7. Enforcing the Right to Reasonableness in Social Rights Litigation: The Canadian Experience

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1. Introduction: Assessing the Enforcement and Effectiveness of Social Rights Remedies in Canada

The success of social rights enforcement mechanisms should not be assessed solely in relation to the enforcement of remedies ordered by courts or tribunals. Instead, a more fundamental assessment in relation to the goals and purposes of the rights claims being advanced, in addition to the broader goals of social rights litigation strategies, is in order. Judicial remedies that are more likely to be enforced may not be effective in remedying certain types of social rights violations. A strategic preference for litigation strategies focused on what are perceived to be the more enforceable remedies, and a judicial preference for claims that are subject to ready enforcement, may present a more successful enforcement record, but leave the most critical social rights violations unremedied. Assessing enforcement strategies must ultimately engage more fundamentally with the potential role of courts in the realization of social rights.

A tension between remedies that are most familiar or appealing to courts because of their easy enforceability, and those which are more effective from the standpoint of the violations which claimants seek to remedy is very evident in Canada, where what Louise Arbour has described as a "timidity" among both litigators and courts about advancing social rights claims with complex remedial or enforcement implications has tended to exempt the most egregious violations of social rights from judicial review, and often denied access to justice to the most disadvantaged in society.[1]

Short of invoking the rarely used "notwithstanding clause" under the *Canadian Charter of Rights and Freedoms* [the *Canadian Charter]*[2] which permits Parliament or provincial legislatures to override certain *Charter* rights, governments in Canada are unlikely to blatantly defy court orders.

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[1] L. Arbour, '"Freedom From Want" – From Charity to Entitlement', LaFontaine-Baldwin Lecture, Quebec City (2005), p. 7.

[2] *Canadian Charter* (note 13 above) section 33.

Where governments have been given a period of time to remedy a constitutional violation, they have generally done so, though extensions of time have been sought and granted.[3] Preserving a judicial-political culture in which defiance of a judicially ordered remedy is considered both politically and constitutionally unacceptable is thus one of the factors that must inform strategic litigation in Canada. The notwithstanding provision has been used only once to override an actual court order. In that case, the Parti Quebecois Government of Quebec, with historical motivation to resist the application of the *Canadian Charter* after it was negotiated without Quebec's support, invoked the notwithstanding clause to preserve certain Quebec language laws after the Supreme Court of Canada found them in violation of the right to freedom of expression under the *Canadian Charter*.[4] However, after the UN Human Rights Committee considered the same issue in a complaint filed under the Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR) and concluded that the provisions also contravened the ICCPR, a subsequent Quebec government amended the legislation.

The need for more effective remedies for systemic social rights violations has been identified as a critical issue in Canada by UN human rights bodies. The UN Special Rapporteurs on adequate housing and on the right to food have visited Canada on missions, and each has emphasized the need for institutional mechanisms through which rights to housing and food can be claimed and enforced, and which will ensure that reasonable measures are adopted by a range of actors to address homelessness and hunger amidst affluence.[5] Similar recommendations have been made by the UN Committee on Economic, Social and Cultural Rights at the last three period reviews of Canada, by members of the Human Rights Council during Canada's

[3] See, for example, further to the Supreme Court's decision in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*], Application for a Stay of the Decision of the SCC of the 9th of October, 1997, Court File No. 24896. Affidavit of Heather Davidson, sworn the 25th day of March, 1998.

[4] *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712.

[5] United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada* (9 to 22 October 2007), UN Human Rights Council OR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 90 [SR Mission to Canada]; Olivier De Schutter, Special Rapporteur on the right to food: Visit to Canada from 6 to 16 May 2012: End-of-mission statement. Online: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12159&LangID=E>.

Universal Periodic Review, and by parliamentary committees examining problems of poverty and homelessness in Canada.[6]

The most egregious failures to implement remedies in Canada have not stemmed from governments ignoring judicial decisions, but rather from governments ignoring these critical recommendations from UN human rights bodies, and from vehement resistance by governments to attempts by rights claimants to seek such remedies by way of the *Canadian Charter*. As repeatedly noted by the UN CESCR, governments in Canada have displayed a pattern of "urging upon their courts an interpretation of the *Canadian Charter of Rights and Freedoms* denying protection of Covenant rights."[7]

Governments' arguments against more expansive roles for courts in overseeing the implementation of social rights remedies have not, by in large, been endorsed by the Supreme Court of Canada.[8] The Supreme Court has been clear that broadly framed rights in the *Canadian Charter*, such as the right to security of the person or the right to the equal benefit of the law, can be interpreted so as to include social and economic rights and has recognized that a broad range of remedies is available to courts. [9] The over-riding principle must be to ensure that remedies are effective in protecting and vindicating the rights at issue and responsive to the circumstances at hand.[10] Nevertheless, courts have tended to align their interpretation of rights with what they believe they can immediately remedy, and legal advocates have tended to follow suit by avoiding claims which demand remedial roles of courts that may prompt strenuous governmental opposition and judicial

[6] For a description of the many recommendations for rights-based housing and anti-poverty strategies, see Bruce Porter & Martha Jackman, *International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection*, Working Paper, (Huntsville, ON: Social Rights Advocacy Centre, September 2011).

[7] United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) at para 11(b) [Concluding Observations 2006]. A recent example of this pattern is found in the *Factum of the Attorney General of Canada* in the Motion to Dismiss in *Tanudjaja v Canada* (Ont Sup Ct File no CV-10-403688) (2011) discussed below. Online <http://socialrightscura.ca/documents/legal/motion%20to%20strike/Attorney%20General%20of%20Canada%20Factum%20-%20Motion%20to%20Strike%20(R2H).pdf>

[8] See the discussion of *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR, infra.

[9] Bruce Porter & Martha Jackman, "Socio-Economic Rights Under the Canadian Charter" in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209; Bruce Porter, "Expectations of Equality" (2006) 33 Sup Ct L Rev 23.

[10] *Ibid*.

resistance. Traditional assumptions about limited judicial competence and authority to remedy social rights violations in the manner recommended by UN human rights treaty bodies continue to pose the greatest obstacle to effective social rights litigation in the current legal landscape in Canada.

In Chapter 3, César Rodríguez-Garavito posits a matrix that describes the actual outcomes of ESC rulings by organizing them into four quadrants.[11] Like the assessment proposed in the present chapter, Rogriguez-Garavito measures enforcement outcomes against the goals of realizing the right in question. However, since in Canada the non-enforcement of court judgments is not really an issue, it is more helpful in the Canadian context to consider the extent to which the enforcement of particular judicial remedies has been able to implement effective remedies to social rights violations, ways in which judicial and litigator preferences for traditional paradigms of judicial enforceability have left key structural violations unchallenged, and how more expansive approaches to remedies and enforcement can be put into effect to better address unchallenged violations. Challenges of enforceability in this chapter is considered instead in relation to three types of remedial and enforcement strategies: immediate as opposed to future oriented remedies (hard v. soft[12]); discrete (engaging one provision and one respondent) as opposed to multifaceted (engaging multiple entitlements and different actors) remedies and corrective (of a flaw or omission in an existing program or law) as opposed to transformative of existing entitlement systems. The aim in this case is not to categorize cases or to reach conclusions about the viability of social rights advocacy, but rather to provide a lens through which to assess effectiveness and to assist in the choice of remedial strategies in different circumstances, particularly since social rights litigation remains a work in progress in Canada.

There is of course no social rights remedial and enforcement strategy that is universally applicable. The choice of strategy must be considered on a case by case basis and the needs and motivation of the rights claimants must be a

[11] Rodriguez identifies the following four types of outcomes: 1) a 'paper ruling' occurs when there is neither meaningful enforcement of the ordered remedy, nor any real positive impact on the rights in question in the aftermath; 2) 'winning by losing' occurs when there is no meaningful enforcement of the ordered remedy, but the decision has a positive impact on the situation notwithstanding; 3) 'zero-sum litigation' occurs when meaningful enforcement does take place, but the results either hinder, or do nothing to affect a positive impact on the actual rights in question; and 4) 'positive-sum litigation' occurs when there is both meaningful enforcement of the remedy, and positive impacts result.

[12] For a parallel discussion of 'soft' versus 'hard' remedies in international law, see Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, Summer 2000, 3, pp. 421–456.

critical factor. If a single individual requires only a correction to an existing entitlement system in order to secure housing or food, perhaps qualifying for an already existing benefit, that may be the most effective and appropriate remedy in the circumstances, even if it has no obvious transformative effect. In other cases, as in a challenge to homelessness described below, victims of violations may undertake litigation with clearly transformative aims, seeking no individualized remedy, and choose the most challenging types of remedies, requiring structural changes to multiple programs and entitlements, with meaningful engagement of stakeholders.

A potentially unifying concept, informing all types of remedies and enforcement strategies in Canada, is the emerging jurisprudence of the Supreme Court of Canada affirming a standard of rights-compliant "reasonableness." As will be explained below, this standard can now be leveraged from a range of different types of social rights claims and remedies. It applies, in different ways, to reasonable limits under the *Canadian Charter of Rights and Freedoms*[13] to the obligation to reasonably accommodate needs of disadvantaged groups in human rights law, and to administrative law standards of reasonableness applied across the broad range of administrative and programmatic decisions affecting the implementation of social rights. While the reasonableness standard raises distinctive challenges with respect to enforcement, it will be argued that the risks of weaker enforcement are often outweighed by the transformative potential of a robust standard of reasonableness, informed by international human rights values and norms.

Litigation designed around remedies that will actually solve systemic problems may result in a less impressive enforcement scorecard than has been the case in Canada in the past. While the difficulty of enforcing remedies which engage multiple programs and actors and have no immediate effect must certainly be a factor in the choice of litigation strategies, we must be equally wary of the longer term effect of avoiding remedies which would be capable of fulfilling the broader goals of social rights litigation.

2. Three Dimensions of Remedies and Enforcement

i) Hard versus Soft

Identifying effective remedies is a contextual endeavour that is dependent on the nature of the violation and the claim being advanced. Constitutional remedies that strike down particular legislative provisions, or that "read in" coverage of groups previously denied social benefits (which fall into the

[13] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*] section 1.

category of what have been described as "hard" remedies), have proven successful in a number of social rights cases in Canada; generally speaking, these remedies have not raised issues with respect to governmental compliance.[14]

Forms of judicial remedies subject to immediate and relatively problem-free enforcement may be entirely appropriate remedies for certain social rights violations. Remedies that can be described as "soft", by contrast, that is, those involving courts putting in place a process through which the appropriate remedy is to be fashioned in the future, rather than ordering a specific remedy of immediate application, may be more appropriate in other cases. Remedial options in constitutional litigation in Canada of the "soft" variety have relied on declaratory orders of various sorts. In some cases declarations have simply provided guidance to governments about their constitutional obligations and in others have put governments on notice that one or more rights have been violated, established the parameters for what is needed to remedy the violation, and provided governments with time to design and implement necessary changes.[15]

Some types of law and judicial roles are limited to declaratory remedies. International human rights law is not directly enforceable by courts in Canada if it has not been incorporated by domestic legislation, but under their jurisdiction to answer questions referred to them by governments, courts in Canada have provided advice to resolve legal uncertainty about both domestic and international law.[16] Declaratory judgments on legal issues may be issued by courts for purely extra-judicial purposes, such as to inform political negotiations.[17] Where constitutional rights have been found to have been infringed by legislation or policy, but where new or revised legislation or policy is necessary to implement an appropriate remedy, courts have more frequently used "suspended declarations of invalidity" rather than softer forms of declarations. These provide governments time to develop new legislation

[14] An example of a striking down remedy, declaring a provision to be of no force and effect, is the case of *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur* [2003] 2 SCR 504, in which workers compensation benefits were extended to apply to those with chronic pain. The best example of a 'reading in' remedy in the field of social rights in Canada is the case of *Sparks v Dartmouth/Halifax County Regional Housing Authority*, (1993), 119 NSR (2d) 91 [*Sparks*], which extended security of tenure protections to residents of public housing. These cases will be discussed below.

[15] A good example of a 'softer' remedy of this sort is the well-known decision in *Eldridge* (above, note 3*).*

[16] *Reference re Secession of Quebec*, [1998] 2 SCR 217

[17]*Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC 14 at para 131; *Dumont v Canada* (Attorney General), [1990] 1 SCR 279 p 280.

or programs to remedy the violation of rights before the impugned legislation or policy is rendered of no force and effect.[18] Recent litigation strategies in Canada have applied tools such as reporting requirements, timetables, monitoring, benchmarks, and designated participatory mechanisms as important components to make suspended declarations of invalidity more effective. Such remedies may be strengthened by the court retaining jurisdiction, assuming a supervisory role to ensure that the process that is put in place produces the necessary outcomes within a reasonable time.[19]

As will be described below, softer remedies providing governments with time to implement them, have generally been helpful in social rights litigation in Canada. The implementation of a process to remedy a violation can lead to an effective remedy through the development and implementation of new programs which could not have been provided through an immediate court order extending the benefits provided by existing legislation or programs.[20] There is the risk, of course, that governments may implement weaker remedies than claimants seek, preserving structural inequality that might have been better addressed through an immediate order extending existing legislation or programs to include excluded groups.[21] The issue in these cases in Canada, however, has not been non-compliance with a court's judgment, but rather a weakening judicial commitment to substantive equality and a more general failure to ensure meaningful engagement with rights holders in the design of the remedy. This chapter will argue that there is a need to reconfigure constitutional "dialogue" in Canada, usually conceived as a two way dialogue between the judicial and legislative branches, into a broader democratic "conversation" which meaningfully engages rights claimants and a range of institutional actors in the remedial and enforcement process.

[18] *Schachter v. Canada, [1992] 2 SCR 679.* K. Roach, 'Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity', *University of British Columbia Law Review*, Vol. 35 (2002) , pp. 211-70. A good example of the use of a suspended declaration in relation to the right to health is the well-known decision in *Eldridge* (above note 3) discussed below.

[19] *Doucet-Boudreau v Nova Scotia (Minister of Education*, (note 8 above) at para 136; Kent Roach and Geoff Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable', *South African Law Journal*, Vol. 122 (2005), pp. 325-351; Roach, *Constitutional Remedies in Canada* (n. 60 above), pp. 13-90.

[20] See the discussion of *Eldridge*, (note 3 above) below.

[21] See the discussion of *Dunmore v Ontario (Attorney General)* [2001] 3 SCR1016, 2001 SCC 94, below.

ii) Discrete v multifaceted

A second dimension to be considered in assessing the tension between enforceability and effectiveness is the extent to which remedies effect change beyond a particular piece of legislation or programme benefit, or beyond a single respondent. Even suspended declarations providing a particular government with time to remedy an under-inclusive legislative or benefit scheme may not be adequate to address structural violations of social rights which relate to the interaction of multiple programs and legislative schemes and broader frameworks for administrative decision-making. Effective remedies to poverty, homelessness, and social exclusion in Canada often need to reach beyond a particular program or piece of legislation to address structural causes. As Amartya Sen's early work on famines discovered, systemic social rights violations are usually rooted in "entitlement system failures" that extend well beyond any single program or entitlement.[22] Effective social rights remedies in Canada will often require broad structural reform extending over a number of inter-related program areas such as income assistance, housing subsidy and wage protections, and require programs and strategies.[23]

It is also important to consider the unique challenges of federalism and modern systems of governance in designing strategies for enforcing social rights in Canada. Many social rights violations involve interdependent and overlapping jurisdiction of federal, provincial/territorial and municipal levels of government. Social rights claims may not always conform to the traditional 'citizen-versus-state' framework — even if that is formally how domestic constitutional or international human rights claims must be structured. Those who are actually assigned the responsibility of ensuring the realization of rights ('duty-bearers') may include private actors, non-governmental organizations, or multiple levels of government spanning local to federal. All of these actors are likely bound together in webs of delegated responsibilities and jurisdictional overlap, and their roles become increasingly mixed. Civil society organizations, traditionally tied to rights claimants, have become increasingly engaged in providing or administering services or programs, thus straddling both the claimant and respondent sides of rights claims. The traditional model of the judicial remedy in which the court simply orders the

[22] Amartya Sen, "Property and Hunger" (1988) 4:1 *Economics and Philosophy* 57 reprinted in Wesley Cragg & Christine Koggel, eds, Contemporary Moral Issues (Toronto: McGraw-Hill Ryerson, 2004) 402.

[23] Bruce Porter & Martha Jackman, *International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection*, Working Paper, (Huntsville, ON: Social Rights Advocacy Centre, 2012) <http://socialrightscura.ca/documents/publications/Porter-Jackman%20making%20the%20connection-can.pdf>

state to provide an entitlement that has been denied, or cease an action that has violated a right, is thus, in many cases, inadequate. In some cases, remedies and enforcement strategies must address the different roles that states must play in ensuring that a range of actors behave in a manner that is consistent with the realization of social rights.[24] Courts may be required to play more of a facilitative role in provoking action by other actors and institutions. [25] As will be described below, social rights strategies in Canada have recently attempted to address these kinds of challenges by naming multiple respondents and incorporating orders for joint remedial responses by various levels of government. These too, of course, raise unique issues of enforceability.

iii) Corrective versus Transformative

Remedies of the sort recommended by Special Rapporteurs and UN human rights bodies also raise distinctive challenges because they affirm the necessary role of courts in supporting rights-based transformations of society and new forms of rights-based governance. Realizing social rights is not simply a matter of changing legislative or benefit schemes so as to ensure access to housing or food as social goods. In affluent countries such as Canada, social rights violations are invariably linked to broader patterns of marginalization, exclusion, discrimination and stigmatization. Realizing social

[24] A connection may be drawn between the notion of 'hard' versus 'soft' remedies and what Sabel & Simon refer to as 'command-and-control' versus 'experimentalist' approaches to structural remedies in public litigation. "Command-and-control regulation…takes the form of comprehensive regimes of fixed and specific rules set by a central authority. These rules prescribe the inputs and operating procedures of the institutions they regulate. By contrast, experimentalist regulation combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability." Charles F. Sabel & William H. Simon, "Destabilization Rights: How Public Law Litigation Succeeds," *Harvard Law Review* 117 (2004) 1015-1101 at 1019 and at 1067-1073. For a discussion of 'soft' remedies in the Canadian and South African contexts, see Kent Roach & Geoff Budlender, "Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?" *South African Law Journal* 122 (2005) 325-351

[25] Abram and Antonia Chayes contend that both governments and the public prefer "treaties with teeth", referring to enforcement models that make use of immediate and coercive sanctions.. They contrast this 'enforcement model' with their own 'managerial model', which tends towards employing 'softer', ongoing remedies that may be more novel and less popular, but ultimately more successful in achieving the desired effects. For a discussion of the effectiveness of differing types of remedies, see Chapter 1 of Abram & Antonia Chayes, *The New Sovereignty – Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

rights is therefore also a matter of addressing this human rights crisis of deprivation in the midst of economic prosperity and affluence. A reaffirmation of human rights values is a critical component of the creation of a new social rights architecture, in which access to justice and the role of the courts in safeguarding and promoting human rights values must play an important role. The transformative dimension of remedial strategies which looks beyond specific legislative or programmatic entitlements being claimed, to construct the foundations of a broader commitment to the realization of rights must also be recognized. While transformative strategies tend to be associated with future oriented remedies and multiple actors and entitlements, they also relate to changing attitudes and systemic patterns of exclusion which may sometimes be addressed by individual claims addressing discrete denials. It is therefore important to also consider this third axis, assessing whether remedial and enforcement strategies are able to effect broader social transformations through the claiming and judicial enforcement of social rights.

3. Enforcement Experiences of Social Rights Remedies under the *Canadian Charter*

i) Negative Rights Claims

Negatively-oriented remedies which place limits or invalidate government action are the most familiar and comfortable forms of remedies for courts in Canada. Enforcement challenges are largely circumvented if courts declare laws or policies invalid or of no force and effect, rather than finding that some kind of positive action is required. Under the *Canadian Charter*, negative rights remedies of immediate effect may include reading down, severance, and declarations of invalidity.

While negative rights remedies of immediate effect are generally more suited to civil and political rights claims, they have proven to be effective in generating positive rights outcomes in the struggle for social rights in Canada in certain circumstances, both through their immediate effect and often, more fundamentally, through advances made in the interpretation of *Canadian Charter* rights. The leading example of this is the Supreme Court of Canada's decision in *R v Morgentaler*,[26] in which restrictions on abortion services under the *Criminal Code of Canada* were challenged as violating women's right to security of the person under section 7 of the *Canadian Charter*. The striking down remedy in that case had the immediate effect of ensuring dramatically improved access to safe abortions for women across the country, and represented a significant advance in challenging systemic discrimination

[26] *R v Morgentaler*, [1988] 1 SCR 30.

against women in access to healthcare. The decision also gave a significant impetus to the broader struggle for women's equality rights by securing a rights-based legal victory after years of political mobilization and advocacy. The interpretation of the right to security of the person as including access to a critical component of healthcare was a significant advance in ensuring more expansive interpretations of the *Canadian Charter*. However, the restriction to a striking down remedy in the *Morgentaler* case, clearly justified as a strategic decision to make the case more winnable at the time, meant that the remedy also lacked any positive remedial component that would ensure access to abortion services for women in every region of the country. The legacy of that inadequacy in the remedy remains an issue today, with certain regions denying access to abortions.[27]

In *Victoria (City) v Adams*[28], the British Columbia Court of Appeal struck down components of a bylaw prohibiting homeless people from erecting temporary shelters in public parks. The Court largely upheld the decision of the B.C. Supreme Court in the case, which had relied on Canada's commitment to the right to adequate housing under international human rights law, as well as on statements made by Canadian governments in their reporting to UN human rights treaty monitoring bodies to support an interpretation of the right to life and security of the person in section 7 of the *Canadian Charter* that would provide remedies to violations of the right to housing.[29] While the interpretive principles affirmed by the trial judge were important advances, the Court of Appeal clearly took comfort in the fact that only a negative rights remedy of immediate application was being applied. The Court ruled that the declaration of invalidity may be terminated if improvements to shelter and housing programs meant that the bylaws no longer violated section 7 of the *Canadian Charter* – for example, if the City of Victoria could demonstrate that the number of homeless people does not exceed the number of available shelter beds. Although the Court recognized that the trial court's ruling would likely require some responsive action by the city to address the inadequate number of shelter beds in Victoria, it declared that: "[t]hat kind of responsive action to a finding that a law violates s. 7 does not involve the court in adjudicating positive rights."[30]

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[27] National Abortion Federation, Access to Abortion in Canada online <http://www.prochoice.org/canada/access.html>

[28] *Victoria (City) v Adams*, 2009 BCCA 563; 2008 BCSC 1363 [Adams].

[29] *Ibid* at para 98; Canada also stated to the United Nations Human Rights Committee that the right to life in the *ICCPR* imposes obligations on governments to provide basic necessities. See *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, 1983, UN Doc CCPR/C/1/Add.62 at 23.

[30] *Adams*, (note 28 above) at paras 95-96.

Far from ensuring anything resembling the right to adequate housing as it should be enjoyed in so affluent a country as Canada, the immediate effect of the remedy in *Adams* was simply to permit homeless people to continue to erect temporary overnight shelters in parks. In the longer term, the decision may have had some impact in encouraging governments to address the broader systemic issues leaving people to rely on erecting tents or cardboard shelters overnight in parks.

In 2008, the City of Victoria established the Greater Victoria Coalition to End Homelessness, which has added more than 115 units of permanent, supported housing for people who were formerly homeless.[31] According to a member of the Committee to End Homelessness in Victoria, a positive outcome of *Adams* is that the City of Victoria's homelessness initiatives have "now moved towards more permanent housing rather than shelter, and towards attacking the problem of poverty, including the high cost of rental accommodation."[32] These initiatives, however, have lacked any rights-based foundation, and have not kept pace with demand, as shelter use continues to rise in Victoria;[33] rental prices continue to increase, and rental affordability decreases.[34]

There was hope that the decision in *Victoria v Adams* might effect positive change in other communities in British Columbia but this does not seem to have been the case.[35] After the release of the decision, the City of Vancouver stated that they would be reviewing the case to determine its applicability to Vancouver's bylaws. Unfortunately, the City's legal department concluded that the decision did not apply to Vancouver's bylaws and homeless people were made vulnerable to fines in Vancouver for erecting any kind of shelter.[36]

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[31] http://www.solvehomelessness.ca/content/file/GVCEH-AnnualReport_single%20pages.pdf

[32] Statement by Alison Acker (Personal email correspondence [insert date of email here]).

[33] In 2010/11, the emergency shelter occupancy rate was 95% compared to 86% in 2008/09 http://www.solvehomelessness.ca/content/file/GVCEH_Report_on_Housing%20single%20pages.pdf

[34]http://www.solvehomelessness.ca/content/file/GVCEH_Report_on_Housing%20single%20pages.pdf

[35] Statement by Douglas King (Personal email correspondence [insert date of email here]).

[36]Vancouver, General Manager of Engineering Services, *Structures for Public Expression on City Streets*, (Vancouver: Standing Committee on Planning and Environment, 2011) online: <http://former.vancouver.ca/ctyclerk/cclerk//20110407/documents/penv1StructuresforPublicExpressiononCityStreets.pdf>; see also: "City by-laws must respect homeless rights" *Pivot Legal Society*, online: Pivot Legal Society <http://www.pivotlegal.org/pivot-points/blog/city-by-laws-must-respect-homeless-

In response, a similar constitutional challenge to Adams was launched in late November of 2012 concerning Vancouver bylaws, citing the failure of Vancouver municipal officials to recognize the applicability of the Adams decision as a driving force behind the bylaws and challenge.[37]

The *Adams* decision is an example of how, if rights claims are framed as negative rights restraints on government action, courts in Canada may be more willing to engage with interpretations of the *Canadian Charter* that include rights such as the right to adequate housing, and these interpretations, in and of themselves, may be leveraged into advocating for social rights, both legally and politically. However, there is also a price paid by adopting a negative rights approach. It may encourage governments to continue to ignore their positive obligations and rights claimants themselves to conceive of their rights in negative rights terms. There is also a tendency for negative rights remedies to specific to particular pieces of legislation of government actions, such that it they may not be easy to apply to other jurisdictions or circumstances.

ii) "Reading-In Remedies"

More positively framed social rights claims have been leveraged from courts in Canada when they have agree to "read in" additional protections or benefits to remedy either under-inclusive legislative protections, or social programs which exclude disadvantaged groups from statutory entitlements.[38] Where courts have found that exclusions of protected groups from benefits or legislative protections violates the *Canadian Charter*, and where correcting the unconstitutionality by reading in additional protections is judged to accord with the "twin guiding principles" of respect for the role of the legislature and respect for the purposes of the *Canadian Charter*, Canadian courts have been instructed to expand legislative protections or benefits rather than to strike the

rights>. Under the bylaw, any person who sets up a tent or other structure on City property is at risk of receiving a $1,000 fine, unless they apply for a costly permit. Online <http://vancouver.ca/bylaws/2849c.pdf>).

[37] "Vancouver's ban on homeless street sleeping challenged", *CBC* News (22 November 2012) online: <http://www.cbc.ca/news/canada/british-columbia/story/2012/11/21/bc-homeless-lawsuit.html>.

[38] Section 15(1) of the *Canadian Charter* (note 13 above) states that: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

scheme down. This allows the court to be "as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."[39]

'Reading in' remedies provide for immediate and sometimes far-reaching enforcement of judicial orders. In *Sparks v Dartmouth/Halifax County Regional Housing Authority*, [*Sparks*],[40] security of tenure protection was extended to public housing tenants when the Court read protections for this previously excluded group into the relevant legislation. Existing court procedures for private market tenants contesting evictions became immediately available for 10,000 tenants in public housing. This simple legislative modification had a significant impact on the lives of public housing tenants who had not previously enjoyed tenure protection. It altered their relationship with the state from one in which they could be arbitrarily evicted from their homes, to one in which their dignity and security was respected. The case was precedent-setting, not only for its extension of entitlement-based protections, but also for its recognition of discrimination against poor people as being analogous to other forms of discrimination. The entitlement that had been denied could be immediately provided because the institutional structures were already in place for the remedy to be implemented. There was no need to require legislatures to pass new laws or design new institutions, and there was no need for stakeholder participation in designing, monitoring, or enforcing the remedy. The case thus illustrates how a single entitlement based claim with an immediate remedy may be capable of leveraging both a positive remedy and transformative potential by challenging prevailing exclusion and stigmatization.

Another positive example of reading in remedies is found in the *Vriend* case,[41] in which the Supreme Court held that a failure to include sexual orientation as a prohibited ground of discrimination under provincial human rights legislation governing the actions of both private and government service and housing providers as well as employers, violated the equality rights under the *Canadian Charter*.[42] The majority of the Court opted to read into Alberta's human rights legislation the missing protection, extending protections from discrimination to a previously excluded group.[43] Again, although the claim was framed by the existing human rights protections in Alberta, there was a significant transformative effect achieved by providing protections from discrimination that had previously been denied.

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[39] *Schachter* (Note 18 above)
[40] *Sparks*, *(note* 14 above).
[41] *Vriend v Alberta*, [1998] 1 SCR 493.
[42] *Ibid* at paras 65-66.
[43] *Vriend*, (note 41 above) at paras. 196-197.

The positive impact of cases like *Sparks* and *Vriend* demonstrate the significant potential of positive remedies that "read in" additional entitlements or protections so as to have immediate effect. Negative rights-oriented cases striking down restrictions such as in *Morgentaler* and *Adams* may also have transformative effect, but the lack of direct engagement with positive remedial measures to ensure access to abortion services or adequate housing limited the effectiveness of the remedies in these cases.

iii) Suspended Declarations of Invalidity

Where social rights claims have engaged with longer term obligations of governments to take positive measures to ensure social rights within a reasonable period of time, "suspended declarations of invalidity" have proven to be a useful approach. Suspending the application of declarations of unconstitutionality of legislative provisions or policies has provided an alternative for Canadian courts and advocates where it is deemed desirable for the government to be given time to develop remedial programmatic or legislative responses to rights violations. While such remedies are softer than those which are of immediate application, and therefore raise issues of the quality of the enforcement and implementation, they also have the advantage of encouraging the courts to engage more directly with positive obligations of governments to design and implement legislative and programmatic remedies for social rights violations.

A leading example of this remedial approach is found in the well known case of *Eldridge v British Columbia*.[44] In that case the applicants, who were deaf, argued that the lack of sign language interpretation services within the publicly funded healthcare system violated their section 15 equality rights.[45] The Court held that the failure to provide interpreter services had violated s. 15, but that rather than providing the remedy sought by the claimants of reading these services into the existing legislative framework, it would be more appropriate for the Court to give the government time to choose among a "myriad" of options for the best way to provide interpreter services. The government sought and received an extension of time from the Court to consult with affected communities. There was some skepticism within the disability rights and legal communities about whether the claimants would actually secure the remedy to which they were entitled. Ultimately, however, the consultative participatory process proved beneficial.[46] Rather than providing interpreter services as an individual entitlement to be funded as a

[44] *Eldridge* (note 3 above).
[45] *Ibid*.
[46] Interview of Andrea L. Zwack, Counsel for Appellants in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, by Azin Samani (15 March 2010).

component of healthcare and hospital services, as would have been the result of the "read-in" originally requested, with services under the direction of medical professionals, a non-profit institute under the direction of a board, most of whose members are deaf, was funded to design, implement and administer appropriate programs in consultation with the deaf community.[47] The remedy that resulted from the suspended declaration of invalidity was therefore significantly more participatory and empowering of people with disabilities, relinquishing a medical model of disability for one which was more compatible with empowerment and inclusion of people with disabilities. It is ironic that in this case, it was the Court which reframed the remedy, in dialogue with lawyers for the claimants during the hearing of the claim.[48]

A less positive example of the enforcement of delayed declarations of invalidity is seen in the events following the appeal to the Supreme Court of Canada in *Dunmore v Ontario (Attorney General)*.[49] In that case, the Court ruled that the exclusion of agricultural workers from the *Ontario Labour Relations Act*, denying them the right to organize and to bargain collectively, violated their right to freedom of association under section 2(d) of the *Canadian Charter*. The Court held that the government had a positive duty to enact legislation that would provide protections ensuring agricultural workers the ability to meaningfully exercise their right to organize. The Court suspended its declaration of invalidity for eighteen months to allow the Ontario government to enact new legislative protections consistent with the *Canadian Charter*. However, the Ontario government's response was considered unsatisfactory by the claimants, as agricultural workers were still excluded from the protections of the *Ontario Labour Relations Act*. The separate legislative regime for agricultural ensuing enacted by the Government guaranteed to agricultural workers only the right to form and join an "employees' association", and to make representations to their employers through their association. It failed to protect the right to organize or bargain collectively in a manner that was equivalent to the rights of other workers. A further constitutional challenge was launched to challenge the Government's inadequate remedial response but the Supreme Court of Canada found that the

[47] The program is operated by a non-profit agency, the Western Institute for the Deaf and Hard of Hearing, which is funded by the Provincial Health Services Authority to provide service to communities across British Columbia. It provides interpreter services for most medical appointments including a qualified Sign Language Interpreter for most medical appointments including General Practitioners as well as specialists, psychiatrists, ophthalmologists, patient/ family conferences, gynaecology/ obstetrics, medical imaging and hospital stays. See the website online <http://www.widhh.com/services/is_mis.php>.
[48] *Eldridge (*note 3 above).
[49] *Dunmore*, (note 21 above).

new legislation was in conformity with the requirements of the *Canadian Charter*.[50]

These two cases demonstrate the positive and negative aspects of the delayed declaration of invalidity as a strategy for implementing and enforcing positive remedies. In the *Eldridge* case, the result was enhanced consultation and participation of the claimant group and institutional reform that went further than a simple "reading in" remedy would have accomplished. In the *Dunmore* case, on the other hand, disempowered agricultural workers would have been better served by having been immediately accorded the same rights as other workers through a reading-in remedy. In considering the obligations of the government to design and implement new legislation, the Supreme Court failed to enforce any participatory rights of the claimant group. Further constitutional litigation was required when the government's remedial response was deemed inadequate.

iv) Supervisory Orders

As demonstrated by the *Dunmore* case, the absence of direct judicial engagement with the implementation of remedies that require time to design and put into place has in some cases created particular challenges for claimants seeking adequate enforcement. In cases like this, ongoing judicial oversight of the remedial process to ensure that the results are compliant with the law and that claimant groups are meaningfully engaged in process would clearly have been a benefit.

There has been some resistance to the idea of courts assuming supervisory jurisdiction in Canada, based on the common law principle of *functus officio*, (according to which the court or tribunal's jurisdiction is terminated upon the issuance of a binding order). The issue was largely resolved, however, in 2003, in the case of *Doucet-Boudreau v Nova Scotia*.[51] In that case the decision of a trial judge to maintain supervisory jurisdiction over the implementation of a systemic remedy was challenged as violating the principle of *functus officio* and extending the remedial powers of courts under the Canadian Charter beyond their proper scope. In a successful challenge to governments' failure to develop adequate French language education in Nova Scotia, based on the right in the *Canadian Charter* to publicly-funded minority French language education, the trial judge had ordered the provincial government and a Council responsible for administering French language education in Nova Scotia to use their 'best efforts' to develop French secondary school facilities and programs by specific dates in various districts.

[50] *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.
[51] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, (note 8 above)

The judge retained jurisdiction to hear ongoing progress reports from the government. The Nova Scotia provincial government appealed, arguing that the remedy exceeded the proper role of the judiciary. The Nova Scotia Court of Appeal upheld the government's appeal, finding that while the *Canadian Charter* provides for a wide range of remedial powers, these do not extend to the power of courts to enforce their own orders.[52]

> Therefore, while it is true that courts of competent jurisdiction have broad and wide ranging powers to fashion appropriate remedies under s. 24(1) of the Charter - and have even been encouraged to be creative in so doing - the Charter does not extend the jurisdiction of these courts from a procedural point of view (see Mills supra). Ordering a remedy is one thing. Providing for its enforcement is quite another thing.[53]

The claimants then appealed to the Supreme Court of Canada which, by a narrow majority, reversed the finding of the Nova Scotia Court of Appeal. The Supreme Court affirmed the primacy of the notion of effective and responsive constitutional remedies through which courts fashion, from an array of options, a remedy that is capable of realizing the right:

> A purposive approach to remedies in a Charter context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft a remedy which fully vindicates the right.[54]

The majority of the Court found that in order to ensure that a remedy fulfills these requirements, a lower court may play a role in supervising the implementation of remedies. So long as the decision itself is not altered on the basis of subsequent hearings, supervisory jurisdiction may include holding further hearings regarding implementation of the order, as were convened by the trial judge in this case.[55]

It is an indication of the continued resistance to this kind of remedy in Canadian legal culture, however, that a significant minority of the Supreme Court of Canada found that the supervisory order exceeded the appropriate role of courts by breaching the separation of powers principle and its jurisdiction in relation to the *functus officio* doctrine. The minority emphasized the importance of separating judicial and political processes,

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[52] *Doucet-Boudreau v Nova Scotia (Attorney General)*, 2001 NSCA 104 (CanLII)
[53] *Ibid*, at para. 37.
[54] *Doucet-Boudreau v Nova Scotia (Attorney General)*, (Note 52 above) at para 37..
[55] *Ibid* at para 71.

finding that the order in this case led the Court to become engaged in political activity by attempting to hold the government's "feet to the fire," noting that "the trial judge may have sought to exert political or public pressure on the executive."[56]

A critical issue which was not explored by either the majority or the minority decisions was the role of a supervisory order in creating a democratic process of meaningful engagement between the government and the affected community in the implementation process. In fact, in this case, it was not the judge who exerted the political pressure, but rather the claimants. The claimant communities relied on the reporting sessions to the court as important mechanisms through which to hold their governments accountable to their constitutional obligations as clarified by the court. The reporting sessions enabled claimants to have their voices heard and to move a cumbersome process along more expeditiously.

In *Doucet-Boudreau*, the ongoing accountability for enforcement was assured by way of scheduled reporting sessions to the court. An alternative remedy, fashioned in a different institutional setting, might have required reporting sessions to some other body that could provide effective oversight. The fundamental principle at stake was not accountability to courts, but rather accountability to rights as interpreted by courts, which can play an important role in overseeing the implementation of structural remedies over time. However, ongoing jurisdiction of courts in the Canadian legal context should be conceived of as supporting and enhancing the democratic processes that are required to implement structural remedies of this sort rather than as in any way usurping them.

Under the traditional separation of powers doctrine, courts have the ultimate authority to interpret rights and to determine how they apply in a particular context. This interpretive role must be informed by a dialogue not only with governments, but also with rights holders. Ongoing accountability mechanisms in the implementation process must therefore ensure participatory rights to the groups whose rights have been violated or ignored by legislators. The structural remedy must address not only the denial of a specific entitlement, but also the exclusion, marginalization or discrimination which led to that denial.

[56] *Ibid* at para 131 (per Major, Binnie, LeBel and Deschamps JJ, dissenting).

4. The Right to Reasonable Decisions

While it is tempting to lay the blame for the paucity of systemic remedial judicial responses to social rights violations in Canada on the courts, it would be more accurate to identify the broader legal culture in Canada as the cause. Litigators have demonstrated a propensity to focus on constitutional rights claims that seek limited remedies framed within existing entitlement or legislative schemes, and have shied away from asking for programmatic remedies of the kind that was instituted in the *Eldridge* case. The legal culture in Canada has assumed that the role of the court is generally to issue remedies to discrete statutory violations rather than to enforce substantive obligations to take positive measures or to engage in the transformative "project" that lay behind the adoption of the *Canadian Charter*, described by the Supreme Court of Canada as the creation of a "just society":

> It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity.[57]

Ironically, in a number of cases where claimants have advanced social rights claims within the more traditional framework of statutory entitlement claims, framed more as corrections to legislative omissions of discrete entitlements, the Supreme Court of Canada has demonstrated a preference for softer remedies which engage the broader right to rights-compliant decision-making and to inclusive policies that promote the realization of rights and a "just society." In other words, the Court has reframed challenges in which the requested remedy was a hard remedy, demanding a discrete entitlement, and corrective of a single statutory omission, toward a softer remedial approach, applying a standard that is more broadly applicable to decisions made pursuant to a range of statutes and programs, and engages more directly with the transformative dimension of rights, by requiring decision-making that is consistent with broader human rights values. Where claimants have asked the Court to order that a discrete entitlement be read into legislation in order to remedy a *Canadian Charter* violation, or that a provision be struck down, the Court has preferred, where possible, to frame the remedy as an issue of rights-compliant decision-making within the framework of the existing statutory regime. While this remedy is more conservative in the sense of leaving the legislation unchanged, the softer remedy opens up possibilities for much broader, transformative strategies applying not only to the impugned statute,

[57] *Vriend*, (note 41 above) at para 68.

but to all decision-making. The Court has thus laid the groundwork for a more transformative remedial approach based on the right to reasonable policies and decisions consistent with the realization of social rights.

The *Eldridge* decision provides an apt example of the Supreme Court's approach. The applicants' lawyers written submissions to the Court framed the *Canadian Charter* challenge in that case as an allegation of a discriminatory legislative omission or under-inclusion, arguing that interpreter services should have been explicitly included as a health service in the legislation governing public healthcare insurance and hospital services in order to ensure equal access for the deaf. Had the Court decided the case in the manner in which the Applicants had framed it, the remedy would have been a simple matter of reading the omitted entitlement into the legislation as a component of health services and hospital services. However, a different approach was considered at the oral hearing, during which the Court had noted that the legislation that was being challenged as unconstitutional for not providing interpreter services provided decision-makers with considerable discretion and did not actually preclude supplying sign language interpreters. In its decision, the Court therefore rejected the allegation that the legislation itself was unconstitutional.

> Consequently, the fact that the *Hospital Insurance Act* does not expressly mandate the provision of sign language interpretation does not render it constitutionally vulnerable. The Act does not, either expressly or by necessary implication, forbid hospitals from exercising their discretion in favour of providing sign language interpreters. Assuming the correctness of the appellants' s. 15(1) theory, the Hospital Insurance Act must thus be read so as to require that sign language interpretation be provided as part of the services offered by hospitals whenever necessary for effective communication. As in the case of the *Medical and Health Care Services Act*, the potential violation of s. 15(1) inheres in the discretion wielded by a subordinate authority, not the legislation itself. [58]

The Court held that decision-makers are required to exercise their discretion in a manner consistent with the value of full and equal access to healthcare for the deaf. Moreover, there were many ways in which that result could be achieved. It did not actually require that interpreter services be provided as medical services. As noted above, the softer remedy ordered by the Court allowed for the provision of interpreter services through an independent non-

[58] *Eldridge, (*note 3 above) at para 34.

profit provider under the direction of a board made up of members of the claimant group.

The Court's softer remedy in *Eldridge* failed to provide an immediate entitlement, but affirmed that human rights principles and values must be paramount in all decision-making emanating from governmental or statutory authority. Moreover, the Court ruled that even private actors which are otherwise beyond the reach of the *Canadian Charter*, must exercise this authority consistently with those constitutional obligations when they have been delegated decision-making authority that impacts upon the enjoyment of constitutional rights that are otherwise the responsibilities of the government to fulfill.[59]

The right to decisions by delegated authorities to decisions that are compliant with the *Canadian Charter*, of course, is a critical component of the protection of constitutional rights. The *Canadian Charter* applies to the provincial/territorial and federal governments and to "all matters within the authority" of Parliament and of the provincial legislatures.[60] Central to the Court's analysis of whether decision-making is consistent with *Canadian Charter* rights, however, is the concept of reasonableness, which comes into play through the "reasonable limits" clause in section 1. The *Canadian Charter* rights with which delegated decision-makers must comply are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Having determined that the failure to provide interpretation services violated section 15 of the *Canadian Charter* by denying deaf patients equal access to and quality of healthcare, the Supreme Court considered, in *Eldridge*, whether the decision not to fund interpreter services was nevertheless reasonable in the circumstances. The Court incorporated the positive duty of reasonable accommodation of disability into the consideration of reasonable limits under section 1 of the *Canadian Charter*: "Reasonable accommodation, in this context, is generally equivalent to the concept of 'reasonable limits'."[61] The cost of providing interpreter services in relation to the overall provincial health care budget was not found to be significant enough to justify the government's refusal to fund the services. The failure to provide interpreter services by one means or another was therefore not reasonable.[62]

Not only the positive duty to take measures to accommodate disability, but also international human rights law generally, and the ICESCR particularly,

[59] *Eldridge*, *(*note 3 above) at paras 49 – 52.
[60] *Canadian Charter* (note 13 above) s. 1.
[61] *Ibid* at para 79.
[62] *Ibid*.

are central to the values that underlie the assessment of reasonableness in considering whether decisions or policies are consistent with the *Canadian Charter*. In *Slaight Communications*,[63] the Supreme Court of Canada considered whether the order of a private adjudicator appointed pursuant to the *Labour Relations Act*, requiring an employer to provide a positive letter of reference to a wrongfully-dismissed employee, was a reasonable infringement of the employer's right to freedom of expression. It found that the limitation of the employer's right to freedom of expression was reasonable in this case because it was consistent with Canada's commitments under the ICESCR to protect the employee's right to work. Chief Justice Dickson held in this regard that:

> Especially in light of Canada's ratification of the International Covenant on Economic, Social and Cultural Rights … and commitment therein to protect, inter alia, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one … Given the dual function of s. 1 identified in Oakes, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Canadian Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.[64]

Similarly, in the *Baker*[65] case, the Supreme Court held that for decisions to be reasonable they must be consistent with the values entrenched in international human rights law ratified by the Canadian government, including in cases where there has been no allegation of a violation of the *Canadian Charter*. The Court held that the discretionary authority granted to an immigration officer to review a deportation order on humanitarian and compassionate grounds must be exercised reasonably, which in that case required a recognition that the best interests of the child as mandated by the Convention on the Rights of the Child outweighed concerns about the anticipated health care and social assistance costs of reversing the deportation.[66] The deportation decision was therefore reversed, and the bests interests of the child principle was subsequently incorporated into the Act as well as into procedural guidelines for the exercise of all statutory discretion under the Act.[67]

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[63] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038.
[64] *Slaight Communications*, (Note 63 above) at 1056-1057.
[65] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
[66] *Ibid* at paras 64-71.
[67] *Immigration and Refugee Protection Act*, SC 2001, c 27 (as per s. 25(1), the Minister may grant permanent residency when he/she is satisfied that it is justified by

In a more recent case challenging attempts by the Conservative Government to shut down a safe injection site ('Insite') for intravenous drug users in the most impoverished area of Vancouver, [68] the Supreme Court of Canada again focused on the quality of the conferred decision-making rather than on legislative entitlement. As it had done in *Eldridge*, the Court rejected the claimants' allegation that the legislation at issue was itself unconstitutional. The claimants had argued that the federal *Controlled Drugs and Substances Act*[69] violated the right to security of the person under section 7 of the *Canadian Charter* by making it a criminal offence to possess addictive drugs. [70] The Court, however, focused on the Act's conferral of executive discretionary authority to provide for exemptions from its broad prohibition, and considered whether the Minister of Health's failure to grant an exemption for Insite was in accordance with section 7 and principles of fundamental justice.[71]

Reviewing the overwhelming evidence of the benefits resulting from Insite's safe injection site and its related health services for those in need, and considering the negative effects of a failure to ensure the continued provision of those services, the Court found that the Minister's failure to grant an exemption violated the right to life, and was not in accordance with principles of fundamental justice on account of arbitrariness.. In particular, the Court concluded that "The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."[72] The Court found that the Minister was obliged to grant a discretionary exemption to Insite, based on proper consideration of the evidence of the needs of vulnerable groups for the services it provided.[73] After considering the option of issuing a declaratory order and sending the decision back to the Minister to exercise discretion in conformity with the *Canadian Charter*, the Court opted instead for a mandamus order requiring the Minister to grant Insite the necessary exemption "forthwith". The basis for the mandamus order, however, was an assessment of reasonableness. The Court held that in this case, there was no "myriad" of options available to the Minister as had been

humanitarian and compassionate considerations when taking into account the best interests of the child directly affected); Government of Canada, *OP – 10 Permanent Residency Status Determination*, online: <http://www.cic.gc.ca/english/resources/manuals/op/op10-eng.pdf> (see s. 16.1).

[68] *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 [Insite].

[69] *Controlled Drugs and Substances Act*, SC 1996, c 19.

[70] Insite, *(*Note 68 above) at paras 112-115.

[71] Ibid at paras 127-136.

[72] *Ibid* at para 133.

[73] Insite, *(*Note 68 above).

the case in *Eldridge*. The only reasonable decision in the circumstances was to grant an exemption so that Insite could continue to provide its critical services to intravenous drug users.[74] The Minister complied and Insite has been able to continue to provide its services. The decision has spawned interest in adopting similar services elsewhere in Canada.[75]

In the recent decision of *Doré v Barreau du Québec*[76] the Supreme Court revisited the obligation to exercise discretion consistently with the *Canadian Charter* and with human rights principles of reasonableness. The Court revised the approach taken in *Slaight Communications* and subsequent decisions following the *Slaight Communications* model, in which the assessment of whether administrative decisions were reasonable and compliant with *Charter Rights* was conducted pursuant to section 1 of the Canadian Charter, assessing whether the limitation on a Charter rights was justified by a pressing and substantial objective and applying standards of rational connection, minimal impairment and proportionality according to the well-known "Oakes test".[77] In light of developments in the field of administrative law, recognizing the increasingly important role of constitutional and human rights values in administrative decision-making, the Court held in *Doré* that where administrative decision-makers are required, as in *Slaight Communications*, to protect *Canadian Charter* rights and human rights values in the context of exercising discretion, judicial review of such decisions may be conducted under an administrative law test of reasonableness, rather than by way of section 1 reasonable limits. Writing for the Court, Justice Abella explains that the modern view of administrative tribunals has given rise to a more robust standard of administrative law reasonableness, nurtured by the *Canadian Charter* and human rights law, which can provide essentially the same level of protection of fundamental human rights as does the kind of section 1 analysis of reasonable limits and proportionality that was conducted in *Slaight Communications*.[78]

The longer term implications of this convergence in Supreme Court of Canada jurisprudence pertaining to administrative, constitutional and human rights standards of reasonableness are not yet entirely clear. However, it is certainly clear that the new approach described in *Doré* provides strong grounds for insisting that all administrative decision-makers consider both explicit

[74] Insite, *(*Note 68 above) at para 150.
[75] Initiatives developed in Montreal and Quebec in response to the ruling. Megan Harris "Following Insite ruling, safe-injection sites planned for Montreal and Quebec City," This Magazine (November 11, 2011) <http://this.org/blog/2011/11/28/insite-safe-injection-montreal-quebec/>
[76] *Doré v Barreau du Québec*, 2012 SCC 12 [Doré].
[77] *R. v. Oakes*, [1986] 1 SCR 103.
[78] *Doré*, (Note 76 above) at para 29.

Canadian Charter rights, including the right to substantive equality and positive measures to accommodate needs, as well as foundational "Charter values" that have been closely linked to Canada's international human rights obligations (including socio-economic rights). The challenge of realizing the transformative potential of this new 'robust' standard of reasonable decision-making will be ensuring that the obligation to consider human rights values is taken seriously by administrative decision-makers. As Lorne Sossin notes:

> If the principle that discretion should be exercised in a manner consistent with Charter values is incorporated into the guidelines, directives and practices of tribunals, this could have a profound effect on the opportunity for these adjudicative spaces to advance social rights. By contrast, if such values turn out not to be relevant in the everyday decision-making of such bodies, then the Court's rhetoric in Doré will suggest a rights orientated framework that is illusory.[79]

What is clear is that there is now a foundation in *Canadian Charter* and administrative law jurisprudence to promote and enforce a broadly based right to decision-making that is informed by and consistent with Canada's international obligations under the ICESCR and other human rights treaties, with fundamental rights under the *Canadian Charter* and with a broadly framed standard of reasonableness that incorporated positive duties to address the circumstances and ensure the rights people with disabilities and other marginalized groups. In this sense, we have a basis, in Canada for enforcing the reasonableness standard proposed by Sandra Liebenberg and Geo Quinot under South African constitutional and administrative law. Liebenberg and Quinot have described a similar convergence of different standards of reasonableness in South African jurisprudence, which they argue establishes the basis for a coherent model of judicial review "that builds on the development of reasonableness as a standard in both administrative justice and socio-economic rights jurisprudence."

Reasonableness can be conceived of as more than a standard of judicial review, however. It is the basis of a positive right to have one's rights properly considered and ensured when decisions engaging those rights are made. Enforcing the right to reasonableness is thus not a matter only for courts, it is a standard of decision-making which must be applied by decision-makers in a range of settings and which relies on rights-holders claiming and enforcing their rights in those settings. The wide range of decision-making engaged by the standard is what creates the immense transformative potential of the standard, but at the same time raises creates significant challenges in terms of enforcement. It involves ensuring that decision-makers are presented with the evidence needed to consider all of the relevant circumstances, that

[79] *Doré*, (Note 76 above) at para 29.

they of made aware of how international human rights law and domestic constitutional and human rights may be engaged, and that arguments are advanced as to how decision-makers' enabling statutes can be interpreted consistently with ESC rights. Administrative decision-makers must be trained to contextualize social rights in their areas of expertise and to apply the "robust" standard of reasonableness affirmed by the Supreme Court of Canada. Enforcing this reasonableness standard before the range of administrative, quasi-judicial and judicial decision-makers is a massive undertaking for stakeholders and civil society organizations, currently under sustained attack by a right wing government in Ottawa with traditional governmental sources of funding removed, and charitable sources under attack.[80]

It would be wrong, however, to suggest that the enforcement challenges raised by a more coherent and universally applicable standard of reasonableness outweigh its benefits. The challenges are largely commensurate with its potential. It can only be seen as positive development for the Supreme Court of Canada to have affirmed a right to reasonableness that provides a domestic legal foundation for rights-based advocacy and civil society mobilization engaging with the range of decisions and policies that have created the crisis of poverty, homelessness and hunger in Canada.[81] The courts can still be called upon to review decisions which inconsistent with the new standard, so the dissemination of authority for applying human rights norms and values beyond the courts should not suggest an abdication of judicial responsibility. On the contrary, courts will be extremely important in ensuring that standards of reasonableness are properly applied in the exercise of all delegated governmental authority.

5. Enforcing Transformative Remedies

As noted above, effective remedies to structural "entitlement system failures" as Amartya Sen described them, requires broadly based strategies to revalue and ensure the rights of people who have been denied their dignity and rights.

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[80] Voices-Voix, "Canada: Voices-Voix Submission to the UN Universal Periodic Review, October 2007" *16th Session of the UPR Working Group of the Human Rights Council*, online <http://www.upr-info.org/IMG/pdf/voicesvoix_upr_can_s16_2013_voicesvoix_e.pdf>

[81] For an example of one initiative to promote and enforce the right to reasonableness, see the resources we have developed for claimants and advocates in Ontario at Social Rights Ontario, *Social Rights in Ontario: Adequate Food, Housing and Other Requirements of Dignity* online: Social Rights Ontario < www.socialrightsontario.ca >.

Many strategies, of course, will be based on political mobilization, public education and protest. Even within the legal sphere, however, the demand for change must occur at all levels of decision-making and engage a wide range of actors. Rights-based strategies recommended by UN Human Rights bodies demand access to effective remedies at all levels of programming and administration.

The Supreme Court's remedial focus on ensuring a right to reasonable decisions provides a very strong basis for attempting to enforce social rights-consistent decisions and policies among a range of actors and before multiple adjudicative bodies. Constitutional remedies that order entitlements in the simplest and most enforceable manner do not tend to address the need for rights-based decision-making by non-judicial actors. They assign the job of interpreting and applying constitutional and human rights primarily to the judiciary by giving courts the responsibility for making the decision about what entitlements the constitution or human rights require. This was the paradigm of judicial remedies first proposed by claimants in the *Eldridge* and Insite cases, modelled on the idea that legislatures or parliament make the law, the court considers whether it is consistent with fundamental rights, and delegated decision-makers administer the law. The Supreme Court rejected this in favour of a model in which the constitution functions more as a framework for statutory interpretation and decision-making, such that non-judicial actors also must engage in the assessment of how what rights actually mean in particular contexts. Judicial orders reading into the legislation at issue in *Eldridge* the explicit right to interpreter services, or reading into the *Controlled Drugs and Substances Act* the right to provide narcotic drugs in the therapeutic context of safe injection, would have been simpler in terms of enforceability. However, such remedies would not have had the same effect of extending the obligation of rights-based decision-making beyond courts, disseminating the obligation more widely among other decision-makers charged with exercising conferred decision-making authority or empowering rights claimants to demand reasonable decisions and policies in diverse, extra-judicial contexts.

The alternative approach that has emerged from the Supreme Court of Canada's jurisprudence assigns to courts the role of clarifying the principles, rights, and values that ought to inform rights-based decision-making, and around which entitlement systems must be both designed and administered. Rather than considering whether the *Canadian Charter* or international human rights require that a particular benefit or protection be explicitly provided as a statutory entitlement in every context, this approach focuses on whether the relevant decision-maker had the authority to provide the benefit or protection, and on the quality of the decision- making that was made pursuant to that authority. The quality of the decision-making is not assessed

solely on procedural grounds, but is assessed in light of the substantive obligations of governments to ensure and protect fundamental rights. The court is assigned an oversight role as to whether rights-based standards of reasonableness have been met. In its review of particular cases where *Canadian Charter* rights or international human rights were engaged by the exercise of discretion, the Supreme Court has clarified how *Canadian Charter* and international human rights are to be considered and applied by decision-makers who must themselves develop competence, rather than simply relying on courts or legislatures to resolve every dispute about statutory entitlements.

Reasonable decisions must invariable situation rights within a particular context and may often involve a balancing of competing rights or require assessments of priority expenditures of limited resources. In *Slaight Communications* an adjudicator was found to have exercised discretion reasonably by realizing that the right to work of employees who had been unfairly dismissed outweighed freedom of expression rights of employers. In *Eldridge*, decision-makers were found to have failed to comply with the Charter when they did not deem the projected costs of interpreter services reasonable in light of the importance of equality for people with disabilities. A more difficult balancing was necessary in *Newfoundland (Treasury Board) v. N.A.P.E.*[82] – a case in which the Supreme Court of Canada reached a different conclusion, finding that decision-makers had acted reasonably, in light of budgetary constraints. In this case, the Newfoundland and Labrador Association of Public and Private Employees challenged a provision of the *Public Sector Restraint Act,* [83]passed in 1991, to retroactively delay until 1991 the implementation of a pay equity program scheduled to commence in 1988. The result of the retroactive "delay" was to eliminate a preliminary award of $24 million which would otherwise have been paid in 1991 on the basis of calculations for the years of 1988 – 91 for workers in underpaid areas of women-dominated employment. The government argued that the roll-back of the award was made necessary by "a financial crisis unprecedented in the Province's history." The claimants, on the other hand, argued that the rollback constituted sex discrimination, which could not be justified on budgetary grounds

The Supreme Court of Canada agreed with the claimants that women's right to equality was violated by a decision to revoke a retroactive award made pursuant to an agreement to bring the pay of women-dominated jobs up to the level of comparable jobs in which men dominated. The Court found, however, that the measure was justified in the context of a fiscal crisis which had

[82] *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381.
[83] *Public Sector Restraint Act*, SN 1991, c 3

resulted in across the board cuts in government expenditure, including cuts to hospital beds, lay-offs of many employees and reduced social programs.

The N.A.P.E. decision was seen by many as a setback to women's equality rights, in that no previous decision had found that women's equality rights can be limited by budgetary concerns. However, from the perspective of seeking to advance judicial engagement with substantive social rights claims, it is unlikely (and not necessarily desirable) that courts will consider claims with significant budgetary implications without providing governments or groups defending expenditures on competing needs to provide evidence as to what constitutes reasonable budgetary measures in particular circumstances. Ensuring substantive equality for women and other protected groups under s.15 of the *Canadian Charter* may thus be more a matter of ensuring that a robust standard of "reasonable limits" is applied, commensurate with the primacy of human rights and equality, rather than attempting to keep budgetary considerations out of adjudication altogether.

An issue which arose in the *N.A.P.E.* case which will become increasingly important as administrative decision-makers engage with social rights issues is the quality of the budgetary evidence that is provided to them. A number of commentators have criticized the Supreme Court's willingness in the *N.A.P.E.* case to accept the government's characterization of the fiscal crisis.[84] It is indeed unfortunate that the record available to the Supreme Court of Canada with which to assess the reasonableness of the budgetary decision was very limited. The case was first heard before a three person Arbitration Board as a grievance pursuant to the collective agreement. The evidence put by Government before the Arbitration Board in relation to budgetary constraints consisted of an extract from the *Hansard* record of the legislative debate and some budget documents.[85] The government witnesses had not been directly involved in the weighing of different options during the budgetary process.[86]

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[84] See for example a rewritten judgment of the *N.A.P.E.* case produced by the 'Women's Court of Canada', a group of feminist/equality Charter activists, lawyers, and academics who rewrite major decisions affecting women's interests - *Newfoundland (Treasury Board) v N.A.P.E.*, [2006] 1. WCR 327, online <http://www.thecourt.ca/wp-content/uploads/2008/06/womenscourt-newfoundland.pdf>; see also Hugh Mellon, "Charter Rights and Public Policy Choices: The Supreme Court and Public Finance" (2006) 15:3 Forum Constitutionnel 135; Arghavan Gerami, "Too Much Deference to the Legislature by the Supreme Court: Did the Court Strike the Right Balance in *N.A.P.E.*?", *Public Sector Lawyers*, 7:1 (December 2008) online <http://www.oba.org/En/pub_en/newsletters_en/PrintHTML.aspx?DocId=34810#Article_2>.

[85] N.A.P.E. (Note 82 above) at para 55.

[86] *Ibid*.

Commentators have reached various conclusions about whether the Supreme Court was too deferential to the government's characterization of the budgetary constraints.

If we are assess whether the Supreme Court's standard of reasonableness in this case accords with evolving international standards, it is important to recognize that the debt-to-GDP ratio in Newfoundland and Labrador at the time was higher than any other Canadian province's in the last 20 years.[87] Newfoundland and Labrador had the nation's highest unemployment rate at the time the cuts were made, owing to the traumatic collapse of the cod fishery, and the province had in previous years battled poverty rates among families with children which were the highest in Canada.[88] Newfoundland has a particular political history in relation to debt which might legitimately form part of a reasonableness review. The independent Dominion of Newfoundland had lost its independence and Responsible Government during the Great Depression because of unmanageable debt and this history looms large in the Newfoundland consciousness. The continued debt was also a factor in the contested decision to relinquish independence and become a province of Canada in 1949.[89] It would be difficult in circumstances such as this for an Arbitration Board or a court to reverse a budgetary decision so as to increase by 10% the projected budgetary deficit.[90]

A key consideration in a reasonableness analysis must also be whether the needs of the most vulnerable groups are prioritized.[91] Unlike most other provincial governments in Canada, the Province of Newfoundland and Labrador committed to fully protecting social assistance rates of single mothers from any cut-backs during the years of severe restraint, maintaining

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[87] Dave Norris, *The Fiscal Position of Newfoundland and Labrador* (Royal Commission on Renewing and Strengthening Our Place in Canada, May, 2003) Chart I-10.

[88] National Council on Welfare, Poverty Profile 1980-1990 (Ottawa, 1992) online <http://publications.gc.ca/collections/collection_2011/cnb-ncw/H67-1-4-1990-eng.pdf>.

[89] Neil Reynolds, "What Newfoundland can teach us" *Globe and Mail,* Friday, Nov. 27 2009, online <http://www.theglobeandmail.com/report-on-business/rob-commentary/what-newfoundland-can-teach-us/article793205/

[90] N.A.P.E. (Note 82 above) at para 72.

[91] *Irwin Toy Ltd. v Quebec (Attorney General),* [1989] 1 SCR 927 at para 75; Bruce Porter & Martha Jackman, *International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection, supra,* note 6; United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant,* UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007).

the highest social assistance rates for single mothers in Canada in real terms.[92] With widespread lay-offs of women working at low wage, seasonal employment in fish plants occurring with the decline and subsequent moratorium of the cod fishery in 1992, the exemption of social assistance rates from these cuts was of critical importance for women living in poverty. The standard of reasonableness that applies to Newfoundland's expenditure cuts is a standard which other provincial governments in Canada and governments in many European governments, where cuts have failed to adequately protect the programs relied upon by the most disadvantaged, would be unable to meet. The standard articulated by the Supreme Court in that case is one which would ensure that courts continue to view governments' budgetary justifications with a healthy "skepticism" while recognizing that balancing competing rights and priorities is itself a critical component of rights-compliant decision-making.

> The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints. To do otherwise would devalue the Charter because there are always budgetary constraints and there are always other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis. It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise "whose sole purpose is financial". The weighing exercise has as much to do with social values as it has to do with dollars. In the present case, the "potential impact" is $24 million, amounting to more than 10 percent of the projected budgetary deficit for 1991-92. The delayed implementation of pay equity is an extremely serious matter, but so too (for example) is the layoff of 1,300 permanent, 350 part-time and 350 seasonal employees, and the deprivation to the public of the services they provided.[93]

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[92] See the Chart showing the total income of welfare recipients by province and territory, National Council on Welfare, *Welfare Incomes, 1992* , online <http://www.sixthestate.net/docs/welfare/welfareincomes1992.pdf>. Noe that in 1999, Newfoundland continues to maintain the highest rates for single parents. National Council on Welfare, *Welfare Incomes, 1999* , online <http://www.sixthestate.net/docs/welfare/welfareincomes1999.pdf>. The author thanks the 6th Estate for making available all reports of the National Council on Welfare after the Harper Government shut down this important independent monitoring Council in 2012 as part of a systematic attempt to suppress information and advocacy about social rights violations in Canada.

[93] *Ibid* at para 72.

The standard or reasonableness applied in the *N.A.P.E.* decision is therefore arguably compatible with emerging reasonableness standards internationally and should, in future cases, be interpreted in conformity with international human rights norms. Whether the Supreme Court properly assessed the severity of the financial crisis facing the province, it is perhaps most important that it did not accept the position enunciated by Marshal, J.A. writing the majority decision for the Newfoundland Court of Appeal, suggesting broad deference to governments in relation to budgetary decisions. Binnie J. responded to that Court's proposal for a deferential approach by elucidating a critical distinction between decisions deemed 'reasonable" by legislators, and rights-based or constitutional standards of reasonableness which the courts are mandated to apply:

> No doubt Parliament and the legislatures, generally speaking, do enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to their satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render superfluous the independent second look imposed on the courts by s. 1 of the Charter. Deference to the majority view on that scale would leave little protection to minorities. Marshall J.A.'s proposal, with respect, is not based on fidelity to the text of s. 1 but to dilution of the requirement of "demonstrable" justification.[94]

Although the Court in *N.A.P.E.* found against the claimants and denied them the judicial remedy they sought, the standards of reasonableness that were articulated in the decision, combined with the finding that the impugned measure constituted discrimination against women, played an important role in the claimants' later success in securing this entitlement through political rather than legal means. Two years after the Supreme Court issued its judgment, with oil revenues starting to flow into Newfoundland, a lobbying campaign by women's and labour groups was successful in convincing the government to make the retroactive payment of $24 million previously denied by the Court.[95] The political campaign relied heavily on the decision of the Court that the non-payment of the award had constituted discrimination and was only justified in the circumstances of a fiscal crisis.[96] They did not need to return to court, as the violation of a right had already been established. In this sense, even in finding against the claimants, the Court had empowered the group affected to eventually win the entitlement they sought once the fiscal

[94] *Ibid* at para 103.
[95] Jamie Baker, Pay equity cash 'addresses a wrong', *The Telegram (St. John's)* 24 Mar 2006, p A3.
[96] Letter from Shiela H. Greene, Counsel for Appellants in *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381 (29 March 2010).

circumstances changed. A framework was established by the Court for the assessment of reasonableness in budgetary allocations based on the primacy of human rights (including social rights) which, in the context of an improved fiscal environment, empowered affected constituencies to lobby for reasonable budgetary allocations relative to available resources and competing social rights obligations.

6. *Tanudjaja v Canada*: Claiming and Enforcing The Right to Adequate Housing

As noted above, Amartya Sen, in his early ground breaking research, demonstrated that poverty and famine are not generally caused by a scarcity of goods or discrete failures of particular programs, but rather by structural failures of entitlement systems.[97] Homelessness in Canada is similarly not a problem of scarcity of housing. The entire system of land and property rights, housing laws, land use planning, social programs, wage protections, social security, regulation of private actors (and so on), has left, in its cumulative effect, certain groups without access to adequate housing. The concept of a structural entitlement system failure is thus an accurate characterization of the human rights crisis of homelessness in Canada, referring not to flaws within a particular housing program which could be immediately corrected by extending or improving an existing benefit or piece of legislation, but rather to a systemic pattern of exclusion, inadequate housing and homelessness among particular groups as the cumulative and inter-active effect of a myriad of laws, policies and programs.

This concept seems particularly apt in the context of Canadian social rights advocacy, where widespread homelessness and hunger have emerged during times of economic prosperity and growing affluence. UN human rights bodies have identified many of the component parts of this structural entitlement system failure leading to widespread homelessness, including: inadequate income assistance, low minimum wage, lack of security of tenure, erosion of land and resource rights of Indigenous peoples, insufficient housing subsidy and social housing, restrictions on unemployment insurance affecting women and part-time workers, lack of housing with support for mental health disabilities, inadequate human rights protections against increasing stigmatization, and marginalization of people living in poverty or homelessness.[98] None of these failures of governments to take positive

[97] Amartya Sen, "Property and Hunger" *supra* note 22.

[98] United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (1993), UN Doc E/C.12/1993/5; United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* , UN Doc E/C.12/1/Add.31, (1998); United Nations Committee on Economic, Social and

measures is justified by a scarcity of resources. The evidence clearly supports the contention that governments would achieve significant net savings in healthcare, justice and social program costs by taking positive measures to remedy widespread homelessness.[99]

In *Tanudjaja v Canada*, individuals affected by homelessness have joined with a network of organizations to ask the courts to engage directly, through an array of remedial strategies including both declaratory and supervisory orders, with the ongoing failure governments in Canada to address the human rights crisis of homelessness and inadequate housing. The claimants in *Tanudjaja* seek to ensure, through an innovative model of judicial engagement, that governments develop, in consultation with affected communities, joint national and provincial housing strategies with effective accountability mechanisms through which progress against set goals and timetables for the elimination of homelessness and the implementation of the right to adequate housing can be assessed.[100] Claimants are also asking the court to retain jurisdiction in the same manner as the court in *Doucet-Beaudreau* to ensure that the strategy is designed and implemented in a timely manner, with participation of the effected communities.

The innovative remedial strategy proposed in this case was developed by a large network of groups and individuals involved with the issue of homelessness.[101] The network looked to the recommendations of international human rights authorities, like the United Nations Special Rapporteur on

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Cultural Rights, *Concluding Observations: Canada*, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006).

[99] Bruce Porter & Martha Jackman, *Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework*, Working Paper, (Huntsville, ON: Social Rights Advocacy Centre, June 2012) online at <http://www.socialrightscura.ca/documents/publications/Constitutional%20Framework%20Canada.pdf> at 60-61.

[100] *Tanudjaja v Canada* (Ont Sup Ct File no CV-10-403688) (2011). Amended Notice of Application (May 26, 2010) online <http://socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.(R2H).pdf>. Further documentation of the case online <http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness.html>. See also documentation of the Attorneys General Motion to Dismiss the application online at http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness-motion-to-strike.html.

[101] For a description of the civil society organizations and mobilizing accompanying this litigation initiative as well as the legal strategies and evidence, see "Charter Challenge to Homelessness and Violations of the Right to Adequate Housing in Canada" online < http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness.html>

adequate housing and United Nations Committee on Economic, Social and Cultural Rights (CESCR), which had repeatedly called on Canadian governments to work together to adopt a national strategy to address homelessness. After many years of governmental inaction in response to these critical recommendations, with serious consequences for the most fundamental rights under the *Canadian Charter* for those affected by homelessness and inadequate housing, including the right to life, the network believed that Canadian courts should play a role in ensuring that these authoritative recommendations are acted upon. It was decided that a constitutional challenge would be launched to challenge the provincial and federal governments' failure to implement rights-based housing strategies, establishing that this failure resulted in the violation of rights under the *Canadian Charter*.

While numerous challenges have been advanced in relation to components of the right to adequate housing in Canada, including under-inclusive security of tenure protections,[102] rental qualifications that disqualify low income tenants,[103] inadequate welfare rates for particular groups,[104] excessive utilities costs for low income households,[105] and prohibitions on the temporary erection of shelters in parks,[106] there has never been a challenge claiming a comprehensive remedy that would address the homelessness crisis in Canada as a structural entitlement system failure as described above. In advancing components of the right to adequate housing, international human rights law was often employed to encourage courts to interpret existing statutes or constitutional rights in a manner that would advance the right to housing. However, in over twenty-five years of litigation under the *Canadian Charter*, no group or individual had ever before put forward a claim that would seek, as a remedy, a coherent response to the problem of homelessness. This means that rather than claiming the right to adequate housing as a substantive right, it has only ever been sought as a backdrop to other types of more instrumental claims. While asking that homelessness be remedied in a single court case seems ambitious, the claim recognizes that the problem of homelessness is eminently solvable in Canada. The right to sleep under a box in a park, as had been won in *Victoria v Adams*[107] is a remedy that is grossly disproportionate

[102] *Sparks, supra* note 14.
[103] *Kearney v Bramalea Ltd* (1998), 34 CHRR D/1 (Ont. Bd. Inq.), upheld in *Shelter Corporation v Ontario Human Rights Commission* (2001), 143 OAC 54 (Ont. Sup. Ct.); *Whittom v Québec (Commission des droits de la personne)* (1997), 29 CHRR D/1 (Que. CA).
[104] *Gosselin v Quebec* (Attorney General), [2002] 4 SCR 429, 2002 SCC 84.
[105] *Boulter v Nova Scotia Power Incorporated*, 2009 NSCA 17.
[106] *Adams*, (Note 28 above)
[107] Adams, (note 28 above).

to Canada's abundant resources. In *Tanudjaja*, the claimants seek a remedy that more closely conforms with emerging standards of reasonableness based on available resources.[108]

Rather than starting with specific pieces of legislation that could be challenged and addressed through traditional, statute-based remedies, those advancing the claim in *Tanudjaja* considered what sort of remedy would be effective and developed the claim around the remedy that is needed. The claimants have asked the Court to order the federal and provincial governments to design, in collaboration and meaningful consultation with stakeholders, an effective strategy to implement the right to adequate housing which includes complaints procedures, meaningful accountability mechanisms, timetables and benchmarks for the elimination of homelessness, and a central role for civil society, indigenous communities, and affected groups in developing, implementing and monitoring the strategy. In response to a Motion to Dismiss filed by the Respondents, coalitions of human rights, anti-poverty and housing organizations intervened in the case to defend the justiciability of the claim and of the novel remedial strategy.[109] Judicial acceptance of remedial and enforcement strategies such as this will largely determine whether victims of the most serious, systemic violations of social rights in Canada will have access to effective remedial and enforcement strategies through the courts.

7. Conclusion: Addressing Structural Entitlement System Failures and Enforcing Transformative Remedies

In considering the relevance of the Canadian experience to other countries, it is important to realize that the kind of entitlement system failure that is challenged in the *Tanudjaja* case is not restricted to affluent countries. Sen's research showed that what is most obvious in affluent countries occurs in the context of developing economies as well – only with more severe consequences. In all countries, hunger or homelessness occurs when certain groups are left without access to food or housing because the existing system of income and property related entitlements, be they land and property rights, housing laws, land use planning, social programs, wage protections, social security, international aid programs or regulations of private actors. Therefore, solving hunger and homelessness is not simply a matter of ensuring that governments or charitable agencies provide the poor with

[108] *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878.

[109] For a list of groups filing motions to intervene as well as the intervention briefs see "Motion To Dismiss - Charter Challenge to Homelessness and Violations of the Right to Adequate Housing in Canada" online <<http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness-motion-to-strike.html>

housing and food, though this is certainly necessary in the short term. The entitlement system that has denied certain groups their dignity and security must also be transformed into one which gives priority to the rights of those who have been marginalized, and whose rights have not been properly considered in the design and implementation of a range of programs, laws, and regulations. It is critical that litigation strategies develop enforceable remedies that engage with the need for a transformative social rights practice, rather than one that relies solely on judicial remedies framed within the existing entitlement system.

Justiciable social rights claims have in the past been conceived of primarily as falling within the first category, as entitlements to social goods or services that meet certain standards of adequacy, or to protection from being forced from being deprived of those services or goods. In some cases, such as those involving discrimination in or eviction from housing, social rights claims in Canada may correspond exactly to these kinds of entitlements, and can be advanced within the framework of traditional judicial remedies and enforcement mechanisms. These claims can be framed within existing statutory or programmatic obligations by challenging exclusions on the basis of accepted principles of fairness, consistency, non-discrimination and minimum standards of adequacy. Entitlement-based claims may involve positive remedies by virtue of extending the entitlement to previously excluded groups, or by demanding positive measures to comply with statutory requirements as interpreted by courts or tribunals.

It is now increasingly recognized, however, that if social rights claims and constitutional reviews of legislation are to engage with the most critical issues of exclusion and deprivation, they must also engage with a transformative dimension of policy and program design and implementation, and with the requirements of progressive realization as articulated in article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Social rights claims addressing this transformative dimension cannot be entirely framed by claims within the existing entitlement system, but rather must implement transformative strategies to reconstruct entitlement systems around social rights. Transformative social rights claims, therefore, seek to remedy broader entitlement system failures that extend beyond a single statute or program, and tend to involve complex interactions among social program entitlements, private sector regulation, tax systems, income support, budgetary allocations, land use, resource allocation, and many other policies. Rather than defining the violation and remedy in terms of an unfair deprivation or discriminatory exclusion within an existing statutory or entitlement framework, transformative claims will seek out structural causes of social rights violations, and create a remedial framework around the transformative project of realizing social rights.

There is clearly a tension between entitlement based or corrective claims on the one hand, such as those which, as in the *Sparks* or *Vriend* cases, extend existing legislative protections to excluded groups, and cases such as *Eldridge*, *Doucet-Boudreaux* and, most notably, *Tanudjaja* where enforcement of judgments may involve new legislative initiatives and the creation of new institutions and programs through meaningful engagement with rights claimants or stakeholders. On the other hand, the transformational dimension of social rights remedies and enforcement is not restricted to any particular type of remedy. Social rights claims which identify specific exclusions or inadequacies in existing programs or statutes provide for remedies that are more immediately enforceable, but immediate remedies may also have a longer term transformative effect. Claims to entitlements within existing legislative frameworks rely on interpretations of law and of what constitutes reasonable exercise of conferred decision-making authority. Those aspects of the judicial role engage with the structural and systemic dimensions of social rights violations. Single entitlement based claims may sometimes offer the most strategic approach to challenging the devaluing of the rights of certain groups. Interpreting and administering statutory entitlements in a manner that is consistent with social rights may in some cases be the most effective way to affirm social rights values and engage with broader systemic issues, even if the immediate result in terms of remedy is that a single claimant receives a discrete benefit, service or good. It is important to recognize the transformative dimension of engagement with courts' interpretive role, since giving meaning to rights in particular contexts is a critical component of transformational rights strategies whether they rely on legal claims or on broader strategies of social mobilization, public education and political advocacy.

The success of equality rights litigation on issues of same-sex partnerships in Canada is a good example of the transformative potential of entitlement-based rights claims. Claims advanced by the LGBT community in Canada have consisted largely of challenges to exclusions from existing statutory entitlements or protections. These claims, however, have nevertheless proven to have an immense transformative effect. The inclusion of sexual orientation in human rights legislation and the inclusion of same sex partners in benefits previously restricted to heterosexual couples, in addition to providing benefits and protections that were previously denied, has helped to redefine discriminatory concepts of family, spousal relationships, and marriage. Challenging discriminatory exclusions within existing entitlement frameworks successfully engaged with systemic patterns of marginalization

and discrimination, resulting in a revaluing of the rights of those whose fundamental rights had previously been denied.[110]

Canadian equality jurisprudence has made important contributions to the understanding of this dialectic between entitlement-based claims and the transformative goals of social rights litigation. Canada's comparatively rich history of substantive equality in early jurisprudence under provincial and federal human rights legislation, during the 1970s and 1980s carried over into unique commitments to substantive equality under section 15 of the *Canadian Charter*.[111] Canadian courts played a path-breaking role in linking the right to non-discrimination to positive obligations capable of addressing structural barriers to equality. An early example was the case of *Action Travail des Femmes*, which filed complaints of systemic sex discrimination against the Canadian National Railway. The remedy granted by the human rights tribunal and upheld by the Supreme Court of Canada in that case included an employment equity program to remedy the under-representation of women in the CN Railway workforce and other ongoing effects of systemic discrimination.[112] Canada was the first constitutional democracy to include disability as a constitutionally prohibited ground of discrimination, recognizing that non-discrimination includes positive obligations to reasonably accommodate unique needs of people with disabilities.

While Canadian courts have sometimes retreated from the substantive approach to equality that lay at the center of historical expectations of the *Canadian Charter*,[113] the Supreme Court has nevertheless continued to map out an important path towards more transformative remedies capable of addressing systemic violations spanning multiple programs. As described above, the Supreme Court has tended to respond to constitutional claims involving the denial of specific entitlements by focusing on the right to reasonable decisions rather than on the right to particular entitlements.

The Supreme Court's jurisprudence suggests, as has been described, a convergence and interdependence of a number of different approaches to reasonableness including proportionality and reasonable limits review under the *Canadian Charter*, administrative law reasonableness review, and the

[110] For an overview of these developments see Miriam Smith, 2005. "Social Movements and Judicial Empowerment: Courts, Public Policy and Lesbian and Gay Organizing in Canada," Politics & Society 33: 2 (June): 327-353.
[111] Bruce Porter, "Expectations of Equality" (2006) 33 Sup Ct L Rev 23.
[112] *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114.
[113] Bruce Porter, 'Expectations of Equality' (2006) (Note 113 above); Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" in Sanda Rodgers & Sheila McIntyre, eds, The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat (Markham, Ont: LexisNexis Canada, 2010).

requirement of reasonable accommodation of needs of groups protected from discrimination, including but not limited to persons with disabilities.[114] The Court has adopted a robust standard of reasonableness review in all of these contexts, which can be applied so as to be compatible with Canada's commitments to international human rights, and with the emerging international standard of reasonable allocation of available resources to realize ESC rights included in the new Optional Protocol to the ICESCR.[115] It is the right to reasonable decisions and policies, informed by international human rights values, which potentially brings together individual entitlement claims and broader structural, transformative claims, mapping out a strategy that moves beyond the enforcement of particular judicial decisions to a strategy for social transformation based on human rights values. The right to reasonable decisions and policies requires not only reasonableness in the administration of statutory entitlements, but more broadly, the design and implementation of reasonable strategies to fulfill social rights.

Many claimants are not in a position to forego individual remedies in the way that the individual applicants in the *Tanudjaja* right to housing challenge have chosen. In this particular challenge, the applicants are restricting the remedy sought to the systemic component – a rights-based strategy to end homelessness and implement the right to adequate housing in Canada. The individuals involved only seek individual remedies is so far as these would become available to them, as to others in their circumstances, as the housing strategy sought as a systemic remedy is implemented over time. In other legal contexts, it would be preferable to ask the court to order the immediate provision of individual remedies. Strategic litigation aimed at systemic solutions should complement, and in some cases be combined with, but certainly not displace the vast array of individual claims to particular benefits, as well as challenges to evictions or to discriminatory policies that are critical to housing rights advocacy in Canada and elsewhere.

Modern systems of governance, however, with a significantly "contracted out" state and complex forms of public – private partnerships demand innovative approaches to social rights remedies and enforcement. New

[114] For consideration of these convergences, prior to the Supreme Court's decision in *Doré*, see Susan L Gratton & Lorne Sossin, "In Search of Coherence: The Charter and Administrative Law under the McLachlin Court" in A Dodek & D Wright, eds, *The McLachlin Court's First Ten Years: Reflections of the Past and Projections of the Future* (Toronto: LexisNexis, 2010).

[115] Bruce Porter, "The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins" (2009) 27:1 Nordic Journal of Human Rights 39 [Porter, "Reasonableness"]; Brian Griffey, "The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11 HRL Rev 275 at 290.

approaches must reflect the diversity of actors in the context of modern systems of governance, and the diverse legislative, policy, or adjudicative contexts in which claims may be advanced. Regulation of private actors, particularly when they have been delegated authority in relation to the implementation of social rights, as in the *Eldridge* case, must mean more than restraining them from doing harm. Private actors must also have positive obligations with respect to the realization of social rights. Where private actors are engaged in partnerships with governments in areas that impact the realization of social rights, rights claimants must insist that they act in accordance with state obligations to enhance and sustain strategies to fulfill social rights over time. The modern approach to social rights remedies thus engages with areas of policy, program development and planning that were previously beyond the lens of human rights, bringing social rights squarely into an expanded human rights framework, and bringing new challenges to the enforcement of remedies.

Recognizing that many parties are involved as duty-bearers does not preclude the state being held responsible for violations of social rights involving multiple actors and various programs and policies, or for ensuring that effective remedies are put in place. Although structural causes of poverty may be directly attributable to the actions of private actors, patterns of systemic exclusion and disadvantage are sustained and reinforced by failures of the state to prevent and remedy them through appropriate legislative (and other) means. As the Supreme Court of Canada properly noted in *Vriend*: "Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious."[116] Just as the duty to protect required the regulation of private actors in *Vriend*, imposing on them both negative and positive duties to ensure equality, so the duty to fulfill, through positive action, required governments to ensure that private entities with delegated authority in *Eldridge* acted in accordance with standards of reasonableness of budgetary allocations. The intricate links between state policy, failures to regulate to protect rights, and the exclusions and inequalities created by the private market, challenges litigants to demand a more principled and strategic approach to rights-based policy development, regulation, and legislation. Effective remedies must engage with democratic, institutional and administrative processes at multiple levels of government and delegated decision-making, and a new form of dialogue or conversation among

[116] *Vriend*, (note 41 above).at para 103; see generally Martha Jackman, "Giving Real Effect to Equality: *Eldridge v British Columbia (A.G.)* and *Vriend v Alberta*" (1998) 4:2 Rev Const Stud 352; Bruce Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*" (1999) 9:3 Const Forum Const 71 online <http://www.law.ualberta.ca/centres/ccs/userfiles/9-3porter.pdf >.

governments, stakeholders, human rights institutions, administrative decision-makers, tribunals, and courts framed around the realization of rights.

The expanded role of administrative bodies in relation to rights-based adjudication means that a "robust" standard of reasonableness, articulated in similar terms by the Supreme Court of Canada, by the Constitutional Court in South Africa, and international human rights bodies can help to initiate these new conversations and to guide their outcomes. Reasonableness has become an important framework for the accountability of administrative decision-makers and the enforcement of human rights norms and values among a range of decision-makers beyond courts. Advocates and claimants in Canada as elsewhere have concerns the softness of the right to reasonableness, given its value-laden and contextual elements, leave too much undecided in comparison to immediately enforceable entitlements. Advocating for and enforcing reasonable, rights-compliant decisions in a wide array of settings places significant demands on under-resourced advocacy organizations and claimant groups. However, the benefits and transformative potential of these new approaches, with their broad range of application, must not be disregarded or ignored. Claiming social rights must invariably engage with values and context. It does not serve the longer term goals of social rights advocacy to try to avoid these "soft" elements in search of hard and fast remedies in every case.

The judicial reticence to engage with broader systemic failures rather than discrete deprivations or exclusions thus remains a serious obstacle to effective social rights litigation in Canada. Canadian courts have, at times, attempted to sustain the impossible position that there may be no constitutional obligation for governments to provide welfare, healthcare, or protections from discrimination in human rights legislation – only an obligation to ensure that once a system has been put in place to provide for implementing social rights that Canada has guaranteed to its residents under international human rights law, the system must conform to the *Canadian Charter* in its internal design. The Supreme Court has usually insisted on leaving undecided the question of whether there is an obligation to put such programs in place *ab initio*.[117] However, the Supreme Court has at the same time recognized that the *Canadian Charter* applies to governments' failures to act within their authority in the same way as it applies to their actions.[118] Ultimately, there is no justification in the context of Supreme Court jurisprudence for the argument that governments have no constitutional obligation to take positive legislative and programmatic measures to ensure rights. Such a position is at

[117] This was the Court's official position in *Eldridge*, *(*note 3 above), *Vriend*, (note 41 above) and N.A.P.E. (Note 82 above).
[118] *Vriend*, (note 41 above) at para 60.

odds with Canada's international human rights obligations to adopt necessary legislative measures to implement international human rights, and it is also fundamentally at odds with accepted principles of constitutional supremacy and the Court's affirmation of principles of effective and purposive remedies. Approaches to remedies and enforcement of rights must simply catch up with the emerging recognition of that the *Canadian Charter* imposes both positive and negative obligations.

The Supreme Court's reluctance to affirm positive obligations to ensure that necessary legislation and programs are put in place to ensure rights has meant that courts in Canada have sometimes floundered in relation to the design of remedies and enforcement of rights, failing to properly engage with the broader purposes of the *Canadian Charter* and of international human rights. In the area of welfare entitlements, the Nova Scotia Court of Appeal decided in an early *Canadian Charter* case to remedy discrimination between two categories of welfare recipients by lowering the benefits of single mothers to the level of single fathers or "equalizing down" to identical levels of gross inadequacy.[119] The Supreme Court of Canada properly identified this remedial approach as "equality with a vengeance."[120] As noted above, in the *Vriend*[121] case, the majority of the Supreme Court of Canada ordered 'sexual orientation' to be read into Alberta's provincial human rights legislation, finding that this remedy was more faithful to the purpose of the legislation than striking down the entire *Act* and removing the protections for all groups facing discrimination. However, one justice, Justice Major dissented, favouring a declaratory remedy that would allow the legislature to choose "no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination."[122] The dissent provided fuel to right wing groups in Alberta to "enforce" the Supreme Court's decision by demanding that human rights legislation be repealed.[123] Without recognition of an overarching obligation to ensure the existence of systems and legislation to protect rights, the right to equality for groups facing discrimination thus unravelled into a right to have no human rights protections at all. Clearly, a more coherent and consistent approach to the issue of substantive obligations and remedies is needed in Canada — one that infuses the issue of remedies with values that move beyond the four corners of a particular statutory entitlement, towards the goal of substantive realization of rights.

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[119] *Attorney-General of Nova Scotia v Phillips* (1986), 34 DLR (4th) 633 (NSCA)
[120] *Schachter* (Note 18 above).
[121] *Vriend*, (note 41 above).
[122] *Ibid*, at para 196. (Major J dissenting in part).
[123] See, for example, Link Byfield, "The Supreme Court has left Alberta no choice but to repeal its human rights act" 22:26 Alberta Report (June 1995) at 2.

The enforcement of human rights through rights-based processes of accountability, especially the expansion of two-way 'dialogue' between courts and legislatures into a broader engagement with democratic processes that ensures that rights claimants' are heard, is vital to the effective enforcement of systemic claims in Canada. A rigid division between the hearing process, in which claimants' voices are heard, and a remedial process from which they are excluded, is doomed to failure. Social rights accountability requires much broader and more diverse participation from all stakeholders than the traditional model of dialogical remedies generally envisages. It is up to the courts to frame enforcement orders in a way that engages all of the relevant actors in an ongoing, rights-based process of accountability to substantive rights. Effective participation by rights holders must be incorporated into standards of reasonable decision-making.

Giving a voice to diverse communities of rights-holders is critical to effective enforcement of remedies to structural entitlement system failures. Social rights violations are generally the result of failures of democratic accountability and inclusiveness; as such, social rights remedies must be enforced in a manner that will bring about new forms of democratic participation and accountability. If these remedies are to have any meaningful chance of success, they will have to be based on the ongoing application of human rights principles, and the empowerment of marginalized communities to play a meaningful role in that process. The struggle for meaningful voice and democratic empowerment through more effective judicial remedies is one which advocates and rights claimants in Canada share with their allies elsewhere, and which will hopefully benefit from advances being made both at the United Nations and in other domestic and regional systems.