Competence Concerns in Charter *Adjudication: Countering the Anti-Poverty Incompetence Argument*

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Canadian courts are reluctant to impose anti-poverty obligations upon governments under the *Canadian Charter of Rights and Freedoms*. Concerns over the limits of the institutional competence of courts have played an explicit role in this reluctance. The anti-poverty incompetence argument that has thus emerged is an instance of a broader concern over competence that is evident across the spectrum of types of *Charter* cases.

This article traces the emergence of a judicial framework for recognizing and responding to competence concerns in early *Charter* adjudication and describes the main lines of its evolution in subsequent cases. At the same time, and for the most part remaining within the confines of issues and arguments contained in accumulated *Charter* case law, the article critically evaluates the ongoing application of the framework in anti-poverty *Charter* cases. The central argument of the article is that the case law on competence concerns cannot justify placing relatively greater limits on the availability or rigour of *Charter* protection for anti-poverty claims than for other types of claims. Indeed, the argument is that the case law in fact offers encouragement to courts to pursue responses that manage the concerns or improve competence, thereby allowing equally fulsome protection for anti-poverty claims.

Les tribunaux canadiens sont peu enclins à imposer des obligations de lutte antipauvreté aux gouvernements selon les termes de la *Charte canadienne des droits et libertés*. Les préoccupations quant aux limites à la compétence institutionnelle des tribunaux ont particulièrement motivé ces hésitations. L'argument d'incompétence en matière de revendications antipauvreté qui s'est manifesté reflète un souci plus large quant à la compétence, souci qui est évident dans tous les types de causes intentées en vertu de la *Charte*.

Cet article trace l'émergence d'un cadre judiciaire qui reconnaîtrait et qui répondrait aux questions de compétence manifestes dans les toutes premières décisions prises en vertu de la *Charte,* tout en exposant les grandes lignes de l'évolution de ce cadre dans les décisions ultérieures. D'autant plus, et s'en tenant généralement aux questions et aux raisonnements soulevés dans la jurisprudence accumulée de la *Charte*, l'article évalue d'un oeil critique l'application continue de ce cadre dans les décisions en matière de lutte antipauvreté appuyées sur la *Charte*. La proposition centrale de l'article est que la jurisprudence traitant les questions de compétence ne peut justifier l'élaboration de limites relativement plus considérables à la disponibilité ou à la rigueur de la protection de la *Charte* en réponse aux revendications antipauvreté. En effet, l'auteur propose que la jurisprudence offre en réalité un encouragement aux tribunaux à proposer des réponses qui gèrent les questions ou améliorent la compétence, permettant ainsi une protection aussi ample aux revendications antipauvreté.

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Introduction

Over the first two decades of adjudication under the *Canadian Charter of Rights and Freedoms*,[1] Canadian courts have been reluctant to hold that the *Charter* requires governments to prevent poverty from undermining the rights and freedoms it protects. In other words, the courts have been unwilling to interpret and apply the *Charter* as imposing anti-poverty obligations upon governments. One argument offered by both judges and scholars in justifying this unwillingness is that courts lack the institutional competence to adjudicate anti-poverty *Charter* claims and, therefore, the availability or rigour of anti-poverty protection ought to be limited. In this article I take issue with this "anti-poverty incompetence argument".

The anti-poverty incompetence argument has played an express role in judicial hesitancy over anti-poverty *Charter* obligations since an early 1990s lower court decision rejecting a challenge to disqualification from social assistance due to the so-called "spouse-in-the-house" rule.[2] In the Supreme Court, it is evident as recently as the decision in *Gosselin v. Quebec (A.G.)*,[3] which rejected a challenge to Quebec's use of reduced rates of social assistance as an "incentive" for participation in employability programs. In that case, Justice Arbour wrote a strong dissent in favour of a *Charter* right to adequate social assistance. Nevertheless, she accepted that the competence challenges associated with trying to define adequacy might render the right unenforceable. Even more recently, the incompetence argument appears to have informed the Court's decision in *Chaoulli v. Quebec (A.G.)*,[4] which jeopardized Quebec's prohibition on private health insurance for medically necessary services available through the public health care system.[5] That case did not directly involve an anti-poverty adequate health care obligation, yet most members of the Court indicated their reluctance to recognize any such obligation.[6] For some of them, this reluctance was seemingly in part due to competence concerns.[7]

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

[2] See *Conrad v. Halifax (County)* (1993), 124 N.S.R. (2d) 251, 42 A.C.W.S. (3d) 1103 (N.S.S.C.) [*Conrad* cited to N.S.R.]. In rejecting a claim that s. 7 imposed an obligation to provide adequate social assistance and empowered a court to determine the criteria of provision, Gruchy J. stated, "I do not have the means, the information or the ability in the facts of the case before me to make any such determination. It is also strongly arguable that such pronouncements are not for a court; they are policy" (*ibid.* at 271).

[3] [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 2002 SCC 84 [*Gosselin* cited to S.C.R.].

[4] [2005] 1 S.C.R. 791, 254 D.L.R. (4th) 577, [2005] SCC 35 [*Chaoulli* cited to S.C.R.].

[5] I say "jeopardized" because the Supreme Court only achieved a majority on the issue of whether the prohibition was consistent with the Quebec *Charter of human rights and freedoms*, and the precise effect of inconsistency, and the remedial room available to the government, was not explained in the decision (*Charter of human rights and freedoms*, R.S.Q. c. C-12, s. 45 [*Quebec Charter*]).

[6] McLachlin C.J.C. and Major J. mentioned that the text of the *Charter* contained no express freestanding right to adequate health care (*Chaoulli, supra* note 4 at para. 104). Binnie and LeBel JJ.

The anti-poverty incompetence argument forms part of a broader landscape of *Charter* case law addressing the competence concerns that have arisen across a spectrum of *Charter* claims—from challenges to mandatory retirement[8] to complaints about restrictions on tobacco-product marketing,[9] from claims about minority-language education facilities[10] to challenges to rape-shield laws.[11] The general judicial recognition of competence concerns dates back almost to the inception of *Charter* adjudication.[12]

In this article I primarily assess and criticize the anti-poverty incompetence argument from the perspective of the broader landscape of competence-related *Charter* decisions. Thus, for the purposes of this article, I largely refrain from questioning the judicial analysis of why and when the competence of courts is challenged. I also leave undisturbed the judicial position that anti-poverty claims can raise competence challenges. Instead, my argument is that the accumulated *Charter* case law on competence concerns cannot justify placing relatively greater limits on the availability or rigour of *Charter* protection offered to anti-poverty claims than to other types of claims. Moreover, I argue, the accumulated case law ought to prompt courts to pursue responses that manage the challenges or improve competence, thereby allowing equally fulsome protection for anti-poverty claims.

The argument advanced in this article proceeds in the following stages. In Part I, I situate the issue of the competence of courts as one of the three main types of considerations that are relied upon in *Charter* interpretation and enforcement by the judiciary. This includes illustrations of the appearance of each type of consideration in anti-poverty *Charter* cases. In Part II, I explain and assess the anti-poverty

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stated that it would be open to the Quebec government to install a U.S.-style health care system (*ibid.* at para. 176).

[7] In *Chaoulli*, *ibid.*, all members of the Court recognized the relevance of competence concerns, particularly in relation to evaluating the social science evidence presented and assessing the impact of allowing a parallel private health care system. However, the majority defended its competence to adjudicate the health care claim before it, arguing that the Court had been presented with sufficient social science evidence, that no special expertise was required to evaluate it and that the conclusions that could be drawn from the evidence were clear. For its part, the minority oscillated between taking a similar position, but endorsing the trial judge's view that the evidence clearly supported the opposite conclusion to that drawn by the majority, and taking the position that the issues were contested and complex and that there was a need for judicial restraint in accordance with the purportedly superior competence of legislatures in such matters.

[8] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545, 118 N.R. 1 [*McKinney* cited to S.C.R.].

[9] *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, 187 N.R. 1 [*RJR-MacDonald* cited to S.C.R.].

[10] See *Mahe v. Alberta (A.G.)*, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69, 105 N.R. 321 [*Mahe* cited to S.C.R.] and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 577, 2003 SCC 62 [*Doucet-Boudreau* cited to S.C.R.].

[11] *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235, 191 N.R. 1 [*O'Connor* cited to S.C.R.].

[12] See Part II.B, below, for more on this topic.

incompetence argument in terms of accumulated *Charter* decisions dealing with the issue of competence. In so doing, I build my counter-argument. I begin with the early position that competence concerns were irrelevant to *Charter* adjudication and then discuss the cases that overturned that position and established a foundational framework for recognizing and responding to competence concerns. This includes a brief confirmation that the framework is consistent with academic theories on court competence. I next explain how the foundational framework allows for the anti-poverty incompetence argument, using the basic parameters of a generic *Charter* challenge to inadequate social assistance as context. I then identify various problems with the foundational framework and the implications of those problems for the anti-poverty incompetence argument. Keeping the problems in view, I go on to consider subsequent applications of, and developments in, the foundational framework. This includes an identification and assessment of the extent to which those developments address the problems and support or counter the anti-poverty incompetence argument.

As such, the argument of this article is largely confined to the four corners of accumulated *Charter* decisions and does not purport to be sufficient to overcome the various competence-based objections to anti-poverty constitutional rights adjudication that can be found in, or extrapolated from, the academic literature. But since the debates in the academic literature and in case judgments inform one another, addressing the arguments as they arise in the case law at least provides a resource for addressing the academic arguments. Further, the treatment of competence concerns in *Charter* adjudication has received very little academic attention to date, yet competence concerns are clearly playing a role in a broad spectrum of *Charter* cases. Therefore, some effort to describe and assess the role of competence concerns in *Charter* decision making, even if only on its own terms, is overdue.

I. Situating Competence as an Interpretive Consideration

In all types of *Charter* cases, anti-poverty and otherwise, considerations of competence are but one of the three main types of considerations relied upon by Canadian judges in interpreting and applying the *Charter*. The two other main types of considerations can be categorized as textual considerations and considerations of legitimacy.

Textual considerations include such commonly relied upon factors as the text of the specific *Charter* guarantee at issue; the surrounding text and the *Charter*'s textual structure and underlying principles; the political, social, legal, moral, and ethical traditions, values, and theories of Canadian society that inform textual meanings; and, of course, prior decisions and comparative and international legal doctrine—to the extent that any of these factors are not based upon considerations of competence or legitimacy. Such textual considerations clearly play a significant role in the reluctance of courts to recognize anti-poverty obligations. In relation to the possibility of an obligation to provide adequate social assistance, for instance, a crucial textual issue is the meaning to be given to the use of the word "deprived" in the section 7 guarantee that no person shall be deprived of the rights to life, liberty or security of the person

except in accordance with fundamental justice. In *Gosselin*, Justice Arbour took up the question of whether the use of "deprived" meant that the section only imposed negative obligations to refrain from interfering with the protected rights or whether it was capable of imposing positive obligations to more fully realize those rights. She preferred the latter interpretation,[13] but her colleague, Justice Bastarache, relied upon textual considerations to argue for a much narrower scope of any positive obligations.[14] In the earlier lower court decision in *Masse v. Ontario (Ministry of Community and Social Services)*,[15] which concerned a challenge to reductions in social assistance rates, it was held that an ameliorative program, such as social assistance, even if inadequate, cannot simultaneously constitute a deprivation.[16]

In separating out considerations of legitimacy I mean to delineate concerns that *Charter* review empowers an appointed judiciary to override the decisions of the relatively more democratically accountable branches of government. Legitimacy considerations often appear as brief, but telling, references to the democratic pedigree of legislative decision making. This is how they surfaced, for instance, in the anti-poverty context of *Clark v. Peterborough Utilities Commission*,[17] which concerned a claim that section 7 provided protection against withdrawal of essential utility services. In holding that section 7 provided no such protection, Justice Howden reasoned that the claim raised value and policy judgments better left to legislatures "in a democratic society."[18] Similarly, in *Gosselin*, Justice Arbour acknowledged that, when questions of resource allocation are at stake, legislatures might be better suited to providing answers because they enjoy "the express mandate of the taxpayers."[19]

In contrast, considerations of competence are manifest in concerns that judges and courts face challenges in their capacity to, first, accurately or correctly assess the normative and empirical questions that arise in the cases before them and, second, effectively enforce their decisions. I have already mentioned Justice Arbour's concern, in *Gosselin*, that a court might lack the competence to evaluate whether a given level of social assistance is adequate.[20] Her concern was prompted by the notorious divergence of opinion on that issue among social policy analysts and advocates and within social science literature. The same issue raised the same

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[13] *Gosselin*, *supra* note 3 at para. 357.

[14] *Ibid.* at paras. 218-23.

[15] (1996), 134 D.L.R. (4th) 20, 89 O.A.C. 81, 40 Admin. L.R. (2d) 87 [*Masse* cited to D.L.R.].

[16] *Ibid.* at 42, O'Driscoll J. See also *Chaoulli* where McLachlin C.J.C., who formed part of the majority, noted that the text of the *Charter* contained no express free-standing right to adequate health care (*supra* note 4 at para. 104). For further textual issues and arguments relevant to the anti-poverty protection potential of s. 7, see Peter W. Hogg, *Constitutional Law of Canada*, looseleaf vol. 2 (Scarborough: Carswell, 1992) at 44.2 and 44.7-44.9; Martha Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L. Rev. 257 at 322-23.

[17] (1995), 24 O.R. (3d) 7, 56 A.C.W.S. (3d) 54 [*PUC* cited to O.R.].

[18] *Ibid.* at 28.

[19] *Supra* note 3 at para. 331.

[20] *Ibid.* at para. 330.

concerns for Justice O'Brien in *Masse*.[21] Competence concerns were also expressed in the anti-poverty context of *Collins v. Canada*,[22] which concerned a claim that the exclusion of separated spouses from the federal spousal pension allowance violated section 15 of the *Charter*. At trial, Justice Rothstein accepted that the exclusion violated section 15, but he rejected the claim in the section 1 stage, principally on grounds of competence. Specifically, Justice Rothstein emphasized the difficulty he faced in analyzing the government's choices in such a complex area of public policy, especially given the potentially significant fiscal impact of striking down the exclusion.[23]

Competence concerns are therefore not the only type of consideration relevant to determining the scope of protection offered by the *Charter*'s rights and freedoms in general. Nor are they the only type of consideration that has been relied upon in justifying reluctance to recognize anti-poverty obligations. Further, both analytically and in judicial reasoning, it can be difficult to separate the various types of considerations. Analytically, it can be argued, for instance, that it is illegitimate for a court to attempt adjudication for which it is incompetent. In judicial reasoning, competence and legitimacy considerations often coincide and are rarely explained.[24] Moreover, it is entirely possible that in many cases these considerations are submerged beneath the surface of debates over textual considerations. Nevertheless, and as will become apparent in the more detailed discussion of *Charter* case law to follow, competence concerns have emerged from judicial reasoning as a relevant and ostensibly free-standing consideration in *Charter* adjudication in general. Moreover, competence concerns have clearly played a role in the reluctance of courts to impose anti-poverty *Charter* obligations. To be clear, though, the reluctance has not typically taken the form of holding that anti-poverty claims are generally injusticiable. That is, it has not typically been held that the *Charter* precludes the general possibility that the rights and freedoms it guarantees cannot be violated by social welfare policy decisions. Rather, it has been held that particular anti-poverty claims are specifically injusticiable. That is, it has been held that particular social welfare policy decisions, challenged in particular anti-poverty cases, do not engage the specific scope of protection offered by particular sections of the *Charter* (especially sections 7 and 15).

The anti-poverty incompetence argument has arisen from the role that competence concerns have played in anti-poverty *Charter* cases. I now turn to explaining and assessing that argument in light of the judicial consideration of competence concerns in *Charter* adjudication in general.

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[21] *Supra* note 15 at 54.

[22] [2000] 2 F.C. 3, 178 F.T.R. 161 [*Collins* cited to F.C.], aff'd [2002] 3 F.C. 320, 212 F.T.R. 318, 2002 FCA 82, leave to S.C.C. refused, [2002] S.C.C.A. No. 198 (QL).

[23] *Ibid.* at para. 135.

[24] The discussion of cases in Part II.C.1.a, below, illustrates this. Further illustration is provided in David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51 U.T.L.J. 425.

II. Competence Concerns in *Charter* Decisions

A. Starting Out: The Irrelevance of Competence

In its first two years of *Charter* decisions, and particularly with its decisions in *R. v. Big M Drug Mart Ltd.*,[25] *Singh v. Canada (Minister of Employment and Immigration)*,[26] and *R. v. Oakes*,[27] the Supreme Court of Canada established what was described by Professors Andrew Petter and Patrick Monahan as a "large and liberal" approach to *Charter* adjudication.[28] In doing so, the Court appeared to regard competence concerns as irrelevant. The central elements of the "large and liberal" approach were "an expansive reading of the various Charter rights coupled with a narrow reading of the permissible limitations on those rights."[29] Moreover, limitations were to be justified in largely means-end empirical-instrumental terms.

In reviewing these early cases, and the framework for *Charter* adjudication they established, Petter and Monahan identified both normative and practical problems. Normatively, they critiqued what they saw as the crude liberalism of the Court's approach whereby the state was conceived as the principal threat to absolute individual liberty, rather than an essential means of creating, protecting, and balancing relative individual liberties.[30] The practical problems they identified have since become the main competence concerns of *Charter* adjudication. Noting that the Court was requiring itself to embark on a detailed analysis of the actual and potential instrumental effects of the limitation at issue, and its alternatives, as well as to review the balances struck between affected interests, they doubted whether the Court had the institutional competence to do so successfully. More specifically, they observed that in these early cases the Court often did not have sufficient empirical evidence available to it and, more generally, they argued that the judiciary lacked familiarity with and expertise in empirical matters. They suggested that the courts would have difficulty in identifying the instrumental effects of alternative governmental measures, as well as in identifying the effects of their own interventions.[31]

For its part, however, the Court dismissed such concerns over its legitimacy and competence as were raised in the early cases. For instance, in *Operation Dismantle Inc. v. Canada*,[32] a claim was brought under section 7 of the *Charter* challenging the Canadian government's decision to allow the testing of cruise missiles over its territory. The respondents argued, in part, that the challenge was generally

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[25] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81.

[26] [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1 [*Singh* cited to S.C.R.].

[27] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87 [*Oakes* cited to S.C.R.].

[28] Andrew J. Petter & Patrick J. Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988) 10 Sup. Ct. L. Rev. 61 at 63.

[29] *Ibid.*

[30] *Ibid.* at 66-70.

[31] *Ibid.* at 84-89.

[32] [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 59 N.R. 1 [*Operation Dismantle* cited to S.C.R.].

injusticiable because the courts lacked both the legitimacy and competence to review foreign policy decisions. With respect to competence concerns, Justice Wilson counter-argued that attention needed to be focused on "whether the courts *should* or *must* rather than on whether they *can* deal with [the issues before them]."[33] With these words, Justice Wilson thus appeared to be giving little credence to competence concerns.[34] However, it was not long before the competence concerns voiced by Petter and Monahan, and some litigants, became apparent to the Court.

B. Recognizing Competence Challenges: Framework and Problems

Over the course of the next four terms of *Charter* decisions, competence concerns came to occupy a prominent role in *Charter* adjudication. By the end of this period, competence concerns had been recognized and responded to in all stages of *Charter* adjudication. In the process, the Supreme Court of Canada established a foundational framework for the recognition and treatment of competence concerns that remains in use to this day. In this section, I describe the foundational framework, identify its problems, identify its detrimental implications for anti-poverty claims, and situate it in relation to academic perspectives on court competence.

1. The Foundational Framework for Competence Concerns

The most significant decisions, in terms of establishing the foundational framework, were *R. v. Edwards Books and Art Ltd.*,[35] *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*,[36] and its companion cases (collectively known as the "Labour Trilogy"),[37] *Irwin Toy v. Quebec (A.G.)*[38] and *Mahe*.[39] In *Edwards Books* the Supreme Court was faced with claims that restrictions on Sunday trading violated the *Charter* guarantees of freedom of religion, liberty, and equality.[40] The Court, by majority, held that freedom of religion had been violated but that the violation could be saved under section 1. In reaching this conclusion, the majority watered down the section 1 standard of justification, in part due to competence concerns. In the Labour Trilogy,

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[33] *Ibid.* at 467 [emphasis in original].

[34] At the same time, though, all judges but Wilson J. agreed that some of the specific issues raised by the claimants—such as whether allowing the testing would increase the risk of nuclear war—were incapable of proof and thus, in that more specific sense, injusticiable.

[35] [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, 71 N.R. 161 [*Edwards Books* cited to S.C.R.].

[36] [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, 74 N.R. 99 [*Alberta Labour Reference* cited to S.C.R.].

[37] *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249, 75 N.R. 161 and *Saskatchewan v. Retail, Wholesale & Department Store Union*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277, 74 N.R. 321.

[38] [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 94 N.R. 167 [*Irwin Toy* cited to S.C.R.].

[39] *Supra* note 10.

[40] It was also claimed that the Act was *ultra vires* the province's legislative powers, on division of powers grounds. This claim was unanimously rejected.

competence concerns informed the majority's holding that the *Charter* did not protect rights to strike or collectively bargain and, therefore, those rights were injusticiable in the violations review stage. In *Irwin Toy* the section 1 standard of justification was again relaxed, in part due to competence concerns, enabling the government to withstand a challenge, based on freedom of expression and the right to liberty, to restrictions on advertising aimed at children. Finally, competence concerns were recognized as relevant in the remedy-review stage in *Mahe* and prompted the Supreme Court to exercise restraint in its directions to the government in relation to its obligations with respect to minority language education.

The key prompt for the recognition of competence concerns in these cases was the Court's realization that the crude liberal paradigm was inappropriate. In keeping with the arguments made by Petter and Monahan, the Court came to recognize that *Charter* adjudication often required a review of governmental action that involved the balancing of rights and freedoms and of individual and group interests. Moreover, this balancing implicated a variety of normative and empirical factors that had to be reviewed in the absence of normative and empirical certainty.[41] Consequently, it became apparent that the crude liberal paradigm of expansive definitions of rights and freedoms and rigourous means-ends standards for the justification of limitations was inappropriate. The paradigm was premised on a different view of the nature of rights-limiting governmental action—government action as interference with, rather than balancing of, rights and freedoms. Also, it presumed a degree of normative and empirical certainty that might often be unavailable.

The approach of the crude liberal paradigm therefore had to be abandoned. The Court was compelled to enter into a more deliberate, though by no means exhaustive, consideration of what it could legitimately and competently do in terms of normative and empirical analysis. The starting point for that consideration was the majority judgment of Chief Justice Dickson in *Irwin Toy* in which he identified four factors affecting the degree of legitimacy and competence of *Charter* adjudication, namely whether the impugned governmental action could be categorized as individual-antagonizing criminal justice or as group-mediating social policy; whether there was

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[41] Thus, in *Edwards Books*, La Forest J. noted that "attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups" (*supra* note 35 at 795). This, in turn, meant that legislatures had to be given "reasonable room to manoeuvre to meet these conflicting pressures" (*ibid.*). Moreover, La Forest J. argued, it had to be recognized that the choices which governments needed to make from among the alternative means available for achieving governmental objectives—alternatives that represented different ways of reconciling the conflicting pressures—relied upon "an in-depth knowledge of all the circumstances" and, as such, were choices that "a court is not in a position to make" (*ibid.* at 796). Similarly, in the Labour Trilogy, McIntyre J. noted that in all three cases the "section 1 inquiry involves the reconsideration by a court of the balance struck by the Legislature in the development of labour policy" but that such questions as "which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike" were not "amenable to principled resolution" (*Alberta Labour Reference*, *supra* note 36 at 419). Indeed, McIntyre J. continued: "There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature" (*ibid.*).

conflicting social science evidence; whether there were competing claims to scarce fiscal resources; and whether the interests of vulnerable groups were at stake.

The majority judgment of Chief Justice Dickson in *Irwin Toy* offers little explanation of how these factors raised legitimacy and competence concerns but, when read together with the judgments in the other significant cases of this period, an explanation emerges. Beginning with the issue of competence, the reasoning of these cases indicates that the Court understood the structure of *Charter* adjudication established in the earlier cases as raising a variety of normative and empirical issues that had to be resolved in a principled fashion. In the section 1 review stage, for instance, the requirement of rational connection raised the empirical issue of whether the impugned limitation would actually further the given objective and might require the Court to consider social science evidence on causes and effects. Courts conducting *Charter* adjudication thus needed to be competent to undertake the required normative and empirical analysis and, ultimately, needed to be competent to authoritatively decide which arguments and evidence were "correct" or "right". Over the course of these decisions, however, the Court came to recognize that the normative and empirical arguments and evidence were complex, contested, and subject to uncertainty. In turn, it became concerned about whether it had the institutional competence to determine which arguments and evidence were "correct" or "right" and about how to respond when its competence was lacking. Ultimately, the Court became concerned about three fundamental challenges to its competence and developed four main responses, which I describe in more depth in the following sections.

2. The Three Fundamental Challenges to Competence

The first fundamental challenge identified by the Court was that of gathering an adequate quantity and quality of information relevant to normative and empirical issues. In relation to normative issues, the Court recognized a need to consider not only the normative perspectives of the immediate parties, but also the perspectives of other individuals and groups potentially affected by its decisions. Similarly, the Court recognized a need to ensure that its analysis of empirical issues was sufficiently informed by an adequate range of empirical evidence. This information requirement was especially necessary in respect of the empirically oriented section 1 issues of rational connection and minimal impairment.[42]

The second fundamental challenge recognized by the Court was the difficulty in competently evaluating the information presented to it, especially the empirical information. This challenge is evident in *Irwin Toy*, where conflicting social science

[42] In numerous early cases, the Court was willing to hold against governments that had failed to understand their evidentiary burden in the s. 1 review stage, but the objective of the Court in doing so was ultimately to ensure that it was privy to at least the empirical evidence that informed the impugned governmental decisions.

evidence was identified as a factor that jeopardizes the competence of courts. This challenge may also be evident in that case's assertion that the expertise of judges in criminal justice matters means the courts are relatively more competent in those cases—the argument perhaps being that judges have sufficient expertise to resolve conflicting social science on such matters.

The third fundamental challenge recognized by the Court was the difficulty in reviewing the balances that governments had struck among the various potential normative and empirical effects of the alternative courses of action open to them. Such balancing inevitably involved trade-offs among the various interests affected and the Court was concerned either that principled standards for reviewing those trade-offs were not available or, if they were, that it lacked the expertise to apply those standards. This challenge can be regarded as underlying the identification, in *Irwin Toy,* of the presence of competing claims to scarce fiscal resources as a factor undermining competence. Resolving such competing claims may require the competent evaluation of empirical information on potential fiscal impacts. It may also require the application of some standard for assessing the appropriateness of the balances struck among competing fiscal demands. Likewise, when the majority in *Irwin Toy* asserted that whether the interests of a vulnerable group were at stake was an issue relevant to competence, they may have been concerned that courts lack the normative expertise to properly weigh the interests of vulnerable groups. This is to say that the majority may have been concerned that courts have tended to overlook the interests of such groups. Finally, the decision in *Mahe* includes a recognition of the challenges that courts face in reviewing the balances struck by governments in designing and implementing social programs. Specifically, in opting for a declaratory remedy, the Court in *Mahe* expressly chose to leave it to the government, at least in the first instance, to identify and balance the relevant interests and considerations.[43]

Having identified these fundamental challenges to court competence, the question then became how to respond to them.

3. The Four Responses to Competence Challenges

In the foundational cases on competence, the Court employed four responses to the competence challenges that arose. First, in the Labour Trilogy, the means chosen for responding to the competence concerns recognized was to hold the claim raising those concerns injusticiable (in the specific sense). Injusticiability is a response that operates in the violations review stage and has the consequence of completely excluding not only the immediate claim but all other claims of the same type from the

[43] This challenge also seems evident in the Labour Trilogy insofar as McIntyre J. emphasized that the settlement of labour disputes typically, and appropriately, depended upon the balance of economic, social, and political power between the parties and a willingness to compromise for a defined period of years, the suggestion being that the resolution of labour disputes is a matter of pragmatics rather than principles. See *Alberta Labour Reference, supra* note 36.

realm of *Charter* protection. In this sense, injusticiability is a relatively severe response.[44] Interestingly, the majority in the Labour Trilogy opted for the injusticiability response even though the competence concerns identified related mostly to the requirements of the section 1 and remedy review stages of *Charter* adjudication. The only explanation offered for choosing this response was Justice McIntyre's suggestion that withdrawal is the appropriate response to competence concerns that arise from rights claims where there is some interpretive doubt about whether the rights are protected by the *Charter*.

In *Edwards Books* and *Irwin Toy* the competence concerns arose in the section 1 review stage and were responded to in that stage by a second means, namely, deference or, in other words, the "reasonable basis" standard of review. By virtue of that standard, a government does not need to prove that a limiting measure is, for instance, rationally connected or minimally impairing. Rather, it merely needs to establish that it had a reasonable basis for believing that it was.[45] As this response at least allowed the rights upon which the claims were based to be included within the scope of *Charter* protection, it is a relatively less severe response than injusticiability. Further, since in these cases the legislation under challenge could be regarded as protective of vulnerable groups (i.e., employees in small retail businesses and children), opting for this response meant that those vulnerable groups received the benefit of the competence concerns raised. But it is also worth noting that it was by no means interpretively certain that corporations were entitled to lay claim to the *Charter*'s guarantees of freedom of religion and expression. Thus, the choice of deference, rather than injusticiability, appears potentially inconsistent with Justice McIntyre's position in the Labour Trilogy.[46]

Two further responses were evident in *Mahe*. In that case, the competence concerns arose in both the violations review stage and the remedy review stage. At each stage the concerns revolved around the issue of defining the precise requirements of the section 23 guarantee. In the violations review stage this issue arose because those requirements would define the scope of the guarantee and, therefore, the circumstances amounting to a violation of the guarantee. In the remedy review stage this issue arose because those requirements would define the goal for remedial action. But the Court was concerned that it lacked the competence to define the requirements of section 23 in detail, at least at such an early stage of section 23 adjudication. As has already been mentioned, the competence concerns arising in the

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[44] Alternatively, or as well, it might have been argued that the accumulation of competence concerns, across the stages of *Charter* adjudication, was so great that it was best for the Court to completely withdraw from adjudication of the claim.

[45] This standard in fact originates from pre-*Charter* federalism decisions, particularly the *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 423, 68 D.L.R. (3d) 452, 9 N.R. 541, Laskin C.J.C.

[46] The apparent inconsistency might still be reconciled on the basis that, overall, the competence concerns arising in *Irwin Toy* and *Edwards Books* were not as great as those in the Labour Trilogy, although no such argument was made in the judgments. See *Alberta Labour Reference*, *supra* note 36 at 316-17.

remedy review stage were responded to in that stage by means of remedial restraint. As compared to the responses of injusticiability and deference, this response is the relatively least severe on the claimants as it not only permits inclusion of the claim within the scope of *Charter* protection, but also allows for rigourous scrutiny in the section 1 review stage. Nevertheless, the response of remedial restraint still involves a degree of judicial withdrawal in the face of competence concerns.

In contrast, the response of the *Mahe* Court to the competence concerns arising in the violations review stage indicates that there is a further response of seeking to overcome these concerns by modifying adjudicatory approaches. Specifically, rather than laying out a detailed set of requirements defining the precise obligations flowing from section 23, the Court confined itself to describing the requirements in general terms only. In doing so, the Court expressly left it to governments to undertake, in the first instance, the task of deciding what particular policies and institutional arrangements would fulfill the guarantee. While the Court recognized that this might lead to further litigation to determine whether the guarantee had in fact been complied with, it preferred that to the risk of imposing "impractical solutions".[47] Summing up the philosophy behind this approach, the Court said that "[s]ection 23 is a new type of legal right in Canada and thus requires new responses from the courts."[48] This statement is significant for the suggestion that when legal rights evolve in ways that pose challenges to traditional judicial approaches and to competence, the appropriate response is not to withdraw from adjudicating the rights but to develop new approaches that enable the rights to be adjudicated. This response, which I will call "competence-building", stands in stark contrast to the response of injusticiability chosen in the Labour Trilogy, which also operated in the violations review stage. The willingness of the Court in *Mahe* to consider competence-building appears to be based on the clarity of the positive obligation entrenched in section 23—that clarity meant that the Court did not have the same room to capitulate to the competence concerns, as it had in the Labour Trilogy (where the rights claimed were open to interpretive doubt). Instead, it had no choice but to develop an approach for competently adjudicating the right. If so, then it still remained possible for the Court to choose to read down other rights, where there are greater interpretive doubts, on competence grounds, and thus avoid having to apply new approaches in the adjudication of those other rights. However, given the position taken in *Mahe*, any such avoidance strategy would not be able to rely upon the argument that the Court cannot develop its competence and modify its approach. The most that could be argued would be that it should not. In addition, though, it should be noted that the willingness of the Court to develop its competence in *Mahe* may also have been related to a perception that there were special reasons not to withdraw from adjudication of the section 23 guarantee. Specifically, section 23 might have special status owing to the unique bilingual history of Canada and the possible centrality of

[47] *Mahe, supra* note 10 at 376.
[48] *Ibid.*

the minority language provisions to the entire *Charter* enterprise.[49] If so, this suggests that competence concerns may need to be counterbalanced by normative concerns.[50]

In the foundational cases, then, the Court employed four responses to the competence challenges it identified. In combination, the challenges and responses constituted a foundational framework for addressing competence concerns. It should be noted, however, that these were also the responses relied upon when legitimacy challenges arose.[51] Indeed, in numerous cases the use of one or another response is justified by both competence and legitimacy concerns (and textualist concerns can also be relevant). This complicates the task of assessing the justifiability of any particular instance of reliance upon one of the responses. An assessment that one or another response used in a particular case is not justified on grounds of incompetence does not necessarily render the response unjustifiable when other grounds are taken into account, especially since courts seldom adequately explain the weight of each ground. Nevertheless, it remains possible to assess the extent to which competence challenges justify any particular instance of reliance upon a response, which is the most I purport to do in this article.

At this point it is convenient to reprise the basic elements of the foundational framework and to briefly situate the framework in relation to academic theories of court competence. Once that is done I will explain how it allows for the anti-poverty incompetence argument.

4. The Foundational Framework: Reprised and Theorized

The foundational framework for the recognition and treatment of competence concerns consisted, first, in an identification of three fundamental challenges to

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[49] Michael Mandel argues that Prime Minister Trudeau's primary motivation and objective in pursuing the constitutional entrenchment of a *Charter* was to constitutionally entrench bilingualism. See Michael Mandel, *The Charter of Rights & the Legalization of Politics in Canada* (Toronto: Thomson, 1994).

[50] The fourth response of competence-building is also evident in other ways in the cases under discussion. For instance, the efforts of the Court, in these cases and others, to improve its access to information by generally inviting and encouraging the presentation of a wide range of information and arguments, both normative and empirical, can be understood as competence-building efforts. More specifically, and taking its lead from constitutional division of powers decisions, the Court applied less stringent admissibility standards to so-called legislative fact evidence that often includes social science studies. And although at one point members of the SCC complained that the standards had become too loose and tightened them somewhat (see *Danson v. Ontario (A.G.)*, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686, 112 N.R. 362), they have remained less stringent. In addition, the Court applied the rules on interventions in a more welcoming fashion, although this too has ebbed and flowed. See Jillian Welch, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada" (1985) 43 U.T. Fac. L. Rev. 204; Sharon Lavine, "Advocating Values: Public Interest Intervention in *Charter* Litigation" (1992) 2 N.J.C.L. 27.

[51] Obviously enough, in the context of legitimacy concerns, the fourth response would be labelled "legitimacy building".

competence, namely, the challenge of gathering an adequate quantity and quality of evidence and arguments, the challenge of evaluating the evidence and arguments, and the challenge of reviewing the balancing and trading-off of relevant interests and considerations. As part of this, it was argued that one or more of the following situations would typically bring these challenges into play: the impugned governmental action could be categorized as group-mediating social policy (rather than as individual-antagonizing criminal justice); there was conflicting social science evidence; there were competing claims to scarce fiscal resources; and the interests of vulnerable groups were at stake. It was also recognized that these situations, or the challenges, or both, could arise in any stage of *Charter* adjudication. Finally, the foundational framework consisted in an identification of injusticiability, deference, remedial restraint, and competence building as four types of responses to the competence challenges.

As such, the foundational framework is consistent with the main line of argument in academic debates over the issue of the institutional competence of courts. Briefly put, in academic analyses it has been argued that the competence of courts can be conditioned by four factors: first, the limiting effects of the forms of adjudication, including, at its broadest, the rules of evidence and procedures of litigation, the independence and expertise of judges, and the nature of legal rights and remedies;[52] second, the ideological tilt of judicial values;[53] third, the absolutely and relatively small scale of the court system, as compared to other mechanisms for social decision making;[54] fourth, the dynamics of participation, which determine what issues will be brought to court and by whom.[55]

By far the most prevalent line of argument in scholarly debates on competence concerns, including in *Charter* scholarship, is the argument relating to the limiting effects of the forms of adjudication. This argument has its foundations in the work of Lon Fuller and was elaborated in some detail in a study of U.S. adjudication by Donald Horowitz.[56] A key plank of this argument is that the forms of adjudication

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[52] This argument was pioneered in Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353. See also Donald L. Horowitz, *The Courts and Social Policy* (Washington: Brookings Institution, 1977).

[53] A Canadian example of this line of argument is provided in Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

[54] This line of argument is an aspect of the comparative institutional analysis developed in Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Policy* (Chicago: University of Chicago Press, 1994) [Komesar, *Imperfect Alternatives*].

[55] This is the basic argument of Komesar's comparative institutional analysis. See Komesar, *Imperfect Alternatives*, *ibid.* and Neil Komesar, *Law's Limits: The Rule of Law, and the Supply and Demand of Rights* (Cambridge, UK: Cambridge University Press, 2001).

[56] See Fuller, *supra* note 52 and Horowitz, *supra* note 52. The leading Canadian treatments of this argument are Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993), c. 6, 7; W. A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994); and Jackman, *supra* note 16. See also Craig Scott & Patrick Macklem,

limit the capacity of courts both to gather a sufficient quantity and quality of normative and empirical arguments and evidence, and to accurately evaluate what is gathered. In turn, by this argument, courts have a limited capacity to evaluate the balances that governmental decision makers have struck in light of such arguments and evidence. Clearly, this argument parallels the way that Canadian courts have defined the challenges to their institutional competence. Further, the academic treatments of this argument include consideration of a variety of potential responses to the limits of the forms of adjudication, ranging from complete judicial withdrawal, to cautious case-by-case intervention, and competence-building measures. Thus, the entire foundational framework on court competence established by the Supreme Court of Canada is broadly consistent with the main line of argument in academic debates over that issue.[57]

5. The Foundational Framework and Anti-Poverty Incompetence

The foundational framework on court competence provided ample room for the emergence of the anti-poverty incompetence argument. The instances, mentioned in Part I, in which courts have raised competence concerns in limiting their scrutiny of anti-poverty *Charter* claims illustrate this. Yet in each of those instances, and in the further instances to be discussed in following sections,[58] the explanation of the competence concerns has been inadequate. The anti-poverty incompetence argument thus remains only partially articulated in the case law. Consequently, to explain how the foundational framework allowed for an anti-poverty incompetence argument, I will use the example of a simplified generic anti-poverty challenge to inadequate social assistance. This example is based on the facts and arguments in *Masse* and shares similarities with the claim made in *Gosselin*.

Consider, then, a claim by a social assistance recipient for whom the present or proposed level of assistance is too low to ensure security of the person, as guaranteed by section 7. The claimant thus argues that her rights under section 7 have been violated,[59] that the violation cannot be saved under section 1, and that the appropriate

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"Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 U. Pa. L. Rev. 1; Paul Weiler, "Two Models of Judicial Decision-Making" (1968) 46 Can. Bar Rev. 406; Barry L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed. (Toronto: Butterworths, 1988); and Ralph Cavanagh & Austin Sarat, "Thinking about Courts: Toward and Beyond a Jurisprudence of Judicial Competence" (1980) 14 Law & Soc'y Rev. 371.

[57] This is not to say that the academic argument on the limits of the forms of adjudication in fact justifies the Court's foundational framework. Indeed, in my view, not only does the Court's framework fail to take account of important nuances in the academic argument, but the academic argument itself has a number of shortcomings. I do not advance that view here, but for preliminary steps in that direction, see D. Wiseman, "Taking Competence Seriously" in S. Boyd *et al.*, eds., *Poverty: Rights, Social Citizenship and Governance* (Vancouver: UBC Press, forthcoming 2006).

[58] See Part II.C.1, below.

[59] By the terms of s. 7, the claimant would need to show not only that she was deprived of security of her person but also that the government's failure to address this insecurity did not accord with the

remedy is to order a higher level of assistance. Such a claim raises three main issues: first, the issue of what constitutes security of the person, particularly in relation to economically disadvantaged groups, and in what circumstances poverty can be regarded as a violation of the right to security of the person; second, the issue of on what basis a government can justify failing to provide an adequate level of social assistance; third, the issue of what a government should be required to do to remedy any unjustifiable failure.

In putting these issues before the court, this case could involve all of the factors regarded as giving rise to competence challenges. At the general level of the fundamental challenges to competence, a court would be required to gather and evaluate a broad range of evidence and arguments on a variety of normative and empirical issues, such as whether poverty ought to be recognized as threatening security of the person and, if so, what constitutes poverty. A court would also be required to review the governmental balancing of competing claims upon the scarce fiscal resources available for government programs in general and anti-poverty programs more particularly. At the level of the more specific situations bringing these challenges into play, social assistance and anti-poverty policy is more in the realm of group-mediating social policy than individual-antagonizing criminal justice. Further, as indicated in *Masse* and *Gosselin*, there are conflicts of expert opinion within the social policy and social science communities as to the appropriate concepts and measures of poverty. There are also deep disagreements within these communities as to whether, and to what extent, scarce fiscal resources ought to be devoted to generating general economic opportunities (through such measures as tax cuts and deficit reduction or wage subsidies and public works), rather than to direct poverty alleviation. Clearly, the allocation of fiscal resources will be affected and the competing interests of economically advantaged and disadvantaged groups in such allocations will be present. Finally, by definition, the interests of the vulnerable group of people living in poverty, and reliant upon social assistance, will be at stake.

According to the foundational framework then, the claim to adequate social assistance raises the full range of competence concerns. Consequently, it allows an argument that the courts will suffer incompetence in adjudicating the claim. Further, it allows an argument that it would be best to render the claim specifically injusticiable (i.e., to hold that poverty does not threaten security of the person) or to defer to governmental justifications in the section 1 review stage. In other words, it allows the anti-poverty incompetence argument.

The question then becomes whether, on closer inspection, accumulated *Charter* case law on competence concerns ultimately justifies this anti-poverty incompetence argument. In building my argument that it is not justified, I first identify some problems with the foundational framework itself and explain their implications for the

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principles of fundamental justice. *Charter*, *supra* note 1, s. 7. This latter step might be achieved by arguing that it is arbitrary and unfair to establish a program to meet basic needs and then to refuse to provide a level of assistance sufficient to do so.

anti-poverty incompetence argument. I then move on to an assessment of subsequent developments in competence case law.

6. Three Problems with the Foundational Framework

The foundational framework for recognizing and responding to competence concerns was beset with three problems. The first was the difficulty in discerning the reasons why one response to competence concerns was preferred to another in the different cases. In this regard, I have already raised the potential difficulty in reconciling the choice of injusticiability as the response in the Labour Trilogy case with the choice of deference in *Edwards Books* and *Irwin Toy*. But of greater import is the potential difficulty in explaining why efforts were not made in any of these cases to explore the response of building competence that was utilized in *Mahe*. In relation to the anti-poverty incompetence argument, this problem makes it harder to justify responding to the competence concerns raised by anti-poverty claims with injusticiability or deference, rather than remedial restraint or competence-building.

The second problem with the foundational framework was the reference point, identified in *Irwin Toy*, for distinguishing between significant and insignificant competence concerns—that is, the distinction between governmental decisions that are individual-antagonizing criminal justice decisions and those that are group-mediating social-policy decisions. The validity of this reference point seems to depend upon the position that judges have greater familiarity with criminal justice matters and thus greater expertise and competence in such matters. Also implied is the position that criminal justice matters, since they are individual-antagonizing, do not require a review of governmental balancing. The problems with these positions are threefold. First, legislation that appears to fall into the category of social policy may nevertheless utilize criminal sanctions and so the distinction might be difficult to draw in many cases. An example, which subsequently came before the Court, is legislation imposing criminal sanctions on corporate office-holders whose companies violate restrictions on tobacco product advertising.[60] Second, it is in any event difficult to see how balancing is not relevant to criminal justice matters. In many such matters, consideration may need to be given to a range of interests and considerations, including the public's interest in order, liberty, and privacy; the interests of police in the efficiency and effectiveness of procedural powers; the interests of the accused in fundamental justice; the interests of victims in empowerment and justice; and considerations of the costs of judicial proceedings and of the law enforcement process in general. Third, merely because many judges end up hearing a large volume of criminal cases does not mean that they have had any pre-bench experience in those matters or that judicial experience will necessarily yield real normative expertise. There is, after all, no end of criticism of judicial policy making in criminal justice matters. Even if it were conceded that judges will become expert in evaluating the

[60] *RJR-MacDonald*, *supra* note 9.

normative considerations, it is difficult to see why the general challenge of gathering and evaluating social science evidence, which is often highly relevant to criminal justice matters, would not be as significant as in group-mediating social-policy cases.[61] Moreover, since the operation of the criminal justice and law enforcement systems depends upon a significant devotion of fiscal resources, the competence concerns raised by the presence of that factor would seem as applicable to criminal justice matters as to social policy matters. With respect to the anti-poverty incompetence argument, if these problems were recognized, and the distinction abandoned, then the simplest avenue for categorizing anti-poverty claims as competence challenging would be lost.[62]

The third problem with the foundational framework lies in the fact that in *Irwin Toy* the Court had identified the factor of the interests of vulnerable groups as affecting competence, and therefore as a factor militating in favour of deference, but had failed to address the possibility that, in different circumstances, deference might work against those interests. In both *Edwards Books* and *Irwin Toy* the impugned legislation was regarded as protective of vulnerable groups and the Court relied upon the relevance of the stake of a vulnerable group in being deferential at the section 1 review stage. Deference on this basis can be understood to be grounded in competence concerns to the extent that the courts recognize that they may not have the normative competence to give appropriate weight to the interests of vulnerable groups. This can then be reinforced by the presence of the other factors affecting competence, as well as by the broader normative position, put forward in *Edwards Books*, that the *Charter* not be used as a vehicle for undermining legislation aimed at assisting vulnerable groups. But what if the impugned legislation were being challenged by a vulnerable group, and yet all the other factors affecting competence were also present? The other factors would raise competence concerns and invite deference, and yet to be deferential in these circumstances would work to the disadvantage of the vulnerable group. Whether such a result is appropriate depends upon the more precise reasons behind competence-based deference when the interests of vulnerable groups are at stake. If the reason for deference is that the legislature is better suited to assess the weight of the interests of vulnerable groups than are the courts, then it is appropriate to defer to the government whenever those interests are at stake, regardless of whether vulnerable groups view the governmental decision

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[61] Here it is worth noting that it was in relation to the decision in *Oakes*, *supra* note 27, which addressed a reverse onus of proof for narcotics offences, that Petter and Monahan first raised their concerns over competence. See Petter & Monahan, *supra* note 28.

[62] With respect to the issues of gathering and evaluating social science evidence, the problem may run much deeper than a simple failure to recognize the fuzziness of the distinction between individual-antagonizing and group-mediating governmental decision making. In an illuminating study, Danielle Pinnard argues that the SCC's treatment of concerns with gathering and evaluating factual evidence in *Charter* cases lacks any coherent methodology. She also suggests that the apparently deliberate mystery of the approach to factual issues is the most troubling form of judicial activism. See Danielle Pinnard, "Institutional Boundaries and Judicial Review—Some Thoughts on How the Court is Going About its Business: Desperately Seeking Coherence" (2004) 25 Sup. Ct. L. Rev. (2d Series) 213.

being impugned as protective or antagonistic. But if the reason for deference is to give vulnerable groups, rather than the legislature, the benefit of the competence challenges faced by the court, then deference is only appropriate when the impugned governmental decision is protective.

At this point, though, it might be better to think of this third problem as the issue of whether and to what extent competence concerns can be counterbalanced by normative concerns (as may have occurred in *Mahe*). While considerations of competence may invite deference to governments in the section 1 review stage, other considerations of a more normative nature may pull against deference. Thus, where an impugned governmental decision can be regarded as detrimental to the interests of vulnerable groups, the normative consideration of ensuring that the *Charter* is a vehicle for assisting vulnerable groups may counterbalance competence-based arguments for deference. Indeed, as the decision in *Mahe* suggests, when competence concerns and normative concerns pull in different directions, there may be a stronger argument for exploring competence-building responses. In regard to the anti-poverty incompetence argument, since anti-poverty claims involve the vulnerable group of the poor, any entrenchment of that factor as either a ground for counterbalancing competence concerns, or for justifying responses aimed at overcoming such concerns, would weaken that argument.

As such, the various problems in the foundational framework demanded attention. This was especially so from the perspective of anti-poverty *Charter* claims because, depending upon how the more specific aspects of the general framework were developed and applied, there could be serious detrimental implications for the scope and rigour of anti-poverty *Charter* protection. In considering, then, the recognition and treatment of competence concerns following the establishment of the foundational framework, attention needs to be given not only to general developments but also to the extent to which the potential problems with that framework have been evident, to what extent they have been addressed, and to the ongoing implications for the anti-poverty incompetence argument.

C. Subsequent Developments in Competence Concerns

There have been four general developments in the treatment of competence concerns since the establishment of the foundational framework: (1) the abandonment of the distinction between criminal justice and social policy matters as a reference point for distinguishing matters where competence concerns are significant; (2) the emergence of the factor of the magnitude of potential fiscal impact as a measure of competence concerns and as a determinant of responses to those concerns; (3) the reconstruction of the group of factors recognized as relevant to decisions as to deference and, as part of that, the effort to ensure a normative component to such decisions; (4) the efforts undertaken by some courts to modify the traditional forms of adjudication in order to overcome competence concerns.

The first of these developments occurred for reasons in keeping with those outlined in the previous section as to the problems with attempting to use such a distinction and does not merit further attention in what follows.[63] Since the maintenance of this distinction provides a plank of support for the anti-poverty incompetence argument, its abandonment removes that plank.[64]

The other general developments require more detailed attention. The primary context for the second general development has been anti-poverty cases. I will discuss that development and its implications next, while at the same time outlining and assessing the role of competence concerns in anti-poverty cases in general. I will then move on to a discussion of the third and fourth developments and their implications.

1. Fiscal Impact, Competence, and Anti-Poverty Cases

a. Competence in Anti-Poverty Cases: Overview and Assessment

Over the course of the first two decades of *Charter* adjudication, Canadian courts have been faced with numerous claims, usually launched under section 7 or section 15, or both, that have either directly asserted that the *Charter* imposes anti-poverty obligations or have asserted obligations that are poverty related in the sense that they address the accessibility of social services or the availability of social benefits. Some early encouragement for such claims was offered in *Irwin Toy* when the Supreme Court expressly left open the possibility that section 7 could offer anti-poverty protection.[65] Indeed, even after the decision in *Gosselin*, in which a claim that inadequate social assistance violated sections 7 and 15 of the *Charter* was rejected by a majority of the Court, this possibility remains open. Generally speaking, however, anti-poverty and poverty-related claims have met with little success.

The role of competence concerns in anti-poverty cases, though, is not straightforward. In the first place, in many instances in which anti-poverty claims

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[63] Initially, this distinction was reiterated and relied upon, for instance, in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 109 N.R. 81, [1990] 4 W.W.R. 481 and *McKinney*, *supra* note 8. Its demise occurred over the course of decisions in the following cases: *R. v. Butler*, [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449, 134 N.R. 81 [*Butler* cited to S.C.R.]; *RJR-MacDonald*, *supra* note 9; *O'Connor*, *supra* note 11; *Thomson Newspapers Co. v Canada (A.G.)*, [1998] 1 S.C.R. 877, (1997) D.L.R. (4th) 385, 38 O.R. (3d) 735 [*Thomson Newspapers* cited to S.C.R.].

[64] However, it must be noted that in *Chaoulli*, *supra* note 4, the majority and minority judges alike referred to the legislation at issue as "social policy", and seemed to link competence concerns to that label, which may indicate a lingering refusal to recognize the incoherence of the distinction.

[65] While rejecting an argument that s. 7 protected the economic liberty of a business corporation, the SCC expressly refrained from foreclosing the possibility that the section protected "economic rights fundamental to human life or survival" (*Irwin Toy*, *supra* note 38 at 1003).

were rejected, competence concerns were not mentioned.[66] In contrast, in some of the instances in which competence concerns were considered, the claims also failed,[67] but in other instances they succeeded.[68] The question thus becomes whether the recognition and treatment of competence concerns in anti-poverty cases is consistent and coherent, both within the set of such cases and in relation to other types of cases. It being beyond the scope of this article to undertake a detailed survey of these cases,

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[66] The following are examples of those claims that have been rejected by lower courts on the basis of text-oriented interpretative factors and without reference to competence concerns: *Brown v. B.C. (Minister of Health)* (1990), 66 D.L.R. (4th) 444, 66 B.C.L.R. (2d) 294, 48 C.R.R. 137 (rejecting a claim based on ss. 7 and 15 for access to expensive and only partially publicly subsidized HIV/AIDS medication); *Ontario Nursing Home Association v. Ontario* (1990), 72 D.L.R. (4th) 166, 74 O.R. (2d) 365, 21 A.C.W.S. (3d) 1278 (rejecting claims based on ss. 7 and 15 to protection against inadequate care for extended care residents of nursing homes); *Fernandes v. Manitoba (Director of Social Service)* (1992), 93 D.L.R. (4th) 402, 78 Man. R. (2d) 172, 7 Admin. L.R. (2d) 153 (rejecting claims based on ss. 7 and 15 to an additional allowance for provision of full-time health care services in the home, rather than as an in-patient); *Bernard v. Dartmouth Housing Authority* (1988), 53 D.L.R. (4th) 81, 88 N.S.R. (2d) 190, 50 R.P.R. 12 (rejecting claims based on ss. 7 and 15 to protection against a no-grounds eviction from public housing). But see *Sparks v. Dartmouth/Halifax County Regional Housing Authority* (1992), 112 N.S.R. (2d) 389, 33 A.C.W.S. (3d) 48 (for a different result on s. 15); *Conrad, supra* note 2 (rejecting a claim based on ss. 7 and 15 to protection against withdrawal of social assistance, without a hearing, on the ground of having resumed living with a spouse); *R. v. Clarke* (1998), 23 C.R. (5th) 329, 40 W.C.B. (2d) 394 (rejecting a claim based on s. 7 to protection against charges of mischief in relation to attempted occupation of vacant housing); *R. v. Banks* (2001), 205 D.L.R. (4th) 340, 55 O.R. (3d) 374, 45 C.R. (5th) 23 (rejecting claims based on ss. 7 and 15 to protection against anti-panhandling laws).

[67] The main claims to have failed are those in *R. v. Prosper*, [1994] 3 S.C.R. 236, 118 D.L.R. (4th) 154, 172 N.R. 161 [*Prosper* cited to S.C.R.]; *PUC, supra* note 17; *Masse, supra* note 15; *Collins, supra* note 22; and *Gosselin, supra* note 3.

[68] The main claims that have succeeded are those in *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 [*Tétrault-Gadoury*]; *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, 139 N.R. 1 [*Schachter* cited to S.C.R.]; *R. v. Rehberg* (1993), 111 D.L.R. (4th) 336, 127 N.S.R. (2d) 331, 19 C.R.R. (2d) 242 [*Rehberg* cited to D.L.R.]; *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577, 218 N.R. 161 [*Eldridge* cited to S.C.R.]; *New Brunswick (Minister of Health and Community Services) v. G (J.)*, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124, 244 N.R. 276 [*G(J.)* cited to S.C.R.]; *Auton (Guardian ad litem of) v. British Columbia (A.G)* (2002), 220 D.L.R. (4th) 411, [2003] W.W.R. 42, 173 B.C.A.C. 114 [*Auton (BCCA)* cited to D.L.R.] (but this claim has now been rejected by the Supreme Court without addressing competence concerns: [2004] 3 S.C.R. 657); *Hodge v. Canada (Minister of Human Resources Development)*, [2003] 1 F.C. 271, (2002), 214 D.L.R. (4th) 632, 2002 FCA 243 [*Hodge* cited to F.C.] (but this claim has now been rejected by the Supreme Court without addressing competence concerns: [2004] 3 S.C.R. 357); *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 212 D.L.R. (4th) 633, 59 O.R. (3d) 481, 159 O.A.C. 135 [*Falkiner*]; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 231 D.L.R. (4th) 385, 310 N.R. 22 [*Martin* cited to S.C.R.].

in what follows I present the main conclusions that can be drawn from such a survey.[69]

To begin, it can be said that when competence concerns have arisen in anti-poverty cases, they have generally been recognized and treated in terms of, and consistently with, the foundational framework established by the Supreme Court. In this respect, and beyond general statements about the complexity of social policy making in relation to poverty, one of the main concerns of courts has been their competence to adjudicate upon the appropriate balance between the potential fiscal impact of anti-poverty claims and competing claims to fiscal resources. Another main competence concern has arisen in relation to choosing and designing remedial means (especially when fiscal resources may be required).

At a more specific level, the second conclusion that can be drawn from a review of competence concerns in anti-poverty cases is that there is some difficulty in explaining differences in the recognition of the degree of competence challenges arising in particular cases. This can be illustrated by contrasting the decisions in *R. v. Prosper*[70] and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*.[71] Both *Prosper* and *G.(J.)* concerned claims to government-funded legal services. The claim in *Prosper*, based on the subsection 10(b) *Charter* guarantee of the right to retain and instruct counsel, was to after-hours duty counsel services. The claim in *G.(J.)*, based on section 7, was for legal representation to appeal an extension of an order for state removal of children from their family home. Although the claimant achieved some success in *Prosper*, the specific claim to after hours duty-counsel services was held injusticiable. This was in part due to concerns that the Court lacked the competence to review the allocation of limited fiscal resources, to predict and assess the potentially far-reaching consequences of recognizing a right to state-funded duty counsel and to devise an appropriate remedy.[72] In contrast, the claim in *G.(J.)* was successful, with the competence concerns that were raised in *Prosper* being brushed aside. Specifically, the majority in *G.(J.)* took the position that the scope of the obligation was relatively limited, that the potential budgetary impact of upholding the claim was therefore minimal, and that the detrimental effect of denying assistance to parents outweighed the benefits of any budgetary savings.

The arguments underlying each of these grounds for distinguishing these cases are not, however, quite as self-evident as the majority judgment seems to assume. The actual cost of complying with the ruling in *G.(J.)* was only vaguely adverted to in the reasoning, while in *Prosper* it was simply assumed to be significant. Moreover, at no point was there any explanation of how, or in what way, competence challenges

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[69] A detailed survey is undertaken in D. Wiseman, *Judging Poverty: The Charter, Poverty and Institutional Competence* (S.J.D. Thesis, Faculty of Law, University of Toronto, 2005) [forthcoming in University Microfilms International].

[70] *Supra* note 67.

[71] *Supra* note 65.

[72] See *Prosper*, *supra* note 67 at 288, L'Heureux-Dubé J., and at 267-68, Lamer C.J.C.

increase as potential budgetary impact increases. Nor was there any explanation of why competence concerns are non-existent or can be ignored when budgetary impact is "minimal". Further, the position as to the differential scope of the rulings depends entirely upon how generally the ruling is stated. In *Prosper*, the majority took the position that the claim to twenty-four-hour availability of duty counsel, if upheld for a person being asked to take a breathalyzer test in Nova Scotia, would of necessity apply to all arrests and detentions throughout the country, and thus would have far-reaching implications. However, in *G.(J.)* the Court apparently neglected to consider that the immediate claim, to state-funded legal counsel to ensure a fair hearing in a state-custody order extension hearing in New Brunswick, would surely apply to all such hearings across the country and could easily apply to a myriad of judicial and administrative hearings affecting child-parent relationships for which legal aid is not presently available. And even if the scope of the obligation in *G.(J.)* would still be more confined than that in *Prosper*, the more it expands from the immediate case the more significant competence concerns would become. Finally, perhaps it can be conceded that the interests at stake of a parent unable to obtain legal representation to appeal a state-custody extension order are greater than those at stake for a person refusing to take a breathalyzer test when duty counsel are unavailable. But it is not difficult to imagine circumstances in which the unavailability of duty counsel might be of greater significance (e.g., if a person is being questioned in relation to a homicide).

The third conclusion that can be drawn from a review of the treatment of competence concerns in anti-poverty cases is that there is also some difficulty in explaining the preference for different responses to competence concerns across the range of anti-poverty and poverty-related cases. Again, the decision in *Prosper* is illustrative. By holding that there was no right to summary legal advice under subsection 10(b), the Court in *Prosper* not only denied that right to people being asked to take breathalyzer tests but also to anybody else in need of summary legal advice, no matter how grave the circumstances. However, it seems fairly easy to imagine such graver circumstances arising. Therefore, it can be argued that the Court would have been better to respond to the competence concerns raised in *Prosper*, which really related to issues arising in the section 1 and remedy review stages, through means of deference or remedial restraint, rather than injusticiability. For instance, insofar as the potential budgetary impact of upholding the claimed obligation raised competence concerns, it should be noted that similar concerns were addressed through remedial restraint, in the form of a suspended declaration of invalidity, in some earlier anti-poverty cases,[73] and have been addressed similarly in at least one subsequent anti-poverty case.[74]

Fourth, and finally, a review of the treatment of competence concerns in anti-poverty cases reveals the possibility that the magnitude of the potential fiscal impact

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[73] See *Eldridge*, *supra* note 68, and *Rehberg*, *supra* note 68.

[74] See *Falkiner*, *supra* note 68.

of anti-poverty claims is becoming a determining factor both with respect to the emphasis given to competence concerns and to the responses to these concerns. When the potential fiscal impact is purported to be of significant magnitude,[75] competence concerns are emphasized and responses of more limiting effect, such as injusticiability and deference, are chosen. By contrast, when the potential fiscal impact is purported to be "minimal",[76] competence concerns are rejected or ignored and responses of least limiting effect, in particular remedial restraint, are chosen. Such trends suggest a more general argument that courts are competent to assess the reasonableness of balances involving the allocation of fiscal resources when the quantity of resources at stake can be confidently estimated and is relatively small, but that competence concerns become significant as potential budgetary impacts rise above the minimal level. However, there are some problems with any such argument. Since this argument has surfaced regularly enough to become a general development in the framework for considering competence concerns, and because it potentially poses a significant barrier to any adequate social assistance obligation, these problems need to be considered in greater depth.

b. *Fiscal Impact Magnitude as Competence Measure: Problems*

An initial problem with using the magnitude of potential fiscal impact as a measure of competence is that the metric for assessing whether potential fiscal burdens are immaterial or material is vague and potentially inconsistent. In *G.(J.)* the Court adverted both to the absolute dollar cost of providing the program necessary to fulfill the potential obligation and to the relative proportion of the government's entire budget this represented. Earlier, in *Eldridge*,[77] in which an obligation to provide interpreter services for deaf patients in the B.C. health care system was upheld, the Court noted the absolute dollar cost (around $150,000) of providing the services but also identified the relative proportion of the relevant departmental budget this

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[75] See *e.g. Prosper*, *supra* note 70, *Masse*, *supra* note 15, and *Collins*, *supra* note 22.

[76] See *e.g. Rehberg*, *supra* note 68, *Falkiner*, *supra* note 68, and *G.(J.)*, *supra* note 71. In *Martin*, *supra* note 68, the government suggested that the limitation on benefits for chronic pain sufferers was justified in the interests of maintaining the viability of the workers' compensation scheme. This implied that the potential fiscal impact was significant, but the Court responded that the government had not presented sufficient evidence to establish this as a pressing and substantial objective. Further, in the minimal impairment stage, the Court noted that fiscal impact is a grounds for deference, but rejected a need for deference on the basis that there was a total impairment. The lower court decisions in *Auton (BCCA)*, *supra* note 68, and *Hodge*, *supra* note 68, may seem to counter the idea of a correlation between magnitude of fiscal impact and success. In those cases the fiscal impacts were potentially significant. But it should be noted that in the former it was argued that there were counterbalancing long-term fiscal savings and in the latter the government was forced to bear the burden of not having led any meaningful evidence on the impact.

[77] *Supra* note 68.

represented.[78] Obviously enough, depending upon the circumstances, which measure is used can yield quite a different point of materiality.

A further problem is that if *G.(J.)* and *Eldridge* establish the threshold of materiality at around $150,000, above which the courts will either render a claim injusticiable or defer to its limitation in the section 1 stage, then the scope of rights protection, at least with respect to anti-poverty claims, will be very limited. This is a problem in two ways. First, the idea that the fiscal impact of certain claims can justify excluding those claims from the scope of protection offered by the *Charter*'s rights and freedoms, through injusticiability, has generally been disavowed in *Charter* decisions. The initial position of the courts was that costs could be taken into account in determining the type of remedial order, but could not be relied upon to deny a remedy nor to justify a non-minimal impairment nor to establish a pressing and substantial objective for a limitation nor to truncate the scope of a right or freedom.[79] After *Irwin Toy*, it was accepted that costs could be taken into account in choosing between alternative limiting measures, but it was only with the decision in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*[80] that the Supreme Court allowed fiscal impact to be relied upon as a pressing and substantial objective for a limiting measure. Even then, the Court took pains to emphasize that the fiscal impact had to be of crisis proportions.[81] That being the case, the decisions to hold the claims in some anti-poverty cases injusticiable due to competence concerns associated with potential fiscal impact appear inconsistent with the broader landscape of *Charter* principles.

Second, accepting or rejecting claims according to the potential degree of fiscal impact they involve is an approach that entails denying, rather than engaging, competence concerns. Even if it can be argued that the greater the potential fiscal impact the greater the challenges posed for the court, it does not necessarily follow that there is a point where the fiscal impact is so small that competence is no longer challenged. Thus, the unspecified amount at stake in *G.(J.)* may have been a small proportion of the provincial budget of New Brunswick, just as the $150,000 at stake in *Eldridge* may have been a small proportion of the health budget in British Columbia, but there are surely many ways in which these amounts might be spent. If the budget is tight, then that money will have to be taken from some other area. If the need to assess fiscal resource allocation issues challenges competence because the courts lack the normative and empirical expertise and standards to weigh and balance competing needs, and if such assessments are required for reallocating even

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[78] It is worth noting that in *Eldridge*, *ibid.*, as in the later case of *Martin*, *supra* note 68, the Court also relied upon the fact that the impairment of the right at issue was total, rather than partial. This argument was also relied upon in *Tétrault-Gadoury*, *supra* note 68, which preceded *Eldridge*.

[79] See *Singh*, *supra* note 26, and *Schachter*, *supra* note 68.

[80] [2004] 3 S.C.R. 381, 244 D.L.R. (4th) 294, 2004 SCC 66 [*N.A.P.E.* cited to S.C.R.].

[81] See *ibid.* at paras. 59 to 76. It might be argued that the lack of rigour of the Court's assessment of the purported crisis in that case undermines its own position.

$150,000, then all that the courts are doing with the "minimal impact" distinction is denying or ignoring the competence concerns. The cost of doing so, however, is the severe limitation on the scope of rights protection.

A better approach, and one that is more consistent with decisions in non-poverty cases (as will be explained below), would be for the courts to admit that competence concerns will always be present when budgetary impacts are involved and to seek to develop strategies for managing or overcoming those concerns. And this is especially so because, contrary to what the courts may think, many non-poverty *Charter* claims will have some budgetary impact and often a non-minimal impact. Many laws and policies, if not all, are supported by or place demands upon an apparatus (whether legislative, judicial, administrative, or some combination thereof) that requires fiscal resources. While this is most evident with respect to social-benefits laws and policies, such as social assistance and public health insurance, it is also true for laws and policies that provide other types of services or that otherwise regulate social activity. Whenever a court makes an order under the *Charter* that affects the substance or process of a law or policy, and whether compliance requires negative or positive governmental action, there will be a fiscal impact, at times only once-off, but at other times ongoing. Two well-known examples of cases that do not address social benefits but nevertheless involve significant fiscal impact are *Singh* and *R. v. Askov*.[82] In *Singh*, the Court imposed additional fair-hearing requirements in relation to procedures for determining refugee status. It was reported that the initial estimate of the additional cost of compliance, just for processing the backlog of refugee cases at the time of the decision, was $50 million.[83] In *Askov* the Court set out standards for undue delay in criminal proceedings. The standard threatened to jeopardize so many pending cases that, in the year following the decision, the Ontario government reportedly expended an additional $39 million on increasing the capacity of the criminal trial system in just one region of the Greater Toronto Area.[84]

Moreover, the prospect of significant fiscal impact extends beyond non-social-benefits cases addressing procedural rights. Consider, for instance, the decision in *RJR-MacDonald* to strike down some of the regulations affecting tobacco promotion and packaging. Although the decision required only negative governmental action and did not directly engage any social benefit program, the fiscal impact would potentially have included the following: first, the now-wasted cost of the legislative and administrative resources devoted to creating and implementing the regulations prior to the decision; second, the future one-off cost of the legislative and administrative resources required to withdraw or modify the regulations in accordance with the decision; third, the future ongoing cost of the public health resources and resources of other relevant social benefits programs that could have been saved by any decline in tobacco consumption caused by the invalidated

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[82] [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355, 113 N.R. 241 [*Askov* cited to S.C.R.].

[83] *The Globe and Mail* (22 May 1985), cited in Mandel, *supra* note 49 at 243.

[84] *Law Times* 1991:1 (24-30 June 1991), cited in Mandel, *ibid.* at 227.

regulations; and, fourth, the future ongoing cost of re-establishing whatever public programs were replaced by, or now needed to replace, the regulations. No mention was made of any of these potential fiscal impacts in any judgments in the case, and yet it is hard to believe they would amount to less than $150,000 per annum. Thus, if fiscal impact is to be treated as an important issue in *Charter* cases, then it needs to be recognized that it will be important in many cases beyond those anti-poverty cases that directly seek an increase in the fiscal resources devoted to a social benefit program. And if that is the case, then there is even more reason to abandon the use of the "minimal fiscal impact" standard as a reference point for determining the degree of *Charter* protection and to instead explore measures that would build court competence in relation to fiscal issues.

Indeed, that is in fact what the courts are doing in some non-poverty cases, which brings me to the third way in which using the magnitude of fiscal impact as a determinant of injusticiability or deference in anti-poverty cases is a problem, namely, because those responses are inconsistent with the responses used in non-poverty cases under the *Charter* and other provisions of the Constitution. Most significantly, in some non-poverty cases involving non-minimal fiscal impacts the courts have been willing to undertake competence-building measures. This raises the question of why such measures are not deployed in anti-poverty cases. But as the pursuit of competence-building measures is one of the other main developments in the treatment of competence concerns in *Charter* adjudication, I will defer further discussion of this point until section 3, below.

Until these problems can be addressed, then, the idea, emerging from anti-poverty cases, that the magnitude of the potential fiscal impact of a claim can be used as a reference point for determining whether a court ought to withdraw from the claim on competence grounds, must be regarded as unconvincing.[85] As this idea emerged subsequent to the establishment of the foundational framework, it is not an integral part of the anti-poverty incompetence argument based upon that framework. However, just as its emergence certainly has the potential to bolster that argument, its problems foreclose that potential. Further, to the extent that the foundational framework gives some significance to whether a claim necessitates review of competing claims to fiscal resources, my argument that competence concerns relating to fiscal issues need to be engaged, rather than ignored, is equally applicable. In turn,

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[85] One final observation can also be made as a consequence of this review, namely, that anti-poverty and poverty-related cases appear less likely to succeed when they are cast in terms of violations of *Charter* rights other than the right to equality. Of the claims that have succeeded, only the one in *G(J.)* was not cast in terms of s. 15. The claim in *G(J.)* was cast in terms of s. 7 and, apart from that case, all other s. 7 anti-poverty claims—those in *Masse*, *supra* note 15, *PUC*, *supra* note 17, Rehberg, *supra* note 68, *Falkiner*, *supra* note 68, and *Gosselin*, *supra* note 3—along with the s. 10(b) claim in *Prosper*, *supra* note 67, have either been rejected or left undecided. This raises the question of why the courts tend to opt for the most severe response when anti-poverty claims that raise competence concerns are cast in terms of rights and freedoms other than equality and whether that tendency is justifiable. I will not take up that question here.

that argument goes some way to countering an aspect of the anti-poverty incompetence argument.

2. Reconstructing Deference: A Normative Counterbalance

The third general development has been the reconstruction of the group of factors recognized as relevant to decisions as to deference and, as part of that, an effort to re-emphasize a normative component to such decisions. The primary source of this development is the judgment of Justice Bastarache, on behalf of the majority, in *Thomson Newspapers*.[86] In what follows, I begin with an analysis of this judgment and its potential to assist in countering the anti-poverty incompetence argument. I then discuss and assess subsequent applications and modifications of the framework of factors established by Justice Bastarache in *Thomson Newspapers*, with particular emphasis on *M v. H*.[87]

a. The Paramountcy of Vulnerable Groups' Interests

Thomson Newspapers concerned a challenge to provisions of the *Canada Elections Act*[88] that prohibited broadcasting, publication, and dissemination of opinion survey results during the final three days of a federal election as violations of freedom of expression (subsection 2(b)) and the right to vote (section 3) guaranteed in the *Charter*. By the time this case was argued before the Court, the government had conceded that the prohibitions violated subsection 2(b) and so the focus of argument and judicial attention was on the application of section 1. By majority, the Supreme Court held that the violation could not be saved under section 1. It was in framing the majority's section 1 analysis that Justice Bastarache reconsidered the factors relevant to decisions as to whether to apply the deferential reasonable basis standard in conducting the section 1 review. Justice Bastarache was uncomfortable either with the language of deference, or with the idea that there were only two standards of section 1 review (rigourous or deferential), or both. Picking up the language of contextualism, he argued that decisions about what types of arguments and what degree of evidentiary certainty were required to satisfy the demands of section 1 needed to be made in the context of the case at hand.

At a general level, what the so-called contextual approach amounted to was a commitment to avoid considering the questions posed by section 1 review in a way that abstracts from the specific details and factual setting of the social problem and governmental decisions at issue. According to Justice Bastarache, while paying close attention to context is generally important for section 1 review, it is particularly relevant in determining "the type of proof which a court can demand of the legislator

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[86] *Supra* note 63.

[87] [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577, 238 N.R. 179.

[88] R.S.C. 2000, c. 9.

to justify its measures under s. 1."[89] The background to this statement is the position taken by the Court in the earlier decision of *RJR-MacDonald*: arguments based in reason, logic and common sense are as capable of satisfying the civil standard of proof as are arguments based in social science. This position meant that, in the absence of definitive social science evidence, the section 1 standard could still be satisfied. Moreover, it was argued, satisfying the section 1 standard with non–social science arguments did not necessarily entail deference. Rather, it might merely entail an appreciation of context.

On closer inspection, according to Justice Bastarache, this willingness to accept less-than-scientific types of proof could be attributed to the presence of one or more of a number of contextual factors, namely, an attempt to protect a vulnerable group;[90] a group's own subjective fears and apprehension of harm;[91] an inability to scientifically measure the particular harm in question, or the efficaciousness of the remedy;[92] and the nature of the activity infringed or, more accurately, the importance of the activity infringed.[93] In Justice Bastarache's view, these "are all factors of which the court must take account in assessing whether a limit has been demonstrably justified according to the civil standard of proof."[94]

Two points are worth noting about this framework of factors. First, the factors identified by Justice Bastarache have in common a correlation to the protection of the interests of vulnerable groups. The effect of taking them into account—and in so doing allowing less-than-scientific satisfaction of the section 1 standard of proof—is to make it easier for governments to justify limitations when those limitations are aimed at the protection of the interests of vulnerable groups.[95] Second, although each of the factors can be grounded either in concerns over competence (that is, that the courts lack the competence to appropriately weigh the interests of vulnerable groups) or concerns over legitimacy (that is, that the *Charter* should not become a vehicle for undermining measures protective of vulnerable groups), or both, their tight

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[89] *Thomson Newspapers*, *supra* note 63 at para. 88.

[90] This factor was relied upon for deference in *Irwin Toy*, *supra* note 38.

[91] This factor was relied upon for deference in *Butler*, *supra* note 64. In *Butler* the SCC was called upon to determine whether the *Criminal Code* prohibition on possessing, selling and exposing to public view obscene films violated the *Charter*'s guarantee of freedom of expression. The Court unanimously adopted a deferential position in the s. 1 review stage, in part because of competence challenges posed by conflicting and inconclusive social science evidence.

[92] This factor was relied upon for deference in both *Irwin Toy*, *supra* note 38, and *Butler*, *ibid.*

[93] For example, whether hate speech or commercial speech is of high or low value—factors considered in *Irwin Toy*, *ibid.*, *Butler*, *ibid.*, and other freedom of expression cases in the s. 1 review stage.

[94] *Thomson Newspapers*, *supra* note 63 at para. 90.

[95] For example, the vulnerable group of children, manipulated by commercial advertising (in *Irwin Toy*, *supra* note 38); the vulnerable group of women, demeaned by pornography (in *Butler*, *supra* note 64); the vulnerable groups of minorities, exposed to hate speech (in cases such as *R. v. Keegstra*, [1990] 3 S.C.R. 697, 197 N.R. 26, 39 Alta. L.R. (3d) 305) and the vulnerable group of people addicted to or attracted to smoking (as in *RJR-MacDonald*, *supra* note 9).

connection to the concern to protect vulnerable groups has the effect of limiting the range of circumstances in which concerns over competence (or legitimacy) will justify acceptance of less-than-scientific proof. Specifically, the effect is that competence concerns will only justify a more loose standard of proof when that standard would work to the advantage of vulnerable groups (via the governmental actions that limit rights in order to protect vulnerable groups). As such, Justice Bastarache's rearticulation of the issue of deference as the issue of context represented a potentially significant modification of the role of competence concerns in *Charter* adjudication. If this framework were adhered to, then competence concerns would play second fiddle to the normative concern for the interests of vulnerable groups.

This modification has the potential to make a significant contribution to countering the anti-poverty incompetence argument as it might be applied to the generic social assistance challenge. Specifically, since that challenge impugns a governmental failure that operates to the detriment of a vulnerable group—the poor—none of the contextual factors would be applicable and so a more loose standard of justification would not be available to the government in the section 1 review stage.

But within a year, the approach elaborated by Justice Bastarache in *Thomson Newspapers*, on behalf of a majority of the Court, was being implicitly contested by other members of the Court. Moreover, Justice Bastarache himself was augmenting his framework in such a way as to widen the role of competence concerns and the circumstances in which a less stringent standard of proof would be allowed.

b. *Vulnerable Groups' Interests as Counterbalance*

The seeming retreat from the paramountcy of the interests of vulnerable groups occurred in the decision in *M. v. H.*, which concerned a claim that the exclusion of same-sex couples from the spousal support scheme of the *Family Law Act*[96] violated section 15 of the *Charter*. By majority, the Court held that section 15 had been violated and that the violation could not be justified under section 1 of the *Charter*. In rejecting the Attorney General of Ontario's submissions under section 1, both Justice Iacobucci (who, with Justice Cory, wrote the leading majority judgment) and Justice Bastarache (who wrote a separate judgment to the same result) considered the limits of institutional competence in the context of addressing the issue of deference.

What is interesting about Justice Iacobucci's section 1 analysis is that his explanation as to why and in what circumstances a court may need to be deferential centres entirely, and expressly, on the issue of the limits of the institutional competence of courts. Further, while Justice Iacobucci acknowledges the foundations laid in *Irwin Toy* and specifically mentions the factors of competing claims and conflicting social science evidence, he does not mention the factor of the stakes of

[96] R.S.O. 1990, c. F-3.

vulnerable groups. Although this aspect of Justice Iacobucci's judgment is not cast as an objection to the framework set out by Justice Bastarache in *Thomson Newspapers*, that is what it amounts to. And perhaps it was successful, because in his separate judgment reaching the same result as Justice Iacobucci, Justice Bastarache augments his framework by identifying three further factors that ought to be taken into account in conducting the section 1 review. First, he identified the representativeness of the process giving rise to the decision being challenged as a relevant factor, with the argument being that the less representative the process the greater should be the rigour of the section 1 analysis. The second factor he identified was the sensitivity of the moral judgments embodied in the decision, with the argument being that the more sensitive or, more accurately, the more controversial they were, the more forgiving would be the section 1 analysis. Finally, Justice Bastarache identified the factor of the polycentricity or complexity of the situation from which the claim arose as relevant, with the argument being that the more complex the situation, the more circumspect the court needed to be with any intervention.

As with the factors he identified in *Thomson Newspapers*, the three additional factors Justice Bastarache identified in *M. v. H.* can be understood to be based either in concerns over competence or concerns over legitimacy, or both, although he only made a point of mentioning competence concerns in relation to the factor of complexity. But, in contrast to the orientation of the factors he identified in *Thomson Newspapers*, Justice Bastarache's new factors did not appear to be informed by any special concern to protect the interests of vulnerable groups. With respect to the factor of representativeness, it may well be the case that decisions detrimentally affecting the interests of vulnerable groups, including decisions detrimental to social assistance recipients, will be made in less representative processes (for instance, closed-door Cabinet or Ministerial processes of amending social assistance regulations). But similar processes might also be used for decisions detrimentally affecting advantaged interests. With respect to the factor of moral sensitivity, since it seems reasonable to argue that it is the moral status quo that creates vulnerability, and that efforts to reform that status quo in favour of vulnerable groups will seem morally controversial, the second factor might militate against the interests of those groups. Finally, to the extent that vulnerable groups may often assert claims against governments in polycentric circumstances—and here it must be noted that social assistance decisions are certainly polycentric—the third factor has the potential to allow governments a lower standard of justification in limiting those claims.

At the same time, though, Justice Bastarache's discussion in *M. v. H.* of the factors earlier identified in *Thomson Newspapers* confirmed his continuing concern that decisions as to the rigour of section 1 review ought to attend to the implications for vulnerable groups. This was particularly evident in his discussion in *M. v. H.* of what approach courts ought to take when reviewing the balances struck by governments between competing interests. For Justice Bastarache, the issue of balancing was to be approached via two of the factors he had identified in *Thomson Newspapers*, namely, whether there was an attempt to protect the interests of a vulnerable group and the nature of the interest affected. In keeping with the earlier

cases, Justice Bastarache argued that where the balancing of competing interests involved the interests of vulnerable groups and resulted in a measure that was protective of those groups, then the court should consider applying a less stringent standard of review. But in a move beyond the earlier cases, Justice Bastarache also argued that where such balancing appeared to result in a measure that was detrimental to the interests of vulnerable groups, then the Court should consider applying a more stringent standard of review. The implication of these arguments was that, for Justice Bastarache, the challenges to competence associated with balancing ought to be responded to by means that give the benefit of the lack of competence to vulnerable groups. Thus, whether the need for balancing would allow the government a deferential standard of proof would depend upon the extent to which the government's actions were aligned with the interests of vulnerable groups.

So, on the one hand, as Justice Iacobucci's judgment led the majority, and given the additional factors identified by Justice Bastarache, the reasoning in *M. v. H.* constituted something of a retreat from the position in *Thomson Newspapers* that competence concerns would play second fiddle to the interests of vulnerable groups. On the other hand, the need to consider the implications of deference for the interests of vulnerable groups continued to be emphasized.

In subsequent cases in which Justice Bastarache's framework has been applied, a concern to assess on which side of the case, if any, the interests of vulnerable groups lie, and to take that into account in determining whether to be deferential, has been evident.[97] Specifically, in a case concerning the ability of RCMP officers to participate in labour relations regimes, a minority of the Court applied the framework and rejected a need for deference. In so doing, it rejected the government's argument that the exclusion was meant to protect the vulnerable public from a police strike and instead held that it was the officers, as employees, who were the vulnerable group.[98] In another case concerning a freedom of expression–based challenge to *Criminal Code* prosecution in relation to possession of child pornography, a minority applied the framework and decided to be deferential. In so deciding, it noted that the legislation was attempting to protect the vulnerable group of children.[99] Finally, in a case concerning the exclusion of agricultural workers from a labour relations regime, the minority analysis in the RCMP case was followed and accordingly deference was

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[97] It is worth noting that in subsequent cases a re-emphasizing of a normative dimension to decisions as to deference has been evident even though competence concerns have not arisen. Thus, in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 294 N.R. 1, 2002 SCC 68, a majority rejected deference to a limitation on the right to vote for prisoners because the right was of fundamental normative significance. At the same time, the fact that the limitation would have a disproportionate detrimental impact on Aboriginal peoples (because they are disproportionately disadvantaged and imprisoned) was taken into account in the final stage of the s. 1 analysis. For a broader discussion of the need to return a normative dimension to s. 1 analysis, see Timothy Macklem & John Terry, "Making the Justification Fit the Breach" (2000) Sup. Ct. L. Rev. 11 S.C.L.R. (2d Series) 575.

[98] *Delisle v. Canada (Deputy A.G)*, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513, 244 N.R. 33.

[99] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1, 2001 SCC 2.

not adopted on account of the fact that the governmental measure harmed the interests of the vulnerable workers.[100]

Consequently, Justice Bastarache's initial efforts to give greater weight to the interests of vulnerable groups in decisions as to deference appear to have wrought a lasting adjustment to the foundational framework for the recognition and treatment of competence concerns. Competence concerns may not have been relegated to a secondary consideration behind the normative concern to protect the interests of vulnerable groups, but certainly the potential for deference to work to the disadvantage of those interests has been established as a normative factor that can counterbalance competence concerns. In relation to the generic social assistance challenge, which involves the vulnerable group of the poor, the subsequent development of Justice Bastarache's *Thomson Newspapers* framework thus preserves the availability of a means for countering the anti-poverty incompetence argument. The subsequent developments may mean that the interests of the poor no longer trump competence concerns, but they do at least counterbalance them. More concretely, what this could mean is that until a government can provide reasonably conclusive evidence on the so-called trickle-down effect of such measures as tax cuts and deficit reduction, a court could rely upon the normative importance of the interests of the poor to impose the burden of the conflicting evidence on the government. Thus, when the government calls for deference to its belief that failing to provide adequate social assistance is minimally impairing because of the resources devoted to generating economic opportunities in general, a court could rely upon the stake of the poor to refuse to defer.

In relation to the anti-poverty incompetence argument more generally, it is worth noting that the establishment of the normative counterbalance might have more far-reaching implications for the choice of response to competence concerns. In all of the cases considered in this section, the normative counterbalance is relevant not at the point where a court is determining its degree of competence but, rather, at the point where a court is determining how to respond to competence challenges. And in all of those cases the response being considered was deference. However, deference is only one of four possible responses to competence challenges. In three of the five situations in which Justice Bastarache's approach has been utilized, it was decided that deference was not appropriate, but that did not mean that the competence challenges were ignored. Rather, in each instance where deference was refused, and the *Charter* violation was not saved under section 1, the response of remedial restraint was recommended. As a result, the main effect of the establishment of the normative counterbalance appears to be to prompt a consideration of less severe responses to competence challenges. This effect, I would suggest, ought not to be confined to decisions as to deference. In other words, the interests of vulnerable groups should not only be available as a counterbalance to competence concerns in

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[100] *Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193, 279 N.R. 201 [*Dunmore*].

decisions as to deference. They should also be available as a counterbalance in decisions as to injusticiability, remedial restraint and competence-building. And if the effect of this counterbalance is to prompt consideration of less severe responses, then it should create a presumptive preference for utilizing the least severe response. That is, the presumptive preference should not merely be for remedial restraint over deference but for competence building over both (and over injusticiability as well). Any such presumptive preference would provide a significant counter to the anti-poverty incompetence argument's preference for injusticiability or deference.[101]

By the same token, it must be admitted that the framework of deference factors has two problems. These problems will need to be addressed if the potential of the normative counterbalance to undermine the anti-poverty incompetence argument is to be coherently realized.

First, there is the problem of weighing and balancing the various factors should the circumstances of a case be such that the various factors pull in different directions. In each of the situations in which Justice Bastarache's framework was applied, the various factors were all regarded as pulling in the same direction, that is, against deference. But it is entirely possible that in certain circumstances the factors could pull in different directions, which raises the potential problems associated with having to weigh and balance the factors. This, in turn, might especially be a problem in the circumstances of the generic social assistance challenge, where the interests of the vulnerable group in receipt of social assistance may often coincide with polycentricity in social welfare policy making, conflicting social science, demands on scarce resources and competing interests. While the interests of vulnerable groups may generally be available as a counterbalance to competence concerns, how much of a counterbalance are they?[102]

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[101] The accumulated case law on competence contains little, if any, manifestation of such a preference. Indeed, its only manifestation may be the extent to which the responses to competence challenges in minority language education rights cases might be grounded in the normative importance attributed to those rights. This failure to explore competence-building measures must be seen as a shortcoming because, I would argue, it is precisely when the interests of vulnerable groups are at stake that such exploration is most legitimate and desirable.

[102] In fact, this very problem presented itself in *Gosselin*, *supra* note 3. In that case only Bastarache J. addressed the issue of deference and he did so in the course of undertaking the s. 1 review stage in relation to his finding (which was only that of a minority) that s. 15 had been violated. He opened his s. 1 analysis by invoking his judgment in *Thomson Newspapers*, *supra* note 63, on the need for contextual analysis and the need to consider the specific deference factors he identified therein, but his ultimate discussion and application of those factors in *Gosselin* was perfunctory at best. Most significantly, although this was clearly a situation in which Bastarache J. saw the factors pulling in different directions, he did not explicitly address how the factors might be weighed and balanced or even acknowledge this complication. By implication, it seems he reached the conclusion that the stake of the vulnerable group is the most influential factor, since it is apparently capable of counteracting a combination of factors pulling in the opposite direction. However, even this is by no means clear, since the final level of deference is left somewhat vague. The vagueness of the level of deference was then exacerbated by the lack of explicit reference to it in the detail of the s. 1 analysis.

A second potential problem with Justice Bastarache's framework is that in the cases in which the framework was applied it was possible to situate the vulnerable interests on just one side of the case—either as being protected by the impugned measure or as challenging it. But what happens when vulnerable interests are at stake on both sides of a challenge? Consider, for instance, the circumstances of *R. v. Mills*,[103] in which the Court had to review the government's response to its earlier decision in *O'Connor*[104] that modified the common law evidentiary rules relating to the production of complainant-related records to the accused in sexual assault cases. Certainly, victims of sexual assault, whose interests were regarded as being protected by the common law rules and the subsequent legislation, could be regarded as a vulnerable group. But the criminally accused, even in sexual assault cases, can also be regarded as a vulnerable group. Which vulnerable group's interest ought to take priority in decisions as to deference? That said, perhaps this problem is less likely to be relevant to a social assistance challenge, where the vulnerable group of people living in poverty stands on one side and on the other stands the more diffuse interest of the public in fair but prudent fiscal policy and budgetary allocations. Certainly there are many budgetary allocations that could be regarded as protective of other vulnerable groups, but assuming that not all government expenditure can be closely associated with *Charter* guarantees (or that increasing taxes does not violate *Charter* rights), the issue of balancing the interests of directly competing vulnerable groups is unlikely to arise in a social assistance challenge.[105]

The general development of the reconstruction of the group of factors recognized as relevant to decisions as to deference and, as part of that, the effort to re-emphasize a normative component to such decisions, thus has some problems.[106] Nevertheless, since anti-poverty claims will typically seek to protect vulnerable groups, it is a development that assists in countering the anti-poverty incompetence argument. In a nutshell, the adjudication of a challenge to a failure to provide adequate social assistance may raise valid competence concerns, but courts, in deciding how to respond to those concerns, need to consider the counterbalancing factor that the purpose of social assistance is to protect the interests of vulnerable groups. Indeed, because of this, courts ought to presumptively prefer the response of exploring competence-building measures or otherwise seek to respond in ways that seek to provide as much *Charter* protection and scrutiny as possible. Consequently, to the extent that the anti-poverty incompetence argument prefers the response of injusticiablity, this development counters that injusticiability should only be

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[103] [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1, 248 N.R. 101 [*Mills*].

[104] *Supra* note 11.

[105] It should be noted that in *N.A.P.E.*, the SCC seemingly accepted the argument that the government of Newfoundland and Labrador was in the unenviable position of having to balance needs of equal *Charter* importance (*supra* note 80 at paras. 93 and 95).

[106] A third potential problem with Bastarache J.'s framework is that in boosting the normative component of decisions as to deference, Bastarache J. is assuming that courts have the competence for normative analysis, but I will not address that problem here. See *Dunmore*, *supra* note 99.

considered, if at all, once all competence-building opportunities have been exhausted and the less severe responses of remedial restraint and deference have been found insufficient. In other words, injusticiability should be reserved for only the most severe cases of incompetence.

3. Validating Creative Engagement or Competence-Building

The fourth general development in the recognition and treatment of competence concerns in *Charter* adjudication has been the efforts undertaken by some courts to modify aspects of the traditional forms of *Charter* adjudication. These efforts have enabled courts to respond to competence concerns while maintaining an effective degree of *Charter* protection and judicial supervision. The primary examples of this development are the efforts undertaken by the Supreme Court of Canada in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*[107] and by a lower court (with subsequent Supreme Court approval)[108] in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.[109]

In *Judges Remuneration Reference*, the Court considered a collection of claims, made by numerous accused and a provincial court judges' association, that reductions in the salaries of provincial court judges by the governments of Prince Edward Island, Alberta, and Manitoba compromised the independence of those judges in contravention of subsection 11(d) of the *Charter*. The Court ultimately decided that each province had contravened the requirements of section 11(d). The decision had a number of interesting aspects. Garnering the most attention was the majority's argument as to the source of the guarantee of judicial independence. While the Court decided the case on the basis of subsection 11(d), a majority was prepared to hold that the Constitution contained a more general guarantee of judicial independence, arising from unwritten constitutional standards recognized and affirmed in the preamble to the *Constitution Act, 1867*.[110] For present purposes, though, the most interesting aspect of the decision was the Court's elaboration of what the guarantee of judicial independence required of governments in relation to judicial salaries.

The requirements laid out by the Court in relation to judicial salaries can be summarized in five propositions. First, governments are in general entitled to reduce, freeze or increase provincial court judges' salaries, either as part of broader measures affecting the public service as a whole or as a narrower measure aimed at these judges alone. But, second, before proceeding with proposals affecting these salaries, governments must refer the proposals to independent, objective, and effective commissions for review. And, third, while the recommendations of these

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[107] [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577, 217 N.R. 1 [*Judges Remuneration Reference* cited to S.C.R.].

[108] *Doucet-Boudreau*, *supra* note 10.

[109] (2000), 185 N.S.R. (2d) 246, 98 A.C.W.S. (3d) 1006.

[110] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

commissions on the proposals are not binding, the proposals must not proceed until the governments have responded to the recommendations and, if the recommendations are not followed, the responses are liable to judicial review according to a standard of simple rationality. A failure of simple rationality would render the response, and any action taken after it, unconstitutional (i.e., a violation of subsection 11(d)). Fourth, in any event, these commissions must review the adequacy of judges' salaries (e.g., in relation to the cost of living) regularly (i.e., every three to five years) to ensure they do not fall below minimum acceptable levels. Finally, judges are prohibited from negotiating with the executive or legislature over remuneration, although they may express concerns and make representations on the issue.

Considerations of legitimacy and competence informed the Court's reasoning on how much more specific it should be on the shape and powers of the commissions. Rather than dictating the exact shape and powers, the majority confined itself to setting out only the basic criteria on the grounds that the questions "of detailed institutional design are better left to the executive and the legislature."[111] Nonetheless, the basic criteria covered a variety of matters, including security of tenure of members, the independence of the appointment process, and the criteria for review. Also, the court added that it would be "helpful"[112] if the provincial judiciary were consulted by governments prior to creating these bodies. Further, in rejecting the option of making the recommendations of the commissions binding, the majority relied upon the argument that "decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive,"[113] and that "[t]he expenditure of public funds ... is an inherently political matter."[114]

At the same time, though, the majority defended its decision to expressly require that judicial salaries not fall below a minimum acceptable level from concerns about legitimacy and competence. In terms of legitimacy, the majority went to some lengths to explain that the guarantee of minimum salary levels was not for the benefit of judges but for the benefit of the public and, more specifically, its confidence in the independence of the judiciary. In terms of competence, the majority declined to attempt any identification of the minimum acceptable level in the case at hand, preferring to do so on a case-by-case basis as the need to do so arose. It then noted that "this Court has in the past accepted its expertise to adjudicate upon rights with a financial component, such as s. 23 of the *Charter*"[115] and went on to cite the decision in *Mahe*.

With its decision in this case in relation to the process for reviewing measures affecting judicial salaries, the Court at once acknowledged competence concerns and

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[111] *Judges Remuneration Reference*, *supra* note 107 at para. 167.
[112] *Ibid.*
[113] *Ibid.* at para. 176.
[114] *Ibid.*
[115] *Ibid.* at para. 195.

responded to them in a way that provided a degree of procedural *Charter* protection and allowed for a degree of judicial supervision. When compared to the responses of injusticiability, deference, and remedial restraint, the response adopted in this case evinces an effort to explore innovative means of attuning the degree of *Charter* protection and judicial supervision to the limits of the institutional competence of courts. Moreover, this response was used in the context of a claim with implications for the allocation of scarce fiscal resources and involving the balancing of competing interests. It can thus be argued that this or similar responses could be explored in the context of the generic social assistance challenge, which has similar attributes. For instance, if the validity of governmental action affecting judicial salaries depends upon conformity to this process, why not demand that the validity of governmental action affecting the adequacy of social assistance conform to a similar process? The interest of society in the maintenance of judicial independence is by no means the same as the interest of the poor to adequate social assistance. However, each may be sufficiently important in its own way to justify similar responses to similar competence concerns.

There is another aspect of the decision in *Judges Remuneration Reference* with potential significance for anti-poverty cases, namely, the position that the Court was competent to undertake an inquiry into the minimum level of salary necessary to ensure judicial independence. This position was justified by reference to a general level of competence to consider fiscal matters, rather than a narrow expertise in matters of judicial salary. As a result, this makes available the argument that the Court also has the competence to adjudicate the issue of the minimum level of social assistance necessary to ensure security of the person. Yet it was precisely the competence concerns raised in relation to defining a minimum adequate level of social assistance in *Gosselin* that prompted Justice Arbour to argue that a right to minimum social assistance might be recognized but might also remain largely unenforceable.

The other main example of innovation is the remedial order made by a lower court, subsequently approved by the Supreme Court, in *Doucet-Boudreau*. The case arose from a claim that the Nova Scotia government had failed to comply with its obligations under section 23 in respect of minority-language education. Specifically, it had failed to build five French-language schools that were warranted by the numbers of the minority community. The government essentially conceded the obligation to build the schools and the main issue in the case ultimately became the remedial order of the trial judge, Justice LeBlanc. Justice LeBlanc issued an order that imposed an obligation on the government to use its "best efforts"[116] to build the five schools and, further, set deadlines for their completion that ranged from less than a year from the date of judgment to almost two years. In addition, he imposed

[116] *Doucet-Boudreau v. Nova Scotia (Department of Education)* (2000), 185 N.S.R. (2d) 246, (2000) 98 A.C.W.S. (3d) 1006, [2000] N.S.J. No. 191 (QL) at para. 195.

"reporting hearings",[117] before himself, which required the government to lodge affidavits on its progress in compliance. The claimants would also be permitted to lodge their views. The government objected to the reporting hearings and appealed their imposition. The Court of Appeal, by majority, upheld the government's challenge on the grounds that Justice LeBlanc's retention of jurisdiction violated the common law doctrine of *functus officio* and was not otherwise authorized by any relevant statute governing judicial powers or the *Charter* itself. On appeal by the claimants to the Supreme Court, a majority overturned the Court of Appeal's decision.

In affirming the remedial approach taken by the trial judge, the Supreme Court majority began by emphasizing the need for a purposive approach in *Charter* adjudication. This included ensuring that the remedial sections of the *Charter* were interpreted as empowering "full, effective and meaningful"[118] remedies that were responsive to the purpose of the rights and freedoms at issue. The majority regarded section 23 as granting a set of rights that were unique in terms of their distinctively Canadian content, the positive obligations they imposed and their numbers-dependent collective nature. At the same time, though, the dependency on the size of the community gave rise to a vulnerability to delay and inaction. Generally speaking, then, in the case of violations of section 23, timely remedial compliance was crucial.

But the majority acknowledged that there was generally a good record of governmental compliance with court orders in Canada. Further, they observed that the courts needed to be sensitive to the limitations of their role and, in particular, ought not to undertake remedial tasks that were better suited to other persons or bodies. In other words, courts needed to respect the limits of their institutional competence. However, since there was no easy formula for determining those limits, the best the courts could do was to be guided by the nature of the right at issue and the context of the case.

Against this background, the majority then argued that, as a matter of straightforward textual interpretation, it could not be denied that the wording of section 24 allowed courts to remedy governmental inaction, even if that involved a failure to mobilize fiscal resources. Whether a court ought to do so in any particular case depended upon whether it was, in the words of the section, "appropriate and just" to do so. In turn, according to the Court, that determination depended upon a consideration of five factors: whether the proposed remedy meaningfully vindicated the rights and freedoms of the claimants; whether the remedial means were legitimate within the framework of constitutional democracy; whether the remedy invoked the powers and functions of courts; whether the remedy was fair to all parties; and whether the remedial approach recognized the necessity that *Charter* adjudication evolve to meet new challenges and circumstances. Applying these factors to the case at hand, the majority held that the trial judge's remedy was appropriate and just.

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[117] *Doucet-Boudreau*, *supra* note 10 at para. 8.

[118] *Ibid.* at para. 25.

Of particular interest for present purposes is the reasoning in relation to the second and third factors. The second factor essentially involved maintaining an appropriate separation of powers and functions between the courts and the other branches of government. Here the majority emphasized the fact that Justice LeBlanc's remedial order, like remedial orders in cases such as *Eldridge* and *Mahe*, left the details of implementation to the government. The third factor was understood to be all about the institutional competence of the courts. Here the majority argued that past judicial practice could serve as a useful guide to the remedial limitations of courts. The majority then pointed out that in many areas of law—including bankruptcy, receivership, trusts, and family support—courts were engaged in the use of active and managerial powers. And while the exercise of these powers presented some difficulties, courts had been able to overcome those difficulties. The powers exercised by Justice LeBlanc, being entirely consistent with these past practices, were therefore within the competence of the courts.

In *Doucet-Boudreau*, then, the majority essentially elaborated upon the position in *Mahe* that the novelty of the rights protected by section 23 required new judicial responses. But it did so in a way that established a framework applicable to all types of *Charter* cases. Competence concerns were an important part of that framework, but they were not regarded as overly alarming. And, interestingly, the majority was willing to look beyond the borders of *Charter* adjudication to determine the limits of the institutional competence of courts. As a result, it would seem reasonable to argue that from this point forward there are no excuses for not exploring the potential for innovations such as the one in *Doucet-Boudreau* to be used to build competence in anti-poverty cases in general.[119] Indeed, in a lower court decision on the affordability of special needs health care services (*Auton (BCCA)*),[120] further and similar remedial innovations have already been explored. Specifically, due to competence concerns relating to remedial design, the trial judge agreed to hold separate hearings on liability and remedy. For its part, the Court of Appeal encouraged the parties to come to their own agreement over processes for designing, implementing, and monitoring a satisfactory treatment program. But the court maintained supervisory jurisdiction and allowed the parties to return to the court to resolve any disagreements.

As such, these further aspects of the fourth general development in the framework for recognizing and treating competence concerns in *Charter* adjudication also assist in countering the anti-poverty incompetence argument. Specifically, if a claim such as the generic social assistance challenge were ever upheld by a court, then a government might argue that there remained a range of policy options for

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[119] For approving assessments of the decision in *Doucet-Boudreau*, *supra* note 10, which also acknowledge the relevance of competence concerns, see Marilyn L. Pilkington, "Enforcing the Charter: The Supervisory Role of Superior Courts and the Responsibility of Legislatures for Remedial Systems" (2004) 25 Sup. Ct. L. Rev. (2d Series) 77 and Kent Roach, "Principled Remedial Discretion Under the Charter" (2004) 25 Sup. Ct. L. Rev. (2d Series) 101.

[120] *Supra* note 68. Although the SCC has since upheld an appeal from this decision, the innovation described here was not at issue on appeal.

realizing security of the person for the poor and that the court lacked the competence to choose and design the most appropriate remedy. In response, a court might exercise remedial restraint by opting merely for a declaratory remedy and relinquishing jurisdiction. However, following the lead of *Doucet-Boudreau* and *Auton,* a court might seek to better equip itself for making a more detailed remedial order by ordering a further hearing on the appropriate remedy. Alternatively, it might encourage the parties to negotiate a process for determining the most appropriate remedy and maintain jurisdiction to address any conflicts that might arise.

Conclusion

Any initial hope that the entrenchment of the *Charter* would provide an additional means for prompting Canadian governments to take stronger action against poverty is far from being realized. In part this is because of the role that competence concerns have played in anti-poverty *Charter* adjudication. Generally speaking, the tendency has been for competence concerns to limit the extent of anti-poverty protection offered by the *Charter*. Indeed, through injusticiability holdings, it is often the case that no protection at all is offered. The accumulated case law in which competence concerns have worked to the detriment of anti-poverty *Charter* cases appears to be underwritten by an anti-poverty incompetence argument. This argument, in turn, is based upon the foundational framework for the recognition and treatment of competence concerns established by the Supreme Court. That foundational framework holds that court competence is challenged by the need to gather and evaluate a sufficient quantity and quality of evidence and arguments on both normative and empirical issues, and by the need to assess the balances struck in governmental decisions. Since all three of these needs typically arise in anti-poverty cases, so too do competence concerns. Moreover, anti-poverty cases typically possess the more specific attributes regarded as raising competence concerns. That is, anti-poverty cases involve the adjudication of group-mediating social policy and of conflicting social science evidence. Further, they involve the need to balance competing interests (especially in relation to scarce fiscal resources) and the interests of vulnerable groups. Consequently, according to the anti-poverty incompetence argument, the degree of *Charter* protection offered to anti-poverty claims ought to be limited, either totally (through injusticability) or significantly (through deference).

The anti-poverty incompetence argument is, however, afflicted with some of the problems that beset the foundational framework itself. Further, it is out of step with countervailing aspects of subsequent general developments in the application of that framework. In other words, the very same body of case law that allows, and gives expression to, the anti-poverty incompetence argument also provides the means for countering it (at least as it is expressed in accumulated *Charter* cases). The counter-argument has three main components. First, the Supreme Court itself has rightly questioned some of its own earlier conceptions of the attributes that signal incompetence, particularly the social policy/criminal justice distinction. Second, in other types of *Charter* cases, where competence challenges similar to those that can

arise in anti-poverty cases have arisen, the courts have been willing to respond to those challenges in ways that provide more fulsome *Charter* protection. In particular, courts have been willing to undertake competence-building measures that could be applied in anti-poverty cases. Third, in a number of cases involving the interests of vulnerable groups—interests that are at stake in anti-poverty cases—the Supreme Court has recognized that competence concerns can be counterbalanced by normative concerns. This counterbalance has been relied upon to respond to competence challenges in ways that provide as much *Charter* protection as possible. Similar reliance could be placed upon it in anti-poverty cases.

As such, my counter-argument accepts, for present purposes at least, that the forms of adjudication can cause competence challenges to arise in anti-poverty cases. However, the anti-poverty incompetence argument both overstates the challenges and overreacts to those challenges, especially as compared to the recognition and treatment of competence challenges arising in other types of cases. In fact, on closer analysis, it is possible to argue that what is most coherent in accumulated competence decisions pulls in the opposite direction to the anti-poverty incompetence argument. In other words, it is possible to argue, at least within the confines of accumulated case law, that courts ought to work much harder to respond to competence concerns in ways that limit the force of anti-poverty *Charter* obligations as little as possible. Better yet, courts ought to follow their own lead in exploring the competence-building means by which they can engage and overcome the competence concerns that may arise in anti-poverty *Charter* cases.