BRIEFING NOTE

for the UN Special Rapporteur on the Right to Food Mission to Canada
Ottawa: May 7 2012

Justice and the Right to Food in Canada: The Systemic Denial of Effective Remedies and What Needs to be Done about it

Key Points

Justice lawyers should be encouraged to promote interpretations of the Charter which protect the right to food. In the past, they have promoted interpretations that are inconsistent with the obligation to provide effective remedies under the Charter. The Charter is not going to be amended, at least not in the foreseeable future, so the struggle for the protection of the right to food as a constitutional right in Canada is an interpretative struggle. In the particular historical and jurisprudential context of Canada, there is ample scope in the broadly framed rights in the Charter to ensure that the right to food is fully protected under the Charter - not simply as a minimal requirement of survival, but as subject to the standard of reasonableness and progressive realization in line with the maximum of available resources standard in the ICESCR.

In the past, Canadian courts and human rights experts have made important contributions internationally to the understanding of substantive equality as encompassing a range of positive obligations on governments to ensure that vulnerable groups are not denied equal enjoyment of social rights such as the right to food. However, the substantive approaches to equality for which Canada has been respected internationally have not been applied to address what is clearly a crisis disproportionately affecting equality-seeking groups. The Supreme Court of Canada has denied leave to appeal in important cases involving poverty and equality jurisprudence in recent years threatens Canada's historic commitment to substantive equality. Similarly, the right to security of the person and the right to life can be applied, as they were by Justice Lousie Arbour when she was a Supreme Court Justice here, to include protection of the right to food and other social and economic rights. Government lawyers should be be promoting Jusitce Arbour's approach when they appear before courts and tribunals, rather than trying to defeat it.

Governments and their lawyers should be supporting the argument that equality rights in s.15 of the Charter include protection from discrimination and stigmatization on the grounds of "social condition" of poverty. This has been consistently recommended by the CESCR in reviews of Canada. Stigmatization of the poor is a critical issue in Canada and has accompanied many of the most draconian cuts and attacks on social rights in recent years.

Governments and their counsel should be promoting a standard of "reasonableness" under both section 1 of the Charter and in administrative law which is consistent with ensuring effective remedies to violations of the right to food and with the 2(1) of the ICESCR. Such positions would be in accordance with existing Supreme Court of Canada jurisprudence.

Constitutional interpretation:

In its submissions to United Nations (UN) treaty bodies, the Canadian Government has affirmed that the *Canadian Charter of Rights and Freedoms* is capable of being interpreted as guaranteeing the right to

the means necessary for an adequate standard of living as protected by the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[1] The Canadian judiciary has affirmed in its jurisprudence that international human rights norms constitute persuasive sources for constitutional and statutory interpretation in Canada. The following are examples of jurisprudence that affirms that Canadian law should be interpreted in accordance with international legal standards including rights protected under the ICESCR such as the right to adequate food.

Case	**Comment**
Baker v Canada (Minister of Citizenship and Immigration) 1999 SCC, Justice L'Heureux-Dubé for the majority	"the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review… [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred." (para 70)
R v Ewanchuk, 1999 SCC, L'Heureux-Dubé	"Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect In particular, s. 15 (the equality provision) and s.7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity." (para 73)
Reference Re Public Service Employee Relations Act (Alberta), 1987 SCC, Chief Justice Dickson in dissent (position later adopted by majority in *Slaight Communications v Davidson*	"The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the full benefit of the *Charter's* protection… The *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified." (para 59) "The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions." (para 57)
Slaight Communications v Davidson 1989 SCC	The Court pointed to Canada's ratification of the *ICESCR* as evidence that the right to work must be considered a fundamental human right, to be balanced in that case against the right to freedom of expression explicitly guaranteed under the *Charter* (page 1056-7)
National corn growers assn. v. Canada (Import tribunal), 1990 Justice Gonthier for the majority	"In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations"

Given this body of jurisprudence it the Canadian judiciary should be encouraged by Justice lawyers to interpret Canadian law in a manner that conforms with Canada's commitments under the ICESCR to ensure the right to food. While rights claimants routinely refer to the ICESCR and other international human rights treaties to guide the interpretation of the Canadian Charter, Canadian governments have opposed interpretations of the provisions of the Charter which would provide remedies to homelessness, hunger or other violations of the right to an adequate standard of living. The CESCR has emphasized its ongoing concern about "the practice of governments of urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights, and the inadequate availability of civil legal aid, particularly for economic, social and cultural rights."[2] Not only is it contrary to international standards for Canadian governments to eschew international commitments in the

[1] United Nations Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Fourth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Canada*, UN Doc E/1994/104/Add.17 (1998) [*Third Report*] at para 8.

[2] United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) at para 11.

interpretation and application of domestic law, it is contrary to the principles underlying the *Canadian Charter* to do so.

Case law relating to the interpretation of s. 7 and s. 15 of the *Canadian Charter*

Section 7 of the *Charter* declares that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." While the *Canadian Charter* does not specifically protect economic, social and cultural rights, there are also ample sources of Canadian jurisprudence that would allow Canadian courts to interpret the section 7 guarantee of life, liberty and security of the person as also protecting a right to an adequate standard of living and the right to adequate food. In its submission to the Committee on Economic Social and Cultural rights in its section periodic review, the Canadian government assured the Committee that "[w]hile the guarantee of security of the person under section 7 of the Charter might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life."[3]

Case	Comment
Irwin Toy v Quebec (AG), 1989 SCC	The Court rejected attempts by corporate interests to situate their economic claims within the scope of section 7. However, the Court was careful, to distinguish what it characterized as "corporate-commercial economic rights" from "such rights included in various international covenants, as the rights to social security, equal pay for equal work, adequate food, clothing and shelter." (page 1003-1004)
Gosselin v Quebec (AG), 2002 SCC	"One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits..." I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances." (para 82)
Rodriguez v British Columbia (Attorney General) 1993 SCC	Security of the person, has both physical and psychological dimensions. "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person." (para 136)
Canada (Attorney General) v. PHS Community Services Society (*Insite*), 2011 SCC	"Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out… Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation [of s. 7] is even clearer" (para 93)
New Brunswick (Minister of Health and Community Services) v G(J), 1999 SCC	Section 7 is not only implicated in a criminal/judicial context: "For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility." The court should interpret s. 7 through an equality rights lens in order "to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society." (para 115)
Chaoulli v Quebec (AG), 2005 SCC	majority of the Court in *Chaoulli* found that it was the failure by the provincial government to ensure access to healthcare of "reasonable" quality within a "reasonable" time that engaged the right to life and security of the person and triggered the application of section 7
Federated Anti-Poverty Groups of BC v Vancouver (City), 2002 British Columbia Superior Court	"I conclude that the ability to provide for one's self (and at the same time deliver the "message") is an interest that falls within the ambit of the s. 7 provision of the necessity of life. Without the ability to provide for those necessities, the entire ambit of other constitutionally protected rights becomes meaningless" (para 201-202)

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

Rodriguez v. British Columbia (Attorney General), 1993 SCC	Section 7 is "intrinsically concerned with the well-being of the living person" ... "based upon respect for the intrinsic value of human life and on the inherent dignity of every human being"
Vriend v Alberta, 1998 SCC	"The application of the *Charter* is not restricted to situations where the government actively encroaches on rights" (para 60)

Section 15 of the *Charter* guarantees every Canadian the right to equality before and under the law and equal benefit of the law. It is well documented that in Canada, poverty and the inability of individuals to access basic necessities of life such as food disproportionately affects historically disadvantaged groups such as women, children, immigrants, people with mental and physical disabilities and aboriginal people. The Supreme Court of Canada has repeatedly affirmed that section 15 of the *Charter* protects substantive equality which recognizes that "the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[4] Furthermore the Court conducts their equality analysis in a contextual manner and examines the "nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society's treatment of that group"; specifically, whether persons with the characteristics at issue are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked.[5] Also, the Supreme Court has affirmed that section 15 is in many ways a remedial provision designed not only to eliminate distinctions but gives rise to positive obligation on governments to remedy inequality. Given this approach to s. 15 it is possible to interpret Canadian law in a manner that rectifies the inequality experienced by so many Canadians in relation to access to adequate food.

Stigmatization and Discrimination Against the Poor

Those living in poverty have been struggling since the advent of the Charter's equality guarantee to have discrimination on the grounds of poverty recognized as an "analogous ground" – ie. analogous to enumerated grounds such as race, sex or disability and therefore prohibited under s.15. The Supreme Court of Canada has denied leave to appeal in a number of cases in which this issue has been argued. Lower court jurisprudence has been mixed. Canada is unique for the degree of protection from discrimination against poor people or against those relying on social assistance within human rights legislation. All provincial/territorial human rights legislation contains protections from discrimination on grounds such as "social condition" "receipt of public assistance" or "source of income." The *Canadian Human Rights* Act is the only human rights legislation with no protection from discrimination on the grounds of poverty. A panel appointed by the Minister of Justice to review the Canadian Human Rights Act found, in 2000, "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy" and recommended that "social condition [be included] as a prohibited ground of discrimination in all areas covered by the Act in order to provide protection from discrimination because of disadvantaged socio-economic status"[6] the Canadian government has failed to include poverty/socio-economic status as a prohibited ground of discrimination and thus continues to deny the poor access to legal remedies for the discrimination they face. The CESCR has recommended the inclusion of this ground, as well as enhanced protections of ESC rights in human rights legislation in reviews of Canada since 1993.

[4] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 at para 34.
[5] *Law v Canada* (*Minister of Employment and Immigration*), [1999] 1 SCR 497, 170 DLR (4th) 1 at para 93.
[6] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 105 - 112.

Ultimately, despite this body of jurisprudence that provides a constitutional foundation for those living in poverty to claim that their section 15 and 7 rights have been violated, Canadian governments' litigation positions are inconsistent with Canada's obligations under the *ICESCR* to protect these rights and to ensure effective remedies for violations of these rights. For example, in the *Insite* case relating to the section 7 implications of withdrawing legal status of a supervised injection clinic in British Columbia, the Canadian government conceded that drug and alcohol consumption was an illness that implicated individual's health and life yet argued that the decision to allow supervised injection is a policy question, and thus immune from *Charter* review. The government further argued that drug addiction is a choice and thus the government is not causally responsible for the deprivations of the client's security of person and life.

Case law specific to adequacy of social security/assistance and the right to food

Social security is not a constitutionally protected right in Canada. The adequacy of social security benefits is directly related to poverty and the ability of individuals to realize the right to adequate food. The Government of Ontario has made repeated reference to its social assistance legislation as implementing the right to social security and the right to an adequate standard of living. In its 2004[7] and 2005[8] report to the Committee on Economic, Social and Cultural Rights (CESCR), the province highlighted the *Social Assistance Reform Act* that created the *Ontario Works Act* as evidence of its compliance with article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR): the right to social security. Furthermore, the provincial government stated in reference to *Ontario Works* that "social assistance rates are calculated to meet the basic needs of individuals and families" and furthermore, that the government is "committed to ensuring that people in need receive adequate benefits."[9] The province also cited *Ontario Works* as the primary source through which it implements article 11 of the Covenant: the right to an adequate standard of living by explaining that "Ontario Works provides financial support for basic needs and shelter primarily for people who are actively taking steps to find and keep employment."

It is the position of many NGOs and civil society organizations in Ontario that, given that Ontario has affirmed its choice to fulfill its international human rights commitments (particularly the right to an adequate standard of living and the right to adequate social security) principally through the enactment of the *Ontario Works Act,* the adequacy of this legislation must be assessed according to international standards. In this regard the level of social assistance must be adequate to ensure that all recipients have financial access to food, shelter and clothing.

In *C.B. v Ontario,* a case that was before the Ontario Human Rights Tribunal, Human rights complaints were filed simultaneously by a number of single mothers relying on social assistance, alleging that Ontario's shelter allowance policies keep social assistance recipients from accessing housing. The complainants argued that they were being discriminated against on the ground of receipt of social assistance by the failure of the government to accommodate the needs, in the absence of undue hardship, of social assistance recipients. The complaint was filed prior to eradication of the Human Rights Commission's "gatekeeper" authority, whereby the Commission had authority to bar claimants' access to the Human Rights Tribunal in cases which the Commission did not wish to proceed to a tribunal. The case

[7] United Nations Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Fourth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Canada,* UN Doc E/C.12/4/Add.15, (2004) [*Fourth Report*] at para 1425. 1433. 1434, 1470.
[8] United Nations Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, Canada,* UN Doc E/C.12/CAN/5 (2005) [*Fifth Report*] at para 327.

was 'dismissed' by the Ontario Human Rights Commission under its gatekeeper discretion. Astonishingly, the Commission found the complaints to be "frivolous".

The Ontario Human Rights Commission, under its new role, recognized the legitimacy of the claims. In its report *Right at Home*[10], the Commission stated:

> [S]ection 11 provides that a right under Part I of the *Code* is infringed where persons identified by a*Code* ground are excluded because of neutral rules or requirements that are not reasonable and*bona fide* in the circumstances. This determination requires a consideration of whether the needs of the group can be accommodated without undue hardship.19 This means that applications may be filed against a wide range of responding parties, including government and housing providers, based on the combination of sections 2, 9 and 11. For example, applications may be filed against government where shelter allowances are so low that people in receipt of social assistance are unable to afford housing. It could also be argued that this is a violation of section 1 of the *Code*, which prohibits discrimination in services. Similarly, arguments may be made that section 2 is violated when the denial of services by a support-service provider results in a person's loss of housing because they are viewed as being unable to live independently. These kinds of situations give rise to serious human rights issues that the Commission will consider as it works towards developing its policy on human rights and rental housing and fulfilling its new mandate.

In *Broomer v Ontario (Attorney General)* (2002),[11] the applicants sought an injunction to prevent the government from halting their social assistance payments while they challenged the constitutional validity of the provincial legislation that imposed a lifetime ban on any person convicted of an offence in relation to the receipt of social assistance. Prior to this case proceeding to trial on its merits, the impugned provision was repealed by the government. While the case ultimately did not proceed to trial, in granting the injunction, the court held that due in part to the potential health consequences to the family unit (primarily children) due to the inability to access nutritionally inadequate food if social assistance payments were terminated, the family faced irreparable harm. In addition, the court commented that the irreparable harm faced by the applicants provided the basis for the granting of the injunction.[12]

In *Gosselin v. Québec (Attorney General)* (1999), the Supreme Court considered a challenge to grossly inadequate levels of social assistance benefits in Quebec that were paid to employable recipients not enrolled in workfare programs. In her dissenting judgment (supported by Justice L'Heureux-Dubé), Justice Arbour found that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities.[13] Although the majority found such an interpretation to be inapplicable on the facts of *Gosselin*, viewing the impugned welfare regime as a defensible means of encouraging young people to become part of the workforce, the majority of the Court nonetheless left open the possibility that this interpretation of section 7 could be applied in a future case. Ultimately, the majority of the Court held that the inadequacy of the government's welfare benefits did not amount to a deprivation of Louise Gosselin's life, liberty and security of the person because the deprivations she faced were not causally connected to the state action, and were caused by her lack of participation in workfare or training programs. In the view of 4 justices and of supportive intervening groups, the evidence showed that Ms. Gosselin could not realistically have participated in these programs.

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[10] Ontario Human Rights Commission, *Right at Home: Report on the Consultation on human rights and rental housing in Ontario*, May 28 2008, available at: http://www.ohrc.on.ca/en/resources/discussion_consultation/housingconsultationreport/pdf
[11] *Broomer v Ontario (Attorney General)***,** [2002] OJ No 2196 (QL).
[12] *Broomer* at para 52.
[13] *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 332, [2002] 4 SCR 429 [*Gosselin*].

In this case, the evidence showed that the inadequacy of the benefit under the *Regulation* meant that the Appellant was constantly hungry and malnourished and that to get food, she was forced to rely on her family, soup kitchens, church and other charity-run food programs. Also, the inadequate entitlements made it impossible for Gosselin and others in her situation to meet basic needs: to obtain adequate food, clothing, shelter, and to maintain an acceptable standard of physical and mental health. Moreover, it perpetuated and exacerbated the hopelessness, vulnerability to violence, loss of self-esteem, social isolation and immobilization which unmitigated poverty creates. Despite this evidence and the possibility of the *Charter* to provide for the protection of rights recognized under the ICESCR, provincial/territorial governments intervening in the case argued for an interpretation of the Charter that would provide no protection at all from such deprivations. The AG of Canada was not an intervener in this case. The government in the case argued that section 7 only protects against state action intruding on life liberty and security of the person (in a criminal/administrative law context) and does not protect against state inaction that may lead to the same rights deprivations. The government also adopted the position that "The state has no constitutional obligation to adopt measures to promote or ensure the security of persons."

The "reasonableness" standard – toward convergence of international and domestic norms

In addition to promoting interpretations of the section 15 and 7 of the Charter to include the right to food as a component of life and security of the person and equal enjoyment of the right as a component of substantive equality under s. 15, the Attorney General should be promoting interpretations of section one of the Canadian Charter, and the concept of "reasonable limits" consistent with international human rights law and the right to food.

Section 1 of the *Charter* provides as follows:

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

The Supreme Court has affirmed that section 1 plays a dual role, both as a limit to rights and a guarantee of rights.[14] As Justice Arbour observed in *Gosselin*, "[w]e sometimes lose sight of the primary function of s. 1 – to constitutionally guarantee rights – focussed as we are on the section's limiting function."[15] Thus while section 1 provides a means by which governments can justify infringements of *Charter* rights, it also serves as a guarantee that laws, policies, government programs and administrative decision-makers will limit rights and balance competing societal interests in a "reasonable" manner. In this sense, section 1 serves as a potential domestic source for the international law obligation to adopt reasonable measures, commensurate with available resources and in light of competing needs, to implement and realize social and economic rights.[16]

International human rights law generally, and the *ICESCR* in particular, are central to the values that underlie section 1. In *Slaight Communications*,[17] the Court found that an adjudicator's order requiring an employer to provide a positive letter of reference to a wrongfully-dismissed employee was a justifiable infringement of the employer's right to freedom of expression because it was consistent with Canada's

[14] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 at p 135 [*Oakes*].
[15] *Gosselin*, *supra* note 13 at para 352.
[16] Jackman & Porter, *Making the Connection*, *supra* note **Error! Bookmark not defined.** at 41-46.
[17] *Slaight Communications,supra* note **Error! Bookmark not defined.**.

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

> Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights* … and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one … Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.[18]

The assessment of what positive measures are reasonably required to accommodate disability or other characteristics of disadvantaged groups, in line with similar obligations under domestic human rights legislation, has been situated by the Supreme Court of Canada within the section 1 guarantee of reasonable limits.[19] In the *Eldridge* case[20], for example, the Court considered a challenge brought by deaf patients in British Columbia to the provincial government's failure to provide sign language interpretation services within the publicly funded health insurance system. Having determined that the failure to provide interpretation services violated the section 15 of the *Charter*, the Supreme Court considered the cost of providing interpreter services to deaf patients in relation to the overall provincial health care budget. The Court concluded that the government's refusal to fund such services was not reasonable.[21] In the course of its section 1 analysis the Court stated that "[r]easonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits."[22]

The Supreme Court reaffirmed this principle more recently in the case of *Multani*, finding that "correspondence between the legal principles [of "reasonable limits" and "reasonable accommodation] is logical.[23] In a more recent case, *Doré v. Barreau du Québec,* the Court suggested that in cases raising Charter equality claims of this nature, the standard of reasonable accommodation will be considered under an administrative law standard of reasonableness rather than under section 1 as had been the case in *Multani*. However, the Court emphasized that Charter human rights values must inform the administrative law standard. This area of law is thus in considerable flux, but whether the standard of reasonableness is considered under administrative law standards or under the reasonable limits test in section one of the Charter, the Court has been clear that reasonable decision-making must be consistent with fundamental human rights and Charter values.

The standard of reasonable accommodation as it has been developed under human rights legislation in Canada is a rigorous standard in relation to the allocation of necessary budgetary measures. In *Central Okanagan School District v Renaud*,[24] the Supreme Court of Canada considered the 'undue hardship' analysis under human rights legislation and rejected the *de minimus* test adopted in some American cases, suggesting that it "seems particularly inappropriate in the Canadian context."[25]

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[18] *Ibid* at 1056-1057.
[19] *Schachter v Canada*, [1992] 2 SCR 679 at 709, 93 DLR (4th) 1; *Egan v Canada*, [1995] 2 SCR 513 at para 99; *Nova Scotia (Workers' Compensation Board) v Martin,* 2003 SCC 54 at para 109, [2003] 2 SCR 504.
[20] *Eldridge*, *supra* note **Error! Bookmark not defined.**.
[21] *Ibid.*
[22] *Ibid* at para 79.
[23] *Multani*,*supra* note **Error! Bookmark not defined.** at para 53.
[24] *Central Okanagan School District v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577.
[25] *Ibid* at para 19.

The Supreme Court of Canada has recognized that, in these kinds of "weighing" exercises, a certain amount of judicial deference is mandated, since "there may be no obviously correct or obviously wrong solution, but a **range of options** each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives."[26] Recognizing that there may be a range of policy measures which are reasonable does not, however, justify blanket deference to legislatures in relation to budgetary allocations or socio-economic policy. Such deference would be inconsistent with the constitutionally mandated role of courts to assess whether governments have acted within the range of reasonable or constitutional options, in accordance with *Charter* or human rights values. Thus in *NAPE*, Justice Binnie rejected the Court of Appeal's suggestion that budgetary decisions are inherently political and should be subject to a unique deferential standard based on the separation of powers.[27] Writing for the Court, Justice Binnie noted that such a broad deference in relation to budgetary decisions or socio-economic policy would essentially transfer the judicial mandate of assessing reasonableness under section 1 onto the legislature.[28]

In this regard, the Supreme Court of Canada's approach to 'deference' under section 1 is very similar the standard set out under the *OP-ICESCR*, which directs the Committee on Economic, Social and Cultural Rights adjudicating complaints to "consider the reasonableness of the steps taken by the State Party" and to "bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."[29]

In light of the standard that the Court has adopted for the assessment of reasonable measures and budgetary allocations, particularly where these are required for the protection of the rights of vulnerable groups, it is hard to imagine how Canadian governments could successfully argue that their refusal to adopt measures to address increasing hunger in the midst of affluence constitutes a reasonable limit under section 1.

The Supreme Court's recent jurisprudence has emphasized the authority of a wide range of administrative actors to address *Charter* claims. The Court's jurisprudence has recognized the role of administrative tribunals in this regard for many years. In *Slaight Communications*, the primary responsibility for balancing the right to freedom of expression with the right to work under the *ICESCR* was found to lie with an appointed adjudicator exercising conferred decision-making authority under the *Canada Labour Code*.[30] In *Baker*, the exercise of reasonable discretion, which in that case involved balancing the best interests of children against anticipated health care and social assistance costs that might be incurred by their parent who was being threatened with deportation, was, in the Supreme Court's view, within the discretionary authority granted to an immigration officer. Justice l'Heureux-Dubé found in that case that the immigration officer providing an opinion to the federal Minister was obliged to make a reasonable decision, in conformity with international human rights principles.[31] In *Eldridge* the Supreme Court found that relevant legislation did not prevent decision-makers from taking positive measures to provide interpreter services. On that basis, the Court found that it was the decision-making by those administering hospitals and medical services, rather than provincial health legislation *per se*, which violated section 15 in that case.[32] Most recently, in the *Insite* case, the Court again rejected a claim that the law itself was unconstitutional in favour of a finding that the exercise of conferred discretion, in that case by the Minister, was inconsistent with the *Charter*. Thus the Court found that the Minister was obliged to have granted a

[26] *Ibid* at para 83.
[27] *Newfoundland (Treasury Board) v NAPE*, 2002 NLCA 72, 221 DLR (4th) 513.
[28] *NAPE*, *supra* note **Error! Bookmark not defined.** at para 103.
[29] *OP-ICESCR, supra* note **Error! Bookmark not defined.** at art 8(4).
[30] *Slaight, supra* note 17.
[31] *Baker*, *supra* note **Error! Bookmark not defined.** at paras 64-71.
[32] *Eldridge*, *supra* note **Error! Bookmark not defined.** at paras 22-24.

discretionary exemption based on a proper consideration of the evidence of the needs of vulnerable groups for the service.[33] This jurisprudence places a significant obligation on governments to properly train administrative decision-makers in Canada's obligations under international human rights law, as well as ensuring that its own executive decisions conform with the standard of reasonableness and consistency with international human rights values.

In designing decision-making structures for a right to food strategy, it is a basic requirement of the *Charter* that those who are making decisions pursuant to conferred statutory authority operate within a human rights framework, informed by international human rights and *Charter* values, so as to ensure that reasonable steps are taken to ensure equality, dignity and security and to balance competing needs and interests.[34] Reasonable priority must be accorded to those who are most in need, and whose *Charter* rights would be infringed by a failure to act. Section 1 requires that administrative decision-makers, acting in the context of programs and strategies to address hunger must be authorized and required to engage in assessments of what measures may be reasonably required to ensure both the substantive and participatory rights of those whose rights are at stake. Like the courts, such delegated decision-makers must adopt a rigorous standard in relation to the allocation of necessary resources where *Charter* rights are at stake.

Case law specific to the right to adequate food:

In *Ball v Ontario (Community and Social Services*) (17 February 2010),[35] the applicants challenged the special diet allowances established by regulation under social assistance regimes. The applicant argued that the dietary allowance discriminated on the basis of disability by not funding, or funding on a significantly disproportionate basis the disability related dietary needs of some groups and not others. In holding that the failure of the regulations to fund the special dietary needs amounted to discrimination on the basis of disability, the tribunal explained with reference to the purpose of the social benefits scheme:

> " It is significant, in my view, that the special diet allowance is one of the four "budgetary requirements" components of social assistance, together with basic needs, the shelter allowance and the northern allowance. **All four amounts are designed to fund basic expenses of living, such as food, shelter, toiletries, clothing, etc.** The housing and shelter allowances are available to all persons on the programs. The shelter allowance funds housing costs, while the basic needs amount is a global amount to fund other basic expenses.
>
> The other two allowances – the special diet allowance and the northern allowance – are available only to members of certain groups. It appears that they recognize exceptional basic expenses for these individuals. The special diet allowance recognizes that the basic dietary requirements of certain persons lead to higher costs than others. **It is designed to assist in alleviating the disadvantage of persons with disabilities and to support substantive equality by funding certain additional dietary costs that result from disability** (emphasis added).

In this case, ultimately, the Human Rights Tribunal ordered those administering social assistance plans to provide special diet benefits for individuals with hypoproteinemia, hyperlipidemia, hypertension, and obesity in accordance with *Human Rights Code* principles.

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[33] *Insite, supra* note **Error! Bookmark not defined.**.
[34] The application of section 1 of the Charter to administrative decision-makers exercising conferred discretion was reaffirmed by the majority in *Multani*, *supra* note **Error! Bookmark not defined.** at paras 22-23.
[35] *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360, available at: http://www.canlii.org/en/on/onhrt/doc/2010/2010hrto360/2010hrto360.html

In an unreported decision by the Social Benefits Tribunal (SBT) (case # *SBT 0302-00974R*, 31 August 2004) which hears appeals from individuals regarding social assistance, the tribunal held that the intent of the regulations was that a person in an emergency hostel should get some basic coverage for food and personal needs as well as lodging. The $3/day allowance given to the appellant by the shelter was clearly insufficient. He was entitled to the personal needs allowance in the amount of $112/month.

In an unreported decision by the Social Benefits Tribunal (*SBT 0505-04259*, 1 December 2005), the tribunal held that the appellant was entitled to a housing maintenance benefit to pay for repairs to his stove and stove gas line. The appellant's health would be harmed by staying in his residence without a proper place to cook the food he needed to live within the strictures of his diabetic diet, and the appellant had done all that he reasonably could to find other resources, given his disabilities. There was only one reasonable interpretation of the regulation: "The ability to remain in a residence reasonably should include the ability to cook food, particularly, if one has a health condition that requires a balanced diet."