

## 6 Human Rights and Poverty: A Twenty-First Century Tribute to J.S. Woodsworth and Call for Human Rights<sup>1</sup>

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The Canada for which J.S. Woodsworth and the Co-operative Commonwealth Federation (CCF) party struggled – a society in which everyone has an adequate standard of living, including access to adequate food, clothing and housing, health care, workers' rights, and social programs are vigorous (MacInnis, 1953), is not the Canada of today. This is a moment in Canadian political history when government commitment to social programs is at a low ebb.<sup>2</sup> It has become shockingly ordinary that people in Vancouver, and other major cities in Canada, have to line up at food banks, beg, steal, sleep in doorways and on church pews, and sell their bodies to support themselves and their children.<sup>3</sup> This chapter is concerned with the disjuncture between Canada's human rights obligations and poverty in Canada. Social programs are essential to realizing Canada's human rights obligations. This essay maps out in general terms a practical and concrete proposal for legislation that would require greater governmental accountability for the establishment and maintenance of adequate social programs. If it is recognized that having adequate social programs is essential to the realization of human rights that inhere in all Canadians, it follows that there is a governmental obligation, not only to establish social programs, but to have effective accountability mechanisms to ensure stability, and consistency for social programs, and to guard against their erosion.

It is not my intention in this chapter to take issue with the moral and religious foundations for the sense of social obligation that animated the social reformers of Woodsworth's time. The underlying values and beliefs of human rights such as the right to an adequate standard of living, and associated governmental obligations, are respect for the inherent dignity of all human beings and a belief that

there is a collective responsibility for the well-being of a society's members.<sup>4</sup> These values also lie at the heart of J.S. Woodsworth's vision of a better society (MacInnis, 1953). On the other hand, it is my intention to challenge the sufficiency of an institutional framework that does not give people any place to go besides the voting booth to hold governments to account for what must be understood to be human rights failures. Woodsworth would likely have shared this concern and interest in accountability had he lived long enough to see how social programs, like social assistance and unemployment insurance, having been hard-won, could then be stripped down and rolled back by governments indifferent to the needs of people.

### **Social Programs and Human Rights**

The understanding that access to protections such as social assistance for persons in need is a right, and not a matter of mere charity, has been evolving since the Great Depression of the 1930s. From then through the 1990s, the Canadian social safety net developed. Social assistance schemes, which exist in every province and territory, are emblematic of an understanding that there is a social obligation to ensure that everyone has an adequate standard of living that includes access to food, clothing, and shelter, as an incident of personhood and of social citizenship. The period after the Second World War was also characterized by increased consciousness about human rights, within Canada, and globally.

However, the consciousness within Canada that our social programs represent a fulfilment of governments' human rights obligations is relatively recent. When social programs were being voluntarily developed and maintained by governments, there was not much imperative to focus on the obligatory nature of the programs. Historically, within liberal democracies such as Canada the emphasis in thinking about the rights-based obligations of governments to the citizenry has been on civil and political rights, such as formal equality before the law, fair trial processes, freedom of expression, and the right to vote in elections. Social and economic rights were assumed to be either irrelevant, not real rights, or merely synonymous with whatever social programs governments deigned to provide. However, this is changing. As social programs are eliminated and diminished, many Canadians believe that they are losing benefits and protections that they had regarded, perhaps unconsciously, as established rights that governments are not at liberty to abandon.

As the impacts of more than a decade of cuts in social spending in Canada play out, it has become increasingly apparent that lack of access to adequate food and housing is integrally connected to violations of other human rights that everyone recognizes as real rights. Within Canadian non-governmental organizations (NGOs) that are involved in advocacy efforts to address discrimination and other human rights violations, there is a growing consensus that group-based inequality and poverty are profoundly connected, and must be addressed as such, in conceptions of rights and through activism. The high level of NGO participation in the 2006 United Nations review of Canada's compliance with the International Covenant on Economic, Social, and Cultural Rights (ICESCR) is a significant indication of the consensus. More than twenty Canadian NGOs submitted written briefs and many also participated in the oral hearings in Geneva in March 2006, ranging from the African Canadian Legal Clinic of Toronto to Justice for Girls of Vancouver. This is a marked increase in NGO participation from earlier periodic ICESCR reviews. It is notable that even NGOs such as Amnesty International (2006a) that in the past have concentrated strongly on traditional civil and political rights issues, now have poverty on their activist agendas. In conjunction with the ICESCR hearings in Geneva, Alain Roy, program director for Amnesty International Canada stated in the media:

Economic, social and cultural rights must be fully incorporated into federal and provincial law says Amnesty International. They must be enforceable rights, not aspirational goals. To achieve this Canada must also support the adoption of an Optional Protocol that will allow individual complaints to the United Nations if these rights are violated.

All human rights are linked, they cannot be divided ... The economic, social and cultural rights at the heart of every society must be strengthened if Canada is truly to be a country committed to supporting human rights. (Amnesty International, 2006b)

In recent years, NGOs in various parts of the world have undertaken initiatives before courts, tribunals, and U.N. committees advancing a vision of human rights that encompasses the idea that poverty is a human rights violation.<sup>5</sup>

### **Poverty and Human Rights**

The proposition that poverty is a human rights violation is multilayered (Brodsky, 2003; Brodsky & Day, 2002, 2006; Réaume, 2007; Norman, 2007).<sup>6</sup>

In the lived experience of people who are poor, civil and political rights can be meaningless. Poor people have much less access to justice, and they are criminalized because of their poverty. They are less able to defend themselves against abuse, and less able to participate in or to influence political decision-making.<sup>7</sup> For women, poverty and lack of access to social assistance and related services exacerbates every form of inequality that is associated with their subordinate social status. In practice, governments cannot effectively implement one set of rights without implementing the other.

Without protections from the deprivations associated with poverty people do not have meaningful rights to life, liberty, and security of the person. Poverty is also an equality rights issue. Social programs have been an egalitarian force in society. Cuts to social programs exacerbate the inequality of vulnerable and marginalized groups. People who are reliant on state assistance to meet their basic needs are an unpopular group, subject to negative stereotyping, and they lack political power. People living in poverty are also predominantly comprised of individuals who are members of groups that are vulnerable to discrimination and marginalization in the political process: women, Aboriginal people, people of colour, and people with disabilities. Also, for each of these groups, lack of economic security has particular effects that magnify their inferior social status. Cost-cutting agendas that deprive people of access to food, clothing, and shelter, and thereby exacerbate pre-existing group disadvantage and vulnerability to stereotyping and prejudice, run afoul of the norm of substantive equality.

The insight that the enjoyment of social and economic rights is a necessary condition for the enjoyment of civil and political rights is not new in the arena of international human rights. From the outset, the interdependence and indivisibility of all human rights has been a foundational principle of international human rights. Article 25 of the Universal Declaration of Human Rights (UDHR), adopted in 1948 by the member states of the United Nations Organization, recognizes the right of everyone to an adequate standard of living. Subsequently, in 1968, the indivisibility and interdependence of human rights was reaffirmed in the Proclamation of Tehran which recognizes the impossibility of protecting civil and political rights without realizing social and economic rights. Similarly, the 1993 Vienna Declaration (para. 5) states: 'All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equitable manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities ... must

be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote, and protect all human rights as fundamental.' The International Covenant on Civil and Political Rights (ICCRC) and the ICESCR, adopted by Canada in 1976, both explicitly draw on the UDHR, and recognize that civil and political freedom and freedom from fear and want can only be enjoyed if conditions are created whereby everyone can enjoy civil and political rights as well as economic and social rights.

Article 11 of the ICESCR obligates Canada to progressively realize the right of everyone to an adequate standard of living including adequate food, clothing, and housing, using the maximum of available resources. Further, any deliberately retrogressive measures are subject to a requirement of 'careful consideration' and must be 'fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' (CESCR, 2003: 14).

The equality rights of women, Aboriginal people, people of colour, and people with disabilities are also reflected in and reinforced by international human rights treaties. In the most recent human rights treaties adopted by Canada, such as the Convention on the Elimination of All Forms of Discrimination against Women (1982), the International Convention on the Elimination of all Forms of Racial Discrimination (1969), the Convention on the Rights of the Child (1990), and the Convention on the Rights of Persons with Disabilities (2007), there is no distinction made between civil and political rights issues and social and economic rights issues.

Recognition of the importance of social and economic protections in the human rights schema can be found in the constitutional jurisprudence of various countries. In *Grootboom*,<sup>8</sup> a South African constitutional case recognizing the human right of indigent people to housing, the Constitutional Court of South Africa, put it this way: 'There can be no doubt that human dignity, freedom, and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people enables them to enjoy the other rights enshrined in ... [the *Constitution*]. The realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential' (*Government of the Republic of South Africa v. Grootboom*, 2001: para. 23). These ideas and observations about the linkages between poverty, race, and sex – and the necessity

for an integrated approach to rights – are also applicable in the Canadian context.<sup>9</sup>

The values of respect for human dignity and integrity underlie all human rights guarantees. Giving effect to those values now means that governments in Canada must be understood to have an obligation to respond to the contemporary reality of widespread homelessness and the use of food banks.

### *Canada's Legal Human Rights Obligations*

In the Canadian legal system the primary human rights provisions that are relevant to inadequacies in social programs are: sections 7 and 15 of the Canadian Charter of Rights and Freedoms (1982) and section 36 of the Constitution Act (1982).

Section 7 provides that everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The s. 7 right to security of the person has been interpreted by courts as applying to a person's physical and psychological integrity.

Section 15 is the equality guarantee.<sup>10</sup> The courts have held that other Charter rights are meant to be read against the backdrop of the right to equality. At one time, in Canadian jurisprudence, particularly under the pre-Charter Canadian Bill of Rights,<sup>11</sup> the right to equality was thought of as a purely formal right consisting of an entitlement to be treated the same by government without regard to presumptively irrelevant characteristics such as sex and race. Although the transition from formal equality thinking to a truly substantive conception of equality is uneven and incomplete, the dominance of formal equality has been eroded by the insight that inequality has group-based dimensions that are not always effectively addressed or even perceived under a policy of such 'blindness.' The courts have held that a purpose of section 15 is to ameliorate the inequality of disadvantaged groups in the society. There is also an evolving understanding that equality rights are necessarily resistant to characterization as either civil and political or social and economic, but rather are a hybrid, and that equality rights place positive obligations on governments to act to address conditions of material deprivation and inequality (Brodsky & Day, 2002).

Section 36 of the Constitution Act, 1982 commits federal, provincial, and territorial governments in Canada to providing essential public services of reasonable quality to all Canadians.<sup>12</sup> Although jurisprudence

on section 36 is scant, the legislative record indicates that section 36 is intended to constitutionalize the government commitment to adequate social programs (Nader, 1996; Hogg, 2006).<sup>13</sup>

Inadequacies in social programs may also violate statutory human rights protections, which exist in every province, territory, and at the federal level. For example, the 2002 cuts to social assistance made by the British Columbia Gordon Campbell Liberals have had particularly harsh effects on single mothers. It is arguable that the social assistance regime violates the B.C. Human Rights Code prohibitions against discrimination based on the grounds of sex and family status (Brodsky et al., 2005).

Since the coming into force of the Charter the volume of anti-poverty litigation has not been great, and the jurisprudence is underdeveloped (Brodsky, 2007). However, there have been some important victories, such as the striking down of the spouse-in-the house rule under welfare legislation, which has disproportionately negative effects on poor single mothers.<sup>14</sup> Community-based advocates have also made effective use of human rights language and legal analysis in the context of public political protests about issues such as homelessness. For example, during a major protest about homelessness in Vancouver during the fall of 2002, the Woodward's squatters wrote the text of Article 11 of the ICESCR on the Vancouver Woodward's building, as graffiti. In turn, the squatters' use of human rights language in graffiti and public statements was also picked up by the media.<sup>15</sup> This was an important aspect of their successful protest against the provincial government's decision to sell a building that had long been promised for social housing.

In 2002, the Supreme Court of Canada ruled in the first anti-poverty case under the Charter to reach the highest court, *Gosselin v. Quebec (Attorney General)*. The issue in *Gosselin* was the constitutionality of a provision under Quebec's welfare regime, which provided a reduced rate of assistance for adults under thirty years of age. The government contended that the reduced rate was intended to induce people to enter the workforce and to participate in employability schemes. Louise Gosselin, in a class action, claimed that Quebec's scheme violated sections 15 and 7 of the Charter, and section 45 of the Quebec Charter of Human Rights and Freedoms.<sup>16</sup> Although a majority of the judges rejected the claim, the Court was very divided.<sup>17</sup> Arbour J. wrote a particularly powerful dissent holding that cutting the social assistance rate for young adults to \$170 a month, which was well below

subsistence level established by the government, constituted a violation of their constitutional right to security of the person and perhaps their right to life as well.<sup>18</sup>

Justice Arbour explained: 'a minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it' (*Gosselin v. Quebec (Attorney General)*, 2002: para. 356). The majority of the Court chose not to decide in *Gosselin* whether the s. 7 right to security of the person could obligate a government to provide social assistance. Rather, the majority expressly left the question open.<sup>19</sup>

In the wake of *Gosselin*, s. 7 Charter jurisprudence continues to develop. A positive example of continuing developments in the jurisprudence is the 2008 case of *Victoria (City) v. Adams*.<sup>20</sup> In *Adams*, Justice Carol Ross of the British Columbia Supreme Court recognized that creating shelter to protect oneself from the elements is critical to an individual's dignity and independence, and established constitutional limits on governments' ability to stop people from trying to shelter themselves, based on s. 7 rights to liberty and security of the person.

*Adams* is a small but important step towards the advancement of social and economic rights for women and men. *Adams* was argued within a negative rights paradigm. The case was not about governments' positive obligations to provide. It was about the freedom not to be prevented from making a shelter in a park. In Canada, there is no practical reason why someone who is homeless should be confronted with the hard choice between breaching a bylaw to take shelter in a park and facing a risk of becoming sick or dying because of lack of access to even a tarp or cardboard box. However, *Adams* contains important language about the right to housing as reflected in international law, and the role of international law as an aid to defining the scope and meaning of Charter rights. Justice Ross J. referred to a wide variety of international covenants and declarations that 'establish the different dimensions of the right to adequate housing and enshrine it as a fundamental principle of international law.'<sup>21</sup> Justice Ross also quoted the Chief Justice of the Supreme Court of Canada in *Gosselin v. Quebec (Attorney General)*, saying: 'One day s. 7 may be interpreted to include positive obligations.'<sup>22</sup>

There are counter-examples. Charter jurisprudence concerning positive state obligations is in a state of flux, and as mentioned, is underdeveloped. At a time like this, precisely when the jurisprudence is still

taking shape, it is particularly crucial that advocates maintain their clarity and convictions about what the rights should mean, because there is a need for strong and effective advocacy. The city was unsuccessful in its attempt to overturn *Adams* in the British Columbia Court of Appeal (*Victoria (City) v. Adams*, 2009).<sup>23</sup> The Poverty and Human Rights Centre, an intervenor in the appeal, argues that section 7 protects the right to adequate housing. The Court acknowledged the argument, and determined that resolution of the appeal did not require that it be addressed. However, doubtless in time, the Supreme Court of Canada will be called on to revisit the question of whether it is constitutionally permissible for government to turn a blind eye to conditions that result in denials of constitutionally protected rights to equality, life, liberty, and security of the person.

*The Intersection between the Charter and International Human Rights Treaties*

There is a strong basis in international law, and in well-established principles of constitutional interpretation, to support the conclusion that the Charter and section 36 of the Constitution encompass positive obligations on governments to maintain social programs at levels adequate to ensure that everyone has access to an adequate standard of living, including food, clothing, and housing, and to provide mechanisms for the domestic enforcement of rights under international treaties that Canada has ratified.

It is well established that international human rights treaties were an important source of inspiration for the Charter. The Supreme Court of Canada has recognized international human rights standards as a relevant and persuasive source for the interpretation of the Charter, because they reflect 'the values and principles that underlie the *Charter* itself' (*R. v. Keegstra*, 1990, para. 66). The Court has also treated other sources of international human rights law including U.N. resolutions, government positions in support of resolutions, customary norms, and decisions of international tribunals as relevant and persuasive authorities for the interpretation of the Charter.<sup>24</sup>

Where Canada has ratified a treaty, it is an established interpretive principle that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents that Canada has ratified.<sup>25</sup>

Questions about the interaction between the ICESCR and the Charter have frequently arisen before the U.N. committee to which Canada is

required to report periodically, under the ICESCR (CESCR Committee). Before the CESCR Committee, Canada has repeatedly claimed that the Charter guarantees that Canadians will not be deprived of the basic necessities of life. The jurisprudence of the CESCR Committee, as well as submissions that have been made to it by official representatives of the government of Canada, are persuasive authority for an interpretation of the Charter that encompasses the right to an adequate standard of living.<sup>26</sup>

*The Disjuncture between Canada's Human Rights Obligations and Poverty in Canada*

Considering the content of the human rights treaties that Canada has signed, Canada's official statements regarding its human rights obligations, combined with the intersection between the human rights treaties and the Charter, there should be no doubt in the minds of government officials that governments have a positive obligation to ensure that everyone in Canada has an adequate standard of living, and that even the poorest people have adequate food, clothing, and housing. Unfortunately, the conduct of governments indicates they have considerable doubt. Not only do governments have doubt, by savaging legislative schemes that they themselves have claimed are the means by which human rights obligations are fulfilled, governments have blatantly repudiated their human rights obligations.

The story of the repeal of the Canada Assistance Plan Act (CAP) is a central and glaring example of the problem. As a signatory to the ICESCR, Canada is required to report to the CESCR, on a periodic basis, roughly at four-year intervals. In its reports, which are prepared jointly by the federal, provincial, and territorial governments, Canada reports on its progress in complying with the requirements of the ICESCR. In 1982 and again in 1992, Canada filed reports under the ICESCR claiming that the CAP was a means of implementing the right to an adequate standard of living and that it established minimum standards for social programs (Canada, 1982: 13; Canada, 1992: 8).

However, in 1995 the federal government repealed the CAP. The significance of the about-turn that the repeal of the CAP represents cannot be overstated. While the CAP standards should not be falsely idealized because in practice access to welfare has never been adequate in Canada, the CAP provided more leverage for poor people than anything that exists in legislation at this time. As a condition of entering into a CAP agreement, the federal government and provincial governments

jointly agreed to provide assistance to persons in need, without regard to the reason for the need, in an amount adequate to meet basic requirements. Further, the adequacy of welfare was a justiciable issue (*Finlay v. Canada*, 1993). Thus, the CAP established an enforceable right to social assistance in an amount adequate to meet basic needs.<sup>27</sup> Through the mechanism of targeted intergovernmental cost sharing, the CAP also created a powerful economic incentive for provinces to fund civil legal aid services and other related social services such as women's transition houses. Although the CAP was not a conventional human rights instrument, in effect, the CAP was an important mechanism through which governments protected the right of everyone to an adequate standard of living. The CAP also promoted women's equality by mandating the provision of benefits and protections that are essential to women's enjoyment of their right to equality. The CAP was a made-in-Canada human rights accountability mechanism.

More than a decade of experience shows that the results of the repeal of CAP have been devastating for social programs, especially social assistance and civil legal aid, programs that are relied on exclusively by poor people (Day & Brodsky, 2006). Governments have come under harsh criticism for failing to take steps to ameliorate poverty, and for cuts to social programs, not only by the CESCR but also by the U.N. committees that oversee compliance with the ICCPR, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Negative impacts of cuts to social programs on women and Aboriginal people have been particularly noted. Most recently, on 7 November 2008, the United Nations Committee that oversees Canada's compliance with the CEDAW called on Canada to establish minimum standards for the provision of funding to social assistance programs. In the area of housing, the CEDAW Committee expressed its regret that Canada lacks a national housing strategy and concern over the severe housing shortage in the country and urged Canada to step up its efforts to provide affordable and adequate housing options, including in Aboriginal communities, with priority being given to low-income women. However, so far, criticism from international treaty bodies has produced no discernible response from governments (Day, 2007).<sup>28</sup>

We have in Canada what might be called an 'accountability gap.' Governments have signed international treaties, constitutionalized human rights guarantees, and very shortly thereafter scrapped the social programs along with the federal-provincial machinery that was an accountability mechanism for realizing human rights, namely, the CAP,

the associated cost-sharing agreements, and provincial legislation that was mandated by the CAP-funded agreements. In the lifetime of the Charter, governments have also routinely instructed the courts that social and economic rights are not enforceable. In turn, this has had an undermining effect on judges' perceptions of their mandate. Louise Arbour, former Justice of the Supreme Court of Canada, speaking in Canada in her new role as United Nations High Commissioner for Human Rights, expressed her concern about the 'timidity' of the Canadian judiciary in tackling claims emerging from the right to be free from want (Arbour, 2005).

The CESCR Committee, in its May 2006 Concluding Observations,<sup>29</sup> issued at the conclusion of the fourth and fifth periodic review of Canada's compliance with the ICESCR, identified a number of crucial issues. The Committee expressed particular concern about the lack of legal redress available to individuals when governments fail to implement the Covenant (CESCR, 2006: para. 11). The Committee also reiterated a concern, which had been previously expressed in 1998, that federal transfers for social assistance and social services to provinces and territories do not include standards in relation to Covenant rights, including rights to social security. The CESCR Committee recommended that Canada make Covenant rights enforceable within provinces and territories through legislation or policy measures and establish independent and appropriate monitoring and adjudication mechanisms (*ibid.*: para. 35). The CESCR Committee also recommended that Canada 'take immediate steps, including legislative measures, to create and ensure effective domestic remedies for all [ICESCR] Covenant rights in all relevant jurisdictions' (*ibid.*: para. 40).

Viewed as a whole, the 2006 Concluding Observations of the CESCR underscore the point that it is time for governments in Canada to take seriously their obligations to provide accountability mechanisms for the enforcement of rights to social programs, in other words, to fill the human rights accountability gap.

### **Conclusion: The Canada Social Transfer**

Turning to the question of what specific measures can be taken to fill the human rights accountability gap, there are various things that can and should be done, including ratifying the new ICESCR Optional Protocol by Canada which, if it is ratified by a sufficient number of countries, will permit individual complaints to the CESCR for

Covenant violations.<sup>30</sup> Reinstatement of the Court Challenges Program is also crucial because without it access to the courts will be illusory, even to resist attacks on public programs by corporate and other elite interests. Governments should also desist from trying to convince courts that the Charter is only a negative rights instrument (Brodsky, 2007).

However, I want to focus on one very practical, timely, potentially effective initiative, that of reintroducing minimum standards for social programs, through the Canada Social Transfer (CST), currently, the primary vehicle for federal-provincial transfers. When the CAP was repealed in 1995, the federal government created the Canada Health and Social Transfer (CHST), a no-standards-attached block transfer to the provinces. Subsequently, dollars for health were separated out, and standards, for health have been addressed through a new Health Accord.<sup>31</sup> The precedent of the Health Accord has created a potential opening to do something similar for the other non-health social programs that are supposed to be funded through the CST. Through the CST, Canada could have much needed standards of adequacy and targeted dollars for programs such as social assistance, post-secondary education, and legal aid designed to bring Canada into compliance with its human rights obligations under the Constitution and under international human rights law. It is beyond the scope of this chapter to address arguments about provincial jurisdiction and the position of Quebec. Suffice to say that legal arguments against the use of the federal spending power to create pan-Canadian standards are very weak, and that the concerns of Quebec are better addressed by making special arrangements with Quebec, than by balkanizing the rest of Canada.<sup>32</sup>

Done properly, reintroducing and providing improved standards through the CST could serve several important goals. First, it would make the CST what it should be, and what Canada officially claimed the CAP to have been, a mechanism for fulfilling Canada's human rights obligations. Second, reintroducing the concept of adequacy would require governments to revisit cuts that they have made to social programs. Third, incorporating standards into the CST could be a way for governments to send a potentially powerful signal to courts and tribunals that Canada does not intend poor people to be constitutional castaways.<sup>33</sup> The CST should also be structured to commit the federal government to providing adequate and ongoing funding, thereby addressing valid provincial government concerns about the unreliability of the federal government as a cost-sharing partner.

Although a conservative Harper-style federal government regime would be very unlikely to warm to a role for the federal government as initiator of standards for social programs, there are some powerful moral levers that may appeal to others. The increased provincial innovation, which was the justification offered for the federal government withdrawal from standard-setting in 1995 at the time of repeal of the CAP, has not materialized. Instead, programs have been cut, eligibility requirements tightened, and human rights treaty obligations have been flouted by the provinces.<sup>34</sup> Going back to the 1998 ICESCR review, the federal government is on record with the CESCR as stating that if any provincial government ignored Canada's human rights treaty obligations, 'national political-legal machinery would be brought to bear.'<sup>35</sup> In addition, also on the occasion of the 1998 review, Canada offered assurances to the CESCR that the Social Union Framework Agreement (SUFA) would be a vehicle that would ensure respect for Canada's international commitments. However, to date the SUFA has not had this result.<sup>36</sup> Moreover, successive federal government regimes have stood idly by, watching and even offering encouragement while provinces have derogated from human rights obligations that would have been legally enforceable under the CAP. Although intergovernmental collaboration to create new national social programs and to produce reliable standards for existing social programs in Canada is both desirable and theoretically possible, there has been no such development. It is time for the federal government to take the initiative.

I am not suggesting that legislated CST standards should serve as a substitute for the Constitution or for a usable Optional Protocol to the ICESCR, but rather that there is a need for such standards to operationalize the human rights norms reflected in those instruments. Various accountability mechanisms are needed. As a fundamental guarantee of human rights, and statement of intergovernmental powers and obligations, the Constitution is one kind of human rights accountability mechanism. Legislated standards, tailored to conform to human rights norms, and enforceable by individual citizens, are another kind of human rights accountability mechanism, and they are a necessary companion to the Constitution.

Some may be interested in securing an explicit amendment to the Constitution, to expressly articulate social rights to such things as a minimum income, housing, education, and health care, sometimes referred to as a social charter. Significant efforts to secure a social charter were made in the early 1990s (Bakan & Schneiderman, 1992). Setting aside

the question of whether embarking on a renewed process of constitutional reform at this time is strategic, these are not either/or proposals. Existing constitutional language is clearly susceptible to interpretations that encompass social and economic rights (Brodsky & Day, 2002). The virtue of more concrete constitutional language is that it might reduce the fact and influence of judicial uncertainty about whether such rights are real constitutional rights. However, there is no constitutional language that can eliminate the need for particularized government-promulgated standards for social programs, whether achieved through intergovernmental agreement or through federal legislation.

Even if social charter – type amendments were made to the Constitution, the task of putting meat on the bones of explicit social rights, such as a right to housing, would remain. Inevitably, constitutional language is too general and abstract to substitute for the particularizing and operationalizing work that governments must do. There is a need for government to establish and maintain what I refer to as interstitial institutional standards and mechanisms, that is, standards and mechanisms that go back and forth through the membranes that separate governments from each other and from courts. The task of fleshing out detailed standards and accountability mechanisms requires the involvement of governments because this is not something that can or will be done by courts alone. Courts are in a position to provide guidance concerning the interpretation of constitutional principles. They are also needed to enforce legislation.

However, governments, legislation, and intergovernmental agreements are necessary and central to particularizing and operationalizing social rights. A focus on the legislative framework for intergovernmental transfer agreements is essential given the complex nature of fiscal federalism in Canada, and the reality that such agreements have, in fact, become central to how governmental responsibilities to Canadians for social spending are shaped, understood, and discharged. The CST is an important vehicle for the transfer of funds, and it should not be overlooked. Moreover, the CST is an obvious legislative vehicle through which to establish interstitial standards and mechanisms explicitly grounded in human rights norms: to specifically designate funds for social assistance and post-secondary education and legal aid, to specify levels of adequacy, and to establish a complaint mechanism for non-compliance.<sup>37</sup>

In *Securing the Social Union* (2007) Shelagh Day and I recommend the establishment of a Social Programs Act, in which the authority and responsibility of the federal government with respect to the Canada

Social Transfer is set out, along with the conditions that are attached to the CST, and the procedures and mechanisms for holding federal, provincial, and territorial governments accountable for expenditures and adherence to standards. *Securing the Social Union* recommends that the Social Programs Act should:

- Articulate the purposes of the Canada Social Transfer, grounding those purposes in Canada's human rights obligations
- Designate the programs and services on which transferred funds are to be spent by provinces and territories, specifically designating funds for social assistance, and related essential services, including civil legal aid
- Contain standards for key programs
- Establish stable funding formulas for the transfer
- Create a monitoring and accountability mechanism that works for all levels of government and for Canada's women and men
- Recognize and define a separate and parallel arrangement with Quebec.<sup>38</sup>

There are others who support the view that government accountability for social program spending must be improved. Barbara Cameron has put forward a model for enhanced accountability in 'Accountability Regimes for the Federal Social Transfer,' a paper presented at the 2008 Annual Meetings of the Canadian Political Science Association, held in Vancouver, British Columbia. Many of the elements of the proposed Social Programs Act are reflected in the Child Care Act (Bill 303) which was introduced in the House of Commons as a private member's bill by Denise Lavoie of the New Democratic Party in 2006. Bill 303 passed two readings in Parliament during 2006, and was supported by the Bloc Québécois and the Liberals. But moving forward requires commitment to improving the conditions of the poorest women and men, a federal decision to increase the dollars in the CST, some genuine federal – provincial/territorial cooperation, and a willingness to deal maturely with a special arrangement for Quebec.

In this political climate of blatant government indifference to extreme disparities in wealth and income, heirs to the progressive vision that animated J.S. Woodsworth have a big responsibility. Programmatic reform, that is, striving to obtain decent social programs, as Woodsworth did, is one part of the responsibility. Another important task is to strive for the establishment of effective accountability mechanisms, in hopes

of providing some stability, consistency, and buffer against the erosion of social programs, for periods, such as this, when governments so clearly need to be recalled to their obligations to people.

## NOTES

- 1 This essay has evolved over a period of time. A version of it was presented at the J.S. Woodsworth Conference in September 2005. Some parts of it were written earlier for a May 2002 consultation of the Poverty and Human Rights Project, now the Poverty and Human Rights Centre. My proposal with regard to the Canada Social Transfer, which is briefly outlined at the end of this chapter, is fully developed in Day and Brodsky (2007).
- 2 As David Schneiderman points out (in this volume), Woodsworth's vision elevates the principle of human rights above property rights. Schneiderman raises the very valid concern that Canada is moving in the direction of United States – style constitutionalism that privileges corporate interests, property rights, and deregulated markets over human needs and human rights, and away from the world that Woodsworth envisioned. The North America Free Trade Agreement (NAFTA), to the extent that it privileges corporate interests and private property over human needs, as Schneiderman explains, is an example of this shift.
- 3 It is for those people, and because of my belief that people should have adequate food, clothing, and housing – not as a matter of charity – but as an incident of personhood and social citizenship that I work with the Poverty and Human Rights Centre and various NGOs to promote compliance with the human rights commitments that Canada has made. The tag line of the Poverty and Human Rights Centre is 'Poverty is a human rights violation.' I am very aware that I am a beneficiary of the social safety net for which J.S. Woodsworth fought. Although I was not born into a wealthy family, I have received an excellent education, enjoyed access to health care, employment, clothing, housing. I have never had to seriously worry that I, or my parents, partner, close friends, grandparents, nieces, or nephews would be homeless or hungry. I have never had to steal or beg or prostitute myself to meet my basic needs or the needs of my loved ones. I have had the opportunity to pursue a multifaceted career as a lawyer, teacher, writer, and activist. But I am not under any illusion that I did it myself. I have received a lot of help, not just from other individuals, but from public institutions that serve as an equality-promoting social safety net. My goal is to see that those opportunities are made available

- to future generations. The following studies provide some indication of the problem: National Council of Welfare, 2006: 87; Pulkingham, 2006; Dieticians of Canada, 2005; Statistics Canada, 2005.
- 4 This is clear from the Universal Declaration of Human Rights (1948), which is the foundational document for all international human rights instruments. The preamble begins: 'Whereas recognition of the *inherent dignity and of the equal and inalienable rights of all members of the human family* is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear *and want* has been proclaimed as the highest aspiration of the common people' (emphasis added).
  - 5 Briefs submitted by the NGOs can be accessed on the Office of the United Nations High Commissioner for Human Rights website. Retrieved 13 June 2007 from <http://www.ohchr.org/english/bodies/cescr/cescrs36.htm>.
  - 6 I have advanced an analysis of poverty as a human rights violation, elsewhere. Shelagh Day and I have summed up our position as: social and economic rights are civil and political rights (Brodsky & Day, 2002, 2006; Brodsky, 2003). Réaume (2007) argues that the value of human dignity requires the provision of certain dignity-constituting benefits. Ken Norman (2007) submits that the idea of substantive equality is best understood as being informed by an egalitarian theory of justice.
  - 7 This proposition finds support by Hugh Shewell who argues (in this volume) that Canada's failure to adhere to and promote social rights, embedded in international human rights instruments, 'impedes the full realization of civil and political rights since, without full and adequate social security, it is far more difficult for impoverished citizens to exercise these rights. In effect, democracy is diminished.'
  - 8 *Government of the Republic of South Africa v. Grootboom*, [2001] (1) South African Law Reports 46 (CC).
  - 9 Campaign 2000 (2006) notes that child poverty rates are disproportionately high among vulnerable social groups such as children in female lone-parent families, recent immigrant families, and off-reserve Aboriginal children.
  - 10 Section 15(1) states: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability' (Canadian Charter of Rights and Freedoms, 1982).

- 11 Canadian Bill of Rights, 1960, c. 44.
- 12 Section 36 of the Constitution Act, 1982 states: '(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians. (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation' (Canadian Charter of Rights and Freedoms, 1982, c. 11).
- 13 The legislative record is carefully analysed by Aymen Nader (1996). Nader views s. 36 as justiciable, as does Peter Hogg (2006). In general Canadian courts have taken an expansive view of what is justiciable, as indicated by these cases: *re Amendment of the Constitution of Canada* (1981), *re Objection by Quebec to a Resolution to Amend the Constitution*, [1982]; and *Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board*, [1992].
- 14 *Falkiner v. Ontario (Ministry of Community & Social Services)* (2002).
- 15 The squatters at Woodward's received extensive press coverage. See, e.g.: Brodsky & Day, 2000; 'Squatters perform a public service,' *Vancouver Sun*, 16 Nov., A25; "'We feel safe in that place,'" squatter tells court,' *The Province*, 21 Nov., A11; 'Squatter's rights: Homeless youth part of Vancouver squat for affordable housing,' *Sudbury Star*, 28 Nov., n.p.
- 16 Quebec Charter of Human Rights and Freedoms, R.S.Q., 1977 (*Quebec Charter*), section 45 provides that: 'every person in need has a right, for himself and his family, to measures provided for by law, susceptible of ensuring such person an acceptable standard of living.'
- 17 In an opinion written by Chief Justice Beverley McLachlin, five of the judges found no violation of section 15. In the majority, in addition to the Chief Justice were Justices Charles Gonthier, Frank Iacobucci, John C. Major, and Ian Binnie. In dissent, with respect to section 15 were Justices Michel Bastarache, Louise Arbour, Louis LeBel, and Claire L'Heureux-Dubé. The main dissenting opinion on section 15, with which Arbour, LeBel, and L'Heureux-Dubé JJ. expressed their agreement, was authored by Bastarache J. LeBel and L'Heureux-Dubé JJ. also wrote separate section 15 opinions. A majority of the Court found no section 7 violation. The main section 7 opinion with which Iacobucci, Gonthier, Major, and Binnie JJ.

agreed was written by McLachlin C.J. Bastarache and LeBel JJ. each wrote separate concurring opinions elaborating on their views with respect to the interpretive scope of section 7. Bastarache J.'s approach was a restrictive one, while LeBel J.'s was more generous. Arbour and L'Heureux Dubé JJ. would have found the regulation to be in violation of section 7 of the Charter. Arbour J. wrote the main dissenting opinion on section 7. L'Heureux-Dubé J. expressed her agreement with Arbour J.'s reasoning and wrote supplementary reasons. With respect to section 45 of the *Quebec Charter*, there was a six-to-three split in the Court. A majority of the Court found no violation. The main opinion was written by McLachlin C.J. for herself, Gonthier, Major, Iacobucci, and Binnie JJ. LeBel J. wrote a concurring opinion. In dissent, were Bastarache and Arbour JJ. for whom Bastarache J. wrote one opinion. L'Heureux Dubé J. who was also in dissent, wrote a separate opinion, expressly endorsing the opinion of Robert J.A. in the Court of Appeal, who had relied extensively on international human rights law as an aid to the interpretation of the Quebec Charter.

18 Justice Claire L'Heureux-Dubé concurred with Arbour J.

19 Citing the 'living tree' doctrine of Charter interpretation, the majority endorsed the view that 'it would be a mistake to regard section 7 as frozen, or its content as having been exhaustively defined in previous cases,' and it stated that 'one day section 7 may be interpreted to include positive obligations' (*Gosselin*, 2002, *supra* n16 at para. 82–3). McLachlin C.J. emphasized that, as with section 15, the dispute on the Court was not based on theoretical approach but rather on evidence. The Chief Justice said: 'The question therefore is not whether section 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of section 7 as the basis for a positive state obligation to guarantee adequate living standards (*Gosselin*, 2002, para. 82). Similarly, LeBel J. although he was among the seven judges who did not find that a section 7 violation had been made out in this case, refused to shut the door on future section 7 claims (*Gosselin*, 2002, at para. 414). In the final tally, eight out of the nine judges indicated receptiveness to future section 7 claims.

20 2008 BCSC 1363 ('*Adams*').

21 *Ibid.*, *Adams*, para 90.

22 See *supra* n19.

23 *Victoria (City) v. Adams* BCCA (2009) 563.

24 See, e.g., Reference *Re: Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at 348, per Dickson CJ, cited with approval in *United States v. Burns*, [2001] 1 S.C.R. 283, at para. 80. To a similar effect, In *Baker v. Canada*

- (*Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 (*Baker*) at para. 70, the Supreme Court of Canada declared that international law is 'a critical influence on the interpretation of the scope of the rights included in the *Charter*.'
- 25 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. In *Baker*, *ibid.*, the Court reaffirmed that interpretive presumption.
  - 26 Interestingly, in *Adams*, *supra* n22, Ross J referred extensively to Canada's statements internationally about its human rights obligations.
  - 27 The standards and processes recommended in *Securing the Social Union* are significantly more developed than the CAP standards (Day & Brodsky, 2007).
  - 28 Day documents the persistent lack of response and even lack of processes that could permit the development of a meaningful response, specifically with regard to the recommendations of the U.N. committee that presides over the CEDAW.
  - 29 U.N. Committee on Economic, Social and Cultural Rights (CESCR), 2006: 211–12.
  - 30 The ICESCR Optional Protocol was adopted by the General Assembly of the United Nations on 20 December 2008 (GAres.A/RES/63/117). It will not come into force until it is ratified by ten countries. Canada has not ratified the Optional Protocol.
  - 31 First Ministers' Accord on Health Care Renewal, 2003.
  - 32 The issue of federalism is more fully addressed in *Securing the Social Union* (Day & Brodsky, 2007), and in 'Harper's 'Open Federalism' and the Human Rights of Canadians' (Day & Brodsky, forthcoming).
  - 33 Schneiderman (2007) reflecting on the *Gosselin* case and the lack of positive leadership shown by the courts on poverty issues, has also argued that it is time for governments to take some leadership on social and economic rights matters.
  - 34 Shewell (in this volume) puts it this way: 'What has changed since the rise of neoliberal politics has been a continued elimination and/or targeting of benefits.'
  - 35 Tapes from the 1998 CESCR hearings, on file with the author.
  - 36 See, the Poverty and Human Rights Project, 2002.
  - 37 These proposals are more fully developed in *Securing the Social Union* (Day & Brodsky, 2007).
  - 38 Because the standards and principles set out here reflect human rights norms accepted historically by governments of Quebec, they may be acceptable to Quebec. However, Quebec will probably wish to devise its own implementation, monitoring, and accountability systems, as it has created

its own health council. Parallel but different delivery and accountability mechanisms for Quebec and the rest of Canada are appropriate.

## CASES

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*Falkiner v. Ontario (Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 (C.A.)  
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*Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 [*Gosselin* cited to S.C.R.]  
*Government of the Republic of South Africa v. Grootboom*, [2001] (1) South African Law Reports 46 (CC)  
*Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board*, [1992] M.J. No. 218, 78 Man.R. (2d) 141 (Man.C.A.)  
*Reference Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1, at 13.  
*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.  
*Reference Re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793  
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