

## Introduction: Advancing Social Rights in Canada\*

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### A. The Human Rights Crisis in Canada

A book which purports to discuss advancing social rights in Canada in 2014 may be viewed by some as an exercise in denial. Thirty years into Canada's post-*Charter* democracy, growing economic inequality and violations of social rights, disproportionately experienced by Aboriginal people, sole support mothers and their children, people with disabilities, racialized groups and newcomers, represent egregious human rights failures that call into question our collective commitment to what have long been understood as definitional values. As former NDP leader Jack Layton observed:

Canadians, overwhelmingly, believe in justice and equality. These are values we trust, and we want to bring them to life in our communities. Our vision of the just society forms the core of our sense of identity *as Canadians*. But rejecting poverty in our national heart hasn't stopped poverty from festering. Our society enters this new millennium with open wounds and a poverty rate that stands among the worst in the developed world.<sup>1</sup>

In recent years, civil society and Aboriginal organizations in Canada have consistently identified poverty, food insecurity, inadequate housing and lack of access to health care, education and decent work as fundamental

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\* This is a pre-publication text of the Introduction to Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 1-32.

\*\* The authors wish to acknowledge and thank the Social Sciences and Humanities Research Council of Canada (SSHRC) Community-University Research Alliance (CURA) Program for its generous funding support; Andrei Ilas for his invaluable editorial assistance; the many student research assistants from the participating universities for their important contributions; and the University of Ottawa Faculty of Law for its ongoing support for the CURA project and for hosting the symposium which led to this book.

<sup>1</sup> Jack Layton, "Foreword to the First Edition" in Dennis Raphael, *Poverty in Canada*, 2<sup>nd</sup> ed. (Toronto: Canadian Scholars' Press Inc., 2011) xii.

violations of human rights.<sup>2</sup> UN human rights bodies have also expressed “grave concern” about the extent and systemic impact of homelessness, hunger and poverty in Canada, and have called for immediate and concerted federal and provincial/territorial government action to address these issues.<sup>3</sup> It is not, as the Canadian government likes to suggest, that the UN mistakenly believes that hunger and homelessness are more extreme in Canada than in struggling economies in Africa or Asia.<sup>4</sup> Rather these harms are seen as a human rights crisis in Canada because they are completely unnecessary in a country experiencing unprecedented affluence and economic prosperity; the result of governmental choice and symptomatic of a serious retrogression from the respect for social rights norms that the UN had come to expect of post-war Canada.<sup>5</sup>

At one time ranked by the international community as a leading voice for human rights and a model for emerging constitutional democracies, Canada is now more often viewed as shamelessly pursuing environmentally unsustainable development within and beyond its own borders in ways that

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<sup>2</sup> See for example: Ligue des droits et libertés, *Rapport sur l'état des droits humains au Québec et au Canada* (2013) online : LDL <http://liguedesdroits.ca>; Bruce Porter & Leilani Farha, “Reaffirming Canada’s Commitments to Human Rights” in *Poverty and Parliament* (Spring 2009) online: Social Rights in Canada CURA [www.socialrightscura.ca](http://www.socialrightscura.ca); Leilani Farha, Alex Neve, Bruce Porter, “The Universal Periodic Review of Canada: February 2009 – An overview of a select number of Canadian NGO concerns and recommendations” (January 2009) online: Social Rights in Canada CURA [www.socialrightscura.ca](http://www.socialrightscura.ca); Assembly of First Nations, *Submission to the United Nations Human Rights Council Universal Periodic Review of Canada’s Human Rights Obligations* (October 2012) online: Universal Periodic Review [www.upr-info.org](http://www.upr-info.org); Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, PC) (“[w]hether the subject was poverty, housing or homelessness, many witnesses described the problems in terms of rights denied” at 15); Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) (Chair: Hon. G.V. LaForest) (“[d]uring our consultations we heard more about poverty than any other single issue” at 106).

<sup>3</sup> Bruce Porter & Martha Jackman, “International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection,” Ottawa Faculty of Law Working Paper No. 2013-09 47-54, online: CURA <http://socialrightscura.ca>; See also Bruce Porter’s discussion in Chapter 1.

<sup>4</sup> House of Commons Debates, 41st Parl, 1st Sess, No 127 (18 May 2012) at 1155 (Deepak Obhrai).

<sup>5</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Mission to Canada*, UNHRCOR, 22nd Sess, A/HRC/22/50/Add.1 (2012) online: OHCHR [www.ohchr.org](http://www.ohchr.org) [*Report of the Special Rapporteur on the right to food*].

primarily benefit the most affluent, exploit vulnerable groups, damage ecologies, disinherit Indigenous communities and exacerbate global and domestic inequality.<sup>6</sup> In response to increasing criticism of Canada's human rights and environmental record at home and abroad, the Canadian government has staged a dramatic retreat from Canada's earlier engagement with international human rights norms and accountability mechanisms.<sup>7</sup> Instead of being an active proponent of advances in international human rights at the UN, as it has in earlier years, Canada has resisted recent progressive reforms in the field of social rights. In particular, Canada has failed to support the development of, and then refused to ratify, new complaints procedures which would empower those whose social rights have been violated in Canada to seek international adjudication.<sup>8</sup> As the current Canadian government would have it, serious human rights violations only occur in other countries, and Canada needs no lessons from the UN in this sphere.<sup>9</sup>

When UN human rights bodies have pointed to the estimated 150,000 – 300,000 people who are homeless across Canada<sup>10</sup> and the close to a million

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<sup>6</sup> “International human rights: Canada's role dwindling”, *The Toronto Star* (4 April 2011); Less Whittington, “Canadian mining firms worst for environment, rights: Report”, *The Toronto Star* (19 October 2010); House of Commons, Standing Committee on Foreign Affairs and International Trade, *Mining in Developing Countries and Corporate Responsibility* (2005) (Chair: Bernard Patry) online: Parliament of Canada [www.parl.gc.ca](http://www.parl.gc.ca); Alain Deneault and William Sacher, *Imperial Canada Inc: Legal Haven of Choice for the World's Mining Industries* (Vancouver: Talonbooks, 2012).

<sup>7</sup> Alex Neve, Béatrice Vaugrante, “Op-Ed: Time for a human-rights reboot”, *Ottawa Citizen* (29 December 2013); John E. Trent, “The United Nations and Canada: What Canada has done and should be doing at the UN” (2013), online: Academic Council on the United Nations System <http://acuns.org>.

<sup>8</sup> Canada has refused to ratify any of the three complaints procedures that include social rights: *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117 (2008) [OP-ICESCR]; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/RES/61/106, (2006); and *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, UNHRCOR, 17<sup>th</sup> Sess, UN Doc A/HRC/RES/17/18 (2011). On Canada's role in opposing development of a complaints procedure for social rights, see Bruce Porter, “The Reasonableness of Article 8(4) – Adjudicating Claims From The Margins” (2009) 27:1 *Nordic Journal of Human Rights* 39 at 44-47.

<sup>9</sup> Laura Payton, “UN official sparks debate over Canadian food security”, *CBC News* (16 May 2012).

<sup>10</sup> 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*,

adults and children relying on food banks to provide necessary supplements to inadequate diets<sup>11</sup> – phenomena which would have been unimaginable when Canada ratified the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>12</sup> along with the *International Covenant on Civil and Political Rights (ICCPR)*<sup>13</sup> in 1976<sup>14</sup> – the federal government has insisted that such concerns are both misplaced and politically biased.<sup>15</sup> When the UN Special Rapporteur on the Right to Food conducted a mission to Canada in 2013, voicing distress about the extent of hunger in so affluent a country, and questioning the absence of a national food security strategy or legal protection for the right to food, Canada's response was to launch a personal and very undiplomatic attack. Leading members of the government characterized the Special Rapporteur as a meddling academic who was wasting UN funds by investigating Canada when he could have been somewhere with real hunger and food issues.<sup>16</sup> When the UN Committee on the Rights of the Child commented negatively on Canada's human rights performance with respect to growing poverty among Aboriginal, immigrant and disabled children, the Canadian government dismissed these concerns as politically motivated. The justification in that case: one of the Committee experts was of Syrian origin, a

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*and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada* (October 2007), UNHRCOR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 54, online: OHCHR [www2.ohchr.org](http://www2.ohchr.org). Current estimates suggest there are 150,000 individuals using shelters in Canada annually and that there are three times as many "hidden homeless" as the number living in shelters or unsheltered. Stephen Gaetz, Jesse Donaldson, Tim Richter & Tanya Gulliver, *The State of Homelessness in Canada 2013* (Toronto: Canadian Homelessness Research Network, 2013) at 21-24.

<sup>11</sup> *Report to the Special Rapporteur on the right to food*, above note 5 at para 7.

<sup>12</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

<sup>13</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

<sup>14</sup> Bruce Porter, "ReWriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada" in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues*, 5th ed (Toronto: McGraw-Hill Ryerson, 2005) 373.

<sup>15</sup> Government of Canada, *Interactive Dialogue with the Special Rapporteur on the Right to Adequate Housing, UN Human Rights Council OR, 10th Sess, Response to the Addendum Report on Canada* (9 March 2009) online: Social Rights in Canada CURA <http://socialrightscura.ca>;

<sup>16</sup> Open letter from human rights organizations and allied individuals to Prime Minister Stephen Harper concerning the Government of Canada's treatment of the United Nations human rights Special Rapporteur on the right to food (30 May 2012) online: Social Rights Advocacy Centre [www.socialrights.ca](http://www.socialrights.ca).

country with its own record of serious human rights violations.<sup>17</sup> This approach, accurately described by the Special Rapporteur as a new Canadian self-righteousness,<sup>18</sup> is deeply disturbing, not least because it undermines Canada's adherence to human rights and sustainable development as important and viable objects of international co-operation and respect.

### **B. Looking Back: The Historic Social Rights Paradigm in Canada**

Those seeking to advance social rights in Canada today must not only remind people of what has been lost, but also sustain a human rights paradigm that is larger than one particular government or decade of Canadian political history. The problems associated with growing economic inequality in an era of neoliberalism are not unique to Canada. However the unwillingness of Canadian governments and courts to address the resulting violations of social rights is surprising, at least to international observers, in light of Canada's post-war image and self-identity. Unlike its neighbor to the south, by ratifying the *ICESCR* in 1976, Canada formally acknowledged that adequate food, housing, health care, education, social security, and just and favourable conditions of work were not simply laudable goals of social policy. These were recognized as fundamental human rights, requiring progressive implementation to the maximum of available resources by all appropriate means, and demanding access to justice and effective remedies for rights claimants when governments fail to meet their obligations.<sup>19</sup>

While social rights in the 1970s were not always implemented in legislation or programs, what is striking in retrospect is the degree to which they were referred to as core "Canadian values." In a period when Canada defined itself largely in relation to the U.S., Canada's ratification of the *ICESCR* and its recognition of the positive role governments must play in protecting rights was seen as part of Canada's national identity. Former Prime Minister Pierre Trudeau had, for instance, written of the importance of economic and social rights as a young academic,<sup>20</sup> and his campaign for the "just society" capitalized on widespread public acceptance of social justice as a central component of Canadians' self-identity. As Trudeau reaffirmed as Prime Minister in June of 1968 "[M]ost people take it for granted that every Canadian is assured a reasonable standard of living. Unfortunately, that is not

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<sup>17</sup> *House of Commons Debates*, 41st Parl, 1st Sess, No 178 (27 September 2012) at 1500 (Bob Dechert).

<sup>18</sup> Sarah Schmidt, "UN envoy blasts Canada for 'self-righteous' attitude over hunger, poverty", *Postmedia News* (15 May 2012).

<sup>19</sup> *ICESCR*, above note 12.

<sup>20</sup> Pierre Trudeau, "Economic Rights" (1961) 8 McGill LJ 122 at 125.

the case ... The Just Society will be one in which all of our people will have the means and the motivation to participate.”<sup>21</sup>

Parallel to, and nurtured by, Canada’s engagement with international human rights, the 1970s saw the emergence of vibrant domestic human rights movements.<sup>22</sup> Though influenced by the American civil rights campaign, they were grounded in a different rights paradigm than the one that predominated in the U.S. Both in Quebec and the rest of Canada, domestic human rights protections were linked to a commitment to internationalism and to a more comprehensive conception of human rights. Cold war dichotomies, including the rigid distinction drawn between social and economic *versus* civil and political rights, were less firmly entrenched in 1970s Canada than in the U.S.<sup>23</sup> Social rights were particularly important in Quebec. With the adoption of its new *Charter of Human Rights and Freedoms*<sup>24</sup> in 1976, Quebec provided explicit legal recognition for social rights, including to free public education, an “acceptable standard of living” and a healthful environment in which biodiversity is preserved. The Quebec *Charter* was, as Pierre Bosset and Lucie Lamarche point out, strongly influenced by the international human rights context: “Le Québec, qui connaît sa révolution tranquille et développe l’État social, tient alors à s’inscrire dans la mouvance d’un droit international qui, officiellement, reconnaît ces droits...”<sup>25</sup>

New social movements across Canada increasingly articulated struggles for justice and equality as human rights struggles. In 1981, people with disabilities mobilized around the International Year of Persons with Disabilities and the celebrated “Obstacles” Report<sup>26</sup>, issued by an All Party House of Commons Committee – an early expression of the “social model of

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<sup>21</sup> Cited in Ron Graham, ed, *The Essential Trudeau* (Toronto: McLelland & Stewart, 1998) at 16-20.

<sup>22</sup> Dominique Clément, Will Silver & Daniel Trottier, “The Evolution of Human Rights in Canada” (2012), online: Canadian Human Rights Commission [www.chrc-ccdp.ca](http://www.chrc-ccdp.ca).

<sup>23</sup> *Ibid*, at 5 & 17; Chaviva Hosek, “Women and Constitutional Process” in Keith Banting and Richard Simeon eds., *And No One Cheered: Federalism, Democracy & the Constitution Act* (Toronto: Methuen Publications, 1983) 280 [Hosek, “Women and Constitutional Process”]; Cynthia Soohoo, Catherine Albisa, and Martha F Davis, *Bringing Human Rights Home: A History of Human Rights in the United States* (Westport: Praeger, 2008).

<sup>24</sup> *Charter of Human Rights and Freedoms*, RSQ, c C12.

<sup>25</sup> Pierre Bosset & Lucie Lamarche, “Introduction: Donner droit de cité aux droits économiques, sociaux et culturels” in Pierre Bosset & Lucie Lamarche, eds, *Droit de cité pour les droits économiques, sociaux et culturels : La Charte québécoise en chantier* (Cowansville: Éditions Yvon Blais, 2011) 1 at 3.

<sup>26</sup> House of Commons, Special Parliamentary Committee on the Disabled and the Handicapped, *Obstacles*, 32nd Parliament, 1st Session (February 1981).

disability” that was adopted more than two decades later in the UN *Convention on the Rights of Persons with Disabilities*.<sup>27</sup> Emerging rights-based approaches to social justice fed directly into debates about the wording and content of rights in the proposed new *Canadian Charter of Rights and Freedoms*.<sup>28</sup> Disability rights organizations demanded that mental and physical disabilities be added to the list of prohibited grounds of discrimination in section 15 of the new *Charter*.<sup>29</sup> Aboriginal organizations demanded that the constitutional debates not ignore the desperate conditions on reserves and demanded positive recognition of treaty rights, the right to self-determination and control over resources and development.<sup>30</sup> For their part, women’s organizations orchestrated an historic cross-country campaign for changes to the heading and wording of section 15,<sup>31</sup> in order to put an end to the formal, negative rights equality paradigm that had been adopted by the courts under the *Canadian Bill of Rights*.<sup>32</sup> Demanding the inclusion of a right to the “equal protection and equal benefit of the law” in section 15, they sought to ensure that the *Charter* would directly engage with government obligations to institute programs and benefits to address historic patterns of exclusion and disadvantage.<sup>33</sup>

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<sup>27</sup> *Convention on the Rights of Persons with Disabilities*, GA Res. 61/106,

UNGAOR, 61<sup>st</sup> Sess, Supp. No. 49, UN Doc A/61/611, (2007).

<sup>28</sup> Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back*, (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 15-17.

<sup>29</sup> Yvonne Peters, “From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada’s Constitution” in Deborah Stienstra & Aileen Wight-Felske, eds, *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord, Ontario: Captus Press, 2003) 119.

<sup>30</sup> Dominique Clément, Will Silver & Daniel Trottier, *The Evolution of Human Rights in Canada*, (Ottawa: Minister of Public Works and Government Services, 2012) at 31 [*The Evolution of Human Rights in Canada*]; Douglas E. Saunders, “The Indian Lobby” in Keith Banting & Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen Publications, 1983) 301.

<sup>31</sup> Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women’s Educational Press, 1983) 34-36. Hosek, “Women and Constitutional Process”, above note 23.

<sup>32</sup> *Canadian Bill of Rights*, SC 1960, c 44.

<sup>33</sup> Mary Eberts, “The Equality Provision of the Canadian Charter of Rights and Freedoms and Government Institutions” in Claire Beckton & A. Wayne MacKay, Research Coordinators, *The Courts and the Charter* (Ottawa: Minister of Supply and Services Canada, 1985) 133; Francine Fournier, “Égalité et droits à l’égalité” in Lynn Smith et al., eds., *Righting the Balance: Canada’s New Equality Rights* (Saskatoon: Canadian Human Rights Reporter Inc., 1986) 25; Bruce Porter, “Expectations of Equality” (2006) 33 Sup Ct L Rev (2d) 23 [Porter, “Expectations of Equality”].

Social movements adopting new rights-based approaches were ultimately successful in transforming the architecture of equality under the new *Charter*. Then Justice Minister Jean Chrétien succumbed to the pressure from women's groups and endorsed the proposed changes to section 15, as he put it, "to stress the positive nature of this important part of the *Charter*."<sup>34</sup> Moreover, Canada became the first democracy to include disability as a constitutionally prohibited ground of discrimination. This advance was critical from a social rights perspective because a negative rights framework is so clearly inadequate in relation to disability discrimination, which frequently results from failures of law and policy to address unique circumstances, needs and capabilities, and which often requires positive measures to ensure real, instead of merely formal, equality.<sup>35</sup> Yvonne Peters, one of the contributors to this book and a key advocate for disability rights at the time, has observed that the constitutional recognition of disability was:

[A] watershed event that occurred at a time when people with disabilities were just beginning to construct a new vision and analysis of the disability experience... The disability rights movement rejected the medical model of disability, and argued that it was social barriers and prejudices that created disabilities. .... This shift to a rights-based analysis therefore represents a profound and decisive turning point in the history of people with disabilities.<sup>36</sup>

Substantive equality, as articulated by women's organizations, the disability rights movement and other equality seeking groups in Canada, was and remains a social rights paradigm. It emphasizes positive rights, social inclusion, a hybrid of group/individual rights, and the necessity of structural change and historical transformation to achieve the realization of rights over time. The equality/social rights paradigm is remedial in its focus – defined by

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<sup>34</sup> Statement by the Honourable Jean Chrétien, Minister of Justice, to the Special Joint Committee on the Constitution, January 12, 1981 (Government of Manitoba Archives).

<sup>35</sup> Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?* (Winnipeg: Council of Canadians with Disability, 2004); Dianne Pothier, "Legal Development in the Supreme Court of Canada Regarding Disability" in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 304. See the discussion by Shelagh Day, Gwen Brodsky & Yvonne Peters in Chapter 7.

<sup>36</sup> Yvonne Peters, "From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution" in Deborah Stienstra & Aileen Wight-Felske, eds, *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord, Ontario: Captus Press, 2003) at 122.

the broad purposes of human rights, rather than by restorative or compensatory justice in relation to a single individual.<sup>37</sup> From the outset, it was nurtured by jurisprudence developed under provincial and federal human rights legislation and by the work of newly created national and provincial human rights institutions across the country.<sup>38</sup> In landmark cases, such as *Action Travail des femmes v CNR*,<sup>39</sup> equality advocates insisted upon, and Canadian courts and tribunals recognized, the necessity of placing obligations on both governments and private actors to address systemic inequality through positive action, including social programs, measures to address the needs of people with disabilities, and “employment equity” to combat systemic inequality in the workplace. Building on this social rights paradigm, the *Charter* was expected to ensure that access to housing, health care, nutrition, jobs, child care and social assistance for those in need would be accorded as much importance as negative guarantees of freedom from unreasonable government interference.<sup>40</sup>

Equality seeking groups mobilized and won support for an approach to constitutional rights centered on a commitment to substantive equality as a framework for proactively addressing what were seen as the critical sources of inequality and exclusion in Canadian society: poverty, lack of access to appropriate housing, employment, education and social programs. Barbara Cameron, another contributor to this book, accurately predicted in 1984 that the neoliberal version of equality of opportunity would only mean that “equalization is downwards.”<sup>41</sup> She emphasized that ensuring the “just and favourable conditions of work”, to which Canada was committed under the *ICESCR*, required active government engagement in labour markets, through employment equity, affirmative action and other positive measures.<sup>42</sup> Appearing before the Subcommittee on Equality Rights of the Standing Committee on Justice and Legal Affairs in 1985, two other contributors to this book, Gwen Brodsky and Shelagh Day, argued that the new constitutional right to equality demanded positive measures to protect social rights. Gwen

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<sup>37</sup> Colleen Sheppard, “Recognition of the Disadvantaging of Women: The Promise of *Andrews v. Law Society of British Columbia*” (1989) 35 McGill LJ 207; *Andrews v Law Society of British Columbia*, [1989] 1 SCR. 171; Mary Eberts, “Section 15 Remedies for Systemic Inequality: You Can’t Get There From Here” in Sheila McIntyre & Sanda Rogers, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis, 2006) 389.

<sup>38</sup> *The Evolution of Human Rights in Canada*, above note 30.

<sup>39</sup> *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114.

<sup>40</sup> Porter, “Expectations of Equality”, above note 33.

<sup>41</sup> Barbara Cameron, “Labour Market Discrimination and Affirmative Action” in Jill McCalla Vickers, ed., *Taking Sex into Account: The Policy Consequences of Sexist Research* (Ottawa: Carleton University Press, 1984) 135.

<sup>42</sup> *Ibid.*

Brodsky stated on behalf of the National Association of Women and the Law that: “Unless the Government implements positive programs to remove barriers to equality it will be signaling tolerance of discrimination and indifference to the expectations of Canadian women.”<sup>43</sup> Speaking for the Women’s Legal Education and Action Fund (LEAF), Shelagh Day affirmed that the right to equality embodies “a fresh beginning” and a rejection of “[n]arrow interpretations or technical pathways that lead us away from what is really happening to the lives of Canadians and to the lives of Canadian women . . .”<sup>44</sup>

Social rights were not seen as relying solely on *Charter* rights, however. They were supported by legislative and programmatic commitments in the areas of health care, education, housing, social security, and financial assistance for those in need, particularly through the mechanism of joint federal-provincial/territorial cost sharing agreements such as the *Canada Health Act (CHA)*<sup>45</sup> and the *Canada Assistance Plan Act (CAP)*.<sup>46</sup> The *CAP*, for example, created an entitlement to an adequate level of financial assistance for anyone in need, regardless of cause, in exchange for shared federal funding of provincial social assistance costs. The *CAP* requirement to provide an adequate level of social assistance was subject to judicial review for reasonable compliance, and to systemic (though not individual) remedy by courts.<sup>47</sup> Similarly, the *CHA* implemented five legally binding principles: public administration, comprehensiveness, universality, portability and accessibility. These *CHA* conditions were understood and embraced as social rights principles, designed to guarantee access to health care based on need, rather than ability to pay, as a fundamental human right.<sup>48</sup> The commitment

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<sup>43</sup> House of Commons, Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings*, 33rd Parl. 1st Sess, Vol 3 (17 April 1985) at 3:9, cited in Porter, “Expectations of Equality”, note 33 above at 30-31.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Canada Health Act*, RSC 1985, c C-6.

<sup>46</sup> *Canada Assistance Plan*, SC 1966-67, c 45.

<sup>47</sup> In *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, the Supreme Court determined that an affected individual had public interest standing to challenge provincial non-compliance with the adequacy requirements of *CAP*. Subsequently, in *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080, the Court that found that *CAP* “requires assistance to be provided in an amount that is compatible, or consistent, with an individual’s basic requirements” but provides for some flexibility and for the recovery of overpayments.

<sup>48</sup> Marie-Claude Prémont, *The Canada Health Act and the Future of Health Care Systems in Canada Discussion Paper No. 4* (Saskatoon: Commission on the Future of Health Care in Canada, 2002); Martha Jackman, “Law as a Tool for Addressing Social Determinants of Health” in Nola Ries, Tracey Bailey & Timothy

to implementing social rights through programmatic entitlements such as these was given concrete expression in section 36 of the *Constitution Act, 1982*, which entrenches an explicit undertaking by governments in Canada to “promote the well-being of Canadians and to provide essential public services of reasonable quality to all Canadians.”<sup>49</sup> In its submissions to U.N. treaty monitoring bodies, the Canadian government has described the constitutional commitment in section 36 as a core element in the implementation of Canada’s social rights obligations under international human rights law.

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Canada of the 1970s and 1980s was not a Camelot for social rights. While food banks and homelessness did not exist to the extent and in the same way as they do now, there were nevertheless serious violations of social rights during this period, particularly among Aboriginal communities, racialized groups, women and LGBT communities. Still, what is striking, looking back, is the extent to which social rights values were accepted as definitional during that period. Commitments to social rights, under both international and domestic law, created the foundation for a distinctive social rights paradigm to take root and flourish in post-*Charter* Canada. Today, commitments to a distinctive idea of substantive equality, linked to social rights and international human rights law, is still strong, or stronger at the community level, where disability rights, anti-poverty, food security, women’s and other groups in in all parts of the country continue to embrace both social rights and the international nature of the human rights project.<sup>51</sup> Beyond that, however, there is far less evidence of any meaningful commitment to the distinctive Canadian social rights paradigm that was widely affirmed in the period leading up to, and immediately following the adoption of the *Charter*. As

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Caulfield, eds., *Public Health Law and Policy in Canada*, 3rd ed. (Markham: LexisNexis Canada, 2013) 91.

<sup>49</sup> *Constitution Act, 1982*, s 36, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; See generally Martha Jackman and Bruce Porter, “Rights-based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework” (June 2012) online: SSRN <http://ssrn.com>.

<sup>50</sup> Canadian Heritage, *Core Document forming part of the Reports of States Parties: Canada* (October 1997), online: Canadian Heritage [www.pch.gc.ca](http://www.pch.gc.ca). The document was submitted by Canada pursuant to HRI/CORE/1 sent to States parties by note verbale of the Secretary General, G/SO 221 (1) of 26 April 1991.

<sup>51</sup> *Empty Words And Double Standards: Canada’s Failure To Respect And Uphold International Human Rights. Joint Submission to the United Nations Human Rights Council in relation to the May 2013 Universal Periodic Review of Canada* (Ottawa, October, 2012) online: Social Rights in Canada CURA <http://socialrightscura.ca>; Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality and Citizenship” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77.

Layton accurately described, widespread poverty, homelessness and hunger amidst affluence has created an open wound in the Canadian body politic.<sup>52</sup>

### C. The *Charter* Critics and the Justiciability of Social Rights

There was some indication in early *Charter* jurisprudence that a distinctive Canadian human rights paradigm inclusive of social rights might take root in the courts. In his 1986 decision in *R v Oakes*, Chief Justice Dickson spoke eloquently of the values and principles which must guide *Charter* interpretation, including “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”<sup>53</sup> In 1989, in *Irwin Toy Ltd. v Quebec (Attorney General)*<sup>54</sup> the Supreme Court rejected a corporate challenge to a ban on children’s advertising, emphasizing that the protection of vulnerable groups is a core value which must guide the interpretation of *Charter* rights, as well as the assessment of reasonable limits under section 1. The Court concluded in *Irwin Toy* that corporate-commercial economic rights were not included in section 7.<sup>55</sup> However Chief Justice Dickson was careful to distinguish these private property-related rights from the social and economic rights “included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter ...”<sup>56</sup> This latter category of rights, the court cautioned, should not be excluded from the scope of section 7 at such an early stage of the *Charter*’s development.<sup>57</sup>

In retrospect we can also see the serious challenges facing the emergent social rights paradigm in Canada. While attracting a very high level of public support in all parts of the country, the enactment of the *Charter* was met with significant ambivalence and scepticism within some political, academic and judicial circles. Many remained loyal to the Westminster tradition of parliamentary supremacy and were concerned about expanding the role of the courts.<sup>58</sup> When it came time to reconcile the two traditions of parliamentary sovereignty and constitutional supremacy, the traditional distinctions between civil and political rights on the one hand, and social rights on the other, provided a convenient, though misguided, way of limiting

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<sup>52</sup> Above note 1.

<sup>53</sup> *R v Oakes*, [1986] 1 SCR 103 at 136.

<sup>54</sup> [1989] 1 SCR 927 [*Irwin Toy*].

<sup>55</sup> *Ibid* at 1003.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> See for example Ronald I. Cheffins and Patricia A. Johnson, *The Revised Canadian Constitution: Politics as Law* (McGraw-Hill: Ryerson Ltd, 1986).

constitutional supremacy. Traditional civil and political rights, conceived as negative rights, were ascribed to the courts while social rights, conceived as positive rights, were deemed to fall within the exclusive purview of legislatures, engaging matters beyond the institutional legitimacy and competence of the courts.<sup>59</sup> Quoting from Oliver Wendell Holmes, for example, constitutional scholar Peter Hogg characterized social rights as “issues upon which elections are won and lost”<sup>60</sup> – an oft-repeated statement in Canadian social rights jurisprudence.

The problematic and now widely discredited distinction between justiciable civil and political rights and non-justiciable social rights has a number of adverse consequences for *Charter* interpretation, however. When they are conceived solely as negative rights, broadly framed guarantees, such as rights to life and security of the person, are whittled down to freedom from government interference and stripped of their social rights content. The effect is to disenfranchise disadvantaged groups from the protection of section 7 since, as the Supreme Court noted in *Irwin Toy*: “Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.”<sup>61</sup> Moreover, a negative rights framework reduces section 15 – the very *Charter* section that was drafted to ensure substantive rather than formal equality for disadvantaged groups – to a guarantee of freedom simply from direct discrimination.<sup>62</sup> Finally, the remedial promise of section 24 is rendered

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<sup>59</sup> See generally David Robitaille, *Normativité, interprétation et justifications des droits économiques et sociaux: Les cas Québécois et Sud-africain* (Brussels: Éditions Bruylant, 2011); Martha Jackman, “The Protection of Welfare Rights under the Charter” (1988) 20 *Ottawa L Rev* 257 at 330-337.

<sup>60</sup> As Hogg expressed it: “It has been suggested that “security of the person” includes the economic capacity to satisfy basic human needs ... The trouble with this argument is that it ... involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state, including ... of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena and s. 7 does not provide that clear mandate.” Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough, ON: Carswell, 1997) at 1073.

<sup>61</sup> *Irwin Toy*, above note 54 at 993; see generally Cara Wilkie & Meryl Zisman Gary, “Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality” (2011) 30 *Windsor Rev Legal Soc Issues* 37; Davide Wiseman, “Taking Competence Seriously” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 263; David Wiseman, “The *Charter* and Poverty: Beyond Injusticiability” (2001) 1 *UTLJ* 425.

<sup>62</sup> Margot Young, “Blissed Out: Section 15 at Twenty” in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ontario: LexisNexis, 2006) 45; Fay Faraday,

illusory in relation to social rights, if claims requiring positive action are deemed to be non-justiciable. The bifurcation of positive and negative rights as a simplistic solution to the separation of powers has thus seriously undermined the inclusive paradigm of social rights for which women, people with disabilities and other stakeholders fought. This approach has also been profoundly out of step with the growing international recognition of the interconnectedness and interdependence of all human rights.<sup>63</sup> When characterized as non-justiciable, and as matters to be relegated to legislatures and “resolved” by elections, social rights lose their legitimacy as rights claims and become no more than competing policy positions advocated by “interest groups” lacking in political power. The result, intentional or not, has too often been to banish those living in poverty and homelessness from access to justice and the equal protection and benefit of the *Charter*.

Unfortunately, the argument that courts should not engage with issues of social policy in response to *Charter* claims was made not only by the conservative right. It also found support in a parallel critique of rights-discourse put forward by prominent voices within the social democratic left.<sup>64</sup> Among the leftist *Charter* critics, the concern was about vesting privileged and unelected judges with the power to review social policy and programs adopted by democratically elected and accountable legislatures. Like their conservative counterparts, these critics accepted that the dominant legal paradigm under the *Charter* would be individualistic and negative-rights oriented. On that basis they insisted that the pursuit of social justice through the courts would prove illusory and would distract social justice movements from more fruitful political avenues for seeking progressive change. Rather than insisting that the judicial system be reformed or transformed to realize

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Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law Inc., 2006); Sharon Donna McIvor, “Aboriginal Women Unmasked: Using Equality Litigation to Advance Women’s Rights” (2004) 16 CJWL 106 at 111; Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty (2002) 14 CJWL 185.

<sup>63</sup> On interdependence of social rights and women’s equality rights, see for example Leilani Farha, “Committee on the Elimination of Discrimination Against Women: Women Claiming Economic, Social and Cultural Rights – the CEDAW Potential” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008); Leilani Farha, Shelagh Day & Marianne Mollman, “The Montreal Principles: Needed Clarity on Women’s Right to Equal Enjoyment of Economic, Social and Cultural Rights” (2004) 22:3 Nordic Journal of Human Rights 345.

<sup>64</sup> See for example Harry J Glasbeek & Michael Mandel, “The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms” (1984) 2 Socialist Studies 84; Andrew Petter, “The Politics of the Charter” (1986) 8 Sup Ct L Rev 473; Allan C Hutchinson & Andrew Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 UTLJ 278.

the expectations inherent in the social rights paradigm put forward by women's and other equality seeking groups, *Charter* critics tended to accepted the *status quo*, pointing to negative legal outcomes in social rights cases as proof that rights-based approaches were misguided.

While the Canadian courts have been accused by some of undue *Charter* activism, nothing could be further from the truth insofar as the socio-economic rights claims of the poor and other disadvantaged groups are concerned. In response to the challenge of reconciling constitutional supremacy with parliamentary democracy, judicial culture in Canada has made a virtue out of deference to legislatures and Parliament on matters of social policy. There has been a widespread failure to acknowledge that, in many cases, such deference can amount to an abdication of judicial responsibility to ensure that the Charter provides adequate safeguards for the rights and interests of the most marginalized groups in Canadian society. Those attempting to litigate social rights claims have been subject to criticism for risking negative jurisprudence, or for misleading rights claimants into thinking that rights could actually be realized through the courts. Thus Louise Arbour has noted that “the first two decades of Charter litigation testify to a certain timidity – both on the part of litigants and the courts – to tackle head on the claims emerging from the right to be free from want.”<sup>65</sup> But, the less Canadian courts have been asked, or have been willing, to determine social rights claims, the more the negative rights paradigm appears to have settled-in, almost by default.<sup>66</sup>

What is remarkable about the first thirty years of Charter jurisprudence in relation to social rights claims is not any observable trend of having been successful or unsuccessful – there are examples of both.<sup>67</sup> Rather, it is the relative absence of cases addressing what were seen at the outset of the Charter as the critical human rights issues of poverty and systemic inequality. Social rights have, with limited exceptions, remained largely unclaimed. Those few cases with significant social rights potential

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<sup>65</sup> Louise Arbour, “‘Freedom from Want’ – From Charity to Entitlement”, LaFontaine-Baldwin Lecture, Quebec City (2005) 7; Margot Young, “Why Rights Now? Law and Desperation” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 317; Barbara Billingsley & Peter Carver, “Sections 7 and 15(1) of the Charter and Access to the Public Purse: Evolution in the Law?” (2007) 36 SCLR (2d) 223.

<sup>66</sup> Martha Jackman, “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 279.

<sup>67</sup> Martha Jackman & Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209.

that have been brought before the courts have, as often as not, been unheard: victims of motions to strike or of lower court losses, with leave to appeal usually denied by appellate and the Supreme Court.<sup>68</sup> As a consequence, more than three decades after the enactment of the Charter, the critical question of the extent to which Charter rights to life, security of the person and equality include social rights guaranteed under international human rights law, remains unanswered by the Canadian courts.

In *Gosselin v Quebec (Attorney General)*<sup>69</sup> the only Supreme Court case to directly address the issue of whether social rights guaranteed under international human rights law ought to be included in the interpretation of section 7, since the question was left open in *Irwin Toy*, the scope of the Charter's protection for social rights was again left unresolved. However, Canadian lower courts appear to be taking the Supreme Court's silence and continued denials of leave to appeal in poverty-related cases as a license to treat the matter as closed, preventing poor people from even getting a hearing into denials of civil legal aid, access to housing, or other critical social rights challenges.<sup>70</sup> Perhaps the over-riding lesson of the last decade, then, is less about the track record of social rights claims under the Charter, and more about the failure of political solutions that social rights claimants were advised by the Charter critics to rely upon. There has been little diversion of attention or resources to legal cases addressing social rights claims in Canada. The failure of Canadian democracy to address poverty and homelessness and the denial of meaningful access to democratic procedures for those affected by social rights violations is a much bigger story than that.

#### D. Social Rights beyond the Courts

The federalist dimensions of the social rights paradigm of 1980s Canada also proved to be fragile. The worldwide pressure for structural adjustment in the early 1990s resulted in the

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<sup>68</sup> Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50 SCLR (2d) 1 at 40; see also Martha Jackman & Bruce's review in Chapter 2.

<sup>69</sup> 2002 SCC 84.

<sup>70</sup> See for example *Tanudjaja v Attorney General (Canada) (Application)*, 2013 ONSC 5410; *Canadian Bar Assn. v British Columbia*, 2008 BCCA 92; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 Sup Ct L Rev 297.

Canadian government relinquishing social rights standards embedded in cost-sharing agreements with the provinces.<sup>71</sup> In particular, the *Canada Assistance Plan*<sup>72</sup> was abandoned in 1995, and with it any political commitment to implementing and protecting the right to adequate social assistance through such conditional shared-cost programs.<sup>73</sup> Non-binding principles, sometimes not even put in writing, have come to replace social entitlements embedded in legislation. Provinces have further downloaded key programs in housing, social assistance and health care to municipalities and local service providers. The “reinventing government” movement has brought about widespread privatization of publicly delivered services and the replacement of social rights-based standards with market criteria to assess public services.<sup>74</sup>

Over the past decade, the capacity of civil society organizations to pursue social rights claims, either in court or through social mobilization, has also been seriously eroded. Since the 1970s, the human rights movement in Canada has depended heavily on government recognition of, and financial support for, the independent role of civil society organizations as a means of giving voice to concerns of groups that would otherwise lack the resources or ability to participate in democratic processes. Unlike their counterparts in other countries, where charitable or development funding is more available, human rights groups in Canada have relied primarily on public rather than private funding. This was seen as the hallmark of a social democracy, mitigating the need to cater to charity and charitable models of addressing social rights violations linked to poverty and inequality.<sup>75</sup> With the election in 2004 of a federal party whose leader had been steadfastly hostile to human rights “interest groups”, the fragility of this commitment became clear.

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<sup>71</sup> International Monetary Fund, *Canada: Article IV Consultation Discussions Statement by the Fund Mission to the Minister of Finance* (Ottawa, December 7, 1995) online: The Halifax Initiative [www.halifaxinitiative.org](http://www.halifaxinitiative.org).

<sup>72</sup> *Canada Assistance Plan*, above note 46.

<sup>73</sup> Martha Jackman, “Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform” (1995) 8 Can J Women & L 371; Shelagh Day & Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada’s Social Programs* (Ottawa: Status of Women Canada, 1998).

<sup>74</sup> Barbara Cameron, “Accounting for Rights and Money in the Canadian Social Union” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 162; Lucie Lamarche, “The ‘Made in Québec’ Act to Combat Poverty and Social Exclusion: The Complex Relationship Between Poverty and Human Rights” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 139; and see Barbara Cameron’s discussion in Chapter 4 of this book.

<sup>75</sup> Voices-voix, *Submission to the United Nations Human Rights Council. Universal Periodic Review of Canada’s Human Rights Obligations* (October 2012), online: OHCHR <http://lib.ohchr.org> [Voices-voix, *Canada’s Human Rights Obligations*].

The systematic exclusion of human rights and equality seeking groups from the federal programs that remain in existence and the outright cancellation of funding for the Court Challenges Program of Canada, Status of Women Canada's Policy Research Program, the Law Commission of Canada, the National Council on Welfare, Aboriginal health programs and many other organizations and institutions promoting human rights accountability, have had profound effects on the capacity of civil society organizations to advocate for social rights in Canada.<sup>76</sup> Moreover, in response to the increased reliance of human rights and environmental organizations on charitable donations, the federal Minister of Finance has allocated 8 million dollars of special funding to the Canada Revenue Agency to conduct audits of organizations suspected of expending more than ten per cent of their resources on any form of advocacy, including public education, research, meetings or other activities that might promote change to or retention of existing programs, policies or laws. This has had a significant chilling effect across the country, creating a fear that charitable status could be lost by speaking out about violations of human rights where remedies require changes to policy or legislation.<sup>77</sup>

#### **E. Ongoing Engagement with Social Rights**

A major strength of the social rights paradigm in Canada is its grounding in evolving international human rights procedures, frameworks and norms. Notwithstanding a hostile domestic climate, Canadian NGOs have continued to engage with all aspects of UN human rights review, adjudication and norm-setting procedures. These have included periodic reviews of Canada undertaken by various UN treaty monitoring bodies; the Universal Periodic Review before the UN Human Rights Council; missions by Special Rapporteurs to Canada; petitions under optional complaints procedures; and investigations into rights violations in Canada conducted by international and regional bodies.<sup>78</sup> Beyond engaging in these existing mechanisms related to Canada's compliance with international and regional human rights instruments, social rights advocates in Canada have also participated in new

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<sup>76</sup> Maria Gergin, *Silencing Dissent: The Conservative Record* (Ottawa: Canadian Centre for Policy Alternatives, 2011) online: Canadian Centre for Policy Alternatives [www.policyalternatives.ca](http://www.policyalternatives.ca); Kathleen Rodgers & Melanie Knight, " 'You Just Felt the Collective Wind Knocked Out of Us': The Deinstitutionalization of Feminism and the Survival of Women's Organizing in Canada" (2011) 34 *Women's Studies International Forum* 570.

<sup>77</sup> Voices-voix, *Canada's Human Rights Obligations*, above note 75.

<sup>78</sup> Civil society and Indigenous initiatives in Canada in relation to these procedures are outlined at CURA, "International and Regional Accountability Initiatives" (2013) online: Social Rights in Canada CURA <http://socialrightscura.ca>.

international developments in the field of social rights. The dynamic evolution of social rights practices, in other countries and at the international level, has provided a framework for advancing social rights at home, despite the comparative inertia of Canadian courts and legislators.

For example, disability rights groups in Canada were actively involved in the negotiation of the text of the new *Convention on the Rights of Persons with Disabilities (CRPD)* and its *Optional Protocol*.<sup>79</sup> The CRPD provides for self-standing rights to housing, education, health care, work, social security, an adequate standard of living, social protection and the right to live independently in the community and acts as a key reference point for domestic advocacy groups, such as the Council of Canadians with Disabilities, working to advance the rights of people with disabilities in Canada.<sup>80</sup> Aboriginal representatives from Canada also participated actively in the drafting of the *UN Declaration of the Rights of Indigenous People*, which addresses many social rights issues in the context of Indigenous and treaty rights, colonization and dispossession of Indigenous lands and resources.<sup>81</sup> While Canada was one of the few states refusing to support the UNDRIP when it was adopted by the UN Human Rights Council and the UN General Assembly, the Declaration has been central to social rights advocacy undertaken by Indigenous organizations in Canada. The federal government eventually reversed its position and agreed to endorse the UNDRIP.<sup>82</sup>

Advocates from Canada were also actively engaged in the ongoing debate over the justiciability of economic, social and cultural rights, including at the Open Ended Working Group mandated by the UN Human Rights Council to consider an *Optional Protocol* to the *ICESCR*<sup>83</sup> to establish a complaints procedure for victims of violations of economic and social rights. The adoption on December 10, 2008, and entry into force on May 5, 2013 of

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<sup>79</sup> Council of Canadians with Disabilities, “Canada and the CRPD Archives” (2013) online: Council of Canadians with Disabilities [www.ccdonline.ca](http://www.ccdonline.ca).

<sup>80</sup> Council of Canadians with Disabilities, online: Council of Canadians with Disabilities [www.ccdonline.ca](http://www.ccdonline.ca).

<sup>81</sup> Jackie Hartley, Paul Joffe, and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010).

<sup>82</sup> Foreign Affairs, Trade and Development Canada, News Release, No 361, “Canada Endorses the United Nations Declarations on the Rights of Indigenous Peoples” (12 November 2010) online: Foreign Affairs, Trade and Development Canada [www.international.gc.ca](http://www.international.gc.ca).

<sup>83</sup> Activities in support of the development of the OP-ICESCR are outlined at CURA, “Promoting a Complaints Adjudication Procedure for Social Rights at the International Level: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2013) online: Social Rights in Canada CURA <http://socialrightscura.ca>.

the OP-ICESCR marked the international community's formal acceptance of the fact that access to adjudication and remedy for rights violations is as fundamental for social rights as it is for civil and political rights claimants. The government of Canada has continued to oppose recognition of the justiciability of social rights and, as noted above, has refused to support, sign or ratify the *OP-ICESCR*<sup>84</sup>. Whatever position governments may take regarding the justiciability of social rights, either internationally or before Canadian courts, however, social rights advocates now operate within this new internationally recognized social rights paradigm. That paradigm now informs not only legal but also political social rights advocacy in Canada.

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While it is undeniable that resources and capacity have been seriously reduced by the Harper government's attacks on human rights and programs that support them, at the same time many new spaces are opening up, and many new actors are becoming involved in social rights advocacy at the domestic level. Current developments in the field of law and in social policy suggest that social rights practice will be more diversified in the future than may have been imagined in the past. On the social policy side, the new federalism and the contracted-out state make it difficult to envisage any comprehensive protection of social rights that does not include multiple actors and a number of different policy areas. In the future, social rights strategies may need to encompass a variety of formal and informal instruments and processes. As the Special Rapporteur on the Right to Food made clear in his recommendations to Canada following his 2013 mission, a food security strategy, for example, will need to engage with a range of policies, programs and instruments, including income security, minimum wage, indigenous rights to land and resources, social security, affordable housing programs, support for alternative food production, land-holding regulation, and new supply management and distribution systems.<sup>86</sup>

As for the legal context for advancing social rights in Canada, the Supreme Court has increasingly moved to diversify the space for rights claims to be heard and enforced. The Court has recognized that a broad array of administrative decision-makers and tribunals must actively engage with

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<sup>84</sup> Above note 8.

<sup>85</sup> The claim in *Tanudjaja v Attorney General (Canada) (Application)*, above note 70, is an example of legal advocacy informed by the international human rights paradigm. An example of a political initiative informed by recent developments internationally is Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 42nd Parl, 2012 (first Reading 16 February 2012). See generally Bruce Porter's discussion in Chapter 1 in this book.

<sup>86</sup> *Report of the Special Rapporteur on the right to food*, above note 5.

human rights norms.<sup>87</sup> This means that rights must be protected at the level where decisions affecting rights are made: both where they are put at risk and where decision-making can play a constructive role in realizing rights. In two of its most important *Charter* cases in the social rights area: *Eldridge v British Columbia (Attorney General)*<sup>88</sup> and *Canada (Attorney General) v PHS Community Services Society (Insite)*<sup>89</sup>, the Supreme Court has drawn attention to the fact that substantive rights, such as access to health care for vulnerable groups, may often depend more on the quality of delegated decision-making than on the precise wording or explicit provisions of any applicable legislation. By articulating a standard of reasonable decision-making, consistent with the *Charter* and international human rights, the Court has opened up an expanded field of government decision-making to review for compliance with domestic and international social rights norms.<sup>90</sup> The scope of protection for social rights in Canadian law is unlikely to be resolved by a single administrative or *Charter* decision answering for all time the question, left open in the *Irwin Toy* case, of the status of social and economic rights under the *Charter*. Rather, the answer will evolve as a number of administrative and judicial bodies confront the questions that have been put before them as a result of the Supreme Court's opening-up of new spaces in which social rights-related claims can be advanced.

#### F. Moving Forward: New Avenues for Social Rights Practice

What is required, then, to advance social rights in Canada? On the one hand, it will be important to maintain a commitment to international human rights and to equality-seeking social movements – the twin foundations of social rights in Canada. As described above, the human rights paradigm that has emerged internationally has strong resonance with the ideal of substantive equality as it has been articulated and pursued by women's, disability and other equality seeking groups in Canada over the past four decades. The critical links between domestic and international human rights has been under assault from recent governments in Canada, but they continue to be solid at the civil society level. On the other hand, it will be necessary to diversify social rights practice: to take advantage of the variety of *fora* that are now available for advancing social rights claims in Canada; to address the

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<sup>87</sup> See Lorne Sossin and Andrea Hill's discussion of the dissemination of rights adjudication to a wide range of administrative tribunals in Chapter 11 of this book.

<sup>88</sup> [1997] 3 SCR 624.

<sup>89</sup> 2011 SCC 44 [*Insite*]; Matthew Rottier Voll, "PHS Community Services Society v Canada (Attorney General): Positive Health Rights, Health Care Policy, and Section 7 of the *Charter*" (2011) 31 Windsor Rev Legal Soc Issues 41. These cases are discussed by Martha Jackman & Bruce Porter in Chapter 2 and by Margot Young in Chapter 14 of this book.

<sup>90</sup> See the analysis by Lorne Sossin and Andrea Hill in Chapter 11 of this book.

challenges of the contracted-out state and downloading of social service delivery; and to engage more constructively with new models of federalism. It will also be important to ensure that the new social rights paradigm is inclusive of experiences of Aboriginal communities, people with disabilities, racialized groups, migrants and others who have been marginalized, not only from mainstream politics but, all too often, from the human rights movement itself.

This book emerged from a Social Sciences and Humanities Research Council of Canada (SSHRC) Community-University Research Alliance (CURA) project entitled: “Reconceiving Human Rights for the New Social Rights Paradigm.” The SSHRC’s CURA program and the CURA research project we co-directed provided unique opportunities to link innovative academic research in domestic and international social rights law and policy to community based social rights initiatives in a wide range of fields of human rights practice. The CURA grant enabled us to bring a number of Quebec and Canadian academics and activists together for a symposium on emerging approaches to social rights practice, leading to the publication of this edited collection, which includes contributions by many of the CURA researchers and collaborators. The book provides examples of just some of the wide range of new spaces, approaches, and opportunities for advancing social rights in Canada. It is hoped, however, that the underlying methodology and commitment evidenced by the authors in the book, including both academics and community-based social rights advocates, will act as a catalyst for ongoing work and networking in this critical area of research.

In the first chapter Bruce Porter explores how proposals for rights-based housing and anti-poverty strategies in Canada have opened an important new space for advancing social rights. He considers how the new paradigm of social rights, as claimable rights under international law, can provide a framework for such domestic strategies. Porter proposes a more robust integration of rights and social policy, to engage directly with Canada’s international human rights law obligation to progressively realize social rights to the maximum of available resources. He suggests how the standard of “reasonableness” that has been adopted under the new *OP-ICESCR*<sup>91</sup> offers a normative framework for housing and anti-poverty strategies in Canada. And he explains how such strategies must entail coherent and coordinated initiatives engaging multiple levels of government, Aboriginal peoples, and other stakeholders; incorporating goals and timelines; and providing effective claiming, adjudication and monitoring procedures.

In the second chapter Martha Jackman and Bruce Porter consider the implications of evolving domestic constitutional and human rights jurisprudence for the protection of social rights to housing, food and an adequate standard of living, in order to assess whether a rights-based

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<sup>91</sup> *OP-ICESCR*, above note 8.

framework for housing and anti-poverty strategies can also be found in the Canadian *Charter*. Examining recent Supreme Court case law on the right to life and security of the person under section 7 and the Court's professed return to a substantive approach to equality under section 15, the authors contend that there is ample room for the courts to address Canadian governments' failure to combat widespread homelessness, hunger and poverty, as violations of the *Charter*. They further argue that the reasonableness of government action and inaction in relation to poverty and homelessness can be effectively assessed under section 1 of the *Charter*. Beyond judicial recognition of social rights claims, however, the authors suggest that rights-based federal, provincial/territorial and municipal anti-poverty and housing strategies are urgently required.

In the third chapter, Vincent Greason provides a critical assessment of existing anti-poverty strategies both in Quebec and in other Canadian provinces. Greason finds that anti-poverty strategies have been shaped by the context in which they were created: one of neoliberal consolidation, reduced taxation, and offloading of state responsibilities to non-state entities. He identifies five common themes in provincial anti-poverty initiatives: i) the repackaging of poverty as a social rather than material deprivation; ii) a focus on poverty measurement rather than poverty elimination; iii) emphasis on individual responsibility; iv) integrating philanthropic organizations as key actors, and; v) reframing social services to address a range of social needs rather than addressing economic deprivation. Greason notes that two themes have been markedly absent from anti-poverty strategies: attention to growing income disparities and the incorporation of a human rights framework for fighting poverty. Greason calls for a reorientation of anti-poverty strategies in Quebec and Canada, around a framework of social rights and redistributive justice.

In the fourth chapter, Barbara Cameron provides an updated analysis of the federal spending power as an instrument for advancing social rights in Canada. She argues that there are three distinct accountability relationships implicated in federal transfers to fund provincial social programs: the social rights relationship (legislature to citizen); the federal relationship (federal to provincial executive); and the responsible government relationship (executive to legislature). By distinguishing these three sets of accountability relationships, Cameron is able to identify three corresponding accountability regimes that have governed federal social transfers in Canada: the administrative accountability regime, seen in the *Canada Assistance Plan*;<sup>92</sup> the political accountability regime, evident in the *Canada Health Act*;<sup>93</sup> and the public reporting accountability regime, associated with the Social Union Framework agreements. Cameron finds that none of these is entirely satisfactory and she proposes an alternative accountability regime that would

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<sup>92</sup> *Canada Assistance Plan*, above note 46.

<sup>93</sup> *Canada Health Act*, above note 45.

affirm the expansion of the social citizenship rights of members of Canadian society as the primary purpose of federal social transfers.

In the fifth chapter, Marie-Ève Sylvestre and Céline Bellot develop a critical understanding of homelessness as a human rights issue by documenting and assessing discriminatory and punitive responses to homelessness in Canada. The authors argue that an analysis of the discriminatory discourses that prevail in relation to homeless people strongly supports the recognition of homelessness as an analogous ground of discrimination, as well as supporting housing rights claims under sections 7 and 15 of the *Charter*. The authors contend that the courts must consider the complexity of embedded social structures and interactions at play in this area, understanding homelessness as a social construct and characteristic that is difficult for affected individuals to change. Recognizing the discriminatory underpinnings of, and responses to, homelessness should also lead, in Sylvestre's and Bellot's view, to a reorientation of social programs to address the structural causes of homelessness and the reversal of cuts to income support, housing and employment programs that have been part of the punitive responses to homelessness in Canada in recent years.

In the sixth chapter Kerri Froc explores the interdependence of equality and social rights, analyzing how Canadian courts have dealt with discrimination linked to socioeconomic status and women's right to just conditions of work in section 15 *Charter* cases. She finds that in cases involving women at work, the test for analogous grounds, initially sensitive to social and historical context and power relations, has been increasingly applied as a hard status/conduct binary. The formerly contextualized concept of "discrete and insular minorities" has, in Froc's view, been fused with a static notion of immutability, undermining women's legitimate claims to equality and denying discrimination in cases of mutable, gendered conduct that is fundamentally linked to women's socio-economic inequality. Froc argues that recognizing the gendered nature of women's work would shift the focus of discrimination analysis from considerations of immutability to how systems of economic and gender subordination operate in fact to construct women's work.

In Chapter Seven, Shelagh Day, Gwen Brodsky and Yvonne Peters, analyze the current legal landscape for litigating the substantive equality rights of people with disabilities. While the Supreme Court's decisions in *British Columbia (Public Service Employee Relations Comm.) v BCGEU (Meiorin)*<sup>94</sup> and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (Grismer)*<sup>95</sup> were cause for optimism that the courts would take adverse effects discrimination seriously, and apply the duty to accommodate so as to engage with systemic obstacles to

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<sup>94</sup> [1993] 3 SCR 3.

<sup>95</sup> [1999] 3 SCR 868.

equality, the authors describe how subsequent human rights case law has regressed toward a minimalist version of accommodation. The authors note, however, that in the recent *Moore v British Columbia (Education)*<sup>96</sup> decision, the Supreme Court rejected the formalistic use of a comparator group and rejected a narrow conception of services available to the public. They explain that this positive development comes at a time when Canada's ratification of the UN *Convention of Rights of People with Disabilities*<sup>97</sup> should also provide domestic tribunals and courts with motivation for fusing social rights with substantive equality analysis and recommitting to the promise of social transformation and inclusion of persons with disabilities that is at the core of the section 15 equality guarantee.

In chapter eight, Vince Calderhead and Claire McNeil reflect on their experience representing low income consumers of electricity in Nova Scotia, in the *Boulter v Nova Scotia Power Incorporated (Boulter)*<sup>98</sup> case, challenging a legislative provision prohibiting utilities monopolies from adjusting rates based on ability to pay. The authors point explain that, while most social rights equality litigation has addressed unequal access to government services or benefits, the *Boulter* case raised the important issue of inequalities in accessing essential services provided by private actors; the regulatory responsibilities of governments to ensure access by all who are in need; and the expense rather than the income side of household finances. The authors point out that what the courts found particularly challenging in *Boulter* was the idea of applying constitutional equality rights to market pricing. While the litigation was ultimately unsuccessful, the issues raised in the case were critical for those living in poverty and the authors suggest that the basis for the *Boulter* decision may ultimately be revisited in light of more recent Supreme Court jurisprudence rejecting formal comparator group analysis.

In Chapter nine, Constance MacIntosh assesses the viability of new approaches to litigating Aboriginal claims to the right to water in Canada, focusing on whether fiduciary law creates an actionable right to safe drinking water for Aboriginal peoples living on reserves. Reviewing the shocking state of water safety on reserves, the author points out that the Crown has not only offloaded to First Nations governments the responsibility to meet water quality standards which the Crown had previously failed to meet, it has also failed to provide First Nations with the facilities or resources that would enable them to meet these basic standards. Such policies do not, MacIntosh argues, comply with standards of reasonableness and due diligence under fiduciary law. While the author notes that Canada has resisted recognizing the right to water under international human rights law, that right is now firmly established internationally as a component of treaties ratified by

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<sup>96</sup> 2012 SCC 61.

<sup>97</sup> *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, Supp No 49, UN Doc (2007).

<sup>98</sup> 2009 NSCA 17.

Canada, and provides reinforcement for a rigorous standard of review of whether the Crown has met its fiduciary duties towards First Nations.

In Chapter Ten, Alana Klein considers new avenues for advancing the right to health in Canada, focusing on the challenging issue of human rights scrutiny of health resources distribution. Reviewing the current state of *Charter* jurisprudence on the issue of health care equity, Klein observes a judicial reticence to engage with critical issues of resource distribution and considers what benefits judicial review of health care decisions may offer. Since Canadian provinces have come to rely on participation and accountability to drive more responsive resource allocation, Klein suggests that promoting participatory and accountable governance at the provincial and local levels may be an avenue for activism in support of the right to health in Canada. The existence of accountability and participation requirements at the local level might then serve to enhance judicial confidence in addressing human rights claims, and enable health policy decision-making to be more responsive to rights-based claims and adjudication. Klein suggests that international actors may also play an important role in monitoring the outcome of participatory governance in Canadian health care.

In Chapter Eleven, Lorne Sossin and Andrea Hill consider the possibilities for advancing social rights in the crucial area of administrative decision-making. As the focus of social rights compliance has turned toward government plans and policies, the authors contend that the role of agencies, boards, and commissions charged with implementing those plans and policies must be better recognized as a critical area of social rights compliance and implementation. In particular, they argue that such bodies should create a meaningful and accessible system of establishing and protecting social rights, by firmly rooting adjudication in constitutional and international human rights commitments; in the practical realities of the administrative justice system; and in the lived experiences of the parties who come before them. While the Supreme Court's recent decision to adopt a new robust standard of administrative law reasonableness, in *Doré v Barreau du Québec*,<sup>99</sup> offers significant potential for protection of social rights in day to day administrative decision-making, the authors raise the concern that, without adequate resources, administrative tribunals will not be able to fulfill the critical role that has now been assigned to them.

In Chapter twelve, Sylvie Paquerot examines the practical application of the principle of the interdependence of environmental and human rights in the work of the *Ligue des droits et libertés du Québec (Ligue)*. She explains that the *Ligue* first focused on the connection between procedural rights and environmental protection: advocating against Strategic Lawsuits Against Public Participation (SLAPPs), used by corporations in an attempt to silence environmental challenges. Later the *Ligue* advocated more substantively for rights to water, health and self-determination, in its opposition to fracking for

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<sup>99</sup> 2012 SCC 2012.

shale gas in Quebec. The author suggests that situating environmental issues within a human rights framework allowed the *Ligue* to reinforce principles of environmental responsibility, both politically and judicially. She advocates further alliances between human rights and environmental groups, proposing a transformation of sector-specific advocacy into a more comprehensive and inclusive affirmation of the right to public participation in social and environmental decisions, mobilizing around the right to ‘say no’ to development that would undermine social and environmental rights.

In Chapter Thirteen, Graham Mayeda engages with another critical question for social rights advocacy: the relationship between courts and social protest movements. Mayeda analyses how courts in Canada have traditionally considered the right to protest in terms of competing rights or claims to public space, pitting protestors’ right to freedom of expression against the rights of residents to walk their dogs or use parks for recreational purposes, and linking the rights of dog-walkers, rather than the rights of protestors, to the public interest. In opposition to the competing rights paradigm, Mayeda outlines a social rights approach that would promote legal rules that facilitate rather than silence protest. Drawing on the transformative dimension of social rights emphasized in South African commentary and jurisprudence, Mayeda proposes that a social rights approach recognize and support the transformative role of public protest and social conflict in a democratic state. He further urges the courts to recognize deliberative democracy as a core public interest and acknowledge and facilitate claims made by the public against the ‘justice’ of the existing social order.

In the final chapter, Margot Young reflects on judicial responses to neoliberalism and widening socio-economic inequality in Canada in the adjudication of recent claims under sections 7 and 15 of the *Charter*. Focusing on the *Victoria (City) v Adams*<sup>100</sup> and *Insite*<sup>101</sup> cases, she argues that rights claims must be contextualized in the spatial aspect of struggles for equality and justice. The author suggests that in both of these cases, consideration of the social context of poverty and homelessness is critical, but that context also has a geographical and spatial dimension. She points out that rights claims advanced in these cases demanded a re-shaping of city space around the realization of a social right. Young finds that the legal victories in *Adams* and *Insite* are localized, however, leaving the systemic barriers to realizing social rights largely intact. Effective challenges to neoliberal inequality within urban landscapes will, according to Young, require a broader re-ordering and re-allocation, and thus a re-production, of spaces and civic geography.

## G. Conclusion

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<sup>100</sup> 2009 BCCA 563.

<sup>101</sup> *Insite*, above note 89.

The contributors to this book hope to advance social rights in Canada by outlining opportunities and challenges in a wide range of fields. Provincial and national housing and anti-poverty strategies may be transformed by a revitalized social rights paradigm. So too may new and existing accountability regimes within Canadian federalism. Substantive equality can be reconceived and updated by addressing discriminatory and punitive responses to homelessness; by relinquishing the judicial obsession with immutability as a marker of disadvantage; by reconceptualizing reasonable accommodation of disability; and by engaging with governments' obligations to regulate private actors. Relationships between Aboriginal communities and the Crown may be recontoured through recognition and enforcement of Aboriginal and treaty related social rights claims. Health care adjudication and administrative decision-making can become new spaces for the pursuit of social rights claims. Incorporating environmental rights, social protest, and the struggles of marginalized communities in Canadian inner-cities may give rise to a more inclusive, comprehensive and creative human rights practice. All of these advances would engage social rights claimants in a revitalized, more inclusive human rights movement in Canada.

The central role of social rights as a response and corrective to inequality and exclusion within Canada's constitutional democracy may be profoundly threatened – but not lost. The social rights paradigm that emerged in Canada in the pre-*Charter* period continues to be embraced by an increasingly wide range of constituencies. The reasons are clear. Social rights are interdependent with, and indivisible from, civil and political rights. They speak in a more direct way to aspects of material well-being that are necessary conditions for full and effective participation in social, economic and political life. Social rights are founded upon a more holistic understanding of both government and citizenship. They do not simply restrain governments. They reflect and reinforce the indispensable role of governments in ensuring the wellbeing of individuals, households and communities. They engage with the need for ongoing social transformation and structural change that flows from providing fair hearings to previously silenced voices and unheard claims. Social rights remain fundamental to recognizing the unique circumstances and needs of equality seeking and marginalized groups and to giving real effect to equality.

As Justice Cory observed in his concurring judgment for the majority of the Supreme Court in *Vriend v Alberta*, the notion of equality and the “just society” as core values require more than rhetorical affirmation if they are to continue to define our collective identity:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian 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.<sup>102</sup>

The gap between our national self-image and the reality of rights violations perpetrated by Canadian governments at home and abroad can no longer be filled with reassuring affirmations of shared values of equality and the just society. If we are to engage in the “arduous struggle” that is at the heart of the social rights/equality paradigm, poverty, homelessness, hunger and Aboriginal dispossession in the midst of affluence and unsustainable development must be understood first and foremost as human rights violations demanding urgent and concerted attention. Canada is at a crossroads. Social justice, equality and inclusiveness require a broad re-engagement with the international human rights project and a recommitment to the transformational goals that were embraced by equality seeking groups and others in the early years of Canada’s constitutional democracy.

Social rights practice in Canada need not start from scratch. It is not a matter of renegotiating the content of constitutional rights in Canada but rather of retrieving and building on the existing domestic and international human rights foundation. Key questions about the scope and meaning of relevant *Charter* provisions remain open. Evolving international human rights norms continue to be accepted by courts, at least in theory, as relevant and persuasive in interpreting and applying domestic law. Canada remains a state party to UN treaties guaranteeing social rights. There is a lot to work with. However, the time has come for us to choose the kind of country we want to live in. The contributors to this book have sketched the beginnings of a blueprint for reconceiving and retrieving social rights in a range of spheres of human rights practice, both political and legal. Meaningful advances in social rights in Canada will, however, depend on a broader commitment to renew and update the struggle to realize social rights and equality, among legislators and policy makers, administrative decision-makers and tribunals, Canadian courts at all levels, and within civil society itself. This book can only offer direction: the choice to commit to social rights is one we must all make.

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<sup>102</sup> *Vriend v Alberta*, [1998] 1 SCR 4 at para 68.