12. Canada

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1. Introduction

Louise Arbour, the UN High Commissioner of Human Rights and a former Justice of the Supreme Court of Canada, has observed in commenting on the scope of constitutional rights in the Canadian Charter of Rights and Freedoms[1] (the Charter) that 'the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law.'[2] Meeting this challenge is, however, at best a work in progress. The UN High Commissioner also notes that: 'The first two decades of Charter litigation testify to a certain timidity – both on the part of litigants and the courts – to tackle head on the claims emerging from the right to be free from want.'[3] As a result, the constitutional status of socio-economic rights in Canada remains, to a large extent, an open question – perhaps the most central unresolved issue in Canadian Charter jurisprudence.

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[1] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11 ('Charter').
[2] L. Arbour, '"Freedom From Want" – From Charity to Entitlement', LaFontaine-Baldwin Lecture, Quebec City (2005), p. 7, available at: www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument
[3] Ibid.

The Charter, marking its twenty-fifth anniversary in 2007, contains no explicit reference to any of the guarantees in the International Covenant on Economic, Social and Cultural Rights[4] (ICESCR). The closest the Charter comes to recognising a socio-economic right is the section 23 right to publicly funded minority language education at the primary and secondary levels, 'where numbers warrant.' The minority language education guarantee has been interpreted by the Supreme Court as a 'novel form of legal right' which 'confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.'[5]

As High Commissioner Arbour explains, however, when the Charter is considered in light of the historical expectations and broader values surrounding its adoption, it is clear that the obligations of governments to maintain and develop 'major institutional structures' in support of substantive rights need not be limited to minority language rights. Of particular importance in this respect are the equality rights guarantees in section 15 of the Charter,[6] and the right to 'life, liberty and security of the person' in section 7.[7] These rights, which might otherwise be classified as 'civil and political' are best understood in the Canadian context as including both civil and political and socio-economic dimensions. When the Charter was adopted in 1982, equality rights experts and advocacy groups considered the adequacy and accessibility of publicly funded programs, such as social assistance, universal healthcare, education and unemployment insurance, as implicit in these broadly framed Charter rights.[8]

2. The Canadian Charter as a source of protection for socio-economic rights

2.1 Historical context and legislative history of the Charter

Canadian rights culture in the 1960s and 70s was significantly affected by the civil rights movement in the US. In this period, broad anti-discrimination guarantees were introduced in federal and provincial human rights legislation across Canada. Considerable attention was paid to emerging civil rights jurisprudence from the US, but at the same time, Canadian rights culture absorbed a distinctive commitment to social rights and to an emerging system of international human rights protections in which Canada was directly engaged.[9] Prime Minister Pierre Elliot Trudeau, who presided over the initiative to adopt a constitutional charter of rights after his re-election in 1980, linked the proposal to his ideal of a 'just society.' In an article on 'Economic Rights' he wrote as a law professor in 1962, Trudeau had affirmed that: 'if this society does not evolve an entirely new set of values ... it is vain to hope that Canada will ever reach freedom from fear and freedom from want. Under such circumstances, any claim by lawyers that they have done their bit by upholding civil liberties will be dismissed as a hollow mockery.'[10]

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[4] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[5] *Mahe v. Alberta*, [1990] 1 SCR 342, at p. 389.
[6] Section 15 provides that: '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.'
[7] 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.'
[8] B. Porter, 'Expectations of Equality', *Supreme Court Law Review*, Vol. 33 (2006), pp. 23-44.
[9] Ibid. 23-35.
[10] P. Trudeau, 'Economic Rights', *McGill Law Journal*, Vol. 8 (1961-62), pp. 122-125, at 125. Subsequently, as federal Minister of Justice, Trudeau released a discussion paper on the Liberal government's proposal for a new Charter of Rights in which he suggested that while a constitutional guarantee of economic rights was desirable and 'should be an ultimate objective of Canada' it 'might take considerable time to reach agreement on the rights to be guaranteed.' On that basis Trudeau concluded

Unlike the US, Canada ratified the ICESCR in 1976 at the same time as the International Covenant on Civil and Political Rights (ICCPR)[11]. In 1980-81, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada considered including an explicit reference to ICESCR rights under section 36 of the Constitution Act, 1982.[12] As enacted, section 36 states that federal and provincial governments 'are committed to ... providing essential public services of reasonable quality to all Canadians.'[13] However, rather than pressing for explicit inclusion of socio-economic rights under section 36 or the Charter, most human rights experts and advocacy groups emphasised the importance of framing rights, such as the right to equality, as expansively as possible. The Charter could then be applied to require governments to take positive action to address the needs of vulnerable groups, to remedy systemic inequality, and to maintain and improve social programs on which the enjoyment of equality and other Charter rights depends.[14]

Section 15 of the Charter, originally entitled 'non-discrimination rights' was renamed 'equality rights' and significantly expanded after an unprecedented lobbying campaign by women's groups, disability rights groups and others. Section 15 was reworded to guarantee both equality 'before and under' the law, and the equal 'protection and benefit' of the law. This wording (unique at that time) was intended to ensure that equality rights applied to social benefit programs, such as welfare and unemployment insurance, and that the positive obligations of governments toward disadvantaged groups were constitutionally recognised and affirmed.[15] As the Canadian Bar Association noted at the time: '[it] is an equality rights section, not merely an anti-discrimination section. The difference between an equality purpose and an anti-discrimination purpose is that the former is broader and more positive than the latter.'[16]

In addition, as a result of energetic lobbying by disability rights groups, Canada became the first among constitutional democracies to include disability as a constitutionally prohibited ground of discrimination.[17] This signalled the importation into Canadian constitutional law of an approach to equality that had already been accepted under provincial human rights legislation: remedial in its focus, and recognising that discrimination could include a failure to

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that it was 'advisable not to attempt to include economic rights in the constitutional bill of rights at this time.' See P.E. Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968), p. 27.

[11] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS171 (entered into force 23 March 1976).

[12] Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., No. 49 (30 January 1981), pp. 65-71. Section 36 is set out in Part III of the Constitution Act, 1982.

[13] Canada has stated in its Core Document to UN treaty monitoring bodies that the provisions of section 36: 'are particularly relevant in regard to Canada's international obligations for the protection of economic, social and cultural rights.' However, the justiciability of the governmental 'commitments' in section 36 has never really been tested; see L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999), pp. 184-91; A. Nader, 'Providing Essential Services: Canada's Constitutional Commitment Under Section 36' *Dalhousie Law Journal*, Vol. 19 (1996), pp. 306-372; see also *Winterhaven Stables Ltd.* v. *A.G. Canada* (1988), 53 DLR (4th) 413 (Alta. CA), at 432-4.

[14] Porter, 'Expectations of Equality' (n. 8 above), pp. 23.

[15] Ibid.

[16] Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, Written Submissions, Submission of the Canadian Bar Association, cited in B. Porter, 'Twenty Years of Equality Rights: Reclaiming Expectations', *Windsor Yearbook of Access to Justice*, Vol. 23 (2005), pp. 145-192, at footnote 83.

[17] See generally Y. Peters, 'From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution', in D. Stienstra, A. Wight-Felske and C. Watters (eds.), *Making Equality - History of Advocacy and Persons with Disabilities in Canada* (Concord Ontario: Captus Press, 2003), pp. 119-136; M. D. Lepofsky, 'A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?', *National Journal of Constitutional Law*, Vol. 7 (1998), pp. 263-431.

take positive measures to accommodate the unique needs of protected groups, even in the absence of discriminatory intent.[18] An 'undue hardship' test had been adopted under Canadian human rights legislation as the standard for determining whether 'reasonable steps' or 'reasonable measures' had been taken to accommodate the needs of protected groups in view of cost, health and safety and other relevant factors.[19] However, Canadian courts and tribunals adopted a significantly more rigorous standard than was applied by US courts.[20] In this sense, the type of obligations contained in article 2 of the ICESCR, to take reasonable steps based on a maximum of available resources, had already become familiar to Canadians in their approach to human rights protections. This is particularly true for Quebec, where socio-economic rights were explicitly included under the Quebec Charter of Human Rights and Freedoms. [21]

The wording of section 7 of the Charter, which guarantees the 'right to life, liberty and security of the person' and the right not to be deprived thereof 'except in accordance with principles of fundamental justice' similarly reflects historical Canadian values linked with socio-economic rights. A proposed amendment to add a right to 'the enjoyment of property' to the Charter was rejected in part because of fears that property rights would conflict with Canadians' commitment to social programs and give rise to challenges to government regulation of the private market. Provincial governments opposed Charter recognition of property rights on the grounds that constitutional entrenchment of such rights could give rise to challenges to government regulation of corporate interests and control of natural resources.[22] Similarly, the phrase 'fundamental justice' was preferred over any reference to 'due process of law' because of concerns around the use of the due process clause in the US during the *Lochner* era as a means for propertied interests to challenge the regulation of private enterprise and the promotion of social rights.[23]

2.2 Socio-economic rights in sections 7 and 15 of the Charter

In light of the Charter's wording and historical context there is significant opportunity, as High Commissioner Arbour has suggested, for Canadian courts to interpret substantive Charter obligations, particularly under sections 7 and 15, to include most, if not all, components of the rights contained in the ICESCR.[24] While Supreme Court of Canada jurisprudence has not yet moved clearly in this direction, neither has it foreclosed it.

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[18] *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536.
[19] Ibid. paras. 20-9.
[20] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970.
[21] Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12. For a discussion of the socio-economic rights guarantees under the Quebec Charter, see P. Bosset, 'Les droits économiques et sociaux, parents pauvres de la Charte québécoise? Étude no. 5' [Economic and social rights, poor parents of the Quebec Charter ? Study No.5], in Commission des droits de la personne et des droits de la jeunesse du Québec, *Après 25 ans: La Charte québécoise des droits et libertés, Volume 2: Études* (Montreal: Commission des droits de la personne et des droits de la jeunesse du Québec, 2003) at pp. 229-244 , available at:
www.cdpdj.qc.ca/fr/droits-personne/bilan_charte.asp?noeud1=1&noeud2=16&cle=0
[22] S. Choudhry, 'The *Lochner* Era and Comparative Constitutionalism', *International Journal of Constitutional Law*, Vol. 2 (2004), pp. 17-24.
[23] Ibid.
[24] For elaboration of this possibility, see M. Jackman, 'The Protection of Welfare Rights Under the Charter', *Ottawa Law Review*, Vol. 20, No. 2 (1988), pp. 257-338; B. Porter, 'Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights', *Journal of Law and Social Policy*, Vol. 15 (2000), pp. 117-162; D. Wiseman, 'The *Charter* and Poverty: Beyond Injusticiability', *University of Toronto Law Journal*, Vol. 51 (2001), pp. 425-458; R. Bahdi, 'Litigating Social and Economic Rights in Canada in Light of International Human Rights Law: What Difference Can it Make?', *Canadian Journal of Women and the Law*, Vol. 14 (2002) pp. 158-184; The Honourable C. L'Heureux-Dubé, 'A Canadian Perspective on Economic and Social Rights' in Yash Ghai & Jill Cottrell (eds.), *Economic, Social And Cultural Rights In Practice: The Role of Judges in Implementing Economic,*

From its earliest decisions under the Charter to its most recent, the Supreme Court has been careful to leave open the possibility that the Charter may protect a range of socio-economic rights. In its 1986 decision in *Irwin Toy* ,[25] the Court rejected attempts by corporate interests to situate their economic claims within the scope of section 7, finding that private property rights had been intentionally excluded from the Charter. However, the Court was careful to distinguish what it characterized as 'corporate-commercial economic rights' from 'such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.' The Court found that it would be 'precipitous' to exclude the latter class of rights at so early a moment in Charter interpretation.[26]

During the 1990s, most Canadian lower courts called upon to consider socio-economic rights claims rejected such challenges on the basis that economic rights were beyond both the scope of section 7 and the legitimate purview of the courts.[27] At the Supreme Court level, however, the question left unanswered in *Irwin Toy*, about the status of ICESCR rights under section 7, lay essentially dormant for seventeen years. During this period, few socio-economic rights cases reached the appellate level and no case involving poverty or social assistance was heard by the Supreme Court. In the 2003 *Gosselin* case, the Supreme Court considered a challenge to grossly inadequate levels of social assistance benefits in Quebec, paid to employable recipients not enrolled in workfare programs. In an important dissenting judgment (supported by Justice L'Heureux-Dubé), Justice Arbour found that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities.[28] The majority of the Court left open the possibility of adopting this 'novel' interpretation of the right to security of the person in a future case, but found that there was insufficient evidence in this case to make such a finding. Chief Justice McLachlin stated, for the majority:

> The question therefore is not whether s. 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 s. 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not.[29]

While its approach to section 7 has been inconclusive, in its early section 15 Charter jurisprudence, the Supreme Court of Canada played a leading role, internationally, in affirming and developing a notion of substantive equality that includes important dimensions of socio-economic rights and places positive obligations on governments to remedy disadvantage. The Supreme Court has recognised that programs such as social assistance for single mothers are 'encouraged' by section 15, and has justified positive remedies to under-inclusive benefit programs on that basis.[30] In several key cases, the Court issued positive remedial orders extending or increasing parental, social assistance and pension benefits and

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Social and Cultural Rights (London: Interrights, 2004*)*, pp. 42-49; M. Young, 'Section 7 and the Politics of Social Justice', *University of British Columbia Law Review*, Vol. 38 (2005), pp. 539-560.

[25] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

[26] Ibid. pp. 1003-4.

[27] See, for example, *Masse* v. *Ontario Ministry of Community and Social Services)* (1996), 134 DLR. (4th) 20 (Ont. SCJ), leave to appeal to Ontario Court of Appeal denied, (1996) 40 Admin. LR 87N, leave to appeal to the Supreme Court of Canada denied, (1996) 39 CRC. (2d) 375. See generally D. Parkes, 'Baby Steps on the Way to a Grown up Charter: Reflections on 20 Years of Social and Economic Rights Claims', *University of New Brunswick Law Journal*, Vol. 52 (2003), pp. 279-298; M. Jackman, 'Poor Rights: Using the *Charter* to Support Social Welfare Claims', *Queen's Law Journal,* Vol. 19 (1993), pp. 65-95; Porter, 'Judging Poverty' (n. 24 above).

[28] *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429, at paras. 82-83.

[29] Ibid. para. 82.

[30] *Schachter v. Canada*, [1992] 2 SCR 679, at para. 41.

extending legislative protections under security of tenure and human rights legislation.[31] These decisions suggested that the Court would fulfil its constitutional mandate to ensure that governments met their substantive equality rights obligations, notwithstanding a steady stream of media and right wing criticism about the Court's excessive 'judicial activism.'[32]

However, even in its most progressive equality rights decisions, the Supreme Court has insisted on sidestepping the issue of whether, in the absence of an under-inclusive program or benefits scheme, the Charter imposes a positive obligation on governments to provide benefits or social programs necessary to address the needs of disadvantaged groups.[33] The Court has stepped back from an explicit affirmation of a key element of the notion of equality that was advanced by groups during the pre-Charter debates about the wording of section 15 and that is also at the core of Canada's international human rights obligations – the obligation of governments to protect vulnerable groups through appropriate legislative measures and to take positive action to remedy socio-economic disadvantage that is independent of the obligation to ensure that existing legislation and benefit schemes are not under-inclusive or discriminatory.[34]

2.3 The horizontal application of the Charter

Section 32(1) of the Charter provides that the Charter applies to the federal parliament and provincial legislatures and to the actions and decisions of federal and provincial/territorial governments. In principle, the Charter does not therefore apply to non-governmental entities. However, as the courts' understanding of state action has evolved, it has become clear that the Charter does provide important socio-economic rights protections in the private as well as the public sphere.

First, the Supreme Court has emphasised that governments cannot contract out of their constitutional obligations.[35] Where private actors are given responsibility for the implementation of specific government policies or programs, these entities will be subject to the Charter in relation to those activities. The importance of this principle in the socio-economic rights context was evident in the Supreme Court's 1999 decision in the *Eldridge* case.[36] The applicants, who were deaf, argued that the lack of sign language interpretation services within the publicly funded healthcare system violated their section 15 equality rights. The Supreme Court found that, although hospitals were non-governmental entities not

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[31] M. Buckley, '*Law v. Meiorin*: Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the Charter', in F. Faraday, M. Denike and M.K. Stephenson (eds.), *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006), pp. 179-206 and see the discussion in Part 7, below.

[32] Porter, 'Expectations of Equality' (n. 8 above), pp. 36-38; B. Porter, 'Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*', *Constitutional Forum*, Vol. 9 (1998), pp. 71-82; M. Jackman, '"Giving Real Effect to Equality": *Eldridge v. B.C. (A.G.)* and *Vriend v. Alberta*', *Review of Constitutional Studies*, Vol. 4 (1998) pp. 352-371. For a discussion of the critiques of 'judicial activism' in Canada from a socio-economic rights perspective, see L. Weinrib, 'The Canadian Charter's Transformative Aspirations', in J.E. Magnet et al. (eds.), *The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Toronto: LexisNexis Butterworths, 2003), pp. 17-37; M. Jackman, '*Charter* Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party', *Policy Options* Vol. 27, No. 1 (Dec. 2005 – Jan. 2006), pp. 72-77.

[33] V*riend v. Alberta*, [1998] 1 SCR 493 at para. 64; see generally Porter, 'Reclaiming Expectations' (n. 16 above), pp. 180-5.

[34] For a discussion of substantive equality and positive obligations in Canadian and other jurisprudence, see S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide', *South African Journal on Human Rights*, Vol. 21 (2005), pp. 163-190; G. Brodsky & S. Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty', *Canadian Journal of Women and the Law*, Vol. 14 (2002), pp. 185-220.

[35] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at para. 40.

[36] Ibid.

otherwise subject to the Charter, in providing publicly funded healthcare services, they were acting as the vehicles chosen by government to deliver a comprehensive healthcare program, and were therefore subject to the requirements of the Charter.[37] Thus, the Court found that hospitals' failure to provide medical interpretation services necessary to ensure that the deaf enjoyed the equal benefit of healthcare services violated section 15.

The other important horizontal dimension of Charter-based protection for socio-economic rights is found in governments' obligation to protect vulnerable groups from violations of their rights by others, at least in so far as such an obligation can be grounded in a requirement that legislation not be under-inclusive. In the *Vriend* case,[38] the Supreme Court held that a failure to include sexual orientation as a prohibited ground of discrimination under provincial human rights legislation governing the actions of private employers, service and housing providers, violated Charter equality rights.[39] Underscoring the importance of distinguishing between private activity that is not subject to the Charter, and laws regulating private activity, that are subject to review, the Court rejected the government's argument that the discrimination at issue in the case resulted from the actions of private entities, not from those of government.[40] As Justice Cory declared: 'Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination.' [41]

Similarly, in the 2001 *Dunmore* case, the Supreme Court dealt with a claim that the decision of a newly elected government to revoke legislation protecting the right of agricultural workers to organize and bargain collectively violated the section 2(d) Charter guarantee of 'freedom of association'. The Court had to consider whether: '2(d) obligates the state simply to respect trade union freedoms, or additionally to protect trade union freedoms by prohibiting their infringement by private actors.' [42] Noting that the Court's understanding of 'state action' had matured since its early decisions on the application of the Charter, and that 'this Court has repeatedly held in the s. 15(1) context that the Charter may oblige the state to extend underinclusive statutes to the extent underinclusion licenses private actors to violate basic rights and freedoms', the Court concluded that 'it is not a quantum leap to suggest that a failure to include someone in a protective regime may affirmatively permit restraints on the activity the regime is designed to protect.'[43]

It should also be noted that other statutory means exist in Canada for challenging violations of socio-economic rights by non-state actors. Socio-economic rights are dealt with by a wide variety of administrative tribunals in employment, housing and other matters, as well as by the courts. In addition, human rights legislation in all provinces/territories and at the federal level, protects the right to equality in the private sector. The courts' approach to positive obligations under human rights legislation has been similar to their approach to substantive equality under section 15 of the Charter. So, for example, in the area of housing rights, human rights legislation has been successfully used to challenge landlords' practice of screening prospective tenants based on income level, credit history or reference requirements – practices which were identified by the CESCR as problematic in relation to the right to adequate housing under article 11 of the ICESCR.[44] In Quebec, as noted above, socio-economic rights are

[37] Ibid. paras. 40-52.
[38] *Vriend v. Alberta* (n. 33 above).
[39] Ibid. paras. 65-66.
[40] Ibid.
[41] Ibid. para. 103
[42] *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016, at para. 13.
[43] Ibid. para. 26.
[44] *Kearney v. Bramalea Ltd* (1998), 34 CHRR D/1 (Ont. Bd. Inq.), upheld in *Shelter Corporation v. Ontario Human Rights Commission* (2001), 143 OAC 54 (Ont. Sup. Ct.); *Whittom v. Québec (Commission des droits de la personne)* (1997), 29 CHRR D/1 (Que. CA); *Ahmed v. Shelter Corporation* (Unreported, Ont. Bd. Inq., M. A. McKellar, Decision No 02–007, 2 May 2002); *Sinclair and Newby v. Morris A Hunter Investments Limited* (Unreported, Ont. Bd. Inq., M. A. McKellar, Decision No 01– 024,

explicitly recognized under the Quebec Charter of Human Rights and Freedoms and in some cases extend to private actors.[45]

3. International human rights law as a source of protection for domestic socio-economic rights

3.1 The 'interpretive presumption'

Rights contained in international human rights treaties ratified by Canada are not directly enforceable by Canadian courts unless they are incorporated into Canadian law by parliament or provincial legislatures.[46] There has been no serious discussion of incorporating any international human rights treaties into Canadian law. Rather, the emphasis has been on ensuring that the Charter, federal and provincial human rights legislation, and other domestic laws, give effect to Canada's international human rights obligations.

The Supreme Court affirmed in its 1989 *Slaight Communications* decision, with specific reference to the ICESCR, that an 'interpretive presumption' exists according to which 'the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.'[47] This has meant, as Justice L'Heureux-Dubé stated for the majority of the Court in the 1999 *Baker* decision, that international human rights law is 'a critical influence on the interpretation of the scope of the rights included in the *Charter*.'[48] Justice L'Heureux-Dubé further elaborated on this point in a subsequent case, where she stated that:

> Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra*, [1990] 3 S.C.R. 697). In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity.[49]

3.2 Review of discretionary decision-making for consistency with socio-economic rights

The interpretive presumption affirmed in *Slaight Communications* has important implications not only for the scope of the Charter but also for statutory interpretation and the exercise of conferred discretion by administrative actors. The Supreme Court has emphasised that the Charter is not the sole preserve of the judiciary. As Chief Justice McLachlin has expressed it:

> The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the

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5 November 2001). Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada, UN. Doc. E/C.12/1993/5 (1993), para. 18.

[45] Quebec Charter of Human Rights and Freedoms, (n. 21 above).

[46] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras. 69-71.

[47] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, at 1056-7; see also R. Sullivan, *Driedger on the Construction of Statutes*, 3rd edition (Toronto: Butterworths, 1994), p. 330: 'the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. In so far as possible, therefore, interpretations that reflect these values and principles are preferred'; cited in *Baker v. Canada* (n. 46 above), para. 70 and in *R. v. Sharpe*, [2001] 1 SCR 45, at para. 175.

[48] *Baker v. Canada* (n. 46 above), para. 70.

[49] *R. v. Ewanchuk*, [1999] 1 SCR 330, at para. 73.

> *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[50]

All conferred decision-making authority must be exercised in a manner consistent with the Charter, which in turn is assumed to be consistent with the ICESCR. It is by means of this interpretive presumption that the Court was able to ensure, in *Slaight Communications*, that the decision of a private labour arbitrator was in conformity with the Charter and hence with the recognition of the right to work and the obligation to protect vulnerable workers under the ICESCR.

The interpretive effect of international human rights law on discretionary decision-making may, alternatively, be applied directly without invoking Charter rights, as affirmed by the Supreme Court in the 1999 *Baker* case.[51] Mavis Baker, a Jamaican citizen who had worked illegally in Canada as a domestic worker for a number of years and who had given birth to four children in Canada, was issued with a deportation order. She sought review of the deportation order under a provision of the federal Immigration Act allowing for humanitarian and compassionate review. The immigration officer charged with the review was asked to overturn the deportation order based on the best interests of the children, as protected under the International Convention on the Rights of the Child (CRC)[52] but declined to do so. No Charter claim was made on behalf of either Ms. Baker or her children and the issue in the case was whether the officer's decision, which was inconsistent with the best interests of the children as recognized under the CRC, could be overturned for that reason. The Supreme Court reversed the immigration officer's decision on the basis that it was unreasonable because of 'the failure to give serious weight and consideration to the interests of the children.'[53] On the question of the role of the CRC in assessing reasonableness, the Court held that:

> The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H[umanitarian] & C[ompassionate Review] power.[54]

The implications of the *Baker* decision are significant for the application of a reasonableness test to discretionary decisions or policies in relation to evictions into homelessness; denials of financial assistance necessary for adequate food or housing; access to healthcare, educational aids and assistance; and many other areas affecting the enjoyment of ICESCR rights in Canada.[55]

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[50] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, para. 29.

[51] *Baker v. Canada* (n. 46 above). For a discussion of the case see D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004).

[52] International Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[53] *Baker v. Canada* (n. 46 above) at para. 65.

[54] *Ibid.* at para. 71. Two of seven judges in the *Baker* case dissented on the question of the majority's direct recourse to international human rights law. They held that giving this kind of direct interpretive effect to international human rights law would allow indirectly what is not allowed directly, giving the force of law to treaties negotiated by the executive, without parliamentary approval. However, the dissenting judgment acknowledged that the same result might have been reached by way of a *Charter* claim, based on the 'interpretive presumption' that the *Charter* would subsume the protections of rights of children under international human rights law and that the exercise of discretion must conform with the *Charter;* ibid. para. 81, per Iacobucci J.

[55] See generally: C. Scott, 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?', *Constitutional Forum*, Vol. 10, No. 4 (1999), pp. 97-111; L. Sossin, 'From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion', *University of Toronto Law Journal*, Vol. 56 (2005), pp. 427-447;

3.3 CESCR jurisprudence relating to the Charter

The importance of interpreting the Charter and other Canadian laws so as to give effect to ICESCR rights has become a central concern for the UN Committee on Economic, Social and Cultural Rights (CESCR) over the course of several periodic reviews of Canada's compliance with its Covenant obligations.

The Committee commented, during Canada's second periodic review in 1993, that 'the process of interpretation of the Charter is still in its early stages, but that its provisions and the interpretations adopted by the Supreme Court in early cases suggest that Canadian courts will give full consideration to the rights in the Covenant when interpreting and applying the Canadian Charter of Rights and Freedoms.'[56] However, the Committee also expressed concern that Canadian lower courts had characterized ICESCR rights 'as mere "policy objectives" of governments rather than as fundamental human rights.'[57] In its 1993 report the Committee encouraged Canadian courts 'to continue to adopt a broad and purposive approach to the interpretation of the Charter of Rights and Freedoms and of human rights legislation so as to provide appropriate remedies against violations of social and economic rights in Canada.'[58]

Subsequent CESCR reviews manifest similar concerns. In 1998, the Committee expressed particular reservations about Canadian lower court Charter interpretations that denied remedies for violations of the right to an adequate standard of living. The Committee also questioned governments' decision to advance Charter interpretations that would deprive claimants of any remedy to the denial of basic necessities.[59] At its May 2006 review of Canada's Fourth and Fifth Period Reports, the Committee again criticised 'the practice of Canadian governments to urge upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights.'[60]

4. Standing and access to legal services

4.1 Standing to pursue Charter claims

Section 24(1) of the Charter provides that an individual whose Charter rights have been infringed has automatic standing to challenge that violation before the Canadian courts in order to obtain an 'appropriate and just' remedy.[61] The Supreme Court has also established criteria for granting public interest standing in constitutional cases, pursuant to section 52 of the Constitution Act, 1982. In particular, individuals or groups seeking public interest standing to challenge a Charter rights violation must demonstrate: first, that a serious constitutional

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L. Sossin and L. Pottie 'Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare', *U.B.C. Law Review*, Vol. 38 (2005), pp. 147-87.

[56] CESCR, Concluding Observations on Canada (n. 44 above), para 5.

[57] Ibid. para. 21.

[58] Ibid. para. 30.

[59] Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada, E/C.12/1/Add.31 (1998), paras. 14-15. For a discussion of the significance of the CESCR 1998 comments on Canada, see Scott, 'Canada's International Human Rights Obligations and Disadvantaged Members of Society' (n. 55 above).

[60] Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada, E/C.12/CAN/CO/5 (2006), para. 11(b).

[61] See generally: K. Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1994) [looseleaf].

issue is being raised; second, that they have a genuine interest in the issue, and; third, that there is no other reasonable or effective way for the matter to come before the courts.[62]

The Supreme Court has also recognised public interest standing of affected individuals to challenge governmental failures to comply with inter-governmental agreements and legislative or administrative obligations engaging socio-economic rights, even where there is no statutory right conferred upon the individual. In the 1986 *Finlay* case,[63] the Supreme Court granted public interest standing to Jim Finlay, a social assistance recipient, to litigate the issue of alleged provincial non-compliance with the adequacy requirements of the Canada Assistance Plan Act, a cost-sharing agreement governing conditions for the provision of social assistance programs and services.[64] The Supreme Court rejected governments' arguments that inter-governmental agreements of this nature were political in nature and could not therefore be challenged by individuals. The Court found that: 'the particular issues of provincial non-compliance raised by the respondent's statement of claim are questions of law and as such clearly justiciable.'[65] The Court granted Finlay standing to bring an action challenging the legality of the federal cost-sharing payments, based on the province of Manitoba's violation of the federal requirement that social assistance payments meet the 'basic requirements' of persons in need.[66]

4.2 Funding for socio-economic rights litigation

There is no explicit right to publicly funded legal aid under the Charter. The Supreme Court has, however, recognised the right to state funded legal counsel as a component of section 7, where this is necessary to ensure that a decision affecting an individual's life, liberty and security of the person respects the principles of fundamental justice. In the 1999 *G.(J.)* case,[67] the Supreme Court held that the failure to provide publicly funded legal aid in child protection proceedings infringed a low income parent's security of the person under section 7. Jeanine Godin had been threatened with loss of custody of her children based on evidence of her parental fitness contained in fifteen affidavits presented by three lawyers acting for the government, over the course of a three-day hearing. Chief Justice Lamer concluded that 'without the benefit of counsel, the appellant would not have been able to participate

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[62] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration*), [1992] 1 SCR 236. See generally R.J. Sharpe and K. Roach, *The Charter of Rights and Freedoms*, 3rd edition (Toronto: Irwin Law, 2005), pp. 186-189.

[63] *Finlay v. Canada (Minister of Finance*), [1986] 2 SCR 607; for a discussion on the case, see M. Young, 'Starving in the Shadow of the Law: A Comment on *Finlay v. Canada (Minister of Finance)*', *Constitutional Forum*, Vol. 5, No. 2 (1994), pp. 31-37.

[64] *Finlay v. Canada*, ibid.

[65] Ibid. para. 33.

[66] Ibid. paras. 33-6. In its subsequent decision on the merits of the case, the Supreme Court found that the provinces were obliged to ensure 'reasonable compliance' with the adequacy requirements of the Canada Assistance Plan, but that a 5 percent reduction of benefits to recover overpayments was within the provinces' margin of discretion; see *Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080. This important basis for challenging inadequate social assistance rates disappeared in 1996, however, when the federal government revoked the Canada Assistance Plan Act; see S. Day and G. Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social* Programs, (Ottawa: Status of Women Canada, 1998); L. Lamarche and C. Girard, 'Évolution de la sécurité sociale au Canada: la mise à l'écart progressive de l'état providence canadien', *Journal of Law and Social Policy*, Vol. 13 (1998), pp. 95-124; B. Porter, 'Using Human Rights Treaty Monitoring Bodies in Domestic Social And Economic Rights Advocacy: Notes From Canada', *Economic and Social Rights Review*, Vol. 2 (1999), available at www.communitylawcentre.org.za/ser/esr1999/1999jul_seradvocacy.php

[67] *New Brunswick (Minister of Health and Community Service) v. G.(J.)*, [1999] 3 SCR 46.

effectively at the hearing ... thereby threatening to violate both the appellant's and her children's section 7 right to security of the person.'[68]

While limited civil legal aid is available in all provinces/territories and is supplemented by funding for community legal clinics in some areas, many low-income claimants, especially women, are unable to secure funding for legal challenges relating to the enjoyment of their socio-economic rights. [69] The inadequacy of available legal aid funding has been identified as a concern by the Committee on Economic, Social and Cultural Rights and by the Committee on the Elimination of Discrimination Against Women and is currently being challenged by the Canadian Bar Association, as a violation of sections 7 and 15 of the *Charter*.[70]

In its 2003 *Okanagan Indian Band* decision,[71] the Supreme Court recognised the special considerations that come into play in public interest litigation. In that case, dealing with an Aboriginal rights claim to log on Crown land, the Bands involved argued that in view of the importance of the issues raised and their lack of financial resources to fund a trial the Court should order the provincial government to pay the Bands' legal fees and disbursements in advance, whether or not they were ultimately successful in their claim. The Supreme Court concluded that a grant of interim costs could be justified in public interest cases if the following criteria were met: first, that the party seeking such an award genuinely could not afford to pay for the litigation and no other realistic option existed for bringing the issues to trial; second, that the claim to be adjudicated was *prima facie* meritorious, and; third, that the issues raised in the case transcended the individual interests of the particular litigants, were of public importance and had not been resolved in previous cases.[72]

Aside from the possibility of legal aid funding on a case-by-case basis, or of a request for advance costs pursuant to the *Okanagan Indian Band* decision, funding for socio-economic rights claims may also be available from the Court Challenges Program of Canada (CCPC).[73] Funded by the federal government but administered independently of it, the CCPC provides test cases litigation funding in Charter minority language rights cases and in section 15 equality cases involving the federal government or matters of federal jurisdiction. The CESCR has recognised the CCPC as an important positive measure and has recommended its extension to include challenges by equality seeking groups to provincial laws and policies.[74]

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[68] Ibid. para. 81. For comments on the significance of the case in relation to socio-economic rights, see L'Heureux-Dubé, 'A Canadian Perspective on Economic and Social Rights' (n. 24 above), pp. 44-5; L. Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998); H. Lessard, 'The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring', *Osgoode Hall Law Journal*, Vol. 39 (2001) pp. 717-771.

[69] See L. Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998); M. Buckley, *The Legal Aid Crisis: Time for Action* (Ottawa: Canadian Bar Association, 2000).

[70] CESCR, Concluding Observations on Canada, 2006 (n. 60 above), para. 11(b); Committee on the Elimination of Discrimination Against Women, Concluding Observations on Canada, U.N. Doc. A/58/38 (2003), paras. 355-56; Canadian Bar Association, 'CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid' Vancouver (2005), available at: www.cba.org/CBA/News/2005_Releases/2005-06-20_legalaid.aspx. See also discussion of this legal challenge in Chapter 3 of this volume.

[71] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371.

[72] Ibid. paras. 40-1; see C. Tollefson, D. Gilliland and J. DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation', *Canadian Bar Review*, Vol. 83 (2004), pp. 473-514.

[73] A. Peltz and B. Gibbons, *Deep Discount Justice: The Challenge of Going to Court with a Charter Claim and No Money* (Winnipeg, Manitoba: The Court Challenges Program of Canada, 1999), available at: www.ccppcj.ca/documents/justice-e.html

[74] CESCR, Concluding Observations on Canada (1993), (n. 44 above), paras. 6, 28; CESCR, Concluding Observations on Canada (1998), (n. 59 above), paras. 8, 59; CESCR, Concluding Observations on Canada (2006), (n. 60 above), para. 13. Sadly, the minority Conservative Government of Prime Minister Stephen

5. Justifiable limits and the balancing of rights

5.1 Justifiable limits on socio-economic rights

Section 1 of the Charter allows governments to argue that violations of Charter rights are 'reasonable' and 'demonstrably justified in a free and democratic society.' In its 1986 decision in the *Oakes* case[75], the Supreme Court established a set of criteria for determining whether a rights infringement is justified under section 1. First, governments must show that the objectives they are pursuing are sufficiently important to warrant the violation of an individual Charter right. Second, they must show that the means they have adopted to achieve those objectives are proportional, that is: that they are rationally connected to their objectives; that they violate individual rights as little as possible, and; that the benefits to society resulting from the Charter violation outweigh the harm to individual Charter rights.[76]

While the Supreme Court has exercised considerable deference with respect to governments' assessment of socio-economic priorities, it has also held that the financial burden on governments of respecting Charter rights does not justify a rights violation under section 1.[77] However, in cases involving positive dimensions of socio-economic rights, the Court's approach to justification based on available resources has been refined. In the *Eldridge* case, for example, the provincial government argued that the cost of providing medical interpretation services to the deaf, and potentially to non-English speaking patients, would divert resources from other healthcare needs and would interfere with governments' ability to choose among competing priorities in the healthcare system. The Supreme Court considered the cost of interpreter services in relation to the overall provincial healthcare budget, and concluded that the government's refusal to fund such services was not reasonable, even if some deference was granted to government decision-making in this area:

> In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only $150,000, or approximately 0.0025 percent of the provincial health care budget at the time.[78]

In the more recent *NAPE* case[79], the Supreme Court considered the constitutionality of a provincial government's decision to erase a $14 million retroactive pay equity award owed to women public sector employees. This action was taken in conjunction with broad ranging government expenditure cuts in response to a ballooning provincial deficit. The Court concluded that, in exceptional circumstances, a fiscal crisis may warrant over-riding a Charter right, in this case, the right to compensation for unequal pay for work of equal value. As the Court explained:

> At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a *Charter* right, subject, of course, to the measures being proportional both to the fiscal crisis and to their impact on the affected *Charter* interests. In this case, the fiscal

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Harper announced on September 25, 2006 that all funding for the Court Challenges Program will be eliminated. A major campaign has been launched for a reversal of this decision.

[75] *R v. Oakes*, [1986] 1 SCR 103.

[76] See generally Sharpe and Roach, *The Charter of Rights and Freedoms*, (n. 62 above), pp. 62-85.

[77] *Schachter v. Canada* (n. 30 above), p. 709; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 99; *Nova Scoita (Workers' Compensation Board) v. Martin* (n. 50 above), para. 109.

[78] *Eldridge v. British Columbia(Attorney General)* (n. 35 above), para. 87.

[79] *Newfoundland (Treasury Board) v. NAPE*, [2004] 3 SCR 381.

> crisis was severe and the cost of putting into effect pay equity according to the original timetable was a large expenditure ($24 million) relative even to the size of the fiscal crisis.[80]

Following the *NAPE* decision, the financial burden on government of responding to a socio-economic rights claim has become an explicitly relevant factor in determining whether a rights violation will be considered justified by the courts under section 1 of the Charter. The standard of reasonableness applied in the *Eldridge* case is, however, more consistent with the requirement under article 2 of the ICESCR that a government take 'steps ... to the maximum of its available resources' to realise socio-economic rights.

5.2 Section 1 as a guarantee of socio-economic rights

The Supreme Court has affirmed that section 1 plays a dual role, both as a limit to rights and a guarantee of rights. The Court has also suggested that the section 1 analysis must be guided by the values underlying the Charter, which it has identified as including social justice and enhanced participation in society.[81] As Justice Arbour observed: 'We sometimes lose sight of the primary function of s. 1 – to constitutionally guarantee rights – focussed as we are on the section's limiting function.'[82]

In interpreting and applying section 1, the Supreme Court has underscored governments' obligations to protect the rights of vulnerable groups and international human rights law generally and the ICESCR in particular, in determining whether Charter rights – particularly those of more advantaged interests – may be limited in order to protect socio-economic rights. In the *Irwin Toy* case,[83] for example, restrictions on advertising aimed at children under the age of thirteen were found to be a justifiable infringement of toy manufacturers' section 2(b) rights to freedom of expression, because such restrictions were consistent with the important Charter value of protecting vulnerable groups such as children. While evidence in the case suggested that other less restrictive means were available to the government, the Court affirmed that 'This Court will not, in the name of minimal impairment [of a Charter right] ... require legislatures to choose the least ambitious means to protect vulnerable groups.'[84]

In its 1989 decision in *Slaight Communications*,[85] the Court found that an adjudicator's order requiring an employer to provide a positive letter of reference to a wrongfully-dismissed employee was a justifiable infringement of the employer's right to freedom of expression because it was consistent with Canada's commitments under the ICESCR to protect the employee's right to work. Chief Justice Dickson held in this regard:

> Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights* ... and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one ... Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content

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[80] Ibid. para. 64.
[81] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at p. 344; *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 64; *R.* v. *Oakes* (n. 75 above), p. 136; *Irwin Toy Ltd. v. Quebec (Attorney General)*, (n. 25 above), pp. 1003-4; *Vriend v. Alberta* (n. 33 above), para. 64; *Eldridge v. British Columbia (Attorney General)* (n. 35 above), para. 73.
[82] *Gosselin v. Quebec (Attorney General)* (n. 28 above), paras. 350-4.
[83] *Irwin Toy Ltd v. Quebec (Attorney General)* (n. 25 above).
[84] Ibid. p. 993. See however *RJR-Macdonald Inc. v. Canada*, [1994] 1 SCR 311, where the Supreme Court granted a tobacco manufacturer's section 2(b) challenge to federal tobacco advertising and marketing restrictions, notwithstanding evidence of tobacco related harm to health, and the particular vulnerability of children and youth to tobacco advertising.
[85] *Slaight Communications Inc. v. Davidson* (n. 47 above).

> of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.[86]

The result of the section 1 balancing in *Slaight Communications* was that the adjudicator's duty to recognize the vulnerability of workers in relation to employers, and to protect the right to work as recognized in the ICESCR, took precedence over the employer's explicitly protected right to freedom of expression under section 2(b) of the Charter.

6. Positive and negative duties in relation to socio-economic rights

The Supreme Court has affirmed that the Charter places duties on governments that may be categorized as both positive and negative. The Court has recognized, for example, that the democratic rights contained in section 3 of the Charter include positive duties: federal and provincial governments must hold regular elections to allow citizens to select their representatives and the failure to hold such elections would violate the Charter.[87] The potential scope of Charter duties to enhance participatory decision-making in the sphere of socio-economic rights remain largely unexplored by the courts, but this is clearly an area in which positive duties to protect democratic and other rights may equally apply.[88]

The 'fundamental freedoms' set out in section 2 of the Charter, such as freedom of expression and freedom of association, have generally been interpreted by the Court as imposing negative duties to refrain from state interference with individual rights,[89] but the Court has recognised the need to 'nuance' the distinction between positive and negative duties in this context also.[90] In the *Dunmore* case, described above, the Court imposed a duty on the government to protect agricultural workers from interference with their right to freedom of association.[91] The Court has also found that, in some circumstances, positive action may be required to protect the section 2(b) right to freedom of expression of disadvantaged groups.[92]

The right to equality, in particular, has been described as a 'hybrid' right, since it is neither purely positive nor purely negative. The Court has held that: 'In some contexts it will be proper to characterize s. 15 as providing positive rights.'[93] Section 15 not only requires governments to refrain from discriminating against protected groups, but may also require governments to adopt positive measures to ensure equality, as was found in the *Eldridge* case, or positive measures of protection from discrimination by others, as was found in *Vriend*.[94]

Similarly, section 7 of the Charter has both positive and negative dimensions. Section 7 imposes negative duties on governments to refrain from interfering with individual physical or psychological security or integrity. An illustration of this aspect of section 7 in the socio-economic rights context is found in the 1988 *Morgentaler* case,[95] dealing with women's access

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[86] Ibid. pp. 1056-7.
[87] *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 SCR 995.
[88] See M. Jackman, 'The Right to Participate in Health Care and Health Resource Allocation Decisions Under Section 7 of the Canadian Charter', *Health Law Review*, Vol. 4 (1995/1996), pp. 3-11.
[89] See K. Roach and D. Schneiderman, 'Freedom of Expression in Canada' in G.A. Beaudoin and E. Mendes (eds.), *The Canadian Charter of Rights and Freedoms*, 4th edition (Markham: LexisNexis Butterworths, 2005), pp. 259-323.
[90] *Dunmore v. Ontario (Attorney General)* (n. 42 above), para. 20.
[91] For a discussion of the implications of the *Dunmore* case and freedom of association, see P. Barnacle, 'Dunmore meets Wilson and Palmer: interpretation of freedom of association in Canada and Europe', *Canadian Labour & Employment Law Journal* , Vol. 11, No. 2 (2004), pp. 205-236.
[92] *Haig v. Canada* (n. 87 above), p. 103. See however *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627.
[93] *Schachter v. Canada* (n. 30 above), p. 721.
[94] *Eldridge v. British Columbia (Attorney General)*,(n. 35 above); *Vriend v. Alberta* (n. 33 above).
[95] *R. v. Morgentaler*, [1988] 1 SCR 30.

to reproductive health services. A provision of the federal Criminal Code requiring that abortions performed in hospitals be approved by 'Therapeutic Abortion Committees' was found by the Supreme Court to be an unlawful state interference with psychological and bodily integrity, that violated pregnant women's rights to 'life, liberty and security of the person' in a manner that was not in accordance with section 7 principles of fundamental justice or justifiable under section 1 of the Charter.[96]

An example of a positive duty associated with section 7, is the requirement that publicly funded legal aid be provided in child custody cases or other cases in which section 7 rights are at issue, as was found in the *G(J)* case described above.[97] As noted earlier, in both the *Irwin Toy* and the *Gosselin* cases, the Supreme Court left open the possibility that the state may also have a positive obligation to provide financial assistance or other measures necessary to ensure access to adequate food, housing and other necessities, in order to comply with the right to security of the person under section 7.[98]

The Supreme Court has pointed out that the distinction between government action and inaction, and between positive and negative rights or duties, is 'problematic'.[99] It has also recognised that as a general pattern, '[v]ulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.'[100] The Court held in *Vriend* that the distinction between governmental action and failure to act is not a valid basis on which to determine whether or to what extent the Charter applies.[101] Rather, the Court held that since the Charter applies to all matters within the authority of the legislature, it will be engaged even if the legislature refuses to exercise its authority.[102]

At the same time, however, as discussed earlier, the Court has been unwilling to clearly affirm that the Charter imposes a positive obligation on governments to adopt measures necessary to address the needs of disadvantaged groups. Thus, in his dissenting judgment on the appropriate remedy in the *Vriend* case, Justice Major made the astonishing suggestion that the legislature should be given the option of complying with section 15 equality rights in the *Charter* by revoking its human rights legislation altogether, thereby remedying the discriminatory 'under-inclusion.' [103] The majority of the Court, though opting for a remedy of 'reading in' the additional ground, did not seem to rule out the possibility of this kind of draconian legislative response, insisting that it was not required to decide in that case whether governments have any obligation to provide legislative protection from discrimination. [104]

In recent section 7 and 15 jurisprudence, there are worrying indications that this 'timidity' on the part of the Supreme Court with respect to socio-economic rights is developing into a stronger inclination to avoid imposing positive constitutional requirements on governments that correspond to the obligations to protect and to fulfill rights under the ICESCR and other international human rights treaties. In its 2005 decision in the *Auton* case, involving a section

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[96] See S. Rogers, 'Abortion Denied: Bearing the Limits of Law' in C.M. Flood (ed.,), *Just Medicare: What's In, What's Out, How We Decide* (Toronto: University of Toronto Press, 2006), pp. 107-136, at 109-11; M. Jackman, 'Section 7 of the Charter and Health Care Spending' in G.P. Machildon, T. McIntosh and P.-G. Forest (eds.), *The Fiscal Sustainability of Health Care in Canada* (Toronto: University of Toronto Press, 2004), pp. 110-136, at 111-114.
[97] *New Brunswick (Minister of Health and Community Service) v. G.(J.)* (n. 67 above).
[98] *Irwin Toy Ltd. v. Quebec (Attorney General)* (n. 25 above); *Gosselin v. Quebec (Attorney General)* (n. 28 above).
[99] *Vriend v. Alberta* (n. 33 above), para. 53.
[100] *Irwin Toy v. Quebec (Attorney General)* (n. 25 above), pp. 993-4.
[101] *Vriend v. Alberta* (n. 33 above), para. 53.
[102] Ibid. para. 6.
[103] Ibid., paras. 196-197 .
[104] Ibid., paras. 62-64. See Porter, 'Reclaiming Expectations' (n. 16 above), pp. 180-5.

15 challenge to a provincial government's failure to fund intensive behavioural treatment for autistic children, Chief Justice McLachlin, writing for the Court, stated that: 'this Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.'[105] Similarly, in the 2005 *Chaoulli*[106] decision, involving a section 7 challenge to provincial government restrictions on private healthcare funding designed to protect the universal medicare system, the Chief Justice asserted that: 'The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.'[107]

Clearly this 'truncated' notion of positive obligations under sections 7 and 15 is at odds with the 'interpretive presumption' that the Charter provides rights protections at least equivalent to those under international human rights law that is binding on Canada. Further, it results in a discriminatory approach to socio-economic rights in which the right to healthcare of those who have unique needs, such as autistic children, or of those who cannot afford or are ineligible for private healthcare insurance, are denied Charter protection, while those whose health rights can be vindicated by challenges to governmental 'interference' will be actively protected through judicial intervention. In this sense, the timidity to which the High Commissioner refers is now threatening to undermine the Court's commitment to substantive equality and has prompted widespread expressions of concern among many legal commentators in Canada.[108]

7. Principle areas of socio-economic rights litigation

7.1 Housing rights

The 1990 *Alcohol Foundation* case[109] was an early application of Charter equality rights in the context of access to housing. A by-law of the city of Winnipeg, imposing restrictions on the establishment of group homes for persons with drug or alcohol addictions in residential neighborhoods, was found to discriminate on the basis of disability and was struck down as violating section 15. In rendering its decision, however, the Court of Appeal noted that it

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[105] In support of this statement, the Chief Justice cites *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, at para. 61; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 SCR 325, at para. 55; *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357, at para. 16.

[106] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791.

[107] Ibid. para. 104. For a discussion of the case see M.-C. Prémont, 'L'affaire Chaoulli et le système de santé du Québec: Cherchez l'erreur, cherchez la raison', *McGill Law Journal*, Vol. 51 (2006), pp. 167-196; M. Jackman, ' "The Last Line of Defence for [Which?] Citizens": Accountability, Equality and the Right to Health in *Chaoulli*', *Osgoode Hall Law Journal*, Vol 44 (2006), [forthcoming]; C. Flood, K. Roach, and L. Sossin (eds.), *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto, University of Toronto Press, 2005).

[108] See, for example, B. Ryder, C. Faria and E. Lawrence, 'What's *Law* Good For? An Empirical Overview of *Charter* Equality Rights Decisions', *Supreme Court Law Review*, Vol. 24 (2004) pp. 103-126; Faraday, *Making Equality Rights Real* (n. 31 above); S. McIntyre and S. Rogers (eds.), *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, (Markham: LexisNexis Butterworths, 2006); Flood, *Access to Care*, ibid. Some critics have claimed, however, that this jurisprudence simply validates initial critiques of the potential of *Charter* review as a mechanism for progressive social change; see for example A. Hutchinson, 'Condition Critical: The Constitution and Health Care', in Flood, *Access to Care*, ibid. pp. 101-15; A. Petter, 'Wealthcare: The Politics of the *Charter* Revisited', in Flood, Access to Care, ibid. pp. 116-38; J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

[109] *Alcohol Foundation of Manitoba et al. v. Winnipeg (City)*, (1990) 6 W.W.R 232 (Man. CA).

might have been willing to uphold the by-law if the municipal government had introduced any evidence at all to justify it under section 1 of the Charter.

In the 1993 *Sparks* case,[110] Irma Sparks, a Black single mother of two children challenged the exclusion of public housing tenants from security of tenure provisions as a violation of equality rights, after being issued an eviction order with no reasons given and one (rather than three) months' notice to vacate. The Nova Scotia Court of Appeal found that public housing residents were disproportionately single mothers, Black and poor, and that their exclusion from provincial residential tenancies legislation constituted adverse effect discrimination on the grounds of race, sex, marital status and poverty. Significantly, the Court found that poverty was a personal characteristic analogous to those enumerated under section 15 of the Charter.[111]

7.2 Health rights

In the *Eldridge* case, as discussed above, a non-profit provider of interpreter services informed the provincial government that it could no longer afford to offer such services without public funding.[112] At a meeting of health ministry officials, it was decided not to provide funding, in part because of concerns that this might lead to similar request from other groups. As a result, the two claimants, both of whom were born deaf, were unable to communicate effectively with their healthcare providers.[113] In arguing that the failure to fund interpretation services did not amount to adverse effects discrimination under the Charter, the province insisted that section 15 does not oblige governments to address the needs of disadvantaged groups where the disadvantage exists independently of state action. A unanimous Court responded to this argument as follows:

> [T]he respondents and their supporting interveners ... assert ... that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits ... In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.[114]

In considering whether the failure to fund interpretation services was justified in light of competing priorities within the healthcare system, the Court considered not only the fact that the cost would be minimal relative to the overall provincial healthcare budget, but also the nature of the disadvantage experienced by the group and the fact that the government had made no effort to provide any interpreter services at all.[115]

As discussed in Section 6 above, the claimants in the *Chaoulli* case[116] challenged the ban, under Quebec health and hospital insurance legislation, on private health insurance and funding. The claimants argued that the ban violated their rights to life, liberty and security under section 7, because it effectively rendered the provision of private health services

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[110] *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, (1993) 119 NSR (2d) 91 (NS CA).
[111] See M. Jackman, 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law', *Review of Constitutional Studies*, Vol. 2 (1994), pp. 76-122; L. Iding, 'In a Poor State: The Long Road to Human Rights Protection on the Basis of Social Condition', *Alberta Law Review*, Vol. 41 (2003), pp. 513-525.
[112] *Eldridge v. British Columbia (Attorney General)* (n. 35 above), paras. 3-4.
[113] In particular, one of the applicants, Linda Warren, had delivered twins prematurely by emergency cesarean section without any hospital staff being able to communicate with her about the procedure or her newborns' survival or state of health.
[114] Ibid. para. 72-3.
[115] Ibid. para. 93; see generally D. Greschner, 'How Will the Charter of Rights and Freedoms and Evolving Jurisprudence Affect Health Care Costs?', in T. McIntosh et al. (eds.), *The Governance of Health Care in Canada* (Toronto: University of Toronto Press, 2004), pp. 83-124.
[116] *Chaoulli v. Quebec (Attorney General)* (n. 106 above).

uneconomical and thereby forced them to wait for services within an over-burdened public system. A four-judge majority of the Supreme Court agreed with the claimants that, in view of lengthy waiting times for treatment within the public system, the prohibition on private insurance violated rights to life and to security of the person.[117] The majority pointed to the absence of similar restrictions on private funding in other countries with public healthcare systems as proof that the ban was arbitrary and thus not in accordance with section 7 principles of fundamental justice. In rejecting the claimants' Charter arguments, the three dissenting justices referred to evidence accepted at trial that the ban on private insurance was necessary to protect the publicly funded system, upon which everyone relies. In concluding that the limits on private care were rational and justified under sections 7 and 1 of the Charter, Justice Binnie warned that 'the *Canadian Charter* should not become an instrument to be used by the wealthy to "roll back" the benefits of a legislative scheme that helps the poorer members of society.'[118] The majority's decision in the *Chaoulli* case has been widely criticised by legal and health policy commentators.

7.3 Right to an adequate standard of living and social security

In the 2002 *Falkiner* case,[119] the Ontario Court of Appeal struck down the province's 'spouse in the house' rule as discriminatory against single mothers and social assistance recipients. The rule treated single mothers living with a man as if they were spouses for the purposes of eligibility for social assistance. This had the effect of either reducing their benefits or disentitling them from assistance altogether, based on the income of the man with whom they were residing. The Court found that the policy denied single mothers on social assistance the ability to cohabit with men in the early stages of a relationship without becoming financially dependent. Having found discrimination under section 15, the Court did not address the question of whether the rule also violated section 7 of the Charter.

In the *Gosselin* case,[120] described above, Louise Gosselin challenged a Quebec social assistance regulation that reduced by two-thirds the amount paid to single employable persons under the age of thirty not enrolled in a workfare program. In a split-decision, the Supreme Court found no discrimination under section 15. A majority of five judges concluded that the government had not treated those under the age of thirty as less worthy than older welfare recipients by making increased payments conditional on participation in workfare programs – programs that the majority concluded were designed specifically to integrate young welfare recipients into the workforce and to promote self-sufficiency. The four dissenting justices found, on the evidence, that it was highly improbable that young welfare recipients could actually be enrolled in workfare programs at all times in order to qualify for the higher rate of assistance. They also found that reducing the rate for young recipients to one-third the amount deemed necessary to meet basic living requirements clearly violated claimants' section 15 dignity interest. Seven of nine judges found no violation of the right to security of the person under section 7 of the Charter, but left open the possibility that a denial of adequate financial assistance might violate section 7 rights in some other circumstances. The majority's unwillingness to find a Charter violation on the facts of the case has been harshly criticised within and outside the anti-poverty community in Canada.[121]

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[117] In her ruling for the four judge majority in the case, Justice Deschamps held that the prohibition on private insurance violated the right to 'life', 'personal security' and 'inviolability' under section 1 of the Quebec Charter of Human Rights and Freedoms. The Court split 3-3 on the issue of whether the ban also violated section 7 of the Canadian Charter.

[118] Ibid. para. 94.

[119] *Falkiner v. Ontario (Ministry of Community and Social Services)*, (2002) 212 DLR (4th) 633 (Ont CA).

[120] *Gosselin v. Quebec (Attorney General)* (n. 28 above).

[121] See for example G. Brodsky, '*Gosselin v. Quebec (Attorney General)*: Autonomy with a Vengeance', *Canadian Journal of Women and the Law*, Vol. 15 (2003), pp. 194-214; J. Keene, 'The Supreme Court, the Law Decision, and Social Programs: The Substantive Equality Deficit', in Faraday, *Making Equality*

7.4 Right to work

In three early Supreme Court decisions dealing with the right to strike, known as the 'labour trilogy' a majority of the Court found that the right to strike is not protected by the Charter's section 2(d) guarantee of 'freedom of association.'[122] Subsequent decisions extended these findings to deny section 2(d) protection for the right to bargain collectively and to benefit from a particular labour relations regime.[123] This jurisprudence has placed serious limits on Canadian workers' ability to claim rights protected in article 6 of the ICESCR by way of Charter review.[124]

The Supreme Court's 2001 decision in *Dunmore,*[125] described above, suggests a somewhat more positive outlook for Charter-based labour rights claims.[126] In that case, agricultural workers in Ontario, a clearly disadvantaged group, challenged the repeal of legislation enacted by a previous government designed to bring agricultural workers into the province's labour relations regime. The workers in *Dunmore* argued that the legislative repeal infringed their right to associate under section 2(d) of the Charter and their equality rights under section 15. The Court found a violation of the right to freedom of association in the case, but did not deal with the section 15 claim. In an significant judgment in relation to the notion of 'retrogressive measures' discussed by the CESCR in its General Comment No. 3, the Court found the repeal of the previous legislation unconstitutional, to the extent that it denied agricultural workers the benefits of collective bargaining laws. The Court suspended the declaration of invalidity for 18 months, to give the government an opportunity to enact new legislation that would minimally protect the rights of agricultural workers to form associations. The legislation subsequently adopted by the province did not, however, restore full collective bargaining rights for agricultural workers, and has since been challenged.[127]

In the 2004 *NAPE* case,[128] as described in Part 5.1, above, a public employees' union challenged a provincial decision to rescind a pay equity award pursuant to a pay equity regime and a collective bargaining agreement. While the Supreme Court declined to rule on the question of whether a regime to ensure compensation for denial of equal pay for work of equal value was itself required by section 15, it did find that in so far as such a regime had been created and the new pay equity rights had been implemented and incorporated into a collective agreement, the repeal of the award was discriminatory against women workers. However, the Court concluded that the province's fiscal crisis justified the measure under section 1 of the Charter. Since the *NAPE* decision, the economic situation in Newfoundland has improved and women have successfully lobbied for payment of the award.[129]

Rights Real (n. 31 above), pp. 345-370; M. Jackman, 'Sommes nous dignes? L'égalité et l'arrêt *Gosselin*' [Are we worthy? Equality and the *Gosselin* case], *Canadian Journal of Women and the Law*, Vol. 17 (2005), pp. 161-76.

[122] Reference re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313; *PSAC v. Canada*, [1987] 1 SCR 424; *RWDSU v. Saskatchewan*, [1987] 1 SCR 460.

[123] *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989.

[124] See generally: D. Pothier, 'Twenty Years of Labour Law and the Charter' *Osgoode Hall Law Journal*, Vol. 40 (2002) pp. 369-400; J. Fudge, 'Labour is not a Commodity: The Supreme Court of Canada and the Freedom of Association', *Saskatchewan Law Review*, Vol. 67 (2004), pp. 425-452.

[125] *Dunmore v. Ontario* (n. 42 above).

[126] Barnacle, 'Dunmore Meets Wilson and Palmer' (n. 91 above); Fudge, 'Labour is not a Commodity' (n. 123 above).

[127] *Fraser v. Ontario (Attorney General)*, [2006] OJ. No. 45 (Ont. Sup. Ct.).

[128] *Newfoundland (Treasury Board) v. NAPE* (n. 79 above).

[129] J. Baker, 'Pay equity cash "addresses a wrong"', *The Telegram (St. John's)*, 24 March 2006, p. A3.

7.5 Right to education

In dealing with French and English minority language education rights guaranteed under section 23 of the Charter, the Supreme Court recognized in its 1990 decision in *Mahe v. Alberta* that that the courts have a mandate to ensure that governments meet positive obligations to allocate resources and to create necessary institutional structures for the realization of the right.[130] In this context, the Court has been required to address the more difficult remedial issues arising from positive obligations to fulfil socio-economic rights.[131]

These issues were the focus of the Supreme Court's 2003 decision in *Doucet-Broudreau*.[132] In that case, francophone parents in New Brunswick applied for an order that French-language facilities and programs be provided at the secondary school level in five school districts. The trial judge found that the provincial government had failed to prioritise these obligations as required by section 23 of the Charter. He ordered the province to undertake its 'best efforts' to provide school facilities and programs by specific dates and he retained jurisdiction to hear reports on the status of the efforts made over time. A narrow majority of the Supreme Court upheld the trial judge's order, finding that the positive guarantees contained in section 23 and the necessity of timely governmental compliance in the minority language education setting may require courts to order prospective remedies to guarantee that rights are meaningfully and promptly implemented.

In the 1997 *Eaton* case,[133] the Supreme Court considered the application of section 15 to the rights of children with disabilities and the accommodation of their needs by the public education system. The case involved a 12-year-old student with cerebral palsy, who was unable to communicate through speech, sign language or other alternative means. The girl's parents claimed that the decision to place their daughter in a segregated special education setting, rather than integrating her into the regular school system, was a violation of her right to equality under section 15. The Court found that a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality, and that the best interests of the child should be assessed by a court without the burden of a presumption in favour of integration.[134] While the *Eaton* decision was controversial within the disability community, the Court's emphasis on positive obligations to address real educational needs, instead of only on discriminatory stereotypes, has been seen as a positive move toward informing equality rights analysis with an understanding of the 'social construction of disability'. This approach is consistent with the recognition of the section 15 equality guarantee as a positive social right to have unique needs met in the most effective way.[135]

8. Remedies

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[130] *Mahe v. Alberta* (n. 5 above) at p. 389.
[131] See M. Power and P. Foucher, 'Language Rights in Education' in M. Bastarache (ed.,), *Language Rights in Canada*, 2nd edition (Cowansville: Yvon Blais, 2004), pp 365-452.
[132] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3.
[133] *Eaton v. Brant County*, [1997] 1 SCR 241.
[134] Ibid. paras. 78-81.
[135] Y. Peters, *Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference? An Assessment by the Council of Canadians with Disabilities* (Winnipeg: Council of Canadians with Disabilities, 2004), available at Council of Canadians with Disabilities, www.ccdonline.ca/publications/20yrs/20yrs.htm; F. Sampson, 'Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability an Equality Rights Law', in D. Pothier and R. Devlin (eds.), *Critical Disability Theory: Essays in Philosophy, Policy and Law* (Vancouver: University of British Columbia Press, 2002), pp. 257-284; E. Chadha and T. Sheldon, 'Promoting Equality: Economic and Social Rights for Persons With Disabilities', *National Journal of Constitutional Law*, Vol. 16 (2004), pp. 27-102.

Section 24(1) of the Charter provides that courts can grant whatever remedy is 'appropriate and just in the circumstances' for a violation of a Charter right. Section 52(1) of the Constitution Act, 1982 states that laws are of no force and effect to the extent of their inconsistency with the Constitution. There is thus a wide range of remedies available for violations of Charter rights, and Canadian courts have made use of this remedial flexibility in dealing with socio-economic rights claims.

Upon finding a Charter violation, Canadian courts may issue an immediate declaration of invalidity or they may suspend the declaration for a set period of time to provide governments with an opportunity to determine the best remedy or to put in place necessary legislation or programs.[136] In rare cases, the courts may issue a constitutional exemption to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended.[137] The courts may award damages or order governments to take positive remedial action, and their orders may be enforced against the Crown through contempt of court proceedings.[138] Where appropriate, courts may also issue supervisory orders and maintain ongoing jurisdiction over the implementation of remedies that take time to put in place, where this is deemed appropriate and just.

In assessing the proper role of the judiciary in relation to legislatures, an over-riding principle linked to the rule of law is that rights must have effective remedies. The Supreme Court has emphasized that the exercise of judicial deference vis-à-vis the role of the legislature in exercising socio-economic policy choices should not render Charter rights illusory or immunize certain areas of government authority from Charter review.[139] As Justice Binnie wrote in the *NAPE* case:

> If the "political branches" are to be the "final arbitrator" of compliance with the *Charter* of their "policy initiatives", it would seem the enactment of the *Charter* affords no real protection at all to the rights holders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy by denying effective remedies.[140]

The Court has held that where appropriate, deference 'will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a *Charter* breach.'[141]

The application of deference at the remedial stage in socio-economic cases has led to a judicial preference for suspended declarations of invalidity in situations where positive remedial action is required and in which governments have various policy options available to achieve Charter compliance. A leading example of a suspended declaration is found in the *Eldridge* case. While the trial and appellate courts had concluded that section 15 ought not to be invoked to second-guess governments' choices in the allocation of scarce resources among competing healthcare priorities, the Supreme Court insisted that section 15 did apply to a failure to fund

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[136] *Schachter v. Canada* (n. 30 above); see K. Roach, 'Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity', *University of British Columbia Law Review*, Vol. 35 (2002) , pp. 211-70.
[137] Ibid. pp.715-7; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519 at p. 577.
[138] *Doucet-Boudreau v. Nova Scotia (Minister of Education)* (n. 132 above), para. 136; Kent Roach and Geoff Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable', *South African Law Journal*, Vol. 122 (2005), pp. 325-351; Roach, *Constitutional Remedies in Canada* (n. 60 above), pp. 13-90.
[139] *Symes v. Canada*, [1993] 4 SCR 695, at p.753.
[140] *Newfoundland (Treasury Board) v. NAPE* (n. 74 above), para. 111.
[141] *Vriend v. Alberta* (n. 33 above), para. 54; see also D. Wiseman, 'The *Charter* and Poverty' (n. 24 above).

interpreter services, and that even if a deferential standard of justification under section 1 were to be adopted, the failure could not be justified.[142] It was at the remedial stage that deference to legislative policy choices was found by the Court to be appropriate. As Justice LaForest explained:

> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response.[143]

Another factor that may weigh in favour of a suspended declaration of invalidity is the importance of democratic participation and consultation with affected minorities. The Supreme Court has pointed out that the Charter may create a 'dialogue' between courts and legislatures.[144] As the Court stated in its 1999 Corbière decision:

> The remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process.[145]

In other socio-economic rights cases, however, 'reading in' has been determined to be the most appropriate remedy, insofar as this is most consistent with nature of the right, the context of the legislation and with the purposes of the Charter. In *Vriend*, for example, the majority of the Court determined that, even in the face of evidence of a clear legislative intent to exclude sexual orientation from Alberta's human rights legislation, reading this ground of discrimination into the statute was preferable to striking the legislation down and potentially leaving other groups without protection. The majority found that the legislative intent in that case was 'inconsistent with democratic principles', making it appropriate to extend the legislative protection of the province's human rights act to gays and lesbians in order to achieve Charter compliance.[146]

In the *Doucet-Boudreau* case, where the trial judge had determined that ongoing supervision of the implementation of complex obligations to provide for French language secondary school education was required, the Supreme Court similarly agreed that a declaration of invalidity was an inadequate remedy.[147] The trial judge had established deadlines for various school districts and set dates for submitting reports to the court on progress made. On appeal, the majority of the Supreme Court found that the supervisory order issued by the trial judge was a 'just and appropriate' remedy in the circumstances.[148] The Court emphasized that courts must be creative in considering different remedial options in order to ensure that remedies are both responsive to particular needs and contexts, and effective.[149] In the *Doucet-Boudreau* case, the Court found that maintaining supervisory jurisdiction was an appropriate response to

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[142] *Eldridge v. British Columbia (Attorney General)* (n. 35 above), para. 85.
[143] Ibid. para. 96.
[144] See generally K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Iriwin Law, 2001); for a critique of this approach, see however A. Petter, 'Twenty Years of Charter Justification: From Liberalism to Dubious Dialogue', *University of New Brunswick Law Journal*, Vol. 52 (2003), pp. 187-200.
[145] *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at para. 116.
[146] *Vriend v. Alberta* (n. 33 above), paras. 175-9.
[147] *Doucet-Boudreau v. Nova Scotia (Minister of Education)* (n. 132 above), paras. 66-67.
[148] Ibid. para. 86.
[149] Ibid. para. 59.

concerns about assimilation of minority language communities and ongoing delays in governmental action.[150]

9. Conclusion

In light of the historical expectations of rights holders; the Charter's open-ended and expansive wording; its balancing of individual rights and collective values; the important interpretive role the ICESCR can play both in determining the scope of rights and the responsibilities of governments; and the broad range of remedies available for Charter violations; there is no reason why the Canadian courts should not play an active role in safeguarding socio-economic rights in Canada. As yet, however, the courts have largely failed to fulfill the Charter's promise in this regard. As High Commissioner Arbour has pointed out, this may be due to timidity on the part of litigants as well as the courts.[151] Few socio-economic rights cases have been brought before the courts in the first quarter century of constitutional democracy in Canada. And, as the CESCR points out, one cannot absolve Canadians governments from responsibility either. Why, the CESCR has asked, should governments not be encouraging courts to consider Canada's international human rights obligations when interpreting the Charter, rather than arguing against interpretations that would provide effective remedies for these rights?[152]

While there have been some important Charter victories for socio-economic rights claimants, there have also been very disappointing losses. Courts have sidestepped the issue, so central to international human rights law in general and to socio-economic rights in particular, of whether governments do indeed have a positive constitutional duty to attend to the needs of those who are without adequate food, housing, healthcare, education or decent work, in a country with such an abundance of resources that all should enjoy these core human rights. As long as the obligation of governments to protect and promote socio-economic rights is considered ancillary to Charter compliance rather than as central to it, socio-economic rights will continue to be marginalised in Canada.

If, however, Canadian rights claimants have suffered from the disadvantage of a lack of any explicit Charter recognition of socio-economic rights, they have also benefited from the ability to frame socio-economic rights claims as fundamental issues of constitutional inclusion. This is Canada's potential contribution to the field of socio-economic rights – to enhance the understanding of these rights as central to all human rights, rather than as a separate category of rights. Given the historical expectations associated with the adoption of the Charter, those who are faced with hunger or homelessness amidst affluence see issues of constitutional interpretation as being linked to underlying issues of equal citizenship and social inclusion. In cases where Canadian courts have suggested that homelessness or poverty do not engage equality rights or the right to security of the person, or that those who can afford to buy it have a right to healthcare while those who rely on publicly funded healthcare do not, the courts have not been seen to be merely deciding the scope of particular words or provisions. Rather, such decisions are considered by rights claimants and by an increasing number of commentators as serious assaults on the very values of dignity and equal citizenship that the Charter embodies.

It is in this sense that the constitutional status of socio-economic rights in Canada is much more than a matter of the scope of particular Charter guarantees. It is, fundamentally, a question of the integrity with which the Charter will be interpreted and applied, and the values

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[150] Ibid. paras. 66-70.
[151] Arbour, 'Freedom from want'(n. 2 above), p. 7.
[152] CESCR, Concluding Observations on Canada, 2006, (n. 57 above), para. 11(b); G. Brodsky, 'The Subversion of Human Rights by Governments in Canada', in M. Young *et al*, (eds.), *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2006) [forthcoming].

that will be conveyed to governments and citizens, as those that are deserving of constitutional status. As Chief Commissioner Arbour has eloquently summarized it:

> Whatever cause there may have been to question the equal status and justiciability of economic, social and cultural rights 60 years ago, one thing is clear: there is no basis for categorical disclaimers today ... The legality of judicial review of all human rights is not open to question under the Canadian constitutional system.[153]

[153] Arbour, 'Freedom from Want' (n. 2 above), pp. 7, 9.