

The Committee on the Administration of Justice (CAJ)
45/47 Donegall Street, Belfast BT1 2BR
Tel: (028) 9096 1122 Fax: (028) 9024 6706
Website: www.caj.org.uk



Winner of the Council of Europe Human Rights Prize

***“Socio-Economic Rights in a domestic charter of rights –
a Canadian perspective”***

**by
Bruce Porter**

**Executive Director, Centre for Equality Rights in Accommodation & Co-
ordinator, Canadian Charter Committee on Poverty issues**

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include prisons, policing, emergency laws, the criminal justice system, the use of lethal force, children's rights, gender equality, racism, religious discrimination and advocacy for a Bill of Rights.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

“Socio-Economic Rights in a domestic charter of rights – a Canadian perspective”

**Bruce Porter, *Executive Director,
Centre for Equality Rights in Accommodation
And Co-ordinator,
Canadian Charter Committee on Poverty Issues***¹

It really is a great privilege for me to be here and to be able to participate in what I gather is a fairly early stage of the process of constructing a Bill of Rights for Northern Ireland. It is a particular privilege to be asked to talk about socio-economic rights, because my sense from experiences elsewhere, and from the few days I have had here, is that this could be a critical aspect of the discussion, and perhaps the foundation for a visionary and unifying Bill of Rights which might not otherwise be possible.

The process is at an early stage, but already I sense a really critical energy and enthusiasm among the few people who are working on it. I have had a chance to look at the background papers that have been created for the Human Rights Commission, and also the work that CAJ has done, and I have been immensely impressed by all of that work, particularly the work on socio-economic rights and equality. The debate is off to an incredible start.

At this stage it is perhaps a somewhat cloistered discussion among people who have experience of human rights and has not yet engaged a wider audience. That is not surprising, though. In my experience there tend to be four important phases of constitution building when it happens. This is the first phase, when a relatively small group of experts - people who already know the field - start to survey the terrain and come up with drafts and proposals of the kinds of rights and categories of rights that you might think about putting into a constitution or Bill of Rights.

The second stage, which I do not think has really happened in any major way yet here, is a more political stage when politicians start to wake up to the process and see that there are some implications for them in all of it. At that point, an earlier conceptual and intellectual discourse turns more into a discourse of ‘power’ and debates about jurisdiction. People start to think ‘what are the implications here in terms of what institutions have what power? To what levels of government does this apply? Do we really want courts to have power to reverse decisions that we as legislators have made? Do we want a human rights commission to have this kind of power – for example, to bring complaints against government?’ There is a danger, in fact, that the whole process can flounder at this stage because you can get all sorts of different political groups reading political agendas into the constitution making process, sometimes when they are not even there. Social democrats and unions can fear that it is a conservative agenda to give social policy issues over to the courts. Conservatives

¹ As part of a lecture series organised by the Committee on the Administration of Justice (CAJ) to inform the debate on a Bill of Rights for Northern Ireland, Bruce Porter gave a speech both at Magee College, Derry on 9 May, and in the Wellington Park Hotel, Belfast on 10 May 2001.

complain that it is a left-wing agenda to give too much power to particular interest groups. As you can imagine, it can all start to unravel.

Hopefully, though, the process moves on to the third phase. That is the phase when the people wake up to the fact that this is something that could be pretty important to *them*. This happens in different ways in different contexts. In South Africa, of course, there was the personality of Nelson Mandela to bring a unique energy and enthusiasm to the human rights debate, and make it an integral part of starting anew, defining a new constitutional democracy. But even without Mandela, I don't think those who had struggled against apartheid for so many years would have been willing to hand over the issue of what rights would be protected to a few politicians. So there was an engagement there that was unquestionable.

In Canada, twenty years ago when we were engaging in the debate about our constitution, it was a bit more problematic. Pierre Elliott Trudeau, the Prime Minister at the time, dedicated himself in his last term to repatriating the Canadian Constitution from Westminster and to getting agreement on a new charter of rights and freedoms. But this was not a vision which was necessarily shared by other politicians, particularly our provincial premiers, and the more we moved from phase one to phase two, and the politicians started to look at what the implications were, the more it began to become mired in politics.

At a First Ministers' meeting called in order to discuss the idea and see whether it was possible to proceed with any consensus, the prevalent view among the other first ministers seemed to be that this was likely to go nowhere. There were a number of Provincial Premiers who felt that federal government had too centralist a vision. There were others who felt that a Charter of Rights would permit unacceptable judicial intrusions into the legislative domain, contrary to our parliamentary tradition. They condemned the "creeping republicanism from the south" – which for us, of course, referred to the United States.

Interestingly it was the first time a First Ministers' conference was televised – they probably expected nobody to be watching. But Prime Minister Trudeau, knowing that the project was in jeopardy of unravelling into political disarray, simply ignored all the Premiers around the table and spoke, at the outset, directly to the television camera, addressing the Canadian people. Essentially he said: 'This whole process is not really about us around this table. It is not about how much power the provinces have, or how much power the federal government has, or how much power the court has. It is about the citizens of Canada setting rules and establishing basic values, a framework within which all of us have to operate. The discussion is not really about us and what we want, it is about the basic rules and values that the Canadian people want to set for their governments.'

And it worked. The public woke up and said, 'Hey this project is kind of interesting'. Of course what was most interesting to them was not the stuff about amending clauses and jurisdictional levels but this idea of a charter of rights. What kinds of rights did we want? What kinds of values did we want to protect from assault by politicians and governments? All of a sudden the discussion was back on the rails and we were into phase three.

Of course, it is not always clear sailing after the public is engaged. In Canada 20 years ago it became clear that the politicians might not support clauses that had been proposed to enhance protection of women's equality and equality in general. Important phraseology had been proposed to include protection of the "equal benefit of the law" which was very important to women in order to distinguish any emerging cases under the new Charter from an earlier Bill of Rights. Under the earlier Bill, equality had been restricted to equality "before" the law, so that as long as a law was applied equally to all, it did not matter if it was discriminatory in its effect. One infamous decision under the old Bill had found that a woman who was discriminated against because she was pregnant had not been discriminated against on the grounds of her sex because there were no pregnant men to compare her to, thus no basis for finding unequal treatment.

In order to ensure that the new Charter of Rights would guarantee more than this formalistic notion of equality and would address the underlying causes of disadvantage and how to remedy them, new phraseology for the protection of equality was developed which referred not only to being "equal under the law" and "before the law", but to entitlement to the "equal benefit of the law". This wording suggested that even when it comes to the substance of legislation itself, such as the provisions of benefits in social programmes, the right to equality would impose substantive obligations on governments to promote and protect equality and address disadvantage. I see that in some of the drafts that people have come up with already in Northern Ireland that language has been incorporated, so to that extent Canada may have made some positive contribution.

When it became clear that this language was threatened, along with a separate section that talked about the equality of women and men, almost instantaneously - it was kind of miraculous - a group called the Ad Hoc Committee of Women sprung up. What was incredible was that it was not just lawyers, although there were lawyers, and it was not just political parties, although there were political parties represented, but there were women working in Shelters, there were women working in anti-poverty work, women working on issues of violence against women. It was really quite unprecedented to have this kind of diversity of women united around one cause, and it became very clear within a short time that politicians would not get away with weakening the protection of women's equality rights in the draft Charter.

The fourth stage of the debate starts off from the moment at which a constitution or Bill of Rights is finally adopted. I think it is at that point that one realises that all this enthusiasm and all this work went into something that *is* very important, but is at the same time only a lot of words on paper. One of the women from a grassroots organization who was involved in the Ad Hoc Committee of Women said at the end of the lobbying that "constitutional rights are a hell of a lot to lose, but they are not a hell of a lot to gain". In other words, when it is all over, even if you succeed in winning the rights you fought for, you have only rights that are written. Rights are not really for writing, they are for claiming. Most of the definitions, most of the problems, most of the questions about what these are really going to mean to people, and what difference they are going to make in their lives, are going to be resolved in that process of claiming rights.

It is worth thinking now about how you can draft a Bill of Rights with the real purpose of rights in mind, remaining cognisant of how the words on paper will play out in the claiming process. What messages are you sending to courts about what rights claims are not going to be heard and what rights claims are going to be heard, and who is going to be included in and who is going to be excluded from this new constitutional democracy that you are designing? Sometimes these questions get lost in debates about what categories of rights to include and which to exclude, and we lose sight of what is really at stake in the constitution making process. When you consider the claiming process that gives social meaning to rights, you realise that many of the categories through which the debate is conceptualised are not, in fact, that meaningful. Rights claimants do not claim categories of rights. In fact I would really suggest that this whole category of rights we are talking about tonight - socio-economic rights - is really a conceptual abstraction, it does not really exist as a separate category of rights at all.

At home, I never get a phone call from a woman who is facing homelessness saying 'I want to make a social and economic rights claim to a right to adequate housing'. She does not say 'I want to make a civil and political rights claim to non-discrimination'. She outlines the situation she is facing. Perhaps her entitlement to social assistance has been reduced to the point where the level of her shelter allowance is \$300 lower than she can find an apartment for, so she can barely afford what is out there. She may have found an apartment this morning but the landlord said he will not rent it to her because she would be paying 65% of her income towards rent. They have a rule where they will not rent to anyone paying over 30% of their income towards rent.

There are components in that scenario that have been the basis of rights' claims that we have brought forward to address the systemic issues that this woman is facing and that are causing homelessness, and I will talk a bit later about what we have tried to do under the Canadian Charter to advance those claims. Of course, that is informed by what is in the Canadian Charter, and is limited by what is not. But the point I am making here is that it is my job on the other end of the phone to put the categories of rights in place, to put a little framework over what she is telling me, but that is not the story she is telling me. She is telling me a rights story, she is telling me that a human right has been violated, she is telling me that what has happened to her is not fair, she is telling me it does not feel like it is just, she thinks there should be something that can be done about it and she thinks it is a human rights issue. But she does not disaggregate her claim into a social and economic rights claim and a civil and political rights claim. It is a human rights claim.

And she is right. She is right not only in terms of the indivisibility of the issues denying her adequate housing, but she is right conceptually. Even at the international level, we talk about human rights being indivisible, and revolving around the central values of dignity, security, integrity and equality. She knows what she is describing is a human rights issue, she is describing systemic barriers which deprive her of these values.

I think this is going to be important as you think through what is going to be in your Bill of Rights and hear people making arguments about this and that category of rights. Social and economic rights will be described and debated as if they were a distinct compartment of rights. Do we really want to include this category? Do we

want to give courts powers to adjudicate these types of issues? The issues will be defined in some quarters by what they mean to legislators, or as areas in which money is spent. They may also be defined by lawyers and judges saying that these issues are complicated, that they involve complex social policy elements. But what does it mean to the woman on the other end of the phone? It is what is keeping her from a life of dignity, equality and security. Surely that has to be the focus in deciding what rights you want in there, and what message you want to send, not only to the courts, but to politicians and as a sort of reflection within the community itself, about what values are being held dear, and what kind of constitutional democracy you want to live in.

When social and economic rights were referred to in the debates about the Canadian Constitution twenty one years ago, it was suggested that there be a reference put in to the International Covenant on Economic, Social and Cultural Rights. It was not a big lobby, it got no attention at all. When it was put forward, the then Minister of Justice, Jean Chretien - now our Prime Minister - responded by saying that these rights were high-sounding rhetoric - the right to food, the right to housing and so on, but you could not put everything in a constitution. He said 'I am waiting for somebody to suggest that we put my Aunt Bertha's recipe for apple pie into the constitution'.

In your discussions about social and economic rights, you will need to consider this argument, that the inclusion of such rights broadens the framework of rights so far as to blur the focus of rights protections. What I would suggest in fact is that it does the opposite. With emerging jurisprudence it is becoming clear that the inclusion of economic and social rights actually refines the focus of constitutional rights so that the issues of the most disadvantaged groups are not lost, so those who most need the protection of the constitution are not ignored, so the claims that are actually at the heart of these fundamental values of dignity and equality are validated and made central to the ongoing process of rights claiming.

We did not manage to get socio-economic rights in the Canadian Charter, but we were living in a different world then. Social and economic rights were in a complete backwater of the international human rights movement. The Universal Declaration had affirmed that economic and social rights were integral components of human rights generally. Rights like the right to an adequate standard of living, including food, clothing and housing, the right to education, the right to work freely chosen, the right to health - these were all included in the Universal Declaration, and there had been a long-standing commitment to the notion that all these rights, both civil and political and economic, social and cultural were indivisible and interdependent. But this was largely on the intellectual level.

When it came to the concrete institutional level, on the civil and political rights side you had a very well respected treaty monitoring body established in 1976 called the Human Rights Committee. This Committee not only carried out five-year periodic reviews of governments for their compliance with the Covenant on Civil and Political Rights, but also was able to receive individual complaints or petitions alleging violations of civil and political rights. The Optional Protocol, as it is called, to the Covenant on Civil and Political Rights came into force at the same time as the Covenant itself. So since 1976 - for twenty five years - we have had on the international level evolving jurisprudence about what civil and political rights mean

and what constitutes a violation of civil and political rights. This evolving international jurisprudence has fed into all sorts of jurisprudence on the domestic level.

On the economic, social and cultural rights side, on the other hand, although you had an International Covenant on Economic, Social and Cultural Rights which was supposed to have the same status, there was no Optional Protocol permitting complaints of violations. There still isn't, although there is debate about having one. There was little evolving jurisprudence. In most domestic regimes, there was no recognition that social and economic rights could be adjudicated. It was generally thought that these were more policy objectives than rights – 'high sounding rhetoric' as Jean Chretien said.

But that has really dramatically changed in recent years. There is now a recognition at the international level that socio-economic rights are rights which are not mere policy objectives of governments, not just goals or aspirations, but rights which need to be claimed and adjudicated.

Virtually every modern human rights treaty system, whether it is in Africa or Europe or in the Inter-American system, now has provisions not only for socio-economic rights in words, but for socio-economic rights' adjudication, with complaints procedures and so on. The European Social Charter now has protection for rights, even such as protection from poverty and social exclusion, and a group complaints mechanism whereby violations of those rights can be alleged and adjudicated.

While at the UN level we do not yet have an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the review of countries' compliance with the Covenant has dramatically improved, so that we now have an emerging jurisprudence on social and economic rights which feeds into domestic adjudication. In the early years of the Covenant there had been at the UN level only a few quite ineffective working groups charged with monitoring compliance with the Covenant. In 1985/86, the Economic and Social Council of the United Nations constituted the Committee on Economic, Social and Cultural Rights. This Committee has now developed quite a respectable jurisprudence, not from individual complaints, but from general comments and from periodic reviews of state parties.

In the Canadian context, the changes to the way the Committee monitored compliance with the Covenant made a significant difference in advancing social and economic rights claims domestically. At its first review, in 1988, the only participants in the process were the Government of Canada and the Committee members. Those whose rights were at issue had no place in the process, and no one really paid any attention to it. In 1993, when Canada was to be reviewed for the second time by the Committee, a coalition of groups from Canada asked that they develop a procedure so that NGOs could actually make submissions to the Committee about what constituted violations of economic and social rights in Canada. We argued that the whole process did not mean much if the UN Committee only heard from the government and could not hear from the people whose rights were at stake. In response, the Committee initiated a new procedure allowing NGO submissions. A couple of us rushed over to Geneva to represent the National Anti-poverty Organisation and the Charter Committee on Poverty Issues, to present to the Committee (in the context of the periodic review of

Canada) what we alleged were violations of the Covenant. Since then, NGO submissions have become a critical component to the Committee's periodic reviews of states' compliance with the Covenant.

It is a kind of quasi-adjudicative procedure, even within the periodic reviews process, where NGOs from most countries that are being reviewed will show up before the Committee and will present documentation. It is very much like a court-case in that the evidence has to be very well documented and based on solid authority if you want the Committee to pay any attention to it. The Committee reviews it and puts questions to the government and officials based on this information, providing the government with the opportunity to dispute contested evidence or justify impugned actions or policies. At the end of the process, one gets "concluding observations" in which the Committee identifies positive areas where compliance with the Covenant is being advanced and "concerns" about areas where the Covenant is not being implemented or where it is being violated. We go back to Canada, then, with decisions or observations from a UN treaty monitoring body which constitute respected jurisprudence interpreting how the Covenant applies to contemporary issues and policies in Canada. We are able to rely on these when the issues addressed by the Committee go before courts and tribunals in Canada, not as binding law, but as relevant sources of law from which our courts and tribunals should benefit in interpreting the meaning of domestic law.

So socio-economic rights have really emerged from the "high sounding rhetoric" referred to by Mr. Chretien in 1980 and have entered a whole field of rights adjudication, both internationally and in many regional and domestic contexts. Why have they emerged? Why are they considered such a pressing issue now?

In the twenty years since we debated our Charter of Rights in Canada, we have witnessed dramatic changes that are making us think differently about human rights and what is necessary to protect dignity, security and equality. If I had approached one of the parliamentarians involved in drafting Canada's Charter of Rights and Freedoms back in 1980 about food banks, I would have been greeted with a blank stare. There wasn't a single food bank in Canada at the time. We now have 2,600 food banks across Canada feeding over 300,000 children every month. Thousands of families cannot make it from the beginning to the end of the month without this kind of assistance in order to receive basic nutrition. Hunger has become a real issue after 20 years of unprecedented economic prosperity and growth in the country which, for six years, has perched at the top of the UNDP development index, which measures the quality of life and well-being in various countries.

In 1980, a parliamentarian interested in the problem of "homelessness" in Canada would find in the parliamentary library a couple of reports about transient men living in weekly rental accommodation or "flop houses" in a few of the larger cities in Canada. Now, of course, there are many more reports, but parliamentarians would not need to go to the library to find out about homelessness. They would have stepped over homeless people on the way to the parliament buildings and would read about deaths on the cold streets every winter. It would have been unthinkable twenty years ago that after two decades of unprecedented economic prosperity, development and new technology, we would see Canada move from a system in which we would rarely see anyone homeless - in which people were entitled in law to financial

assistance to cover basic necessities such as housing - to one in which legislators have revoked the most basic legal protections of income adequacy and access to housing, and have explicitly adopted policies that would force people into homelessness and hunger. A Canada where we have tens of thousands every night without a home, many sleeping in shelters that are significantly below the UN standards for refugee camps. A Canada where we have people dying on the streets, where if you walk around in any of the big cities like Toronto in the winter, you will be sure to see dozens of homeless people huddled over grates for warmth.

So what happened? It is not just happening in Canada. When Canadians look to our neighbours to the south, the richest nation in the world, things are significantly worse even than in Canada in terms of poverty and homelessness. And in virtually every developed country, we have seen increases in poverty and homelessness in recent years despite strong economic growth.

We are dealing with a very different world compared to twenty years ago - a world in which governments both see themselves and act differently, particularly in relation to protecting fundamental social rights. At the time Trudeau was Prime Minister in Canada and we adopted the Charter of Rights, it was assumed that governments were perhaps better situated than courts to protect vulnerable groups and ensure a "just society." Politicians didn't imagine that we needed social and economic rights to force governments to do what they did naturally. Now, however, things have changed.

Our governments now see themselves fundamentally as actors in a global marketplace. They must always have one eye on the credit rating agencies in New York who are looking critically at how much they are spending on social programmes. If these agencies downgrade the government's credit rating, that could change the deficit significantly. If governments improve social programmes and have to raise corporate tax rates to pay for them, then they may repel investment and leave more people unemployed. Competition between and among governments for investment, and their interaction with private market forces, has seriously eroded the commitments to social rights which, twenty years ago, seemed unquestionable.

One response to these trends has been that emerging constitutional democracies are beginning to see the kinds of values that have to be protected through rights as being social and economic in nature, as well as civil and political. The fear about governments acting outside of an agreed set of rules or standards can no longer be defined solely in terms of what governments might do when they intrude on our privacy, or our freedom. We have to worry increasingly about what governments are failing to do, when they abdicate their fundamental responsibilities to protect disadvantaged groups. Constitutional democracies are turning to social and economic rights to establish a common set of rules or standards which may prevent the further erosion of social programs and protective legislation that results from governments competing against each other in the global market.

One country, however, cannot accomplish this alone. Together, we have to develop an international rule of law which says that social and economic rights are not just fundamental values in South Africa, or Canada, or Europe, or South America, but that

these are universal rights which courts everywhere will begin to enforce and ensure that governments live up to.

Certainly we have not responded fast enough. We are way behind the corporations and behind the trade and investment agreements which are making sure that a regulatory measure which might protect jobs in one country, but might disadvantage a trading partner, can be challenged by a corporation and that these corporate claims can be adjudicated and enforced. Corporations from other countries can challenge legislative regulation or subsidies before a trade panel fairly quickly, and get a decision. On the side of the people who might be hurt by those kinds of decisions, on the other hand, we are struggling to quickly catch up with a notion of human rights which can allow us to insist that these too are universal values that we can build into our shared agreements with other countries. Europe, of course, has been significantly ahead of the game in trying to develop social rights that go with trading relations, but it not something that can just be done on a regional basis.

It is increasingly clear that the protection of social and economic rights cannot be restricted to international agreements. All the evidence we have shows that rights have to be rights locally within your own constitution, and within your own legislation, if they are really to make a difference. You have to be able to claim and enforce them locally. So, in emerging constitutional democracies, whether it is Latin America or South Africa, countries are opting for including social and economic rights as enforceable rights that can be adjudicated. These are standards and international rights that countries and governments need to be held accountable to, and many governments, to their credit, are choosing when they are drafting constitutions to be held accountable to them through domestic courts and tribunals.

The most recent example is South Africa. South Africa chose to include the right to adequate housing, the right to social security, the right to water, the right to food, the right to access to healthcare - a number of very important social and economic rights. Recently, the first 'right to adequate housing' case was adjudicated in the Constitutional Court in South Africa and it found that the government had failed in its constitutional duties when it allowed 900 individuals, including 500 children, to live in a sports field after having been evicted from their squatting community, without basic facilities, without drinking water, and without even a decent roof over their heads.

Now, this is a democratically elected government and one in which we can actually have a lot of faith. But things get missed, and when the government of South Africa was before the Constitutional Court in this case, it had to admit that there had not really been any hearings into how much it would cost to deal with the issues faced by these families and others like them. There had not really been a process of costing out what it would require to have a program to deal with emergency housing for families in this type of situation. The government had a pretty good housing programme in place for dealing with longer-term housing problems, but they had somehow failed to address this shorter term problem. So the Constitutional Court found that the government had failed in its constitutional duty with respect to these families but they left it up to the government of South Africa to work with other levels of government to remedy the problem.

Giving constitutional legitimacy to social and economic rights claims inevitably gives rise to new types of relationships between courts and legislators. Nothing was struck down by the Court in this case. This was not a constitutional challenge that struck down a piece of legislation and said 'no, you went too far and violated these individuals' rights'. The Court did not find that the eviction itself had been a violation, because it was an eviction that was long-planned and was a component of actually developing affordable housing. It was done in accordance with the law. The violation was in not providing what was necessary, and in not meeting positive obligations that are necessary to protect the right to adequate housing. Thus, the Court cannot itself achieve the remedy simply by striking down legislation or stopping an eviction. The Court left it up to the government to take the necessary positive actions. So this decision was not the court taking over housing policy, but the court essentially doing what is the job of courts - to determine whether basic values of security and dignity and equality are being complied with in government policy.

What we are seeing, then, is not to be understood as an expansion of the role of courts into a new "category" of rights which were previously excluded but rather an important move towards a new paradigm of human rights. We are dealing with new problems, new kinds of issues and we need new approaches to rights in order to effectively deal with them. It is very much like the people who study changes in scientific paradigms and the way they describe changes in scientific paradigms. It is not so much that the scientists decide to develop a new paradigm or theory in order to expand into some new area or terrain - it is more that they get thrown back onto the contradictory premises of their own theory when they are confronting a problem that they previously did not deal with.

It seems to me that the contradiction that we had in the heart of the earlier paradigm of rights, and which restricted them predominantly to civil and political rights, was the premise that somehow the primary thing we had to fear from governments was excessive government action. If we thought of governments negatively as things that tended to act excessively, or in ways that were improper, then we forgot about the problem that sometimes governments do not do the things that they have to do to ensure dignity, security and equality. Excluding the positive components of government obligations from the ambit of human rights clearly leaves us with a paradigm of rights which is increasingly incapable of dealing with the problems with which people are coming to organisations like mine in Canada and to organisations like the Legal Resources Centre in South Africa, which are fundamental to the values behind human rights. People will also be coming to organisations in Northern Ireland - if you have a Bill of Rights - with types of rights claims which do not fall into one category of rights or the other, whether substantive claims to government action or inaction, to respect those basic constitutional values.

In the Canadian context, what we had to do with those claims, rather than using socio-economic rights, which were not in our Charter, was to try to exploit the fact of indivisibility and interdependence in order to validate claims with a substantive social rights component. Part of that was something that I think was inevitable in the evolution of the concept of equality in Canada and elsewhere. When people with disabilities brought claims to the Human Rights Commission in Canada, it was clear that in asking for equality, they were asking for more than "same treatment". Equality meant having a job along with other people, and having a job meant the

provision of accessible premises or special technology in order to accommodate the needs that were unique to a particular disability. These things cost money, and so within our human rights jurisprudence, we had an evolving recognition that equality sometimes makes demands on governments to provide things.

This approach really means that things which in another regime might be claimed as a socio-economic right, could be claimed in Canada as a component of the right to equality. Let me give the example of a recent case at the Supreme Court of Canada - the Eldridge case. Susan Eldridge and Linda Warren were both deaf and were unable to communicate effectively with their doctors because sign language interpreter services were not provided. Linda Warren had the frightening experience of giving birth to twins prematurely without being able to communicate with hospital staff about what was happening. She and Susan Eldridge alleged that the failure to provide interpreter services as a component of healthcare in British Columbia violated their right to equality. The government argued that this was a disadvantage that the claimants already had. The government did not cause the disadvantage. There had been a programme (funded as a non-profit) which had provided interpreter services, but it ran out of funding so it stopped providing the services. The government had never provided the services so the issue was not that it had stopped providing the services. The government really had not done anything, and they were being asked in a sense to start a new programme to meet a need that they had not met in the past.

The Government had argued successfully at the Court of Appeal level that if the Court told them that interpreter services was a need that had to take priority over needs in the healthcare system, or over different needs in the social services sector, they would be acting inappropriately. They argued that this type of decision about which needs should be prioritised was not the role of courts but of legislators. So at the Court of Appeal level, the Eldridge claim was defeated because it was seen to extend the reach of courts into an area that was not really their terrain. The Supreme Court of Canada unanimously reversed that decision, however, and said that governments were advancing "a thin and impoverished vision of equality" to suggest that equality means simply providing services in the same manner to everyone while failing to provide the resources necessary for disadvantaged individuals and groups to enjoy them in a meaningful way.

If you take that kind of approach to equality, it seems to me that the kinds of changes that we have seen in Canada - dealing with poverty, homelessness, leaving single mothers without adequate financial assistance - could be subjected to exactly the same kind of analysis. In fact, we have our first poverty and homelessness claim going to the Supreme Court of Canada in the autumn. I have to say that it has been a real battle to try to convince the courts to extend the "substantive" approach to equality to issues related to poverty, and so far the experience on some of the most important poverty related issues has been the opposite of the Eldridge experience. The response of lower courts to poverty related inequalities has been to say that because socio-economic rights are not included in the Canadian Charter, these kinds of claims to security and dignity are beyond the scope of the Charter's protections.

In Ontario, for example, we had welfare cuts in 1995 of 22%, reducing benefits, which were already inadequate, to a level which we showed, in undisputed evidence before the court, would probably double the reliance on food banks and force 120,000

households and 67,000 single mothers out of their homes. All of what our experts predicted, unfortunately, came true. A number of recipients challenged the cuts as violations of the Charter, arguing that they clearly deprived single mothers, people with disabilities and other people relying on social assistance, of basic dignity, security and equality.

The court did not really question the validity of our evidence. It accepted that “the daily strain of surviving and caring for children on a low and inadequate income is unrelenting and debilitating; all recipients of social assistance and welfare payments will suffer in some way from the reduction in assistance; many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many may become homeless.”

Clearly, on that evidence, “security of the person” and “equality” were breached under any reasonable definition of those terms. However, what the court said was that the right to security of the person does not provide the applicants with any legal rights to live on social assistance. The legislature could repeal the social assistance statutes if it wanted.

Well, that was pretty shocking - that we would have a charter of rights which guarantees security and equality, but the legislature could take away everything that the most vulnerable groups in society rely on in order to be able to feed and clothe and house themselves – where is the reasoning in that? The reasoning, of course, was that this was an economic right and there are no economic rights in the *Canadian Charter of Rights and Freedoms*.

It was the same in other lower court cases. Eric Fernandez suffered from a muscular degenerative disease and had relied on a partner to provide attendant care in order for him to live in his home. When the partner left, he needed attendant care for certain times of the day in order to stay in his home. The alternative was to move into hospital full-time at a significantly higher cost than paying for attendant care in the home. So he asked for financial assistance, which was available on a discretionary basis from the province of Manitoba, so that he could stay in his home. When he was refused, he challenged that decision as violating his Charter rights to security of the person and to equality. The court ruled in that case too that this was a socio-economic rights claim and therefore excluded from the ambit of the Charter. It said Fernandez “was not being disadvantaged because of any personal characteristic or because of his disability - he was unable to remain community-based because he had no caregiver, because he must rely on public assistance, and because the facilities available to meet his needs were limited.”

So the experience we have had is that the Supreme Court has applied a “substantive” approach to equality, to issues of disability, sex equality or the protection of sexual orientation in human rights codes. Further, the Supreme Court has made it clear that courts are supposed to interpret rights in the Charter consistently with Canada’s international obligations, including our international obligations under the Covenant on Economic, Social and Cultural Rights and under the Convention on the Rights of the Child.

The court has recently found that international human rights law should be a "critical influence on the interpretation of the scope of the rights included in the Charter." This was in a case dealing with the deportation of a woman from Jamaica who had four children born in Canada, and who would have to be separated from her children if she were to be deported. In the exercise of discretion on humanitarian and compassionate grounds, the question was whether the administrator had erred in failing to consider the best interests of the child, which is a right protected under the Convention on the Rights of the Child. The answer was 'yes' – the reasonable exercise of discretion must give sufficient weight to the central values contained in international human rights instruments, and the provisions of the Charter of Rights should be interpreted in a manner that is consistent with these values. So it is clear that courts should be interpreting the Charter rights to "security of the person" and "equality", if they can, in a way that is consistent with the recognition that adequate food, clothing and housing are basic rights.

The Committee on Economic, Social and Cultural Rights has suggested quite clearly that the right to equality should wherever possible be interpreted in a manner which provides remedies to violations of socio-economic rights. When cases like the challenge to welfare cuts in Ontario, or the denial of special assistance to Eric Fernandes, were reviewed by the U.N. Committee on Economic, Social and Cultural Rights in its periodic review of Canada in 1998, the Committee made it very clear that the courts in Canada were not acting in compliance with Canada's international obligations when they denied legal remedies to these types of claims. Even the government of Canada was saying before the Committee that section 7 of the Charter on the right to security of the person can, and should, be interpreted to include basic necessities. Yet back in the Canadian courts, provincial governments were arguing that you can eliminate social assistance altogether without violating the Charter.

So we have had this kind of disjuncture. None of the cases like the Fernandes case, or the welfare cuts case, got to the Supreme Court of Canada - they were both denied leave. The case that will be heard in the autumn is the case of Louise Gosselin. She was a welfare recipient in Quebec who was the victim of a regulation which limited the amount of social assistance for under 30's who are employable to \$158 a month – about £60 a month. It is essentially undisputed in the evidence that you could not provide yourself with food, clothing and housing in Montreal with that amount of assistance. So she suffered all the kinds of hardships that are typical of women who are forced into homelessness – she was vulnerable to an attempted sexual assault, she had to turn at one time to prostitution to survive, she lived for a time with a man for whom she had really little affection, essentially because he was her only source of food and shelter. When she finally turned 30 and her entitlement went up to \$470, she said she felt like she had survived this horrific ordeal and was finally emerging into a meaningful life.

It would be hard to suggest that Louise Gosselin had any meaningful security of the person, and it would be hard to argue that she had any meaningful equality in the sense of that term adopted by the Supreme Court of Canada in other cases. What will trouble the Supreme Court when they hear the case, however, is the fact that this may be seen by some as a different kind of rights claim – a substantive rights claim that deals with the positive obligations of governments in social programmes. The Eldridge case required interpreter services, of course, which required a programme

and cost money – but not that much money. We are dealing here with social programmes and social programme cuts which engage some of the major fiscal issues that governments are dealing with. The Court will be asking itself, is this really the role of the courts?

I am hopeful that the Court will realise that to interpret the Charter of Rights as applying to these kinds of issues is absolutely critical if you are going to make it a Charter of Rights for everybody in Canada. If they reject Louise Gosselin's claim, what kind of message is it really sending out to Canadians about our Charter of Rights? It is a message that says that this is a Charter of Rights which will validate discrimination claims as long as it is somebody who is disadvantaged by discrimination, perhaps refused a job, but not from someone who is jobless. It will validate a claim that is related to some sort of personal characteristic that might be defined in current parlance as 'the worthy poor'. But if it is a claim from somebody who is increasingly subject to quite incredible stereotypes and hostility - 'the welfare poor' – then somehow, because it is coming from the most marginalized and disadvantaged person, it loses its standing under the Charter of Rights.

This is a critical kind of decision to leave up to the Supreme Court of Canada, one which will have a major impact on the future of the Charter of Rights and what it means for Canadians. We are looking at complex situations, where we know there was pressure from the International Monetary Fund on our Finance Minister in the mid-nineties to remove the Canada Assistance Plan Act, which required provinces to provide adequate levels of financial assistance so as to cover the costs of basic necessities like food, clothing and housing. It was the decision to revoke the Canada Assistance Plan which actually enabled provinces to put in place the kind of welfare cuts that have had all these devastating consequences. So, these are issues where the Supreme Court in Canada is not just dealing with a particular violation in one province, or even simply in one country. It is dealing with systemic issues that are confronting the human rights movement around the world. The fact that our Supreme Court justices are now talking to Justices in South Africa and in many other countries, and that judges everywhere are starting to wrestle with these kinds of questions, means that where ten or fifteen years ago courts might have been fairly comfortable asserting that 'it's not our role', 'we're not competent to determine these types of issues' or 'that's not our legitimate role in a constitutional democracy', now I think they must see that courts and tribunals elsewhere are successfully adjudicating these types of claims, that they are increasingly central to the international human rights movement which gave birth to our Charter, and that courts do have an important role to play holding governments accountable to fundamental values necessary to dignity, equality and security of the person.

There was one case in which our current Chief Justice, Beverly McLachlan, was dealing with arguments from the government to suggest that somehow the courts should not be playing any kind of role in these complex social policy areas. I think what she said is something that is worth thinking about in your deliberations about what rights go into a Bill of Rights for Northern Ireland. She said: "Parliament has its role, to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The Courts are no more permitted to abdicate their

responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's views simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."

I think the drafters of the Canadian Charter would probably agree with that, and even though they did not include socio-economic rights when they drafted the Charter, I think these days they would recognize that this "category" of rights is actually an integral component of many of the rights that were explicitly enumerated in our Charter. When there were consultations last year about what should go into a new Canadian Human Rights Act, it was unanimous in every consultation with equality-seeking groups – women, people with disabilities, visible minorities, youth – that social and economic rights are fundamental to the protection of equality. They all said that "for us, the big equality issue is poverty". There was an organisation of low-income women in Ottawa a number of years ago that distributed a button that I always liked. It said "Poverty stops Equality – Equality stops Poverty". These rights cannot be separated into airtight categories – courts cannot do it and constitutional drafters cannot do it. If we really want to protect dignity and equality and security, we have to deal with poverty, we have to deal with homelessness, and we have to deal with access to basic social and economic rights. It is really ultimately a question of full citizenship, of affirming a progressive notion of a "just society".

These are the kinds of things we talked about twenty years ago in Canada and which we continue to debate through the process of claiming and adjudicating fundamental rights. They are the kinds of things you are going to be talking about in the next couple of years in Northern Ireland. I hope that you will be able to work collaboratively with groups in other countries who are trying to bring these types of issues forward as claims, because we are in it for the long haul. It is not something that is going to be solved just in the drafting of a Northern Ireland Bill of Rights, but I think if we work together and within an evolving human rights framework, we really can start to make a difference to people's lives.

Thanks very much.

The lecture was followed by a discussion in which members of the audience asked questions of the speaker. Below are some excerpts from this discussion.

▪ ***What is the Canadian experience in terms of environmental rights?***

I did not talk about that largely because it is not my area of expertise. There is a lot of specialisation that happens in a rights-based society because things do become complicated! The environmental rights movement in Canada has developed a very special expertise. I think that the themes that I touched on around socio-economic rights, however, would resonate entirely within the environmental movement in Canada.

First of all, the importance of linking domestic and international has been critical for them, so Canadian environmental movements have been very central in some of the work on trade and investment agreements and looking at the impact they have on domestic environmental policy. Some of the most devastating claims from trans-national corporations against Canadian regulation under the North America Free Trade Agreement, under the Investment Chapter, have been against our environmental regulation. We are battling against multi-million dollar American corporations that are challenging environmental regulation in Canada as being protectionist. In one well-known case, there was an American corporation which wanted to sell a gasoline additive which the Canadian government decided was not proven safe. The onus that was placed on the Canadian government in those hearings under the North American Free Trade Agreement, however, was to show that it was unsafe. It was not an onus on the manufacturer to prove that it was safe but rather on Canada to prove it unsafe. So this kind of traditional legislative authority, to ban something if the government felt that it was not proven to be safe, is being threatened. Because it was an American producer banned from selling its product in Canada, the producer put forward a large claim for damages. Canada felt it was about to lose the case so settled for a multi-million dollar settlement.

In fact the environmentalists, I think, have been ahead of the game in understanding some of the implications of international trade and investment agreements, which are starting to have a major impact on health services, social assistance and social housing. As these services become increasingly privatised in Canada, an increasing number are provided by American based corporations. U.S. based corporations are increasingly being retained to redesign and administer social programmes in Canada. So the private/public split that you used to be able to rely on twenty years ago is vanishing.

I think the other thing that the environmental movement in Canada has seen is the importance of having a claiming and enforcement procedure. In Ontario under the Social Democratic government that was defeated in 1995, an environmental Bill of Rights was developed. I did not get too much of a chance to talk about the idea of social rights and environmental rights giving citizens a chance to identify things that are not working right, and often bringing, even to the government's attention,

something that had just been overlooked, as in the South African case. I think we are understanding now that governments need those triggers, and when you shift towards a rights-based constitutional framework, then priorities start to be set by rights. I am completely in favour of including environmental rights in a Bill of Rights, and ensuring that those issues have the same kinds of triggers to get attention as other social and economic issues.

- ***How does one make a Bill of Rights comprehensive but also ambiguous enough to stay relevant for as long as possible? Have there been attempts to change the Canadian Charter to address the emerging issues you described?***

The constitutional process in Canada is fraught with difficulties. When I gave my sort of romantic version of the discussions twenty years ago, I oversimplified. If you were hearing from somebody from Quebec, you would hear about the “night of the long knives” in which Premier Rene Levesques of Quebec was double-crossed by the Prime Minister and the other Premiers. It was a constitution and Charter of Rights that Quebec was dragged into without ever having agreed to it. Subsequently there were attempts to re-open the issue in order to bring Quebec into the agreement.

The most recent attempt was back in 1992. During the discussions leading up to a proposed text agreed to by the premiers and the Federal Government, NGOs proposed a social charter for inclusion in the constitution. Politicians took this idea of socio-economic rights, however, and made it into a statement of socio-economic “policy objectives” which were declared to not be enforceable by courts. So in fact it would have had a negative impact, reinforcing the kind of reasoning that courts have adopted in excluding poverty related claims to dignity and security under the Charter.

This is something you will need to worry about it in terms of how you frame socio-economic rights here. If you are trying to get socio-economic rights in and the politicians say ‘well, we will put them in but we will put them in a separate section, or even worse, ‘we will put them in but we will say they are commitments of governments, not things that can be litigated in court’, - then essentially what you do is send a message to courts which means that when Eric Fernandez, or Louise Gosselin, or the women on social assistance in Ontario try to bring forward their claims, they will get the same response here as they got in Canada from the lower courts. In that scenario, the courts might find explicit constitutional instructions to justify avoiding any substantive equality claim that intersects with economic and social policy. That is a disaster, because those are the claims that are brought forward by the most disadvantaged groups.

So if you do end up with socio-economic rights in any kind of separate category, it is important to have them affirmed as interdependent with other rights, creating an interpretive framework for equality, security of the person, and other rights - rather than being designated as an entirely separate category of rights, which would be inconsistent at any rate with international human rights law.

I will not go on, but I will just say that what happened with that attempt in 1992 was kind of interesting from a procedural point of view for you, because they had

consultation processes which were televised and they designed these consultations so that they would include constituencies affected, but also so-called 'ordinary' Canadians. The legislators were sensitive to the critique that the constitutional process was being dominated by interest groups, and so they had 'ordinary' Canadians. It actually ended up working against their attempts to control the process, though, because the whole process really excited people and ordinary Canadians really got involved - everybody was watching it on cable TV. A strong public commitment to preserving Charter rights emerged, with a concern that in their desire to make deals, the politicians were prepared to weaken the Charter. The women's movement and other equality-seeking groups opposed the Accord that the premiers had agreed to and it was defeated in a public referendum. No one is talking about constitutional reform now so in Canada, we have to work with what we have, but that is obviously different from you.

- ***Is it crucial to have the public behind socio-economic rights, or is there another way of lobbying and campaigning our government to actually include socio-economic rights in the Bill?***

There are different levers that are useful –international law is very useful. It would be very difficult for the government of Northern Ireland or for Westminster to somehow say that one cannot put socio-economic rights in the Northern Ireland Bill of Rights when they have ratified the International Covenant on Economic Social and Cultural Rights, and they are part of the European Community and so on. They cannot be arguing that socio-economic rights are not human rights. It is very clear from the Committee on Economic, Social and Cultural Rights that the UK would be in violation of its obligations under the Covenant on Economic, Social and Cultural Rights, if it imposed on Northern Ireland a distinction between civil and political rights and socio-economic rights as to access to legal remedy. It would be in contravention of the Covenant if it imposed on the Northern Ireland Human Rights Commission that kind of distinction, because the Committee has made it fairly clear, and they made it clear to Canada, that you cannot just define socio-economic rights as policy objectives of government and leave it all up to government. There has to be some sort of remedy for people whose rights are violated.

You may not want to rely explicitly on the courts, you might want to develop some alternative remedies, but you cannot just leave those whose rights are violated without any remedy at all. So if you had a consultation process in which Northern Ireland arrived at a draft Bill of Rights which included socio-economic rights, and some sort of remedy, I think international law gives you high moral ground to stand on.

Problems usually arise if you get rights from the top-down. I think it would be a lot better from all standpoints if people do get actively involved. What is interesting is that we find that the more you get people involved, the more pressure you get for socio-economic rights. If you go out to the community - and I do not know much about Northern Ireland but the people I have talked to here have suggested that the experience here is the same as elsewhere – if you go and talk to people about what it is they need and expect from governments, what kind of society they want to live in, what issues of dignity or security are important to them etc, people talk about access to housing, access to healthcare, education and so on. These are the issues that are

important to people. So you are marginalizing your Bill of Rights from these critical issues if you do not reflect what the people are really interested in. If you start dealing with what people are interested in, then all of sudden they get interested in rights.

- ***How can human rights bodies effectively tackle the problem that less than 50% of people vote?***

A traditional concern with social and economic rights was that when things get into courts, then they are taken out of the legislature. I think the emerging model is different from that, in that a rights culture tends actually to put issues of politically marginalized groups on the democratic agenda, whether it is of the European Parliament or the UK or Northern Ireland. That can make participating in the democratic process more meaningful for those who might otherwise ignore it.

Rights claims are not always or even predominantly brought forward in courts. As I said, drafting of the original rights and institutionalising enforcement procedures is only a small part of it. People are learning in Canada to use rights politically and to use rights to mobilise. For example, when we do community organising around poverty or homelessness, we are not going to the courts necessarily, but you certainly hear the idea of housing being a right at those meetings. So, even if you did not have any court enforcement, just the fact that you had a constitution that said adequate housing is a right, you start to hear that and politicians will be hearing it and so on. Just that in itself brings people into the political process who might previously have felt that it was doing nothing for them.

It may mean that you have a human rights committee that is holding annual hearings into different aspects of the Bill of Rights, and their hearings include hearings on homelessness. Then all of a sudden you have women showing up from shelters saying 'one of the things is (as I heard yesterday) that it takes too long to get a determination of the housing subsidy and by the time I get the determination, the place I am trying to rent is gone'. This means there are all these women suffering homelessness who cannot get a place just because of an administrative thing like that. But perhaps this would not happen if, because it is listed as a right, one had an audit around what was causing homelessness in Northern Ireland. The hope is that including things as rights actually makes the political process meaningful to the very people for whom it otherwise might not be and maybe gets them voting.

- ***If we embrace a human rights culture and we have the right to freedom of movement and freedom of expression, but then also have a right to liberty and security and the right to privacy, how are we going to decide whose rights take precedence? Is there a hierarchy of rights, and is this really the way to solve our problems in Northern Ireland? I am interested in what you think about that.***

I think all rights-claiming and adjudication involve issues of balancing, so a rights claim related to adequate housing is going to mean that the government is going to say that 'yes you can say that we should be putting more into housing but then a lot of

people think we should be putting more into healthcare', and those balancing questions will be put before courts and they will have to deal with them. Similarly, in dealing with the right to freedom of expression and the right to freedom from discrimination, courts and human rights tribunals in Canada have had to wrestle with the very difficult question of: where does one person's freedom of expression end, and another person's right to live free from a hostile discriminatory environment start?

We are not dealing with the same issues that you are, obviously, but the same problems are there conceptually. The question, for example, about a hostile environment for women that is created by sexually explicit material that could be argued for in terms of freedom of expression - those are tough issues, and the courts have had to deal with those balancing issues. Human rights frameworks are not going to solve everything but I do think it would be a mistake to create a human rights framework which is primarily orientated around issues that are most divisive and more identity-based. To move into the area of socio-economic rights, it seems to me that this would be an area of human rights which would draw on some of the things that people share, and allow for rights to be affirmed in ways that are not dividing one constituency from another, but essentially saying that these are things that everybody can rally behind.

I will just say one other thing which is just the perspective of someone who has been here for two days. When I got my tour of Belfast yesterday, it did seem to me that it was clear that living in poverty means a lot in terms of where you are placed with respect to the conflict, and that people who can be free of poverty seem to have a better ability to be free of some of the clear delineations. Maybe the connections between poverty and conflict go even further than that.

- *The cases that you mentioned have been primarily pursued by individuals. To what extent have the courts dealt with group interests or group rights as quite clearly economic policies impact upon individuals but also can affect groups and systemic issues for groups as well.*

The cases tend to have individual names of course. For example in the benefits-cut case, one individual was named but in fact there was a group including seven single mothers relying on social assistance who brought that case forward, and they did so with the assistance of community organisations and groups from around Ontario. The courtroom was packed, the media coverage was intense, and it was something that was seen as strategic litigation. It was a tough decision for the community actually to take about whether to take that case forward. It was known that it was going to be a very hard sell at that particular point in the development of Charter jurisprudence. But it was felt that we had to go ahead with it because of the immense suffering that was going to occur.

In the Eldridge case, there were just four individuals named, but by the time it got to the Supreme Court of Canada, all of the major equality-seeking groups were seeking amicus standing or public interest standing to talk about it. It was not any more because Susan Eldridge needed anything in particular - I think her problem had been solved - it was an issue of people with disabilities generally and what the right to

equality was going to mean, so there was a real intersection between groups and individuals.

We do not have in the Canadian Charter permission for groups to just go ahead on cases without having an individual whose rights have been infringed, and in the Canadian Council of Churches decision, it was found that a group did not have standing to bring forward a claim related to refugees because such a claim could come forward from refugees themselves. In South Africa, they have a much broader approach to standing, and I assume from the background papers that this may be recommended here. This is not an issue that I think is absolutely critical, and I can actually live happily within the Canadian system essentially because I never have any trouble finding low income people who are prepared to take cases forward for the good of others. To some extent, I think it keeps me honest to have to be working with the people whose rights have been infringed, rather than just working with groups who think they know what is best. On the other hand, I know in the South African context it has been absolutely critical to be able to get groups involved in bringing claims forward, so I would go for a kind of mixed approach.

- *Could you say anything about cultural rights and their link to socio-economic rights?*

We all talk about the areas that we know best, and I probably went through this whole talk without once mentioning indigenous people in Canada, which is a terrible omission. You would not be able to make a distinction between the cultural rights of indigenous people in Canada and the incredible socio-economic deprivation in which they live. Socio-economic rights claims are thus inseparable from treaty rights and claims to land and protection of environment and way of life. Those kinds of intersections I think go back to my original point - we really are integrating the various categories of rights and recognizing that the categories themselves are just conceptual abstractions. I think the focus has to be on issues of disadvantage, and the disadvantage may very well be coming from a historic or linguistic background, may be related to disability or to gender - there are so many intersecting issues. Cultural rights, to the extent that they relate to those fundamental issues of disadvantage, I think, point to a critical role for the courts. I think in general all of these rights should be approached by courts, and in the drafting, to make it clear that the court's primary role is to step in to protect the interests of those who are not in a good position in society to defend their own interests. I think you need to have language which ensures that the more advantaged groups cannot use these rights as ways to perpetuate or increase disadvantage. So that is why you ought to make sure that if you have property rights, for example, that it is clear that this is not a way for powerful interests to challenge public interest legislation or regulation. Similarly with cultural rights, there are ways in which cultural rights can sometimes be affirmed to further disadvantage disadvantaged groups, but there are a lot of really important ways in which cultural rights need to be affirmed in order to deal with cultures that are disadvantaged politically, socially and historically.

**Committee on the Administration of Justice
45-47 Donegall Street
Belfast BT1 2BR**

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