPI?

CCPI is a national coalition founded in 1989 to bring together low_income activists and poverty law advocates for the purpose of assisting poor people in Canada to secure and assert their rights under international human rights law, the Canadian Charter of Rights and Freedoms (the "Charter"), human rights legislation and other laws in Canada. The activities of CCPI fall into three main categories:

i) Initiating litigation and intervening in cases before courts and tribunals to promote and protect the basic human rights of poor people and to ensure that poverty issues are more fully understood and considered by Canadian courts and tribunals;

ii) Appearing before and making submissions to United Nations Human Rights bodies to provide information related to compliance with international human rights law and problems of poverty in Canada; and

iii) Engaging in research into how Canadian or international law can be used by poor people to address their needs and to promote compliance with international and domestic human rights guarantees.

CCPI's litigation before Canadian courts and tribunals is always directed by a project team of low income individuals and legal advocates with particular expertise in the area. CCPI has intervened in a number of important cases at the Supreme Court of Canada and at lower courts and tribunals, raising issues of concern to people living in poverty, including *Lovelace et al. v. Ontario et al.*[1], *J.G. v. Minister of Health And Community Services New Brunswick) et al*,[2] *Baker v. Minister of Citizenship and Immigration*[3], *Kearney et al. v. Bramalea Ltd et al.*[4], *Eldridge* v. *British Columbia (Attorney General)*,[5]

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[1](S.C.C. File No. Court File No.26165) (heard December 7, 1999).

[2] [1999] S.C.J. No. 47.

[3] [1999] S.C.J. No. 39.

[4]*Kearney et al. v. Bramalea Ltd et al* (1998), 34 CHRR D/1 (Ont. Bd. Inq.). (Currently under appeal to Ontario Court of Justice, Divisional Court).

[5][1997] 3 S.C.R. 624.

R. v. Prosper[6], *Roberts v. Ontario*[7], *Symes v. Canada*,[8] *Thibaudeau v. Canada*,[9] and *Walker v. Prince Edward Island*.[10].

CCPI has also become increasingly active in the area of international human rights. In 1993 CCPI petitioned the U.N. Committee on Economic, Social and Cultural Rights (CESCR) to adopt a new procedure to permit non_governmental organizations to make oral submissions to the Committee in the context of its review of state compliance with the *International Covenant on Economic,Social and Cultural Rights (ICESCR)*. The Committee adopted the proposed procedure and in May 1993 CCPI joined with the National Anti_Poverty Organization to make oral submissions with respect to the Committee's review of Canada's second periodic report under the Covenant. Since then, CCPI has made two submissions before the CESCR and recently made submissions to the United Nations Human Rights Committee on the occasion of the Fourth Periodic Review of Canada's compliance with the International Covenant on Civil and Political Rights (ICCPR)

ii)Priority Concerns in the Review of the CHRA

We have decided to focus these submissions on the inclusion of social and economic rights in the CHRA. There are, of course, many other issues of importance to poor people. Poor people are usually equality seekers on multiple grounds and any discrimination leads in the direction of poverty. Thus, poor people have an interest in all aspects of the CHRA. The issue of social and economic rights, however, is critical, in our view, to all equality protections. To date, there has only been one background paper prepared on this issue, for Status of Women Canada.[11] The majority of experts and equality seeking groups have voiced support the inclusion of social and economic rights and the recommendations in that paper. We have therefore decided to use these submissions as an opportunity to flesh out some of the proposals and clarify what considerations should guide the panel in assessing alternatives to these proposals. Our particular emphasis will be on the importance of including a framework for adjudicating social and economic rights rather than limiting them to some kind of weaker review mechanism and on addressing concerns about the appropriate role of courts and tribunals in adjudicating social and economic rights.

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[6] [1994] 3 S.C.R. 236.

[7](1994), 117 D.L.R. (4th).

[8][1993] 4 S.C.R. 695.

[9][1995] 2 S.C.R. 627.

[10][1995] 2 S.C.R. 407.

[11] M. Jackman and B. Porter "Women's Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act" in Status of Women Canada, *Women and the Canadian Human Rights Act: a collection of policy research reports* (Ottawa: Status of Women Canada, 1999).

In a more summary fashion, however, we wish to address two other issues which directly relate to poverty issues - the inclusion of "social condition" as a ground of discrimination and the problem of the "screening function" of the Commission.

B. Social Condition as a Ground of Discrimination

CCPI supports the inclusion of the ground "social condition" in the CHRA, and recommends that it be defined in the statute as referring to "social and economic disadvantage or characteristics associated with social and economic disadvantage." As noted in the papers of Shelagh Day and Gwen Brodsky[12], Wayne Mackay et al.[13] and Martha Jackman and Bruce Porter[14] social condition ought to be included in the Act in conjunction with the recognition of a positive obligation on governments to ameliorate the condition of poverty itself through the recognition of social and economic rights and the right to substantive equality.

It is important to be clear that the inclusion of social condition in the CHRA is distinct from the inclusion of social and economic rights. There is, however, some overlap Discrimination on the basis of poverty is not simply an attack on the dignity and equal citizenship of people living in poverty. It is itself a major cause of poverty. There is considerable overlap between prejudicial and stereotypical attitudes toward poor people and failures by governments to adequately address their needs.

Governance based on stereotype and hostility toward the poor is an emerging pattern of systemic discrimination and constitutes one of the more serious threats to modern democracies in affluent countries. Program cuts which exacerbate poverty are frequently made in response to polling data showing the public's discriminatory attitudes toward the poor, and political campaigns have become opportunities for the perpetuation of prejudice and stereotype. As a confidential poll done for the Federal Government to assist in designing a child poverty program stated:

> Most secure participants see children as deserving and their parents as less so (possibly unwitting agents of their children's misfortune) ... Welfare recipients are

[12] S Day and G Brodsky, *Improving Canada's Human Rights Machinery: A Report Prepared for Canadian Human Rights Act Review Panel* (October, 1999).

[13] Wayne Mackay, Tina Piper and Natasha Kim, *Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act* (Submitted to the Canadian Human Rights Act Review Panel, December, 1999) [hereinafter *Mackay*].

[14] Jackman & Porter, supra note 11.

> seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of SARs from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.[15]

The prejudices and stereotypes which pose the greatest threat to democracies are those which are widely enough held that they make discriminatory government actions popular. A critical issue in Canada is the nature of governments' responsibilities in addressing public opinion of this sort. Is it legitimate for governments to mold social policy to these widely held views or is there a democratic responsibility to resist them and promote non-discriminatory attitudes?

Human rights protections play a vital role in delineating government responsibilities. It is clear, at least from a human rights standpoint, that in Canada a government has a responsibility to combat racist attitutes rather than adopting policies to conform with any rise in public prejudice. It is not so clear in the case of the stereotypes related to the poor. Government leaders in Ontario and elsewhere have been quite open about describing their decision to structure political campaigns around "surprising" polling data that emerged in the early 1990's showing an unprecedented public hostility to single mothers, social assistance recipients, unemployed youth and others living in poverty.

In the context of receiving the polling data described above, the federal government negotiated with the provinces to develop the National Child Benefit Supplement, heralded as a joint initiative to address child poverty. By agreement with the provinces, the benefit is denied to families in receipt of social assistance, though two provinces, New Brunswick and Newfoundland have refused to follow the agreement and do not claw back the National Child Benefit from social assistance recipients. This discriminatory exclusion of social assistance recipients from the benefit of a critical child poverty initiative has been criticized by both the U.N. Committee on Economic, Social and Cultural Rights and the U.N. Human Rights Committee as discriminatory under international human rights law.[16](*The National Child Benefit:*

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[15]Ekos Research Associates Inc., *Memorandum Concerning Child Poverty Focus Groups: Revised Conclusions* (February 4, 1997). Secured through a Freedom of Information Request by Jean Swanson.

[16]U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations (Canada)*, 10 December 1998, E/C.12/1/Add.31 (1998) [hereinafter, CESCR Concluding Observations, 1998], at paragraph 22; U.N. Human Rights Committee, *Concluding Observations (Canada)*, 7 April 1999, CCPR/C/79/Add.105 (1999), [Hereinafter "Concluding Observations, HRC, 1999") at para. 18.

Building a Better Future for Canadian Children, Federal-Provincial-Territorial Meeting of Ministers Responsible for Social Services, *The National Child Benefit--Building a Better Future for Canadian* Children, Document: 830-594/013, September 1997). Yet with the absence of social condition in the CHRA or a broader public recognition of this type of discrimination in domestic law, such discrimination is likely to go unrecognized and unchallenged within Canada itself.

Systemic patterns of discrimination because of social condition in the private sector also exacerbate poverty. Here they are immune from Charter scrutiny and adequate human rights protections for the poor are therefore of even more critical importance. The issue of income related discrimination in housing and access to mortgages is a current example. Discrimination because of receipt of public assistance, source of income or social condition is prohibited in housing in most provinces. Recent rulings in Quebec[17] and Ontario[18] have found that refusing rental housing because of "minimum income criteria" constitutes unlawful discrimination against social assistance recipients and most other protected groups. Yet, as the U.N. Committee on Economic, Social and Cultural Rights noted in its 1993 Concluding Observations on Canada:

> Although prohibited by law in many of Canada's provinces, these forms of discrimination are apparently common. A more concerted effort to eliminate such practices would therefore seem to be in order.[19]

Professor Michael Ornstein of the Institute for Social Research at York University analysed census data for the Centre for Equality Rights in Accommodation and found that when low

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Under the agreement between the Federal Government and the provinces respecting the new National Child Benefit Supplement:

> 1) *The federal government will increase its benefits for low-income families with children*, enabling it to assume more financial responsibility for providing basic income support for children.
>
> 2) *Corresponding with the increased federal benefit, provinces and territories will decrease social assistance payments for families with children*, while ensuring these families receive at least the same level of overall income support from governments.
>
> 3) *Provinces and territories will reinvest these newly-available funds* in complementary programs targeted at improving work incentives, benefits and services for low-income families with children

[17] *L Leonard Whittom c. La Commission des Droits de la Personne du Quebec et Johanne Drouin*, Cour D'Appel, Province de Quebec Greffe de Montreal No. 5000-09-000153-940, Date of Decision, May 28, 1997, appealed from *Quebec (Comm. des droits de la personne)* v. *Whittom* (1993), C.H.R.R. D/349. [Hereinafter *Whittom*.]
[18] *Kearney et al.* v. *Bramalea Ltd. et al., supra,* note 4.
[19] *Concluding Observations, CESCR, 1998*, *supra* note 16, par.107.

income single parents in Toronto rent apartments (ie. moved within the year prior to the census) more than half had to pay rent that corresponds to the most expensive third of the market.[20] The difference between getting access to the more affordable units on the market and having to resort to the most expensive, overpriced units can amount to several hundred dollars a month in what is left over to feed and clothe one's children. The cost of discrimination because of social condition is thus a significant contributor to poverty among low income renters.

Although there are presently no studies on the effect of similar income restrictions used by banks and financial institutions, we know anecdotally and can derive from census data that single mothers who own homes are almost universally disqualified for conventional mortgages on the basis of the "gross debt service to income ratio" (ie. they must pay no more than 32% of income toward mortgage costs). There is no published evidence that single mothers in this category are more likely to default on their mortgages. Many pay in excess of 50% of income toward rent or housing costs and do not default. Studies show little or no correlation between mortgage default and income level at the commencement of mortgages[21]. The common stereotype, however, is that poor people are bad "money managers". Those most in need of affordable housing are either denied access to the most affordable housing options (which in some cases may be ownership) or are forced to pay private lenders significantly higher interest rates, thus increasing the cost of housing.

Systemic issues of credit-worthiness assessment, deposit requirements, co-signor requirements and the like loom large in the denial of services, housing and facilities to poor people. By and large, these practices are based on what turn out to be false stereotypes about poor people. The stereotypes are so deeply ingrained in public attitudes, however, that they are only disproved when poor people have the opportunity, through human rights claims, to put them to the test of rigorous analysis. It was only after low income women were able to get to a human rights tribunal in Ontario to challenge landlords' practice of assessing default risk on the basis of minimum income criteria that evidence emerged from landlords' own surveys showing no correlation between income level at the commencement of tenancy and risk of default.[22] Prior to

[20] "Human Rights, Access and Equity: CERA's Recommendations for the Homelessness Action Task Force" in *Taking Responsibility for Homelessness: An Action Plan for Toronto. Report of the Mayor's Homelessness Action Task Force. Background Papers*. *Vol. 1*. (Toronto, 1998).
[21] R. Querica and M. Stefman, "Residential Mortgage Default: A Review of the Literature", *Journal of Housing Research*, Vol. 3, Issue 2, 1993, 345-79 at 350.
[22] For a description of the results of these surveys, see Michael Ornstein, *Access to Rental Accommodation Restricted by Income Criteria The Effect of Permitting the Use of "Income Information in Tenant*

that, it had been broadly assumed that low income renters pose a greater risk of default. Landlords, of course, were the only ones with the evidence to disprove it, and the evidence only came to light through the adjudication process.
CCPI and CERA have filed complaints with the Canadian Human Rights Commission on behalf of single mothers denied mortgages on the basis of being in receipt of public assistance and/or minimum income level requirements. The complaints have been dismissed because social condition is not a prohibited ground of discrimination under the CHRA. These practices will likely not be examined until the CHRA is amended.

Creditworthiness issues also arise for poor people trying to access telephone services. According to its published "Terms of Service," Bell Canada cannot require deposits from an applicant or customer at any time unless: (a) the applicant or customer has no credit history with Bell Canada and will not provide satisfactory credit information; (b) has an unsatisfactory credit rating with Bell Canada due to payment practices in the previous two years regarding Bell Canada's services; or (c) clearly represents an abnormal risk of loss.
These terms were negotiated with CRTC. Social assistance recipients are regularly denied service by Bell because they are considered, "an abnormal risk of loss" solely on the basis that they are not employed. Most, of course, are unable to pay the required deposits. In these cases Bell is supposed to provide telephone service for local calling only, but this is not well known and at any rate, is not what most people want and need when family or work is frequently out of the local calling area.

At least one complaint has been filed with the Canadian Human Rights Commission challenging Bell Canada's decision to categorize a single mother, on social assistance, with a spotless credit history as "an abnormal risk of loss" solely because she is not employed. The complaint was dismissed by the Canadian Human Rights Commission because "social condition or receipt of public assistance is not a prohibited ground of discrimination under the CHRA". Does Bell Canada have reliable studies to showing that single mothers relying on social assistance represent an abnormal risk of loss, even where they have no negative payment history and no negative cretit rating? We seriously doubt it. But we will not know until we are permitted to proceed with complaints through an amended CHRA

The protection from discrimination because of social condition under the CHRA will be limited, as are other protections, by the "bfq" (bona fide qualification) defence. Respondents have ample opportunity under the Act to defend credit worthiness assessments and deposit requirements where they are based on reliable data and where they consititute a reasonable business practice. We would not, however, agree that such practices are warranted wherever **any** correlation between poverty and creditworthiness is proven. The question ought to be the extent of the correlation, the social cost and personal implications for security and well being of being denied a service and the cost to the respondent of accommodating the needs of poor people by either relinquishing the policy and pursuing default through normal channels or by coming up with alternative methods for assessing credit risk. These issues will appropriately be considered under the bfq and undue hardship analysis. They do not warrant limiting the definition or application of the term social condition so as to avoid putting such practices to the test of human rights review.

Systemic issues related to social condition invariably involve adverse effect discrimination where malicious intent or prejudice may be non-existent or simply well concealed. Our experience under provincial human rights legislation and under the Charter has been that human rights commissions, tribunals and courts have tended to impose a narrower approach to discrimination on the ground of "receipt of public assistance", source of income or social condition than to other grounds. The Ontario Human Rights Commission, for example, currently refuses to challenge the common practice among landlords who insist that people on social assistance provide a co-signor or guarantor for rent, though they would challenge a similar policy if it were imposed on the basis of race or sex. There is no statutory justification for this distinction between prohibited forms of differential treatment under the Ontario Code. Human rights officers, legal staff and commissioners simply find the practice more reasonable when applied to social assistance recipients than to other protected groups, even though the effects on this group may in fact be more severe. The practice leaves many low income households homeless because they simply have no access to a "qualified" co-signor.

As the Supreme Court has recently noted, it is difficult to sustain any formal distinction between adverse effect discrimination and direct discrimination.[23] This is particularly the case in dealing with discrimination because of social condition. It is difficult to categorize a minimum income rule which disqualifies 100% of applicants who rely on social assistance as direct discrimination

[23] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* (S.C.C File No. 26274) (1999).

or adverse effect discrimination? A Quebec tribunal found that such criteria constitute direct discrimination on the ground of social condition and adverse effect discrimination against single mothers.[24] An Ontario tribunal found that income criteria constitute adverse effect discrimination but "the use of income criteria has an impact which is so pervasive that it is proper to declare that the rule is contrary to the *Code*, and strike it in its general application." Since it had opted for a remedy that is characteristic of a finding of direct discrimination, it decided it did not need to consider the question of whether the practice also constitutes direct discrimination.[25] It would be equally inappropriate if a banker who said "We do not provide mortgages to social assistance recipients" were captured by a prohibition of discrimination because of social condition under the CHRA but one who said: "We have a gross debt service to income rule and an employment requirement" (which disqualifies social assistance recipients) was somehow exempt.

During the Senate hearings into Bill S-ll, the Department of Justice raised concerns about the application of "social condition" to practices such as credit checks and deposit requirements, as well as bus fares and legislative distinctions based on employment (such as unemployment insurance) or income (such as income tax cut-offs).[26] As noted above, some of the issues mentioned are much in need of human rights review. Others such as a challenge to income cut-offs in the Income Tax Act or to work requirements for Employment Insurance would be unlikely to succeed, in light of the approach that has been taken to other grounds. There are, however, issues linked to these legislative distinctions which ought to be open to human rights review. The denial of maternity leave entitlement to young mothers in receipt of social assistance participating in workfare or changes to eligibility requirements which, as noted by the U.N. Committee on Economic, Social and Cultural Rights, have adverse consequences for young women with children and other equality seeking groups may well be in need of scrutiny.[27]

CCPI urges the panel to resist any temptation to adopt a narrow definition of "social condition" which would preclude the proper consideration and adjudication of systemic social condition claims. The definition should not incorporate, through the back door as it were, the distinction between adverse effect discrimination and invidious, intentional discrimination which has been rejected by the Supreme Court with respect to other grounds nor limit, in any way, the approach to substantive equality that has been developed with respect to other grounds.

[24] *Whittom, supra*, note 17.
[25] *Kearney et al. v. Bramalea Ltd. et. al*, *supra* note 4.
[26] *Mackay*, *supra* note 13 at 101.

C. The Screening Function of the Commission

CCPI urges that the screening function of the Human Rights Commission be removed from the Act and that claimants have access to the tribunal and to effective legal representation. We believe that any dismissal of a complaint for being outside the jurisdiction of the tribunal or trivial and vexatious can be dealt with by way of a preliminary proceeding, either an oral hearing before the Tribunal or through written submissions.

The screening function of the Commission has often been defended on the grounds that it favours poor people who, if guaranteed access to adjudication, would be unable to proceed to the tribunal because they would lack the resources for a lawyer. The provision of Commission resources in order to take cases forward to tribunals is thus considered a particular benefit to low income complainants, ensuring that the most important complaints proceed to adjudication, not simply the complaints of more advantaged individuals who have the resources to litigate their human rights claims.

This argument neglects to appreciate the extent to which poor people are disadvantaged by undefined, bureaucratic "discretion" and the inaccessibility of Commission processes to unrepresented complainants. Critical issues of discrimination against poor people have rarely been brought forward by Human Rights Commissions in Canada on their own initiative. It has only been through poor people getting direct access to a tribunal after complaints have been **dismissed** by the Human Rights Commission in Quebec that the discriminatory nature of workfare programs was successfully challenged in *Lambert* v. *Quebec (Ministere du tourisme) (No. 3)*[28], or that discrimination by banks against welfare recipients was successfully challenged in *D'Aoust c. Vallieres.*[29] Income discrimination in housing was entirely ignored in Ontario despite explicit protections in Ontario's Code since 1981 prohibiting discrimination on the basis of receipt of public assistance. Receipt of public assistance was added to the Ontario Code in 1981 yet it was over five years before a social assistance recipient managed to challenge such

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[27] *Concluding Observations, CESCR, 1998*, *supra* note 16 at para. 20.

[28] *Lambert c. Québec (Ministère du Tourisme du Québec et ministère de la Main-d'oeuvre, de la Sécurité du revenu et de la Formation professionnelle*) (1997) R.J.Q. 726 29 C.H.R.R. D/246 (Que. Trib.).

[29] 19 C.H.R.R. D/322.

discrimination before a tribunal. She had been represented by a legal clinic lawyer throughout the complaints process.[30]

Far from benefitting from the current screening function of the Commission, poor people are the most adversely affected. The Commission's exercise of discretion tends to operate in favour of cases which have more public attention and issues which have greater resonance for Commissioners, who likely do not live in poverty themselves. Many cases are dismissed simply because damages for poor people do not amount to much compared to higher income complainants denied a job and therefore entitled to significant monetary awards. Poverty issues are often seen as more difficult to win at a tribunal and this concern is used to justify a thorough scrutiny of low income complainants to ensure that they would not appear to be "unworthy" at a tribunal. If they have been late with a bill payment or had to lie about their income to get an apartment they are not considered worthy of access to adjudication of their human rights claims.

From the standpoint of poor people, the Commission's discretion to dismiss their complaint without a hearing is very much like the discretionary power of bureaucrats or commissioners in other areas of their lives to make judgments about them and to deny them benefits. The experience of the "judgment" of the human rights officer is simply a painful repetition of the systemic indignities and discrimination which they face on a daily basis in the welfare system or in their workplaces. We have encountered numerous examples at the provincial level in which investigations of human rights complaints filed by social assistance recipients have been transformed into investigations into whether they are fraudulently receiving welfare.

The "double" role of the investigating officer is also a negative experience for poor people, for whom it repeats the pattern of social workers, Children's Aid Society workers and others who are their primary source of information, advice and support but who are at the same time willing to use any information they receive "against them".

Poor peoples' need for effective legal representation is no excuse for denying them or anyone else access to adjudication. The fact that a Commission lawyer is provided at a hearing is little consolation when there are so few complaints which get to a hearing. Those low income

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[30] *Willis v. David Anthony Phillips* (1987) 8 C.H.R.R. D/3546.

complainants who do get to a hearing frequently rely on their own lawyer or representative and those representatives usually take the lead on the litigation of systemic cases.[31]

Commission pre-dispute mediation procedures or other alternatives to adjudication are also unfavourable to poor people unless independent representation is provided. We believe these processes are likely to be more fair, more effective and more economical if shifted to the tribunal, and conducted within a framework of complainants and respondents having a right to a hearing if mediation fails.

The Ontario Human Rights Commission has been very vocal about the favourable responses from complainants, including unrepresented complainants, participating in its new mediation program and has advocated that the Review Panel recommend the adoption of these procedures for the federal jurisdiction. While we do not doubt the importance of more effective and timely mediation procedures in Ontario or elsewhere, we find that such procedures, where they are conducted by the Commission, remain tainted by the problems of the screening function.

The Ontario Commission's claims are based on a survey with a 20% response rate. There was no analysis of whether the small number who agreed to fill out the survey might have been participants who were more satisfied with the process, higher income, higher education level, or benefitted from more favourable outcomes.[32] A survey with a 20% response rate without any analysis of how the sample selection affects the results is virtually meaningless.

An indication of how well low income complainants are faring in the new mediation process is provided by the Human Rights Commission's Annual Reports. In 1998-99 it reported only 5 settlements of complaints based on receipt of public assistance, apparently with no monetary damages. 27 were dismissed, not dealt with or withdrawn, while 5 were referred to a board of inquiry[33] In 1997-98 the Commission reported 7 mediated settlements of complaints based on receipt of public assistance, 19 were dismissed, not pursued or withdrawn and 5 were referred to

[31] See, for example, *Kearney et al. v. Bramalea Ltd. et al, supra*, note 4, in which the complainants' representatives led most of the evidence and were supported by 7 coalitions of 23 intervener organizations.

[32] *Ontario Human Rights Commission, Mediation Services Participation Satisfaction Report For the Period May 8, 1998 to September 22, 1998*. (Ontario Human Rights Commission, Queen's Printer for Ontario, 1999) ISBN 0-7778-8905-6 p. 20 and endnote 2. The sample is found to be representative of ground cited and region only. There was either no consideration of whether the sample was representative in terms of the issues under consideration, such as represented or unrepresented complainants, outcome of mediation, amount of settlement, income and education level, etc.

[33] *Ontario Human Rights Commission, Annual Report, 1998-99*. ISSN 0702-0538 6/99 2M at pp. 76-77.

boards of inquiry.[34] Again, no monetary damages are reported for mediated complaints on the basis of receipt of public assistance.

Access to effective representation for human rights claimants is essential, of course, if a system of direct access to the tribunal is implemented. But this is not a new cost. Complainants need representation under the current system and the inefficiencies of the screening provisions make the provision of representation more costly or in its denial. Many legal clinics and poverty law practitioners refuse to represent human rights complainants before the Commission because of the amount of time it takes and the remote chances of reaching a hearing. We would hope that low income claimants will be better served by the legal community if they have access to adjudication in a more timely and predictable system. The Government should be informed that the cost of providing legal representation is not a cost associated with removing the screening function but rather a cost of making the system fair and of making it work more economically and effectively.

In the case of poverty issues and other specialized equality issues, centres of expertise for the provision of advice and representation are frequently the most effective way to provide representation, particularly in the development of strategic initiatives addressing systemic issues. Advocacy centres can have a broader accountability to low income communities and a specialized expertise in poverty issues. This would need to be supplemented by the availability of some kind of legal aid certificate for a local lawyer where necessary, but it is important that local lawyers with no special expertise in human rights also have access to consultation with the specialized centre.

D. Including Social and Economic Rights in the *CHRA*

1. Refining the Scope of Human Rights Protections in Canada

In CCPI's view the most important issue before the panel in its review of the CHRA is the inclusion of social and economic rights. Social and economic rights, of course, are of critical importance to low income people in Canada, for whom poverty and inequality are synonyms. They are also important to all others living in Canada who demand that national human rights

[34] *Ontario Human Rights Commission, Annual Report, 1997-98.* ISSN 0702-0538 6/98 3M at pp. 62-63.

legislation entrench more than rules of "fairness" - that it additionally articulate human rights as universal entitlements linked with dignity, equality and security, engaging the most pressing and relevant issues of inequality and disadvantage in the social and economic domain.

Including social and economic rights is of paramount importance if the CHRA is to become relevant and meaningful as a primary statement of the human rights which are valued and protected in Canada. Their inclusion would permit the Human Rights Commission and the Tribunal to address the issues which the public sees as the most critical human rights issues in Canada - systemic issues of social and economic exclusion and disadvantage such as Aboriginal unemployment and poverty, child poverty, hunger and homelessness amidst affluence - and which have increasingly been identified at the international level by United Nations human rights treaty monitoring bodies in their reviews of Canada.[35] It is of vital importance to the future of human rights in Canada that we renew the fundamental link between our domestic human rights protections, the international human rights movement which has always been their reference point and the values and principles that motivate the modern human rights movement.

Adding social and economic rights to the CHRA is not so much an extension of the Act's breadth of coverage as a renewal of its "scope" in the traditional sense of the term, adjusting its aim and orientation so as to more effectively bring into focus the fundamental issues of inequality and disadvantage in Canada. The CHRA is supposed to address social and historical disadvantage in a broad, remedial fashion, free of technical and narrow limitations. Yet the exclusion of social and
economic rights from the Act has meant that Commissioners, adjudicators and rights claimants have assumed that the most important, systemic issues of social and historical disadvantage are somehow beyond its purview. The exclusion of systemic issues of poverty, hunger and homelessness is discordant with Canadians' sense of what universal human rights ought to be about. A narrow spotlight on discrimination linked with personal characteristics and group identity, severed from a broader focus on universal entitlements to meaningful social and economic participation, dignity and security, risks undermining public confidence in and reliance on domestic human rights legislation. The inclusion of social and economic rights is a prerequisite to human rights legislation that embodies universal values and principles behind social inclusion and democratic participation.

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[35]For an examination of the emerging consensus among human rights treaty monitoring bodies about human rights issues in Canada, see C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional Forum* 97.

Poverty is perhaps the most obvious marker of social and historical disadvantage in society. It is thus imperative that an Act focusing on remedying social and historical disadvantage address the amelioration of poverty. As the Chief Commissioner of the Canadian Human Rights Commission has remarked on numerous occasions, we need to include social and economic rights within the CHRA in order to adequately address what the Act is supposed to be about - disadvantage and inequality.

> Experience suggests that it is largely those who are most vulnerable in our society by virtue of the various prohibited grounds of discrimination -- for example, women, Aboriginal people or people with disabilities __ who are also more likely to be poor. In the case of women, there is in fact a direct link to pay equity, since many of the working poor are women employed in low_wage, undervalued jobs. But even if that were not the case, it is difficult to argue that poverty is not a human rights issue, given the devastating impact it has on people's lives ... The international community has recognized for some time that human rights are indivisible, and that economic and social rights cannot be separated from political, legal or equality rights. It is now time to recognize poverty as a human rights issue here at home as well.[36]

It is of fundamental importance, of course, that women, Aboriginal people, people with disabilities, racial minorities, gays and lesbians, social assistance recipients and other equality seeking groups enjoy effective protections from and remedies for discriminatory treatment of the sort that has traditionally been addressed through complaints to the Canadian Human Rights Commission. It is equally important, however, that the broader contours and historical evolution of inequality and disadvantage also be subject to human rights review and remedy. Adding social and economic rights brings the broader picture into play.

The social and economic plight of Aboriginal people, both on and off reserve, is an example of a human rights issue which most Canadians, as well as domestic experts and international observers, would agree is a critical human rights issue in Canada. In its recent review of Canada's compliance with the *ICESCR*, the U.N. Committee on Economic, Social and Cultural Rights expressed concern about the "gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights" and condemned "the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth, in the Aboriginal communities." Noting that "[t]here has been little or no progress

[36]*Canadian Human Rights Commission, Annual Report 1997* (Ottawa: Canadian Human Rights Commission, 1998) at 2.

in the alleviation of social and economic deprivation among Aboriginal people", the Committee urged Canadian governments "to take concrete and urgent steps" to remedy the disadvantaged conditions of Aboriginal communities.[37] The Government of Canada has admitted that the social and economic destruction of Aboriginal communities is not only a pressing social and political issue but, more fundamentally, a *human rights* issue. In its recent *Concluding Observations*, following the Fourth Periodic Review of Canada under the *International Covenant on Civil and Political Rights*, (ICCPR) the United Nations Human Rights Committee noted the Canadian government's acknowledgment that the impoverished situation of Aboriginal peoples constitutes "the most pressing human rights issue" in Canada.[38]

It makes no sense for the Federal Government to describe the social and economic deprivation of Aboriginal people as the most pressing human rights issue in Canada at the same time as excluding issues of poverty and economic destitution from the ambit of federal human rights legislation. The focus on differential or unfair treatment that has characterized human rights and Charter equality jurisprudence in Canada has meant that the issue of the adequacy of remedial responses to Aboriginal poverty, poverty among women, particularly single mothers, homelessness - issues which have been the focus not only of social and economic rights review but also of discrimination analysis at the international level under the *International Covenant on Civil and Political Rights* - has been almost completely ignored.[39] We are not aware of a single human rights case in a generation of human rights challenges under the CHRA that has identified inaction with respect to poverty and housing conditions in Aboriginal communities as a violation of the right to equality and demanded remedial action on that basis. An issue of primary concern in international human rights review has been immune from domestic human rights review.

If our human rights legislation excludes from its scope what are commonly perceived as the primary issues of human rights facing Canada, that legislation will not be viewed by either the public or by politicians as pre-eminent, quasi-constitutional legislation incorporating the fundamental values of our society. Rather, domestic human rights will be institutionalized as regulatory administrative law dealing with a narrow band of "fair treatment" questions, on the margins of modern human rights and equality discourse and increasingly irrelevant to the human

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[37] *Concluding Observations, CESCR, 1998*, *supra* note 16 at paras.17 and 43.
[38] *Concluding Observations, HRC 1999*, *supra* note 16 at para. 8.
[39] See C. Scott, *supra* note 35 at 102-105.

rights movement in Canada and internationally. The inclusion of social and economic rights is essential to the revitalization and "mainstreaming" of human rights protections in Canada.

2. The "Two Stream" Model for the Adjudication of Social and Economic Rights Claims

Any incorporation of social and economic rights in human rights legislation should accord the same significance to social and economic rights as to the equality rights already protected. This means that social and economic rights must be adjudicable under the Act and, as well, be interdependent with equality rights. Social and economic rights are but one part of the family of human rights that, in modern times, have a common origin in the Universal Declaration of Human Rights. They are protected by a set of International Covenants all of which have been ratified by Canada.[40] The interests protected by different human rights are, under international human rights law, inherently interdependent[41]

The proposals advanced in a previous article[42] and endorsed by CCPI and other equality seeking groups have four main features:

i) a list of social and economic rights that is based largely on social and economic rights contained in international instruments ratified by Canada;

ii) a guarantee of the equal enjoyment of social and economic rights without discrimination, and

iii) an affirmation of the obligation of Parliament and the Government of Canada to take steps "to the maximum of available resources" to progressively realize social and economic rights;

iv) a process for the adjudication of systemic social rights claims addressing the government's obligation to take adequate or appropriate measures to realize social and economic rights.

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[40] For a summary of the protections of social and economic rights protected in instruments ratified by Canada, see Jackman & Porter, *supra*. note 13.

[41] See C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall Law Journal* 769; C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Pennsylvania Law Review* 1.

[42] Jackman & Porter, *supra*, note 13.

Under the proposals, there would be two complementary streams for the adjudication of social and economic rights. First, the equal enjoyment of social and economic rights would be included in the over-all protection from discrimination, allowing for complaints to proceed to the regular Human Rights Tribunal on the basis of a denial of equal enjoyment of social and economic rights on a prohibited ground of discrimination (including social condition). Second, there would be a procedure for the adjudication of complaints addressing the responsibility of the government to "progressively realize" social and economic rights over time.
Complaints alleging a failure to take adequate measures to progressively realize social and economic rights would be filed with a Social Rights Tribunal. The Social Rights Panel would have broad discretion to decide whether or not to hold a hearing into a complaint. Following the hearing of a complaint, the Social Rights Panel would issue a decision as to whether the complaint is justified. It would then either issue a remedial order, after further submissions from the complainant and government as to the content and timing of remedial measures, or issue a report order, requesting the government to report on the content and timing of remedial measures. A remedial order by the Social Rights Panel would not come into effect until the House of Commons had sat for at least eight weeks, during which time the order could be overridden by a simple majority vote of Parliament.

The list of the social and economic rights proposed and their wording is derived largely from relevant provisions of international instruments ratified by Canada, as is the wording of Parliament's positive obligations to progressively realize social and economic rights. As noted in the previous article, this is important in order for domestic human rights jurisprudence to benefit from the growing jurisprudence emerging from the United Nations human rights treaty monitoring system and to encourage domestic compliance with international human rights norms.

3. Why Would Human Rights Commission Review of Compliance with Social and Economic Rights Not Be Sufficient?

The most important feature of the proposals to include social and economic rights in the CHRA is that they are made adjudicable by the Human Rights Tribunal. For CCPI, this aspect of the proposals is essential.

The proposed amendments would also create a sub-committee of the Human Rights Commission with expertise in social and economic rights. We recognize the important role the Human Rights

Commission and a specialized sub-committee could play in promoting compliance with and public support for social and economic rights. The Commission's promotional role, however, must be situated, in CCPI's view, within the context of the statutory recognition of social and economic rights *as claimable, enforceable human rights*. We would oppose any proposal to include social and economic rights as subject only to review or promotion by the Human Rights Commission, barring adjudication by the tribunal or courts. Restricting these rights to review only would have the net effect of entrenching the denial rather than the affirmation of fundamental social and economic rights in Canada's national human rights legislation.

Amendments to the CHRA which provide only for Commission "review" of social and economic rights would give no real legitimacy to social and economic rights within Canadian democratic institutions. In the context of Canadian human rights and political culture, restricting social and economc rights to "review" simply denies them the status of rights. This would be comparable to the proposals adopted in the Charlottetown Constitutional Accord in which a proposed social charter became, at the end of the political "horse-trading" a "social and economic union" which defined internationally recognized social and economic rights as "policy objectives." - universal and accessible health care, adequate social services, primary and secondary education and reasonable access to post-secondary education - subject to a review process but not to. adjudication.[43] The reaction to this type of proposal in the Charlottetown Constitutional Accord was negative because it downgraded what are recognized as human rights in international law to the level of unenforceable "policy objectives" of governments, giving constitutional sanction to the rationale of lower courts in rejecting Charter and human rights claims linked with social and economic rights[44] The U.N. Committee on Economic, Social and Cultural Rights in its 1993 review noted that "in some court decisions, and in recent constitutional discussions, social and economic rights have been described as mere "policy objectives" of Governments rather than as fundamental human rights."[45] In the 1998 Concluding Observations the Committee reiterated its

[43]*A Framework to Improve the Social Union for Canadians: An agreement between the Government of canada and the Governments of the Provinces and Territories, February 4, 1999.* ss. 36.1-2. For a description of these proposals, see Mackay, *supra* note 15 at 47-49.

[44] See J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992); M. Jackman "When a social Charter Isn't: When a Tory Majority recommends a social covenant let the buyer beware" (1992) 70 *Constitutional Forum* 8; B. Porter, "Social Rights and the Question of a Social Charter," in P. Leduc Browne ed., *Finding Our Collective Voice, Options for a New Social Union* (Ottawa: Canadian Centre for Policy Alternatives, 1998) 59; B. Porter, "Social and Economic Union: The Social Charter that isn't" *The Canadian Forum*, October, 1992.

[45] Concluding Observations, CESCR 1993, supra note 16 par. 110.

concern “that economic and social rights should not be downgraded to "principles and objectives" in the ongoing discussions between the Federal Government and the provinces and territories regarding social programmes.”[46] The same would apply to their incorporation in human rights legislation.

The emphasis on legal remedies to violations of social and economic rights and appropriate adjudicative procedures is all important both for achieving compliance with international human rights law and for achieving domestic recognition of these rights, even at the political level. It makes no more sense to restrict social and economic rights to Commission review and promotion than it would to limit the human rights of any other constituency to this type of review. Poor people need hearings and adjudicative processes for the same reason that other equality seeking groups need them - because of their marginalization from political and governmental institutions and mainstream policy review procedures. Ombudsman review, Commission promotion, parliamentary committee review and the like are all components of what Craig Scott calls the “new political ethic” through which human rights norms must be better incorporated into political processes, but none of this will happen if we deprive social and economic rights of recognition as human rights, subject, as are other human rights, to adjudication.[47]

Frequently voiced concerns about the “institutional competence” of courts and tribunals to consider issues related to poverty and social and economic rights, which we will discuss further below, might lead the panel to support confining social and economic rights to Commission Review. From the standpoint of poor people, however, considerations of competency should lead in the opposite direction, toward ensuring access to adjudication. The difference is not in the particular expertise of those who sit on Commissions or on tribunals or in the qualifications of staff at the respective institutions. Rather, it is the difference between an “expert review” model of assessing compliance with human rights and a “petition” and “hearing” model which, for poor people, makes the critical difference in the competence of the respective institutions to assess compliance. Poor people look to human rights institutions not for social policy experts but rather for a human rights framework within which their human rights claims can be heard and assessed.

[46] Concluding Observations, 1998, *supra* note 16, para. 52.

[47] Scott, *supra* note 35.

CCPI's experience at the international level has been that when human rights of the poor are approached from the standpoint of human rights "expertise" rather than considered claimable rights, the result is a continued marginalization of poor people from a human rights movement which treats social and economic rights as second class rights. Similarly, at the domestic level, social and economic rights "rhetoric" can easily be incorporated into social policy discourse without any measurable effect either at the level of policy or on the extent of participation of poor people in the decision making process. Including social and economic rights in the CHRA should enhance poor peoples' ability to participate effectively in democratic decision-making through a rights claiming process, not further legitimate the power of experts to speak on their behalf without granting institutionalizing a procedure for hearing their claims.

The relative "competence" of courts and tribunals to grapple with poverty issues is largely derived, in our view, from their ability to hold hearings within a context of procedural fairness and natural justice. This is not to deny that poverty related claims will meet with resistance from tribunal members or courts or that there will be considerable problems of social or "class" bias confronting poor people taking social and economic rights claims forward under an amended CHRA But the opportunity to address poverty issues in a public forum, to have poor peoples' stories told, to have relevant evidence put on the record and submissions heard is all important to a constituency that has previously been excluded from the human rights movement in Canada.

It is largely human rights claims advanced by poor people and granted hearings by tribunals or courts which have put poverty issues on the public policy agenda, not reviews by appointed Human Rights Commissioners. Where Human Rights Commissions have identified and pursued poverty related issues in the past, it has usually been in response to tribunal rulings or to complaints filed by individuals and pursued by organizations with accountability to claimants.[48] This is not unlike the experience of other equality seeking groups, who have always relied on more than Human Rights Commission policy statements to get their issues on the public agenda. They take systemic claims forward to tribunals and courts, with or without the support of the Human Rights Commission. That is how human rights advocacy works in Canada. If anything,

[48] An example of this is found in challenges to minimum income criteria used by many landlords to deny housing to low income applicants and to discrimination by banks against social assistance recipients. The issue was never addressed by Human Rights Commissions in Ontario or Quebec until it was forced onto the agenda by complaints being filed and pursued by poor people themselves. See *Kearney et al.* v. *Bramalea Limited et al.*, *supra*, note 4 and *D'Aoust c. Vallieres*, *supra*, note 29.

rights claiming is even more important for poor people usually lack representation on Human Rights Commissions.

The experience of poor people within the human rights system to date, though admittedly limited, has been that poverty related claims fare badly at the initial screening stage of the Commission, where there is no hearing but are likely to succeed if they can get to a tribunal. As noted above, in Quebec, when there was a possibility of proceeding to the tribunal with complaints that were dismissed by the Human Rights Commission, important systemic claims related to poverty which had been rejected by the Commission were subsequently upheld by tribunals.[49] Similarly, claims of discrimination because of receipt of social assistance in provincial jurisdictions have shown a low rate of success in getting through Human Rights Commission "gatekeepers" but have fared well at tribunals.[50] The guarantee of a hearing and the protections of procedural fairness and natural justice, taken for granted by constituencies that have had their human rights protected as "first generation rights", are quite new and empowering to poor people who have been denied access to these processes. It is of fundamental importance that social and economic rights be included in the CHRA as claimable rights so as to benefit fully from the participatory rights associated with adjudication.

Canada's domestic human rights culture is largely an adjudicative culture. The public and the media pay attention to adjudicative decisions by courts or tribunals, not to Human Rights Commission's public policy statements or reviews. Similarly, governments and private respondents are used to disputing the views of the Human Rights Commission before tribunals. They are not in the habit of simply agreeing with what the Human Rights Commission dictates as necessary for compliance without any adjudication procedures. If social and economic rights were not subject to adjudication before the Human Rights Tribunal in some manner, the Commission's views could simply be disputed by the Government or private respondents and

[49]See *D'Aoust* and *Lambert*, *supra*, notes 28 and 29.

[50]Ontario and Saskatchewan are the only provinces which prohibit discrimination because of receipt of public assistance, though a number of others prohibit discrimination because of "source of income", "social origin" or "social condition". There have been no reported decisions on this ground in Saskatchewan. In Ontario, reported board decisions include *Willis v. David Anthony Phillips, supra* note 30, *McEwen v. Warden Building Management Ltd.* (1993) 26 C.H.R.R. D/129; *Kostanowicz v. Zarubin* (1994), 28 C.H.R.R. D/55; *Garbett v. Fisher* (1996) 25 C.H.R.R. D/378; *Kearney et al. v. Bramalea Ltd. et al.*(1998), *supra* note 4, all of which have been upheld.

that would be the end of the matter. In our view, it is unrealistic to think that simply putting social and economic rights in the mandate of the Human Rights Commission's public review and education mandate, without a complaints process, would have any significant effect on the behavior of either governments or private respondents.

4. The International Experience of Social and Economic Rights Adjudication

CCPI's experiences at the U.N, with the CESCR and other treaty monitoring bodies has solidified our view that a participatory, adjudicative process is far preferable to an "expert review" or "commission review" mechanism in considering issues of compliance with social and economic rights.

While poor people in Canada now place considerable weight on the protections of social and economic rights in international human rights law, this was not always the case. It is at the international level, of course, that the bifurcation of social and economic rights from civil and political rights first occurred. Cold war rhetoric and an aggressive campaign by the U.S. against the recognition of social and economic rights[51] led to the separation of what was originally a unified conception of rights in the *Universal Declaration of Human Rights* into two separate Covenants, the ICESCR and the ICCPR. While both Covenants affirm, in their preambles, the interdependence of civil, political, economic, social and cultural rights and while there is no explicit differentiation in either Covenant with respect to whether the rights they contain are amenable to adjudication, the two sets of rights were often distinguished on this basis in the first years of the Covenants.

An Optional Protocol establishing an individual complaints procedure for civil and political rights was adopted in 1966 along with the ICCPR and came into force with the Covenant in

[51] The U.S. opposition to social and economic rights continues to this day and is an important subtext to the interplay, in Canadian courts, between the American rights paradigm and an emerging international consensus in favour of giving equal recognition to social and economic rights. The U.S., of course, has not only refused to ratify the ICESCR but stubbornly remains one of only two countries to refuse to ratify the Convention on the Rights of the Child, which recognizes fundamental social and economic rights of children. For a review of the U.S. response to social and economic rights see Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. (1990) 365.

1976.[52] No similar provision was adopted for the ICESCR. While the Human Rights Committee was created under the ICCPR to receive and review periodic reports from State parties and also to receive and decide on complaints, the review of compliance with the ICESCR was assigned to a variety of ineffective expert "working groups" appointed by the Economic and Social Council in the early years of the Covenant. The result of this institutional differentiation between the two Covenants at the international level was that for many years the United Nations treaty monitoring system provided an evolving experience and jurisprudence on the adjudication of civil and political rights but provided nothing comparable for social and economic rights.

Even after the formation of the current CESCR in 1985, social and economic rights continued to be weighed down by an exclusive reliance on "expert review". State parties submitted periodic reports at intervals of five years or so, and the Committee of 18 experts then engaged in a dialogue with delegations of the State parties with respect to compliance with the Covenant. The dialogue was predictably stultified. Governments like Canada submitted lengthy documentation of all of their accomplishments and the Committee was hamstrung by the one sided nature of the information before it. The first periodic review of Canada by the new CESCR in 1988 had little impact domestically.

In 1993, with Canada's Second Periodic Report coming up for review, Canadian NGOs decided to challenge the "expert review" paradigm. Despite advice from international NGOs that we would never succeed, the Charter Committee on Poverty Issues petitioned the Committee for a new procedure through which it would hear oral submissions from domestic NGOs as part of the consideration of States' periodic reports. We explained, in our letter that in the Canadian context at least, a review for compliance with human rights with no participation from those whose rights are at stake had little meaning. The request, surprisingly enough, caught the imagination of the new Chairperson, Philip Alston, who used the request to provoke a review of Committee procedures. The Committee then asked the Government of Canada if it would object to the Committee trying a new procedure and, with the Canada's somewhat apprehensive agreement, the Committee decided to set aside time at the beginning of the session for NGO presentations relating to periodic reports.[53] As the Committee notes on its official "Fact Sheet",

[52] *International Covenant on Civil and Political Rights, (First) Optional Protocol*, Adopted Dec. 19, 1966 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

[53] Sarah Sharpe, a low income activist from St. John's and I appeared before the Committee on behalf of CCPI and the National Anti-Poverty Organization on May, 16 1993 for a twenty minute oral presentation, backed up with a written brief and a slide show! International NGOs lined the back of the Committee

this was the first time a human rights treaty monitoring body at the United Nations permitted domestic NGOs to appear in the context of periodic reviews of State party compliance.[54]

> The Committee has long recognized the important contribution which can be made by civil society in the provision of information concerning the status of the Covenant within States parties. The Committee was the first treaty body to provide non_governmental organizations (NGOs) with the opportunity to submit written statements and make oral submissions dealing with issues relating to the enjoyment or non_enjoyment of the rights contained in the Covenant in specific countries.
>
> On the first day of each session of the Committee, the afternoon meeting is set aside to give international and national NGOs and community_based organizations (CBOs) an opportunity to express their views about how the Covenant is or is not implemented by States parties. The Committee will receive oral testimony from NGOs as long as the information focuses specifically on the provisions of the Covenant, is of direct relevance to matters under consideration by the Committee, is reliable and is not abusive. In recent years, NGOs and CBOs have taken increased advantage of this procedure and provided the Committee with written, audio and video materials alleging the non_enjoyment of economic, social and cultural rights in States parties. [55]

The result of the CESCR's innovation in 1993 is that economic, social and culturalrights are now subject to what Mathew Craven calls an "unoffical petition procedure."[56] The submission and review of State party reports, previously the essence of the review process, is now only the beginning of a review procedure that is fundamentally adjudicative in nature. Ironically, the absence of an optional protocol for individual complaints of violations of social and economic rights has led the CESCR to lead the way in developing an adjudicative model for systemic social and economic rights claims.

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room to witness the spectacle and the cafes and cafeteria of the Palais des Nations in Geneva were abuzz with the news. See Sarah Sharpe Taking Canadian Poverty Issues to the U.N. NAPO News No. 40 at 1; *The Right to an Adequate Standard of Living in a Land of Plenty: Submissions by the Charter Committee on Poverty Issues to the United Nations Committee on Economic, Social and Cultural Rights* (May, 1993).

[54]*United Nations Committee on Economic, Social and Cultural Rights Fact Sheet*, online <www.unhchr.ch/html/menu6/2/fs16.htm>.

[55]*Ibid*.

[56]M. Craven "Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committeee on Economic, Social and Cultural Rights" in K. Drzewicki, C. Krause and A. Rosas eds., *Social Rights as Human Rights: A European Challenge* (London: Martinus Nijhoff, 1994) 91.

Rather than pretending that it has a particular expertise in the complex social and economic issues in each country under review, the CESCR has recognized that it functions most competently when it facilitates and draws conclusions about compliance from a hearing of allegations of non-compliance advanced by domestic groups and then consideris "responses" from governments. Admittedly, this is not always possible. It depends on the ability of domestic NGOs to participate effectively in the review process - which requires, at a minimum, resources, an ability to leave the country and freedom to participate without reprisals from government. Where such participation is possible, however, the Committee relies on the NGOs to identify the most critical issues regarding the implementation of the Covenant and to provide the necessary background for members to put these issues to government delegates for a response. In cases where domestic NGOs are not able to participate, international human rights NGOs will frequently step in.

Under the CESCR's procedure, the Periodic Report itself must address particular issues identified by the Committee with respect to compliance, such as the situation of identified vulnerable groups.[57] After the Report has been received and a review scheduled, a pre-sessional working group convenes six months prior to the review to consider the report and develop a list of issues or questions to send to the State party. This is one of the most important and frequently overlooked components of the Committee review process for both NGOs and governments. As NGOs, the submissions we make to the "pre-sessional working group", consisting of both written submissions and brief oral submissions, are all important. The Committee "experts" would have little sense of the primary issues of importance and would be completely unable to penetrate the government's self-congratulatory recitation of programs, legislative initiatives and court decisions if they were not directed to the issues in dispute by NGO submissions to the Pre-Sessional Working Group. The list of issues also provides governments with a first opportunity to respond, in writing, to concerns or "allegations" of non-compliance. This is the government's opportunity to put its pleadings "on the record." [58]

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[57]United Nations Committee on Economic, Social and Cultural Rights, *Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, 17 June 1991, Un Doc. E/C.12/1989/SR.8 at part B article 11.

[58]Committee on Economic, Social And Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, *List of issues to be taken up in connection with the consideration of the third periodic report of Canada concerning the rights referred to in articles 1_15 of the International Covenant on Economic, Social and Cultural Rights* (E/1994/104/Add.17) E/C.12/Q/CAN/1 (10 June 1998), paragraph 8, page 2 [hereinafter *List of Issues].* *Review of Canada's Third Report on The*

Five months or so after the list of issues is sent to the State party, the actual review occurs before the Committee. The review affords NGOs an opportunity to appear briefly before the Committee and to present by way of written and oral submissions their concerns and evidence with respect to non-compliance with the Covenant. The Committee ensures that copies of all NGO submissions are provided to the government delegation in advance of its appearance before the Committee and government representatives attend the NGO oral submissions. The Committee's questioning of the government delegation focus on concerns or questions raised in the government's response to the list of issues, concerns raised by NGOs and concerns of Committee members themselves.[59] The concluding observations are then prepared by the Committee in closed door sessions, based on the outcome of the review process.

The prominent role of NGO "complaints" within the review procedures of the CESCR is necessary, in our view, for the CESCR to live up to the authority it is granted under international human rights law to apply and interpret the Covenant. Lacking a jurisprudence arising from an individual complaints procedure but nevertheless required to issue authoritative considerations of compliance with fundamental human rights, the Committee has adopted an essentially adjudicative framework that distinguishes its findings from the opinions of other institutions or experts, who may from time to time weigh in with views on government policies and their compliance with international human rights standards

Democratic societies are properly cautious about authorizing "experts" to make "findings" of violations of human rights outside the context of participatory rights and procedural fairness to parties concerned - both the constituencies whose rights may have been infringed and those accused of infringing them. To the extent that the public and parliament sees the social and economic rights review process, either at a domestic or international level, to be a group of "experts" trying to dictate social policy to Canadians, social and economic rights will be seen as illegitimate incursions into democratic decision-making. It is only if there is a fair and competent adjudicative process that the public and parliamentarians can legitimately be asked to

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Implementation of The International Covenant on Economic, Social And Cultural Rights: Responses to the supplementary questions emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C/12/Q/CAN/1) *on Canada's third report on the International Covenant on Economic, Social and Cultural Rights* (E/1994/104/Add17) [hereinafter *Responses to Supplementary Questions*]. These are available at the U.N. website and also at the Canadian NGO website, along with the NGO submissions, online:<www.web.net/ngoun98>.

incorporate its results into the democratic process. The transformation of the CESCR in the last 7 years from a largely irrelevant expert review mechanism to an influential and authoritative human rights monitoring body provides a model for domestic institutional reform in Canada and elsewhere.

5. Positive Rights, Negative Rights and the Question of Justiciability

A recommendation to include social and economic rights in the CHRA as claimable rights subject to adjudication by the tribunal will no doubt provoke discussions about whether this would encourage further unwanted judicial intrusions into social policy, whether tribunals and courts have the necessary competence to adjudicate "complex issues" of social and economic policy and whether giving them any remedial powers in this area constitutes an attack on the democratic sovereignty of parliament. While a lengthy rehashing of these old debates would be unhelpful, CCPI wishes to suggest how these issues ought to be considered by the panel and the Government of Canada, so as to be respectful of public, judicial and political concerns about the appropriate roles of various institutions and at the same time be true to emerging principles of human rights, both within Canada and internationally.

The argument that social and economic rights are not justiciable comes in various guises and is not new.[60] Given that civil and political rights can be claimed before adjudicative bodies, including both courts and tribunals, in most legal systems, the factors relevant to justiciability have tended to be equated with the perceived attributes of civil and political rights.[61] On the one hand, civil and political rights were perceived to be *negative* constraints on government action, capable of *precise* definition, implemented *immediately*, at *little cost*. On the other hand, social and economic rights were perceived to be *positive* requirements for government action, involving *significant resources*, encompassing a *vague* range of actors, actions and standards that could only be implemented *progressively*, as governmental resources grew, and were therefore too

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[59] Porter, *ibid*.
[60] E. W. Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights (1978) 9 *Netherlands Yearbook of International Law* 69; D. Davis, "The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles" (1992) 8 *South African Journal on Human Rights* 475. For instructive overviews of justiciability arguments, see: C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a partial Fusion of the International Covenants on Human Rights" (1989); C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" *supra*, note 41.
[61] E. W. Vierdag, *ibid*.

complex to be dealt with in a judicial context.[62] On this basis, social and economic rights were categorized as injusticiable.

Subsequently, as the implications of social and economic disadvantage have become more acute and more and more countries have undertaken, both domestically and internationally, to protect social and economic rights, these perceptions have received considerable attention from courts, scholars and human rights advocates and institutions. From this attention something of a consensus has emerged rejecting the early claim of injusticiability.[63]
The U.N. Committee on Economic and Social Rights reflects the new consensus when it rejects the "rigid classification" of social and economic rights as injusticiable. In its General Comment on Domestic Application of the Rights in the Covenant the Committee states that:

> The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[64]

While courts are not the only venue through which social and economic rights claims can be adjudicated, the Committee insists that the general assumption must be that social and economic rights would be protected in a similar fashion to civil and political rights:

> Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.[65]

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[62] The attribute labels are taken from C. Scott, above n 3, at 840 (?).
[63] For example: G. van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views" in P. Alston and K. Tomasevski (eds) *The Right to Food* (Dordrecht: Martinus Nijhoff Publishers, 1984); E. Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *South African Journal on Human Rights* 464; M. Jackman "The Protection of Welfare Rights Under the Charter" (1988) 20 *Ottawa Law Review* 257; P. Bailey, *Human Rights: Australia in an International Context* (Sydney: Butterworths, 1990.
[64]United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 9 The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights,* Geneva, 16 November - 4 December 1998, E/C.12/1998/24 [hereinafter *General Comment No. 9]* at paras. 7, 9, 10.
[65] *Ibid*. para. 7.

Crucial to this consensus has been the recognition that all human rights—civil, political, social, economic, cultural—give rise to a multi-layered set of obligations to respect, protect, promote and fulfill.[66] The obligation to respect requires that governments refrain from acting in ways that would deprive people of their rights or impair their enjoyment of them, and is immediately applicable. The obligation to protect requires that governments act to prevent third parties (private actors) from violating human rights, and typically involves the establishment of regulatory regimes and remedial processes. The obligation to promote requires government action to ensure, for instance, accessible information about remedial processes is available to those whose rights have been violated. Finally, the obligation to fulfill requires immediate government action to ensure adequate levels of human rights enjoyment across society and progressive government action to improve conditions so that human rights are fully realised, for every person.

Once this multi-layered framework is recognised it can then be seen that it is these different categories of obligations, rather than the different categories of rights, that span the spectrum from negative to positive, from cost-free to resource-intensive, from precise to vague, and so on. For instance, with respect to the negative to positive spectrum, the right to life, which is categorised as a civil and political right, gives rise to obligations that the government: negatively refrain from taking or endangering life (i.e.: respect the right to life); positively prohibit, investigate and prosecute those who take or endanger other's lives (i.e.: protect); and, positively establish and maintain, or ensure the existence and maintenance of, facilities adequate to assist or treat people whose lives or health is endangered (i.e.: fulfill). Likewise, the right to adequate housing, which is categorised as a social and economic right, gives rise to obligations that the government: negatively refrain from forced evictions or otherwise depriving a person of adequate housing (i.e.: respect); positively implement legislative protections from arbitrary evictions by others without due process (i.e.: protect); and, positively establish and maintain, or ensure access to adequate housing through income assistance and/or housing supply programs (ie. fulfill). Just as the obligations arising from these rights vary in their degrees of negativity and positivity as they move from respecting towards fulfilling, so too do they tend to vary in the degrees to which they exhibit the other attributes, such as immediacy and costliness of implementation.

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[66] This typology was developed from the work of H. Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

While the Supreme Court of Canada has not explicitly adopted this framework of "duties", the international approach is consistent with the Court's recognition that rights have both positive and negative component. The Court has consistently refused to restrict justiciability to "negative" components of rights. The Court noted in *Schachter* that an equality right is "a hybrid of sorts, since it is neither purely positive nor purely negative.[67] It has adopted a similar approach with respect to other rights in the Charter such as "freedom of expression"[68] , minority language rights[69], and the right under section 7 to life, liberty and security of the person.[70]

Recognizing that positive components of rights ought to be justiciable does not, however, mean that courts and tribunals must approach these aspects of rights in the same manner. Along with a growing appreciation for the importance of adjudicating social and economic rights claims has come a recognition that violations of obligations requiring more positive, progressive and resource-intensive remedial responses also require greater adjudicative creativity and sensitivity. But rather than confuse those requirements with injusticiability, courts and commentators have developed other more appropriate means of enforcing rights, while respecting governments' role in designing and implementing programs.

6.Adjudicating Social and Economic Rights Does Not Mean Taking Over Social Policy

Where courts have come to adjudicate social and economic rights claims they have done so without taking over the social policy-making function of governments. Rather, courts have taken pains to develop innovative remedial responses that respect and preserve the responsibility of governments for social policy decisions and have been willing to adopt a cautious and deferential, though principled, approach.

The proposals for justiciable social and economic rights seek to recognise and implement an approach that is sensitive to the appropriate roles of Parliament and the Human Rights Tribunal. The proposals achieve this goal in a number of ways: inherent limits on the volume of complaints; adoption of the s. 1 test under the Charter for adjudicating government defences to discriminatory social and economic rights deprivations; incorporation of the principles of progressive realization contained in Article 2(1) of the International Covenant on Economic,

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[67] *Schachter v. Canada*, [1992] 2 S.C.R. 679_at p. 702 [hereinafter *Schachter*].

[68] *Haig* v. *Canada* (Chief Electoral Officer), [1993] 2 S.C.R. 995 [hereinafter *Haig*].

[69] *Mahé* v. *Alberta*, [1990] 1 S.C.R. 342 at 393; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839 at 862_63, 866.

Social and Cultural Rights; and encouragement of sensitive and innovative remedies; and, the Parliamentary override power.

(a) Inherent Limitations on the Volume of Work

Although the general proposal to include social and economic rights within the jurisdiction of the Canadian Human Rights Commission and Tribunal is intended to subject governmental decisions on social and economic matters to human rights scrutiny, it must be recognised that the sheer volume of such decisions and the means that only a small proportion of those decisions could ever be subjected to adjudicative review.[71] The complaints process before the Social Rights Panel is limited to those cases which the panel identifies as being of sufficient importance to conduct a hearing. The primary influence of social and economic rights, as of Charter rights, will be on the democratic decision-making of parliament, which will hopefully be influenced by considerations of compliance, as clarified by selective, adjudicated complaints.

(b) Adoption of the s. 1 Charter test:

At the stage of assessing government defences to complaints alleging discrimination in relation to social and economic rights, the proposal adopts the test formulated under s. 1 of the Charter. Adoption of the Supreme Court of Canada's test under s. 1 of the Charter can be expected to preserve Parliamentary authority and responsibility, first, through its general delineation of roles for adjudicators and legislators and, second, through the particularly cautious/deferential approach taken to its application in social and economic contexts.

(i) General Delineation of Roles

[70] *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, *supra*, note 2.
[71] This point has been made with respect to judicial review in the US by N. Komesar, "A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society" (1988) 86 *Michigan Law Review* 657.

Ever since the inception of the Charter the SCC has been concerned to distinguish its role from that of Parliament's or, in the parlance of the Court, to tread the line between reviewing and second-guessing government decisions. As explained by the Court in *Vriend v Alberta*:[72]

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform the role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect the others' role and the role of the courts. [73]

Accordingly, the test formulated for the application of s. 1 of the Charter, and adopted for assessing justifications for discrimination in relation to social and economic rights under the CHRA, is by definition intended to preserve an appropriate degree of authority and responsibility in Parliament.

(ii) Deference Under A Charter Style Section 1 Test

In its applications of the s. 1 test in the particular context of social and economic claims, the Supreme Court has reinforced the ultimate authority and responsibility of government by adopting a more cautious and deferential approach than characterizes its application in other contexts. As the Court put it in *Eldridge*:

> It is also clear that while financial considerations alone may not justify Charter infringements (*Schachter* [*v Canada*] ¼), governments must be afforded wide latitude to determine the proper distribution of resources in society; see *McKinney* [*v University of Guelph*] ¼ and *Egan* [*v Canada*] ¼ This is especially true where Parliament, in providing social benefits, has to choose between disadvantaged groups; see *Egan*.[74]

In M *& H*[75] the Supreme Court has further elaborated on how deference will affect a section 1 analysis. Iacobucci J (who, with Cory J, wrote the leading majority judgment) notes that:

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[72] [1998] 1 S.C.R. 493.
[73] *Ibid*. at para. 136.
[74] *Supra,* note 5 at para. 85.
[75] [1999] 2 S.C.R. 3.

> Under s. 1, the burden is on the legislature to prove that the infringement of a right is justified. In attempting to discharge this burden, the legislature will have to provide the court with evidence and arguments to support its general claim of justification. Sometimes this will involve demonstrating why the legislature had to make certain policy choices and why it considered these choices to be reasonable in the circumstances. These policy choices may be of the type that the legislature is in a better position than the court to make, as in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research.: *Irwin Toy, supra,* at p. 993, *per* Dickson C.J. and Lamer and Wilson JJ. Courts must be cautious not to overstep the bounds of their institutional competence in reviewing such decisions. The question of deference, therefore, is ultimately tied up with the nature of the particular claim or evidence at issue and not in the general application of the s. 1 test; it can only be discussed in relation to such specific claims or evidence and not at the outset of the analysis.[76]

The identification and elaboration of the factors relevant to the adoption of a deferential approach under s. 1 of the Charter is in many respects still in its infancy. Nevertheless, as *M &H* makes clear, courts and tribunals, when faced with the challenges arising from the need to adjudicate social and economic matters, can be expected to be cautious of respecting the government function of social policy-making.

(c) Remedial Creativity and Sensitivity

Where courts find it necessary to intervene in the social and economic arena to protect fundamental rights, they are still able to respect the role of legislators by adopting alternative approaches to remedy. In the *Eldridge* case, for example, the Court found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a violation of s.15(1) of the *Charter*. While the Court found the formal constitutional violation to reside in the failure of the Medical Services Board to fund interpreter services when it had the discretion to do so, it recognized that there are "myriad options available to the government that may rectify the unconstitutionality of the current system." Thus, in designing its remedy, the court was content to declare the government's constitutional responsibility to ensure that sign language interpreters will be provided where necessary for effective communication in the delivery of medical services, by whatever means it considers most appropriate.

[76] *Ibid.* at para. 79

> Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.[77]

More recently, in M&H, the Supreme Court declared the offending section of no force or effect but suspended the application of the declaration for six months for the express purpose of enabling the Parliament "some latitude in order to address these issues in a more comprehensive fashion."[78]

Thus, it is clear that the court has already developed an approach to remedy under the Charter which respects the role of parliament and legislators in designing and implementing social programs.

(d) Adoption of Progressive Realization Standard for Obligations

At the stage of defining government obligations in relation to substantive social and economic rights claims, the government's social policy making function is respected and preserved by the incorporation of the obligations clause of Article 2(1) of the ICESCR, which Canada has accepted.

The recognition by courts that remedies for social and economic rights violations require the complementary efforts of all branches of government flows from the understanding that such rights can be implemented through a variety of means that require time to plan, execute, review and modify as necessary. This understanding has been captured in the wording of Article 2(1) of the ICESCR which defines States obligations in terms of taking steps, to the maximum of available resources, to progressively achieve full realization of social and economic rights by a variety of appropriate means.[79] There now exists a significant body of jurisprudence interpreting

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[77] *Eldridge, supra* note 5 at 631-32.
[78] *M &H*, *supra* note 75 at para. 147.
[79] The obligations arising from this Article are considered in M. Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995).

and applying these concepts which can be expected to inform the task of adjudicating social and economic rights claims in Canada.[80]

The recognition of the obligations with respect to progressive realisation will also encourage a different approach to remedies. The appropriate remedy to these types of claims may be the development of a plan and a schedule to which the government is willing to commit in order to ensure that progress is made. The role of the tribunal will not be to require certain policies as much as to measure progress and outcomes of whatever policies the government decides to adopt. The social policy-making function of government is thus protected not by courts and tribunals declining to adjudicate social rights claims but rather by properly distinguishing the role of the court or tribunal from the role of parliament at the remedial stage. The proposed Social Rights Review panel will have the capacity to defer making remedial orders in order to request reports from all parties as to the most appropriate remedial options. In addition, it is proposed that Parliament have express power to override, by simple majority, remedial orders of the Social Rights Panel.

(e) The South African Experience

The experience with adjudication of social and economic claims in South Africa, though still at its early stages, is worth noting here because, even though, in contrast to Canada, social and economic rights are expressly constitutionalised there, South African courts have adopted a similar approach of deference and remedial innovation as have Canadian courts.

The Constitutional Court of South Africa first considered its its approach to adjudicating social and economic rights in *Soobramoney v Minister of Health, KwaZulu-Natal*[81] in which the general approach of the Court to social and economic rights was expressed. In *Soobramoney* it was claimed that a public hospital's refusal of kidney dialysis treatment to the applicant, who was chronically ill and could not afford private treatment, violated both the right not to be refused emergency medical treatment and the right of access to health care services (each of which is protected by s. 27 of the South African Constitution). In rejecting the claim on both counts, the

[80] See, for instance, M. Craven, ibid; P. Alston and G. Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156; A. Chapman "A Violation Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 *Human Rights Quarterly* 23.
[81] 1997 (12) BCLR 1696 (CC).

Court noted that this section also expressly allows progressive realisation within available resources and emphasized that the hospital, which had limited resources, had established a rational policy for determining who would receive the very expensive treatment and that the criteria used in the policy were objectively fair and properly applied to the applicant. In encapsulating its general position with respect to such claims, the Court noted that courts "will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility its is to deal with such matters."[82]

More recently the High Court of South Africa in *Grootboom v Oostenberg Municipality*[83] considered a claim by a group of squatters comprised of 390 adults and 510 children. The group had been living in extremely poor conditions in a squatter camp and so moved to nearby land they considered to be vacant. When the owners of the land brought proceedings for their removal the group agreed to leave, but since their original space in the camp had by then been occupied, they became truly homeless and were forced to camp at a sportsfield without tents or facilities. Subsequently they launched a claim against all relevant governments, from local to national, alleging violation of their right to adequate housing, as protected by s. 26 of the Constitution of the Republic of South Africa Act 108 of 1996 , or, alternatively, violation of the children's right to basic shelter, as protected by s. 28 of that Constitution. The court was not prepared to find for the group under s. 26 because the governments could show that, in a context of scarce financial resources, they had initiated a rational housing programme. This defense was made available by the wording of the section which establishes a right of access to adequate housing and obliges the government to take "reasonable legislative and other measures, within its available resources, to achieve a progressive realisation of this right."

On the other hand, the Court was prepared to accept the claim under s. 28 because that section established a right of every child to basic nutrition, shelter, health care services and social services and was not expressed to be subject to the "progressive realization" provision.

Nevertheless, the Court was greatly concerned not to intrude upon the responsibility and functions of the various levels of government concerned, nor to pre-empt the development of an appropriate remedy. Thus, the court declared that the various levels of government were jointly

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[82] *Ibid.* at para 29.
[83] (Unreported) High Court of South Africa, Cape of Good Hope Provincial Division, 17 December, 1999, Case No. 6826/99.

responsible for a violation of the children's right to basic shelter, and in so doing indicated certain minimum requirements, including that the shelter accommodate both parents and children and that it minimally consist of tents, portable latrines and a regular supply of water. However, the court also ordered that the governments report back to the court on matters of implementation within three months, that the applicants then have a further month to comment on the report, followed by a reply from the governments. Only then, if necessary, would the court make a further remedial order.

The express inclusion of justiciable social and economic rights in the Constitution has not, therefore, led to South African courts to take-over the social policy function of government. Indeed, there is concern among advocates for social and economic rights in South Africa that the courts there may carry the principle of deference too far, and fail to fulfill their constitutional responsibility to adjudicate social and economic rights claims.[84]

It can be expected that in Canada, like South Africa, domestic protections of social and economic rights will not alter the courts' or tribunals' appreciation of the distinctive role of parliament or dramatically increase their appetite for designing social policy. Poor people will take claims forward and governments will argue for deference. The courts and tribunals will decide, on a contextual basis, when judicial intervention is warranted, and in what form, on very much the same terms and conditions as under the Charter of Rights. However, they would put these rights on the table, for the tribunal and courts to consider for the first time as human rights, and perhaps here, as in South Africa, some homeless families and children could, by claiming their rights, prod governments into acting.

7. Social and Economic Rights and Democracy

[84] The author appeared before the Constitutional Assembly public hearings on social and economic rights in 1995 to assuage fears that social and economic rights would mean a judicial appropriation of the legislative function. I told the Assembly that the experience of poor people in Canada was not that courts had any desire to take over social policy but rather showed an excessive disinclination to adjudicate the most important rights in the social and economic domain - a bias which the inclusion of social and economic rights was necessary to correct. See B. Porter, "The Importance of Including Social and Economic Rights in the South African Constitution: A Canadian Perspective" *South African Business Times*, August, 1995.

A number of commentators have described the relations between institutions which adjudicate rights claims and the legislatures as a "dialogue" between the respective institutions.[85] The extent to which this idea is manifest in Canadian institutional practice has recently been explored by Hogg and Bushell who reveal that in the vast majority of instances in which courts have struck down legislation for violation of Charter rights and freedoms there has remained an opportunity for a more careful and appropriate legislative measure aimed at the same or similar objective.[86] Moreover, legislatures routinely take up this opportunity, although in doing so "the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision."[87]

In similar vein, Philip Alston, the former chair of the United Nations Committee on Economic, Social and Cultural Rights, has argued, in the context of proposing an individual complaints procedure (or Optional Protocol) in relation to social and economic rights, that such procedures offer a unique form of particularized participation and scrutiny that complements the more general perspective of legislation and policy-making.[88] In his words, "a complaints procedure brings concrete and tangible issues into relief" and makes "real problems confronting individuals and groups come alive."[89]

CCPI submits that there is no cause for concern that the establishment of a Tribunal complaints procedure will undermine the democratic accountability of social policy decision-making. In fact, to the contrary, the establishment of such a procedure will redress a shortcoming in the existing system of complementary institutional decision-making and dialogue.

In rejecting equality claims in the social and economic sphere, lower courts have made frequent use of Justice La Forest's statement from *Andrews* that: "Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect

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[85] See, for example, C. Scott and J. Nedelsky, "Constitutional Dialogue" in *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).
[86] P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35:1 *Osgoode Hall Law Journal* 75.
[87] *Ibid*. at 79.
[88] P. Alston "No Right to Complain About Being Poor: The Need for an Optional Protocol to the UN Covenant" in A. Eide and J. Helgensen, eds, *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address (Essays in Honour of Torkel Opsah)* (Oslo: Norwegian University Press) 79.
[89] *Ibid*. at 91-2.

against incursions on fundamental values, not to second guess policy decisions."[90] It seems to us, however, that this statement points out the importance of social and economic rights in defining the appropriate role of courts and tribunals in the social and economic domain.

Social and economic rights define the fundamental human rights values linked with dignity and personal integrity within the social and economic sphere. Including them in our human rights protections thus assists courts and tribunals to distinguish between second-guessing legislative decisions and protecting fundamental values. The details and priorities in a government housing program will usually be legislative decisions which courts and tribunals do not need to second-guess. When government action or inaction leaves families without access to adequate housing or deprives children of adequate nutrition, these policies engage fundamental human rights values. In those instances, social and economic rights would legitimate a human rights review which, in CCPI's submission, is essential for the health and legitimacy of our democratic institutions.

The issue of perceived **competence** of courts and tribunals ought to be secondary to the issue of the **responsibility** of courts and tribunals. Courts have had to address and remedy issues of judicial competency in the criminal law context because it was their responsibility to do so in order to interpret and apply the law. Assessing complex DNA evidence or dealing effectively with children witnesses who were victims of sexual abuse were not areas of inherent judicial competency. Rather, they became issues of important judicial responsibility, and judges learned new skills. There is nothing about social policy and programs that is beyond the competency of tribunals and courts.

Surely the point is to identify the proper judicial **role**. That role is not to make policy choices on behalf of the electorate but to uphold fundamental human rights As Craig Scott and Patrick Macklem interpret the position of the Court in S*chachter*:

> [I}nstitutional competence is first and foremost subservient to and conditioned by a commitment to the fundamental values that underlie constitutional rights. Courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary. When the desirability of recognizing such values nonetheless conflicts with perceived institutional inadequacies, the judiciary need not absolve itself of the issue.

[90] *Andrews* v. *Law Society of British Columbia* [1989] 1 S.C.R. 123 at 194.

> Instead, it is free to provide an interpretation and a remedy as best as it can do in the circumstances, and hope to provoke a cooperative and constructive dialogue with other organs of government and the citizenry at large.[91]

In CCPI's submission, adjudicating social and economic rights claims does not so much override or intrude upon as complement democratic decision-making.[92] The traditional controversy over unelected courts and tribunals usurping democratic decision-making fails to take account of the fact that the vast majority of political systems reach decisions on important matters of social policy through a combination of institutions, including legislatures, executives, administrative agencies, markets, courts and tribunals.

The increasing attention to the role of social and economic rights adjudication in modern democracies is reflective of a growing recognition that without social and economic rights, our democracies may be in increasing peril. The focus of human rights in the last century was justifiably, perhaps, on civil and political rights. They emerged at a time when the power of the modern state and its unprecedented assaults on human freedom and dignity through totalitarian governments was the most obvious threat to democracies. While these threats continue, the increased attention to social and economic rights among international human rights advocates is a response to a different experience of the "perils" to democracy - the experience of governments in global "retreat" from the state's positive protective and regulatory functions, reduced transparency of and participation in social policy formulation and a sense of powerlessness in the face of deregulation, economic globalization, social exclusion and marginalization.

The South African model sends a clear message that a country deeply committed to protecting its new democratic freedoms must also ensure that human rights play an ongoing part in all aspects of the democracy, including the social and political realm.. Even the UK, a traditional bastion of resistence to "constitutionalism" has recently acceded to the European Social Charter while the European Union has itself taken steps to strengthen the Charter's effectiveness by establishing a complaints procedure.[93] These developments reflect that human freedom and dignity depends

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[91] Macklem and Scott, "Ropes of Sand", *supra*., pp. 35-36.

[92] For an analysis of a recent term of decisions of the Supreme Court of Canada which contemplates a democracy-complementing role for the Court, see B. Baines and C. Greenfield, "Developments in Constitutional Law: the 1995-96 term" (1997) 8 *Supreme Court Law Review* 77. See also A. Gutman "The Rule of Rights or the Right to Rule?" in J. Pennock and J. Chapman (eds) *Justification: Nomos XXVIII* (New York: NYU Press, 1986, 15 at 166 (cited and discussed in C. Scott "Social Rights: Towards a Principled, Pragmatic Judicial Role" (1999) 1:4 *ESR Review: Economic and Social Rights in South Africa Newsletter* 4; and W. Black, "*Vriend*, Rights and Democracy" (1996) 7 *Constitutional Forum* 126.

[93] As discussed in Jackman & Porter, *supra* note 13 at 65.

upon equal respect for all human rights, not just civil and political rights and, further, that equal respect for social and economic rights means comparable implementation and enforcement mechanisms. The absence of social and economic rights in Canada's human rights protections is already becoming an international embarrassment, having attracted consecutive statements of "concern" from the U.N. CESCR. Excluding social and economic rights is no longer seen by the international community as an affirmation of participatory democracy but rather its opposite.

Depriving poor people of institutional mechanisms to bring to the fore and to review, from a human rights standpoint, systemic assaults on dignity, equality and security, simply because they occur in the social and economic domain, is hardly a gesture of participatory democracy. It is a fundamental denial of equal citizenship. Democracies need human rights, including social and economic rights, as much as all human rights need democracies.