

# Rights Based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework\*

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## A. Introduction

The interdependence and overlap between socio-economic rights recognized under international human rights treaties ratified by Canada, including the right to adequate housing and to an adequate standard of living guaranteed by the *International Covenant on Economic, Social and Cultural Rights*,<sup>1</sup> and the rights that are explicitly included in the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> such as the right to life, liberty and security of the person and the right to equality are widely acknowledged.<sup>3</sup> As Bruce Porter notes in Chapter 1, an enhanced understanding of the indivisibility of these rights was a key factor in overcoming the historic divide between civil and

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<sup>1</sup> 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>3</sup> Louise Arbour, “Freedom From Want – From Charity to Entitlement” (LaFontaine-Baldwin Lecture delivered in Quebec City, 3 March 2005), online: Unhchr.ch www.unhchr.ch [Arbour, “Freedom from Want”]; David Robitaille, *Normativité, interprétation et justification des droits économiques et sociaux: les cas québécois et sud-africain* (Brussels: Éditions Bruylant, 2011); John Currie, “International Human Rights Law in the Supreme Court’s *Charter* Jurisprudence: Commitment, Retrenchment and Retreat in No Particular Order” in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat?* (Markham, ON: LexisNexis, 2010) [Rodgers & McIntyre, *The Supreme Court of Canada and Social Justice*] 458; Margot Young, “Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v. Adams* (BCSC)” (2009-2010) 164 BC Studies 103 [Young, “Rights, Homeless, and Social Change”]; Malcolm Langford, “Justiciability of Social Rights” in Malcolm Langford, ed, *Social Rights Jurisprudence* (Cambridge: Cambridge University Press, 2008) 3; Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14:1 CJWL 185.

political rights and economic and social rights at the international level.<sup>4</sup> The UN Human Rights Committee has affirmed that positive measures are required to address homelessness in Canada in order to respect right to life guarantees under article 6 of the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>5</sup> The Committee has also pointed out that poverty disproportionately affects women and other disadvantaged groups in Canada and that, as a consequence, social program cuts have had a discriminatory impact on those groups.<sup>6</sup> From an international standpoint, Canadian constitutional guarantees are seen to be directly engaged by Canada's failure to implement effective strategies to address poverty and homelessness. As the UN Committee on Economic, Social, and Cultural Rights notes in its *General Comment* on the domestic application of the *ICESCR*, "[t]he existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies."<sup>7</sup>

In its 2009 report, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness*, the Senate Sub-Committee on Cities observes that international human rights continue to be viewed by Canadian

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<sup>4</sup> See Chapter 1. See also Bruce Porter, "International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection," *Ottawa Faculty of Law Working Paper No. 2013-09*, online: CURA <http://socialrightscura.ca> [Porter, "Making the Connection"].

<sup>5</sup> United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee: Canada*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.105, (1999) at para 12 [UNHRCOR, *Concluding Observations*, 1999].

<sup>6</sup> *Ibid* at para 20. See also 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) [UNCESCROR, *Concluding observations*, 2006].

<sup>7</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/24, (1998) at para 4 [UNCESCROR, *General Comment 9*, 1998].

governments as “closer to moral obligations than enforceable rights.”<sup>8</sup> In this context, the Sub-Committee points to the use by Canadian courts of international human rights to interpret the provisions of the *Charter* as the primary means through which Canada’s international human rights obligations achieve domestic legal enforceability.<sup>9</sup> In his dissenting judgment in *Reference Re Public Service Employee Relations Act (Alberta)*, former Chief Justice Dickson declared that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”<sup>10</sup> In applying this interpretive presumption, which was endorsed by the majority in *Slaight Communications v Davidson*<sup>11</sup> and reaffirmed in *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*,<sup>12</sup> the Court has not only considered guarantees with direct counterparts in the *Charter*, such as the right to life or to non-discrimination

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<sup>8</sup> Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, PC) at 69, online: Parliament of Canada www.parl.gc.ca [*In from the Margins*]; see also United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 19th Sess, UN Doc E/C.12/1/Add.31 (1998) at paras 14-15; 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/5 (2006) at para 11(b); Shelagh Day, “Minding the Gap: Human Rights Commitments and Compliance” in Margot Young et al, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 201 [Young, *Poverty*]; Gwen Brodsky, “The Subversion of Human Rights by Governments in Canada” in Young, *Poverty*, *ibid* at 355.

<sup>9</sup> *In from the Margins*, above note 8 at 69.

<sup>10</sup> *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 59 [*Alberta Reference*]. See generally Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Markham: Butterworths, 1994) at 330.

<sup>11</sup> *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 [*Slaight Communications*]. See also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70 [*Baker*]; *R v Ewanchuk*, [1999] 1 SCR 330, at para 73 [*Ewanchuk*].

<sup>12</sup> *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70 [*Health Services Assn*].

under the *ICCPR*.<sup>13</sup> It has also made reference to socio-economic rights as part of the unified international human rights landscape within which *Charter* interpretation must be situated. In *Slaight Communications*,<sup>14</sup> the Court pointed to Canada's ratification of the *ICESCR* as evidence that the right to work is a fundamental human right that had to be balanced against the *Charter* guarantee of freedom of expression in that case. In relying on the *ICESCR*, the Court endorsed Dickson CJ's statement in the *Alberta Reference* that:

The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions.<sup>15</sup>

In the words of McLachlin CJ and Lebel J in *Health Services Bargaining Assn*, “the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.”<sup>16</sup>

The present chapter explores the extent to which a domestic constitutional framework exists in Canada for a rights-based approach to housing and anti-poverty strategies, compatible with and informed by the international human rights law and jurisprudence outlined in Chapter 1.<sup>17</sup> In particular, this chapter will focus on three key *Charter* provisions for the protection of the right to adequate housing and to freedom from poverty: first, the right to life, liberty and security of the person guaranteed under section 7 of the *Charter*; second, the right to equal protection and equal benefit of the law under section 15; and third, the obligation to ensure that any limits on

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<sup>13</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

<sup>14</sup> *Slaight Communications*, above note 11 at 1056-57.

<sup>15</sup> *Alberta Reference*, above note 10 at para 57. See also Craig Scott, “Reaching Beyond (Without Abandoning) the Category of ‘Economic, Social and Cultural Rights’” (1999) 21:3 Hum Rts Q 633 at 648; Martha Jackman & Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214-15.

<sup>16</sup> *Health Services Assn*, above note 12 at para 78.

<sup>17</sup> See Bruce Porter, Chapter 1.

*Charter* rights are reasonable and demonstrably justified, pursuant to section 1.<sup>18</sup>

### **B. Section 7: The Right to Life, Liberty and Security of the Person**

In a lecture delivered at the outset of her mandate as UN High Commissioner on Human Rights, Louise Arbour pointed to the persistence of poverty and gross inequality in Canada and asked the question: “What is it in Canadian society that prevents the poor and marginalized from claiming equal enjoyment to the full range of their rights recognized under law, including economic, social and cultural rights?”<sup>19</sup> In examining how Canadian courts have applied section 7 of the *Charter*<sup>20</sup> in relation to poverty, she concluded that “[t]he first two decades of Charter litigation testify to a certain timidity – both on the part of litigants and the courts – to tackle head on the claims emerging from the right to be free from want.”<sup>21</sup> Almost ten years later, poverty and homelessness cases are still scarce and judges remain reluctant to impose positive obligations on governments to adopt reasonable measures to ensure access to adequate housing and other necessities, in accordance with

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<sup>18</sup> The paper does not address Aboriginal treaty rights under s 35 or the social rights safeguards set out under s 36 of the *Constitution Act, 1982*. For a discussion of social rights issues raised under s 35, see Constance MacIntosh, Chapter 4) and see generally John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010). For a discussion of s 36, see Martha Jackman & Bruce Porter, “Rights-Based Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework,” Ottawa Faculty of Law Working Paper No. 2013-10, online: CURA [www.socialrightscura.ca](http://www.socialrightscura.ca) [Jackman & Porter, “Constitutional Framework”]; Aymen Nader, “Providing Essential “Services: Canada’s Constitutional Commitment under Section 36” (1996) 19:2 Dal LJ 306 (for a discussion of s 36 of the *Constitution Act, 1982*).

<sup>19</sup> Arbour, “Freedom From Want” above note 3.

<sup>20</sup> Section 7 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.”

<sup>21</sup> Arbour, “Freedom From Want” above note 3. See also Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulation: the *Charter* at 25 in an International Perspective” (2007) 45 Osgoode Hall LJ 239 [Arbour & Lafontaine, “Beyond Self-Congratulation”].

the *ICESCR* and other human rights treaties ratified by Canada.<sup>22</sup> The absence of any clear judicial affirmation of the applicability of the right to life, liberty and security of the person in this area has led many to dismiss, or to discount, the claim that section 7 requires governments to take positive measures to address poverty and homelessness.<sup>23</sup> However, as outlined below, the Supreme Court continues to affirm its willingness to entertain such *Charter* claims and the possibility that section 7 protects socio-economic rights.

### 1) Rights to Adequate Housing and Protection from Poverty

In its judgment in *Irwin Toy v Quebec (AG)*, the Supreme Court drew a distinction between “corporate-commercial economic rights” which are excluded from the *Charter*, and “economic rights fundamental to human life or survival”<sup>24</sup> which may fall within the scope of section 7. As Dickson CJ explained,

[I]ower courts have found that the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous.<sup>25</sup>

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<sup>22</sup> Martha Jackman, “Constitutional Castaways: Poverty and the McLachlin Court” and Jennie Abell, “Poverty and Social Justice at the Supreme Court during the McLachlin Years - Slipsliding Away” in Rodgers & McIntyre, *The Supreme Court of Canada and Social Justice*, above note 3, 297 and 257; Kerri Froc, “Is the Rule of Law the Golden Rule? Accessing ‘Justice’ for Canada’s Poor” (2008) *Can Bar Rev* 459 [Froc, “Golden Rule”]; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 *UBC Law Rev* 539; Shelagh Day & Gwen Brodsky, *Women and the Canada Social Transfer: Securing the Social Union* (Ottawa: Status of Women Canada, 2007); David Wiseman, “Methods of Protection of Social and Economic Rights in Canada” in Fons Coomans, ed, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp-Oxford: Intersentia, 2006) 173 [Wiseman, “Social and Economic Rights”].

<sup>23</sup> See for example Andrew Petter, “Wealthcare: The Politics of the *Charter* Revisited” in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) 167.

<sup>24</sup> *Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927 at 1003-4 [*Irwin Toy*].

<sup>25</sup> *Ibid.*

In *Gosselin v Quebec (AG)*, the Supreme Court considered a *Charter* challenge to a provincial regulation that reduced the level of social assistance benefits payable to recipients under the age of thirty by two-thirds, unless they were enrolled in education or workfare programs. In her dissenting judgment in the case, Arbour J 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.<sup>26</sup> Although the majority of the Court viewed the impugned welfare regime as a defensible means of encouraging young people to join the workforce,<sup>27</sup> McLachlin CJ left open the possibility that:

[o]ne day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v Attorney-General for Canada* ... 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.<sup>28</sup>

Security of the person, as defined by the courts, has both physical and psychological dimensions.<sup>29</sup> There is no longer any doubt that section 7 applies well beyond the criminal justice context and that state action that is likely to impair a person's mental and physical health engages the right to security of the person.<sup>30</sup> In *Chaoulli v Quebec (AG)*, the majority of the Court held that the government's failure to ensure access to health care of "reasonable" quality within a "reasonable" time engaged the right to life and security of the person and thus triggered the application of section 7 and the

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<sup>26</sup> *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 332 [*Gosselin*].

<sup>27</sup> *Ibid* at paras 74 & 83.

<sup>28</sup> *Ibid* at para 82. See also Martha Jackman, « Sommes nous dignes? Légalité et l'arrêt Gosselin » (2006) 17 RFD 161; Gwen Brodsky et al, "Gosselin v Quebec (Attorney General)" (2006) 18:1 CJWL 189; Gwen Brodsky, "Gosselin v. Quebec (Attorney General): Autonomy With a Vengeance" (2003) 15:1 CJWL 194; Shelagh Day et al, *Human Rights Denied: Single Mothers on Social Assistance* (Vancouver: Poverty and Human Rights Centre, 2005).

<sup>29</sup> *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at para 136 [*Rodriguez*]; *Federated Anti-Poverty Groups of BC v Vancouver (City)*, 2002 BCSC 105 at paras 201-2 [*Federated Anti-Poverty Groups*].

<sup>30</sup> *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*]; *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [*G(J)*]; *Rodriguez*, above note 29 at para 21.

equivalent guarantee under Quebec’s *Charter of Rights and Freedoms*.<sup>31</sup> In *Canada (AG) v PHS Community Services Society*, the Court reaffirmed that where a law creates a risk to health, this amounts to a deprivation of the right to security of the person and that “where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.”<sup>32</sup>

With increased understanding of the significant health consequences of homelessness and poverty, it has become obvious that governments’ failure to ensure reasonable access to housing and to an adequate standard of living for disadvantaged groups undermines section 7 interests, certainly as directly as the regulation of private medical insurance at issue in *Chaoulli*.<sup>33</sup> The Mental Health Commission of Canada reported in 2012 that “[p]eople who are homeless more commonly experience serious mental illness, substance abuse, and challenges with stress, coping, and suicidal behavior than the general population [and] mortality among homeless people in Canada is much higher than among the general Canadian population.”<sup>34</sup> The Commission concludes that governments’ reliance on shelters is a “costly and ineffective way to respond to the problem.”<sup>35</sup>

In the *Tanudjaja v Attorney General (Canada)* case,<sup>36</sup> a number of individuals who have experienced homelessness and inadequate housing are arguing that the federal and Ontario governments’ failure to adopt housing strategies violates their *Charter* rights, including to security of the person under section 7. In her Affidavit in support of the *Tanudjaja* claim, Cathy Crowe, a street nurse who has worked with homeless people in Toronto for more than twenty years, describes some of the consequences of homelessness that she has witnessed:

I saw infections and illnesses devastate the lives of homeless people – frostbite injuries, malnutrition, dehydration, pneumonias, chronic diarrhoea, hepatitis, HIV

<sup>31</sup> *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 105 [*Chaoulli*].

<sup>32</sup> *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 93 [*Insite*].

<sup>33</sup> *Chaoulli*, above note 31. See generally David R Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011) 57 McGill LJ 81 at 106-7; Martha Jackman, “*Charter* Review as a Health Care Accountability Mechanism in Canada” (2010) 18 Health LJ 1; Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

<sup>34</sup> Mental Health Commission of Canada, *At Home/Chez Soi: Interim Report* (Ottawa: Mental Health Commission of Canada, September 2012) at 12 [Mental Health Commission, *At Home/Chez Soi*].

<sup>35</sup> *Ibid* at 8.

<sup>36</sup> 2013 ONSC 5410 [*Tanudjaja*].

infection, and skin infections from bedbug bites. For people who live in adequate housing, these conditions are curable or manageable. For homeless people, however, it is much more difficult. The homeless experience greater exposure to upper respiratory disease; more trauma, including violence such as rape; more chronic illness, greater exposure to illness in congregate settings; more exposure to infectious agents and infestations such as lice and bedbugs; suffer more from a greater risk of depression. This is compounded by their reduced access to health care.<sup>37</sup>

Crowe notes that, while these physical illnesses and conditions are difficult enough to treat when people lack adequate housing, treating the emotional and mental effects of homelessness is even more difficult. As she explains “chronic deprivation of privacy, sleep and sense of safety; and living in circumstances of constant stress and violence” leads to “mental and emotional trauma.”<sup>38</sup> Crowe goes on to affirm that these negative health outcomes cannot be dealt with effectively “by programs of support for living on the street, emergency shelters, drop-in programs or counselling and referral services despite the critical need for all these services.”<sup>39</sup> She argues that they can only be addressed by ensuring access to adequate “permanent housing.”<sup>40</sup>

A recent Canadian longitudinal study on the effects of homelessness also found that the negative health outcomes associated with living on the streets or in shelters extend to a much wider segment of the population and also affect those living in inadequate or precarious housing. The results of the study showed that “for every one person sleeping in a shelter there are 23 more people living with housing vulnerability. They are all at risk of devastating health outcomes.”<sup>41</sup> People who are vulnerably housed face the same severe health problems as those who are homeless, including reduced life expectancy, increased chronic health conditions, reduced access to health care, and suicide rates that are twice the national average for men and six

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<sup>37</sup> Cathy Crowe, “Affidavit for *Tanudjaja v Attorney General (Canada)*”, Ont Sup Ct File no CV-10-403688 (2011) at paras 23-24 [Crowe, “Affidavit for *Tanudjaja*”]; see also Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada’s Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing and Health, 2010) [Holton, Gogosis & Hwan, *Housing Vulnerability and Health*].

<sup>38</sup> Crowe, “Affidavit for *Tanudjaja*”, above note 37 at para 26.

<sup>39</sup> *Ibid* at para 44.

<sup>40</sup> *Ibid*.

<sup>41</sup> Holton, Gogosis & Hwan, *Housing Vulnerability and Health*, above note 37 at 4.

times the national average for women.<sup>42</sup> As the Mental Health Commission of Canada concludes: “Living in shelters and on the streets makes it very difficult to take care of one’s health, adhere to treatment routines and move forward in one’s life.”<sup>43</sup>

The damaging effects of poverty on physical and mental health are equally clear. Income-related differences in life expectancy in Canada provide a stark illustration of the importance of poverty as a determinant of health. For men aged twenty-five in 2001, those in the highest income quintile could expect to live 6.9 years longer than those in the poorest; for women, the difference was 4.5 years.<sup>44</sup> Poverty is also associated with higher rates of death and more years of life lost from injury, higher suicide rates, higher rates of strokes and heart attacks, and higher infant mortality rates, among other effects.<sup>45</sup> Beyond its adverse impact on life expectancy, Juha Mikkonen and Dennis Raphael explain why poverty is the single most significant determinant of health in Canada:

Level of income shapes overall living conditions, affects psychological functioning, and influences health-related behaviour such as quality of diet, extent of physical activity, tobacco use, and excessive alcohol use. In Canada, income

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<sup>42</sup> Mental Health Commission, *At Home/Chez Soi*, above note 34 at 11-12; Michael Shapcott, “Housing” in Dennis Raphael, ed, *Social Determinants of Health*, 2d ed (Toronto: Canadian Scholars’ Press, 2008) 221 [Raphael, *Social Determinants*]; Toba Bryant, “Housing and Health: More Than Bricks and Mortar” in Raphael, *Social Determinants*, *ibid* 235; *In from the Margins*, above note 8 at 69; Senate, Standing committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 16, online: Parliament of Canada [www.parl.gc.ca](http://www.parl.gc.ca).

<sup>43</sup> Mental Health Commission, *At Home/Chez Soi*, above note 34 at 10.

<sup>44</sup> Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 192 [Leatherman & Sutherland, *Chartbook*] (to put this in perspective, it is estimated that eliminating all cancers would increase life expectancy in the US by 2.8 years).

<sup>45</sup> See generally Health Disparities Task Group of the Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1-2; Leatherman & Sutherland, *Chartbook*, above note 44 at 192-206; Dennis Raphael, “Social Determinants of Health: An Overview of Concepts and Issues” in Toba Bryant, Dennis Raphael & Marci Rioux, eds, *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed (Toronto: Canadian Scholars’ Press, 2010) 145 at 150-52.

determines the quality of other social determinants of health such as food security, housing and other prerequisites of health.<sup>46</sup>

Raphael concludes that “[p]eople living in poverty experience material and social deprivation, stress, stigma and degradation by others. These experience are clearly seen a threats to health and quality of life.”<sup>47</sup> Given the negative health consequences and adverse impact of poverty and homelessness on physical and psychological integrity, security, dignity, and other interests which the Supreme Court has recognized as falling within the ambit of section 7, it is hard to imagine how these documented effects of government inaction in relation to poverty and homelessness and governments’ ongoing failure to implement effective housing and anti-poverty strategies, as recommended by experts and UN bodies, can reasonably be excluded from section 7 of the *Charter*.

## **2) Principles of Fundamental Justice: Arbitrary Responses to Poverty and Homelessness**

Section 7 requires that any deprivation of the right to life, liberty, or security of the person “must be in accordance with the principles of fundamental justice.” In his judgment in *Reference Re BC Motor Vehicle Act*, Lamer CJ explained that the concept of fundamental justice “involves more than natural justice (which is largely procedural) and includes as well a substantive element.”<sup>48</sup> Factors to be considered include the drafting history of the

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<sup>46</sup> Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 12; *In from the Margins*, above note 8; Nathalie Auger & Carolyne Alix, “Income, Income Distribution, and Health in Canada” in Raphael, *Social Determinants*, above note 42 at 61; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008); Canadian Population Health Initiative, *Reducing Gaps in Health: A Focus on Socio-Economic Status in Urban Canada* (Ottawa: Canadian Institute for Health Information, 2008); Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1-3; National Forum on Health, “Determinants of Health Working Group Synthesis Report” in *Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers*, vol 2, (Ottawa: Minister of Public Works and Government Services, 1997) at 9.

<sup>47</sup> Dennis Raphael, *Poverty in Canada: Implications for Health and Quality of Life*, 2d ed (Toronto: Canadian Scholars’ Press, 2011) at 179 [Raphael, *Poverty in Canada*].

<sup>48</sup> *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 99; *United States v Burns*, 2001 SCC 7 at para 71; *Rodriguez*, above note 29 at 590-91.

*Charter*,<sup>49</sup> Canadian identity and values,<sup>50</sup> and Canada’s international human rights commitments.<sup>51</sup> A core principle of fundamental justice under section 7 is the notion that governments cannot arbitrarily limit rights to life, liberty and security of the person.<sup>52</sup> Prior to the recent *Insite* case,<sup>53</sup> the Supreme Court’s consideration of arbitrariness was largely confined to situations where the government had actively interfered with section 7 rights. The Court had not been called upon to consider whether a government’s failure to take action or to adopt positive measures to protect life, liberty, or security of the person were arbitrary and therefore fundamentally unjust within the meaning of section 7.

In the *Insite* case, the Supreme Court rejected the claim that the federal *Controlled Drugs and Substances Act*,<sup>54</sup> itself, violated section 7.<sup>55</sup> Instead, the Court considered whether the Minister of Health’s failure to grant *Insite*, a safe injection facility located in Downtown Eastside Vancouver, an exemption from the application of the *Act* was in accordance with principles of fundamental justice.<sup>56</sup> Acknowledging that “the jurisprudence on arbitrariness is not entirely settled”<sup>57</sup> the Court considered the alternative approaches it had taken to arbitrariness, including whether the impugned measure is “necessary” to or “inconsistent” with, the state objectives underlying the legislation.<sup>58</sup> Reviewing the overwhelming evidence of the benefits of *Insite*’s safe injection and related health services to those in need of them, and the adverse effects of a failure to ensure the continued provision

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<sup>49</sup> See Bruce Porter, “Expectations of Equality” (2006) 33 Sup Ct L Rev 23 (the drafters and rights holders expected that the *Charter* would impose a new social contract in which new entitlements would be granted to citizens and new (positive) duties imposed on the government to allow for the realization of *Charter* rights) [Porter, “Expectations of Equality”].

<sup>50</sup> *Rodriguez*, above note 29 at 590-91; see generally Martha Jackman, “The Protection of Welfare Rights under the *Charter*” (1988) 20:2 Ottawa L Rev 257 [Jackman, “Welfare Rights”].

<sup>51</sup> *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 23 & 48.

<sup>52</sup> *R v Jones*, [1986] 2 SCR 284 at 303; *Rodriguez*, above note 29 at 203; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 135.

<sup>53</sup> *Insite*, above note 32.

<sup>54</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19.

<sup>55</sup> *Insite*, above note 32 at paras 112-15.

<sup>56</sup> *Ibid* at paras 127-36.

<sup>57</sup> *Ibid* at para 132.

<sup>58</sup> *Ibid* at paras 130-32.

of those services, the Court found that the Minister's failure to grant an exemption "qualifies as arbitrary under both definitions."<sup>59</sup> The Court further concluded that: "[t]he effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."<sup>60</sup>

The Court's decision in *Insite* has significant implications for the application of section 7 to governments' failure to act to protect the life and security of the person of those who are homeless or living in poverty. As Bruce Porter outlines in Chapter 1, UN human rights bodies, housing and poverty experts, and a wide spectrum of civil society have called upon Canadian governments to adopt housing and anti-poverty strategies both as a matter of sound, evidence-based social policy and of domestic and international human rights law.<sup>61</sup> And, as Marie-Ève Sylvestre and Céline Bellot document in Chapter 7,<sup>62</sup> there is mounting evidence of the irrationality of governments' inaction in this area, in light of the health outcomes associated with homelessness and poverty, as well as its fiscal consequences. In her Affidavit in the *Tanudjaja* case,<sup>63</sup> Sylvestre points to the arbitrary and unreasonable nature of current government responses to homelessness. She argues that:

As programmatic responses that addressed the causes of homelessness such as social housing, investment in health care or employment policies, have been reduced or eliminated, governments have adopted unprecedented measures based on the "stigma" of homelessness as a perceived "moral" failure and designed to make homeless people disappear from the public sphere.<sup>64</sup>

By prohibiting behavior linked to homelessness in public spaces, such as parks, subway stations, and sidewalks, governments have criminalized

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<sup>59</sup> *Ibid* at para 131.

<sup>60</sup> *Ibid* at para 133.

<sup>61</sup> See Bruce Porter, Chapter 1.

<sup>62</sup> See Marie-Ève Sylvestre & Céline Bellot, Chapter 7.

<sup>63</sup> *Tanudjaja*, above note 36.

<sup>64</sup> Marie-Ève Sylvestre, "Affidavit for *Tanudjaja v Attorney General (Canada)*", Ont Sup Ct File no CV-10-403688 (2011) at para 27 [Sylvestre, "Affidavit for *Tanudjaja*"]; see also Marie-Ève Sylvestre & Céline Bellot, Chapter 7.

homeless people rather than addressing their need for housing.<sup>65</sup> The result of these punitive measures is, as Sylvestre explains, frequently unwarranted incarceration, as well as the imposition of fines on those who are unable to pay them: “homelessness leads to incarceration, and incarceration, in turn, produces homelessness.”<sup>66</sup> Janet Mosher also questions the rationality of what has, since the mid-nineties, become the dominant approach to poverty in Canada:

Massive reforms to various federal and provincial social policies ... have significantly re-shaped both the physical and ideological landscape of poverty. The day-to-day realities of living in poverty have become harsher; ... welfare benefits have been cut ... eligibility criteria have been tightened, workfare has been introduced and the discourse ... of welfare fraud and the practices connected with its detection have led to increased scrutiny and surveillance of recipients. Police have been given new powers to remove from the streets panhandlers and squeegee workers, who, like welfare recipients, have been demonized as a threat to public order and safety.<sup>67</sup>

These arbitrary governmental responses to the needs of a vulnerable population and the failure to take positive steps to better ensure the protection of life and security of the person of people who are living in poverty and who are homeless are clearly not in accordance with section 7 principles of fundamental justice as interpreted by the Supreme Court, particularly in the *Insite* case.

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<sup>65</sup> *Ibid* at para 28; see also Commission des droits de la personne et des droits de la Jeunesse, *La judiciarisation des personnes itinérantes à Montréal : Un profilage social* (Montreal: Commission des droits de la personne, 2009); Joe Hermer & Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2002) [Hermer & Mosher, *Disorderly People*].

<sup>66</sup> Sylvestre, “Affidavit for *Tanudjaja*”, above note 64 at para 47 (Sylvestre’s conclusions are reinforced by a recent study conducted by the John Howard Society of Toronto, which found that sixty-nine percent of the respondents experienced residential instability in the two years prior to their incarceration; twenty-four percent of them had used a shelter during that period; and twenty-three percent were homeless). See Amber Kellen et al, *Homeless and Jailed: Jailed and Homeless* (Toronto: John Howard Society of Toronto, 2010) at 18-20.

<sup>67</sup> Janet Mosher, “The Shrinking of the Public and Private Spaces of the Poor” in Mosher & Hermer, *Disorderly People*, above note 64 at 41; see also Raphael, *Poverty in Canada*, above note 47 at 354-67.

### 3) Meaningful Participation in Housing and Anti-Poverty Strategies

Section 7 of the *Charter* offers important support for the principle of participation in the design, implementation, monitoring, and evaluation of strategies to address poverty and homelessness, in keeping with the recommendations of UN human rights bodies and civil society organizations in Canada, and as Alana Klein argues in relation to health care in Chapter 6.<sup>68</sup> The Supreme Court has ruled that the principles of fundamental justice under section 7 include the procedural safeguards guaranteed under common law principles of natural justice and fairness.<sup>69</sup> Among these are the right to adequate notice of a decision, the right to respond, and the right to be heard by a fair and impartial decision-maker.<sup>70</sup> In *New Brunswick (Minister of Health and Community Services) v G(J)*, Lamer CJ held that in order to comply with the requirements of fundamental justice, a person “must be able to participate meaningfully” and “effectively” in a decision-making process that engages his or her section 7 rights.<sup>71</sup> On that basis, the Chief Justice concluded that section 7 imposed a positive obligation on the government to provide legal aid to a mother in receipt of social assistance, who was threatened with the loss of custody of her children, and who could not afford a lawyer to represent her.<sup>72</sup>

In addition to participatory rights demanded in individualized decision-making, the way in which a program or policy is implemented at a

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<sup>68</sup> Porter & Jackman, *Making the Connection*, above note 4 at 7-14; Alana Klein, Chapter 6; Martha Jackman, “The Right to Participate in Health Care and Health Resource Allocation Decisions Under Section 7 of the Canadian Charter” (1995/1996) 4:2 Health L Rev 3 [Jackman, “Health Care”].

<sup>69</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 29; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 113; *Singh*, above note 30 at 212-16.

<sup>70</sup> See generally Lorne Sossin, “Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance” (2004) 42:3 Osgoode Hall LJ 1 at 30 & 31 [Sossin, “Discretionary Justice”]; Martha Jackman, “Section 7 of the *Charter* and Health-Care Spending,” in Gregory Marchildon, Tom McIntosh & Pierre-Gerlier Forest eds, *The Fiscal Sustainability of Health Care in Canada* (Toronto: University of Toronto Press, 2004) 110; Jackman, “Health Care”, above note 68 at 5; John M Evans, “The Principles of Fundamental Justice: The Constitution and the Common Law” (1991) 29:1 Osgoode Hall LJ 51; Martha Jackman, “Welfare Rights,” above note 50 at 305-22.

<sup>71</sup> *G(J)*, above note 30 at paras 81 & 83.

<sup>72</sup> *Ibid* at para 107; for a discussion of the broader issue of access to legal aid see Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Ottawa: Canadian Bar Association, 2010).

systemic level may also violate section 7 principles of fundamental justice. In *Wareham v Ontario (Ministry of Community and Social Services)* the Ontario Court of Appeal held that “there is a potential argument to be made that a delay in processing applications for welfare benefits, essential for day-to-day existence and to which the applicants are statutorily entitled, could engage the right to security of the person where that delay has caused serious physical or psychological harm.”<sup>73</sup> The court accepted Lorne Sossin’s view that bureaucratic disenfranchisement includes “structural and situational features of the welfare eligibility process which together have the effect of discouraging applicants and demoralizing recipients” and that this amounts to a violation of procedural fairness guarantees.<sup>74</sup>

In the context of housing and anti-poverty strategies, section 7 principles of fundamental justice should be read as requiring participatory rights of the kind called for under international human rights law. In outlining a human-rights based approach to poverty reduction strategies, the UN High Commissioner for Human Rights has called for States to set targets, benchmarks and priorities in a participatory manner “so that they reflect the concerns and interests of all segments of the society.”<sup>75</sup> Former UN Special Rapporteur on adequate housing, Miloon Kothari, has also emphasized the importance of using participatory mechanisms for accessing necessary information and for providing accountability to stakeholders in the evaluation of housing programs and strategies.<sup>76</sup> In determining the steps a state must take to meet the “reasonableness standard” set out in the *OP-ICESCR*,<sup>77</sup> the *CESCR* has stated that it will examine whether the decision making-process

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<sup>73</sup> *Wareham v Ontario (Ministry of Community and Social Services)*, 2008 ONCA 771 at para 17 [*Wareham*].

<sup>74</sup> Lorne Sossin, “Discretionary Justice”, above note 70 at 399.

<sup>75</sup> United Nations Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) at para 55 [OHCHR, *Guidelines*].

<sup>76</sup> *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, UN Human Rights Council, 4th Sess, UN Doc A/HRC/4/18, (2007).

<sup>77</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) [*OP-ICESCR*].

with regard to the implementation of a policy or program is transparent and participatory.<sup>78</sup>

These types of international human rights law obligations should inform the interpretation and application of the principles of fundamental justice under section 7. Individual dignity, security, and autonomy must be protected through meaningful participation in decision-making at both an individual and broader public policy level. Adequate notice should be provided regarding any changes to housing and poverty-related benefits or programs, ensuring that individuals have a right to be heard by decision makers, a right to appeal decisions, and a right to judicial review.<sup>79</sup> In the broader policy and regulatory setting, participation that meets the requirements of fundamental justice must consist of more than mere consultation and should instead ensure rights-based engagement and access to justice for vulnerable and marginalized groups to ensure that programs and policies respect their rights.

Generalized decisions relating to poverty and homelessness and the allocation of resources and services should be open to hearings and rights-based adjudication and review for compliance with human rights norms, and active steps should be taken to guarantee the inclusion of disadvantaged groups – those whose members are lacking in resources and who do not have an established history of participation, or grounds for confidence in its value. Such measures are required to ensure that collective involvement in decision-making actually results in a more equitable and efficient distribution of decision-making authority, and does not simply reinforce existing decision-making patterns and structures.<sup>80</sup> As Louise Arbour has affirmed, “the possibility for people themselves to claim their human rights entitlements through legal processes is essential so that human rights have meaning for those most at the margins, a vindication of their equal worth and human agency.”<sup>81</sup>

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<sup>78</sup> United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007). See Sandra Liebenberg, “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of ‘Meaningful Engagement’” (2012) 12 African Human Rights Law Journal 1 (for a discussion of meaningful participation requirement in the South African context).

<sup>79</sup> Sossin, “Discretionary Justice,” above note 70; Jackman, “Welfare Rights,” above note 50.

<sup>80</sup> Jackman, “Health Care”, above note 70 at 69.

<sup>81</sup> Arbour, “Freedom from want,” above note 3.

### C. Section 15: The Right to Equal Protection and Benefit of the Law

Civil society organizations in Canada, parliamentary committees and international human rights bodies, have emphasized that strategies to address poverty and homelessness should be informed by an equality rights framework.<sup>82</sup> Grounding such a framework in section 15<sup>83</sup> is critical to addressing the structural and systemic patterns of discrimination and exclusion that underlie these problems and it assists in understanding poverty and homelessness as more than simply a matter of unmet needs but also, fundamentally, as a denial of dignity and rights.<sup>84</sup> The Senate Sub-Committee on Cities notes in its report, *In from the Margins*:

The Charter, while not explicitly recognizing social condition, poverty or homelessness, does guarantee equality rights, with special recognition of the remedial efforts that might be required to ensure the equality of women, visible minorities (people who are not Caucasian), persons with disabilities, and Aboriginal peoples. As the Committee has heard, these groups are all overrepresented among the poor – in terms of both social and economic marginalization.<sup>85</sup>

The Supreme Court’s equality rights jurisprudence has been subject to significant criticism for undermining the commitment to substantive equality that has been a unique strength of Canadian human rights law and section 15

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<sup>82</sup> Porter & Jackman, *Making the Connection*, above note 4.

<sup>83</sup> *Charter*, above note 2 at s 15 (s 15 declares that, (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).

<sup>84</sup> Amartya Sen, “Property and Hunger” (1988) 4:1 *Economics and Philosophy* 57 reprinted in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2005) 402-408.

<sup>85</sup> *In from the Margins*, above note 8 at 69; House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (November 2010) (Chair: Candice Hoepfner) at 2, online: Parliament of Canada www.parl.gc.ca.

of the *Charter*.<sup>86</sup> However, as with section 7, the Court has left the door open to advancing substantive social rights claims under section 15. In light of recent commentary from the Court, there remains a solid conceptual basis for a renewed rights-based approach to poverty and homelessness in Canada. In *R v Kapp*,<sup>87</sup> the Court reiterated the ideal of substantive equality as it was affirmed in *Andrews v Law Society of British Columbia*<sup>88</sup> and it acknowledged the formalism of its analytical framework in *Law v Canada (Minister of Employment and Immigration)*.<sup>89</sup> The Court has abandoned the *Law* analysis in favour of the simplified two-step approach from *Andrews* that asks, first, whether a law, policy or provision creates a distinction on an enumerated or analogous ground and, second, whether that distinction is discriminatory in a substantive sense.<sup>90</sup>

In *Withler v Canada (AG)*,<sup>91</sup> the Court further clarified that finding a section 15 violation does not depend on identifying a particular comparator group that “mirrors” the claimant’s characteristics, as long as the “claimant establishes a distinction based on one or more enumerated or analogous grounds.”<sup>92</sup> The Court recognized that a mirror comparator group analysis “may fail to capture substantive inequality ... – and, indeed, thwart the identification of – the discrimination at which s. 15 is aimed.”<sup>93</sup> The Court went on to affirm that consideration of whether a distinction amounts to

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<sup>86</sup> See Sheila McIntyre, “Timely Interventions: MacKinnon’s Contribution to Canadian Equality Jurisprudence” (2010) 46 *Tulsa Law Review* 81; Margot Young, “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15” in Rodgers & McIntyre, *The Supreme Court of Canada and Social Justice*, above note 3 183; Margot Young, “Why Rights Now? Law and Desperation” in Young, *Poverty*, above note 8, 317; Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis, 2006) (for critiques of recent equality jurisprudence from Canadian courts) [McIntyre & Rodgers, *Diminishing Returns*]; Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

<sup>87</sup> 2008 SCC 41 [*Kapp*].

<sup>88</sup> [1989] 1 SCR 143 at para 34 [*Andrews* cited to SCR].

<sup>89</sup> [1999] 1 SCR 497 [*Law*].

<sup>90</sup> *Kapp*, above note 87 at para 17.

<sup>91</sup> 2011 SCC 12 [*Withler*].

<sup>92</sup> *Ibid* at para 60.

<sup>93</sup> *Ibid*. See Dianne Pothier, “Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What’s the Fairest of Them All?” in McIntyre & Rodgers, *Diminishing Returns*, above note 86 at 135; Diana Majury & Daphne Gilbert, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006) 24 *Windsor YB Access Just* 111.

substantive discrimination should be contextual, rather than rigid, in order to “provide the flexibility required to accommodate claims based on intersecting grounds of discrimination.”<sup>94</sup>

As the Senate Sub-Committee notes in its report, *In from the Margins*, governments’ failure to implement housing and anti-poverty strategies engage the equality rights of groups protected from discrimination on enumerated grounds under section 15, such as women, people with disabilities, Aboriginal people and racialized groups because these groups are over-represented among the poor.<sup>95</sup> However, for the purposes of situating housing and anti-poverty strategies within an equality framework, it is important to consider whether poverty and homelessness should, themselves, be recognized as analogous grounds of discrimination under section 15.<sup>96</sup>

### 1) The “Social Condition” of Poverty and Homelessness

The analogous grounds inquiry must, according to the Supreme Court, be undertaken in a purposive and contextual manner.<sup>97</sup> 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” must be considered;<sup>98</sup> specifically, whether persons with the characteristics at issue are lacking in political power or vulnerable to having their interests overlooked.<sup>99</sup> In *Miron v Trudel*, the Court identified a number of factors that may be considered in determining whether an analogous ground of discrimination should be recognized under section 15, including whether the proposed ground may “serve as a basis for unequal treatment based on stereotypical attributes;” whether it is a source of historical social, political, and economic disadvantage; whether the group experiencing discrimination constitutes a “discrete and insular minority;” and whether the proposed ground is similar to other prohibited forms of discrimination recognized in domestic and

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<sup>94</sup> *Withler*, above note 91 at para 63.

<sup>95</sup> *In from the Margins*, above note 8 at 69-70.

<sup>96</sup> See Kerri Froc, Chapter 3; Wayne MacKay & Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009) [MacKay & Kim, *Social Condition*]; Froc, “Golden Rule”, above note 22; Martha Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law” (1994) 2 Rev Const Stud 76.

<sup>97</sup> *Law*, above note 89 at para 6; *Andrews*, above note 88 at para 46.

<sup>98</sup> *Law*, above note 89 at para 93.

<sup>99</sup> *Andrews*, above note 88 at para 5.

international human rights law.<sup>100</sup> The Court in *Miron* cautioned that “while discriminatory group markers often involve immutable characteristics, they do not necessarily do so.”<sup>101</sup>

In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, the Court broadened the concept of immutability, introducing the notion of “constructive immutability,” linked to identity and prevailing social attitudes.<sup>102</sup> While reiterating that the analogous grounds inquiry must consider the general purpose of section 15, the majority went on to suggest that analogous grounds must either be “actually immutable, like race, or constructively immutable, like religion” and that other factors to be considered in the analogous grounds analysis “may be seen to flow from the central concept of immutable or constructively immutable personal characteristics ...”<sup>103</sup> The Court concluded in *Corbiere* that the distinction between on-reserve and off-reserve residential status “goes to a personal characteristic essential to a band member’s personal identity, which is no less constructively immutable than religion or citizenship.”<sup>104</sup>

There are compelling reasons for recognizing that the socially constructed dimension of homelessness and poverty make these characteristics constructively immutable, in the same way as residential status was found to be in *Corbiere*. A purposive approach must link the economic deprivation associated with homelessness or poverty to the “social condition” or socially constructed characteristics of those who are living in poverty or who are homeless. As Dennis Raphael explains, “[i]n addition to the burdens of living with material and social deprivation – and the stresses associated with these – people living in poverty must deal with the reality that others frequently blame them for their own situation ... The experience of stigma adds to the profound issues that people in poverty must live with.”<sup>105</sup> Quantifiable measures of income level may accurately identify needs that must be addressed. However, understanding how the group’s imputed characteristics are socially constructed, often through stigmatization, stereotyping, and prejudice, brings into focus the social relations and attitudes which accompany and exacerbate physical and material deprivations, and that create and legitimate discriminatory governmental responses to poverty and homelessness.

This social dimension of poverty and homelessness has been recognized in domestic human rights legislation under the prohibited ground

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<sup>100</sup> *Miron v Trudel*, [1995] 2 SCR 418 at paras 144-55 [*Miron*].

<sup>101</sup> *Ibid* at paras 148-149.

<sup>102</sup> [1999] 2 SCR 203 [*Corbiere*].

<sup>103</sup> *Ibid* at para 13.

<sup>104</sup> *Ibid* at para 14.

<sup>105</sup> Raphael, *Poverty in Canada*, above note 47 at 178.

of “social condition.” All provincial and territorial human rights statutes in Canada include protection from discrimination because of “social condition” (New Brunswick, Northwest Territories, Quebec) or a related ground, such as “social origin” (Newfoundland); “source of income” (Alberta, British Columbia, Manitoba, Nova Scotia, Nunavut, and Prince Edward Island); or “receipt of public assistance” (Ontario and Saskatchewan).<sup>106</sup> These grounds have been interpreted broadly to provide protection against discrimination on the basis of poverty, low level of income, reliance on public housing, and homelessness.<sup>107</sup> The only human rights legislation in Canada that does not prohibit discrimination based on social condition or a similar ground is the *Canadian Human Rights Act*.<sup>108</sup> The *Canadian Human Rights Act* Review Panel, chaired by former Supreme Court Justice Gerard LaForest, found there was “ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy.”<sup>109</sup> The Panel recommended “the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the Act in order to provide protection from discrimination because of disadvantaged socio-economic status, including homelessness.”<sup>110</sup>

The socially constructed dimensions of poverty and homelessness have also been recognized as analogous grounds of discrimination under international human rights law. In *General Comment No 20* on non-discrimination, the CESCR identifies a number of grounds of discrimination

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<sup>106</sup> Russel Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, loose-leaf (consulted on 2 June 2010) (Aurora: Canada Law Book, 1996), ch 13:30 [Zinn, *The Law of Human Rights*].

<sup>107</sup> See *Shelter Corp v Ontario (Human Rights Commission)* (2001), 143 OAC 54; *Whittom c Québec (Commission des droits de la personne)* (1997), 73 ACWS (3d) 490 (CA Qc), confirming (1994) 20 CHRR D/349, (1993) RDLPD 55-1 (Tribunal des droits de la personne du Québec); *Quebec (Commission des droits de la personne) v Gauthier*, (1994) 19 CHRR D/312, as cited in Zinn, *The Law of Human Rights* above note 106 at 13-14. See also The Honourable Lynn Smith & William Black, “The Equality Rights” in Gerald Beaudoin & Errol Mendes, eds, *Canadian Charter of Rights and Freedoms*, 4th ed (Markham: LexisNexis, 2005) 927 at 1010-111.

<sup>108</sup> RSC 1985, c H-6.

<sup>109</sup> Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 107.

<sup>110</sup> *Ibid* at 106-12 (although strongly supported by civil society organizations and UN human rights bodies, the LaForest Panel’s recommendations have yet to be implemented); 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, 19<sup>th</sup> Sess, UN Doc E/C.12/1/add.31, (1998) at para 51; MacKay & Kim, *Social Condition*, above note 96.

that are comparable to enumerated grounds under the *ICESCR*.<sup>111</sup> Along with grounds such as disability and sexual orientation, the Committee lists “economic and social situation,” noting that “[a] person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping.”<sup>112</sup> In a recent report presented to the UN General Assembly, the UN Special Rapporteur on Extreme Poverty, Magdalena Sepulveda, described patterns of stigmatization and criminalization of poor people as common to both developed and developing countries:

Penalization measures respond to discriminatory stereotypes that assume that persons living in poverty are lazy, irresponsible, indifferent to their children’s health and education, dishonest, undeserving and even criminal. Persons living in poverty are often portrayed as authors of their own misfortune, who can remedy their situation by simply “trying harder”. These prejudices and stereotypes are often reinforced by biased and sensationalist media reports that particularly target those living in poverty who are victims of multiple forms of discrimination, such as single mothers, ethnic minorities, indigenous people and migrants.<sup>113</sup>

The Special Rapporteur points out that “[s]uch attitudes are so deeply entrenched that they inform public policies and prevent policymakers from addressing the systemic factors that prevent persons living in poverty from overcoming their situation” and she recommends that State parties to the *ICECR*, such as Canada, “ensure that discrimination on the basis of economic and social status is prohibited by law and the law applied by courts.”<sup>114</sup>

The Supreme Court has yet to consider the question of whether the social conditions of homelessness and of poverty are analogous grounds of discrimination under section 15 of the *Charter*. Lower court jurisprudence on the issue is mixed. Where courts have considered evidence of the socially constructed exclusion and devaluation of poor and homeless people, including evidence of stereotyping and stigma, these have been recognized as analogous

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<sup>111</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UNCESCROR, 42d Sess, UN Doc E/C.12/GC/20, (2009) art 2 para 2[*General Comment 20*].

<sup>112</sup> *Ibid* at para 35.

<sup>113</sup> *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda*, UNGAOR, 66th Sess, UN Doc A/66/265, (2011) at para 7.

<sup>114</sup> *Ibid* at para 82(b).

grounds of discrimination.<sup>115</sup> However, in cases where the courts have focused solely on the characteristic of economic need or income level, analogous grounds claims have been rejected.<sup>116</sup> In some unsuccessful cases the courts have focused on level of income in relation to a generalized poverty line and found that income level may change.<sup>117</sup> In others, the courts have considered economic activities linked to poverty and homelessness, such as “begging” or “panhandling,” and have concluded that economic activity is not a personal characteristic that can be protected under section 15.<sup>118</sup> As Fichaud J asserted in *Boulter v Nova Scotia Power Inc*: “[p]overty is a clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources ... Economic status, poverty or wealth, is not an adopted emblem of identity like religion, citizenship or marital status, that the individual observes peacefully free of government meddling.”<sup>119</sup>

The denial of analogous grounds claims on the basis that income level or economic circumstances can change and that people may move in and out of poverty or homelessness represents a misapplication of the concept of immutability and the contextual and purposive assessment called for in *Miron*<sup>120</sup> and *Corbiere*.<sup>121</sup> In considering whether off-reserve status constituted an analogous ground in *Corbiere*, the Court did not consider the question of immutability in relation to residency status in the abstract, nor did

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<sup>115</sup> *Federated Anti-Poverty Groups*, above note 29; *Falkiner v Ontario (Ministry of Community and Social Services)* (1996), 140 DLR (4th) 115 at 130-139 (Ont Ct J (Gen Div), Rosenberg J, dissenting); *Falkiner v Ontario (Ministry of Community and Social Services)* (2000), 188 DLR (4th) 52 (Ont Div Ct); *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481 (Ont CA) [*Falkiner CA*]; *Schaff v Canada* (1993), 18 CRR (2d) 143 at para 52; *Dartmouth/Halifax County Regional Housing Authority v Sparks* (1993), 119 NSR (2d) 91 (NSCA) [*Sparks*]; *R v Rehberg* (1993), 127 NSR (2d) 331 (NSSC) [*Rehberg*].

<sup>116</sup> Froc, “Golden Rule”, above note 22 at 468-70; MacKay & Kim, *Social Condition*, above note 96 at 64-73.

<sup>117</sup> *Boulter v Nova Scotia Power Incorporated*, 2009 NSCA 17 at para 42 [*Boulter*]; *Guzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134 at para 19.

<sup>118</sup> *R v Banks*, 2007 ONCA 19 at para 104, leave to appeal to SCC refused, 31929 (23 August 2007) [*Banks*]; *Thibaudeau v Canada*, [1995] 2 SCR 627; *Donovan v Canada*, [2006] 1 CTC 2041 at para 18 (TCC); *Dunmore v Ontario (AG)* (1997), 37 OR (3d) 287 (Ont Gen Div), aff’d (1999), 182 DLR (4th) 471 (ONCA), rev’d on other grounds 2001 SCC 94; *Bailey v Canada*, 2005 FCA 25 at para 12 (FCA).

<sup>119</sup> *Boulter*, above note 117 at para 42.

<sup>120</sup> *Miron*, above note 100 at para 100.

<sup>121</sup> *Corbiere*, above note 102 at para 59.

it rely on data quantifying the frequency of movement between on-reserve and off-reserve residence. Rather, the immutability analysis was focused on the socially constructed characteristics associated with on-reserve and off-reserve status. The Court considered how residency status was tied to social identity and social relations, such that it may “stand as a constant marker of potential legislative discrimination” and of “suspect distinctions.”<sup>122</sup> The majority in *Corbiere* also insisted that the analogous grounds analysis should not be restricted to the facts of a particular case, but rather must be conducted in relation to broader historical and systemic patterns of discrimination, in order to develop “a conceptual jurisprudence of the sorts of distinctions that fall under the s. 15 guarantee, without foreclosing new cases of discrimination.”<sup>123</sup>

Judicial decisions predating *Corbiere*, which recognize poverty as an analogous ground, are not inconsistent with the focus on socially constructed identity, which the majority in *Corbiere* relied on in developing the concept of “constructive immutability.” For instance, in its decision in *Dartmouth/Halifax County Regional Housing Authority v Sparks*, challenging the exclusion of public housing tenants from provincial residential tenancies legislation, the Nova Scotia Court of Appeal found that poverty and reliance on public housing constituted analogous grounds under section 15.<sup>124</sup> The Court recognized that, while people may move in and out of public housing, social attitudes related to residency in public housing attach to personal identity in a way that attracts stigma and discriminatory treatment. Noting that attitudes toward public housing tenants were linked to the over-representation of racialized households and single mothers among those living in poverty and relying on public housing,<sup>125</sup> Hallett J concluded that “the impugned provisions amount to discrimination on the basis of race, sex and income.”<sup>126</sup> The Court of Appeal’s reasoning in *Sparks* was later applied by the Nova Scotia Supreme Court in *R v Rehberg*, where the Court found that a “spouse in the house” rule that disentitled sole support parents, largely women, from receiving social assistance benefits if they were co-habiting with a man, was discriminatory on the ground of poverty.<sup>127</sup>

The *Sparks* and *Rehberg* decisions were cited by the Ontario Court of Appeal in *Falkiner v Ontario (Ministry of Community and Social Services)*, which involved a similar challenge to a “spouse in the house” rule in Ontario social assistance legislation.<sup>128</sup> Referring the Ontario Divisional Court’s

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<sup>122</sup> *Ibid* at paras 10-11.

<sup>123</sup> *Ibid* at para 11.

<sup>124</sup> *Sparks*, above note 115.

<sup>125</sup> *Ibid* at para 31.

<sup>126</sup> *Ibid* at paras 26-27.

<sup>127</sup> *Ibid* at para 83.

<sup>128</sup> *Falkiner CA*, above note 115 at para 90.

earlier decision in *Masse v Ontario (Ministry of Community and Social Services)*,<sup>129</sup> Laskin J acknowledged that recognizing receipt of public assistance as an analogous ground of discrimination has been “controversial primarily because of concerns about singling out the economically disadvantaged for *Charter* protection, about immutability and about lack of homogeneity.”<sup>130</sup> He noted, however, that the inquiry into analogous grounds should be situated in the context of the broader purposes of section 15 and must take into account “the nature of the group and Canadian society’s treatment of that group.”<sup>131</sup> Justice Laskin pointed to the trial court’s finding that “[s]ocial assistance recipients face resentment and anger from others in society, who see them as freeloading and lazy” and that the members of the group are “subject to stigma leading to social exclusion,”<sup>132</sup> and he went on to suggest that:

[A]lthough the receipt of social assistance reflects economic disadvantage, which alone does not justify protection under s. 15, economic disadvantage often co-exists with other forms of disadvantage. That is the case here. The economic disadvantage suffered by social assistance recipients is only one feature of and may in part result from their historical disadvantage and vulnerability. I am comforted in this conclusion by two Nova Scotia decisions: *R. v. Rehberg* (1994), 111 D.L.R. (4th) 336 (S.C.) and *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 244 (C.A.).<sup>133</sup>

Given the significant evidence of historical disadvantage and continuing prejudice experienced by those in receipt of social assistance, including sole support mothers, Laskin J concluded that “recognizing receipt of social assistance as an analogous ground of discrimination under s. 15(1) would further the protection of human dignity.”<sup>134</sup>

In *R v Clarke*,<sup>135</sup> the Ontario Superior Court considered whether discriminatory attitudes toward those living in poverty or who are homeless

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<sup>129</sup> *Masse v Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, leave to appeal denied without reasons, [1996] OJ No 1526 (Ont CA); [1996] SCCA No 373 (SCC).

<sup>130</sup> *Falkiner CA*, above note 115 at para 84.

<sup>131</sup> *Ibid* at para 85.

<sup>132</sup> *Ibid* at para 86.

<sup>133</sup> *Ibid* at para 88.

<sup>134</sup> *Ibid* at para 86-87.

<sup>135</sup> *R v Clarke* (2003), 61 WCB (2d) 134.

ought to be recognized as a basis for challenges to prospective jurors. Noting the Court of Appeal’s findings in *Falkiner*, Ferrier J concluded that “there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight.”<sup>136</sup> He further found that “the prejudice against the poor and homeless is similar to racial prejudice.”<sup>137</sup>

As Kerri Froc points out in Chapter 6,<sup>138</sup> the analogous grounds analysis outlined by the Supreme Court in *Miron* and *Corbiere*<sup>139</sup> requires an in-depth inquiry into the lived reality — material, political, economic, and social — of the members of the group whose equality rights are at issue. As described above, the material deprivation experienced by people living in poverty and who are homeless directly threatens life, liberty, and security of the *person-related interests* under section 7 of the *Charter*. Far from justifying exclusion from section 15, these material conditions reinforce the call for equal protection and equal benefit of the *Charter*’s equality guarantees. Above and beyond the economic disadvantage to which they are subject, however, it is evident that people living in poverty and who are homeless are, in the words of Wilson J, “lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated.”<sup>140</sup> This understanding is reflected in both domestic human rights legislation and international human rights laws. In view of the stigma and marginalization which poor people and the homeless experience, individually and as a group, and their effective exclusion from political power and from full participation in social, economic and political life, judicial recognition of the social condition of poverty and homelessness as prohibited grounds of discrimination under section 15 is long overdue.

Aside from the issue of whether poverty and homelessness constitute analogous grounds in-and-of-themselves, the material reality and social construction of homelessness and poverty must also, as the Senate Sub-Committee observed in *In from the Margins*, be understood as intersecting

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<sup>136</sup> *Ibid* at para 18.

<sup>137</sup> *Ibid*.

<sup>138</sup> See Kerri Froc, Chapter 3.

<sup>139</sup> *Miron*, above note 100; *Corbiere*, above note 102.

<sup>140</sup> *Andrews*, above note 88 at para 5.

with other enumerated grounds of discrimination.<sup>141</sup> The CESCR has pointed out that women, especially single mothers and people with disabilities, racialized groups, Aboriginal people, newcomers and youth, are disproportionately affected by homelessness and poverty in Canada.<sup>142</sup> A purposive equality rights analysis of poverty and homelessness must be informed by an understanding of systemic patterns of discrimination against these groups, and must consider, for example, how attitudes toward people with mental health disabilities, youth or racialized immigrants, are manifested in government and public responses to homelessness and poverty. As UN human rights monitoring bodies have underscored,<sup>143</sup> disaggregated data relating to such groups, as well as provisions to ensure their effective representation in decision-making processes, are critical components in any rights-based poverty and housing strategy that is informed by an equality framework consistent with section 15 of the *Charter*.<sup>144</sup>

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<sup>141</sup> *In from the Margins*, above note 8; see also Raphael, *Poverty in Canada*, above note 47 at 62-89; Shelley Gavigan & Dorothy Chunn, eds, *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010); Human Resources and Skills Development Canada, *Federal Disability Report 2010 – The Government of Canada's Annual Report on Disability Issues* (Ottawa: Human Resources And Skills Development Canada, 2010) at 7-14; Grace-Edward Galabuzi, "Social Exclusion" in Raphael, *Social Determinants*, above note 42 at 252-268; Daniel Wilson & David Macdonald, *The Income Gap Between Aboriginal Peoples and the Rest of Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2010); Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" in Young, *Poverty*, above note 8 at 96; Monica Townson, *Women's Poverty and the Recession* (Ottawa: Canadian Centre for Policy Alternatives, 2009); Hermer & Mosher, *Disorderly People*, above note 65; Grace-Edward Galabuzi, *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Toronto: Canadian Scholars Press, 2006).

<sup>142</sup> *Concluding observations* (2006), above note 5; Day, "Minding the Gap," above note 8.

<sup>143</sup> See United Nations Committee On Economic, Social And Cultural Rights, *Guidelines on Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights*, UNCESCROR, 2009, UN Doc E/C.12/2008/2 (24 March 2009) at paras 3 & 10 [UNCESCROR, *Treaty-Specific Documents*]; *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, UN Human Rights Council, 4th Sess, UN Doc A/HRC/4/18, (2007) [UNHRC, *Report of Miloon Kothari*]; *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt*, Commission on Human Rights, 62d Sess, UN Doc E/CN.4/2006/48 (2006).

<sup>144</sup> See UNCESCROR, *Treaty-Specific Documents*, *ibid* at paras 3 & 10; UNHRC, *Report of Miloon Kothari*, *ibid*.

## 2) Substantive Discrimination

The second stage of the Supreme Court's equality analysis is to consider whether a law or policy that draws a distinction on a prohibited ground is substantively discriminatory. As the Court explained in *Kapp*, "perpetuation of disadvantage and stereotyping" were identified in *Andrews* "as the primary indicators of discrimination."<sup>145</sup> An understanding of the social construction of poverty and homelessness is therefore critical at this stage of the section 15 analysis as well. This does not mean, as Vincent Greason underscores in Chapter 9, that material deprivation or the adverse effects of governments' failure to address economic need do not violate equality guarantees.<sup>146</sup> Rather, governments' lack of response to the material needs of those living in poverty should be understood in light of the discrimination, exclusion, and discounting of rights that lies behind the denial of adequate benefits. As Kerri Froc explains:

Poverty is not easily analyzed under section 15, given its multi-dimensional and relational nature. More than simply an objective economic condition (lack of financial resources), it touches almost every aspect of the lives of those it affects, including the ability to exercise their constitutional rights ... it is interwoven in various intersections relations of oppression, and itself is the basis for subordination (demonstrated by the stereotyping and "victim blaming" of poor people).<sup>147</sup>

An illustration of the link between government failure to address needs, and social patterns of stigma and stereotype is provided in Marie-Eve Sylvestre's Affidavit in *Tanudjaja*.<sup>148</sup> Sylvestre's research has found that the proliferation of false stereotypes about homeless people and the devaluation of their rights are inextricably linked to government neglect of the needs of this vulnerable group. She points, as one example, to statements by the Mayor of Ottawa that the city was attracting the homeless "like seagulls at the dump" by offering too many services. On another occasion, the Mayor compared homeless people to pigeons, saying that if Ottawa would stop feeding them, they would stop coming.<sup>149</sup> Sylvestre notes that these attitudes create socially

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<sup>145</sup> *Kapp*, above note 87 at para 23.

<sup>146</sup> See Vincent Greason, Chapter 9.

<sup>147</sup> Froc, "Golden Rule", above note 22 at 468.

<sup>148</sup> Sylvestre, "Affidavit for *Tanudjaja*", above note 64; see also Marie-Ève Sylvestre & Céline Bellot, Chapter 7.

<sup>149</sup> "'Pigeons' squawk over mayor's comments on homeless", *CBC News* (25 April 2007), online: CBC.ca [www.cbc.ca](http://www.cbc.ca) cited in Sylvestre, "Affidavit for *Tanudjaja*", above note 64 at para 41.

constructed identities, as well as significant barriers to any conception of equal rights to services or programs for members of this stigmatized group. Governments at every level are dissuaded from reasonably addressing the needs of the poor and homeless based on stereotypic views of the groups' moral unworthiness and laziness and prejudicial assumptions that the more their needs are addressed, the more of a 'problem' they will become. As Sylvestre explains, "[b]ecause of the prevalence of stereotypes and stigma applied to homeless people, the lived experience of homelessness involves far more than economic deprivation and absence of housing. It becomes an all-encompassing social identity or social label for individuals. It defines one's personhood in a way that is socially constructed and difficult to change." The result is that:

Virtually every part of society perceives and treats a person differently once they become homeless. Law enforcement officials treat them as potentially dangerous and disorderly and in need of severe regulation: they apply measures in a discriminatory fashion, on the basis of visible signs of poverty. Politicians tend to treat them as a 'problem' to be kept out of a neighbourhood by denying basic sustenance or other services, rather than equal citizens entitled to programs and services to meet their unique needs.<sup>150</sup>

While homelessness is not 'immutable' in an absolute sense, Sylvestre describes how this all-encompassing personal identity is difficult to escape:

Street exit is a long and difficult process which involves considerable movement back and forth from being homeless and being "vulnerably housed." When applying for a job, it is hard to justify the period of time that the individual remained unemployed because he or she was homeless. When applying for an apartment, the homeless person often has difficulties providing references to future landlords and is seen as an undesirable tenant ... As noted above, landlords routinely check prospective tenants' credit before renting an apartment, and debt collection on unpaid fines may compromise a tenant's ability to pay rent.<sup>151</sup>

The Supreme Court has recognized that discrimination occurs when a policy fails to take into account "the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their

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<sup>150</sup> Sylvestre, "Affidavit for *Tanudjaja*", above note 64 at para 51; see also Dennis Raphael, *Poverty in Canada: Implications for Health and Quality of Life*, 2d ed (Toronto: Canadian Scholars' Press, 2011) at 153-85 and 356-66.

<sup>151</sup> *Ibid* at para 52.

value as human beings and members of Canadian society.”<sup>152</sup> In *Eaton v Brant County Board of Education*,<sup>153</sup> Sopinka J warned that ignoring the needs and capacities of people with disabilities may be “a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.”<sup>154</sup> Housing and antipoverty strategies must similarly recognize the unique needs, capacities and circumstances of people who are living in poverty or who are homeless and, in particular, must meet needs that are linked to economic deprivation. At the same time, however, such strategies must remedy the devaluation of rights and capacity that is the underlying cause and fuel for the perpetuation of the inequality being addressed. A rights-based approach, which restores equal citizenship to members of the group, is critical to a remedial, purposive approach to addressing homelessness and poverty amidst affluence.<sup>155</sup> At a fundamental level, such an approach recognizes homelessness and poverty as denials of “a basic aspect of full membership in Canadian society”<sup>156</sup> and demands that government neglect and inaction be addressed as a matter of constitutional right.

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<sup>152</sup> *Law*, above note 89 at para 70. See *Andrews*, above note 88 (the principle was first enunciated in *Andrews*, where Justice McIntyre explained that “[i]t will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant’s actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant’s needs, capacities, and circumstances” at para 70.

<sup>153</sup> [1997] 1 SCR 241.

<sup>154</sup> *Ibid* at paras 66-7, as cited in *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 [*Eldridge*].

<sup>155</sup> See generally Gwen Brodsky, “Human Rights and Poverty: A Twenty-First Century Tribute to J.S. Woodsworth and Call for Human Rights” in Jane Pulkingham, ed, *Human Welfare, Rights, and Social Activism: Rethinking the Legacy of J.S. Woodsworth* (Toronto: University of Toronto Press, 2010) 136; Lucie Lamarche, “The ‘Made in Quebec’ Act to Combat Poverty and Social Exclusion: The Complex Relationship Between Poverty and Human Rights” in Young, *Poverty*, above note 8, 138.

<sup>156</sup> *Law*, above note 89 at para 74; Janine Brodie, “Reforming Social Justice in Neoliberal Times” (2007) 1:2 *Studies in Social Justice* 93 at 102-03; Janet Mosher, “Welfare Reform and the Re-Making of the Model Citizen” in Young, *Poverty*, above note 8 119; Ken Norman, “The *Charter* as an Impediment to Welfare Rollbacks: A Meditation on ‘Justice as Fairness’ and as ‘Bedrock Value’ of the Canadian Democratic Project” in Young, *Poverty*, above note 8 at 297.

#### D. Section 1: The Guarantee of Reasonable Limits

The Supreme Court has affirmed that section 1 of the *Charter*<sup>157</sup> plays a dual role, both as a limit to rights and a guarantee of rights.<sup>158</sup> As Arbour J 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.”<sup>159</sup> In interpreting and applying section 1, the Court has underscored governments’ obligations to protect the rights of vulnerable groups. In *Irwin Toy*, for example, restrictions on advertising aimed at those under the age of thirteen were found to be a justifiable infringement of section 2(b) rights to freedom of expression because such restrictions were consistent with the important *Charter* value of protecting vulnerable groups, such as children.<sup>160</sup> While evidence in the case suggested that other less restrictive means were available to the government, the Court affirmed it would not “in the name of minimal impairment [of a *Charter* right] ... require legislatures to choose the least ambitious means to protect vulnerable groups.”<sup>161</sup>

In line with similar obligations under human rights legislation, the Supreme Court has situated the assessment of what positive measures are reasonably required to accommodate disability or other characteristics of disadvantaged groups within the section 1 guarantee of reasonable limits.<sup>162</sup> In *Eldridge v British Columbia (AG)*,<sup>163</sup> for example, the Court considered a challenge brought by deaf patients to the government’s failure to include sign language interpretation as an insured service within the publicly funded health care system. Having determined that the failure to provide interpretation services violated section 15, the Court examined the cost of providing

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<sup>157</sup> *Charter*, above note 2 s 1 (s 1 of the *Charter* provides, “[t]he 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”).

<sup>158</sup> *R v Oakes*, [1986] 1 SCR 103 at para 135 [*Oakes*].

<sup>159</sup> *Gosselin*, above note 26 at para 352.

<sup>160</sup> *Irwin Toy*, above note 23.

<sup>161</sup> *Ibid* at 999; *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 57. See however *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 136 (where the Supreme Court granted a tobacco manufacturer’s s 2(b) challenge to federal tobacco advertising and marketing restrictions, notwithstanding evidence of tobacco related harm to health, and the particular vulnerability of children and youth to tobacco advertising).

<sup>162</sup> *Schachter v Canada*, [1992] 2 SCR 679 at 709; *Egan v Canada*, [1995] 2 SCR 513 at para 99; *Nova Scotia (Workers’ Compensation Board) v Martin*; *Nova Scotia (Workers’ Compensation Board) v Laseur*, 2003 SCC 54 at para 109.

<sup>163</sup> *Eldridge*, above note 154.

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.<sup>164</sup> In the course of his section 1 analysis, LaForest J noted that

[i]t is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation ... In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits."<sup>165</sup>

The "undue hardship" standard was thus found by the unanimous Court in *Eldridge* to fit within the "reasonable limits" requirement of section 1. The majority of the Court reaffirmed this principle more recently in *Multani v Commission Scolaire Marguerite-Bourgeoys*, finding that "correspondence between the legal principles [of "reasonable limits" and "reasonable accommodation] is logical."<sup>166</sup> The standard of undue hardship, as it has been developed under human rights legislation, is a rigorous standard in relation to the allocation of necessary budgetary measures. In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*,<sup>167</sup> the Court cautioned in regards to financial justifications for rights violations that "it is all too easy to cite increased costs as a reason;" that "impressionistic evidence of increased expenses will not generally suffice;" and that courts must consider that "there may be ways to reduce costs."<sup>168</sup>

In those *Charter* cases where the Court has approached issues of positive obligations and budgetary measures without reference to the human rights standard of "undue hardship," the standard that has been applied under section 1 has, like in *Eldridge*, been described as a rigorous one. In *New Brunswick v G(J)*, the Court held that the government had a positive obligation under section 7 to provide legal aid to parents who cannot afford a lawyer when the parent's life, liberty, or security is at stake in child custody proceedings.<sup>169</sup> Noting that violations of section 7 rights will only rarely be

<sup>164</sup> *Ibid* at para 93.

<sup>165</sup> *Ibid* at para 79.

<sup>166</sup> 2006 SCC 6 at para 53.

<sup>167</sup> [1999] 3 SCR 868.

<sup>168</sup> *Ibid* at para 41.

<sup>169</sup> *G(J)*, above note 30.

overridden by competing social interests and, hence, are unlikely to constitute reasonable limits under section 1,<sup>170</sup> the Court found that “a parent’s right to a fair hearing when the state seeks to suspend such parent’s custody of his or her child outweighs the relatively modest sums, when considered in light of the government’s entire budget, at issue in this appeal.”<sup>171</sup>

Even in *Newfoundland (Treasury Board) v NAPE*, where the Supreme Court concluded that the province’s failure to honour a \$24 million pay equity award in favour female public sector workers was justifiable under section 1, the Court claimed to be applying a rigorous standard of review.<sup>172</sup> The province’s decision was made as part of an across-the-board reduction of government expenditures in response to a perceived provincial debt crisis that was characterized by the government and accepted by the Supreme Court as amounting to a “financial emergency.”<sup>173</sup> While the Court found that a budgetary crisis justified an infringement of section 15 in that case, Binnie J cautioned that courts must remain sceptical of attempts by governments to justify such rights infringements, noting that “there are *always* budgetary constraints and there are *always* other pressing government priorities.”<sup>174</sup> At the same time, Binnie J noted the important social values that are engaged in budgetary decision-making:

The weighing exercise has as much to do with social values as it has to do with dollars. In the present case, the “potential impact” is \$24 million, amounting to more than 10 percent of the projected budgetary deficit for 1991-92. The delayed implementation of pay equity is an extremely serious matter, but so too (for example) is the layoff of 1,300 permanent, 350 part-time and 350 seasonal employees, and the deprivation to the public of the services they provided.<sup>175</sup>

The Supreme Court has recognized that, in these kinds of “weighing” exercises, a certain degree of judicial deference is mandated, since “there may be no obviously correct or obviously wrong solution but, rather, a range of options each with its advantages and disadvantages. Governments act as they

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<sup>170</sup> *Ibid* at para 99.

<sup>171</sup> *Ibid* at para 100.

<sup>172</sup> 2004 SCC 66 [*NAPE*].

<sup>173</sup> *Ibid* at para 1.

<sup>174</sup> *Ibid* at para 72.

<sup>175</sup> *Ibid*.

think proper within a range of reasonable alternatives.”<sup>176</sup> However, as McLachlin CJ underscored in *RJR-MacDonald Inc v Canada (AG)*,<sup>177</sup> acknowledging that there may be a range of policy measures that are reasonable does not justify blanket deference to legislatures in relation to budgetary allocations or socio-economic policy. Section 1 calls for rigorous and independent judicial assessment and oversight of government choices, where these infringe *Charter* protected rights.<sup>178</sup> Thus, in *NAPE*, Binnie J 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.<sup>179</sup> As Binnie J cautioned:

No doubt Parliament and the legislatures, generally speaking, *do* enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render superfluous the independent second look imposed on the courts by s. 1 of the *Charter*.<sup>180</sup>

In light of the rigorous standard of justification imposed under section 1, it is hard to see how governments’ refusal to adopt measures to address increasing poverty and homelessness in the midst of affluence in Canada can be characterized as a reasonable limit on the *Charter* rights of those who are harmed and whose rights are infringed by such inaction. In his Affidavit in support of the *Tanudjaja* case,<sup>181</sup> former UN Special Rapporteur on adequate housing, Miloon Kothari, makes the observation that:

The most striking feature of my visit to Canada was the contrast between the abundance of resources available and the dire living conditions facing the most vulnerable in society ... At the time of my mission, the Federal Government had enjoyed a multi-billion dollar surplus for a decade. Canada Mortgage and Housing Corporation, the federal government’s national housing

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<sup>176</sup> *Ibid* at para 83.

<sup>177</sup> [1995] 3 SCR 199 at paras 134-138.

<sup>178</sup> Douglas Elliott & Jason Tan, “Unequal Benefits or Unequal Persons? Social Benefit Programs and the Charter” (2006) 19 NJCL 285 at 308-11; Margot Young, “The Politics of Social Justice” (2005) 38 UBC L Rev 539.

<sup>179</sup> *Newfoundland (Treasury Board) v NAPE*, 2002 NLCA 72.

<sup>180</sup> *NAPE*, above note 172 at para 103.

<sup>181</sup> *Tanudjaja*, above note 36.

agency, had an increasingly large operating surplus – almost \$1 billion in 2007 ... And yet, everywhere I visited in Canada, I met people who were homeless and living in inadequate and insecure housing conditions. I received reliable evidence that people had died as a direct result of Canada’s nation-wide housing crisis.<sup>182</sup>

There is overwhelming evidence that governments are wasting large amounts of money by failing to adopt anti-poverty and housing strategies called for by international treaty monitoring bodies.<sup>183</sup> A 2009 Alberta government study estimated the cost of supporting each homeless person in that province to be close to \$100,000/year.<sup>184</sup> As Marie-Ève Sylvestre and Céline Bellot note in Chapter 7, the cost of services for homeless people has been estimated at \$4,000 per month.<sup>185</sup> Incarceration costs are about the same for adults and significantly higher for youth.<sup>186</sup> In comparison, a program involving rent supplements and support services, which provided access to adequate and stable housing for former homeless residents of tent-city in Toronto, was estimated to have cost about \$1,000 per month – a quarter of the cost of incarceration or homelessness services.<sup>187</sup>

Pointing to the estimated \$1.4 billion in annual costs of homelessness in Canada, the Mental Health Commission of Canada has recently characterized Canadian governments’ response of relying on shelters and emergency and acute health services as “a costly and ineffective way of responding to the problem.”<sup>188</sup> In a 2009 report, the Auditor General of British Columbia likewise found that “[a]ccording to a growing body of evidence, the cost to society of not addressing homelessness is significantly higher than the cost of providing housing and intervention services.”<sup>189</sup> The

<sup>182</sup> Miloon Kothari, “Affidavit for *Tanudjaja v Attorney General (Canada)*”, Ont Sup Ct File no CV-10-403688 (2011) at paras 75-77.

<sup>183</sup> Porter & Jackman, “Making the Connection”, above note 4 at 20-31.

<sup>184</sup> Alberta Secretariat for Action on Homelessness, *A Plan for Alberta: Ending Homelessness in 10 years* (Edmonton: Ministry of Housing and Urban Affairs, 2009) at 8.

<sup>185</sup> Marie-Ève Sylvestre & Céline Bellot, Chapter 7; see also Sylvestre, “Affidavit for *Tanudjaja*”, above note 64 at para 50.

<sup>186</sup> *Ibid.*

<sup>187</sup> Gloria Gallant, Joyce Brown & Jacques Tremblay, *From Tent City to Housing: An Evaluation of The City of Toronto’s Emergency Homelessness Pilot Project*, (Toronto: City of Toronto, 2004).

<sup>188</sup> Mental Health Commission, *At Home/Chez Soi*, above note 34 at 11.

<sup>189</sup> Office of the Auditor General of British Columbia, *Homelessness: Clear Focus Needed* (Victoria: Office of the Auditor General of British Columbia, 2009) 19.

Senate Sub-Committee on Cities came to a similar conclusion in relation to the cost of poverty and homelessness in its 2009 report, *In From the Margins: A Call to Action on Poverty, Housing and Homelessness*:

... the Committee's testimony clearly underlines that poverty costs us all. Poverty expands healthcare costs, policing burdens and diminished educational outcomes. This in turn depresses productivity, labour force flexibility, life spans and economic expansion and social progress, all of which takes place at huge cost ... We believe that eradicating poverty and homelessness is not only the humane and decent priority of a civilized democracy, but absolutely essential to a productive and expanding economy benefitting from the strengths and abilities of all its people.<sup>190</sup>

Governments' refusal to implement effective strategies to address poverty and to ensure access to adequate housing is not only violation of both domestic constitutional and international human rights. It is also a fiscally irresponsible response to problems that could be better addressed in accordance with human rights and values of social inclusion, rather than through the perpetuation of patterns of stigmatization and exclusion. It is precisely in these types of situations that an "independent second look" at government policies through a human rights lens is essential to ensure governmental accountability and the proper functioning of a constitutional democracy.<sup>191</sup>

## E. Conclusion

The fact that adequate housing, or an adequate standard of living, are not explicitly recognized as constitutional rights in Canada does not mean that there is no domestic constitutional framework to protect and guarantee these rights. Section 7 of the *Charter* can and should be interpreted as requiring governments not only to refrain from interfering with the survival tactics of people who are homeless or living in poverty in public spaces, but to actively address and combat homelessness and poverty through appropriate strategies. Section 7 principles of fundamental justice provide a solid basis for claiming a substantive right to fair and reasonable housing and anti-poverty strategies and procedural rights to meaningful, rights-based participation in the design, implementation, monitoring, and evaluation of such programs. For its part, section 15 not only mandates an effective response to economic and physical needs, but also creates an equality framework for challenging structural and systemic injustices and exclusion based on stereotypes, stigma, and

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<sup>190</sup> *In From the Margins*, above note 8 at 3; Food Banks Canada, *Hunger Count 2009* (Toronto: Food Banks Canada, 2010) at 3.

<sup>191</sup> *NAPE*, above note 172 at para 103.

marginalization faced by those who are homeless and living in poverty in such a wealthy country as Canada. Section 1, in turn, offers a rights-based approach to assessing the reasonableness of government action and inaction in relation to poverty and homelessness, and for balancing competing needs and budgetary allocations.

Although sections 7, 15, and 1 of the *Charter* have the potential to provide a robust constitutional framework for a rights-based approach to poverty and homelessness, such claims have been resisted by Canadian governments at every level. In the *Tanudjaja* case,<sup>192</sup> for example, the governments of Canada and Ontario have brought a motion to strike the claim, prior to any hearing on the evidence or merits, on the grounds that “the issues raised and the relief sought ... are not justiciable” and that the Applicants’ claim “challenges economic and social policies that are essentially political matters, beyond the institutional competence of the Superior Court.”<sup>193</sup> Of even greater concern, however, is the prevailing judicial bias in Canada against applying the *Charter* to require governments to act in response to human rights crises of this sort. Although homeless people were successful in their *Charter* challenge in *Victoria (City) v Adams*,<sup>194</sup> this judicial bias is evident even in that case.<sup>195</sup> The *Adams* claim arose from an application by the City of Victoria for an injunction authorizing it to evict a number of homeless people, including the Defendants, from a tent city they had created in a public park. In response, the Defendants challenged the constitutionality of the municipal bylaw that prohibited the overnight erection of temporary structures, such as tents and tarps attached to trees, in public places. In its intervention in the case, the Attorney General of British Columbia argued against the application of the *Charter* and judicial interference in relation to the problem of homelessness:

The AGBC says that the solutions to the difficult and challenging circumstances faced by the homeless lie in the hands

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<sup>192</sup> *Tanudjaja*, above note 36.

<sup>193</sup> *Ibid*, “Notice of Motion of the Attorney General of Canada (on motion to strike)”, para 15; “Factum of the Attorney General of Canada (on motion to strike)”, paras 3-4, 20-24, 42-46, 49-57; “Factum of the Attorney General of Ontario (on motion to strike)”, paras 1, 15, 21-25, 30-35, 37-45, 59-66. The Attorney Generals’ motion to strike was granted in the Ontario Superior Court of Justice April 2013 (above note 36). The claimants have appealed the Superior Court decision. The appeal was heard in the Ontario Court of Appeal May 26th-28th, 2014.

<sup>194</sup> *Victoria (City) v Adams*, 2009 BCCA 172 [*Adams* (CA)], affirming *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams* (SC)].

<sup>195</sup> See generally Young, “Rights, Homeless, and Social Change” above note 3; Martha Jackman, “*Charter* Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Kent Roach, ed, *Taking Remedies Seriously* (Montreal: Les Editions Yvon-Blais, 2010).

of the democratically elected legislative and executive arms of government, and not in the courts creating a constitutionally entrenched ‘right’. The courts are not equipped with the resources or the expertise to address the many challenging issues raised by the phenomenon of homelessness, and ought not to extend the reach of the Canadian constitution in an attempt to moderate the effects of homelessness in a manner that inevitably creates more problems than it can resolve.<sup>196</sup>

The Attorney General also denied that Canada’s international human rights obligations had any bearing on the case, arguing instead that “international documents to which Canada is a party do not assist the Defendants ... They cannot be enforced in Canadian courts.”<sup>197</sup>

At trial, Ross J found that the shortage of shelter spaces in Victoria meant that “hundreds of people are left to sleep in public places in the City”<sup>198</sup> and that the government’s interference with the ability of homeless people to provide themselves with temporary shelter while sleeping outdoors at night exposed them to a risk of serious harm, including death by hypothermia.<sup>199</sup> On that basis she concluded that the bylaw prohibition on erecting temporary shelter violated section 7 of the *Charter* and could not be justified under section 1.<sup>200</sup> The British Columbia Court of Appeal agreed with this finding.<sup>201</sup> However, like Ross J,<sup>202</sup> the Court of Appeal insisted on interpreting and applying section 7 as a negative ‘restraint’ on government action, rather than as imposing any positive obligations on governments to address the problem of homelessness or the rights of the homeless.<sup>203</sup> While the Court of Appeal recognized that the trial court’s ruling would likely require some responsive action by the City to address the inadequate number of shelter beds in Victoria and the lack of housing options available to homeless people, the Court declared “[t]hat kind of responsive action to a

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<sup>196</sup> *Adams* (SC), above note 194, “Factum of the Intervenor the Attorney General of British Columbia” at para 3.

<sup>197</sup> *Ibid* at paras 56-7.

<sup>198</sup> *Adams* (SC), above note 194 at para 58.

<sup>199</sup> *Ibid* at para 142.

<sup>200</sup> *Ibid* at para 216.

<sup>201</sup> *Adams* (CA), above note 194 at para 10.

<sup>202</sup> *Adams* (SC), above note 194 at paras 119-20.

<sup>203</sup> *Adams* (CA), above note 194 at para 95.

finding that a law violates s. 7 does not involve the court in adjudicating positive rights.”<sup>204</sup>

As argued above, there is no constitutional basis for courts or governments to draw such distinctions between the “positive” and “negative” rights obligations imposed by the *Charter*, or to focus exclusively on government action that violates rights while ignoring those that result from government inaction. In discussing the application of the *Charter* pursuant to section 32,<sup>205</sup> the Supreme Court has emphasized that the distinction between government action and inaction is “very problematic.”<sup>206</sup> Quoting from Dianne Pothier in *Vriend v Alberta*,<sup>207</sup> the Court affirmed that section 32 of the *Charter* is “worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority.”<sup>208</sup> The Court went on to state that “[t]he application of the *Charter* is not restricted to situations where the government actively encroaches on rights.”<sup>209</sup>

The Supreme Court has also rejected the idea that, because such decisions are inherently political in nature, the *Charter* should not apply to executive or legislative choices about what policies or legislation to enact. In *R v Operation Dismantle*, the Court established that “political” questions are not immune from *Charter* review.<sup>210</sup> In *NAPE*, after the Newfoundland Court of Appeal invoked the separation of powers as a basis for limiting judicial interference with “policy initiatives within the purview of the political branches of government,”<sup>211</sup> Binnie J responded for the majority:

The “political branches” of government are the legislature and the executive. Everything that they do by way of legislation and executive action could properly be

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<sup>204</sup> *Ibid* at para 96.

<sup>205</sup> Section 32 provides that the *Charter* applies: “(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

<sup>206</sup> *Vriend v Alberta*, [1998] 1 SCR 493 at para 53 [*Vriend*].

<sup>207</sup> *Ibid*.

<sup>208</sup> Dianne Pothier, “The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak” (1996) 7 Const Forum 113 at 115, cited in *Vriend, ibid* at para 60.

<sup>209</sup> *Vriend*, above note 206.

<sup>210</sup> *R v Operation Dismantle*, [1985] 1 SCR 441 at para 64.

<sup>211</sup> *NAPE*, above note 172 at para 110.

called “policy initiatives”. If the “political branches” are to be the “final arbitrator” of compliance with the *Charter* of their “policy initiatives”, it would seem the enactment of the *Charter* affords no real protection at all to the rights holders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy.<sup>212</sup>

Governmental authority to act, or not, in response to poverty and homelessness must be exercised consistently with the *Charter*; whether through positive measures to ensure equality or to protect life and security, or through ‘negative’ obligations to refrain from actively interfering with such rights. Louise Arbour and Fannie Lafontaine make the point that,

[r]ights are not just about protection against abusive or unjustified interference by the state. The role of the state has evolved and it has become central for human dignity and security to be fulfilled through a system of public policy and legislation aimed at protecting the individual and his or her family from want and need ... The duality of roles for the state that is mandated by international human rights law needs to be integrated into our understanding of the *Charter*.<sup>213</sup>

As suggested at the outset of the chapter, the Supreme Court has affirmed that: “Canada’s *current* international commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.”<sup>214</sup> In 2008, the International Commission of Jurists (ICJ) undertook a comprehensive review of socio-economic rights jurisprudence from across Europe, Africa, Asia and the Americas, including cases from the United States, Germany, Israel, and the United Kingdom among others.<sup>215</sup> The ICJ found that, while the constitutions of some of the countries surveyed include explicit protection for socio-economic rights,<sup>216</sup> courts and tribunals in many other jurisdictions rely on

<sup>212</sup> *Ibid* at para 111.

<sup>213</sup> Arbour & Lafontaine, “Beyond Self-Congratulation”, above note 21 at 271.

<sup>214</sup> *Health Services Assn*, above note 12 at para 78.

<sup>215</sup> International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) [ICJ, *Comparative Experiences*]; see also Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 649-76.

<sup>216</sup> ICJ, *Comparative Experiences*, above note 215 at 4, footnote 7.

more general constitutional guarantees, such as the right to life and to non-discrimination, as a basis for ordering governments to remedy rights violations in the areas of social security, housing, health, education and other fundamental socio-economic rights.<sup>217</sup> The ICJ report underscores the degree to which Canadian courts stand out in their continuing conservatism in regards to the recognition and enforcement of socio-economic rights. Of the 200-plus trial, appellate and Supreme Court cases contained in the ICJ's report, only one Canadian case can be found: the 1997 Supreme Court decision in *Eldridge*.<sup>218</sup> The continued reliance by Canadian courts and tribunals on a rights paradigm, long abandoned under international law and which is increasingly rejected in other constitutional democracies, undermines Canada's international human rights obligations. For people living in poverty and the homeless who, unlike affluent Canadians, lack the alternate social, economic, or political means to hold elected governments to account, it also represents a fundamental failure of constitutionalism and of the rule of law.<sup>219</sup> As Margot Young has observed in relation to the *Adams* decision:

Ultimately, the tougher and real question is why anyone in Canada should end up sleeping in a park – even with the shelter of a tarp or cardboard box. Governments have failed to respond adequately to this challenge. No wonder that the dispossessed and politically powerless have looked to the *Charter* and the rights it enshrines for just resolution. Whether or not our *Charter* and our Canadian courts are up to this task is still an open question.<sup>220</sup>

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<sup>217</sup> *Ibid* at 65-72; see also Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009).

<sup>218</sup> *Eldridge*, above note 154.

<sup>219</sup> ICJ, *Comparative Experiences*, above note 215 at 3-4 and 82-83; see also Arbour, "Freedom From Want," above note 3; Frow, "Golden Rule," above note 22; David Wiseman, "Taking Competence Seriously" in Young, *Poverty*, above note 8 at 263; Wiseman, "Social and Economic Rights," above note 22; Porter, "Expectations of Equality", above note 49.

<sup>220</sup> Young, "Rights, the Homeless, and Social Change" above note 3.