

The Year in Review

Poverty and a Victorian Bill of Rights: a View from Canada

David Wiseman

Assistant Professor, Faculty of Law, University of Windsor,
Canada

Introduction

Victoria is presently engaged in a process of considering whether to introduce a Bill of Rights. This paper addresses the possibility that any such Bill of Rights might provide a means for imposing obligations upon the Victorian government to improve the standard of living of people living in poverty. More particularly, in accordance with the government's preference for constraints on the scope of human rights protection, I examine the possibility that an instrument cast in the language of civil and political rights, but not social and economic rights, can meaningfully contribute to the amelioration of poverty. My examination of this possibility takes place from the perspective of experience in Canada with anti-poverty litigation under the Canadian Charter of Rights and Freedoms, which is also cast in the language of civil and political rights. My basic argument is that it is certainly possible that civil and political rights language can be relied upon to impose anti-poverty obligations, but, given the Canadian experience, that possibility is unlikely to be realised in Victoria unless a range of predictable barriers are addressed during the process of establishing a Victorian Bill of Rights. As it happens, the Victorian government's preference for a political, rather than judicial, supervision mechanism will, perhaps inadvertently, render some of the barriers faced in Canada redundant. But still other barriers will require attention.

Those concerned with the plight of the poor and marginalised ought to ensure that the government takes the appropriate action to ameliorate those barriers.

In this paper I first briefly describe the process of considering a Bill of Rights established by the Victorian government, giving particular attention to the government's preferred model. This includes consideration of the government's antipathy to including social and economic rights and also an appraisal of the justifications it offers for that position. I then discuss the two approaches that have been used in Canada by those seeking to address poverty through human rights guarantees cast in terms of civil and political rights. I identify the extent to which these approaches have been successful and the barriers to success that have emerged. Finally, I consider the implications of the Canadian experience for a Victorian Bill of Rights.

1. The Victorian Bill of Rights consultation process

The Victorian government's commitment to considering whether to introduce a Bill of Rights was formally announced in the Attorney-General's Justice Statement released in May, 2004. Included in the Justice Statement was a commitment to establishing a process of community consultation on how best to protect and promote human rights in Victoria. The community consultation process was initiated in May, 2005 with a Statement of Intent on Human Rights in Victoria from the Department of Justice. The Statement of Intent established a Human Rights Consultation Committee, identified the context and framework for its consultation, set-out the basic parameters of the government's preferred human rights model, specified a basic process of consultation and requested that the Committee submit its recommendations in a written report by 30 November, 2005. The government's preferred model emphasised retention of the sovereignty of Parliament through reliance upon a legislative rather than constitutional human rights instrument. The preferred model was also oriented towards prevention and dispute mediation through

The Year in Review

“mechanisms that promote dialogue, education, discussion, and good practices”¹ rather than litigation. The courts were to have a limited role and no new individual causes of action based on human rights breaches were to be created. Finally, the substance of human rights protection was to be drawn from the International Covenant on Civil and Political Rights (the ICCPR) rather than the International Covenant on Economic, Social and Cultural Rights (the ICESCR) (both of which Australia has ratified). The ICCPR includes protection for the rights to life (Article 6), liberty and security of the person (Article 9), equality before the law and a fair trial (Article 14), and freedom of expression, thought, conscience and religion (Articles 18 and 19). The ICESCR includes protection for the right to an adequate standard of living (Article 11), including adequate housing, food and clothing, the right to social security (Article 9), and the right to health (Article 12).

The most straight-forward way for a Victorian Bill of Rights to potentially play a meaningful role in the elimination of poverty would be for it to expressly protect the so-called social rights enshrined in the ICESCR. Although it pre-emptively decided against this option, the Victorian government nevertheless purported to be concerned that any eventual Bill of Rights have significance for “[t]hose who are living in poverty and people from marginalised communities.”² In the government’s view, confining a Bill of Rights to the substance of the ICCPR was not inconsistent with this concern because the poor and marginalised “have often had the most need of the protections offered by the basic rights found in the ICCPR.”³ This may well be so, but, as the following discussion of the Canadian experience clearly shows, confining the scope of human rights protection to the guarantees of the ICCPR can limit the extent to which governments can be prompted to address the circumstances and causes, rather than the consequences

¹ Department of Justice, Government of Victoria, “Human Rights in Victoria – Statement of Intent” online: <<http://www.justice.vic.gov.au>> at 2.

² *Ibid.*

³ *Ibid.*

and symptoms, of poverty and marginalisation. For example while it is important that a person living in poverty receive a fair trial, if they were not living in poverty the chances are they would never even be involved in a trial.

Understandably, this has led some of the organisations that are concerned about the poor and marginalised to recommend in their submissions to the Committee that it re-consider the government's exclusion of the guarantees of the ICESCR.⁴ But there is another possibility, namely, broadening the understanding of the substance of civil and political rights guarantees so that they encompass the threat that poverty poses to the enjoyment of those rights. It is this possibility, and the experience of trying to realise it in Canada, that I discuss below.

Before proceeding with that discussion, however, it is worthwhile briefly appraising some specific elements of the government's apparent justification for excluding social and economic rights. The Canadian experience assists here as well.

One element of the government's justification is a preference for giving priority of protection to "those rights that have a strong measure of acceptance in the community."⁵ But a number of the submissions to the Committee attest to the fact that social and economic rights have a strong measure of acceptance among poor and marginalised people and

⁴ Note that; "41 per cent of submissions wanted the Charter to also include economic, social and cultural rights (ESC rights) such as the right to food, health, housing and education. The Committee noted with interest the wide range of people and organisations who argued strongly in favour of including such rights, including many individuals, legal firms, judges, professional bodies, advocacy organisations from a range of sectors and Indigenous communities from across the State." The Human Rights Consultation Committee, *The Report of the Human Rights Consultation Committee* (2005) Para 2.2.2

⁵ *Ibid* at 3.

The Year in Review

their advocates.⁶ If they have a weaker degree of acceptance in the broader community, that may be a function of the relative advantage of the broader community. Since a purpose of protecting human rights is generally taken to be protecting minorities from majorities, for the government to essentially adopt the majority's preferences as to which rights to protect seems problematic—especially when the majority may regard the rights in question as practically irrelevant, given their relative social and economic advantage.⁷

A second and double-pronged element of the government's justification is that social and economic rights "can raise difficult issues of resource allocation and that many deal with responsibilities that are shared between the State and Commonwealth Governments."⁸ The respective justificatory prong of this element relies upon the position that social and economic rights can be meaningfully distinguished from civil and political rights both in terms of the relevance of resource allocation issues and in terms of federal-state responsibility-sharing. Two well-known Canadian Charter cases put the lie to the resource allocation distinction. In *Singh v Canada (Minister of Employment and Immigration)*,⁹ the Supreme Court of Canada 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.¹⁰ Similarly, in *R. v. Askov*,¹¹ significant

⁶ See especially the submission of the Public Interest Law Clearing House's Homeless Persons' Legal Clinic, online: <<http://www.justice.vic.gov.au>>

⁷ Of course, it could be argued that, for many in the majority, these rights may be more relevant than they think or are willing to admit.

⁸ Department of Justice, Government of Victoria, "Human Rights in Victoria – Statement of Intent" online: <<http://www.justice.vic.gov.au>>

⁹ *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 [Singh].

¹⁰ *The Globe and Mail*, May 22, 1985:3, cited in M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishing, 1994) at 243.

fiscal implications arose from the Court's decision setting out standards for undue delay in criminal proceedings. The standard threatened to jeopardise 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.¹²

As for federal-state sharing of responsibility, the long and ongoing history of overlap and inconsistency between federal and state laws in Australia, that are hardly limited to areas associated with social and economic rights, undermines the distinction assumed by the other justificatory prong.

A third element of the government's justification for excluding social and economic rights is its belief "that Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated." This element is a true red herring. Since the Statement of Intent essentially precludes a model of judicial supervision of a Victorian Bill of Rights, Parliament will remain the dominant decision-making forum for all policy issues, regardless of whether civil and political or social and economic rights are implicated.

Each element of the government's apparent justification for excluding social and economic rights from a Victorian Bill of Rights is thus problematic. Nevertheless, in recognition of the fact that the government will probably get its way, I now turn to the possibility that civil and political rights guarantees could play a role in eliminating poverty.

¹¹ [1990] 2 S.C.R. 1199 [Askov].

¹² Law Times, June 24-30, 1991:1, cited in Mandel, *supra* n. 7 at 227.

2. Engaging poverty through civil and political rights in Canada: approaches and barriers

At a general level, Canadian attempts to impose anti-poverty obligations on governments through the Canadian Charter of Rights and Freedoms appear to have achieved little. Canada, like Australia, is one of the wealthiest countries in the world and consistently ranks highly in comparative quality of life measures.¹³ Canada's gross domestic product more than doubled in the last two decades of the twentieth century, which corresponds to the first 18 years of entrenchment of the Charter. Over the same period, however, the poverty rate barely improved.¹⁴ It is estimated that a sixth of the population still lives in poverty.¹⁵ From 1980 to 1999, the poverty rate among children increased by almost 3%.¹⁶ Throughout the period, women and Aboriginal peoples continued to suffer a much higher incidence of poverty than their male and non-Aboriginal counterparts.¹⁷ And, perhaps most tellingly, the poverty gap, that is, the amount of additional income that would be required to bring all Canadians above

¹³ For instance, Canada was ranked at the top of the Human Development Index of the United Nations Development Program from 1993 to 2001. For 2004, it was ranked fourth. See United Nations Development Program, *Human Development Report 2004* (Oxford: New York, 2004).

¹⁴ National Council of Welfare, *Poverty Profile 1999*, looseleaf (Government of Canada: Ottawa, 2002) at 9-10.

¹⁵ *Ibid* at 9-10.

¹⁶ *Ibid* at 11.

¹⁷ *Ibid* at 125-128 and 137-146. With regards to women, in 1980, the poverty rate among all women was 18.8%, whereas it was only 13.2% for all men. By 1999 it had decreased to 17.5% for women and remained unchanged for men. The poverty rate among single parent families headed by mothers declined by almost 6% over the period, but still 51.7% of those families lived in poverty. With regards to Aboriginal peoples, in 1995, the poverty rate for those aged 15 and over was 42.7% for women and 35.1% for men or, in other words, more than double the rates for their non-Aboriginal counter-parts.

the poverty line in any given year, increased by \$5 billion from 1980 to 1999.¹⁸

Nevertheless, or perhaps consequently, Canadian social and economic rights claimants and advocates have been unrelenting in their attempts to persuade Canadian courts that the civil and political rights language of the Charter ought to be interpreted as imposing anti-poverty obligations upon Canadian governments. These efforts have revealed two main approaches to attempting to engage poverty through a human rights instrument cast in terms of only civil and political rights: the equality approach and the adequacy approach. In the following two subsections I discuss each of these approaches in turn. In the third section I discuss the main barriers to these approaches.

A. The equality approach

The equality approach focuses on the right to equality and advances the position that people are entitled to equality in the social and economic aspects of their lives. The justification for this position rests either on an argument that social and economic inequality is as great a concern as civil and political inequality or that real civil and political equality requires social and economic equality. Within the equality approach there are three basic strategies. The first equality strategy relies upon an express prohibition on discrimination on poverty-related grounds, such as "social condition", "source of income" and "receipt of social assistance." For instance, the Ontario Human Rights Code prohibits discrimination against people in receipt of public assistance in relation to housing.¹⁹ No such grounds are included among those that are expressly enumerated and prohibited in the Canadian Charter. But the Charter's equality guarantee does allow the courts to recognise analogous grounds as well. The courts have been encouraged to recognise poverty-related grounds as analogous, but this has only

¹⁸ *Ibid* at 96-97, pre-tax, measured in constant 2000 \$CAD.

¹⁹ Ontario Human Rights Code, R.S.O. 1990 c. H-19, s. 2.

The Year in Review

occurred in one case so far.²⁰ This first equality strategy has thus met with only limited success in Canada.

The second equality strategy relies upon the understanding that discrimination is not limited to words that expressly dictate unequal treatment on prohibited grounds. Discrimination can also result from the adverse effects, on people identifiable in terms of prohibited grounds, of neutral words or of words that dictate unequal treatment on un-prohibited grounds. If an equality guarantee is interpreted as providing protection against such adverse effect or, as it is also referred to, indirect discrimination, then it can become a tool for engaging poverty. This is so because people identifiable in terms of expressly prohibited grounds of discrimination—in particular, women, recent immigrants, and aboriginal people—tend to be over-represented among the poor. As a result, governmental action that differentially and detrimentally affects the poor can be regarded as adverse effect or indirect discrimination on prohibited grounds. This is illustrated by a Canadian case which upheld an equality-based challenge to an exclusion of social housing tenants from a general protection of security of tenure for tenants.²¹ This holding relied upon a finding that the differential treatment of social housing tenants had an adverse impact upon expressly protected groups who are over-represented among social housing tenants—specifically, visible minorities, women and social assistance recipients.

²⁰ *Falkiner v Ontario (Minister of Community and Social Services)* (2002) 59 O.R. (3d.) 481. This case concerned an equality-based challenge to a so-called spouse-in-the-house rule. By virtue of such rules, people in receipt of social assistance benefits for single persons are penalised if they begin co-habiting with a person whom the rules deem to be a spouse. The challenge was upheld and one of the grounds for so holding was that 'being in receipt of social assistance' was an analogous ground of prohibited discrimination.

²¹ *Dartmouth/Halifax County Regional Housing Authority v Sparks* (1993), 119 N.S.R. (2d) 91.

The third equality strategy seeks to move beyond a guarantee of formal equality to a guarantee of substantive equality. On the one hand, formal equality requires that a government itself refrain from differential treatment that impedes people or groups (definable in terms of prohibited grounds) from equally realising their rights and interests. On the other hand, substantive equality requires governments to respond to the unequal circumstances of disadvantage (not imposed by specific government action) experienced by such people or groups, which also impede them from equally realising their rights and interests. Thus, to the extent that poverty precludes people from equally realising their civil and political rights, substantive equality would oblige governments to eliminate poverty. In a number of anti-poverty Charter cases, Canadian courts have been urged to adopt a substantive understanding of equality. The closest they have come so far is a case in which the Supreme Court held that a failure to provide medical interpreter services for deaf patients seeking medical attention in a provincial, public, healthcare system violated the Charter's equality guarantee.²² As this holding ultimately imposed on the government a positive obligation to ensure such services were available, it is suggestive of a substantive conception of equality. However, subsequent cases have treated it as standing only for the proposition that, where a government opts to provide a public program, it must ensure that the program is provided without discrimination on enumerated or analogous grounds. It is in the prerequisite that a government has already opted to provide a program that this understanding of the decision falls short of substantive equality.

At this point in time then, it must be admitted that the three strategies of the equality approach have met with only very limited success in the context of Charter litigation. Nevertheless, they represent possibilities for squeezing anti-poverty obligations out of human rights guarantees framed in the language of civil and political rights. At the same time, this track record also suggests that anyone who is interested in seeing

²² *Eldridge v British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624 [*Eldridge*].

The Year in Review

an eventual Victorian Bill of Rights as an instrument which can engage with issues of poverty ought to be advocating for legislative language, or other statements of interpretive relevance, that requires or allows these equality strategies.

B. *The adequacy approach*

The adequacy approach focuses on the rights to life, liberty and security of the person and holds that social and economic inequality threatens the enjoyment of those rights. This position is based upon an argument that a minimally adequate standard of social and economic well-being is essential to preserving life, liberty and personal security. Put the other way, this position holds that poverty threatens life, liberty and security of the person.²³ The adequacy approach has been used in many social and economic rights claims put forward under the Canadian Charter. In Canadian courtrooms, it is generally accepted that the Charter's right to life, liberty and security of the person (contained in s. 7) guarantees a person's physical and psychological integrity. But while many anti-poverty claimants have argued that the right includes protection against the deleterious effects of inadequate housing, healthcare or social assistance upon physical and psychological integrity, the overwhelming majority of lower court decisions have preferred the view that protection is only provided against the deleterious effects upon physical and psychological integrity posed by the administration of criminal and civil justice. For example, the following claims have all been rejected on the basis of the narrower reading: a claim for access to expensive and only partially publicly-subsidised HIV/AIDS medication;²⁴ a claim to protection against inadequate care for extended care residents of nursing homes;²⁵ a claim for an additional allowance for provision of full-time health care

²³ This approach overlaps somewhat with the third equality strategy.

²⁴ *Brown v. B.C. (Minister of Health)* (1990), 66 D.L.R. (4th) 444 [Brown].

²⁵ *Ontario Nursing Home Association v. Ontario* (1990), 72 D.L.R. (4th) 166 [ONHA].

services in the home, rather than as an in-patient;²⁶ a claim to protection against a no-grounds eviction from public housing;²⁷ a claim to protection against withdrawal of social assistance on the ground of having resumed living with a spouse;²⁸ a claim to protection against reduction of social assistance rates;²⁹ a claim to protection against charges of mischief in relation to attempted occupation of vacant housing³⁰ and, claims to protection against anti-panhandling laws.³¹

At the same time though, the Supreme Court of Canada has left the door open to the broader reading. In an early Charter case, the Supreme Court of Canada expressly refrained from foreclosing the possibility that s. 7 protected "economic rights fundamental to human life and survival", even as it rejected an argument that s. 7 protected the economic liberty of a business corporation. The net result of the more recent case of *Gosselin v. Québec (Attorney General)*,³² in which a s. 7 challenge to the inadequacy of a lower rate of social assistance for younger recipients classified as "employable" was rejected, was the same. Five members of the Court rejected the claim for lack of evidence, but left open the possibility of a broader reading of the section. Two dissenting members of the Court relied upon a broader reading to uphold the claim. The remaining member of the Court

²⁶ *Fernandes v. Manitoba (Director of Social Service)* (1992), 93 D.L.R. (4th) 402 [Fernandes].

²⁷ *Bernard v. Dartmouth Housing Authority* (1988), 53 D.L.R. (4th) 81 [Bernard J]. See also *Newfoundland and Labrador Housing Corp. v Druken* (1992) 101 Nfld. & P.E.I.R. 286 and *Newfoundland and Labrador Housing Corp. v Butler* (1994) 125 Nfld. & P.E.I.R. 104.

²⁸ *Conrad v. Halifax (County)* (1993), 124 NSR 251 (NSSC) [Conrad].

²⁹ *Masse v Ontario (Ministry of Community and Social Services)* (1996), 134 DLR (4th) 20 [Masse].

³⁰ *R v Clarke* (1998), 23 C.R. (5th) 329.

³¹ *R v Banks* (2001), 55 O.R. (3d) 374.

³² [2002] 4 S.C.R. 429 [Gosselin].

The Year in Review

endorsed the narrow reading of the section and thus rejected the claim.³³

If the adequacy approach thus remains alive in Canadian Charter case-law, it is also fraught with danger. This is illustrated by the yet more recent decision of the Supreme Court in *Chaoulli v. Québec (Attorney General)*,³⁴ which concerned a s. 7 challenge to the validity of a provincial prohibition on private health insurance for medically necessary services available through the public health care system. The claimant argued that, given the delay associated with the waiting lists for care in the public health system, the prohibition threatened his life and security of the person. By majority, the Court agreed. At first blush, this may suggest that the detrimental effects of inadequate healthcare on the s. 7 right are being recognised. However, as the decision was framed in terms of the threat posed to life and security of the person by the prohibition on private health insurance, rather than the waiting lists, this remains unclear. Moreover, all members of the Court suggested that they would be extremely reluctant to recognise an obligation to ensure that those who could not afford private health insurance would nonetheless obtain adequate health care.³⁵

³³ It is worth noting that the United Nations Human Rights Committee, which monitors compliance with the ICCPR, has taken some steps towards recognising the threat that poverty poses to the right to life. See B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 J.L. & Soc. Pol'y 117.

³⁴ [2005] SCC 35 [*Chaoulli*].

... who were part of the majority, mentioned that the express freestanding right to adequate health care and that the majority would not have been able to do so.

C. Barriers

The case-law on anti-poverty claims under the Charter reveals three underlying barriers to any efforts at engaging poverty through human rights guarantees framed in the language of civil and political rights. These barriers underlie and inform the more traditional judicial debates over the meaning of the words used in the Charter's text. The first two barriers are judicial concerns over the legitimacy and competence of courts reviewing poverty-related government decision-making through human rights review. The main concern with respect to legitimacy is that Charter review empowers an appointed judiciary to override the decisions of the relatively more democratically accountable branches of government. And while this can be problematic in any area of governmental decision-making, it is particularly so in areas where public opinion is strongly divided and significant fiscal resources are at stake, including anti-poverty policy. Or so many Canadian judges seem to think.

With respect to competence, the concern is that the procedural characteristics of adjudication (including the limits of judicial expertise in non-legal matters) hinder the ability of courts to correctly and effectively resolve cases arising from complex social policy situations.³⁶ Whether the task is to understand the social policy context of the case, or to assess the consequences of alternative governmental action, or to predict the consequences of judicial intervention, or to formulate the appropriate remedial strategy, courts, it is argued, will likely lack a sufficient quantity and quality of information. Moreover, they will have difficulty evaluating even what information they do have. Again, while these problems can arise in any area of governmental decision-making, they are regarded by Canadian courts as particularly pronounced in the area of social welfare policy. This is on account of the inter-

³⁶ For an extended discussion of judicial treatment of this barrier, see the author's "Competence Concerns in Charter Adjudication: Countering the Anti-poverty Incompetence Argument" (2006) 51 *McGill L.J.* (forthcoming).

Year in Review

relationship and complexity of social welfare programs, including the associated budgetary allocations, together with the conflicted or indeterminate state of related social science evidence.

The third barrier is judicial conservatism. While the barriers of legitimacy and competence concerns emerge from the mouths of judges themselves (as well as academic commentators and government litigants), this third barrier emerges from academic analysis of what else judge say in their judgments. Judicial conservatism refers to the apparent dominant ideology of the Canadian judiciary. According to the analyses of leading progressive Charter scholars, Canadian judges are overwhelmingly ideologically conservative, in two senses.³⁷ First, Canadian judges tend to have little understanding of or sympathy for the plight of the socially and economically disadvantaged. Second, and perhaps more significantly, they tend to conceive of the Charter as primarily concerned with guaranteeing individualistic, negative, civil and political protections. Consequently, Canadian judges are ideologically predisposed to resisting invitations to explore the potential of the Charter to provide protection for social and economic rights, which are often regarded as more collectivist and positive.

³⁷ See, for example: J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); A. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishing, 1994). For more recent applications of these critiques, see A. Hutchinson, "Condition Critical: The Constitution and Health Care" and A. Petter, "Wealthcare: The Politics of the Charter Re-visited", both in C. Flood, K. Roach & L. Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 101 and 116, respectively. At the same time, it should be recognised that conservative critics have made the exact opposite criticism (although I find this much less persuasive), see, for instance, F. L. Morton & R. Knopf, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

In addition to these three barriers, which all emerge from the case-law itself, a fourth and different type of barrier to the anti-poverty potential of the civil and political rights guarantees of the Charter needs to be recognised, namely, the costs and other demands of Charter litigation.

3. Implications for the Victorian Bill of Rights debate

Any eventual Victorian Bill of Rights is likely to guarantee equality and the rights to life, liberty and security of the person. Consequently, the equality and adequacy approaches that have been used by Canadian social rights advocates in seeking to bring poverty within the scope of protection offered by such guarantees, would be available for use in Victoria as well. But then the question becomes whether the barriers that those approaches have faced would also arise in Victoria and, if so, what might be done to avoid them.

If the eventual model for a Victorian Bill of Rights departs from the government's preferred model and includes judicial supervision of human rights through individual causes of action, as in Canada, then I can see no reason why all of the barriers would not appear in Victoria. However, if the government's preferred model of a non-judicial (Parliamentary) monitoring mechanism holds sway, then, almost by definition, neither legitimacy nor competence concerns ought to arise as barriers. This is because those concerns are based on a pessimistic assessment of the competence and legitimacy of judicial judgment as compared to political judgment.

The barrier of judicial conservatism would also be redundant with a non-judicial model of supervision, however a corresponding political conservatism may appear. The analysis of judicial conservatism often comes with a forceful argument that legislatures have been, over time, done relatively more to protect people from poverty. However, if the enacting government has entrenched a Bill of Rights at the end of a process that expressly excludes poverty from the scope of protection offered by the instrument, then the inherent conservatism of that

The Year in Review

approach would be likely to inform the political supervision mechanisms for some time following. By the same token though, over the longer term, if political institutions really are less conservative than the judiciary, then this barrier may at least ebb and flow. Ultimately, much may depend upon the more precise details of the political mechanism and, in particular, how prone it is to partisan politics.

The fourth barrier of the costs of effectively participating in the supervision mechanism may still be a problem even with a political supervision mechanism. While litigation may be a particularly expensive form of human rights advocacy, effective political lobbying can still require significant resources of time and money. In addition, assuming the political supervision mechanism allows for participation by human rights claimants, such participation can also be costly, particularly for people who are already poor.

There are measures that can be taken to counter the barriers that would remain even if an eventual Victorian Bill of Rights uses a political supervision mechanism. With respect to political conservatism, it would be useful to secure a clear re-iteration in the Bill of the government's position, as set out in its Statement of Intent, that the guaranteed rights be of relevance to the poor and marginalised. This might come in the form of a directive statement (such as is used in the Indian Constitution). Even more useful would be to secure the inclusion of poverty-related grounds among those expressly prohibited in the equality guarantee. At the least, the wording of the equality guarantee ought to allow for the subsequent identification of grounds analogous to those enumerated at the time of enactment. In addition, it would be important to ensure that people whose human rights may be violated are entitled to participate in the process of political supervision, whether by individual petition or in any particular inquiry.³⁸

³⁸ On the importance of participatory rights, in adjudicative contexts, see B. Porter, "Claiming Adjudicative space: Social Rights and Citizenship" in S. Boyd,

With respect to resource issues, an important ameliorative measure would be the establishment of a program for funding the participation of disadvantaged people and groups in the political supervision process.³⁹

Conclusion

The Victorian government deserves praise for its ostensible concern that any eventual Bill of Rights would be capable of addressing the particular concerns, disadvantages and deprivations of poor and marginalised people. It is troublesome, however, that the government would seek to pre-emptively deny protection for the very human rights of most relevance to the poor and marginalised—that is, social and economic rights. This is all the more so when it becomes apparent that the arguments offered in justification of that position are rather dubious.

Even if the government gets its way, Canadian experience shows that it remains possible to turn a human rights instrument cast in the language of civil and political rights to the task of ameliorating social and economic inequalities, such as poverty. This may take place through an equality approach or an adequacy approach, or a combination of both. However, the Canadian experience also shows that these approaches face a number of barriers to success. Specifically, judicial concerns over the legitimacy and competence of judicial supervision of human rights guarantees, as well as judicial conservatism and the resource demands of litigation. Somewhat ironically, the Victorian government's preference for a political supervision mechanism will alleviate the

G. Brodsky, S. Day & M. Young (eds.) *Poverty: Rights, Social Citizenship and Governance* (UBC Press: Vancouver, 2005)

³⁹ For a discussion of issues and models relating to such programs as they operate in relation to administrative decision-making, see M. Valiante & W.A. Bogart, "Helping 'Concerned Volunteers Working out of Their Kitchens': Funding Citizen Participation in Administrative Decision Making" (1993) 31 *Osgoode Hall LJ*. 687.

The Year in Review

barriers of legitimacy and competence concerns. The barrier of judicial conservatism would also become redundant, but political conservatism may work to similar effect, at least in the short term. The resources needed for the poor and marginalised to effectively participate in a process of political supervision, assuming participatory rights are even granted, would continue to pose a barrier. There are steps that might be taken to overcome these remaining barriers, including a clear statement of legislative commitment to allowing the civil and political rights language to engage social and economic inequality and establishing a program for funding participation.

Given the only modest successes of the Canadian experience with trying to advance the interests of the poor and marginalised through a human rights instrument cast in the language of civil and political rights, it is little wonder that social rights claimants and advocates have resisted the government's view that social and economic rights ought not to be included in a Victorian Bill of Rights. However, since some success has been achieved in Canada, and since the resistance may be futile, I would argue that attention should also be devoted to securing the measures that would ameliorate the barriers to success that might arise in the Victorian context.