

**WOMEN'S SUBSTANTIVE EQUALITY AND THE
PROTECTION OF SOCIAL AND ECONOMIC RIGHTS
UNDER THE *CANADIAN HUMAN RIGHTS ACT***

Martha Jackman

and

Bruce Porter

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EXECUTIVE SUMMARY

The Canadian Human Rights Commission has pointed to the inextricable link between poverty and inequality in Canada, particularly for women, and has questioned whether the Canadian human rights system is based on a definition of “human rights” which is too restrictive, in that it excludes social and economic rights that are a fundamental component of international human rights guarantees. Similarly, recent periodic reviews by United Nations human rights treaty-monitoring bodies have led to unprecedented criticism of Canada for neglecting issues of poverty and social and economic rights, particularly among women.

A crucial component of Canada’s international human rights obligations is to provide effective domestic remedies for violations of social and economic rights, and to include social and economic rights in the mandate of its national human rights institution. Moreover, the Paris Principles, endorsed by the United Nations General Assembly in 1994, require that national human rights institutions have a broad mandate, including the duty to review compliance with the international human rights instruments to which the state is a party. In its concluding observations relating to Canada in both 1993 and 1998, the United Nations Committee on Economic, Social and Cultural Rights recommended that Canadian human rights legislation be amended to include social and economic rights. In November 1998, Canada made a commitment to the UN Committee that this recommendation would be addressed in the federal government’s review of the *Canadian Human Rights Act* (CHRA).

Recently, the Supreme Court of Canada affirmed that equality rights under the *Canadian Charter of Rights and Freedoms*, like equality guarantees in federal and provincial human rights legislation, require positive measures to address social disadvantage. Nevertheless, when women living in poverty have attempted to challenge government policies denying them access to adequate food, housing and social assistance, their claims have been rejected on the grounds that social and economic rights are beyond the jurisdiction of human rights commissions and the courts. As a result, low-income women have been left without remedies to the most critical issues of discrimination and inequality which they face. If the guarantee of equality in the CHRA is to have meaning for low-income women, it must enable them to challenge discriminatory denials of their social and economic rights, and to hold governments accountable for the failure to meet international human rights obligations to protect and promote the social and economic rights of women and other disadvantaged groups.

The paper proposes that social and economic rights be included in the CHRA, and worded in a manner consistent with international human rights treaties ratified by Canada. The paper argues that including social and economic rights in the CHRA would not alter the Act’s essential character or purpose but, rather, would build on what has already been recognized, internationally and domestically, as implicit in the guarantee of dignity and equality.

The proposed amendments would recognize the right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support services and other fundamental requirements for security and dignity of the person. Denying

any of these rights based on a prohibited ground of discrimination would be explicitly prohibited, thus clarifying that discrimination complaints ought not to be rejected simply because they engage social and economic rights.

The amended CHRA would also state explicitly that Parliament and the Government of Canada have an obligation to take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the enumerated social and economic rights. A specialized social rights tribunal would be established, to receive and to hear complaints with respect to the “progressive realization” of these rights. The tribunal would have broad remedial powers, but its orders would not come into effect until the House of Commons had sat for at least eight weeks, during which time the order could be overridden by a simple majority vote of Parliament.

Under the proposed amendments to the CHRA, the mandate of the Canadian Human Rights Commission would also be expanded, to include issues of compliance with social and economic rights and with Canada’s international human rights treaty obligations. This would bring the Commission into conformity with the Paris Principles, and in step with partner institutions in other countries, such as South Africa, which have explicit mandates to address social and economic rights issues. Most important, the proposed amendments to the CHRA would allow some of the most pressing and fundamental human rights claims of women to move from the margin to the centre of human rights discourse in Canada, recognizing and affirming the role of women’s social and economic rights claims in enhancing democratic accountability, participation and transparency.

INTRODUCTION

In 1997, on the eve of the 50th anniversary of the *Universal Declaration of Human Rights*,¹ the Canadian Human Rights Commission acknowledged, for the first time, that poverty is a fundamental human rights issue in Canada, inextricably linked with violations of the right to equality guaranteed under the *Canadian Human Rights Act* (CHRA).² As Chief Commissioner Michelle Falardeau-Ramsay stated in her introduction to the Commission's 1997 *Annual Report*:

Experience suggests that it is largely those who are most vulnerable in our society by virtue of the various prohibited grounds of discrimination—for example, women, Aboriginal people or people with disabilities—who are also more likely to be poor. In the case of women, there is in fact a direct link to pay equity, since many of the working poor are women employed in low-wage, undervalued jobs. But even if that were not the case, it is difficult to argue that poverty is not a human rights issue, given the devastating impact it has on people's lives.... The international community has recognized for some time that human rights are indivisible, and that economic and social rights cannot be separated from political, legal or equality rights. It is now time to recognize poverty as a human rights issue here at home as well.³

While the Commission rejected the suggestion that poverty issues are completely beyond its legislated mandate, it called for a review of the narrow scope of human rights protections under the CHRA, asking in particular, “whether the Canadian human rights system is based on a definition of ‘human rights’ which is too restrictive.”⁴ The Commission pointed out that, in comparison to international human rights instruments, Canadian human rights laws and the *Canadian Charter of Rights and Freedoms*⁵ are limited in scope, with only the *Quebec Charter of Human Rights and Freedoms*⁶ referring directly to social and economic rights. In the Commission's assessment: “The impact of fiscal restraint on health, social and educational services—particularly those affecting the most disadvantaged—is beginning to bring home to many Canadians the inescapable link between social and economic security and human rights.”⁷

The Canadian Human Rights Commission is not alone in identifying violations of social and economic rights of women and other disadvantaged groups as one of the most critical equality issues of our time, nor in recommending the inclusion of social and economic rights within federal human rights legislation. This is also a dominant theme in recent reviews by United Nations (UN) human rights treaty-monitoring bodies, including recent UN reports relating to Canada.⁸ It is clear that women's continuing inequality in the social and economic sphere, including the gender and racial dimensions of poverty and homelessness, and the particular barriers women face in access to child care and other support services necessary for equal participation in Canadian society, have not been effectively addressed within the existing Canadian human rights framework. The current review of the CHRA provides a crucial opportunity to respond to the call for explicit recognition of social and

economic rights under the CHRA in order to ensure that federal human rights law better addresses the real underlying issues of women's substantive inequality.

This paper examines the question of whether, and how, social and economic rights can be effectively protected under the CHRA. Chapter 2 reviews the specific findings and recommendations of UN treaty-monitoring bodies relating to Canada's compliance with its international human rights obligations. This is followed by an examination of this issue from a domestic perspective, including the question of why Canada's existing statutory and constitutional human rights guarantees have been ineffective in promoting women's substantive social and economic equality. Finally, the paper considers how new social and economic rights guarantees under the CHRA should be formulated. Appendix A sets out a draft amendment to the CHRA, in order to provide a clear illustration of how the Act can be amended to strengthen and expand social and economic rights protections for women, without weakening existing equality guarantees.

1. THE INTERNATIONAL CONTEXT FOR REFORM OF THE CHRA

Canada's Compliance with Its International Social and Economic Rights Obligations

Over the last year, Canada has undergone its five-year periodic review for compliance with both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁹ and the *International Covenant on Civil and Political Rights* (ICCPR).¹⁰ This follows a 1997 review of Canada's performance under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).¹¹ The three reviews demonstrate an emerging consensus in the international human rights community that the deterioration of social programs and the unequal enjoyment of social and economic rights in Canada represent a profound assault on the equality rights of women and other disadvantaged groups.

In the past, the Human Rights Committee, which oversees the implementation of the ICCPR, has tended to leave poverty issues to the Committee on Economic, Social and Cultural Rights, which is responsible for monitoring performance under the ICESCR. However, in its 1999 evaluation of Canada's compliance with the equality rights provisions of the ICCPR,¹² the Human Rights Committee highlighted the disproportionate effect of poverty on women and the discriminatory effect of social program cuts in Canada. In its concluding observations, the Human Rights Committee stated:

The Committee is concerned that many women have been disproportionately affected by poverty. In particular, the very high poverty rate among single mothers leaves their children without the protection to which they are entitled under the Covenant. While the delegation expressed a strong commitment to address these inequalities in Canadian society, the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups. The Committee recommends a thorough assessment of the impact of recent changes in social programmes on women and that action be undertaken to redress any discriminatory effects of these changes.¹³

The Human Rights Committee also criticized the lack of effective remedies for human rights violations in Canada, recommending that "relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination."¹⁴ It pointed to gaps between protections under the ICCPR and those available under the Canadian Charter and other domestic human rights statutes, recommending "that consideration be given to the establishment of a public body responsible for overseeing implementation of the *Covenant* and for reporting on any deficiencies."¹⁵

When, during oral questioning of the Canadian delegation, the Human Rights Committee asked about the gaps between domestic and international human rights protections, and the lack of domestic mechanisms for reviewing compliance with human rights treaty obligations, the head of the Canadian delegation, the Honourable Hedy Fry, referred to the upcoming

review of the CHRA. Minister Fry stated she would recommend, in the context of that review, that the mandate of the Canadian Human Rights Commission be expanded to include issues of compliance with international human rights treaties ratified by Canada.¹⁶

The discriminatory effects of social program cuts were also a matter of comment in the most recent review of Canada's compliance under CEDAW. In its concluding remarks in 1997, the Committee on the Elimination of Discrimination Against Women expressed concern about the reduction in women's access to health care due to privatization, the insufficient attention paid by governments to the impact of regional and international economic and structural changes on women and "the deepening poverty among women, particularly among single mothers, aggravated by the withdrawal, modification or weakening of social assistance programmes."¹⁷ To address these concerns, the Committee suggested that "the Government address urgently the factors responsible for increasing poverty among women and especially women single parents and that it develop programmes and policies to combat such poverty."¹⁸

The concerns expressed by the Human Rights Committee and by the Committee on the Elimination of Discrimination Against Women were stated in even stronger terms by the Committee on Economic, Social and Cultural Rights in its review of Canada under the ICESCR.¹⁹ In its concluding observations, released in December 1998, the Committee pointed to the particular discriminatory impact on women of measures such as the federal government's repeal of the Canada Assistance Plan (CAP).²⁰ The Committee noted, with "grave concern," that "the repeal of CAP and cuts in social assistance rates, social services and programmes have had a particularly harsh impact on women, in particular single mothers, who are the majority of the poor, the majority of adults receiving social assistance and the majority among users of social programmes."²¹ The Committee also drew attention to the link between poverty and women's ability to escape domestic violence.

The Committee is concerned that the significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles to women escaping domestic violence. Many women are forced, as a result of those obstacles, to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other.²²

Like its findings in 1993, the Committee's 1998 concluding observations received extensive media coverage and were hotly debated in Parliament.²³ The Government argued that the Committee's negative evaluation of Canada's lack of progress in dealing with poverty was belied by Canada's number one ranking under the UN Development Program's Human Development Index from 1993 to 1998. However, as the Committee's assessment makes clear, it is Canada's overall affluence that makes the extent of poverty and homelessness in Canada a violation of international human rights norms.²⁴ And, while the Government's response may have been disingenuous, it is part of a general tendency in Canada to characterize the Committee's concluding observations as a social development review rather

than an assessment of Canada's compliance with its human rights treaty obligations. To fulfil its obligations under the ICESCR, the Canadian government must do more than review its social policy priorities. It must also change federal laws to ensure adequate legal protection against the social and economic rights violations which poverty and homelessness represent, particularly for women.

The Canadian Government's Undertaking to Review Social and Economic Rights Guarantees Under the CHRA

Too little attention has been paid to the Committee on Economic, Social and Cultural Rights' overriding concern, in both 1993 and 1998, about the absence of domestic remedies to violations of social and economic rights. The Committee has repeatedly criticized the tendency, by politicians and courts in Canada, to treat social and economic rights as mere policy objectives of governments rather than as enforceable human rights. One of the Committee's key recommendations to address this concern, in 1993, was that social and economic rights be expressly incorporated into federal and provincial human rights legislation.²⁵

In its list of issues submitted to Canada before its 1998 review, the Committee asked whether the Government of Canada would be "acting on the recommendation of the Canadian Human Rights Commission that the ambit of human rights protections in Canada be expanded to include social and economic rights."²⁶ In answer, the Government stated: "[T]he Government of Canada will consider this recommendation as part of its comprehensive review of the *Canadian Human Rights Act*, which is scheduled to commence shortly" and that it was "inappropriate to make any commitment to amend the legislation without such analysis as well as without consulting with other organizations and interested citizens."²⁷ During oral questioning, the Committee pressed the Canadian delegation to explain the continued failure of the federal government to amend the CHRA, suggesting that the reference to the upcoming review of the Act did not explain why no action had been taken over the five years since the Committee's last review. The Canadian delegation again assured the Committee that the matter would be considered in the upcoming review of the CHRA.²⁸

In its concluding remarks, the Committee noted, as a "positive measure," the "Canadian Human Rights Commission's statement about the inadequate protection and enjoyment of economic and social rights in Canada and its proposal for the inclusion of those rights in legislation, as recommended by the Committee in 1993."²⁹ In its list of recommendations, the Committee repeated its call for reform of Canadian human rights laws.

The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status. Moreover, enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to

vulnerable groups.³⁰

The Obligation to Provide Effective Remedies for Social and Economic Rights Violations

As the Canadian Human Rights Commission has pointed out, Canada's statutory human rights framework has changed little over the last 30 years.³¹ Grounds of discrimination have been added and jurisprudence has evolved, but the underlying presupposition has remained that enforceable "human rights" in the CHRA are limited to protection from discrimination on a number of specific enumerated grounds. Internationally, the human rights movement has been far from static, particularly in the area of social and economic rights. In 1977, when the CHRA was first enacted, the ICESCR had only just come into effect for Canada. There was no effective review mechanism under the ICESCR, and very little understanding of what obligations flowed from it. Still, under the effect of the cold war, the human rights movement tended to bifurcate economic, social and cultural rights from civil and political rights, with virtually no attention to problems of enforcement of the former.

Though the ICESCR still has no optional protocol for a complaint procedure parallel to the ICCPR, the Committee on Economic, Social and Cultural Rights has adopted novel procedures for the incorporation of oral submissions from non-governmental organizations (NGOs) into state party review. The result is that, in the context of the periodic reviews of their compliance with the ICESCR, states are frequently required to respond to documented allegations of non-compliance from NGOs. In contrast to what was previously an "expert review" role, which did not allow for direct participation by those presenting evidence about government non-compliance with the Covenant, the Committee increasingly assumes more of an "adjudicative" role.³² The Committee now assesses the relative merits of arguments and information presented by NGOs and governments, and issues what amount to "findings" with respect to compliance with the Covenant.³³ Thus, the international community has begun to feel more comfortable with the idea of social and economic rights being claimed and adjudicated in the same manner as other human rights.

In 1998, the Committee adopted two general comments that directly address the issue of justiciability and the provision of legal remedies through domestic human rights legislation.³⁴ In General Comment No. 9 on the domestic application of the ICESCR, the Committee rejects the notion that social and economic rights are inherently unsuitable for judicial enforcement. It adopts a rigorous standard that states are required to meet to justify the denial of legal remedies in the social and economic rights area. The Committee asserts that state parties to the ICESCR are required to provide for legal remedies in two ways: through consistent interpretation of domestic law, particularly in the area of equality and non-discrimination, and through the adoption of legislative measures to provide legal remedies for violations of social and economic rights.³⁵

The Committee points out that it is well established in international law that courts and tribunals must interpret and apply domestic law in a manner consistent with a state's international human rights obligations, but this principle of interpretation has had little effect in many countries insofar as social and economic rights are concerned. As the Committee

explains: “There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.”³⁶ This is particularly true of the interpretation and application of non-discrimination and equality rights which, as Shelagh Day and Gwen Brodsky have argued, form an effective bridge between civil rights and social and economic rights.³⁷ As General Comment No. 9 explains:

Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.³⁸

The Committee is careful to leave room for variation from state to state as to how social and economic rights should be protected within domestic legal systems, noting that “the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide.”³⁹ Nevertheless, the Committee lays out three basic principles of compliance, based on the overriding duty to provide effective domestic remedies for social and economic rights violations. First, the means chosen by the state must be adequate to give effect to the rights in the ICESCR. In many cases, this includes judicial enforcement, particularly when it comes to protecting the most vulnerable. As the Committee explains:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁴⁰

To satisfy the non-discrimination provisions of the ICESCR, judicial enforcement is, the Committee asserts, indispensable.⁴¹ Second, protection for social and economic rights should be comparable to, and integrated with, the protection provided for civil and political rights. Where the means used to give effect to the ICESCR “differ significantly” from those used in relation to other human rights treaties, “there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.”⁴² Third, the Committee suggests that direct incorporation of ICESCR rights into domestic law, though not absolutely required, is desirable in order to enable individuals to invoke Covenant rights directly through court action.⁴³

The Committee’s General Comment No. 10, on the role of national human rights institutions in the protection of social and economic rights, flows directly from the principles laid out in General Comment No. 9. It is clearly incompatible with the fundamental principle of the interdependence and indivisibility of all human rights for domestic human rights institutions to

focus solely on civil rights. The Committee notes that, while national human rights institutions “have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights,” this role has too often been neglected. In the Committee’s view, it “is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.”⁴⁴ General Comment No. 10 outlines a number of possible roles for human rights institutions with respect to social and economic rights. These include:

- review legislation and administrative practice for compliance with social and economic rights;
- promote public education and information programs;
- investigate complaints of violations; and
- hold inquiries into the realization of social and economic rights within the country as a whole, or within particular vulnerable constituencies.⁴⁵

The Committee’s general comments—along with the recommendations contained in its concluding observations relating to Canada—put forward a coherent and compelling vision of the role of domestic human rights laws, and the CHRA in particular, in providing appropriate remedies against the social and economic rights violations experienced most systemically by low-income women. As discussed in Chapter 2, the inclusion of social and economic rights under the CHRA is not only necessary to bring Canada into compliance with its treaty obligations under the ICESCR, it is also consistent with the conception of equality which has evolved under federal and provincial human rights law over the last 20 years and, more recently, under the Canadian Charter.

2. THE DOMESTIC CONTEXT FOR REFORM OF THE CHRA

Social and Economic Rights and the Right to Equality

Violations of social and economic rights in Canada are inherently connected to violations of the right to equality. In a country as affluent as ours, the issue is not an inability to guarantee the essential enjoyment of social and economic rights because of limited resources, but rather a failure to address adequately social and economic inequality which denies the enjoyment of these rights to certain groups. The Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women have all underscored the disproportionate impact of social program cuts on women and other disadvantaged groups, and have condemned the discriminatory nature of poverty in Canada. Canada's perplexity at the increasingly harsh criticism from international human rights treaty-monitoring bodies stems, in part, from a lack of understanding that evolving international jurisprudence increasingly emphasizes the links between social and economic rights, and the right to equality. This is reflected in the emphasis the Committee on Economic, Social and Cultural Rights places on equality rights jurisprudence under the Charter and Canadian human rights legislation, and in the fact that the Committee focusses its analysis of compliance with the ICESCR on the situation of "vulnerable groups"—those qualifying for protection under s. 15 of the Charter—assessing how they fare in relation to access to housing, food, health care, education and work, in comparison to the rest of Canadian society.⁴⁶

It is important to understand that the proposal to include social and economic rights in the CHRA is not intended to alter the Act's essential character or purpose. Rather, its objective is to fill out the current approach to the protection of equality and dignity, and to build on what has already been recognized, internationally and domestically, as implicit in that guarantee. For this reason, the Committee's recommendation that the CHRA incorporate social and economic rights goes hand in hand with its insistence that constitutional and statutory guarantees of equality and non-discrimination be interpreted expansively to provide, wherever possible, remedies to violations of social and economic rights.

Recognizing social and economic rights as fundamental components of equality rights is consistent with the evolving equality rights analysis of the Supreme Court of Canada, as well as with its emerging jurisprudence on the role of international law in interpreting the Canadian Charter and human rights legislation. The Supreme Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. It has affirmed, with respect to section 15 of the Charter in particular, that it is the "broadest of all guarantees" which "applies to and supports all other rights."⁴⁷ The idea of equality which is at the core of a purposive approach to the Charter, and which is essential to the Charter's role in implementing international human rights obligations, is not formal but rather substantive equality. As LaForest, J. explains in his decision for the Court in *Eldridge v. British Columbia (Attorney General)*⁴⁸: "the purpose of s. 15(1) of the *Charter* is not only

to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society.”⁴⁹

Equality, as the Court has insisted since its very first decision on the scope of s. 15 in *Andrews v. Law Society of British Columbia*,⁵⁰ is not about same treatment. Rather, the “accommodation of differences...is the essence of true equality.”⁵¹ The Court has held that positive measures may be required to ensure equality, and the right to equality may be breached by omission or failure to act to address the needs of disadvantaged or vulnerable groups. As LaForest, J. declares in *Eldridge*:

...the respondents...maintain that s.15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action...[and] that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits. In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court’s equality jurisprudence.⁵²

In affirming the idea of substantive equality under s. 15, the Court has explicitly acknowledged that it is incorporating an approach to equality that was first developed under Canadian human rights legislation.⁵³ In *Eldridge*, LaForest, J. points out that the idea that equality rights may create positive obligations to address needs related to disadvantage is not new, but is well established under human rights legislation. He notes that the concept of adverse effect discrimination includes the recognition that there is a positive duty on respondents to accommodate the needs of disadvantaged groups. As he puts it: “The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.”⁵⁴ Demands that the CHRA include specific provisions relating to social and economic rights, in order to address the broader patterns of women’s social and economic disadvantage, are thus an extension of the substantive approach to equality developed under human rights legislation.⁵⁵

The Interdependence of Domestic and International Human Rights Law

In addition to the positive developments in the Supreme Court’s approach to equality, the Court has increasingly recognized the importance of international human rights, including social and economic rights, in interpreting the Charter and human rights guarantees. Writing for the majority in *Slaight Communications v. Davidson*,⁵⁶ Chief Justice Dickson cited his earlier assertion, in *Reference Re Public Service Relations Act (Alta)*, that “the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada ratified.”⁵⁷ This “interpretive presumption” was recently reaffirmed in *Baker v. Canada*,⁵⁸ even though the Charter was not directly at issue in the case. Referring to the Court’s decisions in *Slaight*

*Communications*⁵⁹ and *R. v. Keegstra*,⁶⁰ L'Heureux-Dubé, J. asserts, for the majority in *Baker*, that international law is “a critical influence on the interpretation of the scope of the rights included in the *Charter*.”⁶¹ This statement is consistent with her earlier statement in *R. v. Ewanchuk*, that “our *Charter* is the primary vehicle through which international human rights achieve a domestic effect.”⁶²

In addition to reaffirming the importance of international human rights in Charter interpretation, the Court in *Baker* also affirmed, for the first time, that the interpretation and application of administrative law in Canada, whether federal or provincial, must be consistent with international human rights treaties ratified by Canada. This principle will have important implications for the interpretation of human rights legislation, which is directly linked, historically, and in some instances through explicit reference, to international human rights.⁶³

In *Slaight Communications*, the “right to work” under the ICESCR was invoked by the majority of the Court in aid of Charter interpretation. In *Baker*, the “best interests of the child” provisions under the Convention on the Rights of the Child (CRC) were used to interpret the proper exercise of discretion under the federal *Immigration Act*. Although neither of these provisions has a direct counterpart under the Charter, the Court was nevertheless, prepared to consider them in applying the Charter and in interpreting domestic legislation. A decade ago, in considering the ambit of the right to security of the person under s. 7 of the Charter in the *Irwin Toy* case, the Supreme Court held that it would be “precipitous” to rule out at an early stage of Charter interpretation “such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.”⁶⁴ The Court has not since been called on to revisit this issue directly. But with the emergence of the “interpretive presumption” put forward in *Slaight Communications*, the admission that international social and economic rights *could* be included under the Charter has increasingly been taken, at least at the international level, as a statement that they *should*. Otherwise, the Court would be opting for an interpretation of the Charter that would place Canada in breach of its obligations under the ICESCR and other international human rights laws.

In the list of issues the Committee on Economic, Social and Cultural Rights submitted to Canada before its 1998 review, the Committee asked the following question.

In 1993 the Government had informed the Committee that section 7 of the *Charter* at least guaranteed that people are not to be deprived of basic necessities and may be interpreted to include rights under the Covenant, such as rights under article 11 [to an adequate standard of living, including adequate food, clothing and housing].” Is that still the position of all governments in Canada?⁶⁵

The Government responded to the Committee’s question as follows.

The Supreme Court of Canada has stated that section 7 of the *Charter* may be interpreted to include the rights protected under the Covenant (see decision of

Slaight Communications v. Davidson [1989] 1 S.C.R. 1038). The Supreme Court has also held section 7 as guaranteeing that people are not to be deprived of basic necessities (see decision of *Irwin Toy v. A.-G. Québec*, [1989] 1 S.C.R. 927). The Government of Canada is bound by these interpretations of section 7 of the *Charter*.⁶⁶

Thus, as the Government has directly acknowledged,⁶⁷ an approach to the Charter that gives appropriate weight to the social and economic rights of women is an important component of Canada's international human rights undertakings. As L'Heureux-Dubé, J. points out in *Ewanchuk*, two sections of the Charter will be especially important in giving domestic effect to international human rights obligations. "In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity."⁶⁸ These interdependent rights are recognized, as well, as the core values of human rights legislation. As the preface to Ontario's *Human Rights Code* affirms, human rights legislation is based on the "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family" in accordance with the Universal Declaration.⁶⁹

There is a sizable gap, however, between the conceptual approach to the interdependence of Charter rights, those under human rights legislation and international human rights advocated by the Supreme Court, and the actual approach of lower courts and domestic human rights bodies to poverty issues confronting women in Canada. As the chair of the Panel appointed to review the CHRA, the Honourable Mr. Justice Gérard V. LaForest, has written:

Increasingly, through general conventions and treaties, the international community is creating international institutions and norms governing transnational activities and concerns. But these initiatives cannot be successful unless these international norms are applied with sophistication and understanding by the various national decision-makers before whom they are invoked. Unless these norms are integrated into the various national governmental processes, the rule of law cannot expand to adequately protect individuals throughout the world.⁷⁰

When women in Canada have advanced claims to the equal enjoyment of social and economic rights, based on the Charter or on human rights legislation, international norms have not been applied with "sophistication and understanding." Rather, they have been entirely ignored.

The Failure to Recognize Women's Social and Economic Rights

While the Supreme Court has established that equality analysis should be "effects based," have a strong remedial component, be oriented toward alleviating disadvantage and recognize that discrimination may result from inaction, equality rights have failed low-income women when they have tried to apply these rights to the most pressing issues of discrimination and inequality they face—those related to poverty. Canadian courts have not been prepared to recognize, either under the Charter or under human rights legislation, a legitimate judicial role

in protecting the equal enjoyment of women's social and economic rights. Instead, Canadian lower courts have relied on what the Committee on Economic, Social and Cultural Rights has condemned as the "rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts."⁷¹ In its most recent concluding observations, the Committee described the impact of this approach on the protection of women's social and economic rights in Canada.

The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the *Charter* which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.⁷²

The Committee went on to criticize the interpretive stance of Canadian lower courts vis-à-vis the *Charter*.

The Committee is deeply concerned at the information that provincial courts in Canada have routinely opted for an interpretation of the *Charter* which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the *Charter* can be interpreted so as to protect these rights.⁷³

It is impossible, in the context of this paper, to describe in detail all the cases to which the Committee refers. One case, however, loomed large in the Committee's review and merits particular attention. In *Masse v. Ontario*,⁷⁴ 12 Ontario social assistance recipients, including seven sole support mothers, asked the Ontario courts to strike down a 21 percent cut in provincial social assistance rates—a reduction which, three years later, the Committee on Economic, Social and Cultural Rights found to have had "a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger."⁷⁵

The Ontario Court, General Division, did not disagree with this assessment of the impact of the provincial welfare rate cuts. The Court heard uncontroverted evidence that the cuts would force at least 67,000 single mothers and their children from their homes, and would cause significant increases in hunger, particularly among single mothers.⁷⁶ Corbett, J. described the effects of the rate cut on the applicants who were single mothers, as follows.

O'Sullivan, Monnell, Panzuto, Atkins, Gibbons, Morin and Grimes are single parents who fear losing their existing accommodation, and the deprivations associated with lower income such as less money for food, clothing and educational needs. Some fear losing custody of their children or being forced to return to an abusive marriage as a result of the reductions.... This brief

overview does not sufficiently capture the extent of the effects of the reductions on these applicants and their children. The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of social assistance and their dependants will suffer in some way from the reduction in assistance. Many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many may become homeless.⁷⁷

There is no doubt that the evidence accepted by the Court in *Masse* demonstrated a clear violation of the ICESCR, the ICCPR, CEDAW and the CRC, both in respect of the denial of the substantive right to an adequate standard of living under Article 11 of the ICESCR and Article 27 of the CRC, and in terms of the discriminatory burden of the proposed cuts on women and children, in violation of the non-discrimination guarantees in all four covenants.⁷⁸ The applicants in *Masse* asked the Court to interpret their rights to security of the person and to equality under the Charter in light of Canada's international human rights obligations. They referred the Court to the 1993 concluding observations of the Committee on Economic, Social and Cultural Rights, pointing to the recommendation that Canadian courts adopt an expansive interpretation of the rights in the Charter "so as to provide appropriate remedies to violations of social and economic rights;"⁷⁹ that greater attention be paid by governments to problems of poverty and homelessness, particularly among single mothers; and that social assistance rates be increased to a level which would guarantee the rights in article 11 of the ICESCR to adequate food, clothing and housing.⁸⁰ In its decision rejecting the applicants' Charter claims, the Court simply ignored international human rights law, including Canada's specific obligations under the ICESCR, and relied on the principle that social and economic rights are unenforceable by the courts. O'Brien, J. asserted that "much economic and social policy is simply beyond the institutional competence of the courts."⁸¹ Similarly, O'Driscoll, J., in a separate concurring judgment, rejected the applicants' claims on the basis that the court has no jurisdiction "to second guess policy/political decisions,"⁸² quoting from the United States Supreme Court in *Dandridge v. Williams* that "the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court."⁸³

Low-income women elsewhere in Canada who have attempted to rely on the Charter's guarantee of equality and security of the person, or guarantees under human rights legislation, have encountered judicial responses similar to those in *Masse*. Issues related to social and economic rights, even where they intersect clearly with issues of equality or security of the person, have been found by the courts to be outside the ambit of the Charter or human rights protections.⁸⁴ For example, in Nova Scotia, Faye Conrad challenged the denial of interim assistance to cover basic necessities of food and housing for herself and her child, while an allegation that she had been living with a man was investigated. The Nova Scotia Court of Appeal held that the Charter cannot provide protection of economic interests.⁸⁵ In New Brunswick, when Jeannine Godin challenged the denial of legal aid in child protection proceedings, the New Brunswick Court of Appeal ruled that "the provision of domestic legal aid is a legislative function and not one for determination by the courts."⁸⁶

In Ontario, Elizabeth Wiebe relied on her rights under provincial human rights legislation to challenge the refusal by local welfare authorities to provide any emergency assistance for motel accommodation when her family was forced to live in a garage. She and her husband subsequently had to relinquish voluntarily four of their children to temporary foster care. In her claim,⁸⁷ Ms. Wiebe asserted that municipal and provincial governments had a duty to take positive measures to address the needs of large families relying on social assistance. She asked that, in exercising its discretionary power to dismiss complaints or refer them to a board of inquiry, the Ontario Human Rights Commission consider Canada's recognition of the right to housing in international law. The Commission dismissed Ms. Wiebe's complaint, seven years after it was filed, after being advised by the investigating officer that the issues involved did not appear to fall within the jurisdiction of the Commission.⁸⁸

Also in Ontario, Debbie Clark, a single mother of a disabled child, was unable to pay a \$312 utility deposit, which municipal welfare authorities would not cover. Without the deposit, her hydro service would be disconnected. She challenged the deposit requirement under ss 7 and 15 of the Charter, relying, in part, on her right to adequate housing under the ICESCR. In dismissing her s. 7 arguments, the Ontario Court General Division held that "This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts...."⁸⁹ With regard to her s. 15 claim, the Court concluded: "No incursion on fundamental social values has been shown by virtue of what is simply a policy by a utility to protect against the risk of non-payment by certain customers."⁹⁰

In Quebec, Louise Gosselin challenged the reduction of her welfare entitlement to one third of the amount that had been established as required to meet basic requirements.⁹¹ In her claim, Ms. Gosselin asserted that she could not possibly afford housing and other necessities on the \$170/month provided to recipients under 30 years of age under the Quebec social assistance regime and that, as a consequence, she was hungry and homeless for a time and agreed to live in an intimate relationship with a man she did not wish to live with, in exchange for having a place to live and food to eat. In dismissing her claim under the Canadian Charter and the Quebec *Charter of Human Rights and Freedoms*, the Quebec Superior Court held that:

The Charter is not an obstacle to parliamentary sovereignty...if positive obligations were to be inferred, they would be those of the courts which, with or without approval, would ultimately determine the choices of the political order.... But this role has not been given to the judiciary under the Charter. The courts cannot substitute their judgment in social and economic matters for that of legislative bodies for the purpose of judging such matters.
[translation].⁹²

A majority of the Quebec Court of Appeal recently upheld the view that social and economic rights are not included under the Canadian Charter, and the courts are not empowered by the

Quebec Charter to review the adequacy of provincial social security measures. In Baudouin, J.'s view: "The question resides with the legislative body and is strictly political, not judicial" [translation].⁹³

Judicial Deference and Social and Economic Rights

In assessing the appropriate role for tribunals and courts in the social and economic realm, it is important to acknowledge that women living in poverty go to the courts and to human rights commissions and tribunals with social and economic rights claims for the same reasons women have gone there in the past with other types of human rights cases. It is not out of any naïveté about how judges are likely to react to their claims, nor of any resolve to abandon democratic processes. It is because low-income women see these issues as human rights issues, and only courts and tribunals have the power to address them as such. In the case of social and economic rights claims, however, the class and gender bias of the courts which has always been encountered by women pursuing human rights claims will be invoked by some, not as a reason to fight even harder for recognition of these rights, but as a reason for continuing to deny them. The suggestion that social and economic rights should be included in the CHRA is likely to provoke the same objections as are raised in relation to the Canadian Charter: that it would give inappropriate power to human rights tribunals and, ultimately, to an unelected judiciary. Like the judges in the cases described above, some will argue that giving courts or tribunals the power to meddle in social and economic policy is a profound assault on democracy and parliamentary sovereignty.⁹⁴ These concerns have historically prevented the development of a united front, even among traditional allies for social justice, in favour of protecting social and economic rights in Canadian law.⁹⁵

The limited experience of judges in relation to the poverty issues of low-income women poses a significant obstacle to the advancement of social and economic rights claims in Canada. Concerns about preserving the democratic sovereignty of Parliament are also legitimate ones. Including social and economic rights in human rights legislation does not, however, give courts and tribunals unrestricted authority to determine social policy. Neither does it send a message to tribunals and courts that they should abandon their concerns about judicial deference.⁹⁶ Rather, the inclusion of social and economic rights in human rights legislation will provide much needed guidance to courts and tribunals about when it is appropriate for them to intervene in matters of social and economic policy. Existing equality jurisprudence makes it clear that the courts have the authority and responsibility, both under human rights legislation and the Charter, to intervene on behalf of disadvantaged groups to ensure that governments take necessary positive measures to ensure equality.⁹⁷ The question is not whether courts and human rights tribunals should have a role in these areas, but rather, in what circumstances should they intervene and to what purpose?

An Ekos Research focus group study, commissioned by the federal government to determine public attitudes toward child poverty reported the following.

Somewhat surprisingly, moral explanatory accounts of poverty were more common and powerful perceived causes of poverty: lack of responsibility, effort or family skills were universally cited explanations.... Most secure

participants see children as deserving and their parents as less so (possibly unwitting agents of their children's misfortune)... Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of SARs [social assistance recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.⁹⁸

Providing a role for human rights tribunals and courts in adjudicating and enforcing social and economic rights under human rights legislation is necessary to address many of the discriminatory consequences that flow from these attitudes. It is necessary to institutionalize domestic structures for adjudicating and enforcing these rights for the same reasons that it is necessary to adjudicate and enforce the rights currently protected in federal and provincial human rights legislation. The stereotypes and hostility toward poor women, (the vast majority of the undeserving "parents" described in the Ekos Research memorandum) and their lack of an effective political voice, invariably inform legislative drafting and decision making and, more fundamentally, decisions about the allocation of government resources.

The *Masse* case exemplifies what is at stake in the debate whether to extend domestic human rights protections to include social and economic rights. Low-income women in Ontario have not abandoned the democratic process. They have done everything they can through political and other means to address the increasingly hostile political climate they face in Ontario and elsewhere in Canada. The applicants in *Masse* went to court to argue that the decision to cut their welfare rates was not the result of any reasonable legislative consideration of competing resources, but was the result of governments catering to the public prejudices described in the Ekos Research memorandum. Evidence was clear that the cuts would cause massive increases in homelessness, in some instances, as noted by the Human Rights Committee, leading to death. Had the applicants in *Masse* been successful in their claim, much of the subsequent hardship and destruction of families could have been prevented, and the public would have been spared the long-term costs of poverty caused by the cuts.

The debate about the "justiciability" of social and economic rights is not simply an academic one. It is an issue with real consequences for low-income women, just as the absence of legal remedies to discrimination against pregnant women, domestic violence or harassment, and multiple discrimination had, and continues to have, very real consequences for women. Concerns about the composition, attitudes and institutional competence of the judiciary are well founded. However, they no more justify denying women recourse against violations of their fundamental social and economic rights, than they would justify denying women judicial remedies for other forms of discrimination and violence that they face. Similarly, concerns about legislative sovereignty are no more or less legitimate in the area of social and economic rights than in other areas in which women's human rights are violated. As the Supreme Court framed the question in *Vriend*,⁹⁹ how can a human rights regime which deprives low-income women of the human rights protections they are most in need of be consonant with Charter equality rights principles?

In *Andrews*, the Supreme Court drew on the reasoning of John Hart Ely to describe why, in a democratic system, it is the role of the courts to enforce equality rights. As Ely explained: “The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts.”¹⁰⁰ Canadian courts continue to struggle with the question of how to decide which of the neglected “needs and interests” warrant judicial intervention, rather than deference. To date, the needs and interests of women in poverty have been ignored by human rights commissions, tribunals and courts. In our view, inclusion of social and economic rights in the CHRA will provide important guidance on how to balance judicial deference with the need to attend to the most pressing issues of inequality in the social and economic domain. Formal recognition of social and economic rights under the CHRA will, in short, ensure that the federal human rights regime can begin to respond to the real underlying issues of women’s substantive inequality.

3. SOCIAL RIGHTS AND EQUALITY RIGHTS: TOWARD AN INTEGRATED APPROACH IN THE CHRA

The Movement Toward Domestic Protection of Social and Economic Rights

The historic neglect of social and economic rights in many countries, particularly of enforcement and legal remedies, has been based on the assumption that courts and tribunals lack the competence and the institutional legitimacy to review and provide remedies for governments' failures in the area of social and economic policy. In recent years, however, there has been a growing consensus within the human rights community that social and economic rights violations should be subject to improved complaints and adjudication procedures.¹⁰¹ While some aspects of social and economic rights may not lend themselves to the same types of judicial remedies as civil rights violations, it is now widely recognized that there is an important role for courts, tribunals and human rights commissions in this area. The clear trend, internationally, is toward improved enforcement and petition procedures for social and economic rights.¹⁰²

The 40-member Council of Europe, for example, in which Canada holds "observer" status, has recently adopted the revised *European Social Charter*, which came into force on July 1, 1999.¹⁰³ The revised Charter includes rights such as the right to decent housing, "protection against poverty and social exclusion" and "the right of mothers to social protection."¹⁰⁴ These rights are now subject to a complaints procedure through which non-governmental organizations may file complaints against governments and have them considered by a committee of independent experts.¹⁰⁵

Canada has developed a particularly active partnership with South Africa in the area of human rights since the establishment of parliamentary democracy there. South Africa has a broad range of social and economic rights in its final constitution including the right "to have access to" "adequate housing," "health care services, including reproductive health care," "sufficient food and water" and "social security, including, if they are unable to support themselves and their dependents, appropriate social assistance."¹⁰⁶ Some components of these rights are subject to limitations related to available resources, but all aspects are subject to judicial review.¹⁰⁷ In the language of the final constitution, the state must take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."¹⁰⁸ In some circumstances, it may also be possible to pursue social and economic rights claims against private actors.¹⁰⁹

The South African Human Rights Commission has a broad mandate to promote and enforce all human rights, and to ensure compliance with international human rights treaties ratified by South Africa.¹¹⁰ The Commission has been given a special constitutional responsibility with respect to social and economic rights. Each year, it must "require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."¹¹¹

In light of initiatives in South Africa and elsewhere, it is evident that Canada risks falling seriously behind in the domestic protection afforded to internationally recognized human rights. With the exception of the United States, which has remained staunchly opposed to social and economic rights, the trend among Canada's international partners has been to develop improved social and economic rights guarantees.¹¹² It is now relatively rare for a country to have no domestic recognition of social and economic rights, either through the application of international treaties in domestic law or through constitutional or human rights provisions which refer to social and economic rights.¹¹³ It would be a tragically missed opportunity if the current review of the CHRA, which is intended to carry the federal human rights regime forward into the 21st century, failed to deal with the absence of social and economic rights protections in Canada.

Why the CHRA Is the Appropriate Place to Begin in Canada

Adding social and economic rights to the CHRA would not provide a remedy for all the social and economic rights violations faced by women in Canada. As noted earlier, the Committee on Economic, Social and Cultural Rights has recommended the inclusion of social and economic rights in both provincial and federal human rights legislation. Indeed, many of the most important social rights claims of women fall within areas of provincial jurisdiction. And, inclusion of social and economic rights in human rights legislation is itself only part of the solution. In addition to incorporating social and economic rights in human rights statutes, the Committee has recommended a more expansive interpretation of Charter rights; a shared cost program for social assistance which restores a legally enforceable right to adequate financial assistance; and the protection of social and economic rights through the social union framework.¹¹⁴ Thus, the incorporation of social and economic rights in the CHRA would represent only a partial fulfillment of Canada's overall obligation, under the ICESCR, to integrate social and economic rights into the domestic legal framework.

For a number of reasons, the CHRA is an ideal place to start the process of developing an approach to human rights in Canada that is more consistent with our international obligations and more responsive to the needs and human rights claims of Canada's most disadvantaged constituencies, particularly low-income women. First, including social and economic rights within the CHRA affirms their inherent connection with equality rights. Such a reform will encourage an interdependent approach to equality and social and economic rights in other areas, such as under the Charter and provincial human rights legislation. Formal recognition of the interdependence of equality and social and economic rights will focus social and economic rights challenges on the most critical issues of disadvantage for women, and on their inherent connection with women's equality. While the protection of social and economic rights through federal-provincial/territorial agreements is also important, such agreements are less likely to situate social and economic rights squarely within an equality rights framework.

As noted above, the Supreme Court of Canada has taken significant guidance from human rights tribunals on the proper approach to equality. One of the difficulties in advancing social rights claims under the Charter has been the lack of human rights jurisprudence to guide the

courts on applying equality rights in a manner consistent with social and economic rights. Including social and economic rights in the CHRA will promote the development of an equality jurisprudence that can be carried over to Charter claims within the social and economic sphere.

Second, including social and economic rights in the CHRA will encourage provincial human rights commissions and tribunals to address more effectively the social and economic rights claims of women and other disadvantaged groups under existing provincial human rights legislation. A dominant theme at the most recent meeting of the Canadian Association of Statutory Human Rights Agencies was that all human rights commissions in Canada should be devoting more attention to issues of poverty and social and economic rights.¹¹⁵ The Quebec Commission has an express mandate to address social and economic rights under the Quebec Charter.¹¹⁶ Other commissions have the ability to address poverty issues, at least insofar as they intersect with anti-discrimination guarantees and, under some provincial codes, with protection against discrimination based on receipt of public assistance, source of income or social condition.¹¹⁷ Considerable work can therefore be done by all human rights commissions to develop policies on the positive measures required to ensure equality for social assistance recipients, single mothers and low-income women. Providing a clear mandate under the CHRA with respect to social and economic rights would promote such a collective effort.

Third, including social and economic rights in the CHRA as rights, subject to the complaints and adjudication procedure under the Act, will ensure they are not, in the words of the Committee on Economic, Social and Cultural Rights, “downgraded to principles and objectives.”¹¹⁸ The latter approach is more likely to prevail if social and economic rights are recognized only under federal–provincial/territorial agreements. As the repeal of CAP has shown, there is already a tendency in Canada to replace enforceable social program entitlements with unenforceable “shared principles and objectives.”¹¹⁹ This trend,¹²⁰ which has a particularly harmful impact on women,¹²¹ would be reversed by incorporating social and economic rights into the CHRA.

Fourth, a procedure for claiming social and economic rights must respond to the needs of the most disadvantaged members of society. Human rights tribunals are more accessible, less expensive and less tied to legal procedures than are the courts. Advocates before human rights tribunals do not need to be lawyers, and tribunal members can be chosen for their expertise in human rights, without the requirement that they have formal legal training or accreditation. Women of colour, women with disabilities and other members of equality-seeking groups are better represented on human rights tribunals than on courts. Human rights tribunals will, therefore, provide a more accessible and responsive forum for the consideration of social and economic rights claims, and the development of a social and economic rights jurisprudence, particularly in the early stages of their evolution.

Fifth, the Canadian Human Rights Commission is Canada’s “national human rights institution,” with corresponding responsibilities and obligations.¹²² The fact that the Commission’s mandate has historically been restricted to non-discrimination rights is no

defence for a failure to establish a national human rights institution in conformity with international norms. In 1991, a series of principles establishing minimum standards for national human rights institutions was adopted by a UN-sponsored meeting of representatives of national human rights institutions in Paris. The Paris Principles were subsequently endorsed by the United Nations Human Rights Commission and the General Assembly, including Canada.¹²³ The Paris Principles provide that a national human rights institution shall have “as broad a mandate as possible” with particular responsibility “to promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.”¹²⁴ Including social and economic rights in the CHRA, and expanding the mandate of the Canadian Human Rights Commission, is, therefore, necessary if the Canadian Human Rights Commission is to conform with the Paris Principles, as well as with the requirements of the ICESCR, as outlined in General Comment No. 10 with respect to national human rights institutions.¹²⁵

Sixth, expanding the ambit of the CHRA and the role of the Canadian Human Rights Commission and Tribunal would ensure a better integration of domestic and international human rights review procedures, and a more coherent domestic response to the concerns of international human rights treaty-monitoring bodies. The Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the Human Rights Committee have identified a number of critical issues of discrimination against social assistance recipients and low-income women in Canada.¹²⁶ These include:

- restricted access to civil legal aid;¹²⁷
- the claw back of the National Child Benefit from social assistance recipients;¹²⁸
- minimum income criteria, which disqualify low-income women and social assistance recipients from rental housing and mortgages;¹²⁹
- workfare and the denial of the protections of labour relations law to workfare participants;¹³⁰
- direct payment of social assistance to landlords;¹³¹ and
- the damaging effect of welfare rate cuts,¹³² including on access to housing.¹³³

While only some of these issues fall squarely within federal jurisdiction, most engage the federal government at least as a joint actor. The Canadian Human Rights Commission could, with the appropriate mandate, encourage joint responses by federal, provincial and territorial human rights commissions to the concerns of international treaty-monitoring bodies. Some of the issues identified by the UN committees have been the subject of domestic human rights complaints and tribunal rulings. However, there has been no coherent response by Canadian human rights commissions regarding review and petition procedures at the international level. Human rights tribunals in Canada have generally ignored the fact that many of the issues

raised in the poverty-related claims brought before them have also been the subject of concern at the international level.¹³⁴

Seventh, adding social and economic rights to the CHRA will couple legal remedies for rights violations with institutional mechanisms for supporting and promoting these rights. Through its monitoring, investigation and education functions under the CHRA, the Canadian Human Rights Commission can provide a degree of institutional support that does not exist in the case of social and economic rights under federal–provincial/territorial agreements or in relation to the Charter. This institutional support will be particularly important at the early stages of integrating social and economic rights into Canadian law. As noted above, social and economic rights violations are inherently connected to discriminatory attitudes toward poor people, and toward poor women in particular. Promoting compliance with social and economic rights guarantees thus requires promotion of public attitudes which respect to the dignity and equality of people living in poverty, and public education campaigns to combat stereotypes and prejudice against low-income women. These are the traditional roles of human rights commissions. It is a significant advantage that the Canadian Human Rights Commission has recognized the importance of furthering protection for social and economic rights. The current chief commissioner has shown a strong interest in this area¹³⁵ and would be committed to initiating the necessary institutional transformations required to make the Commission effective.

Finally, while it is true that many social and economic rights issues fall within provincial jurisdiction, the CHRA is the appropriate place to begin to break down the jurisdictional divides that have become an increasingly serious obstacle to ensuring compliance with social and economic rights in Canada. The CHRA is the legislative statement of what are deemed to be the most fundamental human rights in Canada. The fact that housing, health services and income assistance fall primarily within provincial jurisdiction does not absolve the federal government of responsibility for violations of social and economic rights in these areas. There is no reason for our national human rights legislation to exclude rights to housing, health care and an adequate standard of living. Complaints and legal remedies to social and economic rights violations under the CHRA will, of course, be limited to areas in which the federal government is constitutionally permitted to act. Section 36 of the *Constitution Act, 1982*, makes it clear that federal and provincial governments both have a responsibility to ensure the equal enjoyment of social and economic rights in Canada, and the courts have held that the federal government is within its jurisdiction when it establishes enforceable standards in cost-shared social programs within provincial jurisdiction.¹³⁶ Increasingly, social and economic policy is developed jointly by federal, provincial and territorial governments through such bodies as the Federal/Provincial/Territorial Council. Any coherent approach to promoting and protecting social and economic rights in Canada will need to hold the federal government accountable to human rights standards in joint federal–provincial/territorial undertakings. Including social and economic rights under the CHRA will ensure that this federal responsibility is no longer ignored.

Including Social and Economic Rights in the CHRA

The foregoing discussion outlines the reasons why the CHRA is the appropriate place to

begin to provide effective protection for social and economic rights in Canada. In this part of the paper we put forward a concrete proposal for doing so. First, we identify the substantive social and economic rights which must be included in the CHRA. Then, we explain how new social and economic rights guarantees would relate to existing anti-discrimination provisions under the CHRA. We discuss the issue of defences to social and economic rights claims based on cost and other factors, and outline the specific obligations of Parliament and the federal government with respect to the implementation of social and economic rights. We go on to discuss the impact of the inclusion of social and economic rights under the CHRA on the interpretation of other federal laws and the Charter. We end by describing recommended modifications to the functions and responsibilities of the Canadian Human Rights Commission, and recommended changes to the role of the Canadian Human Rights Tribunal. At the outset of each section, model amendments to the CHRA are set out to provide a clear illustration of the proposed changes. The model social and economic rights amendment is reproduced in full in Appendix A.

What Social and Economic Rights Should Be Included in the CHRA?

Rights Guaranteed

1. (1) Everyone has a right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support services and other fundamental requirements for security and dignity of the person.

(2) These rights shall be interpreted and applied in a manner consistent with Canada's human rights treaty obligations and the fundamental value of promoting equality and alleviating social and economic disadvantage.

Any statement of social and economic rights under the CHRA should reflect and reiterate the fundamental social and economic rights recognized under international human rights agreements and treaties ratified by Canada. Express incorporation of these rights in the CHRA will:

- ensure better integration of domestic and international human rights commitments;
- achieve a significant measure of compliance with Canada's obligation to provide effective remedies for social and economic rights violations; and
- enable the Canadian Human Rights Commission, the Human Rights Tribunal and the courts to draw on international sources for guidance on the content and meaning of these rights.

In particular, the CHRA should expressly reaffirm the social and economic rights guarantees contained in the Universal Declaration,¹³⁷ adopted by the members of the UN General Assembly, including Canada, in 1948;¹³⁸ the ICESCR,¹³⁹ ratified by Canada, after lengthy discussions with the provinces, in 1976;¹⁴⁰ CEDAW,¹⁴¹ ratified by Canada in 1982;¹⁴² and the CRC,¹⁴³ ratified by Canada in 1992.¹⁴⁴ At a minimum, the CHRA should, therefore, guarantee a right to adequate food, clothing and housing, as well as a right to health care, education,

social security and employment which is freely chosen. For women, it is also imperative that a right to child care and to social support services be expressly recognized, in view of the barriers which the lack of these services create for women's access to education, employment and economic equality.

The proposed wording of the statement of social and economic rights under the CHRA is similar to the language of the ICESCR. Thus, useful guidance on the legal scope and content of these rights can be found in the general comments adopted by the Committee on Economic, Social and Cultural Rights. The general comments describe the content of specific rights, such as the right to adequate housing¹⁴⁵ and the right to food;¹⁴⁶ the obligations with respect to particular groups, such as persons with disabilities¹⁴⁷ and older persons,¹⁴⁸ and the general nature of state party obligations, particularly with respect to the provision of legal remedies and the mandate of the national human rights institution.¹⁴⁹

It is clear from the Committee's jurisprudence that the government's legislative and regulatory role is of paramount importance in giving effect to social and economic rights. Guaranteeing "the right to adequate housing," for example, does not require the state to provide universal housing.¹⁵⁰ In the Canadian context, the Committee's review of compliance with the right to housing has focussed not simply on the federal government's role in funding social housing programs, but also on the duty to ensure disadvantaged groups have access to housing in the private sphere: to prohibit discrimination in the rental market, to ensure adequate incomes and shelter allowances, to protect security of tenure, to better regulate rental housing conversions, and to provide support services for persons with disabilities.¹⁵¹ To correct any notion that the state is obliged to be the primary provider with respect to social and economic rights, the South African Constitution adds the phrase "access to" before a number of substantive rights, such as the right to housing and the right to food. Given the historic approach of Canadian courts in this area, however, there is a risk the term "access" could be used to place undue limits on the substantive content of social and economic rights, and to restrict their justiciable aspect to their "negative" components.¹⁵² The unqualified wording of the ICESCR is therefore preferred.

Prohibiting Discrimination in Relation to Social and Economic Rights

Discriminatory Practice

2. It is a discriminatory practice to deny a right under s. 1 based on a prohibited ground of discrimination, or on a combination of prohibited grounds, including based on social condition.

3. A discriminatory practice under s. 2 may be the subject of a complaint and of an order under Part III of this Act, whether or not it may also be the subject of a complaint and of an order under this Part.

The mutually reinforcing relationship between social and economic rights and existing equality provisions under the CHRA should be clearly drawn. In keeping with the approach under the ICESCR and the CEDAW¹⁵³ (which explicitly recognize the fundamental interrelationship between social and economic rights and the equality rights of women and other disadvantaged groups), the CHRA should state expressly that social and economic

rights are guaranteed without discrimination, including without discrimination based on sex and on social condition, among other grounds.¹⁵⁴

It is arguable that a discriminatory denial of a social and economic right, or any other adverse differential treatment in relation to such a right, is already prohibited under the anti-discrimination provisions of the CHRA, where the respondent falls within the jurisdiction of the Act. Section 5 of the CHRA states that:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

Section 6 of the CHRA establishes a similar prohibition in relation to “the provision of...residential accommodation,” and s. 7, in relation to employment. The phrase “services...available to the general public” has been interpreted by human rights tribunals¹⁵⁵ and courts¹⁵⁶ as including government programs and services. Section 5 of the CHRA, therefore, already prohibits the federal government from discriminating on the basis of sex or other enumerated grounds in the provision of federal social programs and services,¹⁵⁷ and in the application of federal legislation generally.¹⁵⁸ Section 6 of the CHRA prohibits discrimination by the federal government in the provision of housing,¹⁵⁹ and s. 7 prohibits discriminatory federal government employment practices.¹⁶⁰ Federally regulated industries and other public and private entities falling within the jurisdiction of the Canadian Human Rights Commission are also prohibited from engaging in discriminatory practices in the provision of goods, services, facilities, accommodation and employment.¹⁶¹ So, for example, a discriminatory housing-related policy adopted by Canada Mortgage and Housing Corporation would be subject to review under s. 5, as would discrimination in the provision of health services within federal penitentiaries or other federal institutions. Similarly, a discriminatory practice under s. 7 of the CHRA would include discrimination by federally regulated industries in the provision of child care or housing benefits to their employees.

To ensure that existing equality guarantees under the CHRA effectively apply in the area of social and economic rights, the CHRA should state expressly that a denial of a social and economic right on a prohibited ground of discrimination constitutes a discriminatory practice within the meaning of the Act. Victims of a discriminatory denial of a social and economic right or of adverse treatment in relation to such a right, should have a clearly articulated right to pursue a complaint through the procedures set out under Part III of the CHRA, where such a complaint falls within the jurisdiction of the Act. Defining a discriminatory practice within the CHRA as including a discriminatory denial of a social or economic right would avoid the situation described in the previous section of the paper, of a discrimination complaint being dismissed because it raised a poverty-related issue linked with the denial of a

social and economic right.¹⁶²

Like the existing prohibitions under Part I of the Act, the prohibition against discrimination in relation to social and economic rights must apply to practices that are both directly and systemically discriminatory. Adverse effect analysis in relation to social and economic rights will allow tribunals to assess whether policies or practices, including acts of “omission,” result in the denial of a social and economic right to a group identified by a prohibited ground of discrimination. As LaForest, J. noted in *Eldridge*, with respect to the failure to provide publicly funded interpretation services: “the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone.”¹⁶³ Such an analysis, applied to the enjoyment of social and economic rights generally, incorporates the approach to violations of social and economic rights, developed at the international level, which places a particular priority on obligations toward the most disadvantaged. Thus, a failure to address adequately the needs of vulnerable groups could be challenged as a form of adverse effect discrimination in relation to the enjoyment of social and economic rights.

In addition, for a prohibition against discrimination in relation to social and economic rights to be effective, it is imperative that “social condition” be added to the CHRA as a prohibited ground of discrimination. While a full review of this issue is beyond the scope of this paper,¹⁶⁴ it is clear that the omission of social condition from the proscribed grounds of discrimination under the CHRA leaves the legislation relatively powerless to address the kinds of discriminatory attitudes described in the Ekos Research memorandum,¹⁶⁵ and the exclusionary results of policies and practices that fail to address inequalities resulting from poverty. The Committee on Economic, Social and Cultural Rights has made it clear it regards protection from discrimination based on receipt of public assistance or low income as falling within the rubric of discrimination on the basis of “social origin, property, birth or other status” which Canada is obliged to prohibit in domestic legislation. The Committee has recommended the inclusion of “social or economic status” as a prohibited ground of discrimination in the CHRA.¹⁶⁶

For similar reasons, it is important that the *Indian Act* exemption under s. 67 of the CHRA not apply in the area of social and economic rights.¹⁶⁷ In its concluding observations in 1998, the Committee on Economic, Social and Cultural Rights made particular note of the situation of Aboriginal peoples in relation to the equal enjoyment of ICESCR rights. The Committee stated:

The Committee is greatly concerned at the gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people. In particular, the Committee is deeply concerned at the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among

youth in the Aboriginal communities. Another concern is the failure to provide safe and adequate drinking water to Aboriginal communities on reserves. The delegation of the State Party conceded that almost a quarter of Aboriginal household dwellings require major repairs for lack of basic amenities.¹⁶⁸

In its 1999 concluding observations, the Human Rights Committee was equally critical of Canada's performance under the ICCPR, noting that "as the State party acknowledged," the situation of Aboriginal peoples remains "the most pressing human rights issue facing Canadians."¹⁶⁹ While the general issue of the applicability of the CHRA to the *Indian Act* is beyond the scope of this paper, it is clear that Aboriginal women are among the most socially and economically disadvantaged groups in Canadian society.¹⁷⁰ Aboriginal women and their families, whether living on or off reserve, experience severe and systemic deprivations of the most basic social and economic rights including, as the Committee on Economic, Social and Cultural Rights observed, the right to safe drinking water and to adequate housing. Social and economic rights guarantees under the CHRA must prohibit discrimination against Aboriginal people to the same extent as against other disadvantaged groups in Canadian society, irrespective of whether that discrimination results from the application of the federal *Indian Act*, or from other laws or policies.

The proposed prohibition against discriminatory denials or adverse treatment in relation to social and economic rights will also allow certain types of complaints against private respondents. The amendment would not, in fact, create an entirely new ground for complaints, since discriminatory practices are already prohibited under the CHRA. It would, however, change the focus of some inquiries to highlight social and economic rights as they intersect with discrimination issues, and it would require an assessment of the nature of the obligations imposed on respondents in light of the importance of social and economic rights. For example, the bank policy which disqualifies mortgage applicants paying more than 30 percent of their income toward essential housing costs, could be challenged under the current provisions of the CHRA for its discriminatory impact on women, particularly single mothers who have lower incomes and must pay more for housing.¹⁷¹ However, under the CHRA as it is presently framed, there is nothing to encourage the Tribunal to give particular weight to the fact that the banks' mortgage lending policy might result in the denial of access to adequate housing for rural women with children, who cannot easily obtain rental housing. In principle, the CHRA applies to a denial of credit necessary to obtain housing in the same way as it applies to a denial of a loan for a sports car.¹⁷² Without limiting, in any way, the general application of the anti-discrimination guarantees under the CHRA, the inclusion of a right to housing and an express prohibition against discrimination in relation to this right would encourage a tribunal inquiry into the banks' mortgage lending practices to consider broader issues relating to women's access to adequate housing. Similarly, the banks' obligations under the CHRA would also be assessed in relation to the importance of this right.

Justifying Discrimination in Relation to Social and Economic Rights

Exception

4. (1) A discriminatory practice under s. 2 includes any policy or practice which results in the denial of a right under s. 1 to any disadvantaged individual or group,

unless such a denial is reasonable and bona fide considering health, safety and cost.

(2) For a discriminatory practice under s. 2, by the Crown or an agency of the Crown, to be reasonable considering cost, its objective must be sufficiently important to warrant overriding a s. 1 right; it must be rationally connected to its objective; it must impair the right as little as possible; and its effects must be proportionate to its objective, considering the principles under s.1.

The permissible defences to a complaint that a social or economic right has been denied on a prohibited ground of discrimination should be stated explicitly under the CHRA. Section 15(1) of the Act now provides that a practice will not be found discriminatory if there is a reasonable and bona fide justification for it. For a practice to be deemed to have a reasonable and bona fide justification under s. 15(2), “it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.”

In the case of private respondents, the “reasonable and bona fide” standard applied to discriminatory practices in other areas would also apply to discrimination in relation to social and economic rights. In the example mentioned above, of a challenge to lending restrictions that disproportionately deny mortgages to women, the banks may be required to alter their credit restrictions or to develop housing loan programs for low-income women, where such measures would not impose an “undue hardship.” The standard for undue hardship with respect to private respondents is an evolving one. It is significant, however, that in its decision in *Central Okanagan School District No. 23 v. Renauld*, the Supreme Court of Canada explicitly rejected the *de minimus* economic test applied by the United States Supreme Court in *Trans World Airlines Inc. v. Hardison*.¹⁷³ The Court stated that “the use of the term “undue” infers that some hardship is acceptable; it is only “undue” hardship that satisfies this test.”¹⁷⁴ Boards of inquiry have taken this to mean that, in order to remedy discrimination, substantial expenses may be imposed on private respondents, relative to the resources available to them.¹⁷⁵

In the case of government respondents, however, the issue of cost as a defence to discrimination is more complex, not only because government resources are virtually unlimited, but because governments are generally balancing competing demands in making any social or economic policy choice. Neither the Canadian Human Rights Tribunal nor the courts have squarely addressed the cost justification under s. 15(2) of the CHRA with respect to governments’ obligations under the Act. As an employer, the government will likely be held to the same standards as the private sector.¹⁷⁶ It is more difficult to assess the notion of “undue hardship” with respect to broader obligations of governments to address disadvantage through social programs and other measures.

In approaching the issue of cost as a justification for social or economic rights violations under the CHRA, it is helpful to consider the way in which the Supreme Court of Canada has dealt with the issue of cost as a defence under the Canadian Charter. The Court has

consistently held that financial considerations alone cannot justify a rights violation under s. 1.¹⁷⁷ The Court has required, instead, that governments comply with the requirements set out in the *Oakes*¹⁷⁸ case. First, the governmental objective is sufficiently important to warrant overriding an individual right and, second, the means chosen to pursue that objective are rational, the individual right is impaired as little as possible and the benefit resulting from the rights violation outweighs the harm. The Court has been clear that an

objective which is itself discriminatory cannot be considered pressing or substantial within the meaning of s. 1, and, hence, cannot justify a violation of a Charter right.¹⁷⁹

In the *Eldridge* case, where the Court first adopted a clear position that positive measures may be required under s. 15 of the Charter, LaForest, J. asserted that any defence analogous to an “undue hardship” standard of reasonableness under human rights legislation should be put forward under s. 1, and should not be used to restrict the ambit of s. 15.

The obligation to make reasonable accommodation 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”. It should not be employed to restrict the ambit of s. 15(1).¹⁸⁰

Rather than leaving the reference to cost under s. 15 of the CHRA undefined in relation to discrimination by government in areas of social and economic rights, the proposed amendments incorporate the existing standard of review under s. 1 of the Charter. Such a formulation of the cost defence under the CHRA will help to foster an approach to social and economic rights under human rights legislation which reflects and can, in turn, inform rights claims under the Charter. This approach will also counter the existing trend in the lower court jurisprudence, which has essentially held that where cost or the allocation of resources is an issue, the courts have no role in enforcing equality rights in government programs. Instead, the proposed amendment imposes a rigorous requirement on the federal government to justify, in a principled way, any discriminatory denial of social and economic rights based on cost.

Government Obligations in Relation to Social and Economic Rights

Obligation of Parliament and the Government of Canada

5. (1) Parliament and the Government of Canada have an obligation to take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the rights under s. 1 by all appropriate means, including taxation and fiscal policies, equalization payments, funding of shared cost programs, negotiation of federal–provincial/territorial and international agreements, and other legislative and regulatory measures, in accordance with Canada’s international human rights treaty obligations and s. 36 of the *Constitution Act, 1982*.

(2) This obligation shall be carried out in a manner which recognizes the distinct needs and particular disadvantages facing low-income women and ensures women's security and promotes their social and economic equality.

As discussed in Chapter 1, it is clearly established under the human rights treaties ratified by Canada that the federal government has particular obligations in relation to the implementation of social and economic rights. These include the obligation to take necessary measures to ensure that such rights are enjoyed equally by the most vulnerable and disadvantaged members of Canadian society. This obligation is articulated most clearly under Article 2(1) of the ICESCR, which sets out the government's responsibilities in the following terms.

Each State Party to the present Covenant undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In terms similar to the ICESCR, Article 4 of the CRC provides that state parties "shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention" and that "[w]ith regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources...." Article 2 of the CEDAW commits state parties to taking "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." Article 3 of the CEDAW provides that state parties "shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

The particular obligations of the federal government in relation to social and economic rights are reinforced by the language of s. 36 of the *Constitution Act, 1982*.¹⁸¹ It entrenches an express commitment by Parliament and the Government of Canada to "promoting equal opportunities for the well-being of Canadians," "furthering economic development to reduce disparity in opportunities" and "providing essential public services of reasonable quality to all Canadians." Social and economic rights guarantees under the CHRA should reflect the governmental obligations under the ICESCR and other human rights treaties ratified by Canada, as well as the federal government's constitutional commitments under s. 36.

The concept of "progressive realization" and the standard of "the maximum of available resources" provide important guidance as to the nature of the government's responsibility to take positive measures to "fulfil" social and economic rights. Progressive realization recognizes that some components of social and economic rights are realized over time. It does not, however, offer governments a blanket defence of "incrementalism." As stated in the Maastricht Guidelines on Violations of Social and Economic Rights, "the fact that the full

realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of states which requires that certain steps be taken immediately and others as soon as possible.”¹⁸² Or, as the Committee on Economic, Social and Cultural Rights explains in its General Comment No. 3 on the nature of state parties’ obligations under the ICESCR, governments must demonstrate that they have taken steps that are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations” and they have an obligation “to move as expeditiously and effectively as possible towards that goal.”¹⁸³ Where the realization of certain components of a social or economic right is left for a future date, governments may be required to show that they have developed strategic plans to work toward meeting their obligations in full. Thus, the right to food requires that a “national strategy” be adopted to ensure food and nutrition security for all, and the right to housing requires a “national housing strategy.”¹⁸⁴ Under the terms of the ICESCR, these are clearly obligations of the federal government, notwithstanding that housing and food security are largely matters of provincial jurisdiction.

The “maximum of available resources” standard includes, but is not limited to, budgetary resources. This standard can include other types of resources as well, such as human, technological and natural resources.¹⁸⁵ A review of whether the government has satisfied this standard will necessarily consider competing demands on budgetary resources, and the extent to which allocating resources in one area will impact the enjoyment of rights in others. For example, in the first case to deal with the “maximum available resources” standard under the new South African Constitution, the Constitutional Court of South Africa observed that:

In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources “to achieve the progressive realization of each of these rights.” In its language, the Constitution accepts that it cannot solve all of our society’s woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution’s guarantees is that of limited or scarce resources.¹⁸⁶

Thus, the Court was required to consider, not only the needs of the individual applicant, but also “those who need access to housing, food and water, employment opportunities, and social security.”¹⁸⁷

The inclusion in the CHRA of a “maximum of available resources” standard for the realization of social and economic rights does not prevent the federal government from invoking competing demands for public spending as a justification for its failure to meet its social and economic rights obligations in a particular area. It does, however, give necessary direction to tribunals and courts that the existence of budgetary considerations and the necessity of balancing competing claims on resources do not justify absolute deference to Parliament. Rather, decisions involving competing resources must be subject to some degree of scrutiny. As a general rule, the focus of tribunal or court scrutiny will be on the most vulnerable groups in society, and on those deprived of the “minimum essential elements” of

the right. In such cases, the Committee on Economic, Social and Cultural Rights has indicated that a government will have a more onerous burden in meeting the “maximum of available resources” standard. A government will be required to demonstrate “that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”¹⁸⁸

The Committee has also indicated that a more rigorous standard of review will be applied to what it characterizes as a “deliberately retrogressive measure” with respect to the realization of social and economic rights. While legislative and policy approaches to realizing social and economic rights will be continuously reviewed and revised, it will be very difficult for governments to show that they are in compliance with the ICESCR if they deliberately move backward. Removing important legislative protections for disadvantaged groups, for example, without putting new ones in their place, would constitute a deliberately retrogressive measure. Such action “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources.”¹⁸⁹

The proposed amendments to the CHRA identify a number of “appropriate means” through which the federal government must pursue the progressive realization of social and economic rights. These include taxation and fiscal policies, equalization payments, funding of shared cost programs, negotiation of federal–provincial/territorial and international agreements, and other legislative and regulatory measures. This expansive approach to the nature of the federal government’s social and economic rights obligations is necessary to deal with what the Committee on Economic, Social and Cultural Rights identified as a primary obstacle to the implementation of the Covenant in Canada: a “complex federal system” and a reliance on “political processes” with provinces to negotiate implementation in areas of provincial jurisdiction.¹⁹⁰ Notwithstanding the growth of federal–provincial/territorial agreements, negotiations and consultations in areas of social and economic policy, it is the federal government which is ultimately responsible for ensuring compliance with the ICESCR and other international human rights treaties ratified by Canada. Article 28 of the ICESCR provides that its provisions “shall extend to all parts of federal States without any limitations or exceptions.” The constitutional division of powers between the federal and provincial governments cannot justify a failure to ensure compliance.¹⁹¹ Thus, the obligations of Parliament and the Government of Canada with respect to the progressive realization of social and economic rights must include all the legislative, regulatory and policy instruments available to the federal government for the promotion, protection and fulfilment of social and economic rights.

The federal government’s responsibility to comply with the progressive realization of the right to adequate housing, for example, should extend well beyond its direct responsibility for housing provided by the Royal Canadian Mounted Police or the Department of National Defence. It should also include accountability for many of the issues of non-compliance identified by the Committee on Economic, Social and Cultural Rights. These include:

- changes in levels and conditions of federal funding of provincial social housing programs;
- the failure to address substandard housing conditions for Aboriginal peoples living on and off reserves;
- the failure to adopt a national strategy to deal with homelessness;
- the failure to establish a national poverty line;
- the failure to attach conditions to federal funding of provincial social assistance programs;
- the failure to ensure access to adequate housing; and
- the failure to allocate sufficient resources to address poverty among women, among other housing-related issues.¹⁹²

Interdependence of Rights

6. Federal laws, regulations, policies and practices shall be interpreted and applied in a manner consistent with the rights under s. 1 and the obligation under s. 5, and with the fundamental value of promoting equality and alleviating social and economic disadvantage.

7. Nothing in this Part limits or diminishes the rights or obligations contained elsewhere in this Act or in the *Canadian Charter of Rights and Freedoms*.

Apart from direct incorporation of social and economic rights guarantees into the CHRA, considerable protection of social and economic rights can be achieved through interpretation and application of federal laws and regulations, and through the appropriate exercise of administrative discretion. By the same token, serious violations of social and economic rights can occur through delegated decision making and through the application of legislation and regulations in a manner inconsistent with social and economic rights guarantees. As the cases discussed in Chapter 2 illustrate, many of the decisions which bear most heavily on the lives of women living in poverty are the result of the exercise of discretion by governmental and quasi-governmental officials, such as social program administrators. Ensuring that such decision making respects social and economic rights principles would be an important step toward remedying many of the injustices low-income women are currently forced to challenge through the courts.

In its decision in *Baker*, the Supreme Court ruled that federal laws should be applied consistently with the international human rights treaties Canada has ratified.¹⁹³ However, an express statement of this interpretive principle should be included under the CHRA. In addition to increasing administrative and judicial awareness of the need to interpret domestic legislation in accordance with international human rights guarantees, including such an interpretive clause under the CHRA will mitigate the concern of the minority of the Court in *Baker* that according this degree of authority to unincorporated treaties would circumvent parliamentary sovereignty.¹⁹⁴

The second part of the proposed interdependence provision is required to ensure that inclusion of social and economic rights in the CHRA will not indirectly reduce the scope of Charter rights or the effectiveness of existing equality guarantees in the CHRA. Including social and economic rights in the CHRA as a separate category with a distinct enforcement mechanism, could, in the absence of a direction otherwise, be taken by tribunals and courts to mean that any rights claims with a social or economic component could only be considered under the new social and economic rights provisions of the CHRA. This might discourage courts and tribunals from dealing with issues of discrimination in social benefit programs, or from addressing other poverty-related issues under the Charter or under existing human rights guarantees. The *Eldridge* case, for example, was both an equality claim with respect to a public service and a claim to the equal enjoyment of the right to health care.¹⁹⁵ Given the fundamental interdependence of equality and social and economic rights, protection of social and economic rights should not be limited to a single forum or remedial avenue. The proposed interpretive clause would dissuade tribunals and courts from using the new social and economic rights provisions under the CHRA as a basis for weakening any existing rights under the Charter or human rights legislation, and would encourage a greater appreciation of the interdependence and indivisibility of all human rights as well as a new responsiveness in all areas of law to the substantive equality issues linked with poverty.

The Role of the Human Rights Commission

Social Rights Sub-committee

8. A social rights sub-committee of the Human Rights Commission, consisting of at least three full-time members with demonstrated experience in the area of social and economic rights, shall be responsible for evaluating and promoting compliance with this Part.

9. In particular, the social rights sub-committee shall:

- (a) establish and revise standards according to which compliance with the rights under s. 1 can be measured;
- (b) submit recommendations to appropriate government and private sector bodies on measures necessary to promote, respect, protect and fulfil the rights under s. 1;
- (c) evaluate government compliance under s. 5, including through review of federal laws, regulations, policies and practices;
- (d) promote the production, exchange and dissemination of information and statistics on the social and economic circumstances of individuals with respect to the rights under s. 1, especially of those who are members of disadvantaged groups;
- (e) encourage and facilitate government and private sector consultation with non-governmental organizations representative of disadvantaged groups with respect to the rights under s.1;
- (f) collaborate with similar bodies or authorities at the provincial and international level;

- (g) respond to any request for information or invitation to intervene from the social rights panel;
- (h) have the right to intervene in any proceedings before the social rights panel;
- (i) report annually on the progress which has been made in achieving the objectives under this Part; and
- (j) carry out any other task that is necessary or appropriate for the purpose.

10. With respect to Canada's international reporting obligations relating to the rights under s. 1, the Sub-committee shall, in addition:

- (a) encourage relevant government bodies to consult with non-governmental organizations representative of disadvantaged groups in the preparation of Canada's reports;
- (a) disseminate the findings and recommendations of international treaty-monitoring bodies relating to Canada's reports;
- (b) organize periodic meetings of relevant government bodies and non-governmental organizations to discuss the measures taken by Canada in response to such findings and recommendations; and
- (c) submit independent opinions on issues of compliance with social and economic rights in international treaties ratified by Canada, on its own initiative or on request, where appropriate.

11. The social rights sub-committee shall respond to any request for information or invitation to intervene from the social rights panel, and the sub-committee shall have the right to intervene in any proceedings before the panel.

The current mandate of the Canadian Human Rights Commission under s. 27 of the CHRA includes most of the activities necessary for the effective promotion of social and economic rights at the federal level. Transforming the role of the Commission with respect to poverty and social and economic rights is, therefore, primarily a matter of expanding the ambit of the rights protected under the CHRA, rather than redefining the powers, duties and functions of the Commission. In addition to its duties under Part III of the Act with respect to complaints, the Commission currently has the mandate to engage in public education and research on issues of compliance with the CHRA, establish close liaison with provincial human rights commissions to foster common policies and deal with areas of overlapping jurisdiction, consider and comment on recommendations concerning human rights from any source,¹⁹⁶ conduct studies and issue recommendations.

Two changes must be made to the present mandate of the Commission, however, in order to

enable it to meet the requirements of the Paris Principles and to carry out the duties of a national institution under the ICESCR. Both the Paris Principles and General Comment No. 10 require the Commission to have an explicit mandate to review legislation.¹⁹⁷ As it is presently formulated, the CHRA permits the review of “regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament” but does not expressly provide for review of legislation or draft legislation. In addition to the power to review domestic legislation, both the Paris Principles and General Comment No. 10 require that the Commission have the mandate to consider domestic compliance with international human rights treaties which Canada has ratified.¹⁹⁸ While the Commission’s current mandate under s. 27 of the CHRA could be read as including this power, the Commission’s role in

reviewing Canada’s compliance with human rights treaties should be explicitly included among the Commission’s duties and functions.

The Paris Principles also suggest that national human rights institutions may play a role in the reporting process before UN treaty-monitoring bodies, although the precise nature of that role is not clearly set out.¹⁹⁹ The Committee on Economic, Social and Cultural Rights does not include this as one of the required activities of a national human rights body under General Comment No. 10. In view of the increasingly “adjudicative” approach of the Committee to state party review under the ICESCR, it would be inappropriate for the Human Rights Commission to represent, or to speak on behalf of, the Canadian government. Submitting an independent opinion on matters of compliance would be more appropriate. However, it is essential that the Commission remain independent of government in the treaty-monitoring review process. In its 1998 review of Canada’s performance under the ICESCR, the Committee requested the independent opinions of federal and provincial human rights commissions on a number of matters within their area of expertise, including whether workfare programs discriminate against welfare recipients, the effect of changes to the Ontario *Human Rights Code* which permit income discrimination and whether social condition should be added as a prohibited ground of discrimination under Canadian human rights statutes.²⁰⁰

Rather than simply adding to the already heavy responsibilities of the Human Rights Commission, the proposed amendments would create a special social rights sub-committee, with responsibility for promoting compliance with social and economic rights.²⁰¹ The creation of a specialized sub-committee enables the Commission to draw on specific expertise in the social and economic rights area, and ensures that a specialized unit within the Commission can focus on social and economic rights exclusively. Under the proposed amendments, the social rights sub-committee would not play a role in relation to the filing of complaints. Rather, complaints not falling within the anti-discrimination provisions of Part III of the CHRA would be submitted directly to the social rights panel, as described below. The sub-committee would have the right to intervene in any case that is heard before the social rights panel, but it would not have the power to screen complaints, or to decide which complaints should go forward to the Tribunal. In the area of social and economic rights in particular, the entity responsible for promoting compliance with social and economic rights obligations must

be free from any requirement to remain neutral with respect to the outcome of complaints. The duties and functions of the proposed social rights sub-committee include effective liaison with non-governmental organizations which may also be parties under the complaints procedure. It is important that the sub-committee be liberated from the constraints that go with any role in the evaluation or processing of complaints, in order to be an effective social and economic rights advocate within the Commission, within government and at a broader public level.

The Role of the Canadian Human Rights Tribunal

Social Rights Panel

12. A social rights panel of the Human Rights Tribunal, consisting of at least three full-time members with demonstrated experience in the area of social and economic

rights, shall be responsible for inquiring into complaints that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

13. (1) Any individual or group whose members are directly affected may submit a written complaint to the panel that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

(2) On receipt of a complaint, the panel shall decide if it will hold a hearing into the complaint, and if so, it shall conduct the hearing in accordance with the procedures under Part III of the Act.

14. (1) Following the hearing into a complaint under s. 13, the panel shall issue a decision whether or not the complaint is justified.

(2) Where the Panel decides that a complaint is justified, it shall:

(a) hear submissions from the complainant and the government regarding the measures required to achieve compliance with s. 1 or s. 5, and regarding the time required to carry out such measures; and

(b) make an order that the required measures be taken within a specified period of time, including an order requiring the amendment of any federal law, regulation, policy or practice.

15. (1) In lieu of making an order under s. 14, the panel may, where appropriate, order that the government report back by a specified date on measures taken or proposed to be taken which will achieve compliance with s. 1 or s. 5.

(2) On receipt of a report, the panel may make a further order under sub-section (1) or it may make an order under s. 14.

16. An order under s. 14 shall not come into effect until the House of Commons has sat for at least eight weeks, during which time the order may be overridden by a simple majority vote of Parliament. The government may indicate its acceptance of the terms of the order prior to the expiry of the time period specified in the order.

17. On coming into effect, an order under s. 14 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure.

As noted above, the inclusion of social and economic rights in the CHRA, and the prohibition against discriminatory practices resulting in the denial of social and economic rights, will bring many of women's social and economic rights claims within the ambit of the existing equality guarantees of the CHRA. These claims are subject to the regular complaints procedure under Part III of the Act, and, if referred to a tribunal by the Human Rights Commission, will be heard in the same manner as other discrimination complaints.²⁰²

There is no necessity for the Tribunal's functions or powers to be revised in order to deal with these anti-discrimination complaints. As suggested above, it is rather a matter of expanding the scope of the rights in the Act.

The proposed amendments in relation to the Tribunal would provide an additional complaints and adjudication procedure, before a specialized social rights panel of the Tribunal, in relation to any alleged failure on the part of Parliament or the Government of Canada to meet its obligations to "take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the rights." Complaints of this nature would not be filed with the Human Rights Commission, but would be submitted directly to the social rights panel. On receipt of a complaint, the panel would have the power to decide if a hearing should be held. Thus, whatever the outcome of the current CHRA review with respect to direct access to the Tribunal for discrimination complaints under Part III of the CHRA, complaints under the new social and economic rights provisions relating to the obligations of the federal government would be processed under a separate procedure. While all such complaints would be received, in written form, by the social rights panel, they would not necessarily be granted a full hearing or be adjudicated. This alternative to the selection of complaints for adjudication, in relation to the failure of the federal government to meet its specific social and economic rights obligations, is based on the idea that the adjudication procedures in this area would function as an important complement to the parliamentary process, rather than providing an individualized legal remedy in the more traditional sense.²⁰³

It must be emphasized that the creation of a special procedure for social and economic rights claims involving the obligations of government is not meant to suggest social and economic rights claims are inherently different from other types of rights claims and, therefore, ought to be subject to a different model of adjudication. Many social and economic rights claims will continue to be advanced by way of the equality provisions of the CHRA, under the Charter, and through the interpretation and application of other legislation consistent with international social and economic rights principles. Establishing a social rights panel creates a supplementary adjudication procedure, designed to hear certain types of social rights claims related to progressive realization and to facilitate public review of whether the federal government has complied with its obligations, under s. 5 of the proposed amendments, to promote and fulfill social and economic rights "by all appropriate means" and "to the maximum of its available resources."

The cases heard by the social rights panel will generally relate to issues of national importance, and involve systemic issues affecting the rights of many individuals and groups. The proposed complaints procedure is designed to ensure that those who suffer harm as a result of the government's failure to act in accordance with its social and economic rights obligations, including the obligation of "progressive realization," are able to bring issues to the attention of the public and the government, and have these issues considered as matters of high priority. Complaints can be brought before the social rights panel by individuals directly affected by the government's failure to meet its obligations, or by organizations representing those affected.

Thus, an allegation that the federal government has failed to take action, required under s. 5 of the proposed amendments, to address homelessness could be brought either by individuals who are homeless or by an appropriate non-governmental organization. The focus of the panel's inquiry would not generally be on providing individualized remedies or compensation for the complainants who bring the issue forward. Rather, the review process would examine the more general question of whether the government is meeting its broad obligation to realize the right to housing. Where urgent remedial issues were at stake, those affected would need to rely on other means of vindicating their rights. For example, if the right to housing were being infringed by an eviction, action would have to be taken under residential tenancies laws or the Charter, relying on the right to housing under the CHRA as an interpretive guide in dealing with the eviction complaint.

Under the proposed amendments, the social rights panel has the ability to place critical issues of social and economic rights on the parliamentary agenda. The panel may either order the government to report back on measures that will be taken to comply with the CHRA, or make a remedial order which does not take effect until the House of Commons has sat for eight weeks, during which time Parliament may override the panel's order. To preserve the effectiveness of this remedy, it is important that the panel be empowered to be selective in choosing the issues it addresses, both in light of its own limited resources, and in view of its ability to place issues directly before Parliament, through its remedial orders. It is not envisioned that the social rights panel would rule on a large number of complaints in a year. Rather, it would select cases of national and jurisprudential importance in a manner somewhat analogous to the consideration of leave to appeal applications by the Supreme Court of Canada.

Hearings before the social rights panel, will play an important function in allowing disadvantaged groups and individuals to tell their stories while, at the same time, provoking thorough public review of critical issues related to access by disadvantaged groups to housing, health care, education, child care, employment and support services. It is to be hoped the government will recognize the complaints process before the social rights panel as a valid and important forum for social policy review, as an aid to strategic prioritization of social and economic issues within a domestic and international human rights framework, and as an opportunity to promote greater transparency of social and economic policy making. The social rights panel hearing process will also promote greater public awareness and

support for social and economic rights and so may, indirectly, assist the federal government in securing agreement from provinces for joint action to address violations.

By giving Parliament the authority to override any order of the social rights panel, the amended CHRA would place an onus on the panel to earn and to maintain the respect of the public and of Parliament. For low-income women and other victims of social and economic rights violations, the availability of the panel's complaint process is ultimately a mechanism for ensuring a "dialogue" with Parliament, and for providing a more effective avenue for democratic participation in the social and economic policy-making process.²⁰⁴ The social rights panel complaint process will enable complainants to present evidence in a public forum, on issues which might otherwise receive little public attention.²⁰⁵ Whether or not complainants achieve the remedy they seek from Parliament will depend, to some extent, on the success of the established "dialogue." If the panel, its decision-making process and its decisions have the respect of the public, it will be difficult for Parliament to exercise its override power and to ignore the rights violations the panel has identified. And, while the parliamentary override may appear to weaken the panel's remedial powers, this limit will ensure that the panel is granted unrestricted authority to consider issues that have previously been the subject of excessive judicial deference. As the Supreme Court's decision in *Vriend* demonstrates, courts and tribunals are more comfortable in finding rights violations in the area of positive obligations when they are able to rely on the "ultimate parliamentary safeguard" of a legislative veto.²⁰⁶

4. CONCLUSION

Including social and economic rights in the CHRA is not simply a question of achieving compliance with international human rights law or greater consistency with the approach to Charter interpretation advocated by the Committee on Economic, Social and Cultural Rights and increasingly accepted by the Supreme Court of Canada. Nor is it a matter of bringing our national human rights institution into closer conformity with the ICESCR and the Paris Principles. Rather, it is about creating a federal human rights regime that recognizes and validates the substantive claims to dignity and equality advanced by the most disadvantaged women in Canadian society—women living in poverty, women of colour, young mothers, elderly women, women with disabilities and other women facing multiple obstacles to substantive equality.

When Lynn Bluecloud, an Aboriginal woman who was five months pregnant—one of approximately 6,000 homeless people in Ottawa—died of hypothermia near the Rideau Canal, almost in the shadow of Parliament Hill,²⁰⁷ many Canadians understood that fundamental human rights issues were being ignored in our country. UN human rights treaty-monitoring bodies have pointed to the connection between dramatic increases in homelessness among women and recent decisions at the federal level, such as the repeal of CAP and the cancellation of federal funding for social housing.²⁰⁸ A few days after Ms. Bluecloud's death, the United Nations Human Rights Committee expressed concern that homelessness in Canada "has led to serious health problems and even to death," and recommended that the government take "positive measures required by article 6 [the right to life] to address this serious problem."²⁰⁹ The consternation and dismay expressed by members of various UN committees that Canada, considered so exemplary in the field of human rights, is allowing this to happen, is shared by many Canadians. It is wrong to assume that social and economic rights violations, represented in the extreme by the death of Lynn Bluecloud and numerous other homeless people in Canada, are the "will of the majority." These rights violations go unaddressed because the institutional and legislative framework to call governments to account for them is lacking, not because Canadians do not perceive them as human rights issues in need of remedies.

Social and economic rights have particular resonance for women because they articulate women's lived experience of human rights violations. This is clearly illustrated in the recent Ontario human rights case of *Kearney et al. v. Bramalea Limited et al.*²¹⁰ After 60 days of hearings, involving complex statistical evidence of "adverse effect" on multiple grounds of discrimination, and almost \$1 million spent by a coalition of landlords to defend their right to deny housing to low-income applicants, the Tribunal ruled that discrimination because of poverty is discrimination because of sex, race, family status and other intersecting grounds. This was the first time in Canada that a tribunal or court has formally recognized that discrimination because of poverty is sex discrimination. Catarina Luis, one of the complainants in the case, a black single mother of three, had been a refugee claimant from Angola when she and her daughter were refused housing because of her low income. She lived in shelters with her children on several occasions and, particularly after the 21 percent

cut in Ontario social assistance rates and relied extensively on food banks to feed her family. Ms. Luis summed up the significance of her victory before a throng of reporters in Toronto, three days before Christmas, saying: “I believe, especially in Canada, that it’s a very cold country and people can’t afford to live in the streets. Today it’s so cold. How can I live in the street in this cold?”²¹¹

Canadian human rights jurisprudence has for too long been deprived of the practical and theoretical understanding of interdependence which comes with the adjudication of the rights claims of women living in poverty. If social and economic rights are included in the CHRA, it will be these claims which will be transformative of human rights discourse in Canada.²¹² As Martin Scheinin, the Finnish member of the Human Rights Committee has observed about the impact of petition procedures before international treaty-monitoring bodies, the ability of women to bring their issues to adjudication is fundamental to developing an understanding of the interdependence of social and economic rights with civil and political rights.²¹³ Professor Scheinin points out that the *Airey* case,²¹⁴ a pivotal decision under the European Convention on Human Rights with respect to the right to counsel in civil cases, (invoked recently before the Supreme Court of Canada by Jeanine Godin, who was denied the same right in Canada)²¹⁵ was the result of a struggle by an Irish woman, living in a country which does not provide for divorce, seeking a legal separation because of violence and threats from her husband. Similarly, in the cases of *Zwann-de Vries* and *Broeks*,²¹⁶ in which two Dutch women challenged the denial of unemployment insurance on the basis of a presumption that married women would be maintained by their husbands, the Human Rights Committee, “after long discussions, expanded the protection of the non-discrimination provision in article 26 of the ICCPR to cover discrimination in the enjoyment of economic and social rights.”²¹⁷

The consultation paper prepared by the CHRA Review Panel to identify possible issues for review does not refer to the inclusion of social and economic rights, but asks whether reference should be made to Canada’s international human rights obligations.²¹⁸ This issue is clearly central to the Review Panel’s terms of reference, to examine “the purpose and grounds, including social condition, to ensure that the Act accords with modern human rights and equality principles” and to determine “the adequacy of the scope and jurisdiction of the Act.”²¹⁹ Moreover, the Canadian government has made an explicit undertaking before the Committee on Economic, Social and Cultural Rights²²⁰ to include this issue in the current CHRA review, and to consult “with other organizations and interested citizens.”²²¹ The proposals put forward here to add social and economic rights to the CHRA would, if adopted, create a legislative and institutional framework which would allow some of the most pressing and fundamental human rights claims of women to move from the margin to the centre of human rights discourse. The amendments we propose, while respectful of concerns about parliamentary sovereignty, recognize and affirm the role of women’s social and economic rights claims in enhancing democratic accountability, participation and transparency. Our proposed amendments represent only a preliminary attempt to address this issue. We hope the Human Rights Review Panel will support and encourage further efforts and discussions, in order to ensure that the current CHRA review process results in a federal human rights regime which better meets the goal of promoting the dignity and substantive

equality of all women.

APPENDIX A: MODEL SOCIAL AND ECONOMIC RIGHTS AMENDMENT

Part III.1 Social And Economic Rights

Rights Guaranteed

1. (1) Everyone has a right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support services and other fundamental requirements for security and dignity of the person.

(2) These rights shall be interpreted and applied in a manner consistent with Canada's human rights treaty obligations and the fundamental value of promoting equality and alleviating social and economic disadvantage.

Discriminatory Practice

2. It is a discriminatory practice to deny a right under s. 1 based on a prohibited ground of discrimination, or on a combination of prohibited grounds, including based on social condition.

3. A discriminatory practice under s. 2 may be the subject of a complaint and of an order under Part III of this Act, whether or not it may also be the subject of a complaint and of an order under this Part.

Exception

4. (1) A discriminatory practice under s. 2 includes any policy or practice which results in the denial of a right under s. 1 to any disadvantaged individual or group, unless such a denial is reasonable and bona fide considering health, safety and cost.

(2) For a discriminatory practice under s. 2, by the Crown or an agency of the Crown, to be reasonable considering cost, its objective must be sufficiently important to warrant overriding a s. 1 right; it must be rationally connected to its objective; it must impair the right as little as possible; and its effects must be proportionate to its objective, considering the principles under s. 1.

Obligation of Parliament and the Government of Canada

5. (1) Parliament and the Government of Canada have an obligation to take steps, to the maximum of available resources, with a view to achieving progressively the full realization of the rights under s. 1 by all appropriate means, including taxation and fiscal policies, equalization payments, funding of shared cost programs, negotiation of federal-provincial/territorial and international agreements, and other legislative and regulatory measures, in accordance with Canada's international human rights treaty obligations and s. 36 of the *Constitution Act, 1982*.

(2) This obligation shall be carried out in a manner which recognizes the distinct needs and particular disadvantages facing low-income women, and ensures women's security and

promotes their social and economic equality.

Interdependence of Rights

6. Federal laws, regulations, policies and practices shall be interpreted and applied in a manner consistent with the rights under s. 1 and the obligation under s. 5, and with the fundamental value of promoting equality and alleviating social and economic disadvantage.

7. Nothing in this Part limits or diminishes the rights or obligations contained elsewhere in this Act or in the *Canadian Charter of Rights and Freedoms*.

Social Rights Sub-committee

8. A social rights sub-committee of the Human Rights Commission, consisting of at least three full-time members with demonstrated experience in the area of social and economic rights, shall be responsible for evaluating and promoting compliance with this Part.

9. In particular, the social rights sub-committee shall:

- a) establish and revise standards according to which compliance with the rights under s. 1 can be measured;
 - (a) submit recommendations to appropriate government and private sector bodies on measures necessary to promote, respect and fulfil the rights under s. 1;
 - (b) evaluate government compliance under s. 5, including through review of federal laws, regulations, policies and practices;
 - (c) promote the production, exchange and dissemination of information and statistics on the social and economic circumstances of individuals with respect to the rights under s. 1, especially of those who are members of disadvantaged groups;
 - (d) encourage and facilitate government and private sector consultation with non-governmental organizations representative of disadvantaged groups with respect to the rights under s. 1;
 - (e) collaborate with similar bodies or authorities at the provincial and international level;
 - (f) respond to any request for information or invitation to intervene before the social rights panel;
 - (g) have the right to intervene in any proceeding before the social rights panel;
 - (h) report annually on the progress which has been made in achieving the objectives under this Part; and
 - (i) carry out any other task that is necessary or appropriate for the purpose.

10. With respect to Canada's international reporting obligations relating to the rights under s. 1, the sub-committee shall, in addition:

- (a) encourage relevant government bodies to consult with non-governmental organizations representative of disadvantaged groups in the preparation of Canada's reports;
- (b) disseminate the findings and recommendations of international treaty-monitoring bodies relating to Canada's reports;
- (c) organize periodic meetings of relevant government bodies and non-governmental organizations to discuss the measures taken by Canada in response to such findings and recommendations; and
- (d) submit independent opinions on issues of compliance with social and economic rights in international treaties ratified by Canada, on its own initiative or on request, where appropriate.

11. The social rights sub-committee shall respond to any request for information or invitation to intervene from the social rights panel, and the sub-committee shall have the right to intervene in any proceedings before the panel.

Social Rights Panel

12. A social rights panel of the Human Rights Tribunal, consisting of at least three full-time members with demonstrated experience in the area of social and economic rights, shall be responsible for inquiring into complaints that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

13. (1) Any individual or group whose members are directly affected may submit a written complaint to the panel that the government has infringed a right under s. 1 or failed to meet its obligation under s. 5.

(2) On receipt of a complaint, the panel shall decide whether to hold a hearing into the complaint, and if so, it shall conduct the hearing in accordance with the procedures under Part III of the Act.

14. (1) Following the hearing into a complaint under s. 13, the panel shall issue a decision whether or not the complaint is justified.

- (2) Where the panel decides that a complaint is justified, it shall:
 - (a) hear submissions from the complainant and the government regarding the measures required to achieve compliance with s. 1 or s. 5, and regarding the

time required to carry out such measures; and

- (a)

- (b) make an order that the required measures be taken within a specified period of time, including an order requiring the amendment of any federal law, regulation, policy or practice.

15. (1) In lieu of making an order under s. 14, the panel may, where appropriate, order the government to report back by a specified date on measures taken or proposed to be taken which will achieve compliance with s. 1 or s. 5.

(2) On receipt of a report, the panel may make a further order under sub-section (1) or it may make an order under s. 14.

16. An order under s. 14 shall not come into effect until the House of Commons has sat for at least eight weeks, during which time the order may be overridden by a simple majority vote of Parliament. The government may indicate its acceptance of the terms of the order prior to the expiry of the time period specified in the order.

17. On coming into effect, an order under s. 14 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure.

ENDNOTES

¹*Universal Declaration of Human Rights*, GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

²R.S.C. 1985, c. H-6.

³Canadian Human Rights Commission. 1998. *Annual Report 1997*. Ottawa: Canadian Human Rights Commission, 2.

⁴*Ibid.* at 8.

⁵Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Charter or Canadian Charter].

⁶R.S.Q. c. C-12.

⁷*Annual Report 1997 supra* note 3 at 8.

⁸See the discussion in Chapter 1, below.

⁹*International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada August 19, 1976) [hereinafter ICESCR].

¹⁰*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force March 23, 1976, accession by Canada May 19, 1976). [hereinafter ICCPR].

¹¹*Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force September 3, 1981, accession by Canada January 10, 1982) [hereinafter CEDAW].

¹²ICCPR *supra* note 10 at articles 2, 3 and 26.

¹³United 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)*, Geneva, April 7, 1999, CCPR/C/79/Add. 105 (1999) at par. 20 [hereinafter *Concluding Observations, 1999*].

¹⁴*Ibid.* at para. 9.

¹⁵*Ibid.* at para. 10.

¹⁶Summary records for the review of Canada are not yet available, but Minister Fry's verbal commitment was recorded by a number of the NGOs present at the meeting, including one of

the authors of the present paper.

¹⁷United Nations Committee on the Elimination of Discrimination Against Women, *Adoption of the Report of the Committee on the Elimination of Discrimination Against Women on its Sixteenth Session: Concluding Observations of the Committee on the Elimination of Discrimination Against Women (Canada)*, February 29, 1997, A/52/38/Rev.1 at paras 306-343 [hereinafter *Concluding Observations, 1997*].

¹⁸*Ibid.* at para. 336.

¹⁹United Nations Economic and Social Council, 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)*, December 10, 1998, E/C.12/1/Add.31 [hereinafter *Concluding Observations, 1998*].

²⁰R.S.C. 1985, c. C-1. See generally M. Jackman. 1995. "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" *Canadian Journal of Women and the Law*. 8: 371; S. Day and G. Brodsky. 1998. *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs*. Ottawa: Status of Women Canada.

²¹*Concluding Observations, 1998, supra* note 19 at paras 23 and 28.

²²*Ibid.* at para. 28. On the link between domestic violence and the right to housing, see Leilani Farha. 1999. "Women and Housing." In *Women and International Human Rights Law. Vol. 1*. Edited by K. Askin and D. Koenig. New York: Transnational Publishers, 483 at 514-518.

²³G. York. 1993. "UN Body Chastises Canada on Poverty" *The Globe and Mail*. May 29, A1; R. Speirs. 1993. "UN Report on Poverty Levels is Flawed, Tories Say" *Toronto Star*. June 1, A12; V. Lawton. 1998. "UN Condemns Canadian Poverty." *Toronto Star*. December 5, A5; *House of Commons Debates* No. 161 (November 27, 1998).

²⁴In its *Concluding Observations, 1998*, the Committee notes that Canada's ranking in the Human Development Index simply indicates a "capacity to achieve a high level of respect for all Covenant rights" which has not been achieved, *supra* note 19 at para. 3.

²⁵United Nations Economic and Social Council, 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)*, Geneva, June 10, 1993, E/C.12/1999/5; reproduced in (1994) 20 C.H.R.R. C/1 at paragraph 25 [hereinafter *Concluding Observations, 1993*].

²⁶Committee on Economic, Social And Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, *List of issues to be taken up in connection with the consideration of the third periodic report of Canada concerning the*

rights referred to in articles 1- 15 of the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add.17) E/C.12/Q/CAN/1 (June 10, 1998), para. 8, p. 2 [hereinafter *List of Issues*].

²⁷*Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights: Responses to the supplementary questions emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1) on Canada's third report on the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add17)* [hereinafter *Responses to Supplementary Questions*].

²⁸Nations Unies Conseil économique et social, Comité des Droits Économique, Sociaux et Culturels, *Compte Rendu analytique de la 48ème seance: Canada*, Geneve, novembre 27, 1998, E/C.12/1998/SR.48 at paras 12, 13, 15, 22 and 24.

²⁹*Concluding Observations, 1998 supra* note 19 at para. 9.

³⁰*Ibid.* at para. 51.

³¹*Annual Report 1997 supra* note 3 at 7.

³²For an overview of the role of the Committee and the implementation measures under the ICESCR, see P. Alston and J.J. Quinn. 1987. "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly*. 9: 156; P. Alston 1992. "The Committee on Economic, Social and Cultural Rights." In *The United Nations and Human Rights: A Critical Appraisal*. Edited by P. Alston. Oxford: Clarendon Press, 473.

³³See generally, Bruce Porter. 1999. "Socio-economic Rights Advocacy - Using International Law: Notes from Canada." 2:1 *Economic & Social Rights Review*. July, 2: 1; M. Craven. 1994. "Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights." *Social Rights as Human Rights: A European Challenge*. Edited by K. Drzewicki, C. Krause and A. Rosas. London: Martinus Nijhoff, 91.

³⁴United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 9 The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights*, Geneva, November 16 - December 4, 1998, E/C.12/1998/24 [hereinafter *General Comment No. 9*]; United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 10 The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, Geneva, November 16 - December 4, 1998 E/C.12/1998/25 [hereinafter *General Comment No. 10*].

³⁵*General Comment No. 9, ibid.* at para. 3.

³⁶*Ibid.* at para. 13.

³⁷For an elaboration of the argument that equality rights provide the bridge between civil and political and economic and social rights, see Day and Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* *supra* note 20 at 48.

³⁸*General Comment No. 9* *supra* note 34 at para. 15.

³⁹*General Comment No. 9* *supra* note 34 at para. 5.

⁴⁰*Ibid.* at paras 7, 9, 10.

⁴¹*Ibid.* at para. 9.

⁴²*Ibid.* at para. 7.

⁴³*Ibid.* at para. 8.

⁴⁴*General Comment No. 10*, *supra* note 34 at para. 3.

⁴⁵*Ibid.*

⁴⁶United Nations Committee on Economic, Social and Cultural Rights, *Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, June 17, 1991, Un Doc. E/C.12/1989/SR.8 at part B article 11.

⁴⁷*Ibid.* at 185.

⁴⁸[1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

⁴⁹*Ibid.* at 620-621.

⁵⁰*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

⁵¹*Ibid.* at 13.

⁵²*Eldridge* *supra* note 48 at 677-78; see also *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 532-34. For a general discussion of this aspect of the *Eldridge* and *Vriend* decisions see Porter, B. 1998. "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*." *Constitutional Forum*. 9:3, 71; Jackman, M. 1998. "Giving Real Effect to Equality: *Eldridge v. British Columbia (Attorney General)* and *Vriend v. Alberta*." *Review of Constitutional Studies*. 4: 352.

⁵³*Eldridge*, *supra* note 48 at 681.

⁵⁴*Ibid.* at 623. LaForest, J. goes on to review a series of cases in which positive obligations were imposed under human rights legislation, including *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal refused, [1985] 1 S.C.R. vi; *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353; and *Le Centre de la communauté sourde de Montréal métropolitain inc. c. Régie du logement*, [1996] R.J.Q. 1776.

⁵⁵The most decisive shift from a formal to a substantive approach to equality by the Supreme Court was in a sex discrimination case brought under human rights legislation: *Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219. In finding that an employee benefit plan that differentiated adversely against pregnant women violated sex equality guarantees under Manitoba human rights legislation, the Supreme Court reversed its earlier decision in the *Bliss v. Attorney General of Canada* [1979] 1 S.C.R. 83, where it had ruled that an unemployment insurance regime that provided lesser benefits to pregnant women was not discriminatory because it treated all pregnant “people” the same. The Court’s subsequent decision in *CN v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 114, involving a CHRA challenge by Action Travail des Femmes to the systemic under-hiring of women at CN Rail, clearly affirmed that equality rights have a strong “remedial component,” focussing on the alleviation of systemic disadvantage and requiring positive measures.

⁵⁶*Slaight Communications v. Davidson*, [1989] 1 S.C.R. 103 [hereinafter *Slaight Communications*].

⁵⁷*Ibid.* at 1056.

⁵⁸*Baker v. Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39 [hereinafter *Baker*]. The *Baker* case involved a challenge by Mavis Baker, a Jamaican citizen employed as a domestic worker in Canada, to the denial of her application for permanent residence on humanitarian and compassionate grounds, notwithstanding that her deportation would separate her from her Canadian-born children, in contravention of articles 3, 9(1) and 10(1) of the *Convention on the Rights of the Child*, November 20, 1989, Can T.S. 1992 No. 3; UN Doc. A/RES/44/25 (entered into force September 2, 1990 and in force for Canada May 28, 1990) [hereinafter CRC]. For a discussion of the *Baker* case, see Scott, C. 1999. “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight.” *Constitutional Forum*. 10 (forthcoming).

⁵⁹*Supra* note 56.

⁶⁰[1990] 3 S.C.R. 697.

⁶¹*Supra* note 58 at para. 70.

⁶²*R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 365 [hereinafter *Ewanchuk*].

⁶³See, for example, the Preface to the Ontario *Human Rights Code*, R.S.O. 1990 c. H-19; and

the Preface to the Prince Edward Island *Human Rights Act*, R.S.P.E.I. 1998 c. H-12.

⁶⁴*Attorney General of Quebec v. Irwin Toy*, [1989] 1 S.C.R. 927 at 1003-1004.

⁶⁵*List of Issues*, *supra* note 26 at paragraph 53.

⁶⁶*Responses to Supplementary Questions*, *supra* note 27 at Question 53 (Government of Canada).

⁶⁷In argument before the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, the federal government asserted to similar effect that: “Canadian constitutional structures are fully in compliance with” the *Universal Declaration* and the *ICESCR*; *Factum of the Attorney General of Canada in the Matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, Court File No. 25506 (Supreme Court of Canada) at 71, paragraph 195.

⁶⁸*Ewanchuk*, *supra* note 62 at 365.

⁶⁹*Human Rights Code*, *supra* note 62.

⁷⁰Hon. G.V. LaForest. 1996. “The Expanding Role of the Supreme Court of Canada in International Law Issues.” *Canadian Yearbook of International Law*. 34: 89 at 98.

⁷¹*General Comment No. 9*, *supra* note 34 at para. 10.

⁷²*Concluding Observations, 1998*, *supra* note 19 at para. 14.

⁷³*Ibid.* at para. 15.

⁷⁴*Masse v. Ontario* (1996), 134 D.L.R. (4th) 20, leave to appeal to Ontario Court of Appeal denied (1996), 40 Admin. L.R. 87N, leave to appeal to the Supreme Court of Canada denied (1996), 39 C.R.C. (2d) 375 [hereinafter *Masse*].

⁷⁵*Concluding Observations, 1998*, *supra* note 19 at para. 21.

⁷⁶*Masse*, *supra* note 74; Affidavit of Michael Ornstein, Application Record, Volume II, Tab 15; Affidavit of Gerard Kennedy, Application Record, Volume II, Tab 14 in *Masse v. Ontario*, Ont.C. J. (Gen. Div.) Court File No. 590/95.

⁷⁷*Ibid.* at 69, para. 40. On the link between the cuts and increased vulnerability to domestic violence, see Ontario Association of Interval and Transition Houses, *Locked In, Left Out: Impacts of the Progressive Conservative Budget Cuts and Policy Initiatives on Abused Women and their Children in Ontario* (Toronto: OAITH, November, 1996).

⁷⁸See the discussion in Part III, below.

⁷⁹*Concluding Observations, 1993*, *supra* note 25 at para. 119.

⁸⁰*Ibid.* at paras 101-109, 115, 116, 121.

⁸¹*Masse, supra* note 74 at 46.

⁸²*Ibid.* at 46-47.

⁸³*Dandridge v. Williams*, 90 S. Ct. 1153 (1970) at 1162-63.

⁸⁴See generally, M. Jackman. 1999. "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through Charter of Rights Review." *Journal of Law & Social Policy*. 14: 69; J. Keene. 1998. "Claiming the Protection of the Court: Charter Litigation Arising from Government Restraint." *National Journal of Constitutional Law*. 9; Day and Brodsky. *Women and the Equality Deficit, supra* note 20 at 79-108; M. Jackman. 1993. "Poor Rights: Using the Charter to Support Social Welfare Claims." *Queen's Law Journal*. 19: 65.

⁸⁵*Conrad v. Halifax (County)* (1994), 130 N.S.R. (2d) 305 (Court of Appeal) affirming (1994), 124 N.S.R. (2d) 251.

⁸⁶*New Brunswick (Minister of Health and Community Services v. G. (J.))* (1997), 145 D.L.R. (4th) 349 (N.B.C.A.) at 356.

⁸⁷*Elizabeth Wiebe v. The Queen in Right of Ontario et al.*, Ontario Human Rights Commission Complaint No. 20-106S (filed with the Ontario Human Rights Commission on June 12, 1989, dismissed February 16, 1996).

⁸⁸*Ibid.*

⁸⁹*Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (2d) 7 at 28 [hereinafter *Peterborough Utilities*].

⁹⁰*Ibid.* at 33.

⁹¹*Louise Gosselin c. Procureur général du Québec* (April 6, 1999) Montréal 500-09-001092-923 (C.A.); [1992] R.J.Q. 1657 (C.S.) at 1658 (C.S.).

⁹²*Ibid.* at 1670 (C.S.).

⁹³*Ibid.* at 18 (C.A.).

⁹⁴See generally M. Mandel. 1994. *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Thompson Educational; J. Simpson. 1994. "Rights Talk: The Effect of the Charter on Canadian Political Discourse." In *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life*. Edited by P. Bryden, S. Davis and J. Russell. Toronto: University of Toronto Press, 52; R. Knopff and F.L. Morton. 1992. *Charter Politics*. Scarborough: Nelson Canada; J. Bakan. 1991. "Constitutional

Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)." *Canadian Bar Review*. 70: 307; A.C. Hutchinson and A. Petter. 1988. "Private Rights/Public Wrongs: The Liberal Lie of the Charter." *University of Toronto Law Journal*. 38: 278.

⁹⁵See J. Bakan and D. Schneiderman, eds. 1992. *Social Justice and the Constitution: Perspectives on a Social Union for Canada*. Ottawa: Carleton University Press; Bruce

Porter. 1998. "Social Rights and the Question of a Social Charter." In *Finding Our Collective Voice, Options for a New Social Union*. Edited by P. Leduc Browne. Ottawa: Canadian Centre for Policy Alternatives, 59.

⁹⁶See generally W. Black. 1996. "Vriend, Rights and Democracy." *Constitutional Forum*. 7: 126; M. Jackman. 1996. "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter." *Osgoode Hall Law Journal*. 34: 661; C. Scott and P. Macklem. 1992. "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution." *University of Pennsylvania Law Review*. 141:1.

⁹⁷For example, in *Roberts v. Ontario (Ministry of Health)* (1994), 117 D.L.R. (4th) 297, the Ontario Court of Appeal ordered the Government of Ontario to abolish an age restriction in an assistive devices program in order to comply with the Ontario *Human Rights Code*, notwithstanding that the restriction had been adopted to limit costs. Similarly, in *Eldridge supra* note 47 at 631-32, the Supreme Court ordered the Government of British Columbia to "ensure that sign language interpreters will be provided where necessary for effective communication in the delivery of medical services" in order to comply with the equality rights provisions of the Charter.

⁹⁸Ekos Research Associates Inc. 1997. *Memorandum Concerning Child Poverty Focus Groups: Revised Conclusions*. February 4. Secured through a freedom of information request by Jean Swanson.

⁹⁹*Supra* note 52.

¹⁰⁰J.H. Ely. 1980. *Democracy and Distrust*. Cambridge: Harvard University Press at 151, cited in *Andrews supra* note 49 at 152.

¹⁰¹See A.R. Chapman. 1996. "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly*. 18: 23; P. Alston. 1991. "No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant." In *The Future of Human Rights Protection in a Changing World*. Edited by A. Eide and J. Helgesen. London: Martinus Nijhoff; Craven, "Towards an Unofficial Petition Procedure", *supra* note 33; Scott Leckie. 1998. "Another Step Towards Indivisibility: Identifying Key Features of Violations of Economic, Social and Cultural Rights." *Human Rights Quarterly*. 20: 81; Scott and Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees?" *supra* note 96.

¹⁰²In 1998, the Canadian Human Rights Commission engaged in discussions with human rights bodies in Indonesia, India, South Africa and Mexico around the issue of improved domestic enforcement of human rights, including social and economic rights; Canadian Human Rights Commission. 1999. *Annual Report 1998*. Ottawa: Canadian Human Rights Commission.

¹⁰³*European Social Charter (Revised)*, May 3, 1996, E.T.S. No. 163 (entered into force July 1, 1999) in B.H. Wester ed. 1997. *International Law and World Order: Basic Documents*. May at Vol. 3, Doc III.3.16d.

¹⁰⁴*Ibid.* especially Part II.

¹⁰⁵*Ibid.* at Part IV, Article C in reference to the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, November 9, 1995, E.T.S. No. 158 (entered into force July 1, 1998).

¹⁰⁶*Constitution of the Republic of South Africa 1996*, Act 108 of 1996 at sections 26(1) and 27(1).

¹⁰⁷*Ibid.* at sections 34 and 38; see for example *Thiagraj Soobramoney v. Minister of Health CCT 32/97* (decided November 1997). For a full discussion of the standard of judicial review of social and economic rights under South Africa's Constitution, see Sandra Liebenberg. 1996. "Socio-Economic Rights." In *Constitutional Law of South Africa*. Edited by M. Chaskalson et al. 3rd Revision Service, Johannesburg: Juta & Co. Ltd.

¹⁰⁸*Supra*, note 106 at ss 26(2), 27(2) and 34.

¹⁰⁹*Ibid.* at s. 8(2).

¹¹⁰*Ibid.* at s. 184; *Human Rights Commission Act*, No.54/1994 at s. 7, by virtue of which the South African Human Rights Commission has established the "International Co-ordination Committee" to monitor South Africa's observance of its obligations under international law and to keep abreast of developments at the UN, the Organization of African Unity and other national human rights institutions worldwide; see generally S. Liebenberg. 1997. "Identifying Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission." *Law, Democracy and Development*. November, 1:161.

¹¹¹*Ibid.* at s. 184(3).

¹¹²The United States has refused to ratify the ICESCR and is one of only two countries to refuse to ratify the CRC.

¹¹³Sandra Liebenberg, "Socio-economic Rights", *supra* note 107 at 19-28.

¹¹⁴*Concluding Observations, 1993*, *supra* note 25 at para. 114, 119-121.

¹¹⁵See *Resolution on Economic and Social Rights*, Res. No. 10.1 (DRAFT), Canadian

Association of Statutory Human Rights Agencies, 1999 Annual Meeting, Montreal, May 31, 1999.

¹¹⁶For a discussion of social and economic rights provisions of the Quebec Charter, see P. Bosset. 1996. “Les droits économiques et sociaux: parents pauvres de la Charte québécoise?” *Canadian Bar Review*. 75: 583; H. Tessier. 1996. “Lutte contre la pauvreté : question de droits de la personne et mesure de prévention contre une violence systémique à l’égard des enfants.” *Cahiers de droit*. 37: 475; A. Collard. 1987. “La condition sociale : est-ce vraiment un motif de discrimination?” *Revue du Barreau*. 47: 188.

¹¹⁷“Source of income” is a prohibited ground of discrimination in Alberta, Manitoba and Nova Scotia; “receipt of public assistance” is a prohibited ground in Saskatchewan and (in relation to accommodation) in Ontario; “social origin” is a prohibited ground in Newfoundland; and “social condition” is a prohibited ground in Quebec; see generally R.W. Zinn and P.P. Brethour. 1997. *The Law of Human Rights in Canada*. Looseleaf, Aurora, Ontario: Canada Law Book.

¹¹⁸*Concluding Observations, 1998, supra* note 19 at para. 52.; *Concluding Observations, 1993, supra* note 25 at para. 110.

¹¹⁹See generally Provincial/Territorial Council on Social Policy Renewal. 1998. *Progress Report to Premiers - Report No. 3*. August; Provincial/Territorial Council on Social Policy Renewal. 1997. *New Approaches to Canada’s Social Union: An Options Paper*. April; Provincial/Territorial Council on Social Policy Renewal. 1997. *Progress Report to Premiers - Report No. 2*. July; and 1996 APC Provincial-Territorial Working Group on Social Policy Reform and Renewal. 1996. *Issues Paper on Social Policy Reform and Renewal: Next Steps*. August.

¹²⁰For a description of this trend, see National Anti-Poverty Organization. 1998. *Poverty and the Canadian Welfare State: A Report Card*. Ottawa: National Anti-Poverty Organization, June; C. Girard and L. Lamarche. 1998. “Évolution de la sécurité sociale au Canada : Le mise à l’écart progressive de l’état providence Canadien.” *Journal of Law & Social Policy*. 13: 95; R. Ellsworth. 1997. “Squandering Our Inheritance: Re-Forming the Canadian Welfare State in the 1990s.” *Journal of Law & Social Policy*. 12: 259.

¹²¹See Jackman, “Women and the CHST”, *supra* note 20; Day and Brodsky, *Women and the Equality Deficit, supra* note 20; K. Scott, *Women and the CHST: A Profile of Women Receiving Social Assistance in 1994*. Ottawa: Status of Women Canada, 57.

¹²²United Nations General Assembly, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, June 14 - 25, 1993, UN Doc. A/CONF.157/23 (July 12, 1993) at paras 36-37.

¹²³*National Institutions for the Promotion and Protection of Human Rights*, GA Res. 48.134, UN GAOR, 48th Sess., 8th Plenary Mtg, UN Doc. A/RES/48/134 (December 20, 1993);

National Institutions for the Promotion and Protection of Human Rights, Res. 1994/54, UN HRC, 56th Meeting, UN Doc. E/CN.4/RES/1994/54 (March 4, 1994) [hereinafter *Paris Principles*].

¹²⁴*Ibid.* at paras 2 and 3(b).

¹²⁵*Supra* note 34 at para. 3.

¹²⁶See generally, Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society,” *supra* note 58.

¹²⁷*Concluding Observations, 1998, supra* note 19 at para. 16.

¹²⁸*Ibid.* at para. 22; *Concluding Observations, 1999, supra* note 13 at para. 18.

¹²⁹*Concluding Observations, 1993, supra* note 25 at paras 107 and 116.

¹³⁰*Concluding Observations, 1999, supra* note 13 at para. 17; *Concluding Observations, 1998, supra* note 19 at paras 31 and 32.

¹³¹*Concluding Observations, 1998, ibid.* at para. 26.

¹³²*Concluding Observations, 1997, supra* note 17 at para. 331.

¹³³*Concluding Observations, 1998, supra* note 19 at paras 21 and 46.

¹³⁴On the issue of workfare, see *Gosselin, supra* note 91 and *Lambert v. Québec (Ministère du Tourisme)*, [1996] J.T.D.P.Q. No. 42 ; on direct payment of rent, see *McEwen v. Warden Building Management Ltd. and V.I.P. Property Management Ltd.* (November 14, 1993) (O.H.R.T.) [unreported]; on minimum income criteria, see *Quebec (Comm. des droits de la personne) v. Whittom* (1993), C.H.R.R. D/349 and *Kearney et al. v. Bramalea Limited et al.*, [1998] 21 O.H.R.B.I.D., Decision No. 98-021. In both the *Whittom* and *Kearney* cases, international human rights provisions relating to the right to adequate housing were argued, but were not addressed in the tribunals’ decisions. See, for example, the expert report submitted in *Kearney*, Exhibit 42, Scott Leckie. 1995. “Income Discrimination in Rental Housing and Canada’s International Human Rights Obligations.” March.

¹³⁵Canadian Human Rights Commission, *Annual Report 1997, supra* note 3.

¹³⁶*Reference Re Constitutional Questions Act (B.C.)*, [1991] 2 S.C.R. 525; *Eldridge, supra* note 48. Section 36 entrenches an express commitment by the federal government and the provinces to: “promoting equal opportunities for the well-being of Canadians”; “furthering economic development to reduce disparity of opportunities”; and “providing essential public services of reasonable quality to all Canadians.” This provision represents a constitutionally binding undertaking on the part of the federal and provincial governments to promote equal opportunities for the welfare of women and men living in all parts of the country, and to provide basic public services of reasonable and comparable quality to all Canadians.

¹³⁷*Supra* note 1. While the Universal Declaration was originally intended to stand as a statement of principle, it is now accepted by many legal scholars that it has achieved the status of customary international law, and hence applies to Canada to the same extent as conventional international law; see for example J. Claydon. 1982. "International Human Rights Law and the Interpretation of the *Canadian Charter of Rights and Freedoms*." *Supreme Court Law Review*. 4: 287 at 288-89.

¹³⁸Article 25(1) of the Universal Declaration provides that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Other social and economic rights recognized under the Universal Declaration include the right to "social security" and to the realization of social and economic rights "indispensable for [a person's] dignity and the free development of his [or her] personality" under Article 22; the right to work, to free choice of employment, to protection against unemployment, and to remuneration ensuring "an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" under Article 23; and the right to education under Article 26.

¹³⁹*Supra* note 9. For a review of rights contained under the ICESCR, see generally L. Lamarche. 1995. *Perspectives occidentales du droit international des droits économiques de la personne*. Brussels: Bruylant; M. Craven. 1995. *The International Covenant on Economic, Social and Cultural Rights*. Oxford: Clarendon Press.

¹⁴⁰Article 6 of the ICESCR guarantees "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts..." Article 9 recognizes "the right of everyone to social security, including social insurance." Article 10 declares that "The widest possible protection and assistance should be accorded to the family...particularly...while it is responsible for the care and education of dependent children..." Article 11(2), in terms similar to the Universal Declaration, guarantees: "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

¹⁴¹*Supra* note 11. For a discussion of the CEDAW and the general issue of the international protection of women's rights, see *The United Nations and the Advancement of Women, 1945-1995*. 1995. New York: Department of Public Information, United Nations.

¹⁴²Among the specific social and economic rights guaranteed in the CEDAW are the right to equality in education, under Article 10; in employment, under Article 11; in health care, under Article 12; and in other areas of social and economic life, including the right to family benefits and to financial credit, under Article 13. Article 11(2)(c) of the CEDAW provides that: "In order to prevent discrimination against women on the grounds of...maternity and to ensure their effective right to work, States Parties shall take appropriate measures.... To encourage the provision of necessary supporting social services to enable parents to combine family

obligations with work responsibilities and participation in public life...”

¹⁴³*CRC, supra* note 58. For a discussion of the CRC see generally L.J. Leblanc., 1995. *The Convention on the Rights of the Child: United Nations Law-Making on Human Rights*. Lincoln, University of Nebraska Press.

¹⁴⁴Article 24 of the CRC recognizes the right of the child to “the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.” Article 26 of the CRC sets out “for every child the right to benefit from social security, including social insurance...” Under Article 27(1), state parties “recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.” Article 27(3) of the CRC states that: “State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.” Article 28 sets out “the right of the child to education.” Recognition of the need for adequate supports for women as parents, and in their efforts to combine family and work responsibilities, is reflected in Article 18 of the CRC, which requires state parties to “render appropriate assistance to parents...in the performance of their child-rearing responsibilities.”

¹⁴⁵See United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Sixth Sess., *General Comment No. 4 The Right to Adequate Housing (Article 11(1) of the Covenant)*, Geneva, December 13, 1991, E/1992/23; United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Sixteenth Sess., April 28 - May 16, 1997, *General Comment No. 7 The Right to Adequate Housing (article 11.1 of the Covenant): Forced Evictions*, Geneva, May 20, 1997, E/C.12/1997/4.

¹⁴⁶United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twentieth Sess., April 26 - May 14, 1999, *General Comment No. 12 The Right to Adequate Food (article 11.1)*, Geneva, May 12, 1999, E/C.12/1999/5.

¹⁴⁷United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Eleventh Sess., 38th Mtg., November 25, 1994, *General Comment No. 5 Persons With Disabilities*, Geneva November 25, 1994, E/C.12/1994/13.

¹⁴⁸United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirteenth Sess., 39th Mtg., November 20 - December 8, 1995, *General Comment No. 6 The Economic, Social and Cultural Rights of Older Persons*, Geneva, November 24, 1995, E/1996/22 as reported in (1996) 3:2 *I.H.R.R.* at 253.

¹⁴⁹United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, 5th Sess., 1990, *General Comment No. 3 The nature of states parties' obligations (art 2(1))*, E/1991/23; *General Comment No. 9, supra* note 37 and *General Comment No. 10, supra* note 37.

¹⁵⁰*General Comment No. 3, ibid.* at para. 8; *General Comment No. 4, supra* note 38 at paras 10, 11 and 13-15; *General Comment No. 7, supra* note 38 at paras 9, 10 and 14-17.

¹⁵¹*Concluding Observations, 1998, supra* note 19 at para. 26.

¹⁵²Sandra Liebenberg, “Socio-economic Rights,” *supra* note 107 at 29.

¹⁵³Article 2(2) of the ICESCR guarantees enjoyment of the rights contained in the ICESCR without discrimination “of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Under Article 3 of the ICESCR, state parties “undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights.” Article 3 of the CEDAW guarantees sex equality in “the exercise and enjoyment of human rights”; and Article 5(e) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28 (entered into force January 4, 1969, ratified by Canada November 13, 1970) prohibits discrimination on the basis of race, colour or national or ethnic origin in relation to the enjoyment of social and economic rights.

¹⁵⁴Section 3 of the CHRA currently includes “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted” as prohibited grounds of discrimination. Section 3.1 provides that a discriminatory practice includes “a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”

¹⁵⁵For example, in *Canada (Attorney General) v. Druken* (1988), 9 C.H.R.R. D/5359 (F.C.A.), the provision of federal unemployment insurance was held to be a “service available to the public” under the CHRA; as was the application of the *Income Tax Act*, in *Bailey v. Minister of National Revenue* (1980), 1 C.H.R.R. D/193 (Cdn. Human Rights Trib.). However, in a recent decision for a majority of the Federal Court of Appeal in *Canada (Attorney General) v. McKenna*, [1997] 1 F.C. 401 at 448-449, Robertson, J.A. stated, in *obiter*, that the Court’s decision in *Druken* did not support the proposition that a denial of citizenship under the federal *Citizenship Act* constituted a denial of a “service available to the public.”

¹⁵⁶See for example *Chambers v. Government of Saskatchewan* (1988), 9 C.H.R.R. D/5181 at 5187 (Sask.C.A.), where Vancise J.A. reversed a lower court decision that social assistance payments were not “services customarily available to the public” stating: “Broadly speaking, services provided by the Crown are available to all members of the public. Most services the Crown provides can be described as publicly available benefits. Provision of financial assistance to people in need is but one example.”

¹⁵⁷In *Floyd v. Canada (Employment & Immigration Commission)* (1993), 20 C.H.R.R. D/381 (Cdn. Human Rights Trib.), for example, provisions of the *Unemployment Insurance Act* restricting the eligibility of pregnant women were held to constitute a discriminatory practice based on sex within the meaning of s. 5 of the CHRA. In *Moore v. Canada*

(*Treasury Board*) (1996), 25 C.H.R.R. D/351 (Cdn. Human Rights Trib.), a denial of federal employment-related health care benefits was found to be discriminatory on the basis of sexual orientation.

¹⁵⁸In *LeDeuff v. Canada (Employment and Immigration Commission)* (1987), 9 C.H.R.R. D/4479 (Cdn. Human Rights Rev. Trib.), it was held that whenever the government of Canada applies an act of general scope, it is providing a service to the public within the meaning of the CHRA.

¹⁵⁹See for example *Schaap v. Canada (Canadian Armed Forces)* (1988), 12 C.H.R.R. D/4451 (F.C.A.).

¹⁶⁰See for example *Grover v. Canada (National Research Council)* (1992), 18 C.H.R.R. D/1 (Cdn. Human Rights Trib.).

¹⁶¹For example, in *MacGillivray v. Hume's Transportation Ltd.* (1982), 3 C.H.R.R. D/732 (Cdn. Human Rights Trib.), a federally regulated trucking company's failure to pay provincial health insurance premiums for a female employee, when such benefits were provided to male employees, was found to be a discriminatory practice based on sex under s. 7 of the CHRA.

¹⁶²This is effectively what occurred in the *Gosselin* case, *supra* note 91, where Louise Gosselin's challenge to inadequate welfare rates for single employable persons under the age of 30, relying on the anti-discrimination and the social and economic rights provisions of the Quebec *Charter of Human Rights and Freedoms*, was dismissed by trial court on the grounds that social and economic rights are merely "policy objectives" and not enforceable rights.

¹⁶³ *Eldridge*, *supra* note 48 at 675.

¹⁶⁴See generally M. Jackman. 1994. "Constitutional Contact With the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law." *Review of Constitutional Studies*. 2: 76; S. Turkington. 1993. "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism." *Journal of Law & Social Policy*. 9: 134.

¹⁶⁵*Supra* note 98.

¹⁶⁶*Concluding Observations, 1993*, *supra* note 25 at paras 107 and 116; *Concluding Observations, 1998*, *supra* note 19 at para. 51.

¹⁶⁷Section 67 of the CHRA provides that: "Nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that *Act*."

¹⁶⁸*Concluding Observations, 1998*, *supra* note 19 at para. 17.

¹⁶⁹*Concluding Observations, 1999*, *supra* note 13 at para. 8.

¹⁷⁰ See for example Native Women's Association of Canada. 1997. *Hear Their Stories*. Ottawa, Native Women's Association of Canada; M. Dion Stout and G.D. Kipling. 1998. *Aboriginal Women in Canada: Strategic Research Directions for Policy Development*. Ottawa, Status of Women, at 3-8; and see also the sources of statistical information on Aboriginal women catalogued in Status of Women Canada. 1998. Finding Data on Women: A Guide to Major Sources. Ottawa, Status of Women Canada at 86-87.

¹⁷¹The issue of income criteria as a form of sex and marital status discrimination against single mothers has been addressed in the context of rental housing in Quebec and Ontario; see *Quebec (Comm. Des droits de la personne) v. Whittom*, *supra* note 134 and *Kearney et al. v. Bramalea Limited et al.*, *supra* note 134.

¹⁷²Courts and tribunals, of course, may give weight to the broader social and economic dimensions in assessing whether a policy or practice can be justified and in considering remedies. The intersection of credit criteria with the broader systemic patterns of poverty and exclusion, however, have generally lead courts to find that equality protections do not apply, rather than to apply them more rigorously in light of their serious effects. See, for example, *Clark v. Peterborough Utilities Commission*, *supra* note 89.

¹⁷³432 U.S. 63 (1977).

¹⁷⁴*Central Okanagan School District No. 23 v. Renauld*, [1992] 2 S.C.R. 970 at 984-5; see also *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353 (B.C. Council of Human Rights).

¹⁷⁵In *Saskatchewan Human Rights Commission v. Ripplinger* (1993), 20 C.H.R.R. D/427 (Sask. Board of Inquiry). Affd (1996), 24 C.H.R.R. D/435, the board found that making an art gallery wheelchair accessible at a cost of \$30,000 would not result in undue hardship. The gallery's net annual income was \$600,000 to \$700,000. In *Quesnel v. London Educational Health Centre* (1995) 28 C.H.R.R. D/474 (Ont. Board of Inquiry) the board held that a chiropractor with an income of between \$61,438 and \$73,640 had a duty to make his offices wheelchair accessible, at a cost of \$19,657. For concerns about the undue hardship standard see, however, S. Day and G. Brodsky. 1996. "The Duty to Accommodate: Who Will Benefit?" *Canadian Bar Review*. 75: 433.

¹⁷⁶With respect to duties on the government as an employer, see *Re Ontario (Ministry of Government Services) and OPSEU (Kimmel/Leaf)* (1991), 21 L.A.C 129 in which a grievance settlement board found that the Ministry of Labour in Ontario was required to accommodate the needs of religious minorities by providing them with paid leaves of absences on religious holidays at estimated annual cost of \$2.5 million.

¹⁷⁷*Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 218-219; *Schachter v. Canada (Employment and Immigration Commission)*, [1992] 2 S.C.R. 679 at 709.

¹⁷⁸*R. v. Oakes*, [1986] 1 S.C.R. 103.

¹⁷⁹*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 303.

¹⁸⁰*Eldridge*, *supra* note 48 at 624.

¹⁸¹ *Supra* note 136.

¹⁸²*Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* at para. 8 as reproduced in “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.” *Human Rights Quarterly*. 1998, 20: 691. The Maastricht Guidelines were developed by a group of more than 30 experts who met in Maastricht January 22 – 26, 1997, at the invitation of the International Commission of Jurists and others, in order to elaborate on the earlier Limburg Principles on the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies; see V. Dankwa, C. Flinterman and

S. Leckie. 1998. “Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.” *Human Rights Quarterly*. 20: 704.

¹⁸³*General Comment No. 3*, *supra* note 149 at paras 2 and 9.

¹⁸⁴*General Comment No. 12*, *supra* note 146 at paras 21 and 22; *General Comment No. 4*, *supra* note 145 at para. 12.

¹⁸⁵See R. E. Robertson. 1994. “Measuring State Compliance with the Obligation to Devote the ‘Maximum Available Resources’ to Realizing Economic, Social and Cultural Rights.” *Human Rights Quarterly*. 16: 693 at 698; Alston and Quinn, “The Nature and Scope of States Parties’ Obligations,” *supra* note 32 at 177-181.

¹⁸⁶*Soobramoney v. Minister of Health, KwaZulu-Natal* (1997) (12) BCLR 1696 (CC) at paragraph 43.

¹⁸⁷*Ibid.* para. 31.

¹⁸⁸*General Comment No. 3*, *supra* note 149 at para. 10.

¹⁸⁹*Ibid.* para. 9. For a discussion of this issue in relation to the repeal of CAP, see C. Scott. 1995. “Covenant Constitutionalism and the Canada Assistance Plan.” *Constitutional Forum*. 6: 79 at 82; and see also Scott and Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees”, *supra* note 96 at 81.

¹⁹⁰*Concluding Observations, 1998*, *supra* note 19 at para. 12.

¹⁹¹*Vienna Convention on Law of Treaties*, May 23, 1969; 115 U.N.T.S. 331; 8 I.L.M. 679 (entered into force January 27, 1980), art. 27.

¹⁹²*Concluding Observations, 1993*, *supra* note 25 at para. 20; *Concluding Observations*,

1998, *supra* note 19 at paras 17, 34, 40, 41, 44, 45, 46, 52, 54.

¹⁹³*Baker, supra* note 58.

¹⁹⁴*Ibid.* at paras 79-80, per Iacobucci, J.

¹⁹⁵*Eldridge, supra* note 48.

¹⁹⁶This would include the concluding observations of treaty-monitoring bodies.

¹⁹⁷*Paris Principles, supra* note 123 at para. 3(b); *General Comment No. 10, supra* note 34 at paragraph 3(b).

¹⁹⁸*Paris Principles, ibid.* at para. 3 (b)(c); *General Comment No. 10, ibid.* at para. 3(b).

¹⁹⁹*Paris Principles, ibid.* at para. 3(d).

²⁰⁰*List of issues, supra* note 26 at paras 12 - 14.

²⁰¹The Social Rights Sub-committee is modelled, in part, on the provisions the Alternative Social Charter, which the authors of this paper participated in drafting. The Alternative Social Charter was endorsed by a national coalition of anti-poverty and equality seeking groups during the constitutional negotiations leading up to the *Charlottetown Accord* Referendum in 1992. The Alternative Social Charter is discussed and reproduced in Bakan and Schneiderman, *Social Justice and the Constitution, supra* note 95, Appendix I at 155.

²⁰²The issue of whether there should be direct access to the tribunal in general is under review by the CHRA Review Panel. As discussed above, whatever procedure is adopted for the investigation and adjudication of discrimination complaints will apply in the same way to complaints involving the discriminatory denial of social and economic rights.

²⁰³Like the social rights sub-committee, the social rights panel is modelled, in part, on the provisions of the Alternative Social Charter; see the discussion, *supra* at note 196.

²⁰⁴See generally M. Jackman. 1990. "Rights and Participation: The Use of the Charter to Supervise the Regulatory Process." *Canadian Journal of Administrative Law & Practice*. 4: 23; Scott and Macklem, "Constitutional Ropes of Sand," *supra* note 96.

²⁰⁵See C. Scott and J. Nedelsky. 1993. "Constitutional Dialogue." *Social Justice and the Constitution, supra* note 95 at 59; J. Nedelsky. 1993. "Reconceiving Rights as Relationships." *Review of Constitutional Studies*. 1: 1.

²⁰⁶*Vriend, supra* note 52 at 578.

²⁰⁷Ken Gray and Hattie Klotz. 1999. "Homeless pregnant woman died of exposure." *The Ottawa Citizen*. March 1.

²⁰⁸*Supra* notes 129, 133.

²⁰⁹*Concluding Observations, 1999, supra* note 13 at para. 12.

²¹⁰*Supra* note 134.

²¹¹Margaret Philp. 1998. "Ruling Bars Bias Against Low-income Tenants: Landlords Can't Set Arbitrary Ratios on Rent." *The Globe and Mail*. December 23.

²¹²Shelagh Day. *Making the Indivisibility of Women's Human Rights Real* (Commission on the Status of Women 42nd Session, March 2 - 13, 1998).

²¹³Martin Scheinin, "Women's Enjoyment of their Economic and Social Rights: Conceptual Framework for the Discussion." United Nations: Division for the Advancement of Women, Expert Group Meeting on Promoting Women's Enjoyment of Their Economic and Social Rights (Turku/Abo, Finland December 1 - 4, 1997) EGM/WESR/1997/BP.1.

²¹⁴*Airey v. Ireland*, European Court of Human Rights, Judgment of October 9, 1979, Series A, vol. 32.

²¹⁵*Supra* note 86.

²¹⁶Communications 182/1984 (*Zwaan-de Vries*) and 172/1984 (*Broeks*), Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. 2(1990) at 209 and 196, respectively.

²¹⁷*Supra* note 206 at 8.

²¹⁸*Canadian Human Rights Act Review Panel Consultation Paper*. 1999. Ottawa, *Canadian Human Rights Act Review Panel*, July. Online at www.chrareview.org

²¹⁹*Canadian Human Rights Act Review Panel: Terms of Reference* online at www.chrareview.org

²²⁰*Supra* notes 27, 28.

²²¹*Responses to Supplementary Questions, supra* note 27.