

**Women and the Canada Social Transfer:
Securing the Social Union**

Shelagh Day and Gwen Brodsky

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ACRONYMS

CACL	Canadian Association for Community Living
CAP	Canada Assistance Plan
CASW	Canadian Association of Social Workers
CBA	Canadian Bar Association
CCD	Council of Canadians with Disabilities
CCPA	Canadian Centre for Policy Alternatives
CCSD	Canadian Council on Social Development
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
CERD	<i>Convention on the Elimination of All Forms of Racial Discrimination</i>
CERA	Centre for Equality Rights in Accommodation
CESCR	Committee on Economic, Social and Cultural Rights
CHA	<i>Canada Health Act</i>
CHST	Canada Health and Social Transfer
CHT	Canada Health Transfer
CPP	Canada Pension Plan
CPRN	Canadian Policy Research Network
CRC	<i>Convention on the Rights of the Child</i>
CSIL	Choices in Supports for Independent Living program
CST	Canada Social Transfer
CUPE	Canadian Union of Postal Workers
ECDA	Early Childhood and Development Agreement
EPF	Established Programs Financing
GIS	Guaranteed Income Supplement
GDP	Gross domestic product
GNP	Gross national product
GST	Goods and Services Tax
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
LEAF	Legal Education and Action Fund
LICO	Low Income Cut-Off
NAC	National Action Committee on the Status of Women
NACSW	National Action Committee on the Status of Women
NAPE	Newfoundland and Labrador Association of Public and Private Employees
NAPO	National Anti-Poverty Organization
NAWL	National Association of Women and the Law
NCBS	National Child Benefit Supplement
NCW	National Council of Welfare
OAITHS	Ontario Association of Interval and Transition Houses
POGG	Peace order and good government
QUAD	Four principles of child care: quality, universally inclusive, accessible and developmental
SCC	Supreme Court of Canada
SUFA	Social Union Framework Agreement
UNHRC	United Nations Human Rights Committee

PREFACE

Good public policy depends on good policy research. In recognition of this, Status of Women Canada instituted the Policy Research Fund in 1996. It supports gender based policy research on public policy issues in need of gender-based analysis. Our objective is to enhance public debate on gender equality issues in order to enable individuals, organizations, policy makers and policy analysts to participate more effectively in the development of equitable policy.

The focus of the research may be on long-term, emerging policy issues or short-term policy issues that require an analysis of their gender implications. Funding is awarded through an open, competitive call for proposals. A non-governmental, external committee plays a key role in identifying policy research priorities, selecting research proposals for funding and evaluating the final reports.

This policy research paper was proposed and developed under a call for proposals in September 2004, entitled *Social Security Review: Ten Years Later*. Research projects funded by Status of Women Canada on this theme examine issues such as: the integration of marginalized women into policy discussions on the Canada Social Transfer; the gender impact of Employment Insurance rules on eligibility and earnings replacement; the impact on women of Canada's social policy regime over the last decade; the treatment of lone parent mothers in new employability regimes; and the link between the availability and adequacy of social programs and women's human rights.

A complete list of the research projects funded under this call for proposals is included at the end of this report.

We thank all the researchers for their contribution to the public policy debate.

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ABOUT THE AUTHORS

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Shelagh Day and Gwen Brodsky have written extensively about equality rights theory, social and economic rights, and the Charter, both independently and as co-authors.

EXECUTIVE SUMMARY

Social assistance and civil legal aid are in trouble in Canada. These social programs are vital to the realization of women's rights to equality and security of the person.

Since the repeal of the *Canada Assistance Plan* (CAP) in 1995, social assistance and civil legal aid have been in decline, with devastating effects for the poorest women. The Canada Assistance Plan provided for cost sharing between the federal government and the provinces for social assistance and related services. Under its terms, provinces and territories were required to spend federal monies on designated programs and to meet legislated standards for social assistance. The Plan was replaced by the Canada Health and Social Transfer, which provided unconditioned funding to the provinces; spending designations and standards, except for those in the *Canada Health Act*, were removed.

On its face, CAP was neither a gender-specific nor a human rights-promoting instrument. But, the spending designations and the standards set out in CAP were an important means of protecting the right of everyone to an adequate standard of living and of promoting women's human rights. They helped to ensure that the poorest women had basic economic security and access to justice. The Canada Assistance Plan also went some distance toward satisfying section 36(1)(c) of the Constitution, which commits federal and provincial governments to "providing essential public services of reasonable quality to all Canadians." The Canada Assistance Plan terms offered strong incentives to all provinces and territories to provide social assistance and civil legal aid to their residents; it also ensured that social assistance schemes met specified criteria of adequacy.

In 1995, Canadian women were told that shifting to unconditional block funding would increase innovation by the provinces and foster improvements in basic social programs. But after 10 years, the evidence shows that this has not occurred. Instead, social assistance and civil legal aid for family law and poverty law — the areas of law in which women most often need legal assistance — have been devastated by cuts and the imposition of new rules that shrink access. Welfare rates have been called "cruel and punitive" by the National Council of Welfare, and they stand at lower levels now than 10 years ago. Civil legal aid is in a crisis across the country, with many women who need legal assistance unable to obtain it.

Since social programs, such as social assistance and civil legal aid, are such an important means for fulfilling women's human rights, it is essential to ensure that they are available to all women no matter where they live in Canada, and that the programs are adequate to satisfy rights to equality and security of the person, in keeping with section 36 of the Constitution. Standards for social programs are the interface between social programs and the human rights norms to which Canada has committed itself in various ways over more than 50 years. National standards put flesh on the bones of the human rights norms, particularizing what is required to satisfy them.

In the absence of standards set through conditions attached to federal transfers, another possibility was that human rights mechanisms — courts, human rights tribunals and international treaty

bodies — might fill the post-CAP vacuum by setting standards for social programs through adjudication of complaints and constitutional challenges, based on rights to equality and security of the person, and through reviews of Canada's compliance with its treaty obligations. But governments have resisted fiercely the notion that courts and tribunals could hold them accountable for the ways in which they spend public money even when social spending is the means of giving life to constitutional and statutory human rights norms. Governments have exhibited particular resistance to acknowledging any obligation to spend money to address poverty or group-based patterns of inequality, even denying that there is an obligation to pay women equal pay. In turn, the response of the courts to government efforts to weaken the Charter and women's human rights, has, with some exceptions, been to submit to the will of governments rather than to defend the interests of society's most disadvantaged groups. Even functioning at their best, courts and tribunals could never provide, through adjudication, a complete substitute for legislated national standards. But the helpful role they could play, by recalling governments to their obligations and providing remedies to people who have been wrongly denied access to crucial benefits and protections, has been diminished, not enhanced, during this decade.

Interestingly, international treaty bodies, reviewing Canada's compliance with its human rights obligations, have been most responsive in the era of social program erosion. Both the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women have expressed detailed concerns about the absence of national standards, particularly for social assistance and civil legal aid. Both bodies have urged Canada to consider re-establishing standards by attaching conditions to federal transfers. But there is no discernible official response on the part of Canada to the treaty bodies' comprehensive and consistent recommendations.

Another possibility after the repeal of CAP was that federal, provincial and territorial governments would collaborate to produce new standards for social programs. Many proponents of federal government withdrawal from standard setting viewed the new Social Union Framework Agreement (SUFA), created in 1997, as an alternative vehicle through which national standards could be designed and agreed upon by first ministers, making federally legislated standards unnecessary. But, despite its promise as an umbrella framework agreement for Canada's social programs, the SUFA has not produced federal-provincial/territorial agreement on new pan-Canadian standards for these key social programs, and there is no reason to think that it will.

Given that social assistance and civil legal aid have been permitted to erode significantly over the last decade, that provinces and territories have not produced new standards and that courts, tribunals and treaty bodies have been unable to fill the post-CAP vacuum, the federal government's constitutionally approved power to attach conditions to its social spending continues to be an essential tool for promoting women's human rights and for securing the terms of Canada's social union.

In the 2004 budget, the federal government divided the Canada Health and Social Transfer into the Canada Health Transfer (CHT) and the Canada Social Transfer (CST). These two transfers are now designed to support health care on the one hand (CHT) and post-secondary education, social assistance, related social services, and early childhood and early learning programs on the other (CST).

The creation of a separate CST provides an important opportunity for re-establishing and strengthening standards, thereby stemming the tide of the damage to the social union, and vindicating Canada's reputation as a promoter of human rights.

Inevitably, talking about "national" standards raises the "national question": what about Quebec? An asymmetrical approach can permit a strong role for the federal government in setting standards and conditions for social programs delivered in the provinces and territories outside Quebec, while the Quebec government plays a leading role in the design and delivery of similar programs in Quebec. Parallel but different delivery and accountability mechanisms for Quebec and the rest of Canada are possible and appropriate.

The fact that the CST is a federal fiscal tool does not mean the federal government needs to, or should, act alone. However, the federal government has a primary responsibility to restore national standards, because it has the greatest structural capacity to do so, and federal government intervention is overdue. If there is to be a social union, no government — federal, provincial or territorial — can act without constraints. To make the federal transfers work, the federal government has a responsibility to establish standards and provide stable fiscal contributions to support provincially delivered programs, while the provinces have a responsibility to account for the expenditure of the money, and comply with pan-Canadian (or Quebec) standards.

New federal legislation is required. A new social programs act should set out the authority and responsibility of the federal government with respect to the CST, along with the conditions that are attached to it, and the procedures and mechanisms for holding federal, provincial and territorial governments accountable for expenditures and adherence to standards. The social programs act should:

- articulate the purposes of the Canada Social Transfer, grounding those purposes in Canada's human rights obligations;
- designate the programs and services on which transferred funds are to be spent by provinces and territories, specifically designating funds for social assistance, and related services, including civil legal aid;
- contain standards for key programs, such as social assistance and civil legal aid;
- establish stable funding formulas for the transfer; and
- create a monitoring and accountability mechanism that works for all levels of government and for Canada's women and men.

This is a crucial moment for women. Currently, women face the prospect of further decentralization, no standards and more withdrawal by governments from the provision of social programs, particularly those that matter to the most disadvantaged women. Women must not permit further erosion of Canada's social programs, but rather urge governments to reinvigorate and redesign the system of federal transfers to ensure social programs reflect women's needs and satisfy Canada's commitments to women's human rights.

INTRODUCTION

Women in Canada are economically unequal to men and more likely to be poor. They are also disproportionately reliant on social programs, including social assistance and related social services (Morris and Gonsalves 2005; Statistics Canada 2006; Townson 2000; Scott 1998). For all women, and particularly for women whose race, disability, age or single motherhood deepens their disadvantage, access to adequate social programs is integrally linked to human rights (Brodsky and Day 2002). Legislation, intergovernmental accords and transfers that establish social programs, and determine funding levels for them, are indispensable practical vehicles that give life to women's human rights.

The link between the availability and adequacy of social programs and women's enjoyment of their human rights is recognized by international human rights treaty bodies. In particular, the harsh impact that cuts to social programs and services have had on women in Canada over the last decade has been found by the United Nations Committee on Economic, Social and Cultural Rights, the Human Rights Committee, and the Committee on the Elimination of Discrimination Against Women to be inconsistent with rights to equality and an adequate standard of living (CEDAW 1997: paras. 330, 331, 334, 336, 342; CESCR 1998: paras. 19, 23, 54; UNHRC 1999: para. 20; CEDAW 2003: paras. 351, 352, 357, 358, 359, 360; UNHRC 2005: para. 24).

However, domestically, there is an accountability gap between the human rights commitments Canada has made, and the practice of developing and monitoring social programs. On the one hand, as Canada itself has recognized, social programs are a central means by which human rights obligations are fulfilled. On the other hand, sturdy domestic mechanisms for ensuring that essential social programs are in place and that they actually comply with rights norms are lacking.

In 1995, the *Canada Assistance Plan Act* was repealed and replaced by the Canada Health and Social Transfer (CHST). On its face, the Canada Assistance Plan (CAP) was neither a gender-specific nor a human rights-promoting instrument; it set the terms of federal-provincial cost sharing for social assistance, and related social services, such as civil legal aid, and set minimum standards. In this concrete way, CAP was a means of giving life to women's rights to an adequate standard of living, equality and security of the person (Jackman 1995).

In *Women and the Equality Deficit*, (Day and Brodsky 1998), we warned of the loss that the repeal of CAP represented for women. However, at that time, our analysis was predictive. It was not possible to say with certainty that adjudicative institutions, such as courts, tribunals and international human rights treaty bodies, or the Social Union Framework Agreement (SUFA) negotiated by the federal, provincial and territorial governments in 1999, would not fill the vacuum left by CAP, promulgating and upholding standards that would substitute for those contained in it. However, 10 years of experience shows that the vacuum left by CAP has not been filled, and that the results of CAP's repeal have been detrimental for women in Canada.

Adjudicative bodies are not a substitute for legislated standards for social programs. Although courts and tribunals applying the *Canadian Charter of Rights and Freedoms*, human rights

statutes, and international human rights treaty processes have a significant role to play, they have not provided, and perhaps never could provide on their own, a sufficient system of accountability to ensure government decisions about social spending comply with human rights norms.

The Charter and human rights laws provide open-textured rights to equality, security of the person and non-discrimination. Assessing social programs against these norms, courts and tribunals preside over complaint-driven and redress-oriented procedures, which tend to focus on one law, or even one provision of one law, rather than on a bigger picture of disadvantage and inequality that is exacerbated when social programs are inadequate or missing.

International human rights instruments also set out human rights norms, and here they are more specifically worded, referring to health, education, an adequate standard of living, social security, just and favourable conditions of work, pay equity, child care, and maternity leave, for example. The treaty body reviews have shown themselves to be more suited to dealing with systemic concerns. They allow for examination of a panoply of social programs, and for assessment of the current strengths and weaknesses of the overall provision of social programs for people in Canada. Moreover, the treaty bodies have been consistent in their critique of Canada's deficiencies with respect to social programs and, as noted, articulate about the negative impact on women of eroding the social safety net. They have also repeatedly noted that serious intergovernmental collaboration is needed if Canada is to make international treaty rights real. But the treaty body recommendations have produced no discernible response at home, and there are no established domestic mechanisms for responding to noted inadequacies.

The Social Union Framework Agreement held out the possibility of creating a social union through federal-provincial/territorial collaboration, for setting cross-jurisdictional priorities and standards for social programs, and for monitoring outcomes. But it has not become such a vehicle, mainly because governments have bypassed it. Although Quebec declined to sign the agreement, SUFA could nonetheless be a significant national framework, as long as asymmetrical arrangements are made with Quebec for parallel programs. The Agreement's capacity, at an intergovernmental level, to incorporate, whether implicitly or explicitly, the norm of women's equality into social programming has simply not been realized.

In the 2004 budget, the federal government divided the CHST into the Canada Health Transfer (CHT) and the Canada Social Transfer (CST). These two transfers are now designed to support health care on the one hand (CHT) and post-secondary education, social assistance, related social services, and early childhood and early learning programs on the other (CST). However, because of the federal government's cuts and changes to the federal-provincial transfers over the last 20 years, some political parties and major political players now take the position that the federal government can no longer play a leadership role in social policy. Some even advocate for replacing federal cash transfers with a permanent transfer of tax room to the provinces so they can raise revenues for social programs on their own and spend those revenues as they see fit.

Those who advocate for further diminishing the role of the federal government in social policy and for transferring tax points do not answer the questions: What about the social union? What about standards that reflect human rights norms that Canada is committed to? How will there be any consistency across provinces in terms of what social programs are provided or what standard

of adequacy they meet? In the decade since the repeal of CAP, social assistance and civil legal aid have been devastated by cuts and the imposition of new rules that shrink access. Provinces have not stepped into the post-CAP vacuum to agree on any standards for these key social programs, and there is no reason to think that they are likely to do so. Women face the prospect of further decentralization, no consistency from one province to the next regarding program provision or adequacy, and more withdrawal by governments from social programs, particularly those that matter to the most disadvantaged women.

We consider what has gone wrong in the last decade since the repeal of CAP and the constructive measures that can be taken to fill the human rights accountability gap. Rights to equality, security of the person and an adequate standard of living must not only be reflected by the provision of social programs; to protect and ensure the adequacy of social programs, there also needs to be enforceable standards of adequacy grounded in those human rights norms. We conclude that the creation of a separate CST provides an important opportunity for re-establishing and strengthening standards for social programs that can assist women in every province and territory, for stemming the damage to the social union, and for vindicating Canada's reputation as a promoter of human rights. Instead of decentralizing further, the system of federal transfers needs to be redesigned and reinvigorated. To explain and support our concrete proposal for federal legislation, we address the following questions.

- Do women need legislated standards for social programs?
- What is a standard?
- Do standards need to be national, that is pan-Canadian?
- Can we have national standards and still recognize Quebec's distinctiveness?
- Why have courts, tribunals and treaty bodies not filled the gap left by the repeal of CAP and developed national standards in a different way?
- Can the provinces develop national standards and enforce compliance with them?
- Do we need the federal government to play a role in the social policy field by attaching conditions to transfers?
- Is such a role for the federal government in social policy constitutionally or politically illegitimate?
- What needs to be attached to the Canada Social Transfer to make it an effective mechanism for implementing women's human rights?

Women are a large group, with many intersecting identities, complicated by race, class, disability, sexuality, and age. For all women, this is a crucial moment. Women have to decide how to defend their human rights and those of the most disadvantaged people in Canada.

Chapter 1 outlines the connections between the social union, human rights norms and national standards. Subsequent chapters delineate these connections in more detail. Chapter 2 describes

the fiscal arrangements between the federal government, the provinces and the territories that have underpinned the development of Canada's social programs, focussing on the transfers for health, post-secondary education, social assistance and other social services. Chapter 3 examines the fall-out from the repeal of CAP, particularly on social assistance and civil legal aid. It uses British Columbia's programs of social assistance and civil legal aid as examples. Chapter 4 concludes that human rights mechanisms have not been able to articulate standards for social programs in a way that fills the gap left by the repeal of CAP. Chapter 5 discusses the legitimacy of the federal government's use of its spending power to establish national standards for some social programs. Chapter 6 offers a plan for ensuring that the CST is a vehicle for creating national solidarity and implementing women's human rights.

1. WOMEN, SOCIAL PROGRAMS, HUMAN RIGHTS AND NATIONAL STANDARDS

Women in Canada: A Snapshot

Women's socially assigned role as the primary caregivers for others continues to affect their participation in employment, their incomes and their status in society (Fudge and Vosko 2003: 185). Women continue to be secondary, adjuncts in the world of paid work and public life, and relied on by family members and governments for unpaid reproductive and caregiving work (Boyd 2003: 210; Jensen et al. 2003: 135; Armstrong et al. 2001: 16 and 41; Johnson 2002: 16). This secondary status, and the economic inequality that accompanies it, have been reinforced in recent years because of the enlargement of a low paid labour force sector, which is feminized and racialized (Caragate 2003; Zeytinoglu and Metushi 2000: 133; Pay Equity Task Force 2004: 32), and because of governments' withdrawal from social programs.

The number of women joining the work force continues to rise in Canada, with over 7.5 million women doing paid work in 2004. Women with children have shown a particularly sharp increase in employment rates, with 73 percent of mothers with children under 16 doing paid work. In particular, women with very young children show increased employment levels, with 70 percent of mothers with children ages 3 to 5 in the labour force. The vast majority of these working mothers hold full-time jobs (Statistics Canada 2006: 105). While women are doing paid work in increasing numbers, they also do most of the unpaid domestic and child-care work in their homes,¹ and most of the volunteer work in their communities (Statistics Canada 2006: 115). *In 2000 women did two thirds of the unpaid domestic work in their families* (Statistics Canada 2000: 97).²

Women are more likely than their male counterparts to be in part-time, temporary or multiple jobs, which are less likely to have pensions and other benefits attached to them. Women are more likely than men to take these jobs because of child-care responsibilities, or because they are not able to find full-time work. "In 2004 26% of women part-time workers indicated that they wanted full time employment, but could only find part-time work"(Statistics Canada 2006: 103-110).

Most Canadian women continue to be denied access to the most lucrative and powerful paid employment in Canadian society, and continue to be streamed into "women's work." In 2004, 67 percent of women doing paid work were teaching, nursing or doing clerical or administrative work, compared to only 30 percent of men. This number has remained virtually unchanged for over a decade. Women continue to occupy only 37 percent of managerial positions, and are highly concentrated in lower management. In 2004, women made up only 21 percent of professionals in the natural sciences, engineering and mathematics, a number that has not changed significantly since 1987 (Statistics Canada 2006: 113).³

Women are paid less than their male counterparts across all age groups, education levels, and occupational categories. Comparing men and women who have full-year, full-time employment, women make 71 percent of the income of men (Statistics Canada 2006: 139-140). This number

drops drastically when we compare income from all sources, with women having incomes that are just 62 percent of men's (Statistics Canada 2006: 138).

Racialized women are disproportionately part of Canada's low-paid work sector. Employed Aboriginal women are disproportionately represented in low-paying "traditionally female" occupations. In 2000, 60 percent of employed Aboriginal women worked in sales, service or administration jobs. In 2001, only seven percent of Aboriginal women held managerial positions (Statistics Canada 2006: 198-199).

While immigrant women are highly educated compared to other Canadian women, they remain constrained in various ways within the work force. This is true despite the fact that for other Canadian groups, a high level of education can be correlated with higher incomes and better employment (Statistics Canada 2006: 104 and 139). Immigrant women are more likely than their native-born counterparts to have completed university, and are more likely to have an advanced university degree such as a master's or Ph.D. Despite this, immigrant women are less likely to be employed than Canadian-born women.⁴ When employed, they are more likely than Canadian-born women to be holding jobs in the low-paid manufacturing sector. They are less likely than their male counterparts and than Canadian-born women to be in management and professional jobs (Statistics Canada 2006: 223-225).

Women of colour in Canada are also a well-educated population. In 2001, 21 percent of women of colour had a university degree, compared to 14 percent of other women, and young women of colour have a disproportionate share of advanced degrees (Statistics Canada 2006: 246). Despite this, women of colour are ghettoized in low-paying administrative, clerical, sales and service jobs, and have lower employment earnings than other women, and their male counterparts. A large proportion (21 percent) of women of colour also reported they are discriminated against in finding employment, and in their places of employment (Statistics Canada 2006: 251-54).

Because of inequality in the labour force and greater involvement in unpaid caregiving, women make up a disproportionate number of poor Canadians (Statistics Canada 2006: 143). Some groups of women have particularly high rates of poverty. Single mothers have the highest poverty rates of any group in Canada. In 2003, 38 percent of families headed by single mothers lived in poverty,⁵ compared to 13 percent of families headed by single fathers (Statistics Canada 2006: 144). They also have the lowest incomes of all family types (Statistics Canada 2006: 138), and their income has dropped in the last two years. In contrast, the incomes for two-parent families, and those headed by single fathers rose over the same time (Statistics Canada 2006: 135).

Aboriginal women, immigrant women, women with disabilities, senior women and women of colour are also disproportionately poor, both when compared to other Canadian women, and to their male counterparts. In 2000, 36 percent of Aboriginal women, 23 percent of immigrant women, 29 percent of women of colour and 26 percent of women with disabilities lived in poverty. In 2003, 19 percent of senior women lived in poverty. Many of these groups intersect; for instance Aboriginal and Black women are more likely to be single mothers than other women (Statistics Canada 2006: 199, 228, 297, 280, 254, 200, 228, 254, 297 and 280).

Because of the tight connection between women's lives and various forms of caregiving, public social programs play a central role in women's lives. Because women are still assigned the role of principal caregiver for children, old people and men (Statistics Canada 2000: 97), the development of public child care, schooling, post-secondary education, health care, and long-term care, particularly over the last 50 years, have all shifted some of the burden of caregiving from the shoulders of women to the state (Stinson 2004: 1-2; Turnbull 2001: 174). This has opened more opportunities for women to participate in employment and education and public life, increasing their earnings, their choices and their social participation.

Public social programs have created "good jobs" for women, with decent wages, job security and union protection, in the caregiving sector — as teachers, nurses, child-care workers (Creese and Strong-Boag 2005: 24; Armstrong et al. 2001: 307; HRDC 2002). In addition, income security programs, including unemployment insurance, social assistance, old age security and public pensions have all provided ways of ameliorating women's inequality, and softening women's economic dependence on men (McKeen and Porter 2003: 112; Brodie 1998: 25).

When these programs and services are cut back, as they have been over the last decade, women lose "good jobs" (Creese and Strong-Boag 2005: 24; BC Coalition of Women's Centres 2005; Fuller and Stephens 2004) the burden of unpaid caregiving is increased (Stinson 2004: 1-2) and employment opportunities are narrowed (Fuller 2005: 408 and 418). Women are less able to leave harassing, abusive (McIntyre 2000; Barling et al. 2001; Duncan et al. 2001) or dangerous work (Lakeman 2005: 81; Neal 2004: 21; Montgomery 2003) or home situations (Lenon 2000; OAITHS 2002: 417), because unemployment insurance and welfare benefits are inadequate and fewer women are eligible.⁶ For the poorest women, the erosion of social programs means their ability to feed their children and pay the rent, or to leave a violent relationship, is jeopardized (Lenon 2000; CERA 2002: 47; OAITHS 2002: 417). Their basic security is threatened.

Public social programs have an egalitarian thrust. They are redistributive in nature, equalizing opportunities for well-being and individual flourishing between members of otherwise unequal groups. Particularly for women, public social programs are equality-constituting.

Social Programs and Human Rights

Over the past 50 years Canada has made commitments to ensure everyone has access to certain kinds of benefits and protections as incidents of their membership in the society. The social union refers to that commitment, namely that those who live in Canada will take care of each other, and that they will share resources in order to do so. The social union is based on an understanding that there is more that unifies the people of Canada than living within national borders and sharing political institutions. There are also shared social values, and there is a common recognition of basic human requirements for a decent life. Everyone needs adequate food, clothing and housing; fair, safe and non-discriminatory conditions of work; access to education; a degree of income security throughout her or his lifetime; and health care, including protection from environmental causes of ill health. Creating a society in which these are entitlements, provided, not as a matter of charity, but as incidents of social citizenship, is a collective responsibility.⁷

The commitment to the idea of a social union entails recognition of Canada as a community that is bigger than the sum of its provinces and territories. Many who live in Canada take pride in being part of a country that has promoted the ideals of social sharing, redistribution of wealth and equality by establishing pan-Canadian social programs. They regard the commitment to social programs as a core component of Canadian identity. Canadian philosopher Charles Taylor has said, “collective provision” helps to explain “why we are and want to remain a distinct political unit” (Taylor 1991: 56).

The commitment of Canadians and their governments to maintaining a social union, through the provision of adequate pan-Canadian social programs, is codified and entrenched in section 36(1)(c) of the Constitution,⁸ which commits federal and provincial governments to “promoting equal opportunities for the well-being of Canadians” and “providing essential public services of reasonable quality to all Canadians.” Section 36(2) commits the federal government to making equalization payments to ensure provincial governments have sufficient revenues to provide “reasonably comparable levels of public services at reasonably comparable levels of taxation.”

The major social programs in the areas of health and welfare that developed in the postwar period are the centrepiece of Canadian social citizenship. Canada’s social programs are also a means of giving reality to the human rights norms that are articulated in the constitutional rights to equality⁹ and security of the person,¹⁰ in section 36, and in international human rights guarantees, including the right to an adequate standard of living.¹¹

During the same 50-year period in which Canada developed its social safety net, it also developed a framework of human rights commitments — statutory, constitutional and international. That is, at the same time that Canada was creating a social safety net to ensure the basic needs of all Canadians for health, education, and income security would be met, it was also engaged, both at home and abroad, in articulating a framework of human rights that guaranteed to people in Canada the exercise and enjoyment of civil, political, economic, social and cultural rights. This is hardly accidental, as the social union and the human rights framework have overlapping content, and are vitally connected.

Central to the human rights framework is the commitment to substantive equality. By substantive equality we mean the recognition that inequality is not just an individual phenomenon. Rather, it is disproportionately experienced by groups in the society that are vulnerable to marginalization and discrimination, in particular, Aboriginal people, women, people of colour and people with disabilities. The deeply rooted social inequality of these groups cannot be resolved by enacting laws that are merely non-discriminatory on their face. Measures are required that directly, and over time, address the material conditions of disadvantage that systemic discrimination creates.

To give life to the Charter’s guarantees of equality in section 15 and security of the person in section 7, governments must ensure that benefits and protections are provided that will address the disadvantage of vulnerable groups and ensure that everyone enjoys the basic elements of a decent life. Thus, Canada’s social programs are a central means of meeting the goal of substantive equality and security of the person for all those in Canada. It is through social programs that governments can address and ameliorate the conditions of inequality and

insecurity experienced by disadvantaged individuals and groups, and protect basic social and economic security.

An understanding that positive governmental obligations flow from Charter rights to equality and security of the person is reinforced by the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹² and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),¹³ as well as other treaties to which Canada is signatory. These international human rights treaties are a part of the historical fabric from which the Charter emerged, and they also provided direct inspiration for amendments, made in the drafting process, that were designed to strengthen the Charter's protections. (Claydon 1987: 349; Brodsky and Day 1990: 28 and notes 3-8).

The Charter guarantees of equality and security of the person are connected to, and their meaning is illumined by ICESCR rights which include freely chosen work (Article 6), just and favourable conditions of work (Article 7), fair and non-discriminatory wages (Article 7(a)(i) and (ii), safe and healthy working conditions (Article 7(b), social security (Article 9), an adequate standard of living, including adequate food, clothing and housing (Article 11), the highest attainable standard of physical and mental health (Article 12) and education (articles 13 and 14).

They are also illumined by CEDAW rights including equal pay for work of equal value (Article 11(1) (d)), maternity leave with pay (Article 11(2)(b)), supports for parenting, including child care (Article 11(2)(c)), reproductive health care services, including family planning (Article 12(1)) and equality in marriage and family relations (Article 16).

As the treaties inspired and underlie the Charter, so too one of the key objects of the Charter is to ensure that governments implement Canada's obligations under international human rights instruments. The Supreme Court of Canada has held that Charter rights must be interpreted in light of Canada's human rights treaty obligations.¹⁴ In short, Canadian governments have made political, programmatic and legal commitments to ensuring that there is a network of social programs and services to give life to Canada's human rights obligations.

It is widely acknowledged that social programs and services have particular importance for women and that, for women especially, they are equality constituting. They are preconditions to women's security of the person, freedom and autonomy, and equality in the society and in their relations with men. They are essential to women actually benefiting from their rights to equality and security of the person under the Charter and international human rights law.

In reality, the ideal of equal social citizenship has never been fully realized in Canada. From the earliest days of section 15 of the Charter women have told governments that poverty and economic inequality are central manifestations of women's subordination. Women have hoped and expected that governments would share their understanding that the right to the "equal benefit of the law" imposed positive obligations on governments to provide adequate social programs.¹⁵ Women believed that the constitutionalization of equality rights represented a paradigm shift, a recognition that Charter rights encompassed not only civil and political rights, but also economic and social rights.¹⁶

However, some 20 years later, women are concerned by the increasing tendency of governments to withdraw from the provision of social programs, and back away from a fulsome conception of human rights.¹⁷ A sign of government retreat is the abandonment of national standards for social programs.

Protecting the Social Union and Operationalizing Human Rights Norms

Given the experience of the last decade, about which we say more in the following chapters, it seems evident that to protect and ensure the adequacy of social programs, there must be legislated standards and rights-based accountability mechanisms. We do not suggest that legislated standards are a substitute for Charter rights or international treaty rights, but rather that there is a need for such standards to operationalize the human rights norms reflected in those instruments.¹⁸ Standards put flesh on the bones of the human rights norms, particularizing what is required to satisfy them. Also, standards are the means of ensuring that the social union values of sharing and caring are expressed in concrete terms to which governments can be held accountable.

They are also the means of securing the national or pan-Canadian dimension of the social union, and of reflecting the fundamental human rights proposition that the enjoyment of rights must be available to everyone. If standards are not national in scope, access to adequate social programs becomes contingent on where one lives in the country, and on the policies of individual provincial and territorial governments. (We discuss in following pages how “made in Quebec” standards could be developed as companions to national standards for the rest of Canada.)

Standards for social programs are the interface between social programs and the human rights norms that are expressed in the Charter and in international treaties to which Canada is a signatory. If the human rights norm is “an adequate standard of living” what does this mean for social assistance rates in Canada today? Standards can define adequacy for particular programs and services. They also can identify which programs are “essential services” that need to be available for all Canadians. In the absence of standards and associated accountability mechanisms, there is no framework for identifying and correcting inadequacies. Further cross-jurisdictional standards are necessary to ensure that governments deliver essential public services (required to fulfill human rights norms) of reasonable quality (adequate to satisfy those norms) to all Canadians (in all regions), as required by section 36(1) of the Constitution.

There is a remarkable level of agreement among policy experts, civil society organizations, and professional associations on the need for national or cross-jurisdictional standards. Though people may mean different things when they use this term, there is still a broad consensus that national standards are needed. From Thomas Courchene (Courchene 1996), to the National Council of Welfare (NCW 2005), from the Inuit Tapirisat, to the Canadian Medical Association (CMA 2002: 4),¹⁹ there is agreement about the need for strong national standards. The need for strong national standards for social programs is a dominant concern of civil society organizations with expertise in social policy (Findlay 2005: 33).

National Standards and the Federal Role

Where there is contention about national standards, it is mainly among governments, and it is mainly about the federal role. In other words, the contention is not about whether there should be standards that are pan-Canadian in scope, but how they are put in place. This is a central issue in this study, and we examine it practically and legally in following sections.

Historically, we have had national standards for health care and social assistance because the federal government has offered funding to the provinces to support those programs and it has attached conditions, or standards, to the money. This conditionality is now called names, such as “federal intrusion,” “federal imposition,” “central control,” “federal invasion of provincial jurisdiction,” “trenching on the sovereignty of the provinces” — names that imply that this is a highly illegitimate exercise.

This contention about jurisdiction over social programs was central to the repeal of the *Canada Assistance Plan Act*²⁰ in 1995. Some provinces objected to the federal government shaping provincial spending priorities, and imposing national standards for social programs. They argued for increased provincial autonomy and flexibility. The federal government had its own reasons for wanting to back away from CAP, because it was a 50/50 cost-sharing agreement, and that meant that provincial spending determined federal expenditure. In 1995, the federal government gave in to provincial demands. The repeal of CAP was widely regarded as a major concession to decentralization and to an agenda to roll back benefits for the poorest people. In 1999, Martha Jackman wrote:

Given the current context of social policy reform in Canada, there is no question that abandoning the CAP conditions relating to need, adequacy and rights of appeal in favour of “increased provincial flexibility” under the CHST represents a significant step backwards in terms of Canadian compliance with the *International Covenant [on Economic, Social, and Cultural Rights]*. Enhanced flexibility has become a euphemism, in Canada, for a series of welfare reforms which are highly regressive and discriminatory in their impact on individuals and families in need of assistance (p. 69).

The possibility held out by the 1999 SUFA was that new national standards could be invented and agreed upon by the first ministers, making federally legislated standards redundant. There could be national standards, agreed to by executive consensus and enforced through some collaborative mechanism, without the federal government playing a defining role. But this has not happened in the decade since the repeal of CAP. On the contrary, all governments have shown a lack of interest in stepping into the post-CAP vacuum to invent new national standards for social assistance and social services, in part because the provinces wish to assert their own authority, and in part because they are not committed to the values that national standards would represent. This is the failed experiment of the last decade.

It is important to emphasize that, for women, the issue about the federal role is not about who is the good guy and who is the bad guy as between the federal government and the provinces. There is no good guy. Neither the federal nor the provincial governments have shown themselves

to be committed to enlivening the part of Canada's social safety net that is most important to Canadians when they are poor. Nonetheless, the lack of willingness of the provinces to pick up the ball when it has been in their court, as it has been for the last decade, means it is important to keep thinking about what mechanisms there are to put standards in place that reflect human rights norms. That requires continuing to think about what role the federal government can, and should play, in social policy because it is the government that has the tool of fiscal transfers to use.

It is essential that women do not permit the intergovernmental disputes about territoriality to defeat the possibility of maintaining and reinventing national standards that give life to women's human rights. Women need national standards — whether agreed to by all levels of government, or attached as conditions to federal transfers, or embedded in federal schemes of benefits and services — to cut across territorial interests, and to ground social programs in the values of the social union and the values of women's human rights.

Quebec and the Rest of Canada

Of course, talking about national standards raises the national question: What about Quebec? Quebec was originally the key objector to “federal intrusion,” although it is now accompanied by Alberta (Duffy 1997). Quebec, of course, is unique because it is the territorial home of the largest French-speaking population in North America, with Francophones being about 80 percent of Quebec's population (Smith 2004: 74). Its distinctness has been recognized in some constitutional provisions: the province must maintain bilingual courts and a bilingual legislature; some federally appointed judges must come from Quebec; the civil law system is recognized; its 24 senators, unlike senators from other provinces, must be appointed from each of Quebec's 24 electoral districts (Smith 2004: 74). It is also, we note, like the rest of Canada, a multiracial and multilingual community.

Although the division of powers set out in the *Constitution Act, 1867* did not contemplate social programs of the kind that Canada now has, the importance of maintaining its distinctive culture led Quebec to insist on the Quebec National Assembly playing the leading role in designing and delivering social programs and services for its residents. The federal government has made many accommodations with Quebec over the years to respect its specificity including the maintenance of a separate pension plan, and many bilateral and particular arrangements (Milne 2005).

Women's organizations have had more comfort than other groups with the idea that the federal government could have a different relationship with Quebec than with other provinces. At the time of the Charlottetown Round of Constitutional Talks, the National Action Committee on the Status of Women (NAC) supported a “three-nations” position, recognizing that Canada can be thought of, and governed as, three nations, with Quebec and Aboriginal peoples enjoying distinct status in the federation. The National Action Committee did not ground its position in a constitutional abstraction but in a pragmatic reality. In 1994 NAC described the perspective of these three nations in its brief to the Standing Committee on Human Resource Development.

Social programs are valued by all Canadians. At the same time, Canada's constitutional debates have demonstrated that English-speaking Canadians,

aboriginal peoples and the people of Quebec have distinct perspectives on the role of particular governments in the management and delivery of social programs. A restructuring of social programs must respect these differences and not attempt to impose a formula that meets the needs of one national community onto the others. With respect to English-speaking Canada, this means respecting the desire of most Canadians outside of Quebec to have the Canadian government play a strong role in social programs. With respect to Quebec, this means recognizing that the majority of Quebecers look to the Quebec government for the management and delivery of their social programs. With respect to aboriginal peoples, this means respecting their desire for self-government which includes control of social services. Furthermore, the multi-racial and multi-cultural makeup of Quebec and the rest of Canada must be recognized in the design and delivery of anti-racist and culturally appropriate social services.

We wrote in 1998 that it was possible and practical to permit Quebec to design and deliver social programs suited to its distinct cultural and social needs, while permitting the rest of Canada to retain and improve national standards for social programs, rather than abandoning standards, and blaming Quebec for their loss (Day and Brodsky 1998: 24). As Barbara Cameron (1996: 24) pointed out “there is a conflict inherent in existing Canadian federalism between the social rights of English Canadians and the national rights of Quebec.” This is still true. In the rest of Canada, the intensified decentralization thrust of the last decade has been experienced by women not as a welcome opportunity to bring increased powers to the government nearest to them, but as a triumph of territorial interests over those of disadvantaged Canadians. Given the devastating changes made to social assistance schemes during this decade (British Columbia is a prime example) women can be forgiven for not believing that the desire of provincial governments for more flexibility is rooted in a desire to provide more progressive social programs and advances for women. In fact, outside Quebec, provincial governments do not try to persuade residents that decentralization is best for them on the terrain of values at all. Instead, they argue that they are defending the honour of their province by not allowing any other province to get more (money or powers), or that the federal government is an intrusive, unreliable partner²¹ and it is important to be free of it.

The spectre that is raised for women, if there are no national standards, is of having no meaningful recourse when a provincial government in Ontario, Alberta or British Columbia decides to make massive cuts to social programs and protections, cutting welfare rates, narrowing eligibility rules for social assistance, diminishing employment rights, and, in British Columbia, restricting or eliminating access to civil legal aid. While civil society organizations — women’s groups, unions, churches, and others — have contested these decisions on the grounds that they are neither moral nor practical, the fact that there are no common legislated standards for these programs makes efforts to reclaim lost ground in a particular province or territory much more difficult. The difficulty is compounded by the fact, as discussed in Chapter 4, that provincial governments take the position that the norms inherent in international human rights treaties are not domestically enforceable. They also strenuously resist the idea that the Charter and human rights statutes impose positive obligations on them to provide programs that create equality or provide for an adequate standard of living.

If governments will not agree to a common set of domestically enforceable standards for social programs, grounded in human rights norms, the courts will not apply the Charter and human rights laws to compel governments to provide adequate social programs, and rulings of international treaty bodies can be ignored, the residents of Canada cannot be blamed for wondering just where they are supposed to go to recall governments to values of equality and justice. At such moments, arguments in favour of subsidiarity, that is, in favour of ensuring that authority rests with the level of government that is delivering services, seem particularly unconvincing.

The irony of the current impasse is that women in Quebec and women in the rest of Canada want the same thing from governments — practical realization of commitments to eradicating their inequality. Yet, in effect, women are being played off against each other. Women outside of Quebec are told they cannot have national standards for social programs because Quebec would consider them an “imposition.” Women in Quebec are told their needs can be best satisfied by further decentralization.

At the time of the Charlottetown Round of Constitutional Talks, women argued against the principle of same treatment for the provinces as an unworkable version of equality to apply in a complex nation. They embraced asymmetrical federalism, granting that Quebec has a different relationship with the federal government than the other provinces do (Day 1991). Since that time, other provinces have lined up behind Quebec, with Alberta in the lead, insisting on further decentralization, a lesser role for the federal government in social policy, and asymmetry for all (Pelletier 2005; Roberts 2005).

National women’s organizations continue to endorse asymmetrical federalism, by which they mean national standards embodied in federal legislation that sets standards for social programs delivered in the provinces and territories outside of Quebec, while the Quebec government plays the leading role in the design and delivery of similar programs in Quebec.²² As noted above, although the discourse of equality of the provinces is pervasive, many special arrangements have been made with Quebec over the years. In essence, these special arrangements recognize a somewhat different status for the Quebec government than for other provincial and territorial governments. Parallel but different delivery and accountability mechanisms for Quebec and the rest of Canada are appropriate. Also, because the Quebec government is more committed to the international human rights treaties that Canada has ratified than other provincial and territorial governments, women in Quebec may be more successful at obtaining “made in Canada” standards for social programs that reflect their government’s obligations under these instruments.

Further decentralization may be good for women in Quebec, but it will be damaging for women in the rest of Canada. This contradiction points to the importance of alliance building between women in Quebec and women in other provinces. We need to support each other’s equality interests and find an asymmetrical solution.

Aboriginal Women

There is one more part to the national question: How should national standards for social programs work for Aboriginal women, including First Nations, Métis and Inuit women? These women have a special relationship to the federal government, because of its fiduciary duty to

them, whether they live on or off reserves. National standards, as we imagine them, would apply to programs delivered by provincial governments to off-reserve Aboriginal women. What about Aboriginal women living on reserves or on self-governing lands?

European settlers imposed patriarchal norms on Aboriginal communities, to the detriment of Aboriginal women. Because of this history, the Government of Canada has a remedial obligation to Aboriginal women to ensure they achieve equality, both within their own communities and in the broader society. In particular, programs and services need to be delivered to Aboriginal women in ways that will foster their equality and take account of the particular forms of discrimination and marginalization they experience. For this reason, it is appropriate that national standards for social programs that operationalize human rights norms should apply to programs and services delivered to Aboriginal women who are residents on lands under federal jurisdiction, or governed under self-government or Inuit land claims agreements, as well as to programs and services delivered to Aboriginal women living off reserves.²³

Summary

As discussed more fully in Chapter 2, since 1995, the unconditional transfer of monies by the federal government to the provinces and territories has not led to innovation and the development of stronger social programs, but rather to the erosion of social assistance and civil legal aid, and to unevenness from region to region in the availability of programs and services, and in their quality. National standards are necessary to satisfy the requirements of section 36 of the Constitution and Canada's human rights commitments to women. They must be developed and enforced in ways that respect Canada's national complexity.

2. SOCIAL PROGRAMS AND FISCAL FEDERALISM

The deep cuts in social spending and the complete re-ordering of federal–provincial fiscal arrangements that were introduced by the federal government in 1995 were presented then as necessary to deal with Canada’s deficit. The fact that the federal deficit was retired so easily, in only three years, has raised questions about whether the deep cuts and restructuring were ever needed (Yalnizyan 2005: 6).

There were other motivations. The Honourable Paul Martin, then Finance Minister, was also determined to “downsize” government. In his 1995 Budget Speech, he said it was his intention to make a permanent change not only to “*how* government works but what government *does*” (Martin 1995). It is more apparent in retrospect that both the Mulroney and the Chrétien-Martin governments wanted to back away from the postwar welfare state. The deficit was a convenient justification for doing so. Perhaps it is not surprising then that, although the federal government has had budget surpluses in every year since 1998, it has not rushed to make stable re-investments in social programs, or to reassert, with conviction, a federal leadership role in social policy.²⁴

Two new federal programs created during this period are the National Child Benefit (1998) and Employability Assistance for People with Disabilities (1997). The first is a direct payment to low-income families with children, about which there is considerable dispute because of the clawback of the National Child Benefit Supplement from families on social assistance. The second is a transfer to provinces and territories for investment in labour market programming for people with disabilities. But these programs have not filled the gap left by the 1995 cuts. Although there have been recent increases in spending on health care, and bilateral child care agreements, the Liberal Government maintained a commitment to small government, even after the deficit was retired, with government spending staying at about 12 percent of gross domestic product (GDP) since 1995. This low rate is “unmatched in any other advanced industrialized nation” (Yalnizyan 2005: 7).

There is a stronger neoliberal strain in media reporting on social programs, and therefore in public debate. The collective values of caring for all members of society and providing social programs that support Canadians when we are old, ill, disabled, pregnant, unemployed, poor, raising young children or escaping violence are treated more often as suspect. Market values, such as self-reliance and competition, are offered as substitutes. Social programs designed to “protect against labour market change and enhance population health and well-being” are now regarded by some as “fostering dependency.”²⁵

There are different attitudes to different social programs. Health care is talked about as an essential program, although insatiable, gobbling up government dollars. But increasingly, some social programs, particularly social assistance and civil legal aid, if they are talked about at all, are treated as though they are perhaps not good for us, indulgences that no society really owes to its citizens. Janet Mosher, Patricia Evans and Margaret Little (2005: 2) claimed in *Walking on Eggshells* that the very idea of citizenship is being recast.

The ascent of neo-liberalism and neo-conservatism in the 1970s and 1980s paved the way for the erosion of universal programs such as health care and education, and in the 1990s, significant cuts to the social safety net. Privatization and retrenchment emphasize the importance of the market as the sole legitimate source of citizenship at a time when precarious employment is on the rise, labour standards are threatened, and incomes are increasingly polarized. The idea of the “social” disappears and the “good” citizen is one who is “self-reliant”, making no “claims” on the state.

As citizenship becomes enshrined in market norms, poverty is further inscribed as an individual problem of lack of motivation, not a lack of decent jobs. The “solution” is to ensure that “the poor” are subjected to the “discipline” of the market, so benefits are restricted and surveillance and coercion are heightened.

This neoliberal strain in the public discourse about social programs is accompanied by jurisdictional warfare between the premiers and the prime minister. Given the history of cuts, caps and freezes to federal transfers during the Mulroney and Chrétien-Martin eras, the premiers’ frustration about the federal government’s unreliability as a funder of social programs is understandable. But the premiers also engage in a less credible “province’s rights” rhetoric, asserting that provinces have exclusive constitutional authority over social programs, and should be permitted to provide them or not, designed in whatever way they wish, free from “federal interference.” Social programs are being debated as though they are principally a subject of interest to first ministers, who need to contend among themselves over dollars and territoriality, rather than a subject of primary concern to the people of Canada who need them. And a key message from premiers to prime ministers is “give us the money and stay out of our way.”

Disturbingly, as we noted earlier, some major players in Canada are talking once more about solving the problems of funding Canada’s social programs by permanently transferring tax points to the provinces. This is not supported by all provinces, however. Though both federal and provincial governments have constitutional powers to impose income taxes on individuals and corporations, in practice, the two levels of government co-ordinate and rationalize income taxes for the very practical reason that they both look to the same tax base, that is, to the same taxpayers and the same income. At various times, one level of government has agreed to cede some of its “tax room” to the other. In other words, one level agrees to reduce its income tax rate on the understanding that there will be a corresponding rise in the taxes collected by the other level. The amount of tax room ceded in this fashion is often expressed as a certain number of tax points, referring to the percentage points by which one level of government reduces tax rates to leave room for the other.

The concept of the “fiscal imbalance” has taken an increasingly prominent place in the debate over federal–provincial fiscal relations since the replacement of CAP with the CHST in 1995. The provinces have argued that when the federal government significantly cut transfers for social programs, it created a vertical fiscal imbalance between the levels of government.

The core of the provinces’ argument is that the federal government has revenue-raising abilities that considerably exceed the cost of fulfilling its program

responsibilities, while they lack the revenue-raising capacity to meet their constitutional obligations, especially in the areas of health, education, and social services, which are recognized as key public priorities. The provinces further argue that the costs of delivering these large and important programs are rising more rapidly than federal program costs, while their revenues are growing at a significantly slower pace than federal revenues (Lazar et al. 2003b: 148).

Whether the fiscal imbalance is real is a matter of debate. Until recently, the federal position was that there was no vertical fiscal imbalance because “provinces enjoy unlimited powers of taxation; if the provinces chose not to raise sufficient revenues from their taxation powers, they were the authors of their own fiscal shortfalls” (Department of Finance 2004).²⁶ But the provinces, led by Quebec, and joined by the Bloc Québécois, the Conservative Party and the Council of Chief Executive Officers have all embraced the idea that there is a fiscal imbalance that must be solved. Proposed solutions differ.

In 2001, Quebec established the National Forum on Fiscal Imbalance under the leadership of President Yves Séguin. In its 2002 report, *A New Division of Canada's Financial Resources*, the Forum concluded there was a “serious” vertical fiscal imbalance stemming from “imbalance between spending and access to sources of revenue, the inadequacy of intergovernmental transfers from the federal government to the provinces and the federal spending power” (Quebec 2002: viii). The Commission’s main recommendation was to increase funding to the provinces by abolishing the CHST and transferring the Goods and Services Tax (GST) as a direct revenue source to the provinces (Quebec 2002: xii).

In its Supplementary Opinion attached to the Standing Committee on Finance’s Report on Canada’s Fiscal Imbalance, the Bloc Québécois said that the provinces and territories should have the choice of withdrawing from the transfers for health, post-secondary education and social assistance and social services in exchange for complete compensation in the form of a transfer of tax points on individual income tax or for other tax bases. The Bloc also said that “the federal government should stop spending in areas that are the exclusive jurisdiction of the provinces and territories under the *Constitution*” and further, that the provinces and territories should be able to withdraw from federal programs, without conditions and with full compensation (Bloc Québécois, Supplementary Opinion 2005: 57).

The Conservative Party in its supplementary opinion to the same report recommended that the federal government review all tax fields and transfer mechanisms and “consider transferring an appropriate level of income tax points to the provinces” (Conservative Party, Supplementary Opinion 2005: 56).

The Council of Chief Executive Officers echoed the Séguin proposal, recommending that the federal government “hand the GST to the provinces” and that they pay for social programs with this revenue. According to the Council, this would give the provinces a stable and growing source of revenue and encourage the federal government “to focus on its core responsibilities instead of continuously looking for ways to intrude in provincial jurisdiction” (Canadian Council of Chief Executives 2006: 19).

When Thomas Courchene (1996) proposed transferring tax points to the provinces in 1996, he was greeted with outrage by the premiers of the poorer provinces. Because tax points are worth less in the hands of the poorer provinces, this transfer makes the rich provinces richer and the poor provinces just as poor as always. John Savage (1996), then Premier of Nova Scotia, said: “The plain truth is Nova Scotia can’t afford to let Ottawa vacate the social welfare field because, on its own, our province doesn’t have the money to bankroll a takeover. . . . It should be remembered that if every have-not province paid full fare for its social programs, this country’s existing disparities would be greatly magnified.” Perhaps most importantly, Savage went to say: “As our east-west economic links slacken to take advantage of the continental north-south pull, it’s generally agreed we must maintain social bonds, like medicare, which Canadians recognize as national family traits — as entitlements of citizenship and unifying features of this country.”

Courchene thought if tax points were transferred a convention on the social and economic systems, that is, a kind of social union contract among the provinces, would have to be put in place. But the Bloc, the Conservative Party, and the Council of Chief Executives, so far, propose nothing. Courchene (1996: 95) thought that tax point transfers could only become a reality if provinces “demonstrate[d] to themselves, the federal government and, most of all to Canadians that they. . . have the will and the ability to design and deliver an effective internal social union.” Those who propose transfer of tax points now, offer no such demonstration.

In 2006, the Council of the Federation, which is a forum for the premiers, issued its own report on the fiscal imbalance, *Reconciling the Irreconcilable*. This report, whose recommendations not all the premiers agreed with, found that there is a vertical fiscal imbalance that was created principally by the cuts to federal transfers made in 1995. It recommended a number of steps with respect to transfers, equalization payments and tax points to modernize Canada’s fiscal arrangements. It also proposed a new first ministers’ fiscal council to oversee federal–provincial/territorial fiscal relations and a Canadian institute for fiscal information to provide information to governments and the public (Council of the Federation 2006: 94-99).

The recommendations from the Council of the Federation may reflect the fact that some provinces, while joining Quebec in identifying a fiscal imbalance, seek different ways of addressing it. They do not advocate for a simple transfer of tax points or GST revenue, but rather for additional funds being added to federal transfers and for a comprehensive review and reform of Canada’s fiscal arrangements, including equalization (Ontario Summit 2006; Manitoba 2006).

A disturbing feature of the institutions proposed by the Council of the Federation, however, is that they seem to be focussed on the distribution of the money among governments, not on the social programs — or standards for them — on which the money is ostensibly to be spent.

This disconnection between the vehicles of redistribution and the goals of redistribution is also found in the report of the Expert Panel on Equalization and Territorial Formula Financing. The Panel’s report acknowledged that the purpose of equalization payments to the provinces and territories is “to give them the financial means to offer their residents reasonably comparable public services, at reasonably comparable levels of taxation. In the absence of these programs, the residents of less wealthy provinces and territories would face higher tax burdens and/or

lower levels of public services than those of wealthier regions” (Department of Finance 2006). However, the Panel noted that equalization payments have “no strings attached” and, among its recommendations, while there is a reference to improving “transparency, communications, and governance,” there is no consideration given to defining the “essential public services” that the money is for, and no expectation of accountability for how equalization money is spent.

In the 2006 Budget Papers, the Conservative Government made clear that it wishes to confine its sphere of operation to “repayment of the federal debt; ensuring the efficient functioning of the national economy; and implementing sound policies in the areas of defence, foreign policy, security, Status Indians on reserve, Equalization, Territorial Formula Financing (TFF), and financial support of shared priorities through transfers to provinces and territories” (Department of Finance 2006a: 57). It said further “excess federal revenues [should] be used primarily to reduce federal taxes rather than to launch new policies in areas where the federal government is not best placed to design or deliver programs.” The Budget Papers offered the child-care program of the previous Liberal Government and funding to combat homelessness as examples of federal government spending that “blurred lines of accountability” and made it more difficult for Canadians to determine which order of government is responsible (Department of Finance 2006a: 23).

Approaches to fiscal federalism are crucial to women. A decade after the *Budget Implementation Act* of 1995 and the repeal of CAP, federal–provincial fiscal relations appear to be in crisis and the vehicles of redistribution are being re-examined. How the “fiscal imbalance” is resolved will intimately affect the future of Canada’s social programs and women’s human rights. While women may not relish the prospect of entering into the debate about fiscal imbalance, equalization payments, transfers and tax points, there may be little choice.

To understand what is at stake, it is essential to look more closely at how social programs in the areas of health, post-secondary education and social assistance and social services developed in Canada, the fiscal arrangements that have supported them so far, the content of national standards for these programs and the roles of the federal and provincial governments. Although our concern is particularly with social assistance and the related services now supported by the CST, it is not possible to understand the political and fiscal context for the CST, without considering the broader picture.

National Social Programs and Fiscal Federalism

For the last 30 years,²⁷ Canada has had national standards for health and social assistance. These standards were set out in federal legislation in the *Medicare Care Act*, the *Canada Health Act* (CHA), and CAP, even though health and social assistance (as well as post-secondary education) are generally understood to fall within provincial jurisdiction under the division of powers in Canada’s constitution. The national medicare and welfare programs were created and their standards were enforced through the use of the federal spending power. The story of their development is the story of fiscal federalism.

Starting in 1948, the federal government used the power of its treasury in the field of health by providing grants to the provinces for hospital construction, cancer control programs and other specific health care services. Gradually, grants for other services were added. In 1953, after four provinces had initiated some form of public hospital insurance, the federal government introduced the *Hospital Insurance and Diagnostic Services Act*. Under this Act the federal government reimbursed 50 percent of the provinces' costs of providing specified hospital services under their insurance plans. By 1961, all provinces had joined this scheme (Maslove 1995: Appendix A, 32-41).

In 1968, the *Medicare Care Act* came into effect. This provided medical care insurance similar to the hospital insurance that was already in place. Under this Act, the federal government contributed to each province 50% of the average national per capita cost multiplied by the province's population (Maslove 1995: Appendix A, 33). Maslove recounted that "initially provinces were required to meet four conditions to be eligible for reimbursement: the provincial plans had to provide universal coverage, be comprehensive in the range of services covered, be administered by the province or an agency of the province, and be portable between provinces" (Maslove 1995: Appendix A, 33). Though medicare was invented in Saskatchewan, the federal government converted it into a national program by offering, on certain conditions, to share its costs. By 1971 all provinces were part of the national medicare program.

In 1977, the financial arrangements were changed and the separate grants, which the federal government provided for hospital insurance, medicare insurance and post-secondary education were rolled into Established Programs Financing (EPF). Under this arrangement, the federal government transferred more "tax points" to the provinces; that is, it reduced its share of corporate and personal income tax and allowed the provinces to raise their share proportionately.

During the Depression and World War II, the federal government became ascendant in the tax field when it was clear that co-ordination of relief and war efforts was needed. In 1941, the provinces agreed to turn over their room in the tax fields in return for federal payments. David Perry (1997: 270-271) said: "The war had... encouraged Canadians to think in national terms. It had broken down (or at any rate mitigated) the parochialism of regional loyalty and interregional competition. In any case, the depression had already shown that 'province-building' was poor economic strategy. Every region had a stake in the well-being of all of the other regions. This new interest in interregional equity had its parallel in a growing belief in the responsibility of government to provide some approximation of equity among individuals as well — at least to the extent of ensuring that all Canadians enjoyed basic access to the requirements of a decent life." This put the federal government in a strong position in the postwar period to shape national social programs.

However, in 1967 the federal government began ceding tax points to the provinces to replace part of its cash commitment for post-secondary education. In 1977, with the new EPF, the federal government gave up an additional chunk of tax points as part of a permanent arrangement for funding post-secondary education and health. It also provided block cash transfers to support both health and education that gave an equal per capita payment to each province. This cash transfer was set at the level of 50 percent of the federal contribution to hospital, medicare and post-secondary education programs in 1975-76. The cash transfer would grow from year to year,

to reflect changes in provincial population and growth in gross national product (GNP) (Maslove 1995: Appendix A, 39).

The National Council on Welfare explained how the EPF arrangement worked.

Each year, the federal government calculates its total commitments under EPF to each province and territory. It then calculates the revenue raised that year by the tax points that were transferred to each province and territory [in 1977], and it subtracts the tax revenue from total EPF entitlements. The amount left over is paid in cash by Ottawa (NCW 1995a: 9).

The change from cost sharing to block funding for health and post-secondary education was a result of unease at both the federal and provincial levels. At the federal level, there was increasing concern about the open-endedness of the funding formula and the lack of control it afforded as health costs rose. As long as the federal government paid fifty percent of provincial health care costs with no ceiling, its expenditures were dictated by provincial levels of spending. At the provincial level, there was resentment because of the extent of federal intrusion into the province's constitutional jurisdiction over health and education (Maslove 1995: Appendix A, 35). The shift to the block funding of the EPF meant that the amount of the federal government's cash transfer was no longer determined solely by the provinces. For the provinces, it meant they were freer to allocate the funds between health and education according to their priorities, and with fewer conditions (Maslove 1995: Appendix A, 36).

In 1984, at the time when federal cash transfers were at their highest level, the *Canada Health Act* (CHA) was enacted to replace the legislation that dealt separately with hospital insurance and medical care insurance. The CHA sets out the five standards provinces must meet to receive the full EPF cash transfer.

- **Accessibility:** Provide reasonable access to health care without financial or other barriers.
- **Comprehensiveness:** Cover all medically necessary hospital and medical services.
- **Universality:** Cover all legal residents of a province (after a three-month residency).
- **Portability:** Entitle residents to coverage when temporarily absent from their province or when moving between provinces.
- **Public administration:** Administer health plans by an agency of the province on a non-profit basis (Maslove 1995: Appendix A, 37-38).

The CHA outlines the federal government's authority to enforce the standard of accessibility by reducing the cash transfer dollar for dollar if a province allows doctors to bill their patients or hospitals to charge user fees. It also allows the federal government to reduce the cash transfer if other standards are violated (Maslove 1995: Appendix A, 38). The CHA articulates the standards and recognizes the federal role in the health field, but legislation is only one lever here. Both the existence of the national medicare program and the enforcement of the five national standards

flow from the federal government: spending on a program that is delivered by the provinces, and having the power to withdraw the funding if the provinces do not adhere to the standards that it sets.

Social Assistance and Social Services

As with health, national standards regarding welfare were developed through the federal government's sharing the costs of social assistance and social services with the provinces and setting conditions on its contribution. In the 1950s, the federal government passed the *Old Age Assistance Act*, the *Blind Persons Act*, the *Disabled Persons Act* and the *Unemployment Assistance Act*. This legislation permitted the federal and provincial governments to share the costs of assisting low-income seniors, blind and severely disabled adults, and some unemployed people. At the time, provincial and local governments provided allowances for single mothers and relief programs for others who were needy (NCW 1995: 2).

In the 1960s, there were two major advances. The federal government introduced the Guaranteed Income Supplement (GIS) for low-income Canadians over 65. The GIS was added to the Old Age Security pension for those who passed an income test. It changed markedly the rates of poverty among seniors in Canada (Oderkirk 1996). The poverty rate for seniors dropped from 33.6 percent in 1980 to 17.5 percent in 1998, a significant improvement, attributed directly to government action on public pensions and supplements (NCW 2000a). However, it is important to note that overall poverty rates for seniors can be misleading because poverty rates for unattached women over 65 remain high (Townson 2005: 3).

For people under 65, CAP, in 1966 overtook the scatter of programs operated and funded by both levels of government, replacing it with a scheme that meant "for the first time ever, welfare was available everywhere in Canada to all people who were unable to provide for their own needs" (NCW 1995a: 3).

Between 1966 and 1996, the *Canada Assistance Plan Act* was the vehicle for federal-provincial cost sharing for social assistance, and for national standard setting in the welfare field. It is highly doubtful that a nationwide social safety net would ever have been developed without this federal leadership. Peter Hogg (1993: 146) said about CAP: "Without the federal initiative, and the federal sharing of costs, it is certain that at least some of these services would have come later, at standards which varied from province to province, and not at all in some provinces."

Adopted by Parliament to encourage provinces to develop social assistance programs that met national standards, in its preamble the *Canada Assistance Plan Act* stated:

The Parliament of Canada, recognizing the provision of adequate assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on social assistance are the concern of all Canadians, is desirous of encouraging the further development and extension of assistance and welfare services programs throughout Canada by cost-sharing more fully with the provinces in the cost thereof.

The Act authorized the federal government to make payments to provincial governments, to enable them to finance and administer social assistance programs and other welfare-related services, subject to contractual conditions, or in other words, standards. The provinces were required to:

- provide financial aid or other assistance to any person in need²⁸;
- provide an amount that is consistent with a person's basic requirements, defined as "food, shelter, clothing, fuel, utilities, household supplies and personal requirements"²⁹ establishing a minimum national standard of substantive adequacy for provincial social assistance programs³⁰;
- impose no residency requirement as a condition of eligibility to receive or to continue to receive assistance³¹;
- provide a procedure for appeals for applicants for assistance from decisions of welfare agencies³²; and
- impose no requirement that recipients of assistance provide labour in a federal-provincial cost-shared work project.

Provincial governments were also required to pass their own legislation and regulations, in which these standards were incorporated, as well as procedures for appeal.

The importance of the standards set out by the Act cannot be overemphasized. While, in our view, they were significantly incomplete, they affirmed basic entitlements. Because of these standards, residents anywhere in Canada were entitled to social assistance. Canadians were not required to have a particular status, such as widowed mother, or to have a particular condition, such as blindness, to qualify for social assistance, but only to show that they could meet a needs test for eligibility. Also, applicants were entitled to appeal decisions of the welfare-granting agency. Finally, the Act, while not barring it completely, put a definite chill on workfare, that is, on requirements for recipients to work in government programs to be eligible for welfare.³³ Each one of these standards was essential to the dignity of those who found themselves without means.

Collectively, the CAP protections constituted crucial elements of a social safety net for people living in poverty. Because 50-50 cost sharing was a significant incentive to the provinces to maintain the CAP programs, the Act gave social assistance beneficiaries a reasonable expectation that CAP standards would be respected by provincial governments.³⁴ The Canada Assistance Plan also provided 50-50 cost sharing of important welfare-related social services, including:

- homemaker services for the elderly, to assist them with shopping, cooking, cleaning;
- attendant services for people with disabilities, to allow them to live independently;
- child-care services to assist parents with the care of young children while they completed their education, got training or worked;
- services to unemployed people to assist them to enter or re-enter the work force, by paying for start-up costs, such as transportation and clothing, or tools;
- child welfare services to assist children who are neglected or abused;

- services for women fleeing male violence and abusive relationships, such as shelters and transition homes;
- counselling services for individuals, couples, families and children, to assist them with personal, health-related or employment problems;
- information and referral services to direct people in need to counselling, training, shelters or emergency support;
- respite services to assist parents caring at home for children with severe disabilities;
- assistance in covering the costs of medically prescribed diets, wheelchairs, special eyeglasses, and prostheses for people unable to purchase these necessities on their own (Torjman 1995); and
- legal aid for family and other non-criminal matters (CBA 2006).

Fifty-fifty cost sharing was a strong incentive for provincial governments to provide these services. For every 50 cents they spent, they could provide a dollar's worth of services for the residents of their province. The Act also committed the federal government to pay 50 percent of the real costs of social assistance and CAP-funded services in each province. In other words, CAP contemplated that the amount of money contributed by the federal government would vary in proportion to the levels of need experienced in a province. Additionally, the CAP regulations required that funds contributed by the federal government under CAP were available only as a reimbursement to the provinces for actual expenditures on social assistance and social services.³⁵ That is, federal funds designated for social assistance programs, and welfare services were not available for provinces to spend on other initiatives that might be more popular. Two thirds of CAP dollars went directly into social assistance and to legal aid for family and other non-criminal cases; the other third went to other CAP-funded services and to administration. Over 30 years, CAP-funded programs helped many millions of Canadians (NCW 1995a: 5-6).

We do not wish to engage in a kind of nostalgia for CAP. There was a lot wrong with it. The standards were not complete or strong enough; verification procedures for provinces to obtain payments were onerous; the citizen right to challenge federal payments that did not comply with CAP was indirect and inaccessible. It may be a measure of how much has been lost that today the CAP system's strengths are more evident. Not only did it establish conditions and entitlements, which are sorely missed in 2006, it created a shared federal-provincial social assistance and social services system, with accountability to both Parliament and the legislatures for expenditures and implementation.

The 1995 Transformation

In 1995, everything changed. This was a watershed moment in the history of Canada's social union. Paul Martin, as Finance Minister, introduced the *Budget Implementation Act*, which eliminated the EPF, repealed CAP and rolled the transfers for health, post-secondary education and social assistance and social services into one block transfer, the Canada Health and Social Transfer, with few conditions attached.

This meant that:

- **The CAP standards were gone.** The requirement that social assistance programs adhere to substantive and procedural standards was eliminated. Canadians no longer had an entitlement in every jurisdiction to social assistance in an amount adequate to meet basic needs, to appeal decisions made by welfare agencies³⁶ or to challenge in the courts transfers that did not meet CAP conditions. And provinces were given the flexibility to require welfare recipients to work for welfare. The only condition that survived in the CHST was the no residency requirement.

By contrast, the *Canada Health Act* was retained with its five standards. This was a clear indication that while the federal government considered medicare standards national icons, CAP standards did not have the same status, and could be abandoned without political penalty.

- **Fifty-fifty cost sharing for social assistance and social services was eliminated.** Funds for social assistance became part of the block fund for health, post-secondary education and social assistance, and each province received funds in the same proportion as the 1995-96 transfers under the EPF and CAP.

The loss of 50-50 cost sharing for social assistance and social services was significant. Block funding did not allow for the fact that welfare is a more volatile social program than health care or post-secondary education, and that funds required to support it adequately fluctuate with economic cycles and with changes in the rate of unemployment. Also, the loss of cost sharing meant that an important incentive to provide the CAP-funded social services was gone, because the amount of the transfer for social assistance and social services was no longer tied to actual spending by the provinces and territories.

- **The specific allocation of funds for social assistance and social services, which CAP provided was gone.** Funds for social assistance and social services were rolled in with those for health and post-secondary education to provide to the provinces one comprehensive transfer. Consequently, provinces could allocate the transfer monies among health, post-secondary education and welfare programs in whatever way they wished. Further, since there was no longer the careful verification of how transfer monies were spent that existed when programs were cost shared, the provinces could spend CHST monies as they chose, including not on health, post-secondary education and social assistance and social services at all, without any accountability.
- Finally, **the amounts transferred to the provinces under the CHST were cut.** Between 1995 and 1998, the federal government reduced the cash portion of the transfer for health, post-secondary education and social assistance and social services by \$8.2 billion (Yalnizyan 2005: 61).

The 1995-2005 Decade

The 1995 budget cuts were not the federal government's first unilateral cuts to transfer payments for social programs, but rather the latest in a series. The federal government had been an

unreliable and unpredictable partner in the financing of social programs for some time (Courchene 1995c: 57). In particular, after the initial financial formula was set in 1977 for the EPF transfers for health and post-secondary education, a steady string of financial restraints were imposed on provincial entitlements between 1983 and 1995, with the result that federal cash transfers for health fell from paying for 36.5 percent of provincial health expenditures in 1980 to 21.1 percent in 1995 (Maslove 1995: 41). Also, the 50-50 cost-sharing formula of CAP was changed abruptly in 1990³⁷ when, in the federal budget speech, without any prior notice, Finance Minister Michael Wilson announced a “cap on CAP” for the three wealthiest provinces: Alberta, British Columbia and Ontario.³⁸ Ottawa indicated that it would no longer be bound by the 50-50 formula; in these provinces it would limit any increase in its CAP contribution to five percent a year.

The CHST entrenched these cuts and added to them. One problematic element of the financial arrangements was that the cash portion of the transfer was vanishing. The CHST was an extension of the EPF model, so it too was a combination of tax points and cash. Since under this formula the federal government calculates the current value of the tax points that were transferred in 1977 and subtracts this from the current value of the entitlements, the amount of the cash transfer is reduced as the value of the tax points rises. The combination of restraints on the overall amount of the entitlements, and the rising value of the 1977 tax points meant that the federal government was gradually reducing the amount of the cash transfer. The cuts that were part of the 1995 budget made this reduction in the cash transfer dramatic. Without change, the cash transfers to the provinces would have run out some time between 2005 and 2012 (Boadway 1995: 95; Battle and Torjman 1995: 7; Courchene 1995b: 115).

Since the provinces consider the tax room transferred in 1977 to be a permanent part of their revenue base now, they consider only the cash transfers as direct federal contributions to social programs (Courchene 1995a: 12-13). And as the federal government’s cash contribution diminished so did its ability to set or enforce any standards, including those in the area of health. The federal government had little credibility as a standard setter with the provinces as its contribution declined. This was evident in a statement from the Western Premiers Conference in November 1995: “All provinces agreed that it is unacceptable for the federal government to unilaterally prescribe structure and standards for social policy while abandoning their commitment to support social programs with adequate, stable and predictable funding” (Western Premiers 1995: 2).

The federal government absorbed this message quickly, and as soon as 1997 was promising that the cash transfers to the provinces would not be allowed to drop below \$11 billion. In 1998 and 1999, the federal government introduced multi-year deals to increase the cash floor of the CHST. The 1999 five-year plan was called a “health care deal” although the money was added to the CHST and no conditions were attached. In 2000, there was another five-year plan to “save health care.” The total CHST pot was \$21.1 billion; \$2.2 billion was set aside for early child development programs, and \$2.5 billion was an unallocated one-time CHST increase. In addition to this, additional one-time funds were earmarked for medical and diagnostic equipment (\$1 billion), health informatics (\$500 million) and reforms in primary care (\$800 million) (Yalnizyan 2005: 62-64).

The earmarked funds were not tightly conditioned, and there were allegations about the misuse of the fund for medical and diagnostic equipment, in particular. Norman Laberge, Chief Executive Officer of the Canadian Association of Radiologists, said funds for replacing aging machines were really needed, but from the 2000 fund “[w]e ended up with a pressure cooker, delivery trucks and lawnmowers instead of CTs and MRIs, which was a real disaster” (Lawton 2003: 1).

In 2003, after the Romanow Report, the federal budget included another \$34.8 billion to be spent over five years for health care. Some money was added to the CHST. But about half of it was one-time allocations of money. The largest of these was the Health Reform Fund of \$16 billion allocated over five years for catastrophic drug coverage, home care and primary care reform. Yalnizyan (2005: 64) described these funds as “so loosely conditional as to have no effect.” She characterized this period this way: “[B]etween 1998 and 2003 there were 4 five-year plans. ... Each ‘deal’ promised to sustain... health care. In that same period, though more resources flowed, public health care was deemed increasingly in peril, and ... other social programs and priorities were getting crowded out” (Yalnizyan 2005: 64). There seems to be general agreement that when health care, post-secondary education and social assistance and social services were all included under the CHST, health care spending systematically squeezed out spending on post-secondary education and social assistance and other services (Council of the Federation 2006: 58).

In 2003, the federal government and the provinces agreed to a new health accord, a 10-year plan to save health care. There was a separate funding arrangement with Quebec (Health Canada 2006). This plan was based on \$41.3 billion in federal transfers and it re-introduced an escalator formula to ensure predictable increases in cash funding for health care over 10 years (Yalnizyan 2005: 64-65; Council of the Federation 2006: 58). This was also the time when the CHST was divided into the Health Transfer and the Social Transfer, to ensure that this money would be more clearly designated for health care, and would not go to the undifferentiated CHST.³⁹

But when the CHST was split into two component parts, spending on post-secondary education and social assistance and social services suffered in order to increase spending on health care. *The federal government’s support for post-secondary education, social assistance and social services has never been restored to 1994-95 levels.* The CST for 2005-2006 is \$8.2 billion. This is less than the provinces and territories received in 1989-90. To increase CST support for post-secondary education and social assistance and social services to their 1994-95 levels, adjusted for inflation, would require an additional \$2.2 billion annually (Council of the Federation 2006: 75).

The Social Union Framework Agreement

These were the developments in federal–provincial fiscal arrangements post-CAP. What about other social program machinery? In 1999, after the restructuring of 1995, and when the deficit era was over, the federal government, the territories and the provinces, except Quebec, agreed to a new framework agreement for social program negotiations (Canada 1999).⁴⁰ In the post-CAP era, this seemed like an important step. The SUFA was initially looked to with hope by both voluntary organizations and social policy experts. Harvey Lazar (2000: 10) said: “SUFA is about building a better Canada. It is about better social policy and a renewed partnership between the

two orders of government. If successful, it will be a major cornerstone of political nation-building in Canada.”

The Canadian Council on Social Development noted that then-Minister of Human Resources Development, Pierre Pettigrew, promised that the SUFA would “reinvent the country” and provide a forum for renewing the social union (CCSD 2002: 6). The Agreement held out the possibility that federal, provincial and territorial governments in an atmosphere of “mutual respect” would work more closely together “to meet the needs of Canadians.” The expectation was that the SUFA would be a forum for negotiating new funding formulas, designations, basic standards and accountability systems for Canada’s social programs. The fact that Quebec chose to stay outside the SUFA was not necessarily defeating, since it was likely that Quebec could negotiate separate agreements with the federal government to provide similar programs and receive its share of any funds being provided.

The SUFA included commitments to:

- principles for the social union;
- mobility rights;
- citizen engagement, accountability and transparency;
- joint planning and collaboration among governments;
- ground rules regarding the use of the federal spending power;
- a dispute avoidance and resolution clause; and
- a review of the agreement in three years.

The SUFA principles provided that governments would meet the needs of Canadians by:

- ensuring “access for all Canadians, wherever they live or move in Canada, to essential social programs and services of reasonably comparable quality”⁴¹;
- providing “appropriate assistance to those in need”;
- respecting “the principles of medicare”; and
- promoting “the full and active participation of all Canadians in Canada’s social and economic life.”

The Agreement also stated that the social union should reflect and give expression to the fundamental values of Canadians: “equality, respect for diversity, fairness, individual dignity and responsibility, and mutual aid and our responsibilities for one another.” Governments committed themselves to ensuring “adequate, affordable, stable and sustainable funding for social programs.” In other words, the Agreement provided a clear commitment to using redistributive fiscal tools and collaborative action among governments to ensure the collective well-being of the people who live in Canada.

Regarding enhancing accountability and transparency, each government agreed to:

- Monitor and measure outcomes of its social programs and report regularly to its constituents...
- Share information ...[and] develop, over time, comparable indicators to measure progress on agreed objectives
- Publicly recognize and explain the respective roles and contributions of governments
- Use funds transferred from another order of government for the purposes agreed and pass on increases to its residents
- Use third parties, as appropriate, to assist in assessing progress on social priorities (SUFA 1999: para. 3).

They also agreed to ensure that there were in place “effective mechanisms for Canadians to participate in developing social priorities and reviewing outcomes.”

The articulation of ground rules in the Agreement regarding the federal government’s use of the spending power was not surprising. In the wake of the cuts to transfer payments and the repeal of CAP with its cost-sharing provisions, the provincial and territorial governments wanted to curtail the federal government’s ability to spend money on matters within provincial jurisdiction, and subsequently unilaterally cut the funds, leaving them with unfunded or underfunded programs. The federal government, for its part, wanted to ensure that the provincial governments were held more accountable for their expenditure of transferred dollars and for showing results (Lazar 2000: 4).

The federal government was also concerned to have its spending power acknowledged as a legitimate instrument for the creation and maintenance of social programs and services, and to ensure that any constraints on the federal spending power were narrowly procedural, not substantive. So section 5 of the SUFA acknowledged the legitimate role and historical importance of the federal spending power in the development of Canada’s social programs. But the federal government agreed not to introduce new programs through transfers without the agreement of a majority of provincial governments. And it also agreed to provide its share of funding to any province or territory that “meets or commits to meet” the Canada-wide objectives for a new program. This was a very loosened form of conditionality. Thus the SUFA, in its text, reflected the tensions between federal and provincial governments over social program funding and control.

As it has turned out, the SUFA has not delivered on the promise it seemed to offer. By the time of the three year review in 2002, the social policy community, including expert bodies, such as the National Council of Welfare, professional associations such as the Canadian Bar Association, and advocacy organizations, such as the Native Women’s Association of Canada and the National Anti-Poverty Organization, had lost faith in the SUFA as a vehicle for enlivening and reshaping the social union.

In submissions made in the review process, these organizations expressed concern that:

- existing social programs, such as social assistance and legal aid, were being allowed to erode further and no action was being taken (Findlay 2005: 19-26);
- decisions were being made behind closed doors through executive federalism (Findlay 2005: 17-19); and
- the promise of citizen engagement, let alone participation in decision making by the most vulnerable Canadians, including women, was unrealized (Findlay 2005: 11-19).

Aboriginal groups, including the Assembly of First Nations, the Native Women's Association of Canada, the Congress of Aboriginal Peoples, and the Inuit Tapirisat, were disturbed. They had been excluded from the negotiation of SUFA, and were not recognized as partners with governments in the development of social policy, despite its importance to them.

The Canadian Council on Social Development said "little has been done under the agreement to restore Canada's weakened and under-funded social services, or to modernize its aging and incomplete social infrastructure. Where action has been taken, it has fallen far short of the ambitious goals and principles enunciated by the SUFA" (CCSD 2002: 6).

The Canadian Bar Association (2002b: 2) wrote: "Legal services, especially civil legal aid services, have been eroded in recent years and, in some areas, gutted.... the CHST has not met important goals of the SUFA, such as that of ensuring 'access to essential social programs and services of reasonably comparable quality' across Canada. This is simply not the current reality in terms of access to justice."

The submissions to the SUFA review exhibit a profound disappointment that the SUFA did not provide a forum for modernizing or enlivening existing social programs and services. But the submissions were also critical of the new programs that were claimed as part of the accomplishments of SUFA.

Although SUFA did not come along until 1999, the social policy agreements negotiated after 1995, including the National Child Benefit (1998), Early Childhood Development (2000) and Early Learning and Care (2003), Employability Assistance for People with Disabilities (1997) Labour Market Agreements for Persons with Disabilities (2004) and a series of agreements on health care concluded between 2000 and 2004 are considered part of the SUFA record.⁴² The two new priorities named under the SUFA were programs for children and for people with disabilities. But social policy commentators considered these new initiatives weak and unfocused, because they did not contain firm standards and accountability mechanisms (Findlay 2005: 6-11).

The agreement regarding the National Child Benefit Supplement (NCBS), for example, drew heated criticism. The NCBS is an element of the National Child Benefit Initiative. The Initiative consists of the federal government's Canada Child Tax Benefit and the NCBS, which was negotiated with the provinces and territories. The NCBS is targeted to low-income families. Commentators noted that the National Child Benefit Initiative has been hailed "...not only as a breakthrough in federal-provincial relations, but as perhaps the most important social policy

reform since the mid-1960s.” The federal government presents it as its answer to concerns over “child poverty” (Wiegers 2002: 2).

However, the NCBS does not live up to this praise. The problem is that the provinces and territories are permitted “to adjust social assistance or child benefit payments by an amount equivalent to the NCB Supplement.” This permission to reduce, or “adjust” social assistance payments — as government promotional materials say — amounts to a clawback of this benefit from the poorest families (Wiegers 2002: 3). In effect, governments agreed to help low-income families, but to discriminate against families on social assistance by permitting “reinvestment” of their NCBS money in other programs for working poor families. The National Council of Welfare (2004: 13) explained:

The clawback mechanisms [have] varied from place to place. One option for provinces and territories was treating the National Child Benefit Supplement as non-exempt income and deducting an equivalent amount from the monthly welfare cheques they paid to families with children. Another option was simply reducing the amount paid by welfare by the amount of the supplement. A third option was reducing the amount of provincial child benefits or family allowances where these programs existed.

In other words, many of the poorest families do not benefit from the NCBS. Further, most of the poorest families who do not get the benefit of the NCBS are led by single mothers. The National Council of Welfare (2004: 13) has stated that the clawback, in effect, discriminates based on sex, contrary to the non-discrimination principles set out in the SUFA (Findlay 2005: 27). As we note later, the National Council of Welfare in its 2005 report (p. 88) found that the NCBS has made little difference to the lives of families on welfare.

For participants in the SUFA review, the NCBS seemed to provide an example of the failure to set a new course. When standards of adequacy were so recently removed for welfare, this willingness to penalize welfare families when designing a new benefit, while doing nothing to introduce new standards of adequacy for welfare, raised the question of whether the social union of 1999 effectively excluded “those most victimized and oppressed” (Wiegers 2002: 33).

The major organizations in Canada representing persons with disabilities — the Canadian Association for Community Living (CACL) and the Council of Canadians with Disabilities (CCD) — wrote an open letter to the Federal/Provincial/Territorial Ministers of Social Services in July 2005 calling on them to support “a new strategic investment in disability-related supports” to deal with the “very real inequality faced by Canadians with disabilities.” They said that although the ministers identified children and people with disabilities as two priorities for putting the SUFA into action for Canadians, “relatively little has been realized as yet...on the disability file” (CCD and CACL 2005). The CCD and CACL called on the federal government to provide a targeted transfer to the provinces, territories and First Nations, based on principles taken from the *In Unison Accord* (HRDC 1998), to enhance disability supports and transitions from institution to community and from youth to adult labour force participation (CCD 2005).

There was also serious discontent with the Early Childhood and Development Agreement (ECDA), because it provided provincial governments with a menu of services. They could choose whether to spend the ECDA funds on healthy pregnancy, birth and infancy, parenting and family supports, early childhood development, learning and care or community supports. Because of this cafeteria approach, some governments spent no or few funds on the development of regulated child-care spaces, and in some jurisdictions child care “experienced decline” (National Children’s Alliance 2002). The ECDA allowed the provinces “to pursue different children’s policies based on ideology and financial resources, not to ‘ensure access to basic social programs of reasonably comparable quality’” (Friendly 2002, quoted in Findlay 2005: 22).

Martha Friendly (2005: xv) said:

[E]ach of Canada’s 14 jurisdictions — 10 provinces, three territories and the federal government — has its own approach to early childhood education and care (or early learning and child care). Each has a number of programs for “care” and “education” as well as for meeting other objectives such as ameliorating the effects of poverty and supporting parents.... No region of Canada yet provides a system of well-designed and funded early childhood education and care services to meet the needs of a majority of families and children.

So it was a change in 2004 when the federal Liberal Government decided to put its weight behind the development of a new national early learning and child-care system, negotiated agreements with nine provinces, and supported Quebec’s child-care system. The agreements recognized four principles, commonly referred to as the QUAD principles. The agreements required quality child care that is universally inclusive, accessible and facilitates early child development (QUAD).⁴³ Federal funds could be spent on centres, nursery schools or regulated family day care, for full- or part-time care, for children with parents in and out of the work force and in urban, rural and suburban regions. Funds could also be spent on improving quality and affordability of existing spaces as per the QUAD principles (Friendly and Ferns 2006: 1).

The process was designed so provinces could sign a one-year agreement to invest in child care while they devised an action plan, and then sign five-year agreements to implement the plans (Friendly and Ferns 2006: 1). Before the 2006 election, Ontario and Manitoba released their action plans and signed five-year agreements. The federal government signed a five-year agreement with Quebec to support its existing plan (Friendly and Ferns 2006: 2).

Despite its importance to women, the 2006 Conservative minority government decided to abandon this beginning. During the 2006 election, the Conservative Party promised to replace the child-care agreements with a Choice in Child Care Allowance. This promise was implemented and is now called the Universal Child Care Benefit. The benefit consists of a payment of \$1,200 per year to all parents with children under age 6, taxed in the hands of the lower-income spouse. In addition, the Conservatives promised \$250 million in tax credits for employers and non-profit agencies to provide new spaces. The child care agreements were cancelled as of March 2007 (CTV 2006). The Conservative minority government has made it clear that, in its view, the federal government has no role to play in securing a national child care program.

This is a moment of profound irony — when thinking about the developments under SUFA. It seems clear that federal leadership is needed. The federal government is not more reliable than the provincial governments when it comes to supporting the poorest and most disadvantaged women and men, or ensuring the development and maintenance of social programs that support the well-being of Canadians. But federal leadership, when it emerges, does matter. The beginnings, after 35 years of lobbying, of a national child-care system depended on a federal government committed to a strategy and to some standards, even if not complete, for implementing that strategy. It could not reach a multilateral agreement with the provinces and territories on child care, but it could negotiate bilateral agreements that met the standards.

So what is good about the child-care agreements — that they move forward a pan-Canadian child care strategy with some articulated standards — seems to owe nothing to the SUFA. The Agreement, which appears to be moribund now, produced little by way of standards. But what is wrong with the child-care agreements does owe something to the SUFA. It made intergovernmental agreements, concluded through executive federalism, *the* vehicle for social policy. And a key weakness of the child-care agreements is just that, that they are intergovernmental agreements. They have no legislative base and they can be cancelled by the executive, even the executive of a minority government. If the funds for child care flowed to the provinces under the authority of legislation, at least that authority would have to be rescinded in Parliament through a publicly accountable process, a democratic vote.

Summary

So what picture does the 1995-2005 decade present? It was a decade of restructuring, cuts and the loss of standards for social programs, from which the country has not recovered. Although the federal government increased its contributions between 1998 and 2005, this has not undone the harm. Contributions of one-time money, and the bilateral agreements for child care have led to charges of unsustainability, and “patchwork federalism.” The federal government’s role is contested.

In addition, most of the money and most of the attention has been directed to health. Post-secondary education took a back seat and suffered during this period, and social assistance, civil legal aid and other programs most often needed by the poorest and most vulnerable Canadians dropped from view, seeming to have no place in the discourse of politicians.⁴⁴ Contributions for these programs have not been restored to pre-1995 levels.

While there is loyalty to the *Canada Health Act* standards for health care, revisiting standards for social assistance has not been on the agenda. The CHST directed the Minister of Human Resources to invite representatives of all the provinces to consult and work together to develop, through mutual consent, a set of shared principles and objectives for social programs.⁴⁵ The CST contains similar language, inviting the federal Minister of Human Resource Development to work with representatives from all the provinces to develop a shared set of principles and objectives to govern the programs funded by the CST. But this is legislative language with no bite. Whether in the CHST or now in the CST this apparently envisions federal–provincial agreement on “principles and objectives” as a substitute for national standards for social assistance and social services. But no action has been taken, even on this soft language.

The *Budget Implementation Act* of 1995 and the CHST have had a very strong decentralizing effect. They have given more flexibility to the provinces, but this has not resulted in innovation and improvements to social programs. The programs that have had no standards attached to them since 1995, and that have been squeezed because they must compete for dollars with health care, have been eroded, cut, and narrowed in ways that put vulnerable women and men at risk. Social rights have become lost in the fiscal struggle. Federal–provincial fiscal arrangements, instead of being the vehicle for creating a comprehensive and equitable social safety net for Canada, seem now to be the main concern.

3. THE FALL-OUT

A number of programs that matter to women have suffered since the repeal of CAP. Child care, home care, social assistance and civil legal aid are all examples. To consider the fall-out, however, we focussed on two — social assistance and civil legal aid — both of central importance to women, and to the most disadvantaged women in particular.

Not having the means of subsistence deepens women's sex-based disadvantage. Poor women get sex inequality writ large. As the evidence in *Gosselin v. Quebec (Attorney General)*⁴⁶ showed, women whose social assistance rates are reduced to a below subsistence level, are forced to accept sexual commodification and sexual subordination to men to survive. Women engage in prostitution or "survival sex" to get by. They lose autonomy to choose freely when and with whom they will have sex. They exchange sex for food, or a roof over their heads. They also live in unsafe places, and are more vulnerable to rape, assault and sexual harassment in squats and boarding houses. They are not free to walk away from violent or psychologically abusive relationships, because they cannot support themselves and their children on inadequate welfare incomes. Poor women are also less able to participate in public life. They are not equal social citizens, accorded equal respect and concern. They do not enjoy equal civil and political rights. They do not enjoy equality.

There could be other social programs than welfare as it is currently conceived that would ensure that women do not live in poverty. Until we have devised that substitute, the availability of adequate social assistance to women who are in need is a cornerstone of women's equality.

Similarly, without access to civil legal aid for family and poverty law matters, women do not have the ability to exercise even the rights they supposedly have under statutory schemes of benefits and protections. Their rights and social citizenship lack meaning. They cannot assert or benefit from them. They live unprotected, below the law. Legislative schemes have been designed over the last 50 years, in part, to ameliorate women's inequality in the family and in the market. But, without access to legal aid to make use of the benefits and protections set out in the laws about family relations, residential tenancy, social assistance and employment insurance, they are illusory.

Social assistance and civil legal aid were two key programs funded under CAP. They have suffered badly since its repeal.

Social Assistance

The decade since the repeal of CAP has brought lowered welfare rates, narrowed eligibility rules, diminished rights of appeal, and increasing hardships for all recipients. The provincial social assistance schemes that existed during the CAP era were not models for which we can feel legitimate nostalgia. But the repeal introduced an era of further reductions and diminishments. "Innovation" by the provinces has taken mainly negative forms. The federal government's own advisory body on welfare, the National Council of Welfare, says that this has been a decade of going backward. The Council, in its Presentation to the Standing Committee on Finance at the

time of the 2005 Pre-Budget Consultations, said: “Severe cuts to the CST by the federal government a decade ago have resulted in severe and enduring cuts to welfare incomes” (NCW 2005: 3). The Council also noted that cuts in incomes have been accompanied in many provinces by punitive rules and “asset squeeze,” that is, the tightening of rules about what assets recipients can retain and still receive welfare (NCW 2004: 2 and 3).

We examine changes made during this decade to the social assistance regime in British Columbia, as an example of the significant erosion of welfare programs. The restructuring of the welfare system in British Columbia has been drastic, and it has had serious harmful effects. This does not mean that it is atypical.

In 2002, a major welfare reform was undertaken by the new Liberal Government under the leadership of Premier Gordon Campbell. The thrust of this reform was to dispel any notion that social assistance was an entitlement of persons in need, and to characterize it instead as a temporary support during a transition from unemployment to work. Among other things, this involved redefining the employability of persons with disabilities and single mothers.

Taking inflation into account, welfare incomes in British Columbia rose slightly in the decade between 1986 and 1995, but fell steadily after 1996 (NCW 2005: 40-41). Welfare rates that were already inadequate were cut further in 2002. They were not cut for younger single employable adults, but they were cut for older single employable adults and employable couples without children between 55 and 65 years of age. For the first time in 20 years, welfare rates were cut for families with children (Brodsky et al. 2005: 20). Table 1 summarizes rates after the 2002 cuts and their relationship to Low Income Cut-Offs (LICOs) (Klein and Long 2003: 20).⁴⁷

Table 1: Welfare Rates after 2002 Cuts

Type of Recipient	2002 Rates after Cuts \$	Monthly Income Loss \$	2002 Rate as % of LICO ^a
Single employable adult 18-54	510	0	32
Single employable adult 55-59	510	47	32
Single employable adult age 60-64	510	98	32
Employable couple 55-59	827	94	41
Employable couple 60-64	827	145	41
Single parent, one child	961	43	41
Single parent, two children	1,111	90	44
Employable couple, age 18-54, one child	1,071	47	43
Employable couple, two children	1,221	45	40

Notes:

These figures include the B.C. Family Bonus.

^a According to Statistics Canada (2005: 145) “families or individuals are classified as ‘low-income’ if they spend, on average, at least 20 percentage points more of their pre-tax income than the Canadian average on food, shelter, and clothing.”

But the cuts to rates were not the only dollar losses that came with the 2002 reforms. The Family Maintenance Exemption, which since 1976 had permitted a single parent receiving child support payments from a spouse to keep \$100 per month, was eliminated.⁴⁸ Child support payments are

now deducted dollar for dollar from income assistance benefits (BC CEDAW Group 2002: 13; Klein and Long 2003: 23; Brodsky et al. 2005: 21).

The Earnings Exemption was also eliminated for “employable” recipients. This exemption allowed people on welfare to work and keep \$100 if they were single, or \$200 if they had children or a partner (BC CEDAW Group 2002: 13; Klein and Long 2003: 23; Brodsky et al. 2005: 21).

The basic rates shown in Table 1 do not include these extra amounts to which recipients used to have access. In *Human Rights Denied*, a report on the impact on single mothers of the changes to the social assistance regime in British Columbia, we calculated that the reductions in support and shelter allowances, combined with the elimination of the exemptions, meant that some single mothers experienced a drop in their benefits of up to \$380 per month or 25 percent (Brodsky et al. 2005: 21).

Also, in British Columbia, the NCBS has been clawed back from families on social assistance since its introduction by the federal government in 1998 (NCW 2003: 15; 2004: 9), depriving them of this additional income (Tarasuk 2001). British Columbia’s system is more complex than some others because the NCBS has been incorporated into the B.C. Family Bonus. But for families on social assistance, the Family Bonus has been reduced by the full value of the NCBS each year (NCW 2003: 15).

As the pre-2002 rates were inadequate to meet basic needs, the post-2002 rates are even more so (Goldberg and Long 2001: 20; Klein and Long 2003: 20-21; Goldberg and Wolanski 2005). Welfare recipients in British Columbia cannot afford “safe and adequate food and shelter” (Dietitians of Canada 2005b: 4). In its 2004 report, *The Cost of Eating in British Columbia*, the Dietitians of Canada concluded that families on welfare are forced to live in “poor housing in unsafe neighbourhoods, line up at food banks and soup kitchens, leave their children in unsafe child care situations...and go without the basic necessities of life, including healthy food” (p. 1). In 2003, welfare recipients were 78.6 percent of all B.C. food bank users (Creese and Boag 2005: 2).

Goldberg and Wolanski (2005: 20) also studied the real costs of living in British Columbia and concluded that in 2005 an even lower percentage of minimum costs were covered by B.C. welfare rates than in 2002. Welfare rates are simply not keeping pace with increases in the cost of living and the value of the benefits continues to erode.

Also, homelessness grew in Vancouver between 2002 and 2005, providing another measure of the inadequacy of income security and social supports. The number of homeless persons (living in shelters or on the street) doubled, and street homelessness grew by 235 percent or 800 persons (Goldberg et al. 2005: 1). About 30 percent of the homeless who were counted in shelters and 23 percent of the street homeless in Vancouver were women. These percentages, though lower than men’s, must be understood to reflect increasingly serious problems for women and girls, since, because of their vulnerability to sexual assault and harassment, women avoid street homelessness in any way they can. Women’s experience of homelessness is more hidden and more complex, because it includes staying with violent partners, trading sex for shelter, living in overcrowded

accommodations, living in emergency shelters or sacrificing basic needs, such as food and clothing, to pay rent (CERA: 2002). The women in the shelters and on the street are the pointed evidence of an iceberg of under-housed women.

In addition to cutting rates, the 2002 B.C. welfare reform included a number of changes to eligibility rules. Many of these were clearly intended to ensure that social assistance was no longer a benefit provided to any person in need, but rather a temporary benefit to cover an interruption in work.

- **Two years' paid work.** Most applicants without children must now show that they have been in the paid work force for two consecutive years to be eligible for income assistance.⁴⁹ This is a particularly damaging eligibility rule for young people, who have left home, not found work and need welfare (Klein and Long 2003: 30). One young woman identified during the latest homeless count may be an example of the impact of this rule. When interviewed, this young woman was 18. She had been homeless and on the streets of Vancouver since she turned 16 and was kicked out of a foster home. She was not able to get a youth agreement. "Unable to qualify for social assistance, she has turned to prostitution for income and multiple drugs to forget" (Goldberg et al. 2005: 12).
- **Three week wait.** Before being able to start the application process, individuals are required to undertake a "three-week self-directed job search."⁵⁰ Income assistance benefits are not available during this period. Only after the evidence of the job search is reviewed, does the application process actually start and then it can be another three weeks, or more, before people receive benefits. Front-line advocates have complained to the B.C. Ombudsman that the three-week wait is "unnecessary and unhelpful." It "creates hardship and does not assist individuals to find work." The advocates report that "people are asked to search for employment when they are often hungry, about to get evicted, and have no money for transportation, child care, or telephone service" (BC Public Interest Advocacy Centre 2005: 12). The delays in getting help cause stress, fear, hunger and loss of housing.
- **Employment plans.** Recipients are also required to develop employment plans in consultation with the Ministry, and their benefits can be reduced or suspended if they do not comply with them.⁵¹ This strategy is ostensibly intended to put recipients on a path to finding employment; but, in fact, it does not provide effective help to recipients in finding or keeping work. Since most recipients are on welfare for short periods, having an employment plan that one is required to comply with makes very little difference, beyond "forcing people to jump through more hoops...and possibly convincing a few...that...living on the street is less grief than navigating the welfare system" (Klein and Long 2003: 26). The employment plans may require recipients to enroll in job placement and training for jobs programs. These programs are paid for by the Ministry, but contracted out to private companies. While the B.C. government claims success from these programs, policy experts report that based on the government's own statistics, they have shown minimal success in helping recipients stay off welfare, and have cost a lot more than they have saved in welfare benefits (Ministry of Employment and Income Assistance 2005; Beall 2005).

- **Single parents employable when youngest child is 3.** Single parents, most of whom are women, have been redefined as employable when their youngest child is 3, down from 7.⁵² As in other jurisdictions, single mothers have been moved from the deserving poor category to the undeserving poor category. Their child-raising work is not valued, and they are seen to be irresponsible for having children they cannot support financially.
- **Time limits.** Since the introduction of a nationwide social assistance program in Canada in the 1960s, there has never been an arbitrary time limit on eligibility for welfare (Poverty and Human Rights Project 2003: 5). Welfare has been understood to be a benefit that would be available to those in need for the period of need. But a time limit was introduced by the B.C. government in 2002. The *B.C. Employment and Assistance Act* stipulates that recipients are only allowed to claim social assistance for a total of 24 months out of every 60 months. Those who cannot find or maintain steady work can have their benefits cut once their 24 months have run out,⁵³ whether or not they are still in need.

This provision was timed to start affecting welfare recipients on April 1, 2004, 24 months after the introduction of the law. Fortunately, the combined opposition of community organizations, advocates, churches and labour (Povnet 2004) as well as the threat of a constitutional challenge to the law, made the government decide to back away from applying the time limits, or rather to introduce “a clarification.” The government “clarified” that those who were complying with their employment plans, but were unable to find work, would not be cut off (Reitsma-Street and Wallace 2004: 3-6). Although the time limits have not been applied across the board, they remain in the law.

Since 1995 and dramatically since 2002, the number of people receiving welfare in British Columbia has declined. In 1995, 371,427 British Columbians were eligible for assistance. By 2004, that number had fallen to 166,479 (Reitsma-Street and Wallace 2004: 7). The number of people receiving social assistance plummeted by 42 percent between 2001 and 2005, as has the percentage of the province’s population receiving social assistance benefits — from six percent of British Columbia’s population to 3.5 percent. (Wallace et al. 2006: 8).

The government insists that the decline in numbers is a mark of success, a part of making “a fundamental shift in the culture surrounding income assistance from one of entitlement to one with a renewed sense of personal responsibility.”⁵⁴ It has defined reduced caseloads, not reduced poverty, as a measure of success (Klein and Long 2003: 10-11). A new study shows however, that, contrary to what the B.C. government has been telling the public, the 2002 changes to social assistance did not reduce the number of people receiving social assistance benefits mainly by getting more recipients into jobs.⁵⁵ The authors (Wallace et al. 2006: 6) of *Denied Assistance* reported:

Data obtained through Freedom of Information requests shows that the recent drop in the caseload is not the result of more people leaving welfare (i.e. an increase in what the government calls “exits”). Rather, fewer people are entering the system and accessing assistance. Simply put, the caseload reduction is mainly a front-door story).

The dramatic reduction in caseloads is due in large part to a decrease in the number of applications for assistance *and* a decrease in the numbers of applications approved (Wallace et al. 2006: 23). There has been “a dramatic drop in the number of pre-applications for assistance (from an average of 9,848 per month in 2001/02 to 6,735 per month in 2004).” But there has been an even more dramatic drop in the proportion of applicants for welfare who are successful in becoming recipients. “In the fiscal year 2001/02, 85 per cent of pre-applicants received assistance... And by 2004, just over half (51 per cent) of those who applied actually received assistance” (Wallace et al. 2006: 23). The three-week wait, the two-year independence rule and the implementation of “electronic alternative delivery systems” are the biggest barriers for those in need to actually getting assistance (Wallace et al. 2006: 7 and 41).

The front end denial of welfare, and the difficulty navigating the application procedure, have particular gendered effects. Some young women, like the one interviewed in the homeless count, who are deemed not eligible for welfare and are homeless, are turning to prostitution (Wallace et al. 2006: 52). Women leaving abusive relationships are supposed to be able to circumvent the three-week wait, but many do not know this, or are not being helped to do it safely (Wallace et al. 2006: 55-58).

This picture of welfare reform in British Columbia would not be complete without a brief description of the package of welfare policies that now apply to single mothers.

Single mother-led families are the largest group on welfare in British Columbia today. About 49 percent of those on “temporary assistance,” that is, not disability benefits, are single parent families.⁵⁶ More than 90 percent of these families are led by single mothers (Brodsky et al. 2005: 6). The caregiving that these single mothers do is not considered work, and they are encouraged to get off assistance and into paid employment. However, the B.C. government’s policies create barriers to paid employment for poor women with dependent children, rather than removing them (Brodsky et al. 2005: 5).

In addition to being affected by rate cuts, and the loss of family maintenance and earnings exemptions, because single mothers are now defined as employable when their youngest child is 3, they are required to seek out any available paid employment when their children may still be too young to be left alone, or be in school for any portion of the day (Brodsky et al. 2005: 8). Nor are they any longer permitted to be in full-time post-secondary education and receive social assistance. This change was made even though statistics show that obtaining a post-secondary education is a single mother’s best route to being able to support herself and her children adequately (Brodsky et al. 2005: 23).

At the same time as pushing single mothers toward any paid employment, the B.C. government also made cuts and changes to child-care funding and subsidies, making access to safe, affordable child care for women seeking to enter the work force more, not less, difficult (Brodsky et al. 2005: 25-26). And it weakened labour standards protections, by introducing a \$6 training wage that applies to new entrants to the labour force, stripping many part-time workers of statutory holiday pay, introducing overtime “averaging agreements” that permit employers to pay overtime only when employees work more than 160 hours in a month, weakening labour standards enforcement

and repealing the pay equity provisions in the B.C. *Human Rights Code* (Brodsky et al. 2005: 27-28). These changes have made work more precarious, and less remunerative.

The B.C. government's policies toward single mothers are contradictory. On the one hand, the government holds out paid employment as the best route to adequate support for single mothers and their children; on the other hand, it has made decent employment, affordable child care and post-secondary education less accessible.

Human Rights Denied (Brodsky et al. 2005) concluded that the Government of British Columbia in the years since 2001 has made the lives of single mothers and their children more difficult, more stressful, and more risky. Single mothers who are reliant on social assistance have seen their benefits reduced and their opportunity to supplement inadequate benefits with other income taken away.⁵⁷ Single mothers with preschool children are now required to take available paid work even though child-care subsidies have been reduced or eliminated and some child-care services have been closed due to government funding cuts. "Required to seek employment in the labour market, yet no longer eligible for social assistance support while getting post-secondary education, many single mothers have access only to precarious employment that guarantees that their poverty will continue" (Brodsky et al. 2005: 30).

The rationales provided by governments for the diminishment of social assistance have taken different forms over the last decade. The Harris Government in Ontario, for example, accompanied its 22 percent cut to welfare rates⁵⁸ with a campaign against welfare fraud, suggesting to the public that all welfare recipients should be treated as potential fraud artists, who were obtaining government support to which they were not entitled (Gavigan and Chunn 2004). In Ontario this policing of the poor has taken the form of snitch lines, prosecutions and punishment of those suspected of fraud, and it culminated in the death of Kimberly Rogers, a pregnant woman, who was banned for life from receiving welfare and was under house arrest.⁵⁹

Across the country, researchers, experts and community organizations have documented the inadequacy of welfare rates, the lack of access to adequate housing, the narrowing of eligibility rules, the failed policies with respect to single mothers, and the worsening situation of the poorest women (Kerr et al. 2004; CASW 2004; Neal 2004; CERA 2000; NAPO 2003; Morel 2002; St. John's Status of Women Council 2003; The New Brunswick Advisory Council on the Status of Women 2006, 2001; The New Brunswick Advisory Council on the Status of Women 2001; Provencher and Bourassa 2005; Wiebe and Keirstad 2004; Savarese and Morton 2005).

The National Council of Welfare documented in its 2004 report a decline in welfare incomes across the country that, however justified, has remarkable similarity. In no province or territory, for any family type, has welfare income in Canada ever met the poverty line. But the recent trend has been further cuts and erosions rather than increases in welfare benefits. The Council (2005: 44) said: "Deliberate cuts from time to time, combined with the lack of annual cost-of-living adjustments in welfare rates, have resulted in falling incomes year after year. Many of the provincial and territorial benefits... for 2004 were all-time lows since the National Council of Welfare started doing calculations in 1986 and 1989." The Council (2005: 63) reported that welfare incomes are far lower in most provinces and territories than they were a decade ago. It assigns responsibility to both levels of government for this decline.

As noted earlier, the National Child Benefit has been of little value to families on welfare. Because of the clawback of the NCBS, the poorest families are no better off. Provinces have dealt with the clawback in different ways, and some have not clawed it back (NCW 2005: 13-15). But even in those provinces that have not clawed it back, this has made little difference. In these provinces, welfare rates have been set so low that, even *with* the NCBS, welfare families are not better off (NCW 2005: 88). As we have pointed out previously, the clawback discriminates against single mothers in particular because single mother-led families are the majority of the families affected (NCW 2003: 15).

According to the National Council of Welfare (2005: 87), Canadian welfare policy over the past 15 years has been “an utter disaster.” It made two recommendations: change the CST to make new financial arrangements for welfare, complete with commitments to financial support for adequate benefits; and change the current system of child benefits, including an immediate end to the clawbacks.

Interestingly, while welfare has been so eroded, particularly since the repeal of CAP, a new Ipsos-Reid poll in British Columbia shows that 89 percent of respondents — without much variation by region, gender, age, educational attainment or income — agree that access to welfare when in need should be a right for all British Columbians (Wallace et al. 2006).

Legal Aid

Since the repeal of CAP, there has also been an erosion of civil legal aid, affecting eligibility, areas of coverage and level of services provided. The term “civil legal aid” generally refers to legal aid for family and poverty law matters, and for other non-criminal matters. The federal government makes a direct transfer to the provinces and territories to support criminal law legal aid and immigration and refugee legal aid. However, civil legal aid, which was a service designated for financing under CAP, is now, according to the federal government, a part of the basket of services ostensibly supported by the CST. Provincial and territorial ministers of justice do not agree that civil legal aid is covered by the CST, and have been asking for new federal funding specifically designated for civil legal aid. But, in any case, in the post-CAP period, expenditure on civil legal aid, like expenditure on social assistance, has lost out in the competition with health and post-secondary education, and so access to civil legal aid has been diminished in most jurisdictions.

The Canadian Bar Association reported in a recent study that there is a crisis in the legal aid system, which is characterized by general under-funding, and disparities in coverage from one jurisdiction to the next (Buckley 2005: 33). Because each provincial and territorial legal aid plan defines differently which legal issues will be covered, there is wide disparity across the country in access to legal aid; amounts and adequacy of funding for family law legal aid vary widely. In some provinces, family legal aid is so restricted that it is virtually unavailable. In others, some kinds of services, like mediation and negotiation are not recognized and funded hours are not sufficient to complete cases. The Association attributes this pattern of inconsistency and inadequacy to cuts made to legal aid plans during the 1990s and to the repeal of CAP and the introduction of the undifferentiated funds in the CHST and CST (Buckley 2005: 33).

Again, we use British Columbia as an example to examine more closely recent developments with respect to the civil legal aid regime, in particular with respect to the ability of low-income women to obtain the services of a lawyer.

The Government of British Columbia provides legal aid through the Legal Services Society of British Columbia, using a combination of federal and provincial funds. Provincial cuts made to legal aid in the 1990s had very serious effects on access to justice in the province and generally a disproportionate effect on women and children (Trerise 2000; Bain et al. 2000). As a result of cuts, the Law Society found that women were receiving an inadequate level of service to pursue their share of family assets; women who were dealing with violence issues were appearing in court unrepresented on variation applications and custody and access matters, as well as restraining orders; and women were abandoning claims rather than pursue them on their own (Trerise 2000: 71). In 2002, things got worse. The B.C. government cut funding for legal aid by almost 40 percent. Full-time staff members of the Legal Services Society were cut from 460 to 155; 35 legal aid offices closed leaving only seven still open (CCPA 2004).

The Government specified that the remaining 60 percent of legal aid funds were to be used only for criminal law matters, *Young Offenders Act* matters, mental health reviews, restraining orders and child apprehensions. Post-2002, services are provided for family maintenance or custody disputes only where there is evidence that violence is involved and there is an emergency. Even when legal aid is granted in family matters where violence is involved, it is limited to a maximum of eight hours. And it is only provided to obtain a restraining order or a change to custody that is necessary to protect children (CCPA 2004). Because of these restrictive rules, referrals for family law legal aid fell 53 percent between 2001 and 2004, and the actual amount spent on family law legal aid was reduced by almost 60 percent (CCPA 2004).

Legal aid coverage for poverty law matters, that is for landlord–tenant, employment insurance, employment standards, welfare, and disability pension claims or appeals, was eliminated entirely (Legal Services Society 2002b).

Until 2002, the B.C. legal aid system provided legal assistance for a legal problem or situation that threatened an individual, or her/his family's physical or mental safety or health; ability to feed, clothe and provide shelter for her/himself and any dependants; or livelihood.⁶⁰ Under this mandate, a legal aid lawyer would provide assistance in cases of eviction, or refusal of benefits under social assistance, worker's compensation or Canada Pension Plan (CPP) schemes. Up to 2002, the Legal Services Society assisted about 40,000 poverty law clients every year (Long and Beveridge 2005: 9). In 2002-2003, the number was 512 (Brewin and Stephens 2004: 13). Women and men with poverty law problems can only get telephone summary advice from the Legal Services Society through the Law Line. No legal aid funded representation for poverty law matters is available. Legal aid for prison law matters was also significantly cut, and there are serious deficiencies in the services provided for immigration and refugee law.

There was widespread concern about the drastic cuts to legal aid. The Board of the Legal Services Society refused to implement the cuts and was fired by the government (Legal Services Society 2002a; Brewin and Stephens 2004: 15). The Law Society of British Columbia passed a resolution stating that it had lost confidence in the Attorney General as a result of the cuts (Law

Society 2002a). The president of the Law Society said the government was “making a mockery of equality before the law” by creating legal rights and then denying the poor any means to assert them (Law Society 2002b). The Canadian Bar Association (2002a) objected strenuously, questioned the Attorney General’s financial claims, and called on him to consult with players in the justice system,⁶¹ rather than cutting services.

But, despite the unprecedented objections of the legal community, the cuts were made, and they have had a harsh impact on all low-income British Columbians. A survey of front-line advocates undertaken after the 2002 cuts reveals that many poor British Columbians, who have legitimate claims to statutory entitlements, have given up because they cannot pursue them on their own. Their inability to access services to help them when they are in difficulty has caused “a notable increase in...stress...more people... just giving up, enormous fear, and physical consequences in the form of poor health and chronic illness” (Long and Beveridge 2005: 10). There are also concerns about the impact on both fairness and efficiency in the courts of people appearing without legal representation (Law Society 2005).

Like the previous ones, the 2002 cuts have had a particularly harsh impact on women (Brewin and Stephens 2004: 4). The majority of users of family law legal aid are women; the majority of users of criminal law legal aid are men (CCPA 2004). When criminal law legal aid is preserved and family law legal aid is cut, women lose. Also, women were slightly more likely than men to use poverty law services (Brewin and Stephens 2004: 13). Because women have lower incomes than men, they are less able to afford legal representation when they need it, and more likely to depend on social assistance and other benefits for basic survival.

The importance to women of civil legal aid is widely recognized (Addario 1998; NCW 1995b) but the cuts in British Columbia failed to take women’s realities into account. After the cuts, 70 percent of the legal aid clients in British Columbia were male, because legal aid is now mainly provided for criminal law matters (Long and Beveridge 2005: 9). Similar cuts have been made to civil legal aid across the country (Purcette 2001; NCW 2000a). Reports on Manitoba, Prince Edward Island, Newfoundland and Labrador, Alberta, Saskatchewan and Ontario, as well as on specific groups such as African-Canadians, people with disabilities and immigrants, confirm that civil legal aid is woefully inadequate and that lack of access to legal representation and legal services in civil cases has a particularly harmful impact on women (CUPE Research 2003; LEAF 2003; Alberta Law reform Institute 2005; Canadian Forum on Civil Justice 2006; Ministry of the Attorney General Ontario 1996; CCSD 2004b; African Canadian Legal Clinic 2004; Manitoba Association of Women and the Law 2002; NAWL 1998; Women’s Network PEI 2001).

In 2005, the Canadian Bar Association filed a constitutional challenge against Canada and British Columbia for failing to provide adequate civil legal aid. In its court documents, the Association stated that legal aid is the means by which governments in Canada ensure that poor people are equal beneficiaries of the rule of law and enjoy the equal benefit and protection of the law. The CBA (2005b) claimed that the existing civil legal aid regime in British Columbia is inconsistent with the rule of law and the norm of constitutional equality, and undermines the independence of the judiciary, violates sections 7, 15, 28 and 36(1) of the Constitution, and is incompatible with Canada’s obligations under international human rights law. The Association explained that its decision to initiate the legal challenge came about because it sees diminishment

of legal aid across the country, and neither federal nor provincial governments are taking responsibility for the consequences:

For people with little money, publicly funded legal representation through legal aid plans allows them to rely upon legal protections and guarantees that are intended for all. Without legal aid, access to justice is a hollow idea — many individuals simply cannot take advantage of these legal entitlements and protections. In spite of the CBA's resources and membership, our lobbying for improved legal aid services has not brought about significant improvements over the past decade; things are getting worse.

Provinces are cutting legal aid services, narrowing the types of cases they cover and raising the eligibility criteria, making it harder to qualify for legal aid services. The federal government assumes no responsibility for any minimum coverage across the country, with the primary exception of serious criminal matters. Even when critical interests are at stake, decisions such as those involving the risk of homelessness, loss of income security, loss of children to a former partner, people often have no legal assistance and no government is accountable (CBA 2005a).

Summary

The CEDAW Committee commented on the disproportionate impact on women of cuts in British Columbia in its 2003 review of Canada. It expressed concern “about a number of recent changes in British Columbia which have a disproportionately negative impact on women.” It named the cuts and changes to social assistance and legal aid specifically (CEDAW Committee 2003: para. 359).

The CEDAW Committee urged the Government of British Columbia “to analyse its recent legal and other measures as to their negative impact on women and to amend the measures, where necessary” (CEDAW Committee 2003: para.360). The Attorney General refused to do this.⁶²

British Columbia is not an isolated case. The provinces generally have failed to comply with their human rights obligations with respect to social assistance and civil legal aid. The decade of “flexibility for the provinces” has been a failure. Although these two programs — social assistance and civil legal aid — are so vital to women’s equality and to their enjoyment of all other human rights, the provinces have not shown the capacity or willingness to innovate, or to ensure that these essential services are of reasonable quality and provided in all regions.

4. CAN HUMAN RIGHTS MECHANISMS FILL THE POST-CAP VACUUM?

The question we ask here is: have human rights-enforcing mechanisms filled the post-CAP vacuum? This is important because various human rights instruments codify human rights norms in which Canada's social programs should be grounded.

The Canada Assistance Plan did several things.

- It specified which programs and services were eligible for cost sharing and so, in a sense, defined some of the "essential services" referred to in section 36 of the Constitution.
- It created minimum statutory entitlements to social assistance and related programs, including civil legal aid.
- It set some standards of adequacy for social assistance.

The check against provincial government non-compliance was the legal requirement on the federal government to turn off the tap if provincial governments did not comply with the conditions attached to the money. In the absence of CAP, potential standard-setting and accountability mechanisms remained: under the Constitution, human rights legislation and international treaties Canada has signed. If courts and tribunals could be relied upon to establish detailed standards of adequacy for social programs through their adjudicative decisions, there might be an argument that it would be redundant for such standards to be legislated.

However, these alternative mechanisms have not filled the post-CAP vacuum. Under the Charter, governments have assigned to courts the very serious responsibility of determining whether they are in violation of their legal obligations. The Constitution also gives courts the responsibility of granting appropriate and just remedies for Charter violations. Pursuant to section 52, "the Constitution of Canada is the supreme law of Canada." However, governments have aggressively and systematically campaigned in the courts to dissuade judges from carrying out their constitutionally mandated responsibilities. The campaigning has been most vigorous in cases concerning "government spending priorities." Of course many cases indirectly engage questions about government spending priorities, including claims of the criminally accused for fair trials. Satisfying fair trial requirements is very expensive for governments, as is the implementation of constitutional minority language rights. However, only certain fields of government activity are perceived to raise questions directly about spending priorities: pay equity, social assistance, child care, health care and the like. With some exceptions, in those fields, courts have been receptive to a "government knows best" approach. This is a serious obstacle to the enforcement of Charter rights in some of the areas of government activity that matter most to women's equality.

Under human rights statutes, tribunals have powers that are similar to those of judges applying the Charter. Although the scope of human rights code protections is more circumscribed, human rights statutes, because of their importance, are considered to have quasi-constitutional status. Over the last decade, human rights tribunals have provided some significant relief from injustice in cases involving people's access to housing, social assistance and related services, and

education. But, human rights tribunals, even more than courts, are intimidated when governments caution them on overstepping their institutional bounds by “spending the government’s money.”

International human rights committees, through review processes, have been the most effective in recognizing and naming the problem that social program cuts and the absence of national standards pose for Canada’s compliance with human rights norms. They have issued reports that are broad, detailed and credible in the description of the problems in Canada, and they have provided thoughtful and useful recommendations. However, whereas decisions made by courts and tribunals under the Charter and human rights legislation have the force of law, the recommendations of the international treaty bodies are not legally binding on Canada. Although courts and tribunals have taken international human rights jurisprudence into account when interpreting the Charter and human rights legislation, in the main, the enforcement of treaty body recommendations depends on voluntary government responsiveness. Sadly, women are still waiting for government action on treaty body recommendations about measures needed to address poverty and social program erosion in Canada, recommendations that have been repeated, amplified and particularized over a period of more than a decade. More recently, the treaty bodies have spoken directly to the matter of Canada’s lack of national standards, and the repeal of CAP in particular. In this chapter, we examine the specifics of why Charter litigation, human rights complaints and submissions to treaty bodies are not a stand-in for legislated national standards. We also consider the content of what the human treaty bodies have said to Canada.

Charter Litigation

Women’s efforts to secure their rights to the equal benefit of the law through Charter litigation have increasingly been met by both government hostility and judicial timidity. Using two case studies, we show how the usefulness of the Charter to women has been diminished. We examine both the government positions and the judicial responses in *Newfoundland (Treasury Board) v. N.A.P.E.*⁶³ and *Gosselin v. Québec (Attorney General)*.⁶⁴ *NAPE* was the first Charter challenge concerning women’s right to pay equity to reach the Supreme Court of Canada. *Gosselin* was the first Charter challenge concerning the right to social assistance to reach the highest court. We begin with an analysis of the government arguments in *NAPE* and then *Gosselin*, followed by the response of the Supreme Court of Canada to each.

NAPE

At first glance a women’s pay equity challenge may not seem to fit with the topic of national standards for social programs. But pay equity — or women’s entitlement to equal pay for work of equal value — is a human rights norm that Canada endorsed by ratifying both CEDAW and the ICESCR. It can be understood to be a particularization of women’s right to equality in the work force, and it is a human rights norm that has been unevenly and inconsistently implemented across the country. In other words, *NAPE* provided an opportunity for the courts to ensure that there would be consistency of application of a human rights norm.

NAPE is a classic illustration of the government–court dynamic in cases perceived to engage a question of government spending priorities directly. The arguments advanced by the government

lawyers in *NAPE* are typical of government arguments in Charter challenges involving social program entitlements. At the same time, this case provides an indication of how broad the field of government activity is that governments seek to shield from judicial review, precisely because pay equity does not directly engage the role of government as a provider of social programs, but rather as an employer of civil servants, with debts to its female employees for past wage discrimination.

In *NAPE*, the Newfoundland and Labrador Association of Public and Private Employees (NAPE or the Employee Association) brought a section 15 Charter challenge to section 9(3) of the *Public Sector Restraint Act*.⁶⁵ The *Public Sector Restraint Act* erased a \$24 million debt to women health care workers to remedy past wage discrimination. In 1998, the provincial government signed a pay equity agreement to compensate the women for systemic wage discrimination during the years 1988-91. In 1991, the year the government learned the cost of implementing the agreement would be \$24 million, it declared it was experiencing a financial crisis and rolled back the pay equity agreement, permanently erasing the agreed-upon obligation to the women for the years 1988-91.

The Employee Association initiated legal proceedings, invoking the section 15 Charter rights of its female members. The women claimed that the erasure of the pay equity adjustments, which were expressly intended to provide a remedy for systemic discrimination against female employees, was discriminatory because its effect was to maintain and perpetuate wage inequality between women and men, and to legitimate and condone the practice of paying less to women who do “women’s work” (Appellant factum: paras. 37-53).⁶⁶

At the first level of hearing, the Arbitration Board was unanimous in deciding that the *Public Sector Restraint Act* infringed section 15 of the Charter. The Board was also unanimous in concluding that the rollback of women’s pay equity adjustments for services already provided could not be saved under section 1, because the violation could not be “justified in a free and democratic society” as section 1 requires. The government had failed to demonstrate it had even examined less drastic or less unfair means of solving its fiscal problems such as unpaid leave, job sharing, early retirement or reduced employer pension contributions in respect of all public sector employees, held the Board. The Government of Newfoundland appealed, and both the Newfoundland Supreme Court and the Newfoundland Court of Appeal held that the *Public Sector Restraint Act*, while discriminatory, was saved by section 1 of the Charter.

In the Supreme Court of Canada, two government intervenors, British Columbia and Alberta, joined forces with the government of Newfoundland to try to convince the Court not to enforce the women’s rights to past wages. From various angles they pressed a theory of equality rights and a role for the judiciary reminiscent of the thoroughly discredited approach to equality claims under the *Canadian Bill of Rights*,⁶⁷ an approach which section 15 of the Charter was intended to overcome.

The Government of Newfoundland argued first that section 15 does not impose a positive obligation on a government to address sex discrimination in wage scales, because the source of the discrimination is societal rather than legal (Respondent factum: paras. 24-26). Since there is no positive obligation to address pay inequity, the “postponement or repeal” of a pay equity

scheme cannot constitute discrimination (Respondent factum: paras. 24-26). Legislation that repeals a non-obligatory scheme will not be discriminatory, unless discriminatory distinctions are made within the repealing legislation, argued the Attorney General's counsel.⁶⁸

Newfoundland also advanced a second line of argument under section 1 of the Charter. Section 1 permits a government to place limits on a right guaranteed by the Charter if those limits can be reasonably and demonstrably justified in a free and democratic society. The Supreme Court of Canada's section 1 test requires a government to demonstrate, through evidence and argument that it had "a pressing and substantial objective" for impairing the right, and that no less impairing means of reaching this objective was available. However, Newfoundland argued that section 1 requires the judiciary to defer to the legislature regarding decisions about how to balance competing claims of disadvantaged groups for the allocation of scarce resources (Respondent Factum: paras. 38-103). The section 1 objective identified by the government was preserving essential government services, such as health care, education and social assistance, relied upon by other disadvantaged groups, in a circumstance of fiscal emergency. Newfoundland emphasized that in 1991 the government had been predicting a surplus of \$17 million dollars, and instead was confronted by a \$200 million deficit. As for the constitutional requirement on the government to adopt the least rights-impairing measure, Newfoundland asserted it had considered various alternatives such as a general wage freeze, mass layoffs and social program cuts, tax increases and borrowing. Newfoundland argued strenuously that the Court should defer to the legislature since the case was characterized by complex economic and legislative questions, budgetary implications and competing interests, painful trade-offs and difficult choices among disadvantaged groups: "deferred"⁶⁹ pay equity adjustments vs. hospital beds, education and social assistance (Respondent factum: paras. 79-88). Also referred to in the Attorney General's argument were various other restraint measures undertaken, the incremental nature of the pay equity process in which the government was engaged with NAPE, and the adjustments for a post-1991 period to which the government had committed itself.

The Attorney General of British Columbia, an intervenor in *NAPE*, echoed the arguments of Newfoundland, but concentrated on section 15 rather than section 1. British Columbia argued that the "deferral" of pay equity adjustments was not discriminatory, because there is no constitutional obligation to achieve pay equity. Government did not create the inequality. A budget restraint measure that is directed at the wages of *all* public sector employees (Intervenor factum: para. 26)⁷⁰ and which "defers" pay equity adjustments, properly viewed from the perspective of the reasonable person, does not constitute discrimination. Courts cannot spend public money; the principle that courts are not allowed to spend public money must be incorporated into section 15, said the Attorney General. The position that may be distilled from the factum of British Columbia is that government spending is simply not subject to the obligation of equality (Intervenor factum: paras. 26-45). The factum quotes Southin J.A. of the British Columbia Court of Appeal (Intervenor factum: para. 33) in *R. v. Ho*:⁷¹ "I cannot accept that the framers of the *Charter* intended the courts should have the power, whether by direct or indirect means, to subvert parliamentary control of the public purse."

Gosselin

As in *NAPE*, in *Gosselin* governments strongly pressed the theme that courts should defer to governments. At issue in *Gosselin* was the constitutionality of Quebec's social assistance scheme. In 1984, the Quebec government altered the social assistance scheme in an effort to coerce young people into the labour force, through denial of the means of subsistence. Quebec's legislature had set \$466 per month as the regular rate for welfare, defining it as "the bare minimum for the sustainment of life" (*Gosselin*: paras. 251, 285).⁷² Section 29(a) of the *Regulation Respecting Social Aid*⁷³ then reduced the regular rate of welfare for adults between the ages of 18 and 30 to roughly one third, to \$170 per month. The monthly cost of proper nourishment alone was \$152 (*Gosselin*, per L'Heureux-Dubé J.: para. 130).

The under-30s could increase their rate by participating in three different "employability programs." But the government's employability programs were structurally incapable of allowing all the under-30 recipients to reach the regular rate of welfare, defined as necessary to meet basic needs. This was so because not all of the programs provided participants with a full top-up to the basic level; there were temporal gaps in the availability of the various programs to willing participants; welfare recipients who were illiterate or severely under-educated or "over-educated" could not participate in certain programs; and only 30,000 program places were available although there were 75,000 under-30 welfare recipients.

Although some people in the under-30 age group were able to access employability programs through which they could get themselves back to the regular rate, for the vast majority, the regular rate was out of reach (*Gosselin* per L'Heureux-Dubé J.: para. 130).

Living on the reduced rate had severe physical and psychological effects. The reduced rate did not provide enough income to allow the men and women in the under-30 group to meet basic needs for food, clothing and shelter. They resorted to degrading and criminalized survival strategies, such as begging and petty theft. They were often homeless and malnourished. They experienced psychological stress, anxiety and despair.

The reduced rate put women at risk in specific ways. For example, as a survival strategy, some young women on the reduced rate became pregnant and had children in order to become eligible for benefits at the regular rate of social assistance. A number of young women on the reduced rate engaged in prostitution, or accepted unwanted sexual advances to try to keep their apartments, to pay monthly expenses, such as heat and electricity, or to buy food.

Louise Gosselin brought a class action on behalf of herself and approximately 75,000 other young people who were affected by the regulation between 1985 and 1989. The constitutional issue before the Supreme Court of Canada was whether the challenged regulation violated section 7 or 15 of the Charter.

In the Supreme Court of Canada, the Attorney General of Quebec, flanked by three governmental intervenors — Ontario, British Columbia and Alberta — argued there was no discrimination, when account was taken of the government's autonomy-promoting objectives, and the existence of compensatory employability programs; and, in the alternative, that the discrimination was justified pursuant to section 1 of the Charter.

The one government that was “off-message” was New Brunswick, which did not ask the Court to simply defer to government. The Attorney General of New Brunswick informed the Court that New Brunswick wished to provide residents with “essential public services of reasonable quality,” as section 36(1)(c) of the Constitution⁷⁴ promises.⁷⁵ However, the Attorney General for New Brunswick also explained that, for a have-not province, the ability to fulfill such obligations depends on the federal government living up to its obligations under section 36(2) of the Constitution to make “equalization payments to ensure that the provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”

Table 2: Blueprint for Resisting Claims

	<i>NAPE</i>	<i>Gosselin</i>
Discount adverse effects	Pay equity adjustments were not erased, only “deferred;” pay equity was always incremental; others were also affected by restraint measures.	Reduced rate was only conditional; no real harm given the compensatory employment programs; reduction not based on prejudicial stereotype — young people are employable.
Shift blame for adverse effects	Systemic discrimination in wages is not caused by government, but rather wage determinations are market driven; it is not government’s fault if women “choose” low wage jobs.	Poor people suffer from personal problems that are not caused by government; government not responsible if people “chose” not to participate in employment programs.
No positive obligation on governments to address inequality	Since there is no obligation on governments to address inequality, the rollback of pay adjustments is not discriminatory except to the extent that it differentiates internally.	Welfare recipients have no entitlement to absolute equality. Attorney General for Ontario: The Charter only constrains government action and does not compel government action. Similar arguments apply to section 7 right to security of the person.
Purpose trumps adverse effects: if legislation is motivated by a reasonable government purpose, there is no discrimination	Rollback of pay equity adjustments was motivated by “extraordinary deficit concerns” and therefore is non-discriminatory.	There is no discrimination when account is taken of government’s autonomy-promoting purpose.
Deference: institutional boundaries/minimal impairment	Extraordinary economic crisis in Newfoundland; the <i>NAPE</i> case calls for deference under section 1 of the Charter, because it involves cost, complexity and competing group interests. Attorney General for British Columbia: The <i>NAPE</i> case calls for deference under section 15 (no justification of discrimination required), because it is about expenditures and all such decisions are the exclusive responsibility of government.	Long-term economic crisis in North America; courts should not second guess the means chosen to pursue a laudable objective; the state need not prove that its measures were effective only that its beliefs were reasonable. Attorney General for Ontario: The Charter does not protect against economic deprivations; the appropriate level of social assistance is a policy/political matter for determination by governments, not courts; section 36 of the Constitution is non-justiciable; human rights treaty obligations, such as ICESCR, are non-justiciable; courts must defer to governments regarding “social and economic policy.” Attorney General for British Columbia: Allocation of resources is a government responsibility.

Resisting Equality Rights Claims: The Blueprint

The governments' arguments in *NAPE* and *Gosselin* are consistent with a blueprint governments in Canada have used repeatedly to resist Charter substantive equality claims that call on government to act positively to ameliorate poverty and inequality between groups. Governments consistently discount the adverse effects complained of, shift the blame, deny governments have any positive obligation to do anything, emphasize intention over effects, assert that courts must defer to governments and claim, in particular, that courts must not spend government money. In Table 2, using our case studies of *NAPE* and *Gosselin*, we examine the blueprint more closely.⁷⁶

The Supreme Court of Canada Decisions in *NAPE* and *Gosselin*

NAPE

In *NAPE*, the Supreme Court of Canada rejected the governments' arguments that the repeal of the pay equity adjustments was not discriminatory. The Court acknowledged that by targeting the contractual rights to pay equity adjustments, which had been defined and agreed to by the government and NAPE, the government had discriminated against women. Adopting the submission of NAPE, the Court held that the effect of the *Public Sector Restraint Act* was to draw a clear formal distinction between those entitled to benefit from pay equity and everyone else, in particular men in male-dominated classifications who were performing work of equal value. The Court recognized that in purpose and effect the *Public Sector Restraint Act* erased, rather than deferred, a debt of \$24 million to female health care workers that fell due on April 7, 1991. The Court said (*NAPE*: para. 46):

Postponement of pay equity and extinguishment of the 1988-91 arrears could reasonably be taken by the women, already underpaid, as confirmation that their work was valued less highly than the work of those in male-dominated jobs. The *Public Sector Restraint Act* reinforced an inferior status by taking away the remedial benefits their unions had negotiated on their behalf. This perpetuated and reinforced the idea that women could be paid less for no reason other than the fact they are women [references omitted].

The Court also distanced itself from the suggestion of the government of Newfoundland that section 15 is not engaged by a government failure to pay women equal wages for work of equal value, but it considered that it was not necessary to rule on this issue in the case, because on the facts, the contractual obligation was clear.

In the Court's view, the "battleground" in the *NAPE* case was the section 1 justification. Ordinarily, a plaintiff could take comfort from a decision by the Court that the outcome of a case would turn on section 1, because it is so well established that the government bears a heavy onus under section 1 to justify its actions, and the section 1 analysis must be rigorous. The government respondent must demonstrate, not only through argument, but through evidence, not only that it meant well, but that there was proportionality between means and ends, and the discriminatory measure only minimally impaired Charter rights.

However, in *NAPE*, the evidentiary record, which the Court described as “a casually introduced section 1 record,” was insufficient to place the Attorney General in a position to discharge its onerous burden of proof. The only evidence before the Arbitration Board regarding the government’s financial situation consisted of an extract from *Hansard* and some budget documents. Although *Hansard* showed that the minister who introduced the *Public Sector Restraint Act* was aware of non-discriminatory alternatives, the Attorney General presented no evidence that the Legislature had made any effort to weigh the various alternatives and to minimize the infringement of women’s rights. The Attorney General presented no evidence as to why alternatives to depriving the women of past wages permanently were not pursued.

Further, Newfoundland’s public accounts, of which the Court could have taken judicial notice, contradicted the Attorney General’s contention that the 1991 financial circumstance of Newfoundland was an extraordinary crisis. A review of Newfoundland’s public accounts for previous years reveal that in reality 1991 was quite an ordinary year in Newfoundland. The Court referred to the forecast in the minister’s second reading speech that fiscal 1990-91 would end with a deficit of \$117 million or \$200 million unless serious expenditure cuts were made (*NAPE*: para. 60). However, these amounts certainly were not at all “unprecedented in the Province’s history” (*NAPE*: para. 7). The deficits of the previous five years were: 1985-86: \$253 million; 1986-87: \$231 million; 1987-88: \$197 million; 1988-89: \$226 million, 1989-90: \$175 million (Department of Finance 2000). When the hyperbole about the “extraordinariness” of the fiscal situation in 1990-91 is scraped away, it is apparent that the government’s defence was based on cost alone.

Cost should not be accepted as a juristic reason for discrimination. Alleviating discrimination will frequently involve the expenditure of public funds. As Abella J. explained, in *Rosenberg v. Canada (Human Rights Commission)*,⁷⁷ when she was a member of the Ontario Court of Appeal:

Cost/benefit analyses are not readily applicable to equality violations because of the inherent incomparability of the monetary impacts involved. Remedying discrimination will always appear to be more fiscally burdensome than beneficial on a balance sheet. On one side of the budgetary ledger will be the calculable cost required to rectify the discriminatory measure; on the other side, it will likely be found that the cost to the public of discriminating is not as concretely measurable. The considerable but incalculable benefits of eliminating discrimination are therefore not visible in the equation, making the analysis an unreliable source of policy decision making.

In *NAPE*, the Supreme Court of Canada endorsed the government’s claim that the hard choice facing the government of Newfoundland was not just a matter of dollars versus rights but of “rights versus hospital beds, rights versus layoffs, rights versus education and rights versus social welfare” (*NAPE*: para. 75). However, this is a highly problematic formulation of the situation and should have been rejected. A government can always draw a theoretical link between financial concerns and other programs, but there was no evidence in *NAPE* that there was necessarily a contest between wage discrimination and cuts to social programs. Pitting pay equity adjustments against social programs is rhetorically catchy but logically weak. Even if deficit reduction was accepted as a pressing and substantial objective animating the wage

rollback legislation, the Supreme Court of Canada should have put the Attorney General of Newfoundland to the test of showing that it was necessary to erase *permanently* a debt owed to women in order to meet that objective. This, the government did not and could not do. However, the Court effectively waived the requirement of minimal impairment, advertent to various factors including the scale of the fiscal crisis, the cost of implementing the plan, the fact that the *Public Sector Restraint Act* required a pay increase for women (which did not mitigate the loss for 1988-91), that there had been a process of consultation with NAPE, and the government, as the Court saw it, was mediating between disadvantaged groups.

There was no evidence that the permanent erasure of pay equity payments was necessary to protect social programs relied on by disadvantaged groups. On the contrary, there was evidence that the government was aware of, but for unexplained reasons chose not to pursue alternatives such as tax increases, which could have been designed with a view to minimizing the impact on women and other disadvantaged groups. There is no reason to assume that honouring the pay equity obligations would require taking something away from other disadvantaged groups, instead of taking something away from more advantaged groups.

Notwithstanding statements by the Court and the government litigants to the contrary, *NAPE* is a case in which institutional boundaries between courts and governments were redrawn, and the safeguards of the test for satisfying section 1 set out in *R. v. Oakes*⁷⁸ were abandoned, because there was an issue of cost. The Supreme Court of Canada was more concerned about the cost to government of rectifying the discrimination and about not being seen to interfere with government spending priorities than it was about the cost to women of being forced to continue to bear the burden of the discrimination. By adopting such an extraordinarily deferential position, the Court ignored its own insights. In *RJR-Macdonald Inc. v. Canada (Attorney General)*⁷⁹ the Court wrote that:

[C]are must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. 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.

Gosselin

Similarly, Louise Gosselin's challenge to Quebec's overtly discriminatory welfare scheme was unsuccessful, on all grounds.⁸⁰ As in *NAPE*, the Supreme Court of Canada was extremely deferential to government, emphasizing government's purpose, which was seen as laudable, rather than dealing with the manifestly discriminatory and extremely damaging effects of the scheme. It dispensed with the evidentiary requirements that would normally apply to a government respondent seeking to justify such a patently discriminatory legislative scheme.

However, unlike *NAPE*, which was a unanimous decision of the Court, the *Gosselin* decision was deeply divided. The section 15 decision was particularly close, a 5-4 split. In its section 15

decision, the majority, led by Chief Justice Beverly McLachlin, ruled that cutting the social assistance rate of adults under 30 to a below-subsistence rate did not violate section 15. The five-judge majority identified the disagreement with respect to section 15 as not being about the “fundamental approach” but rather about whether the claimant had discharged her burden of proof. Similarly, regarding the section 7 rights to life, liberty and security of the person, the decision was split (7-2). The dissent on section 7 features a particularly strong dissenting opinion by Arbour J. concurred in by L’Heureux Dubé J. As with section 15, the explanation of the majority for refusing the section 7 claim was that the evidence was insufficient, not that there is no constitutional right to social assistance.

The majority took a very deferential approach to the government’s stated purpose, and a highly sceptical approach to compelling evidence that the reduced rate had severe adverse effects on the under-30 group. As a result, the majority found no discrimination. The Government of Quebec was thereby relieved of its burden of demonstrating through evidence that the discrimination complained of was justified in a free and democratic society under section 1. In *Gosselin*, the role of legislative purpose, within the section 15 analysis, was further muddied by the fact that the majority focussed on the government’s espoused goal of integrating young adults into the work force, rather than the Act’s purpose, which was to provide aid of last resort to people in need. That is the primary purpose the Court should have had in mind when assessing the impact of withholding the means of subsistence from young women and men in need.

The question of what role a government’s statement about its intentions should play in constitutional analysis is not just a minor quibble about the relationship between sections 15 and 1 of the Charter. It can make a critical difference if a respondent government is expected to go beyond a mere assertion of laudable purpose and is actually required to demonstrate through evidence that the means of achieving the purpose are rational and proportional. It is not appropriate to accept at face value the legislative characterization of one purpose of the legislation and then use it to negate otherwise discriminatory effects (*Gosselin*, per Bastarache J., at para. 245). Applying a section 1 analysis, Arbour J. disputed that denying the means of subsistence is rationally connected to the values of long-term liberty and inherent dignity of young adults. She found that lack of adequate food and shelter interferes with the capacity for both learning and job hunting (*Gosselin*: para. 57).

Significantly, Bastarache J., who wrote the main dissenting judgment on section 15, conducted his analysis of the employability programs within the framework of section 1, with the understanding that the government bore the onus of demonstrating that the rights infringement occasioned by the reduced rate (*Gosselin*: paras. 242-44 and paras. 260-90)⁸¹ was justified in a free and democratic society. He concluded that the government had failed to demonstrate that withholding social assistance from the under-30 group was minimally impairing of their equality rights. Other reasonable alternatives to achieve the government’s objective were available. In *Gosselin*, the government should have been, but was not, put to the test of showing that it could not have developed a scheme based on the facts of people’s actual individual circumstances rather than crude generalizations, that would have ensured that vulnerable people did not fall through the cracks.⁸² The government should also have been required to show why it could not have created an incentive for young adults to participate in employment programs by providing a top-up from the base amount, as it did for the 30-and-over group.⁸³ These are among the questions that would

normally and legitimately be asked under section 1, but, in *Gosselin*, as in *NAPE*, the majority did not require the government to discharge its section 1 burden of proof. In *Gosselin*, the Court did not even purport to go through the motions of a section 1 analysis.

Instead, based on an extremely deferential interpretation, denying young adults the means of subsistence was held not to constitute discrimination within the meaning of section 15. In short, the section 1 stage of analysis was pre-empted. Louise Gosselin was denied the high standard of protection that the framework for a section 1 defence is supposed to provide. The result of imposing a heavy evidentiary burden on the plaintiff and a very minimal burden of justification on the government is that manifestly discriminatory legislation was allowed to stand.

The majority of the Court in *Gosselin* failed to recognize the fundamental nature of every individual's interest in having the means to afford adequate food and shelter. This is very difficult to accept. It is also difficult to accept the majority's failure to credit the evidence that showed the harm of reducing young people's social assistance to a below-subsistence level. For an individual who is homeless or hungry, the fact that government has decided to turn a "blind eye" (*Gosselin*: para. 301),⁸⁴ because of what it thinks of as long-term emancipatory objectives, is cold comfort.

Gosselin is symptomatic of tension in our constitutional jurisprudence between competing conceptions of rights.⁸⁵ Substantive equality rights theory understands that individuals can be constrained by circumstances, that not everyone can make it on their own all the time, and that governments have a redistributive role to play to prevent the entrenchment of extreme disparities in material conditions. Another older, classical, 19 century U.S. version of constitutional rights conceives of individuals as autonomous, freely choosing, unconstrained by circumstance and always able to make it on their own (Sheppard 1990: 111; Bakan 1999: 307). Government is conceived of as a threat to autonomy and not an enabler of it. In *Gosselin*, this older version of constitutional rights, which is not at all concerned with substantive equality or the right to security of the person and only concerned with an anti-statist version of liberty, won out.

The majority decision in *Gosselin* represents a convergence between the idealization of a particular version of individual autonomy — a version that is not, in fact, available to everyone — and plain old-fashioned stereotyping of young people who are dependent on government programs as lazy and unwilling to get work or participate in training unless coerced to do so by deprivation. This convergence expresses itself as hostility toward welfare for young adults — a conviction that reducing young people's welfare is a way of helping them and blindness to the actual adverse effects of the rate reduction.

Denying social assistance to people who lack access to decent employment is neither autonomy promoting nor humane. A civilized society does not purport to promote the autonomy of its most vulnerable members by excluding them from aid of last resort. In this circumstance, lack of access to adequate social assistance may be far more threatening to autonomy than welfare dependency, especially for women, for whom poverty enlarges every dimension of sex inequality.

For poor women, access to social assistance raises issues of autonomy and equality (NAWL Factum; Brodsky and Day 2002). Being forced to survive without the means to meet basic needs

increases women's vulnerability to violence, sexual exploitation and coercion, because it makes them more reliant on relationships with men and simultaneously diminishes their equality in those relationships. The notion of autonomy through escape from welfare dependency, which is held up by the majority of the Court in *Gosselin* (*Gosselin*: paras. 27, 43-44, and 65),⁸⁶ obscures the social realities of young people struggling to survive in conditions of high structural unemployment, as they were in Quebec when the rate reductions were introduced, and of women being forced into increased reliance on men, because they do not have access to adequate social assistance. If this notion of autonomy becomes a substitute for meeting people's immediate subsistence needs, without which no autonomy is possible, the danger is that vulnerable groups will never benefit from the promise of equality, respect for human dignity, autonomy or security of the person. Instead, they will get autonomy with a vengeance.

As we said in the beginning, Charter litigation, at least so far, is an insufficient system of accountability to ensure that government decisions about social spending comply with human rights norms. Women have met a tidal wave of government resistance to courts holding them accountable for spending public money in ways that give life to the human rights norms that they have embraced. Governments have exhibited particular resistance to acknowledging any obligation to spend money to address poverty or group-based patterns of inequality, even to the extreme extent of denying that there is an obligation to pay equal pay to women. In turn, the response of the courts to government efforts to subordinate the Charter and women's human rights has, with some exceptions, been to submit to the will of governments rather than to defend the interests of society's most disadvantaged groups. Courts, even functioning at their best, could never be expected to be a complete substitute for legislated national standards, but courts could play a helpful role as an accountability mechanism, recalling governments to their obligations, reinforcing human rights norms and providing remedies to people, such as Louise Gosselin, who have been wrongly denied access to crucial benefits and protections.

Human Rights Complaints

The statutory human rights system is another potential mechanism for holding governments accountable to human rights norms regarding social programs. There is human rights legislation in every jurisdiction that prohibits discrimination in employment, housing and services. It has long been established that human rights legislation applies to social programs, including social assistance. Social assistance is regarded as a service within the meaning of human rights legislation: *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)*.⁸⁷ A review of selected cases regarding housing, social assistance and education shows that human rights legislation has helped to address some problems. The cases also point to certain limitations of the statutory human rights system that make it an inadequate substitute for legislated national standards for social programs.

Stereotyping and Prejudice

Human rights legislation has been effectively used to resist stereotypical assumptions, and prejudice against unpopular groups, such as people reliant on social assistance. Many cases have been brought under Quebec's human rights legislation in which complainants have argued successfully that landlord biases against single mothers who are on welfare violate *The Québec*

Charter of Human Rights and Freedoms,⁸⁸ by discriminating on the ground of their social condition.

Such cases have been important, because they address a pervasive problem experienced by women, especially poor lone mothers. At the same time, they point to a limitation in the scope of the protection provided by the ground “social condition.” The prohibition against discrimination on the ground of social condition has been interpreted by tribunals and courts in Quebec as being related only to the status or place that a person holds in the society because of their level of income, not to the level of the income itself.⁸⁹ In other words, social condition does not provide a means of claiming that the condition of being poor is itself a violation of anti-discrimination law. It only allows one to complain that one has been treated in a discriminatory way with respect to a service or tenancy, because of being a poor person or a recipient of welfare.

As in Quebec, where social condition is the ground, in other jurisdictions in cases where discrimination claims are based on the ground “receipt of public assistance” many successful housing cases have been brought, most notably in Ontario. These cases establish, repeatedly, that prospective tenants have a right to be judged individually, not based on stereotypical assumptions. For example, in *Kearney v. Bramalea Ltd. (No. 2)*⁹⁰ a board of inquiry held that the respondents’ use of income criteria or a rent-to-income ratio to exclude three complainants from housing violated the *Ontario Human Rights Code*,⁹¹ on the grounds of sex, marital status, citizenship, place of origin, family status, receipt of public assistance and age.⁹² The board found that rent-to-income ratios used by landlords are not valid criteria for assessing a person’s ability or willingness to pay rent, nor do they accurately predict a person’s likelihood of defaulting on rent payments.

In subsequent cases, landlords in Ontario have been found to have violated the Ontario Code by refusing to rent an apartment to two single women (*Vander Schaaf v. M. & R. Property Management Ltd.*),⁹³ to a new immigrant ostensibly because he did not have a credit rating (*Ahmed v. 177061 Canada Ltd.*)⁹⁴ and to a single mother with three teen-aged sons (*Cunanan v. Boolean Developments Ltd.*)⁹⁵ In *Ahmed*, the Board found that the evidence failed to establish a correlation between the rent-to-income ratio or absence of a credit rating and the likelihood of rental default.

We reiterate that these cases are important for the anti-discrimination protection they provide. Their limitation, and a limitation of the anti-stereotyping paradigm, is that it does not recognize a right to an adequate standard of living or a right to housing, but rather is concerned with the right to be assessed based on one’s individual merits, and in the housing cases, on one’s actual, not presumed, ability to pay. Within the anti-stereotyping paradigm, inability to pay does not point to a violation of human rights law, but rather constitutes a justification for denying someone housing.

The anti-stereotyping principle pursuant to which people must be judged on their individual merits was used to good effect in the social assistance case *Weller v. Alberta (Human Resources and Employment)*.⁹⁶ In that case, the Alberta Human Rights Panel ruled that Alberta Human Resources and Employment discriminated against Dennis Weller, because of his family status,

when it refused to provide him with the shelter allowance portion of Alberta's social assistance benefit. He was denied the shelter allowance, because he lived with his mother, and was paying rent to her rather than to someone to whom he was unrelated. The government policy of not paying shelter allowance to persons residing with a "blood relative" foundered on the stereotypical assumption that parents do not require rent from their adult children.⁹⁷ Although Weller's mother, aged 61 or 62, who worked as a clerk and earned \$30,000 a year was not a named complainant, it is arguable that she too was discriminated against in that the policy assumed that a parent does not need rental income from a destitute adult child.

It is well established in human rights jurisprudence that discrimination is not just a matter of assuring that people are treated the same. Discrimination is principally defined and recognized by its adverse effects. Thus, human rights legislation has also been deployed to challenge benefit schemes that appear to be neutral but that have discriminatory and exclusionary effects on a particular group. This also has yielded some successes, particularly in the context of disability schemes. For example, in *Chipperfield v. British Columbia (Ministry of Social Services) (No. 2)*,⁹⁸ the British Columbia Human Rights Tribunal held that the government had discriminated based on the ground of disability by treating one group of persons with disabilities receiving social assistance disadvantageously compared with other persons with disabilities. The issue in *Chipperfield* was whether the government could refuse to cover the cost of car maintenance for a person with a disability, restricting the disability transportation allowances to forms of transportation that Christine Chipperfield could not use. Transportation allowances were only permitted for bus use, but Chipperfield could not use a bus. The scheme was neutral on its face, but had adverse effects on Christine Chipperfield because of the nature of her disability. The Tribunal ruled that the Ministry of Social Services must pay part of the cost of Chipperfield's car repairs.

The central principle underlying cases such as *Chipperfield*, whether clearly articulated or not, is the anti-stereotyping principle. The basic idea is that a benefit for persons with disabilities should not exclude people who have disabilities that do not happen to fit the stereotyped notion of a person with a disability. This logic is also reflected in cases involving non-governmental employment benefit schemes. Tribunals and courts have held that persons with mental disabilities (*Battlefords and District Co-operative Ltd. v. Gibbs*)⁹⁹ and pregnant workers (*Brooks v. Canada Safeway Ltd.*)¹⁰⁰ cannot be excluded from an employment-related disability scheme.

The Duty to Accommodate

The duty to accommodate is a companion to the anti-stereotyping principle. Typically, the duty to accommodate arises in cases where the challenged rule is neutral on its face, but has an adverse effect on an individual or group that is in some way different from what is understood to constitute the norm. Accommodation usually entails some modification or adjustment in a rule or practice.

There have been many cases concerning the duty to accommodate in the context of employment. The leading case is *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*,¹⁰¹ or *Meiorin*. This is a sex discrimination case about a woman firefighter named Tawny Meiorin, in which the Supreme Court of Canada held that the government in its role as

employer had failed to show it would be an undue hardship to depart from a fitness standard that discriminated against women and was based on norms for male aerobic capacity. Tawny Meiorin was an experienced, employed and very fit firefighter who had been laid off because she failed to pass a newly introduced aerobic fitness test by a very small margin that reflected the difference between male and female aerobic capacity. The Court held that to defend such a discriminatory rule, a respondent would have to show that it could not accommodate those adversely affected without incurring undue hardship. The Supreme Court of Canada said (*Meiorin*: para. 68):

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible.

In recent years, there has been an increase in cases concerning the duty to accommodate in the context of public services, such as social assistance and education.¹⁰² For example, in *Chipperfield*, discussed above, the British Columbia Human Rights Tribunal held that the government of British Columbia had failed to adduce evidence that the cost of accommodating individuals with disability-related transportation requirements like those of Christine Chipperfield through a partial subsidy, granted on the basis of individualized assessment or otherwise, would be an undue hardship for the government. The Tribunal, in addition to providing an individual remedy to Ms. Chipperfield, ordered the government to revise its policy to provide a non-discriminatory transportation subsidy to all recipients with disabilities.

Similarly, in the case of *Hutchinson v. British Columbia*,¹⁰³ the British Columbia Human Rights Tribunal ruled that the Ministry of Health had discriminated against Cheryl Hutchinson and her father, Philip Hutchinson, by prohibiting Ms. Hutchinson from hiring a family member to be one of her paid caregivers. Cheryl Hutchinson was born with cerebral palsy, and as an adult required assistance with all aspects of daily living. Her father had been her primary caregiver since she was 13. At the time of the hearing, Ms. Hutchinson was 31 years old and her father was 71.

In 1998, Ms. Hutchinson had been accepted as a client of the Choices in Supports for Independent Living program (CSIL), a Ministry of Health program that provides funds directly to qualified adults with disabilities, allowing them to hire their own caregivers. She qualified for 24-hour care and wanted to hire her father as one of her caregivers. However, she could not hire him because of the Ministry policy that prohibited, on a blanket basis, family members from being paid for the care of relatives. The Tribunal found that the Ministry policy discriminated against Ms. Hutchinson on the basis of disability, and against her and Mr. Hutchinson on the basis of family status.

The Tribunal concluded that the government had not established that it would be an undue hardship to make exceptions to its “no family member” rule. It ordered the Ministry to stop discriminating against Cheryl and Philip Hutchinson, to allow for exceptions to its “no family member” policy and to develop a set of criteria to allow for the hiring of family members, on a

case-by-case basis, under the CSIL. The Tribunal also ordered the Ministry to allow Mr. Hutchinson the opportunity to be hired as one of his daughter's caregivers.

The government sought judicial review in the British Columbia Supreme Court. The government's argument essentially was that the Tribunal had overstepped the bounds of its institutional authority by requiring the government to provide a service not otherwise available. The government relied on a statement made by the Supreme Court of Canada in the case of *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*.¹⁰⁴

It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment.... On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect, does not offend the principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.

However, Cullen J. rejected the analogy to *Auton*, saying (*Hutchinson*: paras. 82-83):

As I see it, *Auton* was a case in which the court was asked to interpret the provisions of section 15(1) of the *Charter* in a way that compelled government to provide a service not otherwise available....

In my opinion...the present case is distinguishable from *Auton*. Here, what is being sought is a determination whether a program explicitly funded to provide qualified disabled individuals with the freedom to hire and direct their own caregivers can be said to be discriminatory by excluding all family members from the potential hiring pool. Thus what is at issue is whether the limitation of the means by which the service and the employment contemplated in sections 8 and 13 respectively *may be accessed* creates a discriminatory effect by failing to account for underlying differences between individuals affected. To suggest the limitation on access to the service and employment said to be discriminatory provides the definition of the service and employment available so as to prevent any scrutiny for discrimination or discriminatory effect is a mischaracterization of the reasoning on that point in *Auton* [emphasis added].

The point that is driven home by Cullen J.'s comments is that, under human rights legislation, to date, the duty of non-discrimination in the context of social programs has been understood not as a positive obligation to provide certain social programs and to ensure that they meet certain standards of adequacy, but rather as an obligation to ensure that whatever programs are provided are genuinely accessible. A similar conclusion can be derived from the case of *Moore v. B.C. (Ministry of Education) and School District No. 44 (No. 2)*,¹⁰⁵ which concerned the rights of students with severe learning disabilities. The Tribunal ruled that the B.C. Ministry of Education and North Vancouver School District have obligations under human rights legislation

to ensure that sufficient supports are available so students with learning disabilities can access educational services.

However, the Tribunal was at pains to characterize the rights claim not as a “substantive claim for funding for particular...services, but as a procedural claim anchored in the assertion that benefits provided by the law were not distributed in an equal fashion” (*Moore*: para. 692).¹⁰⁶ The Tribunal found that this case is more like *Eldridge v. British Columbia (Attorney General)*¹⁰⁷ in which the Supreme Court of Canada held that the government had a section 15 Charter obligation to provide interpreters for deaf users of the medical system, and less like *Auton* in which the Court held that the government did not have a section 15 Charter obligation to provide a particular form of medical treatment for autistic children. Human rights tribunals and lower courts are being driven to engage in such jurisprudential gymnastics by the Supreme Court of Canada’s retreat from substantive equality to formalistic legal reasoning.

These cases show that human rights legislation has been somewhat useful in the project of establishing the right of social assistance and other social program beneficiaries to individual assessment, and that an effects-based analysis has resulted in the recognition that governments have an obligation to adjust rules and provide supports where necessary to ensure that a provided benefit is truly accessible. The cases also show that section 15 Charter jurisprudence has permeated the statutory human rights case law, and that, not surprisingly, the arguments advanced by governments in human rights cases are becoming more like the arguments they advance in section 15 Charter cases.

Meorin articulates a substantive approach to discrimination analysis that, if applied, would require governments to take women into account when they design and set the standards for social assistance. The doctrine of inclusivity set out in *Meiorin* could be, and should be, pushed further to challenge the discriminatory impact of restrictive welfare eligibility rules and extremely inadequate welfare schemes. But so far, social program-related rights have been treated as purely procedural.

To make a big difference to the rights of poor women who need adequate social assistance, discrimination analysis, whether under the Charter or under human rights legislation, must anchor itself in substantive equality, not only in the procedural anchor of non-discriminatory distribution of whatever social benefits governments decide to provide. A substantive equality approach would recognize that women in need have a right to adequate social assistance, for example, because it is an equality-constituting benefit. There is also an argument to be made that the right to be free from discrimination in the provision of public services extends to government decisions about whether to fund adequately social programs upon which women disproportionately rely. However, to date, the human rights case law regarding discrimination in relation to social programs is limited in the protection that it provides for the poorest women and men to meet their needs for food, clothing and housing because, at least so far, it does not recognize that there is a justiciable right to housing or to social assistance in an amount adequate to meet basic needs. This is a function both of the language of human rights statutes and the jurisprudence.¹⁰⁸ Therefore, we conclude that human rights legislation does not compensate for the absence of legislated national standards for social programs.

Human Rights Treaties

Canada is a signatory to all major international human rights treaties including the *International Covenant on Economic, Social and Cultural Rights*,¹⁰⁹ the *International Covenant on Civil and Political Rights*,¹¹⁰ the *Convention on the Elimination of All Forms of Discrimination against Women*,¹¹¹ the *Convention on the Elimination of All Forms of Racial Discrimination*¹¹² and the *Convention on the Rights of the Child*.¹¹³

Whereas the Charter and Canadian human rights statutes set open-textured standards for social programs in the form of rights to equality and security of the person, the international human rights treaties set standards for social programs that are cast in more concrete and particularized terms. As we noted earlier, international human rights treaties refer to rights to health, education, an adequate standard of living, social security, just and favourable conditions of work, pay equity, child care and maternity leave.

Treaty body review processes have proven to be well-suited to assessing the adequacy of social programs in Canada, and in this regard have been a better accountability mechanism than either courts or human rights tribunals. Treaty bodies have been consistent in their critique of Canada's deficiencies with respect to social programs and articulate about the negative impact on women of eroding the social safety net. They have also made useful recommendations that are specifically directed to problems that have arisen in the post-CAP era of shrinking social program protections and disappearing national standards. However, a feature of the treaty review process is that its effectiveness entirely depends on governments' willingness to respond to findings. Unless Canada has passed legislation expressly implementing a treaty, there is no domestic legal recourse against a government for non-compliance with a treaty (Bayefsky 1994: 360; Kindred et al. 1993: 147-48). This might not be problematic if Canada treated the rulings of the international committees seriously. The difficulty is that the treaty body recommendations have produced no discernible response at home, and there are no established domestic mechanisms for ensuring that governments respond to documented inadequacies.

Deficiencies in Canada's Compliance with International Human Rights Law

Canada, having signed these international treaties, is obligated to take steps to realize the rights guaranteed. The accountability mechanism is the periodic review by international treaty-monitoring bodies (committees composed of human rights experts) of Canada's compliance with its obligations under the various treaties. Canada is required to submit written reports to each treaty body approximately every four years. The review process provides a broad opportunity for Canadian governments to account for what they have done or not done to fulfill their treaty obligations. After an initial examination of Canada's report, the treaty body requests further information and the federal government submits written responses. A Canadian governmental delegation also appears before the treaty body during its review session, which allows Canadian government officials, including representatives of provincial and territorial governments, to respond in person to questions about Canada's compliance. Treaty body members' questions arise from their review of Canada's written report, the governments' responses to initial questions and submissions from non-governmental organizations. When the review process ends, the treaty body provides a kind of report card on Canada referred to as concluding observations, or concluding

comments. In these concluding reports, the treaty body identifies shortcomings in Canada's treaty rights implementation.

There is an emerging consensus among the treaty bodies regarding serious failures in Canada's fulfillment of its obligations to ensure that everyone has an adequate standard of living, and about the negative impact these failures have on women and other disadvantaged groups in Canada. Criticisms were levied against Canada even before the repeal of CAP; however, they have become more extensive and more pointed as conditions have deteriorated further in the post-CAP era.

In its 1993 review of Canada, the Committee on Economic, Social and Cultural Rights (CESCR) expressed concern about evidence of families being forced to relinquish children, because of an inability to secure housing and other necessities; hunger and extensive reliance on food banks; widespread discrimination in housing against people on social assistance and people with low incomes; inadequate attention to homelessness and low expenditures on social housing; and the failure of lower courts to enforce the right to an adequate standard of living, including adequate housing, as a component of sections 7 and 15 of the Charter (CESCR 1993).

In 1998, about three years after the repeal of CAP, Canada was reviewed again by the CESCR, and was criticized not just for the lack of measurable progress, but for dramatic cuts to social programs, including cuts to social assistance rates and restricted access to civil legal aid, and for increasing homelessness and lack of affordable housing (CESCR 1998).

In 1999, Canada was reviewed for its compliance with the ICCPR. The United Nations Human Rights Committee (UNHRC) found that social program cuts and other government action responsible for perpetuating poverty and homelessness in Canada constitute discrimination against women as well as a failure to provide necessary protections to which children are entitled under the ICCPR (UNHRC 1999). The UNHRC joined the CESCR in condemning discrimination against people on social assistance. The UNHRC also linked homelessness to the guarantee of the right to life under article 6 of the ICCPR, saying: "The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem" (UNHRC 1999: para. 20).

In its 2003 Concluding Comments, the United Nations Committee on the Elimination of Discrimination Against Women expressed serious concerns about the high percentage of women living in poverty, in particular, elderly women living alone, female lone parents, Aboriginal women, women of colour, immigrant women and women with disabilities. It was also concerned about "the disproportionately negative impact on women of recent cuts and changes to social assistance, including the cuts to social assistance rates and the narrowing of eligibility rules for welfare" (CEDAW Committee 2003: paras. 33-35).

The CEDAW Committee urged Canada to increase its efforts to combat poverty among women. In 2005, Canada was reviewed again for its compliance with the ICCPR. And, again, it expressed concern about the impact that severe cuts in welfare programs have had on women and children, as well as on Aboriginal people and African-Canadians. The UNHRC recommended that Canada

adopt remedial measures to ensure that cuts to social programs do not have detrimental impacts on vulnerable groups (UNHRC 2005).

In its May 2006 Concluding Observations, issued after reviewing Canada's fourth and fifth reports on its compliance with the ICESCR, the CESCR Committee noted that Canada had failed to act on its repeated recommendations to address inadequate social assistance and homelessness. The Committee expressed particular concern about the lack of legal redress available to individuals when governments fail to implement the Covenant (para. 11). The Committee also reiterated its concern that federal transfers for social assistance and social services to provinces and territories do not include standards in relation to Covenant rights, and recommended that Canada make Covenant rights enforceable within provinces and territories and establish independent and appropriate monitoring and adjudication mechanisms (Para. 35). The CESCR Committee also recommended that Canada "take immediate steps, including legislative measures, to create and ensure effective domestic remedies for all Covenant rights in all relevant jurisdictions" (para. 40).

All Levels of Government Are Responsible for Human Rights Treaty Obligations

In the wake of cuts to the social safety net, and the elimination of both designations for expenditure under the federal transfers and standards, the federal government has distanced itself from obligations such as its obligation under article 11 of the ICESCR to ensure that everyone has an adequate standard of living, claiming that difficulties in federal-provincial/territorial relationships present obstacles to the fulfillment of such treaty obligations.¹¹⁴

However, the treaty bodies have not been persuaded that the federal government can just blame the provinces; nor have the treaty bodies been convinced by the suggestion that complications inherent in federalism make it too difficult for Canada to comply with its treaty obligations. On the contrary, the treaty bodies have consistently taken the position that all levels of government are responsible for treaty compliance, and that the federal government, in particular, has a primary responsibility for ensuring that treaty obligations are fulfilled (CESCR 1998: paras. 12 and 19; CEDAW 2003: para. 25-28; CERD 2002: para. 326; and CRC 2003: para. 9).

Both the CESCR and CEDAW Committee have expressed concern about the federal government's repeal of CAP, and have recommended that Canada revisit the decision to eliminate the CAP national standards. In its 1998 Concluding Observations, the CESCR stated (CESCR 1998: para. 19):

The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living and facilitated court challenges of federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, the CHST has eliminated each of these features and significantly reduced the amount of cash transfer

payments provided to the provinces to cover social assistance. It did, however, retain national standards in relation to health, thus denying provincial “flexibility” in one area, while insisting upon it in others. The delegation provided no explanation for this inconsistency. The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced.

The CESCR also reminded Canada of the principle of international law set out in article 27 of the *Vienna Convention on the Law of Treaties*,¹¹⁵ that “[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” In other words, said the CESCR in General Comment No. 3, “States should modify the domestic legal order as necessary in order to give effect to their treaty obligations” (CESCR 1998: para. 19).

In the same Concluding Observations, the CESCR made the following recommendation (CESCR 1998: para. 40):

Canada [should] consider re-establishing a national programme with specific cash transfers for social assistance and social services that includes universal entitlements and national standards and lays down a legally enforceable right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another.

The CESCR also urged Canada to establish social assistance at levels which ensure the realization of an adequate standard of living for all (CESCR 1998: para. 41), and to adjust federal–provincial/territorial agreements to ensure, in whatever ways are appropriate (CESCR 1998: para. 42), that services such as mental health care, home care, child care and attendant care, shelters for battered women and legal aid for non-criminal matters are available at levels that ensure the right to an adequate standard of living.

To a similar effect, in its 2003 Concluding Observations, the CEDAW Committee stated:

The Committee is concerned that, within the framework of the 1995 Budget Implementation Act, the transfer of federal funds to the provincial and territorial levels is no longer tied to certain conditions which previously ensured nationwide consistent standards in the areas of health and social welfare. It is also concerned about the negative impact that the new policy has had on women’s situation in a number of jurisdictions (CEDAW 2003: para. 27).

The Committee recommended (CEDAW 2003: para. 28) “the federal Government reconsider those changes in the fiscal arrangements between the federal Government and the provinces and territories so that national standards of a sufficient level are re-established and women will no longer be negatively affected in a disproportionate way in different parts of the State party’s territory.”

No Discernible Response

The treaty body criticisms regarding poverty, homelessness, and cuts to social programs have produced no discernible response by governments in Canada. They have failed to act on the recommendations of the treaty bodies regarding the need for mechanisms to establish and enforce national standards for social programs and, given the length of time that has passed, they must be taken to have refused to do so.

Currently, Canadian governments do not even have procedures in place for deliberation and engagement to address the outcomes of the international review processes, within government, between governments and with citizens. Women's organizations in Canada have called for such procedures to be put into place.¹¹⁶ The UNHRC has also called on Canada to (UNHRC 2005: para. 6) "establish procedures, by which oversight of the implementation of the Covenant is ensured, with a view, in particular, to reporting publicly on any deficiencies. Such procedures should operate in a transparent and accountable manner, and guarantee the full participation of all levels of government and of civil society, including indigenous peoples." As well, as previously noted, at home, our governments actively resist the enforcement of international human rights obligations by domestic courts and tribunals.

International human rights treaty bodies have made valuable observations and recommendations regarding steps that governments in Canada should take to repair and protect the social safety net; to restore mechanisms to establish and enforce national standards; and to respond to treaty body recommendations. Governmental failures to act on these recommendations are problematic in and of themselves, but also point to the insufficiency of the international review processes without "government buy-in" as a means of ensuring that Canada lives up to its commitments to realize women's rights to equality, security of the person and an adequate standard of living.

Summary

We conclude that no human rights mechanism has filled the post-CAP vacuum. Moreover, governments have signalled clearly and consistently that they want a significant measure of autonomy from courts in establishing government spending priorities. Considering the damage governments have inflicted on the social union, this is a reprehensible position for them to take. Encoded in the language of government spending priorities is a desire to make the Charter and statutory human rights puny and to bury the real issues of substantive inequality experienced by women and other disadvantaged groups. Courts have a constitutionally assigned responsibility to apply the Charter, and rights-violating government choices should not be immunized from judicial review simply because a government has said there is an issue of spending priorities. These are just labels, and beneath the labels are major issues of concern and relevance to women, their social citizenship and their human rights.

There is also reason to fear that continued reluctance on the part of the courts to come to the aid of disadvantaged groups will fuel government arrogance and the sense that the money they spend is their money, not our money. We hope that over time a richer substantive equality jurisprudence will develop in Canada, and that courts will be recalled to their obligations under the Charter.

However, in the immediate term let us take governments at their word. If they really want to make spending decisions without too much interference from the courts, there is now an onus on them to establish effective legislated standards for social programs that reflect human rights norms and that are applicable in all jurisdictions.

As we have shown, the human rights mechanism that has been most responsive in the era of social program cuts in Canada is the international treaty body review. Both the CESCR and the CEDAW Committee have expressed concrete and detailed concerns about the absence of national standards, particularly for social assistance and related services such as civil legal aid, and both the CESCR and CEDAW Committee have urged Canada to consider reinstating those standards by means of designated cash transfers from the federal government to the provinces with conditions attached. Women urgently need governments to heed the recommendations of the CESCR and the CEDAW to re-establish national standards.

5. FEDERAL GOVERNMENT JURISDICTION TO ESTABLISH AND MAINTAIN NATIONAL STANDARDS

What is the connection between the federal government and national standards? In social policy debates, an increasingly common assumption is that federally established national standards are an intrusion on provincial jurisdiction. It is important to clarify that this assumption is not supported by the law. Rather, when it is made, it is a political statement. The courts have repeatedly held that the federal government is permitted to use its spending power to fund social programs and, through conditional cost sharing, to establish national standards. The authority of the federal government to establish national standards was reaffirmed by the adoption of section 36 of the *Constitution Act, 1982*.¹¹⁷ Further, the protection of the social union is a compelling reason for interpreting the division of powers in a manner that permits the federal government to promulgate necessary national standards, when a provincial incapacity to establish such standards has been demonstrated.

The assumption that social programs are the exclusive jurisdiction of the provinces has its roots in 19th century ideas about health and well-being as private, non-governmental concerns, and in the long-standing desire of Quebec for control over its social institutions. This historical context does not provide a sufficient rationale for attempting to bar the federal government from creating national standards in the rest of Canada. The modern reality is that Canada, including Quebec, has an extensive and complex public social safety net, and that governments have undertaken to protect the security and equality of all Canadians. Quebec's aspirations can be accommodated, without sacrificing national standards upon which the viability of the social safety net for the rest of the country depends.

Jurisdiction Over Social Programs

Pursuant to the *Constitution Act, 1867*,¹¹⁸ the authority to make laws is formally divided between the federal government and the provinces. It is often assumed that social programs fall exclusively within provincial government jurisdiction, because the *Constitution Act, 1867* assigns jurisdiction over property and civil rights (92(13)), and over merely local or private matters (92(16)), to the provinces. However, as a matter of law and practice, there is a considerable overlap of federal and provincial jurisdiction regarding social programs.

Various provisions of the *Constitution Act, 1867* are potentially relevant to a determination of which level of government has jurisdiction over a given subject. For example, in the field of education, by virtue of section 93 of the *Constitution Act, 1867*, provincial governments have the power to make laws in relation to education. But the federal government also has certain responsibilities incidental to various heads of federal power, including responsibility for providing education, as well as health care and social assistance, on Indian reserves and military bases. In practice, the federal government has been very involved in post-secondary education through transfers of cash and taxes to provincial governments and funding for official language education, as well as through loans, grants and tax measures.¹¹⁹

In the field of health, the *Constitution Act, 1867* assigned jurisdiction over hospitals to the provinces, but was silent about additional elements of the health care system. Both levels of government are active in the area of health care. As mentioned, the federal government, by using its ability to make conditional transfers to the provinces, has played a central role in establishing a national health care system. The Supreme Court of Canada has held that health is not an exclusively provincial matter, and expressly recognized the constitutional authority of the federal government to use the spending power in the field of health care. In *Eldridge v. British Columbia (Attorney General)*,¹²⁰ on behalf of the Court, La Forest J. stated:

[T]he fact that the Constitution assigns explicit jurisdiction over some aspects of health care to the provinces has not prevented the federal Parliament from playing a leading role in the provision of free, universal medical care throughout the nation. It has done so by employing its inherent spending power to set national standards for provincial medicare programs. The *Canada Health Act*, R.S.C., 1985, c. C-6, requires the federal government to contribute to the funding of provincial health insurance programs provided they conform with certain specified criteria. (The constitutionality of this kind of conditional grant, I note parenthetically, was approved by this Court in *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 567.)

The federal government has also used its spending power to support other activities in the health care field, including medical research. There are some issues in the health care field, food and drug issues for example, that bring the federal government's criminal law power into play. In *Schneider v. The Queen*,¹²¹ the Supreme Court of Canada said that health was neither exclusively a matter of provincial jurisdiction, nor a matter of exclusive federal jurisdiction, but rather an amorphous area that can be addressed by either valid federal legislation or valid provincial legislation, depending on the circumstances of each case and the nature and scope of the problem.

The use of the federal spending power to establish national standards for health care was touched upon by the Supreme Court of Canada in *Chaoulli v. Québec (Attorney General)*,¹²² wherein Deschamps J. characterized the *Canada Health Act* principles as “the hallmarks of Canadian identity” (*Chaoulli*: para. 16).¹²³

Social assistance is not explicitly assigned to either level of government in the *Constitution Act, 1867*. Social assistance, as we know it, is not mentioned. The provinces are usually assumed to have jurisdiction to provide social assistance because of their express constitutional jurisdiction over “charities and eleemosynary institutions,” “municipal institutions,” “property and civil rights,” and “matters of a merely local or private nature in the province.”¹²⁴ However, this assumption has its roots in a particular historical situation. At the time of Confederation, the well-being of members of society was the responsibility of private institutions, mainly the family. If the family was unable to care for its members, then support might come from private (mainly church-affiliated) charities and, as a last resort, the local government. The *Constitution Act, 1867* did not contemplate a large publicly funded system of social welfare (Cameron 2005: 7-9; Guest 1985: 9-17). In 19th century Canada, the role of provincial governments was expected to be limited to necessary regulation in relation to private institutions. Further, constitutional

respect for provincial government autonomy in relation to those private institutions was thought necessary as a national accommodation of Quebec's distinctiveness, which entailed protection and development of the social institutions of Quebec by the majority French and Catholic population in Quebec, free from the influence of the English Protestant majority (Cameron 2005: 7-9).

The extensive and complex post-WWII social safety net was not envisioned by the drafters of Canada's Constitution in 1867 (Royal Commission on Dominion-Provincial Relations 1940). In practice, social assistance programs have been mainly provided by provincial and municipal governments, and jointly funded by the federal government through conditional cost sharing. Below, we examine more closely the constitutional basis for the use of the federal spending power to secure national standards for social assistance.

The federal government has also provided various income support programs directly. The Family Allowance, for example, was provided directly by the federal government.¹²⁵ Also, since the federal government and provinces agreed to amend the *Constitution Act, 1867* in 1951 and again in 1964,¹²⁶ the federal government provides directly a national unemployment insurance scheme, old age pensions and supplementary benefits, such as CPP survivor benefits and disability benefits.

In the area of legal aid, both levels of government are involved. Legal aid is delivered through provincial plans, and provincial government agencies. But the federal government makes a specific contribution to the cost of provision of criminal law legal aid by the provinces, subject to minimum conditions. In the past, legal aid for non-criminal matters including family law, poverty law, prisoners' rights law, and refugee and immigration law, has been cost shared. Under CAP, civil legal aid was cost shared as an item of special need. Although CAP did not establish detailed conditions regarding the adequacy of civil legal aid, funding for legal aid was nevertheless conditional in the sense that it was designated as a service and the federal government was obligated to share in the cost of legal aid expenditures by any province. Since the repeal of CAP, and the switch to undesignated block transfers, the amount of the federal government contribution to the cost of civil legal aid has become virtually impossible to ascertain. There is no public reporting on what happens to CST funds once they are transferred to a province. The *Federal-Provincial Fiscal Arrangements Act*¹²⁷ makes no reference to legal aid. The federal government continues to transfer designated funds to the provinces for legal aid for criminal law matters and for refugee and immigration matters, through federal-provincial agreements.

The power of the federal government to use its spending power to make conditional transfers to the provinces for legal aid has never been contested in the courts. It is arguable that constitutional jurisdiction over the provision of legal aid is shared by the federal government and the provinces. An argument for provincial responsibility for the provision of legal aid can be grounded in the constitutional jurisdiction of the provinces over the administration of justice under section 92(14) of the *Constitution Act, 1867*, and by provincial jurisdiction over property and civil rights under section 92(13). The provinces are also responsible for certain areas of substantive law that fall within the ambit of civil legal aid, such as family law matters arising outside the *Divorce Act*. However, the federal government has jurisdiction over other substantive areas of law that are

the subject of legal aid funding including criminal law, and in the civil law area, divorce (including spousal and child maintenance, and child custody and access, ancillary to divorce), and refugee and immigration law.

Social Assistance and Related Services and the Federal Spending Power

The jurisdictional authority that most obviously authorizes the federal government to establish national standards in the area of social assistance, and related services, including civil legal aid, is the spending power. At one time, there was an element of controversy about whether the federal spending power was restricted to purposes relating to enumerated federal heads of authority. However, “the overwhelming weight of opinion among constitutional experts supports the right of federal authorities to spend federal money in any way they please, including for purposes under provincial legislative control, and to impose whatever qualifications they choose on such expenditures” (Gibson 1996: para. 10).

Peter Hogg (1997, updated 2004: 6-17 – 6-18), author of Canada’s leading constitutional law text, is of the opinion that:

[T]he better view of the law is that the federal Parliament may spend or lend its funds to any government or institution or individual it chooses; and it may attach to any grant or loan any condition it chooses, including conditions it could not directly legislate. There is a distinction in my view, between compulsory regulation, which can obviously be accomplished only by legislation within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant, a loan or a commercial contract). There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects.

Repeatedly, courts in Canada have explicitly recognized that the federal government is permitted to place conditions on funds it transfers to the provinces.¹²⁸ A decision of particular interest is *Winterhaven Stables v. Canada (Attorney General)*.¹²⁹ In *Winterhaven Stables*, the plaintiff, a taxpayer, sought a declaration that the *Income Tax Act* was ultra vires, that is, beyond the powers of, Parliament. The claim was that the *Income Tax Act* amounted to prohibited direct taxation within a province because a portion of the monies raised by federal income taxes is transferred to the province to fund social programs. The plaintiff also sought a declaration that various federal statutes including the Canada Assistance Plan were ultra vires, because they intruded on provincial jurisdiction. The Alberta Court of Queen’s Bench dismissed the action and this decision was upheld by the Court of Appeal. The case did not proceed to the Supreme Court of Canada.

At trial, Medhurst J. discussed the relationship between the federal spending power and the legislative division of powers. He concluded: “It is not a question of whether a law “affects” a particular matter but whether it is “in relation to” or “aimed at” the subject matter (*Winterhaven*

Stables trial decision: para. 33). The federal government can impose conditions so long as the conditions do not amount to a regulation or control of a matter outside federal authority, held the Court. Medhurst J. concluded that the legislation under review, including CAP, was not legislation in relation to provincial matters of health, post-secondary education and welfare but was legislation to provide financial assistance to provinces to enable them to carry out their responsibilities (*Winterhaven Stables* trial decision: para. 46).

Parliament has the authority to legislate in relation to its own debt and its own property. It is entitled to spend the money that it raises through proper exercise of its taxing power in the manner that it chooses to authorize. It can impose conditions on such disposition so long as the conditions do not amount in fact to a regulation or control of a matter outside federal authority.

Furthermore, according to Medhurst J., the impugned legislation was simply carrying out objects that the federal government is authorized to pursue under section 36 of the *Constitution Act, 1982*. The Court of Appeal went further in articulating its reasons in support of the conclusion that the federal spending power should not be equated with its legislative power, and also specifically tied its reasons to section 36 of the *Constitution*. Irving J.A. stated (*Winterhaven Stables* Court of Appeal: paras. 16, 20-21):

The appellant argues that Parliament cannot raise moneys which may be used for purposes which fall within the legislative jurisdiction of the provinces.... This argument equates Parliament's spending power with its legislative power. I would not read the *Constitution Act* so restrictively. [C]anadian governments (of all levels) have never restricted spending to matters within their respective legislative competence - certainly not in areas in which there may be a double aspect.... payments to the provinces for provincial purposes are contemplated by the *Constitution Act*. Such payments are also contemplated by section 36(1) of the *Constitution Act, 1982*.

In sum, the appellant's argument is that Parliament is indirectly legislating in respect of matters within provincial jurisdictions. It argues that Parliament cannot directly prohibit extra-billing (over and above health care payments) by doctors, so it cannot achieve the same end by the conditions attached to funding. The conclusion does not follow. Parliament has not by legislative force achieved the result. The *Constitution* does not proscribe those incentives or economic pressure.... The question then becomes whether the conditions attached to this spending legislation are...*legitimate national standards*....

The pattern established over many years whereby Canada and the provinces have developed such shared-cost programs...in areas within provincial legislative jurisdiction, was recognized in [section 36 of] the *Constitution Act 1982*.... [emphasis added; references and text of section 36 omitted].

Irving J.A. concluded: "With the background of a long-standing convention whereby Canada and the provinces have negotiated for the establishment of national shared-cost projects, can it be

suggested that the ‘spending statutes’ here in issue are *ultra vires*? In my view, such an argument cannot be sustained” (*Winterhaven Stables* Court of Appeal: 433-34).

Section 36 of the *Constitution Act, 1982*

The relationship between section 36(1) of the *Constitution Act, 1982*, and the federal role in establishing national standards, is extremely important. The jurisdiction of the federal government to participate in social programs should be interpreted in light of section 36. Section 36 provides a principled rationale for the federal government’s role in establishing and maintaining national standards that goes beyond the formalistic rule that a government may spend any money that it raises. In addition, section 36 reaffirmed the spending power of the federal government, removing any residual doubts on the subject (Gibson 1996: para. 25).

Section 36(1) commits the federal government and the provinces together to “promoting equal opportunities for the well-being of all Canadians;” “furthering economic development to reduce disparities in opportunities,” and “providing essential public services of reasonable quality to all Canadians.”

The central values underlying section 36(1) are equality and basic security for all Canadians. The history of constitutional debates leading up to the enactment of section 36 discloses an awareness that achieving equality for individuals is dependent on the availability of an adequate social safety net, and on the capacity of governments to redistribute income in favour of disadvantaged groups and regions. The belief in the value of equality of opportunity underpins the commitment to provide essential services of reasonable quality to all Canadians. Moreover, successive generations of Canadian political leaders have recognized that the goals of equality and basic security for all Canadians are so fundamental as to have a national dimension.

The national dimension of the goals of equality and basic security was recognized by former Prime Minister Pearson, who, at the Federal/Provincial First Minister’s Conference held in Ottawa in February 1968, said:

The economic prospects of Canadians of certain regions remains more limited than those of people in other regions.... Only through that sense of equality — equality in the opportunities open to all Canadians, whatever their language or cultural heritage, and wherever they may choose to live or move — can we give a purpose to Canada that will meet the proper expectations of our people. And only through measures that will carry this conviction — that we intend to make equality of opportunity an achievement as well as a goal — can we preserve the unity of the country.... Caring for the less privileged, and the disadvantaged, no longer is a matter for the local community alone; for haphazard municipal or charitable relief.... [A] loose association of political units...would jeopardize the ability of the federal government to contribute to rising living standards for the people of Canada.... We believe that the Government of Canada must have the power to redistribute income, between persons and between provinces, if it is to equalize opportunity across the country. This would involve, as it does now, the rights to make payments to individuals, for the purpose of supporting their income

levels — old age security pensions, unemployment insurance, family allowances — and the right to make payments to provinces, for the purpose of equalizing the level of provincial government services. It must involve, too, the powers of taxation which would enable the federal government to tax those best able to contribute to those equalization measures. Only in this way can the national government contribute to the equalization of opportunity in Canada, and thus supplement and support provincial measures to this end (Pearson 1968: 4, 12, 16, 38).

Similarly, former Prime Minister Pierre Trudeau stated:

There is no room in our society for great or widening disparities — disparities as between the opportunities available to individual Canadians, or disparities in the opportunities or the public services available in the several regions of the country.... [The federal government] must have the power to redistribute income and to maintain reasonable levels of livelihood for individual Canadians, if the effects of regional disparities on individual citizens are to be minimized. The provincial governments...must be able to provide an adequate standard of public services to their citizens and to support the incomes of those who are in need (Trudeau 1969: 8, 10).

On October 6, 1980, upon tabling the resolution putting forward the text of section 36, then-Justice Minister Chrétien said section 36 recognized that:

[S]haring of the wealth has become a fundamental principle of Canadians and that is why the resolution entrenches the principle of equalization and commits both orders of government to promoting equal opportunities for the well being of Canadians: furthering economic development to reduce disparities in opportunities, and, specifically, providing essential public services of reasonable quality to all Canadian.

By entrenching this principle in the Constitution, we are entrenching the obligation of sharing which has been fundamental to the Canadian experience (*House of Commons Debates* 1980: 3287).

The words “essential public services” in section 36(1)(c) must be understood to encompass at least those programs that historically have been cost shared by the federal government. A 1981 federal government publication entitled *Federalism and Decentralization: Where Do We Stand?* expressly recognized that shared-cost programs in the health and welfare fields are the means of ensuring that “public services considered essential” are available to all Canadians on an equitable basis, and that those programs would meet certain national standards (Bastien 1981: 28). The words “reasonable quality” must be understood to reflect human rights norms that Canada has embraced.

The necessary implication of section 36(1)(c), which clearly commits both levels of government to the national standard of public services of reasonable quality for all Canadians is that, at least

as a default, the federal government must be able to impose national standards. If the federal government were not permitted to impose national standards, failing the establishment of an effective agreement among the provinces, there would be no means of ensuring fulfillment of the joint commitment to providing essential services of reasonable quality to all Canadians. If there is any part of the country in which people in need do not have access to adequate social assistance and related programs, it cannot be said that effect has been given to the rights of all Canadians to essential services of reasonable quality. Similarly, if everywhere in Canada poor Canadians do not have access to adequate social assistance and related services, it cannot be said that effect has been given to the right of all Canadians to essential services of reasonable quality and to security of the person, equality and an adequate standard of living.

As Aymen Nader (1996: 306) has documented through an analysis of the constitutional debates leading up to the enactment of section 36, a primary concern of the federal government was to secure its spending power in the new constitution, and to confirm the jurisdiction of the federal government to use its spending power to make conditional grants. The language of what ultimately became section 36 was debated over a long period of time, and altered on numerous occasions. A review of the record of the debates supports the view that the federal government succeeded in gaining significant recognition of its spending power.

The federal government commitment to ensuring that essential services of reasonable quality are available to all Canadians is underscored by section 36(2) of the Constitution, which commits the federal government to the principle of making equalization payments so people living in less well off provinces will be able to access public services without having to pay a disproportionate share of taxes. By expressing commitment to redress regional disparities and make equalization payments, section 36(2) of the *Constitution Act, 1982* also reinforces, by implication, a broad interpretation of the spending power (Hogg 1997: 6-17; Nader 1996: 365).

To summarize, section 36 reinforces the human rights commitments of governments in Canada to the goals of equality and security; and it commits both levels of government to national standards for social programs, a commitment, the fulfillment of which can only be ensured if the federal government has the power to impose national standards in the event of provincial inability or unwillingness.

Normatively speaking, there may be a case for a more circumscribed approach to the use of the federal spending power in an area of provincial jurisdiction where there is no national dimension to the concern the federal government seeks to address, or where the provinces have developed an effective integrated approach to addressing the issue. However, that is not the case here. After the extended period without CAP, which Canadians have experienced, there is strong evidence that the provinces are either unable or unwilling to collaborate to establish national standards.

Adapting Confederation to Modern Realities, and Accommodating Quebec

The legitimacy of the federal government using its spending power to establish and maintain national standards should be assessed in light of contemporary realities, not the realities of 1867. Recently, the Supreme Court of Canada reiterated that the “meaning of words used [in the Constitution] may be adapted to modern day realities.”¹³⁰

An approach to constitutional interpretation that is responsive to contemporary realities, and not stuck in the past, is necessary to ensure the continuing relevance of the Constitution to the tasks governments must undertake. New things develop. Protecting the social safety net was not an issue in 1867. It is an issue now. In *Reference Re Same-Sex Marriage*, the Court explained:¹³¹

A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted. For instance, Parliament's legislative competence in respect of telephones was recognized on the basis of its authority over interprovincial "undertakings" in section 92(10)(a) even though the telephone had yet to be invented in 1867. Likewise...early English decisions are not a "secure foundation on which to build the interpretation" of our Constitution [references omitted].

The Supreme Court's recent decision in the *Maternity Benefits Reference*¹³² is instructive. At issue in this case was the constitutionality of federal maternity benefit provisions of the Employment Insurance Scheme. The question confronting the Court was: Are maternity benefits a kind of family assistance payment and therefore within provincial jurisdiction, or employment replacement income, and therefore within federal jurisdiction? Taking a "progressive approach to ensure that Confederation can be adapted to new social realities" (*Maternity Benefits Reference*: para. 8), the Court held that unemployment insurance maternity benefits replace employment income.

In its analysis, the Court took into account the value of childbearing to the society as a whole, and the fact that maternity benefits recognize the equality of women and facilitate the increasing presence of women in the work force. An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility, said the Court (*Maternity Benefits Reference*: para. 66). Constitutional interpretation, as well as the design of benefits and programs for workers, must take into account that not only men, but women also, are workers. In this case, the modern social reality of women's increased participation in the work force, and the value of women's equality, shaped and influenced the court's interpretation of the division of powers between the federal government and the provincial government.¹³³ A benefit, which at one time might have been regarded as a supplement to the family, is now seen as income replacement for an interruption in earnings. This also reflects a shift in the conceptualization of needs associated with maternity as an exclusively private responsibility to a more shared, public responsibility.

Similarly, the development of nationwide social programs and a requirement for national standards reflects a changed understanding of how the health and well-being of the society's members can be secured. The world of 1867, in which care for the well-being of members of the society was thought to be a private responsibility, is very different from the modern day reality of an extensive social safety net, and a national identity that assumes a public responsibility for the well-being of the residents of Canada.

As Cameron (2005: 8-10) explained, the national accommodation of Quebec, which in 1867 meant all the provinces were understood to have jurisdiction over the private institutions that were responsible for the well-being of society's members, worked only as long as the "private" institutions were able to care for the well-being of the community without the significant involvement of the state. However, it unraveled as the lines between the private and the public became blurred, particularly in the Depression of the 1930s when the inability of private, local and even provincial institutions to protect the members of the society became clear in Quebec and the rest of Canada. This triggered a constitutional crisis that has never been resolved. Even though there is a deep consensus in Quebec society about the importance of the institutions of the modern welfare state, which replaced or supplemented the private institutions of family, church and charity, the prevailing view remains that control should reside with the Quebec National Assembly. What no longer works is the attempt to accommodate the distinctiveness of Quebec society in a framework of provincial sameness, when there is a need in the rest of Canada for the federal government to play an active role in ensuring the social security of the population.

Asymmetrical arrangements between the federal government and Quebec are a much better fit for Quebec's concerns than an approach to constitutional interpretation that insists on a diminished role for the federal government in relation to social assistance and social services in all the provinces, at the expense of maintaining the social safety net. There is no virtue in generally precluding the federal government from establishing national standards for the sake of achieving uniform decentralization among all the provinces.

National Standards Have a Dual Aspect

The Supreme Court of Canada has stated that "it is rare that all the subjects dealt with in a statute fall entirely under a single head of power" (*Maternity Benefits Reference*: para. 8). That is why constitutional jurisprudence recognizes that the classes of matters set out in sections 91 and 92 of the *Constitution Act, 1867* are not watertight compartments, and that the power of one level of government to legislate in relation to one aspect of a matter does not necessarily take anything away from the power of the other level to control another aspect within its own jurisdiction (*Maternity Benefits Reference*: para. 8).

The *Maternity Benefits Reference* provides an illustration of how the Supreme Court of Canada has applied the double aspect doctrine to permit provincial and federal government legislation to co-exist. The challenged maternity benefits were a "social measure, but they did not amount to an intrusion into provincial jurisdiction, because in purpose and effect they were more about employment" (*Maternity Benefits Reference*: paras. 38 and 68).

By analogy, it can be argued that federally constructed national standards are more about securing the national social union than about social programs, as such. A potential objection to this argument is that, technically, the spending power is not exactly parallel to the federal jurisdiction over unemployment insurance, because the latter is explicitly authorized by the *Constitution Act, 1867*, whereas the power of the federal government to spend in areas of provincial jurisdiction is inferred from other federal powers. It is true that courts have applied the double aspect doctrine in situations where two or more heads of power are applicable, both federal and provincial. However, the point of considering the double aspect doctrine is simply to

suggest that federal responsibility for legitimate national standards can co-exist with provincial responsibility for design and delivery of social programs.

The potential for an analysis of the federal spending power that differentiates between social programs on the one hand, and national standards intended to serve the goals of section 36 of the *Constitution Act, 1982* on the other, was alluded to though not fully developed by the Alberta Court of Appeal in *Winterhaven Stables*, when the Court said: “The question... becomes whether the conditions attached to this legislation are... legitimate national standards” (*Winterhaven Stables* Court of Appeal: para. 20). We suggest that if the purpose and effect of a given national standard is to keep the promise of section 36(1)(c), the standard should be regarded as legitimate.

The Federal POGG Power

Another source of support for a federal role in establishing national standards is the federal jurisdiction to make “laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces,” known as the peace, order and good government, or POGG, power.

There are two ways in which the POGG power can come into play, in this discussion. There is an argument that the POGG is an independent source of federal jurisdiction to regulate matters of health and welfare.¹³⁴ In addition, jurisprudence in the environmental law field, in which the power of the federal government to legislate pursuant to the POGG power has been applied, reveals a perspective that could be usefully applied to the federal spending power. In particular, the courts have held that POGG authorizes the federal government to regulate in relation to provincial jurisdiction to address a matter of national concern, which the provinces are unable to address.

In *R. v. Crown Zellerbach*,¹³⁵ a case about environmental law, the Supreme Court of Canada held that, pursuant to the POGG power, the federal government is authorized to legislate to control marine pollution in waters under provincial jurisdiction. It can do so because marine pollution has extra-provincial effects, and because marine pollution has a national dimension that the provinces are unwilling or unable to address. Thus, marine pollution was characterized as a matter that has emerged as a national concern, and therefore is properly the subject of federal legislation.

LeDain J. explained that the national concern doctrine applied to two types of subject matters: “new matters which did not exist at Confederation and... matters which, although originally matters of a local or private nature in a province, have since... become matters of national concern” (*Crown Zellerbach*: para. 33).

To determine whether something could count as a matter of national concern, LeDain J. said, “it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter” (*Crown Zellerbach*: para. 38).

The logic of the *Crown Zellerbach* decision has implications for the constitutional authority of the federal government to regulate in respect of social assistance and social services.¹³⁶ Like the control of marine pollution, the fulfillment of section 36 of the Constitution has important national dimensions. Indirectly then, the POGG jurisprudence also supports the use of the federal spending power to establish and maintain national standards for social programs, especially where as here, the provinces have demonstrated an incapacity to establish those standards by other means.¹³⁷

Summary

The jurisprudence about the constitutional division of powers provides ample room for the federal government to establish and maintain legitimate national standards for social programs. The use of the federal spending power to create national standards is clearly authorized. The courts have consistently held that the federal government has the jurisdiction to place conditions on transfers to the provinces for social programs.

The post-WWII Canadian social union is the product of extensive intergovernmental collaboration. The text of the Constitution explicitly provides for a considerable degree of overlap in jurisdiction. Social assistance is not an enumerated head of authority. It is not helpful to ask what the Fathers of Confederation intended in 1867 regarding the division of government responsibility for the social union, because they did not contemplate a large and complex scheme of public redistributive programs and services. They saw such matters as assisting people in need as essentially private. And they could not have contemplated the panoply of human rights obligations that Canada has assumed, under domestic and international human rights instruments.

There is no point in insisting on a division of powers in relation to social programs that is predicated on an outdated version of health and welfare provision as essentially private or charitable, and which does not serve to further Canada's human rights obligations. Recognizing a distinct and central role for the federal government with respect to the stipulation of national standards, for the purpose of fulfilling Canada's obligations under sections 7 and 15 of the Charter, section 36 of the *Constitution Act, 1982* and international human rights law is consistent with a progressive and practical approach to constitutional interpretation.

It is not just that it is undesirable to have a patchwork of programs. Nor is this a case of uniform standards for their own sake. This is a matter of Canada's compliance with its commitments to equality and security for all Canadians. As we have said, if people in need do not have access to adequate social assistance and social services in any part of the country, it cannot be said that effect has been given to the rights of all Canadians to essential services of reasonable quality, to security of the person, equality and an adequate standard of living.

Through its failure to restore national standards, in the face of clear evidence of the problems that have resulted, the federal government is effectively in violation of section 36(1)(c) of the *Constitution Act, 1982*. The provinces are also in violation of section 36(1)(c). However, the federal government has a primary responsibility to restore national standards because it has the greatest structural capacity to set down national standards and to ensure compliance. New federal

intervention to create national standards for social assistance and related services, including civil legal aid, is justified and overdue.

It is politically desirable to accommodate the distinctiveness of Quebec in the federation, and to accept Quebec's aspiration for independence from standards devised by non-Quebecers. This does not mean that Quebec is relieved from the obligation to have social programs that conform to human rights norms. Quebec is subject to the Charter, human rights legislation and international human rights treaties. Standards that reflect human rights norms are likely to be similar, whether invented by Quebec or the rest of Canada.

What is neither desirable nor necessary is to disempower the federal government constitutionally to accommodate Quebec. Quebec's distinct position in the federation can and should be accommodated through asymmetrical arrangements with Quebec. In the rest of Canada, it is reasonable and appropriate to divide governmental responsibility in a manner that prioritizes the values of human rights over jurisdictional competition.

Impediments to the enactment of federal legislation establishing national standards for social assistance and related programs that are binding on the federal government and the provinces are not legal but rather political. In the interest of ensuring that each level of government does the best that it can to ensure that social programs operationalize human rights, provincial governments and the federal government alike should recognize that a central role for the federal government is both constitutionally and politically legitimate.

6. BEING ACCOUNTABLE FOR RIGHTS AND MONEY¹³⁸

The federal government's exercise of its spending power is a central mechanism for maintaining Canada's social union and for operationalizing women's human rights. No alternative has presented itself. While interprovincial collaboration, independent of the federal government, to create national standards for existing social programs in Canada is theoretically possible, there has been no such development. The provinces and territories have displayed no national imagination. The decentralization of Canada, which the Conservative Party, the Bloc Québécois and the Council of Chief Executive Officers embrace, will lead to a deeper divide between rich and poor provinces, and between rich and poor Canadians. At its heart, this decentralization offers no commitment to the social citizenship of Canadians, to the social union or to the human rights of women.

We conclude that the federal transfers, including the CST, are essential tools. The federal government, using the transfers, needs to be the instigator of national action on social policy and the one who maintains regional consistency. We make proposals here that see the federal government using the CST as an invitation to intergovernmental collaboration. The fact that the federal transfer is the operative vehicle for connecting rights and money does not mean the federal government needs to, or should, act alone.

If there is to be a stable social union, no government — federal, provincial or territorial — can act without constraints. Every government has to make commitments to stable, long-term resource allocations to support social programs and commitments to maintaining standards that will ensure adequacy and consistency across regions. No matter what arrangement Canadians invent to maintain the social union, this will be true.¹³⁹ To make the federal transfers work, the federal government has to agree to stable fiscal arrangements to support provincially delivered programs, and the provinces have to agree to comply with some national standards, and there needs to be a parallel, but separate, arrangement with Quebec. We consider here what is necessary to make the CST work as an instrument for creating and maintaining Canada's social union, and for implementing women's human rights.

Desired Outcomes

The subject matter of the social union is not the rights of governments, but the rights of the people whom they serve. We take a results-oriented approach and begin by identifying the desired outcomes for the CST.

- Implement social programs, including post-secondary education, social assistance and social services, that meet the real needs of women in Canada, particularly the most disadvantaged women, and that realize their social rights.
- Establish standards for social programs and services that define adequacy and eligibility.
- Create funding arrangements between federal and provincial/territorial governments that provide stable and adequate support.

- Promote transparency regarding funding formulas, standards, designation of programs and services to be supported by the funding, and roles of government.
- Make executive branches of government accountable to legislatures and Parliament for the provision and expenditure of funding, and for compliance with standards.
- Provide forums for individuals and groups to participate in the development of standards, to dispute or critique standards, delivery and adequacy, and to obtain remedies and ensure changes.

What conditions and machinery needs to be attached to the CST to ensure that it can achieve these outcomes?

Legislation: A New Canada Social Programs Act

The CST needs its own legislation, a new Canada social programs act, in which the authority and responsibility of the federal government with respect to the Transfer is set out, along with the conditions attached to the Transfer, and the procedures and mechanisms for holding federal, provincial and territorial governments accountable for expenditures and adherence to standards.

As we have noted, intergovernmental agreements, such as those governing child care, by themselves are not adequate tools for implementing Canada's human rights obligations and social union goals. They are unstable and ill defined. Most importantly, they are created, and can be cancelled, behind the closed doors of first ministers' meetings, or at cabinet tables. As such, they are vehicles that lack both democratic legitimacy and democratic accountability. Because of the lack of citizen engagement in their development, they can also lack the substantive content necessary to fulfill the needs of women in Canada.

The underlying values and the social policy goals of the CST are too important to women, and to all residents of Canada, to be removed from public democratic forums — Parliament and legislatures — in this way. Only through the passage of legislation can full democratic responsibility for social policy be assumed. Currently, the only legislative reference to the CST is in the *Federal-Provincial Fiscal Arrangements Act*.¹⁴⁰ Section 24.3 (1) provides that the transfer is to be provided to the provinces for the purposes of:

- financing social programs in a manner that provides provincial flexibility;
- maintaining the national standard, set out in subsection 25.1(1), that no period of minimum residency be required or allowed with respect to social assistance; and
- promoting any shared principles and objectives that are developed under subsection (2) with respect to the operation of social programs.

“Social programs” are defined in section 24.3(3) as including programs in respect of post-secondary education, social assistance and social services, including early childhood development, and early learning and child care services. Section 24.3 (2) provides that:

(2) The Minister of Human Resources Development shall invite representatives of all the provinces to consult and work together to develop, through mutual consent, a set of shared principles and objectives for social programs that could underlie the Canada Social Transfer.

Considering the importance of the programs, this is thin legislative treatment. There is only one national standard for social assistance — no residency requirement — and one value expressed — provincial flexibility, a value that, in practice has shown itself to be detrimental, not helpful, to women. The possibility of consultation on, and development of, shared principles and objectives for social programs supported by the CST has not been acted on.

Although there is much talk of accountability today, governments at all levels have retreated a long way in the area of social policy from the accountability of a decade ago. Just how far they have retreated is evident when one examines the elements of the CAP system (Cameron forthcoming).

The *Canada Assistance Plan Act* was federal legislation, but it created a pan-Canadian framework that included bilateral agreements between the federal government and the provinces, and provincial legislation and regulations to implement the CAP conditions and processes. In effect for 30 years from 1966 to 1996, CAP was an important piece of social union apparatus, because it generated complementary legislation and processes at all levels of government to reflect mutual interests in, and responsibilities for, the care of Canada's poorest residents.

The conditions regarding social assistance, including the requirement that the provinces provide social assistance to any person in need, in an amount consistent with a person's basic requirements for food, clothing and shelter, were contained in CAP. Provinces and territories were required to incorporate these conditions, along with no-residency rules and appeal rights, into provincial legislation and regulations to qualify for 50/50 cost-sharing. So CAP:

- treated basic entitlements to social assistance as conditions that provinces had to comply with to qualify for cost-sharing;
- authorized the federal government to enter into bilateral agreements with the provinces;
- required provinces to incorporate the conditions into provincial statutes and regulations in exchange for cost sharing; and
- created a process for listing or approving the programs and services that were designated for cost sharing, as well as for verifying expenditures.

Provinces had to apply for approval for the programs they wished to have cost shared and, if approved, the programs were listed in schedules to the federal–provincial agreements. These schedules included homes for special care, provincially approved agencies providing welfare services and the provincial laws that authorized the provision of assistance and welfare services. (Cameron forthcoming).

For the approved programs, the provinces could submit bills for the federal share of the cost. These were reviewed and certified by federal field staff, and then payments were made monthly,

and audited annually by both provincial and federal officials (Cameron forthcoming). Cameron notes that this process of approval and certification of expenditure was “cumbersome” and in the early 1990s, before the repeal of CAP, efforts were being made to streamline the process.

Admittedly, CAP had problems. The federal government could have used its authority to ensure adequacy more successfully, the verification procedures were onerous, and the mechanism available to residents to challenge federal payments that did not comply with CAP was weak. Nonetheless, the repeal of CAP left a big void, which the language in the *Federal-Provincial Fiscal Arrangements Act* does not fill. A new Canada social programs act is needed that will:

- articulate the purposes of the CST;
- designate the programs and services on which transferred funds are to be spent by provinces and territories;
- define standards for key programs, such as social assistance and civil legal aid;
- establish stable funding formulas for the transfer;
- create a monitoring and accountability mechanism that works for all levels of government and for Canada’s women and men; and
- recognize and define a separate and parallel arrangement with Quebec.

We examine these elements in more detail.

Purposes of a Canada Social Programs Act

A new act should state that the purposes of the CST are to:

- implement rights set out in sections 7 and 15 of the *Charter of Rights and Freedoms* and in international human rights treaties to which Canada is a signatory, including the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Rights of the Child*;
- implement section 36(1)(a) of the *Constitution Act, 1982* by ensuring that the essential public services supported by the CST promote equal opportunities for the well-being of all women and men in Canada, including members of the most vulnerable and disadvantaged groups;
- implement section 36(1)(c) of the *Constitution Act, 1982* by ensuring that the essential public services supported by the CST are of reasonable quality, and available in all jurisdictions.

Designation of Funds

As it stands, the CST is intended to be spent by the provinces and territories on post-secondary education and social assistance and social services, including early childhood development and early learning and child-care services. However, since the repeal of the *Canada Assistance Plan Act*, the federal government has stepped back from verifying how social transfer dollars are actually spent. The Department of Finance says: “Provinces and territories are free to allocate

the CST between their priorities in post-secondary education, social assistance and social services” (Canada 2004).

Because of the lack of reporting by the provinces and territories, and the federal government’s failure to track the funds it transfers, it is unclear what programs and services have been paid for since 1995 under the CHST, and now under the CST. Programs and services, such as home care, some child care, and respite care, which were cost-shared under CAP, may still be being paid for from the CST. But we do not know. The principal reason for the federal government’s decision in 2004 to split the CHST in two, creating the CHT and the CST, was a desire to be clear that the increased funds it was providing were designated for expenditure on health.

To get further clarity about what funds are for, some are calling for splitting the CST into two, to create a post-secondary education transfer and a social assistance and social services transfer. The Standing Committee on Finance in the June 2005 Report of the Subcommittee on Fiscal Imbalance takes this position (p. 39). This is also the position of the Canadian Federation of Students (2004: 10-12). In a time when there is so little accountability, separating the CST into two transfers, one for post-secondary education and one for social assistance and related services, including civil legal aid, may be a good idea.

Even if the CST is not split into two transfers, there are two main designations for the funds: post-secondary education, and social assistance and social services. The transfer for post-secondary education is very important to women, as women’s increased involvement in post-secondary education has been a significant contributor to women’s economic advances in recent years. But our main focus here is on the transfer for social assistance and related services.

The CST should have clear expenditure designations attached to it and these should be set out in a Canada social programs act. Monies should be specifically designated for social assistance, civil legal aid, shelters and other supports for women escaping male violence, women’s centres, child care, home care, supports for persons with disabilities, child welfare services and other specified social services. To ensure that the designations are meaningful, new verification procedures must be in place to make sure both levels of government report to Parliament and legislatures on how the money is actually spent.

Standards and Principles

Explicitly developed standards may not be necessary for all of the programs and services funded through the CST. But, for some, in particular social assistance and civil legal aid, the experience of the last decade has shown that standard setting is crucial. We propose standards for these programs here. Such standards should be binding on both the federal government that provides the funds and on the provincial and territorial governments, or Aboriginal self-governments, that receive them, as well as on municipal governments or other agencies that deliver the programs or services. Quebec may develop its own “made in Quebec” standards that are reflective of shared human rights obligations.

Social Assistance

With respect to social assistance, new common standards for adequacy, eligibility and fair process are necessary. These must include obligations on recipient governments.

- Provide assistance to any person in need, without limitations or restrictions based on the reasons for or duration of the need.
- Meet a standard of adequacy that reflects the right of every person to an adequate standard of living, including food, clothing and housing.
- Provide shelter allowances that reflect actual local costs for decent housing.
- Provide assistance that respects women's unpaid caregiving work, and without imposing work requirements.
- Eliminate requirements to participate in work or training as a condition of receipt of adequate social assistance.
- Eliminate "spouse in the house" rules, as well as temporary or permanent bans and time limits, which have been identified as discriminatory and punitive.
- Publicly administer programs and services, and ensure that they are not delivered by for-profit entities.
- Make rules and procedures understandable and fair, and access to benefits timely.
- Provide a guaranteed right to appeal any decision denying, reducing, restricting or terminating social assistance or a related service.
- Ensure that appeal procedures are fair and accessible, and that recipients and potential recipients have advocates available to assist them, including legal counsel where that is necessary to ensure meaningful access to justice.
- Ensure that social assistance and related services are designed to enhance the equality of all women, fully recognizing their diversity, and that rules and practices do not discriminate against social assistance recipients, because they are receiving social assistance, or because of their sex, marital status, family status, national or ethnic origin, colour, race, sexual orientation, mental or physical disability, age or other analogous grounds.
- Involve women in the design and reform of social assistance and related services so these programs will meet the needs of the women using them, and be accountable to them.

Setting adequate rates for social assistance could be done in a number of ways. For example, each delivering government could define a market basket measure for social assistance, setting out the items that are in the basket, and assessing local costs. This would give social assistance rates a rational, consistent and publicly declared foundation, and permit both social assistance recipients and others to examine and assess, in an informed manner, whether social assistance rates are adequate.

Civil Legal Aid

Standards for the provision of civil legal aid should be developed that apply in all jurisdictions and that define adequacy, eligibility and coverage. Receiving governments must be required to provide civil legal aid that is:

- adequate to ensure effective and meaningful access to justice;
- available to those who lack sufficient means to exercise their rights to obtain proper remedies and redress; and
- available for all legal matters where the fundamental interests of women and men and their dependants are at stake, including in the areas of family law, poverty law, immigration and refugee law, human rights, mental health and prison law matters.

Funding Formulas

Some have expressed concern that if the CST is split in two, the social assistance and social services transfer will become the poor cousin of all transfers, because it is devoted to programs that serve people who are most disadvantaged, a group that is often both maligned and ignored. The concern that the portion of the CST directed to social assistance and related services may be beggared to pay for other more middle class programs is borne out by the fact that the federal government contributes 22.3% of health spending, but only 11.5% of spending on other social programs.¹⁴¹ Experts agree that when health care, post-secondary education, and social assistance and related services were all included under the CHST, health care spending systematically crowded out spending on post-secondary education and social assistance and other services (Council of the Federation 2006).

Interestingly, the Subcommittee on Fiscal Imbalance, at the same time it recommended that the CST be restructured into two components, also recommended that the cash portion of the transfers for both post-secondary education, and social assistance and social services be increased at a rate comparable to the increases in the health transfer in recent years (Standing Committee 2005: 439). This is echoed by the recent report prepared for the Council of the Federation, *Reconciling the Reconcilable* (2006), which notes that the federal government's support for post-secondary education, social assistance and related services has never been restored to 1994-95 levels. To increase CST support for post-secondary education and social assistance and social services to their 1994-95 levels, adjusted for inflation, would require an additional \$2.2 billion annually.

This history makes it clear that the amounts for the CST should be increased immediately; a rate of increase, comparable to that attached to the CHT, should be established; and stability and predictability in the amounts to be transferred and received should be assured. Further, the increase should be attached to standards.

Accountability Mechanisms

Accountability is a popular word these days, but it is not always clear what it means. Women seek to hold governments accountable for the practical realization of Canada's rights

commitments. As Barbara Cameron (forthcoming) notes, women look to governments to bring together rights, money and political will to produce adequate social programs and services.

The CST is a federal vehicle, essential to the social union and to strong social programs. But, as we have said, that does not mean that collaboration between federal and provincial governments is not useful, desirable, even essential. So a key question is: What accountability mechanism can encourage positive interaction between governments that will serve the interests of women?

In *The Cult of Efficiency* Janice Stein (1999) said that “accountability requires transparency, standards, open evaluation, and a capacity to learn quickly and to correct deficiencies when they become apparent.” To reflect Stein’s version of accountability for the social programs and services that are funded under the CST, we need procedures and institutionalized relationships that ensure that:

- money is allocated and spent, and programs and services are delivered, in ways that recognize and realize the human rights of women and all Canadians;
- the performance of governments can be assessed against the standards of rights, as well as against the more detailed standards for specific programs; and
- performance that does not meet standards can be sanctioned and corrected quickly and responsively.

Also, accountability involves relationships (Fooks and Maslove 2004: 3 and 5-6). With respect to the CST, it involves two sets of relationships: among levels of government, and between governments and residents.

Since the February 2003 Health Accord, with its emphasis on accountability in health care, attention has been given to studying existing and possible routes to accountability in the health care field. Some of the routes to accountability that have been examined include: legal challenges using the Charter and human rights legislation, legislative provisions, citizen engagement, performance measurements and citizen governors (CPRN 2006).

Fooks and Maslove (2004: 17) reported that it is striking how many of the system reviews of health care, including the Mazankowski Report, the Romanow Commission, the Kirby Report and others, proposed a health care-specific public institution as a way of increasing accountability. This appears to reflect a desire to combine different accountability functions, as well as to create an arm’s-length body to perform them. We make a similar recommendation for an independent monitoring and accountability body for the CST — we call it the Canada Social Programs Council — with these sets of functions: fostering citizen engagement, monitoring and public reporting, assessing compliance and resolving disputes.¹⁴²

The Canada Social Programs Council

An independent council could provide a means of structuring relations among governments and relations between governments and residents, with respect to social programs. With the Health Accord, the federal government sought agreement of the provinces and territories to appointment of both governmental and non-governmental representatives to a health council. The council is supported by all provinces and territories, except Alberta, which chose not to participate, and

Quebec, which has its own health council. The council is composed of 12 government and 13 non-government representatives, with a chair, Michael Decter, who is an expert in health policy (Health Canada 2003a).

A Canada Social Programs Council could have appointees chosen by all levels of government, be with expertise in the area of social programs, social rights, and intergovernmental fiscal arrangements. They could include persons from non-governmental organizations representing vulnerable and disadvantaged groups.¹⁴³

As the following description of the accountability functions suggest, different functions may be appropriately performed by different arms of a council. Fostering citizen engagement and monitoring and reporting functions might be carried out by a different configuration of appointees than the evaluation and assessment functions and the resolution of disputes. Further, resolving government-to-government disputes may require a different knowledge base and expertise than resolving person-to-government disputes.

Functions of the a Council

- **Citizen engagement:** These functions are to:
 - facilitate public participation in the further elaboration and definition of funding formulas, designations and standards for funded programs and services; and
 - encourage timely and meaningful consultation among governments, communities and citizens, including non-governmental organizations that represent vulnerable and disadvantaged members of society regarding social programs and social services and their effectiveness.
- **Monitoring and public reporting:** These functions are to:
 - monitor, on an ongoing basis, governments' compliance with funding formulas, expenditures on designated programs and standards;
 - make recommendations to governments regarding where changes are needed to funding formulas, designations and standards;
 - report regularly to Parliament and legislatures on social programs and services funded through the CST and on compliance with funding formulas, designations and standards; and
 - report regularly to United Nations treaty bodies regarding compliance of social programs and services with human rights norms.

These roles — encouraging citizen engagement and monitoring and reporting — are widely recognized as needed ones for a body that is intended to monitor the effectiveness of social programs and services.¹⁴⁴ The health council established under the 2003 Health Accord has a mandate “to monitor and make annual public reports on the implementation of the Accord, particularly its accountability and transparency provisions” (Health Canada 2003a).

The Canadian Council on Social Development, in its policy paper entitled *What Kind of Canada? A Call for a National Debate on the Canada Social Transfer* (2004a) proposed to assign similar roles to a multi-stakeholder body that would foster public involvement, provide advice to governments, and report publicly on “efforts and measures to improve quality, access

and outcomes.” Also, public reporting and citizen engagement roles are envisioned for the Advisory Committee on the Prevention of Poverty and Social Exclusion and the Observatory on Poverty and Social Exclusion, bodies newly created in Quebec by *An Act to Combat Poverty and Social Exclusion*.¹⁴⁵

However, these functions are not sufficient. Social program effectiveness cannot be adequately assured, across jurisdictions, simply by ensuring that there is public reporting of CST outcomes and expenditures to parliaments and legislatures, or even by fostering citizen engagement in the definition of standards and funding formulas. Public reporting of information regarding social assistance and related social services is vital, and more is needed, but public reporting is not a sufficient means of holding governments accountable for rights and the adequacy of social programs. Holding out public reporting as a sufficient accountability mechanism, as the SUFA did, assumes that citizens, given good information, can intervene with political representatives if they are concerned about problems in programs and services, and can vote on the basis of the information. However, reported information can be difficult to understand and is generally inaccessible. For those whose human rights are at stake, it is too weakly connected to the means of correcting problems and failures.

- **Assessing compliance:** A third set of functions is necessary. These involve assessment of the compliance of governments with the funding formulas, designations, and standards and resolution of claims of non-compliance. These functions include:
 - verifying funding allocations and expenditures and evaluate the adequacy of resources assigned to the CST;¹⁴⁶
 - assessing governments’ compliance with standards;
 - identifying when obligations with respect to funding formulas, designations or standards are not being met by federal, provincial or territorial governments;
 - recommending changes necessary to achieve compliance;
 - recommending withdrawal of funding by the federal government in the case of non-compliance with designations or standards;
 - hearing claims from individuals or groups that social programs and services are not being provided in ways that meet funding formulas, designations and standards, or programs, services or standards are inadequate, do not serve the needs of vulnerable and disadvantaged groups, or do not reflect human rights norms; and
 - making recommendations to governments flowing from these claims.

This would permit evaluation, correction and the assessment of penalties for failures to be carried out in a transparent, public manner. Provincial and territorial governments would be able to seek review of federal decisions to alter funding arrangements, as would the federal government, and other parties, be able to seek review of provincial and territorial expenditures and adherence to standards. Because the CST is a vital tool for implementing the rights of Canadian women, they should have direct access to consideration of their claims if social programs and services are failing to meet standards, or are otherwise discriminatory or unfair.

The Agreement on Internal Trade, which was signed by first ministers and came into effect in 1995, is designed to eliminate barriers to trade, investment and mobility within Canada. It

includes detailed procedures for hearing and resolving both government-to-government disputes and person-to-government disputes.¹⁴⁷

The federal and provincial governments have agreed to a health care accord dispute resolution process. It permits a dispute resolution panel to determine whether the standards in the *Canada Health Act* are being complied with and to recommend federal reduction or withdrawal of funds (Health Canada 2006).¹⁴⁸

- **Legal enforceability:** In addition, the terms of the *Canada Social Programs Act* should be enforceable in court. Any resident of Canada should be able to obtain public interest standing to challenge a failure by a government to meet its obligations under this statute.
- **Quebec:** As noted, because the standards and principles set out here reflect human rights norms accepted historically by governments of Quebec, they may be acceptable to Quebec. However, Quebec will probably wish to devise its own implementation, monitoring and accountability systems, as it has created its own health council. Parallel but different delivery and accountability mechanisms for Quebec and the rest of Canada are appropriate.

The Canada social programs act can easily be written. The new child care act (Bill 303) introduced as a private member's bill by Denise Lavoie of the New Democratic Party, passed two readings in Parliament during 2006 supported by the Bloc Québécois and the Liberals. It follows this model.

But moving forward requires commitment to improving the conditions of the poorest women and men, a federal decision to increase the dollars in the CST, some genuine federal-provincial/territorial co-operation, and a willingness to deal maturely with a special arrangement for Quebec.

Conclusion

What if federal government attempts to collaborate with the provinces do not work? What if the provinces refuse to participate in devising effective standards for social assistance and related services, and an accountability mechanism, including a claims hearing process? The federal government can still offer money to the provinces for designated social programs and attach conditions to the money. And that is the bottom line. To maintain the social union, the federal government should be ready to offer money to support essential social programs and to attach sufficient conditions to the money to fulfill its obligations to Canadians under section 36 of the Constitution, as well as under the Charter and international human rights treaties.

It is time for the federal government to take the initiative. At the moment, in a sense, Canada has two social unions. One is understood to serve the interests of all Canadians and is focussed on health care. The other is understood to serve only the interests of the poorest Canadians, and it is concerned with deteriorating social assistance and civil legal aid schemes and other social services. Women have a vital interest in both unions, but their basic rights are infringed by the erosion of social assistance and social services that has taken place over the last decade. The standards of the health union are contested, but remain in place. New resources have been added

to support health care. The federal government, including the minority Conservative Government, cares about playing a leading role, and accountability measures are being enhanced. By comparison, the social union lost resources in 1995 that have never been replaced. There are no standards. Politicians barely mention social assistance and social services; and poor women are worse off than they were 10 years ago, despite surpluses and a healthy economy.

All governments have a responsibility to act to give life to section 36 of the Constitution and to the rights of Canadian women to equality, security of the person and an adequate standard of living. A special responsibility rests with the federal government, which has a practical tool at hand in the form of the CST, to bring rights and money together in order to provide essential public services of reasonable quality for all Canadians.

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ENDNOTES

¹ For instance, employed women were more than twice as likely as their male counterparts to miss time from employment for family responsibilities (Statistics Canada 2006: 109). This division of child care continues on marriage breakdown. When sole custody is awarded, mothers receive custody of children 48 percent of the time, compared to eight percent of men (Statistics Canada 2006: 40). See also Boyd (2003: 215).

² This work represented between 32 and 54 percent of the gross domestic product for 2000, depending on the valuation used (Statistics Canada 2000: 97).

³ It is worth noting that due to the small number of women entering university in these areas, this number is not likely to increase in the foreseeable future.

⁴ While highly educated immigrant women fare less well in the labour force than their Canadian counterparts, there is also a group of immigrant women who are not highly educated and who need literacy training as well as English language training. They face additional barriers.

⁵ These are post-tax figures. Pre-tax figures are higher.

⁶ From 1995 to 2005, the number of single women receiving welfare in British Columbia decreased from 34,737 to 4,345 (B.C. Ministry of Employment 2006). Although the B.C. government attributes this to more people working, a study by the Canadian Centre for Policy Alternatives shows that women are in fact being denied welfare when they need it (Wallace et al. 2006).

⁷ See generally, Mosher (2006); Bakan and Schneiderman (1992); Jensen and Phillips (2001); King and Waldron (1988); Prociacci (2001); Banting (1998).

⁸ *The Constitution Act 1982* being Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c. 11. Section 36 states:

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering the economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

⁹ Women’s constitutional rights to equality are contained sections 15 and 28 of the Charter:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

¹⁰ Section 7 of the Charter states: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¹¹ See Article 11 in note 12.

¹² *International Covenant on Economic, Social and Cultural Rights* (1976) G.A. Res.2200(XXI), 21 U.N. GAOR Supp.(No.16) at 49-50, U.N.Doc. A/6316.

¹³ *Convention on the Elimination of All Forms of Discrimination against Women* (1981) G.A. Res.34/180, 34 U.N. GAOR Supp. (No.710.46) at 193, U.N. Doc A/34/46.

¹⁴ *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 860-862; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 per L’Heureux-Dube J. at 365; *United States v. Burns*, [2001] 1 S.C.R. 283.

Quite specifically, the Government of Canada has espoused the view that the Charter is a vehicle for implementing Canada’s obligations under the ICESCR. In 1993, in response to questions from the UN Committee on Economic, Social and Cultural Rights, which was reviewing Canada’s compliance with its obligations under the ICESCR, the federal government indicated that the Charter “ensured that persons were not deprived of the basic necessities of life” (CESCR, *Summary Record of the 5th Meeting: Canada*, UN Doc. E/C.12/1993/SR.5, 25 May 1993 at para. 21). Canada reconfirmed this position in 1998, noting that the decisions of the Supreme Court of Canada in *Slaight*, supra and *Irwin Toy v. A.-G. Quebec* [1989] 1 S.C.R. 1038 confirm that the Charter may be interpreted to protect ICESCR rights and to guarantee that people are not to be deprived of basic necessities (Government of Canada, *Responses to the Supplementary Questions to Canada’s Third Report on the International Covenant on Economic, Social and Cultural Rights*, UN Doc. HR/CESCR/NONE/98/8, October 1998) at 33.

¹⁵ Toward the end of the three year moratorium on section 15, in 1985, the federal government established the Parliamentary Committee on Equality Rights, Chaired by Patrick Boyer, MP, to

hold consultations and make recommendations for changes in federal legislation, policies and programs to conform with section 15. Bruce Porter (2005) documented the submissions, in “20 Years of Equality Rights: Reclaiming Expectations.” As Porter demonstrated by reviewing the Minutes of the Proceedings of the Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs (April 17, 1985), many people argued that section 15 imposes positive obligations on governments, in particular to address socio-economic disadvantage. For example, the National Action Committee on the Status of Women argued that section 15 “imposes a positive duty on the federal government as well as provincial governments to provide equal benefit of the law, meaning that its use of funds and legislation must equally benefit women” (NACSW 1985: A-142).

¹⁶ Porter, 2005 notes that Lynn Smith argued that section 15 signaled and required a paradigm shift. (Smith 1986: 368) In “Egalite et droits a L’Egalite”, in the same publication as Smith, Francine Fournier (1986: 25) emphasized the commonality of the right to equality in the *Québec Charter of Rights and Freedoms* with the equality rights in section 15 of the *Canadian Charter*. Both, she argued, incorporated not only civil and political rights but also economic, social and cultural rights.

Policies, measures and legislation aimed at ensuring a more equal and therefore a more equitable distribution of wealth must go hand in hand with those promoting the fight against discrimination if a society is to be built which respects equality rights both from the point of view of civil and political rights and from the point of view of social, economic, and cultural rights (pp. 25-26).

Anne Bayefsky (1986: 24), in her article of the same year “Defining Equality Rights” similarly argued that the concept of equality embedded in the term “equal benefit of the law” went beyond traditional notions of non-discrimination to include positive obligations to ensure that social programs are not only provided in a non-discriminatory manner, but also that they are adequate to meet the needs of disadvantaged groups.

This understanding of a goal or purpose of “equal benefit of the law” in section 15 is consistent with the modern Canadian conception of the capacities and responsibilities of government. We are not burdened with visions of the equality Lincoln sought. Minimum standards of welfare - welfare payments, subsidized housing, unemployment insurance, public health insurance, legal aid - are expectations which distinguish us from American society, even now.

¹⁷ Some argue that the idea of what constitutes citizenship is being recast (Mosher et al. 2005: 2).

¹⁸ Some, like Stephen Kennet in *Securing the Social Union* (Kennett 1997: 5-6) and Robin Boadway in “Should the Canadian Federation be Rebalanced?” (Boadway 2003) also argue that national standards are important to efficiency. The efficiency argument is premised on the notion that social policy affects the common internal market, that is the economic union. National standards for the social union can reduce labour market distortions resulting from varied social policies across the provinces. There is a close relationship between economic and social unions

because the health of the economy is supported by a healthy social union. Economist Robin Boadway writes:

[T]here are economic and social objectives that have a national dimension.... These include on the one hand redistributive equity in its various dimensions: social insurance, equality of opportunity, income equality, poverty elimination, and so on.... At the same time, there are objectives of economic efficiency that are particularly national in nature, such as efficiency in the internal economic union (the absence of inter-provincial barriers to the movement of products and factors of production). The national dimension of these principles of redistributive equity and efficiency in the internal economic union have in fact been recognized by the provinces in parallel inter-governmental agreements: the Social Union Framework Agreement (SUFA) covering redistributive equity and the Agreement on Internal Trade (AIT) covering national efficiency.

¹⁹ The Canadian Medical Association recommends national standards in the form of a Canada Health Charter.

²⁰ R.S.C. 1985, C-1 [repealed]. (The CAP Act.)

²¹ Provincial grievances about unilateral federal cuts to transfers are legitimate. In 1990, the federal government, in order to reduce the federal budget deficit, decided to cut expenditures and limit the growth of payments made to financially stronger provinces under CAP. This change was embodied in the *Government Expenditures Restraint Act*. The “cap on CAP” placed a five percent annual cap on the growth of federal contributions to the three “have” provinces of British Columbia, Alberta and Ontario. Under CAP, the federal government had entered into cost-sharing agreements with these three (and the other seven) provinces, under which the federal government had undertaken to pay 50 percent of the costs incurred by the provinces in carrying out provincial welfare programs that met the conditions stipulated in the CAP legislation. The practical effect of the amending legislation was that the federal government reneged on its obligations under the agreements. The amending legislation was challenged on a variety of grounds, all of which were rejected by the Supreme Court of Canada. *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

²² See, for example, the position of the Canadian Feminist Alliance for International Action set out in the CST Roundtable paper at <www.fafia-afai.org>.

²³ This position was adopted by the Canadian Feminist Alliance for International Action after a Roundtable on the CST in which representatives of the Native Women’s Association of Canada participated.

²⁴ The Liberal government did display more enthusiasm for its role in social policy between 2004 and 2006 when it was in a minority position.

²⁵ Caragata (2003: 562) as quoted by LeRoy et al. (2004).

²⁶ See “The Fiscal Balance in Canada: The Facts”(Department of Finance 2004). See also the series of papers commissioned by the Department of Finance that reach the same conclusion (for example Matier et al. 2001).

²⁷ We first provided a brief history of Canada’s social programs and an analysis of the impact of the *Budget Implementation Act* of 1995 in *Women and the Equality Deficit*. An updated version here provides the background for the debate regarding the CST. The earlier account has been relied on by the National Association of Women and the Law and the Canadian Feminist Alliance for International Action in their submissions to United Nations treaty bodies, including the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women. We are among the authors of those submissions.

²⁸ See *CAP Act*, s. 6(2)(a).

²⁹ *CAP Act*, s. 2(a).

³⁰ The Cap Act stated that the provincial plan must “take into account” the “basic requirements of the person.” These words have been interpreted by the Supreme Court of Canada as indicating actual provision of an amount that is “compatible or consistent with” an individual’s basic requirements, not mere “consideration” of basic requirements. *Finlay v. Canada (Minister of Finance)* (1993), 101 D.L.R. (4th) 567 at 576, 1 S.C.R. 1080, 150 N.R. 81, 63 F.T.R. 99n, 2 D.M.P.L. 203 [*Finlay*].

³¹ *CAP Act*, s. 6(2)(c).

³² *CAP Act*, s. 6(2)(e).

³³ There are many documented problems with workfare schemes, including requiring welfare recipients to work for no wages or for substandard wages alongside regular employees who receive wages and benefits that meet labour standards requirements. See, for example, *Québec (Ministère du Tourisme) c. Lambert* (No 3) (1996), 29 C.H.R.R. D/246 (T.D.P.Q.) in which a Quebec court ruled that M. Lambert, who was a social assistance recipient, was discriminated against based on social condition by being required to work in a government department for less than minimum wage.

³⁴ There were other incentives too for the provinces to adhere to the standards. In effect, CAP also created for persons in need a right of access to the courts to obtain review of the substantive adequacy of welfare payments made by a province. This was established in the case of *Finlay v. Canada (Minister of Finance)* [1986], 2 S.C.R.607, which arose in Manitoba. The Supreme Court of Canada held that possible violations of CAP were reviewable by the courts at the behest of welfare beneficiaries. Although the Court was not prepared to grant standing to Jim Finlay as a matter of right, he was nonetheless granted standing, on the basis of the public interest in compliance with the CAP standards. Moreover, the Court explicitly recognized that welfare recipients have a direct, personal interest in provincial compliance with CAP standards. However, this CAP enforcement mechanism was cumbersome in that it did not, in itself, confer on welfare beneficiaries rights and remedies as against provincial governments. Where a

provincial government was alleged to be in non-compliance with CAP funding conditions, the welfare beneficiary's cause of action lay against the federal government for having made an unauthorized payment to the province. The shortcoming of this approach is that the welfare recipient was in a funding relationship, not with the federal government, but rather with the provincial government. It is the provincial government that actually controls the funds that go to social assistance recipients. And yet, CAP did not give welfare recipients the ability to go to court to compel provincial governments to make payments in accordance with CAP. Awkward and indirect as this CAP enforcement mechanism was, it nonetheless gave the beneficiaries of social assistance programs an avenue of legal redress, when CAP protections were violated. To clarify, the *Finlay* avenue of redress arose directly out of CAP, and related to the terms and conditions of funding agreements between the federal government and the provinces. It must not be confused with provincial welfare appeal mechanisms which CAP obligated provincial governments to provide, and which gave welfare recipients an avenue of redress against provincial government officials who did not properly interpret and apply provincial welfare legislation.

³⁵ *Canada Assistance Plans Regulations*, C.R.C. 1978, c. 382, s. 13.

³⁶ There was no requirement in the CHST that provinces have appeal procedures. Provinces have retained appeal procedures, but in some provinces, like British Columbia, they have been significantly truncated.

³⁷ See endnote 21.

³⁸ The provinces appealed the “cap on CAP.” In *Reference Re: Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 58 B.C.L.R. (2d) 1, 1 Admin. L.R. (2d) 1, 6 W.W.R. 1 [*Re CAP*], the Supreme Court of Canada held that CAP could be unilaterally amended by the Parliament of Canada, and that the federal government of the day could not bind Parliament so as to preclude it from making such a legislative amendment in the future. The effect of this decision was to allow the federal government to depart from the 50-50 cost-sharing formula, which it did by capping its contributions to certain provinces in 1990.

³⁹ The Canada Health and Social Transfer remained in place until 2004, when it was split into two transfers: the Canada Health Transfer and the Canada Social Transfer. As part of the Health Accord, first ministers agreed to create separate transfers, “thereby enhancing the transparency and accountability of federal support for health while continuing to provide provinces and territories with the flexibility to allocate funds among social programs according to their respective priorities” (Department of Finance 2004).

⁴⁰ Quebec chose to remain outside of the SUFA, because it considers the federal government's spending power an intrusion on its sovereignty.

⁴¹ This is a significant restatement of section 36 of the Constitution, which guarantees Canadians access to essential services “of reasonable quality” not “reasonably comparable quality.”

⁴² Communiqué on Health (September 11, 2000); Agreement on a Dispute Avoidance and Resolution process around the Canada Health Act (April 24, 2002); Health Care Renewal Accord (February, 2003); A Ten-Year Plan to Strengthen Health Care (September 16, 2004). See Social Union Framework Agreement at <www.socialunion.ca>.

⁴³ For more information on the meaning of these principles see Goelman et al. (2005).

⁴⁴ It is important to note some differences from province to province regarding civil legal aid. Despite the cuts to the transfer that has provided funds for civil legal aid, Ontario provides broader civil legal aid coverage than most other jurisdictions. Nonetheless, in its latest report, Legal Aid Ontario (2006: 1 and 17) stated that it is turning away more clients than ever before and cannot maintain the current level of service with the current level of funding. Legal Aid Ontario said that new funding for civil legal aid is essential.

⁴⁵ Section 13(3) of the *Budget Implementation Act* 1995, S.C. 1995, c. 17.

⁴⁶ [2002] 4 S.C.R. 429, 2002 SCC 84.

⁴⁷ In 2003 there was a small increase in rates. A family of four headed by a single parent received \$21.24 more than in 2002 (BC Reg 286/2003).

⁴⁸ See BC Re. 479.1976, Schedule B, s. 14 and BC Re. 58/2002, Schedule 2, s. 14(b).

⁴⁹ *Employment and Assistance Act*, S.B.C. 2002, c. 40 [*EA Act*], s.8, and *Employment and Assistance Regulation*, BC Reg. 331/2003 [*EA Regulation*], s. 18. Some people are exempted from the requirement for two years of employment.

⁵⁰ *Employment and Assistance Regulation*, BC Reg. 331/2003 [*EA Regulation*], s. 3. Some people are exempted from having to do the three-week work search.

⁵¹ BC Reg. 331/2003 [*EA Regulation*], s. 29.

⁵² *EA Regulation*, s. 29(4)(b); *Income Assistance Regulation*, BC Reg. 75/97, s. 6(2).

⁵³ *EA Regulation*, s. 27. This rule applies to every recipient of welfare, except for those classified as unemployable. Not included within the 24-month limit are months in which a recipient is pregnant; under 19 years of age, or aged 65 and older; a child in the home of a relative; in a training program approved by the government; receiving a reduced amount of welfare, because her spouse or someone with whom she lives or shares assets has reached the 24 month limit for receiving welfare; classified as a person with disabilities or person with persistent multiple barriers to employment; a single parent caring for a child, foster child or child in the home of a relative who is under 3 years old; a single parent caring for a child, a child in the home of a relative, or a foster child who has a mental or physical condition that requires her to be at home; not eligible for welfare because of her immigrant status; or temporarily excused by the government from seeking work. Rather than having their benefits cut altogether, the regulation

provides that parents with children over three years old will have their benefits cut by \$100 per month. *EA Regulation* ss. 27 and 29.

⁵⁴ Honourable Stan Hagen. Debates of the Legislative Assembly (2004: 10037).

⁵⁵ Wallace et al. (2006a: 6) explained that only some of the decrease in the welfare caseload can be explained by an improved labour market.

We would expect fewer people to need welfare when times are good and jobs are plentiful, just as we would expect more people to need help when unemployment is high. However, the number of people receiving welfare shrank even when the unemployment rate was going up in 2002. The labour market then improved, but according to economic analysis conducted for this study, this turnaround can explain only about 50 per cent of the caseload decline. The other half is due to the government's policy changes.

⁵⁶ There were 140,587 clients receiving welfare in December 2005. Most of them were on temporary assistance, that is, they were not receiving disability benefits. Of these 49 percent were single-parent families, most of which were mother-led, 8 percent were two-parent families, 4 percent were couples without children, 15 percent were single women and 24 percent were single men (British Columbia 2005).

⁵⁷ Eligibility requirements have been tightened across Canada, with disproportionate negative impacts on women. A recent national, longitudinal study of those who left welfare showed that one of four reasons for declines in the number of those receiving welfare was "the tightening of eligibility rules that may have resulted in the exit of some people who weren't prepared to enter the labour market" (Frenette and Picot 2003: 17).

⁵⁸ The 22 percent cut to social assistance rates was made in 1995. A decade later, in 2005, social assistance rates were increased by three percent.

⁵⁹ Kimberly Rogers was convicted of welfare fraud for receiving a student loan while also receiving welfare benefits, and sentenced to house arrest. Despite being in the late stages of pregnancy she was denied all benefits in the preliminary decision, and received only minimal support upon appeal. "Isolated, in her eighth month of pregnancy, with an uncertain future at best, and unable to leave her apartment, Ms Rogers died of a prescription drug overdose during a sweltering heat wave in mid-August 2001" (Chunn and Gavigan 2004). The lifetime ineligibility for welfare as a penalty for welfare fraud that was provided for in *Ontario Works Act, 1997, O. Reg 134/98 Section 36* was repealed after the coroner's inquest into Kimberly Rogers death recommended this. Temporary bans were also eliminated. However, three and six month bans for non-compliance with "participation agreements" remain.

⁶⁰ Section 3(2)(d) of the *Legal Services Society Act*, R.S.B.C. 1996, c. 256. This was repealed and replaced by the *Legal Services Society Act*, S.B.C. 2002, c. 30, s. 28, effective May 9, 2002.

⁶¹ The provincial government in British Columbia collects considerably more money than it spends on legal aid every year. It receives both funding from the federal government, and the revenue from a 7.5 percent tax on legal services in the province that had been earmarked for legal aid (Brewin and Stephens 2004 16-17).

⁶² Letter from Attorney General Geoff Plant, dated November 17, 2003, in possession of the BC CEDAW Group.

⁶³ [2004] 3 S.C.R. 381 [*NAPE*].

⁶⁴ [2002] 4 S.C.R. 429 [*Gosselin*].

⁶⁵ S.N. 1991, c. 3 [*Public Sector Act*].

⁶⁶ As aids to the interpretation of section 15, international human rights instruments that obligate Canada to remedy sex-based discrimination in wages were invoked by NAPE. The Association also argued that the rights violation was not reasonably and demonstrably justified pursuant to section 1 of the Charter, relying on the well-established framework for section 1 analysis, which holds that the government respondent bears a heavy onus to demonstrate through evidence and argument that the infringement of Charter rights is justified by a “pressing and substantial objective” and that the means are proportional to the objective. The Association also contended that reducing government expenditures is not sufficiently important to justify overriding Charter rights, and emphasized that the respondent had not shown that it had considered reasonable alternatives. The Association underscored the requirement on the respondent to adduce evidence of its section 1 justification and disputed that the respondent had discharged its onerous burden. It pointed to the fact that the government did not present any witnesses to establish that the circumstance in which the restraint measures were instituted was an “extraordinary” financial crisis or that government had considered fully less rights-impairing alternatives.

⁶⁷ 1960, c. 44 [*Bill of Rights*]. Under the Bill of Rights, the Supreme Court of Canada ruled in 1973 that Jeanette Lavell and Yvonne Bedard were not discriminated against by section 12(1)(b) of the *Indian Act*. At that time the *Indian Act* provided that men who married non-Indian women conferred their Indian status on their wives and children, while Indian women who married non-Indian men lost their Indian status and their ability to confer it on their children. The Supreme Court ruled that they were not discriminated against, because there was no guarantee of equality “under” the law in the Bill of Rights. The women had all been treated the same “before” the law. This failure to address the substance of discrimination embedded in laws, and the concentration on the mere application or administration of the law, has been discredited. Both women and courts now expect section 15 of the Charter to address the substance of laws, and their effects, not just their wording.

⁶⁸ Oral argument, respondent.

⁶⁹ While Newfoundland repeatedly referred to the 1988-91 pay equity payments as “deferred”, the government in fact simply erased its obligation to pay women public servants pay equity for this period.

⁷⁰ Emphasis in original.

⁷¹ (2003) 190 B.C.A.C. 187, 2003 BCCA 663 at para. 70.

⁷² This is the phrasing used by Bastarache J. Similarly, at para. 334, Arbour J. put it this way: “This is the amount that was deemed by the legislature itself to be sufficient to meet the ‘ordinary needs’ of a single adult.” At para. 372, Arbour J. stated:

On \$170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montréal Metropolitan Area was approximately \$237 to \$412/month, depending on the location. Two-bedroom apartments went for about \$368 to \$463/month. As a result, while some welfare recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5,000 young adults lived on the streets of the Montréal Metropolitan Area. Arthur Sandborn, a social worker, testified that young welfare recipients would often combine their funds and share a small apartment. After paying rent however, very little money was left to pay for the other basic necessities of life, including hot water, electricity and food. No telephone meant further marginalization and made job hunting very difficult, as did the inability to afford suitable clothes and transportation.

⁷³ R.R.Q., c. A-16, r. 1, s. 29(a).

⁷⁴ *Constitution Act 1982* (U.K.), 1982, c. 11.

⁷⁵ Oral argument, intervenor.

⁷⁶ The goal of the table is not so much to attribute particular arguments to particular governments, nor to provide an exhaustive list of arguments, but rather to illustrate a pattern of argumentation that is common to many Charter cases, particularly section 15 equality claims. There is a considerable degree of overlap between arguments made by respondent governments and government intervenors. Unless otherwise indicated, in *NAPE* and *Gosselin*, the arguments were advanced by the respondents. Arguments that were emphasized by government intervenors are noted.

⁷⁷ (1998), 38 O.R. (3d) 577 (C.A.) at 42.

⁷⁸ [1986] 1 S.C.R. 103 [*Oakes*].

⁷⁹ [1995] 3 S.C.R. 199, cited with approval by Iacobucci J. in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 126.

⁸⁰ The critique of *Gosselin* that follows is taken from Brodsky (2003).

⁸¹ L’Heureux-Dubé J. also emphasized the importance of maintaining the analytical distinction between sections 15 and 1 in *Gosselin* at paras. 112-13. She said:

The fact that a legislature intends to *assist* the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them: *Lavoie v. Canada*, 2002 SCC 23, at paras. 5, per McLachlin C.J. and L’Heureux-Dubé J., dissenting, and at para. 51, per Bastarache J.

Of course, benign legislative intent may aid in saving a discriminatory distinction at section 1, but that is a separate inquiry. In the earliest moments of its *Charter* jurisprudence, the Court insisted that the analysis of the right at issue should be kept separate from the inquiry into an impugned distinction’s justification: *R. v. Oakes*, [1986] 1 S.C.R. 103; and *Andrews S.C.R.*, *infra* note 67 at p.182. As we enter the third decade of the *Charter*’s existence, I see no reason to depart from this fundamental division. Moreover, I am unable to imagine how a departure could result in anything but a weakening of the equality guarantee.

⁸² What the majority says about this is worrisome. In *Gosselin*, McLachlin C.J. said (*Gosselin*: paras. 54-56):

It may well be that some under-30s fell through the cracks of the system and suffered poverty. However, absent concrete evidence, it is difficult to infer from this that the program failed to correspond to the actual needs of under-30s. I find no basis to interfere with the trial judge’s conclusion that the record here simply does not support the contention of adverse effect on younger welfare recipients. This makes it difficult to conclude that the effect of the program did not correspond to the actual situation of welfare recipients under 30.

I add two comments. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Charter*. The situation of those people who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law [v. Canada (Minister of Employment and Immigration)]*, [1999] 1 S.C.R. 497 [*Law*], we should not demand “that legislation must always correspond perfectly with social reality in order to comply with section 15(1) of the *Charter*.” Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution (*Law*: para. 105). No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program’s cracks does not show that the law fails to consider the overall needs and circumstances of the

group of individuals affected or that distinctions contained in the law amount to discrimination in the substantives sense intended by section 15(1).

Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a “rational basis” because it is “[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs” (at para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and common sense. With respect, this standard is too high. Again, this is primarily a disagreement as to evidence, not as to fundamental approach. The legislator is entitled to proceed on informed general assumptions without running afoul of section 15, provided that these assumptions are not based on arbitrary and demeaning stereotypes. The idea that younger people may have an easier time finding employment than older people is not such a stereotype. Indeed, it was relied on in *Law* to justify providing younger widows and widowers with a lesser survivor’s benefit.

⁸³ This point was made by Bastarache J. He also identified a number of other reasons that the criterion of minimal impairment was not satisfied (*Gosselin*: paras. 272, 276-84).

⁸⁴ This phrase is used by Arbour J.

⁸⁵ We have written about this more extensively in Brodsky and Day (2002: 185).

⁸⁶ Bastarache J. critiques this general notion (*Gosselin*: para. 250).

⁸⁷ [1988] 5 W.W.R. 446 (Sask. C.A.).

⁸⁸ R.S.Q., chapter C-12 [*Québec Charter*].

⁸⁹ For an overview of significant Quebec cases concerning discrimination a based on the ground of social condition, and an analysis of the proposal to add “social condition” as a new ground in the *Canadian Human Rights Act* R.S., 1985, c. H-6 [*Human Rights Act*] see Day and Brodsky (1999).

⁹⁰ (1998), 34 C.H.R.R. D/1 (Ont.Bd. Inq.).

⁹¹ R.S.O. 1990, c. H.19 [*Ontario Code*].

⁹² The Board found that the application of income criteria had not been shown by the respondent landlords to be reasonable or bona fide. Nor did the respondents show that not being permitted to use income criteria to screen tenants would constitute an undue hardship. The Board declared that the use of rent-to-income ratios and minimum income criteria violate sections 2(1), 4, 9 and

11 of the *Ontario Code*, whether used alone or in conjunction with other selection criteria or requirements.

⁹³ (2000), 38 C.H.R.R. D/251 (Ont. Bd.Inq.).

⁹⁴ (2002), 43 C.H.R.R. D/379 (Ont. Bd.Inq.).

⁹⁵ (2003), 47 C.H.R.R. D/236, 2003 HRTO 17.

⁹⁶ (2004), 50 C.H.R.R. D/196 (Alta. H.R.P.), aff'd *Alberta (Minister of Human Resources and Employment) v. Alberta (Human Rights, Citizenship and Multiculturalism Commission)* (2005), CHRR Doc. 05-313, 2005 ABQB 363. This decision was overturned at the Alberta Court of Appeal. See *Alberta (Human Resources and Employment) v. Alberta (Human Rights and Citizenship Comm.)* (2006), CHRR Doc. 06-631, 2006 ABCA 235. The Alberta Court of Appeal relied on the analysis in *Gosselin* [2002] 4 S.C.R. 429, discussed earlier in this chapter.

⁹⁷ Weller lost his employment in Saskatchewan, returned home to Edmonton, and moved in with his mother, to whom he paid room and board. He applied for social assistance and was given a payment of \$230 per month to cover food, clothing, transportation, etc. But he was denied the shelter allowance of \$168 per month for a single person, because he was living in the home of a relative. Alberta Human Resources and Employment did not pay shelter allowances to persons living with "blood relatives." The government said it believed that it was normal for a person to be taken in by a family member, and that family responsibility should be fostered.

⁹⁸ (1997), 30 C.H.R.R. D/262 (B.C.H.R.T.) [*Chipperfield*].

⁹⁹ (1994), 21 C.H.R.R. D/211 (Sask. C.A.); aff'd [1996] 3 S.C.R. 566, 27 C.H.R.R. 87.

¹⁰⁰ [1989] 1 S.C.R. 1219, 10 C.H.R.R. D/6183.

¹⁰¹ [1999] 3 S.C.R. 3, 35 C.H.R.R. D/257 [*Meiorin*].

¹⁰² The leading case concerning the duty to accommodate in the provision of public services is *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; (1999), 36 C.H.R.R. D/129.

¹⁰³ (No. 4) (2004), 49 C.H.R.R. D/348, 2004 BCHRT 58; aff'd *British Columbia v. Hutchinson (No. 2)* (2005), CHRR Doc. 05-640, 2005 BCSC 1421 [*Hutchinson*].

¹⁰⁴ [2004] 3 S.C.R. 657, 2004 SCC 78 at para 41.

¹⁰⁵ (2005), CHRR Doc. 05-737, 2005 BCHRT 580 [*Moore*].

¹⁰⁶ The Tribunal cites *Auton* at paras. 45-46 on this point.

¹⁰⁷ [1997] 3 S.C.R. 624.

¹⁰⁸ With regard to the jurisprudence, in *Gosselin*, a majority of the Supreme Court of Canada held that there was no violation of section 45 of the Quebec Charter. Section 45 is the strongest guarantee of a right to assistance known to human rights legislation in Canada:

Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

¹⁰⁹ GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [*ICESCR*].

¹¹⁰ GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16) 52, UN Doc. A/6316 (1966) [*ICCPR*].

¹¹¹ GA Res. 34/180, UN GAOR, 34th Sess. (Supp. No. 46) UN Doc. A/34/46 (1982) Can. T.S. 1982 No. 31. [*CEDAW*].

¹¹² GA Res. 2106 (XX), Annex, 20 UN GAOR (Supp. No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [*ICERD*].

¹¹³ GA Res. 44/25, Annex, 44 UN GAOR (Supp. No. 49) at 167, UN Doc. A/44/49 (1989) (entered into force Sept. 2 1990) [*ICRC*].

¹¹⁴ (Oral Argument, Canada).

¹¹⁵ United Nations, Treaty Series, vol. 1155, p. 331.

¹¹⁶ For a detailed account of women's efforts to engage governments in a meaningful follow-up process to the 2003 CEDAW review, see Day (Forthcoming).

¹¹⁷ c. 11 [*Constitution*].

¹¹⁸ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].

¹¹⁹ Under section 93(4) the federal government also has the power to enact laws to implement constitutional powers in relation to denominational schools if the provinces fail to do so, though this power has rarely been used.

¹²⁰ [1997] 3 S.C.R. 624 [*Eldridge*] at para. 25.

¹²¹ [1982] S.C.R. 112.

¹²² [2005] 1 S.C.R. 791, 2005 SCC 35 [*Chaoulli*].

¹²³ In *Chaoulli*, the constitutional authority of the federal government to establish national standards in the *Canada Health Act* was not challenged. Rather, the challenge was to the provincial government's jurisdiction to prohibit private health insurance, which was found not to

infringe the federal government's jurisdiction in relation to the criminal law aspect of health. However, it is interesting to note that, at para. 17, Deschamps J. characterized the *Canada Health Act* as "only a general framework that leaves considerable latitude to the provinces."

¹²⁴ In *Reference Re Adoption Act (Ontario)*, [1938] S.C.R. 398, the Court held that a direct social service provision lies within provincial jurisdiction. In *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] 2 S.C.R. 669, 2005 SCC 56 [*Maternity Benefits Reference*], Deschamps J., while upholding the federal maternity benefits provisions, as a form of employment income replacement, said at para. 77 that social programs fall within provincial jurisdiction.

¹²⁵ In the 1950s, the federal government's constitutional authority to provide family allowances under the *Family Allowance Act* S.C. 1944–45, c. 40 was challenged, but it was held to be a constitutional use of the federal spending power in *Angers v. Minister of National Revenue*, [1957] Ex. C.R. 83.

¹²⁶ The federal government's authority to provide unemployment insurance directly was successfully challenged in the 1930s, because jurisdiction over insurance was understood to reside with the provinces. See *Canada (Attorney General) v. Ontario (Attorney General)*, [1936] S.C.R. 427, 3 D.L.R. 644 (Reference re the Employment and Social Insurance Act) [*UI Reference* SCC]; *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 355, 1 D.L.R. 684 (P.C.) (Reference re The Employment and Social Insurance Act, 1935) [*UI Reference* Privy Council].

¹²⁷ R.S.C. 1985, c. F-8.

¹²⁸ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. See also *Re Canada Assistance; YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532, 59 D.L.R. (4th) 694; *Finlay v. Canada*, [1993] 1 S.C.R. 1080; *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (1997), 138 F.T.R. 275, aff'd (2000), 187 D.L.R. (4th) 741 (F.C.A.); *Canada Mortgage and House Corp. v. Iness* (2002), 43 C.H.R.R. D/401, aff'd (2004), 70 O.R. (3d) 148, 49 C.H.R.R. D/29 (C.A.), which recognize the constitutionality of federal government spending statutes, including in the areas of social assistance and housing.

¹²⁹ (1986), 29 D.L.R. (4th) 394 (Alta. Q.B.), [*Winterhaven Stables* trial decision]; aff'd (1988), 53 D.L.R. (4th) 413 (Alta. C.A.) [*Winterhaven Stables* Court of Appeal].

¹³⁰ *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] 2 S.C.R. 669, 2005 SCC 56 [*Maternity Benefits Reference*] at paras. 9-10.

¹³¹ [2004] 3 S.C.R. 698, 2004 SCC 79 at para. 23, cited with approval in the *Maternity Benefits Reference* at para. 9.

¹³² [2005] 2 S.C.R. 669, 2005 SCC 56.

¹³³ The Court rejected the view that jurisdiction over employment insurance, a federal head of power, is limited by the parameters defined in the early legislation. The Court concluded that on a generous and purposive interpretation of the federal power over employment insurance, the provision of income replacement benefits does not trench on provincial jurisdiction over property and civil rights, although the provinces have a general power in relation to civil rights, and accordingly are responsible for establishing most of the rules that are needed to protect the jobs of pregnant women. The Court said (*Maternity Benefits Reference*: para. 68):

In pith and substance, maternity benefits are a mechanism for providing replacement income during an interruption of work. This is consistent with the essence of the federal jurisdiction over unemployment insurance, namely the establishment of a public insurance program the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market by paying income replacement benefits in the event of an interruption of employment.

¹³⁴ The argument has been very well developed by Sujit Choudhry (2002). Choudhry's conclusion is that the evolution of the national concern doctrine in more recent jurisprudence of the Supreme Court of Canada calls for a re-examination of the federal government's authority to legislate in relation to social policy. In this paper, we have not advanced an argument for a comprehensive federal scheme of social welfare. As we see it, this is an interesting proposal insofar as it relates to a federal benefit such as a guaranteed annual income, which the federal government has the authority to institute as part of the tax system. However, even if the federal government were to expand its role in income support through a guaranteed annual income for example, there would remain the question of how national standards are established and maintained with respect to services such as daycare and civil legal aid that are not generally considered to be part of a guaranteed annual income. An argument that the federal government can assume responsibility for all social service delivery is beyond the goal of this paper. Nor have we developed an argument that the POGG power could support mandatory federal regulation without spending. But this is because of potential difficulties in the federal government regulating service delivery, not because an argument for a federal income support program such as a guaranteed annual income is not legally sustainable.

Our task is the more modest one of defending the federal government's role in establishing conditions on transfers of funds for the purpose of ensuring Canada's compliance with section 36(1)(c) of the Constitution.

¹³⁵ *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 [*Crown Zellerbach*]. In this decision at para. 33, the Court said that to qualify as addressing a "national concern" a federal intervention must have "a singleness, distinctiveness and indivisibility that clearly distinguishes it from provincial concerns and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the *Constitution*." In our view, national standards such as those contained in CAP and those we propose, have a singleness, distinctiveness and indivisibility that distinguish them from program design and delivery. The scale of their impact on decisions about program design is not irreconcilable with provincial jurisdiction over benefit provision.

¹³⁶ Choudhry (2002: 234 and 237) also referred to *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [*General Motors*], for the proposition that in cases of provincial inability, Parliament possesses the power to regulate intra-provincial economic activity.

¹³⁷ It is also possible to draw a tighter link to *Crown Zellerbach* than we have, taking a stricter approach to the provincial inability test. Hogg (1997: 17-14) took a strict approach.

[T]he most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces. A subject-matter of legislation which has this characteristic has the necessary national dimension or concern to justify invocation of the POGG power.

In turn, Choudhry (2002: 224), using an economics analysis, argued that the logic of the *Crown Zellerbach* decision has implications for the constitutional authority of the federal government to regulate in respect of social assistance and related programs. The failure of one province to maintain adequate standards can indeed have grave consequences for the residents of other provinces, because such failure can initiate a “race to the bottom.” Choudhry explained that in the case of redistributive programs such as social assistance, economists have long understood the risks of races to the bottom faced by federal states. Choudhry argued that this problem, inherent in redistributive programs in a federal state, fulfills the provincial inability test and can indicate a proper place for federal legislation pursuant to the POGG power.

¹³⁸ This title is borrowed, with appreciation, from Barbara Cameron (forthcoming).

¹³⁹ Courchene made this point a decade ago (1995: 34).

¹⁴⁰ R.S.C. 1985, c. F-8.

¹⁴¹ From the Subcommittee on Fiscal Imbalance of the Standing Committee on Finance (2005: 43, Appendix B, Chart 2).

¹⁴² Fooks and Maslove (2004) surveyed various mechanisms of accountability.

¹⁴³ See *An Act to Combat Poverty*, R.S.Q. chapter L-7, s. 23, regarding the composition of the Advisory Committee; and section 36 regarding the composition of an “Observatory,” which is “a place of observation, research and exchange devoted to providing dependable and objective information on matters concerning poverty and social exclusion.”

¹⁴⁴ The drafters of the 1992 Alternative Social Charter assigned these roles to a social rights council. The Alternative Social Charter, endorsed by a broad coalition of concerned citizens, organizations and constitutional experts, was developed in response to the social charter proposed by the Government of Ontario at the time of the Charlottetown Round of Constitutional Talks. As Ontario’s proposal was a weak statement of principles only, non-governmental

organizations developed an alternative social charter. It was a more detailed and rights-oriented proposal and included two accountability bodies — a social rights council and a social rights tribunal. The social rights council was envisioned as a public oversight body with expertise in the social policy field. See Bakan and Schneiderman (1992: 157-259).

¹⁴⁵ See *An Act to Combat Poverty*, ss.22-34 and ss.35-44. We note, however, that the provisions of the Act creating these bodies are not yet in force, and so they have not yet been established by the Government of Quebec.

¹⁴⁶ The New Democratic Party in its Dissenting Opinion to the Finance Subcommittee on Fiscal Imbalance, recommended that a Federal-Provincial-Territorial Fiscal Secretariat be created “to coordinate ongoing research and analysis of the equalization program and to recommend modifications, as needed, reporting regularly to each level of government and subject to Parliamentary scrutiny.” It recommended further that this Secretariat set up mechanisms “to develop common principles and objectives for social transfers that would be agreed to by all parties through a broad discussion and engagement with Canadians in an attempt to avoid a race to the bottom on social standards across the country.” The New Democratic Party envisions a multi-government mechanism for evaluating the adequacy of fiscal arrangements to support social programs, and for fostering citizen engagement in the development of standards to govern those social programs (Subcommittee on Fiscal Imbalance 2005: 69).

¹⁴⁷ We note that in *ACCESS*, Thomas Courchene proposed to attach a dispute resolution mechanism to his Convention on the Canadian Economic and Social System, similar to that in the Agreement on Internal Trade. He recommended a model that would permit complaints to be brought forward by governments or citizens to a dispute-resolution panel that could recommend changes, including repeal of laws, if that was necessary to comply with the terms of the Convention (Courchene 1996).

¹⁴⁸ It is important to note that some are worried that this dispute resolution process may allow provinces to escape the stricter provisions of sections 14 and 15 of the *Canada Health Act* until the “third party” dispute resolution panel has completed its work. The Canadian Centre for Policy Alternative argues that the federal government is to “enforce the Canada Health Act, not to bend over backward to avoid such enforcement” (CCPA 2004). Under sections 14 and 15 of the *Canada Health Act*, if the Minister is of the opinion the health plan provided by a province is not operated by a non-profit public authority that provides (a) comprehensive (b) universal (c) portable and (d) accessible coverage, the Minister, after negotiating with the province to remedy the deficiency, must if unsuccessful refer the matter to the Governor in Council for action, including reduction or withholding of the CHST.

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