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THE CHARTER AND POVERTY: BEYOND INJUSTICIABILITY†

I *Introduction*

Determining the justiciability of a claim brought to court may involve considering a range of arguments that can be loosely divided into two groups. The first group of arguments are those addressing the issue of whether the claim is *available* for adjudication, as opposed to some other form of social decision making. A decision that the right to security of the person, guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms, does not provide protection against reductions in social assistance, for instance, is a decision that claims to such protection are unavailable for adjudication by courts. As a result, such claims can be pursued only in alternative social decision-making institutions, such as legislatures. In the context of Charter adjudication, arguments as to the availability of a claim for adjudication typically address the Charter's text, structure, drafting history, underlying principles, and so on. However, such text-oriented arguments are often informed by, if not supplemented with, arguments oriented to the institutional capacity and legitimacy of the courts. Arguments that address the redundancy, abstractness, complexity, or political sensitivity of a claim are examples of arguments with an institutional capacity and legitimacy orientation. Broadly speaking, such arguments can be understood as arguments about whether a claim is *suitable* for adjudication, and this is the second group of arguments that may arise in justiciability determinations.[2]

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† A review of Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) pp. xxxii, 246 [hereinafter *BJR*]. Subsequent references appear parenthetically in the text of the review.

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

2 G. Marshall, 'Justiciability' in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961) 265 at 267. Although Marshall distinguishes between two uses of the term 'justiciability' with the labels 'fact-stating' and 'prescriptive,' I think the distinction I draw, with different labels, is generally consistent with his. See also R.S., Summers 'Justiciability' (1963) 26 Mod.L.R. 530. In other analyses of justiciability,

In *Boundaries of Judicial Review* Lorne Sossin recognizes the range of arguments relevant to justiciability determinations, but his primary concern is to reconstruct the reliance that the law of justiciability in Canada places upon the principle that courts ought not to adjudicate cases beyond their institutional capacity or legitimacy. In Sossin's view, such reconstruction is necessary because, while Canadian courts rightly consider this principle in making justiciability determinations, their reliance upon it has thus far privileged flexibility over coherence. The framework for justiciability determinations in which Sossin's book culminates, which seeks to guide Canadian courts through a more coherent assessment of institutional capacity and legitimacy issues, is thus intended to guide Canadian courts to a more coherent, though not inflexible, justiciability jurisprudence.

For Sossin, the imperative of achieving a more coherent justiciability jurisprudence arises from the significance of justiciability determinations:

> Justiciability is far more than a 'technical legalism.' It defines the boundaries between our legal and political systems. By delineating the scope of judicial adjudication of disputes, courts determine what matters are appropriate for legal determinations, and what matters must be left for political resolution. This is particularly significant in public law settings where the government typically is a defendant to a claim. A finding that a matter is non-justiciable may immunize certain government actions and laws from judicial review and may deny parties wronged by government action a judicial remedy. (vi)

In Sossin's view, therefore, it is the general importance of delineating the scope of judicial review, as well as the serious consequences of holding particular types of claims injusticiable, that gives justiciability jurisprudence its significance and, in turn, justifies his call for greater coherence. Ultimately, it is in successfully laying the foundation for such a significant area of jurisprudence to become more principled and coherent that Sossin's analysis achieves its own significance.

The seriousness of the consequences that can flow from injusticiability decisions is well illustrated by the decisions of lower Canadian courts holding injusticiable poverty-related claims brought under the Charter.

only what I categorize as 'suitability arguments' are referred to: see, *e.g.*, P.G. Ingram, 'Justiciability' (1994) 39 Am.J.Juris. 353. In Charter cases and commentary, what I categorize as 'availability arguments' are often referred to as arguments about the scope of Charter rights or freedoms. These scope-oriented arguments are then implicitly distinguished from arguments about the justiciability of Charter claims, that is, institutional legitimacy and capacity arguments. In my view, since all these arguments ultimately inform the decision as to the scope of Charter rights and freedoms and, therefore, delineate the boundary between judicial and other forms of social decision making, the distinction (which is fluid in any event) is more usefully drawn in terms of availability/suitability rather than in terms of scope/justiciability.

In *Masse* v. *Ontario (Ministry of Community and Social Services)*,[3] for example, the government's decision to reduce social assistance entitlements by up to 21.6 per cent was challenged as a violation of the Charter rights to life, liberty, and security of the person (s. 7) and to equality (s. 15). The court was unanimous in holding the s. 7 claim injusticiable and, by majority, also rejected the s. 15 claim. The most immediate consequences of this result were clear to at least one member of the court, Corbett J., who noted,

> The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of social assistance and their dependants will suffer in some way from the reduction in assistance. Many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many may become homeless. There will be disadvantage suffered from the effects of having less income available for food, basic necessities, and education-related expenses.
>
> There can be no doubt the effects of reduced income will be severe for all and devastating for some ...[4]

Put more generally, the foremost consequence of injusticiability decisions in poverty-related cases such as *Masse* is the disabling of the Charter's potential to engage one of the most egregious threats to the equality, human dignity, and personal security of vulnerable and disadvantaged groups. But, further, such decisions are inconsistent with the international human rights standards and obligations to which Canada has committed itself. Indeed, United Nations human rights monitoring bodies have recently, repeatedly, and specifically criticized the injusticiability decisions made by lower courts in *Masse* and like cases.[5] At the same time, such decisions leave Canadian Charter jurisprudence out of step with emerging transnational constitutional human rights standards and approaches.[6]

The illustrative potential of the decisions of lower courts holding poverty-related Charter claims injusticiable is not, however, limited to the serious consequences that can flow from such decisions. What these decisions also illustrate is the lack of coherence afflicting Canadian justiciability jurisprudence. While lower courts routinely rely upon concerns over their institutional capacity and legitimacy in holding poverty-related Charter claims injusticiable, their exploration and explanation of those concerns remains woefully inadequate. In particular,

3 (1996), 134 D.L.R. (4th) 20 (Ont. Gen. Div.) [hereinafter *Masse*].
4 Ibid. at 69–70 (per Corbett J.).
5 See notes 37 through 43 infra and accompanying text.
6 See notes 44 through 46 infra and accompanying text.

lower courts have failed to identify adequately the challenges that poverty-related Charter claims pose to their institutional capacity and legitimacy and have failed to explain adequately how those challenges justify refusing to address, to any extent, the vulnerability of Charter rights and freedoms to poverty-related threats. Further, lower courts have failed to account for the fact that the Supreme Court of Canada, though yet to fully consider the justiciability of poverty-related Charter claims, refused to rule out their justiciability in *Irwin Toy* v. *Attorney-General (Quebec)*[7] and has reversed lower court injusticiability holdings in some important cases involving the allocation of government resources and access to publicly funded services and programs.[8]

The serious consequences and continuing incoherence of lower court decisions holding poverty-related Charter claims injusticiable thus illustrate that the comprehensive analysis of the law of justiciability in Canada provided by Sossin is much needed and long overdue. Moreover, as the Supreme Court will shortly hear an appeal from the decision of the Quebec Court of Appeal in *Gosselin* v. *Québec*[9] (rejecting claims to an adequate level of social assistance under both the Quebec Charter of Human Rights and Freedoms[10] and ss. 7 and 15 of the Charter), and thus for the first time be faced with the question of the justiciability of such poverty-related claims, Sossin's analysis is also timely. In Part III of this essay I therefore discuss the implications of Sossin's analysis for debates over the justiciability of poverty-related Charter claims. In doing so, I reveal a number of the points at which the approach taken in decisions of lower courts holding such claims injusticiable is inconsistent with both Sossin's analysis and Supreme Court jurisprudence. This leads me to consider, in Part IV of this essay, developments in the Supreme Court's approach to institutional capacity and legitimacy concerns that encourage, if not demand, a movement beyond injusticiability as a response to those concerns – a movement that, as I explain, is consistent with Sossin's analysis. But first let me provide a more complete overview of the structure and content of Sossin's inquiry, including some evaluation of how that inquiry proceeds and concludes.

II

The purpose of Sossin's inquiry into the law of justiciability in Canada is 'to develop a framework capable of guiding (but not fettering) the

7 [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].

8 E.g., *Eldridge* v. *British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*] and *New Brunswick (Minister of Health and Community Service)* v. *G.(J.)*, [1999] 3 S.C.R. 46 [hereinafter *J.G.*].

9 (23 April 1999), Montreal 500-09-001092-923 (C.A.), leave to appeal to S.C.C. granted (1 June 2000), No. 27418 [hereinafter *Gosselin*].

10 Q.R.S., c. C-12.

judiciary in its decision-making relating to justiciability' (*BJR* 228). In the course of working towards this objective, Sossin acknowledges, and to some extent addresses, the influence of Alexander Bickel's argument for the 'passive virtues' of US justiciability-related doctrines.[11] At the outset, then, it is instructive to briefly compare the general direction and motivations of Sossin's and Bickel's arguments.

Wary of those who encourage an inflexible adherence to principle in US constitutional and justiciability jurisprudence, Bickel, with his 'passive virtues' argument, invited US courts to refuse to adjudicate matters that were in principle justiciable if there were good prudential reasons for so refusing. While Bickel acknowledged that courts accepting his invitation could not be said to be making decisions that were principled in a legally conventional sense, he nevertheless maintained that such decisions were not wholly expedient and unprincipled: 'The role of principle, when it cannot be the inflexible governing rule, is to affect the policies of expediency.'[12] But Bickel's critics feared that in reaching for flexibility and prudence he had let go of principle altogether, particularly given that he countenanced courts obscuring the prudential aspects of their decisions.[13] For his part, and in this respect in contrast to Bickel, Sossin is wary of those who encourage flexibility in Canadian justiciability jurisprudence (*BJR* 227).[14] What Sossin fears is that, through encouragement to avoid the inflexibility of firm rules, justiciability jurisprudence has neglected to maintain the degree of coherence and principle necessary to establish reliable guides for future litigants and to encourage public confidence in the judicial process (228). Consequently, Sossin, like Bickel, seeks an approach to justiciability allowing both flexibility and coherence (230), an approach that is pragmatic, but at the same time 'rooted in predictable, justifiable and rational rules' (231), and an approach that is principled, but in which those principles are applied in a 'coherent and pragmatic fashion' (237).

The framework that Sossin ultimately offers is founded upon, and elaborates, the principle that courts ought not to adjudicate matters beyond their institutional capacity or legitimacy. According to Sossin, adherence to his framework would not deny courts flexibility, since it

11 A. Bickel, 'The Supreme Court, 1960 Term – Foreword: The Passive Virtues' (1961) 75 Harv.L.Rev. 40 (further elaborated in A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* [New Haven, CT: Yale University Press, 1962]).

12 Ibid. at 49.

13 *E.g.*, G. Gunther, 'The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review' (1964) 64 Colum.L.Rev. 1; H. Weschler, Book Review of *The Least Dangerous Branch* and *Politics and the Warren Court* by A. Bickel (1966) 75 Yale L.Rev. 672.

14 In particular, Sossin refers to R. Sharpe, 'Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide' in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 327.

must be recognized that pragmatic considerations play a role in determining the limits of the institutional capacity and legitimacy of Canadian courts. However, since his framework filters those considerations through a governing principle, Sossin takes the view that the flexibility it allows does not come at the expense of the necessary degree of principle and coherence. A question worth bearing in mind, then, is whether Bickel's critics would be satisfied with the way in which Sossin's framework balances the need for principle with the need for flexibility. In this respect, the fact that Sossin, unlike Bickel, wants that balancing to occur in the open is certainly to Sossin's advantage.

In content and structure, Sossin's inquiry is oriented towards case analysis. In his opening overview of the law of justiciability in Canada, Sossin begins by defining justiciability as 'a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life' (*BJR* 2). He then identifies three factors generally considered in justiciability determinations: the capacity and legitimacy of the judicial process; the constitutional separation of powers; and the nature of the dispute before the court. Contrasting the issue of justiciability with those of standing and enforceability, Sossin then relates it to Canadian jurisprudence on the separation of powers, outlines UK and US approaches to justiciability, and summarizes his subsequent analysis.

The bulk of that analysis is taken up with a consideration of the three areas of legal doctrine that Sossin regards as constituting the law of justiciability, namely ripeness, mootness, and political questions. Sossin's consideration of these doctrines provides a close and revealing analysis of a wide range of predominantly public law decisions, augmented with useful overviews of comparative jurisprudence in the US and, to a lesser extent, in the UK and Australia. At the outset of his consideration of each doctrine, Sossin sketches its relationship to the factors generally considered in justiciability determinations, with particular emphasis on the capacity and legitimacy of courts. Moving into case analysis, he identifies the criteria developed within each doctrine for deciding whether a matter is injusticiable and when, in its discretion, a court might adjudicate a matter despite its ostensible injusticiability. At the same time, Sossin identifies the concerns motivating those criteria and decisions – for instance, the concern to maintain an adequately adversarial forum for judicial decision making. He then evaluates the extent to which those concerns, criteria, and decisions form coherent and principled doctrines. While Sossin endorses many of the specific justiciability decisions reached, and the concerns motivating them, he finds that Canadian courts have too often failed either to identify appropriate criteria for their decisions, to adequately integrate and organize those criteria, or to apply them completely and consistently. Sossin thus offers a number of specific

criticisms designed to reconstruct each doctrine into more coherent elaborations of the concerns underlying it. For the most part, this involves tying each doctrine more closely to what gradually emerges as a unifying principle: that courts ought not to adjudicate matters beyond their institutional capacity or legitimacy.

Sossin follows his consideration of the justiciability-related doctrines with an instructive examination of an often ignored topic, namely, the procedural contexts within which justiciability arguments might be raised. In conducting this examination, Sossin identifies how different justiciability concerns may be more or less relevant at different procedural stages and how the standards of justiciability may differ according to the type of application being made to the court.

Finally, drawing upon his doctrinal analysis, Sossin turns to the construction of the framework he hopes can guide (but not fetter) future development of the law of justiciability in Canada. Initially, he gives some attention to the place of Bickel's 'passive virtues' argument in Canada and, in so doing, indicates his perception of the relationship between his approach and Bickel's. To some extent Sossin distances his approach from Bickel's (or at least from the criticism of Bickel's approach) by seeming to endorse the refusal of Canadian courts to allow justiciability determinations to turn on prudential considerations alone (*BJR* 230). However, he also draws some support from Bickel's work in arguing that Canadian courts have not rejected the relevance of pragmatic considerations in applying justiciability principles and that they ought not to do so (228–30). In other words, it seems that Sossin seeks to push past Bickel's critics by arguing that, while Canadian courts should not suborn justiciability principles to prudential considerations, they can, and should, recognize that (not dissimilar) pragmatic considerations inform, or infuse, those principles. It is important for Sossin that this distinction enables him to contrast his position with Bickel's because it is on the basis of that contrast that Sossin, unlike Bickel, may succeed in showing Canadian justiciability jurisprudence how it can be both principled and flexible. Given this importance, it would have been useful if Sossin had more fully explained the difference between his approach of infusing principle with pragmatism and Bickel's approach of suborning principles to prudence. While it is certainly possible to see the formal distinction at work here, in practice this may be a distinction without a difference. And the same can be said of what may be a related distinction between prudential and pragmatic considerations that Sossin appears to suggest in the course of his analysis of the political questions doctrine (153).

Having distinguished the approach to balancing principle and pragmatism in Canada from that recommended by Bickel, Sossin then mounts something of a final defence of the need for both principle and

pragmatism in justiciability jurisprudence. Emphasizing that justiciability determinations, in delineating the boundaries of judicial review, also delineate the boundaries of democracy and justice, Sossin calls for a more sophisticated justiciability jurisprudence (*BJR* 232–3) – that is, a justiciability jurisprudence that roots itself in an implied constitutional commitment to the separation of powers (234), rather than in the merely procedural and technical concerns of its common law heritage (232–3). In Sossin's view, once that jurisprudence is rooted in a constitutional commitment, prudence (or judicial convenience) alone cannot suffice as a basis for its determinations (234). Rather, a constitutionally rooted justiciability jurisprudence must be normatively based – while it must be pragmatic, it must also be principled (234).

To identify the proper normative basis of a constitutionally rooted justiciability jurisprudence, Sossin draws upon his doctrinal analysis. According to Sossin, this analysis reveals a number of concerns common to all three justiciability-related doctrines: a concern to ensure economical, efficient, and effective judicial decision-making; a concern to maintain an adequately adversarial forum for judicial decision making; a concern not to immunize laws and governments from judicial review; and a concern not to deny a proper judicial resolution to worthy parties and issues (*BJR* 233). Not surprisingly, this leads him to contend that underlying these concerns, and therefore the Canadian law of justiciability, is the principle that courts ought not to adjudicate cases beyond their institutional capacity or legitimacy. Sossin then briefly summarizes the general and specific issues that judges would need to consider in attending to this principle. Although this would have been an ideal point at which to consider the issues raised in academic studies of the limits of the institutional capacity and legitimacy of courts, Sossin, unfortunately, does not do so. While this is perhaps understandable in the case of institutional legitimacy – given the range and familiarity of the controversies over legitimacy issues – it is less so in the case of institutional capacity because capacity issues have thus far received only limited, though no less enlightening, attention.[15] At any rate, Sossin moves on to a description of the

15 In Anglo-American/Canadian jurisprudence, the classic contribution is that of L.L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv.L.Rev. 353. In the US, debates over the institutional capacity of courts, and Fuller's ideas, have tended to revolve around the issue of whether courts have the capacity to undertake so-called structural reform or public law litigation – that is, litigation in which constitutional rights are applied to the structures and operations of such public institutions as schools and prisons. See, *e.g.*, A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv.L.Rev. 1281; D. Horowitz, *The Courts and Social Policy* (Washington: The Brookings Institution, 1977); O. Fiss, 'The Supreme Court 1978 Term – Foreword: The Forms of Justice' (1979) 93 Harv.L.Rev. 1; R. Cavanagh & A. Sarat, 'Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial

framework meant to focus the attention of justiciability jurisprudence upon, and guide it through, the identified concerns and principle.

According to Sossin's 'flexible' (*BJR* 237) framework for justiciability determinations, courts faced with a claim raising justiciability issues should begin by asking whether they have the institutional capacity and legitimacy to adjudicate the claim. For such legitimacy and capacity to exist, it must be found that there is a sufficient legal, factual, and evidentiary basis for resolving the claim; that the claim does not involve too great a degree of extra-legal complexity; that the positions of the parties to the claim can be presented in an adequately adversarial manner; and that prior jurisdiction of the matter has not been given to another administrative or political body (233–7). If all this is found, then the claim is justiciable and a court is obliged to adjudicate the claim. If some or all of these findings cannot be made, then the claim suffers a defect in justiciability and a court ought not to adjudicate it, unless the defect is curable (238). For instance, a defect of insufficient evidentiary basis is curable if further evidence can be brought to prove the fact at issue, but it is incurable if the fact is inherently incapable of being proven. If the justiciability defect is curable, but yet to be cured, then the court has a discretion whether to adjudicate the claim, and that discretion ought to be exercised according to the factors set out in *Borowski* v. *Canada (Attorney-General) (No. 2)*,[16] namely whether the parties to the claim continue to have an adversarial stake in the issues it raises; whether those issues are of sufficient importance to warrant the investment of scarce judicial resources; and whether the proper role of the courts can be maintained (101–2).

Does this framework achieve Sossin's objective of guiding, but not fettering, justiciability determinations? Sossin's framework certainly offers guidance to justiciability reasoning, with its firm establishment of a principle to govern justiciability determinations, its neat compartmentalizing of the different aspects of such determinations, and its relatively clear identification of the factors and decision-rules applicable thereto.[17]

Competence' (1980) 14 Law & Soc'y Rev. 371. The issues raised in the US debates have also been considered in a Canadian context: see, *e.g.*, P. Weiler, 'Two Models of Adjudication' (1968) 46 Can.Bar Rev. 406; P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974); N. Gillespie, 'Charter Remedies: The Structural In junction' (1989) 11 Advoc.Q. 190; K. Roach, 'Teaching Procedures: The Fiss/Weinrib Debate in Practice' (1991) 41 U.T.L.J. 247; W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

16 [1989] 1 S.C.R. 342 [hereinafter *Borowski*].

17 A minor kink in Sossin's framework perhaps exists in his inclusion of the first of the *Borowski* factors – a continuing adversarial stake – in the latter stage of the framework, as this appears to repeat an issue addressed earlier in the framework.

On the other hand, given the breadth of considerations potentially relevant to delineating the limits of the institutional capacity and legitimacy of courts (and their admittedly normative dimensions [*BJR* 2]), as well as Sossin's general defence of pragmatic considerations, it would be difficult to argue that his framework fetters justiciability decisions. Thus Sossin does manage to provide a framework capable of guiding (without fettering) justiciability determinations.

In focusing the attention of judges making justiciability determinations upon the nature and extent of the institutional capacity and legitimacy of the courts, Sossin's framework guides the law of justiciability in Canada in a productive direction. The validity of this focus relies largely upon Sossin's more specific analysis of justiciability-related doctrines, which convincingly establishes both the normative and the practical importance of institutional capacity and legitimacy issues in justiciability determinations. Indeed, what distinguishes Sossin's inquiry is both his dedication to comprehensively revealing the extent to which these issues already inform such determinations and his concern to develop a general framework of considerations and decision-rules applicable across justiciability-related doctrines. Moreover, in developing such a framework, Sossin provides a means for a more deliberate and transparent approach to institutional capacity and legitimacy issues in justiciability jurisprudence and, in so doing, assists that jurisprudence in achieving a more coherent treatment of those issues.

There is one respect, however, in which Sossin's analysis might have provided even greater assistance to courts grappling with issues of institutional capacity and legitimacy. I have already mentioned that a consideration of academic studies of the limits of the institutional capacity and legitimacy of courts might have enabled Sossin to provide greater guidance to judges in identifying the general and specific issues they need to address in assessing those limits. Similarly, a consideration of the cases in which the Supreme Court has given some of its closest attention to identifying the conditions and limits of its institutional capacity and legitimacy would also have been worthwhile. A brief review of these cases shows why this is so.

The omitted cases to which I refer amount to only a handful. To begin with, Sossin's analysis does not include the so-called Labour Trilogy, composed of *Reference Re Public Service Employee Relations Act (Alta.)*,[18] *Public Service Alliance of Canada* v. *Canada*,[19] and *Saskatchewan* v. *Retail, Wholesale & Department Store Union et al.*[20] In these cases, a majority of the Supreme Court, led by McIntyre J., held that the Charter's s. 2(d)

18 [1987] 1 S.C.R. 313 [hereinafter *Alberta Labour Reference*].
19 [1987] 1 S.C.R. 424 [hereinafter *PSAC*].
20 [1987] 1 S.C.R. 460 [hereinafter *Dairy Workers*].

guarantee of freedom of association did not protect either a right to strike or various related rights, such as a right to bargain collectively. While this finding was in large part based upon a consideration of the Charter's text, structure, drafting history, and so on, as well as on the conceptual relationship between association and collective action, McIntyre J.'s judgments also included a lengthy consideration of institutional capacity and legitimacy issues. Thus, a perceived lack of capacity and legitimacy was one reason the rights being claimed in those cases were held injusticiable. Further, Sossin's analysis is missing a series of cases in which the Supreme Court identifies a lack of institutional capacity and legitimacy as grounds for adopting a deferential position in conducting the review demanded by s. 1 of the Charter. This series, which I will collectively refer to as the 'deference' cases, includes such prominent cases as *Irwin Toy*, *McKinney* v. *University of Guelph*,[21] *RJR-MacDonald* v. *Canada (A-G)*,[22] and, most recently, *M.* v. *H.*[23]

While the Labour Trilogy and deference cases are relevant for their identification of both institutional capacity and legitimacy problems, for convenience' sake I will approach what is said in these cases from the perspective of the relatively neglected issue of institutional capacity. Like the courts in the cases analysed by Sossin, in the Labour Trilogy and deference cases the Supreme Court has tended to define its institutional capacity by reference to the nature and process of adjudication. The nature of adjudication gives rise to a general condition of institutional capacity that, to use the language of McIntyre J.'s leading judgment for the majority in the *Alberta Labour Reference*, a claim be amenable to principled resolution according to correct answers.[24] To achieve such resolution, a claim must be adjudicable according to the structure, and adversarial process, of judicial decision making under the Charter. If these cases took the definition of institutional capacity only this far, then they would do little more than reinforce the conditions of capacity identified in the cases analysed by Sossin. However, they go further. In particular, they suggest that the institutional capacity of Canadian courts is generally challenged by a lack of certainty, and they identify two principal problems of uncertainty. The first of these problems is said to arise from the need to consider social science evidence and the fact that such evidence may be conflicting or lack definitiveness. In Charter cases, this need has arisen most acutely in addressing the questions of rational connection and minimal impairment in the s. 1 review stage. Conflicts of social science evidence challenge institutional capacity because, it is

21 [1990] 3 S.C.R. 229 [hereinafter *McKinney*].

22 [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

23 [1999] 2 S.C.R. 3.

24 *Alberta Labour Reference*, supra note 18 at 419.

argued, judges lack the expertise to resolve conflicts and therefore are unable to determine correct answers to questions posed by the structure of Charter adjudication. The lack of definitiveness of social science evidence challenges capacity because, it is argued, judges lack the expertise and resources to develop definitive answers and because, in any event, such development may be impossible. The second main problem of uncertainty is said to arise from the need to assess the balances struck in considering the claims of competing groups, protecting the vulnerable, and allocating scarce financial resources. This need has arisen most acutely in the minimal impairment aspect of s. 1 review. Uncertainty is present here because, it is argued, judges lack the criteria and/or the expertise required to determine the appropriateness of such balances or trade-offs. This challenge is exacerbated by the problems posed by social science evidence because judging appropriateness may involve judging such evidence.

In identifying these uncertainty problems, the Labour Trilogy and deference cases thus provide insights into some more precise problems of institutional capacity with which the Supreme Court is concerned. The guidance that Sossin's analysis and framework offers to judges investigating their institutional capacity and legitimacy might therefore have been enhanced if he had drawn their attention to, and offered his assessment as to the validity of, these problems.[25]

This omission notwithstanding, Sossin's analysis presents a strong case for reconstructing the reliance of the law of justiciability in Canada upon the principle that courts ought not to adjudicate cases beyond either their institutional capacity or their legitimacy. Further, it lays a solid foundation for that reconstruction, as can be illustrated by considering the implications of Sossin's analysis and framework for debates over the justiciability of poverty-related Charter claims.

III

One area of Canadian justiciability jurisprudence in vital need of reconstruction is that of lower court decisions holding poverty-related Charter

25 A variety of shortcomings in the coherence and consistency of the Supreme Court's approach to finding so-called social facts (and the related use of social science evidence) have been identified in D. Pinard, 'Social Facts and the Courts' (Symposium on New Approaches to Constitutional Law, Faculty of Law, University of Toronto, October 27–29, 2000) [unpublished]. See also D. Pinard, 'La connaissance d'office des faits sociaux en contexte constitutionnel' (1997) 31 Rev.Jur.Thémis 315. An illuminating discussion of the Supreme Court's use, and non-use, of social science evidence in Charter challenges to evidentiary rules can be found in M.T. MacCrimmon, 'Developments in the Law of Evidence: The 1990–91 Term – Social Science, Law Reform and Equality' [1992] 3 (2d) Sup.Ct.L.Rev. 269.

claims injusticiable. In this section I first consider the serious consequences of these decisions and then identify some of the deficiencies in the reasoning upon which they are based. This discussion is followed by an examination of the extent to which the reasoning in these decisions is consistent with Sossin's analysis and with Supreme Court jurisprudence.

As the statement of Corbett J. in *Masse*, quoted in Part I of this essay, attests, the detrimental effects of poverty upon the equality, human dignity, and personal security of vulnerable and disadvantaged groups are quite apparent and very real. And yet the injusticiability arguments and holdings of lower courts have precluded any meaningful judicial scrutiny of poverty-related Charter claims, especially those made under s. 7 (right to life, liberty, and security of the person), but also those made under s. 15 (equality). Claims that have been rejected include a claim to protection against a no-grounds eviction from public housing;[26] a claim for access to expensive and only partially publicly subsidized HIV/AIDS medication;[27] a claim to protection against inadequate care for extended-care residents of nursing homes;[28] a claim to an additional allowance for provision of full-time health-care services in the home, rather than as an in-patient;[29] a claim to protection against withdrawal of social assistance prior to any hearing of an allegation of having resumed living with a spouse;[30] a claim to protection against discontinuance of electricity service, when not in arrears, for failure to pay security deposit;[31] and claims to protection from a significant reduction in levels of social assistance.[32]

Holding such poverty-related Charter claims injusticiable has a number of serious consequences. In the first place, it means that neither the Charter nor the courts can engage some of the most egregious threats to the equality, human dignity, and personal security of many of the most vulnerable and disadvantaged people and groups in Canadian

26 *Bernard* v. *Dartmouth Housing Authority* (1988), 53 D.L.R. (4th) 81 (N.S. C.A.) [hereinafter *Bernard*]. But for a contrasting decision on s. 15 grounds, see *Dartmouth/Halifax (County) Regional Housing Authority* v. *Sparks* (1993), 101 D.L.R. (4th) 224 (N.S. C.A.) [hereinafter *Sparks*].

27 *Brown* v. *B.C. (Minister of Health)* (1990), 66 D.L.R. (4th) 444 (B.C. S.C.) [hereinafter *Brown*]. But for a successful challenge, on s. 15 grounds, to a refusal to publicly subsidize a particular treatment for autism, see *Auton* v. *B.C. (Minister of Health)* (2000), 78 B.C.L.R. 55.

28 *Ontario Nursing Home Association* v. *Ontario* (1990), 72 D.L.R. (4th) 166 (Ont. H.J.C.) [hereinafter *ONHA*].

29 *Fernandes* v. *Manitoba (Director of Social Service)* (1992), 93 D.L.R. (4th) 402 (Man. C.A.) [hereinafter *Fernandes*].

30 *Conrad* v. *Halifax (County)* (1993), 124 N.S.R. 251 (S.C.) [hereinafter *Conrad*].

31 *Clark* v. *Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen. Div.) [hereinafter *PUC*].

32 *Masse*, supra note 3, and *Gosselin*, supra note 9.

society, especially women.[33] In a period characterized by significant reductions in social programs and spending, and the associated increases in such problems as income inequality, poverty, and homelessness,[34] this not only has serious ramifications for the relevance of the Charter to vulnerable and disadvantaged groups but may also have implications for the way in which the claims of these groups are received in other forums of social decision making. As Craig Scott and Patrick Macklem suggest, in the context of recommending the entrenchment of constitutional social rights in South Africa, the refusal of courts to recognize that poverty-related claims implicate the fundamental values protected by the Charter may undermine other forms of social and political advocacy on poverty issues:

> In the absence of entrenched [read: justiciable] social rights, it would be unwise to expect that values left unconstitutionalized (and thus not reinforced by the continuing processes of constitutional interpretation) could hold their own in wider political discourse. They will be marginalized and categorized as second-class arguments and those most dependent on them for basic survival and for integration into society at large will become or remain second-class citizens.[35]
>
> ...
>
> [R]endering social rights justiciable will provide greater weight to their underlying values in policymaking and in political discourse generally.[36]

In the second place, holding poverty-related Charter claims justiciable creates an inconsistency with the international human rights obligations to which Canada has committed itself. Having ratified the International Covenant on Economic, Social and Cultural Rights,[37] Canada has undertaken obligations to respect, protect, promote, and fulfil the rights it guarantees, including the right to an adequate standard of

33 Women have significantly lower average earnings than men; a higher proportion of women have incomes below Statistics Canada's low-income cut-off line, and just over half of all people with low incomes are women. See Statistics Canada, *Women in Canada 2000* (Ottawa: Statistics Canada, 2000).

34 See, generally, A. Yalnizyan, *The Growing Gap* (Toronto: Centre for Social Justice, 1998); National Council of Welfare, *Poverty Profile 1997* (Ottawa: Minister of Supply and Services Canada, 1999); S. Day & G. Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Social Programs in Canada* (Ottawa: Status of Women Canada, 1998); J. Layton, *Homelessness: The Making and Unmaking of a Crisis* (Toronto: Penguin, 2000).

35 C. Scott & P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a Future South African Constitution' (1992) 141 U.Penn.L.Rev. 1 at 35.

36 Ibid. at 39.

37 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [hereinafter ICESCR].

living, which, in turn, includes a right to adequate housing, food, and so on. In undertaking this obligation, Canada also takes on the obligation to provide effective remedies for violations of the rights guaranteed, including, where necessary, judicial remedies.[38]The Charter, clearly, is not only an important means of implementing Canada's international human rights obligations but also an important means of providing effective remedies for their violation. That holding poverty-related claims injusticiable is inconsistent with Canada's international human rights obligations has been confirmed by the United Nations bodies responsible for monitoring these obligations.[39] In both 1993 and 1998 the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the ICESCR, specifically criticized the position adopted by lower courts with respect to the justiciability of poverty-related Charter claims, including the decisions in *Masse* and *Gosselin*.[40] In particular, the CESCR expressed its concern that in lower court decisions, not to mention intergovernmental constitutional discussions, poverty was treated as a mere policy issue, rather than as an issue implicating fundamental human rights.[41] These criticisms were echoed by the Human Rights Committee (which monitors the International Covenant on Civil and Political Rights)[42] in 1999.[43]

Finally, it should be recognized that social and economic rights claims have for some time been the subject of constitutional adjudication in other democratic countries, including Ireland, Germany, India, and

38 For a general overview of the obligations imposed by the ICESCR, see D. Otto & D. Wiseman 'In Search of "Effective Remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7 Aust.J.H.R. (2001) 5.

39 The observations of these bodies with respect to Canada are described in C. Scott, 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?' (1999) 10:4 Const.Forum 97; B. Porter, 'Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights' (2000) 15 J.L.Soc.Pol. 117.

40 See United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, 10 June 1993, E/C.12/1993/19 [hereinafter *Concluding Observations, CESCR, 1993*]; and *Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, 10 December 1998, E/C.12/1/Add.31 [hereinafter *Concluding Observations, CESCR, 1998*].

41 *Concluding Observations, CESCR, 1993*, ibid. at para. 110.

42 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9–14, Can. T.S. 1976 No. 47 [hereinafter ICCPR].

43 United Nations Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Canada)*, 7 April 1999, CCPR/C/79/Add.105 (1999) [hereinafter *Concluding Observations, HRC, 1999*].

Argentina.[44] Further, social and economic rights are protected in a number of regional instruments, such as the European Social Charter.[45] That the new South African Constitution includes justiciable social and economic rights guarantees, and that the UK has recently acceded to the European Social Charter, suggests that the protection of social and economic rights will be a distinct feature of future developments in transnational legal standards. In *Grootboom* v. *Oostenberg Municipality*,[46] for instance, the Constitutional Court of South Africa recently adjudicated, and upheld, a claim based upon the right to adequate housing guaranteed by the new South African Constitution. Holding poverty-related Charter claims injusticiable thus also has the consequence of leaving Charter jurisprudence out of step with emerging transnational human rights standards and jurisprudence.

As Sossin argues, it is because the consequences of injusticiability holdings can be so serious that the reasoning upon which they are based must be principled and coherent. The reasoning of lower courts in poverty-related cases, however, is deficient in these respects. In rejecting poverty-related Charter claims, lower courts rely to some extent upon text-oriented arguments as to the difficulty of interpreting ss. 7 and 15 as providing protection against poverty-related threats to the equality, human dignity, and personal security of disadvantaged and vulnerable groups (i.e., arguments as to whether poverty-related claims are available for Charter adjudication). However, these arguments are usually supplemented with, and appear generally to be informed by, arguments that courts lack the institutional capacity and legitimacy to adjudicate such poverty-related claims (i.e., arguments as to whether poverty-related claims are suitable for Charter adjudication). Both types of arguments have deficiencies. With respect to the text-oriented arguments, the courts have failed to adequately address a number of relevant factors, including the social and economic aspects of the interests referred to in ss. 7 and 15, the legislative history of these sections, Canada's welfare state and social citizenship traditions, and Canada's international human rights commitments.[47] In addition, the courts have often relied upon simplistic

44 See, generally, Scott & Macklem, supra note 35; A. Eide, K. Krause, & A. Rosas, eds., *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 1995).

45 *European Social Charter (Revised)*, 3 May 1996, Eur. T.S. No. 163.

46 [2000] 3 B.C.L.R. 277 (C).

47 M. Jackman, 'The Protection of Welfare Rights Under the *Charter*' (1988) 20 Ottawa L.Rev. 257 [hereinafter 'Protection of Welfare Rights']. See also M. Jackman, 'Poor Rights: Using the *Charter* to Support Social Welfare Claims' (1993) 19 Queen's L.J. 65; Parkdale Community Legal Services, 'Homelessness and the Right to Shelter: A View from Parkdale' (1988) 4 J.L.Soc.Pol. 33; I. Morrison, 'Security of the Person and the Person in Need: Section Seven of the *Charter* and the Right to Welfare' (1988) 4 J.L.Soc.Pol. 1; I. Johnstone, 'Section 7 of the *Charter* and Constitutionally Protected

and ill-founded distinctions between, for instance, negative and positive obligations. With respect to the institutional capacity and legitimacy arguments, the courts have failed to account for the fundamental values at stake in poverty-related Charter claims, as well as for the difficulties that disadvantaged and vulnerable groups face in participating in the political process.[48] Further, the courts have failed to adequately explain their capacity concerns, to justify taking a static view of their capacity, and to distinguish those aspects of poverty-related claims they are capable of adjudicating from those they are not.[49]

Given these deficiencies, some of which are explored more deeply below, the decisions of lower courts holding poverty-related Charter claims injusticiable constitute one area of justiciability jurisprudence that stands to benefit from Sossin's analysis. In the remainder of this section I consider the implications of that analysis for those decisions. In doing so, I also draw attention to the respects in which those decisions are inconsistent with the Supreme Court's jurisprudence, which inconsistencies make the need to reconstruct this area of justiciability jurisprudence all the more pressing.

It is in his analysis of the political questions ground of injusticiability that Sossin considers the justiciability of poverty-related claims under the Charter or, as he describes it, the justiciability of disputes involving social and economic rights (*BJR* 191–4). At the outset of his consideration Sossin notes that while Canadian courts have generally been reluctant to invest Charter rights with social and economic content, in *Irwin Toy* the Supreme Court expressly refrained from foreclosing the possibility that s. 7 protects 'economic rights fundamental to human life and survival.'[50] Sossin then briefly summarizes, without evaluating, the arguments as to whether social and economic rights claims challenge the institutional capacity and legitimacy of the courts. Finally, after expressing agreement with the view that the effect of holding social and economic rights claims injusticiable is to downgrade their importance, Sossin concludes that the justiciability of social and economic rights claims remains an 'open question' (194). In general terms, then, Sossin's analysis confirms that, despite the decisions of lower courts, the question of the justiciability of poverty-related Charter claims remains to be resolved.

In resolving this question, according to Sossin's framework for justiciability determinations, judges ought to focus their attention upon the general issue of whether courts have the institutional capacity and

Welfare' (1988) 46 U.T.Fac.L.Rev. 1; J. Keene, 'Claiming the Protection of the Court: *Charter* Litigation Arising from Government "Restraint"' (1999) 9 N.J.C.L. 97.

48 See Jackman, 'Protection of Welfare Rights,' ibid., and Porter, supra note39.

49 Ibid.

50 *Irwin Toy*, supra note 7 at 1003–4.

legitimacy to adjudicate poverty-related Charter claims. For Sossin, this involves a consideration of whether there is a sufficient legal, factual, and evidentiary basis for resolving the claim; whether the claim involves too great a degree of extra-legal complexity; whether the positions of the parties to the claim can be presented in an adequately adversarial manner; and whether prior jurisdiction of the matter has been given to another administrative or political body. As I have mentioned, in reaching their decisions that poverty-related Charter claims are injusticiable, lower courts have relied upon arguments interpreting the sources of constitutional meaning, as well as arguments considering the limits of their institutional capacity and legitimacy. In general terms, then, the approach of lower courts is consistent with the approach suggested by Sossin. However, within this approach, there are aspects of the reasoning of lower courts that are inconsistent with Sossin's arguments and analysis. A consideration of the decision of the Ontario Court of Justice (General Division) in *Clark* v. *Peterborough Utilities Commission*[51] illustrates both the general consistency and the more particular inconsistencies.

The claims in *PUC* were brought by two plaintiffs, both of whom were in receipt of social assistance and sought electricity service for their respective rented homes from the Peterborough Utilities Commission (PUC). Ostensibly in accordance with prevailing PUC policy, each was asked to provide a security deposit as assurance of payment of future charges. One plaintiff, Debbie Clark, agreed to pay the deposit in instalments over a period of about a month. Service commenced and Clark received an additional amount of social assistance that covered part of the deposit requirement. However, she was threatened with disconnection when the remainder of the deposit was left unpaid, despite the fact that her utility bill was otherwise fully paid. For Clark, a single mother with a disabled child, this threat, which if carried out would have left her unable to heat her home, refrigerate her food, and so on, was all too serious. The other plaintiff, John Baker, was refused a payment-by-instalment plan and also threatened with disconnection when the security deposit went unpaid, again despite otherwise not being in arrears.

The plaintiffs challenged the security deposit requirement on administrative law grounds, as in breach of the Public Utilities Act,[52] and on constitutional grounds, as a violation of their rights under ss. 7 and 15 of the Charter. Howden J. eventually upheld the administrative law ground of challenge in finding that the security deposit policy was so vague as to improperly place discretion in the hands of PUC staff, contrary

51 *PUC*, supra note 31.
52 R.S.O. 1990, c. P.52.

to the terms of the legislative delegation of discretion to the PUC.[53] Before so holding, Howden J. held that there was insufficient evidence to support the s. 15 claim and held the s. 7 claim injusticiable. In reaching this injusticiability holding, Howden J. conducted a text-oriented inquiry into the possibility that s. 7 could be interpreted to protect the plaintiffs and concluded that the section did not establish any entitlement to the social and economic prerequisites of security of the person, such as utility services. In the course of doing so he explained the normative rationale behind this exclusion:

> This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by the courts under the guise of 'principles of fundamental justice' under s. 7. I want to be very clear. This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judicial in a democracy. It raises issues of priority and extent of social assistance and quality of life to which all should be automatically entitled. Courts are well equipped to hear and consider evidence, analyze concepts of law and justice, and apply those principles to the evidence. I think in these submissions the applicants seek to introduce social and economic ideas and policies which were intended to be considered and debated in a political forum when property-economic rights were excluded from s. 7. It is equally dangerous to attempt to introduce personal beliefs or agendas to a good end through improperly or ill-suited means as to do so to a less agreeable end, as exemplified by the judicial frustration of social welfare legislation for decades in the United States in the name of freedom of contract and the Fourteenth Amendment.[54]

In categorizing the judicial process as both an improper and an ill-suited means for the determination of the plaintiffs' claim in *PUC*, Howden J. can be read as arguing that the claim challenged both the institutional capacity and the legitimacy of his court. As such, Howden J.'s approach to the question of the justiciability of the s. 7 claim is consistent with the approach advocated by Sossin. Further, some of the more specific factors that Sossin identifies as relevant to determining the limits of a court's institutional capacity and legitimacy are present in Howden J.'s judgment. For instance, in mentioning that the claim 'raises issues of priority and extent of social assistance and quality of life to which all should be automatically entitled,' Howden J. may be drawing attention to what Sossin labels 'extra-legal complexity.' Similarly, How-

53 This holding was only a hollow victory for the plaintiffs, since it did not prevent the PUC from re-establishing this policy, albeit in clearer terms.

54 *PUC*, supra note 31 at 28.

den J.'s comment that courts are 'well equipped to hear and consider evidence, analyze concepts of law and justice, and apply those principles to the evidence' echoes Sossin's contention that judges ought to consider whether there is a sufficient legal, factual, and evidentiary basis for resolving a claim.

But if Howden J.'s approach to the question of the justiciability of the s. 7 claim in *PUC* is therefore generally consistent with the framework suggested by Sossin, there are nevertheless a number of respects in which his reasoning is inconsistent with the arguments and analysis on which that framework rests. These inconsistencies can be made apparent by considering the extent to which criticisms of Howden J.'s reasoning are supported by Sossin's arguments and analysis. At the same time, such consideration also reveals some points at which Howden J.'s reasoning is inconsistent with developments in the jurisprudence of the Supreme Court of Canada.

In the first place, inconsistencies can be revealed in Howden J.'s reasoning with respect to the limits of his institutional legitimacy. He appears to have concerns over the legitimacy of adjudicating the plaintiffs' claim because of the degree of social obligation the plaintiffs were asking him to recognize and the kind of value and policy judgements such a recognition purportedly requires. Presumably, Howden J. believes that the value and policy judgements at issue are in some sense more 'political' than 'legal.' But it is difficult to see how adjudication of the plaintiffs' claim involved values of a kind distinct from other types of Charter claims. As the plaintiffs put it, '[d]eprivation of electricity results in an absence of heat, light, cooling, refrigeration, hot water and fire alarms and would render their homes uninhabitable.'[55] In turn, being deprived of a habitable home means being deprived of the dignity, equality, freedom, and security that many, if not all, Charter claims seek to protect.[56] Indeed, that a society ought to ensure adequate housing for its citizens is not merely a 'personal belief or agenda'; it is an international human rights obligation to which Canada has committed itself. Howden J. can thus be criticized for failing to explain why it is improper for courts to make the kind of value and policy judgements at issue in this claim. Moreover, he needed to explain why the possibility of having to adjudicate these value and policy judgements precludes the adjudication of the claim in its entirety. Poverty-related claims may take issue with social and economic policy judgements, and it may not be legitimate for courts to intervene in some of those judgements. However, such claims also

55 Ibid. at 25.

56 See articles cited supra note 47. See also, *e.g.*, J. Waldron, 'Homelessness and Freedom' (1991) 39 U.C.L.A.L.Rev. 295.

engage the underlying normative values that the courts have not only the legitimacy but also the responsibility to protect under the Charter – is it legitimate for a court to refuse to adjudicate Charter claims alleging threats to fundamental Charter values simply because those threats also involve 'political' judgements as to social and economic policy?

This question has been addressed by Bruce Porter, who argues that lower courts, in doubting their capacity and legitimacy to adjudicate poverty-related claims, have misinterpreted and misapplied an observation made by La Forest J. in *Andrews* v. *Law Society of British Columbia*.[57] In *Andrews*, La Forest J. cautioned that '[m]uch economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.'[58] According to Porter,

> Admonishing courts not to second-guess legislative policy choices in the social and economic realm, Justice La Forest did not suggest [, as lower courts seem to think,] that there are no fundamental values or human rights at stake in the social and economic realm. Rather, he distinguished the appropriate role of courts in protecting 'fundamental values' from the inappropriate use of the *Charter* as a 'tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society.'[59]

Since *Andrews*, the Supreme Court has upheld a number of Charter challenges affecting the social and economic decisions of governments, in particular *Tetreault-Gadoury* v. *Canada*,[60] *Eldridge*, *Reference re Remuneration of Provincial Court Judges*,[61] *M.* v. *H.*, and *J.G.* What these decisions indicate is that social and economic policy-making can have an impact upon the fundamental values protected by the Charter and that courts should not abandon their responsibility to monitor those impacts.[62] Inconsistently with these decisions, the approach taken by Howden J. delegitimates the adjudication of the poverty-related claim before him by failing to recognize the fundamental values at stake in that claim and/or

57 [1989] 1 S.C.R. 123 [hereinafter *Andrews*].

58 Ibid. at 194.

59 Porter, supra note 39 at 161.

60 [1991] 2 S.C.R. 22.

61 [1997] 3 S.C.R. 3.

62 While there are cases in which the Supreme Court has rejected challenges with implications for social and economic policy making, such as *Egan* v. *Canada* (see note 73 infra), *McKinney* (supra note 21), and *R* v. *Prosper*, [1994] 3 S.C.R. 236, these do not amount to contrary indications because, unlike the lower courts in poverty-related Charter cases, the Supreme Court recognized the fundamental values at stake and did not so readily assume that the court had no role to play in protecting them.

by failing to appreciate that the purported need to respect certain policy judgements neither requires nor justifies abandoning the responsibility to protect those values.[63]

Further, in suggesting that the issues arising from the claim are appropriately dealt with by legislatures, Howden J. seems not to appreciate the difficulty that impoverished claimants face in drawing the attention of legislators to such issues. As Martha Jackman has observed,

> In contrast to the Canadian financial and business community, those groups which have been most affected by social welfare cutbacks, although numerically significant, are both poor and inadequately organised. ... The end result of the inability of these groups to compete for the attention of policy makers is that their interests have largely been ignored.[64]
>
> ...
>
> While the poor may not be well represented by the courts, neither are they well represented by the legislature.[65]

The attention the Supreme Court has on occasion given to the process of public consultation preceding the introduction of legislation that may be the subject of Charter challenge indicates that the Court may be concerned about this problem as well. In *RJR-MacDonald*, for instance, part of the reason that La Forest J, dissenting, was willing to uphold legislation regulating tobacco advertising and marketing was the extensive process of consultation between the government and interested parties.[66] Similarly, in *M.* v. *H.*, Bastarache J. suggested that with respect to exclusionary government decisions, unelected delegated decision makers, as compared to their legislative counterparts, 'are presumptively less likely to have ensured that their decisions have taken into account the legitimate interests of the excluded group'[67] and so are presumptively less entitled to deference. The Supreme Court's concern for the inclusiveness of political decision-making processes has particular relevance to the adjudication of poverty-related Charter claims because, as illustrated by the circumstances in *PUC* and in similar cases such as *Masse*,[68] decisions

63 In fairness to Howden J., it must be acknowledged that his decision in *PUC* predated most of the Supreme Court decisions referred to here. It is for this reason that I speak in terms of 'the approach taken by Howden J.'

64 Jackman, 'Protection of Welfare Rights,' supra note 47 at 282.

65 Ibid. at 336.

66 For discussion of this aspect of La Forest J.'s judgment, and the broader point of the relevance of democratic process to Charter adjudication, see M. Jackman, 'Protecting Rights and Promoting Democracy' (1996) 34 Osgoode Hall L.J. 661.

67 *M.* v. *H*, supra note 23 at para. 315.

68 Supra note 3.

affecting access to basic services and social assistance are often made by regulation or without legislative consultation.

In refusing to engage, to any extent, the threat that poverty poses to fundamental Charter values, and in failing to perceive the problems that the poor face in accessing the political process, the approach taken by Howden J. is therefore not merely open to criticism but also apparently inconsistent with developments in the Supreme Court's jurisprudence. In contrast, Sossin's analysis lends support to the view that the gravity of the threat posed by poverty, together with the problems of political marginalization, are relevant considerations in determining the institutional legitimacy of adjudicating poverty-related claims under the Charter. For instance, in his identification of the concerns common to the justiciability doctrines he has examined, Sossin identifies a 'concern not to deny worthy parties and issues, both present and future, a proper judicial resolution' (*BJR* 233). Also, in indicating the factors that courts should take into account in determining the justiciability of political questions, Sossin includes 'the likelihood that the dispute could be resolved through political means, the nature of the issue and its seriousness for the party seeking judicial review' (200). The approach taken by Howden J. to institutional legitimacy issues, therefore, is not only inconsistent with developments in Supreme Court jurisprudence but is also inconsistent with Sossin's analysis.

Inconsistencies can also be revealed in Howden J.'s reasoning with respect to the limits of his institutional capacity. Howden J. appears to have concerns over his institutional capacity when he suggests that the capacity of Charter adjudication is limited to a process of analysing concepts of law and justice and applying them to evidence heard and considered. This may be so, but it hardly explains how the claim at hand threatened that capacity. The claim may have involved social and economic ideas and policies, but, as in any Charter case, they were translated into concepts of law and justice and presented with supporting evidence and arguments. Howden J. can thus also be criticized for failing to explain his capacity concerns adequately. As the discussion of the Labour Trilogy and deference cases in Part II above shows, Howden J.'s lack of explanation stands in marked contrast to the Supreme Court's attempts to identify and explain the limits of its institutional capacity. And, as should also be evident from the preceding section, Sossin regards inadequate explanation as a serious problem in justiciability jurisprudence. Indeed, immediately before outlining his framework for justiciability determinations, Sossin comments that '[t]oo often, Canadian courts have failed to adequately explain their decisions relating to justiciability. More often, it appears courts are applying a subjective "smell test" rather than a set of established principles in a coherent and

pragmatic fashion' (*BJR* 237). There can therefore be no doubt that Sossin's analysis supports the Supreme Court's attempts at explanation, which, in turn, reveals a further inconsistency between Howden J.'s reasoning and the reasoning underlying Sossin's framework, as well as the approach of the Supreme Court.[69]

While the general approach taken by Howden J. in *PUC* may therefore be consistent with the framework for justiciability determinations developed by Sossin, a consideration of the extent to which criticisms of Howden J.'s reasoning are supported by the arguments and analysis underlying that framework reveals a number of more specific points at which that reasoning is inconsistent with Sossin's. Further, it reveals that the approach taken by Howden J. is also inconsistent with Supreme Court jurisprudence at these points. Since the reasoning in *PUC* is illustrative of the reasoning in lower court decisions holding poverty-related Charter claims injusticiable, this consideration also suggests that a reconstruction of this area of justiciability jurisprudence in accordance with Sossin's analysis and framework would point towards a confirmation of the justiciability of those claims. Moreover, Supreme Court jurisprudence appears to point in the same direction.

69 Two significant further criticisms can be made of Howden J.'s treatment of institutional capacity concerns, but, since the issues they raise are not addressed in Sossin's analysis, I will only note them. First, even if Howden J. had adequately explained his capacity concerns, and even if those concerns were valid, he can be criticized for failing to consider whether his institutional capacity might have been developed to meet the concerns. As Scott & Macklem point out, supra note 35 at 27, justiciability is, in general, context-dependent and has evolved over time. More particularly, institutional capacity is not inherent in the nature of an institution but, rather, is a function of experience and effort (ibid. at 84). As is illustrated by the innovative remedial technique used in *Reference Re Language Rights Under the Manitoba Act 1870*, [1985] 1 S.C.R. 721 [hereinafter *Manitoba Language Reference*], in which the parties were required to submit proposals for gradually remedying the failure to translate statutes and regulations, the institutional capacity of Canadian courts is not static. (For discussion of this and other remedial innovations, see Gillespie, supra note 15.)

Second, Howden J. can be criticized for failing to examine adequately whether alternative social decision-making institutions, such as the legislature, to which his injusticability holding would push the claim, had any greater capacity for dealing with the issues it raised. As Neil Komesar has observed, 'Issues at which an institution, in the abstract, may be good may not need that institution because one of the alternative institutions may be even better. In turn, tasks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse.' N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: University of Chicago Press, 1994) at 6. In other words, if what Komesar refers to as 'comparative institutional analysis' suggests that the alternative institutions have no greater capacity than the courts to deal with poverty-related claims, then courts should be more cautious about holding such claims injusticiable, especially given the serious consequences of so holding.

The conclusion that both Sossin's analysis and framework and the jurisprudence of the Supreme Court point towards the justiciability of poverty-related Charter claims can be reinforced by considering a final criticism made of lower court injusticiability decisions in cases such as *PUC*, namely, that lower courts have failed to investigate whether the challenges to institutional capacity and legitimacy raised by poverty-related claims might have been responded to by means other than injusticiability. A consideration of this criticism, and of its consistency with Sossin's analysis and Supreme Court jurisprudence, is the subject of Part IV.

IV

The criticism that lower courts have failed to investigate means beyond injusticiability for responding to the institutional capacity and legitimacy concerns raised by poverty-related Charter claims stems from a recognition of the serious consequences of holding such claims injusticiable. As the facts and judgments in *Masse* and *PUC* make clear, the inability to seek, let alone obtain, meaningful judicial protection against significant reductions in social assistance and withdrawals of utility services has the most serious immediate consequences. Given the seriousness of these consequences – not to mention the broader ramifications for the relevance of the Charter to vulnerable and disadvantaged groups and the observance of international human rights norms in Canada – lower courts can be criticized for failing to consider whether there were more appropriate means of responding to, alleviating, or managing their concerns about institutional capacity and legitimacy. More particularly, they can be criticized for failing to recognize and consider the option, evident from a comparison of the Labour Trilogy and deference cases, of responding to institutional capacity and legitimacy challenges through deference rather than through injusticiability. Since the possibility of moving beyond injusticiability is not considered in Sossin's analysis, in this section I identify and explore this possibility as revealed in Supreme Court jurisprudence, before concluding with a consideration of its consistency with Sossin's analysis.

That deference may be a more appropriate option for responding to institutional capacity and legitimacy concerns than injusticiability, and that it has long been available in Charter adjudication, can be demonstrated by briefly contrasting the decisions in the *Alberta Labour Reference* and *Irwin Toy*. As mentioned in Part II above, in the *Alberta Labour Reference* a majority of the Supreme Court, led by McIntyre J., rejected an argument that the Charter's s. 2(d) guarantee of freedom of association implied a right to strike. In so holding, McIntyre J. relied both upon a text-oriented argument addressing the sources of constitutional meaning

and upon further considerations 'grounded in social policy against any such implication.'[70] Although the majority's position meant that the claim was rejected before the s. 1 stage of Charter review, the following passage illustrates that these social policy considerations included institutional legitimacy and capacity problems posed by the need to adjudicate legislative balancing, especially in the s. 1 stage:

> In every case where a strike occurs and relief is sought in the courts, the question of the application of s. 1 of the *Charter* may be raised to determine whether some attempt to control the right may be permitted. This has occurred in the case at bar. The s. 1 inquiry involves the reconsideration by a court of the balance struck by the legislature in the development of labour policy. The court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike.... None of these issues [including those in the other cases comprising the Labour Trilogy] is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the legislature. However, if the right to strike is found in the *Charter*, it will be the courts which time and time again will have to resolve these questions, relying only on the evidence and arguments presented by the parties, despite the social implications of each decision. This is a legislative function which the courts should not intrude.[71]

In the *Alberta Labour Reference*, then, the majority relied upon concerns over institutional capacity and legitimacy, especially as arising in the s. 1 stage of Charter review, in holding the claim injusticiable.

In contrast, when similar concerns arose two years later in *Irwin Toy*, they did not lead to a finding of injusticiability but, rather, to the adoption of a deferential position in the application of s. 1 of the Charter.[72] *Irwin Toy* concerned a challenge to Quebec legislation prohibiting commercial advertising directed at persons under the age of thirteen. The prohibition was challenged on the grounds that, amongst other things, it violated the s. 2(b) freedom of expression. The first question for the court was whether corporate advertising was protected by the section. Dickson C.J.C and Lamer and Wilson JJ. (in a joint judgment) regarded this as the same type of question as arose in the *Alberta Labour Reference*, namely, a question as to the scope of a Charter freedom. In the result, the court was unanimous in holding that the advertising in question did constitute expression the freedom of which was protected by s. 2(b). But in the s. 1 stage the law was upheld by a majority (Dickson

70 *Alberta Labour Reference*, supra note 18 at 414.

71 Ibid. at 419–20.

72 It is worth noting that the option of s. 1 deference was recognized and, to some extent, taken by Dickson C.J.C. in *PSAC*, supra note19.

C.J.C, Lamer and Wilson JJ.) that was willing to 'attenuate the *Oakes* standard of justification'[73] in an early instance of deference. As the following passage illustrates, the majority's justification for adopting this position lay in institutional legitimacy and capacity problems posed by the need to adjudicate social science and legislative balancing:

> ... in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how the balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.... When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.[74]

In adjudicating the claim in *Irwin Toy*, the majority thus saw themselves as having to consider questions of a similar type – involving social science and legislative balancing – as those considered in the *Alberta Labour Reference*. Further, in considering those questions, the majority in *Irwin Toy* expressed concerns about their institutional capacity and legitimacy similar to those expressed by the majority in the *Alberta Labour Reference*. However, rather than responding to those concerns by holding the claim injusticiable, as did their counterparts in the *Alberta Labour Reference*, the majority in *Irwin Toy* responded by adopting a deferential position in the s. 1 review stage. Adopting a deferential position was a more appropriate response than holding the claim injusticiable, in the sense that it neither denied constitutional recognition of the interests infringed upon by the legislation at issue nor prevented a judicial assessment of whether the infringement met minimum (deferential) standards of justifiability.

The lesson of *Irwin Toy*, then, is that where there is interpretive doubt as to the scope of a Charter right or freedom – as there seems to be in poverty-related cases, especially those under s. 7 – and where there are concerns about the institutional capacity and legitimacy of undertaking a s. 1 review of violations of a doubtful right or freedom, it is not necessarily the case that those concerns must count against a recognition of the

73 This is how the approach of the majority was characterized in the subsequent case of *RJR-MacDonald*, supra note 22 at para. 68 (per La Forest J.).

74 *Irwin Toy*, supra note 7 at 993.

doubted right or freedom. This option of responding to interpretive doubt and institutional capacity and legitimacy concerns through deference in the application of s. 1, rather than through injusticiability, has been confirmed in a number of subsequent Supreme Court Charter decisions, including *Egan* v. *Canada*,[75] *Eldridge*, and *M.* v *H.* (all of which dealt with equality claims that have implications for social and economic policy-making). Furthermore, the option of adopting a deferential position has been used in subsequent cases where there has been no interpretive doubt but still institutional capacity and legitimacy concerns – for example, *McKinney*.

But just as developments in Supreme Court jurisprudence have established that deference in the s. 1 stage of Charter review may be a more appropriate response to institutional capacity and legitimacy concerns than injusticiability, so too have they suggested an alternative to the response of s. 1 deference, namely, deference in the remedial stage. An example of the possibility of addressing institutional capacity and legitimacy concerns in the remedial rather than the s. 1 stage is provided by the Supreme Court's decision in *Eldridge*.[76] When the claim in *Eldridge* was considered by the BC Court of Appeal, Lambert J., dissenting on this point, held that the failure of the Province to ensure the availability of medical translation services to deaf patients infringed the Charter's s. 15 guarantee of equality. However, in the s. 1 stage, Lambert J. adopted a deferential position and ultimately excused the infringement. In Lambert J.'s view, deference was required because courts lacked the standards, expertise, and information to evaluate decisions as to the appropriate allocation of scarce health-care resources:

> In my opinion the kind of adverse effects discrimination which I consider has occurred in this case should be rectified, if at all, by legislative or administrative action and not by judicial action. The evidence in this case disclosed that legislative or administrative action in relation to medical services for deaf people is being evaluated and considered. That evaluation and consideration can take into account many matters which were not in evidence before us. In those circumstances I have concluded that this is a case for judicial restraint and for deference under the Constitution and under s. 1 of the *Charter* to legislative policy and administrative expertise.[77]

In contrast, while the Supreme Court also held that s. 15 had been infringed, it was reluctant to adopt as deferential a position as that occupied by Lambert J. Thus, in the s. 1 stage, the Court held that the

75 [1995] 2 S.C.R. 513 [hereinafter *Egan*].

76 Supra note 8.

77 *Eldridge* v. *British Columbia (Attorney-General)* (1995), 7 B.C.L.R. (3d) 156 at para. 59 (C.A.).

justification offered by the government in defence of its equality violation was insufficient to satisfy even a deferential standard of s. 1 review. The interests and values at stake in ensuring access to medical services for disabled groups were considered so fundamental that, in the view of the Court, they easily outweighed the costs associated with ensuring such access. And insofar as this determination required a re-evaluation of decisions as to the appropriate allocation of finite health-care resources, and the appropriate means of providing health-care services, the Court argued that such re-evaluations could be left to the government, and deferred to, in the remedial stage. As the Court put it,

> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services ...[78]

The Supreme Court in *Eldridge* thus took responsibility for establishing the result to be achieved but was also prepared to defer to the government's greater capacity and legitimacy to determine the means of achievement.[79] When compared to the result reached by Lambert J. in the lower court, the recognition by the Supreme Court that institutional capacity and legitimacy concerns could be responded to in the remedial rather than in the s. 1 stage can be regarded as integral to the success of the claim. The decision of the Supreme Court in *Eldridge* thus shows how deference in the remedial stage may be an alternative to deference in the s. 1 stage.

78 *Eldridge*, supra note 8 at para. 96.

79 A similar remedial technique has been used in a number of cases requiring government action to remedy Charter violations, including *Manitoba Language Reference*, supra note 72 (failure to translate statutes and regulations into French); *Mahe* v. *Alberta*, [1990] 1 S.C.R. 342 (failure to provide properly organized minority language education); *Marchand* v. *Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596, 55 O.R. (2d) 638 (H.C.J.) (failure to provide minority language educational facilities); *Dixon* v. *British Columbia (A.G.)* (1989), 59 D.L.R. (4th) 247, 35 B.C.L.R. (2d) 273 (S.C.) (failure to properly apportion electoral districts); *J.G.*, supra note 8 (failure to ensure legal counsel for custody appeal).

When put together with the growing line of cases that have developed s. 1 deference as an alternative to injusticiability, the decision of the Supreme Court in *Eldridge* suggests a broader point about the relationship between the stages of Charter adjudication – that is, the stages of violation, s. 1 (with its own distinct stages) and remedy review – and institutional capacity and legitimacy problems. What it suggests, in my view, is that the various stages of Charter adjudication provide discrete moments and opportunities for disaggregating or disassembling the complex issues, and the associated capacity and legitimacy challenges, often raised by rights claims.[80] In other words, while a rights claim involving a complex social problem such as poverty may, taken as a whole, seem to overwhelm the institutional capacity and legitimacy of the courts, the structure of Charter adjudication provides a means for disassembling the claim, and the problem, into more manageable questions and issues. And as the structure of Charter adjudication disassembles the claim, so too does it disassemble the challenges to institutional capacity and legitimacy that it poses. In so doing, the structure of Charter adjudication provides an opportunity for a more precise and contextual assessment of those challenges. In turn, it provides an opportunity for the development of responses to those challenges, such as s. 1 or remedial deference, that are more precise and contextual – and therefore more appropriate – than injusticiability.

A final and significant respect in which the decisions of lower courts holding poverty-related Charter claims injusticiable are inconsistent with the jurisprudence of the Supreme Court is, therefore, their failure to investigate the opportunity that the structure of Charter adjudication provides for responding to institutional capacity and legitimacy concerns by means beyond injusticiability. As the above discussion shows, that there is an option of responding to those concerns through deference, whether in the s. 1 or in the remedial stage, rather than through injusticiability, cannot be doubted. But once forms of deference are recognized as alternatives to injusticiability, it becomes problematic to consider a finding of injusticiability without considering the deference alternatives. While poverty-related Charter claims may pose numerous challenges to the institutional capacity and legitimacy of courts, responding to those challenges by holding such claims injusticiable has a number of serious consequences. Those consequences should not be brought about lightly or unnecessarily, nor, indeed, in the face of contrary trends in the jurisprudence of the Supreme Court. And so, to the extent that developments in that jurisprudence provide lower courts with opportunities to manage

80 For a similar view of the potential of the stages of Charter adjudication to manage capacity and legitimacy concerns, see the discussion of remedial deference in K. Roach, 'Reapportionment in British Columbia' (1990) 24 U.B.C.L.Rev. 79 at 93–101.

the challenges that poverty-related Charter claims pose to their institutional capacity and legitimacy, and thus avoid the consequences of holding those claims injusticiable, those opportunities should be pursued.

All that remains, then, is to explain how the pursuit of means beyond injusticiability for responding to institutional capacity and legitimacy concerns is consistent with Sossin's analysis. An initial difficulty in this respect is the fact that Sossin draws a distinction between the functions of deference and political questions-based justiciability and, on the basis of this distinction, omits a consideration of deference decisions from his inquiry. On the one hand, according to Sossin, determinations of political questions-based justiciability perform the function of determining the threshold jurisdiction of judicial review or, in other words, the scope, or boundaries, of judicial review (*BJR* 171, 230). On the other hand, in his view, determinations of deference perform the function of determining the approach to judicial review or, in other words, the scope of valid government action (171). Consequently, Sossin argues, deference determinations do not touch upon the threshold jurisdiction of judicial review, are not justiciability-related, play no role in setting the boundaries of judicial review, and, therefore, can safely be omitted from analysis. Given this line of argument, it would seem inconsistent with Sossin's analysis to suggest that courts ought to consider responding to institutional capacity or legitimacy concerns through deference rather than through injusticiability.

But there are problems with Sossin's line of argument. In particular, the distinction he posits between the function of justiciability (determining the scope of judicial review) and the function of deference (determining the scope of valid governmental action) strikes me as more imagined than real: are these not merely two sides of the same coin? Both justiciability and deference limit the scope of judicial review and, in so doing, establish a scope for valid governmental action. That justiciability does so at the very threshold of Charter adjudication, whereas deference does so beyond the threshold, is immaterial. And this seems confirmed by what Supreme Court jurisprudence reveals about the relevance of institutional capacity and legitimacy concerns to both justiciability and deference jurisprudence. In my view, this dual relevance indicates that the difference between deference and justiciability is more one of degree than one of kind. In other words, the question of whether to respond to a problem of institutional capacity or legitimacy through injusticiability or through deference is best understood as a question of the degree of incapacity or illegitimacy. Specifically, it is only if the degree of institutional incapacity or illegitimacy is too great to be managed by means of deference that injusticiability should be considered. Consequently, and contrary to Sossin's line of argument, decisions about justiciability are intimately related to decisions about deference.

Furthermore, once deference decisions are understood to be just as much about institutional capacity and legitimacy concerns as justiciability decisions, support for the view that judges making justiciability determinations ought to explore opportunities for deference can be drawn from Sossin's more general analysis. Recognizing the significance of justiciability determinations, Sossin accepts that judges must enjoy some flexibility in making those determinations. But, at the same time, he insists that justiciability determinations must also be principled and coherent. To that end, he positions institutional capacity and legitimacy concerns at the centre of justiciability jurisprudence and then calls for, and begins, a more careful and coherent consideration of the limits of the institutional capacity and legitimacy of Canadian courts. The exploration of opportunities for responding to institutional capacity and legitimacy concerns through deference, rather than through injusticiability, is consistent with this analysis because, as the jurisprudence of the Supreme Court shows, deference can constitute a more precise and contextual response to such concerns. The option of deference, in other words, not only adds flexibility but also improves coherence.

V *Conclusion*

With *Boundaries of Judicial Review* Lorne Sossin has made a valuable contribution to Canadian legal scholarship and practice. On the one hand, he has exposed the lack of principle and coherence afflicting the various doctrines that constitute the law of justiciability in Canada. On the other hand, he has provided a framework, and accompanying analysis, for coherently reconstructing Canadian justiciability jurisprudence around the principle that courts ought not to adjudicate cases beyond either their institutional capacity or their legitimacy.

One area of justiciability jurisprudence in need of reconstruction is that of lower court decisions holding poverty-related Charter claims injusticiable. Despite the serious consequences of these decisions, the treatment of institutional capacity and legitimacy issues upon which they are based is not only incoherent but also inconsistent with the jurisprudence of the Supreme Court. The utility and relevance of Sossin's framework, and the analysis upon which it rests, is therefore illustrated by considering the extent to which that treatment and criticisms of it are consistent with that framework and analysis. In particular, what such a consideration reveals is that, while the general approach of those decisions to institutional capacity and legitimacy issues, as represented by the judgment of Howden J. in *PUC*, is consistent with Sossin's framework and analysis, there are a number of more specific points at which inconsistencies emerge. At each of these more specific points, the reasoning of lower courts has been subjected to searching criticisms that find support in Sossin's analysis, as well as in Supreme Court jurisprudence. Ultimately,

this suggests not only that an application of Sossin's framework and analysis would assist in improving lower court treatment of institutional capacity and legitimacy issues in this area of justiciability jurisprudence but also that it would point those courts towards holding poverty-related Charter claims justiciable. Moreover, what this also suggests is that Supreme Court jurisprudence points in the same direction.

An important step in moving beyond injusticiability as a response to the institutional capacity and legitimacy concerns raised by poverty-related Charter claims is the recognition of the opportunity that the structure of Charter adjudication provides to disassemble those concerns. The Supreme Court's gradual development of s. 1 and remedial deference as alternative responses to institutional capacity and legitimacy concerns amounts to a recognition of this opportunity. At the same time, pursuit of this opportunity, and of these alternatives to injusticiability, is entirely consistent with Sossin's analysis. The failure of lower courts, in determining the justiciability of poverty-related Charter claims, to pursue such alternatives, particularly as developed in Supreme Court jurisprudence, is deeply problematic, especially given the serious consequences of holding such claims injusticiable. In the forthcoming case of *Gosselin*, however, the Supreme Court has an opportunity to address this and other failings of the lower court decisions in this area. If it does so, then the Court will also have taken an important step towards ensuring the relevance of the Charter to disadvantaged and vulnerable groups, as well as towards securing the realization of the international human rights standards to which Canada has committed itself.

But in encouraging the Supreme Court to continue its deference-based movement beyond injusticiability, it is important to note that responding to institutional capacity and legitimacy concerns through deference may bring its own problems, which have been recognized by the Court itself. For instance, in *RJR-MacDonald*, McLachlin J. expressed concern about the possibility that courts might adopt too deferential a position under s. 1 and so undermine Charter adjudication:

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[81]

81 *RJR-MacDonald*, supra note 22 at para. 136.

In other words, if taken too far, or if applied without principle or coherence, deference in the s. 1 stage may make the constitutional recognition of the interests at stake in some Charter claims meaningless and end up reproducing the consequences of injusticiability. As a result, the adoption of a deferential position by courts must be carefully undertaken and closely monitored. As with decisions about justiciability, this involves ensuring that decisions about deference accurately and genuinely reflect the limits of the institutional capacity and legitimacy of courts. And as the words of McLachlin J. remind us, this includes acknowledging that the courts have a legitimate role to play in securing for all citizens, though especially for vulnerable and disadvantaged groups, the fundamental interests – such as dignity, equality, freedom, and security – protected by the Charter.