7. Canada: Systemic Claims and Remedial Diversity

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1. Introduction

The success of social rights enforcement strategies should not be assessed solely in relation to the record of enforcement of remedies ordered by courts or tribunals. Readily enforceable judicial remedies may not be effective in remedying certain types of social rights violations. A preference among litigators and courts for claims that are more likely to be successfully enforced may present a more successful enforcement record but deny justice to victims of more systemic social rights violations considered more challenging to enforce. A more fundamental assessment of enforcement strategies in relation to the goals and purposes of the rights claims being advanced and of social rights litigation more generally is in order. Pragmatic issues of what is likely to win cases and achieve remedies in the short term must be balanced with more forward-looking questions about enhancing the role of courts in the realization of all aspects of social rights, not only those aspects which lend themselves to more traditional models of justiciability and enforcement.

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. What Louise Arbour has described as a "timidity" among both Canadian 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 (Arbour, 2005: 7). The problem of enforcement of social rights remedies in Canada is primarily one of effective remedies not being claimed and ordered rather than one of remedial orders being unenforced. Where governments have been given a period of time to remedy a

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constitutional violation, they have generally done so, though extensions of time have been sought and granted.[1]

The "notwithstanding clause" under the *Canadian Charter of Rights and Freedoms* [the *Canadian Charter*][2] permits Parliament or provincial legislatures to explicitly exempt legislation from certain *Charter* rights. Fortunately, the notwithstanding provision has been rarely used, only once to avoid enforcement of a judicial decision. 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*.[3] 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.[4]

The need for more effective remedies for systemic social rights violations, particularly under the *Canadian Charter*, 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. They have emphasized that remedial strategies must include co-ordinated national strategies, involve a range of actors and a variety of legislative and programmatic measures.[5] Similar recommendations have been made by the UN Committee on

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[1] 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.

[2] *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 33.

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

[4] *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993)

[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)*, (Tenth session, 2009) A/HRC/10/7/Add.3 (2009); Office of the United Nations High Commission for Human Rights (OHCHR), *Olivier De Schutter, Special Rapporteur on the right to food: Visit to Canada from 6 to 16 May 2012: End-of-mission statement*, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12159&LangID=E>, accessed 7 August 2014.

Economic, Social and Cultural Rights in reviews of Canada, by members of the Human Rights Council during Canada's Universal Periodic Review, and by parliamentary committees examining problems of poverty and homelessness in Canada.[6]

Governments in Canada have failed to implement these recommendations and have actively opposed interpretations of the *Canadian Charter* that would provide effective remedies to violations of social rights. 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, but the Court has also been timid about clearly affirming positive obligations with respect to social rights and has demonstrated a pattern of avoidance of the most critical social rights issues by declining to hear the important cases.[8] Effective remedies to social rights violations can still be demanded under the *Canadian Charter* and the struggle of poor people in Canada for access to justice is ongoing. 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 (Porter and Jackman 2008; and Porter 2006). The Court has recognized that the overriding principle must be to ensure that remedies are effective in protecting and vindicating the rights at issue and responsive to the circumstances at hand (ibid). Nevertheless, lower courts have tended to align their interpretation of rights with what they believe they can immediately remedy, granting motions to dismiss claims for

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[6] For a description of the many recommendations for rights-based housing and anti-poverty strategies, see Porter (2014).
[7] United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (Thirty-sixth session, 2006), 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 <http://socialrightscura.ca/documents/legal/motion%20to%20strike/Attorney%20General%20of%20Canada%20Factum%20-%20Motion%20to%20Strike%20(R2H).pdf>.
[8] See, for example, Jennifer Tanudjaja, et al. v. Attorney General of Canada, et al., 2015 CanLII 36780 (SCC), <http://canlii.ca/t/gjs25> dealing with obligation to take positive measures to address homelessness (discussed below); *Nell Toussaint v. Attorney General of Canada*, 2012 CanLII 17813 (SCC), <http://canlii.ca/t/fqwb8> dealing with rights of irregular migrants to health care; Denise Boulter v. Nova Scotia Power Incorporated and Attorney General of Nova Scotia;Yvonne Carvery, Wayne MacNaughton and Affordable Energy Coalition v. Nova Scotia Power Incorporated and Attorney General of Nova Scotia, 2009 CanLII 47476 (SCC), <http://canlii.ca/t/25lnx> dealing with access to electricity by households living in poverty. .

more systemic remedies, and legal advocates have tended to follow suit by avoiding claims which demand of courts more robust remedial and enforcement roles that may prompt strenuous governmental opposition and judicial resistance.[9] Traditional assumptions about limited judicial competence and authority to remedy social rights violations in the manner recommended by UN human rights treaty bodies and adopted by courts in some other jurisdictions 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.[10] Like the assessment proposed in the present chapter, Rogriguez-Garavito's approach measures enforcement outcomes against the goals of realizing the right in question. However, it is helpful in the Canadian context to consider outcomes not only in relation to goals of particular cases but to also consider the extent to which remedies may be effective in realizing the transformative goals of social rights litigation more generally; the ways in which judicial and litigator preferences for traditional paradigms of judicial enforceability may have left key structural violations unchallenged; and whether more expansive approaches to remedies and enforcement might better address these types of violations, even if they also create new challenges in relation to enforceability. Challenges of enforceability in this chapter are considered in relation to three opposing qualities of remedial strategies: immediate and pre-defined as opposed to ongoing and fashioned through a process (hard v. soft[11]); discrete (engaging one provision, entitlement or action and one respondent) as opposed to multifaceted (engaging multiple entitlements and/or various actors); and corrective (of a flaw or omission in an existing program, law or entitlement) as opposed to transformative (of existing entitlement systems).

The aim of this chapter is not to derive statistical conclusions about successful enforcement outcomes in Canada. It is too early to assess social rights enforcement strategies in Canada solely

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[9] Two examples of successful motions to dismiss systemic claims so as to deny access to evidentiary hearings are found in the cases of Canadian Bar Assn. v. British Columbia, 2008 BCCA 92 in which a systemic remedy for inadequate civil legal aid had been sought, and *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 (CanLII), <http://canlii.ca/t/gffz5> discussed below.

[10] 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.

[11] For a parallel discussion of 'soft' versus 'hard' remedies in international law, see Abbott and Snidal (2000).

on the basis of past outcomes. This might simply reinforce existing systemic patterns of exclusion that operate in Canada's justice system by limiting litigation strategies to those that win by conforming to traditional remedial and enforcement models but which may have excluded the most marginalized claimants and the most important claims. Rather than measuring enforcement outcomes within a justice system that has denied access to justice to many social rights claimants, this chapter provides a broader lens through which to consider effectiveness. Hopefully this perspective can help ensure that the choice of remedial strategies in different circumstances is properly informed by the broader principles of access to justice and inclusiveness and is consistent with transformative goals of social rights practice.

Social rights litigation remains a work in progress in Canada. While it is too early to limit litigation and enforcement strategies to those which have succeeded in the past, or to give up on more transformative models that have failed, it is nevertheless important to continue to learn from our experiences. There is, of course, no universally preferred social rights remedial and enforcement strategy. The choice of strategy must be considered on a case-by-case basis and the needs and motivation of the rights claimants will always be a critical factor. Social rights claimants do not always aspire to achieve broader structural change or transformative effect. If a claimant requires only a correction to an existing entitlement system in order to secure housing,food, or health care, perhaps qualifying for an already existing benefit, the most effective and appropriate remedy in the circumstances may be one of immediate application, applying to a single entitlement, identifying a single respondent government.[12] In other cases, as in the challenge to homelessness described below, claimants may undertake litigation with clearly transformative aims, identifying multiple entitlements and respondents and demanding the implementation of ongoing strategies with meaningful engagement of stakeholders. It is important to ensure that a range of remedial and enforcement strategies are employed and to ensure effective enforcement in all cases.

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[12] An example of this remedial approach is found in the case of *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 (CanLII), <http://canlii.ca/t/fm4v6> and *Canadian Doctors for Refugee Care v. Canada (Attorney general)*, 2014 FC 651 (CanLII), <http://canlii.ca/t/g81sg> where positive obligations to protect the right to life of migrants by providing access to health care were addressed by challenging exclusions from or cuts to an existing programme, the Interim Federal Health Programme. The result of this strategy was a formal win in the case of *Canadian Doctors for Refugee Health Care* but a strategic loss on the question of positive obligations to ensure access to health care. In the case of *Toussaint v. Canada* the claim was unsuccessful at the Federal Court of Appeal and has been submitted as a communication to the UN Human Rights Committee. See *Nell Toussaint v Canada* HRC No 2348-2014 <http://www.socialrightscura.ca/eng/legal-strategies-right-to-healthcare.html>

A potentially unifying concept applicable to both individual claims to discrete benefits and to systemic claims with more transformative goals is the concept of "reasonableness." The concept has been applied in both domestic and international law to assess whether programs and policies, as well as individual decisions regarding particular benefits, are compliant with social rights obligations to progressively realize rights through appropriate budgetary, legislative and policy measures (Porter, forthcoming). The emerging jurisprudence of the Supreme Court of Canada affirms a similar standard of rights-compliant "reasonableness" that can be applied to a range of decisions, laws of policies. As will be explained below, 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, and to administrative law standards of reasonableness applied to the exercise of discretionary authority and to administrative decisions. While the reasonableness standard raises distinctive enforcement challenges associated with a more contextual, value-informed standard, it will be argued that the risks of this "softer" enforcement model are often outweighed by the transformative potential of a standard of rights-informed decision-making that applies to a broad range of actors and policies, and is informed by and consistent with international human rights values and norms.

Litigation designed around remedial and enforcement strategies to address systemic violations of social rights in Canada may result in a less impressive enforcement scorecard than has been the case with the more traditional remedies ordered by Canadian courts. Remedies which engage multiple programs and policies, to be formulated and implemented over time by a range of actors, raise significant challenges for enforceability. Sometimes it will be more practical to avoid these challenges and to aim for more incremental change through discrete and immediate remedies. However, it is important to balance these considerations with the longer term effect of an ongoing failure to claimremedies that are responsive to the systemic violations of social rights experienced by many of the most marginalized groups. Those who are living in poverty or homelessness in Canada are rarely victims of only one discrete violation of their rights. Identifying effective remedial and enforcement strategies must remain a contextual endeavour that is dependent on the

[13] *Canadian Charter*, section 1.

nature of the violation and the claim being advanced and which remains true to the inclusive vision of access to justice that must be a guiding principle of social rights practice.

2. Three Dimensions of Remedies and Enforcement

2.1 Hard versus Soft

Constitutional remedies that strike down particular legislative provisions, or that "read in" the provision of benefits that were previously denied, fall into the category of "hard" remedies. That is, the remedies ordered by courts in these cases are defined by the court and have immediate effect. These types of remedies have been applied in a number of social rights cases in Canada; generally speaking, they have been effective and have not raised issues with respect to governmental compliance.[14]

"Soft" remedies, by contrast, are those in which courts put in place a process through which the appropriate remedy is to be fashioned in the future. Soft remedial options in constitutional litigation in Canada have relied on declaratory orders of various sorts. In some cases declarations have simply provided guidance to governments about their constitutional obligations, and the courts have left it up to the government to decide if and in what manner to apply the court's guidance. In other cases courts 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 softer declaratory remedies. International human rights law is not directly enforceable by courts in Canada if it has not been incorporated by domestic legislation. However, under their jurisdiction to answer questions referred to them by governments, courts in Canada have provided advice to resolve legal uncertainty about international law.[16] Courts may issue declaratory judgments on legal issues for purely extra-judicial purposes, such as to inform

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[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 SCC 54 [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.*

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

political negotiations.[17] More robust approaches are generally applied, however, when constitutional rights have been found to have been infringed by existing legislation and new or revised legislation is necessary to remedy the violation. In these cases, courts have suspended the declaration of invalidity in order to provide the government with time to implement an appropriate remedy before the impugned legislation is rendered of no force and effect.[18] Recent litigation strategies in Canada have also applied tools such as reporting requirements, timetables, monitoring, benchmarks, and designated participatory mechanisms as important components to make suspended declarations of invalidity more effective.[19] Such remedies may be strengthened by the court retaining jurisdiction, assuming a supervisory role to ensure that appropriate processes are implemented and outcomes achieved within a reasonable time.[20]

As will be described below, Canadian social rights litigation has benefitted from softer remedies through which courts provide necessary guidance as to the government's responsibilities and leave time for the remedy to be designed and put in place. The implementation of a process to remedy a violation over a period of time has facilitated more meaningful participation by stakeholders and encouraged the development and implementation of new programs.[21] There is the risk, of course, that softer remedial orders allow governments to implement weaker remedies than the court might have ordered, or preserve structural inequality in the design of new programs that might have been better addressed through an immediate order extending existing legislation or programs to include excluded groups.[22] As will be seen below, this risk has materialized in some cases in Canada. Where weaker remedies have ensued, however, the problem has not been governmental non-compliance with the judgments of courts, but rather a lack of commitment by courts and governments to substantive equality and to democratic participation of marginalized and disadvantaged groups. As will be argued below, there is a need to reconfigure constitutional "dialogue" in Canada, usually conceived as a two way dialogue between the judicial and legislative

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

[18] *Schachter v. Canada, [1992] 2 SCR 679*; and Roach, (2002) A good example of the use of a suspended declaration in relation to the right to health is the well-known decision in *Eldridge* discussed below.

[19] See discussion below of *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878.

[20] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, at para 136; Roach, Kent and Budlender, Geoff (2005); and Roach, (2013).

[21] See the discussion of *Eldridge*.

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

branches, into a broader democratic conversation which meaningfully engages rights claimants and a range of institutional actors in the remedial and enforcement process. Reconfiguring soft remedies to better promote democratic values can play an important role in addressing the democratic deficit that currently exists in Canada.

2.2 Discrete v Multifaceted

A second dimension to be considered in assessing the tension between enforceability and effectiveness is the extent to which remedies engage with more than one piece of legislation or discrete benefit, or more than a single respondent. Even softer remedies that provide 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 or systemic patterns of administrative decision-making. Effective remedies to poverty, homelessness, and social exclusion 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 (1988). Effective social rights remedies in Canada will often require comprehensive strategies and broad programmatic reform extending over a number of inter-related program areas such as income assistance, housing subsidy and wage protections (Porter 2014).

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, whereby 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 judicial remedy in which the court simply orders the state to provide an entitlement that has been denied or to cease an action that has violated a right, is often inadequate. Remedies and enforcement strategies must address the different roles that states play, not only in legislating but also in ensuring that a range of actors behave in a manner that is consistent with the realization of social rights.[23] Courts may be required to design remedies so as to play more of a facilitative role in provoking action by multiple actors and institutions.[24] 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.

2.3 Corrective versus Transformative

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, where poverty, homelessness and other social rights violations are manifestations of increasing inequality and social exclusion, social rights remedies must also address the marginalization, exclusion, discrimination and stigmatization which give rise to these violations of social rights. It is not enough to address unmet needs. Social rights practice must also address the social construction of need through inequality and exclusion.

A reaffirmation of human rights values is a critical component of the creation of a more inclusive 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 extends beyond specific legislative or programmatic entitlements being claimed

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[23] 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." Sabel and Simon (2004), at 1019 and 1067-1073. For a discussion of 'soft' remedies in the Canadian and South African contexts, see Roach and Budlender 2005.

[24] 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 Chayes and Chayes (1995), Chapter 1.

to a broader commitment to the struggle to realize social rights. While transformative strategies tend to be associated with future-oriented (softer) remedies and multiple actors and entitlements, there may also be transformative dimensions to individual claims addressing discrete denials, particularly where denials are associated with discrimination or stigmatization. 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*

3.1 Negative Rights Claims

Negatively-oriented remedies which place limits or invalidate government action are the most familiar and comfortable forms of remedies for courts to enforce 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.

Negative rights remedies of immediate effect are generally more suited to civil and political rights claims and the predominance of a negative rights paradigm for constitutional remedies in Canada has been one of the most serious obstacles to social rights claims. Nevertheless, negative rights remedies have sometimes proven to be effective in generating positive rights outcomes, 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*,[25] 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 and represented a significant advance in challenging systemic discrimination against women in access to healthcare. The

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

decision also gave a significant impetus to the broader struggle for women's equality rights by securing a rights-based legal victory on a critical issue after years of political mobilization and advocacy. Interpreting the right to security of the person to include access to healthcare for women was a significant advance in ensuring more expansive interpretations of the *Canadian Charter*. However, the restriction of the remedy to a striking down remedy meant that the Court did not address governments' positive obligations to provide services. The legacy of that inadequacy in the remedy remains an issue today, with certain regions failing to provide the services necessary for access to abortions.[26]

In *Victoria (City) v Adams*[27], 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, which had relied on commitments made by Canadian governments to UN bodies to support an interpretation of the right to life and security of the person in section 7 of the *Canadian Charter* consistent with recognition of the right to housing.[28] Although they were only applied in a negative rights framework in this case, the interpretive principles affirmed by the trial judge did establish the connection between the right to housing under international human rights law and the right to security of the person under the *Canadian Charter*. There was, in addition, an indirect positive rights component to the decision. The Court ruled that the declaration of invalidity may be terminated if improvements to shelter and housing programs removed the need for homeless people to sleep in parks, such 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."[29] The Court's reluctance to engage with positive rights

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[26] National Abortion Federation (N.D.), *Access to Abortion in Canada*, <http://www.prochoice.org/canada/access.html>.
[27] *Victoria (City) v Adams*, 2009 BCCA 563; 2008 BCSC 1363 [Adams].
[28] Ibid. 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 United Nations Human Rights Committee, *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, (March 1983) UN Doc CCPR/C/1/Add.62 (1983) at 23.
[29] *Adams*, at paras. 95-96.

meant that 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, however, 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 nearly 250 units of permanent, supported housing for people who were formerly homeless (Greater Victoria Coalition to End Homelessness, 2014). 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." (Acker, undated). These initiatives, however, have not kept pace with demand, as rental prices continue to increase, and rental affordability decreases,[30] and shelter use continues to rise in Victoria.[31]

Advocates hoped that the decision in *Victoria v Adams* might affect positive change in other communities in British Columbia but this does not seem to have been the case.[32] After the release of the decision, the legal department of the City of Vancouver reviewed the decision but concluded that the ruling did not apply to similar bylaws in Vancouver.[33] Subsequent litigation is addressing restrictions on constructing shelters on city property in Vancouver (CBS News, 2012). In relation to longer term goals of access to justice, however, the decision has clearly had some positive effects. Homeless people have become more organized to challenge systemic patterns of discrimination and sought access to justice to challenge such discrimination. The British Columbia Court of Appeal dismissed an appeal from the Government of British Columbia of a decision granting standing to an organization, the British Columbia/Yukon Association of Drug War Survivors, to assert the rights of its members to challenge the grotesque behavior of officials and police in Abbotsford, British

[30] Ibid.
[31] In 2010/11, the emergency shelter occupancy rate was 95% compared to 86% in 2008/09 (Greater Victoria Coalition to end Homelessness (2014)).
[32] See Pivot Legal Society (N.D.). 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. See also City of Vancouver (2014). King (undated), *Statement by Douglas King in Personal Email Correspondence*, on file with the author.
[33] General Manager of Engineering Services (2011); see also Pivot Legal Society (N.D.), *City by-laws must respect homeless rights*, <http://www.pivotlegal.org/pivot-points/blog/city-by-laws-must-respect-homeless-rights> accessed 7 August 2014. 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. City of Vancouver (2014), <http://former.vancouver.ca/bylaws/2849c.pdf>.

Columbia in forcibly evicting homeless people by spreading chicken manure in the park, using pepper spray in tents, and destroying belongings of the homeless residents. The Court held that in these circumstances it is not reasonable to require individual victims to claim constitutional remedies and permitted the case to proceed by way of the organizations' claim for remedies.[34] Combining mobilizing tactics with strategies for access to justice has become an effective empowerment strategy emanating from the victory in the *Victoria v. Adams* case. 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 to more directly engage with systemic patterns of discrimination against those who are homeless or living in poverty. These interpretations, in and of themselves, may be helpful in advocating for social rights, both legally and politically. However, there is severe price paid by adopting a negative rights approach. It encourages governments to continue to ignore their positive obligations and rights claimants themselves to conceive of their rights in negative rights terms in a manner that is at odds with the substantive positive obligations of governments to realize rights. There is also a tendency for negative rights remedies to remain tied to particular pieces of legislation or government actions – in this case, to a particular bylaw -- such that a finding in one jurisdiction may not be easy to apply to other jurisdictions.[35]

3.2 "Reading-In Remedies"

More positively-framed social rights claims have been leveraged from courts in Canada when they have agreed to "read in" additional protections or benefits to remedy under-inclusive legislative protections, or social programs that deny disadvantaged groups equal benefits.[36] Correcting unconstitutional exclusions by reading in additional protections is considered the most appropriate remedy when it accords with the "twin guiding principles" of respect for the role of the legislature and respect for the purposes of the *Canadian Charter*. In these circumstances, Canadian courts have

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[34] *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142.

[35] For further discussion of the strategic considerations in the positive – negative rights framing of claims under the Canadian Charter in *Victoria v. Adams* and other cases, see Liew,(2012).

[36] Section 15(1) of the *Canadian Charter* 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.

been instructed to expand legislative protections or benefits rather than to strike the scheme down so as to be "as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."[37]

'Reading in' remedies provide for immediate and sometimes far-reaching enforcement of judicial orders. In *Sparks v Dartmouth/Halifax County Regional Housing Authority*, [*Sparks*],[38] security of tenure protection was extended to public housing tenants when the Court read protections for this previously excluded group into the applicable legislation. The existing court procedures available to private market tenants contesting evictions became immediately available for an additional 10,000 tenants in public housing. A simple modification to the application of existing legislation had a significant impact on the lives of public housing tenants, altering 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 entitlement that had been denied could be immediately provided by way of an immediate judicial remedy 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 was precedent-setting, not only for its extension of existing entitlements but also for its recognition of discrimination and stigmatization of poor people and public housing residents. The remedy addressed not only the specific legislative exclusion but also the systemic-structural causes of the exclusion by challenging the discriminatory assumptions about poor people that gave rise to it. The case illustrates how a single entitlement-based claim with an immediate remedy may be capable of leveraging both a positive remedy and transformative effect by challenging prevailing exclusion and stigmatization.

Another positive example of "reading in" remedies is found in the *Vriend* case dealing with under-inclusive human rights protections.[39] 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

[37] *Schachter*.
[38] *Sparks*.
[39] *Vriend v Alberta*, [1998] 1 SCR 493.

employers, violated the equality rights under the *Canadian Charter*.[40] The majority of the Court opted to read the missing protection into Alberta's human rights legislation, extending protections from discrimination to a group the legislature had deliberately chosen to exclude.[41] 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 on the basis of systemic discriminatory patterns of exclusion and stigmatization.

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 absence of positive remedial measures to ensure access to abortion services or adequate housing limited the effectiveness of the remedies in these cases.

3.3 Suspended Declarations of Invalidity

Where remedies to social rights claims have engaged with longer term obligations of governments to take positive measures to ensure constitutional rights, Canadian courts have chosen to suspend the application of declarations of unconstitutionality in order to provide governments time to develop remedial programmatic or legislative remedies to rights violations. "Suspended declarations of invalidity" are softer remedies than declarations that are of immediate application. In the case of suspended declarations, governments are left with some flexibility to design and implement the appropriate remedy. They therefore raise issues with respect to ensuring the quality of the implementation and enforcement of the court's order. On the other hand, suspended declarations have the advantage of encouraging the courts to engage with positive obligations of governments in areas in which the legislative branch is better placed to design and implement legislative and programmatic measures but where judicial constitutional review is also necessary to ensure that the rights of marginalized groups are not ignored.

A leading example of this remedial approach is found in the well-known case of *Eldridge v British Columbia*.[42] In that case the applicants, who were deaf, argued that the lack of sign language

[40] Ibid. paras. 65-66.
[41] *Vriend*, at paras. 196-197.
[42] *Eldridge*.

interpretation services within the publicly funded healthcare system violated their section 15 equality rights and asked that these services be read into legislation governing health care and hospital services.[43] The Court agreed that the failure to provide interpreter services had violated s. 15, but rejected the remedy sought by the claimants of reading these services into the existing legislative framework. The Court held that it would be more appropriate to give the government time to choose among a "myriad" of options for the best way to provide interpreter services. The government subsequently 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.[44] Had the court adopted the "read-in" remedy originally requested by the claimants, interpreter services would have been provided as an individual entitlement as a component of healthcare and hospital services with services under the direction of medical professionals, preserving a "medical model" of disability. The suspended declaration, on the other hand, resulted in the funding of a non-profit institute under the direction of a board, most of whose members are deaf, which designed, implemented and continues to administer appropriate programs in consultation with the deaf community.[45] The remedy that resulted from the suspended declaration of invalidity was significantly more participatory and empowering of people with disabilities, relinquishing a medical model of disability for one which was more compatible with empowerment and social inclusion of people with disabilities. A better remedial and enforcement strategy emerged from the hearing before the court than had originally been proposed by the claimants, who had sought a harder remedy, subject to immediate enforcement.[46]

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[43] Ibid.

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

[45] 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>.

[46] *Eldridge*.

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)*.[47] 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 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. Rather than including agricultural workers under the existing legislation, the Government enacted a separate legislative regime for agricultural workers which guaranteed only the right to form and join an "employees' association" and to make representations to employers through the 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 the Government's remedial response but the Supreme Court of Canada found that the new legislation was in conformity with the requirements of the *Canadian Charter*.[48]

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 by recognizing the distinct needs of people with disabilities and the importance of participatory processes through which to address those needs. In the *Dunmore* case, on the other hand, agricultural workers were not part of the process of designing new legislative protections. They would have been better served by a harder remedy of simply reading into the existing legislation an extension of protections accorded to other workers. In considering the obligations of the government to design and implement new legislation in *Dunmore*, the Supreme Court failed to enforce any participatory rights of the claimant group. The claimants were forced to undertake further litigation within a strictly adversarial framework, which ultimately proved unsuccessful.

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[47] *Dunmore.*
[48] *Ontario (Attorney General) v Fraser,* 2011 SCC 20, [2011] 2 SCR 3.

3.4 Supervisory Orders

The *Dunmore* case demonstrated the need for judicial engagement with the implementation of longer term remedies and strategies that require time to design and put into place. Ongoing judicial oversight of the remedial process with meaningful engagement by the claimant groups would have significantly increased the chances of a more successful remedial response without the need for prolonged and costly litigation to test the constitutionality of the government's remedial response.

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). This judicial resistance to engagement with longer-term remedies plays a significant role in denying effective remedies to social rights claims. The issue was addressed in the constitutional context in 2003, in the case of *Doucet-Boudreau v Nova Scotia*.[49] In that case, francophones in Nova Scotia challenged governments' failure to develop adequate French language education based on the right in the *Canadian Charter* to publicly-funded minority French language education. The trial judge ordered the provincial government and a Council responsible for administering French language education to use their 'best efforts' to develop French secondary school facilities and programs by specific dates in various districts. 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.[50] The Court of Appeal held that while the *Canadian Charter* permits the Court to order positive remedies to social rights violations, "the Charter does not extend the jurisdiction of these courts from a procedural point of view. Ordering a remedy is one thing. Providing for its enforcement is quite another thing."[51]

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

[49] *Doucet-Boudreau v Nova Scotia (Minister of Education).*
[50] *Doucet-Boudreau v Nova Scotia (Attorney General),* 2001 NSCA 104 (CanLII).
[51] Ibid. para. 37.

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.[52]

The majority of the Court found that in order to ensure that a remedy fulfills these requirements, the 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.[53]

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, 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."[54] While it is the majority decision that is binding on lower courts, the minority view articulated a judicial resistance to the kinds of effective remedial responses to social rights violations which continues to prevail in some lower courts. Governments have attempted prevent a broader application of the *Doucet-Boudreau* decision by arguing that minority language education rights in the *Canadian Charter* explicitly require positive measures by governments while other guarantees of rights do not and this argument has, unfortunately, been accepted by some lower courts.[55]

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[52] *Doucet-Boudreau v Nova Scotia (Attorney General)*, at para 37.
[53] Ibid. para. 71.
[54] Ibid. para. 131 (per Major, Binnie, LeBel and Deschamps JJ, dissenting).
[55] *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 at paras 89-90.

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 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. Courts can play an important role in overseeing the implementation of structural remedies over time. Ongoing jurisdiction of courts does not usurp democratic processes. Rather, it supports and enhances participatory processes that are required to implement responsive and effective remedies to violations of rights in many circumstances.

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 and enforcement process must ensure participatory rights to the groups whose rights have been violated or ignored by legislators (Porter, 2014). In this way, remedial and enforcement processes address not only the denial of a specific entitlement, but also the exclusion, marginalization or discrimination and failures in democratic accountability that led to that denial.

4. The Right to Reasonable (Rights-Informed) Decisions

While it is tempting to lay the blame for inadequate remedial responses to social rights violations in Canada solely on the courts, it is actually the broader legal culture in Canada that finds expression in judicial remedial rigidity. 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. A narrow approach to constitutional remedies has been at odds with the transformative aspirations that lay behind the adoption of the *Canadian Charter*, described by the Supreme Court of Canada as the creation of a "just society" through an "arduous struggle."[56]

The Supreme Court has laid the foundation for a more transformative approach to remedies, however, in its evolving understanding of reasonableness as a constitutional and human rights standard of governmental and administrative decision-making in a wide range of circumstances. In a number of cases where claimants have advanced social rights claims within the more traditional framework of statutory entitlement claims, as demands for corrections to legislative omissions or to discrete entitlements, the Supreme Court of Canada has instead utilized softer remedies that engage the broader issue of ensuring that decisions are consistent with the realization of rights and the struggle for a "just society." The Court has reframed challenges in which the requested remedy was for a discrete entitlement to be added to legislation into softer, more contextual remedial approaches focusing on decisions made in the administration and implementation of programs and on the interpretation of existing statutory entitlements. In cases like *Vriend* or *Sparks*, where no discretion was available to decision-makers to extend human rights protections to include discrimination because of sexual orientation or to extend security of tenure protections to include public housing tenants, the specific entitlement had to be read into the legislation. In other cases, however, where the legislation did not explicitly prevent the provision of an entitlement or benefit, the Court has preferred, where possible, to frame the remedy as an issue of rights-compliant decision-making under the existing statutory regime. The Court has relied on a standard of reasonableness to require that conferred decision-making authority be exercised so as to ensure conformity with fundamental rights. While this remedy may seem more conservative because it leaves the legislation unchanged, it is potentially more transformative because it looks beyond the need for a single entitlement to the need for inclusive, rights-promoting decision-making in all areas of governmental authority. The remedy is not limited to the particular entitlement but rather engages the obligations of governmental decision-makers to respect and promote human rights. The Court has thus laid the

[56] *Vriend*, at para. 68.

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' written submissions to the Court framed the *Canadian Charter* challenge in that case as an allegation of a discriminatory legislative omission or under-inclusion. They argued that interpreter services should have been explicitly included as a health service in the legislation governing public healthcare insurance and hospital services. 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 an additional health service. However, a different approach was considered at the oral hearing. The Court noted that the impugned legislation did not actually preclude supplying sign language interpreters. In its decision, the Court therefore rejected the allegation that the legislation itself was unconstitutional.

> [T]he 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. [57]

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, by way of different decision-makers. Compliance with the *Canadian Charter* 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-profit provider under the direction of a board made up of members of the claimant group.

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[57] *Eldridge*, at para. 34.

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, generally beyond the reach of the *Canadian Charter*, are subject to it when they have been delegated governmental decision-making authority that impacts upon the enjoyment of constitutional rights. They must exercise authority consistently with the government's constitutional obligations.[58] By disseminating the obligation to conform with the *Canadian Charter* among a broad range of actors, the Court provided more flexibility as to how the remedy could be implemented.

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.[59] Rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[60] The assessment of reasonable limits under the *Canadian Charter* (section 1) has a dual function of both limiting and protecting rights.[61] In *Eldridge*, having determined that the failure to provide interpretation services violated section 15 of the *Canadian Charter* by denying deaf patients equality in access to and quality of healthcare, the Supreme Court considered whether the decision not to fund interpreter services was reasonable in the circumstances. The Court incorporated the positive duty of reasonable accommodation of disability into its assessment. "Reasonable accommodation, in this context, is generally equivalent to the concept of 'reasonable limits'."[62] 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.[63]

The concept of constitutional reasonableness has thus been developed in the Canadian context primarily through the assessment of reasonable limits. The Supreme Court has established that

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[58] *Eldridge*, at paras. 49 –52.
[59] *Canadian Charter* s. 1.
[60] Under the "Oakes test" the court considers whether a limitation on Charter right is justified by a pressing and substantial objective and applies standards of rational connection, minimal impairment and proportionality according to the well-known "Oakes test." *R. v. Oakes*, [1986] 1 SCR 103 [*Oakes*].
[61] *Oakes* at 135.
[62] Ibid. para. 79.
[63] Ibid.

international human rights law, including the ICESCR, are central to the values that underlie the assessment of reasonableness under section 1. In *Slaight Communications,*[64] the Supreme Court 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. The Court 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 positive obligations 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.[65]

In the *Baker*[66] case, the Supreme Court took an additional step in linking international human rights values to a standard of reasonableness beyond the framework of *Charte*r review and reasonable limits under section 1. In that case, there was no allegation of a *Charter* breach. The Court held that for the discretionary authority granted to an immigration officer to review a deportation order on humanitarian and compassionate grounds to be exercised reasonably, it must be consistent with the values entrenched in international human rights law ratified by the Canadian government. The immigration officer should have recognized 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.[67] The deportation decision was therefore reversed by the Supreme Court on the basis that it was unreasonable. The best interests of the child

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[64] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038.
[65] Ibid. paras. 1056-1057.
[66] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
[67] Ibid .paras. 64-71.

principle was subsequently incorporated into the Act as well as into procedural guidelines for the exercise of all statutory discretion under the Act.[68]

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 ,[69] the Supreme Court of Canada again focused on the right to reasonable decision-making, rejecting the claimants' original claim that the governing legislation was unconstitutional. In this case the claimants had argued that the federal *Controlled Drugs and Substances Act*[70] violated the right to life and security of the person under section 7 of the *Canadian Charter* by making it a criminal offence to possess addictive drugs without providing an exception for therapeutic purposes.[71] As it had done in *Eldridge*, the Court considered instead whether the impugned legislation did not confer any discretionary authority through which Charter rights could have been ensured. The Court noted that the Act conferred executive discretionary authority to provide for exemptions and considered whether the Minister of Health's failure to grant an exemption for Insite was in accordance with the *Canadian Charter*.[72]

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 in these circumstances violated the right to life and security of the person, and was not in accordance with principles of fundamental justice. 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."[73] Based on proper consideration of the evidence and the needs of vulnerable groups the Minister was obliged to grant a discretionary exemption to Insite.[74] The Court considered the option of issuing a

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[68] *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 humanitarian and compassionate considerations when taking into account the best interests of the child directly affected); Government of Canada (May 2013), *OP – 10 Permanent Residency Status Determination*, <http://www.cic.gc.ca/english/resources/manuals/op/op10-eng.pdf >, s. 16.1.
[69] *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 [Insite].
[70] *Controlled Drugs and Substances Act*, SC 1996, c 19.
[71] Insite, at paras. 112-115.
[72] Ibid paras. 127-136.
[73] Ibid para. 133.
[74] Insite, .

declaratory order and sending the decision back to the Minister to exercise discretion in conformity with the *Canadian Charter* but opted instead for a harder mandamus order requiring the Minister to grant Insite the necessary exemption "forthwith". The Court held that in this case, there was no "myriad" of reasonable options available to the Minister as had been 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.[75] Thus, in this kind of case, a reasonableness approach produces a hard and immediate remedy. The Minister complied with the Court's order and Insite was able to continue to provide its services. The decision has spawned interest in adopting similar services elsewhere in Canada.[76]

In the more recent decisions of *Doré v Barreau du Québec*[77] and Loyola *High School v. Quebec (Attorney General)*[78] 2015 SCC 12 the Supreme Court revisited the obligation to exercise discretion consistently with the *Canadian Charter* and with human rights principles of reasonableness and considered the relationship between administrative and constitutional standards 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 an administrative decision was reasonable and compliant with *Charter Rights* was conducted pursuant to the "reasonable limits" requirements of section 1 of the *Canadian Charter*. 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 explained that the modern view of administrative tribunals has given rise to a more robust standard of administrative law reasonableness, a standard of reasonableness which incorporates the *Canadian Charter* and human rights law into administrative law standards. A new administrative law standard that is informed by constitutional and human rights values should be applied to provide

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[75] Insite, at para. 150.
[76] Initiatives developed in Montreal and Quebec in response to the ruling. Harris, (2011), 'Following Insite ruling, safe-injection sites planned for Montreal and Quebec City', *This Magazine*, <http://this.org/blog/2011/11/28/insite-safe-injection-montreal-quebec/> accessed 7 August 2014.
[77] *Doré v Barreau du Québec*, 2012 SCC 12 [Doré].
[78] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

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*.[79]

There is a risk that the Supreme Court of Canada's attempt to bring administrative, constitutional and human rights standards of reasonableness into conformity may lead to greater deference to administrative decision-makers than was the case under full-fledged Charter review as conducted in *Slaight Communications* or *Eldridge*. However, the new approach described in *Doré* and further clarified in *Loyola* as affirming a rigorous standard of reasonableness review that "works the same justificatory muscles" as the *Oakes* test for section 1 of the Charter, rovides strong grounds for insisting that all administrative decision-makers consider both *Canadian Charter* rights, including the right to substantive equality obligations and positive measures required to accommodate needs of protected groups, and 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 and Andrea Hill (2014: 357) note:

> 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.

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 fundamental rights under the *Canadian Charter*, Canada's international obligations under the ICESCR and other human rights treaties and with a broadly framed standard of reasonableness that incorporates positive duties to address the circumstances and ensure the rights of people with disabilities and other marginalized groups. Liebenberg and Quinot (2011:641) 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

[79] *Doré*, para. 29.

builds on the development of reasonableness as a standard in both administrative justice and socio-economic rights jurisprudence." There is now a basis in Canadian jurisprudence for enforcing the reasonableness standard proposed by Liebenberg and Quinot under South African constitutional and administrative law. The question is whether courts and administrative tribunals will apply it.

Reasonableness should be conceived of as more than a standard of judicial review. 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 empowers rights-holders to claim and enforce their rights in diverse settings. The wide range of decision-making engaged by the standard is what creates its immense transformative potential, but at the same time raises significant challenges in terms of enforcement. Decision-makers must be presented with the evidence needed to consider all of the relevant circumstances, made aware of how international human rights law and domestic constitutional and human rights may be engaged, and how statutes can be interpreted consistently with ESC rights. They must be trained to contextualize social rights in their areas of expertise and to apply the rights-informed standard of reasonableness affirmed by the Supreme Court of Canada. Enforcing this reasonableness standard before the wide range of administrative, quasi-judicial and judicial decision-makers, ranging from housing tribunals overseeing eviction, to social assistance tribunals, unemployment insurance arbitrators and administrators of disability programs, is a massive undertaking for stakeholders and civil society organizations. Advocacy organizations able to provide assistance and representation in these areas have beenunder sustained attack by a right wing government in Ottawa with traditional governmental sources of funding removed and charitable sources in jeopardy.[80]

The enforcement challenges raised by a more coherent and universally-applicable standard of reasonableness, however, are commensurate with its potential. The Supreme Court of Canada has 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

[80] Voices-Voix (2013), 'Canada: Voices-Voix Submission to the UN Universal Periodic Review, (22 April - 3 May 2013)', in *16th Session of the UPR Working Group of the Human Rights Council*. Available at <http://voices-voix.ca/sites/voices-voix.ca/files/upr_submission_voices-voix.pdf>.

created the crisis of poverty, homelessness and hunger in Canada.[81] The courts can still be called upon to review decisions that are inconsistent with the new standard, so the dissemination of authority for applying human rights norms and values beyond the courts does not suggest an abdication of judicial responsibility for rigorous oversight and review. The risk that courts will apply reasonableness review in too deferential a manner, denying claimants the rigorous standard of correctness review that applies under *Canadian Charter* review is real and must be strenuously resisted. Courts must not abdicate their constitutional responsibility to ensure that administrative decisions are fully consistent with international and constitutional human rights and are properly applied in the exercise of all delegated governmental authority. As noted above, effective remedies to structural "entitlement system failures" as Amartya Sen described them, require broadly based strategies to revalue and ensure the rights of people who have been denied their dignity and rights. Strategies will be based on political mobilization, public education and protest in a wide range of areas in which social rights are engaged. In the legal sphere as well, the demand for change must occur at all levels of decision-making and engage a wide range of actors. Rights-based strategies as recommended by UN human rights bodies require access to effective remedies at all levels of programming and administration. A broadly applied reasonableness standard is the best way to ensure this.

A key issue in the assessment of enforcement strategies is when to rely on courts to ensure compliance with social rights and when to rely on other actors. Judicial 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. Courts assume sole responsibility for making the decision about what entitlements are required to ensure fundamental rights. This was the paradigm of judicial remedies first proposed by claimants in the *Eldridge* and Insite cases. The claimants sought changes to the legislation to remove any reliance on administrative or executive discretion for the vindication of their rights. The Supreme Court rejected this approach in favour of a model in which the constitution and international human rights function more as a framework for

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

statutory interpretation and decision-making. Non-judicial actors were required to engage in the assessment of what rights actually mean in particular contexts and to make decisions accordingly. Where, in the view of the Court, they got it wrong, the Court reversed their decisions. Judicial orders reading into the health care 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 Supreme Court's remedial focus on ensuring a right to reasonable decisions provides a strong basis for attempting to enforce social rights-consistent decisions and policies among a range of actors and before multiple adjudicative bodies. Reasonable decisions must situate and apply rights in particular circumstances. The Supreme Court's preferred approach 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 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 has the authority to provide the benefit or protection, and on whether the decisions made pursuant to that authority are consistent with fundamental rights. The quality of the decision-making is not assessed solely on procedural grounds, but also in light of the substantive obligations of governments to ensure and protect fundamental rights. 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 the competence to safeguard rights in the exercise of discretion within specialized mandates. Rather than relying on courts or legislatures to resolve every dispute about statutory obligations and entitlements in particular contexts, administrators are required to comply with rights-based standards of reasonableness, with judicial intervention required only when they fail to meet these standards.

5. Enforcing the Right to Reasonable Budgetary Allocations: *Newfoundland (Treasury Board) v. N.A.P.E.*

The Supreme Court of Canada has recognized that reasonable policies and programs often involve balancing competing claims on limited resources. As noted above, the Court held in *Eldridge* that decision-makers failed to comply with the *Canadian Charter* when they refused to fund interpreter services, found to be a reasonable expenditure in light of projected costs balanced against 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 found 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] to retroactively delay for three years the implementation of a pay equity program. The result of the retroactive delay was to eliminate a preliminary pay equity award of $24 million which would otherwise have been paid to 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."[84] The claimants, on the other hand, argued that the rollback constituted sex discrimination, which could not be justified on budgetary grounds. The Supreme Court agreed with the claimants that women's right to equality was violated by the decision to revoke the retroactive award. The Court found, however, that the measure was justified in the context of a fiscal crisis which had 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 promoting 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

[82] *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381 [*N.A.P.E*].
[83] *Public Sector Restraint Act*, SN 1991, c 3.
[84] *N.A.P.E*, para 7.

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 be more a matter of ensuring that a robust standard of "reasonable budgetary measures" is applied by courts, commensurate with the primacy of human rights and equality, rather than keeping budgetary considerations out of rights adjudication altogether.

An issue which arose in the *N.A.P.E.* case was the quality of the budgetary evidence available to the Court. A number of commentators have criticized the Supreme Court's willingness to accept the government's characterization of the fiscal crisis.[85] 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 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 record of the legislative debate and some budget documents.[86] The government witnesses had not been directly involved in the weighing of different options during the budgetary process.[87]

In assessing whether the Supreme Court's decision in this case accords with evolving international standards of reasonableness in relation to budgeting and available resources, 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 in the last 20 years (Norris, 2003). Newfoundland and Labrador had the nation's highest unemployment rate at the time the cuts were made, largely as a result of the traumatic collapse of the cod fishery. The province had battled poverty rates among families with children which were the highest in Canada (National Council on Welfare, 1992a). Newfoundland also has a particular political history in relation to debt. The independent Dominion of Newfoundland had lost its independence from Great Britain during the Great Depression because of an unmanageable fiscal crisis and debt was also a factor in the subsequent contested decision to

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[85] 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, <http://www.thecourt.ca/wp-content/uploads/2008/06/womenscourt-newfoundland.pdf>; see also Mellon (2006), 135.
[86] N.A.P.E., at para. 55.
[87] Ibid.

become a province of Canada in 1949 (Reynolds, 2009). This history looms large in the Newfoundland consciousness. 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.[88]

A key consideration in a reasonableness analysis must also be whether the needs of the most vulnerable groups are prioritized.[89] 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 the highest social assistance rates for single mothers in Canada in real terms (National Council on Welfare, 1992a).[90] The exemption of social assistance rates from expenditure cuts was of critical importance for women living in poverty when the decline and subsequent moratorium of the cod fishery led to widespread lay-offs of women working at low wage, seasonal employment in fish plants. Women relying on social assistance in Newfoundland were in a significantly more precarious and disadvantaged position in the context of austerity measures than the women employed in the public sector who were adversely affected by the revoked retroactive pay equity award.

The standard of reasonableness articulated by the Supreme Court in N.A.P.E is one which should ensure that courts continue to view governments' budgetary justifications with "skepticism" while recognizing that reasonably balancing competing demands on resources is itself a critical component of rights-compliant decision-making. Justice Binnie summarized the Court's approach as follows:

> 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

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[88] N.A.P.E., at para. 72.

[89] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at para. 75; Porter 2006:; and 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*, (38th Session, 2007), UNCESCROR, UN Doc E/C.12/2007/1 (2007).

[90] Note that in 1999, Newfoundland continues to maintain the highest rates for single parents.

> 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 (National Council on Welfare, 1992a, para 72).

The standard or reasonableness applied in the *N.A.P.E.* decision is therefore arguably compatible with emerging reasonableness standards internationally. Significantly, the Court refused to accept that a deferential standard of review should be adopted in relation to all budgetary decisions. The Court firmly rejected the position enunciated by Marshal, J.A. writing the majority decision for the Newfoundland Court of Appeal, suggesting broad deference to governments' budgetary and policy measures based on a more traditional view of the separation of powers between the judiciary and the legislature. Binnie J. responded by elucidating a critical distinction between decisions deemed 'reasonable" by legislators, and those which satisfy the 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.[91]

Although the Court in *N.A.P.E.* found against the claimants and denied them the judicial remedy they sought, the standard of reasonableness that was articulated in the decision 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

[91] N.A.P.E., para. 103.

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 (Baker, 2006). The political campaign relied heavily on the finding of the Supreme Court that women' equality rights had been violated and that the austerity measure was only permissible in the circumstances of a fiscal crisis (Greene, 2010). In this sense, even in refusing the remedy sought by the claimants, the Court had empowered the group affected to eventually win the entitlement they sought once the fiscal circumstances changed. The Court established a framework for the assessment of the constitutionality of budgetary allocations which required that fundamental rights, including social rights such as rights to health care and to work be balanced in a reasonable and fair manner, with particular attention paid to the needs of vulnerable groups. In the context of an improved fiscal environment, the N.A.P.E. decision empowered affected constituencies to lobby for a different result based on the same standard of 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 (1988), 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 more generalized failures of interdependent entitlement systems. Homelessness in Canada is similarly not a problem of scarcity of housing. The broader entitlement system of housing subsidies, social housing production, income assistance, land and property rights, housing laws, land use planning, social programs, wage protections, social security, regulation of private actors (and so on), has, in its cumulative effect, left 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. There is no single flaw or discrete violation that can be corrected by extending or improving an existing benefit or piece of legislation. An effective remedial and enforcement strategy must address the cumulative and inter-active effect of a myriad of laws, policies and programs that have created a systemic pattern of exclusion, inadequate housing and homelessness among particular groups.

The concept of a structural entitlement system failure seems particularly apt in the Canadian context 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

entitlement system failure, including: inadequate income assistance, low minimum wage, lack of security of tenure, erosion of land and resource rights of Indigenous peoples, insufficient housing subsidy, inadequate funding of social housing, restrictions on unemployment insurance affecting women and part-time workers, lack of housing with support for mental health disabilities, and inadequate human rights protections against increasing stigmatization of people living in poverty or homelessness.[92] None of these failures is justified by a scarcity of resources. On the contrary, 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 poverty and homelessness (Jackman and Porter, 2014).

In *Tanudjaja v Canada,*[93] individuals affected by homelessness have joined with a network of organizations to ask the courts to engage directly with the ongoing failure governments in Canada to address the human rights crisis of homelessness and inadequate housing through effective strategies. The claimants in *Tanudjaja* seek to ensure, through an innovative remedial approach including both declaratory and supervisory orders, that governments develop, in consultation with affected communities, joint national and provincial housing strategies. As recommended by UN human rights bodies, these would include effective accountability mechanisms, and set goals and timetables for the elimination of homelessness and the implementation of the right to adequate housing. Claimants requested the court to retain jurisdiction in the same manner as the court in *Doucet-Beaudreau*, described above, to ensure that the strategy would be designed and implemented in a timely manner, with participation of the affected communities.The innovative remedial strategy developed in the *Tanudjaja* case was developed by a large network of groups and individuals involved with the issue of homelessness.[94] The network looked to the recommendations of

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[92] United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (Eighteenth Session, 1993), UN Doc E/C.12/1/Add.31 (1998); United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (Thirty-sixth session, 2006), UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5 (2006).

[93] *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>. *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410; *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852; Denied leave to appeal to the Supreme Court of Canada, *Jennifer Tanudjaja, et al. v. Attorney General of Canada, et al*., 2015 CanLII 36780 (SCC) Further documentation of the case online at http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness.html.

[94] For a description of the civil society organizations and mobilizing accompanying this litigation initiative as well as the legal strategies and evidence, see Social Rights in Canada (2010).

international human rights authorities, like the United Nations Special Rapporteur on 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 rights-based strategy to address homelessness. After many years of governmental inaction in response to these critical recommendations, depriving the fundamental rights under the *Canadian Charter* including rights to life, security of the person and equality for those affected by homelessness and inadequate housing, stakeholders decided that Canadian courts must play a role in ensuring that these authoritative recommendations are acted upon. In past years, challenges have been advanced in relation to components of the right to adequate housing in Canada, including under-inclusive security of tenure protections,[95] rental qualifications that disqualify low income tenants,[96] inadequate welfare rates for particular groups,[97] excessive utilities costs for low income households,[98] and prohibitions on the temporary erection of shelters in parks.[99] International human rights law was employed in these cases to encourage courts to interpret existing statutes or constitutional rights in a manner that would advance the right to housing.

Prior to the *Tanudjaja* case, the courts had never considered a constitutional claim to a comprehensive remedy that would actually address the homelessness crisis itself as a violation of rights requiring a comprehensive, multi-pronged remedial strategy to be implemented over a period of time. No group or individual had put forward a claim that would seek, as a remedy, a coherent response to the problem of homelessness. While asking that homelessness be remedied in a single court case seems ambitious, the claim recognized that the problem of homelessness is eminently solvable in Canada. The solution, however, is not reducible to a single entitlement or policy. The claim did not allege that governments must provide everyone with housing. Rather, it alleged that governments must make decisions and redesign policies and programs in a manner which will reduce and eventually eliminate homelessness. The right to sleep under a box in a park, as had been

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[95] *Sparks*.
[96] *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).
[97] *Gosselin v Quebec* (Attorney General), [2002] 4 SCR 429, 2002 SCC 84.
[98] *Boulter v Nova Scotia Power Incorporated*, 2009 NSCA 17.
[99] *Adams* .

won in *Victoria v Adams*[100] is a remedy that is grossly disproportionate to Canada's abundant resources. In *Tanudjaja*, the claimants soughtr a remedy that more closely conforms with emerging international standards of reasonableness based on available resources.[101]

Rather than trying to identify a specific piece of legislation that could be challenged and asking for a more traditional, statute-based remedy, those advancing the claim in *Tanudjaja* asked first what sort of remedy would be effective and contoured the claim to the remedial measures that are required to deal with homelessness. In order to provide coherence and specificity to the alleged violation, , the claimants identified the governments' failure to implement a comprehensive strategy to address homelessness and inadequate housing as the central violation. The primary violation alleged in *Tanudjaja*, as in the *Eldridge* case, was governments' failure to respond reasonably to the needs of a vulnerable group – a failure to act which led to violations of Charter rights. The failure to adopt a housing strategy has led to violations of the right to life, the right to security of the person and equality rights of disadvantaged groups most vulnerable to homelessness. The claimants have asked the Court to order the federal and provincial governments to engage meaningfully with stakeholders and to design an effective strategy to implement the right to adequate housing within a reasonable time frame.

The claimants provided evidence regarding stigmatization and discrimination against the homeless and of the disproportionate effect of homelessness on people with mental and physical disabilities, Indigenous people, women, children and recent immigrants, thus alleging that the governments' failure to implement a strategy to address homelessness had a discriminatory effect on protected groups. Extensive evidence was provided about the effects of homelessness on life and health. In her Affidavit in support of the claim, Cathy Crowe, a street nurse who has worked with homeless people in Toronto for more than twenty years, describes some of the consequences of homelessness that she has witnessed:

> I saw infections and illnesses devastate the lives of homeless people – frostbite injuries, malnutrition, dehydration, pneumonias, chronic diarrhoea, hepatitis, HIV infection, and skin infections from bedbug bites. For people who live in adequate housing, these conditions are

[100] Ibid.
[101] *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878.

> curable or manageable. For homeless people, however, it is much more difficult. The homeless experience greater exposure to upper respiratory disease; more trauma, including violence such as rape; more chronic illness, greater exposure to illness in congregate settings; more exposure to infectious agents and infestations such as lice and bedbugs; suffer more from a greater risk of depression. This is compounded by their reduced access to health care.[102]

The claimants in this case worked with volunteers, experts and community organizations to assemble a 16-volume record, totalling nearly 10,000 pages, containing 19 affidavits, 13 of which were from experts, (including Miloon Kothari, the former Special Rapporteur on Adequate Housing). Only after all of the evidence was filed did the Governments of Canada and Ontario bring a motion to dismiss the case without a hearing and without any consideration of the evidence, on the grounds that the claim as described in the Notice of Application served at the commencement of the action is non-justiciable and has no reasonable chance of success.

After all of the evidence had been compiled and formally served on them, the respondent governments brought a Motion to Dismiss the claim, arguing that it is non-justiciable. Large coalitions of both international and domestic human rights, anti-poverty and housing organizations intervened in the case to defend the justiciability of the claim, emphasizing that rights claims which seek effective remedial strategies to systemic human rights violations should be welcomed, not rejected, by courts because they ensure access to justice for the most marginalized groups in Canadian society.[103]

Sadly, the governments' arguments were accepted both by the Ontario Superior Court and by two of three judges on the Ontario Court of Appeal. The majority of the Ontario Court of Appeal held that the claim is non-justiciable because an allegation which it described as asserting, in essence that governments "have given insufficient priority to issues of homelessness and inadequate housing"[104] engages with too many interactive policies and programs to be amenable to adjudication. Rather

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[102] Catherine Crowe, "Affidavit for *Tanudjaja v Attorney General (Canada)*", Ont Sup Ct File no CV-10-403688 (2011) at paras 23-24 online <http://www.acto.ca/assets/files/cases/Afd.%20of%20C%20CROWE,%20Former%20Street%20Nurse%20-%20FINAL.pdf>

[103] For a list of groups that intervened before the Court of Appeal and copies of their written submissions, see Social Rights in Canada, 'Motion To Dismiss - Charter Challenge to Failures to Address Homelessness and Inadequate Housing in Canada.''.

[104] *Ibid*, at para 34.

than requiring governments to justify their failure to implement a coherent plan and strategy to co-ordinate the inter-active programs and policies linked to homelessness, as had been recommended by numerous experts and international human rights bodies, the majority of the Court of Appeal of Ontario simply denied homeless people any hearing on the evidence. Despite a strong dissenting opinion from one of three Court of Appeal judges, the Supreme Court of Canada subsequently denied leave to appeal in this case, leaving the justiciability of claims to effective strategic remedies to homelessness in Canada to be determined by the highest court in some future case that would take years to develop. The claimants, meanwhile, are considering avenues through which to take their claim before international or regional bodies, such as through a communication to the United Nations Human Rights Committee.

A retrospective assessment of the Tanudjaja remedia strategy might consider whether framing the case around a singular benefit would have avoided prevailing prejudices about justiciability. However, affirming a false simplicity to systemic violations of social rights is not a guarantee of success either. The courts would likely have invoked the same complexity of inter-active policies to suggest that judicial intervention around a singular benefit would be to deny the complexity of the problem of homelessness. The majority of the Court of Appeal noted that: "All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions, and urban centres are all different, across the country."[105]

The question at issue in *Tanudjaja* was not ultimately one of the appropriate litigation strategy or remedial strategy but whether homeless people will have access to justice in Canada to protect their rights to life and equality. There is no question that had the Court been committed to the protection of these rights, it had the competence to review the evidence produced by the claimants and to consider it in relation to the arguments and any evidence put forward by governments to justify their failures to introduce the recommended strategies. The claimants and interveners quite properly acknowledged that it is not the court's role to itself design and implement the required strategy

[105] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852at para 34.

engaging a wide range of policies and programs. Rather, they relied on the court's competence to consider assessments from experts about whether such a strategy was a reasonable demand to place on governments and whether such a strategy could remedy the violations of the rights of those who are currently homeless. The claim conformed, in structure, to the remedial approach adopted in the *Eldridge* and *Doucet-Boudreaux* cases. The greater complexity of the systemic issue of homelessness corresponds to the more significant numbers affected and the more widespread and egregious violations of rights- a factor which should surely have encouraged the courts to hear the evidence in the case. For courts to deny those affected by these kinds of systemic violations access to hearings even when their right to life is at stake imperils the integrity of Canada's constitutional democracy. At issue is whether victims of the most serious 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 recognize that the kind of entitlement system failure that is challenged in the *Tanudjaja* case is not restricted to affluent countries with comprehensive social programs. Sen's research showed that what is most obvious in affluent countries (ie., that social rights violations relate more to entitlement systems than to scarcity of resources) applies 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 their rights are not prioritized within the existing system of income, property and other 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 those in poverty with housing and food, though this is certainly necessary in the short term. The entitlement system that has denied certain groups their dignity, security and their fundamental rights must 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 programs, laws, and regulations. It is critical that litigation strategies develop enforceable remedies that engage with the need for a

transformative social rights project, rather than one that relies solely on discrete judicial remedies framed as corrections to existing entitlements.

Justiciable social rights claims have in the past been conceived of primarily as claiming entitlements to social goods or services that meet certain standards of adequacy, or as protection from being actively deprived of those services or goods. In some cases, such as those involving discrimination or eviction from housing, social rights claims may correspond exactly to these kinds of entitlements, and can be advanced within the framework of traditional judicial remedies and enforcement mechanisms. Such 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 or constitutional requirements as interpreted by courts or tribunals.

It is now increasingly recognized, however, that if social rights claims are to address the most critical issues of exclusion and deprivation, they must also engage with the strategic or purposive 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 dimension cannot be entirely framed by claims within the existing entitlement system. They must try to implement transformative strategies to reconstruct entitlement systems around social rights and to remedy broader entitlement system failures that extend beyond a single statute or program. Rather than defining the violation and remedy in terms of an unfair deprivation or discriminatory exclusion within an existing statutory or entitlement framework, these 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-Boudreau* 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.

The transformational dimension of social rights remedies and enforcement is most obvious in claims such as the one advanced in *Tanudjaja*. Social rights claims which identify specific exclusions and seek immediate remedies may also have a longer-term transformative effect, however. Claims to entitlements within existing legislative frameworks rely on interpretations of law and of what constitutes reasonable exercise of conferred decision-making authority, both of which are tied to the realization of social rights. Single entitlement-based claims such as those in *Sparks* or *Vriend* may sometimes offer the most strategic approach to challenging the devaluing of the rights of certain groups. In other cases, such as *Eldridge* or *Insite*, interpreting and administering statutes in a manner that is consistent with social rights may be the most effective way to affirm social rights values and engage with broader systemic issues. It is important to recognize the transformative dimension of engagement with courts' interpretive role, since giving meaning to rights in particular legislative 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.[106]

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

[106] For an overview of these developments see Smith (2005).

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* (Porter, 2006). 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*, in which a women's organization filed complaints of systemic sex discrimination against the Canadian National Railway. In that case, the remedy granted by the human rights tribunal and upheld by the Supreme Court of Canada included an employment equity program to remedy the under-representation of women and other ongoing effects of systemic discrimination within the industry.[107] Canada was also 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. This legacy remains an important reference point for the notion of substantive equality. While Canadian courts have sometimes retreated from the substantive approach to equality that lay at the centre of historical expectations of the *Canadian Charter* (Porter, 2006; Jackman, 2010), the Court's finding in *Eldridge* that conferred decision-making authority must be exercised so as to meet governments' positive obligations to ensure substantive equality remains good law and provides a firm foundation for transformative equality claims under both the *Canadian Charter* and by way of administrative law.

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 requirement of reasonable accommodation of needs of groups protected from discrimination, including but not limited to persons with disabilities.[108] The Court has adopted a rigorous 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 reasonableness included in the new Optional Protocol to the ICESCR (Porter, 2009; Griffey, 2011). It is the right to reasonable decisions and policies, informed by

[107] *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114.
[108] For consideration of these convergences, prior to the Supreme Court's decision in *Doré*, see Gratton and Sossin, 2010.

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* case chose. In that case the applicants intentionally relinquished any individual claim and sought only systemic remedy in the form of a rights-based strategy to end homelessness and implement the right to adequate housing in Canada. In other 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 not displace the vast array of individual claims to particular benefits or challenges to evictions or to discriminatory policies that are critical to housing rights advocacy in Canada and elsewhere. There is ample room for both types of claims.

Modern systems of governance, in which many services and programs are contracted out and complex forms of public–private partnerships abound, demand innovative approaches to social rights remedies and enforcement. New remedial strategies must reflect the multiplicity of actors and the diverse legislative, policy, or adjudicative contexts in which social rights claims must be advanced. State regulation of private actors, whether in the form of contractual obligations or judicial oversight, particularly when they have been delegated governmental responsibilities in relation to social rights, as in the *Eldridge* case, must mean more than restraining them from doing harm. Private actors taking on governmental obligations must also bear positive obligations with respect to the realization of social rights, such as by participating in strategies to fulfill social rights over time. The modern approach to social rights remedies and enforcement must therefore engage with areas of policy, program development and planning that have often escaped human rights scrutiny in the past because of the challenges of enforcing remedies in this context.

Recognizing that multiple actors are involved as duty-bearers does not lessen state responsibility for violations of social rights. Although private actors may be directly responsible for violations, 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."[109] Protection from discrimination by private actors imposes both negative and positive duties on private actors. The latter include obligations to accommodate the needs of disadvantaged groups and to redress systemic inequality. Similarly, the governments' duty to fulfill social rights through reasonable measures commensurate with the maximum of available resources must be borne by private entities with delegated authority, as in *Eldridge* when non-governmental hospitals were made to comply with reasonableness standards in the *Canadian Charter*. The intricate links between state policy 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 in order to vindicate rights in the context of new forms of governance. A new conversation among governments, stakeholders, human rights institutions, administrative decision-makers, tribunals, and courts must be framed around the realization of rights and the interests at stake for rights-holders, from which new understandings of duties should emerge.

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 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. 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 potential benefits of these new approaches, with their broad range of application, must not be disregarded. Claiming social rights must invariably engage with questions about what is reasonable in particular contexts. It does not serve the longer term goals of social rights advocacy to try to avoid "soft" elements tied to contextual decision-making in search of hard and fast remedies in every case.

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[109] *Vriend*, para. 103; see generally Jackman (1998); and Porter (1999).

The judicial reticence to engage with broader systemic failures rather than discrete deprivations or exclusions remains a serious obstacle to effective social rights litigation in Canada. The Supreme Court has insisted on leaving undecided the question of whether there is an obligation to put programs and benefits in place *ab initio* in order to ensure social rights.[110] 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.[111] 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 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 the Court's affirmation that remedies must be responsive and effective. Approaches to remedies and enforcement of rights must catch up with the emerging recognition that the *Canadian Charter* imposes both positive and negative obligations.

The Supreme Court's reluctance to affirm positive obligations under the *Canadian Charter* has meant that courts have sometimes failed to properly engage with the broader purposes of the *Charter* and of international human rights in the design and enforcement of remedies. An early example of this failure was a decision of the Nova Scotia Court of Appeal in an early *Canadian Charter* case on welfare entitlements. After finding that lower welfare rates for single fathers were discriminatory, the Court chose to remedy discrimination by lowering the benefits of single mothers to the level of single fathers or "equalizing down" to identical levels of gross inadequacy.[112] The Supreme Court of Canada properly criticized this remedial approach as "equality with a vengeance."[113] In *Vriend*, although the majority of the Supreme Court of Canada ordered 'sexual orientation' to be read into Alberta's provincial human rights legislation, it stopped short of holding that there is a positive obligation to enact human rights legislation, considering such a finding unnecessary in that case. It was thus open to one justice, Justice Major, to dissent on the remedy, favouring a declaratory remedy that would allow the legislature to choose "no human rights Act

[110] This was the Court's official position in *Eldridge*, , *Vriend*, and N.A.P.E. .
[111] *Vriend*, at para. 60.
[112] *Attorney-General of Nova Scotia v Phillips* (1986), 34 DLR (4th) 633 (NSCA).
[113] *Schachter*.

over one that includes sexual orientation as a prohibited ground of discrimination."[114] The dissent provided fuel to right wing groups in Alberta to "enforce" the Supreme Court's decision with a vengeance by demanding that human rights legislation be repealed.[115] Clearly, a more coherent and consistent approach to the issue of substantive obligations and remedies is based on a recognition of positive obligations to enact necessary legislation and programs infusing the design and choiceof remedies with values that move beyond the four corners of a particular statutory entitlement, towards the goal of substantive realization of rights.

Judicial timidity about positive rights in Canada is often based on a misguided focus on the relationship between courts and legislatures which leaves out of the equation the rights claimants and the interests at stake. The expansion of a two-way 'dialogue' between courts and legislatures into a broader engagement with democratic processes to ensure that rights claimants are heard is thus 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 too often excluded, is doomed to failure.

Effective participation by rights holders must be incorporated into standards of reasonable decision-making and courts must frame enforcement orders in a way that engages all of the relevant actors in an ongoing, rights-based process of accountability to substantive rights. 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, empowering marginalized communities to play a meaningful role in decision-making processes. 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 in designing more participatory and effective remedies to social rights violations. In all of these spheres, advocates and claimants must at times remain stubborn in the face of resistance, and insist that prevailing notions of justice and remedial enforcement adapt to the demands of those who have been too long denied access to justice and effective remedies.

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[114] Ibid. para. 196. (Major J dissenting in part).
[115] See, for example, Byfield (1995).

Bibliography

Abbott, Kenneth W. and Snidal, Ducan (2000), 'Hard and Soft Law in International Governance', *International Organization*, 54(3), 421–456.

Acker, Alison (undated), Statement by Alison Acker in Personal Email Correspondence, on file with author.

Arbour, Louise (2005), *'Freedom From Want' – From Charity to Entitlement*, (Quebec City: LaFontaine-Baldwin Lecture).

Baker, Jamie (2006), 'Pay equity cash "addresses a wrong"', *The Telegram (St. John's)*, <http://nlpayequity.cupe.ca/nlpayequity/Article_from_the_St_>, 24 March, at A3.

Byfield, Link (1995), 'The Supreme Court has left Alberta no choice but to repeal its human rights act', *Alberta Report*, 22(26), June, 2-3.

CBC News (2012), *Vancouver's ban on homeless street sleeping challenged*, 22 November <http://www.cbc.ca/news/canada/british-columbia/story/2012/11/21/bc-homeless-lawsuit.html> accessed 7 August 2014.

Chayes, Abram and Antonia Chayes (1995), *The New Sovereignty – Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press).

Liew, Jamie (2012), "Finding Common Ground: Charter Remedies and Challenges for Marginalized Persons in Public Spaces." 1:1 C.J. Poverty Law.

General Manager of Engineering Services (2011), *Structures for Public Expression on City Streets*, (Standing Committee on Planning and Environment, Vancouver),<http://former.vancouver.ca/ctyclerk/cclerk//20110407/documents/penv1StructuresforPublicExpressiononCityStreets.pdf>.

Gosselin v Quebec (Attorney General), [2002] 4 SCR 429, 2002 SCC 84.

Government of Canada (May 2013), *OP – 10 Permanent Residency Status Determination*, <http://www.cic.gc.ca/english/resources/manuals/op/op10-eng.pdf>.

Gratton, Susan L. and Sossin, Lorne (2010), 'In Search of Coherence: The Charter and Administrative Law under the McLachlin Court', in Adam Dodek and David Wright (eds.), *The McLachlin Court's First Ten Years: Reflections of the Past and Projections of the Future* (Toronto: LexisNexis), *-*.

Greater Victoria Coalition to end Homelessness (2014), *Housing ends homelessness*, Greater Victoria Coalition to end Homelessness, <*http://victoriahomelessness.ca/get-informed/housing/*> accessed 21 August 2014.

Greene, Shiela H. (2010), *Letter from Shiela H. Greene*, Counsel for Appellants in *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381 (29 March 2010).

Griffey, Brian (2011), 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *HRL*, 11(2", 275-327.

Harris, Megan (2011), 'Following Insite ruling, safe-injection sites planned for Montreal and Quebec City', *This Magazine*, 11 November, <http://this.org/blog/2011/11/28/insite-safe-injection-montreal-quebec/> accessed 7 August 2014.

Jackman, Martha (1998), 'Giving Real Effect to Equality: Eldridge v British Columbia (A.G.) and Vriend v Alberta', *Rev Const Stud*, 4(2), 352-371.

Jackman, Martha (2010), 'Constitutional Castaways: Poverty and the McLachlin Court', in Sanda Rodgers and Sheila McIntyre (eds.), *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ontario: LexisNexis Canada); (2010), Supreme *Court Law Review*, Vol. 50, 297-328.

King, Douglas (undated), *Statement by Douglas King in Personal Email Correspondence*, on file with author.

Mellon, Hugh (2006), 'Charter Rights and Public Policy Choices: The Supreme Court and Public Finance', *Forum Constitutionnel*, 15(3), 135-146.

Norris, Dave (2003), *The Fiscal Position of Newfoundland and Labrador*, Royal Commission on Renewing and Strengthening Our Place in Canada, May, <http://www.gov.nl.ca/publicat/royalcomm/research/Norris.pdf> accessed 7 August 2014.

Office of the United Nations High Commission for Human Rights (OHCHR), *Olivier De Schutter, Special Rapporteur on the right to food: Visit to Canada from 6 to 16 May 2012: End-of-mission statement*, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12159&LangID=E> accessed 7 August 2014.

Pivot Legal Society (N.D.), *City by-laws must respect homeless rights*, <http://www.pivotlegal.org/pivot-points/blog/city-by-laws-must-respect-homeless-rights> accessed 7 August 2014.

Porter, Bruce (1999), 'Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend', *Const Forum Const*, 9(3), 71-82, <http://www.law.ualberta.ca/centres/ccs/userfiles/9-3porter.pdf>.

Porter, Bruce (2006), 'Expectations of Equality', *Supreme Court Law Review*, 33(23), 23-44.

Porter, Bruce (2009), 'The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins', *Nordic Journal of Human Rights*,27(1),39-53.

Porter, Bruce (2014) 'Inclusive Interpretations: Social and Economic Rights and the Canadian Charter', Helena Alviar, Karl Klare and Lucy Williams (eds.), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (London and New York: Routledge), 215-234.

Porter, Bruce (forthcoming), 'Reasonableness in the Optional Protocol to the ICESCR', in Rebecca Brown, Malcolm Langford, Bruce Porter and Julieta Rossi (eds.), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Capetown: Pretoria University Law Press).

Porter, Bruce and Martha Jackman (2008), 'Canada: 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), 209-229.

Porter, Bruce and Martha Jackman (2014), 'Strategies to Address Homelessness and Poverty in Canada: the Charter Framework', in Martha Jackman and Bruce Porter (eds.), *Advancing Social Rights in Canada* (Toronto: Irwin Law 2014), 99-100.

Porter, Bruce (2014) 'International Rights in Anti-Poverty and Housing Strategies: Making the Connection', in Martha Jackman and Bruce Porter (eds.), *Advancing Social Rights in Canada* (Toronto: Irwin Law 2014), 33-64.

Quinot, Geo and Sandra Liebenberg (2011), 'Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa', *Stellenbosch Law Review*, 22(3), 639-663.

Reynolds, Neil (2009), 'What Newfoundland can teach us', *Globe and Mail*, 27 November, <http://www.theglobeandmail.com/report-on-business/rob-commentary/what-newfoundland-can-teach-us/article793205/> accessed 7 August 2014.

Roach, Kent (2002), 'Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity', *University of British Columbia Law Review*, 35(2), 211-70.

Roach, Kent and Geoff Budlender (2005), 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable', *South African Law Journal*,122(2), 325-351.

Roach, Kent (2013), *Constitutional Remedies in Canada* (Toronto: Canada Law Book).

Sabel, Charles F. and William H Simon (2004), 'Destabilization Rights: How Public Law Litigation Succeeds', *Harvard Law Review*, 117(4), 1015-1101.

Sen, Amartya (1988), 'Property and Hunger', *Economics and Philosophy*,4(1), 57-68, reprinted in Wesley Cragg and Christine Koggel (eds.) (2004), *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson).

Smith, Miriam (2005), 'Social Movements and Judicial Empowerment: Courts, Public Policy and Lesbian and Gay Organizing in Canada', *Politics & Society*, 33(2), 327-353.

Social Rights in Canada, (2010), *Charter Challenge to Homelessness and Violations of the Right to Adequate Housing in Canada*, April, <http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness.html> accessed 7 August 2014.

Social Rights Ontario (N.D.), *Social Rights in Ontario: Adequate Food, Housing and Other Requirements of Dignity*, <www.socialrightsontario.ca>.

Voices-Voix (2013), 'Canada: Voices-Voix Submission to the UN Universal Periodic Review, (22 April - 3 May 2013)', in *16th Session of the UPR Working Group of the Human Rights Council*, <http://voices-voix.ca/sites/voices-voix.ca/files/upr_submission_voices-voix.pdf>.

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