

**ReWriting the *Charter* at 20 or Reading it Right:
The Challenge of Poverty and Homelessness in Canada**

Plenary Presentation

The Canadian Charter of Rights and Freedoms: Twenty Years Later

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If the *Canadian Charter of Rights and Freedoms*¹ were scheduled for a twenty year overhaul and update, I think many would agree that we would want to try to correct its failure address in any meaningful way the growing social and economic inequalities in Canadian society and the widespread poverty and homelessness in the midst of unprecedented affluence. The proliferation of hunger and homelessness in Canada belies the *Charter's* promise of a more egalitarian and just society and has left many of the most disadvantaged in Canada on the outside of our so-called "rights revolution."

Last year, when the Canadian Human Rights Review Panel, chaired by former Justice La Forest, traveled across the country to hear from human rights and equality seeking groups about what they would look for in a revised *Canadian Human Rights Act (CHRA)*,² it was virtually unanimous among equality seeking constituencies that increasingly widespread and severe poverty and homeless among the most vulnerable and disadvantaged groups in Canada must be recognized as a national human rights crisis. These issues, everyone seemed to agree, go to the very core of equality, security and dignity that are at the heart of Canadians' conceptions of human rights and must be addressed not only as issues of social policy but also as human rights violations subject to legal remedy.³

A similar consensus has emerged at the international level among United Nations human rights treaty monitoring bodies reviewing Canada's compliance with our international human rights obligations. These bodies have expressed alarm and shock at the growing crisis of poverty and homelessness in Canada and at the fact that Canadian courts and governments appear unwilling to recognize the effects of unprecedented cuts to social programs and resulting hunger and homelessness as

¹Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter* or *Canadian Charter*].

²R.S.C. 1985, c. H-6.

³See Summaries of Non-Governmental Organizations Roundtable Consultations, Halifax, Nova Scotia, September 28th and 29th 1999; Montréal, September 30/October 1, 1999; Ottawa: October 18th and 19th, 1999; Toronto: October 20th and 21st, 1999; Vancouver-October 25th and 26th, 1999; Edmonton, Alberta-October 27th and 28th, 1999, online at <www.chrareview.org>.

violations of rights under the *Charter* and human rights legislation.⁴

Our governments have tried to dismiss the growing concerns among U.N. bodies by pointing to the fact that Canada has perched proudly atop the United Nations Development Program Human Development Index for the last 6 years. What they fail to appreciate is that from the perspective of international law and those who monitor its compliance, a high average standard of living and increased economic prosperity for the majority does not make the destitution of some members of our society more tolerable. Rather, poverty and homelessness in Canada is more abhorrent because it is completely unnecessary and almost invariably a matter of legislative or administrative choice. Our governments have chosen to ignore the interests of the most marginalized and disadvantaged groups and governed primarily for what J.K. Galbraith calls the "Contented Electoral Majority."⁵

Some would say, of course, that these legislative and administrative choices are somehow exempt from judicial review under the *Charter* and that these are issues beyond the competence and legitimate role of the courts. Yet as Justice Wilson noted in *Andrews*, relying on the words of John Hart Ely: "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."⁶ When governments cater exclusively to majority interests at the expense of fundamental human rights of those at the margins, surely the promise of the *Charter* is that the courts will step in to protect and safeguard their rights. That promise has not been fulfilled for those living in poverty

⁴For descriptions of the emerging consensus with U.N. treaty monitoring bodies about poverty and homelessness in Canada, see B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights," 15 JLSP 2000 and Craig Scott, C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional Forum* 97.

⁵ J. K. Galbraith, *The Culture of Contentment* (Boston: Houghton Mifflin, 1992) at p. 15

⁶ J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) at 151, cited in *Andrews supra* note 49 at 152.

in Canada.

One of the reasons for this is that when poor people claim their rights under the *Charter* to equality or security of the person, they may appear to courts to be seeking remedies to a category of rights which is not explicitly included in the *Charter*. Poor people experience discrimination by governments primarily in relation to refusals to address economic deprivation. The type of government action or inaction that denies poor people equality or security of the person is usually linked with a failure to provide for economic need or a denial of a basic social or economic rights such as housing. Thus, when the most disadvantaged in Canadian society advance claims to dignity, equality and security they are at the same time advancing claims to rights which, under international law, are categorized as “social and economic rights.”

Central to the *Universal Declaration of Human Rights*,⁷ and to most subsequent human rights treaties ratified by Canada is the right to an adequate standard of living, including the right to adequate food and the right to adequate housing.⁸ We do not find those rights, or other social and economic rights, explicitly enumerated in the *Charter*. Does that mean that the *Charter* has to be re-written to include social and economic rights if those living in poverty are to be included in its guarantees of dignity, equality and security? That is the question I want to briefly explore today.

The lack of explicit recognition of social and economic rights in Canadian law has been

⁷*Universal Declaration of Human Rights*, GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

⁸Article 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.

a matter of growing concern at the U.N. Committee on Economic, Social and Cultural Rights, which monitors Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁹ With respect to our human rights legislation in Canada, the Committee has recommended the explicit inclusion of economic, social and cultural rights.¹⁰ This has also been the solution advocated by many within Canada. As Canada's Chief Commissioner of Human Rights has observed:

[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.¹¹

Most equality seeking and human rights groups appearing before Justice La Forest's Task Force last year also called for the inclusion of social and economic rights in the *CHRA*, including the right to an adequate standard of living and the right to adequate

⁹Article 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." M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Clarendon Press, 1995).

¹⁰United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Official Records, 1994, Supplement No.3 *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, 10 June 1993, E/C 12/1993/19 [hereinafter *Concluding Observations, CESCR, 1993*] at par. 9; United 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)*, 10 December 1998, E/C.12/1/Add.31 [hereinafter *Concluding Observations, CESCR, 1998*] at par.51.

¹¹Canadian Human Rights Commission, *Annual Report 1997* (Ottawa: Canadian Human Rights Commission, 1998) 2.

housing as basic rights which could be claimed and adjudicated before a tribunal.¹² If a twenty year “tune up” were on the agenda for the *Charter*, I am sure the U.N. Committee on Economic, Social and Cultural Rights as well as most equality seeking groups in Canada would express similar support for the inclusion of social and economic rights there. Adding to the *Charter* explicit reference to social and economic rights such as the right to adequate food, clothing and housing, social security, work freely chosen, healthcare and education would serve to update the *Charter* in light of recent developments in international human rights and help to overcome what seems to be a strong judicial resistance, at least at lower courts, to address the pressing human rights issues in Canada that are of growing concern both internationally and domestically.

International human rights law has seen significant advances in the area of social and economic rights since the *Charter* was first drafted. At that time, the *International Covenant on Economic, Social and Cultural Rights* had only recently come into force. Though declared by the United Nations to be indivisible and interdependent with civil and political rights, social and economic rights were still, in 1981, in the institutional backwaters of the U.N. in comparison to civil and political rights. Civil and political rights were monitored and adjudicated by a specially constituted treaty monitoring body under the *International Covenant on Civil and Political (ICCPR)*¹³ - the U.N. Human Rights Committee - which reviewed governments’ five year periodic reports under that

¹²Among the organizations supporting the inclusion of social and economic rights are the Charter Committee on Poverty Issues (CCPI), the National Anti-Poverty Organization (NAPO), Equality for Gays and Lesbians Everywhere (EGALE), The African Canadian Legal Clinic, Action travail des femmes, La table féministe de concertation provinciale de L'Ontario National Association of Women and the Law (NAWL), the Council of Canadians with Disabilities (CCD), Coalition of Persons with Disabilities (Newfoundland and Labrador) and Independent Living Resource Centre (St. John's, Newfoundland), Metro Toronto Chinese & Southeast Asian Legal Clinic, Affiliation of Multicultural Societies & Service Agencies of B.C. (AMSSA) and the Canadian Council for Refugees (CCR). See Summaries of Non-Governmental Organizations Roundtable Consultations, Halifax, Nova Scotia, September 28th and 29th 1999; Montréal, September 30/October 1, 1999; Ottawa: October 18th and 19th, 1999; Toronto: October 20th and 21st, 1999; Vancouver-October 25th and 26th, 1999; Edmonton, Alberta-October 27th and 28th, 1999, online at <www.chrareview.org>.

¹³*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 23 March 1976, accession by Canada 19 May 1976)

Covenant and also received and adjudicated individual complaints of violations.¹⁴ Social and economic rights, on the other hand, had no official treaty monitoring body. They were reviewed by various ineffective working groups within the Economic and Social Council, were subject to no complaints procedure and had virtually no jurisprudence. Because they require resources and are subject to “progressive realization” over time, social and economic rights such as the right to adequate food, clothing and housing, were considered more as policy commitments than as enforceable human rights.¹⁵

A lot has changed in the last twenty years. The *ICESCR* was given its own Committee in 1986 which has developed more rigorous state party review and developed General Comments on various rights and obligations under the *Covenant*, including the right to adequate housing¹⁶ and the right to food;¹⁷ the obligations with respect to particular groups such as persons with disabilities¹⁸ and older persons;¹⁹ and on the general nature of state party obligations, particularly with respect to the provision of legal

¹⁴*International Covenant on Civil and Political Rights, (First) Optional Protocol*, Adopted Dec. 19, 1966 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

¹⁵ For a description of changes since the early 1980s see B. Porter, “Socio-economic Rights Advocacy - Using International Law: Notes from Canada” (July 1999) 2:1 *Economic & Social Rights Review* 1.

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

¹⁷ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twentieth Sess., 26 April - 14 May 1999, *General Comment No. 12 The Right to Adequate Food (article 11.1)*, Geneva, 12 May 1999, E/C.12/1999/5.

¹⁸ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Eleventh Sess., 38th Mtg., 25 November 1994, *General Comment No. 5 Persons With Disabilities*, Geneva 25 November 1994, E/C.12/1994/13.

¹⁹ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirteenth Sess., 39th Mtg., 20 November - 8 December 1995, *General Comment No. 6 The Economic, Social and Cultural Rights of Older Persons*, Geneva, 24 November 1995, E/1996/22 as reported in (1996) 3:2 *I.H.R.R.* at 253.

remedies.²⁰ Experts have convened from around the world, first in Limburg and more recently in Maastricht to develop guidelines on violations of economic, social and cultural rights.²¹ At the urging of the World Conference on Human Rights in Vienna the U.N. Committee on Economic, Social and Cultural Rights has prepared a Draft Optional Protocol which would establish a complaints and adjudication procedure similar to that which exists under the *ICCPR*.²²

With the expansion of the human rights treaty monitoring system at the United Nations in the 1980s and the adoption of treaties dealing with the rights of groups such as women and children, the indivisibility of social and economic rights and civil and political rights has become an institutional reality. The *Convention on the Rights of the Child*²³ adopted in 1989, recognizes a broad range of economic and social rights of children and now enjoys almost universal ratification.²⁴

Virtually all regional treaty bodies now have incorporated review and adjudication of social and economic rights. The 40 member Council of Europe, for example, has

²⁰United 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, 16 November - 4 December 1998, E/C.12/1998/24 [hereinafter *General Comment No. 9*]

²¹*Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN doc. E/CN.4/1987/17; reproduced in *Human Rights Quarterly*, Vol. 9 (1987), pp. 122-135; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights in Human Rights Quarterly*, Vol. 20 (1998).

²²*Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN doc. E/CN.4/1997/105.

²³*Convention on the Rights of the Child*, 20 November 1989, Can T.S. 1992 No. 3; UN Doc. A/RES/44/25 (entered into force 2 September 1990 and in force for Canada 28 May 1990) [hereinafter *CRC*].

²⁴The *CRC* recognizes, *inter alia*, 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 24); “the right to benefit from social security, including social insurance ...” (Article 26); the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” (Under Article 27(1)). Article 27(3) states that: “States 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.” The United States has refused to ratify the *ICESCR* and is one of only two countries to refuse to ratify the *CRC*, the other being Rwanda.

adopted an updated and revised *European Social Charter* which includes rights such as the right to decent housing and the right to “protection against poverty and social exclusion” and provides for a complaints procedure.²⁵ Most other regional human rights systems now provide in some manner for the adjudication of social and economic rights.

The United Nations and regional human rights bodies are struggling to respond, although arguably too slowly, to an urgent need for internationally enforceable social and economic rights in the new global economy. When the primary market in which corporations competed was circumscribed by national borders and protectionist trade barriers, governments were relatively free to set the rules of the competition. They could establish minimum wages, health and safety protections, labour standards, and social programs and set appropriate taxation rates through which to pay for them. In the new international economy, however, governments are too often governed by the market they regulate - by their credit ratings, their ability to compete for investment, their need to sell their products in the global market and by the decisions of trade panels about the legality of domestic regulatory measures. Without a new emphasis on social and economic rights that can be applied both internationally and domestically as universal norms, social policy can easily be held hostage to global competition.

These developments have brought new domestic challenges to social and economic rights in all countries. Certainly the challenges facing Canadian society have altered dramatically since parliamentarians debated and framed the provisions of a new *Charter of Rights* back in 1980-81. If our parliamentarians at that time had gone to the Parliamentary Library to look into the problem of “homelessness” in Canada they would have found only a couple of reports dealing with transient men in larger cities living in inadequate rooming houses or “flop houses”.²⁶ They would not have imagined that after

²⁵*European Social Charter (Revised)*, 3 May 1996, E.T.S. No. 163 (entered into force 1 July 1999) in B.H. Wester ed., *International Law and World Order: Basic Documents* (May 1997) at Vol. 3, Doc III.3.16d. especially Part II. at Part IV, Article C in reference to the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, 9 November 1995, E.T.S. No. 158 (entered into force 1 July 1998).

²⁶See, for example, Toronto Social Planning Council, *Report on Homelessness* (City of Toronto, 1976)

twenty years of unprecedented economic prosperity, there would be thousands in Canada who sleep on the streets or in grossly inadequate shelters for the homeless. Most parliamentarians would have had no idea what a “food bank” was. The first food bank only opened in Edmonton in 1981. It would have been unimaginable to them that twenty years later three quarters of a million people, including over 300,000 children, would rely every month on emergency assistance from a national network of over 615 food banks and over 2,000 agencies providing limited emergency food²⁷

These developments, occurring to various degrees in all countries, raise new challenges to domestic constitutional regimes. Many of the world’s newer constitutional democracies have responded by providing, at least in some form, for the adjudication of social and economic rights, either through the direct application of international human rights law in domestic courts or through the inclusion of specified social and economic rights in national constitutions.

An example with which many in the Canadian Bar Association (CBA) will be familiar is South Africa, where the CBA has forged important research and support networks for advocates working under the new Constitution. South Africa’s final Constitution includes a broad range of social and economic rights that are fully justiciable, 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.”²⁸ Their Constitutional Court recently released its first ruling which applied the right to have access to adequate housing. The Court found that various levels of government failed to fulfill their constitutional responsibilities when 390 adults and 510 children were living on a sports field without tents or facilities after having been forced to

²⁷Canadian Association of Food Banks, *Hunger Count 2000: A Surplus of Hunger*, Prepared by Beth Wilson and Carly Steinman (Toronto, October, 2000). The first food bank in Canada opened later in 1981 in Edmonton.

²⁸*Constitution of the Republic of South Africa 1996*, Act 108 of 1996 at sections 26(1) and 27(1). For a full discussion of the standard of judicial review of social and economic rights under South Africa’s *Constitution*, see Sandra Liebenberg, “Socio-Economic Rights,” in M. Chaskalson et al eds., *Constitutional Law of South Africa*, 3rd Revision Service (Johannesburg: Juta & Co. Ltd, 1996)

vacate a squatter settlement.²⁹ Surely if a government facing a horrific AIDS crisis, and with considerably fewer resources than Canada is prepared to be held constitutionally accountable to these fundamental norms of international human rights law, we in Canada should be.

It is interesting to note that as early as 1990, when Canada was experiencing a serious housing crisis and after the International Year of Shelter for the Homeless in 1987 had brought new attention to the right to housing in international law, a Liberal Housing Task Force co-chaired by Paul Martin recommended that the *Charter* be amended to include the right to adequate housing and other social and economic rights³⁰ Mr. Martin argued at that time that while many of the rights in the *Charter* tend to be seen as “negative” rights, it is increasingly important to recognize the positive obligations of governments:

... [S]ince the middle of the Great Depression and particularly from the end of World War II, we have moved into an era where government decides not only that certain rights are available but also undertakes an obligation to provide the means whereby the rights may be enjoyed. In Canada, the most obvious example of those types of rights and corresponding obligations can be seen with respect to minority language rights, health care and education.

The Task Force believes that it is a healthy sign in a democracy for new rights to be created. It is therefore not unusual at this time in our history to have positive rights creating a State or government obligation. The question then becomes how best can a right to housing, or even to shelter, be expressed.

.... In order to find a definition and legal description of housing rights, it is instructive to look at specific international covenants to which Canada is a signatory. These covenants are also significant in that they highlight the fact that Canada, as a member of the international community, has recognized the universal need for a rights declaration dealing with adequate housing.

²⁹*The Government of South Africa v. Grootboom*, Case CCT 11/00, 4 October 2000.

³⁰Paul Martin and Joe Fontana, *Report of the National Liberal Caucus Task Force on Housing* (National Liberal Caucus, Parliament of Canada, 1990)

... though Canada is a signatory to these international covenants, some of the matters contained in them, such as housing, tend still to be looked upon only as worthy goals of social and economic policy rather than legally enforceable rights.

... The Task Force believes that those searching for adequate, affordable housing may be better served by giving them some form of constitutionally guaranteed right to shelter.³¹

The 1990 Task Force concluded by recommending that the constitutional recognition of the right to housing should be placed on the agenda of the next First Minister's Meeting.

Today, of course, telling homeless people that they need to wait for the *Charter* to be re-written by the First Ministers to protect their right to housing is to condemn them to a lengthy, if not eternal, exile from Canada's constitutional democracy. Before we propose to re-write the *Charter* to include social and economic rights like the right to housing, we should make sure we are reading the one we've got right, and that poor peoples' claims to dignity and security could not receive an appropriate hearing and response in the context of the present *Charter*. For while the *Charter* may seem old to some, it is relatively new for poor people. The first *Charter* challenge to poverty and homelessness to reach the Supreme Court of Canada will be heard in the autumn.³² It is a bit early in their rights claiming history to be telling poor people that they need to re-write the *Charter* if they want to have their claims to dignity, equality and security heard.

While we do not have in the *Charter* an enumeration of particular social and economic rights, we still have two all-important, open-ended provisions which were the result of hard fought battles back in 1980-81. First, there is the broad guarantee of the right to "life, liberty and security of the person" in section 7, duplicating the wording of the broad, overarching guarantee in article two of the *Universal Declaration*, and situated within a

³¹Report of the Liberal Housing Task Force, (Ottawa, Parliament of Canada, 1990)

³²*Louise Gosselin v. Quebec (Attorney General)* (S.C.C. File No. 27418). The case referred to here was subsequently heard by the Supreme Court of Canada on October 29, 2001 and the decision was released December 19, 2002. See *Gosselin v. Quebec (Attorney General)* 2002 SCC 84, and f.n. 63 below.

Constitution which uniquely excludes the right to property in order to ensure that regulatory measures important to the community at large and to the personal security of individuals are not subject to challenge by more advantaged corporate interests. And second, there is a substantive guarantee of the equal benefit of the law in section 15. Neither of these rights conforms to the “negative rights” paradigm described by Paul Martin. Both have been recognized by the Supreme Court as being “hybrid” rights, made up of positive and negative components.³³

Open ended, substantive rights such as these are particularly well equipped for providing remedies to more specific substantive rights enumerated and codified in international human rights law. The Supreme Court has embraced the well established principle of international law that domestic law should be interpreted in a manner that conforms to international legal obligations and it has done so specifically in relation to social and economic rights. It was in the context of invoking the right to work under the *ICESCR* that the majority of the Supreme Court embraced Chief Justice Dickson’s important precept 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.”³⁴ The Supreme Court has recognized that while corporate property rights were deliberately excluded from the *Charter* and can not be read back into it through section 7, this is not true of social and economic rights which might be claimed by those living in poverty. It has recognized that section 7 may be interpreted to include rights in the *ICESCR* such as “rights to social security, equal pay for equal work, adequate food, clothing and shelter.”³⁵ It has found that section 7 obliges governments to provide legal aid or counsel for poor people in custody cases

³³On sections 7 and 15 as “hybrid” rights incorporating positive and negative components, see *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 702, 721. For the Supreme Court’s subsequently consideration of positive obligations under section 15, see B. Porter, “Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*” (1998) 9 *Constitutional Forum* 71.

³⁴*Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1056.

³⁵*Irwin Toy v. Attorney General of Quebec* [1989] 1 S.C.R. 927 at 1003-04.

where there is an issue of security of the person at stake.³⁶

Considering the status of the *Convention on the Rights of the Child* as an interpretive framework for administrative discretion, Justice L'Heureux-Dubé asserted for the majority of the Court in *Baker* that international law is “a critical influence on the interpretation of the scope of the rights included in the *Charter*.”³⁷ She further elaborated on that principle in *Ewanchuk*, noting that “our *Charter* is the primary vehicle through which international human rights achieve a domestic effect.”³⁸ and that the equality guarantee, along with the guarantee of security of the person, will be particularly important vehicles for incorporating international human rights norms, as these two rights “embody the notion of respect of human dignity and integrity.”³⁹

Canada's unique approach to equality should thus act as an appropriate vehicle for providing domestic legal effect to many of the substantive obligations toward disadvantaged groups contained in the *ICESR* and the *Convention on the Rights of the Child*, *The Convention on the Elimination of All Forms of Discrimination Against Women* and other human rights treaties. As the U.N. Committee on Economic, Social and Cultural Rights put it in the Committee's *General Comment on the Domestic Application of the Covenant*:

... 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.⁴⁰

³⁶*New Brunswick (Minister of Health and Community Services v. G. (J.))* [1999] S.C.J. No. 47

³⁷*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 at paragraph 70.

³⁸*Ibid.* at 365.

³⁹*R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paragraph 73..

⁴⁰United Nations Committee on Economic, Social and Cultural Rights, Nineteenth Session *General*

In its first decisions under section 15 in *Andrews and Turpin* in 1989, the Supreme Court affirmed that the equality guarantee is the broadest of all guarantees, underpinning all other rights, that it has a strong remedial component and that its purposes are “in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.”⁴¹ In the *Eldridge*⁴² case, deaf patients in British Columbia challenged the fact that there was no sign language interpretation provided when it was necessary to adequate healthcare. When the B.C. government had declined to fund a non-profit provider of these services they argued that their right to the equal benefit of the healthcare system had been infringed. Government lawyers argued that the right to equality ought only to protect against inequalities created by government action, not to authorize courts to require governments to allocate resources to particular issues of disadvantage that were not directly caused by government action. Justice La Forest, on behalf of a unanimous Supreme Court of Canada, forcefully rejected that argument, stating that:

To argue 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 bespeaks a thin and impoverished vision of s. 15(1).⁴³

It is difficult to see how government action or inaction depriving single mothers and their children, people with disabilities, youth or others enumerated or analogous groups of adequate food, clothing and housing would fall outside of this broad guarantee of substantive equality.

While the Supreme Court’s evolving approach to equality and security of the person is

Comment No. 9: The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights, Geneva, 16 November - 4 December 1998, E/C.12/1998/24 at paragraphs 14, 15.

⁴¹*R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1332.

⁴²[1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

⁴³*Ibid.* at 677-78.

properly informed by modern developments in international human rights law, it is also a retrieval of the original promise of the *Charter*, and its broad affirmation of social justice as a fundamental foundation of our constitutional democracy. Chief Justice Dickson wrote in *Oakes* in 1986 of the values and principles essential to a free and democratic society which must guide *Charter* interpretation, including “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”⁴⁴

As Justice Cory noted in *Vriend*, the guarantee of substantive equality at the core of the *Charter* evokes the promise of a “just society” in which all individuals live in dignity - arduous and difficult as it may be to attain, but well worth the effort.⁴⁵ We were certainly reminded last September, watching historical clips of Pierre Elliot Trudeau, of how inseparable were our expectations of the *Charter* twenty years ago from the ideal of a just and inclusive society based on universal dignity and social justice. As the young Trudeau wrote in 1961 in an article on “Economic Rights” for the *McGill Law Journal*, unless society evolves “an entirely new set of values” and produces the services that private enterprise is failing to produce “any claim by lawyers that they have done their bit by upholding civil liberties will be dismissed as a hollow mockery.”⁴⁶

Without being naively nostalgic, I think it is true to say that in 1981, governments’ commitments and ability to, in the words of section 36 of the Constitution, “promote the well-being of Canadians and to provide essential public services of reasonable quality to all Canadians” was an assumed commitment and obligation behind the rights entrenched in the *Charter*. Rights and obligations were two sides of the same coin. Canadians had lived under the guarantee of the *Canada Assistance Plan Act* for 15

⁴⁴*R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

⁴⁵*Vriend v. Alberta*, [1998] 1 S.C.R. 493 (per Cory, J.) at par. 68.

⁴⁶ Pierre Trudeau, “Economic Rights” *McGill Law Journal*, 1961.

years, in which the entitlement to an adequate level of financial assistance for anyone in need, regardless of the cause of need, was a core social right, and one which was subject to judicial review and remedy⁴⁷. These social rights and constitutional commitments were inextricably interwoven with the *Charter's* guarantees of individual rights.⁴⁸ They were part of the *Charter's* promise, and we should not have to re-write the *Charter* to demand that its promise be realized.

In the twelve years since the Supreme Court issued its first decisions under section 15, affirming the primacy of the guarantee of equality and the over-riding purpose of alleviating social and historical disadvantage, almost half a million more households have fallen into poverty. The number of single mothers living in poverty has increased by more than 50% to over 300,000, and their poverty has in many cases deepened to the point of extreme destitution.⁴⁹ The number of homeless women and children living in shelters in Toronto has increased by 130%.⁵⁰ Surely this is not the version of substantive equality for which the Ad Hoc Committee of Women fought so hard back in 1981.

Rosemary Billings, in her Introduction to *The Taking of Twenty-Eight*,⁵¹ quotes Linda Ryan-Nye as saying, after the lobbying for women's rights in the *Charter* was over 20

⁴⁷In the same year that the Charter came into effect, Jim Finlay, a social assistance recipient in Manitoba, sought standing to challenge provincial non-compliance with the adequacy requirements of CAP. In *Finlay v. Canada* (Minister of Finance, [1986] S.C.R. 607, it was subsequently determined that an affected individual had public interest standing to challenge provincial non-compliance with the adequacy requirements of CAP. Subsequently, in a 5-4 judgment, the Court found in *Finlay v. Canada* (Minister of Finance) [1993] 1 S.C.R. 1080 that Manitoba had not violated the adequacy requirements by imposing a 15% deduction for recovery of overpayments. Sopinka, J., writing for the majority, found that CAP "requires assistance to be provided in an amount that is compatible, or consistent, with an individual's basic requirements" but provides for some flexibility and for the recovery of overpayments.

⁴⁸Martha Jackman, "The Protection of Welfare Rights Under The Charter", 20 *Ottawa L. Rev.* Review 257 at 259-283

⁴⁹National Council on Welfare *Poverty Profile: 1998*, Vol. 113 (Autumn, 2000)

⁵⁰City of Toronto *Homelessness Report 2001*

⁵¹Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: The Women's Press, 1983)

years ago, that although constitutional equality was “a helluva lot to lose it was not a helluva lot to gain.” Rights still have to be claimed after the writing is over. Twenty years after the *Charter*, most of the work remains to be done, at least in terms of realizing the *Charter's* promise for those living in poverty, most of whom are women. Our *Charter*, informed by its history and nurtured with new developments in international human rights, is a solid foundation on which social and economic rights can be claimed by the most disadvantaged in society. But we need to make place for people living in poverty in our rights revolution.

When people living in poverty have brought forward claims under sections 7 and 15 of the *Charter*, the primary vehicles for giving domestic effect to international human rights obligations, have been told, essentially, that their issues of equality and security are not included under the *Charter*. Rather than attracting additional judicial attention and concern because their claims intersect with internationally recognized social and economic rights, their claims have been rejected for this reason. Let me give three examples which have been particularly disturbing to the U.N. Committee on Economic, Social and Cultural Rights.

Eric Fernandes, a person with a severe degenerative muscular disease, argued that his rights to equality and security ought to include special assistance for attendant care necessary for him to live in dignity in his home rather than be confined for the rest of his life to a hospital room. Under international law this would be a straightforward claim to adequate housing and medical care and under the *Charter*, it would seem to be a straightforward claim to substantive equality. The Manitoba Court of Appeal, however, rejected this claim precisely because it could be construed as a claim to a right to adequate housing. The Court stated that “the desire to live in a particular setting does not constitute a right protected under s.7 of the Charter.” As for the rights of persons with disabilities to positive action by government, the Court found that this right does not extend to situations where the disadvantage of disability is exacerbated by poverty:

Fernandes is not being disadvantaged because of any personal characteristic or because of his disability. He is unable to remain community-based because he has no caregiver, because he must rely on public assistance and because the facilities available to meet his needs are limited.⁵²

Another case which provoked some astonishment at the United Nations was that of *Masse v. Ontario (Ministry of Community and Social Services)*,⁵³ in which twelve Ontario social assistance recipients, including seven sole support mothers, asked the Ontario Court (General Division) to reverse a twenty-two percent cut in provincial social assistance rates on the basis that it would deprive them of basic necessities and force many into homelessness. Some of the uncontroverted evidence in the case showed that the cuts would lead to significant increases in homelessness and would dislocate approximately 120,000 families, including 67,000 single mothers from their homes.⁵⁴ The court described the effects of the cuts in the following terms:

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.⁵⁵

The court nevertheless accepted the pleadings of the Attorney General of Ontario “that the plight of welfare recipients, although urgent and serious, relates to their inability to

⁵²*Fernandes v. Manitoba (Director of Social Services (Winnipeg Central))* 93 D.L.R. (4th) 402 at pp. 414-415. This decision was denied leave by the Supreme Court of Canada.

⁵³*Masse v. Ontario Ministry of Community and Social Services* (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*].

⁵⁴Affidavit of Michael Ornstein, Application Record, Volume II, Tab 15; Affidavit of Gerard Kennedy, Application Record, Volume II, Tab 14 in *Masse v. Ontario*, Ont. Ct. (Gen. Div.) Court File No. 590/95.

⁵⁵*Ibid.* at 69 (per Corbett J.).

provide for themselves.” O’Brien J. found that “S. 7 does not provide the applicants with any legal rights to minimal social assistance. The legislature could repeal the social assistance statutes... “⁵⁶

Both of these cases were denied leave to the Supreme Court of Canada. Ironically, it is Canada’s first *Charter* challenge to poverty and homelessness, launched in 1989, which will be the first to be heard by the Supreme Court.⁵⁷

Louise Gosselin was subject to a regulation in Quebec’s Social Assistance Law which reduced the assistance for those who were employable and under 30, not engaged in workfare or training programs, from \$434/month to \$170/month. It was largely undisputed that no one can find adequate food, clothing and housing in Montreal for this amount. Ms. Gosselin was periodically homeless and slept in shelters. When she rented a room in a boarding house she had no money left for food. A man from whom she was receiving food attempted to rape her. She lived for a winter in an apartment without heat. She resorted at times to prostitution and to making herself sexually available to a man for whom she had no affection in exchange for shelter and food.⁵⁸

The trial judge rejected Ms. Gosselin’s claim largely on the basis that economic or social rights such as the right to an adequate standard of living, protected under international human rights law, are not enforceable rights under the *Charter*. Poverty, the judge found, is frequently the result of “internal” causes. Poor people, he noted, smoke at twice the average rate of Canadians, are under-educated, psychologically vulnerable and have a weak work ethic.⁵⁹ The Quebec Court of Appeal upheld the decision, but the dissenting judgment of Robert, J., drew extensively on the fundamental importance

⁵⁶ *Ibid.* at 42-43.

⁵⁷ *Gosselin v. Quebec (Attorney General)* 2002 SCC 84, *supra* f.n. 31.

⁵⁸ Testimony of L. Gosselin, Record Vol. 1, pp. 106-127. *Gosselin v. Québec (Procureur Général)* [1992] R.J.Q. 1647 at pp. 1676 - 77.

⁵⁹ *Gosselin v. Québec (Procureur Général)* [1992] R.J.Q. 1647 at pp. 1676 - 77.

of social and economic rights in international law as an interpretive framework for human rights legislation and the *Canadian Charter*.⁶⁰

The lower court decisions in all of these cases show a common theme - that the substantive approach to equality or security of the person affirmed by the Supreme Court in other contexts, ought not to be applied to address poverty and homelessness. To do so, the courts seem to believe, would be to read into the *Charter* social and economic rights. While it defies common sense to suggest that the deprivation of adequate food, clothing and housing in these cases did not engage directly the equality and security interests protected by the *Charter*, the lower courts rejected these claims essentially because the claimants' disadvantage was, in part, linked to their poverty, and to remedy poverty or homelessness is to grant a remedy for a violation of an "economic" right.

Courts in these and other cases in which poor peoples' *Charter* claims have been dismissed have also made reference to concerns about the unique competence of legislatures to determine matters of social and economic policy. It is noteworthy, however, that in none of the cases was the challenged decision a legislated one. Most of the decisions engaging poor peoples' equality and security, in fact, are regulatory changes and administrative decisions, made behind closed doors, with no hearings, no consultation and no debate.

This is not to say that courts ought not to avoid unnecessary tampering with legislative decision-making. Finding the line, and developing the criteria for making these distinctions is an ongoing project. The distinction between social, economic and cultural rights on the one hand, and civil and political rights on the other, however, seems to be of no value in distinguishing between occasions when courts ought to intervene and those when they ought to defer to parliament. At worst, such a distinction encourages courts to abandon those who need their protection the most. As Justice McLachlin (as

⁶⁰*Louise Gosselin c. Procureur général du Québec* (6 April 1999) Montreal 500-09-001092-923 (C.A.).

she then was) put it:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.⁶¹

The Supreme Court, it seems, has begun to chart a different course than that followed by the lower courts in poverty related cases. Rather than declaring certain categories of rights claims to be non-justiciable because they engage with social and economic rights, the Court has found it preferable to exercise appropriate deference in the context of particular cases, and at various stages of the *Charter* analysis. In the *Eldridge* case, for example, the Court left it up to the government to choose from the "myriad options available to the government that may rectify the unconstitutionality of the current system."⁶² The South African Constitutional Court followed the same approach in its recent decision with respect to the right to housing, mandating the South African Human Rights Committee to work with the various levels of government in fashioning an appropriate remedy. In this way, courts and legislators may fashion new relationships to meet the new challenges of poverty and homelessness.

Perhaps, if my optimism about the Supreme Court proves ill founded, I will be arguing, a year from now that we must re-write the *Charter* to protect the fundamental rights of those in Canada whose equality and security is assaulted daily by the ordeal and indignities of poverty. I hope, instead, to be applauding the Supreme Court's decision to allow Ms. Gosselin's appeal and that all of us will be explaining to Jeffrey Simpson

⁶¹ *RJR-MacDonald Inc. v Canada (A.G.)*, [1995] 3 S.C.R. 199 at paragraph 136.

⁶² *Eldridge, supra*, at 631-32.

that the Court did not re-write the *Charter* or read new rights into it, so as to give judges more power to make social policy. Rather, we will explain, the Court read the *Charter* right and decided to include poor people in our constitutional democracy, which may not, after all, prove so old at 20.⁶³

⁶³Jeffrey Simpson, a columnist in the *Globe and Mail* newspaper, is well known for his relentless tirades against what he sees as increasing judicial intrusions on parliament's domain under the *Canadian Charter of Rights and Freedoms*.

As it turns out, the Supreme Court of Canada's decision in *Gosselin*, released on December 19, 2002, was neither the inclusive reading of the *Charter* I had hoped for nor the rejection of social and economic rights I had feared. The decision to dismiss the appeal, supported by a slim majority of five to four, showed a disturbing lack of empathy or understanding of the indignity of poverty and homelessness among some of the justices. On the other hand, Justice Arbour, supported by Justice L'Heureux Dubé, wrote a strong dissent in support of including in the scope of "security of the person" the right to adequate food, clothing, housing and other necessities, and placing positive obligations on governments to provide adequate financial assistance to those in need. Significantly, six of the seven remaining justices, though not agreeing that the right to security of the person had been breached in this case, refused to rule out the possibility that in a future case such a "novel" interpretation of security of the person might be adopted. The justices were sharply divided on their assessment of the evidence in this case and the interpretive issues raised in my presentation remain undecided.

We did not meet with Jeffrey Simpson about the decision. Predictably, he wrote in his column the day after the decision of his alarm at this "very near thing", and at the fact that the majority of the Court had signaled that in a future case, the Court may be prepared to find that the right to security of the person "empowers courts to instruct the government to do certain things to underpin economic and social rights." See Jeffrey Simpson, "Talk About a Very Near Thing," *The Globe and Mail*, (December 20, 2002).