

January 2000

Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights

Bruce Porter

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/jlsp>

Citation Information

Porter, Bruce. "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights." *Journal of Law and Social Policy* 15. (2000): 117-162.

<http://digitalcommons.osgoode.yorku.ca/jlsp/vol15/iss1/4>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized administrator of Osgoode Digital Commons.

JUDGING POVERTY: USING INTERNATIONAL HUMAN RIGHTS LAW TO REFINE THE SCOPE OF CHARTER RIGHTS

BRUCE PORTER*

RÉSUMÉ

Au cours des dernières années, un consensus a fait surface au sein des organes de défense des droits créés en vertu d'instruments internationaux à l'effet que la pauvreté chez les groupes vulnérables au Canada constitue une atteinte sérieuse aux droits de la personne. Le processus d'examen du Comité des droits économiques, sociaux et culturels a entraîné une nouvelle façon de comprendre la nécessité d'établir des procédés juridictionnels et une participation réelle des personnes dont les droits sociaux et économiques sont en jeu. Les organes de défense des droits créés en vertu d'instruments internationaux ont souligné combien il est important que les interprétations de la *Charte canadienne des droits et libertés* faites par les cours canadiennes reconnaissent les droits fondamentaux contenus dans les traités internationaux des droits de la personne, notamment le droit à une alimentation, à des vêtements et à un logement appropriés.

Une telle réorientation de la portée des droits protégés par la *Charte* est-elle possible au Canada? L'auteur avance que la responsabilité fondamentale des cours et des tribunaux de reconnaître les défis posés par la pauvreté et l'itinérance en tant que revendications légitimes pour des raisons de dignité, d'égalité et de sécurité en vertu de la *Charte* découle de la nouvelle jurisprudence relative à la *Charte*. Les revendications des droits de la personne faites par les personnes pauvres au Canada, qui ont commencé à faire l'objet de procès équitables à l'échelle internationale pendant les années 1990, doivent maintenant être entendues par les tribunaux et les cours au Canada.

La Cour suprême du Canada a affirmé que le droit international des droits de la personne aura une influence déterminante dans l'établissement de la portée des droits prévus par la *Charte*, notamment du droit à la vie, à la liberté et à la sécurité de la personne décrits à l'article 7 de la *Charte*, et des droits à l'égalité décrits à l'article 15. Bien que la Cour ait fait preuve de prudence relativement à l'usurpation du rôle législatif dans les programmes sociaux et économiques, elle a reconnu qu'il revient aux cours de déterminer si les choix et les programmes portant sur les politiques législatives respectent les valeurs démocratiques fondamentales reliées aux normes internationales des droits de la personne. L'incorporation des droits sociaux et écono-

* Bruce Porter is the Executive Director of the Centre for Equality Rights in Accommodation <www.web.net/cera> and the Co-ordinator of the Charter Committee on Poverty Issues <www.web.net/ccpi>. The author thanks Vincent Calderhead, Vincent Gogolek, Martha Jackman, David Porter, Mary Truemner and David Wiseman for helpful comments and/or editorial assistance.

miques dans l'interprétation de la *Charte* ne revient pas à empiéter sur le pouvoir législatif. Elle consiste plutôt à reconnaître les revendications légitimes à la dignité, à l'égalité et à la sécurité des groupes les plus vulnérables et à mieux concentrer la vision des cours sur les domaines qui constituent, tant pour la communauté internationale que pour les Canadiens eux-mêmes, des questions cruciales. Comme c'est le cas pour l'utilisation traditionnelle du terme « portée » dans l'interprétation textuelle, les cours doivent s'assurer que le sens détaillé de la *Charte* dans les domaines sociaux et économiques demeure fidèle à son objectif central. Les droits sociaux et économiques devraient constituer un point de référence crucial pour les valeurs et les motifs qui sous-tendent l'interprétation de la *Charte*.

INTRODUCTION: POVERTY AND THE CRISIS OF HUMAN RIGHTS IN CANADA

Over the last few years, a consensus has emerged among human rights treaty monitoring bodies reviewing Canada's compliance with its international human rights obligations that there is a serious and growing gap between the human rights to which Canada has committed under international law and the domestic policies and actions of governments in Canada.¹ Ironically, it is primarily in the social and economic domain that the country at the top of the United Nations Development Programme's Human Development Index² has been found to be violating the fundamental human rights of its most vulnerable citizens. The emerging consensus at the international level is that poverty among vulnerable groups in Canada constitutes a serious breach of human rights obligations. A more major concern in the long run is that our approach to human rights in Canada leaves us incapable of addressing it.

Poverty has been defined in Canadian political and judicial culture as a problem of social policy within the preserve of legislatures and social policy advisors to solve. It has not, as yet, been incorporated into our domestic human rights framework - primarily defined by the *Canadian Charter of Rights and Freedoms*³ (the *Charter*) and human rights legislation - as a human rights issue of the highest order. That, however, is how it is articulated in international human rights law emerging from the *Universal Declaration of Human Rights*, which lists a number of social and economic rights among its fundamental human rights, including the right to an adequate standard of living, including food, clothing and housing.⁴

1. *Infra*, parts 2 and 3.

2. See, for instance, United Nations Development Programme, *Human Development Report, 1997* (New York: Oxford University Press, 1997).

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

4. Universal Declaration of Human Rights, GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 25.

The exclusion of issues of poverty among vulnerable groups from domestic rights adjudication has created a growing gulf between Canada's human rights culture and the international human rights movement. Further, the inability or unwillingness of our courts and human rights institutions to address poverty seems to have created a political and cultural paralysis in the face of levels of homelessness and destitution which most agree are incompatible with the fundamental values of Canadian society.⁵ Contrary to what critics of rights strategies suggest, the exclusion of issues of poverty from our domestic human rights and constitutional framework has not meant that poor people rely on legislatures and parliament rather than on courts and human rights institutions to have their concerns addressed. Rather, the exclusion of their fundamental human rights from Canada's domestic rights framework has meant that poor people's rights have been increasingly marginalized in both political and judicial fora, falling between the institutional cracks of our relatively new constitutional democracy.

Directions from international human rights treaty monitoring bodies have been clear and unequivocal. Courts in Canada need to interpret and apply the rights in the *Charter* in a manner that recognizes the interdependence and indivisibility of all human rights and to bring within its scope critical issues of poverty and homelessness among vulnerable groups. This means that social and economic rights such as the right to an adequate standard of living, including adequate food, clothing and housing, must be recognized as rights which can be claimed and adjudicated by way of existing *Charter* rights, as well as through other areas of law.⁶ It also means recognizing the important place those living in poverty must play in bringing social and economic rights claims forward, challenging the systemic causes of poverty and claiming their constitutional rights to dignity, equality and security. Is such a reorientation of the scope of *Charter* rights possible in Canada? The present article will argue that emerging *Charter* and international human rights jurisprudence makes it a fundamental responsibility of courts and tribunals to address social and economic rights claims as legitimate *Charter* claims.

Bringing poverty issues into our domestic human rights framework in Canada will require more than a refined approach to *Charter* rights, of course. As Craig Scott has observed, a "judicial transformation" which absorbs international human rights norms must be part of a broader transformation of Canadian politics and human rights culture.⁷ There are other avenues of important legislative and institutional reform which must be pursued along with a new approach to *Charter* rights.⁸ International

5. For a discussion of the value that Canadian society places on social and economic well-being, see M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 *Ottawa L. Rev.* 257, part I; see also B. Porter, "Social Rights and the Question of a Social *Charter*," in P. Leduc Browne ed., *Finding Our Collective Voice, Options for a New Social Union* (Ottawa: Canadian Centre for Policy Alternatives, 1998) 59.

6. For discussion of the recommendations of U.N. bodies with respect to domestic remedies, see *infra*, part 3; see also C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional Forum* 97 at 104.

7. *Ibid.* at 111.

8. *Ibid.*

human rights treaty monitoring bodies have recommended adding social and economic rights to the *Canadian Human Rights Act*⁹ (CHRA) as well as to provincial human rights legislation. This recommendation has been endorsed by the Canadian Human Rights Commission¹⁰ and the majority of human rights groups across Canada.¹¹ A panel charged with reviewing the CHRA, headed by the Honourable Gérard La Forest, former Justice of the Supreme Court of Canada, has been holding consultations with respect to, among other things, “the adequacy of the scope and jurisdiction of the Act.”¹² Public consultations across Canada have discovered an emerging domestic consensus parallel to the international consensus, that traditional approaches to human rights in Canada which exclude poverty and social and economic rights must be reformed.¹³ There is broad support for a new vision of human rights which affirms the connection between domestic and international human rights protections and includes social and economic rights in the CHRA.

A previous article, written by Martha Jackman and myself, outlines proposals for the inclusion of social and economic rights within an amended CHRA.¹⁴ We argue there for an integrated approach to the interpretation of human rights legislation and the *Charter* which would affirm the fundamental place of social and economic rights in both, and which would make the provisions of international human rights law their common reference point.

In the present article, I revisit the issue of claiming and adjudicating social and economic rights under the *Charter*. I review the emerging international human rights jurisprudence and the concerns and recommendations of U.N. human rights treaty monitoring bodies with respect to Canada, considering how these can be integrated with domestic *Charter* jurisprudence. It is in the context of *Charter* interpretation that

9. R.S.C. 1985, c. H-6.

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

11. Among the organizations supporting the inclusion of social and economic rights are the Charter Committee on Poverty Issues (CCPI), the National Anti-Poverty Organization (NAPO), Equality for Gays and Lesbians Everywhere (EGALE), The African Canadian Legal Clinic, Action travail des femmes, La table féministe de concertation provinciale de L'Ontario, the National Association of Women and the Law (NAWL), the Council of Canadians with Disabilities (CCD), Coalition of Persons with Disabilities (Newfoundland and Labrador) and Independent Living Resource Centre (St. John's, Newfoundland), Metro Toronto Chinese & Southeast Asian Legal Clinic, Affiliation of Multicultural Societies & Service Agencies of B.C. (AMSSA) and the Canadian Council for Refugees (CCR). Submissions to the Canadian Human Rights Act Review Panel, on file with the Panel.

12. Canadian Human Rights Act Review Panel: Terms of Reference, online: <www.chrareview.org>.

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

14. M. Jackman and B. Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act” in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) available online: <www.swc-cfc.gc.ca>.

the courts have considered important issues related to the adjudication of social and economic rights claims – the relationship between domestic and international human rights law; the role of courts and tribunals in adjudicating “positive rights” claims; judicial competence to adjudicate claims in the social and economic domain; and the distinction between social policy issues and human rights issues which has tended to exclude poverty from the scope of human rights and *Charter* adjudication in Canada. These are the issues which we must re-think in Canada if we are to bring poverty issues properly within the scope of domestic approaches to human rights.¹⁵

In part I, I consider how emerging trends in international human rights law have come to give a more prominent place to social and economic rights violations in affluent countries such as Canada than was previously the case. I consider how the review procedures at the Committee on Economic, Social and Cultural Rights have created a new understanding that these rights need more than “expert review” – that they need adjudicative procedures based on effective participation by those whose rights are at stake.

In part II, I review the consensus among the most prominent U.N. human rights treaty monitoring bodies about the most critical substantive violations of human rights in Canada. I show that these are primarily linked with poverty and the failure of governments in Canada to meet substantive obligations toward vulnerable groups. I consider what this emerging human rights framework for poverty issues at the international level has meant to poor people in Canada. I contrast their experience of the human rights framework at the international level with the reception of the U.N. treaty monitoring bodies’ reports back in Canada, where they have been generally allocated to the field of “social policy review” rather than being understood as findings of violations of fundamental human rights.

In part III, I consider the reviews by the treaty monitoring bodies of how well Canada’s domestic legal order conforms with international human rights obligations to provide effective domestic remedies to violations of human rights, and their recommendations as to what we need to do to transform our domestic approach to human rights into one which is consistent with international human rights norms.

In part IV, I consider how the recommendations for reorientation of *Charter* interpretation fit with developments in *Charter* jurisprudence. I argue that the recommendations of treaty monitoring bodies for more effective adjudication of social and economic rights by way of the *Charter* are consistent with recent Supreme Court jurisprudence. I argue that incorporating social and economic rights into *Charter* interpretation is not a matter of dramatically expanding the role of tribunals and courts in Canada. Rather, it is a matter of better focusing their gaze on the areas where both the international community and Canadians themselves find the most critical human rights issues, and applying recognized principles of *Charter* interpretation to the *Charter* claims of poor people to dignity, security and equality.

15. *Infra*, part 4.

I. THE EMERGENCE OF MORE EFFECTIVE SOCIAL AND ECONOMIC RIGHTS REVIEW OF CANADA WITHIN THE U.N. HUMAN RIGHTS TREATY MONITORING SYSTEM

The fact that Canada is no longer seen by the international human rights community as the promised land of human rights compliance has only recently become apparent. The Canadian government has still not fully comprehended what happened or why.¹⁶ How did Canada, a darling of the international human rights community, come to be identified as a violator of human rights in reviews of its compliance with international human rights treaties?

The most obvious cause for the emerging critique, of course, is what has been occurring domestically within Canadian social policy. The 1990s saw a systematic attack on the protection of and respect for social and economic rights within many of the world's most affluent countries and within new global economic arrangements. These retrogressive developments have been particularly dramatic in Canada. The treaty monitoring reviews of Canada in the 1990s found clear evidence of a dramatic erosion of both legislative and programmatic adherence to social entitlements linked to the right to an adequate standard of living in Canada.¹⁷

Canada has been at the leading edge of, and much affected by, global trends toward free trade and government withdrawals from previously assumed roles in protecting social and economic rights. Unlike the U.S., however, which leads these global economic developments, we have ratified the *International Covenant on Economic, Social and Cultural Rights*¹⁸ (ICESCR) and thus have unequivocally affirmed social and economic rights under international human rights law. On the other hand, our approach to domestic human rights protections has not incorporated this fundamental difference and has tended to conform more to a U.S. style rights regime in which social and economic rights have been accorded little recognition. Non-governmental organizations (NGOs) representing poor people in Canada have thus turned increasingly to international human rights law and its review procedures for a framework of human rights which more closely conforms with what poor people consider fundamental human rights protections. Here is a human rights framework that is capable of acknowledging the serious attack on fundamental rights that has accompanied the dramatic political and economic changes of recent years.

The reviews of Canada for compliance with U.N. human rights treaties have thus become important occasions for confronting the growing gap between the international human rights commitments of affluent countries like Canada (the majority, unlike the U.S., recognize social and economic rights under international law) and

16. For a description of Canadian government reactions to the emerging criticism from international human rights bodies, see C. Scott, *supra* note 6.

17. *Infra*, quotation accompanying note 46.

18. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 August 1976) [hereinafter *ICESCR*].

their domestic performance. These reviews have also played an important part in the development of the jurisprudence of the treaty monitoring bodies as they have been challenged to come to grips with emerging problems in Canada and elsewhere linked with the new global developments threatening social and economic rights. Two developments in particular were important in the Canadian context: the development of an “adjudicative” model of assessing compliance with social and economic rights, and the development of a more rigorous approach to the obligations surrounding the “progressive realization” of social and economic rights in affluent countries.

A. Developing an Adjudicative Model for Assessing Compliance with Social and Economic Rights

While poor people in Canada now place considerable weight on the protections of social and economic rights in international human rights law, this was not always the case. It is at the international level, of course, that the bifurcation of social and economic rights from civil and political rights first occurred. Cold war rhetoric and an aggressive campaign by the U.S. against the recognition of social and economic rights¹⁹ led to the separation of what was originally a unified conception of rights in the *Universal Declaration of Human Rights* into two separate Covenants, the ICESCR and the *International Covenant on Civil and Political Rights*²⁰ (ICCPR). Both Covenants affirm, in their preambles, the interdependence of civil, political, economic, social and cultural rights and there is no explicit differentiation in either Covenant with respect to whether the rights they contain are amenable to adjudication. Nevertheless, the two sets of rights were often distinguished in the first years of the Covenants on the basis that social and economic rights were somehow not amenable to adjudication, findings of violations or effective legal remedies.

An Optional Protocol establishing an individual complaints procedure for civil and political rights was adopted in 1966 along with the ICCPR and came into force with the Covenant in 1976.²¹ No similar provision was adopted for the ICESCR. The U.N. Human Rights Committee (HRC) was created under the ICCPR to receive and review

-
19. The U.S. opposition to social and economic rights continues to this day and is an important subtext to the interplay, in Canadian courts, between the American rights paradigm and an emerging international consensus in favour of giving equal recognition to social and economic rights. The U.S. has not only refused to ratify the ICESCR but stubbornly remains one of only two countries to refuse to ratify the *Convention on the Rights of the Child* (see, *infra*, note 33). (Somalia is the other country not to have ratified the *Convention on the Rights of the Child* in large part because of political instability). For a review of the U.S. response to social and economic rights see P. Alston, “U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy” (1990) 84 A.J.I.L. 365.
 20. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*]. For an overview of the bifurcation of these Covenants, see M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995).
 21. *International Covenant on Civil and Political Rights, (First) Optional Protocol*, Adopted Dec. 19, 1966 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

periodic reports from State parties and also to receive and decide on complaints. The review of compliance with the ICESCR, on the other hand, was assigned to a variety of ineffective expert "working groups" appointed by the U.N. Economic and Social Council in the early years of the Covenant. The result of this institutional differentiation between the two Covenants at the international level was that for many years the United Nations treaty monitoring system provided an evolving experience and jurisprudence on the adjudication of civil and political rights but provided nothing comparable for social and economic rights.

Even after the formation of the current U.N. Committee on Economic Social and Cultural Rights (CESCR) to supervise state compliance with the ICESCR, social and economic rights continued to be weighed down by an exclusive reliance on expert review rather than adjudication. State parties submitted periodic reports at intervals of five years or so, and the Committee of 18 experts then engaged in a dialogue with delegations of the State parties with respect to compliance with the Covenant. The dialogue was predictably stultified. Governments like Canada submitted lengthy documentation of all of their accomplishments and the Committee was hamstrung by the one sided nature of the information before it.²² The first periodic review of Canada by the new CESCR in 1988 had little impact domestically.

In 1993, with Canada's Second Periodic Report coming up for review, Canadian NGOs decided to challenge the "expert review" paradigm. Despite advice from international NGOs that we would never succeed, the Charter Committee on Poverty Issues (CCPI) petitioned the Committee for a new procedure through which it would hear oral submissions from domestic NGOs as part of the consideration of States' periodic reports. The request, surprisingly enough, caught the imagination of the Chairperson, Philip Alston, who used the request to provoke a review of Committee procedures. With Canada's somewhat apprehensive agreement, the Committee decided to set aside time at the beginning of the session for NGO presentations relating to periodic reports.²³ As the Committee notes on its official "Fact Sheet", this was the first time a human rights treaty monitoring body at the United Nations permitted domestic NGOs to appear in the context of periodic reviews of State party compliance and has since

22. For an overview of the role of the Committee and the implementation measures under the ICESCR prior to 1993 see P. Alston & J.J. Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156; P. Alston, "The Committee on Economic, Social and Cultural Rights" in P. Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) 473.

23. Sarah Sharpe, a low income activist from St. John's, and I appeared before the Committee on behalf of CCPI and the National Anti-Poverty Organization on May, 16 1993 for a forty-five minute oral presentation, backed up with a written brief and a slide show. See S. Sharpe "Taking Canadian Poverty Issues to the U.N." *NAPO News* No. 40 at 1; See also *The Right to an Adequate Standard of Living in a Land of Plenty: Submissions by the Charter Committee on Poverty Issues and the National Anti-Poverty Organization to the United Nations Committee on Economic, Social and Cultural Rights to the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of Canada's Second Periodic Review Under the International Covenant on Economic, Social and Cultural Rights* (May, 1993), available online: <www.web.net/ccpi> [hereinafter *Right to An Adequate Standard of Living in a Land of Plenty*].

been used by NGOs in many other countries as a critical means for bringing to light violations of social and economic rights.²⁴

The result of the CESCR's innovation in 1993 was that economic, social and cultural rights became subject to what international human rights scholar Mathew Craven calls an "unofficial petition procedure."²⁵ The submission and review of State party reports, previously the essence of the review process, is now only the beginning of a review procedure that is fundamentally adjudicative in nature. Ironically, the absence of an optional protocol for individual complaints of violations of social and economic rights has led the CESCR to lead the way in developing an adjudicative model for systemic social and economic rights claims.

Rather than presuming to an expertise in the complex social and economic issues in each country under review, the CESCR has recognized that it functions most competently when it facilitates what amounts to a hearing – considering allegations of non-compliance advanced by domestic groups and then considering "responses" from governments. Admittedly, this is not always possible. It depends on the ability of domestic NGOs to participate effectively in the review process. This requires, at a minimum, resources, an ability to leave the country, and freedom to participate without reprisals from government. Where such participation is possible, however, the Committee relies on the NGOs to identify the most critical issues regarding the implementation of the Covenant and to provide the necessary background for members to put these issues to government delegates for a response. NGO briefs, to be effective, need to provide well documented evidence in the nature of "*amicus* briefs" filed in domestic judicial proceedings. In cases where domestic NGOs are not able to participate, international human rights NGOs will frequently step in.

Under the CESCR's procedure, the Periodic Report is required to provide evidence on particular issues of compliance, for example, the availability of domestic legal remedies and the situation of identified vulnerable groups.²⁶ After the Report has been received and a review scheduled, a pre-sessional working group convenes six months prior to the review to consider the report and develop a list of issues or questions to send to the State party. This is one of the most important and frequently overlooked components of the Committee review process for both NGOs and governments – analogous to a pre-hearing in a judicial setting to identify critical issues in dispute. NGOs are permitted brief oral submissions and may submit written briefs to the pre-sessional working group. Without effective NGO submissions to the pre-sessional

24. *United Nations Committee on Economic, Social and Cultural Rights Fact Sheet*, online: <www.unhcr.ch/html/menu6/2/fs16.htm>.

25. M. Craven "Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights" in K. Drzewicki, C. Krause and A. Rosas eds., *Social Rights as Human Rights: A European Challenge* (London: Martinus Nijhoff, 1994) 91.

26. United Nations Committee on Economic, Social and Cultural Rights, *Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, 17 June 1991, U.N. Doc. E/C.12/1989/SR.8 at part B article 11 [hereinafter *Reporting Guidelines*].

working group the committee would have little sense of the primary issues of importance. The list of issues also provides governments with a first opportunity to respond, in writing, to concerns or allegations of non-compliance. This is the government's opportunity to put its pleadings on the record.²⁷

Five months or so after the list of issues is sent to the government, the actual review occurs before the Committee. The review affords NGOs an opportunity to appear briefly before the Committee and to present by way of written and oral submissions their concerns and evidence with respect to non-compliance with the Covenant. The Committee ensures that copies of all NGO submissions are provided to the government delegation in advance of its appearance before the Committee and government representatives attend the NGO oral submissions. The Committee's questioning of the government delegation focuses on concerns or questions raised in the government's response to the list of issues, concerns raised by NGOs and concerns of Committee members themselves.²⁸ Concluding Observations are then prepared by the Committee in closed door sessions, based on the outcome of the review process. These Observations will not comment on any issue which has not properly been put to the government for a response.

Lacking a jurisprudence arising from an individual complaints procedure but nevertheless required to issue authoritative considerations of compliance with fundamental human rights, the Committee has adopted an adjudicative framework that has affected both the competency and legitimacy of its review process. Experts from 18 different countries sitting as part-time Committee members would have little competence to assess compliance with social and economic rights in Canada and other countries without the participatory, adjudicative procedures the CESCR has developed. Indeed, many of the members of the Committee are legal scholars or appellate judges in their own countries, so their expertise is less a social policy expertise than an adjudicative one.

The development of an adjudicative process has given more legitimacy to the Committee's human rights review as well. Democratic societies are properly cautious about authorizing experts to make findings of violations of human rights outside the

27. For the results of this process with respect to Canada, see Committee on Economic, Social And Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, *List of issues to be taken up in connection with the consideration of the third periodic report of Canada concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights* (E/1994/104/Add.17) E/C.12/Q/CAN/1 (10 June 1998), paragraph 8, page 2 [hereinafter *List of Issues*]. *Review of Canada's Third Report on The Implementation of The International Covenant on Economic, Social And Cultural Rights: Responses to the supplementary questions emitted by the United Nations Committee on Economic, Social and Cultural Rights* (E/C.12/Q/CAN/1) on Canada's third report on the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add17) [hereinafter *Responses to Supplementary Questions*]. These are available at the U.N. website and also at the Canadian NGO website, along with the NGO submissions, online: <www.web.net/ngoun98>.

28. For description of this process in the context of the review of Canada, see B. Porter, "Socio-economic Rights Advocacy – Using International Law: Notes from Canada" (July 1999) 2:1 *Economic & Social Rights Review* 1.

context of participatory rights and procedural fairness to parties concerned – both the constituencies whose rights may have been infringed and those accused of infringing them. To the extent that the public and parliament see a social and economic rights review process, either at a domestic or international level, as a group of “experts” trying to dictate social policy to Canadians, social and economic rights will be seen as illegitimate incursions into democratic decision-making. It is only if there is a fair and competent adjudicative process and full participation from interested parties and constituencies that the public and parliamentarians can legitimately be asked to incorporate findings of human rights infringements into the democratic process.

In response to support from the Vienna World Conference on Human Rights for continued work by the CESCR in developing an optional protocol for petitions under the Covenant, the Committee has adopted a draft.²⁹ It has not as yet received necessary support from governments. Nevertheless, the transformation of the CESCR in the last decade from a largely irrelevant expert review mechanism to an influential human rights adjudication procedure has been of fundamental importance in allowing the international human rights community to leave behind the sterile debates about the justiciability of social and economic rights which dominated the earlier years. The CESCR has developed a practice which establishes that these rights can be adjudicated with both competency and legitimacy.³⁰

B. Adjudicating Progressive Realization and the Allocation of Resources at the CESCR

As well as benefiting from an institutional shift toward an adjudication model of social and economic rights review at the CESCR, constituencies seeking more effective adjudication of social and economic rights in Canada also benefited during the 1990s from a new willingness on the part of the CESCR to subject affluent countries to a more meaningful review than had occurred in previous years.

There has traditionally been a strong institutional bias within the U.N. human rights system in favour of U.S. and northern rights paradigms. Many of the international human rights NGOs are funded by U.S. based charities to do work in developing

29. Report of the Committee on Economic, Social and Cultural Rights on the subject (E/CN.4/1997/105) was submitted for consideration by the Commission on Human Rights at its 53rd session held in Geneva, from 17 March to 25 April 1997. For discussion of this issue, see F. Coomans and G. J. H. van Hoof, eds., *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Utrecht, 25-28 January 1995)* (Utrecht, Netherlands Institute of Human Rights, 1995); *United Nations Committee on Economic, Social and Cultural Rights Fact Sheet*, *supra* note 24.

30. For a development of this theme see B. Porter, *supra* note 28; A.R. Chapman, “A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights” (1996) 18 Hum. Rts. Q. 23; P. Alston, “No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant” in A. Eide and J. Helgesen, eds, *The Future of Human Rights Protection in a Changing World* (London: Martinus Nijhoff, 1991); Craven, *supra* note 25; S. Leckie, “Another Step Towards Indivisibility: Identifying Key Features of Violations of Economic, Social and Cultural Rights” (1998) 20 Hum. Rts. Q. 81.

countries, so the prevailing model is one of "exporting" U.S. based "expertise" in human rights to underdeveloped countries. There has been little consideration given to the need to identify violations of fundamental human rights in countries like the U.S. and Canada. It remains very difficult to get funding from northern based human rights funders to apply international human rights law to northern countries themselves.³¹

This tendency to focus on human rights violations within developing rather than affluent countries dominated the early years of social and economic rights jurisprudence at the international level. A primary focus of the debate about the status and justiciability of social and economic rights was on the concept of "progressive realization" in article 2(1) of the ICESCR, which sets out the government's responsibilities in the following terms:

Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³²

The concept of progressive realization and the standard of "the maximum of available resources" is articulated explicitly in international human rights instruments only with respect to economic, social and cultural rights.³³ For those opposed to recognizing social and economic rights, this was an indicator that they were too vague and undefined to be judicially enforced.³⁴

In response to this critique, scholars defending social and economic rights tended to focus in the early years on the aspects of these rights that would conform with more

31. Leilani Farha, "Human Rights Across Cultures," Unpublished paper presented at "Beyond Beijing: From Words to Action: Association for Women and Development 7th International Forum," Washington, D.C. (September, 1996). Copy on file with author.
32. *ICESCR*, *supra* note 18. article 2(1). For an overview of the requirements of Article 2(1) see M. Craven, *supra* note 25.
33. Note that Article 4 of the *Convention on the Rights of the Child* 20 November 1989, Can T.S. 1992 No. 3; UN Doc. A/RES/44/25 (entered into force 2 September 1990 and in force for Canada 28 May 1990) [hereinafter *CRC*] provides that States Parties "shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention" and that "With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources." Current scholarship recognizes that the principle actually applies to all rights to various degrees. See, for example *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* at paragraph 8 as reproduced in "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Hum. Rts. Q.* 691.
34. For an overview of justiciability issues, see C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall L.J.* 769. For an early debate of this issue see E. W. Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights (1978) 9 *Netherlands Yearbook of International Law* 69 and G. van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views" in P. Alston and K. Tomasevski, eds., *The Right to Food* (Dordrecht: Martinus Nijhoff Publishers, 1984).

traditional ideas of “universal application” – the obligations which were independent of progressive realization, subject to immediate application and could thus be equally applied to all countries, regardless of resources. There was thus a focus on the “minimum core” obligations required for compliance with social and economic rights.³⁵ This kind of “universality”, however, is universal in name only. Naturally, affluent countries tended to meet the minimum core obligations while poor countries were more likely to violate them.

By the early 1990s, however, members of the CESCR, and other international human rights experts, began to consider more carefully standards that would apply to countries with the resources necessary to move well beyond these “minimums.” While continuing to identify issues with respect to minimum core content of rights, the CESCR’s *General Comment No. 3: The nature of state parties’ obligations*,³⁶ adopted in 1990, places more weight on how compliance with progressive realization can be reviewed. The Committee states that the notion of progressive realization places serious obligations on governments to demonstrate that they have taken steps that are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations” and that they have an obligation “to move as expeditiously and effectively as possible towards that goal.”³⁷ Significantly for what would be occurring in many affluent countries in subsequent years, the Committee further held that “deliberately retrogressive measures” or backward movement in the protection of social and economic rights “would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources.”³⁸

The following year, the CESCR revised its *Reporting Guidelines* to place greater emphasis on the obligation to report meaningful evidence with respect to available resources, (such as per capita gross national product, external debt and distribution of income), progressive realization (showing changes in living conditions and programme commitments over time) and the situation of the poorest households and vulnerable groups.³⁹ The new focus on available economic resources, progressive improvement and the position of “vulnerable and disadvantaged groups” set the stage for a more rigorous assessment of whether affluent countries were meeting their obligations under the Covenant. With the highest Gross Domestic Product per capita

35. The earlier preoccupation with minimums is evident in the “Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights”, printed in (1987) 9 Hum. Rts. Q.

36. United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Fifth Sess., 1990, *General Comment No. 3: The nature of States parties’ obligations (art 2(1))*, E/1991/23 [hereinafter *General Comment No. 3*].

37. *Ibid.* at paras. 2 and 9.

38. *Ibid.* at para. 9. For discussion of what he calls the “ratchet effect” of the doctrine of progressive realization, see C. Scott, “Covenant Constitutionalism and the Canada Assistance Plan” (1995) 6 *Constitutional Forum* 79 at 82. See also C. Scott and P. Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992) 141 U. Pa. L. Rev. 1 at 80-81.

39. *Reporting Guidelines*, *supra* note 26 at 88, 99.

of the major industrialized countries that had ratified the ICESCR, Canada would be scrutinized to determine if it was properly using its available resources to meet its commitments to move toward the fulfillment of social and economic rights, and to address the situation of the most disadvantaged groups.

II. THE EMERGING CONSENSUS AT THE INTERNATIONAL LEVEL ABOUT POVERTY AND HUMAN RIGHTS IN CANADA

A. 1993 CESCR Review of Compliance with ICESCR

Canada's first harsh human rights review before a United Nations treaty monitoring body occurred at the CESCR in 1993, at its Second Periodic Review under the ICESCR. The Committee's Concluding Observations on Canada received considerable attention internationally as well as domestically because they indicated a new resolve by the CESCR to hold affluent countries accountable to standards of progressive realization.⁴⁰ The Committee focused particularly on Canada's apparent non-compliance with article 11 of the Covenant "the right to an adequate standard of living, including adequate food, clothing and housing" and addressed the obligations under article 2 of the Covenant to apply the "maximum of available resources" to the progressive realization of this right. It strongly condemned the level and severity of poverty among vulnerable groups, particularly single mothers, the increasing reliance on foodbanks, the gap between social assistance rates and the poverty line, and the minimal allocation of resources to address homelessness.⁴¹ A new focus on the obligation to apply available resources to protect the interests of vulnerable groups and to move forward in addressing problems of poverty was prominent:

In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realization of the rights recognized in the treaty, and considering Canada's enviable situation with regard to such resources, the Committee expresses concern about the persistence of poverty in Canada. There seems to have been no measurable progress in alleviating poverty over the last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups.⁴²

B. 1998 CESCR Review of Compliance with ICESCR

If failure to make "measurable progress" in alleviating poverty among vulnerable groups was the prominent theme in Canada's 1993 review, "retrogressive measures" was the theme at its next review before the CESCR in November, 1998.⁴³ After five

40. United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Official Records, 1994, Supplement No.3 *Consideration of Reports Submitted by States parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the committee on Economic, Social and Cultural Rights (Canada)*, Geneva, 10 June 1993, E/C 12/1993/19 [hereinafter *Concluding Observations, CESCR, 1993*]

41. *Ibid.* at paras. 101, 102, 104, 105, 109.

42. *Ibid.* at para. 101.

43. United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights,

years of robust economic growth, the problems that had been identified in 1993 had grown considerably worse, largely through the predictable results of deliberate legislative and policy changes. The Committee noted that the Federal Government and the provinces had implemented dramatic cuts to social programmes with severe consequences for the most vulnerable groups, particularly women.⁴⁴ Further, the Federal Government had removed a principle feature of the protection of the right to an adequate standard of living in Canada by revoking the *Canada Assistance Plan*⁴⁵ (CAP).

The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living and facilitated court challenges of federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, CHST has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance.⁴⁶

The Committee observed that with the elimination of national standards in CAP, provinces had proceeded to institute drastic cuts to social assistance levels which, in 1993, had been criticized for already being so far below the poverty line:

The Committee received information to the effect that cuts of about 10 per cent in social assistance rates for single people have been introduced in Manitoba; 35 per cent in those for single people in Nova Scotia; and 21.6 per cent in those for both families and single people in Ontario. These cuts appear to have had a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger.⁴⁷

The CESCR issued an extensive list of other areas in which Canada appeared to have violated the ICESCR. There had been no progress made or commitment shown to address the most serious issues of disadvantage, such as alleviating social and economic deprivation among Aboriginal people or in addressing the plight of refugees denied access to social programmes.⁴⁸ The discriminatory "clawback" of the National Child Benefit Supplement meant that the major initiative to address child poverty provided no benefit for families on social assistance in most provinces.⁴⁹ There was

Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada), 10 December 1998, E/C.12/1/Add.31 [hereinafter *Concluding Observations, CESCR, 1998*].

44. *Ibid.* at paras. 22, 28.

45. R.S.C. 1985, c. C-1.

46. *Concluding Observations, CESCR, 1998, supra* note 43 at para. 19.

47. *Ibid.* at para. 21.

48. *Ibid.* at paras. 17, 18, 37, 39.

49. *Ibid.* at paras. 22, 44.

evidence of backward movement in many other areas such as restrictions on eligibility for unemployment insurance, the implementation of workfare and other discriminatory provisions against welfare recipients, programme cuts which discriminated against women, and increased reliance on food banks.⁵⁰ The Committee was “gravely concerned that such a wealthy country as Canada has allowed the problem of homelessness and inadequate housing to grow to such proportions that the mayors of Canada’s 10 largest cities have now declared homelessness a national disaster,” noting that “provincial social assistance rates and other income assistance measures have clearly not been adequate to cover rental costs of the poor.”⁵¹

The 1998 Concluding Observations of the CESCR, like those it issued in 1993 were the subject of extensive media coverage and heated parliamentary debate. On both occasions, the Government of Canada took the “low road” in response to the criticism. After years of promoting the U.N. treaty monitoring system abroad and urging compliance with international human rights in other countries, Canada’s reaction to being on the receiving end of criticism by a treaty monitoring body was to attack the credibility of the review.⁵² Politicians and government officials, still living largely within the social and economic rights paradigm of the previous decade, found it outrageous that Canada should be condemned for violating social and economic rights by a Committee including experts from southern countries where levels of extreme poverty made Canada’s problems, in their view, insignificant.⁵³

Subsequent reviews by other U.N. human rights treaty monitoring bodies, however, suggested that Canada’s problem was not simply a strained relationship with the CESCR and with evolving jurisprudence in the area of social and economic rights. Policies which exacerbated poverty among disadvantaged groups in Canada were increasingly seen at the international level not simply as violations of social and economic rights, but also as substantive violations of equality rights and other civil and political rights.

C. 1997 CEDAW Review

Canada’s 1997 review under the *Convention on the Elimination of All Forms of Discrimination Against Women*⁵⁴ confirmed a primary concern of the CESCR in the context of women’s human rights. The Committee on the Elimination of Discrimination Against Women (CEDAW), which monitors compliance with the Convention, expressed concern about “the deepening poverty among women, particularly among single mothers, aggravated by the withdrawal, modification or weakening of social

50. *Ibid.* at paras. 20, 21, 26, 27, 30, 31, 32, 33.

51. *Ibid.* at paras. 24, 25.

52. G. York, “UN Body Chastises Canada on Poverty” *The Globe and Mail* (29 May 1993) A1; R. Speirs, “UN Report on Poverty Levels is Flawed, Tories Say” *Toronto Star* (1 June 1993).

53. For description and commentary on Canada’s reaction, see *supra* note 6 at 104-105.

54. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 3 September 1981, accession by Canada 10 January 1982).

assistance programmes.”⁵⁵ The Committee recommended that “the Government address urgently the factors responsible for increasing poverty among women and especially women single parents, and that it develop programmes and policies to combat such poverty.”⁵⁶ Responding to the social assistance cut-backs, it recommended that “social assistance programmes directed at women be restored to an adequate level.”⁵⁷

The Committee addressed itself to the discrepancy between Canada’s positive role at the international level in promoting the human rights of women and domestic policies which reinforced the erosion of women’s social and economic rights both within Canada and elsewhere:

The restructuring of the economy, a phenomenon occurring in Canada and other highly industrialized countries, appeared to have had a disproportionate impact on women. Although the Government had introduced many measures designed to improve the status of women, the restructuring was seriously threatening to erode the significant gains and advances made by Canadian women. Given the Government’s proud record of leadership on women’s issues globally, those developments would not only have an impact on Canadian women, but would also be felt by women in other countries.⁵⁸

D. 1999 HRC Review of Compliance with ICCPR

The concern of CEDAW about the discriminatory effect of social programme reductions on women was reiterated by the U.N. Human Rights Committee (HRC) in its Fifth Periodic Review of Canada under the ICCPR in March, 1999. The HRC echoed the concerns of CEDAW and CESCR about the extraordinary extent of poverty among women with children in Canada. It found that social programme cuts and other government action responsible for perpetuating such poverty in Canada constitute discrimination against women as well as a failure to provide necessary protections to which children are entitled under the ICCPR:

The Committee is concerned that many women have been disproportionately affected by poverty. In particular, the very high poverty rate among single mothers leaves their children without the protection to which they are entitled under the Covenant. While the delegation expressed a strong commitment to address these inequalities in Canadian society, the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups. The Committee recommends a thorough assessment of the impact of recent changes in social programmes on

55. United Nations Committee on the Elimination of Discrimination Against Women, *Adoption of the Report of the Committee on the Elimination of Discrimination Against Women on its Sixteenth Session: Concluding Observations of the Committee on the Elimination of Discrimination Against Women (Canada)*, 29 February 1997, A/52/38/Rev.1 at paras. 306-343 [hereinafter *Concluding Observations, CEDAW, 1997*].

56. *Ibid.* at para. 336.

57. *Ibid.* at para. 342.

58. *Ibid.* at para. 321.

women and that action be undertaken to redress any discriminatory effects of these changes.⁵⁹

The HRC also joined the CESCRC in condemning the discriminatory clawback from families on social assistance of the National Child Benefit Supplement, noting that this “may lead to non-compliance with article 24 of the Covenant.”⁶⁰ Article 24 guarantees to every child, without discrimination “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”⁶¹ Further, the HRC linked homelessness to the guarantee of the right to life under article 6 of the Covenant:

The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem.⁶²

While the link between homelessness and the right to life may seem obvious, this was the first time the HRC found that a failure to take “positive measures” to address homelessness may be found to violate the right to life under the ICCPR – at least in a country which so obviously has the resources to ensure that everyone has access to adequate housing.

In the past, the HRC has tended to leave poverty issues to the CESCRC. Its 1999 review of Canada broke new ground by focusing on the extent to which increasing poverty among disadvantaged groups in so affluent a country as Canada engages not only social and economic but also civil and political rights. The HRC focused on many of the same issues as those addressed by its ICESCR counterpart and derived, from civil and political rights, similar substantive obligations to address poverty among disadvantaged groups. While not recognized explicitly in the *Concluding Observations*, the availability of resources on the part of Canada to remedy these problems was clearly a consideration. Even without express recognition of the right to an adequate standard of living, the ICCPR requires positive measures to address homelessness in order to protect the right to life, positive measures to address child poverty in order to protect the rights of children, and positive measures to maintain adequate social programmes in order to ensure women’s equality rights. Compliance with these substantive obligations can only be assessed in relation to competing needs and available resources.

In the context of the abundance of resources available to governments in Canada and the absence of competing needs of the sort that are faced by more impoverished countries, homelessness and poverty among disadvantaged groups in Canada is now

59. 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)*, Geneva, 07 April 1999, CCPR/C/79/Add. 105 (1999) at para. 20 [hereinafter *Concluding Observations, HRC, 1999*].

60. *Ibid.* at para. 18.

61. ICCPR, *supra* note 20.

62. *Concluding Observations, HRC, 1999, supra* note 59 at para. 20.

seen at the international level as clear evidence of non-compliance with the broad spectrum of fundamental human rights recognized in international human rights law ratified by Canada.

E. Bringing Human Rights Review of Poverty Home to Canada

Within an adjudicative model, and drawing both on social and economic and on civil and political rights, we have seen emerging an increasing international focus on Canada's non-compliance with substantive obligations to address poverty and social disadvantage among vulnerable groups. Poor people in Canada have found, within the U.N. treaty monitoring review process, a venue in which their fundamental human rights issues can be adjudicated. But there are serious limitations to this venue. The reviews occur, at best, once every five years, outside of Canada. The most recent reviews, as noted by Craig Scott, raise a critical question. How do we incorporate this type of adjudication of the rights of poor people in Canada into domestic human rights adjudication?

These Concluding Observations represent an interlinked expression of concern about a host of failures by Canada to adhere fully to its international human rights obligations in the two treaties. Indeed, it is not an overstatement to describe the two sets of Concluding Observations as pathbreaking in their focused treatment of the overlapping and shared obligations which emanate from the two Covenants as a partly fused legal order. In particular, the rich potential meaning the HRC has already given to the right to life and the right to non discrimination in the above-mentioned General Comments has moved from the realm of potential to the realm of firm legal obligations vis-à-vis the less advantaged in an affluent state like Canada. Significantly, both committees' Concluding Observations also address a number of inadequacies in the opportunities for legal protection in Canada's legal system of Covenant rights in such a way that we cannot, if we act at all in good faith, relegate the committees' concerns to some rarefied international space.⁶³

As noted above, Canadian political and human rights culture has tended to assign poverty issues to the social policy realm and to exclude them from the domain of human rights. Domestic response to the findings of human rights treaty monitoring bodies with respect to poverty and homelessness in Canada have similarly tended to focus on the social policy implications of these findings rather than on their implications for human rights in Canada. The various Committees' Concluding Observations have been mistaken by the media, the courts, the government and by others as a kind of expert U.N. "Report" assessing how well Canada is measuring up to social policy norms and standards. While the public attention to important policy issues that has been generated by the Concluding Observations is not without benefit, that is not why poor people and human rights advocates in Canada have turned to these procedures and it does not capture what the experience at the international level has been all about, either subjectively or objectively.

63. C. Scott, *supra* note 6 at 99.

Those of us who have attended the reviews, particularly by the CESCR, have discussed among ourselves a shared experience of the impact of seeing Canada through the glass of an emerging international human rights framework. Low income participants in particular, have described a sense of being “heard” for the first time. The realities of poverty and homelessness in Canada come into a sharper focus even for those who have lived them, through a human rights scope that is not yet available at home.⁶⁴ It is hard to imagine that Canada’s human rights issues are very urgent when other NGOs are working on the AIDS epidemic in Africa and the devastation of Hurricane Mitch in Honduras and Nicaragua. Yet these same NGOs are astounded to hear of homelessness and foodbanks in Canada. Similarly, Committee members who deal with problems of extreme poverty in other countries do not find what is happening in Canada in any way insignificant. On the contrary, they have become increasingly frustrated with the smug complacency of the Canadian delegation precisely because the violations of human rights in Canada could so easily be remedied. In Canada, particularly in the late 1990s, poverty and homelessness were clearly the result of legislative choices by governments.

As Sarah Sharpe, a low income advocate and President of the National Anti-Poverty Organization wrote of her experience at the CESCR in Geneva in 1993:

One question, which I felt was very powerful and still stands out in my mind, was from a gentleman from Tunisia who asked the Canadian delegation: how is it that Canada, one of the richest nations in the world, having most of the world’s fresh water supply and more housing than it needs, still has so much poverty? How is that possible? But there was no answer!⁶⁵

Government “choices” in affluent countries which engage fundamental values of dignity, security and equality by ignoring or exacerbating poverty among vulnerable groups are seen sharply in this light to go beyond social policy and to enter very clearly into the domain of human rights, requiring effective human rights adjudication and review.

U.N. human rights treaty monitoring reviews and adjudication procedures are not social policy reviews but consideration of compliance with fundamental human rights assessed in the context of the resources available to fulfill them. They are supplementary to, and cannot replace domestic legal protections of these rights. As the CESCR notes in its *General Comment No. 9: The Domestic Application of the Covenant*:

64. See, for example, Sarah Sharpe’s article in the *NAPO News*, describing the 1993 CESCR review in Geneva:

We concluded the writing and editing at around three Monday morning and I finally went home to take advantage of what was left of sleep time. I didn’t get much sleep though – I kept seeing the faces of Canada’s poor: its children, its elderly, the homeless, the street people, the foodbank users, the single parents, Native Peoples, those who died because they were evicted from their homes, and those who took up the fight of challenging the courts by letting their cases go public. (S. Sharpe, *supra* note 23 at 2.)

65. *Ibid.*

In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The 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.⁶⁶

A primary focus of treaty monitoring review and recommendations must therefore be on the extent to which international human rights are protected domestically. In the next part I describe the assessments made by the CESCR as to what types of human rights protections we lack in Canada and what we need to do to transform our domestic approach into one which is consistent with international human rights norms. In the parlance of the CESCR, the issue of equipping the domestic human rights system to address identified violations of international human rights is the obligation to provide effective domestic remedies. For poor people in Canada, it is a matter of “bringing home” systemic human rights claims that in the 1990s only received fair hearings in Geneva and New York.

III. THE REQUIREMENT OF EFFECTIVE LEGAL REMEDIES

For both the CESCR and the HRC, the growing crisis in human rights in Canada is not defined by the substantive violations alone. The increasing problems of poverty amidst affluence suggest a fundamental flaw not only in the prevailing political and economic paradigm, but also in the ruling human rights paradigm. Canada’s domestic approach to the protection of human rights has been seen by the treaty monitoring bodies as increasingly incapable of addressing the most critical human rights issues in the social and economic domain.

The CESCR has paid particular attention to the discrepancy between the rights which Canada recognizes and promotes internationally, and the approach that has been taken to the interpretation of the *Charter*. At both its 1993 and 1998 reviews, the Committee received extensive information on *Charter* jurisprudence from the Government and NGO submissions.⁶⁷ The Committee focused on two rights of particular relevance for the protection of social and economic rights: “security of the person” and “equality”.

A. 1993 CESCR Review of Remedies under the *Charter*

In 1993 the CESCR gave positive recognition to two cases dealing with equality rights under section 15 of the *Charter* – the Supreme Court’s decision in *Schachter v. Canada*⁶⁸ to extend parental benefits and the decision of the Nova Scotia Court of

66. United Nations Committee on Economic, Social and Cultural Rights, Nineteenth Session *General Comment No. 9: The Domestic Application of the Covenant*, Committee on Economic, Social and Cultural Rights, Geneva, 16 November – 4 December 1998, E/C.12/1998/24 [hereinafter *General Comment No. 9*] at para. 4.

67. See *Right to An Adequate Standard of Living in a Land of Plenty*, *supra* note 23.

Appeal in *Dartmouth/Halifax County Regional Housing Authority v. Sparks*⁶⁹ to extend security of tenure to residents of public housing. These types of positive rights remedies were seen to have provided effective remedies to Covenant violations, since the ICESCR requires the protection of security of tenure and the provision of adequate maternity and parental benefits and further requires that these rights be enjoyed without discrimination.⁷⁰

The Committee was also encouraged by early *Charter* jurisprudence from the Supreme Court of Canada suggesting a fusing of *Charter* interpretation with international human rights norms, including social and economic rights. It took particular note of the decision in *Slaight Communications v. Davidson*⁷¹ in which Chief Justice Dickson, writing for the majority of the Supreme Court, had invoked the right to work under the ICESCR as an aid to interpreting the *Charter*, affirming in this context that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada ratified.”⁷²

With respect to section 7 of the *Charter* and the right to security of the person, the Committee considered the decision of the Supreme Court of Canada in *Irwin Toy v. Attorney General of Quebec*.⁷³ In that decision, the Court stated that it would be “precipitous” to exclude, “at this early moment in the history of *Charter* interpretation,” such economic rights, “included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.”⁷⁴ In light of these developments in *Charter* interpretation, the Committee included the following in its Concluding Observations, under “Positive aspects”:

The Committee was informed that the *Charter of Rights and Freedoms* guarantees, in section 7, the right to security of person and, in section 15, the equal benefit and protection of the law. It notes with satisfaction that Canadian courts have applied these provisions to cover certain economic and social rights, and that the Supreme Court of Canada has, on occasion, turned to the International Covenant on Eco-

68. *Schachter v. Canada*, [1992] 2 S.C.R. 679 [hereinafter *Schachter*].

69. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.) [hereinafter *Sparks*].

70. These protections are expressed in, respectively, United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Sixth Sess., *General Comment No. 4: The Right to Adequate Housing (Article 11(1) of the Covenant)*, Geneva, December 13, 1991, E/1992/23, paragraph 8(a), [hereinafter *General Comment No 4*]; and, *ICESCR*, *supra* note 18, article 10. The equal enjoyment of social and economic rights without discrimination is guaranteed in article 2(2) of the ICESCR.

71. [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*].

72. *Ibid.* at 1056.

73. [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].

74. *Ibid.* at 1003-04

conomic, Social and Cultural Rights for guidance as to the meaning of provisions of the *Charter*.⁷⁵

On the other hand, NGO submissions documented the pleadings of provincial governments and judicial reasoning in a number of lower court *Charter* cases in which low income claimants were deprived of legal remedies to evident social and economic rights violations. In *Fernandes v Director of Social Services (Winnipeg Central)*,⁷⁶ for example, a permanently disabled man suffering from muscular atrophy with progressive respiratory failure had appealed a denial of special assistance from social services to cover the cost of necessary attendant care. Without it, he would be forced to abandon his home to live permanently in a hospital. He argued that the right to security of the person and the right to equality ought to be interpreted consistently with Canada's international human rights obligations to ensure an adequate standard of living. In the appeal, the Attorney General for Manitoba took the position that the *Charter* does not protect economic rights under section 7 "with the possible exception of extreme cases where needs fundamental to human life or survival are involved"⁷⁷ and that the right to equality applies only to discriminatory government action, not to disadvantage that exists independently of government action. The Court of Appeal in Manitoba agreed that the interests raised in the appeal were outside the scope of sections 7 and 15 of the *Charter* and dismissed the claim.⁷⁸

Similarly, in *Conrad v. County of Halifax*,⁷⁹ in which a single mother had been denied interim assistance to cover basic necessities pending an appeal of a termination of assistance, the Attorney General for Nova Scotia had argued that the right to security of the person confers no right to be "free from poverty and the physical, emotional and social consequences of that condition."⁸⁰ Both the trial court and the Court of Appeal agreed that the *Charter* cannot provide protection of economic interests of this sort.⁸¹

The Committee reviewed at that time the trial court decision in the case of Louise Gosselin (who, at the time of writing, seven years later, awaits a decision on a leave application at the Supreme Court of Canada). Ms. Gosselin's social assistance benefit had been reduced to only \$170 per month, 20% of the poverty line for that year, on the basis that she was a single employable person between the ages of 18 and 30. Her claim was based not only on sections 7 and 15 of the Canadian *Charter*, but also relied on section 45 of the Québec *Charter of Human Rights and Freedoms*⁸² (the Québec *Charter*). Though not subject to the complaints procedure under the Québec *Charter*,

75. *Concluding Observations, CESCR, 1993, supra* note 40 at para. 93.

76. (1992), 93 D.L.R. (4th) 402 (Man. C.A.) [hereinafter *Fernandes*].

77. *Fernandes v. Director of Social Services (Winnipeg Central)* (Man. C.A. File No. AI 91-30-00477) Factum of the Respondent and the Attorney General of Manitoba, at 16, 19.

78. *Ibid.*

79. *Conrad v. County of Halifax* (1993) 124 N.S.R. (2d) 251, aff'd (1994), 130 N.S.R. (2d) 305 (N.S.C.A.) [hereinafter *Conrad*].

80. Factum of the County of Halifax, cited in the *Right to An Adequate Standard of Living in a Land of Plenty, supra* note 23 at 76.

81. *Conrad, supra* note 79.

section 45, part of the section on “social and economic rights”, guarantees to every person in need “the right for himself [herself] and his [her] family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living (niveau de vie décent).”⁸³ The court found that there is no justiciable right to adequate financial assistance either under the Québec *Charter* or the Canadian *Charter*. In coming to this conclusion, the court considered the right to an adequate standard of living in article 11 of the ICESCR. The court reasoned that because this right is subject to “progressive realization” it “signifies a mere intent” or policy objective of government rather than an enforceable human right.⁸⁴

In response to these and other cases documented in the NGO 1993 submissions, the CESCR expressed concern that “some provincial governments in Canada appear to take the position in courts that the rights in article 11 of the Covenant are not protected, or only minimally protected, by the *Charter of Rights and Freedoms*.”⁸⁵ It expressed further concern that “in a few cases, courts have ruled that the right to security of the person in the *Charter* does not protect Canadians from social and economic deprivation, or from infringements of their rights to adequate food, clothing and housing.”⁸⁶

The Committee had questioned the government delegation about how far the protection of security of the person may go in protecting the rights under article 11 to an adequate standard of living, including adequate food, clothing and housing. The delegation responded by saying that:

While the guarantee of security of the person under Section 7 of the *Charter* might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life.⁸⁷

One of the key recommendations in 1993 from the Committee was to “encourage the Canadian Courts to continue to adopt a broad and purposive approach to the interpretation of the *Charter of Rights and Freedoms* and of human rights legislation so as to provide appropriate remedies against violations of social and economic rights in Canada.”⁸⁸ In response to the reasoning of the trial court in *Gosselin* and other cases, as well as to information provided to the Committee about the unenforceable “social charter” or “social and economic union” provisions contained in the Charlottetown Accord,⁸⁹ the Committee expressed concern that “in some court decisions, and in

82. *Charte des droits et liberté de la personne*, R.S.Q. c. C-12.

83. *Ibid.*, s.45.

84. *Gosselin v. Québec*, [1992] R.J.Q. 1647 (C.S.) at 1669, aff'd (6 April 1999) Montreal 500-09-001092-923 (C.A.). Leave sought to the S.C.C. [hereinafter *Gosselin*].

85. *Concluding Observations, CESCR, 1993*, *supra* note 40 at para. 110.

86. *Ibid.* at para. 112.

87. UN Committee on Economic, Social and Cultural Rights, Summary Records, Eighth Session. UN Doc. E/C.12/1993/SR.5 at para. 21.

88. *Ibid.* at para. 118.

89. *Consensus Report on the Constitution, Charlottetown, August 28, 1992, Final Text*. (Ottawa:1992)

recent constitutional discussions, social and economic rights have been described as mere 'policy objectives' of Governments rather than as fundamental human rights."⁹⁰

B. 1998 CESCR Review of Domestic Legal Remedies

In its 1998 review of Canada, the inadequacies of domestic human rights protections continued to be a major focus of attention, centering again on sections 7 and 15 of the *Charter*. In a follow-up to its 1993 concerns and recommendations regarding the application of section 7 of the *Charter*, the Committee asked the Government the following question:

In 1993 the Government had informed the Committee that section 7 of the *Charter* at least guaranteed that people are not to be deprived of basic necessities and may be interpreted to include rights under the Covenant, such as rights under article 11 [to an adequate standard of living, including adequate food, clothing and housing].” Is that still the position of all governments in Canada?⁹¹

The federal Government responded to the Committee's question as follows:

The Supreme Court of Canada has stated that section 7 of the *Charter* may be interpreted to include the rights protected under the Covenant (see decision of *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038). The Supreme Court has also held section 7 as guaranteeing that people are not to be deprived of basic necessities (see decision of *Irwin Toy v. A.-G. Québec*, [1989] 1 S.C.R. 927). The Government of Canada is bound by these interpretations of section 7 of the *Charter*.⁹²

Thus, the Committee noted among positive developments that:

[T]he Federal Government has acknowledged, in line with the interpretation adopted by the Supreme Court, that section 7 of the *Charter* (liberty and security of the person) guarantees the basic necessities of life, in accordance with the Covenant.⁹³

In reviewing Supreme Court section 15 jurisprudence, the Committee was particularly pleased by the *Eldridge*⁹⁴ decision. In that case the Court considered a failure of the British Columbia Government to provide interpreter services for the Deaf and Hard of Hearing in the provision of healthcare. In finding that the province had a positive obligation to ensure that such services are provided, a unanimous Court explicitly

90. *Concluding Observations, CESCR 1993, supra* note 40 at para. 110.

91. *List of Issues, supra* note 27 at para. 53.

92. *Responses to Supplementary Questions, supra* note 27 at Question 53 (Government of Canada). The Canadian Delegation's description of the *Irwin Toy* decision actually goes further than the decision itself. The Court in *Irwin Toy* acknowledged that including the rights such as those in article 11 of the Covenant under section 7 was a possible interpretation and explicitly did not "rule out" such an interpretation. However, the pleadings of the Canadian Government in 1998 were consistent with their undertaking in 1993 to the effect that section 7 at least protects against being deprived of basic necessities.

93. *Concluding Observations, CESCR, 1998, supra* note 43 at para. 5.

94. [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

rejected the basis on which so many lower court decisions reviewed by the Committee had dismissed poverty related claims:

The Committee notes with satisfaction that the Supreme Court of Canada has not followed the decisions of a number of lower courts and has held that section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) imposes positive obligations on governments to allocate resources and to implement programmes to address social and economic disadvantage, thus providing effective domestic remedies under section 15 of the *Charter* for disadvantaged groups.⁹⁵

As in 1993, NGO submissions documented government pleadings in court which were quite inconsistent with the position taken by Canada before the Committee and with what the Committee saw as positive developments at the Supreme Court of Canada.⁹⁶ Of particular concern to the CESCR were the pleadings of the Government of Ontario in *Masse v. Ontario (Ministry of Community and Social Services)*,⁹⁷ in which twelve Ontario social assistance recipients, including seven sole support mothers, asked the Ontario Court (General Division) to strike down a twenty-one percent cut in provincial social assistance rates. The CESCR was provided with some of the uncontroverted evidence in the case that showed, among other things, the cuts would lead to significant increases in homelessness and would dislocate approximately 120,000 families.⁹⁸

The Court in *Masse* summarized the Attorney General's pleadings in the following terms:

In connection with the *Charter* arguments, the respondents [counsel for the Attorney General of Ontario] argue that the plight of welfare recipients, although urgent and serious, relates to their inability to provide for themselves. That inability does not arise from government activity and hence under s.32 of the *Charter*, the *Charter* is not applicable. They argue the effect of the provincial welfare legislation and its regulations is to alleviate the problems and financial burdens of those in need by providing financial "last resort" benefits.

They argue that while poverty is a deeply troubling social problem, it is not unconstitutional. They also take the position that there is no right to social assistance nor to a minimum standard of living under s.7.⁹⁹

The court in *Masse* accepted evidence that "the effects of poverty include low birth weight, poor nutrition, inadequate housing, ill health and stress, all of which affect the

95. *Concluding Observations, CESCR, 1998, supra* note 43 at para. 4.

96. See, in particular, *Charter Committee on Poverty Issues, Submissions to The Committee On Economic, Social and Cultural Rights by the Charter Committee on Poverty Issues* November 16, 1998. Online: <www.web.net/ccpi>.

97. *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, leave to appeal to Ontario Court of Appeal denied (1996), 40 Admin. L.R. 87N, leave to appeal to the Supreme Court of Canada denied (1996), 39 C.R.C. (2d) 375 [hereinafter *Masse*].

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

99. *Masse, supra* note 97 at 49 (per O'Brien J.).

cognitive and psycho-social development of children”¹⁰⁰ and that the welfare cuts would have severe consequences for social assistance recipients in Ontario:

The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of social assistance and their dependants will suffer in some way from the reduction in assistance. Many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many will become homeless.¹⁰¹

The court nevertheless accepted the pleadings of the Attorney General of Ontario with respect to the scope of rights under the *Charter*. O’Brien J. noted that “much economic and social policy is simply beyond the institutional competence of the courts.”¹⁰² He found that:

S. 7 [of the *Charter*] does not provide the applicants with any legal rights to minimal social assistance. The legislature could repeal the social assistance statutes. ... In my view, s.7 does not confer any affirmative right to governmental aid. ... [M]oreover, there is no reason in law why the Government of Ontario must so provide.¹⁰³

Similarly O’Driscoll J., in a separate concurring judgment, rejected the applicants’ claims on the basis that the court has no jurisdiction “to second guess policy/political decisions.”¹⁰⁴

The Committee received information at the 1998 review about other cases in which courts had refused to consider claims related to poverty issues on the basis that these are not rights issues for adjudication by courts but rather policy decisions for the consideration of legislatures. Debbie Clark, a single mother of a disabled child, for example, was required to pay a \$312 utility deposit because she had no previous service in her name. Municipal welfare authorities would not cover this, so Ms. Clark was threatened with having her hydro service disconnected. In dismissing her challenge under sections 7 and 15 of the *Charter* to the deposit requirement, the Ontario Court (General Division) held that “[t]his type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts.”¹⁰⁵

In another case reviewed by the Committee, *New Brunswick (Minister of Health and Community Services v. G. (J.))*,¹⁰⁶ a single mother on social assistance challenged the

100. *Ibid.* at 71 (per Corbett J.).

101. *Ibid.* at 69 (per Corbett J.).

102. *Ibid.* at 46.

103. *Ibid.* at 42-43.

104. *Ibid.* at 46-47.

105. *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (2d) 7 at 28 [hereinafter *Clark*].

106. *Concluding Observations, CESCR, 1998, supra* note 43 at paras. 16, 42, 51, 54.

denial of legal aid in a custody proceeding on the basis of section 7 of the *Charter*. The majority of the New Brunswick Court of Appeal (since reversed by the Supreme Court of Canada¹⁰⁷) had dismissed the claim on the basis that "the provision of domestic legal aid is a legislative function and not one for determination by the courts."¹⁰⁸ The CESCR expressed concern about the limited access to civil legal aid for some women and recommended that the provinces allocate more resources to this area. Of even greater concern, however, was the judicial reasoning in this and other cases reviewed which relegated exclusive responsibility for protecting the rights of poor people to the legislature.

Judicial reasoning of this sort is clearly incompatible with the acceptance of social and economic rights as fundamental human rights requiring effective domestic remedies. The CESCR was deeply perturbed by the immense distance between the approach of the courts in *Masse, Clark, G.(J.)* and other cases, and any interpretation and application of the *Charter* which would be consistent with the ICESCR. The courts had failed to make any attempt to provide effective remedies for violations of Covenant rights by way of a "broad and purposive" interpretation of the *Charter*, as the Committee had recommended in 1993. Rather, compelling equality and security claims of poor people had been rejected on the basis of government pleadings and bold judicial assertions that social and economic rights are not rights at all, but policy choices that are not appropriate issues for the consideration of courts. The lower courts were displaying a consistent pattern, invariably encouraged by government pleadings, of narrowing the scope of *Charter* protections in order to exclude poverty issues and any positive obligations on governments to comply with substantive obligations under international human rights law.

The CESCR leads off its lengthy list of concerns with two caustic comments about government pleadings and court decisions in *Charter* cases:

The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the *Charter* which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.

The Committee is deeply concerned at the information that provincial courts in Canada have routinely opted for an interpretation of the *Charter* which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of

107. *New Brunswick (Minister of Health and Community Services v. G. (J.))* (1999), 177 D.L.R. (4th) 124 (S.C.C.).

108. *New Brunswick (Minister of Health and Community Services v. G. (J.))* (1997), 145 D.L.R. (4th) 349 (N.B.C.A.) at 356.

Canada before this Committee, that the *Charter* can be interpreted so as to protect these rights.¹⁰⁹

The consensus and recommendations of the various treaty monitoring bodies send a strong message of the need for reform of our approach to human rights in Canada. The CESCR suggests, however, that the necessary reform does not mean reversing Supreme Court jurisprudence on sections 7 and 15 of the Charter but rather, simply applying it more consistently to the claims of poor people to security, dignity and equality. The CESCR is clear that the courts in Canada have an important role to play in protecting social and economic rights by way of *Charter* claims. In the final section, I will review the Supreme Court's approach to the appropriate role of courts and legislatures in relation to social and economic rights claims, and consider whether the adjudication of social and economic rights claims can be accommodated within the scope of what the Court has described as its proper role.

IV. SOCIAL AND ECONOMIC RIGHTS AND FUNDAMENTAL VALUES: REFINING THE INTERPRETIVE SCOPE OF THE *CHARTER*

A. The Interpretive Presumption

The directions from the CESCR to interpret the *Charter* so as to provide effective remedies to violations of social and economic rights are grounded in the commonly accepted relationship between international law and domestic law. As the CESCR notes in its *General Comment No. 9*:

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.¹¹⁰

The Supreme Court of Canada has affirmed the requirement that domestic law be interpreted consistently with international human rights law on a number of occasions.¹¹¹ Most recently in *Baker v. Canada (Minister of Citizenship and Immigration)*,¹¹² L'Heureux-Dubé, J. asserted for the majority, that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*."¹¹³ She further elaborates on that principle in *R. v. Ewanchuk*,¹¹⁴ where she

109. *Concluding Observations, CESCR, 1998, supra* note 43 at paras. 14, 15.

110. *Supra* note 66 at paras. 14, 15.

111. See, for example, *Slaight Communications, supra* note 71 and *R. v. Keegstra*, [1990] 3 S.C.R. 697.

112. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, online: QL (SCJ) [hereinafter *Baker*].

113. *Ibid.* at para. 70.

states that “our *Charter* is the primary vehicle through which international human rights achieve a domestic effect.”¹¹⁵ She notes that “the equality guarantee, along with the guarantee of security of the person, will be particularly important vehicles for incorporating international human rights norms, as these two rights “embody the notion of respect of human dignity and integrity.”¹¹⁶

There would be no justification for excluding social and economic rights obligations under international law from the general principle of consistent interpretation, particularly of the rights to equality and security of the person in the *Charter*. As noted above, it was in the context of invoking the right to work under the ICESCR that the Supreme Court adopted Dickson C.J.’s precept that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada ratified.”¹¹⁷ Social and economic rights, particularly those linked with the right to an adequate standard of living, including adequate food, clothing and housing, directly engage the fundamental values of “respect of human dignity and integrity.”

In this sense, the following proposal from the international human rights scholar William Schabas seems entirely consistent with the Court’s vision of the relationship between the *Charter* and international human rights law:

Fifty years after its adoption, the economic, social and cultural rights set out in the *Universal Declaration of Human Rights* are subject to ongoing violation within Canada, as the Committee on Economic, Social and Cultural Rights has pointed out. Judges can and should rectify the situation by adopting a judicial approach to indivisibility, in effect reading into the *Charter* and the other relevant instruments human rights which have been marginalized in the past.¹¹⁸

Craig Scott similarly argues that the emerging consensus among international human rights treaty monitoring bodies calls for a “judicial transformation” in which international human rights values would permeate domestic human rights culture. He borrows from a speech by Justice La Forest in which it is observed that “we are absorbing international legal norms affecting the individual through our constitutional pores” such that Canadian courts and many other national courts “are truly becoming international courts in many areas involving the rule of law.”¹¹⁹ Scott notes, however, that Justice La Forest’s description “still applies much more to the Supreme Court than

114. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 [hereinafter *Ewanchuk*] at para. 73.

115. *Ibid.* at 365.

116. *Ibid.*

117. *Slaight Communications*, *supra* note 71 at 1056.

118. W.A. Schabas, “Freedom from Want: How Can We Make Indivisibility More than a Mere Slogan?” (Building a Human Rights Agenda for the 21st Century: A Practical Celebration of the 50th Anniversary of the Universal Declaration of Human Rights, Ottawa, Ontario, October 1-3, 1998) at 18-19, quoted in M. Jackman, “What’s Wrong with Social and Economic Rights?” (2000) 11:2 N.J.C.L. (forthcoming).

119. G. La Forest, J., “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 Can. Y. B. Int’l L. 89 at 98, 100-101, quoted in C. Scott, *supra* note 6 at 110-111.

it does to most lower courts” and as such is more of a “desirable orientation for the future” than any existing “judicial ethos.”¹²⁰

B. Judicial Reluctance to Intervene in the Social and Economic Domain

Ironically, in rejecting poverty related claims under the *Charter*, lower courts have frequently relied on Justice La Forest, the same judge who speaks eloquently for the absorption of international human rights law, who signed onto Dickson, C.J.’s majority decision in *Slaight Communications*, and who affirmed on behalf of a unanimous Court in *Eldridge* that the *Charter* imposes positive obligations on governments to address the needs of disadvantaged groups. Virtually every lower court decision reviewed and criticized by the CESCR relied around Justice La Forest’s caution in *Andrews* that: “Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.”¹²¹ Even in *Eldridge* itself, at the same time as affirming positive obligations under the Charter consistent with the recognition of social and economic rights, Justice La Forest noted that courts must afford legislatures “wide latitude” when it comes to the distribution of resources:

It is also clear that while financial considerations alone may not justify *Charter* infringements (*Schachter* [v. *Canada*] ...), governments must be afforded wide latitude to determine the proper distribution of resources in society; see *McKinney* [v. *University of Guelph*] ... and *Egan* [v. *Canada*] ... This is especially true where Parliament, in providing social benefits, has to choose between disadvantaged groups; see *Egan*.¹²²

Clearly the result in *Eldridge* demonstrates that these and other comments from the Supreme Court suggesting deference to legislatures in the social and economic domain ought not to be taken as justifying a refusal on the part of the courts to ensure that governments meet their substantive obligations toward vulnerable and disadvantaged groups. The Supreme Court has not, however, been as clear as it might have been about how lower courts are to decide when to defer to legislatures and when to intervene. Lower courts have rallied around three themes in Supreme Court jurisprudence in dismissing poverty related claims: (a) reluctance to review decisions dealing with positive obligations to allocate resources; (b) judicial incompetence in dealing with social policy; and (c) reluctance to assume the “policy-making” role legitimately assigned to elected legislatures.¹²³ While all of these principles involve valid judicial and political concerns, they have been too often invoked by lower courts to justify an abdication of judicial responsibility to uphold the constitutional rights of the most vulnerable groups in the social and economic sphere. These concerns need to be properly situated within the context of the broader purposes of the *Charter*, an

120. C. Scott, *supra* note 6, f.n. 48.

121. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 123 at 194 [hereinafter *Andrews*].

122. *Supra* note 94 at para. 85.

123. For analysis of the themes of positive rights, competency and legitimacy, see C. Scott and P. Macklem, *supra* note 38 and M. Jackman, *supra* note 118.

appreciation of the contents of international human rights law, and a recognition of the importance of protecting the rights of the most vulnerable groups.

C. *Charter* Rights and Positive Obligations

Positive obligations to “respect, protect and fulfill” human rights are at the heart of the international human rights movement.¹²⁴ Treaty monitoring review, as noted above, has increasingly focused on the requirement in the ICESCR of the application of the “maximum of available resources”, and held affluent countries accountable to “progressive” standards. Similarly, the HRC has identified critical substantive obligations to address homelessness and poverty as issues linked with the right to life, the right to equality and the special status of the needs of children in international human rights law. If the *Charter* is to become a vehicle for giving domestic effect to Canada’s international human rights obligations, as envisaged by L’Heureux-Dubé, J. and the rest of the Court in *Baker*,¹²⁵ substantive obligations must similarly frame the analysis of these rights in the *Charter*.

Recognizing the positive components of rights in the *Charter* corresponds in a direct fashion to recognizing the dignity and equality interests of the most disadvantaged constituencies. Poor peoples’ claims to dignity, security and equality occur largely in the social and economic domain and frequently relate to governments’ positive obligations to address disadvantage. As Martha Jackman has noted, if these types of claims are rejected, poor people are disenfranchised from an important aspect of a participatory democracy.

It is important to realize that traditional distinctions between classical or negative rights, and social and economic or positive rights, and the willingness to provide for judicial enforcement of one, but not the other, operate in fact to discriminate against the poor. To be in a position to complain about state interference with rights, one has to exercise and enjoy them. But without access to adequate food, clothing, income, education, housing and medical care, it is impossible to benefit from most traditional human rights guarantees.¹²⁶

To the Supreme Court’s credit, it has been fairly consistent in resisting the idea that the *Charter* primarily protects “negative” rights. The Court has generally asserted that *Charter* rights are a combination of positive and negative aspects, and that the courts have an important role in ensuring compliance with both aspects.¹²⁷ This approach has been affirmed not only in the interpretation of rights such as minority language rights, set out in more positive terms in s. 23 of the *Charter*¹²⁸ but also in the

124. For an outline of the three dimensions of “duties” see C. Scott and P. Macklem, *ibid.*

125. While in *Baker* Iacobucci J. wrote a minority judgment which disagreed with the majority on the interpretive use of international human rights law in administrative law, both the majority and minority affirmed the importance of international law as an interpretive framework for the *Charter*, *Baker*, *supra* note 112.

126. M. Jackman, *supra* note 118.

127. *Schachter*, *supra* note 68; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [hereinafter *Vriend*] at para. 64.

128. *Mahé v. Alberta*, [1990] 1 S.C.R. 342 at 393; *Reference re Public Schools Act (Man.)*, s. 79(3), (4)

interpretation of more classical civil and political rights such as “freedom of expression”.¹²⁹ The effectiveness of the *Charter* in protecting the dignity and security interests of poor people, people with disabilities, and other disadvantaged groups, however, relies to a large extent on the courts’ treatment of positive rights claims under sections 7 and 15.

(i) *Positive Obligations under Section 15*

The Supreme Court affirmed in *Schachter* that an equality right is “a hybrid of sorts, since it is neither purely positive nor purely negative.” The Court endorsed, within the context of a respect for legislative purpose and *Charter* values, a “positive rights” approach to remedies in cases of programmes which are under-inclusive, choosing to “read into” legislation those groups that would otherwise be denied a benefit because of a discriminatory provision.¹³⁰ The CESCR commented favourably on that decision, and also on the *Sparks* decision, extending security of tenure to residents of public housing.¹³¹ A positive remedy of the sort endorsed by the Supreme Court in *Schachter* and implemented by the Nova Scotia Court of Appeal in *Sparks* is clearly more consistent with the provisions of the ICESCR than the “equality with a vengeance” approach that had previously been adopted by some lower courts, such as when disparities between eligibility of single mothers and single fathers led the Nova Scotia Court of Appeal to strike down the benefits of single mothers.¹³²

Substantive obligations under international law, however, go beyond the type of positive remedy for discriminatory under-inclusion endorsed in *Schachter* and utilized in *Sparks*. International human rights law does not only require that maternity and parental benefits or security of tenure be provided to disadvantaged or excluded groups in order to remedy discriminatory under-inclusion. It requires, more fundamentally, that adequate programmes and benefits be provided and that appropriate legislation be adopted to provide necessary protection and support for mothers, parents and children, for example, or security of tenure for tenants.¹³³ Providing effective remedies to violations of social and economic rights thus means not only providing legal recourse when particular groups are discriminated against in the provision of benefits, but also providing for legal remedies when governments simply fail to comply with their positive obligations to provide adequately, through legislation or social programmes, for the needs of vulnerable groups. From the standpoint of international human rights obligations, the responsibility of the courts to intervene to protect the

and (7), [1993] 1 S.C.R. 839 at 862-63, 866.

129. *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995.

130. *Schachter*, *supra* note 68 at 702, 721. For the Supreme Court’s subsequently consideration of this issue, see B. Porter, “Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*” (1998) 9 *Constitutional Forum* 71.

131. *Schachter*, *supra* note 68 and *Sparks*, *supra* note 69.

132. *Phillips v. Nova Scotia* (1986), 27 D.L.R. (4th) 156 (N.S.S.C.). See also the related reference decision in *Ref. Re Family Benefits Act* (1986), 75 N.S.R. (2d) 338 (N.S.C.A.).

133. These requirements can be found in: CEDAW, *supra* note 55, Article 11(2)(c), ICESCR, *supra*, note 18 Article 10, *General Comment No. 4*, *supra* note 70.

fundamental human rights of disadvantaged groups should not only be triggered by discriminatory provisions in social programmes or legislation. It should also be triggered where governments are simply not meeting their normative obligations to address the needs of vulnerable groups, particularly where they have adequate resources to do so.

Lower courts' rejection of social and economic rights claims under section 15 of the *Charter* have relied on assertions that governments are not required by section 15 to implement programmes or to provide any particular "level" of benefit.¹³⁴ They have consistently asserted that section 15 does not impose positive obligations on governments to remedy disadvantage existing independently of government action or legislation. Thus, in *Fernandes*, *Gosselin*, *Masse*, and other cases reviewed by the CESCRC, poverty was found to be the result of personal circumstances rather than government action and the courts held that there was consequently no obligation on governments to implement programmes to address it.¹³⁵ The CESCRC was particularly shocked to read so starkly in the *Masse* decision that "the legislature could repeal the social assistance statutes," presumably to let single mothers, their children, people with disabilities and others currently relying on social assistance simply go without food, clothing or housing.¹³⁶ Courts infer that if there is no obligation to implement programmes or pass legislation in the first place then there can be no basis for reviewing the adequacy of programmes or benefits, even where the benefits are clearly necessary for the enjoyment of meaningful equality and dignity for those who rely on them.

It is incomprehensible from the standpoint of international human rights law that the guarantee of equality and dignity under the *Charter* does not include even the most universally acknowledged responsibilities of governments to legislate and provide necessary protections for vulnerable groups. International human rights law is founded upon governmental obligations to **implement** the rights under various Covenants through appropriate legislative and other measures. A *Charter* jurisprudence premised on the absolute right of governments to revoke legislative protection or social programmes relied on by vulnerable groups would be completely incompatible with international human rights law. Nevertheless, it has been quite routine for governments to argue, and for courts to endorse, that section 15 imposes no positive obligations on governments in Canada to meet even the most fundamental responsibilities under international human rights law. Courts have agreed with respondent governments that they are not required by section 15 to, for example, ameliorate the conditions of

134. See, for example, *Masse*, *supra* note 93 at 43: "The legislature could repeal the social assistance statutes... s.7 does not confer any affirmative right to governmental aid."

135. On the treatment of these claims by lower courts, see, for example, *Gosselin*, *supra* note 84; *Fernandes*, *supra* note 76; *Masse*, *supra* note 97; *Clark*, *supra* note 105. See also M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 *Queen's L.J.* 65; B. Porter, "The Uninvited Guests: Reflections on the Brief History of Poor People Seeking their Rightful Place in Equality Jurisprudence" in *Roads to Equality* Vol. 3, (Canadian Bar Association, Continuing Legal Education Program, Annual General Meeting, 1994).

136. *Masse*, *ibid.*

poverty and inadequate housing in Aboriginal communities;¹³⁷ adopt human rights legislation prohibiting discrimination;¹³⁸ provide healthcare for the sick and infirm;¹³⁹ or ensure the provision of social assistance for single mothers and others in need.¹⁴⁰

Fortunately, however, this wall separating domestic equality jurisprudence from substantive obligations under international human rights law has now been knocked down by the Supreme Court. In *Eldridge*,¹⁴¹ when deaf claimants argued that section 15 imposed an obligation on the Government of British Columbia to provide interpreter services so they could communicate with their doctors, provincial governments from across Canada rallied to argue against the idea that section 15 would impose obligations on governments to address social or economic disadvantage that exists independently of government action. They argued that only disadvantage caused by a discriminatory provision or action of government would fall within the ambit of section 15 – not disadvantage that exists independently of government action, such as the disadvantage associated with deafness. Justice La Forest, writing for a unanimous court, condemned as “thin and impoverished” the notion of equality advanced by those who claim that “section 15(1) does not oblige governments to implement programmes to alleviate disadvantages that exist independently of state action.”¹⁴²

As noted by the Court in *Vriend*¹⁴³ the “substantive” equality analysis endorsed in *Eldridge* redirects the focus of inquiry from the effect of legislative distinctions to the effects of the social realities faced by disadvantaged groups. In more traditional discrimination claims, the equality analysis will focus on the comparison between those who are included in legislative protections and benefits and those who are excluded. The substantive equality analysis, however, considers the discriminatory effect on members of disadvantaged groups of not providing the protection or benefit they need. This failure to address a unique need or disadvantage is considered in the context of the social realities facing disadvantaged groups in Canada. Refusing to provide necessary funding to a programme that provides interpreter services to the deaf and hard of hearing or failing to enact human rights protections necessary to gays

137. *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 (C.A.) Leave granted to Supreme Court of Canada, S.C.C. File No. 26165. S.C.C. Bulletin, 1998, p. 224; Heard December 7, 1999. Decision not yet released. The Ontario Court of Appeal found that limited judicial scrutiny of an ameliorative programme designed to address the socio-economic needs of Aboriginal communities is warranted in part because “[g]overnments have no constitutional obligation to remedy all conditions of disadvantage in our society.”

138. *Vriend*, *supra* note 127 at para. 196, per Major J. (in dissent) “The issue may be that the Legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination, or the issue may be how the legislation ought to be amended to bring it into conformity with the *Charter*. That determination is best left to the Legislature.”

139. *Eldridge v. British Columbia (Attorney General)* 125 D.L.R. (4th) 323 (B.C.C.A.) at 341.

140. *Schachter*, *supra* note 68 at 721-22; *Masse*, *supra* note 97.

141. *Supra* note 94.

142. *Ibid.* at 677-78.

143. *Vriend*, *supra* note 127.

and lesbians has a discriminatory effect simply because of the unique needs of the groups.¹⁴⁴

In many cases, a substantive equality analysis such as this may provide a basis on which to claim important components of social and economic rights, which similarly oblige governments to address the needs of the most vulnerable groups, by implementing programmes or legislating protections necessary to the enjoyment of dignity and security.¹⁴⁵ Further, the substantive equality approach outlined by the Court in *Eldridge* and *Vriend* is consistent with the emerging approach to equality within the United Nations human rights treaty monitoring bodies such as CEDAW and HRC described above. When these bodies identify the discriminatory effect on women and children of social programme cut-backs or inadequate legislative protections in Canada, they are engaging in precisely the kind of equality analysis endorsed by the Supreme Court of Canada as a substantive equality approach.

Does this approach to equality mean that the courts will become policy-makers or examine every piece of legislation or programme for adequacy? Not at all. It means that Canadian courts, like U.N. human rights treaty monitoring bodies, can consider the broad systemic pattern of social and economic disadvantage as being central to the equality guarantee. Where adequate programmes or legislation are necessary for the protection of fundamental human rights linked with dignity and personal integrity, section 15 will require governments to meet certain substantive obligations in the implementation of the necessary legislation and programmes. The threshold for judicial intervention and the nature of the remedy will be derived, as in other section 15 cases, from the analysis of dignity interests and a consideration of the respective competencies and roles of courts and legislatures.

Equality analysis that is better informed by international human rights law, however, will be able to draw on evolving norms within international human rights defining the scope and content of governments' obligations toward disadvantaged groups in the social and economic domain. *General Comments* adopted by the CESCR, for example, describe the obligations attached to the right to adequate housing¹⁴⁶ and the right to food.¹⁴⁷ They also identify substantive obligations linked with the protection of dignity and equality interests of persons with disabilities¹⁴⁸ and older persons.¹⁴⁹ The

144. *Ibid.*

145. *General Comment No. 9*, *supra* note 66 at paras. 14, 15.

146. *General Comment No. 4*, *supra* note 70; United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Sixteenth Sess., 28 April – 16 May 1997, *General Comment No. 7: The Right to Adequate Housing (article 11.1 of the Covenant): Forced Evictions*, Geneva, 20 May 1997, E/C.12/1997/4.

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

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

importance of considering this evolving jurisprudence at the international level is recognized by L'Heureux-Dubé, J. in *Ewanchuk*, where she relies on interpretive comments from CEDAW in applying the *Convention on the Elimination of All Forms of Discrimination Against Women* to *Charter* interpretation.¹⁵⁰ Canadian courts can derive considerable guidance from both the interpretive comments of U.N. human rights treaty monitoring bodies and their specific observations on issues within Canada. These provide a useful reference point from which Canadian courts can assess the substantive obligations of governments toward disadvantaged groups under section 15 of the *Charter*.

ii) *Positive Obligations under Section 7*

As L'Heureux-Dubé, J. notes in *Ewanchuk*,¹⁵¹ section 7 of the *Charter* will also be important as a vehicle for the incorporation of international human rights in the *Charter*. The CESCR has challenged Canadian courts to adopt a more substantive reading of life, liberty and security of the person, and of fundamental justice to recognize governments' positive obligations to protect social and economic interests linked with security and integrity.

In the past, courts have tended to assume that section 7 of the *Charter* is primarily a right to be free of state interference, not a right to the benefit of government action or programmes.¹⁵² Lamer, C.J. observed in *Schachter* that section 7 is generally viewed as more of a "negative" right than section 15:

Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s.7 as a positive right in some circumstances.¹⁵³

If the potential of section 7 to protect rights such as the right to food, clothing and housing, referred to in *Irwin Toy*¹⁵⁴ is to be realized, however, the positive components of these rights must clearly achieve greater recognition.

Though in no way developing a broad, substantive reading of section 7, the Supreme Court's recent decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,¹⁵⁵ certainly rejected an exclusively "negative rights" orientation to

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

150. *Ewanchuk*, *supra* note 114 at para. 71.

151. *Ibid.* at para. 73.

152. See, for example, *Masse*, *supra* note 97 at 42.

153. *Schachter*, *supra* note 68 at 702.

154. *Supra* note 73.

155. *Supra* note 107.

section 7 and affirmed that this section, like section 15, places positive as well as negative obligations on the state. In that case the Supreme Court overturned the majority decision of the New Brunswick Court of Appeal, which had dismissed a section 7 challenge to the denial of funding for legal aid in child custody proceedings. As noted above, this had been one of the decisions which caused concern at the CESCRC.¹⁵⁶ The majority of the Court of Appeal had rejected the section 7 claim on the basis that “it is [not] the responsibility of the courts to effectively create programmes designed to further social justice and equality ...”¹⁵⁷

Lamer, C.J., writing for the majority, rejected the view that section 7 only protects negative rights to be free of state interference. He distinguished his earlier decision in *Prosper*,¹⁵⁸ in which he had rejected the notion of a positive obligation on governments to provide duty counsel under section 10 of the *Charter*.¹⁵⁹ According to Lamer C.J., the earlier decision “does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing.”¹⁶⁰ Rather than invoking the allocation of financial resources as a reason for excluding this type of positive rights claim from the scope of section 7, as had been done by the Court below (relying on *Prosper*) Lamer, C.J. addressed the financial issues under section 1, finding that an estimated cost of less than \$100,000 of providing state-funded counsel in these circumstances “is insufficient to constitute a justification within the meaning of s.1”¹⁶¹

It is noteworthy that Bastarache J., who had to reclude himself from the hearing of *G.(J.)* at the Supreme Court, had written an eloquent dissent in the Court of Appeal decision prior to his appointment to the Supreme Court, in which he invoked social and economic rights under international human rights law as providing the basis for a more substantive reading of section 7:

I believe, however, that the policy of human rights has evolved internationally and domestically and that both the protective and integrative functions of human rights must be constitutionally accepted under the *Charter*. (See: John D. Whyte, *Fundamental Justice: The Scope and Application of Section 7 of the Charter* (1983), 13 *Man. L.J.* 455, at p. 462.) In modern societies, rights cannot be fully protected by preventing government intrusions in the lives of citizens. Some rights in effect require governmental action for their integration into the concept of fundamental justice. It is also important to look at individual international instruments with regard to the text of companion instruments. While article 9(1) of the International Covenant on Civil and Political Rights seems to limit “liberty”, and “security” to

156. See *supra*, text accompanying note 108.

157. *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (1997), 145 D.L.R. (4th) 349 (N.B.C.A.) at 356, adopting the words of Creaghan J. in *R. v. Cormier* (1988), 90 N.B.R. (2d) 265 (QB) at 270.

158. *R. v. Prosper*, [1994] 3 S.C.R. 236.

159. *Ibid.* at 266-67.

160. *G.(J.)*, *supra* note 107 at para. 107.

161. *Ibid.* at para. 100.

their physical aspect, for instance, article 25 of the Universal Declaration of Human Rights, 1948 G.A. Res. 217A (III), U.N. Doc. A/810 speaks of “the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond [one’s] control” (my emphasis).

The *Charter* must limit the intrusion of the state in the lives of its citizens; it must also mandate its function in those limited cases where individuals can make legitimate claims against it in the name of liberty and human dignity.”¹⁶²

The door to a substantive reading of section 7 of the sort envisaged by Bastarache, J., acting as a vehicle through which to give domestic effect to many of the rights under the ICESCR, is thus still open. A “broad and purposive reading” of section 7, as recommended by the CESCR, would complement the substantive approach to equality already affirmed by the Supreme Court, capturing the interdependence of equality, dignity and security issues and of international and domestic human rights. Sections 7 and 15 combined would go a long way in addressing the need to provide, through consistent interpretation of the Charter, effective remedies to violations of fundamental human rights linked with poverty.

Would a recognition of positive obligations under section 7 demand judicial intervention in all manner of policy choices? Not at all. As with a substantive approach to equality, it would simply ensure that courts intervene in “those limited cases” when, as Bastarache, J. put it, “individuals can make legitimate claims against it [the state] in the name of liberty and human dignity.”¹⁶³ Bastarache J. clearly envisages international human rights law as providing essential guidance as to the normative content of governments’ obligations. As in section 15 jurisprudence, evolving international human rights norms, assessed in the context of competing needs and available resources, would provide Canadian courts with appropriate guidelines as to the line between policy choices and violations of the right to life, liberty and security of the person.

C. Judicial Competence in the Social and Economic Realm

As noted above, most courts which have rejected poverty related claims under the *Charter* have relied on Justice La Forest’s statement in *Andrews* that “[m]uch economic and social policy-making is simply beyond the institutional competence of the courts.” The New Brunswick Court of Appeal in *G.(J.)* relied further on Justice La Forest’s dissent in *RJR-MacDonald Inc. v Canada (A.G.)*,¹⁶⁴ in which he wrote that:

Courts are specialists in the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the peoples, who have at their disposal the necessary institutional resources to enable them to compile and assess

162. *Supra* note 157 at 366.

163. *Ibid.*

164. *RJR-MacDonald Inc. v Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

social science evidence, to mediate between competing interests and to reach out and protect vulnerable groups.¹⁶⁵

These comments, of course, need to be understood in the context of considering the rights of a tobacco company, not fundamental social rights of the poor.¹⁶⁶ It is clear from the position which Justice La Forest adopts in other cases, most notably in *Eldridge*, that his cautions about judicial competence ought not to be taken as a reason for rejecting the human rights claims of the most disadvantaged groups in the social and economic domain. Nevertheless, judicial musings about the relative incompetence of courts in comparison to elected representatives who “compile and assess social science evidence” and “reach out to protect vulnerable groups” have frequently been invoked by lower courts as a reason to refuse to protect the most fundamental rights of poor people.¹⁶⁷

Assertions of incompetence in the social and economic field, however, have been made and repeated by lower courts with little examination in specific contexts. For instance, it is difficult to credit the suggestion that social science evidence is so difficult as to be beyond judicial competency where fundamental rights rather than policy-making choices are at issue. Courts deal with social science evidence all the time. The court in *Masse*, in fact, had no difficulty in assessing social science evidence as to the effect of the welfare cuts. The court found, as did the CESCR subsequently, that the cuts would force many families out of their homes and some into homelessness.¹⁶⁸ This type of social science evidence is no more difficult for the courts to deal with than issues that arise in the criminal context, such as complex DNA evidence or the child psychology needed to deal with children witnesses who have been victims of sexual abuse. These are not areas in which judges had obvious expertise, and nor need they have. Their role is to hold fair hearings and to consider the evidence, not to use any inherent expertise in the issues before them.

It is important to be clear about what claimants of social and economic rights are actually asking courts to do before declaring courts incompetent to do it. The court in *Masse* was asked, first, to assess social science evidence as to the anticipated effects of the welfare cuts. Evidence was presented that the cuts would, among other things, force households from their homes and deprive them of sufficient income to provide for adequate food and nutrition. The court considered this evidence and found that it was credible. It found that many recipients would have to leave their present homes and some would become homeless. The claimants then asked the court to consider whether government action creating these effects was in violation of their constitutional rights. The claimants asked that their *Charter* rights to equality and security of the person be interpreted consistently with international human rights law.

165. *Ibid.* at para. 68.

166. See M. Jackman, “Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*” (1996) 34 *Osgoode Hall L.J.* 661.

167. W. Mackay, T. Piper and N. Kim, “Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act” (Submitted to the Canadian Human Rights Act Review Panel, December, 1999) at 33-46.

168. *Concluding Observations, CESCR, 1998, supra* note 43 at para. 21.

Assessing whether these documented effects infringe on constitutional rights and interpreting these rights in line with international human rights law surely engages an area of judicial, not legislative competence. Poor people such as the claimants in *Masse* do not advance rights claims under the *Charter* on the assumption that courts are experts in social policy and on that account ought to redesign programmes. Rather, they seek from courts adjudication of constitutional rights, informed by the principles of *Charter* interpretation affirmed by the Supreme Court of Canada.

Unfortunately, lower courts have premised their assessments of these constitutional claims linked with poverty on the idea that social and economic rights are not fundamental human rights, not subject to adjudication and remedy, and therefore not within the competency of courts. Poor peoples' constitutional claims to dignity, equality and security are mistaken for demands that judges "make policy" simply because these rights are interdependent with and indivisible from the right to an adequate standard of living. Examined more closely, however, these claims are really only demands that *Charter* rights be adjudicated in the social and economic domain in the same way as they are adjudicated in other areas.

Without underestimating problems of social or class bias confronting poor people claiming their *Charter* rights in court, the opportunity to address poverty issues in a public forum, to have stories told and heard, often for the first time, to have relevant evidence disclosed, put on the record and examined, and to have submissions heard as to the interpretation and application of universal principles of law to specific issues in the lives of poor people – these participatory rights which transformed the review process at the CESCRC are seen as all-important to a constituency that has previously been excluded from the human rights movement in Canada. As Frank Michelman suggests, courts may "enjoy a situational advantage over the people at large in listening for voices from the margins."¹⁶⁹ The guarantee of a hearing and the protections of procedural fairness are taken for granted by constituencies that have had their human rights protected as "first generation rights;" yet they are new and empowering to poor people who have been denied access to rights claiming processes in the past.

There is no question that remedies to violations of social and economic rights may frequently require the legislature or executive to implement or alter programmes, or to adopt new regulatory or legislative measures. These types of remedies fall in the legislative rather than the judicial sphere of competence. But this fact does not warrant the kind of abandonment of the social and economic sphere and problems linked with poverty that has been seen at the lower court level in Canada. Rather, it requires a more flexible approach to *Charter* remedies.

The Supreme Court has appropriately preferred to exercise deference at the remedial stage in these types of cases rather than abdicate from any judicial role simply because substantive *Charter* claims may engage issues of programme implementation or legislative duties. In *Eldridge*, for example, the Court recognized that legislatures ought to be given "wide latitude in the allocation of resources".¹⁷⁰ But this did not

169. F. Michelman, "Law's Republic" (1988) 97 Yale L.J. 1493 at 1537.

mean dismissing an equality claim simply because the remedy required would involve the implementation of a programme or the allocation of resources. The Court simply rendered its decision on the “rights” issues and left the “policy-making” to the government. It recognized that there were “myriad options available to the government that may rectify the unconstitutionality of the current system.” The Court declared the government’s constitutional responsibility to ensure that sign language interpreters will be provided where necessary for effective communication in the delivery of medical services, by whatever means it considers most appropriate.¹⁷¹

As Craig Scott and Patrick Macklem note with respect to the Supreme Court’s decision in *Schachter*, courts must respond to their new constitutional responsibility through a combination of creating competence where needed and deference to legislatures where appropriate:

[I]nstitutional competence is first and foremost subservient to and conditioned by a commitment to the fundamental values that underlie constitutional rights. Courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary. When the desirability of recognizing such values nonetheless conflicts with perceived institutional inadequacies, the judiciary need not absolve itself of the issue. Instead, it is free to provide an interpretation and a remedy as best as it can do in the circumstances, and hope to provoke a cooperative and constructive dialogue with other organs of government and the citizenry at large.¹⁷²

Remedies to violations of social and economic rights in the context of Canadian federalism will frequently involve more than one level of government. A number of violations that have been identified at the international level have themselves been the result of inter-governmental agreements and the recommended remedies require that various levels of government in Canada work together to achieve compliance.¹⁷³ In these instances, courts would need to give governments time to negotiate new arrangements and agreements to achieve compliance with substantive obligations under the *Charter* and international human rights law.

A recent decision under the social and economic rights provisions of the *Constitution of the Republic of South Africa*¹⁷⁴ provides a useful model of a flexible approach to remedies that can be adopted in relation to substantive *Charter* claims linked with

170. *Eldridge*, *supra* note 94 at para. 85.

171. *Eldridge*, *supra* note 94 at 631-32.

172. C. Scott and P. Macklem, *supra* note 38 at 35-36.

173. For example, the National Child Benefit clawback, identified by both the CESCR and the HRC as discriminatory, is a result of a federal/provincial agreement which would need to be renegotiated to remedy the violation. See *Federal/Provincial/Territorial Ministers Responsible for Social Services, NCB Governance and Accountability Framework*, online: <http://socialunion.gc.ca/ncb/geston3_e.html>; Federal-Provincial-Territorial Meeting of Ministers Responsible for Social Services, *The National Child Benefit—Building a Better Future for Canadian Children*, Document: 830-594/013, September 1997.

174. *Constitution of the Republic of South Africa 1996*, Act 108 of 1996 at ss. 26 and 28.

social and economic rights in Canada. The High Court of South Africa in *Grootboom v Oostenberg Municipality*¹⁷⁵ considered a claim by a group of 390 adults and 510 children forced to camp at a sportsfield without tents or facilities after having been forced to vacate a squatter settlement. The homeless families initiated a claim against all relevant governments, from local to national, alleging violation of their right to adequate housing, as protected by s. 26 of the South African Constitution or, alternatively, violation of the children's right to basic shelter, as protected by s. 28 of that Constitution. The Court was not prepared to find for the group under s. 26 because the governments could show, according to the Court, that in the context of scarce resources and competing needs, it had taken "reasonable legislative and other measures, within its available resources, to achieve a progressive realisation of this right."

On the other hand, the Court was prepared to accept the claim under s. 28 because that section established a right of every child to basic nutrition, shelter, health care services and social services and was not expressed to be subject to the "progressive realization" provision. Like Canadian courts, however, the Court was concerned not to intrude upon the responsibility and functions of the various levels of government concerned, nor to pre-empt the development of an appropriate remedy. It declared that the various levels of government were jointly responsible for a violation of the children's right to basic shelter and outlined certain minimum requirements that needed to be met. It further ordered that the governments report back to the court on matters of implementation within three months, that the applicants then have a further month to comment on the report, followed by a reply from the governments. Only then, if necessary, would the Court make a further remedial order.

The express inclusion of justiciable social and economic rights in their Constitution has not, therefore, led South African courts to take over the social policy function of government. Rather, they have begun to adopt flexible and creative approaches to remedy, recognizing that various governments need to work together to achieve compliance with social and economic rights, and need to be given appropriate time to develop policy responses to judicial rulings. At the same time the Court recognized, in *Grootboom*, the importance of ensuring the participation of affected constituencies in the development of an appropriate remedy. These are precisely the types of approaches which Canadian courts ought to take, along the model of the *Eldridge* decision, in order to recognize the respective competencies of courts and legislatures while safeguarding the rights of vulnerable groups in critical areas linked with equality, security and dignity in the social and economic domain.

D. Respect for the Policy-Making Role of Legislatures

Closely related to the question of relative competence of courts and legislatures is the question of the "legitimate" role of legislatures in making policy. Poor peoples' *Charter* claims are frequently considered demands that courts take over policy-making. The underlying premise of such statements, however, is simply that social and

175. (17 December, 1999) 6826/99 (High Court of South Africa, Cape of Good Hope Provincial Division).

economic rights such as the right to an adequate standard of living are not rights at all, but policy issues. What is needed, of course, is a clearer distinction between “policy making”, which is what legislatures ought to do, and “rights adjudicating”, which is what courts ought to do. Rather than relegate the entire social and economic sphere to “policy-making”, it makes more sense to delineate the respective responsibilities of legislatures and courts in this as in other areas through the recognition of the courts’ proper role in upholding fundamental rights.

The Supreme Court has made it clear in recent decisions that courts cannot simply abandon their constitutional responsibility when *Charter* rights claims engage more complex issues of social policy. As McLachlin J, writing in *RJR-MacDonald*, stated:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.¹⁷⁶

As stated by Iacobucci, J. in *Vriend*, a “social contract” was created with the *Charter* which gave a new role and responsibility to the courts. The oft cited critique that courts are wrongfully usurping the role of the legislatures “misunderstands what took place and what was intended when our country adopted the *Charter* in 1981–82.”¹⁷⁷ Judicial interventions in defence of democratic values and principles are what the new judicial role is all about:

Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*.¹⁷⁸

As Chief Justice Dickson affirmed in *Slaight Communications*, international human rights “reflect the values and principles that underlie the *Charter* itself.”¹⁷⁹ Our judicial culture which is more at home with civil and political rights, however, has too often ignored the important role of international human rights in guiding courts in their determination of the fundamental *Charter* values in the social and economic domain.

176. *RJR-MacDonald*, *supra* note 164 at para. 136.

177. *Vriend*, *supra* note 127 at para. 130, per Iacobucci J.

178. *Ibid.*

179. *Slaight Communications*, *supra* note 71.

CONCLUSION

The lower court decisions which have expunged poverty issues from the scope of Charter protections have simply misapplied and misinterpreted Justice La Forest's statement in *Andrews*. Admonishing courts not to second-guess legislative policy choices in the social and economic realm, Justice La Forest did not suggest that there are no fundamental values or human rights issues at stake in the social and economic domain. Rather, he distinguished the appropriate role of courts in protecting "fundamental values" from the inappropriate use of the *Charter* as a "tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society."¹⁸⁰

Legislative choices which deprive vulnerable groups of access to adequate food, clothing and housing clearly infringe on fundamental *Charter* values. The right to an adequate standard of living and other social and economic rights are central to what Chief Justice Dickson described as "the values and principles that underlie the *Charter* itself."¹⁸¹ It is simply no longer tenable, given the emerging consensus at the international level about the nature of the most fundamental human rights violations in Canada, to hold that legislative choices linked with poverty, homelessness and hunger have not engaged fundamental democratic values.

The recent decision in *Baker*¹⁸² suggests that international human rights law will be a "critical influence" in distinguishing issues of fundamental human rights from areas of legitimate policy choice. And the CESCR has made it clear that the right to an adequate standard of living and other social and economic rights cannot be downgraded to mere policy objectives. Poverty among vulnerable groups engages "fundamental democratic values" and human rights. There is a critical role for the courts in applying the Charter appropriately in the social and economic domain so as to address these critical violations of fundamental human rights.

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.¹⁸³

For poor people, the recognition of social and economic rights as components of *Charter* rights to dignity, equality and security is a prerequisite for their acceptance as full and equal participants in the human rights movement and in democratic institutions in Canada.¹⁸⁴ The challenge emerging from the U.N. treaty monitoring

180. *Andrews*, *supra* note 121 at 194.

181. *Slaight Communications*, *supra* note 71.

182. *Supra* note 112.

183. *General Comment No. 9*, *supra* note 66 at paras. 7, 9, 10.

184. See B. Baines and C. Greenfield, "Developments in Constitutional Law: the 1995-96 term" (1997) 8 *Supreme Court L.R.* 77. See also A. Gutman "The Rule of Rights or the Right to Rule?" in J. Pennock and J. Chapman, eds., *Justification: Nomos XXVIII* (New York: NYU Press, 1986), 15 at

bodies is not so much for judges to be “creative” about reading social and economic rights into the *Charter* as it is for them to stop reading out of the *Charter* poor peoples’ legitimate rights to security and dignity. The interdependence and indivisibility of social and economic rights with civil and political rights means that if domestic courts downgrade social and economic rights to unenforceable policy objectives, the equality and security interests of the most vulnerable groups will be unfairly denied the protection *Charter* guarantees.¹⁸⁵

Giving appropriate recognition to poor peoples’ claims to dignity, equality and security and infusing *Charter* interpretation with evolving international human rights norms does not require courts to throw aside concerns about judicial deference to the role and competence of legislatures. It is important to appreciate Justice L’Heureux-Dubé’s use of the word “scope” of the *Charter*’s protections. Ensuring that international human rights law is a critical influence in determining the “scope” of the rights in the *Charter* does not mean dramatically expanding the role of the judiciary or encroaching on the policy making function of legislatures. In its classical use, the idea of interpretive “scope” was used to describe the navigational aim or sight of textual interpretation which would ensure that the elaborated meaning of a text remains true to its central purpose.¹⁸⁶ For the social and economic rights protected in international human rights law to become a critical influence in determining the “scope” of *Charter* rights, the courts need not expand the ambit of the rights protected or extend the role of the judiciary into policy-making. Rather, they need simply to refine the “sight” or orientation of *Charter* interpretation around its central purpose.

Referencing *Charter* interpretation to social and economic rights and other substantive obligations under international human rights law will assist the courts in identifying and protecting the values fundamental to a free and democratic society. At the same time, this new reference point will help human rights advocates, human rights institutions, social justice advocates, politicians and the media rethink the distinction between human rights and social policy in order to bring the most critical issues of human rights more clearly into focus. We all need to think again about rights and politics in Canada to ensure a fair hearing for those whose fundamental human rights are being violated by poverty and homelessness.

166 (cited and discussed in C. Scott “Social Rights: Towards a Principled, Pragmatic Judicial Role” (1999) 1:4 *ESR Review: Economic and Social Rights in South Africa Newsletter* 4; and W. Black, “Vriend, Rights and Democracy” (1996) 7 *Constitutional Forum* 126.

185. See Mackay, *supra* note 167 at 33-46.

186. M. O’Rourke Boyle, *Erasmus on Language and Method in Theology* (Toronto: U of T Press, 1977).