

Law as a Tool for Addressing Social Determinants of Health

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I. INTRODUCTION

Equality is a fundamental principle in Canada. It is expressed in the constitutional commitment by Canadian governments to “promoting equal opportunities for the well-being of Canadians”, set out in section 36 of the *Constitution Act, 1982*.¹ It is enshrined in section 15 of the *Canadian Charter of Rights and Freedoms*² and protected in federal and provincial/territorial human rights legislation.³ It is recognized under numerous international treaties ratified by Canada, including the *International Covenant on Economic, Social and Cultural Rights*, which proclaims the right to “the highest attainable standard of physical and mental health” without discrimination.⁴ Equality is also an underlying value in the health care system, manifest in the ideal that “all Canadians have timely access to health services on the basis of need, not ability to

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¹ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 (“the Charter”).

³ See generally Karen Schucher, “Human Rights Statutes as a Tool to Eliminate and Prevent Discrimination: Reflections on Supreme Court of Canada Jurisprudence” in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) at 387; Leslie A. Reaume, “Postcards from O’Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter” in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law Inc., 2006) at 373.

⁴ *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966), 993 U.N.T.S. 3, arts. 2, 12(1), Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976) (“ICESCR”).

pay, regardless of where they live.”⁵ But while equality is guaranteed under both domestic and international human rights law, and equal access to health services is a core component of health equity⁶ and of the right to health,⁷ it is evident that Canadians do not have equal access to mental and physical health itself.⁸ Instead, like elsewhere in the world, access to health in Canada is overwhelmingly dictated by the social conditions in which people live and work: “The primary factors that shape the health of Canadians are not medical treatments or lifestyle choices but rather the living conditions they experience. These conditions have come to be known as social determinants of health.”⁹

From the landmark *A New Perspective on the Health of Canadians*,¹⁰ tabled by federal health minister Marc Lalonde in 1974, through to recent reports by Canada’s Chief Public Health Officer,¹¹ the Canadian Institute

⁵ First Ministers’ Meeting, 2003, *First Ministers’ Accord on Health Care Renewal*, Doc. 800-039 (Ottawa: 2-4 February 2003) at 1. See also Lois L. Ross, “Passion and Persistence, Cooperation and Commitment: The Roots of Public Health Care in Canada” in North-South Institute, ed., *The Global Right to Health: Canadian Development Report 2007*, vol. 3 (Ottawa: Renouf Publishing, 2007) at 21; Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at xvi (Chair: Honourable Roy J. Romanow); Donna Greschner, *How Will the Charter of Rights and Freedoms and Evolving Jurisprudence Affect Health Care Costs? Discussion Paper No. 20* (Saskatoon: Commission on the Future of Health Care in Canada, 2002); Marie-Claude Prémont, *The Canada Health Act and the Future of Health Care Systems in Canada Discussion Paper No. 4* (Saskatoon: Commission on the Future of Health Care in Canada, 2002).

⁶ See generally Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 38-40; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 59; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 6.

⁷ See generally Martha Jackman, “Health Care and Equality: Is There a Cure?” (2007) 15 *Health L.J.* 87; Paul Hunt & Gunilla Backman, “Health Systems and the Right to the Highest Attainable Standard of Health” (2008) 10 *Health and Human Rights* 81.

⁸ Organization for Economic Co-operation and Development, *OECD Economic Surveys: Canada 2012* (Paris: OECD, 2012) at 137.

⁹ Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 7.

¹⁰ Marc A. Lalonde, *A New Perspective on the Health of Canadians* (Ottawa: Department of Supply and Services, 1974) (*Lalonde Report*).

¹¹ See Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2011 – Youth and Young Adults – Life in Transition* (Ottawa: Minister of Health, 2011); Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2010 – Growing Older – Adding Life to Years* (Ottawa: Minister of Health, 2010); Chief Public Health Officer, *Report on the State of Public Health in Canada, 2009 – Growing Up Well: Priorities for a Healthy Future* (Ottawa: Minister of Health, 2009); Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008).

for Health Information,¹² the Health Council of Canada¹³ and the Senate:¹⁴ “[r]esearch has consistently shown that a limited number of modifiable non-medical determinants underlie the greatest health disparities.”¹⁵ The World Health Organization describes these social determinants of health as:

... the conditions in which people are born, grow, live, work and age, including the health system. These circumstances are shaped by the distribution of money, power and resources at global, national and local levels, which are themselves influenced by policy choices. The social determinants of health are mostly responsible for health inequities – the unfair and avoidable differences in health status within and between countries.¹⁶

Aboriginal status, low income, gender, race, disability, education and literacy, employment and working conditions, early childhood development, food security, environment and housing, social exclusion and access to health services are commonly associated with the most significant health inequities in Canada.¹⁷ As Dennis Raphael summarizes

¹² Canadian Institute for Health Information, *Reducing the Gaps in Health: A Focus on Socio-economic Status in Urban Canada* (Ottawa: Canadian Institute for Health Information, 2008).

¹³ Health Council of Canada, *Stepping Up: Moving the Focus from Health Care in Canada to a Healthier Canada* (Ottawa: Health Council of Canada, 2010).

¹⁴ Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon).

¹⁵ Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 10.

¹⁶ World Health Organization, *Social Determinants of Health*, online: WHO <http://www.who.int/social_determinants/en/>. See also World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008) at 1.

¹⁷ See generally National Collaborating Centre for Determinants of Health, *Integrating Social Determinants of Health and Health Equity Into Canadian Public Health Practice: Environmental Scan 2010* (Antigonish, N.S.: National Collaborating Centre for Determinants of Health, 2011) at 52-53; Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 9; Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 188-210; Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 7-9; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 35-60; Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008); Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 3; Public Health Agency of Canada, *What is the Population Health*

it, these social determinants of health: “1) have a direct impact on health of individuals and populations, 2) are the best predictors of individual and population health, 3) structure lifestyle choices, and 4) interact with each other to produce health”.¹⁸

Differences in life expectancy based on income and Aboriginal status provide a stark illustration. In the case of income, for men in Canada aged 25 in 2001, those in the highest income quintile could expect to live 6.9 years longer than those in the poorest; for women, the difference was 4.5 years.¹⁹ In the case of Aboriginal status, the average lifespan is 12 years shorter for Inuit women than for Canadian women generally, and eight years shorter for Inuit versus non-Inuit men.²⁰ For First Nations men, the difference in life expectancy is seven years, and for First Nations women, five years.²¹ To put this in perspective, it is estimated that eliminating all cancers would increase life expectancy in the U.S. by 2.8 years.²² Low income and Aboriginal status are also associated with higher rates of death, and more years of life lost from injury, higher suicide rates, higher rates of strokes and heart attacks, and higher infant mortality rates, among other effects.²³ Beyond its adverse

Approach? (Ottawa: Public Health Agency of Canada, 2001) online: Public Health Agency of Canada <<http://www.phac-aspc.gc.ca/ph-sp/pdf/discussion-eng.pdf>>; National Forum on Health, “Determinants of Health Working Group Synthesis Report” in Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers (Ottawa: Minister of Public Works and Government Services, 1997) at 37-41.

¹⁸ Dennis Raphael, “Addressing the Social Determinants of Health in Canada: Bridging the Gap Between Research Findings and Public Policy” (March 2003) *Policy Options* 35 at 36.

¹⁹ Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 192.

²⁰ *Ibid.*, at 194.

²¹ Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1. See generally Charlotte Loppie Reading & Fred Wien, *Health Inequality and Social Determinants of Aboriginal People’s Health* (Prince George, B.C.: National Collaborating Centre for Aboriginal Health, 2009); Janet Smylie, “The Health of Aboriginal Peoples” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 280; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 19-34.

²² Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 192.

²³ See generally Health Disparities Task Group of the Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1-2; Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 192-206; Dennis Raphael, “Social Determinants of Health: An Overview of Concepts and Issues” in Toba Bryant, Dennis Raphael & Marci Rioux, eds., *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed. (Toronto: Canadian Scholars’ Press, 2010) 145 at 150-152.

impact on life expectancy, Juha Mikkonen and Dennis Raphael explain why income is the most significant determinant of health in Canada:

Level of income shapes overall living conditions, affects psychological functioning, and influences health-related behaviour such as quality of diet, extent of physical activity, tobacco use, and excessive alcohol use. In Canada, income determines the quality of other social determinants of health such as food security, housing and other prerequisites of health.²⁴

Other determinants of health have been shown to have equally significant effects. Conditions and experiences in early childhood “have strong immediate and longer lasting biological, psychological and social effects upon health.”²⁵ Women, including Aboriginal women and women with disabilities in particular, face gendered barriers to health and health care.²⁶ People with higher education are generally healthier than those

²⁴ Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 12; Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009)(Chair: Honourable Art Eggleton, P.C.); Nathalie Auger & Carolyne Alix, “Income, Income Distribution, and Health in Canada” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 61; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008); Canadian Population Health Initiative, *Reducing Gaps in Health: A Focus on Socio-Economic Status in Urban Canada* (Ottawa: Canadian Institute for Health Information, 2008); Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1-3; National Forum on Health, “Determinants of Health Working Group Synthesis Report” in Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers (Ottawa: Minister of Public Works and Government Services, 1997) at 9.

²⁵ Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 23. See also Campaign 2000, *2010 Report Card on Child and Family Poverty in Canada: 1989-2010* (Toronto: Campaign 2000, 2011); Chief Public Health Officer, *Report on the State of Public Health in Canada, 2009 – Growing Up Well: Priorities for a Healthy Future* (Ottawa: Minister of Health, 2009); Martha Friendly, “Early Childhood Education and Care as a Determinant of Health” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 128; National Council of Welfare, *First Nations, Métis and Inuit Children and Youth: Time to Act* (Ottawa: National Council on Welfare, 2007); National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 24-30.

²⁶ See generally Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 2; Pat Armstrong, “Gender, Health, and Care” in Toba Bryant, Dennis Raphael & Marci Rioux, eds., *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed. (Toronto: Canadian Scholars’ Press, 2010) at 331; Pat Armstrong, “Health Care Reform as if Women Mattered” in Bruce Campbell & Greg Marchildon, eds., *Medicare: Facts, Myths, Problems and Promise* (Toronto: James Lorimer & Company, 2007) at 257; National Forum

with lower educational attainment, and education has a strong impact on disability-free life expectancy.²⁷ Employment, job security, working conditions and work environment, shape health outcomes in a multitude of ways.²⁸ People who are vulnerably housed face the same severe health problems as those who are homeless, including reduced life expectancy, increased chronic health conditions, reduced access to health care and suicide rates that are twice the national average for men and six times the national average for women.²⁹ Food insecurity, which is most prevalent among social assistance recipients, sole support mothers with children, Aboriginal people and those who live in remote communities, “is associated with increased odds of poor or fair self-rated health, multiple chronic conditions, distress and depression”.³⁰ Geography and environment also compound other determinants of health: “geographic segregation and ghettoization, weather patterns (especially in the North), and pollution dispersion patterns all contribute and intersect to shape the

on Health, “Determinants of Health Working Group Synthesis Report” in Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers (Ottawa: Minister of Public Works and Government Services, 1997) at 8.

²⁷ See generally Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 15-16; Charles Ungerleider, Tracey Burns & Fernando Cartwright, “The State and Quality of Canadian Public Elementary and Secondary Education” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 156; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1.

²⁸ See generally Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 17-22; Andrew Jackson, “The Unhealthy Canadian Workplace” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 99; National Forum on Health, “Determinants of Health Working Group Synthesis Report” in Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers (Ottawa: Minister of Public Works and Government Services, 1997) at 11-12.

²⁹ See generally Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada’s Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing, and Health, 2010); Michael Shapcott, “Housing” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 221; Toba Bryant, “Housing and Health: More Than Bricks and Mortar” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 235; Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, P.C.) at 69.

³⁰ See generally *United Nations Special Rapporteur on the Right to Food Mission to Canada: Joint Civil Society Submission* (December 15, 2011); Food Banks Canada, *Hunger Count 2011* (Toronto: Food Banks Canada, 2011) Lynn McIntyre & Krista Rondeau, “Food Insecurity” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) 188; Valerie Tarasuk, “Health Implications of Food Insecurity” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) at 205.

health status of Canadians and their access to health care and other services.”³¹

Addressing social determinants of health was a major impetus in the creation of the field of public health, and Canada was an early leader in this area.³² In recent years, however, Canada has been criticized for its lack of commitment and progress in tackling persistent health inequities, particularly those facing Aboriginal people and people living in poverty. Former federal health minister, Monique Bégin, offers a blunt assessment of the current situation:

The truth is that Canada – the ninth richest country in the world – is so wealthy that it manages to mask the reality of poverty, social exclusion and discrimination, the erosion of employment quality, its adverse mental health outcomes, and youth suicides. While one of the world’s biggest spenders in health care, we have one of the worst records in providing an effective social safety net. What good does it do to treat people’s illnesses, to then send them back to the conditions that made them sick?³³

In 1986, *Achieving Health for All: A Framework for Health Promotion* (“the *Epp Report*”) concluded that “existing policies and practices are not sufficiently effective to ensure that Canadian men and women of all ages and backgrounds can have an equitable chance of achieving health”.³⁴ This chapter examines law as a tool for translating this understanding into government action to address social determinants

³¹ Elizabeth McGibbon, “Health and Health Care: A Human Rights Perspective” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) 318 at 324; see also Janet Smylie, “The Health of Aboriginal Peoples” in Dennis Raphael, ed., *Social Determinants of Health*, *ibid.*, at 280; Canadian Institute for Health Information, *Reducing the Gaps in Health: A Focus on Socio-economic Status in Urban Canada* (Ottawa: Canadian Institute for Health Information, 2008).

³² See National Collaborating Centre for Determinants of Health, *Integrating Social Determinants of Health and Health Equity into Canadian Public Health Practice: Environmental Scan 2010* (Antigonish, NS: National Collaborating Centre for Determinants of Health, 2011) at 8-9; Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 7; Health Canada, *Health Promotion in Canada: A Case Study* (Ottawa: Health Canada, 1997) at 1.

³³ Honourable Monique Bégin, “Forward” in Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 5. Monique Bégin was also a member of the World Health Organization’s Commission on Social Determinants of Health; World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008). See also Toba Bryant *et al.*, “Canada: A Land of Missed Opportunity for Addressing the Social Determinants of Health” (2011) 101 *Health Policy* 44; Elizabeth McGibbon, “Health and Health Care: A Human Rights Perspective” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) 318 at 319; Toba Bryant, Dennis Raphael & Marci Rioux, eds., *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed. (Toronto: Canadian Scholars’ Press, 2010) at 396-402.

of health. The chapter will begin with a brief review of the findings and recommendations from some of the major Canadian reports in this area. The chapter will go on to consider how international and domestic human rights guarantees can be used to challenge health inequity in Canada. The final section of the chapter will examine the obstacles facing determinant of health-related claims, in particular, the continued reliance by Canadian courts on the distinction between positive and negative rights. The chapter will conclude by suggesting that moving forward on determinants of health requires action by all branches of government, including the courts.

II. SOCIAL DETERMINANTS OF HEALTH: REPORTS AND FINDINGS

In 1974, *A New Perspective on the Health of Canadians* (“the Lalonde Report”)³⁵ proposed a major rethinking of Canadian health policy and spending priorities. While lauding Canada’s success in creating a publicly funded system that substantially removes financial barriers to medical and hospital care, the *Lalonde Report* drew attention to the fact that “the health care system is only one of many ways of maintaining and improving health”.³⁶ Along with the organization of health care, the report pointed to human biology, the environment, and lifestyle as factors that needed to be addressed “with equal vigour” for real progress to be made in improving the health of Canadians.³⁷ In 1986, the *Epp Report* characterized health as “a basic and dynamic force in our daily lives, influenced by our circumstances, our beliefs, our culture and our social, economic and physical environments”.³⁸ The *Epp Report* advocated for a “health promotion” approach, which it defined as follows:

[H]ealth promotion implies a commitment to dealing with the challenges of reducing inequities; extending the scope of prevention, and helping people to cope with their circumstances. It means fostering public participation, strengthening community health services and coordinating

³⁴ Jake Epp, *Achieving Health for All: A Framework for Health Promotion* (Ottawa: Health and Welfare Canada, 1986) at 4.

³⁵ Marc A. Lalonde, *A New Perspective on the Health of Canadians* (Ottawa: Department of Supply and Services, 1974). For a chronology and discussion of the Lalonde, Epp and subsequent reports, see Honourable Monique Bégin, “‘Do I See a Demand?...’ From ‘medicare’ to Health For All” (Paper delivered at 19th IUHPE World Conference, Vancouver, June 14, 2007); Health Canada, *Health Promotion in Canada: A Case Study* (Ottawa: Health Canada, 1997); National Collaborating Centre for Determinants of Health, *Integrating Social Determinants of Health and Health Equity Into Canadian Public Health Practice: Environmental Scan 2010* (Antigonish, NS: National Collaborating Centre for Determinants of Health, 2011) at 9.

³⁶ Marc A. Lalonde, *A New Perspective on the Health of Canadians* (Ottawa: Department of Supply and Services, 1974) at 5.

³⁷ *Ibid.*, at 6.

³⁸ Jake Epp, *Achieving Health for All: A Framework for Health Promotion* (Ottawa: Health and Welfare Canada, 1986) at 2.

healthy public policy. Moreover, it means creating environments conducive to health, in which people are better able to take care of themselves and to offer each other support in solving and managing collective health problems.³⁹

The *Epp Report* was released in conjunction with the First International Conference on Health Promotion, which was held in Ottawa and co-hosted by Health and Welfare Canada, the Canadian Public Health Association and the World Health Organization. The conference culminated in the adoption of the *Ottawa Charter for Health Promotion*.⁴⁰ The *Ottawa Charter* declared that: “To reach a state of complete physical, mental and social well-being, an individual or group must be able to identify and to realize aspirations, to satisfy needs, and to change or cope with the environment.”⁴¹ It identified the fundamental prerequisites for health as: “peace, shelter, education, food, income, a stable ecosystem, sustainable resources, social justice and equity”.⁴² Echoing the *Epp Report*, the *Ottawa Charter* affirmed the need to build “healthy public policy” that “puts health on the agenda of policy makers in all sectors and at all levels, directing them to be aware of the health consequences of their decisions and to accept their responsibilities for health.”⁴³

Over the next five years, Canadian governments took a number of steps to implement the recommendations of the *Epp Report* and the *Ottawa Charter*, including the establishment of large-scale federal strategies, such as the National AIDS strategy, directed at specific health issues and groups; the strengthening of provincial/territorial health promotion programs; the creation of Health Councils/Commissions and the adoption of “Healthy Communities” projects in several provinces; and a variety of government sponsored research initiatives, including two major national health promotion surveys in 1985 and 1990.⁴⁴ The 1990s also saw a series of federal and provincial/territorial reports and studies continuing the call for an expanded focus on determinants of health as a means of improving the health of Canadians. In its first *Report on the Health of Canadians* in 1996, the Federal, Provincial, and Territorial Advisory Committee on Population Health reiterated the message from the *Lalonde* and *Epp Reports* that: “Our overall high standard of health is not shared equally by all sectors in Canadian society. There are differences in health status by age, sex, level of income, education and geographic

³⁹ *Ibid.*, at 9.

⁴⁰ World Health Organization, Health and Welfare Canada & Canadian Public Health Association, *Ottawa Charter for Health Promotion* (Geneva: World Health Organization, 1986).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Health Canada, *Health Promotion in Canada: A Case Study* (Ottawa: Health Canada, 1997) at 3-11.

area.”⁴⁵ Among other challenges, the report identified the need to ensure an adequate income for all Canadians, healthy working conditions, life-long learning, a healthy and sustainable environment, adequate and affordable housing and healthy child development, and it recommended the development of “national health goals” to address the major influences on population health.⁴⁶

In 1999, the Advisory Committee’s *Toward a Healthy Future: Second Report on the Health of Canadians*, provided a comprehensive picture of the collective state of Canadian health, focusing on gender and age; income and income distribution; the social environment; education and literacy; the physical environment; personal health practices; health services; and biology and genetics as key determinants of health.⁴⁷ The report called on federal and provincial/territorial governments to adopt a “population health” approach to “improve the underlying and interrelated conditions in the environment that enable all Canadians to be healthy” and to “reduce inequities in the underlying conditions that put some Canadians at a disadvantage for attaining and maintaining optimal health.”⁴⁸ In its final report, *Canada Health Action: Building on the Legacy*, the National Forum on Health summarized the widespread consensus that had emerged in Canada by the end of the 1990s:

Being healthy requires clean, safe environments, adequate income, meaningful roles in society, good housing, nutrition, education, and social support in our communities. In fact, actions on these broad determinants of health through public policies have led to most of the improvement in the health status of Canadians over the last century. There is still much to do, however, if we want to reduce health disparities among various groups of the population and continue on the path toward better health for all.⁴⁹

⁴⁵ Federal, Provincial, and Territorial Advisory Committee on Population Health, *Report on the Health of Canadians* (Ottawa: Minister of Supply and Services Canada, 1996) at iii.

⁴⁶ *Ibid.*, at iv-v. See generally Honourable Monique Bégin, “‘Do I See a Demand?...’ From ‘medicare’ to Health For All” (Paper delivered at 19th IUHPE World Conference, Vancouver, June 2007) at 4-5.

⁴⁷ Federal, Provincial, and Territorial Advisory Committee on Population Health, *Toward a Healthy Future: Second Report on the Health of Canadians* (Ottawa: Minister of Public Works and Government Services, 1999).

⁴⁸ *Ibid.*, at xv.

⁴⁹ National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 9.

III. LAW AS A TOOL FOR ADDRESSING SOCIAL DETERMINANTS OF HEALTH

As Juha Mikkonen and Dennis Raphael explain, governments not only influence, but are often directly responsible for, social determinants of health:

There is much evidence that the quality of ... health-shaping living conditions is strongly determined by decisions that governments make in a range of different public policy domains. Governments at the municipal, provincial/territorial, and federal levels create policies, laws and regulations that influence how much income Canadians receive through employment, family benefits, or social assistance, the quality and availability of affordable housing, the kinds of health and social services and recreational opportunities we can access and even what happens when Canadians lose their jobs during economic downturns.⁵⁰

In its 2008 report, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, the World Health Organization's Commission on Social Determinants of Health puts it even more succinctly: "unequal distribution of health-damaging experiences is not in any sense a "natural" phenomenon but is the result of a toxic combination of poor social policies and programmes, unfair economic arrangements, and bad politics".⁵¹ Not surprisingly, the major reports described in the preceding section of the chapter envision a central role for governments in addressing determinants of health and reducing health inequities. This is reflected in the *Ottawa Charter's* conception of "healthy public policy":

Health promotion policy combines diverse but complimentary approaches including legislation, fiscal measures, taxation and organizational change. It is coordinated action that leads to health, income and social policies that foster greater equity ... Health promotion policy requires the identification of obstacles to the adoption of healthy public policies in non-health sectors, and ways of removing them.⁵²

⁵⁰ Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 7-8.

⁵¹ World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008) at 1; Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 17-26; National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 16.

⁵² World Health Organization, Health and Welfare Canada, Canadian Public Health Association, *Ottawa Charter for Health Promotion* (Geneva: World Health Organization, 1986); National Forum on Health, "Determinants of Health Working Group Synthesis Report" in *Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers* (Ottawa: Minister of Public Works and Government Services, 1997) at 9.

Such systemic change has not taken place in Canada. Instead, in its 1995 budget,⁵³ the federal government repealed the *Canada Assistance Plan*⁵⁴ — arguably the most important piece of post-war legislation in Canada from a determinant of health perspective.⁵⁵ This was followed by massive cuts in federal support for welfare, social service, housing, legal aid, and other provincial programs with a direct bearing on determinants of health.⁵⁶ Over the next decade, major cutbacks in social spending also occurred at the provincial level.⁵⁷ Since then, as reflected in the cursory directive to federal and provincial/territorial health ministers “to continue their work on healthy living strategies and other initiatives to reduce disparities in health status”, in the *2003 First Ministers’ Accord on Health Care Renewal*,⁵⁸ and the passing reference to health promotion in the 2004 Accord,⁵⁹ acute medical and hospital care has eclipsed population health as a government priority. As the Senate Subcommittee on Population Health concluded in its June 2009 report, *A Healthy, Productive Canada: A Determinants of Health Approach*:

Canada has led the world in understanding population health and health disparities ... However, in recent years, as the costs and delivery of health care have dominated the public dialogue, there has been inadequate policy development reflecting what we have learned about population health. This lack of action has led to a widening of health disparities in Canada. The Subcommittee believes that it is unacceptable for a wealthy country like ours to continue to tolerate such disparities in health.⁶⁰

⁵³ *Budget Implementation Act, 1995*, S.C. 1995, c. 17.

⁵⁴ *Canada Assistance Plan*, R.S.C. 1985, c. C-1, repealed by *Budget Implementation Act*, S.C. 1995, c. 17, s. 32.

⁵⁵ See generally Martha Jackman, “Women and the Canadian Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform” (1995) 8:2 C.J.W.L. 371.

⁵⁶ See generally Shelagh Day & Gwen Brodsky, *Women and the Quality Deficit: The Impact of Restructuring Canada’s Social Programs* (Ottawa: Status of Women Canada, 1998); Shelagh Day & Gwen Brodsky, *Women and the Canadian Social Transfer: Securing the Social Union* (Ottawa: Status of Women Canada, 2007).

⁵⁷ See generally Jennie Abell, “Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away” in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) at 257; Shelley A.M. Gavigan & Dorothy Chunn, eds., *The Legal Tender of Gender: Law, Welfare and the Regulation of Women’s Poverty* (Oxford: Hart Publishing, 2010) at 189; Monica Townson, *Women, Poverty and the Recession* (Ottawa: Canadian Centre for Policy Alternatives, 2009); Janet Mosher & Joe Hermer, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002); Jean Swanson, *Poorbashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001); National Council on Welfare, *Another Look at Welfare Reform* (Ottawa: Public Works and Government Services Canada, 1997).

⁵⁸ First Ministers’ Meeting, *2003 First Ministers’ Accord on Health Care Renewal*, Doc. 800-039 (Ottawa: February 2-4, 2003) at 7.

⁵⁹ First Ministers’ Meeting, *A 10-Year Plan to Strengthen Health Care*, Doc. 800-042 (Ottawa: September 13-16, 2004) at 8.

After nearly four decades of study, it is well understood that: “[t]he most appropriate and effective way to improve overall population health status is by improving the health of those in lower [socio-economic status] groups and other disadvantaged populations”⁶¹ and that: “reductions in health inequalities require reductions in material and social inequalities”.⁶² What role can law play in translating this understanding into action by governments to improve determinants of health?

(a) The International Human Rights Framework

The *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”), adopted by the UN General Assembly in 1966, and ratified by Canada with the support of the provinces in 1976, imposes a number of binding obligations that relate to determinants of health. In particular, Article 2(1) of the ICESCR requires a State Party: “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”. The Committee on Economic, Social and Cultural Rights (“CESCR”), the UN body responsible for monitoring and, since 2008 for enforcing⁶³ the ICESCR, has explained what the duty of progressive realization entails. In a case where the violation of an ICESCR right results from the denial of an immediate entitlement which a State party has the means to provide, such as an adequate level of social assistance or access to subsidized housing in a wealthy country like Canada, the remedy is straightforward: the government must act immediately to provide the benefit that has been denied. Beyond these immediate obligations, the progressive realization standard also creates future-oriented obligations to fulfill ICESCR rights within a reasonable

⁶⁰ Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 42-43.

⁶¹ See generally Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 10.

⁶² Public Health Agency of Canada, “The Population Health Template: Key Elements and Actions That Define a Population Health Approach” (Ottawa: Public Health Agency of Canada, 2001) online: Public Health Agency of Canada <<http://www.phac-aspc.gc.ca/ph-sp/pdf/discussion-eng.pdf>>.

⁶³ In 2008, the UN General Assembly adopted the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 63/117, U.N.G.A.O.R., 63rd Sess., Supp. No. 49, U.N. Doc. A/RES/63/117 (2008), which creates a complaints procedure parallel to the one that has existed for civil and political rights since 1966. See generally Martha Jackman & Bruce Porter, *International Human Rights, Health, and Strategies to Address Homelessness and Poverty in Ontario: Making the Connection* (Ottawa: Institute of Population Health, 2011).

time, and to address broader structural patterns of disadvantage and exclusion which cannot be remedied immediately.⁶⁴

In its *General Comment 14: The Right to the Highest Attainable Standard of Health*, the CESCR explains that the right to health under Article 12(1) of the ICESCR⁶⁵ extends not only to “timely and appropriate health care” but also “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment”.⁶⁶ In addition to the right to health, the ICESCR also guarantees the right to key determinants of health. Article 6 recognizes the right to work.⁶⁷ Article 7 guarantees “just and favourable conditions of work”, including decent wages, safe and healthy working conditions, reasonable working hours and periodic holidays with pay.⁶⁸ Article 9 recognizes the right “of everyone to social security, including social insurance”.⁶⁹ Article 10 affirms that “[the] widest possible protection and assistance should be accorded to the family ... particularly ... while it is responsible for the care and education of dependent children” including paid maternity leave and “special measures of protection and assistance” on behalf of children and youth.⁷⁰ Article 11(2) guarantees “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions”.⁷¹ Article 13 recognizes the right to education, including accessible higher education.⁷² Article 2(2) guarantees the rights in the ICESCR “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” and Article 28 affirms that the

⁶⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)*, U.N.C.E.S.C.R.O.R., 5th Sess., U.N. Doc. E/1991/23 (1990).

⁶⁵ *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966), 993 U.N.T.S. 3, art. 12(1), Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976).

⁶⁶ *General Comment 14: The Right to the Highest Attainable Standard of Health (art 12)*, U.N.C.E.S.C.R.O.R., 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000) at paras. 4, 11; see generally Paul Hunt & Gunilla Backman, “Health Systems and the Right to the Highest Attainable Standard of Health” (2008) 10 *Health and Human Rights* 81.

⁶⁷ *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966), 993 U.N.T.S. 3, art. 6, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976).

⁶⁸ *Ibid.*, art. 7.

⁶⁹ *Ibid.*, art. 9.

⁷⁰ *Ibid.*, art. 10.

⁷¹ *Ibid.*, art. 11(2).

⁷² *Ibid.*, art. 13.

ICESCR's provisions "extend to all parts of federal States without any limitations or exceptions".⁷³

The obligations imposed on federal and provincial/territorial governments by the ICESCR are reinforced by other international human rights treaties ratified by Canada. In addition to the right to life and to security of the person under Articles 6 and 9 of the *International Covenant on Civil and Political Rights* ("ICCPR"),⁷⁴ these include non-discrimination and other determinant of health related guarantees under the *Convention on the Elimination of Racial Discrimination*,⁷⁵ the *Convention on the Elimination of All Forms of Discrimination Against Women*,⁷⁶ the *Convention on the Rights of the Child*,⁷⁷ the *Convention on the Rights of Persons with Disabilities*,⁷⁸ and the *Declaration on the Rights of Indigenous Peoples*,⁷⁹ among others.⁸⁰

As the Senate Sub-Committee on Cities observed in its 2009 report, *In From the Margins: A Call to Action on Poverty, Housing and Homelessness*, international human rights continue to be viewed by Canadian governments as "closer to moral obligations than enforceable rights".⁸¹ While increased legislative incorporation into Canadian law

⁷³ *Ibid.*, arts. 2(2), 28.

⁷⁴ *International Covenant on Civil and Political Rights* (December 19, 1966), 999 U.N.T.S. 171, arts. 6, 9, Can. T.S. 1976 No. 47 (entered into force March 23, 1976, accession by Canada May 19, 1976).

⁷⁵ *International Convention on the Elimination of All Forms of Racial Discrimination* (March 7, 1966) at 660 U.N.T.S. 195, art. 2, 5(e), Can. T.S. 1970 No. 28 (entered into force January 4, 1969, ratified by Canada October 14, 1970).

⁷⁶ *Convention on the Elimination of All Forms of Discrimination against Women* (March 1, 1980), 1249 U.N.T.S. 13, art. 2, 12, Can. T.S. 1982 No. 31 (entered into force September 3, 1981, ratified by Canada December 19, 1981).

⁷⁷ *Convention on the Rights of the Child* (November 20, 1989), 1577 U.N.T.S. 3, art. 2, 24, Can. T.S. 1992 No. 3 (entered into force September 2, 1990, ratified by Canada December 13, 1991).

⁷⁸ *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, U.N.G.A.O.R., 61st Sess., Supp. No. 49, U.N. Doc. A/61/611 (2007) art. 25 (entered into force May 3, 2008, ratified by Canada March 11, 2010).

⁷⁹ *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), G.A. Res. 61/295, U.N.G.A.O.R., 61st Sess., Supp. No. 53, U.N. Doc. A/61/53 (2007), art. 2, 24. On September 13, 2007, Canada voted against the UN General Assembly resolution to adopt the UNDRIP, but the Canadian government issued a Statement of Support endorsing the UNDRIP on November 12, 2010.

⁸⁰ Canada's failure to respect its international human rights obligations relating to determinants of health has frequently been the object of criticism by the CESCR and other United Nations human rights treaty monitoring bodies, see generally Martha Jackman & Bruce Porter, *International Human Rights, Health, and Strategies to Address Homelessness and Poverty in Ontario: Making the Connection* (Ottawa: Institute of Population Health, 2011).

⁸¹ Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, P.C.) at 69. See generally Martha Jackman & Bruce Porter, *International Human Rights, Health, and Strategies to Address Homelessness and Poverty in Ontario: Making the Connection*

would provide for more direct domestic application of the ICESCR and related international human rights treaty guarantees, access to social security, an adequate standard of living, food, housing, work, education, and other key determinants of health must, first and foremost, be grounded in Canada's domestic constitutional framework, and in the interpretation and application of Charter rights in particular. The CESCR notes in its *General Comment 9: The Domestic Application of the Covenant*, that: “[t]he existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.”⁸² In keeping with this understanding of the interrelationship between international and domestic human rights guarantees, Dickson C.J.C. affirmed in *Slaight Communications Inc. v. Davidson*,⁸³ that: “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”.⁸⁴ Key constitutional provisions for addressing determinants of health and improving health equity in Canada include the commitment to provide public services of reasonable quality to all Canadians under section 36 of the *Constitution Act, 1982*; the right to life, liberty and security of the person under section 7 of the Charter; and the right to equal protection and equal benefit of the law under section 15(1) of the Charter.⁸⁵

(Ottawa: Institute of Population Health, 2011).

⁸² United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 4.

⁸³ [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.).

⁸⁴ *Ibid.*, at 1054 (S.C.R.), citing *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 at para. 59 (S.C.C.); see also *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 at para. 70 (S.C.C.).

⁸⁵ Aboriginal rights and self-government guarantees under section 35 of the *Constitution Act, 1982* also have direct implications for addressing health equity and determinants of health for Aboriginal People, see National Collaborating Centre for Aboriginal Health, *Looking for Aboriginal Health in Legislation and Policies: 1970 to 2008 – The Policy Synthesis Project* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2011); Larry Chartrand, “The Story in Aboriginal Law and Aboriginal Law in the Story: A Métis Professor’s Journey” in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) at 89; Constance MacIntosh, “Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health” in Colleen Flood, ed., *Just Medicare: What’s In, What’s Out, How We Decide* (Toronto: University of Toronto Press, 2006) at 193; Yvonne Boyer, “Discussion Document for the Aboriginal Dialogue: Self Determination as a Social Determinant of Health” (Aboriginal Dialogue, Canadian Reference Group, WHO Commission – Social Determinants of Health, Vancouver, June 29, 2006); Yvonne Boyer, *First Nations, Métis and Inuit Health Care: The Crown’s Fiduciary Obligation*, Discussion Paper Series in Aboriginal Health: Legal Issues, No. 2 (Ottawa: National Aboriginal Health Organization, 2004); and see generally Professor Constance MacIntosh’s chapter in this book.

(b) Section 36 as a Source of Obligation in Relation to Determinants of Health

Section 36 of the Constitution Act, 1982 is an important source of obligation for federal and provincial/territorial governments in relation to social determinants of health.⁸⁶ Section 36(1) declares that:

Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.⁸⁷

When then Justice Minister Jean Chrétien tabled the resolution to include the provision as part of the federal government's proposed package of constitutional reforms, he described section 36 as recognizing that "[s]haring the wealth has become a fundamental right of Canadians".⁸⁸ In the proceedings leading up to the enactment of the *Constitution Act, 1982*, the Special Joint Committee of the Senate and of the House of Commons considered an amendment to what is now section 36, put forward by NDP MP Svend Robinson, to add a "commitment to fully implementing the ICESCR and the goals of a clean and healthy environment and safe and healthy working conditions".⁸⁹ During debate on the proposal, government members agreed there was no opposition to the "principles embodied in the amendment".⁹⁰ Justice Minister Chrétien affirmed that Canada was already committed to implementing the ICESCR, but he suggested that "we cannot put everything [in s. 36]".⁹¹

⁸⁶ See generally Martha Jackman & Bruce Porter, *Rights Based Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework*, Working Paper (Huntsville, ON: Social Rights Advocacy Centre, 2012); David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill L.J. 81 at 118-22; Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19:2 Dal. L.J. 306; Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8:2 C.J.W.L. 371 at 392-93.

⁸⁷ *Constitution Act, 1982*, s. 36(1).

⁸⁸ *House of Commons Debates*, 32nd Parl., 1st Sess. (October 6, 1980) at 3287 (Honourable Jean Chrétien).

⁸⁹ Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., 1st Sess., No. 49 (January 30, 1981) at 65-71.

⁹⁰ *Ibid.*, at 68.

⁹¹ *Ibid.*, at 70.

There has been ongoing academic debate about the justiciability of section 36,⁹² and the question has yet to be judicially resolved.⁹³ However, the Supreme Court of Canada's analysis in *Finlay v. Canada (Minister of Finance)*⁹⁴ provides useful direction as to how federal and provincial/territorial governments might be held accountable for their non-compliance with section 36 as it relates to determinants of health. In *Finlay*, the Court considered whether an individual could challenge a provincial government's failure to comply with the conditions of a federal/provincial cost sharing agreement, in that case the *Canada Assistance Plan* ("CAP").⁹⁵ To be eligible for CAP transfers, provinces were required to meet a number of conditions, including that assistance be provided to recipients in "an amount ... that takes into account the basic requirements of that person," including "food, shelter, clothing, fuel, utilities, household supplies and personal requirements".⁹⁶ The Supreme Court held that the CAP did not create a justiciable individual right to an adequate level of assistance. However it concluded that Jim Finlay, who was adversely affected by Manitoba's failure to respect CAP conditions, should be granted "public interest standing" to challenge the province's non-compliance with the agreement.⁹⁷ In the Court's analysis, in order to continue to receive federal transfer payments, provinces would be required to provide assistance in an amount that was "compatible, or consistent, with an individual's basic requirements" with some flexibility granted to provincial governments in meeting that standard.⁹⁸

As Vincent Calderhead argues, the Supreme Court's approach to intergovernmental agreements in *Finlay* is equally applicable to the

⁹² See Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, ON: Carswell, 1999) at 19; Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19:2 Dal. L.J. 306 at 357; Michael Robert, "Challenges and Choices: Implications for Fiscal Federation" in T.J. Courchene, D.W. Conklin & G.C.A. Cook, eds., *Ottawa and the Provinces: The Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985) at 28.

⁹³ See generally *Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board*, [1992] M.J. No. 218, 91 D.L.R. (4th) 554 (Man. C.A.); *Canadian Bar Association v. British Columbia*, [2008] B.C.J. No. 350 at para. 53, 290 D.L.R. (4th) 617 (B.C.C.A.); *Cape Breton (Regional Municipality) v. Nova Scotia*, [2008] N.S.J. No. 154, 267 N.S.R. (2d) 21 (N.S.S.C.).

⁹⁴ *Finlay v. Canada (Minister of Finance)*, [1986] S.C.J. No. 73, [1986] 2 S.C.R. 607 at para. 36 (S.C.C.); *Finlay v. Canada (Minister of Finance)*, [1993] S.C.J. No. 39, [1993] 1 S.C.R. 1080 (S.C.C.). See also Margot Young, "Starving in the Shadow of Law: A Comment on *Finlay v. Canada (Minister of Finance)*" (1994) 5:2 Const. Forum 31; Sujit Choudry, "The Enforcement of the *Canada Health Act*" (1996) 41:2 McGill L.J. 461.

⁹⁵ *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1, repealed by *Budget Implementation Act*, S.C. 1995, c. 17.

⁹⁶ *Ibid.*, ss. 2(a), 6(2)(a).

⁹⁷ *Finlay v. Canada (Minister of Finance)*, [1986] S.C.J. No. 73 at para. 36, [1986] 2 S.C.R. 607 (S.C.C.).

⁹⁸ *Finlay v. Canada (Minister of Finance)*, [1993] S.C.J. No. 39 at para. 81, [1993] 1 S.C.R. 1080 (S.C.C.).

enforcement of federal and provincial/territorial undertakings under section 36. Individuals or groups whose mental and physical health is adversely affected by governments' failure to promote "equal opportunities for the wellbeing of Canadians" or to provide "essential public services of reasonable quality to all Canadians" should, at a minimum, be granted public interest standing to demand judicial scrutiny of governments' compliance with section 36. Where necessary, courts should order governments to take whatever steps are required to meet their section 36 commitments in relation to income support, housing, employment and other key determinants of health.⁹⁹ Any other approach would be inconsistent with Canada's duty to ensure that effective domestic remedies are available for violations of ICESCR and other treaty rights,¹⁰⁰ and with the principle established in *Slaight Communications* and subsequent Supreme Court cases, that the Constitution should be interpreted and applied in conformity with Canada's international human rights obligations.¹⁰¹

(c) Determinant of Health Rights under Section 7

Section 7 of the Charter declares that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."¹⁰² During the Special Joint Committee proceedings leading up to the adoption of the Charter, Progressive Conservative MPs put forward an amendment to add a right to "the enjoyment of property" to section 7. This proposal was defeated, in part because of fears that entrenching property rights could interfere with government regulation of land use, natural resource and other economic interests.¹⁰³ Referring to this

⁹⁹ Vincent Calderhead, "CBRM appeal ruling renews debate", Editorial, *Cape Breton Post* (May 16, 2009) A7.

¹⁰⁰ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 4.

¹⁰¹ *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 at 1054 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at paras. 69-71 (S.C.C.); *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 at para. 73 (S.C.C.); *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 S.C.C. 27 at para. 70 (S.C.C.).

¹⁰² *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰³ See Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 I.C.O.N. 17 at 24-25; Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 *Queen's L.J.* 65 at 76. The phrase "fundamental justice" was also preferred over a reference to "due process of law" in section 7, because of concerns around the use of the due process clause in the *United States Bill of Rights* during the *Lochner* era, as a means of challenging the regulation of private enterprise and the promotion of social rights, see Sujit Choudhry, "The *Lochner* Era and Comparative

legislative history in his decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*,¹⁰⁴ Dickson C.J.C. distinguished what he characterized as “corporate-commercial economic rights” from socio-economic rights of the kind recognized under the ICESCR.¹⁰⁵ As he explained:

The intentional exclusion of property from s. 7 ... leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee ... however ... the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property – contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous.¹⁰⁶

In *Gosselin v. Quebec (Attorney General)*, the Supreme Court considered a challenge to a provincial social assistance regulation that reduced the level of benefits payable to recipients under the age of 30 by two-thirds, unless they were enrolled in workfare or training programs.¹⁰⁷ Justice Arbour found that the section 7 right to “security of the person” placed positive obligations on governments to provide an amount of social assistance adequate to cover basic needs.¹⁰⁸ Although the majority of the Court viewed the impugned welfare regime as a defensible means of encouraging young people to join the workforce, it did not foreclose the possibility of such a positive rights interpretation of section 7 in a future case.¹⁰⁹

In *Chaoulli v. Quebec (Attorney General)*,¹¹⁰ a majority of the Court held that the provincial government’s failure to ensure access to health care of “reasonable” quality within a “reasonable” time triggered the application of section 7, and the equivalent guarantees under Quebec’s *Charter of Human Rights and Freedoms*.¹¹¹ The dissenting justices likewise accepted the trial judge’s finding that “that the current state of the

Constitutionalism” (2004) 2:1 I.C.O.N. 17 at 17-24.

¹⁰⁴ [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

¹⁰⁵ *Ibid.*, at 1003-1004.

¹⁰⁶ *Ibid.*, at 1003.

¹⁰⁷ *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.).

¹⁰⁸ *Ibid.*, at para. 332.

¹⁰⁹ *Ibid.*, at para. 82. For a critique of the decision, see Sheila McIntyre, “The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review” (2006) 31 *Queen’s L.J.* 731; Martha Jackman, « Sommes nous dignes? Légalité et l’arrêt *Gosselin* » (2006) 17:1 *R.F.D.* 161; Gwen Brodsky, “*Gosselin v. Quebec (Attorney General)*: Autonomy With a Vengeance” (2003) 15:1 *C.J.W.L.* 194.

¹¹⁰ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at para. 159, [2005] 1 S.C.R. 791 (S.C.C.). The majority went on to find that the ban on private insurance violated s. 7 principles of fundamental justice and could not be justified under s. 1 of the Charter.

¹¹¹ *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, ss. 1, 9.1; *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at paras. 100, 105, [2005] 1 S.C.R. 791 (S.C.C.).

Quebec health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of *some* individuals on *some* occasions, of putting at risk their life or security of the person”.¹¹² In its recent decision in *Canada (Attorney General) v. PHS Community Services Society* (“*Insite*”), the Supreme Court reaffirmed that where a law creates a risk to health, this amounts to a deprivation of the right to security of the person, and that “where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer”.¹¹³ Given the significant adverse health consequences identified in the preceding section of the paper, particularly for people living in poverty and other disadvantaged groups, it is obvious that governments’ failure to ensure reasonable access to income, housing, food and other crucial determinants of health undermines section 7 interests – certainly as directly as the regulation of private medical insurance.¹¹⁴ As UN Special Rapporteur on the Right to Health, Paul Hunt, summarizes it: “The health of individuals, communities and populations requires more than medical care.”¹¹⁵

Section 7 of the Charter states that any deprivation of the right to life, liberty and security of the person must be in accordance with the principles of fundamental justice. A core component of fundamental justice is the principle that governments cannot arbitrarily limit section 7 rights.¹¹⁶ Prior to the *Insite* case, the Supreme Court had not been called

¹¹² *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at para. 200, [2005] 1 S.C.R. 791 (S.C.C.). (emphasis in original). The dissenting justices disagreed, however, with the majority’s conclusion that the province’s ban on private health insurance was arbitrary, concluding instead that “Prohibition of private health insurance is directly related to Quebec’s interest in promoting a need-based system and in ensuring its viability and efficiency”, at para. 256.

¹¹³ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44 at para. 93, [2011] 3 S.C.R. 134 (S.C.C.).

¹¹⁴ See generally, Martha Jackman and Bruce Porter, *Rights Based Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework*, Working Paper (Huntsville, ON: Social Rights Advocacy Centre, 2012); Martha Jackman, “Charter Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?” in Robert J. Sharpe & Kent Roach, eds., *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 279; Lynda M. Collins, “An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*” (2009) 26 Windsor Rev Legal & Soc 7; Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective” (2007) 45:2 Osgoode Hall L.J. 239; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 U.B.C. L. Rev. 539; Andrew Gage, “Public Health Hazards and Section 7 of the *Charter*” (2003) 13 J Env L & Prac 1; Martha Jackman, “The Protection of Welfare Rights Under the *Charter*” (1988) 20:2 Ottawa L. Rev. 257.

¹¹⁵ *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Paul Hunt, U.N. Doc. No. A/HRC/7/11 (2008) at para. 45.

¹¹⁶ See *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 at para. 203 (S.C.C.); *R. v. Marmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79,

upon to consider whether a government's failure to take action, or to adopt positive measures, to protect the right to life or to security of the person, were arbitrary and so fundamentally unjust within the meaning of section 7. In the *Insite* case, however, after rejecting the claim that the *Controlled Drugs and Substances Act*¹¹⁷ itself violated section 7, the Court considered whether the federal Minister of Health's failure to grant an exemption, as provided for under the Act, was in accordance with the principles of fundamental justice.¹¹⁸ Accepting the trial judge's findings with respect to the benefits of Insite's safe injection and related health services to the lives and health of those using them, and the harms that would result if those services were not made available, the Court found that the Minister's failure to grant an exemption was arbitrary and it went on to conclude that: "The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."¹¹⁹

The *Insite* decision has direct implications for the application of section 7 in the determinant of health context. As discussed in the previous section of the paper, for more than 40 years, Canadian governments have been called upon to take concerted action to improve determinants of health. There is overwhelming evidence of the serious consequences, including illness and premature death, of their failure to do so. Measured against the negative health, social and economic outcomes associated with health inequity for individuals, communities and the country as a whole, governments' continuing inaction in this area is both arbitrary and irrational. As the Senate Subcommittee on Population Health concludes:

Taking action on the determinants of health has the potential to improve population health outcomes by addressing the causes of illnesses and injuries before they occur. There are sound economic and social reasons to improve the physical and mental health of the population. The benefits of population health extend beyond improved health status and reduced health disparities to foster economic growth, productivity and prosperity ... Simply put, Canada's health and wealth depend on the health of all Canadians.¹²⁰

[2003] 3 S.C.R. 571 at para. 135 (S.C.C.).

¹¹⁷ *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

¹¹⁸ *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44 at paras. 112-115, 127-136, [2011] 3 S.C.R. 134 (S.C.C.).

¹¹⁹ *Ibid.*, at paras. 131, 133.

¹²⁰ Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 16; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 5.

It is thus increasingly difficult to sustain the position that governments' failure to take the necessary measures to address determinants of health, as outlined in the *Lalonde* and *Epp Reports*, the National Forum on Health, and other major domestic and international reports and studies since the mid-1970s, is in accordance with section 7 guarantees of life, liberty, security of the person and the principles of fundamental justice.

(d) Section 15 as a Guarantee of Health Equity

Section 15(1) of the Charter declares that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."¹²¹ As Bruce Porter has documented, there was a strong expectation that section 15 would give rise to "a more positive conception of equality, placing new responsibilities on governments to identify and address issues of socio-economic disadvantage through positive legislative and social measures" and "making the right to equality reach the level of everyday life, engaging the concrete struggles for dignity and security, an adequate income, a decent job, access to child care, transportation, adequate housing, education and health care."¹²² In its landmark decision in *Andrews v. Law Society of British Columbia*,¹²³ the Supreme Court of Canada broke with its pre-Charter past, adopting a substantive approach to equality – one that is primarily concerned with the effects, rather than the intent of government action, and that is designed to remedy "the most socially destructive and historically practised bases of discrimination."¹²⁴

In order to address health inequity, Ronald Labonté has underscored the need to focus not only on socially excluded groups, but on socially excluding structures and practices.¹²⁵ This is also the objective of a substantive equality analysis under section 15. The implications of such an

¹²¹ Section 15(2) goes on to affirm that: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

¹²² Bruce Porter, "Expectations of Equality" in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) 23 at 34; see also Lynn Smith, ed., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986); Anne Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985).

¹²³ *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

¹²⁴ *Ibid.*, at para. 38.

¹²⁵ Ronald Labornté, "Social Inclusion/Exclusion and Health: Dancing the Dialectic" in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars' Press, 2008) at 270.

approach from a determinant of health perspective can be seen in the Supreme Court's decision in *Eldridge v. British Columbia (Attorney General)*.¹²⁶ The appellants' section 15 challenge to the province's failure to fund interpretation services was dismissed by the lower courts in *Eldridge* on the grounds that B.C.'s health care system treated everyone the same.¹²⁷ Writing for a unanimous Supreme Court, LaForest J. rejected this restrictive reading of section 15, and the lower courts' presupposition that "the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate".¹²⁸ Justice LaForest identified the inequality in *Eldridge* as the failure to ensure that persons who were deaf received the same level and quality of care as the hearing population.¹²⁹ In doing so, LaForest J. endorsed Dianne Pothier's assertion that: "the unavailability of sign language interpretation is not ... the provision of universal health care but rather the provision of able-bodied health care".¹³⁰

In *Vriend v. Alberta*, the Court adopted a similar analysis in rejecting the province's assertion that the omission of sexual orientation from Alberta's human rights legislation amounted to government inaction that was not subject to Charter review.¹³¹ Justice Cory found that the impact on gays and lesbians of the absence of human rights protection based on sexual orientation had to be examined under section 15, and that it was not an answer to say that all Albertans benefitted from the same human rights guarantees. Rather, Cory J. concluded, Alberta's human rights legislation violated section 15 because of the systemic effects of its failure to protect gays and lesbians from the form of discrimination they were most likely to suffer.¹³²

In the decade following *Eldridge* and *Vriend*, the Supreme Court rendered a number of negative section 15 decisions, most notably in *Law v. Canada (Minister of Employment and Immigration)*,¹³³ that threw its

¹²⁶ [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

¹²⁷ *Eldridge v. British Columbia (Attorney General)*, [1992] B.C.J. No. 2229 (B.C.S.C.); *Eldridge v. British Columbia (Attorney General)*, [1995] B.C.J. No. 1168 (B.C.C.A.).

¹²⁸ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at para. 66 (S.C.C.).

¹²⁹ *Ibid.*, at para. 71.

¹³⁰ Dianne Pothier, "M'Aider, Mayday: Section 15 of the Charter in Distress" (1996) 6 N.J.C.L. 295 at 338; *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at para. 69 (S.C.C.).

¹³¹ *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

¹³² *Ibid.*, at paras. 86-87.

¹³³ [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.). See generally Sheila McIntyre & Sandra Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

commitment to substantive equality into doubt. In *R. v. Kapp*,¹³⁴ the Court acknowledged the widespread criticism of the *Law* decision¹³⁵ as having narrowed section 15 to “an artificial comparator analysis focused on treating likes alike.”¹³⁶ This formalism was typified by the Supreme Court’s decision in *Auton (Guardian ad litem of) v. British Columbia*, in which McLachlin C.J.C. held that, to succeed in a claim for provincial funding for intensive autism therapy for their children, the petitioners were required to prove differential treatment in comparison to “a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core

¹³⁴ [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.).

¹³⁵ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.). See generally Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

¹³⁶ *R. v. Kapp*, [2008] S.C.J. No. 42 at para. 22, [2008] 2 S.C.R. 483 (S.C.C.).

therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required".¹³⁷ In *Kapp*,¹³⁸ the Court reiterated its commitment to the ideal of substantive equality enunciated in *Andrews*.¹³⁹ As it subsequently affirmed in *Withler v. Canada (Attorney General)*: "At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"¹⁴⁰

Consistent with the findings in earlier reports discussed in the preceding section of the chapter, the Senate Subcommittee on Population Health observed in 2009 that:

Wide disparities in health exist among Canadians – between men and women, between regions and neighbourhoods, and between people with varying levels of education and income. Although ill-health is distributed throughout the whole population, it is borne disproportionately by specific groups, notably Aboriginal peoples and individuals and families whose incomes are low.¹⁴¹

Given the substantive equality and remedial objectives of section 15, it is not surprising that many of the most significant determinants of health in Canada, including Aboriginal status, gender, race, disability and age, are also recognized as prohibited grounds of discrimination under section 15. Nor is it surprising that women, Aboriginal people, racialized minorities and people with disabilities are disproportionately impacted by other determinants of health, such as low income, unemployment and poor working conditions, illiteracy, lower levels of education, food insecurity, poor housing and environmental conditions, social exclusion and barriers to health services.¹⁴²

¹³⁷ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 at para. 55, [2004] 3 S.C.R. 657 (S.C.C.). For a critique of the decision see Martha Jackman, "Health and Equality: Is There a Cure?" (2007) 15 Health L.J. 87; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) 136 at 146-49.

¹³⁸ *R. v. Kapp*, [2008] S.C.J. No. 42 at para. 14, [2008] 2 S.C.R. 483 (S.C.C.).

¹³⁹ *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

¹⁴⁰ *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12 at para. 2, [2011] 1 S.C.R. 396 (S.C.C.).

¹⁴¹ Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 9.

¹⁴² National Collaborating Centre for Determinants of Health, *Integrating Social Determinants of Health and Health Equity Into Canadian Public Health Practice: Environmental Scan 2010* (Antigonish, N.S.: National Collaborating Centre for Determinants of Health, 2011) at 52-53; Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 9; Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook*

In view of its importance as a source, consequence and manifestation of economic and social disadvantage and stigma, there is a strong argument that poverty – the single most significant determinant of health in Canada – should itself be recognized as an analogous ground of discrimination under section 15.¹⁴³ Poverty has been linked to prohibited grounds of discrimination under international human rights law, including under the ICESCR.¹⁴⁴ With the exception of the *Canadian Human Rights Act*,¹⁴⁵ “social condition” and other grounds related to poverty are also protected under domestic human rights legislation.¹⁴⁶ The Canadian Human Rights Act Review Panel, chaired by former Supreme Court Justice Gérard LaForest, found that there was “ample evidence of widespread discrimination based on characteristics related to social conditions such as poverty, low education, homelessness and illiteracy”.¹⁴⁷ The Panel recommended “the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the [*Canadian Human*

(Ottawa: Canadian Health Services Research Foundation, 2010) at 188-210; Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 7-9; Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008); Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 3.

¹⁴³ Martha Jackman & Bruce Porter, *Rights-Based Strategies to Address Poverty and Homelessness in Ontario: The Constitutional Framework* (Ottawa: Institute of Population Health, 2012); Jennie Abell, “Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away” in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) at 257; Kerri Froc, “Is the Rule of Law the Golden Rule? Accessing “Justice” for Canada’s Poor” (2008) 87 Can. Bar Rev. 459 at 467-70; Martha Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law” (1994) 2:1 Rev. Const. Stud. 76.

¹⁴⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2 para. 2)*, U.N.C.E.S.C.R.O.R., 42nd Sess., U.N. Doc. E/C.12/GC/20 (2009); *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda*, U.N.G.A.O.R., 66th Sess., U.N. Doc. A/66/265 (2011).

¹⁴⁵ *Human Rights Act*, R.S.C. 1985, c. H-6.

¹⁴⁶ All provincial and territorial human rights statutes in Canada provide protection from discrimination because of “social condition” (New Brunswick, Northwest Territories, Quebec) or a related ground such as “social origin” (Newfoundland); “source of income” (Alberta, British Columbia, Manitoba, Nova Scotia, Nunavut and Prince Edward Island), or “receipt of public assistance” (Ontario and Saskatchewan). These different grounds have been interpreted broadly to provide protection against discrimination on the basis of poverty, low level of income, reliance on public housing, and homelessness. See generally Wayne MacKay & Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009).

¹⁴⁷ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 107.

Rights] Act in order to provide protection from discrimination because of disadvantaged socio-economic status, including homelessness.¹⁴⁸

The Supreme Court has yet to consider whether the social condition of poverty should be recognized as an analogous ground under section 15, and lower court jurisprudence on the issue is mixed. In cases where the courts have focused primarily on the characteristic of economic need or income level, analogous grounds claims have been rejected on the reasoning that poverty does not satisfy the “immutability” requirement set out by the Supreme Court in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.¹⁴⁹ However, where courts have considered the social exclusion and marginalization of poor people, including evidence of stereotyping and stigma, poverty has been recognized as an analogous ground of discrimination.¹⁵⁰

Whether or not poverty itself is recognized as an analogous ground under section 15, to the extent that it intersects with other prohibited grounds of discrimination as a determinant of health and source of health inequity, the Charter’s equality guarantees are clearly engaged. As the Senate Subcommittee on Cities summarizes it in its 2009 report, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness*:

The *Charter*, while not explicitly recognizing social condition, poverty, or homelessness, does guarantee equality rights, with special recognition

¹⁴⁸ *Ibid.*, at 106-112. Although strongly supported by civil society organizations and UN human rights bodies, the LaForest Panel’s recommendations have not been implemented; see generally United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1/Add.31 (1998) at para. 51.

¹⁴⁹ [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.). See e.g., *Toussaint v. Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 636, 2011 F.C.A. 146 at para. 59 (F.C.A.); *Boulter v. Nova Scotia Power*, [2009] N.S.J. No. 64 at para. 42, 307 D.L.R. (4th) 293 (N.S.C.A.); *R. v. Banks*, [2007] O.J. No. 99 at para. 104, 87 O.R. (3d) 1 (Ont. C.A.); *Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1443 at para. 21, [2007] 3 F.C.R. 411 (F.C.A.); *Bailey v. Canada*, [2005] F.C.J. No. 81, 2005 F.C.A. 25 at para. 12 (F.C.A.); *Donovan v. Canada*, [2005] T.C.J. No. 494, 2005 T.C.C. 667 at para. 18 (T.C.C.); *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] S.C.R. 1016 at para. 166 (S.C.C.); *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.).

¹⁵⁰ See e.g., *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] O.J. No. 1771, 59 O.R. (3d) 481 (Ont. C.A.); *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2000] O.J. No. 2433, 188 D.L.R. (4th) 52 (Ont. Div. Ct.); *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493, 2002 B.C.S.C. 105 (B.C.S.C.); *R. v. Clarke*, [2003] O.J. No. 3883, 61 W.C.B. (2d) 134 (Ont. S.C.); *Falkiner v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 3737, 140 D.L.R. (4th) 115 at 130-39, 153 (Ont. Gen. Div.); *Schaff v. Canada*, [1993] T.C.J. No. 389, 18 C.R.R. (2d) 143 at para. 52 (T.C.C.); *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97, 119 N.S.R. (2d) 91 (N.S.C.A.); *R. v. Rehberg*, [1994] N.S.J. No. 35, 127 N.S.R. (2d) 331 (N.S.S.C.).

of the remedial efforts that might be required to ensure the equality of women, visible minorities ... persons with disabilities, and Aboriginal peoples. As the Committee has heard, these groups are all overrepresented among the poor – in terms of both social and economic marginalization.¹⁵¹

The World Health Organization has pointed out that “[d]ifferent government policies, depending on their nature, can either improve or worsen health and health equity” and that “coherent action across government, at all levels, is essential”.¹⁵² Government inaction in relation to determinants of health not only reflects, but perpetuates and reinforces social and economic exclusion and disadvantage on grounds of discrimination that are prohibited under section 15. This inaction is a concrete manifestation of a lack of equal “concern, respect and consideration”¹⁵³ for the health-related interests and rights of Aboriginal people, women, people living in poverty and members of other disadvantaged groups, in comparison to more advantaged members of Canadian society for whom access to medical care, rather than other determinants of health, is a higher priority.¹⁵⁴

There is no reason why the systemic failure of Canadian governments, whether deliberate or not, to address determinants of health, particularly as they affect disadvantaged groups, should be immune from section 15 review. To the contrary, the language, history and remedial

¹⁵¹ Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, P.C.) at 69; Jennie Abell, “Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsiding Away” in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) 257 at 260-61.

¹⁵² World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008) at 10.

¹⁵³ *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6 at para. 34, [1989] 1 S.C.R. 143 (S.C.C.).

¹⁵⁴ See generally Marcia Rioux, “The Right to Health: Human Rights Approaches to Health” in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008) 318 at 319; Toba Bryant, Dennis Raphael & Marci Rioux, eds., *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed. (Toronto: Canadian Scholars’ Press, 2010) at 93; Honourable Monique Bégin, “‘Do I See a Demand?...’ From ‘medicare’ to Health For All” (Paper delivered at 19th IUHPE World Conference, Vancouver, June 14, 2007) at 10-11; David Schneiderman, “Universality vs. Particularity: Litigating Middle Class Values under Section 15” in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) at 367; Martha Jackman, “Misdiagnosis or Cure? Charter Review of the Health Care System” in Colleen M. Flood, ed., *Just Medicare: What’s In, What’s Out, How We Decide?* (Toronto: University of Toronto Press, 2006) at 58; Nuala P. Kenny, *What good is Health Care? Reflections on the Canadian Experience* (Ottawa: Canadian Hospital Association Press, 2002) at 182.

objectives of section 15 provide a solid basis for challenging governments' ongoing failure to ensure that social welfare, health, education, employment, housing, environmental, fiscal and other laws and policies reduce, rather than exacerbate health inequity in Canada. As David Boyd has observed in relation to the failure to ensure access to the most basic determinants of health – safe drinking water, running water and indoor toilets – for thousands of First Nations people living on reserves across Canada:

If Canada's *Constitution*, including the *Charter of Rights and Freedoms*, cannot be extended to provide relief to individuals deprived of their human right to water, a deprivation that causes adverse health effects, violates human dignity, and flouts the principle of environmental justice, then the *Constitution* is not a living tree but is merely dead wood.¹⁵⁵

IV. OBSTACLES TO LEGAL ACTION TO IMPROVE DETERMINANTS OF HEALTH

In its *General Comment 14: The Right to the Highest Attainable Standard of Health*, the CESCR outlines the obligations of States parties to ensure the domestic legal enforcement of the right to health under Article 12 of the ICESCR.¹⁵⁶ In particular, the CESCR asserts that: "Any person or group victim of a violation of the right to health should have access to effective judicial ... remedies at both national and international levels."¹⁵⁷ The CESCR further recommends that: "Judges ... should be encouraged by States parties to pay great attention to violations of the right to health in the exercise of their functions."¹⁵⁸

Notwithstanding Canada's international human rights obligations and the remedial promise of section 24(1) of the Charter,¹⁵⁹ those pursuing

¹⁵⁵ David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill L.J. 81 at 134; see also Janet Smylie, "The Health of Aboriginal Peoples" in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars' Press, 2008) at 280.

¹⁵⁶ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (art. 12)*, U.N.C.E.S.C.R.O.R., 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000).

¹⁵⁷ *Ibid.*, at para. 59.

¹⁵⁸ *Ibid.*, at paras. 59, 61. The CESCR also suggests at para. 62 that: "State parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health."

¹⁵⁹ Charter, s. 24(1) provides that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." See generally Robert J. Shape & Kent Roach, *The Charter of Rights and Freedoms*, 4th ed. (Toronto: Irwin Law, 2009), ch 17 at 373-403; Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-economic Rights" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*

rights claims related to poverty, homelessness, access to health care or other determinants of health have been denied an effective remedy, or even a hearing, in the vast majority of cases.¹⁶⁰ This lack of success of legal challenges to government action and inaction in relation to determinants of health can be explained, in large part, by judicial reliance on an outmoded conception of positive versus negative rights.

The distinction traditionally drawn between positive, or socio-economic rights on the one hand, and negative, or civil and political rights on the other, is premised on the idea that the state is merely required to refrain from interfering with individuals' exercise of the latter class of rights, while socio-economic rights impose positive obligations on governments to act, whether by providing services, money or other benefits necessary to ensure that these rights can in fact be enjoyed by all. The enforcement of negative rights is seen to fall within the traditional purview of the courts. In contrast, judicial enforcement of positive rights is alleged to raise issues of institutional legitimacy and competence so problematic as to render socio-economic rights non-justiciable. Socio-economic rights violations, including those directly related to determinants of health, are characterized as matters of social policy, rather than fundamental rights, which governments alone are empowered to address, free from judicial interference and the constraints of Charter review.¹⁶¹

The distinction between positive and negative rights has long been discredited under international human rights law, replaced by the

(Cambridge: Cambridge University Press, 2009) at 46.

¹⁶⁰ See generally Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010); Martha Jackman & Bruce Porter, "Socio-Economic Rights under the Canadian Charter" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 209; Margot Young *et al.*, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: U.B.C. Press, 2007); Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539.

¹⁶¹ Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 3; Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-Economic Rights" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 46; Charter Committee on Poverty Issues, *The Right to Effective Remedies: Submission of the Charter Committee on Poverty Issues to the United Nations Committee on Economic, Social and Cultural Rights Review of Canada's Fourth and Fifth Periodic Reports Under the ICESCR* (2006); Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539; Martha Jackman, "What's Wrong with Social and Economic Rights?" (2000) 11 N.J.C.L. 235.

recognition that all human rights are interdependent and indivisible, and that governments have a corresponding duty to respect, protect and fulfil socio-economic rights on an equal footing with civil and political rights.¹⁶² In a 2008 report on the legal enforcement of socio-economic rights around the world, the International Commission of Jurists (“ICJ”) points out that: “[e]very human right imposes an array of positive and negative obligations ... the challenge to the justiciability of ESC rights as a whole is based on a false distinction that overestimates the differences between civil and political rights and ESC rights on this basis.”¹⁶³ As the ICJ’s report documents, courts around the world have increasingly rejected the false dichotomy between positive and negative rights and have ordered governments to remedy determinant of health-related rights violations in the areas of employment, health, housing, education, food and other fundamental socio-economic rights.¹⁶⁴ Against this international trend, however, Canadian courts remain largely wedded the positive/negative rights approach, urged upon them by Attorneys General attempting to justify violations of socio-economic rights by Canadian governments at all levels.¹⁶⁵ While this judicial attitude results in the outright dismissal of many claims that relate directly to determinants of health, it also affects the remedy that is granted in those rare cases that do succeed.¹⁶⁶

¹⁶² United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998); International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 42-49; see generally Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulation: The Charter at 25 in an International Perspective” (2007) 45:2 Osgoode Hall L.J. 239.

¹⁶³ International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 10.

¹⁶⁴ While the constitutions of some of the nations surveyed include explicit protection for socio-economic rights, courts and tribunals in many other countries rely on more general constitutional guarantees, such as the right to life and the right to non-discrimination, as a basis for enforcing socio-economic rights; see International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 4, 65-72. See also Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 649-76.

¹⁶⁵ Perhaps surprising to international observers, if not to human rights activists in Canada, the ICJ report underscores the degree to which Canadian courts and tribunals stand out in terms of their continuing conservatism in regards to the recognition and enforcement of socio-economic rights. Of the 200-plus trial, appellate and Supreme Court cases contained in the ICJ’s report, only one Canadian case can be found: the 1997 Supreme Court decision in *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

¹⁶⁶ See e.g., *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 313 D.L.R. (4th) 29 (B.C.C.A.), aff’d [2008] B.C.J. No. 1935, 299 D.L.R. (4th) 193 (B.C.S.C.); *Johnston v. Victoria (City)*, [2010] B.C.J. No. 2360, 14 B.C.L.R. (5th) 372 (B.C.S.C.). See generally Martha Jackman,

The Supreme Court's decisions in *Auton*¹⁶⁷ and in *Chaoulli*¹⁶⁸ illustrate the problem. In *Auton*, the Supreme Court declared that: “[t]his Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory way.”¹⁶⁹ This negative rights-based reading of the Charter, and the obligations it imposes on governments in relation to health, led the Chief Justice to distinguish the Court's earlier decision in *Eldridge*¹⁷⁰ and thereby dismiss the petitioners' section 15 claim for provincial funding for autism treatment for their children.¹⁷¹ The failure of British Columbia's health insurance regime to provide anything other than “core” therapies delivered by physicians did not amount to substantive discrimination, in McLachlin C.J.C.'s view, because it was “an anticipated feature of the legislative scheme”.¹⁷² As Bruce Porter remarks:

However controversial the specific treatment sought in *Auton* might be, it is difficult to explain the decision merely as a way of avoiding a remedy the Court did not like. In *Auton*, the Supreme Court was considering, really for the first time, the constitutionality of doing nothing to meet the needs of an extremely disadvantaged group in our society. It appears to have affirmed, in a shocking fashion, the government's “right” to do nothing.¹⁷³

“Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Robert J. Sharpe & Kent Roach, eds., *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 279.

¹⁶⁷ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.).

¹⁶⁸ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

¹⁶⁹ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 at para. 41, [2004] 3 S.C.R. 657 (S.C.C.).

¹⁷⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

¹⁷¹ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 at para. 38, [2004] 3 S.C.R. 657 (S.C.C.).

¹⁷² *Ibid.*, at para. 43.

¹⁷³ Bruce Porter, “Expectations of Equality” in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) 23 at 40; Douglas Elliott & Jason J. Tan, “Unequal Benefits or Unequal Persons? Social Benefit Programs and the Charter” (2006) 19 N.J.C.L. 285. While the *Auton* decision has been heavily criticized within the equality community generally, it must be noted that Michelle Dawson, an autistic woman who intervened before the Supreme Court in the case, takes a profoundly different view of the ethical and equality rights issues raised by the claim that intensive autism treatment should be provided as a matter of Charter right, see generally *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.) (Factum of the Intervener, Michelle Dawson at paras. 40-41); Michelle Dawson, *An Autistic Victory: The True Meaning of the Auton Decision*, online: <http://www.sentex.net/~nexus23/naa_vic.html>.

The Supreme Court's negative rights-based approach is even more evident in the majority's judgment in *Chaoulli*.¹⁷⁴ The central question in that case, according to Deschamps J., was "whether Quebecers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state". The answer, in her view, was no.¹⁷⁵ In her concurring judgment McLachlin C.J.C. held, albeit in *obiter*, that while the Charter "does not confer a free standing constitutional right to health care",¹⁷⁶ Quebec's ban on private insurance was objectionable because it prevented "ordinary" Quebec residents from securing private insurance that would enable them to obtain private health care in order to avoid delays in the public system.¹⁷⁷ In the Chief Justice's view, rather than requiring the province to take affirmative measures to ensure that timely health care was available to all, section 7 of the Charter demanded state inaction: the appellants must be free to buy their own care without government interference.

From a health equity perspective, the remedy dictated by the majority's negative conception of the right to health in *Chaoulli* is particularly problematic. The majority found that "patients die as a result of waiting lists for public health care".¹⁷⁸ To remedy this Charter violation, it concluded that the provincial prohibition on private insurance must immediately be struck down. The result is a remedy, as Bruce Porter puts it: "only if you can pay for it".¹⁷⁹ As the dissenting justices point out: "Those who seek private health insurance are those who can afford it and can qualify for it ... They are differentiated from the general population, not by their health problems, which are found in every group in society, but by their income status."¹⁸⁰ The trial judge in *Chaoulli* concluded that invalidating Quebec's prohibition on private insurance would, by diverting energy and resources into the private system, have a deleterious effect on the publicly funded system, and on those who depend on it.¹⁸¹ Based on this evidentiary finding, she held that the ban promoted, rather than undermined, the purposes of section 15 of the Charter by guaranteeing medical care for all.¹⁸² In contrast, not only does the Supreme Court's remedy in *Chaoulli* offer no benefit to those for whom a

¹⁷⁴ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

¹⁷⁵ *Ibid.*, at para. 4.

¹⁷⁶ *Ibid.*, at para. 104.

¹⁷⁷ *Ibid.*, at paras. 111, 124.

¹⁷⁸ *Ibid.*, at para. 123.

¹⁷⁹ Bruce Porter, "A Right to Healthcare in Canada: Only If You Can Pay for It" (2005) 6 ESR Review: Economic & Social Rights in South Africa 8.

¹⁸⁰ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at para. 274, [2005] 1 S.C.R. 791 (S.C.C.).

¹⁸¹ *Chaoulli c. Quebec (Procureure générale)*, [2000] J.Q. no 479, [2000] R.J.Q. 786 at para. 258 (Que. C.S.).

¹⁸² *Ibid.*, at para. 306.

negative conception of the right to health is of little value, it seriously undermines the health rights of people with disabilities, people living in poverty, and other disadvantaged groups.¹⁸³

At the lower court level, in addition to access to health care claims, challenges relating to an adequate level of social assistance, housing, education, unemployment insurance, pensions, legal aid, pharmacare and affordable utilities, have all been dismissed by courts unwilling to impose positive obligations on governments.¹⁸⁴ Speaking to issue of the justiciability of positive rights claims in its *General Comment No 9: The Domestic Application of the Covenant*, the CESCR observed:

While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. 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.¹⁸⁵

¹⁸³ For a critique of the *Chaoulli* decision see Martha Jackman, “The Last Line of Defence for [Which?] Citizens’: Accountability, Equality and the Right to Health in *Chaoulli*” (2006) 44:2 *Osgoode Hall L.J.* 349; Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005); Marie-Claude Prémont, “L’affaire *Chaoulli* et le système de santé du Québec: cherchez l’erreur, cherchez la raison” (2006) 51:1 *McGill L.J.* 167.

¹⁸⁴ See generally Martha Jackman & Bruce Porter, eds., *Social Rights Practice in Canada* (Toronto: Irwin Law, forthcoming); Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010); Martha Jackman, “Charter Review as a Health Care Accountability Mechanism in Canada” (2010) 18 *Health L.J.* 1; Joan M. Gilmour, “Retrenchment or Reform: Using Law and Policy to Restrict the Entitlement of Women with Disabilities to Social Assistance” in Shelley A.M. Gavigan & Dorothy Chunn, eds., *The Legal Tender of Gender: Law, Welfare and the Regulation of Women’s Poverty* (Oxford: Hart Publishing, 2010) at 189; Martha Jackman & Bruce Porter, “Socio-Economic Rights under the Canadian Charter” in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 209; Kerri Froc, “Is the Rule of Law the Golden Rule? Accessing ‘Justice’ for Canada’s Poor” (2008) 87 *Can. Bar Rev.* 459; Margot Young *et al.*, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: U.B.C. Press, 2007); Sheila McIntyre & Sanda Rodgers, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Martha Jackman, “Poor Rights: Using the Charter to Support Social Welfare Claims” (1993) 19 *Queens L.J.* 65.

¹⁸⁵ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 10; see also Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulation: The Charter at 25 in an International Perspective” (2007) 45:2 *Osgoode Hall L.J.* 239.

The unwillingness of Canadian courts to review government inaction relating to poverty, homelessness, unemployment, or other determinants of health, presents a serious obstacle to legal action to improve health equity in Canada. Until Canadian judges acknowledge the discriminatory implications of their continued reliance on the distinction between positive and negative rights, this situation is unlikely to change.¹⁸⁶

V. CONCLUSION

In a recently filed Charter application in the Ontario Superior Court (*Tanudjaja v. Canada (Attorney General)*),¹⁸⁷ the federal and provincial governments are being challenged for their failure to deal effectively with

¹⁸⁶ International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 3-4, 82-83. See also Louise Arbour, “‘Freedom from want’ – from charity to entitlement” (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, March 3, 2005) at 17, online: Institute for Canadian Citizenship <<http://www.icc-icc.ca/en/lbs/docs/LouiseArbour2005EN.pdf>>; United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 14; Kerri A. Froc, “Is the Rule of Law the Golden Rule? Accessing ‘Justice’ for Canada’s Poor” (2008) 87 Can. Bar Rev. 459; Bruce Porter, “Expectations of Equality” in Sheila McIntyre & Sandra Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) at 23; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 U.B.C. L. Rev. 539.

¹⁸⁷ [2013] O.J. No. 1604 (Ont. S.C.J.); the Amended Notice of Application can be found online: <[http://socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.\(R2H\).pdf](http://socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.(R2H).pdf)>.

problems of inadequate housing and homelessness. The applicants are alleging that the action as well as the inaction of Canadian governments in this area amount to a violation of the Charter. In her affidavit in support of the Charter claim in the case, Cathy Crowe, a street nurse who has worked with homeless people in Toronto for more than 20 years, describes some of the consequences of homelessness she has witnessed:

I saw infections and illnesses devastate the lives of homeless people – frostbite injuries, malnutrition, dehydration, pneumonias, chronic diarrhea, hepatitis, HIV infection, and skin infections from bedbug bites ... homeless people experience more exposure to upper respiratory disease, reduced access to health care, more trauma including violence such as rape, more chronic illness, more exposure to illness in congregate settings, more exposure to infectious agents and infestations such as lice and bedbugs, lack the means to care for themselves when ill and suffer from more depression.¹⁸⁸

Crowe notes that, while these physical illnesses and conditions are difficult enough to treat while people are living without adequate housing, treating the emotional and mental effects of homelessness is even more difficult. As she explains, “[c]hronic deprivation of privacy, sense of safety, sleep and living in circumstances of constant stress and violence leads to mental and emotional trauma”.¹⁸⁹ Crowe goes on to affirm that these negative health outcomes cannot be addressed effectively “by programs of support for living on the street, emergency shelters, drop-in programs or counselling and referral services despite the critical need for all these services”.¹⁹⁰ She argues that they can only be addressed by ensuring access to adequate “permanent housing”.¹⁹¹

Crowe’s first-hand testimony reflects what numerous studies and reports, many commissioned by governments themselves, have concluded about determinants of health over the past four decades. As the World Health Organization has declared: “Social injustice is killing people on a

¹⁸⁸ Cathy Crowe, *Affidavit for Tanudjaja v. Canada* (Ont. Sup. Ct. File no. CV-10-403688) (2011). In its 2006 report on Canada’s compliance with the I.C.E.S.C.R., the C.E.S.C.R. recommended that Canada pay “special attention to the difficulties faced by homeless girls, who are more vulnerable to health risks ... and that it take all necessary measures to provide them with adequate health services”; see United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 36th Sess., U.N. Doc. E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5 (2006) at para. 57.

¹⁸⁹ Cathy Crowe, *Affidavit for Tanudjaja v. Canada* (Ont. Sup. Ct. File no. CV-10-403688) (2011).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* See also Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada’s Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing, and Health, 2010) at 4.

grand scale.”¹⁹² Evidence shows that the health of Canadians will not be improved through increased spending on health care services which, according to the Senate Subcommittee on Population Health “only accounts for 25% of health outcomes regardless of the level of funding it receives”.¹⁹³ As Dr. Nuala Kenny cautions:

The goal of equity in health care requires that we think carefully about more than just getting more money into acute care. It requires a reflection on the implications of the rising social inequity in Canadian society and its implications for health and well-being.¹⁹⁴

Nor, the evidence suggests, will the current focus on biomedical and lifestyle approaches to health be effective, since these are “a small factor in whether individuals stay healthy or become ill”.¹⁹⁵ Improving the health of Canadians and achieving health equity will require that determinants of health be directly addressed.

Monique Bégin has argued that: “health equity can be defined as the absence of unfair or unavoidable or remediable differences in health among populations or groups ... this is what we should be aiming for”.¹⁹⁶ Given the evident health consequences and adverse impact of poverty, homelessness and other determinants of health on physical and psychological integrity, security and equality, law has a crucial role to play in achieving that goal. In particular, sections 7 and 15 of the Charter and section 36 of the *Constitution Act, 1982* mandate governments to protect and promote life, liberty, security of the person, fundamental justice and equality. As outlined in the preceding section of the chapter, these constitutional safeguards are directly related to determinants of health and health equity.

The CESCR and other international treaty monitoring bodies have been highly critical of Canada’s failure to ensure domestic respect and enforcement of ICESCR rights, and in particular, the failure by Canadian

¹⁹² World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008) at 1.

¹⁹³ Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 7; Federal, Provincial and Territorial Advisory Committee on Population Health, *Toward a Healthy Future: Second Report on the Health of Canadians* (Ottawa: Minister of Public Works and Government Services Canada, 1999) at viii.

¹⁹⁴ Nuala P. Kenny, *What Good is Health Care? Reflections on the Canadian Experience* (Ottawa: Canadian Hospital Association Press, 2002) at 182.

¹⁹⁵ Dennis Raphael, “Addressing the Social Determinants of Health in Canada: Bridging the Gap Between Research Findings and Public Policy” (March 2003) *Policy Options* 35 at 37; Health Council of Canada, *Stepping Up: Moving the Focus from Health Care in Canada to a Healthier Canada* (Ottawa: Health Council of Canada, 2010) at 14.

¹⁹⁶ Honourable Monique Bégin, “Do I See a Demand?...’ From ‘medicare’ to Health For All” (Paper delivered at 19th IUHPE World Conference, Vancouver, June 14, 2007) at 9.

courts to interpret and apply the Charter in a way that adequately safeguards the health and determinant of health-related rights of Aboriginal people, women, people living in poverty and other disadvantaged groups.¹⁹⁷ As early as 1993, the CESCR expressed concern that Canadian courts had characterized ICESCR rights “as mere ‘policy objectives’ of governments rather than as fundamental human rights”.¹⁹⁸ In 1998, the CESCR expressed concern about lower court Charter interpretations that deprived claimants of a remedy to the denial of basic necessities.¹⁹⁹ And in its most recent review of Canada in 2006, the CESCR again criticized “the practice of Canadian governments to urge upon their courts an interpretation of the *Canadian Charter of Rights and Freedoms* denying protection of *Covenant* rights”.²⁰⁰

Failure to act to address determinants of health places Canada in violation of both domestic and international human rights obligations – something Canadian governments cannot fail to be aware of. In 2009, the Senate Subcommittee on Population Health exhorted “all governments – from the federal to the local” to “work together to improve health for all Canadians and reduce health disparities among various population groups” and it warned that “lack of action will produce ... even greater health disparities in Canada”.²⁰¹ In his first annual report in 2008, Canada’s Chief Public Health Officer affirmed that: “Canada has the capacity to address the full range of issues that can adversely affect the

¹⁹⁷ See generally *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Canada, A/HRC/WG.6/4/CAN/2* (December 17, 2008); Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective” (2007) 45:2 *Osgoode Hall L.J.* 239.

¹⁹⁸ United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 1993, U.N. Doc. E/C.12/1993/5 at para. 21.

¹⁹⁹ United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1/Add.31 (1998) (“*Concluding Observations 1998*”) at paras. 14-15.

²⁰⁰ United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 36th Sess., U.N. Doc. E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5 (2006) at para. 11(b).

²⁰¹ Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 17; National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 16.

health of Canadians”.²⁰² Health disparities have been proven to have enormous financial as well as human costs, and reducing health inequity to promise major social, political and economic benefits.²⁰³ As the Senate Subcommittee on Population Health characterizes it, “spending on population health is an investment, not an expense”.²⁰⁴ The failure to move forward on determinants of health when, as a country, we have the ability and resources to do so, cannot be justified as a matter of health policy. Nor can it be justified as a matter of law. This chapter has argued that reducing health disparities by improving determinants of health engages the legal responsibilities of all levels of government. To quote former Supreme Court Justice Cory, “giving real effect to equality” in this area also requires both commitment and action by the courts.²⁰⁵

²⁰² Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 3.

²⁰³ See Health Council of Canada, *Stepping Up: Moving the Focus from Health Care in Canada to a Healthier Canada* (Ottawa: Health Council of Canada, 2010) at 28; Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 16-17, 5; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 67-68; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 4-5.

²⁰⁴ Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 17; National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 16.

²⁰⁵ *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 at para. 68 (S.C.C.).