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Rights-Based Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework

Martha Jackman & Bruce Porter

Abstract

This paper is the second part of a two-part research project that considers what the new paradigm of social rights and the re-unified system of human rights mean for the design and implementation of programs and strategies to address poverty and homelessness in Canada. The paper explores the extent to which a domestic constitutional framework exists for a rights-based approach to housing and anti-poverty strategies in Canada, compatible with, and informed by, the international human rights law and jurisprudence. Particular attention is paid to four Canadian constitutional provisions: 1) the commitment to provide public services of reasonable quality to all Canadians, under section 36 of the *Constitution Act, 1982*; the right to life, liberty, and security of the person, under section 7 of the *Canadian Charter of Rights and Freedoms*; the right to equal protection and equal benefit of the law, under section 15 of the *Charter*; and Canadian governments' obligation, under section 1 of the *Charter*, to balance and limit rights in a manner that is reasonable and demonstrably justifiable. Funding for this paper was provided by the Institute of Population Health, University of Ottawa and the Social Sciences and Humanities Research Council Community-University Research Alliance Project "Reconceiving Human Rights Practice"

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A. INTRODUCTION

A previous paper: *International Human Rights and Strategies to Address Homelessness and Poverty: Making the Connection* [*Making the Connection*],[1] described a new conception of human rights-based strategies to address homelessness and poverty that has emerged at the international level over the past decade. Heralding a shift from a "needs-based" to a "rights-based" approach to poverty, the new model is situated within the modern conception of social rights as fully equal in status to civil and political rights and, thus, subject to the same requirement of effective adjudication and remedies. This new understanding of social rights – characterized by Louise Arbour as "human rights made whole" – was institutionalized through the adoption of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (*OP-ICESCR*) [2] by the United Nations on December 10, 2008, on the 60th anniversary of the *Universal Declaration of Human Rights*.[3] In addition to now being officially enforceable within the UN system,[4] social rights are claimable in a wide variety of other *fora*, including before domestic courts, through local and city human rights charters, under expanded human rights legislation, and before tribunals and other administrative decision-makers.[5] They are also recognized more broadly, through meaningful participatory rights in program and policy design, and in the implementation and monitoring of strategies to progressively realize social rights. [6]

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[1] Bruce Porter & Martha Jackman, *International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection*, Working Paper, (Huntsville, ON: Social Rights Advocacy Centre, September 2011) [Jackman & Porter, *Making the Connection*].

[2] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) [*OP-ICESCR*].

[3] *Universal Declaration of Human Rights,* GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71 [*UDHR*].

[4] See *Optional Protocol*, *supra* note 2 at art 18(1) (the *Optional Protocol* will enter into force three months after the tenth ratification, As of February 1, 2012, 7 states had formally ratified it, including Argentina and Spain. For updates on signatures and ratifications, see United Nations Treaty Collection, online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en>.

[5] Amnesty International, *Make our Rights Law: Enforce Economic, Social and Cultural Rights* (London: Amnesty International, 2010), online: <http://www.amnesty.org/en/library/info/ACT35/002/2010/en>; Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International & Comparative Law* (Cambridge: Cambridge University Press, 2008) [Langford, *Social Rights*].

[6] Jackman & Porter, *Making the Connection*, *supra* note 1 at 7-15, 37-41;

Making the Connection described how international human rights law and the commentary of UN human rights bodies provide a normative framework for the new approach to rights-based strategies to address poverty and homelessness. This framework draws on the reasonableness standard developed by the Constitutional Court of South Africa in its landmark decision on the right to housing in *Government of the Republic of South Africa v Grootboom*.[7] There the Court held that emerging international human rights norms require housing programs and policies to conform to a standard of "reasonableness" by, among other things, ensuring that adequate attention is paid to the circumstances of those who are most disadvantaged.[8] As outlined in *Making the Connection*, a similar standard of "reasonableness" has been applied by the Committee on Economic Social and Cultural Rights (CESCR) to assess compliance with positive measures, progressive realization, and allocation of resources, under the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).[9] This standard has also been incorporated into the *OP-ICESCR*.[10]

The CESCR has clarified that governments' obligations under the *ICESCR* to progressively realize the right to housing and to an adequate standard of living require the adoption of coherent and effective plans and strategies to reduce and eliminate homelessness and poverty with measurable goals, standards, and time lines, reasonable budgetary allocations, legislative provisions, and social rights complaints procedures.[11] *Making the Connection* reviewed the concerns expressed by the CESCR and the UN Special Rapporteur on Adequate Housing at the absence of any such rights-based strategy in Canada.[12] Calls by UN human rights bodies for the

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[7] *Government of the Republic of South Africa v Grootboom*, [2000] ZACC 19, 11 BCLR 1169 (SAFLII), (S Afr Const Ct) [*Grootboom*].
[8] *Ibid* at para 44. See generally Bruce Porter, "The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins" (2009) 27:1 Nordic Journal of Human Rights 39; Brian Griffey, "The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11 HRL Rev 275 at 290; Jackman & Porter, *Making the Connection*, *supra* note 1 at 41-46.
[9] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976).
[10] *Grootboom*, *supra* note 7; Jackman & Porter, *Making the Connection*, *supra* note 1.
[11] Jackman & Porter, *Making the Connection*, *supra* note 1 at 7-15, 37-41.
[12] *Ibid* at 48-49.

incorporation of international human rights norms into housing and anti-poverty strategies in Canada have been echoed by the Senate Sub-Committee on Cities,[13] the House of Commons Standing Committee on Human Resources, Skills and Social Development, and the Status of Persons with Disabilities (HUMA),[14] in legislative committee submissions in Ontario,[15] and reinforced by recommendations made directly to the Ontario government by the UN Special Rapporteur on Adequate Housing.[16] Federal housing strategy legislation, which had the support of the majority of members in the last Parliament,[17] and which has been reintroduced as a private member's bill in the new Parliament,[18] provides an important model for incorporating international human rights norms into domestic strategies and legislation.

However, as the Senate Sub-Committee on Cities has observed, international human rights continue to be viewed by Canadian governments as "closer to moral obligations than enforceable rights."[19] In this context, the Sub-Committee points to the Canadian courts' use of international human rights to interpret the provisions of the *Canadian Charter of Rights and Freedoms*,[20] (the *Charter*) as the primary means through which international human rights are able to achieve domestic legal

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[13] Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, PC) at 16 [*In from the Margins*].

[14] House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (November 2010) (Chair: Candice Hoeppner) [HUMA Committee, *Poverty Reduction Plan*].

[15] Ontario, Legislative Assembly, Standing Committee on Justice Policy, "Bill 140, Strong Communities through Affordable Housing Act, 2011" in *Official Report of Debates (Hansard)*, No JP-8 (24 March 2011) at 162 (Registered Nurses' Association of Ontario); 164-166 (Centre for Equality Rights in Accommodation); 166-169 (Social Rights Advocacy Centre); 198 (Federation of Metro Tenants' Associations).

[16] Letter from Miloon Kothari to Honourable Rick Bartolucci, Minister of Municipal Affairs and Housing (6 April 2011), online: < http://www.socialrights.ca/docs/bill%20140/Kothari%20letter%20to%20Minister.pdf>; Jackman & Porter, *Making the Connection*, *supra* note 1 at 46-49.

[17] Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 3d Sess, 40th Parl, 2011 (Committee report presented in House of Commons 21 March 2011).

[18] Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 42st Parl, 2012 (First Reading February 16, 2012).

[19] *In from the Margins, supra* note 13 at 69.

[20] *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 [*Charter*].

enforceability.[21] While increased legislative incorporation of international human rights into domestic law would provide for more direct domestic application of international norms, a robust framework of rights based on access to adjudication and remedy must, first and foremost, be grounded in Canada's domestic constitutional framework and in the interpretation and application of *Charter* rights. As noted by the CESCR in its *General Comment on the Domestic Application of the Covenant*, "[t]he existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies."[22]

The current paper explores the extent to which a domestic constitutional framework exists for a rights-based approach to housing and anti-poverty strategies in Canada, compatible with, and informed by, the international human rights law and jurisprudence outlined in *Making the Connection*. In particular, this paper will focus on four key Canadian constitutional provisions for the protection of the right to adequate housing and to freedom from poverty in Canada.[23] These include: first, the constitutional commitment to provide public services of reasonable quality to all Canadians, set out under section 36 of the *Constitution Act, 1982*;[24] second, the right to life, liberty, and security of the person guaranteed under section 7 of the *Charter*; third, the right to equal protection and equal benefit of the law under section 15 of the *Charter*; and, finally, the obligation on governments to balance and limit *Charter* rights in a manner that is reasonable and demonstrably justifiable, under section 1 of the *Charter*.

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[21] *In from the Margins, supra* note 13 at 69.
[22] United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/24, (1998) at para 4 [*General Comment 9*].
[23] The issue of Aboriginal treaty rights under Section 35 of the *Constitution Act, 1982*, is beyond the scope of the present paper. See however Leonard Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus between Governmental Power and Responsibility" (1994) 32:4 Osgoode Hall LJ 735 (for a discussion of provincial fiduciary obligations toward First Nations) and see generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).
[24] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

B. INTERNATIONAL HUMAN RIGHTS AND CONSTITUTIONAL INTERPRETATION

The international human rights norms described in *Making the Connection* constitute persuasive sources for constitutional and statutory interpretation in Canada. The *Constitution Act, 1982*, the *Charter*, domestic laws, and regulations must, wherever possible, be interpreted by courts, governments, and decision-makers in a manner consistent with international human rights law. As Justice L'Heureux-Dubé noted for the majority of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[25] Justice L'Heureux-Dubé cited Ruth Sullivan's *Driedger on the Construction of Statutes* in support of this interpretive principle:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.[26]

Interpretation in conformity with international human rights law is particularly important in the context of the *Charter*. The *Charter* is the preeminent guarantee of human rights in Canada and, thus, the primary vehicle for the implementation of Canada's international human rights obligations.[27] In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,[28] the Supreme Court reaffirmed Chief Justice Dickson assertion in *Slaight Communications v Davidson* that: "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights

[25] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71 [*Baker*].
[26] *Ibid* at para 70, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Markham, Ont: Butterworths, 1994) at 330.
[27] *Baker*, *supra* note 25 at para 70; *R v Ewanchuk*, [1999] 1 SCR 330 at para 73 [*Ewanchuk*]; Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in Langford, *Social Rights*, *supra* note 5 at 209, 214-15 [Jackman & Porter, "Socio-Economic Rights"].
[28] [2007] 2 SCR 391 at para 70.

documents which Canada has ratified."[29] This 'interpretive presumption' is not only to be applied with respect to international human rights guarantees with direct counterparts in the *Charter*, such as the right to life or the right to non-discrimination entrenched in the *International Covenant on Civil and Political Rights* (*ICCPR*).[30] Social and economic rights are also part of the unified international human rights landscape within which *Charter* interpretation must be situated. In *Slaight Communications*,[31] the Court pointed to Canada's ratification of the *ICESCR* as evidence that the right to work must be considered a fundamental human right, that had to be balanced against the *Charter* right to freedom of expression in that case.[32] In relying on the *ICESCR*, the majority endorsed Chief Justice Dickson's statement in the *Alberta Reference* that:

> The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.[33]

The Court also adopted the Chief Justice's view that "the content of Canada's international human rights obligations is … an important indicia of the meaning of the 'full benefit of the *Charter's* protection.'"[34] This approach was reaffirmed by Justice L'Heureux-Dubé, writing for the majority of the Court in *Baker*, that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*."[35] In *R v Ewanchuk*, Justice L'Heureux-Dubé further declared that "[o]ur *Charter* is the primary vehicle through which international

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[29] *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at 1054 [*Slaight Communications*], citing *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 59 [*Alberta Reference*].
[30] *International Covenant on Civil and Political Rights*, December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].
[31] *Slaight Communications*, *supra* note 29.
[32] *Ibid* at 1056-1057. See also Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'" (1999) 21:3 Hum Rts Q 633 at 648.
[33] *Alberta Reference*, *supra* note 29 at para 57.
[34] *Slaight Communications*, *supra* note 29 at 1054, citing *Alberta Reference*, *supra* note 29 at para 59.
[35] *Baker, supra* note 25 at para 70.

human rights achieve a domestic effect. In particular, s. 15…and s. 7…embody the notion of respect of human dignity and integrity."[36]

The interdependence and overlap between socio-economic rights recognized in international human rights law ratified by Canada, such as the right to adequate housing and to an adequate standard of living and the rights that are explicitly included in the *Charter*, such as the right to life, liberty, and security of the person and the right to equality, are widely acknowledged. As noted in *Making the Connection*, an enhanced understanding of the indivisibility of these rights was a key factor in overcoming the historic divide between civil and political and economic and social rights.[37] In the *Grootboom* case, where the South African Constitutional Court first grappled with the question of the justiciability of the right to housing, the Court took as its starting point that "[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter."[38] As noted in *Making the Connection*,[39] the UN Human Rights Committee (HRC) has affirmed that positive measures are required to address homelessness in Canada[40] in order to respect right to life guarantees under article 6 of the *ICCPR*. The HRC has also pointed out that poverty disproportionately affects women and other disadvantaged groups in Canada and that social program cuts therefore have a discriminatory impact on those groups.[41]

The rights to life and to security of the person guaranteed under section 7 of the *Charter* and the right to equality under section 15 are thus seen, from the international human rights standpoint, to be directly engaged by Canadian governments' failure to implement effective strategies to address poverty and homelessness. As the next section of the paper explains, the *Constitution Act, 1982* and the *Charter* provide an important framework for the development and implementation of rights-based anti-poverty and housing strategies in Canada

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[36] *Ewanchuk, supra* note 27.
[37] Jackman & Porter, *Making the Connection*, *supra* note 1 at 3, 36-37.
[38] *Grootboom*, *supra* note 7.
[39] Jackman & Porter, *Making the Connection*, *supra* note 1 at 36-37.
[40] United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, *Canada*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.105, (1999) at para 12.
[41] *Ibid* at para 20.

through which international human rights to adequate housing and an adequate standard of living may be subject to effective legal remedies under domestic law.

C. SECTION 36 OF THE CONSTITUTION ACT, 1982

Section 36 of the *Constitution Act, 1982* is a significant, if sometimes overlooked, constitutional provision with direct links to Canada's economic and social rights obligations under international human rights law.[42] Though framed in terms of government commitments, rather than individual rights, section 36 represents a key social rights safeguard within the context of Canadian federalism. Section 36(1) affirms that:

> Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (a) promoting equal opportunities for the well-being of Canadians;
>
> (b) furthering economic development to reduce disparity in opportunities; and
>
> (c) providing essential public services of reasonable quality to all Canadians.

When then Justice Minister Jean Chrétien tabled the resolution to include section 36 as part of the federal government's proposed package of constitutional reforms, he spoke of the provision as recognizing that "[s]haring the wealth has become a fundamental right of Canadians."[43] In the proceedings leading up to the enactment of the *Constitution Act, 1982*, the Special Joint Committee of the Senate and of the House of Commons considered an amendment to what is now section 36, put forward by Svend Robinson on behalf of the New Democratic Party, to add a "commitment to fully implementing the *ICESCR* and the goals of a clean and healthy environment and safe and healthy working conditions."[44] During the debate on the

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[42] *Constitution Act, 1982*, *supra* note 24 at s 36. See also Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19:2 Dal LJ 306.
[43] *House of Commons Debates*, 32d Parl, 1st Sess (6 October 1980) at 3287.
[44] Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32d Parl, 1st Sess, No 49 (30 January 1981) at 65-71.

amendment, government members agreed there was no opposition to the "principles embodied in the amendment."[45] Justice Minister Chrétien stated that Canada was already committed to implementing the *ICESCR* and he suggested that "we cannot put everything [in s. 36]."[46] Subsequently, when the Secretary General of the UN asked Canada to submit a *Core Document* outlining, among other things, the implementation of its international human rights treaty obligations in domestic law, section 36 was described by the Canadian government as being "particularly relevant in regard to ... the protection of economic, social and cultural rights."[47]

I) THE JUSTICIABILITY OF SECTION 36

There has been an ongoing debate about whether section 36 can be enforced by the courts, either as a 'right' to public services of reasonable quality, or simply as a justiciable government commitment to provide such services. Michel Robert, a Commissioner for the Royal Commission on the Economic Union and Development Prospects for Canada, expressed the view that section 36 would allow Canadians to "go before the courts and seek a remedy saying: 'my provincial government, or any federal government is not respecting its commitment to provide me with essential public services of reasonable quality.'"[48] Lorne Sossin has argued that the use of the term 'committed' implies that section 36 was "intended to create justiciable obligations on the federal and provincial governments," although it "falls short of creating any mandatory obligation to provide a particular level of funding or type of benefit."[49] Other scholars have suggested that the particular wording of the commitment in section 36(1)(c), in comparison to sections 36(1)(a) and (b),

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[45] *Ibid* at 68.
[46] *Ibid* at 70.
[47] Canadian Heritage, *Core Document forming part of the Reports of States Parties: Canada* (October 1997), online: Canadian Heritage <http://www.pch.gc.ca/ddp-hrd/docs/core-eng.cfm> (the document was submitted by Canada pursuant to HRI/CORE/1 sent to States parties by note verbale of the Secretary General, G/SO 221 (1) of 26 April 1991).
[48] Michel Robert, "Challenges and Choices: Implications for Fiscal Federation" in TJ Courchene, DW Conklin & GCA Cook, eds, *Ottawa and the Provinces: The Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985) at 28.
[49] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont: Carswell, 1999) at 19; see also Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8:2 CJWL 372 at 390.

indicates a standard that is clearly amenable to judicial review.[50] The commitments set out in 36(1)(a) and (b) are framed in softer language, referring to "promoting equal opportunities" and "furthering economic development," whereas section 36(1)(c) refers to providing essential public services.[51] Governments' commitment to "provide" services of "reasonable" quality under section 36 is framed in terms which are familiar to courts. Under human rights legislation and pursuant to section 15 of the *Charter*, for example, courts and tribunals regularly apply a reasonableness standard in determining what programs or services must reasonably be provided to accommodate needs related to disability.[52]

The justiciability of section 36 has yet to be judicially determined. In *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board*,[53] the Manitoba Court of Appeal accepted that "a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights."[54] However, in its decision in *Canadian Bar Association v British Columbia,* involving a *Charter* challenge to the inadequacy of provincial civil legal aid funding in the province, the British Columbia Court of Appeal found that there was an insufficient factual basis to consider a section 36 claim in that case.[55] Referring to the trial court decision, the Court affirmed that "this constitutional provision cannot form the basis of a claim since it only contains a statement of 'commitment.'"[56] In *Cape Breton (Regional Municipality) v Nova Scotia,*[57] it was alleged that the province's failure to spend equalization payments, received from the federal government in a manner that would reduce regional economic disparity, constituted a violation of Nova Scotia's

[50] Nader, *supra* note 42 at 357.
[51] *Ibid* (Nader also notes that the French version of section 36 uses the verb engager, "which lends credence to the interpretation that the commitment is closer to an absolute, binding duty or responsibility" need pinpoint). See also David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81 at 118-122.
[52] See e.g. *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 65 [*Eldridge*]; *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 at paras 50-54 [*Multani*] (where the Court explains the requirements of reasonable accommodation).
[53] *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board* (1992), 91 DLR (4th) 554, 78 Man R (2d) 141.
[54] *Ibid* at para 10.
[55] *Canadian Bar Association v British Columbia*, 2008 BCCA 92 at para 53, 290 DLR (4th) 617.
[56] *Ibid* at para 33.
[57] *Cape Breton (Regional Municipality) v Nova Scotia*, 2008 NSSC 111, 267 NSR (2d) 21.

obligations under section 36(1). Like the BC Court of Appeal, the Nova Scotia Supreme Court concluded that the pleadings in the case did not allege material facts that would permit the court to adjudicate a claim under section 36. In reaching its decision, the Court expressed the view that "the fact that the section forms part of the Constitution does not, by virtue of s. 52, make the commitments 'supreme law' justiciable as to constitutionality."[58]

In view of the direct connection between the governmental commitments set out under section 36 and Canada's international social and economic rights obligations, it is appropriate to look to evolving international human rights principles for guidance in resolving judicial uncertainty as to the justiciability of section 36. With the adoption by the UN General Assembly of the *OP-ICESCR*,[59] Canadian governments' constitutional commitment to provide public services of a 'reasonable quality' has a new resonance, not only with standards of reasonableness applied under domestic human rights law, but also in relation to Canada's international human rights undertakings. Section 36 should be interpreted in a manner that gives effect to the federal and provincial/territorial governments' obligations to adopt "reasonable measures" to realize the right to an adequate standard of living, guaranteed under the *ICESCR*.[60] In addition, the CESCR's *General Comments*, establishing the fundamental principle that social and economic rights must be subject to effective domestic remedies, encourage a similar approach to section 36.[61] Given the importance accorded to the provision by the Government of Canada in relation to the implementation the *ICESCR* in Canada, the argument that section 36 provides no effective remedy would be inconsistent with the requirement of effective domestic remedies for violations of international rights.

Even if courts are reluctant to interpret section 36 as conferring an individual right to reasonable programs and policies, alternative judicial avenues exist to ensure effective remedies in circumstances where governments have failed to meet a standard of reasonableness in the provision of essential public services. A

[58] *Ibid* at para 53.
[59] *OP-ICESCR*, *supra* note 2.
[60] Jackman & Porter, *Making the Connection*, *supra* note 1 at 41-45.
[61] *General Comment 9*, *supra* note 22. See also Jackman & Porter, *supra* note 1 at 33.

similar issue regarding the justiciability of governmental commitments arose and was addressed by the Supreme Court of Canada in its decision in *Finlay v Canada (Minister of Finance)*.[62] In that case the Court considered whether an individual could challenge a provincial government's failure to comply with conditions of a cost-sharing agreement between the province and the federal government. Under the *Canada Assistance Plan,* federal contributions to provincial social assistance costs were conditional upon provincial compliance with a number of requirements, including that the level of assistance provided by the province be adequate to cover basic necessities.[63] The Supreme Court found in *Finlay* that the agreement between the two levels of government did not create a justiciable individual right to an adequate level of assistance. However the Court held that an individual who was affected by the province's failure to respect conditions of the cost-sharing agreement should be granted 'public interest standing' to take legal action to require provincial compliance with the terms of the agreement.[64] Jim Finlay – an affected social assistance recipient – was thus empowered to demand that federal payments to Manitoba be withheld until the province complied with the terms of the agreement, with compliance assessed under a standard akin to the 'reasonableness' standard under international law.[65] In order to continue to receive federal transfer payments, provinces would be required by the court to provide assistance in an amount that was "compatible, or consistent, with an individual's basic requirements," with some flexibility provided to the provincial government in meeting the standard.[66]

The Supreme Court's analysis in *Finlay* is directly relevant to the issue of the justiciability of section 36. As Vincent Calderhead argues, the Supreme Court's

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[62] *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080 [*Finlay 2*]. See also Margot Young, "Starving in the Shadow of Law: A Comment on *Finlay v Canada (Minister of Finance)*" (1994) 5:2 Const Forum 31; Sujit Choudry, "The Enforcement of the *Canada Health Act*" (1996) 41:2 McGill LJ 461.

[63] *Canada Assistance Plan*, RSC 1985, c C–1, as repealed by *Budget Implementation Act*, SC 1995, c 17, s 32. Under s 6(2)(a) of the *Canada Assistance Plan*, for provinces to receive federal funds, assistance had to be provided in an amount that took into account basic requirements, including food, shelter, clothing, fuel, utilities, household supplies, and personal requirements.

[64] *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at para 36 [*Finlay 1*].

[65] Jackman & Porter, *Making the Connection*, *supra* note 1 at 41-45.

[66] *Finlay*, *supra* note 62 at para 81.

approach to federal-provincial cost-sharing agreements in *Finlay* is equally applicable to the enforcement of federal and provincial/territorial constitutional undertakings under section 36. Individuals or groups who are adversely affected by governments' failure to respect section 36 and who are consequently left without access to adequate income or housing should, at a minimum, be granted public interest standing to demand judicial scrutiny of the federal and provincial/territorial governments' compliance with section 36 and, where necessary, courts should order governments to take whatever steps are required, within a reasonable period of time, to meet their constitutional commitments.[67]

II) THE RELEVANCE OF SECTION 36 FOR HOUSING AND ANTI-POVERTY STRATEGIES

Section 36 is particularly relevant to Canadian governments' shared and overlapping obligations in relation to housing and anti-poverty strategies. Both federal and provincial/territorial governments play critical roles in poverty reduction and housing programs. An effective national housing strategy in Canada requires coordinated and interdependent initiatives by both levels of government. UN human rights monitoring bodies and civil society organizations have frequently expressed concern about a tendency for each level of government in Canada to hide behind the failures or jurisdictional responsibilities of the other.[68] This pattern has been especially evident in the federal government's responses to repeated recommendations for a national anti-poverty strategy in Canada.

As discussed in *Making the Connection*,[69] during the 2010 hearings of the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA Committee) that culminated in the report, *Federal Poverty Reduction Plan: Working in Partnership*

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[67] Vincent Calderhead, "CBRM appeal ruling renews debate", Editorial, *Cape Breton Post* (16 May 2009) A7.
[68] Letter from Alex Neve, Secretary General, Amnesty International Canada, to Prime Minister Stephen Harper (23 February 2009), online: Social Rights in Canada: A Community-University Research Alliance Project <http://socialrightscura.ca/documents/UPR/Letter_to_PM_Harper%20PDF2.pdf>.
[69] Jackman & Porter, *Making the Connection, supra* note 1 at 22-24.

Towards Reducing Poverty in Canada,[70] witnesses identified a range of federal policies and programs that must be included in any coordinated strategy to address poverty. These include Employment Insurance, working tax credits, child tax benefits, Old Age Security, a Guaranteed Income Supplement, early learning and child care, affordable housing programs, disability-related income support programs, and Aboriginal programming among other measures.[71] The Committee noted that every province that has implemented a poverty reduction strategy has expressly recognized that its provincial strategy requires cooperation and support from the federal government.[72] The Honourable Deb Matthews, Ontario Minister of Children and Youth Services and Chair of the province's Cabinet Committee on Poverty Reduction, explained in her testimony before the HUMA Committee: "Canada is a different country in that we have strong provincial governments. That doesn't mean the federal government can abdicate its responsibility when it comes to issues like this. We are looking for engaging partners at every level of government."[73] As the HUMA Committee observed, Canadian federalism requires a different approach to anti-poverty and housing strategies than has been adopted in unitary states. Having reviewed anti-poverty initiatives taken in Ireland and in the UK, the HUMA Committee cautioned that:

> [T]he UK and Ireland are unitary states whose political systems differ from Canada's federal system. In a unitary state, the central government can delegate power to subnational administrations, but it retains the principal right to recall such delegated power. In Canada, the division of powers between the federal and provincial legislatures is outlined in the *Constitution Act*. The powers of the provinces cannot be changed unilaterally by the federal government. The sharing of constitutional powers in Canada's federal system makes it more difficult to develop and implement an integrated approach to reducing poverty and of social exclusion.[74]

[70] See e.g. HUMA Committee, *Poverty Reduction Plan*, *supra* note 14.
[71] *Ibid* at 92.
[72] *Ibid* at 75-76.
[73] *Ibid* at 96.
[74] *Ibid* at 79, n 312.

In its response to the HUMA Committee's report, the federal government acknowledged that "[p]rovincial and territorial governments have a shared responsibility with the Government of Canada in addressing poverty and have jurisdiction over some key mechanisms in supporting low-income Canadians."[75] The federal government has, nevertheless, consistently refused to accept or implement recommendations for a federal anti-poverty strategy. For instance, when a national housing strategy was recommended by the UN Human Rights Council's 2009 *Universal Periodic Review* (*UPR*) of Canada, the federal government refused to accept this recommendation on the grounds that "[p]rovinces and territories have jurisdiction in this area of social policy and have developed their own programs to address poverty." [76]

When federal or provincial/territorial governments rely on the complexities of Canadian federalism to abdicate responsibility in relation to homelessness or poverty reduction in this manner, section 36 provides constitutional authority for rights claimants to insist that their rights should not be compromised by jurisdictional overlap or ambiguity. Such claims can be advanced politically, of course. However, section 36 arguments may also be advanced legally, in *Charter* or human rights complaints against one or both levels of government, or in the statutory interpretation or administrative law contexts, discussed in greater depth below. Whatever the forum, the shared governmental responsibilities and commitments that are set out under section 36 should translate into a constitutional right to co-operative and coherent federal and provincial strategies, that are focused on affirming and realizing fundamental social rights as paramount over jurisdictional divides.[77]

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[75] *Government Response to the Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, Entitled Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (presented to the House of Commons on 4 March 2011).

[76] United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, *Addendum*, *Views on Conclusions and/or Recommendations*, *Voluntary Commitments and Replies Presented by the State under Review*, UN Human Rights Council OR, 11th Sess, UN Doc A/HRC/11/17/Add.1, (2009) at para 27.

[77] See Aboriginal Affairs and Northern Development, *Implementation of Jordan's Principle in Saskatchewan*, online: < http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2009/bk000000451-eng.asp> (for an enunciation of this principle in the context of Aboriginal rights).

D. SECTION 7 OF THE CHARTER: THE RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON

Section 7 of the *Charter* declares that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 7 should be read in light of Canadian values and longstanding conceptions of individual wellbeing, community welfare, and the role of the state in safeguarding those interests within Canadian society.[78] In the debates leading up to the adoption of the *Charter*, an amendment was put forward to add a right to 'the enjoyment of property' to section 7. This proposal was rejected in part because of fears that property rights would conflict with Canadians' commitment to social programs and could give rise to challenges to government regulation of corporate interests and provincial regulation of natural resources.[79] The phrase 'fundamental justice' was also preferred over any reference to 'due process of law' in section 7, because of concerns around the use of the due process clause in the United States Bill of Rights during the *Lochner* era as a means for propertied interests to challenge the regulation of private enterprise and the promotion of social rights.[80]

I) THE SCOPE OF SECTION 7

In reviewing how Canadian courts have applied section 7 to issues of poverty, Louise Arbour, in her capacity as the UN High Commissioner on Human Rights, found that: "The first two decades of Charter litigation testify to a certain timidity – both on the part of litigants and the courts – to tackle, head on, the claims emerging from the right to be free from want."[81] Almost ten years later, Canadian

[78] See generally Martha Jackman, "The Protection of Welfare Rights under the *Charter*" (1988) 20:2 Ottawa L Rev 257 [Jackman, "Welfare Rights"].
[79] Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 ICON 17; Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's LJ 65 at 76.
[80] *Ibid* at 17-24, as cited in Jackman & Porter, "Socio-Economic Rights," *supra* note 27.
[81] Louise Arbour, "'Freedom from want' – from charity to entitlement" (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, 3 March 2005), online: UNHCHR

jurisprudence continues to reflect a scarcity of poverty and homelessness-related cases that have either made it to trial, or been allowed to proceed on appeal or to the Supreme Court of Canada. The section 7 record also shows a continued judicial timidity about making any clear determination as to whether section 7 imposes obligations on governments to adopt reasonable measures to ensure access to adequate housing and other necessities, in keeping with the guarantees set out under the *ICESCR* and other human rights treaties ratified by Canada.[82] The absence of any clear judicial affirmation of the application of the right to life, liberty, and security of the person in this area has led many to dismiss, or to discount, the claim that section 7 requires governments to take positive measures to address poverty and homelessness. It is important to remember, however, that the Supreme Court continues to declare its willingness to entertain such *Charter* claims and that it has been careful to leave open the possibility that section 7 protects socio-economic rights.[83] In addition, as outlined below, the Court's recognition that transparent and participatory decision-making is a component of section 7 principles of fundamental justice, reflects and reinforces the modern understanding of the importance of rights-based participatory approaches to strategies to address poverty and homelessness. In view of the international human rights law developments described in *Making the Connection*, and given the Supreme Court's commitment to interpreting the *Charter* in light of international human rights law, it is reasonable to expect that these interpretive possibilities will be realized in future cases.

II) RIGHTS TO ADEQUATE HOUSING AND PROTECTION FROM POVERTY UNDER SECTION 7

In its 1989 judgment in *Irwin Toy v Quebec (AG)*,[84] the Supreme Court of Canada rejected the argument that section 7 of the *Charter* protects economic rights

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www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument [Arbour, "Freedom from want"].

[82] Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ont: LexisNexis Canada, 2010) 297.

[83] *Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927 [*Irwin Toy*].

[84] *Ibid*.

– in that case the rights of manufacturers to market their products free from governmental restraint. In coming to this conclusion, the Court was careful, however, to distinguish what it characterized as "corporate-commercial economic rights" from human rights of the kind recognized under the *ICESCR*.[85] As Chief Justice Dickson explained:

> Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property—contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.[86]

In *Gosselin v Quebec (AG)*, the Supreme Court considered a challenge to a provincial social assistance regulation that reduced the level of benefits payable to recipients under the age of thirty by two-thirds, to approximately $145 per month, unless they were enrolled in workfare or training programs. Justice Arbour found that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities.[87] Although the majority found such an interpretation to be inapplicable on the facts of *Gosselin*, viewing the impugned welfare regime as a defensible means of encouraging young people to join the workforce, the majority of the Court nonetheless left open the possibility that this interpretation of section 7 could be applied in a future case. Chief Justice McLachlin stated in this regard:

> The question therefore is not whether s. 7 has ever been – or will ever be –
> recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate

[85] *Ibid* at 1003-4.
[86] *Ibid*.
[87] *Gosselin v Quebec (AG)*, [2002] 4 SCR 429 at para 332 [*Gosselin*].

> living standards. I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.[88]

As noted by the BC Supreme Court in *Victoria (City) v Adams*, statements made by Canadian governments in their reporting to UN human rights treaty monitoring bodies support an interpretation of section 7 that would provide remedies to violations of the right to housing and to an adequate income, as proposed by Arbour J in the *Gosselin* case.[89] In response to a question from the CESCR in the context of Canada's second periodic review before the UNCESCR, the federal government assured the Committee that "[w]hile the guarantee of security of the person under section 7 of the Charter might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life."[90] This position was again asserted by the Canadian government in responding to questions from the CESCR relating to its 1998 report on Canada's compliance with its social and economic rights obligations under the *ICESCR*.[91]

Security of the person, as it has been defined by the courts, has both physical and psychological dimensions. In *Rodriguez v British Columbia (Attorney General)*, Justice Sopinka held that "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of

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[88] *Ibid* at para 82. See also Martha Jackman, "Sommes nous dignes? Légalité et l'arrêt *Gosselin*" (2006) 17 RFD 161; Gwen Brodsky, et al, "Gosselin v Quebec (Attorney General)" (2006) 18:1 CJWL / RFD 189; Gwen Brodsky, "Gosselin v. Quebec (Attorney General): Autonomy With a Vengeance" (2003) 15:1 CJWL / RFD 194; Shelagh Day et al, *Human Rights Denied: Single Mothers on Social Assistance* (Vancouver: Poverty and Human Rights Centre, 2005).

[89] *Victoria (City) v Adams*, 2008 BCSC 1363 at para 98, 299 DLR (4th) 193 [*Adams*]. See *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, 1983, UN Doc CCPR/C/1/Add.62 at 23 (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)..

[90] United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, UNCESCROR, 1993, UN Doc E/C.12/1993/SR.5 at paras 3, 21.

[91] United Nations Committee on Economic, Social and Cultural Rights, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, 1998, UN Doc HR/CESCR/NONE/98/8 at questions 16, 53.

the person."[92] State action that is likely to impair a person's health engages the fundamental right under section 7 to security of the person.[93] In its recent decision in *Canada (Attorney General) v. PHS Community Services Society* (*Insite*), the Court reaffirmed that where a law creates a risk to health, this amounts to a deprivation of the right to security of the person and that "where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."[94]

Although earlier Supreme Court judgments took the position that the section 7 guarantee of life, liberty, and security of the person was restricted to the sphere of criminal law, there is no longer any doubt that section 7 applies well beyond the criminal justice context. This was affirmed in *New Brunswick (Minister of Health and Community Services) v G(J)*,[95] involving the right to access legal aid in a child custody case. Chief Justice Lamer affirmed that, although the majority of the Court's jurisprudence has "considered the right to security of the person in a criminal law context … the protection accorded by this right extends beyond the criminal law and can be engaged in child protection proceedings."[96] Chief Justice Lamer went on to explain that:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.[97]

In *Chaoulli v Quebec (AG)*,[98] a majority of the Supreme Court agreed there was interference with life and security of the person within the meaning of section 7, notwithstanding that the legislation at issue related to access to health care and health insurance and was entirely removed from the criminal context, or even from

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[92] *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 at para 136 [*Rodriguez*].
[93] *Ibid* at para 21.
[94] *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 at para 93 [*PHS Community Services*].
[95] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [*G(J)*].
[96] *Ibid* at para 58.
[97] *Ibid* at para 60.
[98] *Chaoulli v Quebec (AG)*, [2005] 1 SCR 791 [*Chaoulli*].

the administration of justice. The majority found that the province's failure to ensure access to healthcare of "reasonable" quality within a "reasonable" time engaged the right to life and security of the person and triggered the application of section 7 and the equivalent guarantee under the Quebec *Charter of Rights and Freedoms*.[99] The dissenting justices likewise accepted the trial judge's finding that "that the current state of the Quebec health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of *some* individuals on *some* occasions, of putting at risk their life or security of the person."[100] The dissenting Justices disagreed, however, with the majority's conclusion that the province's ban on private health insurance was arbitrary, concluding instead that "Prohibition of private health insurance is directly related to Quebec's interest in promoting a need-based system and in ensuring its viability and efficiency."[101]

With increased understanding of the significant health consequences of homelessness and poverty, it has become obvious that governments' failure to ensure reasonable access to housing and to an adequate standard of living for disadvantaged groups undermines section 7 interests – certainly as directly as the regulation of private medical insurance. In a recently filed *Charter* application in the Ontario Superior Court (*Tanudjaja v Canada*),[102] a number of individuals who have experienced the effects of homelessness and inadequate housing are challenging the federal and provincial governments' failure to adopt housing strategies. They are arguing not only that governments' action but also inaction amount to a violation of their *Charter* rights, including their right to security of the person under section 7. In her affidavit in support of the *Charter* claim in the case, Cathy Crowe, a street

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[99] *Ibid* at para 105 (the majority went on to find that the ban on private insurance violated section 7 principles of fundamental justice and could not be justified under section 1 of the *Charter*). See Martha Jackman, "'The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in Chaoulli" (2006) 44 Osgoode Hall LJ 349 (for a critique of the *Chaoulli* decision); Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005); Marie-Claude Prémont, "L'affaire *Chaoulli* et le système de santé du Québec: cherchez l'erreur, cherchez la raison" (2006) 51:1 McGill LJ 167.

[100] *Chaoulli*, *supra* note 98 at para 200.

[101] *Ibid* at para 256.

[102] *Tanudjaja v Canada*, Ont Sup Ct File no CV-10-403688 (2011) [*Tanudjaja*].

nurse who has worked with homeless people in Toronto for more than twenty years, describes some of the consequences of homelessness she has witnessed in the following terms:

> 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 curable or manageable but homeless people experience more exposure to upper respiratory disease, reduced access to health care, more trauma including violence such as rape, more chronic illness, more exposure to illness in congregate settings, more exposure to infectious agents and infestations such as lice and bedbugs, lack the means to care for themselves when ill and suffer from more depression.[103]

Crowe notes that, while these physical illnesses and conditions are difficult enough to treat while people are living without adequate housing, treating the emotional and mental effects of homelessness is even more difficult. As she explains, "[c]hronic deprivation of privacy, sense of safety, sleep and living in circumstances of constant stress and violence leads to mental and emotional trauma."[104]

Crowe goes on to affirm that these negative health outcomes cannot be dealt with effectively "by programs of support for living on the street, emergency shelters, drop-in programs or counselling and referral services despite the critical need for all these services."[105] She argues that they can only be addressed by ensuring access to adequate "permanent housing."[106] A recent Canadian longitudinal study on the effects of homelessness and inadequate housing likewise found that the negative health outcomes associated with living on the streets or in shelters extend to a much wider segment of the population and also affect those living in inadequate or precarious housing. The results of the study showed that "for every one person

[103] Cathy Crowe, *Affidavit for Tanudjaja v Canada* (Ont Sup Ct File no CV-10-403688) (2011).
[104] *Ibid*.
[105] *Ibid*.
[106] *Ibid*.

sleeping in a shelter there are 23 more people living with housing vulnerability. They are all at risk of devastating health outcomes."[107]

There is no basis in existing Supreme Court jurisprudence to exclude these kinds of documented effects on personal security, dignity and life – resulting from governments' decisions not to implement effective housing and anti-poverty strategies, as recommended by experts and UN bodies – from section 7 of the *Charter*. In considering the constitutionality of a municipal restriction on panhandling in his judgment for the BC Supreme Court in *Federated Anti-Poverty Groups of BC v Vancouver (City)*, Justice Taylor held:

> I conclude that the ability to provide for one's self (and at the same time deliver the "message") is an interest that falls within the ambit of the s. 7 provision of the necessity of life. Without the ability to provide for those necessities, the entire ambit of other constitutionally protected rights becomes meaningless. [108]

Other Canadian courts have suggested that requiring positive measures to address homelessness or poverty would expand the reach of section 7 beyond what its framers intended.[109] However, Justice Taylor's view is more consistent both with international human rights jurisprudence and with traditional Canadian understandings of life, liberty, and security of the person. Given the evident health consequences and adverse impact of poverty and homelessness on physical and psychological integrity, security, and other interests, which the Supreme Court has found to be protected under section 7, it is hard to imagine how the effects of homelessness and poverty on health can reasonably be excluded from the scope of section 7.

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[107] Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada's Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing and Health, 2010) at 4.
[108] *Federated Anti-Poverty Groups of BC v Vancouver (City),* 2002 BCSC 105 at paras 201-202, 40 Admin LR (3d) 159 [*Federated Anti-Poverty Groups*].
[109] *Gosselin*, *supra* note 87.

III) FUNDAMENTAL JUSTICE AND ARBITRARY STATE RESPONSES TO POVERTY AND HOMELESSNESS

Section 7 of the *Charter* requires that any deprivation of the right to life, liberty or security of the person "must be in accordance with the principles of fundamental justice." In *Re BC Motor Vehicle Act*, Chief Justice Lamer declared that the principles of fundamental justice "represent principles which have been recognized … as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law."[110] In Justice Sopinka's words, they are principles "upon which there is some consensus that they are vital or fundamental to our societal notion of justice."[111] As the Court recently affirmed in the *Insite* case, the principles of fundamental justice "are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound."[112]

A core component of fundamental justice under section 7 is the principle that governments cannot arbitrarily limit rights to life, liberty, and security of the person. Prior to *Insite*,[113] the Court's consideration of arbitrariness had been largely confined to the question of whether provisions of existing laws that infringe rights to life, liberty, and security of the person were arbitrary. The Court had not been called upon to consider whether a government's failure to take action or to adopt positive measures to protect the right to life or security of the person were arbitrary and fundamentally unjust within the meaning of section 7. In considering the prohibition of assisted suicide under the *Criminal Code*,[114] Justice Sopinka stated in *Rodriguez* that "[a] particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation."[115] In their decision in *R v Malmo-Levine*, involving a section 7 challenge to the criminal law prohibition

[110] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 30.
[111] *Rodriguez*, *supra* note 92 at 590-591.
[112] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 23, 48, [2010] 1 SCR 44.
[113] *PHS Community Services*, *supra* note 94.
[114] *Criminal Code*, RSC 1985, c C-46, ss 14, 215, as amended by SC 1991, c 43, s 9; s 241(a), as amended by SC 1991, c 27, s 7(3), s 241(b).
[115] *Rodriguez*, *supra* note 92 at 203.

of possession of marijuana, Justices Gonthier and Binnie stated that a measure that is "disproportionate to the societal problems at issue" is arbitrary.[116] In the *Insite* case, however, after rejecting the claim that the federal *Controlled Drugs and Substances Act,*[117] itself, violated section 7[118] the Court considered whether the Minister of Health's failure to grant an exemption, as provided under the *Act*, was in accordance with principles of fundamental justice.[119] Acknowledging that "the jurisprudence on arbitrariness is not entirely settled," the Court considered the alternative approaches it had taken to arbitrariness, including whether the impugned measure, in this case a failure to provide an exemption to enable the provision of the services, is "necessary" to, or "inconsistent" with the state objectives underlying the legislation.[120] Reviewing the overwhelming evidence of the benefits of Insite's safe injection and related health services to those in need of them and the effects of a failure to ensure the continued provision of those services, the Court found that the Minister's failure to grant an exemption "qualifies as arbitrary under both definitions."[121] The Court further concluded that "[t]he 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."[122]

In the *Insite* case, the Supreme Court applied section 7 principles of fundamental justice and arbitrariness to a governmental failure to act to protect the life and security of the person of members of a vulnerable population in need of services. The Court's decision has significant implications for the application of section 7 to failures to act to protect the life and security of the person of those who are homeless or living in poverty. As described in *Making the Connection*, UN human rights bodies, housing and poverty experts, and a wide spectrum of civil society have called upon Canadian governments to adopt housing and anti-poverty

[116] *R v Malmo-Levine*, [2003] 3 SCR 571 at para 135.
[117] SC 1996, c 19.
[118] *PHS Community Services*, *supra* note 94 at paras 112-115.
[119] *Ibid* at paras 127-136.
[120] *Ibid* at paras 130-132.
[121] *Ibid* at para 131.
[122] *Ibid* at para133.

strategies both as a matter of sound, evidence-based social policy, and of domestic and international human rights law.[123] Empirical evidence is mounting as to the irrationality and arbitrariness of governments' inaction in this area, in light of the health outcomes associated with homelessness and poverty, as well as its fiscal consequences.[124] It is therefore increasingly difficult to sustain the position that governments' failure to adopt reasonable strategies to respond to the crisis of homelessness and poverty in Canada is in accordance with section 7 principles of fundamental justice.

In her affidavit in support of the *Charter* challenge to governments' failures to implement reasonable strategies to address homelessness in *Tanudjaja v Canada*,[125] Marie-Êve Sylvestre provides compelling evidence of the arbitrary and unreasonable nature of current responses to homelessness. Sylvestre argues that:

> As programmatic responses that addressed the causes of homelessness such as social housing, investment in health care or employment policies, have been reduced or eliminated, governments have adopted unprecedented measures based on the "stigma" of homelessness as a perceived "moral" failure and designed to make homeless people disappear from the public sphere.[126]

As Sylvestre explains, by prohibiting behavior linked to homelessness in public spaces, such as parks, subway stations, and sidewalks, governments have criminalized homeless people rather than addressing their need for housing.[127] She points out that homeless people received between 30% and 50% of all statements of offences served by the Montreal police in 2004 and 2005.[128] The result of these punitive measures, involving the imposition of fines on those who are unable to pay them, is frequently unwarranted incarceration. Sylvestre's conclusions are reinforced by a recent study conducted by the John Howard Society of Toronto,

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[123] Jackman & Porter, *Making the Connection*, *supra* note 1.
[124] *Ibid* and see *infra* notes 258-268.
[125] *Tanudjaja*, *supra* note 102.
[126] Marie-Eve Sylvestre, *Affidavit for Tanudjaja v Canada* (Ont Sup Ct File no CV-10-403688) (2011).
[127] See Joe Hermer & Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2002).
[128] Sylvestre, *supra* note 126. See also Commission des droits de la personne et des droits de la jeunesse, *La judiciarisation des personnes itinérantes à Montréal*: *Un profilage social*, at 2.120-8.61, Montréal, Commission des droits de la personne, novembre 2009.

which found that 69% of the respondents experienced residential instability in the two years prior to their incarceration, 24% of them had used a shelter during that period, and 23% were homeless.[129] Sylvestre summarizes the existing situation:

> High incarceration rates among homeless and vulnerably housed individuals are largely explained by three structural factors: first, homeless people are more visible and often targeted by law enforcement because of their occupation of public spaces and may end up incarcerated for these reasons; second, criminalization has been one of the dominant state responses to homelessness in the last decades and accordingly, the number of adults with no fixed address admitted to correctional facilities has increased; and third, the number of ex-prisoners released onto the streets is very high. Thus, homelessness leads to incarceration, and incarceration, in turn, produces homelessness.[130]

This kind of punitive and arbitrary governmental response to the needs of a vulnerable population, and the failure to take whatever action is necessary to ensure access to services to better ensure the protection of life and security of the person is clearly not in accordance with principles of fundamental justice, as interpreted by the Supreme Court of Canada, particularly in the *Insite* case.

IV) PARTICIPATORY RIGHTS AND FUNDAMENTAL JUSTICE

Section 7 of the *Charter* also provides important support for the principle of participation in the design, implementation, monitoring, and evaluation of strategies to address poverty and homelessness, as has been recommended by UN human rights bodies and by civil society organizations in Canada.[131] Section 7 of the *Charter* can be read to require meaningful participation in all levels of governmental decision-making that affect life, liberty, and security of the person. Participation by those whose rights and interests are at stake should occur, both at the level of individual access to essential services and within broader decision-making

[129] Amber Kellen et al, *Homeless and Jailed: Jailed and Homeless* (Toronto: John Howard Society of Toronto, 2010) at 18-20.
[130] Sylvestre, *supra* note 126.
[131] Jackman & Porter, *Making the Connection*, *supra* note 1 at 7-14.

processes relating to public policy and resource allocation.[132] Jennifer Nedelsky explains the importance of due process guarantees in the social assistance context:

> The opportunity to be heard by those deciding one's fate, to participate in the decision ... means ... that the recipients will experience their relations to the agency in a different way. The right to a hearing declares their views to be significant, their contribution to be relevant. In principle, a hearing designates recipients as part of the process of collective decision making, rather than as passive, external objects of judgment. Inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power.[133]

The Supreme Court of Canada has held that, aside from the substantive requirements of fundamental justice such as the limit on arbitrary government action discussed above, section 7 also includes the procedural guarantees provided under common law principles of natural justice and fairness.[134] Among these are the right to adequate notice of a decision, the right to respond, and the right to be heard by a fair and impartial decision-maker.[135] In *G(J)*, Chief Justice Lamer held that in order to comply with the requirements of fundamental justice, a person "must be

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[132] Martha Jackman, "Section 7 of the *Charter* and Health Care Spending" in Gregory P Marchildon, Tom McIntosh & Pierre-Gerlier Forest, eds, *The Fiscal Sustainability of Health Care in Canada*, *Romanow Papers*, *Volume 1* (Toronto: University of Toronto Press, 2004)110 at 121-128 [Jackman, "Health Care].

[133] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7 at 27.

[134] *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 at para 29; *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at apara 113; *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631 at 656; *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 212-216.

[135] See generally Lorne Sossin, "Boldly Going Where No law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2004) 41:3 Osgoode Hall LJ 1 at 30-31 [Sossin, "Discretionary Justice"]; Jackman, "Health Care," *supra* note 132; Martha Jackman, "The Right to Participate in Health Care and Health Resource Allocation Decisions Under Section 7 of the Canadian *Charter*" (1995/1996) 4:2 Health L Rev 3 at 5; JM Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29:1 Osgoode Hall LJ 51; Jackman, "Welfare Rights," *supra* note 78 at 305-322.

able to participate meaningfully" and "effectively" in a decision-making process that engages his or her section 7 rights.[136] He concluded in that case that the government of New Brunswick had a positive obligation to provide legal aid to the appellant, a mother in receipt of social assistance who was threatened with the loss of custody of her children and who could not afford a lawyer to represent her.[137]

The procedural safeguards imposed by section 7 are designed not only to ensure that the decision-maker has all the information he or she needs to make an accurate and appropriate decision, but also to guarantee that the decision-making process itself respects the dignity and autonomy of the person whose life, liberty, or security-related interests are at stake.[138] Thus, the Court has held that decisions implicating section 7 rights which are made without adequate and uniform standards (such as failure by the decision-maker to consider all of the relevant circumstances or to fairly consider the affected person's representations), would not be in accordance with the principles of fundamental justice.[139]

In addition to participatory rights demanded in individualized decision-making, the way in which a program or policy is implemented at a systemic level may also violate section 7 principles of fundamental justice. For instance, in *Wareham v Ontario (Ministry of Community and Social Services)* the Ontario Court of Appeal held that "there is a potential argument to be made that a delay in processing applications for welfare benefits, essential for day-to-day existence and to which the applicants are statutorily entitled, could engage the right to security of the person where that delay has caused serious physical or psychological harm."[140] The Court accepted Lorne Sossin's view that bureaucratic disentitlement includes "structural and situational features of the welfare eligibility process which together have the effect of discouraging applicants and demoralizing recipients."[141] Sossin contends

[136] *G(J)*, *supra* note 95 at paras 81, 83.
[137] *Ibid* at para 107.
[138] Jackman, "Health Care," *supra* note 132 at 22-23.
[139] *R v Jones*, [1986] 2 SCR 284, as cited in Jackman, "Health Care," *supra* note 132 at 24; *R v Morgentaler*, [1988] 1 SCR 30 at 63-73.
[140] *Wareham v Ontario (Ministry of Community and Social Services),* 2008 ONCA 771 at para 17, 93 OR (3d) 27 [*Wareham*].
[141] Sossin, "Discretionary Justice," *supra* note 135 at 399 as cited in *Ibid* at 30.

that "applicants for benefits, many of whom are seriously disadvantaged and vulnerable, face difficulties and unnecessary barriers to an expeditious and fair determination of their claim on its merits" and that this amounts to a violation of procedural fairness guarantees.[142] The plaintiffs in *Wareham* were thus given the opportunity to amend their pleadings to include a claim for breaches of section 7 of the *Charter* based on the government's failure to comply with the procedural requirements of the principles of fundamental justice.[143]

In the context of housing and anti-poverty strategies, section 7 principles of fundamental justice should be read as requiring the kinds of participatory rights demanded by international human rights bodies to ensure that those whose interests are at stake are accorded access to key decision-making processes in the design, implementation, and administration of strategies and programs. For example, in *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (*Guidelines*), the High Commissioner for Human Rights has called for states to set targets, benchmarks, and priorities in a participatory manner "so that they reflect the concerns and interests of all segments of the society" when creating human rights-based strategies.[144] The UN's former Special Rapporteur on adequate housing, Miloon Kothari, emphasized the importance of using participatory mechanisms for accessing necessary information and for providing accountability to stakeholders in the evaluation of housing programs and strategies.[145] In the context of determining the steps a state must take to meet the "reasonableness standard" set out in the *OP-ICESCR*,[146] the *CESCR* has also stated that it will examine whether the decision making process with regard to the implementation of a policy or program is transparent and participatory.[147]

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[142] *Ibid.*
[143] *Wareham*, *supra* note 140 at para 34.
[144] United Nations Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) at para 55.
[145] *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, UN Human Rights Council, 4th Sess, UN Doc A/HRC/4/18, (2007).
[146] *OP-ICESCR*, *supra* note 2.
[147] United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007).

These types international human rights law obligations should inform domestic courts' and decision-makers' interpretation and application of the right to participation guaranteed under section 7. Individual dignity, security, and autonomy must be protected through meaningful opportunity to participate in decision-making at both an individual and broader public policy level. Adequate notice must be provided regarding any changes to benefits or programs, ensuring that individuals have a right to be heard by decision makers, a right to appeal decisions, and a right to judicial review.[148] In the broader policy and regulatory setting, generalized decisions relating to poverty and homelessness and the allocation of resources and services should be open to hearings and rights-based adjudication and review for compliance with human rights norms, with meaningful engagement with stakeholders. Those whose section 7 interests are most directly at risk in the regulatory and policy-making process should be given full participatory rights in decision-making. In particular, active steps should be taken to guarantee the inclusion of disadvantaged groups – those whose members are lacking in resources and who do not have an established history of participation (or grounds for confidence in its value). Such measures are required to ensure that collective involvement in decision-making actually results in a more equitable and efficient distribution of decision-making authority, and does not simply reinforce existing decision-making patterns and structures.[149]

Participatory processes in accordance with procedural guarantees of fundamental justice must therefore be grounded in rights. As Louise Arbour has affirmed in reference to access to justice as a procedural guarantee, "the possibility for people themselves to claim their human rights entitlements through legal processes is essential so that human rights have meaning for those most at the margins, a vindication of their equal worth and human agency."[150] The constitutional entitlement to rights-informed accountability frameworks to address homelessness and poverty, ensuring that decision-makers provide proper hearings

[148] See Sossin, "Discretionary Justice," *supra* note 141; Jackman, "Welfare Rights," *supra* note 78 at 305-322.
[149] Jackman, "Health Care," *supra* note 132 at 31, 33.
[150] Arbour, *supra* note 81.

to rights-holders, and make decisions in accordance with the full recognition of their rights is particularly important when addressing systemic concerns in relation to vulnerable groups.

E. SECTION 15 OF THE CHARTER: EQUALITY RIGHTS

Section 15(1) of the *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.[151]

Section 15(2) goes on to affirm that:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[152]

As noted in *Making the Connection*, civil society organizations in Canada, parliamentary committees, as well as international human rights bodies have emphasized that strategies to address poverty and homelessness should be informed by an equality rights framework.[153] An emphasis on equality rights ensures appropriate attention is paid to the situation of disadvantaged and marginalized groups – one of the key requirements of "reasonable" policies and programs in international human rights law, as well as in domestic regimes, such as South Africa.[154] An equality framework is also critical to addressing the structural and systemic patterns of discrimination and exclusion that underlie the problems of homelessness and poverty. As noted by the HUMA Committee's *Federal Poverty*

[151] *Charter*, *supra* note 20 at s 15(1).
[152] *Ibid* at s 15(2).
[153] Jackman & Porter, *Making the Connection*, *supra* note 1.
[154] See *Grootboom*, *supra* note 7; Geo Quinot & Sandra Liebenberg, "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (Paper delivered at the Law and Poverty Colloquium, Stellanbosch University, South Africa, 29-31 May 2011) [unpublished, on file with authors].

Reduction Plan, a human rights approach "limits the stigmatization of people living in poverty."[155] By making more transparent the ways in which people living in poverty or homelessness are stigmatized and marginalized, an equality framework assists in understanding poverty and homelessness as more than simply a matter of unmet needs but also, fundamentally, as a denial of dignity and rights. As the Senate Sub-Committee on Cities notes in its report, *In from the Margins*:

> The Charter, while not explicitly recognizing social condition, poverty or homelessness, does guarantee equality rights, with special recognition of the remedial efforts that might be required to ensure the equality of women, visible minorities (people who are not Caucasian), persons with disabilities, and Aboriginal peoples. As the Committee has heard, these groups are all overrepresented among the poor – in terms of both social and economic marginalization.[156]

I) SUBSTANTIVE EQUALITY AND THE SOCIAL CONSTRUCTION OF NEED

In Canada, the field of disability rights has been at the forefront of developing the concept of substantive equality through which positive obligations of governments and other actors can be affirmed and enforced as rights. Substantive equality takes as its starting point equal citizenship and inclusion, rather than the notion of 'impairment,' requiring assistance or charity. It demands that the different needs of persons with disabilities be included in program design and implementation in a manner that ensures the rights and capacities of people with disabilities are equally valued. Disability rights organizations have emphasized the importance of understanding the 'social construction' of disability and of rejecting the 'medical' model. They have had some success in promoting a judicial understanding of the ways in which discrimination and social exclusion constitute people with disabilities as "impaired" and how these systemic structures must be effectively challenged if section 15 of the *Charter* is to fulfill its promise. As Justice Binnie explained in *Granovsky v Canada (Minister of Employment and Immigration)*:

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[155] HUMA Committee, *Poverty Reduction Plan, supra* note 14 at 2.
[156] *In from the Margins*, *supra* note 13 at 69.

> The true focus of the s. 15(1) disability analysis is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the "large remedial component" ... that creates the *legally relevant* human rights dimension to what might otherwise be a straightforward biomedical condition.[157]

A remedial approach based on substantive equality principles requires a fundamental reformulation, focused on rights rather than simply on needs. The fact that a wheelchair user is unable to access a workplace because there is no ramp was understood, in earlier discourse on disability, simply as a 'need' that required 'accommodation.' Under a substantive equality framework, however, the need for a ramp and for positive measures to accommodate the need, is understood as flowing from a more profound exclusion and devaluing of people with disabilities. In this example, architecture and building design has failed to recognize the equal right of mobility-impaired workers to inclusion in workplaces. By universalizing an able-bodied norm and by designing workplaces on the basis of the stereotype that people with disabilities are not an integral part of the work-force, exclusionary architecture created a "need" for a wheelchair ramp, with cost consequences that could have been avoided had more inclusionary design been implemented at the outset.[158]

The same approach applies to other grounds of discrimination. To address the structural and systemic issues underlying the inequality of disadvantaged groups, it is important to consider whether unmet needs are linked to discriminatory exclusions and devaluing of the group. This is how the Supreme Court of Canada dealt with an aerobics requirement that disproportionately disqualified women from positions as firefighters in *British Columbia (Public Service*

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[157] *Granovsky v Canada (Minister of Employment and Immigration),* 2000 SCC 28 at para 26, 186 DLR (4th) 1 [*Granovsky*].

[158] There will, of course, be competing needs and entitlements requiring a balancing. Positive measures necessary to address the needs of disadvantaged groups, even when these are linked to social exclusion and previous discrimination, may have budgetary implications. The balancing of competing needs for positive measures is to be conducted under section 1, as described below.

Employee Relations Commission) v BCGSEU.[159] In *Granovsky*, Justice Binnie notes that the Court concluded in *BCGSEU* that "[t]he 'problem' did not lie with the female applicant but with the state's substitution of a male norm in place of what the appellant was entitled to, namely a fair-minded gender-neutral job analysis."[160]

An equality framework provides a similar conceptual basis for rights-based challenges to structural and systemic causes of poverty or homelessness and provides the critical foundation for transforming a needs-based approach to poverty and homelessness into a rights-based approach, consistent with international human rights norms. Women do not have a need to be accommodated in order to become firefighters, but rather have a 'right' to a fair policy that values their right to inclusion. So too do those living in poverty and homelessness have a right to housing and anti-poverty strategies and to reasonable social policies and programs that implement access to housing and income adequacy, not as a matter of charity but as rights to equal citizenship and inclusion. An equality analysis challenges the devaluing of the rights claims of the group in comparison to those of more advantaged members of society. It is this devaluing of rights that Amartya Sen described as "entitlement system failures," leading to hunger or homelessness even in circumstances when adequate resources are available to ensure that no one is denied these rights.[161]

A number of negative section 15 decisions, including at the Supreme Court of Canada level, has left many commentators in doubt as to the value of pursuing substantive equality before Canadian courts.[162] However, a firm basis can still be found in the Supreme Court's equality jurisprudence for a conceptual framework that can ground a renewed rights-based approach to poverty and homelessness in

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[159] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*BCGSEU*].
[160] *Granovsky*, *supra* note 157 at para 40.
[161] Amartya Sen, "Property and Hunger" (1988) 4:1 Economics and Philosophy 57, reprinted in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004) 402.
[162] For critiques of recent Canadian equality jurisprudence, see Sheila McIntyre & Sanda Rogers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis Butterworths, 2006); Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

Canada. In *R v Kapp*,[163] the Court eschewed the formalism of the analytical framework laid out its earlier *Law v Canada* (*Minister of Employment and Immigration*) decision.[164] In *Law,* based on the premise that equality is an inherently comparative concept,[165] the Court formalized the requirement that claimants establish an appropriate comparator (or mirror) group with whom they wished to be compared for the purposes of advancing their discrimination claim.[166] This requirement frequently translated into a rigid judicial analysis of which group the claimant should properly be compared to, in order to determine if the respective groups were being treated the same, leaving those without a clear comparator group without any protection under section 15.[167] In *Kapp,* however, the Court rejected this formal approach, acknowledging the criticism of the *Law* decision as having narrowed equality analysis to "an artificial comparator analysis focused on treating likes alike."[168] The Court reiterated the ideal of substantive equality as it was affirmed in its landmark judgment in *Andrews v Law Society of British Columbia*; an ideal that often requires treating groups differently in order to address unique needs.[169] As Justice McIntyre found in that case, in contrast to formal equality, substantive equality is grounded in the idea that "[t]he promotion of equality entails

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[163] *R v Kapp*, [2008] 2 SCR 483 [*Kapp*].
[164] *Law v Canada* (*Minister of Employment and Immigration*), [1999] 1 SCR 497 [*Law*].
[165] In *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164 [*Andrews*] the Supreme Court explained that differential treatment can only be discerned by comparing the condition of the claimant against others in a similar social and political circumstances. In *Hodge v Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357 at para 23 the Court explained that an appropriate comparator group is one that "mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes or omits a personal characteristic in a way that is offensive to the *Charter*."
[166] *Law*, *supra* note 164 at 56.
[167] *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657 is an example of the rigid approach to mirror comparator analysis. The petitioners in the case sought coverage of controversial intensive behavioural therapy for their children's autism. Chief Justice McLachlin stated that, to establish a violation of section 15, the petitioners must find a comparator group which "should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised." Thus, the Chief Justice held that the petitioners must demonstrate differential treatment in comparison to "a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required". For a critique of the decision, see Martha Jackman, "Health and Equality: Is There a Cure?" (2007) 15 Health LJ 87.
[168] *Kapp*, *supra* note 163 at para 22.
[169] *Andrews*, *supra* note 165.

the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[170]

In its decision in *Kapp*, the Court established a simplified, two-step framework for assessing section 15 claims: it must be determined, first, whether a policy or provision creates a distinction on an enumerated or analogous ground and, second, whether the distinction is discriminatory in a substantive sense. In *Withler v Canada (Attorney General)*,[171] the Court further clarified that the equality analysis does not depend on identifying a particular comparator group, which mirrors the claimant's characteristics.[172] The Court explained the faults of mirror comparator group analysis, noting that it

> may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification of — the discrimination at which s. 15 is aimed.[173]

The Court went on to affirm that consideration of whether a distinction amounts to substantive discrimination should be contextual, rather than rigid, in order to "provide the flexibility required to accommodate claims based on intersecting grounds of discrimination."[174]

As noted in the Senate Sub-Committee's Report, *In from the Margins*, governments' failure to implement housing and anti-poverty strategies engage the equality rights of groups protected from discrimination under section 15, such as women, people with disabilities, Aboriginal people, and racialized groups because these groups are over-represented among the poor and the homeless.[175] However, for the purposes of situating housing and anti-poverty strategies within an equality framework, and to better understand and expose the way in which needs related to

[170] *Ibid* at para 34.
[171] [2011] 1 SCR 396 [*Withler*].
[172] *Ibid* at para 60.
[173] *Ibid*.
[174] *Ibid* at para 63.
[175] *In from the Margins*, *supra* note 13 at 69-70.

poverty and homelessness are themselves socially constructed based on stereotype and stigmatization, it is also important to consider whether poverty or homelessness should be directly recognized as prohibited grounds of discrimination, analogous to the grounds that are expressly enumerated under section 15.

II) ANALOGOUS GROUNDS: THE "SOCIAL CONDITIONS" OF POVERTY AND HOMELESSNESS

The analogous grounds inquiry, according to the Supreme Court, is to be undertaken in a purposive and contextual manner.[176] The "nature and situation of the individual or group, and the social, political, and legal history of Canadian society's treatment of that group" must be considered;[177] specifically, whether persons with the characteristics at issue are lacking in political power, disadvantaged, or vulnerable to having their interests overlooked.[178] In its decision in *Miron v Trudel*,[179] the Court identified a number of factors that may be considered in determining whether an analogous ground of discrimination should be recognized under section 15, including whether:

- the proposed ground may serve as a basis for unequal treatment based on stereotypical attributes;
- it is a source of historical social, political, and economic disadvantage;
- it is a "personal characteristic";
- it is similar to one of the enumerated grounds;
- the proposed ground has been recognized by legislatures and the courts as linked to discrimination;
- the group experiencing discrimination on the proposed ground constitutes a discrete and insular minority; and

[176] *Law*, *supra* note 164 at para 6; *Andrews*, *supra* note 165 at para 46.
[177] *Law*, *supra* note 164 at para 93.
[178] *Ibid* at para 29; *Andrews*, *supra* note 165 at para 152.
[179] *Miron v Trudel*, [1995] 2 SCR 418.

- the proposed ground is similar to other prohibited grounds of discrimination in human rights codes.[180]

Noting that "it has been suggested that distinctions based on personal and *immutable* characteristics must be discriminatory within s. 15(1)," the Court in *Miron* cautioned that "while discriminatory group markers often involve immutable characteristics, they do not necessarily do so."[181]

In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, the Court broadened the concept of immutability by introducing the notion of "constructive immutability," linked to identity and prevailing social attitudes.[182] While reiterating that the analogous ground inquiry must consider the general purpose of section 15, the majority of the Court went on to suggest that analogous grounds must either be "actually immutable, like race, or constructively immutable, like religion" and that other factors to be considered in the analogous grounds analysis "may be seen to flow from the central concept of immutable or constructively immutable personal characteristics …"[183] The Court explained that the basis for recognizing constructively immutable characteristics as analogous grounds is that these characteristics either cannot be changed or "the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[184] The Court concluded that the distinction between on-reserve and off-reserve residential status, at issue in *Corbiere*, "goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship."[185]

There are compelling reasons for recognizing that the socially constructed dimension of homelessness and poverty make these characteristics constructively immutable in the same way as off-reserve residential status was found to be constructively immutable in *Corbiere*. In considering whether homelessness or

[180] *Ibid* at paras 144-155.
[181] *Ibid* at paras 148-149. Is emphasis added?
[182] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*].
[183] *Ibid* at paras 5,13.
[184] *Ibid* at para 13.
[185] *Ibid* at para 14.

poverty are analogous grounds of discrimination under section 15, a purposive approach must distinguish the economic deprivation linked to homelessness or poverty from the "social condition" or the socially constructed identities and characteristics of those who are poor or homeless which are embedded in broader historical and societal structures. Quantifiable measures of income level, like measures of biomedical impairment connected with disability, may accurately identify needs that must be addressed. However, as with disability, it is the social dimension of poverty or homelessness, including social relationships characterized by exclusion and stigmatization, which is linked to the patterns of discriminatory treatment and failures to recognize the groups' unique capacities and needs.

This social dimension of poverty and homelessness has been recognized under the prohibited ground of "social condition" in Canadian human rights legislation. All provincial and territorial human rights statutes in Canada provide protection from discrimination because of "social condition" (New Brunswick, Northwest Territories, Quebec) or a related ground such as "social origin" (Newfoundland); "source of income" (Alberta, British Columbia, Manitoba, Nova Scotia, Nunavut, and Prince Edward Island); or "receipt of public assistance" (Ontario and Saskatchewan).[186] These different grounds have been interpreted broadly to provide protection against discrimination on the basis of poverty, low level of income, reliance on public housing, and homelessness.[187] The only human rights legislation in Canada that does not provide protection from discrimination because of social condition or a similar ground is the *Canadian Human Rights Act*.[188] The Canadian *Human Rights Act* Review Panel, chaired by former Supreme Court of Canada Justice Gérard LaForest, was asked by the federal Minister of Justice to

[186] Russel W Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, loose-leaf (consulted on June 2, 2010) (Aurora, Ont: Canada Law Book, 1996), ch 13:30.
[187] See e.g. *Ontario (Human Rights Commission) v Shelter Corp* (2001), 143 OAC 54, [2001] OJ no 297 (QL); *Québec (Commission des droits de la personne) c Whittom* (1997), 73 ACWS (3d) 490, [1997] JQ no 2328 (Que CA), confirmant (1994) 20 CHRR D/349, (1993) RDLPD 55-1 (Tribunal des droits de la personne du Québec); *Quebec (Commission des droits de la personne) v Gauthier*, (1994) 19 CHRR D/312, (1993) RDLPD 47-1, as cited in *ibid* at 13-14. See also the Honourable Lynn Smith & William Black, "The Equality Rights" in Gerald A Beaudoin & Errol Mendes, eds, *Canadian Charter of Rights and Freedoms*, 4th ed (Markham, Ont: LexisNexis Butterworths, 2005) at 1010-1011.
[188] *Human Rights Act*, RSC 1985, c H-6.

consider this exclusion, among other issues, and found that there was "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy."[189] The Panel recommended "the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the Act in order to provide protection from discrimination because of disadvantaged socio-economic status, including homelessness."[190] Although strongly supported by civil society organizations and UN human rights bodies, the LaForest Panel's recommendations have not been implemented.[191]

Poverty and homelessness have also been linked to grounds of discrimination under international human rights law. In *General Comment No. 20* on non-discrimination, the CESCR lists a number of grounds of discrimination that are comparable to enumerated grounds under the *ICESCR*.[192] Along with grounds such as disability and sexual orientation, the Committee lists "economic and social situation," noting that "[a] person's social and economic situation when living in poverty or being homeless may result in *pervasive discrimination, stigmatization* and *negative stereotyping*."[193] In a recent report presented to the UN General Assembly, the UN Special Rapporteur on Extreme Poverty, Magdalena Sepulveda, described patterns of stigmatization and penalization of poor people as common to both developed and developing countries:

> Penalization measures respond to discriminatory stereotypes that assume that persons living in poverty are lazy, irresponsible, indifferent to their children's health and education, dishonest, undeserving and even criminal. Persons living in poverty are often portrayed as authors of their own misfortune, who can remedy their situation by simply "trying harder". These prejudices and

[189] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 107.
[190] *Ibid* at 106-112.
[191] United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 19th Sess, UN Doc E/C.12/1/Add.31, (1998) at para 51.
[192] United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art 2 para 2)*, UNCESCROR, 42d Sess, UN Doc E/C.12/GC/20, (2009).
[193] *Ibid* at para 35.

> stereotypes are often reinforced by biased and sensationalist media reports that particularly target those living in poverty who are victims of multiple forms of discrimination, such as single mothers, ethnic minorities, indigenous people and migrants. Such attitudes are so deeply entrenched that they inform public policies and prevent policymakers from addressing the systemic factors that prevent persons living in poverty from overcoming their situation.[194]

The Special Rapporteur recommended that States "ensure that discrimination on the basis of economic and social status is prohibited by law and the law applied by courts."[195]

Characterizing homelessness or poverty as including not only economic deprivation, but also a socially created identity, encourages an appreciation of the systemic or structural obstacles which prevent equal participation, including prevailing patterns of marginalization, stereotypes, and social exclusion linked to the devaluation of the group's rights and, as a consequence, unmet needs. Understanding the social construction of the group's imputed characteristics, often through stigmatization, stereotyping and prejudice, brings into focus the social relations and attitudes which often accompany and exacerbate physical and material deprivations.

The Supreme Court has yet to consider the question of whether the social conditions of homelessness and of poverty are analogous grounds under section 15. Lower court jurisprudence on the issue is mixed. As described below, where courts have considered evidence of the socially constructed exclusion and devaluing of poor people and homeless people, including evidence of stereotyping and stigma, these have been recognized as analogous grounds of discrimination.[196] However, in

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[194] *Report of the Special Rapporteur on extreme poverty and human rights*, *Magdalena Sepulveda*, UNGAOR, 66th Sess, UN Doc A/66/265, (2011) at para 7.
[195] *Ibid* at para 82(b).
[196] *Federated Anti-Poverty Groups*, *supra* note 108; *Falkiner v Ontario (Ministry of Community and Social Services)* (1996), 140 DLR (4th) 115 at 130-139, 153, 94 OAC 109, Rosenberg J, dissenting (Ont Ct J (Gen Div)); *Falkiner v Ontario (Ministry of Community and Social Services)* (2000), 188 DLR (4th) 52, 134 OAC 324 (Ont Div Ct); *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (Ont CA) [*Falkiner* CA]; *Schaff v Canada* (1993), 18 CRR (2d) 143 at para 52, [1993] TCJ no 389 (QL); *Dartmouth/Halifax County Regional Housing Authority v Sparks* (1993), 119 NSR (2d) 91, 101 DLR (4th) 224 (NSCA) [*Sparks*]; *R v Rehberg* (1993), 127 NSR (2d) 331, 111 DLR (4th) 336 (NSSC) [*Rehberg*].

cases where the courts have focused solely on the characteristic of economic need or income level, analogous grounds claims have been rejected. In this latter category of cases, courts have found that income level or economic circumstances can change and, on that basis, that poverty does not satisfy the "immutability" requirement for analogous grounds identified by the Supreme Court in *Corbiere*.[197] In some of these cases the courts have focused on income level, in relation to a generalized poverty line, and found that income level may change. In others, the courts have considered economic activities linked to poverty and homelessness, such as "begging" or "panhandling," and concluded that economic activity is not an immutable personal characteristic that can be protected under section 15.[198]

The denial of analogous grounds claims on the basis that people may move in and out of poverty or homelessness represents a misapplication of the concept of immutability as set out in *Corbiere*. In *Corbiere*, the Supreme Court considered whether the status of living off-reserve constituted an analogous ground. It concluded that this ground was immutable and qualified as analogous.[199] The Court did not, however, consider the question of immutability in relation to mere residency status as such, nor did it rely on any data quantifying the frequency of movement between on-reserve and off-reserve residence. Rather, the immutability analysis was focused on the socially constructed characteristics associated with on-reserve and off-reserve status. The Court considered how residency status was tied to social identity and social relations, such that it may "stand as a constant marker of potential legislative discrimination" and serve as a marker for "suspect distinctions."[200] The majority in *Corbiere* was also anxious to preserve the principle first enunciated in the *Andrews* decision—that the analogous grounds analysis should not be restricted to the facts of a particular case, but rather must be

[197] *Supra* note 182.
[198] *R v Banks,* 2007 ONCA 19 at para 104, 84 OR (3d) 1, leave to appeal to SCC refused, [2007] SCCA no 139 [*Banks*]; *Thibaudeau v Canada,* [1995] 2 SCR 627; *Donovan v Canada*, [2006] 1 CTC 2041 at para 18, 59 DTC 1531 (TCC); *Dunmore v Ontario (AG)*, (1997), 37 OR (3d) 287 (Ont Gen Div), aff'd (1999), 182 DLR (4th) 471 (ONCA), rev'd on other grounds 2001 SCC 94; *Bailey v Canada*, 2005 FCA 25 at para 12, 248 DLR (4th) 401 (FCA).
[199] *Corbiere*, supra note 182.
[200] *Ibid* at paras 10-11.

conducted "in the context of the place of the group in the entire social, political and legal fabric of our society."[201] The majority of the Court insisted that a ground found to be analogous must be considered analogous in all cases, pointing out that distinctions made on the basis of an enumerated or analogous ground will not always constitute discrimination within the meaning of section 15.[202] The contextual analysis of the effects of a particular provision, action, or failure to act must be carried out under the second step of the section 15 analysis in considering whether a distinction on the basis of an enumerated or analogous ground is discriminatory or not.[203]

Judicial decisions predating *Corbiere*, which recognize poverty as an analogous ground, are not inconsistent with the focus on socially constructed identity relied upon by the majority in *Corbiere* in developing the concept of 'constructive immutability.' In its decision in *Dartmouth/Halifax County Regional Housing Authority v Sparks*, involving a challenge to provincial residential tenancies legislation that excluded public housing tenants from "security of tenure" protections afforded to private sector tenants, the Nova Scotia Court of Appeal found that poverty and reliance on public housing constituted analogous grounds under section 15.[204] While acknowledging that people may move in and out of public housing, the Court recognized that social attitudes towards residency in public housing attach to personal identity in a way that attracts stigma and discriminatory treatment. Writing for the Court, Justice Hallett noted that attitudes toward public housing tenants were linked to the over-representation of racialized households and single mothers among those living in poverty and relying on public housing.[205] He concluded that "the impugned provisions amount to discrimination

[201] *Ibid* at para 60, citing *Andrews*, *supra* note 165 at 152.
[202] *Corbiere*, *supra* note 182 at para 10 (some lower courts have ignored this directive, however, distinguishing circumstances in which poverty or receipt of social assistance is not an analogous ground from cases in which it has been found to be one). See *Guzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134 at para 21, [2007] 3 FCR 411; *Toussaint v Minister of Citizenship and Immigration* 2009 FC 873 at paras 81-82, [2010] 3 FCR 452.
[203] *Corbiere*, *supra* note 182.
[204] *Sparks*, *supra* note 196.
[205] *Ibid* at para 31.

on the basis of race, sex and income."[206] The Court of Appeal's reasoning in *Sparks* was later applied by the Nova Scotia Supreme Court in *R v Rehberg* where the Court upheld a section 15 challenge to a "spouse in the house" rule that disentitled sole support parents, largely women, from receiving social assistance benefits if they were co-habiting with a man. The Court found that the differential treatment of co-habitants when they rely on social assistance constituted discrimination on the ground of poverty.[207]

The *Sparks* and *Rehberg* decisions were cited by the Ontario Court of Appeal in *Falkiner v Ontario (Ministry of Community and Social Services)*, which involved a similar challenge to "spouse in the house" rules in Ontario.[208] Justice Laskin likewise found that there was significant evidence of historical disadvantage and continuing prejudice against social assistance recipients, concluding that "recognizing receipt of social assistance as an analogous ground of discrimination under s. 15(1) would further the protection of human dignity."[209] Also in Ontario, in *R v Clarke*,[210] Justice Ferrier considered whether, in the context of jury selection, discriminatory attitudes toward those living in poverty or who are homeless ought to be recognized as a basis for challenges to prospective jurors. Noting the findings of the Ontario Court of Appeal in *Falkiner*, Justice Ferrier concluded that "there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight."[211] He further found that "the prejudice against the poor and homeless is similar to racial prejudice."[212]

As the Senate Sub-Committee observed in *In from the Margins*, the disproportionate representation of particular groups among those living in poverty or without inadequate housing, such as Aboriginal people, people with disabilities, lone parents (mostly women), and new Canadians, means that homelessness and

[206] *Ibid* at paras 26-27.
[207] *Ibid* at para 83.
[208] *Falkiner* CA, *supra* note 196 at para 90.
[209] *Ibid* at para 86.
[210] *R v Clarke* (2003), 61 WCB (2d) 134, [2003] OJ No 3883 (QL).
[211] *Ibid* at para 18.
[212] *Ibid*.

poverty must also be understood as intersecting with other grounds of discrimination: "[t]hese and other characteristics, including gender and race, interact to create particularly complex challenges."[213] The CESCR has pointed out that women, especially single mothers, people with disabilities, racialized groups, Aboriginal people, newcomers, and youth, are disproportionately affected by homelessness and poverty in Canada.[214] An equality framework must be informed by an understanding of systemic patterns of discrimination against these groups as well. A purposive equality rights analysis must consider, for example, how attitudes toward people with mental health disabilities, youth or racialized immigrants, are manifested in government and public responses to homelessness and poverty. As UN human rights monitoring bodies have underscored,[215] the disaggregated data called for in the monitoring and implementation of poverty and housing strategies, as well as provisions ensuring representation of these groups in decision-making processes, are critical components in any rights-based strategy informed by an equality framework consistent with section 15 of the *Charter*.

III) SUBSTANTIVE DISCRIMINATION

The second stage of the Supreme Court's equality analysis under section 15 involves a consideration of whether a law or policy that draws a distinction on a prohibited ground is substantively discriminatory. An understanding of the social construction of poverty and homelessness is critical to the section 15 analysis at this stage as well. This does not mean that material deprivation or the adverse effects of governments failing to address economic need are not discriminatory in the

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[213] *In from the Margins*, *supra* note 13 at 27.
[214] United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006).
[215] See United Nations Committee On Economic, Social And Cultural Rights*, Guidelines on Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights*, UNESCOR, 2009, UN Doc E/C.12/2008/2 (24 March 2009) at paras 3, 10; *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, UN Human Rights Council, 4th Sess, UN Doc A/HRC/4/18, (2007); *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt*, Commission on Human Rights, 62d Sess, UN Doc E/CN.4/2006/48 (2006).

substantive sense. Rather, failure to adequately address the economic needs of those living in poverty should be understood in light of the discrimination, exclusion and the devaluation of rights that lies behind the denial of adequate benefits.

An illustration of the link between government failure to address needs, and social patterns of stigma and stereotype is provided in Marie-Eve Sylestre's affidavit in *Tanudjaja*.[216] Sylvestre's research shows how the proliferation of false stereotypes about homeless people and the devaluation of their rights are inextricably linked to government neglect of the needs of this vulnerable group. She points, as one example, to the Mayor of Ottawa's allegation that the city was attracting the homeless "like seagulls at the dump" by offering too many services. On another occasion, the Mayor compared homeless people to pigeons, saying that if Ottawa would stop feeding them, they would stop coming.[217] Sylvestre notes that these attitudes create socially constructed identities, as well as significant barriers to any conception of equal rights to services or programs, for members of this stigmatized group. Governments at every level are dissuaded from reasonably addressing the needs of the homeless based on stereotypic views of the groups' moral unworthiness and laziness and assumptions that the more their needs are addressed, the more of a 'problem' they will become. As Sylvestre explains:

> Because of the prevalence of stereotypes and stigma applied to homeless people, the lived experience of homelessness involves far more than economic deprivation and absence of housing. It becomes an all-encompassing social identity or social label for individuals. It defines one's personhood in a way that is socially constructed and difficult to change. Virtually every part of society perceives and treats a person differently once they become homeless. Law enforcement officials treat them as potentially dangerous and disorderly and in need of severe regulation: they apply measures in a discriminatory fashion, on the basis of visible signs of poverty. Politicians tend to treat them as a 'problem' to be kept out of a neighbourhood by denying basic sustenance or other services, rather than equal citizens entitled to programs and services to meet their unique needs.[218]

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[216] Sylvestre, *supra* note 126.
[217] "'Pigeons' squawk over mayor's comments on homeless", *CBC News* (25 April 2007), online: CBC.ca <http://www.cbc.ca/news/canada/ottawa/story/2007/04/25/pigeon-070425.html>.
[218] Sylvestre, *supra* note 126 at para 51.

While homelessness is not 'immutable' in the manner of race or sex, Sylvestre describes how this all-encompassing personal identity constitutes a relatively inflexible socially constructed characteristic that is difficult to escape:

> The broader category of homelessness defines a disadvantage that is very difficult for an individual to overcome. Street exit is a long and difficult process which involves considerable movement back and forth from being homeless and being 'vulnerably housed.' When applying for a job, it is hard to justify the period of time that the individual remained unemployed because he or she was homeless. When applying for an apartment, the homeless person often has difficulties providing references to future landlords and is seen as an undesirable tenant. As mentioned before, homeless people will carry several thousands of dollars in unpaid fines as a result of their criminalization. This has a major impact on their ability to exit the street and change their position. In Ontario, the fact that a fine remains unpaid affects the person's credit rating. As noted above, landlords routinely check prospective tenants' credit before renting an apartment, and debt collection on unpaid fines may compromise a tenant's ability to pay rent.[219]

The Supreme Court has recognized that discrimination occurs when a policy fails to takes into account "the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society."[220] The principle was first enunciated in *Andrews*, where Justice McIntyre explained that "[i]t will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances."[221] In *Eaton v Brant County Board of Education,*[222] Justice Sopinka warned that ignoring the needs and capacities of people with disabilities may be "a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of

[219] *Ibid* at para 52.
[220] *Law*, *supra* note 164 at para 70.
[221] *Ibid*.
[222] *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."[223] Housing and antipoverty strategies must similarly recognize unique needs, capacities, and circumstances and, in particular, must meet needs that are linked to economic deprivation. At the same time, however, such strategies must remedy the devaluation of rights and capacity that is the underlying cause of, and fuel for, the perpetuation of the inequality being addressed by such strategies. A rights-based approach, which restores equal citizenship to members of the group, is critical to a remedial, purposive approach to addressing homelessness and poverty amidst affluence. At a fundamental level, such an approach recognizes and addresses homelessness and poverty as denials of "a basic aspect of full membership in Canadian society"[224] to those who are affected.

F. SECTION 1 OF THE CHARTER: THE GUARANTEE OF REASONABLE LIMITS

Section 1 of the *Charter* provides that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court has affirmed that section 1 plays a dual role, both as a limit to rights and a guarantee of rights.[225] As Justice Arbour observed in *Gosselin*, "[w]e sometimes lose sight of the primary function of s. 1 – to constitutionally guarantee rights – focussed as we are on the section's limiting function."[226] Thus while section 1 provides a means by which governments can justify infringements of *Charter* rights, it also serves as a guarantee that laws, policies, government programs, and administrative decision-makers will limit rights and balance competing societal interests in a "reasonable" manner. In this sense, section 1 serves as a potential

[223] *Ibid* at paras 66-67, as cited in *Eldridge*, *supra* note 52.
[224] *Law*, *supra* note 164 at para 74.
[225] *R v Oakes*, [1986] 1 SCR 103 at 135 [*Oakes*].
[226] *Gosselin*, *supra* note 87 at para 352.

domestic source for the international law obligation to adopt reasonable measures, commensurate with available resources and in light of competing needs, to implement and realize social and economic rights.[227]

Under section 1, a government seeking to defend the violation of a *Charter* right bears the onus of demonstrating that the infringement is reasonable and demonstrably justified, pursuant to a two-part test developed by the Supreme Court in *R v Oakes*.[228] First, the objective being pursued must "relate to concerns which are pressing and substantial."[229] In other words, the objective must be sufficiently important to justify overriding a *Charter* right. Second, the means chosen must be "reasonable and demonstrably justified," which involves a proportionality test.[230] In *Oakes*, the Court identified three important components of this analysis: first, the measures adopted must be "rationally connected to the objective;" second, the means adopted must impair the *Charter* right as little as possible; and third, there must be "proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified."[231]

Implicit in the *Oakes* test is what Leon Trakman describes as a normative standard of justification," which serves as is backdrop.[232] In the words of Chief Justice Dickson, "[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter, and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justifiable."[233] Chief Justice Dickson has identified the underlying *Charter* values that must guide the section 1 analysis as including social justice and equality, enhanced participation of

[227] Jackman & Porter, *Making the Connection*, *supra* note 1 at 41-46.
[228] *Oakes*, *supra* note 225.
[229] *Ibid* at para 69.
[230] *Ibid* at para 70.
[231] *Ibid*.
[232] Leon E Trakman, William Cole-Hamilton & Sean Gatien, "*R v Oakes* 1986-1997: Back to the Drawing Board" (1998) 36:1 Osgoode Hall LJ 83 at 85.
[233] *Oakes*, *supra* note 225 at para 64.

individuals and groups in society, and Canada's international human rights obligations.[234]

I) SECTION 1 AND POSITIVE OBLIGATIONS TO ADOPT REASONABLE MEASURES TO PROTECT VULNERABLE GROUPS

In interpreting and applying section 1, the Supreme Court has underscored governments' obligations to protect the rights of vulnerable groups. In *Irwin Toy*, for example, restrictions on advertising aimed at children under the age of thirteen were found to be a justifiable infringement of section 2(b) rights to freedom of expression, because such restrictions were consistent with the important *Charter* value of protecting vulnerable groups, such as children.[235] While evidence in the case suggested that other less restrictive means were available to the government to achieve its objectives, the Court affirmed it would not "in the name of minimal impairment [of a *Charter* right] … require legislatures to choose the least ambitious means to protect vulnerable groups."[236] The Court's emphasis on the primary importance to be accorded protection of vulnerable groups in the assessment of 'reasonable limits' parallels the emerging standard of reasonableness under international human rights law, illustrated by requirements of a 'reasonable' housing policy established by the South African Constitutional Court in the *Grootboom* case.[237]

International human rights law generally, and the *ICESCR* in particular, are central to the values that underlie section 1. In *Slaight Communications*,[238] the Court found that an adjudicator's order requiring an employer to provide a positive letter of reference to a wrongfully-dismissed employee was a justifiable infringement of the employer's right to freedom of expression because it was consistent with Canada's commitments under the *ICESCR* to protect the employee's right to work.

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[234] *Ibid*; *Slaight Communications*, *supra* note 29 at 1056-1057.
[235] *Irwin Toy*, *supra* note 83.
[236] *Ibid* at 999. But see *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at para 136 (the Supreme Court granted a tobacco manufacturer's section 2(b) challenge to federal tobacco advertising and marketing restrictions, notwithstanding evidence of tobacco related harm to health, and the particular vulnerability of children and youth to tobacco advertising).
[237] Jackman & Porter, *Making the Connection*, *supra* note 1 at 41-45; *Grootboom*, *supra* note 7.
[238] *Slaight Communications*, *supra* note 29.

The Court concluded that an appropriate balancing of the two rights by the adjudicator properly came out on the side of protecting the right to work, as guaranteed in the *ICESCR*. Chief Justice Dickson held in this regard:

> 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 *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.[239]

The assessment of what positive measures are reasonably required to accommodate disability or other characteristics of disadvantaged groups, in line with similar obligations under domestic human rights legislation, has been situated by the Supreme Court within the section 1 guarantee of reasonable limits.[240] In the *Eldridge* case,[241] for example, the Court considered a challenge brought by deaf patients in British Columbia to the provincial government's failure to provide sign language interpretation services within the publicly funded health insurance system. Having determined that the failure to provide interpretation services violated section 15 of the *Charter*, the Supreme Court considered the cost of providing interpreter services to deaf patients in relation to the overall provincial health care budget. The Court concluded that the government's refusal to fund such services was not reasonable.[242] In the course of his section 1 analysis, Justice LaForest noted that:

> It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation

[239] *Ibid* at 1056-1057.
[240] *Schachter v Canada*, [1992] 2 SCR 679 at 709; *Egan v Canada*, [1995] 2 SCR 513 at para 99; *Nova Scotia (Workers' Compensation Board) v Martin,* [2003] 2 SCR 504 at para 109.
[241] *Eldridge*, *supra* note 52.
[242] *Ibid*.

> for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits."[243]

The "undue hardship" standard is thus found by the unanimous Court in *Eldridge* to fit within the "reasonable limits" standard of section 1. The standard of undue hardship as it has been developed in Canadian human rights law is a rigorous one in relation to the allocation of budgetary resources. In *Central Okanagan School District v Renaud*,[244] the Supreme Court considered the 'undue hardship' analysis under human rights legislation and rejected the *de minimus* test adopted in some American cases, suggesting that it "seems particularly inappropriate in the Canadian context."[245] In the Court's view:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words 'reasonable' and 'short of undue hardship.' These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights*),[246] the Court held that the standard of reasonableness under human rights legislation must be particularly high in relation to costs defenses put forward by governments. The Court cautioned that: "it is all too easy to cite increased costs as a reason," that "impressionistic evidence of increased expenses will not generally suffice," and that courts must consider that "there may be ways to reduce costs."[247]

In those *Charter* cases where the Court has approached issues of positive obligations and budgetary measures without reference to the human rights

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[243] *Ibid* at para 79.
[244] *Central Okanagan School District v Renaud*, [1992] 2 SCR 970.
[245] *Ibid* at para 19.
[246] [1999] 3 SCR 868.
[247] *Ibid* at para 41.

standard of "undue hardship," the standard that has been applied under section 1 proportionality analysis has, like in *Eldridge*, been described as a rigorous one. In *G(J)*, the Court held that the government had a positive obligation under section 7 to provide legal aid to parents who could not afford a lawyer when the parent's life, liberty, or security is at stake in child custody proceedings.[248] Noting that violations of section 7 rights will only rarely be overridden by competing social interests and, hence, are unlikely to constitute reasonable limits under section 1, the Court found that "a parent's right to a fair hearing when the state seeks to suspend such parent's custody of his or her child outweighs the relatively modest sums, when considered in light of the government's entire budget, at issue in this appeal."[249] Even in *Newfoundland (Treasury Board) v NAPE*, where the Supreme Court found the provincial government's decision not to honour a pay equity award in favour of public sector workers, largely women, in the amount of $24 million, was reasonable and justifiable under section 1, the Court claimed to be applying a rigorous standard.[250] The impugned decision was made as part of an across-the-board reduction of government expenditures, in response to a perceived provincial debt crisis, characterized by the government and accepted by the Supreme Court as constituting a "financial emergency."[251] While the Court found that a budgetary crisis justified an infringement of section 15 of the *Charter* in that case, Justice Binnie, cautioned that courts must remain sceptical of attempts by governments to justify infringements of rights on the basis of budgetary constraints, noting that "there are *always* budgetary constraints and there are *always* other pressing government priorities."[252] At the same time Justice Binnie noted the important social values that are engaged in budgetary decision-making:

> [i]t cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise "whose sole purpose is financial". The weighing exercise has as much to do with

[248] *G(J)*, *supra* note 95.
[249] *Ibid* at para 100.
[250] [2004] 3 SCR 381 [*NAPE*].
[251] *Ibid* at para 1.
[252] *Ibid* at para 72. Was emphasis added or in original?

> 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.[253]

The Supreme Court has recognized that, in these kinds of "weighing" exercises, a certain amount of judicial deference is mandated, since "there may be no obviously correct or obviously wrong solution, but, rather, a range of options each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives."[254] Recognizing that there may be a range of policy measures which are reasonable does not, however, justify blanket deference to legislatures in relation to budgetary allocations or socio-economic policy. Such deference would be inconsistent with the constitutionally mandated role of courts to assess whether governments have acted within the range of reasonable or constitutional options, in accordance with *Charter* or human rights values. Section 1 calls for rigorous and independent judicial assessment and oversight of government choices, where these infringe *Charter* protected rights. Thus in *NAPE*, Justice Binnie rejected the Newfoundland Court of Appeal's suggestion that budgetary decisions are inherently political and should be subject to a unique deferential standard based on the separation of powers.[255] Writing for the Court, Justice Binnie noted that such a broad deference in relation to budgetary decisions or socio-economic policy would essentially transfer the judicial mandate of assessing reasonableness under section 1 onto the legislature:

> 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

[253] *Ibid*.
[254] *Ibid* at para 83.
[255] *Newfoundland (Treasury Board) v NAPE*, 2002 NLCA 72, 221 DLR (4th) 513.

> and render superfluous the independent second look imposed on the courts by s. 1 of the *Charter*.[256]

In this regard, the Supreme Court's approach to 'deference' under section 1 is similar the standard set out under the *OP-ICESCR*, which directs the Committee on Economic, Social and Cultural Rights adjudicating complaints to "consider the reasonableness of the steps taken by the State Party" and to "bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."[257]

In light of the rigorous standard that the Supreme Court has proposed for the assessment of reasonable measures and budgetary allocations, particularly where these are required for the protection of the rights of vulnerable groups, it is hard to imagine how Canadian governments could successfully argue that their refusal to adopt measures to address increasing poverty and homelessness in the midst of affluence constitutes a reasonable limit under section 1. The overwhelming evidence suggests that governments are wasting significant amounts of money by failing to adopt anti-poverty and housing strategies called for by international treaty monitoring bodies.[258] For instance, 2009 Alberta government study estimated the cost of supporting each homeless person in that province to be close to $100,000/year.[259] In her Affidavit in *Tanudjaja* Marie-Êve Sylvestre notes that the cost of services for homeless people has been estimated at $4,000 per month.[260] Incarceration costs are about the same for adults and significantly higher for youth.[261] In comparison, a program involving rent supplements and support services, which provided access to adequate and stable housing for former homeless

[256] *NAPE*, *supra* note 250 at para 103.
[257] *OP-ICESCR*, *supra* note 2 at art 8(4).
[258] Jackman & Porter, *Making the Connection*, *supra* note 1 at 20-31.
[259] Alberta Secretariat for Action on Homelessness, *A Plan for Alberta: Ending Homelessness in 10 years* (Edmonton: Ministry of Housing and Urban Affairs, 2009) at 8.
[260] Sylvestre, *supra* note 126 at para 50.
[261] *Ibid*.

residents of tent-city in Toronto, was estimated to have cost about $1,000 per month – a quarter of the cost of incarceration or homelessness services.[262]

Pointing to the estimated $1.4 billion in annual costs of homelessness in Canada, the Mental Health Commission of Canada has characterized Canadian governments' current response of relying on shelters and emergency and acute health services as "a costly and ineffective way of responding to the problem."[263] In a 2009 report, the Auditor General of British Columbia likewise found that "[a]ccording to a growing body of evidence, the cost to society of not addressing homelessness is significantly higher than the cost of providing housing and intervention services."[264] The Senate Sub-Committee on Cities came to a similar conclusion in relation to the cost of poverty and homelessness in its 2009 report, *In From the Margins: A Call to Action on Poverty, Housing and Homelessness*:

> … the Committee's testimony clearly underlines that poverty costs us all. Poverty expands healthcare costs, policing burdens and diminished educational outcomes. This in turn depresses productivity, labour force flexibility, life spans and economic expansion and social progress, all of which takes place at huge cost … We believe that eradicating poverty and homelessness is not only the humane and decent priority of a civilized democracy, but absolutely essential to a productive and expanding economy benefitting from the strengths and abilities of all its people.[265]

Governments' refusals to implement effective strategies to ensure access to adequate housing is thus a fiscally irresponsible response to a problem that could be more economically and reasonably addressed in accordance with human rights and values of social inclusion, rather than through perpetuation of patterns of criminalization and stigmatization. It is precisely in these types of situations that an "independent second look" at government policies, through a human rights lens, is

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[262] Gloria Gallant, Joyce Brown & Jacques Tremblay, *From Tent City to Housing: An Evaluation of The City of Toronto's Emergency Homelessness Pilot Project* (Toronto: City of Toronto, 2004).
[263] Mental Health Commission of Canada, *At Home/Chez Soi: Interim Report* (Ottawa: Mental Health Commission of Canada, September 2012) 11.
[264] Office of the Auditor General of British Columbia, *Homelessness: Clear Focus Needed* (Victoria: Office of the Auditor General of British Columbia, 2009) 19.
[265] *In From the Margins*, above note 13 at 3; Food Banks Canada, *Hunger Count 2009* (Toronto: Food Banks Canada, 2010) at 3.

important to the proper functioning of a constitutional democracy.[266] The section 1 standard of reasonable limits, properly applied in a manner consistent with Canada's international human rights obligations, would ensure more effective governmental accountability in this area.

II) SECTION 1, REASONABLENESS AND ADMINISTRATIVE DECISION-MAKERS

As described above, the section 1 guarantee of reasonable limits may provide an important vehicle for the domestic implementation of international obligations to take reasonable measures to address poverty and homelessness and to respond to the needs of vulnerable groups more generally. This is not a standard which should be applied solely by courts. As noted in *Making the Connection*, rights-based strategies proposed internationally seek to ensure that social rights are claimable and adjudicated in multiple *fora*: from local community mechanisms and city charters to provincial and national mechanisms of oversight and monitoring. This decentralized or 'disseminated' model for the adjudication of rights is consistent with the Supreme Court's more recent *Charter* jurisprudence, where an increasing number of administrative bodies and decision-makers are charged with the mandate and responsibility to consider *Charter* rights and to adjudicate *Charter* claims. As Chief Justice McLachlin noted in *Cooper v Canada (Human Rights Commission)*,[267] administrative decision-makers, tribunals, and commissions play a critical role in adjudicating fundamental rights of many citizens, including many *Charter* rights. In keeping with this view, the Supreme Court has confirmed the authority of a wide range of administrative bodies to consider and apply the *Charter*.[268]

In the recent decision of *Doré v Barreau du Québec,*[269] the Court departed from some of its earlier jurisprudence[270] by proposing that, in cases where

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[266] *NAPE*, *supra* note 250 at para 103.
[267] *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854.
[268] *R v Conway*, [2010] 1 SCR 765.
[269] *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].
[270] *Multani*, *supra* note 52.

administrative decision-making under statutory authority is alleged to have been exercised in a manner that is contrary to the *Charter*, judicial review of such decisions may be conducted under an administrative law test of reasonableness, rather than by way of section 1 and the *Oakes* test. Writing for the Court, Justice Abella argues that the modern view of administrative tribunals has given rise to a more robust form of administrative law reasonableness, nurtured by the *Charter*, which can provide essentially the same level of protection of *Charter* rights as does a section 1 analysis.[271] Justice Abella suggests that this approach is better suited to reviewing whether administrative decisions have properly ensured *Charter* "guarantees and values" in particular factual contexts. She further contends that the deference accorded to administrative decision-makers under administrative law reasonableness analysis is consistent with the degree of deference accorded to legislative decision-makers under section 1 of the *Charter*. Justice Abella explains:

> As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47) …
> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play … If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.[272]

As Lorne Sossin has pointed out, there remain ambiguities in this new approach to protecting *Charter* rights in the administrative context.[273] For example, under human rights law and pursuant to section 1 of the *Charter*, the onus is placed on the

[271] *Doré*, *supra* note 269 at para 29.
[272] *Ibid* at paras 56-58.
[273] Lorne Sossin, "Social Rights and Administrative Justice" in Martha Jackman & Bruce Porter, eds, *Social Rights Theory and Practice in Canada* (Ottawa: Irwin Law, forthcoming).

respondent to establish the reasonableness of measures taken or to justify any limitations on rights. It is not clear whether this "reverse onus," which has been fundamental in adjudicating both "reasonable accommodation" and *Charter* claims, will become a universal feature of administrative law reasonableness review or will only apply in certain cases. Irrespective of how this issue is resolved, *Doré* provides strong grounds for insisting that administrative decision-makers consider both explicit *Charter* rights and the foundational "*Charter* values" that have been closely linked to Canada's international human rights obligations, including socio-economic rights. The challenge will be to ensure that this obligation is taken seriously by administrative decision-makers, particularly where decisions are being made affecting such fundamental rights as the right to adequate housing or to an adequate standard of living. As Lorne Sossin notes:

> If the principle that discretion should be exercised in a manner consistent with *Charter* values is incorporated into the guidelines, directives and practices of tribunals, this could have a profound effect on the opportunity for these adjudicative spaces to advance social rights. By contrast, if such values turn out not to be relevant in the everyday decision-making of such bodies, then the Court's rhetoric in *Doré* will suggest a rights orientated framework that is illusory.[274]

It is beyond the scope of this paper to address the complex and evolving question of the relationship between administrative law standards of reasonableness, particularly as applied to standards of judicial review, and the section 1 standard of reasonable limits. [275] However, the expanded role of administrative bodies in relation to *Charter* adjudication means that a "robust" standard of reasonableness, articulated in very similar terms as those of the Constitutional Court in South Africa and international human rights bodies, has become an important framework for the accountability of administrative decision-makers. This is particularly true for decisions affecting the circumstances of disadvantaged groups, including decision-

[274] *Ibid*.
[275] See Susan L Gratton, "Standing at the Divide: the Relationship Between Administrative Law and the Charter Post-*Multani*" (2008) 53:3 McGill LJ 477; Susan L Gratton & Lorne Sossin, "In Search of Coherence: The Charter and Administrative Law under the McLachlin Court" in A Dodek & D Wright, eds, *The McLachlin Court's First Ten Years: Reflections of the Past and Projections of the Future* (Toronto: LexisNexis, 2010).

making that engages issues of resource allocation and other positive measures required to protect equality or security of the person.

While the Supreme Court has placed increased emphasis on the authority of a wide range of administrative actors to address *Charter* claims, in *Doré* and other recent cases, it has recognized the role of administrative decision-makers in this regard for some time. In *Slaight Communications*, the primary responsibility for balancing the right to freedom of expression with the right to work under the *ICESCR* was found to lie with an appointed adjudicator, exercising conferred decision-making authority under the *Canada Labour Code*.[276] In *Baker*, the Supreme Court was of the view that the exercise of reasonable discretion, which, in that case, involved balancing the best interests of the child against anticipated health care and social assistance costs that might be incurred by a parent threatened with deportation, was within the discretionary authority granted to an immigration officer. Justice l'Heureux-Dubé further found that the immigration officer providing an opinion to the federal Minister was obliged to make a reasonable decision, in conformity with international human rights principles.[277] In *Eldridge*, the Supreme Court concluded that provincial health and hospital insurance legislation did not prevent administrative decision-makers from taking positive measures to provide interpreter services. Instead, the Court held that it was the decision-making by those administering hospitals and medical services, and their determination of what services should be insured, that violated section 15 of the *Charter*.[278] More recently, in the *Insite* case, the Court again rejected a claim that the law itself was unconstitutional in favour of a finding that the exercise of conferred discretion, in that case by the Minister, was inconsistent with the *Charter*. The Court found that the Minister was obliged to grant a discretionary exemption to Insite, based on a proper consideration of the evidence of the needs of vulnerable groups for the service Insite provided.[279]

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[276] *Slaight Communications*, *supra* note 29.
[277] *Baker*, *supra* note 25 at paras 64-71.
[278] *Eldridge*, *supra* note 52 at paras 22-24.
[279] *PHS Community Services*, *supra* note 94.

In designing decision-making structures for housing and anti-poverty strategies, it is a basic *Charter* requirement that those making decisions pursuant to conferred statutory authority operate within a human rights framework, informed by international human rights and *Charter* values, in order to ensure that reasonable steps are taken to ensure equality, dignity, and security and to balance competing needs and interests.[280] Reasonable priority must be accorded to those who are most in need, and whose *Charter* rights would be most severely infringed by a failure to act. The *Charter* demands that administrative decision-makers, acting in the context of programs and strategies to address poverty or housing, must not only be authorized but required to engage in assessments of what measures may be reasonably necessary to safeguard both the substantive and participatory rights of those whose rights are at stake. Thus the adjudicator in *Slaight Communications* had to ensure that his decision to limit the right to freedom of expression was consistent with the right to work under the *ICESCR*.[281] The Medical Services Commission in *Eldridge* had to allocate resources to interpreter services to ensure that the needs of disabled healthcare consumers were accommodated, where such accommodation did not impose undue strain on government resources.[282] In the same manner, other administrative decision-makers may be called upon to consider the right to housing and the right to adequate income when making decisions that impact on these interests, under conferred statutory authority. Like the courts, delegated decision-makers must adopt a rigorous standard of review where *Charter* rights are at stake. Such administrative decision-making must be consistent with standards of undue hardship under human rights legislation and must apply a high level of scrutiny of any governmental claim that budgetary constraints justify *Charter* rights infringements under section 1 of the *Charter*, consistent with the "maximum of available resources" standard for the realization of rights to housing and adequate living standards under international human rights law. Anti-poverty and housing

[280] *Multani*, *supra* note 52 at paras 22-23 (the majority of the Court reaffirmed the application of section 1 of the Charter to administrative decision-makers exercising conferred discretion).
[281] *Slaight Communications*, *supra* note 29.
[282] *Eldridge*, *supra* note 52.

strategies can strengthen rights-based accountability by making these *Charter* obligations of administrative decision-makers more explicit.

G. POSITIVE AND NEGATIVE RIGHTS

The obligation to implement effective poverty or homelessness strategies has not yet been directly addressed by the Canadian courts. However, as described in previous parts of the paper, the text of section 36 of the *Constitution Act, 1982*, sections 7 and 15 of the *Charter*, the domestic and international human rights context within which these provisions must be interpreted, and the guarantees implicit in the notion of 'reasonable limits' under section 1 have the potential to provide a robust constitutional framework for a rights-based approach to poverty and homelessness in Canada. Unfortunately, as Louise Arbour has pointed out,[283] there remains a prevailing domestic judicial bias against applying the *Charter* to require governments to act in response to human rights crises of this sort.

For example, although homeless people were successful in their *Charter* claim in *Victoria (City) v Adams*, this judicial bias is evident even in that case – the first to consider the relevance of international human rights law, including concerns and recommendations from the CESCR, to section 7 of the *Charter*.[284] The BC Court of Appeal in *Adams* upheld the trial judge's decision that the City of Victoria was violating homeless persons' constitutional rights to life, liberty and security of the person by prohibiting them from erecting temporary overhead shelters in public parks.[285] However the Court of Appeal was insistent on framing its decision as a negative 'restraint' on government, rather than as a positive obligation. 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, "[t]hat kind of responsive action to a finding that a law violates s. 7 does not involve the court in adjudicating positive rights."[286]

[283] Arbour, "Freedom from want," *supra* note 81.
[284] *Adams, supra* note 89.
[285] *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29.
[286] *Ibid* at paras 95-96.

So long as courts and governments in Canada restrict their understanding of *Charter* and human rights obligations to "negative rights," focusing exclusively on government action that violates rights, while ignoring the violations that result from inaction, they will not be applying the *Charter* as an effective human rights framework for addressing poverty and homelessness. As argued above, there is no constitutional basis for excluding positive action by governments to remedy *Charter* violations. In discussing the application of the *Charter* pursuant to section 32, the Supreme Court has emphasized that the distinction between government action and inaction is "very problematic."[287] In *Vriend,*[288] quoting Dianne Pothier, the Supreme Court of Canada pointed out that section 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority."[289] The Court went on to state that "[t]he application of the *Charter* is not restricted to situations where the government actively encroaches on rights."[290]

The Supreme Court has also consistently rejected the idea that, because such decisions are inherently political in nature, the *Charter* should not apply to executive or legislative choices about what policies or legislation to enact. In *R v Operation Dismantle*, the Court established that "political" questions are not immunized from *Charter* review.[291] In *NAPE*, where the Newfoundland Court of Appeal invoked the principle of the separation of powers as a barrier to judicial interference with "policy initiatives within the purview of the political branches of government,"[292] Justice Binnie responded for the majority:

> The "political branches" of government are the legislature and the executive. Everything that they do by way of legislation and

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[287] *Vriend*, *supra* note 234 at para 53. Section 32 states that the *Charter* applies:
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
[288] *Ibid*.
[289] Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7 Const Forum Const 113 at 115, as cited in *ibid* at para 60,
[290] *Vriend*, *supra* note 234 at para 60.
[291] *R v Operation Dismantle*, [1985] 1 SCR 441 at para 64.
[292] *NAPE*, *supra* note 250 at para 110.

> executive action could properly be called "policy initiatives". If the "political branches" are to be the "final arbitrator" of compliance with the *Charter* of their "policy initiatives", it would seem the enactment of the *Charter* affords no real protection at all to the rights holders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy.[293]

Governmental authority to act, or not, in response to poverty and homelessness must be exercised consistently with the *Charter,* whether through positive measures to ensure equality or to protect life and security, or through 'negative' obligations of restraint, by refraining from actively interfering with such rights.

H. CONCLUSION

The fact that adequate housing, or an adequate standard of living, are not explicitly recognized as constitutional rights in Canada does not mean that there is no domestic constitutional framework to protect and guarantee these rights. As outlined above, there is ample room to interpret section 36 of the *Constitution Act, 1982* in a manner consistent with international human rights, in order to ensure that those who are homeless or living in poverty have access to an effective remedy when governments fail to honour their constitutional commitments. Section 7 of the *Charter* can (and should) be interpreted as placing obligations on governments, not only to refrain from interfering with the survival tactics of people who are homeless or living in poverty, but also to take positive measures to address homelessness and poverty through appropriate strategies. Section 7 principles of fundamental justice provide a solid basis for claiming both a substantive right to fair and reasonable housing and anti-poverty strategies and procedural rights to meaningful, rights-based participation in their design, implementation, monitoring, and evaluation. Section 15 of the *Charter* creates a firm foundation for an equality framework that goes beyond addressing economic and physical needs and also provides an avenue for challenging structural and systemic injustice based on the stereotypes, stigma,

[293] *Ibid* at para 111.

and exclusion faced by those who are homeless and living in poverty in so affluent a society as Canada. Finally, section 1 of the *Charter* offers a rights-based approach to assessing the reasonableness of measures taken in relation to particular disadvantaged groups and for determining whether government programs meet a standard of reasonableness in terms of timeliness, balancing of competing needs, and budgetary allocations.

In the final analysis, however, the question of whether the courts are willing to exercise their constitutional mandate to address homelessness and poverty in Canada should not be determinative of the domestic constitutional rights framework being embraced by rights claimants, civil society organizations, and legislators. It is up to those who are demanding designing, and implementing strategic responses to these widely recognized human rights violations, to reclaim *Charter* rights.[294] In doing so, they must challenge judicial resistance to positive rights and advance the legitimate claims of those who are homeless and living in poverty in light of the courts' own jurisprudence, properly informed by evolving international human rights norms and longstanding Canadian values. A meaningful engagement of *Charter* rights with housing and anti-poverty strategies need not rely on the courts as the sole trustees of rights. Rights-based strategies should disseminate the adjudicative and remedial role previously restricted to courts more broadly, among other actors and decision-makers, in order to implement a participatory and empowering model of rights-based strategies consistent with the international norms described in *Making the Connection*.

Governments, of course, are the ultimate "duty-bearers" and courts the final arbiters of constitutional rights—but to become meaningful to homeless people and those living in poverty,

Charter rights must inform the ongoing implementation of strategies, not merely the final review of their constitutionality and they must guide decision-making at every level, not merely in the courts.

[294] See generally Bruce Porter, "Expectations of Equality" (2006) 33 Sup Ct L Rev 23.