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Taking Competence Seriously

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With the enactment of the *Canadian Charter of Rights and Freedoms* came the hope that *Charter* litigation might provide an additional avenue for prompting Canadian governments to address poverty and other circumstances of social and economic inequality that constitute violations of the social rights of Canadians.¹ In the short history of the adjudication of social rights claims brought under the *Charter*, an underlying concern over whether courts possess the institutional resources to competently adjudicate such claims has emerged. This concern has been expressed throughout the stages of *Charter* adjudication and has often been relied upon to justify a full or partial limit upon the scope of judicial review. Thus, courts have often narrowed the scope of *Charter* rights and freedoms to exclude social rights obligations in the violations review stage,² have deferred to governmental balancing of economic and social priorities in the section 1 review stage,³ and have refused to impose positive remedial obligations in the remedy review stage.⁴ Such decisions have serious consequences not only for the immediate social rights claimants (whose claims are often partially or fully rejected) but also for the more general allocation of decision-making power and responsibility in Canadian society. In limiting the scope of judicial review in social rights cases, Canadian judges are limiting the role of the judicial branch of government, and the governance tool of adjudication, in addressing poverty and social rights. At the same time, they are preserving the role of the other branches of government and of other governance tools. Ultimately, then, *Charter* adjudication of social rights claims involves not only issues of poverty, human rights, and justice but also issues of governance.

The fact that Canadian judges are devoting attention to the issue of the institutional competence of courts in social rights *Charter* cases, and in *Charter* cases more generally, indicates a laudable judicial willingness to take the issue of the allocation of decision-making power and responsibility seriously. However, the judicial analysis of institutional competence issues is too

superficial to justify the resultant allocations of decision-making power and responsibility. In other words, the issue of institutional competence is not being taken seriously enough. More particularly, Canadian judges are failing to adequately explore and apply the full range of their institutional competence and are responding to perceived incompetence without sufficient analysis of the limitations of alternative decision-making institutions or of countervailing considerations. As a result, Canadian judges are both underestimating their competence and overreacting to perceived incompetence. This tendency is particularly marked in social rights cases and has meant that concerns over competence have had a disproportionate, detrimental effect in this area.

In this chapter, I seek both to facilitate a more serious analysis of competence issues in general and to prompt a reassessment of the treatment of social rights claims more specifically. I begin with an explanation of the competence concerns and illustrate their role in social rights cases with reference to the Supreme Court of Canada's decision in *Gosselin v. Québec (Attorney General)*.⁵ I also identify the bases upon which social rights cases bear a disproportionate burden of such concerns. The bulk of the chapter is then devoted to identifying and discussing a range of questions and issues that Canadian judges ought to be considering if they are really serious about the issue of competence. I also briefly assess the extent to which Canadian judges have recognized and analyzed these questions and issues and discuss select examples of their shortcomings.

Competence Concerns in Charter Adjudication

The starting point for consideration of the issue of competence in *Charter* adjudication is the understanding that *Charter* adjudication involves courts in a combination of human rights dispute resolution and human rights policy making.⁶ The issue, then, is whether courts are competent to perform these tasks. The concern over competence is, generally speaking, a concern over both the accuracy and effectiveness of judicial performance of these tasks. With respect to accuracy, the concern is whether courts can correctly identify, both in normative and empirical terms, the range of interests potentially affected by the decision, the potential effects on these interests, and the relative weight or value to be assigned to the different interests in balancing these effects (or, more precisely, in reviewing the balances struck by the governmental actor). With respect to effectiveness, the concern is whether courts can meaningfully supervise areas of social decision making for which the *Charter* makes them responsible as well as whether they can ensure that their decisions are properly implemented. Competence concerns can be contrasted with concerns over legitimacy, where the basic issue is the appropriateness of allowing an appointed judiciary to review and override the decisions of the relatively more democratic branches of

government. Both legitimacy and competence concerns can be distinguished from such interpretive issues as whether the text, drafters' intentions, or underlying principles of the *Charter* support the imposition of social rights obligations, although legitimacy and competence concerns often explicitly or implicitly inform interpretive conclusions.⁷

To the extent that competence has been an issue thus far in *Charter* adjudication, concerns over accuracy have mostly occupied the minds of Canadian judges. In this regard, judges have emphasized two related problems.⁸ The first problem is that of gathering and evaluating relevant social fact information – that is, information (often including social science research) relating to the broader political and social situation from which cases arise – by reference to which the positions of parties are justified and within which the judicial decision will operate.⁹ The second problem is that of identifying and weighing competing interests.¹⁰ Further, since in each stage of *Charter* review it may be necessary to consider social facts or to identify and strike balances between affected parties and interests, these problems affect all stages of review. In the violations review stage, the vehicle for giving expression to these and other competence concerns is the concept and doctrine of justiciability. When a *Charter* claim is held to be unjusticiable, it is dismissed at the very threshold of adjudication and denied any degree of *Charter* protection. In the section 1 review stage, competence concerns are given expression in the choice, form, and content of the questions that constitute the sub-stages of section 1 review and are more generally expressed in the concept, doctrine, and practice of deference. Deference affects the rigour of the standard of proof applied in each sub-stage of section 1 review and makes it easier for governments to justify limitations. In the remedy review stage, where concerns over effectiveness become more prominent, competence concerns are expressed in a preference for declaratory relief and a willingness to suspend the legal effect of such declarations, both of which can be regarded as forms of remedial restraint.

As well as being the means of giving expression to competence concerns, unjusticiability, deference, and remedial restraint can be regarded as alternative responses to these concerns. Each response involves a different degree of limitation on the scope of judicial review and *Charter* protection. Whereas the unjusticiability response involves a total and potentially permanent limitation, the responses of deference and remedial restraint involve more partial and contingent limitations. In this sense, unjusticiability is the most severe of the alternatives for responding to competence concerns.¹¹ Most competence concerns are expressed in the section 1 review stage. Courts, therefore, choose to respond to these concerns through deference. Although deference often means that a *Charter* claim is defeated at the section 1 stage, the choice of deference over unjusticiability at least serves to validate the claim in the sense that an initial rights violation is recognized.

However, in anti-poverty social rights cases, lower courts, in particular, have tended to respond to competence concerns through injusticiability, thus, excluding such cases – and the claimants who bring them – from the realm of even initial *Charter* protection.¹² In this way, competence concerns tend to have a disproportionate impact on social rights claims. When such concerns arise in social rights cases, courts tend to choose the more severe responses. Compounding this disproportionate impact is the frequency with which competence concerns are raised, and accepted, in social rights adjudication. The issues arising in social rights cases are more susceptible to being viewed by judges as requiring relatively more challenging information gathering and evaluation as well as interest weighing and balancing. Thus, courts regard themselves as being relatively more incompetent to adjudicate such cases. The recent Supreme Court of Canada decision in *Gosselin* illustrates the continuing presence of such competence concerns in social rights cases.

As described in the introduction to this volume, *Gosselin* concerned a social assistance regulation that set differential rates based on the age of the recipients.¹³ The claimants argued that the reduced rate violated a governmental duty to provide adequate social assistance under section 7 and that the reduced rate amounted to age discrimination under section 15(1).¹⁴ The issue of competence was explicitly addressed in the judgments of only the two judges who dissented on the section 7 claim. Justice Louise Arbour wrote the lead dissent and, in it, considered the justiciability objection. As she understood it, this objection consisted of the argument that poverty rights are unenforceable because they require courts to decide complex social policy matters and thus to move beyond the limits of their judicial role and into the province of the legislature. More specifically, the respondent government and the intervening attorneys general argued that the claim at hand required the court to dictate governmental allocation of scarce fiscal resources, which was a task beyond the institutional competence of the courts.

Arbour J. conceded that the justiciability argument was a valid one: “Questions of resource allocation typically involve delicate matters of policy. Legislatures are better suited than courts to addressing such matters, given that they have the express mandate of the taxpayers as well as the benefits of extensive debate and consultation.”¹⁵ She argued, however, that it was necessary to distinguish the question of resource allocation from the question of rights protection. In her view, the threshold issue raised by the claim before her was whether section 7 imposed positive obligations upon the state to provide the basic means of subsistence to those who cannot provide for themselves. This question was about rights protection or, in her words, “a question about what kinds of claims individuals can assert against the state.”¹⁶ Therefore, according to Arbour J., the courts were entirely competent to

answer this question. The question could, in principle, be separated out from the question of resource allocation, which would arise only when and if the rights claim was recognized as being valid. In other words, the fact that a court might have to refrain from deciding what level of social assistance was sufficient for subsistence, and how a government should provide it, did not mean a court had to refrain from deciding the initial question of whether a government had an obligation to provide sufficient social assistance. At the same time, Arbour J. acknowledged that it might be of little use to a claimant to know that a right exists if a court must then refrain from enforcing it due to competence concerns. In her view, however, such a dilemma did not arise in the case before her because the legislature had already defined (and the claimant had not disputed) a minimally sufficient level of social assistance (the full social assistance rate).

While Justice Claire L'Heureux-Dubé generally concurred with Arbour J.'s analysis of section 7, she emphasized that the court should show deference to governmental choices with respect to resource allocation. However, L'Heureux-Dubé J. also observed that it remained open to claimants to present evidence on such issues as "what a minimal level of assistance would be"¹⁷ and that courts may simply defer to governments at the implementation stage. L'Heureux-Dubé J. seemed to infer that Arbour J. was too ready to concede judicial incompetence on resource issues and that courts need not defer on all aspects of resource allocation questions.

Both Arbour and L'Heureux-Dubé JJ. thus express competence concerns in a social rights case, although they differ as to the precise nature and extent of the concern. Further, they appear to disagree about when and how best to respond to these concerns. Their judgments, thus, illustrate not only the continuing presence of competence concerns in social rights cases but also the lack of agreement as to the recognition of, and response to, these concerns. In turn, their judgments suggest that the courts are yet to develop a coherent and consistent framework for addressing competence concerns. In the next section, I identify and discuss the range of questions and issues that ought to be addressed in developing such a framework.

Framing and Assessing the Jurisprudence of Competence

The recognition and treatment of competence concerns in *Charter* adjudication, as in adjudication more generally, raise a number of questions. First, should courts take account of their competence in adjudicating the *Charter*? Second, are courts determining their competence correctly? This involves both the question of whether courts are correctly defining the conditions in which they are competent and the question of whether courts are properly identifying when those conditions are threatened. Third, are courts responding to these threats appropriately? Canadian judges should

address these questions if they are serious about the issue of institutional competence. I now turn to a consideration of the various issues raised by these questions, as identified by legal scholars and other commentators, and assess the extent to which Canadian judges have engaged these issues.

The Relevance of Institutional Competence

In academic analysis of the institutional competence of courts, more attention has been devoted to considering the conditions, rather than the relevance, of court competence. For their part, Canadian courts now also take it for granted that competence concerns are relevant, although this was not always the case.¹⁸ The lack of attention to the relevance of competence concerns is understandable, as it does seem self-evident that a court, as well as any other institution of social decision making, ought to have misgivings about being set a task that it is incompetent to perform. Indeed, in *Charter* adjudication, it is accepted and expected that courts have a measure of discretion to refuse to perform a particular adjudicatory task – for courts to ignore their own competence would seem particularly obtuse.

To the extent that the relevance of competence is not self-evident, it is, however, amply justified by broader bodies of thought relating to institutional choice and governance. It is beyond the scope of this chapter to go into these bodies of thought in any detail, but they include the work of the so-called legal process school of jurisprudence,¹⁹ which rose to prominence in the 1950s, as well as the work of contemporary scholars of legal process,²⁰ comparative institutional analysis,²¹ and the tools of public administration.²² Common to these bodies of thought is the basic premise that court-based adjudication needs to be regarded as but one of the institutions, processes, and tools of law and governance and that questions of competence, or of functionality or effectiveness, are fundamental in considering the role of all such institutions, processes, and tools. Consequently, the question raised by courts taking competency concerns into account in *Charter* adjudication is not so much whether such concerns are relevant but, rather, how relevant they are. This issue can be approached as a question of how courts ought to respond to their incompetence and is taken up later in this chapter.

Defining Institutional Competence

The question of whether courts are determining the extent and limits of their institutional competence appropriately revolves around the issue of how to define the institutional competence of courts. This, in turn, involves two sub-issues: first, defining what it is that courts need to be competent to do and in what sense they need to be competent to do it; and, second, identifying the factors and circumstances that threaten or limit this competence. With respect to the first sub-issue, I have already mentioned that

Charter adjudication involves courts in a combination of human rights dispute resolution and policy making and that competence in these tasks is understood as an issue of both accuracy and effectiveness. I now turn to four factors that affect competence: the forms of adjudication, judicial conservatism, court system scale, and the dynamics of participation.²³ I also identify the potential implications of each factor for the adjudication of anti-poverty *Charter* claims such as *Gosselin*. I then offer some observations on the extent to which Canadian judges have taken these factors seriously and identify some shortcomings in judicial considerations of competence in recent case law.

Forms of Adjudicative Process

The first and most widely recognized factor conditioning the competence of courts is the form of judicial decision making. Associated with the legal process school, and taking its terminology of “forms and limits” from Lon Fuller,²⁴ this line of argument understands adjudication as a distinct mode of social ordering, which is characterized by, for example, reasoned argument, ethical deliberation, or principled resolution. In turn, according to this line of argument, the institutional design of the adjudicative process is aimed at facilitating and preserving this conception of adjudication. At its broadest, this institutional design includes the rules of evidence and procedures of litigation, the independence and expertise of judges, and the nature of legal rights and remedies. These are what Fuller refers to as the “forms” of adjudication. However, the argument goes that in enabling adjudication these forms also condition and limit it. Typically, the forms of adjudicative process render courts least competent when adjudicating complex social problems involving multiple parties and interests.

This general line of argument has been endorsed, adopted, and echoed in a number of academic inquiries into the competence of courts.²⁵ In what remains a foundational study,²⁶ Donald Horowitz identified five attributes of the forms of adjudication and their negative consequences for judicial social policy making: the rights-centred focus of adjudication, which operates to exclude important factors relevant to social policy making (such as alternatives, costs, and benefits) and tends to conflate remedies with rights; the incremental nature of adjudicative problem solving, which tends to fragment what is interrelated; the lack of social science expertise in judges and those procedural aspects of adjudication that create difficulties for undertaking the type of fact finding relevant to competent social policy making; the inability to control timing and representativeness of cases; and, finally, the limited remedial tools available to courts, combined with the inability and unwillingness of courts to monitor remedies and make adjustments if compliance is perverse or produces unintended consequences. Given

that anti-poverty claims brought under the *Charter* undoubtedly entail judicial policy making, Horowitz's analysis has the potential to legitimize concerns that such claims challenge the competence of Canadian courts.

Similarly, and closer to home, Joel Bakan has argued that the competence of courts is limited by the fact that their remedial power must operate through the arrangement of dyadic legal relationships.²⁷ This argument might also support judicial perceptions that anti-poverty claims challenge their competence because, in Bakan's analysis, it is doubtful whether social justice in general, and perhaps the adequacy of standards of living in particular, can be defined in dyadic terms. Others have argued that without a taxing power, the competence of courts to remedy the violation of positive obligations that require the commitment of government fiscal resources is limited.²⁸ Since anti-poverty claims often involve claims to positive obligations, this version of the argument might also offer support to judges arguing that such claims challenge their institutional competence.

Judicial Conservatism

While the first line of argument includes the conditioning effects of the limits of judicial expertise, the second focuses on the conditioning effects of the ideological tilt of judicial values. According to this line of argument, judicial decisions are conditioned by the values of judges. Further, the education, socialization, and selection of judges has left them with a narrow range of values. Consequently, the values of judges condition the competence of courts by limiting the ability of courts to recognize the validity of claims that challenge these values and to properly weigh the interests of those advancing such claims.²⁹ Bakan calls this the problem of "judicial conservatism" since judicial values are likely to coincide with the dominant values that support the status quo.³⁰ In Bakan's analysis, such conservatism can thwart attempts to turn any *Charter* right or freedom to a progressive end. However, his analysis suggests that the degree of progressiveness involved in recognizing and imposing poverty-engaging *Charter* duties is so great that such claims are particularly vulnerable to judicial conservatism.³¹ Finally, even if judges were disposed to advance social justice, their limited understanding of the social context of disadvantage leaves them ill-equipped to do so.³²

Court System Scale

The third line of argument suggests that the scale of the court system limits the competence of courts. Neil Komesar has emphasized that,³³ as social decision-making institutions, and in comparison to the bureaucratic apparatus of modern administrative states, courts are both absolutely and relatively small in scale and cannot possibly review anything but a small proportion of social or political decision making. At the same time, in certain

areas of social or political decision making, competent decisions may depend upon continuing engagement with, and oversight of, a large set of decisions. But since the limits of court scale may preclude such judicial involvement, the competence of courts for decision making in this area will also be limited. Recognizing this, courts inevitably attempt to ration their resources both by abstaining from reviewing certain areas of social and political decision making and, for those areas they will review, by attuning the standard of review to the desired scope of involvement (for example, simple and sweeping standards tend to decrease demands on and for judicial review). Courts often express concern over this factor by reference to the proverbial fear of “opening the floodgates” to a deluge of reviewable decisions. This factor has been relied upon to argue against the adjudication of anti-poverty claims in Canada.³⁴

Dynamics of Participation

The extent to which courts are competent in any particular area of dispute resolution and social decision making is a function of whether claims in that area are brought to the court and, if so, by whom. In turn, the competence of courts can be understood to be conditioned by the determinants of participation in litigation. The raw cost of litigating has long been recognized as a barrier to justice and much has been written about how to increase access to justice (through legal aid, alternative dispute resolution, and so on).³⁵ If courts remain practically inaccessible to low-income people or groups, then courts will lack the experience with issues particular to these people and groups and, thus, will not be competent to address their claims of economic justice. This has obvious significance for the adjudication of anti-poverty claims.

The notion that the determinants of participation impact upon judicial competence is a central focus of Komesar’s work. Komesar has developed a quantitative framework of the determinants of participation common to a range of institutions and processes of social ordering, including courts, markets, legislatures, and administrative agencies, and used it to analyze issues of institutional choice.³⁶ Komesar argues that who participates, and to what extent, is largely determined by, on the one hand, the (potential) distribution of the costs and benefits of the decision (in Komesar’s words, the distribution of stakes) and, on the other hand, the costs of participation in the decision-making process.³⁷ In situations with a particular cost of participation, the (potential) distribution of costs and benefits of the decision is crucial. Generally speaking, the higher the stakes (whether costs or benefits of the decision), and the more concentrated their distribution, the stronger will be the incentive to participate. If the incentives for participation are skewed, then so too will be the participation. But, since different institutions and processes can respond to or act upon different patterns of

participation in different ways, the question of whether the ultimate outcome of participation is also skewed depends upon which institution or process has been chosen to make the decision. Thus, decisions as to institutional choice need to be informed by a comparative assessment of institutional competence and, therefore, by the dynamics of participation.

Neil Komesar's analysis is complex and best left for another occasion. Suffice it to say that his work suggests that the outcome of legislative decision making on poverty issues may be skewed against the poor by reason of their inadequate participation. At the same time, his work suggests, even given the barrier posed by the high costs of litigation, that it may be possible for the courts to play a corrective role in the form of constitutional rights review.³⁸

Judicial Definitions of Competence

If Canadian judges wish to seriously address institutional competence in *Charter* adjudication in general, and how to define competence in particular, then each of these factors – the forms of adjudication, judicial conservatism, court system scale, and the dynamics of participation – must be addressed. Thus far, the judicial record, especially in anti-poverty cases, is mixed. On the one hand, Canadian judges have incorporated these factors – though with varying degrees of explicitness and specificity – into judicial definitions of competence. I have already mentioned that judges have been most concerned about problems of information gathering and evaluation and of identifying and weighing interests – concerns directly rooted in the factor of the limiting effects of the forms of adjudication. While this factor has thus received the greatest attention, some attention has also been devoted to the others.

With respect to judicial conservatism, courts have recognized that judicial impartiality depends upon a willingness to enlarge the mind, to acknowledge a diversity of perspectives, and to appreciate the social context of cases and issues before the courts.³⁹ With respect to court system scale, it was recognized in the “labour trilogy,” as early as 1987, that to accept the justiciability of some types of rights might leave the courts with an unmanageable flood of claims.⁴⁰ Further, it has been recognized that in developing and modifying the questions of proof that structure *Charter* review, in establishing standards of review, and in deciding whether to maintain a supervisory remedial jurisdiction, the courts need to be wary of creating too much work for themselves.⁴¹ Recognition of the relationship between competence and the dynamics of participation is manifest in judicial reasoning on intervener applications and costs awards,⁴² although the analysis is by no means as comprehensive as that provided by Komesar.

On the other hand, much of the analysis of these factors remains superficial, suggesting that Canadian judges need to consider these issues more

seriously. Canadian judges have failed, for example, to adequately explain why the issues that arise in social rights cases should generally be regarded as raising particularly pressing competence concerns. To some extent, this failure is attributable to the inability of the judges to formulate a satisfactory explanation of the dividing line between cases where competence concerns are significant and those where they are not.⁴³ However, in the specific context of anti-poverty claims, courts have failed to explain why the same basic forms of adjudication can pose no apparent competence barrier to the adjudication of anti-poverty issues arising in non-*Charter* cases, but can prevent courts from adjudicating the same or similar issues arising in *Charter* claims. As Arbour J. notes in *Gosselin*, competency assessments must be carried out in reference to the specific context of each case. She argues, however, that since the government had in effect already defined the minimal level of sufficiency, the court was not actually incompetent on this issue in the specific case.⁴⁴

Indeed, in many constitutional and non-constitutional contexts, the Supreme Court of Canada, itself, has established, or has been prepared to adjudicate, a variety of poverty-related standards, such as “sustenance” and “moderate livelihood,”⁴⁵ “relief of the poor,”⁴⁶ and the “necessaries of life.”⁴⁷ Before the concerns about incompetence in defining sufficient levels of social assistance in *Charter* cases can be taken seriously, then, Canadian judges need to provide some explanation as to why the forms of adjudication appear to pose no significant competence barrier to performing this task in non-*Charter* contexts. This particular failing is but one instance of the more general problem of the underestimation of the institutional competence of courts in social rights cases. Other contributors to this volume identify similar instances.⁴⁸ This problem is then compounded by the way in which Canadian judges respond to incompetence.

Responding to Institutional Incompetence

The third issue that needs to be taken seriously by courts is how to respond to a finding of incompetence. Leaving aside the undesirable option of ignoring incompetence, three basic types of responses are set out in the academic literature. The first response is the complete withdrawal of judicial involvement with certain types of cases, principally through injusticiability holdings. The second response involves calibrating the degree of judicial involvement in accordance with the degree of incompetence, principally through deference, remedial restraint, and other means of limiting the extent of judicial involvement, such as the imposition of sweeping rules rather than flexible standards. The third response involves attempting to overcome incompetence – or of attempting to improve competence – principally by modifying the forms of adjudication or other factors that limit competence.

Canadian courts have responded to competence concerns not only through injusticiability but also through deference and remedial restraint. They have also displayed some willingness to take steps to improve their competence. For example, with the arrival of the *Charter*, the Supreme Court of Canada recognized a need to encourage and facilitate participation by intervenors.⁴⁹ In addition, workshops on social inequality and context were incorporated into judicial education programs in an effort to better equip judges for undertaking constitutional rights adjudication.⁵⁰ More recently, the Supreme Court of Canada gave its approval to courts retaining a supervisory remedial jurisdiction, where appropriate.⁵¹

On the other hand, Canadian judges have often failed to explain why they have chosen one response rather than another. Anti-poverty cases brought under section 7 of the *Charter* reveal a judicial tendency to respond to competence concerns through injusticiability rather than through deference or remedial restraint. As I have suggested elsewhere, given the severe consequences of injusticiability (that is, a complete and potentially permanent exclusion of the claim from the realm of *Charter* protection), judges must explain why responses with less severe consequences are not appropriate.⁵² In *Gosselin, Arbour and L'Heureux-Dubé JJ.* both expressly explored the possibility of calibrating the scope of judicial review and *Charter* protection to the degree of competence. If, despite this consideration, Canadian judges, in the lower courts particularly, continue to find social rights cases injusticiable generally, the judiciary must be pressed to explain why similar competence issues, arising in other types of cases, can be responded to in other ways. For example, minority language education cases – like anti-poverty cases – affect the allocation of fiscal resources, and yet, in the former cases the preferred response to associated competence concerns is remedial restraint.⁵³ Indeed, this raises a further point in need of explanation: Why is the issue of potential fiscal impact, which at its base is an issue of affordability, cited as a basis for competence concerns in all stages of the adjudication of anti-poverty claims when it could simply be deferred for consideration in the remedy stage? After all, this is how the Supreme Court of Canada envisaged cost issues being dealt with in *Schachter v. Canada*,⁵⁴ its foundational decision on *Charter* remedies. Much unexplored potential remains along the path of improving competence.⁵⁵

The tasks of choosing responses to institutional competence concerns, and explaining these choices, are not the only ones that Canadian judges need to take more seriously. In determining how to respond to competence concerns, courts must recognize that competence is not the only value at stake. The issue is what weight to give to competence concerns. Is the risk of incompetence in a particular case or class of cases offset by the relative value of an adjudicative outcome?⁵⁶ In other words, cases in which courts

suffer the greatest incompetence may also be the cases where particular outcomes might be of great social benefit, while those types of cases in which courts suffer less incompetence may also be cases where the outcome is of little social value. For example, anti-poverty claims may challenge judicial competence more than claims relating to restrictions on commercial expression, but, regardless, might not judicial resources be better spent struggling with the human rights dimensions of poverty?

More generally, even Fuller recognized that the values at stake in a claim (the adjudication of which would pose problems for the competence of courts) may be so important that the courts must afford them constitutional protection, despite less than perfect competence.⁵⁷ Similarly, in the context of social rights claims, Craig Scott and Patrick Macklem have argued that courts have a responsibility to recognize when the fundamental values underlying constitutional rights are at stake and to do as much as they can to protect these values.⁵⁸ Although at some point the degree of court incompetence may make any significant judicial role counter-productive, courts can calibrate the extent of their role to the degree of competence. Partial involvement, and, therefore, partial protection, may be tangibly and symbolically better than no involvement or protection at all, especially where the interests of disadvantaged groups are at stake. Furthermore, resisting the lure of injusticiability may serve other interests, particularly the interest in participating in governmental decision-making forums (such as courts), regardless of the degree of protection eventually obtained. The ideal of confining courts to the matters for which they are perfectly competent should be balanced against the need to protect fundamental values and to provide greater equality of participatory opportunities.⁵⁹

A recognition that competence is not the only value at stake in considering how to respond to competence concerns is thus one basis for justifying adjudication of cases for which courts are less than perfectly competent. Another basis, emphasized in Komesar's work, lies in the observation that alternative institutions – to which matters would be left if the court bowed out – may be no more competent. Whether or not Canadian judges choose to define their competence in Komesar's terms (that is, predominantly in terms of the dynamics of participation), they need to get serious about comparative institutional analysis if they wish to adequately address institutional competence. While there are some indications of judicial willingness to undertake this analysis,⁶⁰ much more can be done, particularly in anti-poverty cases. For example, courts abstaining from social rights adjudication may be implicitly relying upon Horowitz's argument that the rights-orientation of adjudication obscures considerations important in social policy making (such as alternative means, costs, and benefits). Yet, the section 1 review stage is oriented to means-ends analysis (blindness to this

point is one of the dangers of relying upon arguments formulated in relation to constitutional review, as practised in the United States). Even if there is some truth to Horowitz's argument, attentiveness to the demands of comparative institutional analysis would encourage inquiry into whether, for example, political decision making has become so focused on one social policy consideration – such as deficit reduction or efficiency – that social policy processes and outcomes, while different from those used and reached by courts, may be no more satisfactory.⁶¹ Similarly, before choosing to leave decisions affecting social rights to other branches of government, courts ought to consider whether social rights seekers have meaningful access to the decision-making processes of those branches.⁶² Indeed, such consideration is all the more important as governments increasingly utilize private sector actors in delivering programs and services (the age of so-called third-party government) and as political power is increasingly concentrated in the various executive branches (the development of so-called executive federalism).⁶³ In short, if analysis of the real world of adjudicative decision making raises competence concerns, the decision to leave certain decisions to the legislative or executive branches should be based not on the abstract superiority of their procedures but upon the real world operation of these procedures.

Conclusion

Competence concerns clearly play a role in the decisions of Canadian judges as to whether, and to what extent, they will become involved in different types of *Charter* claims. Unfortunately, competence concerns appear to be having a disproportionate, detrimental impact upon anti-poverty *Charter* claims. Those using the *Charter* to prompt governments to respect the human rights of Canadians living in poverty thus have little choice but to take the competence concerns of Canadian judges seriously. At the same time though, judges must be pressed to address the shortcomings of the present judicial analysis of competence, particularly in the judicial treatment of anti-poverty claims. One main shortcoming is the possibility that Canadian judges are underestimating their competence. When the adjudicative demands of anti-poverty *Charter* cases are compared to those of other types of *Charter* cases, and to the demands of non-*Charter* cases raising poverty-related issues, it is by no means clear that anti-poverty claims raise competence concerns of any greater magnitude. Another main shortcoming is the possibility that Canadian judges are overreacting to such competence concerns that do arise in anti-poverty cases. When judicial choices as to how to respond to competence concerns are similarly compared, the current preference, in anti-poverty cases, for the responses of injusticiability and deference may not be appropriate. This is especially so when it is recognized that all institutions will suffer some incompetence and, moreover, that judicial

concerns over competence need to be counter-balanced with concerns over the substantive and procedural accessibility and accountability of poverty-related decision making by other institutions of governance.

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Notes

- 1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].
- 2 See, for example, *R. v. Prosper*, [1994] 3 S.C.R. 236.
- 3 See, for example, *Collins v. Canada* (1999), 178 F.T.R. 161 (F.C.), aff'd (2002), 212 F.T.R. 318 (F.C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 198 (QL).
- 4 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
- 5 *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429 [Gosselin].
- 6 For an early analysis of the policy-making dimension of *Charter* adjudication, see Patrick Monahan and Andrew Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 *Supreme Court Law Review* 69.
- 7 At the same time, it should be recognized that competence and legitimacy concerns overlap at least to the extent that it can be argued that it is illegitimate for courts to undertake tasks that they are incompetent to perform.
- 8 The identification and elaboration of these problems begins with the decisions in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 [*Alberta Labour Reference*]; and *Irwin Toy v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].
- 9 For example, information relating to the personal, social, and economic effects of reducing social assistance rates in order to lower taxes was relevant to the litigation in *Masse v. Ontario (Minister of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Gen. Div.), leave to appeal to Ont. C.A. refused, [1996] O.J. No. 1526 (QL), leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 373 (QL) [*Masse*].
- 10 For example, *Masse, ibid.*, involved a weighing of the potential for immediate detrimental effects on the health and well-being of social assistance recipients against the potential for longer-term improvements in their employment prospects associated with tax cut-related stimulation of the economy.
- 11 For further discussion of the sense in which these responses are alternatives, see David Wiseman, "The *Charter* and Poverty: Beyond Injusticiability" (2001) 51 *University of Toronto Law Journal* 425.
- 12 This willingness is evident in such cases as *Conrad v. Halifax (County)* (1993), 124 N.S.R. (2d) 251 (S.C.), aff'd (1994), 130 N.S.R. (2d) 305 (C.A.), leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 264 (QL); *Masse, supra* note 9; *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen. Div.); appeal quashed for mootness (1998), 40 O.R. (3d) 409 (C.A.); and *Falkiner v. Ontario (Minister of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.); leave to appeal to S.C.C. granted, [2002] S.C.C.A. No. 297 (QL) [notice of discontinuance filed 1 September 2004].
- 13 *Regulation Respecting Social Aid*, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).
- 14 The claimants also alleged a violation of the Québec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 45 [Québec *Charter*], which provides that "every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living."
- 15 *Gosselin, supra* note 5 at para. 329.
- 16 *Ibid.* at para. 330.

- 17 *Ibid.* at para. 142.
- 18 See, for example, Wilson J.'s comment that judicial attention needs to be focused on "whether the courts *should* or *must* rather than on whether they *can* deal with" the issues before them. *Operation Dismantle v. Canada*, [1985] 1 S.C.R. 441 at 467 [emphasis in original].
- 19 A leading member of this school was Lon L. Fuller, whose work will be referred to later in this chapter. See generally Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon, 1995) (who would object to the "school" label).
- 20 On the relationship between the "old" and the "new" legal process scholarship, see Kent Roach, "What's New and Old about the Legal Process?" (1997) 47 *University of Toronto Law Journal* 363.
- 21 See generally Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Policy* (Chicago: University of Chicago Press, 1994); and Neil Komesar, *Law's Limits: The Rule of Law, and the Supply and Demand of Rights* (Cambridge: Cambridge University Press, 2001).
- 22 See, for instance, Lester M. Salamon, "The New Governance and the Tools of Public Administration: An Introduction" in Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002) 600.
- 23 Factors not considered here are the limitations to the competence of courts imposed by the broader socio-political context and the general relationship between law reform and social change.
- 24 Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353; see also Donald Horowitz, *The Courts and Social Policy* (Washington: Brookings Institution, 1977).
- 25 The leading treatments of this argument in relation to Canadian adjudication are Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland and Stewart, 1993) at c. 6, 7; W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) at c. 3; Martha Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20 *Ottawa Law Review* 257 at 330-7; and Paul Weiler, "Two Models of Judicial Decision-Making" (1968) 46 *Canadian Bar Review* 406.
- 26 Horowitz, *supra* note 24.
- 27 Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). For a critical review of this argument, see David Wiseman, "A Just Republic or Just Words?: Constitutional Rights and Progressive Social Justice" (1998) 20 *Adelaide Law Review* 349.
- 28 Gerald E. Frug, "The Judicial Power of the Purse" (1978) 126 *University of Pennsylvania Law Review* 715.
- 29 See, for example, Bakan, *supra* note 27; and Andrew Petter, "The Politics of the Charter" (1986) 8 *Supreme Court Law Review* 473.
- 30 See also David Schneiderman, "Social Rights and 'Common Sense': *Gosselin* through a Media Lens," in this volume. On the other hand, some scholars have suggested that many judges hold overly progressive values and that the real danger is that the courts will be too responsive to progressive claims. F.L. Morton and Rainer Knopff, eds., *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview, 2000).
- 31 Other scholars, who remain sceptical about the progressive possibilities of litigation, have made similar arguments. See, for example, Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).
- 32 Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 *Canadian Journal of Women and the Law* 37.
- 33 Komesar, *Imperfect Alternatives*, *supra* note 21.
- 34 See, for example, Peter Hogg, *Constitutional Law of Canada*, 3rd edition (Scarborough, ON: Carswell, 1992) at 44-8 and 44-9.
- 35 See Melina Buckley, "The Challenge of Litigating the Rights of Poor People: The Right to Legal Aid as a Test Case," and Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada," in this volume.

- 36 In utilizing economic analysis, Komesar has followed in the footsteps of public choice scholarship, but, in doing so, he has criticized and moved beyond this scholarship. Komesar, *Imperfect Alternatives*, *supra* note 21 at c. 3.
- 37 In keeping with his economic conception, Komesar identifies the costs of information and organization (including access costs) as the principal costs of participation. Generally speaking, participation costs vary with the complexity of the issues, the numbers of people affected (on both sides of the issues), the level of inherent interest in the issues, the rules and procedures of participation, and the costs of access.
- 38 Neil K. Komesar, "A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society" (1988) 86 Michigan Law Review 657.
- 39 See, for example, *R. v. R.D.S.*, [1997] 3 S.C.R. 484.
- 40 *Alberta Labour Reference*, *supra* note 8 at 419-20.
- 41 These concerns were manifest in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, where the Court wrestled with alternative definitions of the equality guarantee under section 15(1) of the *Charter* (see especially comments of La Forest J. at 194).
- 42 In a recent case, the Supreme Court of Canada approved an interim costs order aimed at ameliorating the financial barriers to presenting the court with adequate evidence in relation to Aboriginal rights. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371.
- 43 In *Irwin Toy*, *supra* note 8, the Supreme Court of Canada suggested that the dividing line matched the distinction between individual-antagonizing criminal justice matters, which fell within competence, and group-mediating social policy matters, which fell outside. Though relied upon in some subsequent cases, this distinction now appears to have given way to the recognition, expressed in *R.J.R.-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, that individual-antagonizing criminal justice matters will often, if not always, also involve the mediation of the interests of competing groups and broader issues of social policy. Still alive is the idea, relied upon by Arbour J. in *Gosselin*, *supra* note 5, that the competence dividing line can be defined by reference to whether a claim has an impact upon the allocation of fiscal resources.
- 44 *Gosselin*, *supra* note 5 at para. 332-5.
- 45 These standards are used in Aboriginal rights cases: on "sustenance," see *R. v. Gladstone*, [1996] 2 S.C.R. 723, in particular, the comments of McLachlin J. at paras. 165 and 173; on "moderate livelihood," see *R. v. Marshall*, [1999] 3 S.C.R. 456, in particular, the comments of Binnie J. at para. 59.
- 46 The standard of "relief of the poor" exists in section 3(1)(12)(iii) of the *Assessment Act*, R.S.O. 1990, c. A.31. Courts have had to define and apply the exemption for organizations engaged in "relief of the poor" and, in doing so, have grappled to some extent with the task of identifying who is poor and what counts as relief of poverty. See, for example, *Ontario (Stouffville Assessment Commissioner) v. Mennonite Home Association of York County*, [1973] S.C.R. 189; and *Family Service Assn. of Metropolitan Toronto v. Ontario (Regional Assessment Commissioner, Region No. 9)* (1995), 23 O.R. (3d) 382 (Gen. Div.).
- 47 The offence of failing to provide the "necessaries of life" is set out in section 215 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, and has been considered in cases such as *R. v. Popen*, [1981] 60 C.C.C. (2d) 232 (Ont. C.A.) and *R. v. Naglik*, [1993] 3 S.C.R. 122.
- 48 See Margot Young, "Why Rights Now? Law and Desperation," and Gráinne McKeever and Fionnuala Ni Aoláin, "Enforcing Social and Economic Rights at the Domestic Level: A Proposal," in this volume.
- 49 See Sharon Lavine, "Advocating Values: Public Interest Intervention in *Charter* Litigation" (1992) 2 National Journal of Constitutional Law 27.
- 50 See Dianne Pothier, "But It's for Your Own Good," in this volume for an assessment of the adequacy of these efforts.
- 51 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.
- 52 Wiseman, *supra* note 11.
- 53 This approach was taken in *Mahe v. Alberta*, [1990] 1 S.C.R. 342.
- 54 *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709-10.

- 55 See, for example, the relatively modest suggestions in Carl Baar and Ellen Baar, "Diagnostic Adjudication in Appellate Courts: The Supreme Court of Canada and the *Charter* of Rights" (1989) 27 *Osgoode Hall Law Journal* 1.
- 56 This issue was raised by Owen Fiss in defending so-called "structural reform litigation." See Owen M. Fiss, "The Supreme Court 1978 Term – Foreword: The Forms of Justice" (1979) 93 *Harvard Law Review* 1.
- 57 J.W.F. Allison, "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" (1994) 53 *Cambridge Law Journal* 367 at 374, citing unpublished correspondence between Fuller and Frank Newman. See also Lon Fuller, "Collective Bargaining and the Arbitrator" (1963) *Wisconsin Law Review* 3 at 34 (conceding that if there is a constitutional direction to apply a constitutional standard, and that standard presents competence challenges, then a court is compelled to do the best it can).
- 58 Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Pennsylvania Law Review* 1 at 68-9.
- 59 Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights" (2000) 15 *Journal of Law and Social Policy* 117 at 157. On the significance of participation in relation to social rights claims, see Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada," and Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship," in this volume.
- 60 See, for example, Bastarache J.'s comments on the relative lack of deference to be accorded to rules made by unelected delegated decision makers in *M. v. H.*, [1999] 2 S.C.R. 3 at para. 315.
- 61 For a discussion of the recent narrow focus of political decision making in Canada, see Janice Gross Stein, *The Cult of Efficiency* (Toronto: House of Anansi Press, 2001).
- 62 Jackman, *supra* note 25 at 282 and 336.
- 63 See Barbara Cameron, "Accounting for Rights and Money in the Canadian Social Union," in this volume.