



# **Social Rights in Ontario: The International Human Rights and Constitutional Framework**

**Bruce Porter**  
**Social Rights Advocacy Centre**

With assistance from

**Martha Jackman**  
**University of Ottawa**

Prepared as a component of the Project “Social Rights and the Law in Ontario” funded by the Law Foundation of Ontario. Additional research support provided by the Social Sciences and Humanities Research Council and the Institute for Population Health, University of Ottawa. The support of these funders is gratefully acknowledged.



## Table of Contents

A. Introduction .....	1
B. Social Rights, Social Movements and Rights-Based Strategies.....	7
C. International Human Rights Law and Social Rights in Ontario.....	18
D. Recommendations of International Treaty Monitoring Bodies .....	32
E. International Human Rights and Constitutional Interpretation .....	39
F. Section 36 of the Constitution Act, 1982.....	42
G. Section 7 of the <i>Charter</i> : The Right to Life, Liberty and Security of the Person .....	48
H. Section 15 of the <i>Charter</i> : Equality Rights.....	61
I. Section 1 of the <i>Charter</i> : The Guarantee of Reasonable Limits .....	76
J. Beyond the Positive - Negative Rights Distinction .....	86
K. Strategies for Claiming and Enforcing Social Rights in Ontario.....	89
L. Conclusion .....	101

## A. Introduction\*

Since the adoption of the *Universal Declaration of Human Rights (UDHR)*<sup>1</sup> in 1948, poverty and homelessness and the adverse health consequences that flow from them have been understood not only as issues of economic and social deprivation but also as matters of basic human rights. The *UDHR* and subsequent international human rights treaties, most notably the *International Covenant on Economic, Social and Cultural Rights*<sup>2</sup> (*ICESCR*), have recognized social and economic rights, including the right to an adequate standard of living, the right to housing, the right to just and favourable conditions of work, the right to social security, the right to food, and the right to the highest attainable standard of health, as fundamental human rights guarantees.

The separation of economic, social and cultural rights, guaranteed in the *ICESCR*, from civil and political rights, codified in a sister covenant, the *International Covenant on Civil and Political Rights*<sup>3</sup> (*ICCPR*), encouraged a historical differentiation between the two sets of rights which has taken more than forty years to correct. When the *ICCPR* was adopted in 1966, an optional complaints procedure for alleged violations of civil and political rights was introduced to accompany it.<sup>4</sup> Both the *ICCPR* and its *Optional Protocol* came into force in 1976. However the *ICESCR*, which was introduced and came into force at the same time as the *ICCPR*, had no parallel complaints procedure. For many years, debate focused on the questions of whether

---

\* This research paper is based in part on components of three previously published Working Papers, two of which were co-authored with Professor Martha Jackman. Bruce Porter & Martha Jackman, *International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection*, Working Paper, (Huntsville, ON: Social Rights Advocacy Centre, September 2011); Bruce Porter & Martha Jackman, *Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework*, Working Paper, (Huntsville, ON: Social Rights Advocacy Centre, June 2012); and *Designing and Implementing Rights-Based Strategies to Address Homelessness and Poverty in Ontario* (Huntsville, ON: Social Rights Advocacy Centre, December 2012). The author gratefully acknowledges the Law Foundation of Ontario, the University of Ottawa Institute for Population Health and the Social Sciences and Humanities Research Council Community University Research Alliance program for their funding support. The diligent research assistance of University of Ottawa Faculty of Law students Amelia Martin, Lucy Draper-Chislett and Zofia Vorontsova and Osgoode Hall law student Sonia Nijjar was also critical to the research and production of this article and sincerely appreciated.

<sup>1</sup> *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71 [UDHR].

<sup>2</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

<sup>3</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

<sup>4</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 2200(XXI), UNGAOR, 21st Sess, UN Doc A/RES/2200(XXI), (1966) [OP-ICCPR].

this institutional inconsistency was justified by the different characteristics of economic and social rights; whether the *ICESCR* should have a similar complaints procedure to the *ICCPR*; and, more generally, whether economic and social rights should be subject to judicial review and remedy under domestic law.

In the early years of the debate, economic and social rights were often described as governmental aspirations and commitments, rather than legally enforceable rights. It was argued that realization of this category of rights requires legislation, programs and services that may involve a significant allocation of budgetary resources, and that socio-economic rights obligations often take the form of future commitments rather than immediate entitlements. The traditional view held that such future-oriented undertakings, to develop policies and programs to realize rights over a reasonable period, could not be subject to immediate judicial remedy and should not, therefore, be assigned to courts to adjudicate.

Over time, however, this view has been replaced by a more unified conception of human rights and a more flexible view of the role of courts: one that is more reflective of the entire interdependent framework of rights set out in the *UDHR*, and which adopts a broader understanding of the kinds of remedies courts may order. This unified approach recognizes that all human rights require access to effective remedies. If governments are to be held accountable for failures to meet their obligations with respect to economic and social rights, institutional mechanisms must be in place to enable rights holders to claim their rights. Denying groups living in poverty or without adequate housing or access to food any recourse for violations of their rights, and leaving socio-economic rights entirely to governments to define and implement according to their own priorities, simply reinforces patterns of exclusion of the most powerless and marginalized groups that human rights are supposed to remedy.

In addition to the emerging international consensus that there must be a right to the adjudication and remedy of socio-economic rights claims, civil and political rights have also evolved in a manner that undermines the traditional dichotomy between the two sets of rights. With more substantive understandings of the right to life, equality and non-discrimination, many of the programmatic obligations traditionally associated with socio-economic rights have become subject to legal claims within the civil and political rights domain.<sup>5</sup> For instance, the right to life has come to be understood as requiring positive measures of protection, such as

---

<sup>5</sup> Bruce Porter, Aoife Nolan & Malcolm Langford, "The Justiciability of Social and Economic Rights: an Updated Appraisal", online: (2007) Center for Human Rights and Global Justice Working Paper Series 15 <<http://www.scribd.com/doc/57177908/Justiciability-of-ESCR>>; Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'" (1999) 21:3 Hum Rts Q 633; Martha Jackman, "What's Wrong With Social and Economic Rights" (2000) 11 NJCL 235.

ensuring access to health care or adequate food. The right to equality and non-discrimination has come to be understood as requiring positive measures by governments and other actors, for example, to remove barriers to equal participation for people with disabilities. Similarly, homelessness and poverty, with their documented effect on health, can also be understood as violations of the rights to life and security of the person, which are civil and political rights guaranteed under the *ICCPR*. Homelessness and poverty also disproportionately affect disadvantaged groups, so policies which create poverty or homelessness can be challenged for their discriminatory effect on protected groups such as women or people with disabilities.<sup>6</sup> The positive measures necessary to address systemic inequality or to protect the right to life and security of the person, are not fundamentally different in nature from the programmatic measures needed to realize social and economic rights. Rigid distinctions with respect to justiciability, or availability of legal remedies, for each category of rights have therefore proven both impracticable and conceptually flawed.<sup>7</sup> It is simply no longer tenable to suggest that socio-economic rights are not amenable to adjudication and remedy by courts or tribunals.

An ever-increasing number of countries have included socio-economic rights, such as the right to housing or health care, as fully justiciable rights in their domestic constitutions.<sup>8</sup> Regional human rights monitoring and enforcement systems, including the African Commission and Court on Human and Peoples' Rights, the Inter-American Commission and Court of Human Rights, the European Committee of Social Rights, and the European Court of Human Rights, have all recognized economic and social rights as justiciable.<sup>9</sup> On December 10, 2008, the UN General Assembly eradicated the final vestiges of the historic distinction between the two sets of rights by adopting the *Optional Protocol to the ICESCR*.<sup>10</sup> Once it is in force,<sup>11</sup> the *Optional*

---

<sup>6</sup>See e.g. *ICCPR*, *supra* note 3 at arts 2 (right to equality), 6 (right to life), 9 (right to security of the person), 26 (right to non-discrimination).

<sup>7</sup>Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008); Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209.

<sup>8</sup>Jurisdictions in which social and economic rights have been deemed justiciable and judicially enforceable include, *inter alia*, Argentina, Chile, Bangladesh Colombia, Finland, Kenya, Hungary, Latvia, the Philippines, Switzerland, Venezuela, South Africa and India. For descriptions of judicial roles in enforcing economic and social rights in various jurisdictions, see Langford, *supra* note 7.

<sup>9</sup>Porter, Nolan & Langford, *supra* note 5 at 2-3.

<sup>10</sup>*Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) [*OP-ICESCR*].

<sup>11</sup>The Protocol will enter into force on May 5, 2013, three months after the tenth ratification, deposited by Uruguay. See *OP-ICESCR*, *ibid* at art 18(1). For updates on signatures and ratifications, see United Nations Treaty Collection, online: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en)>. The current Government of Canada has indicated that it does not intend to ratify the *Optional Protocol*, see United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments*

*Protocol* will permit the Committee on Economic, Social and Cultural Rights (CESCR) to adjudicate petitions alleging violations of *ICESCR* rights in the same manner as the Human Rights Committee does with regards to civil and political rights. This historic acknowledgement of the equal status of economic, social and cultural rights was heralded by Louise Arbour, then UN High Commissioner on Human Rights, as “human rights made whole.”<sup>12</sup>

Human rights discourse has, for many years, lent legitimacy to demands that governments develop and adequately maintain and fund programs and policies to better address poverty and homelessness, providing a kind of ‘moral yardstick’ against which to assess government measures and progress over time. However, the new conception of social rights as claimable and subject to ongoing adjudication and remedy opens up possibilities for a considerably richer understanding of the interplay between human rights and socio-economic policy. Rather than being seen only as worthy social policy goals, social rights are now seen as transformative tools for challenging structural disadvantage and social exclusion, and for addressing poverty and homelessness as denials not only of basic needs, but also of equal citizenship and dignity. Social rights are now seen as a process, as much as a goal, and effective strategies to support the implementation and fulfillment of socio-economic rights over time are understood as central obligations of governments. Even if the rights cannot be realized immediately, a coherent plan can still be put in place.

New social rights-based approaches require actions to address structural causes of poverty and to meet obligations to realize socio-economic rights commensurate with the maximum of available resources. While structural causes of poverty may be directly attributable to the actions of private actors, patterns of systemic exclusion and disadvantage are sustained and reinforced by failures of the state to prevent and remedy them. Thus new rights-based approaches require not only government programs to provide for those in need, but also regulation of private actors to address market-driven causes of inequality and deprivation. As the Supreme Court of Canada noted in *Vriend v Alberta*: “Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination.”<sup>13</sup> The new conception of social rights claims creates the foundation for a more principled and strategic approach to rights-based policy development,

---

*and Replies Presented by the State under Review*, UN Human Rights Council OR, 11th Sess, UN Doc A/HRC/11/17/Add.1, (2009) at paras 9, 11 [Response to *UPR*].

<sup>12</sup> Louise Arbour, “Human Rights Made Whole” *Project Syndicate* (26 June 2008), online: Project Syndicate <<http://www.project-syndicate.org/commentary/arbour1/English>>.

<sup>13</sup> *Vriend v Alberta*, [1998] 1 SCR 493 at para 103, 156 DLR (4th) 385 [*Vriend*]; see generally Martha Jackman, “Giving Real Effect to Equality: *Eldridge v British Columbia (AG)* and *Vriend v Alberta*” (1998) 4:2 *Rev Const Stud* 352; Bruce Porter, “Beyond Andrews: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*” (1999) 9:3 *Const Forum Const* 71.

bringing strategic aspects of policy and program development and planning and the actions of a range of actors that were previously beyond the lens of human rights, squarely into an expanded human rights framework.

Under the new rights-based approach, the experience of poverty and homelessness is no longer considered solely in terms of economic deprivation. These conditions are now understood as deprivations of rights and capacity – symptomatic of failures not only of social and economic programs and policies, but also of legal and administrative regimes, justice systems, human rights institutions and other participatory mechanisms through which governments can be held accountable to human rights and citizens can claim their right to dignity to realize their full potential. Among other sources, the new approach has drawn inspiration from the work of Nobel Prize winning economist Amartya Sen.

In his early ground-breaking research, Sen showed that poverty and famine were not generally caused by a scarcity of goods or discrete failures of particular programs but rather by structural “entitlement system failures” that arise in large part from a devaluing of the basic rights claims of the most vulnerable members of society.<sup>14</sup> Whether in an impoverished country or in an affluent country like Canada, hunger or homelessness occurs when certain groups are left without access to food or housing because the existing system of land and property rights, housing laws, social programs, wage protections and regulations of private actors, leave them without the means to produce or purchase adequate food or to secure adequate housing.

From this perspective, solving hunger and homelessness is no longer seen simply as a matter of ensuring that governments or charitable agencies provide the poor with housing and food. The entitlement system that has denied certain groups dignity and security must be transformed into one which gives priority to the rights of those groups. Sen’s analysis exposes poverty as deprivation of capabilities tied, but not reducible to, low-income levels.<sup>15</sup> Eliminating poverty and homelessness requires a re-valuing of the capacities and rights of those living in poverty: empowering them as rights-holders to identify the entitlement system failures that lie behind poverty, hunger and homelessness; challenging systemic barriers to equality that confront marginalized and disadvantaged groups; redressing failures of governmental accountability towards them; and remedying the forms of discrimination and social exclusion they experience. The role of all levels of governments, courts, administrative tribunals, human

---

<sup>14</sup> Amartya Sen, “Property and Hunger” (1988) 4:1 *Economics and Philosophy* 57 reprinted in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004) 402.

<sup>15</sup> See Amartya Sen, *Inequality Reexamined* (New York: Russell Sage Foundation, 1992); Amartya Sen *Development as Freedom* (New York: Anchor Books, 2000).

rights institutions, program administrators, civil society and local organizations must be re-examined and measures taken to ensure that available remedies are responsive and effective.

This paper will examine how the modern conception of social rights can be incorporated into social movements, legal practice and adjudication in Ontario. The first section will consider the sources, under international law, of substantive and procedural rights that are relevant to the right to an adequate standard of living and adequate housing in Ontario. The second section will consider the extent to which Canada's constitutional human rights norms may be interpreted and applied to provide a domestic constitutional framework for social rights in Ontario. And finally, the third section will consider how social rights can be claimed and enforced in Ontario, based on these international and constitutional norms.



## B. Social Rights, Social Movements and Rights-Based Strategies

### i) From Needs-Based to Rights-Based Approaches to Poverty and Homelessness

During the 1990s, efforts were made at the United Nations to better integrate legal practice with social movements working to reduce poverty and defend housing rights. During that period, the Asian Forum for Human Rights and Development (Forum-Asia) convened a number of expert meetings between legal advocates working in the field of economic and social rights and NGOs involved with housing, poverty, health and development issues, to try to better integrate these two areas of work and to consider how rights claims could be incorporated into community-based advocacy and law reform addressing poverty and homelessness.<sup>16</sup> By the latter half of the 1990s, UN development agencies were also supporting the call for rights-based approaches. The UN Population Fund (UNFPA) described the shift to the “rights-based” approach as follows:

Before 1997, most UN development agencies pursued a ‘basic needs’ approach: they identified basic requirements of beneficiaries and either supported initiatives to improve service delivery or advocated for their fulfilment.

UNFPA and its UN partners now work to fulfil the rights of people, rather than the needs of beneficiaries. There is a critical distinction: a need not fulfilled leads to dissatisfaction. In contrast, a right that is not respected leads to a violation, and its redress or reparation can be legally and legitimately claimed. A human rights-based approach to programming differs from the basic needs approach in that it recognizes the existence of rights. It also reinforces capacities of duty bearers (usually governments) to respect, protect and guarantee these rights.

In a rights-based approach, every human being is recognized both as a person and as a right-holder. A rights-based approach strives to secure the freedom, well-being and dignity of all people everywhere, within the framework of essential standards and principles, duties and obligations. The rights-based approach supports mechanisms to ensure that entitlements are attained and safeguarded.<sup>17</sup>

---

<sup>16</sup> See e.g. Asian Forum for Human Rights and Development, *Circle of Rights: Economic, Social and Cultural Rights Activism* (Washington, DC: Institute of International Education, International Human Rights Internship Program, 2000), online: University of Minnesota Human Rights Resource Centre <<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/toc.htm>>.

<sup>17</sup> United Nations Population Fund, *The Human Rights-Based Approach*, online: United Nations Population Fund <<http://www.unfpa.org/rights/approaches.htm>>.

In 2001, the Chairperson of the CESCR asked the UN Office of the High Commissioner for Human Rights (OHCHR) to develop guidelines for the integration of human rights into poverty reduction strategies. In response to this request, UN High Commissioner Mary Robinson asked three experts to prepare draft guidelines and, in the process, to consult with national officials, civil society and international development agencies.<sup>18</sup> This resulted in the OHCHR's publication in 2002 of the *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*.<sup>19</sup> Following consultations on the *Draft Guidelines*, a 'common understanding of a rights-based approach' was developed and *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies [Common Understanding]*<sup>20</sup> was adopted by UN development agencies in 2003. Four key ingredients of rights-based programming were identified in the *Common Understanding*:

- Identifying the central human rights claims of rights-holders and the corresponding duties of "duty-bearers", and identifying the structural causes of the non-realization of rights.
- Assessing the capacity of rights-holders to claim their rights and of duty-bearers to fulfill their obligations, and develop strategies to build these capacities.
- Monitoring and evaluating both outcomes and processes, guided by human rights standards and principles.
- Ensuring that programming is informed by the recommendations of international human rights bodies and mechanisms.<sup>21</sup>

The *Common Understanding* affirmed that a human rights-based approach involves more than 'good programming practices.'<sup>22</sup> It asserted that human rights principles must inform all phases of programming "including assessment and analysis, programme planning and design (including setting of goals, objectives and strategies); implementation, monitoring and

---

<sup>18</sup> United Nations Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (Geneva: OHCHR, 2002) at preface. The three experts who prepared the Guidelines were Paul Hunt, Manfred Nowak and Siddiq Osmani.

<sup>19</sup> *Ibid.*

<sup>20</sup> United Nations, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies* (2003). Adopted by the UN Development Group in 2003. [United Nations, *Common Understanding*]

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* at 3.

evaluation.”<sup>23</sup> It called for a dynamic interdependence of social policy, human rights principles and legal entitlements, requiring that strategies and programs ensure meaningful engagement with, and participation of, those living in poverty as rights-claimants, with access to effective remedies. Rights-based programming, the UN agencies affirmed, recognizes stakeholders as “key actors” and participation as both a means and a goal – empowering marginalized and disadvantaged groups, promoting local initiatives, adopting measureable goals and targets, developing “strategic partnerships” and supporting “accountability to all stakeholders.”<sup>24</sup> The *Common Understanding* emphasized that rights-based strategies and programs should also:

- Monitor and assess budgetary allocations.
- Build awareness of rights among rights-holders.
- Ensure effective participation by stakeholders in the design, implementation, monitoring and evaluation of programs.
- Develop appropriate indicators and data collection disaggregated by gender and other characteristics.
- Integrate international, national, sub-national and local initiatives and strategies.
- Address critical emerging issues, such as migration, urbanization and demographic changes.
- Integrate equality and non-discrimination principles into strategies.
- Address forms of social exclusion affecting those living in poverty.
- Integrate recommendations of UN treaty bodies and the UN Human Rights Council (HRC).<sup>25</sup>

The OHCHR further elaborated the rights-based approach in its 2004 publication *Human Rights and Poverty Reduction: A Conceptual Framework*<sup>26</sup> and in its 2006 publication: *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (Guidelines)*.<sup>27</sup> The latter document was intended to “provide policymakers and practitioners involved in the design

---

<sup>23</sup> *Ibid* at 2.

<sup>24</sup> *Ibid* at 3.

<sup>25</sup> *Ibid* at 2.

<sup>26</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework*, UN Doc HR/PUB/04/1 (Geneva: OHCHR, 2004) [OHCHR, *Conceptual*].

<sup>27</sup> United Nations Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) [OHCHR, *Guidelines*].

and implementation of poverty reduction strategies with guidelines for the adoption of a human rights approach to poverty reduction.”<sup>28</sup> As noted in the introduction to the *Guidelines*, “the adoption of a poverty reduction strategy is not just desirable but obligatory for States which have ratified international human rights instruments.”<sup>29</sup> The *Guidelines* set out the basic human rights approach as follows:

The essential idea underlying the adoption of a human rights approach to poverty reduction is that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in international human rights law. Whether explicit or implicit, norms and values shape policies and institutions. The human rights approach offers an explicit normative framework—that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies, including poverty reduction strategies.<sup>30</sup>

The *Guidelines* emphasize that the premise behind the rights-based approach is that it is essential to challenge the imbalance of power and the denial of rights that lies behind poverty. It explains that it “is now widely recognized, [that] effective poverty reduction is not possible without the empowerment of the poor. The human rights approach to poverty reduction is essentially about such empowerment.”<sup>31</sup> The United Nations High Commissioner for Human Rights has described the role of empowerment in the following terms:

36. Empowerment is a broad concept, but I use it in two distinct senses. Experience from many countries teaches us that human rights are most readily respect, protected and fulfilled when people are empowered to assert and claim their rights. Our work, therefore, should empower rights holders.

37. Additionally, successful strategies to protect human rights depend on a favourable government response to claims that are advanced. Empowerment is also about

---

<sup>28</sup> *Ibid* at 2.

<sup>29</sup> *Ibid* at 19.

<sup>30</sup> *Ibid* at para 16.

<sup>31</sup> *Ibid* at para 18. See also World Health Organization, Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health* (Geneva: World Health Organization, 2008) at 155 for definition of empowerment. CSDH has described empowerment as “changing the distribution of power within society and global regions, especially in favour of disenfranchised groups and nations.” It “requires strengthening the fairness by which all groups in a society are included or represented in decision-making about how society operates,” in particular, it “depends on social structures, supported by the government, that mandate and ensure the rights of groups to be heard to presented themselves – through, for example, legislation and institutional capacity – and on specific programmes supported by those structures, through which active participation can be realized.”

equipping those with a responsibility to implement human rights with the means to do so.<sup>32</sup>

The *Guidelines* recommend that poverty reduction strategies include four categories of accountability mechanisms: judicial, quasi-judicial, administrative, and political<sup>33</sup> and that “[t]hose responsible for formulating and implementing the poverty reduction strategy receive basic human rights training so that they are familiar with the State’s human rights commitments and their implications.”<sup>34</sup> In addition to these more formal mechanisms, the *Guidelines* propose that “innovative and non-formal monitoring” tools should be developed<sup>35</sup> and that all monitoring and evaluation mechanisms should be developed “in close collaboration with people living in poverty.”<sup>36</sup> The *Guidelines* recommend that civil society organizations and other rights-holders should also have a role in monitoring poverty and housing strategies to ensure that governments are held to account for failures (or successes) and to best identify areas that may need increased attention and resources.<sup>37</sup> Effective accountability relies on enhanced links with judicial and quasi-judicial rights claiming, adjudication and enforcement processes, but also relies on rights-based accountability within program design and administration. No singular mechanism should be relied upon for effective accountability and remedies. As the WHO and the OHCHR’s joint report on health and poverty reduction puts it:

Some processes of accountability are specific to human rights, for example inquiries by national human rights institutions and reporting to the UN human rights treaty-monitoring bodies. Others are general, including administrative systems for monitoring service provision, fair elections, a free press, parliamentary commissions and civil society monitoring. The principle of accountability requires that PRS [Poverty Reduction Strategy] processes of design, implementation and monitoring should be transparent and decision makers should answer for policy process and choices. In order to achieve this, the PRS should build on, and strengthen links to, those institutions and processes that enable people who are excluded to hold policymakers to account.<sup>38</sup>

---

<sup>32</sup> United Nations High Commissioner for Human Rights, *The OHCHR Plan of Action: Protection and Empowerment* (Geneva: OHCHR, 2005) at paras 36-37.

<sup>33</sup> OHCHR, *Guidelines*, *supra* note 27 at para 77.

<sup>34</sup> *Ibid* at para 40.

<sup>35</sup> *Ibid* at para 79.

<sup>36</sup> *Ibid* at para 79.

<sup>37</sup> *Ibid* at para 75; para 86.

<sup>38</sup> United Nations Office of the High Commissioner for Human Rights & World Health Organization, *Human Rights, Health and Poverty Reduction Strategies*, UN Doc HR/PUB/08/0 (Geneva: OHCHR, WHO, 2008) [OHCHR & WHO] at 8.

## ii) Monitoring, Evaluation and Indicators

Recent years have seen a growing interest and focus on indicators to assess compliance with social rights and to measure progress towards established targets. The OHCHR's *Guidelines* recommend that States set targets, benchmarks and priorities "in a participatory manner... so that they reflect the concerns and interests of all segments of the society" when creating human rights-based strategies.<sup>39</sup> Further to this, States "should identify appropriate indicators, so that the rate of progress can be monitored and, if progress is slow, corrective action can be taken."<sup>40</sup> The *Guidelines* distinguish between human rights indicators and more traditional indicators of poverty, noting that a human rights indicator is explicitly derived from a human rights norm and its purpose is "human rights monitoring with a view to holding duty-bearers to account."<sup>41</sup> The *Guidelines* emphasize the importance of disaggregating indicators to "reflect the condition of people living in poverty and of specially disadvantaged groups among them."<sup>42</sup> In its joint report on health and poverty reduction, the WHO and the OHCHR emphasize that indicators should also measure adherence to human rights standards and principles, including non-discrimination, participation, accountability and transparency.<sup>43</sup>

In his 2007 report, the UN's former Special Rapporteur on adequate housing, Miloon Kothari, developed a framework for indicators, benchmarks and monitoring mechanisms for assessing the implementation of the right to adequate housing in various contexts.<sup>44</sup> Kothari emphasized the importance of using disaggregated data to describe the situation of groups most vulnerable to homelessness and of participatory mechanisms for accessing necessary information and providing accountability to stakeholders.<sup>45</sup> In his report, Kothari identified three types of indicators necessary for assessing the right to adequate housing:

---

<sup>39</sup> OHCHR, *Guidelines*, *supra* note 27 at para 55.

<sup>40</sup> *Ibid* at para 53.

<sup>41</sup> *Ibid* at para 13. For supplemental information about human rights indicators see Audrey R Chapman, "Indicators and Standards for Monitoring Economic, Social and Cultural Rights" (Paper delivered at the Second Global Forum on Human Development, Rio de Janeiro, Brazil, 9-10 October 2000), online: United Nations Development Programme <[http://hdr.undp.org/docs/events/global\\_forum/2000/chapman.pdf](http://hdr.undp.org/docs/events/global_forum/2000/chapman.pdf)>; Eibe Riedel, Jan-Michael Arend & Ana María Suárez Franco, *Indicators – Benchmarks – Assessment – Scoping: Background Paper* (Berlin: Friedrich Ebert Stiftung, 2010); Food and Agriculture Organization of the United Nations, *Methods to Monitor the Human Right to Adequate Food: Volume II An Overview of Approaches and Tools* (Rome: FAO, 2008).

<sup>42</sup> OHCHR, *Guidelines*, *supra* note 27 at para 12.

<sup>43</sup> OHCHR & WHO, *supra* note 38 at 59.

<sup>44</sup> *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, UN Human Rights Council, 4th Sess, UN Doc A/HRC/4/18, (2007).

<sup>45</sup> *Ibid*.

- Structural indicators to consider the extent of legislative or programmatic coverage of the various components of the right to housing, such as the coverage of a national housing strategy, including affordable housing supply, adequate income or rent supplements and necessary support services.
- Process indicators, including goals, timetables or “milestones” to assess and ensure progress in implementing the right to adequate housing.
- Outcome indicators, to assess the extent to which the right to adequate housing has been successfully implemented, considering data such as the number of households who are homeless or in housing need.<sup>46</sup>

In his previous role as the United Nations Special Rapporteur on the Right to Health, Paul Hunt similarly advocated for the use of a human rights-based approach to indicators, which monitors outcomes and the processes by which they are achieved.<sup>47</sup> Hunt agrees with Kothari that indicators should be disaggregated to reveal whether disadvantaged individuals and communities are “suffering from *de facto* discrimination.”<sup>48</sup> Kothari and Hunt also agree that a human rights approach must ensure that indicators are created with the involvement and advice of the communities they will be measuring. Hunt cautions, however, against exaggerating the role of indicators in determining to what extent goals and targets are being met, since indicators will never provide a “complete picture” of how well a certain right is being experienced.<sup>49</sup>

As Lucie Lamarche and Vincent Greason have pointed out, there is a serious danger that the current preoccupation with indicators may shift the focus of anti-poverty and housing advocacy and strategies from debates about how best to eliminate, to debates about how best to define and measure, poverty and homelessness.<sup>50</sup> The result can be the opposite of the empowering, participatory, approach that must be central to rights-based strategies. Social policy analysts and statisticians devising and analyzing quantifiable indicators, rather than rights-holders, may become the key actors and the human, contextual dimension to human rights claiming may be lost. As Vincent Greason has pointed out:

---

<sup>46</sup> *Ibid* at paras 10-12.

<sup>47</sup> *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, Commission on Human Rights, 62d Sess, UN Doc E/CN.4/2006/48 (2006).*

<sup>48</sup> *Ibid* at para 26.

<sup>49</sup> *Ibid* at para 31.

<sup>50</sup> Lucie Lamarche & Vincent Greason, “Poverty Impact Analysis (PIA) and Governmental Action: «Made in Québec»...Again?” (2008), online: Social Rights in Canada: A Community-University Research Alliance Project <<http://www.socialrightscura.ca/documents/publications/margot/LamarcheGreason.pdf>>.

Poverty has become an object to be debated amongst those experts who are producing different ways to measure it and a contest over who has the best, most accurate, indicator. The poor become dispossessed of their own reality; their voices are not heard because they are not important. The poor person is the person deemed poor by the choice of indicator: change the indicator and you change the poor person.<sup>51</sup>

Greason further warns: “[t]he fight against poverty thus becomes the fight to attain pre-determined indicators. It really has little to do with moving poor people out of their situation of poverty as they experience it.”<sup>52</sup> Salim Jahan similarly notes that there is a need to develop better methodologies for assessing legislation and policy from the standpoint of whether it enables people to claim their rights effectively.<sup>53</sup> In contrast to earlier approaches to indicators, Jahan argues that a rights-based approach must not only include indicators of progress in relation to standard measures of poverty, but also indicators related to human rights norms, including those related to participatory rights.<sup>54</sup>

Critical to the ‘common understanding’ and to the new focus on monitoring, benchmarks and indicators of progress over time in reducing poverty and homelessness, is the incorporation of international human rights norms into the design, implementation and evaluation of the strategies themselves. These rights must be incorporated not simply as goals to which governments might aspire but as rights that can be claimed and enforced by rights-holders. It is therefore necessary to consider international law sources of both substantive and procedural rights protections for those who are living in poverty or who are denied adequate housing.

### **iii) Calls for Rights-Based Approaches to Poverty and Homelessness in Ontario**

Civil society organizations in Ontario have strongly advocated for rights-based approaches to provincial poverty and housing strategies. During the legislative debates and

---

<sup>51</sup> Vincent Greason, *Poverty as a Human Rights Violation: A Comparative Look at Canadian Provincial Anti-Poverty Initiatives* (2011), working draft, on file with the author at 11.

<sup>52</sup> *Ibid.*

<sup>53</sup> Selim Jahan, *Human Rights-Based Approach to Poverty Reduction – Analytical Linkages, Practical Work and UNDP* (New York: United Nations Development Programme, 2004).

<sup>54</sup> *Ibid.* Important work on incorporating indicators of human rights protections and rights-based participation in assessments of fulfillment of socio-economic rights is being done by the Center on Economic and Social Rights. See Center on Economic and Social Rights, *The OPERA Framework: Assessing compliance with the obligation to fulfill economic, social and cultural rights* (Draft), online: <[http://www.cesr.org/downloads/Draft%20CESR%20Paper\\_%20the%20OPERA%20framework.pdf](http://www.cesr.org/downloads/Draft%20CESR%20Paper_%20the%20OPERA%20framework.pdf)>.



committee hearings in relation to both Ontario's *Poverty Reduction Act, 2009*<sup>55</sup> and its *Strong Communities through Affordable Housing Act, 2011*,<sup>56</sup> civil society organizations made a number of recommendations for a strengthened human rights framework. These were supported by amendments put forward by opposition members at the committee stage.

Ontario's Standing Committee on Social Policy heard testimony from 24 stakeholder groups in relation to the *Poverty Reduction Act*, many of whom spoke about the need for poverty reduction to be linked to human rights enforcement and accessibility.<sup>57</sup> Member organizations of Ontario's 25 in 5 Network for Poverty Reduction, including Ontario Campaign 2000, the Income Security Advocacy Centre, and Voices from the Street, pressed for the inclusion of an additional principle in the legislation, stating that: "[s]trengthening Ontario's human rights laws and the enforcement system is essential to the reduction of poverty."<sup>58</sup> Community Living Ontario called for the addition of a clause that read: "[t]he enhancement of the enforcement of equality rights through the Ontario *Human Rights Code* is required to effectively reduce poverty."<sup>59</sup> In its appearance before the Committee, the Registered Nurses' Association of Ontario (RNAO) stated that: "it is essential to make an explicit link with human rights legislation as a mechanism to address discrimination."<sup>60</sup> The RNAO also pointed to Ontario's obligations under international human rights law, testifying that a human rights approach to poverty reduction would be consistent with Article 25 of the *UDHR*.<sup>61</sup>

Showcasing how a human rights approach to poverty reduction would have a significant impact on the lives of those affected by poverty, Michael Creek from Voices from the Street discussed his own experience. He explained that "[w]hen you live in poverty, your dignity, your security and your rights of equality are stripped away." He argued that it is critical for Ontario to adopt a human rights-based approach to poverty and follow through on its "legal obligation to abide by international agreements, covenants and treaties."<sup>62</sup> Other witnesses appearing before the Committee also spoke of the need for active participation by rights-holders in the implementation and monitoring of the proposed poverty reduction strategy and called for the

---

<sup>55</sup> *Poverty Reduction Act, 2009* SO 2009, c 10.

<sup>56</sup> *Strong Communities through Affordable Housing Act, 2011* SO 2011, c 6.

<sup>57</sup> Ontario, Legislative Assembly, Standing Committee on Social Policy, "Bill 152, Poverty Reduction Act, 2009" in *Official Report of Debates (Hansard)*, No SP-28 (20 April 2009) [Ontario, SCSP, 20 April 2009]; Ontario, Legislative Assembly, Standing Committee on Social Policy, "Bill 152, Poverty Reduction Act, 2009" in *Official Report of Debates (Hansard)*, No SP-29 (21 April 2009) [Ontario, SCSP, 21 April 2009].

<sup>58</sup> Ontario, SCSP, 20 April 2009, *ibid* at 623 (Ontario Campaign 2000); at 631 (Income Security Advocacy Centre); Ontario, SCSP, 21 April 2009, *ibid* at 663 (Voices from the Street).

<sup>59</sup> *Ibid* at 659 (Community Living Ontario).

<sup>60</sup> *Ibid* at 669 (Registered Nurses' Association of Ontario).

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid* at 663 (Voices from the Street).

province to institute an independent review mechanism to ensure that the government is held accountable to its commitments. Jacquie Maund from Ontario Campaign 2000 referred to the EU's approach to poverty reduction where "...independent experts conduct peer review of each country's national action plan for poverty reduction and social inclusion."<sup>63</sup> The Association of Ontario Health Centres and Voices from the Street both emphasized the importance of stakeholder groups and those with a "lived experience" having the opportunity to take part in the review process and in measuring the effectiveness of the government's actions.<sup>64</sup>

During the Committee's debates on proposed amendments, NDP MPP Michael Prue moved that the proposed *Poverty Reduction Act* be amended to include the commitment to improved promotion and enforcement of human rights advocated for by NGO's.<sup>65</sup> MPP Prue went on to explain that "in order for poverty to be attacked successfully by the government, the enforcement of the system of human rights needs to be augmented to ensure that they go out and make sure that groups that are at risk, both of abuse and of poverty, are protected."<sup>66</sup> However, MPP Prue's motion was defeated. Liberal MPP Maria Van Bommel explained the government's rejection of the amendment, stating that "in terms of the human rights laws and act...matters that pertain to the code should stay within the code and not necessarily be addressed through this bill."<sup>67</sup> During committee hearings MPP Prue also proposed a motion that an independent review panel be appointed to assess the poverty reduction strategy's effectiveness and to identify areas for improvement.<sup>68</sup> This motion was also defeated.<sup>69</sup>

Proposals were also put forward to strengthen the human rights framework in Ontario's *Long-Term Affordable Housing Strategy*.<sup>70</sup> Bill 140, the *Strong Communities through Affordable Housing Act, 2011*,<sup>71</sup> provides for the implementation of key components of Ontario's *Long-Term Affordable Housing Strategy*. During hearings on Bill 140 before the Standing Committee on Justice Policy, MPPs heard from over 30 community stakeholders regarding the Act.<sup>72</sup>

---

<sup>63</sup> Ontario, SCSP, 20 April 2009, *supra* note 57 at 623 (Ontario Campaign 2000).

<sup>64</sup> *Ibid* at 627 (Association of Ontario Health Centres); Ontario, SCSP, 21 April 2009, *supra* note 57 at 663 (Voices from the Street).

<sup>65</sup> Ontario, Legislative Assembly, Standing Committee on Social Policy, "Bill 152, Poverty Reduction Act, 2009" in *Official Report of Debates (Hansard)*, No SP-30 (27 April 2009) at 678 (Michael Prue) [Ontario, SCSP, 27 April 2009].

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid* at 678 (Maria Van Bommel).

<sup>68</sup> *Ibid* at 685 (Michael Prue).

<sup>69</sup> *Ibid* at 686 (Maria Van Bommel).

<sup>70</sup> Ontario, Ministry of Municipal Affairs and Housing, *Building Foundations: Building Futures: Ontario's Long-Term Affordable Housing Strategy* (Toronto: Queen's Printer for Ontario, 2010).

<sup>71</sup> *Strong Communities through Affordable Housing Act*, *supra* note 56 at 56.

<sup>72</sup> Ontario, Legislative Assembly, Standing Committee on Justice Policy, "Bill 140, Strong Communities through Affordable Housing Act, 2011" in *Official Report of Debates (Hansard)*, No JP-8 (24 March 2011) [Ontario, SCJP, 24

Submissions from the Centre for Equality Rights in Accommodation (CERA), the Social Rights Advocacy Centre (SRAC), the Wellesley Institute, the Ontario Nurses' Association, the Federation of Metro Tenants' Associations and other community groups reinforced the critical need for Ontario to amend its legislation to create a human rights framework, drawing on international human rights norms.<sup>73</sup> Leilani Farha, representing CERA, outlined five key components that should be incorporated into the housing strategy legislation to ensure compliance with international human rights law and the recommendations of UN treaty bodies. According to Ms. Farha, the housing strategy should:

- Prioritize needs of those groups most vulnerable to homelessness and inadequate housing;
- Ensure meaningful participation of all affected groups in the design, implementation and monitoring of the strategy;
- Set enforceable targets and timelines;
- Include accountability mechanisms, independent monitoring and an individual complaints mechanism; and
- Be based in human rights law, including the international right to adequate housing.<sup>74</sup>

NDP MPP Cheri DiNovo proposed a number of key amendments to Bill 140 that would have implemented the recommendations made by CERA and other groups in relation to an enhanced human rights framework. Tabled amendments would have required the provincial Minister of Municipal Affairs and Housing to negotiate the terms of a rights-based provincial-municipal housing strategy that would include recognition of housing as a human right; clear goals and timetables for reducing and eliminating homelessness; independent monitoring of progress in meeting agreed-upon targets; a complaints mechanism for violations of the right to adequate housing; and measures to ensure follow-up to concerns and recommendations from international human rights bodies.<sup>75</sup> However, none of the proposed amendments were adopted.

---

March 2011]; Ontario, Legislative Assembly, Standing Committee on Justice Policy, "Bill 140, Strong Communities through Affordable Housing Act, 2011" in *Official Report of Debates (Hansard)*, No JP-9 (31 March 2011) [Ontario, SCJP, 31 March 2011].

<sup>73</sup> *Ibid* at 162 (Registered Nurses' Association of Ontario); at 166-169 (Social Rights Advocacy Centre); at 198 (Federation of Metro Tenants' Associations).

<sup>74</sup> Ontario, SCJP, 24 March 2011, *supra* note 72 at 164 (Centre for Equality Rights in Accommodation).

<sup>75</sup> Ontario, Legislative Assembly, Standing Committee on Justice Policy, "Bill 140, Strong Communities through Affordable Housing Act, 2011" in *Official Report of Debates (Hansard)*, No JP-10 (7 April 2011) [Ontario, SCJP, 7 April 2011].

It is evident from these experiences that, as in other developed countries, the development of adequate rights-based approaches to poverty and homelessness in Canada and in Ontario remains a work in progress. Civil society organizations and stakeholder groups have become increasingly vocal in advocating for a new rights-based approach to poverty and housing in Canada. Although their proposals have been widely endorsed by experts and, more recently, by parliamentary committees, they have not been adopted by governments. A number of provinces have initiated housing and poverty reduction strategies, but none has incorporated a strong rights-based approach. The successes and failures in this regard, and the lessons for Ontario, will be more closely considered in the subsequent paper.

## **C. International Human Rights Law and Social Rights in Ontario**

### **i) The Right to Effective Remedies for Social Rights Violations**

International human rights are not directly enforceable in Canadian courts and, on that account, have frequently been treated as moral rather than legal imperatives. As the Senate Report *In from the Margins* explains, international human rights are considered persuasive sources for the interpretation of the *Charter* and other domestic law and may be given effect by being incorporated into domestic legislation.<sup>76</sup> Remedies for international human rights violations may also be sought through periodic review procedures before UN treaty bodies; at the *Universal Periodic Review* before the UN Human Rights Council; through optional complaints procedures before human rights treaty bodies; or by way of missions and recommendations from “mandate holders” such as the UN Special Rapporteur on Adequate Housing.

Canada cannot, however, rely solely on international remedies and procedures in respect to the enforcement of socio-economic rights, including those relating to poverty and homelessness. An overriding obligation under international law, and one implicit in the principle of the rule of law, is to provide effective domestic remedies for violations of human rights. This obligation applies equally to economic and social rights as to civil and political rights.<sup>77</sup> While effective judicial review is important to a rights-based approach, more

---

<sup>76</sup> Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, PC) at 15 [Senate, *In from the Margins*] at 69-72.

<sup>77</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/24, (1998) [General Comment 9].

accessible, affordable and timely procedures must also be available. It is important to ensure that judicial remedies are supplemented by adequate and effective administrative or quasi-judicial procedures through which rights can be more expeditiously claimed and enforced.

The judicial system in Canada has been rendered increasingly inaccessible to poor people and Canadian courts have too often failed to provide adequate remedies or even fair hearings to those who allege violations of rights linked to poverty or homelessness.<sup>78</sup> Both the federal and Ontario governments have taken the position that rights to housing and to an adequate standard of living should not generally be amenable to domestic judicial enforcement.<sup>79</sup> The denial of judicial remedies for violations of economic and social rights is a serious violation of the right to effective remedies, and treaty monitoring bodies such as the CESCR have urged Canadian governments to change their position. However, the CESCR also acknowledges the need for some flexibility as to how effective remedies are provided. In particular, the Committee recognizes that, while judicial remedies are required, the enforcement of socio-economic rights need not rely exclusively on courts. The CESCR has emphasized that where judicial remedies are not available, alternative, effective remedies for violations of the right to adequate housing and an adequate standard of living must be implemented, outside of courts.<sup>80</sup> For example, human rights commissions have broad authority to review legislation; to hold inquiries; and to develop policy statements, and thus can play an important remedial role. Many other administrative bodies involved in housing or income assistance should likewise provide new venues through which rights claimants can obtain a hearing and secure effective remedies. Chief Justice McLachlin has observed that *Charter* rights do not belong to the courts but “to the people.”<sup>81</sup> There are multiple *fora* in which rights can be claimed, defined and applied, and many ways in which rights can and should affect policies and programs, short of court orders. The Supreme Court of Canada has yet to decide to what degree programs to remedy poverty or homelessness are constitutionally mandated, but it has affirmed that such measures are constitutionally “encouraged” by *Charter* values.<sup>82</sup>

---

<sup>78</sup> Martha Jackman, “Constitutional Castaways: Poverty and the McLachlin Court” (2010) 50 Sup Ct L Rev 297.

<sup>79</sup> For a review of arguments advanced in domestic courts by the governments of Ontario and Canada see Charter Committee on Poverty Issues, *The Right to Effective Remedies: Review of Canada’s Fourth and Fifth Periodic Reports under the ICESCR* (May 5 & 8, 2006) at 16-25, online: OHCHR <<http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/CCPI.pdf>>.

<sup>80</sup> *General Comment 9*, *supra* note 77 at para 9.

<sup>81</sup> *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 70, 140 DLR (4th) 193, McLachlin J, dissenting.

<sup>82</sup> *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.

### **iii) Provincial Accountability to International Human Rights Law**

Provincial/territorial governments' obligations under international human rights law have not received the same attention as those of the federal government, yet they are equally important. While the federal government is responsible for signing and ratifying international treaties, the accepted practice is to first obtain the agreement of provinces and territories. Under the *Vienna Convention on the Law of Treaties*,<sup>83</sup> treaty obligations are to be performed in good faith and the domestic constitutional division of powers cannot be invoked as a justification for non-compliance.<sup>84</sup> Provincial governments must therefore comply with Canada's international treaty obligations in areas of provincial jurisdiction, just as the federal government must respect its international commitments in areas of federal jurisdiction. And, as is the case in relation to federal legislation, Canadian courts attempt, wherever possible, to interpret and apply municipal by-laws and provincial legislation in a manner consistent with Canada's international human rights obligations.<sup>85</sup> To do otherwise would be to place Canada in violation of its international treaty obligations. While the federal government takes the lead on submitting periodic reports to UN human rights treaty-monitoring bodies, Ontario and other provinces also report on their compliance with international human rights agreements as a component of the federal reporting process.

Provinces carry the greatest responsibility for ensuring compliance with international human rights norms in relation to the right to an adequate standard of living and the right to adequate housing. UN human rights treaty bodies have thus expressed concern in recent years at the absence of meaningful provincial accountability in these areas. The CESCR noted in its 1998 review of Canada that the repeal of the *Canada Assistance Plan Act* in 1996,<sup>86</sup> amounted to the abandonment of the requirement that provincial income support programs provide for basic necessities, including food and housing, as a condition of federal cost-sharing. As the CESCR underscored, a critical lever of provincial accountability and access to remedies for violations of the right to an adequate standard of living and the right to housing had been lost:

---

<sup>83</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980, accession by Canada 14 October 1970).

<sup>84</sup> *Ibid* at arts 26-27.

<sup>85</sup> *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241.

<sup>86</sup> *Canada Assistance Plan*, RSC 1985, c C-1; see generally Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8 CJWL 372; Shelagh Day & Gwen Brodsky, *Women and the Canada Social Transfer: Securing the Social Union* (Ottawa: Status of Women Canada 2007).

The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living and facilitated court challenges of federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, CHST has eliminated each of these features...The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced.<sup>87</sup>

The CESCR reiterated its concerns about the absence of provincial accountability in its most recent review of Canada in 2006, recommending that:

Covenant rights should be enforceable within provinces and territories through legislation or policy measures, and that independent and appropriate monitoring and adjudication mechanisms be established in this regard. In particular, the State party should establish transparent and effective mechanisms, involving all levels of government as well as civil society, including indigenous peoples, with the specific mandate to follow up on the Committee's concluding observations.<sup>88</sup>

Developing improved mechanisms and processes for provincial accountability to international human rights and the provision of effective remedies to social rights violations by provincial institutions and tribunals will be a critical element of strategies to promote social rights in Ontario.

---

<sup>87</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 19th Sess, UN Doc E/C.12/1/Add.31, (1998) [*Concluding Observations 1998*] at para 19.

<sup>88</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) [*Concluding Observations 2006*] at para 35.



**iii) The Right to an Adequate Standard of Living and to Adequate Housing under International Human Rights Law**

Article 11 of the *ICESCR* requires governments to “take appropriate steps to ensure the realization” of “the right of everyone to an adequate standard of living for himself [or herself] and his [her] family, including adequate food, clothing and housing.”<sup>89</sup> Other human rights treaties ratified by Canada also contain guarantees related to the right to an adequate standard of living and the right to adequate housing. Article 27 of the *Convention on the Rights of the Child* obligates States to “recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”<sup>90</sup> The *Convention on the Elimination of Racial Discrimination* recognizes the right of everyone, without distinction as to race, colour, or national or ethnic origin, to enjoy, *inter alia*, the right to housing, and the right to social security and social services.<sup>91</sup> Article 28 of the *Convention on the Rights of Persons with Disabilities* (CRPD) not only guarantees a general right to non-discrimination, including the right to reasonable accommodation of disabilities, but also guarantees the right to an adequate standard of living, to adequate housing and to measures of social protection, as stand-alone economic and social rights.<sup>92</sup>

In addition, rights in the *ICCPR* such as the right to non-discrimination in article 26 and the right to life in article 6, place obligations on governments to address poverty and homelessness.<sup>93</sup> The UN Human Rights Committee, which oversees compliance with the *ICCPR*, as well as the *CESCR*, has pointed out the discriminatory impacts of poverty and social program cuts in Canada on women and other disadvantaged groups.<sup>94</sup> The Human Rights Committee has further noted the effects of homelessness on health and on the right to life, stating that “positive measures are required by article 6 [the right to life] to address this serious problem.”<sup>95</sup> In its 2006 review of Canada, the UN Human Rights Committee responded to evidence of people with mental disabilities being detained in institutions because of lack of supportive

---

<sup>89</sup> *ICESCR*, *supra* note 2 at art 11.

<sup>90</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 27, Can TS 1992 No 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) at art 27.

<sup>91</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195, art 5, Can TS 1970 No 28 (entered into force 4 January 1969, ratified by Canada 14 October 1970).

<sup>92</sup> *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/611, (2007) 2 at art 28.

<sup>93</sup> *ICCPR*, *supra* note 3 at arts 26, 6.

<sup>94</sup> United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Canada*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.105, (1999) at para 20 [*Concluding Observations HRC 1999*].

<sup>95</sup> *Ibid* at para 12.



housing, recommending that governments “ensure that sufficient and adequate community based housing is provided to people with mental disabilities, and ensure that the latter are not under continued detention when there is no longer a legally based medical reason for such detention.”<sup>96</sup> In this sense, an effective strategy to eliminate homelessness is a legal obligation not only with respect to the right to adequate housing under the *ICESCR*, but also in relation to right to life and non-discrimination guarantees under the *ICCPR*.

#### iv) ‘Progressive Realization’ and the Obligation to Implement Strategies

Under both domestic and international law, key components of economic and social rights are subject to “progressive realization.” Obligations are assessed relative to the available resources and to the stage of development of institutions and programs within the State party, and some rights may be realized over time rather than immediately.<sup>97</sup> Article 2(1) of the *ICESCR* requires the government of a State party “to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>98</sup>

Where violations of the right to housing or to an adequate standard of living result from a denial of an immediate, minimal entitlement which is within the government’s means to provide, such as to an adequate welfare benefit or access to public housing, the remedy is straightforward: the government is ordered to provide the benefit that has been denied. Beyond these immediate obligations, however, the progressive realization standard creates future-oriented obligations to fulfill the right to adequate income or housing within a reasonable time and, at the same time, to address broader structural patterns of disadvantage and exclusion which cannot be immediately remedied. While housing and poverty reduction strategies are future-oriented, in terms of fulfilling relevant rights within a reasonable time, the requirement to implement appropriate strategies to achieve full human rights compliance is an immediate obligation.

---

<sup>96</sup> United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Canada*, UNHRCOR, 85th Sess, UN Doc CCPR/C/CAN/CO/5, (2006) at para 17.

<sup>97</sup> *ICESCR*, *supra* note 2 at art 2.

<sup>98</sup> *Ibid.*

## **v) General Comments of the CESCR**

The CESCR has produced a series of General Comments intended to assist States in their understanding of the rights set out in the *ICESCR*. These General Comments are internationally recognized as authoritative jurisprudence on the interpretation and application of the *Covenant*, and are frequently relied upon by domestic courts and human rights institutions in their own decisions relating to *ICESCR* rights.

The CESCR first grappled with the issue of progressive realization in its *General Comment No. 1*, adopted in 1989, in clarifying States' reporting requirements.<sup>99</sup> The Committee emphasized, and has continued to stress in subsequent jurisprudence, that even if the full implementation of *Covenant* rights cannot be achieved immediately because of resource or related constraints, this does not relieve governments of all immediate obligations.<sup>100</sup> There is still an overriding obligation to develop "clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the *Covenant*."<sup>101</sup> There is also a specific obligation "to work out and adopt a detailed plan of action for the progressive implementation" of each of the rights contained in the *Covenant*.<sup>102</sup> This is clearly implied, according to the CESCR, by the obligation in Article 2(1) "to take steps ... by all appropriate means."<sup>103</sup>

The immediate obligation to develop clear strategies and plans and to monitoring progress toward identified goals, was further clarified in *General Comment No. 3, on the nature of States parties obligations (art. 2, para. 1 of the Covenant)*.<sup>104</sup> The CESCR noted that while *Covenant* rights are subject to progressive realization, there are two over-riding obligations which are of immediate effect: the obligation to ensure non-discrimination and the obligation "to take steps." The steps taken, according to *General Comment No. 3*, "should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the *Covenant*."<sup>105</sup> "Moreover, the obligations to monitor the extent of the

---

<sup>99</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 1: Report by States Parties*, UNCESCROR, 3d Sess, UN Doc E/1989/22, (1989).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid* at para 4.

<sup>102</sup> *Ibid.*

<sup>103</sup> *ICESCR*, *supra* note 2 at art 2(1).

<sup>104</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)*, UNCESCROR, 5th Sess, UN Doc E/1991/23, (1990) [*General Comment 3*].

<sup>105</sup> *Ibid* at para 2.

realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.”<sup>106</sup> Legislative measures are almost always desirable and in some cases indispensable. The CESCR notes that it will be particularly interested in whether legislative measures “create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized.”<sup>107</sup>

*General Comment No. 4*, adopted by the CESCR in 1991, elaborated on State parties’ obligation to achieve the full realization of the right to adequate housing (Article 11 of the *ICESCR*).<sup>108</sup> In the Comment, CESCR noted that the *ICESCR* “clearly requires that each State party take whatever steps are necessary” for fulfilling the right to adequate to housing. The Committee clarifies that this “will almost invariably require the adoption of a national housing strategy.”<sup>109</sup> In their development of such a strategy, States are also required to consult extensively with, and to encourage the participation of, groups who are affected by inadequate housing.<sup>110</sup> Legal remedies must be available to groups facing evictions, inadequate housing conditions, or discrimination in access to housing.<sup>111</sup>

Adopted in 1997, *General Comment No. 7* clarified obligations with respect to evictions.<sup>112</sup> Of particular relevance to Ontario is the principle that where evictions cannot be avoided, they “should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.” States are obliged to “take all appropriate measures...to ensure that adequate alternative housing...is available.”<sup>113</sup> In the CESCR’s last review of Canada in 2006, it “strongly” recommended that “the State party take appropriate measures, legislative or otherwise, to ensure that those affected by forced evictions are provided with alternative accommodation and thus do not face homelessness, in line with the Committee’s general comment No. 7 (1997).”<sup>114</sup> As the Centre for Equality Rights in Accommodation noted in a 2007 study on evictions in Ontario, tens of thousands of Ontario households are evicted each year

---

<sup>106</sup> *Ibid* at para 11

<sup>107</sup> *Ibid* at para 6.

<sup>108</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant)*, UNCESCROR, 6th Sess, UN Doc E/1992/23, (1991) [*General Comment 4*].

<sup>109</sup> *Ibid* at para 12.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid* at para 17.

<sup>112</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing: Forced Evictions (art 11(1) of the Covenant)*, UNCESCROR, 16th Sess, UN Doc E/1998/22, annex IV (1997).

<sup>113</sup> *Ibid* at para 16.

<sup>114</sup> *Concluding Observations 2006*, *supra* note 88 at para 63.

with no consideration of whether they will become homeless, the majority owing less than one month's rent.<sup>115</sup>

The CESCR has also published General Comments relating to the right to adequate food,<sup>116</sup> the right to social security,<sup>117</sup> the right to work,<sup>118</sup> the right to health<sup>119</sup> and the right to water.<sup>120</sup> In each of these General Comments, the CESCR calls on States to ensure access to effective remedies through appropriate legislation and other means and to create targeted strategies based on human rights principles to ensure rights are fulfilled

## **vi) The Reasonableness Standard**

The standard to be applied in assessing whether provincial programs or particular decisions or policies comply with the 'progressive realization' standard under Article 2(1) of the *ICESCR* was the object of intense debate during the drafting of the optional complaints procedure to the *ICESCR*. Skeptical States, such as Canada, the U.S. and Australia, argued that the *Optional Protocol* should prescribe a very deferential standard of review, encouraging the CESCR to apply a "broad margin of discretion" or to require a finding of "unreasonableness" before a finding of a violation could be made.<sup>121</sup> Other States argued that such a deferential standard would defeat the very purpose of the *Optional Protocol*, by undermining any meaningful accountability of States in relation to the *ICESCR*'s key substantive programmatic

---

<sup>115</sup> Centre for Equality Rights in Accommodation, National Working Group on Women and Housing & Social Rights Advocacy Centre, *Submission to the Ontario Human Rights Commission on Human Rights and Rental Housing In Ontario* (2007) at 35-36, online: Centre for Equality Rights in Accommodation <<http://www.equalityrights.org/cera/wp-content/uploads/2010/04/FINAL-CERA-SRAC-NWG-Submissionto-OHR-on-HR-in-Housing-07Sep20.doc>>.

<sup>116</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (art 11)*, UNCESCROR, 20th Sess, UN Doc E/C.12/1999/5, (1999) [General Comment 12].

<sup>117</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art 9)*, UNCESCROR, 39th Sess, UN Doc E/C.12/GC/19, (2007) [General Comment 19].

<sup>118</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 18: The Right to Work (art 6)*, UNCESCROR, 35th Sess, UN Doc E/C.12/GC/18, (2006) [General Comment 18].

<sup>119</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (art 12)*, UNCESCROR, 22d Sess, UN Doc E/C.12/2000/4, (2000) [General Comment 14].

<sup>120</sup> *General Comment 15: The Right to Water (art 11 & 12)*, UNCESCROR, 29th Sess, UN Doc E/C.12/2002/1, (2002) [General Comment 15].

<sup>121</sup> United Nations Committee on Economic, Social and Cultural Rights, *Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third Session*, UN Commission on Human Rights, 62d Sess, UN Doc E/CN.4/2006/47, (2006) at para 92.

obligations.<sup>122</sup> In the end, proposals for a deferential standard of review were not accepted and references to a margin of discretion were omitted. The final text of the *Optional Protocol* emphasizes that steps taken to achieve progressive realization of *ICESCR* rights must be in accordance with the substantive guarantees in Part II of the *ICESCR*. It prescribes a standard of ‘reasonableness’ in assessing steps taken, recognizing that in many instances there may be a variety of ways for governments to achieve the results necessary for compliance:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights.<sup>123</sup>

The specific wording used in the *Optional Protocol* was taken from a paragraph of the now famous *Grootboom*<sup>124</sup> decision on the right to adequate housing in South Africa, in which the South African Constitutional Court first developed its reasonableness standard for review of compliance with the justiciable economic and social rights in the South African Constitution.<sup>125</sup> In adopting this formulation, the Open Ended Working Group mandated to draft the *Optional Protocol* was also guided by a statement prepared by the CESCR: *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant*, in which the Committee suggested for the first time that, in evaluating compliance with article 2(1) of the *ICESCR*, it would assess the “reasonableness” of steps taken.<sup>126</sup> In its statement, the CESCR identified a number of possible factors to be considered in determining whether steps taken by a State party meet the reasonableness standard, including:

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.

---

<sup>122</sup> For descriptions of the debates on the reasonableness standard see Bruce Porter, “The Reasonableness of Article 8(4) – Adjudicating Claims From The Margins” (2009) 27:1 Nordic Journal of Human Rights 39 [Porter, “Reasonableness”]; and Brian Griffey, “The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2011) 11 HRL Rev 275 at 290.

<sup>123</sup> *OP-ICESCR*, *supra* note 10.

<sup>124</sup> *Government of the Republic of South Africa v Grootboom*, [2000] ZACC 19, 11 BCLR 1169 (available on SAFLII), (S Afr Const Ct) [*Grootboom*].

<sup>125</sup> Porter, “Reasonableness”, *supra* note 122.

<sup>126</sup> United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007) [CESCR, “Maximum Available Resources”]; Malcolm Langford, “Closing The Gap? – An Introduction To The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights” (2009) 27:1 Nordic Journal of Human Rights 2.

- Whether discretion was exercised in a non-discriminatory and non-arbitrary manner.
- Whether resource allocation is in accordance with international human rights standards.
- Whether the State party adopts the option that least restricts *Covenant* rights.
- Whether the steps were taken within a reasonable timeframe.
- Whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed.
- Whether policies have prioritized grave situations or situations of risk.
- Whether decision-making is transparent and participatory.<sup>127</sup>

Beyond the CESCR's commentary on a reasonableness standard under the *Optional Protocol*, there is extensive jurisprudence in its General Comments and in its Concluding Observations on Periodic Reviews of State parties that provides further clarification as to the requirements of policies and strategies for compliance with article 2(1) of the *ICESCR*. Comprehensive and purposive legislative measures are almost always required, though the CESCR points out that the "adoption of legislative measures, as specifically foreseen by the *Covenant*, is by no means exhaustive of the obligations of States parties."<sup>128</sup>

In the CESCR's view, all reasonable strategies must be informed by an equality framework, prioritizing the needs of disadvantaged groups and ensuring protection from discrimination.<sup>129</sup> States have an immediate, unqualified duty to ensure both formal and substantive equality in the implementation of policies.<sup>130</sup> Strategies must specifically address issues of systemic discrimination and the barriers faced by individuals who have suffered

---

<sup>127</sup> CESCR, "Maximum Available Resources", *ibid*.

<sup>128</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art 2 para 1 of the Covenant)*, UNCESCROR, 5th Sess, UN Doc E/1991/23, (1990) [*General Comment 3*].

<sup>129</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art 2 para 2)*, UNCESCROR, 42d Sess, UN Doc E/C.12/GC/20, (2009) [*General Comment 20*] at para 9. See also: UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, UN Doc E/CN.4/1987/17, (1987) at para 39: "Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination."

<sup>130</sup> Manisuli Ssenyonjo, "Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law" (2011) 15:6 Int'l JHR 969.

historic discrimination or present prejudice.<sup>131</sup> Mirroring the CESCR's statements in *General Comment No. 20* on non-discrimination in economic, social and cultural rights, Manisuli Ssenyonjo explains that "since discrimination undermines the fulfilment of ESC rights for a significant proportion of the world's population, anti-discrimination legislation must cover not only discrimination in the public sector but also discrimination by non-state actors."<sup>132</sup> The CESCR has insisted that reasonable policies should include "efforts to overcome negative stereotyped images."<sup>133</sup> Additionally, policies should rely on effective "coordination between the national ministries, regional and local authorities."<sup>134</sup> Human rights institutions may scrutinize existing laws, identify appropriate goals and benchmarks, provide research, monitor compliance, examine complaints of alleged infringements and disseminate educational materials.<sup>135</sup>

Another critical component of reasonable, rights-based strategies is the provision of effective remedies for violations of *ICESCR* rights. The CESCR has recognized that courts may not always be the best place for marginalized groups to seek remedies, and has acknowledged the potentially important role of administrative remedies. However, as stated in the CESCR's *General Comment No. 9*, administrative remedies must be accessible, affordable, timely and effective, and there must be an ultimate recourse to courts to enforce the rule of law, as rights "cannot be made fully effective without some role for the judiciary."<sup>136</sup>

Meaningful participation of affected constituencies has also been identified by the CESCR as a critical procedural component of the reasonableness standard. As stated in *General Comment No. 4*, "both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected."<sup>137</sup> Once implemented, the strategy should operate according to the principles of accountability which the Committee has identified as including: transparency, participation, decentralization, legislative capacity, judicial independence, institutional responsibility for process, monitoring procedures and redress

---

<sup>131</sup> *General Comment 20*, *supra* note 129 at para 8.

<sup>132</sup> Ssenyonjo, *supra* note 130 at 976.

<sup>133</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 6: The Economic, Social and Cultural Rights of Older Persons*, UNCESCROR, 13th Sess, UN Doc E/1996/22, (1995) at para 41.

<sup>134</sup> *General Comment 15*, *supra* note 120.

<sup>135</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/25, (1998) at para 3.

<sup>136</sup> *General Comment 9*, *supra* note 77 at para 9.

<sup>137</sup> *General Comment 4*, *supra* note 108 at para 12.



procedures.<sup>138</sup> The CESCR has suggested that both long- and short-term timelines should be adopted, with particular attention paid to interim steps such as “temporary special measures [which] may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.”<sup>139</sup>

The CESCR has emphasized that monitoring and redress should also include assessment of budgetary measures. Effective participatory rights and monitoring depend on the transparent allocation and expenditure of resources.<sup>140</sup> The reasonableness of budgetary allotment can be assessed based on information about the percentage of the budget allocated to specific rights under the *Covenant* in comparison to areas of spending that are not related to fulfilling human rights. The State party’s resource allocation may also be compared to that of other states with similar levels of development.<sup>141</sup> Substantive elements required of a reasonable policy have been characterized by “Four A’s”:

- Availability (access to relevant services).
- Accessibility (physical and economic accessibility and non-discriminatory access).
- Acceptability (based on qualitative standards)
- Adaptability (flexible and geared to meeting of particular cultural and other needs as well as responsive to changes in circumstances).<sup>142</sup>

As Brian Griffey notes “questions remain as to how the ‘reasonableness’ test will be applied, but the answer must be consistent with *ICESCR* obligations and the object and purpose of the *Optional Protocol*.”<sup>143</sup> Reasonable strategies will be based on a rigorous standard of “the

---

<sup>138</sup> *General Comment 12, supra* note 116 at paras 23, 29.

<sup>139</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (art 3)*, UNCESCROR, 34th Sess, UN Doc E/C.12/2005/4, (2005) at para 15.

<sup>140</sup> *General Comment 3, supra* note 128 at para 11.

<sup>141</sup> Ssenyonjo, *supra* note 130 at 980-981. See e.g. United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of Congo*, UNCESCROR, 43d Sess, UN Doc E/C.12/COD/CO/4, (2009) at para 16, where the Committee found that the State’s decreased allocation of resources to social sector development combined with increased levels of military spending resulted in a violation of its *Covenant* obligations.; Griffey, *supra* note 122 at 290.

<sup>142</sup> Components of the “four A’s” vary with each specific right. See e.g. United Nations Committee on Economic, Social and Cultural Rights, *General Comment 13: The Role of Education (art 13)*, UNCESCROR, 21st Sess, UN Doc E/C.12/1999/1, (1999) at para 6; *General Comment 14, supra* note 119 at para 12; or *General Comment 15, supra* note 120 at para 11.

<sup>143</sup> Griffey, *supra* note 122 at 304.



maximum of available resources” and a commitment to ensuring access to adequate housing and freedom from poverty as fundamental human rights that can be effectively claimed and enforced.

While the standard of reasonableness under the *Optional Protocol* to the *ICESCR* should be developed as a distinctive standard consistent with the purposes of the *ICESCR*, the CESCR may also benefit from relevant jurisprudence from other UN treaty bodies. The UN Human Rights Committee has affirmed that reasonableness analysis must be both purposive and contextual, and that a policy must be consistent with the purpose of the *Covenant* read as a whole.<sup>144</sup> The Committee on the Rights of the Child has affirmed that a strategy to implement children’s rights must go beyond a list of good intentions or vague commitments: it must set specific, attainable goals with implementation measures, timelines and provisions for necessary resource allocation.<sup>145</sup> A reasonableness standard will also emerge in the jurisprudence of the newly formed UN Committee on the Rights of Persons with Disabilities, under the *Optional Protocol* to the *Convention on the Rights of Persons with Disabilities*, both with respect to the right to reasonable accommodation and the realization of the economic, social and cultural rights that are included in the *Convention*.<sup>146</sup>

In summary, the reasonableness standard imposes obligations on all actors to make decisions that are consistent with the recognition of adequate housing and a decent level of income as fundamental rights subject to effective remedy and meaningful participatory rights. A reasonableness standard must inform all components of a program or strategy, infusing all aspects of decision-making and program design with human rights values. As Sandra Liebenberg and Geo Quinot have argued in relation to the reasonableness standard in South African jurisprudence, the requirement of ‘reasonableness’ itself demands a rights-conscious strategy, commensurate with the special status of “rights” in comparison to other legitimate policy objectives:

It is not enough that the objectives which the State sets itself fall within the broad range of what are regarded as ‘legitimate’ State objectives. These objectives must be consistent with the normative purposes of the rights. This implies a rights-conscious social policy, planning and budgeting process. It is noteworthy in this context that one of the core obligations identified by the UN Committee on Economic, Social and Cultural

---

<sup>144</sup> United Nations Human Rights Committee, *Sandra Lovelace v Canada*, Communication No R.6/24, UNHRCOR, 1981, Supp No 40, UN Doc A/36/40, (1981).

<sup>145</sup> United Nations Committee on the Rights of the Child, *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child*, UNCRCOR, 34th Sess, UN Doc CRC/GC/2003/5, (2003) at paras 32-33.

<sup>146</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/RES/61/106, (2006).

Rights in relation to the rights protected in the International Covenant on Economic, Social and Cultural Rights (1966) is the adoption of a national strategy and plan of action aimed at the realisation of the relevant rights. Such a national plan must be participatory and transparent and set clear goals as well as indicators and benchmarks by which progress can be monitored. Particular attention must be given in the plan to vulnerable or marginalised groups.<sup>147</sup>

## **D. Recommendations of International Treaty Monitoring Bodies**

### **i) Concerns and Recommendations from the CESCR**

Further guidance in relation to the issues that need to be addressed in housing and anti-poverty strategies in Ontario is provided in the commentary of the CESCR and of other treaty bodies in their Periodic Reviews of Canada. The CESCR has reviewed Canada's implementation of the *ICESCR* on three separate occasions (1993, 1998 and 2006), publishing *Concluding Observations* that outline concerns and recommendations with respect to both the federal and provincial/territorial governments. In particular, the CESCR has criticized the apparent unwillingness of governments in Canada to address poverty and homelessness as serious systemic human rights violations, as well as governments' ongoing failure to respond to the concerns and recommendations expressed by treaty monitoring bodies.

In its review of Canada in 1993, the CESCR noted the prevalence of homelessness and inadequate living conditions; high rates of poverty among single mothers and children; evidence of families being forced to relinquish their children to foster care because of their inability to provide adequate housing or other necessities; inadequate welfare entitlements; growing reliance on food banks; widespread discrimination in housing; and inadequate protection of security of tenure for low-income households.<sup>148</sup> The CESCR expressed "concern about the persistence of poverty" in Canada, particularly that "[t]here seems to have been no measurable progress in alleviating poverty...nor in alleviating the severity of poverty among a number of particularly vulnerable groups."<sup>149</sup> These concerns were reiterated in the CESCR's 1998 and 2006 reviews.

---

<sup>147</sup> Geo Quinot & Sandra Liebenberg, "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (Paper delivered at the Law and Poverty Colloquium, Stellenbosch University, South Africa, 29-31 May 2011), [unpublished, on file with authors].

<sup>148</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 1993, UN Doc E/C.12/1993/5 [*Concluding Observations* 1993].

<sup>149</sup> *Ibid* at para 12.

In its 1998 review, in a relatively rare expression of “grave concern”, the CESCR singled out the 21.6 per cent cut in social assistance rates in Ontario, stating that: “The Committee expresses its grave concern at learning that the Government of Ontario proceeded with its announced 21.6 per cent cuts in social assistance in spite of claims that this would force large numbers of people from their homes.”<sup>150</sup> The Committee pointed to the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing.<sup>151</sup> It expressed alarm that “such a wealthy country as Canada has allowed the problem of homelessness and inadequate housing to grow to such proportions that the mayors of Canada’s 10 largest cities have now declared homelessness a national disaster.”<sup>152</sup> It noted that provincial social assistance rates and other income assistance measures have clearly not been adequate to cover rental costs of the poor.<sup>153</sup>

Issues of access to effective remedies to poverty and homelessness as human rights violations have also featured prominently in reviews of Canada. A consistent recommendation from the CESCR has been that human rights legislation be amended to include the right to housing and other social and economic rights.<sup>154</sup> The Committee has been harshly critical of arguments put forward by provincial governments, such as Ontario, in *Charter* cases involving issues of poverty and homelessness. The Committee has noted that “provincial governments have urged upon their courts in these cases an interpretation of the *Charter* which would deny any protection of Covenant rights.”<sup>155</sup> At Canada’s most recent review in 2006, three critical recommendations were made by the CESCR to address the problem of effective remedies in the provincial domain, in particular that:

- [F]ederal, provincial and territorial legislation be brought in line with the State party’s obligations under the Covenant, and that such legislation should protect poor people in all jurisdictions from discrimination because of their social or economic status.
- [Provinces take] immediate steps, including legislative measures, to create and ensure effective domestic remedies for all Covenant rights in all relevant jurisdictions.

---

<sup>150</sup> *Concluding Observations* 1998, *supra* note 87 at para 27.

<sup>151</sup> *Ibid* at para 28.

<sup>152</sup> *Ibid* at para 24.

<sup>153</sup> *Ibid* at para 25.

<sup>154</sup> *Ibid* at para 51; *Concluding Observations* 1993, *supra* note 148 at para 25.

<sup>155</sup> *Ibid* at para 14.

- [F]ederal, provincial and territorial governments promote interpretations of the Canadian Charter of Rights and other domestic law in a way consistent with the Covenant.<sup>156</sup>

Concern has also been expressed about barriers to access to justice created by inadequate civil legal aid and the restriction of the former Court Challenges Program of Canada to federal programs and legislation.<sup>157</sup> The Committee recommended in its 2006 review that the Court Challenges Program be extended to permit funding of challenges with respect to provincial/territorial legislation and policies, and that adequate civil legal aid be provided to those living in poverty to ensure legal representation in cases related to their economic, social and cultural rights.<sup>158</sup> Instead of implementing this recommendation, however, a newly elected federal Conservative government cancelled funding to the Court Challenges Program altogether in the fall of 2006.<sup>159</sup>

The centerpiece of the CESCR's recommendations with respect to poverty and homelessness has been a "strategy for the reduction of homelessness and poverty" that integrates economic, social and cultural rights.<sup>160</sup> The CESCR has emphasized that the strategy should include "measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards."<sup>161</sup> The CESCR has also referred Canada to its statement, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, which is aimed at "encouraging the integration of human rights into poverty eradication policies by outlining how human rights generally, and the ICESCR in particular, can empower the poor and enhance anti-poverty strategies."<sup>162</sup> The CESCR has emphasized that "anti-poverty policies are more likely to be effective, sustainable, inclusive, equitable and meaningful to those living in poverty if they are based upon international human rights."<sup>163</sup>

---

<sup>156</sup> *Concluding Observations* 2006, *supra* note 88 at paras 39-41.

<sup>157</sup> *Ibid* at paras 13-14.

<sup>158</sup> *Ibid* at paras 42-43.

<sup>159</sup> S Laurel Weldon, *When Protest Makes Policy: How Social Movements Represent Disadvantaged Groups* (Ann Arbor: University of Michigan Press, 2011) at 164-165.

<sup>160</sup> *Concluding Observations* 1998, *supra* note 87 at para 46. See also *Concluding Observations* 2006, *supra* note 88 at para 60.

<sup>161</sup> *Ibid* at para 62.

<sup>162</sup> United Nations Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UNCESCROR, 25th Sess, UN Doc E/C.12/2001/1, (2001) at para 3 [*Poverty and the ICESCR*].

<sup>163</sup> *Ibid* at para 13.

## ii) Recommendations from the UN Special Rapporteur on Adequate Housing

In 2007, the UN Special Rapporteur on adequate housing, Miloon Kothari, conducted a mission to Canada. Special Rapporteurs are experts selected and mandated by the UN Human Rights Council to investigate and report on particular human rights issues. During his mission to Canada, the Special Rapporteur spent time in Ontario and developed specific recommendations in light of what he learned about the province's poverty and housing issues. Many of his recommendations echoed those of the CESCR. One of the central recommendations in his Mission Report on Canada was for federal and provincial governments to work in close collaboration, and "commit stable and long-term funding to a comprehensive national housing strategy."<sup>164</sup> Reiterating the recommendations of the CESCR, the Special Rapporteur stated that the strategy should include "measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms."<sup>165</sup>

The Special Rapporteur strongly advocated for the improvement of legal remedies for poverty and homelessness, recommending that the "right to adequate housing be recognized in federal and provincial legislation as an inherent part of the Canadian legal system."<sup>166</sup> The Special Rapporteur recommended that current housing legislation be assessed and amended where necessary to meet the standards required by international human rights obligations.<sup>167</sup> The Special Rapporteur was consulted by the Ontario Human Rights Commission on the question of how international human rights law and the right to adequate housing could be applied in the interpretation and application of Ontario's *Human Rights Code*. Information from that meeting was integrated into the development of the Commission's *Policy on Human Rights and Rental Housing*, which was adopted in July 2009.<sup>168</sup> The Special Rapporteur also commended the Commission's *Right at Home* report in his mission report, suggesting that government authorities implement the detailed recommendations included in it.<sup>169</sup>

---

<sup>164</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)*, UN Human Rights Council OR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 90 [*SR Mission to Canada*].

<sup>165</sup> *Ibid* at para 90.

<sup>166</sup> *Ibid* at para 88.

<sup>167</sup> *Ibid* at paras 98-99.

<sup>168</sup> Ontario Human Rights Commission, *Policy on Human Rights and Rental Housing* (Toronto: Queen's Printer for Ontario, 2009) [OHRC, *Policy*].

<sup>169</sup> *SR Mission to Canada*, *supra* note 164 at para 93.

Subsequent to his mission and mandate as Special Rapporteur, Mr. Kothari has continued to be consulted by politicians, experts and stakeholders in Canada to monitor housing-related developments. He recently wrote to Ontario's Minister of Municipal Affairs and Housing to express his disappointment with Ontario's *Long-Term and Affordable Housing Strategy* and the *Strong Communities through Affordable Housing Act, 2011*, noting that it contained none of the key components of an effective housing strategy as recommended by the CESCR and in his Mission Report.<sup>170</sup> He pointed out that the strategy and legislation made no reference to the right to adequate housing; had no targets for the reduction and elimination of homelessness; had no independent monitoring or complaints mechanism; and made no commitment to address the obstacles facing vulnerable groups, including persons with disabilities. Mr. Kothari urged the Minister to consider the amendments tabled by MPP Cheri DiNovo to bring the legislation into conformity with these recommendations.<sup>171</sup> MPP DiNovo made extensive reference to Mr. Kothari's letter during the clause-by-clause debate on the Bill 140 but, as noted above, all of the proposed amendments were defeated.<sup>172</sup>

### **iii) Recommendations from the Universal Periodic Review**

The UN Human Rights Council's 2009 *Universal Periodic Review (UPR)* of Canada also highlighted the need for anti-poverty and housing strategies based on human rights.<sup>173</sup> The *UPR* was created in 2006 and involves UN member states reviewing the human rights records of other member states and making recommendations on how they could improve their adherence to international human rights obligations. Civil society organizations across Canada were significantly engaged with this new process, despite a lack of timely consultation by the Canadian government. The Human Rights Council provides a formal process for stakeholder organizations, NGOs, and human rights institutions to make written submissions to the OHCHR and the Council prior to the *UPR*. Forty-eight NGOs and Aboriginal organizations made formal submissions, as did the Canadian Human Rights Commission.

A formal joint submission was also made by a coalition of over fifty organizations, expressing their shared concern about the gap between Canada's international human rights

---

<sup>170</sup> Letter from Miloon Kothari to Honourable Rick Bartolucci, Minister of Municipal Affairs and Housing (6 April 2011).

<sup>171</sup> *Ibid.*

<sup>172</sup> Ontario, SCJP, 7 April 2011, *supra* note 75.

<sup>173</sup> United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UN Human Rights Council OR, 11th Sess, UN Doc A/HRC/11/17, (2009) [*UPR Canada*].

obligations and the implementation of those rights domestically. The Coalition made a number of recommendations for improved monitoring, implementation and remedies. In particular, the Coalition argued that a coordinated and accountable process for monitoring implementation of Canada's international human rights obligations, involving both levels of government as well as Aboriginal people and civil society, had to be developed. As part of any such process, the Coalition pointed to the need for a high-level focal point for the implementation of Canada's international obligations that, at a minimum, met the following criteria:

- Regular public reporting and transparency.
- On-going engagement with civil society organizations, citizens and the media.
- Following engagement with affected stakeholder populations, public response to concluding observations from UN treaty body reviews and other UN-level recommendations within a year of receipt.
- A mandate to investigate and resolve complaints, including those related to co-ordination with provinces on matters that cross federal/provincial jurisdiction.

The Coalition further argued that a more concerted effort must be made to ensure that effective remedies for all of the rights contained in human rights treaties ratified by Canada be available, so that governments can be held accountable by Canadian courts and human rights institutions for their failure to comply with international rights.<sup>174</sup>

Subsequent to the submission of written briefs, but prior to Canada's appearance for its *UPR* before the UN Human Rights Council, an NGO Steering Committee coordinated six meetings in cities across the country with civil society and Aboriginal organizations as well as representatives from the federal and provincial governments. Drawing on these meetings, which involved over 200 NGOs, a briefing document outlining major human rights concerns was prepared and provided to members of the Human Rights Council in informal meetings in Geneva in the days leading up to Canada's review.<sup>175</sup> The Briefing Document highlighted

---

<sup>174</sup> *Promise and Reality: Canada's International Human Rights Gap*, Joint NGO Submission to the United Nations Human Rights Council in relation to the February 2009 Universal Periodic Review of Canada (8 September 2008) at 3, online: Social Rights in Canada: A Community-University Research Alliance Project <[http://socialrightscura.ca/documents/UPR/JS1\\_CAN\\_UPR\\_S4\\_2009\\_SocialRightsAdvocacyCentre\\_Etal\\_JOINT.pdf](http://socialrightscura.ca/documents/UPR/JS1_CAN_UPR_S4_2009_SocialRightsAdvocacyCentre_Etal_JOINT.pdf)>.

<sup>175</sup> *The Universal Periodic Review of Canada: February 2009: An Overview of a Select Number Canadian NGO Concerns and Recommendations* (31 January 2009), online: Social Rights in Canada: A Community-University



poverty and homelessness as the issues of greatest concern to all NGOs, Aboriginal communities and stakeholders, and strongly recommended the development of human rights-based strategies to address both.<sup>176</sup>

Recommendations considered under the *UPR* come from other States participating in the *UPR* process, and may be either formally accepted or rejected by the State under review. Canada received 68 such recommendations. Poverty and homelessness were frequently mentioned as key areas of concern. Among the recommendations were that Canada develop “a national strategy to eliminate poverty” and “consider taking on board the recommendation of the Special Rapporteur on adequate housing, specifically to extend and enhance the national homelessness programme.”<sup>177</sup> Further to this, it was recommended that Canada “intensify the efforts already undertaken to better ensure the right to adequate housing, especially for vulnerable groups and low-income families.”<sup>178</sup> In its response to the *UPR*, Canada formally accepted the recommendations with respect to the right to adequate housing. However, the recommendation that Canada adopt a national poverty reduction strategy was not accepted. The Government of Canada stated that: “[p]rovinces and territories have jurisdiction in this area of social policy and have developed their own programs to address poverty. For example, four provinces have implemented poverty reduction strategies.”<sup>179</sup> The federal government expressed support for the provincial strategies but refused to commit to implementing the recommended federal plan.

During the *UPR*, Canada was also encouraged to recognize “the justiciability of social, economic and cultural rights”; to ensure legal enforcement of those rights in domestic courts; and to create “a transparent, effective and accountable system...to monitor publicly and regularly report on the implementation of Canada’s human rights obligations.”<sup>180</sup> Canada responded by noting that it did not accept that “all aspects of economic, social and cultural rights are amenable to judicial review or that its international human rights treaty obligations require it to protect rights only through legislation.”<sup>181</sup> Canada did, however, commit to “considering options” for improving its monitoring and implementation of international human rights obligations in the context of federalism.<sup>182</sup> Canada’s next *UPR* will be on April 26, 2013,

---

Research Alliance Project

<<http://www.socialrightscura.ca/documents/UPR/Briefing%20for%20Canada%20UPR%202009%20Jan%2009.pdf>>.

<sup>176</sup> *Ibid.*

<sup>177</sup> *UPR* Canada, *supra* note 173 at paras 70, 45.

<sup>178</sup> *Ibid* at para 72.

<sup>179</sup> Response to *UPR*, *supra* note 11 at para 27.

<sup>180</sup> *UPR* Canada, *supra* note 173 at paras 40, 68.

<sup>181</sup> Response to *UPR*, *supra* note 11 at para 17.

<sup>182</sup> *Ibid* at para 14.



during which a key focus will be on measures taken to follow-up on the recommendations that Canada accepted from its 2009 *UPR*.

The Human Rights Sub-committee of the Standing Committee on Foreign Affairs and International Development reported on its hearings into Canada's *UPR* as follows:

What spoke clearly to Subcommittee Members throughout this study, from all witnesses, including government witnesses, is the need for a better system and improved human rights mechanisms in Canada...All witnesses firmly stressed the importance of ongoing consultations between federal-provincial-territorial governments and civil society as a condition for effective implementation and enforcement of Canada's human rights obligations.<sup>183</sup>

Provincial/territorial accountability is critical to rights such as the right to adequate housing and the right to an adequate standard of living. Recalcitrance on the part of the present federal government should not prevent provinces, including Ontario, from implementing their own mechanisms, procedures, and strategies for ensuring meaningful accountability to international human rights. Institutions such as the Ontario Human Rights Commission, the Law Reform Commission of Ontario, and the Ontario Ombudsman, could play important roles in making international human rights norms meaningful and relevant to rights-holders in Ontario.

## E. International Human Rights and Constitutional Interpretation

The international human rights norms described above also constitute persuasive sources for constitutional and statutory interpretation in Canada. The *Constitution Act, 1982*<sup>184</sup> including the *Canadian Charter of Rights and Freedoms*,<sup>185</sup> [the *Charter*], domestic laws and regulations must, wherever possible, be interpreted by courts, governments and decision-makers, in a manner consistent with international human rights law. As Justice L'Heureux-Dubé noted for the majority of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."<sup>186</sup> Justice

---

<sup>183</sup> Senate, Standing Committee On Human Rights, *Canada's Universal Periodic Review Before The United Nations Human Rights Council* (May 2009) (Chair: The Honourable Raynell Andreychuk); House of Commons, Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, *Canada's Universal Periodic Review and Beyond – Upholding Canada's International Reputation as a Global Leader in the Field of Human Rights* (November 2010) (Chair: Scott Reid) at 16 [House of Commons, *Universal*].

<sup>184</sup> The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>185</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, [Charter].

<sup>186</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71 [*Baker*].

L'Heureux-Dubé cited Ruth Sullivan's *Driedger on the Construction of Statutes* in support of this interpretive principle:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.<sup>187</sup>

Interpretation in conformity with international human rights law is particularly important in the context of the *Charter*. The *Charter* is the preeminent guarantee of human rights in Canada and, thus, the primary vehicle for the implementation of Canada's international human rights obligations.<sup>188</sup> Chief Justice Dickson affirmed for the majority of the Court in *Slaight Communications v Davidson*<sup>189</sup> that: "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."<sup>190</sup> This 'interpretive presumption' is not only to be applied with respect to international human rights guarantees with direct counterparts in the *Charter*, such as the right to life or the right to non-discrimination entrenched in the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>191</sup> Social and economic rights are also part of the unified international human rights landscape within which *Charter* interpretation must be situated. In *Slaight Communications*,<sup>192</sup> the Court pointed to Canada's ratification of the *ICESCR* as evidence that the right to work must be considered a fundamental human right, to be balanced in that case against the right to freedom of expression explicitly guaranteed under the *Charter*.<sup>193</sup> In relying on the *ICESCR*, the majority endorsed Chief Justice Dickson's statement in the *Alberta Reference* that:

---

<sup>187</sup> *Ibid* at para 70, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Markham, Ont: Butterworths, 1994) at 330.

<sup>188</sup> *Baker*, *supra* note 186 at para 70; *R v Ewanchuk*, [1999] 1 SCR 330 at para 73 [*Ewanchuk*]; Martha Jackman & Bruce Porter, Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214-15 [Jackman & Porter, "Socio-Economic Rights"].

<sup>189</sup> *Slaight Communications v Davidson*, [1989] 1 SCR 1038 [*Slaight Communications*]. See also *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391 at para 70.

<sup>190</sup> *Slaight Communications*, *ibid* at 1054 citing *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 59 [*Alberta Reference*].

<sup>191</sup> *International Covenant on Civil and Political Rights*, December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

<sup>192</sup> *Slaight Communications*, *supra* note 189.

<sup>193</sup> *Ibid* at 1056-7. See also Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'" (1999) 21:3 Hum Rts Q 633 at 648.

The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions.<sup>194</sup>

The Court also adopted the Chief Justice's view that "the content of Canada's international human rights obligations is ... an important indicia of the meaning of the "full benefit of the *Charter's* protection."<sup>195</sup> This approach was reaffirmed by Justice L'Heureux-Dubé, writing for the majority of the Court in *Baker*, that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*."<sup>196</sup> In *R v Ewanchuk*, Justice L'Heureux-Dubé further declared that "[o]ur *Charter* is the primary vehicle through which international human rights achieve a domestic effect. In particular, s. 15...and s. 7...embody the notion of respect of human dignity and integrity."<sup>197</sup>

The interdependence and overlap between socio-economic rights recognized in international human rights law ratified by Canada, such as the right to adequate housing and to an adequate standard of living, and the rights that are explicitly included in the *Charter*, such as the right to life, liberty, and security of the person and the right to equality, are widely acknowledged. As noted above, an enhanced understanding of the indivisibility of these rights was a key factor in overcoming the historic divide between civil and political and economic and social rights. In the *Grootboom* case, in which the South African Constitutional Court first grappled with the question of the justiciability of the right to housing, the Court took as its starting point that "[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter."<sup>198</sup> The UN Human Rights Committee (HRC) has affirmed that positive measures are required to address homelessness in Canada,<sup>199</sup> in order to respect right to life guarantees under article 6 of the *ICCPR*. The HRC has also pointed out that poverty disproportionately affects women and other disadvantaged groups in Canada and that social program cuts therefore have had discriminatory impact on those groups.<sup>200</sup>

---

<sup>194</sup> *Alberta Reference*, *supra* note 190 at para 57.

<sup>195</sup> *Slaight Communications*, *supra* note 189 at 1054 referring to *Alberta Reference*, *supra* note 190 at para 59.

<sup>196</sup> *Baker*, *supra* note 186 at para 70.

<sup>197</sup> *Ewanchuk*, *supra* note 188.

<sup>198</sup> *Grootboom*, *supra* note 124.

<sup>199</sup> United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Canada*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.105, (1999) at para 12.

<sup>200</sup> *Ibid* at para 20.

The rights to life and to security of the person guaranteed under section 7 of the *Charter* and the right to equality under section 15 are thus seen, from the international human rights standpoint, to be directly engaged by Canadian governments' failure to implement effective strategies to address poverty and homelessness. As the next section of the paper explains, the *Constitution Act, 1982* and the *Charter* provide an important framework for the development and implementation of rights-based anti-poverty and housing strategies in Ontario, through which international human rights to adequate housing and an adequate standard of living may be subject to effective legal remedies under domestic law.

## **F. Section 36 of the Constitution Act, 1982**

Section 36 of the *Constitution Act, 1982* is a significant, if sometimes overlooked, constitutional provision with direct links to Canada's economic and social rights obligations under international human rights law.<sup>201</sup> Though framed in terms of government commitments, rather than individual rights, section 36 represents a key social rights safeguard within the context of Canadian federalism. Section 36(1) affirms that:

Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

When then Justice Minister Jean Chrétien tabled the resolution to include section 36 as part of the federal government's proposed package of constitutional reforms, he spoke of the provision as recognizing that "[s]haring the wealth has become a fundamental right of Canadians."<sup>202</sup> In the proceedings leading up to the enactment of the *Constitution Act, 1982*, the Special Joint Committee of the Senate and of the House of Commons considered an amendment to what is now section 36, put forward by Svend Robinson on behalf of the New Democratic Party, to add a "commitment to fully implementing the *ICESCR* and the goals of a clean and healthy environment and safe and healthy working conditions."<sup>203</sup> During the debate on the amendment, government members agreed there was no opposition to the "principles embodied in the amendment."<sup>204</sup> Justice Minister Chrétien stated that Canada was already

---

<sup>201</sup> *Constitution Act, 1982*, *supra* note 184, s 36. See also Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19:2 Dal LJ 306.

<sup>202</sup> *House of Commons Debates*, 32d Parl, 1st Sess (6 October 1980) at 3287.

<sup>203</sup> Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32d Parl, 1st Sess, No 49 (30 January 1981) at 65-71.

<sup>204</sup> *Ibid* at 68.

committed to implementing the *ICESCR*, and he suggested that “we cannot put everything [in s. 36].”<sup>205</sup> Subsequently, when Canada was requested by the Secretary General of the UN to submit a *Core Document* outlining, among other things, the implementation of its international human rights treaty obligations in domestic law, section 36 was described by the Canadian government as being “particularly relevant in regard to ... the protection of economic, social and cultural rights.”<sup>206</sup>

### i) The Justiciability of Section 36

There has been ongoing debate about whether section 36 can be enforced by the courts, either as a ‘right’ to public services of reasonable quality, or simply as a justiciable government commitment to provide such services. Michael Robert, a Commissioner for the Royal Commission on the Economic Union and Development Prospects for Canada, expressed the view that section 36 would allow Canadians to “go before the courts and seek a remedy saying: ‘my provincial government, or any federal government is not respecting its commitment to provide me with essential public services of reasonable quality.’”<sup>207</sup> Lorne Sossin has argued that the use of the term ‘committed’ implies that section 36 was “intended to create justiciable obligations on the federal and provincial governments” although it “falls short of creating any mandatory obligation to provide a particular level of funding or type of benefit.”<sup>208</sup> Other scholars have suggested that the particular wording of the commitment in section 36(1)(c), in comparison to sections 36(1)(a) and (b), indicates a standard that is clearly amenable to judicial review.<sup>209</sup> The commitments set out in 36(1)(a) and (b) are framed in softer language, referring to “promoting equal opportunities” and “furthering economic development” whereas section 36(1)(c) refers to providing essential public services.<sup>210</sup> Governments’ commitment to “provide” services of “reasonable” quality under section 36 is framed in terms which are

---

<sup>205</sup> *Ibid* at 70.

<sup>206</sup> Canadian Heritage, *Core Document forming part of the Reports of States Parties: Canada* (October 1997), online: Canadian Heritage <<http://www.pch.gc.ca/ddp-hrd/docs/core-eng.cfm>>. The document was submitted by Canada pursuant to HRI/CORE/1 sent to States parties by note verbale of the Secretary General, G/SO 221 (1) of 26 April 1991.

<sup>207</sup> Michael Robert, “Challenges and Choices: Implications for Fiscal Federation” in TJ Courchene, DW Conklin & GCA Cook, eds, *Ottawa and the Provinces: The Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985) at 28.

<sup>208</sup> Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont: Carswell, 1999) at 19; see also Martha Jackman, “Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform” (1995) 8:2 CJWL 372 at 390.

<sup>209</sup> Nader, *supra* note 201 at 357.

<sup>210</sup> *Ibid*. Nader also notes that the French version of section 36 uses the verb *engager*, “which lends credence to the interpretation that the commitment is closer to an absolute, binding duty or responsibility.” See also David Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011) 57:1 McGill LJ 81 at 118-122.

familiar to courts. Under human rights legislation and pursuant to section 15 of the *Charter*, for example, courts and tribunals regularly apply a reasonableness standard in determining what programs or services must reasonably be provided to accommodate needs related to disability.<sup>211</sup>

The justiciability of section 36 has yet to be judicially determined. In *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board*,<sup>212</sup> the Manitoba Court of Appeal accepted that “a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights.”<sup>213</sup> However, in its decision in *Canadian Bar Association v British Columbia*, involving a *Charter* challenge to the inadequacy of provincial civil legal aid funding in the province, the British Columbia Court of Appeal found that there was an insufficient factual basis to consider a section 36 claim in that case.<sup>214</sup> Referring to the trial court decision in the case, the Court affirmed that “this constitutional provision cannot form the basis of a claim since it only contains a statement of ‘commitment.’”<sup>215</sup> In *Cape Breton (Regional Municipality) v Nova Scotia*,<sup>216</sup> it was alleged that the province’s failure to spend equalization payments received from the federal government in a manner that would reduce regional economic disparity, constituted a violation of Nova Scotia’s obligations under section 36(1). Like the B.C. Court of Appeal, the Nova Scotia Supreme Court concluded that the pleadings in the case did not allege material facts that would permit the court to adjudicate a claim under section 36. In reaching its decision, the Court expressed the view that “the fact that the section forms part of the Constitution does not, by virtue of s.52, make the commitments ‘supreme law’ justiciable as to constitutionality.”<sup>217</sup>

In view of the direct connection between the governmental commitments set out under section 36 and Canada’s international social and economic rights obligations, it is appropriate to look to evolving international human rights principles for guidance in resolving judicial uncertainty as to the justiciability of section 36. With the adoption by the UN General Assembly of the *OP-ICESCR*,<sup>218</sup> Canadian governments’ constitutional commitment to provide public

---

<sup>211</sup> See e.g. *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 65 [*Eldridge*]; *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 at paras 50-54 (where the Court explains the requirements of reasonable accommodation) [*Multani*].

<sup>212</sup> *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board* (1992), 91 DLR (4th) 554, 78 Man R (2d) 141.

<sup>213</sup> *Ibid* at para 10.

<sup>214</sup> *Canadian Bar Association v British Columbia*, 2008 BCCA 92 at para 53, 290 DLR (4th) 617.

<sup>215</sup> *Ibid* at para 33.

<sup>216</sup> *Cape Breton (Regional Municipality) v Nova Scotia*, 2008 NSSC 111, 267 NSR (2d) 21.

<sup>217</sup> *Ibid* at para 53.

<sup>218</sup> *OP-ICESCR*, *supra* note 10

services of a ‘reasonable quality’ has a new resonance, not only with standards of reasonableness applied under domestic human rights law, but also in relation to Canada’s international human rights undertakings. Section 36 should be interpreted in a manner that gives effect to the federal and provincial/territorial governments’ obligations to adopt “reasonable measures” to realize the right to an adequate standard of living, guaranteed under the *ICESCR*. In addition, the CESCR’s *General Comments*, establishing the fundamental principle that social and economic rights must be subject to effective domestic remedies, encourage a similar approach to section 36.<sup>219</sup> Given the importance accorded to the provision by the Government of Canada in relation to the implementation the *ICESCR* in Canada, the argument that section 36 provides no effective remedy would be inconsistent with the requirement of effective domestic remedies for violations of international rights.

Even if courts are reluctant to interpret section 36 as conferring an individual right to reasonable programs and policies, alternative judicial avenues exist to ensure effective remedies in circumstances where governments have failed to meet a standard of reasonableness in the provision of essential public services. A similar issue regarding the justiciability of governmental commitments arose and was addressed by the Supreme Court of Canada in its decision in *Finlay v Canada (Minister of Finance)*.<sup>220</sup> In that case the Court considered whether an individual could challenge a provincial government’s failure to comply with conditions of a cost-sharing agreement between the province and the federal government. Under the *Canada Assistance Plan Act*<sup>221</sup> federal contributions to provincial social assistance costs were conditional upon provincial compliance with a number of requirements, including that the level of assistance provided by the province be adequate to cover basic necessities.<sup>222</sup> The Supreme Court found in *Finlay* that the agreement between the two levels of government did not create a justiciable individual right to an adequate level of assistance. However the Court held that an individual who was affected by the province’s failure to respect conditions of the cost-sharing agreement should be granted ‘public interest standing’ to take legal action to require provincial compliance with the terms of the agreement. Jim Finlay – an affected social assistance recipient – was thus empowered to demand that federal payments to Manitoba be withheld until the province complied with the terms of the agreement, with compliance

---

<sup>219</sup> *General Comment 9*, *supra* note 77.

<sup>220</sup> *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 180 [*Finlay*]. See also Margot Young, “Starving in the Shadow of Law: A Comment on *Finlay v Canada (Minister of Finance)*” (1994) 5:2 Const Forum 31; Sujit Choudry, “The Enforcement of the *Canada Health Act*” (1996) 41:2 McGill LJ 461.

<sup>221</sup> *Canada Assistance Plan Act*, RSC 1985, c C–1, as repealed by *Budget Implementation Act*, SC 1995, c 17, s 32.

<sup>222</sup> See *ibid* at s 6(2)(a): Under the *Canada Assistance Plan*, for provinces to receive federal cost-sharing of social assistance, the level of assistance provided to persons in need must take into account the cost of basic requirements, including food, shelter, clothing, fuel, utilities, household supplies and personal requirements.



assessed under a standard akin to the ‘reasonableness’ standard under international law.<sup>223</sup> In order to continue to receive federal transfer payments, provinces would be required by the court to provide assistance in an amount that was “compatible, or consistent, with an individual's basic requirements” with some flexibility provided to the provincial government in meeting the standard.<sup>224</sup>

The Supreme Court’s analysis in *Finlay* is directly relevant to the issue of the justiciability of section 36. As Vincent Calderhead argues, the Supreme Court’s approach to federal-provincial cost-sharing agreements in *Finlay* is equally applicable to the enforcement of federal and provincial/territorial constitutional undertakings under section 36. Individuals or groups who are adversely affected by governments’ failure to respect section 36 and who are consequently left without access to adequate income or housing should, at a minimum, be granted public interest standing to demand judicial scrutiny of the federal and provincial/territorial governments’ compliance with section 36 and, where necessary, courts should order governments to take whatever steps are required, within a reasonable period of time, to meet their constitutional commitments.<sup>225</sup>

## **ii) Shared Governmental Responsibilities**

Section 36 is particularly relevant to Canadian governments’ shared and overlapping obligations to address homelessness and poverty. Both federal and provincial/territorial governments play critical roles in poverty reduction and housing programs. UN human rights monitoring bodies and civil society organizations have frequently expressed concern about a tendency for each level of government in Canada to hide behind the failures or jurisdictional responsibilities of the other.<sup>226</sup>

During the 2010 hearings of the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA Committee) that culminated in its report *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*,<sup>227</sup> witnesses identified a range of federal policies and programs that must be included in any coordinated strategy to address poverty.

---

<sup>223</sup> Above, at 41-45.

<sup>224</sup> *Finlay*, *supra* note 220 at para 81.

<sup>225</sup> Vincent Calderhead, “CBRM appeal ruling renews debate”, Editorial, *Cape Breton Post* (16 May 2009) A7.

<sup>226</sup> Letter from Alex Neve, Secretary General, Amnesty International Canada, to Prime Minister Stephen Harper (23 February 2009) online: Social Rights in Canada: A Community-University Research Alliance Project <[http://socialrightscura.ca/documents/UPR/Letter\\_to\\_PM\\_Harper%20PDF2.pdf](http://socialrightscura.ca/documents/UPR/Letter_to_PM_Harper%20PDF2.pdf)>.

<sup>227</sup> House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (November 2010) (Chair: Candice Hoepfner) [HUMA Committee, *Poverty Reduction Plan*].



These include Employment Insurance, working tax credits, child tax benefits, Old Age Security, a Guaranteed Income Supplement, early learning and child care, affordable housing programs, disability-related income support programs, and Aboriginal programming among other measures.<sup>228</sup> As the Committee noted in its report, every province that has implemented a poverty reduction strategy has expressly recognized that its provincial strategy requires cooperation and support from the federal government.<sup>229</sup> The Honourable Deb Matthews, Ontario Minister of Children and Youth Services and Chair of the province's Cabinet Committee on Poverty Reduction, explained in her testimony before the HUMA Committee: "Canada is a different country in that we have strong provincial governments. That doesn't mean the federal government can abdicate its responsibility when it comes to issues like this. We are looking for engaging partners at every level of government."<sup>230</sup> As the HUMA Committee observed, Canadian federalism requires a different approach to anti-poverty and housing strategies than has been adopted in unitary states. Having reviewed anti-poverty initiatives taken in Ireland and in the UK, the HUMA Committee cautioned that:

[T]he UK and Ireland are unitary states whose political systems differ from Canada's federal system. In a unitary state, the central government can delegate power to subnational administrations, but it retains the principal right to recall such delegated power. In Canada, the division of powers between the federal and provincial legislatures is outlined in the *Constitution Act*. The powers of the provinces cannot be changed unilaterally by the federal government. The sharing of constitutional powers in Canada's federal system makes it more difficult to develop and implement an integrated approach to reducing poverty and of social exclusion.<sup>231</sup>

In its response to the HUMA Committee's report, the federal government acknowledged that "[p]rovincial and territorial governments have a shared responsibility with the Government of Canada in addressing poverty and have jurisdiction over some key mechanisms in supporting low-income Canadians."<sup>232</sup> The federal government has, nevertheless, consistently refused to accept or implement recommendations for a federal anti-poverty strategy. For instance, when a national housing strategy was recommended by the UN Human Rights Council's 2009 *Universal Periodic Review (UPR)* of Canada, the federal government refused to accept this

---

<sup>228</sup> *Ibid* at 92.

<sup>229</sup> *Ibid* at 75-76.

<sup>230</sup> *Ibid* at 96.

<sup>231</sup> *Ibid* at 79, n 312.

<sup>232</sup> *Government Response to the Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, Entitled Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (presented to the House of Commons on 4 March 2011).

recommendation on the grounds that: “Provinces and territories have jurisdiction in this area of social policy and have developed their own programs to address poverty.”<sup>233</sup>

When federal or provincial/territorial governments rely on the complexities of Canadian federalism to abdicate responsibility in relation to homelessness or poverty in this manner, section 36 provides constitutional authority for rights claimants to insist that their rights should not be compromised by jurisdictional overlap or ambiguity. Such claims can be advanced politically, of course. However, section 36 arguments may also be advanced legally, in *Charter* or human rights complaints against one or both levels of government, or in the statutory interpretation or administrative law contexts, discussed in greater depth below. Whatever the forum, the shared governmental responsibilities and commitments that are set out under section 36 should translate into a constitutional right to co-operative and coherent federal and provincial strategies, that are focused on affirming and realizing fundamental social rights as paramount over jurisdictional divides.<sup>234</sup>

## **G. Section 7 of the *Charter*: The Right to Life, Liberty and Security of the Person**

Section 7 of the *Charter* declares that “[e]veryone 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.” Section 7 should be read in light of Canadian values and longstanding conceptions of individual wellbeing, community welfare, and the role of the state in safeguarding those interests within Canadian society.<sup>235</sup> In the debates leading up to the adoption of the *Charter*, an amendment was put forward to add a right to ‘the enjoyment of property’ to section 7. This proposal was rejected in part because of fears that property rights would conflict with Canadians’ commitment to social programs, and could give rise to challenges to government regulation of corporate interests and provincial regulation of natural resources.<sup>236</sup> The phrase ‘fundamental justice’ was also preferred over any reference to ‘due process of law’ in section 7, because of concerns around the use of the due process clause in

---

<sup>233</sup> United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UN Human Rights Council OR, 11th Sess, UN Doc A/HRC/11/17/Add.1, (2009) at para 27.

<sup>234</sup> See Aboriginal Affairs and Northern Development, *Implementation of Jordan’s Principle in Saskatchewan*, online: < <http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2009/bk000000451-eng.asp> > (for an enunciation of this principle in the context of Aboriginal rights).

<sup>235</sup> See generally Martha Jackman, “The Protection of Welfare Rights under the *Charter*” (1988) 20:2 *Ottawa L Rev* 257 [Jackman, “Welfare Rights”].

<sup>236</sup> Sujit Choudhry, “The *Lochner* Era and Comparative Constitutionalism” (2004) 2:1 *ICON* 17; Martha Jackman, “Poor Rights: Using the *Charter* to Support Social Welfare Claims” (1993) 19 *Queen’s LJ* 65 at 76.

the United States Bill of Rights during the *Lochner* era, as a means for propertied interests to challenge the regulation of private enterprise and the promotion of social rights.<sup>237</sup>

### i) The Scope of Section 7

In reviewing how Canadian courts have applied section 7 to issues of poverty, Louise Arbour, in her capacity as the UN High Commissioner on Human Rights, found 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.”<sup>238</sup> Almost ten years later, Canadian jurisprudence continues to reflect a scarcity of poverty and homelessness-related cases that have either made it to trial, or been allowed to proceed on appeal or to the Supreme Court of Canada. The section 7 record also shows a continued judicial timidity about making any clear determination as to whether section 7 imposes obligations on governments to adopt reasonable measures to ensure access to adequate housing and other necessities, in keeping with the guarantees set out under the *ICESCR* and other human rights treaties ratified by Canada.<sup>239</sup> The absence of any clear judicial affirmation of the application of the right to life, liberty and security of the person in this area has led many to dismiss, or to discount, the claim that section 7 requires governments to take positive measures to address poverty and homelessness. It is important to remember, however, that the Supreme Court continues to declare its willingness to entertain such *Charter* claims and that it has been careful to leave open the possibility that section 7 protects socio-economic rights.<sup>240</sup> In addition, as outlined below, the Court’s recognition that transparent and participatory decision-making is an important component of section 7 principles of fundamental justice, reflects and reinforces the modern understanding of the importance of rights-based participatory approaches to strategies to address poverty and homelessness. In light of the international human rights law developments described above, and given the Supreme Court’s commitment to interpreting the *Charter* in light of international human rights law, it is reasonable to expect that these interpretive possibilities will be realized in future cases.

---

<sup>237</sup> *Ibid* at 17-24, cited in Jackman & Porter, “Socio-Economic Rights”, *supra* note 188.

<sup>238</sup> Louise Arbour, “‘Freedom from want’ – from charity to entitlement” (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, 3 March 2005), online: UNHCHR [www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument](http://www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument) [Arbour, “Freedom from want”].

<sup>239</sup> Martha Jackman, “Constitutional Castaways: Poverty and the McLachlin Court” in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ont: LexisNexis Canada, 2010) 297.

<sup>240</sup> *Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927 [*Irwin Toy*].

## ii) Right to Adequate Housing and Protection from Poverty under Section 7

In its 1989 judgment in *Irwin Toy v Quebec (AG)*,<sup>241</sup> the Supreme Court of Canada rejected the argument that section 7 of the *Charter* protects economic rights – in that case the rights of manufacturers to market their products free from governmental restraint. In coming to this conclusion, the Court was careful, however, to distinguish what it characterized as “corporate-commercial economic rights” from human rights of the kind recognized under the *ICESCR*.<sup>242</sup> As Chief Justice Dickson explained:

Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.<sup>243</sup>

In *Gosselin v Quebec (AG)*, the Supreme Court considered a challenge to a provincial social assistance regulation that reduced the level of benefits payable to recipients under the age of thirty by two-thirds, to approximately \$145/month, unless they were enrolled in workfare or training programs. 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.<sup>244</sup> Although the majority found such an interpretation to be inapplicable on the facts of *Gosselin*, viewing the impugned welfare regime as a defensible means of encouraging young people to join the workforce, the majority of the Court nonetheless left open the possibility that this interpretation of section 7 could be applied in a future case. Chief Justice McLachlin stated in this regard:

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

---

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid* at 1003-4.

<sup>243</sup> *Ibid.*

<sup>244</sup> *Gosselin v Quebec (AG)*, [2002] 4 SCR 429 at para 332 [*Gosselin*].

obligation to guarantee adequate living standards. I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.<sup>245</sup>

As noted by the B.C. Supreme Court in *Victoria (City) v Adams*, statements made by Canadian governments in their reporting to UN human rights treaty monitoring bodies support an interpretation of section 7 that would provide remedies to violations of the right to housing and to an adequate income, as proposed by Arbour J. in the *Gosselin* case.<sup>246</sup> In response to a question from the CESCR in the context of Canada's second periodic review before the UN CESCR, the federal government assured the Committee that "[w]hile the guarantee of security of the person under section 7 of the Charter might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life."<sup>247</sup> This position was again asserted by the Canadian government in responding to questions from the CESCR relating to its 1998 report on Canada's compliance with its social and economic rights obligations under the *ICESCR*.<sup>248</sup>

Security of the person, as it has been defined by the courts, has both physical and psychological dimensions. In *Rodriguez v British Columbia (Attorney General)*, Justice Sopinka held that "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person."<sup>249</sup> State action which is likely to impair a person's health engages the fundamental right under section 7 to security of the person.<sup>250</sup> In its recent decision in *Canada (Attorney General) v. PHS Community Services Society (Insite)*, the Court reaffirmed that where a law creates a risk to health, this amounts to a deprivation of the

<sup>245</sup> *Ibid* at para 82. See also Martha Jackman, « Sommes nous dignes? Légalité et l'arrêt *Gosselin* » (2006) 17 RFD 161; Gwen Brodsky, et al, "Gosselin v Quebec (Attorney General)" (2006) 18:1 CJWL / RFD 189; Gwen Brodsky, "Gosselin v. Quebec (Attorney General): Autonomy With a Vengeance" (2003) 15:1 CJWL / RFD 194; Shelagh Day et al, *Human Rights Denied: Single Mothers on Social Assistance* (Vancouver: Poverty and Human Rights Centre, 2005).

<sup>246</sup> *Victoria (City) v Adams*, 2008 BCSC 1363 at para 98, 299 DLR (4th) 193 [Adams]. Canada also stated to the United Nations Human Rights Committee that the right to life in the *ICCPR* imposes obligations on governments to provide basic necessities. See *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, 1983, UN Doc CCPR/C/1/Add.62 at 23.

<sup>247</sup> United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, UNCESCROR, 1993, UN Doc E/C.12/1993/SR.5 at paras 3, 21.

<sup>248</sup> United Nations Committee on Economic, Social and Cultural Rights, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, 1998, UN Doc HR/CESCR/NONE/98/8 at questions 16, 53.

<sup>249</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 136 [Rodriguez].

<sup>250</sup> *Ibid* at para 21.

right to security of the person, and that “where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.”<sup>251</sup>

Although earlier Supreme Court judgments took the position that the section 7 guarantee of life, liberty and security of the person was restricted to the sphere of criminal law, there is no longer any doubt that section 7 applies well beyond the criminal justice context. This was affirmed in *New Brunswick (Minister of Health and Community Services) v G(J)*,<sup>252</sup> involving the right to access legal aid in a child custody case. Chief Justice Lamer affirmed that, although the majority of the Court’s jurisprudence has “considered the right to security of the person in a criminal law context, I believe that the protection accorded by this right extends beyond the criminal law and can be engaged in child protection proceedings.”<sup>253</sup> Chief Justice Lamer went on to explain that:

For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person’s psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.<sup>254</sup>

In *Chaoulli v Quebec (AG)*,<sup>255</sup> a majority of the Supreme Court agreed there was interference with life and security of the person within the meaning of section 7, notwithstanding that the legislation at issue related to access to health care and health insurance, and was entirely removed from the criminal context, or even the administration of justice. The majority found that the province’s failure to ensure access to healthcare of “reasonable” quality within a “reasonable” time engaged the right to life and security of the person and triggered the application of section 7 and the equivalent guarantee under the Quebec *Charter of Rights and Freedoms*.<sup>256</sup> The dissenting justices likewise accepted the trial

---

<sup>251</sup> *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 at para 93 [*PHS Community Services*].

<sup>252</sup> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [*G(J)*].

<sup>253</sup> *Ibid* at para 58.

<sup>254</sup> *Ibid* at para 60.

<sup>255</sup> *Chaoulli v Quebec (AG)*, [2005] 1 SCR 791 [*Chaoulli*].

<sup>256</sup> *Ibid* at para 105. The majority went on to find that the ban on private insurance violated section 7 principles of fundamental justice and could not be justified under section 1 of the *Charter*. For a critique of the *Chaoulli* decision see Martha Jackman, “The Last Line of Defence for [Which?] Citizens’: Accountability, Equality and the Right to Health in *Chaoulli*” (2006) 44 Osgoode Hall LJ 349; Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005); Marie-Claude Prémont, “L’affaire *Chaoulli* et le système de santé du Québec: cherchez l’erreur, cherchez la raison” (2006) 51:1 McGill LJ 167.

judge's finding that "that the current state of the Quebec health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of some individuals on some occasions, of putting at risk their life or security of the person."<sup>257</sup> The dissenting Justices disagreed, however, with the majority's conclusion that the province's ban on private health insurance was arbitrary, concluding instead that "Prohibition of private health insurance is directly related to Quebec's interest in promoting a need-based system and in ensuring its viability and efficiency."<sup>258</sup>

With increased understanding of the significant health consequences of homelessness and poverty, it has become obvious that governments' failure to ensure reasonable access to housing and to an adequate standard of living for disadvantaged groups undermines section 7 interests – certainly as directly as the regulation of private medical insurance. In a recently filed *Charter* application in the Ontario Superior Court (*Tanudjaja v Canada*)<sup>259</sup>, a number of individuals who have experienced the effects of homelessness and inadequate housing are challenging the federal and provincial governments' failure to adopt housing strategies. They are arguing not only that governments' action but also government inaction amount to a violation of their *Charter* rights, including to security of the person under section 7. In her affidavit in support of the *Charter* claim in the case, Cathy Crowe, a street nurse who has worked with homeless people in Toronto for more than twenty years, describes some of the consequences of homelessness she has witnessed in the following terms:

I saw infections and illnesses devastate the lives of homeless people – frostbite injuries, malnutrition, dehydration, pneumonias, chronic diarrhea, hepatitis, HIV infection, and skin infections from bedbug bites. For people who live in adequate housing, these conditions are curable or manageable but homeless people experience more exposure to upper respiratory disease, reduced access to health care, more trauma including violence such as rape, more chronic illness, more exposure to illness in congregate settings, more exposure to infectious agents and infestations such as lice and bedbugs, lack the means to care for themselves when ill and suffer from more depression.<sup>260</sup>

Crowe notes that, while these physical illnesses and conditions are difficult enough to treat while people are living without adequate housing, treating the emotional and mental effects of homelessness is even more difficult. As she explains, "[c]hronic deprivation of

---

<sup>257</sup> *Chaoulli*, *supra* note 255 at para 200.

<sup>258</sup> *Ibid* at para 256.

<sup>259</sup> *Tanudjaja v Canada*, Ont Sup Ct File no CV-10-403688 (2011) [*Tanudjaja*].

<sup>260</sup> Cathy Crowe, *Affidavit for Tanudjaja v Canada* (Ont Sup Ct File no CV-10-403688) (2011).



privacy, sense of safety, sleep and living in circumstances of constant stress and violence leads to mental and emotional trauma.”<sup>261</sup>

Crowe goes on to affirm that these negative health outcomes cannot be addressed effectively “by programs of support for living on the street, emergency shelters, drop-in programs or counselling and referral services despite the critical need for all these services.”<sup>262</sup> She argues that they can only be addressed by ensuring access to adequate “permanent housing.”<sup>263</sup> A recent Canadian longitudinal study on the effects of homelessness and inadequate housing likewise found that the negative health outcomes associated with living on the streets or in shelters extend to a much wider segment of the population, and also affect those living in inadequate or precarious housing. The results of the study showed that “for every one person sleeping in a shelter, there are 23 more people living with housing vulnerability. They are all at risk of devastating health outcomes.”<sup>264</sup>

There is no basis in existing Supreme Court jurisprudence to exclude these kinds of documented effects on personal security, dignity and life – resulting from governments’ decisions not to implement effective housing and anti-poverty strategies as recommended by experts and UN bodies – from section 7 of the *Charter*. Given the evident health consequences and adverse impact of poverty and homelessness on physical and psychological integrity, security and other interests, which the Supreme Court has found to be protected under section 7, it is hard to imagine how the effects of homelessness and poverty on health can reasonably be excluded from the scope of section 7.

### **iii) Fundamental Justice and Arbitrary State Responses to Poverty and Homelessness**

Section 7 of the *Charter* requires that any deprivation of the right to life, liberty or security of the person “must be in accordance with the principles of fundamental justice.” As Justice Sopinka affirmed in *Rodriguez*, section 7 principles of fundamental justice are those “upon which there is some consensus that they are vital or fundamental to our societal notion of justice.”<sup>265</sup> In his judgment in *Reference Re BC Motor Vehicle Act*, Chief Justice Lamer explained that the concept of fundamental justice “involves more than natural justice (which is

---

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada’s Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing and Health, 2010) at 4.

<sup>265</sup> *Rodriguez*, *supra* note 249 at 590-591.



largely procedural) and includes as well a substantive element. Principles of fundamental justice “are informed by Canadian experience and jurisprudence, and take into account Canada’s obligations and values, as expressed in the various sources of international human rights law by which Canada is bound.”<sup>266</sup>

A core component of fundamental justice under section 7 is the principle that governments cannot arbitrarily limit rights to life, liberty and security of the person. Prior to the recent *Insite* case,<sup>267</sup> the Court’s consideration of arbitrariness had been largely confined to the question of whether provisions of existing laws that infringe rights to life, liberty and security of the person, were arbitrary. The Court had not been called upon to consider whether a government’s failure to take action, or to adopt positive measures to protect the right to life or security of the person, were arbitrary and so fundamentally unjust within the meaning of section 7. In considering the prohibition of assisted suicide under the *Criminal Code*,<sup>268</sup> Justice Sopinka stated in *Rodriguez* that “[a] particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation.”<sup>269</sup> In their decision in *R v Malmo-Levine*, involving a section 7 challenge to the criminal law prohibition of possession of marijuana, Justices Gonthier and Binnie stated that a measure that is: “disproportionate to the societal problems at issue” is arbitrary.<sup>270</sup> In the *Insite* case, however, after rejecting the claim that the federal *Controlled Drugs and Substances Act*<sup>271</sup> itself violated section 7<sup>272</sup> the Court considered whether the Minister of Health’s failure to grant an exemption, as provided under the *Act*, was in accordance with principles of fundamental justice.<sup>273</sup> Acknowledging that “the jurisprudence on arbitrariness is not entirely settled”<sup>274</sup> the Court considered three alternative approaches it had taken to arbitrariness, including whether the impugned measure, in this case a failure to provide an exemption to enable the provision of the services, is “necessary” to the state objectives behind the legislation; whether it is “inconsistent” with the objectives; and whether it is ‘grossly disproportional’ to the state objectives.<sup>275</sup> Reviewing the overwhelming evidence of the benefits of *Insite*’s safe injection and related health services to those in need of them, and the effects of a failure to ensure the continued provision of those services, the Court

---

<sup>266</sup> *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 23, 48, [2010] 1 SCR 44.

<sup>267</sup> *PHS Community Services*, *supra* note 251.

<sup>268</sup> *Criminal Code*, RSC 1985, c C-46, ss 14, 215, as amended by SC 1991, c 43, s 9; s 241(a), as amended by SC 1991, c 27, s 7(3); s 241(b).

<sup>269</sup> *Rodriguez*, *supra* note 249 at 203.

<sup>270</sup> *R v Malmo-Levine*, [2003] 3 SCR 571 at para 135.

<sup>271</sup> SC 1996, c 19.

<sup>272</sup> *PHS Community Services*, *supra* note 251 at paras 112-115.

<sup>273</sup> *Ibid* at paras 127-136.

<sup>274</sup> *Ibid* at para 132.

<sup>275</sup> *Ibid* at paras 130-132.

found that the Minister's failure to grant an exemption was arbitrary according to all three standards. In particular, the Court concluded that: "The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."<sup>276</sup>

In the *Insite* case, the Supreme Court applied section 7 principles of fundamental justice and arbitrariness to a governmental failure to act to protect the life and security of the person of members of a vulnerable population in need of services. The Court's decision has significant implications for the application of section 7 to failures to act to protect the life and security of the person of those who are homeless or living in poverty. As described above, UN human rights bodies, housing and poverty experts, and a wide spectrum of civil society have called upon Canadian governments to adopt housing and anti-poverty strategies both as a matter of sound, evidence-based social policy and of domestic and international human rights law.<sup>277</sup> Empirical evidence is mounting as to the irrationality and arbitrariness of governments' inaction in this area, in light of the health outcomes associated with homelessness and poverty as well as its fiscal consequences.<sup>278</sup> It is therefore increasingly difficult to sustain the position that governments' failure to adopt reasonable strategies to respond to the crisis of homelessness and poverty in Canada is in accordance with section 7 principles of fundamental justice.

In her affidavit in support of the *Charter* challenge to governments' failures to implement reasonable strategies to address homelessness in *Tanudjaja v Canada*,<sup>279</sup> Marie-Ève Sylvestre provides compelling evidence of the arbitrary and unreasonable nature of current responses to homelessness. Sylvestre argues that:

As programmatic responses that addressed the causes of homelessness such as social housing, investment in health care or employment policies, have been reduced or eliminated, governments have adopted unprecedented measures based on the "stigma" of homelessness as a perceived "moral" failure and designed to make homeless people disappear from the public sphere.<sup>280</sup>

As Sylvestre explains, by prohibiting behavior linked to homelessness in public spaces, such as parks, subway stations and sidewalks, governments have criminalized homeless people

---

<sup>276</sup> *Ibid* at para 133.

<sup>277</sup> See above at pp 7 – 18.

<sup>278</sup> *Ibid*.

<sup>279</sup> *Tanudjaja*, *supra* note 259.

<sup>280</sup> Marie-Eve Sylvestre, *Affidavit for Tanudjaja v Canada* (Ont Sup Ct File no CV-10-403688) (2011).

rather than addressing their need for housing.<sup>281</sup> She points out that homeless people received between 30% and 50% of all statements of offences served by the Montreal police in 2004 and 2005.<sup>282</sup> The result of these punitive measures, involving the imposition of fines on those who are unable to pay them, is frequently unwarranted incarceration. Sylvestre's conclusions are reinforced by a recent study conducted by the John Howard Society of Toronto, which found that 69% of the respondents experienced residential instability in the two years prior to their incarceration; 24% of them had used a shelter during that period; and 23% were homeless.<sup>283</sup> Sylvestre summarizes the existing situation:

High incarceration rates among homeless and vulnerably housed individuals are largely explained by three structural factors: first, homeless people are more visible and often targeted by law enforcement because of their occupation of public spaces and may end up incarcerated for these reasons; second, criminalization has been one of the dominant state responses to homelessness in the last decades and accordingly, the number of adults with no fixed address admitted to correctional facilities has increased; and third, the number of ex-prisoners released onto the streets is very high. Thus, homelessness leads to incarceration, and incarceration, in turn, produces homelessness.<sup>284</sup>

This kind of punitive and arbitrary governmental response to the needs of a vulnerable population, and the failure to take whatever action is necessary to ensure access to services to better ensure the protection of life and security of the person, is clearly not in accordance with principles of fundamental justice, as interpreted by the Supreme Court of Canada, in particular in the *Insite* case.

#### **iv) Participatory Rights and Fundamental Justice**

Section 7 of the *Charter* also provides important support for the principle of participation in the design, implementation, monitoring, and evaluation of strategies to address

---

<sup>281</sup> See Joe Hermer & Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2002).

<sup>282</sup> Sylvestre, *supra* note 280. See also Commission des droits de la personne et des droits de la jeunesse, *La judiciarisation des personnes itinérantes à Montréal: Un profilage social*, cat 2.120-8.61, Montréal, Commission des droits de la personne, novembre 2009; Marie-Eve Sylvestre et al, « Le droit est aussi une question de visibilité : occupation des espaces publics et parcours judiciaires des personnes itinérantes à Montréal et à Ottawa » (2011) RCDS (à paraître).

<sup>283</sup> Amber Kellen et al, *Homeless and Jailed: Jailed and Homeless* (Toronto: John Howard Society of Toronto, 2010) at 18-20.

<sup>284</sup> Sylvestre, *supra* note 280.

poverty and homelessness, as has been recommended by UN human rights bodies and by civil society organizations in Canada.<sup>285</sup> Section 7 of the *Charter* can be read to require meaningful participation in all levels of governmental decision-making that affect life, liberty and security of the person. Participation by those whose rights and interests are at stake should occur, both at the level of individual access to essential services, and within broader decision-making processes relating to public policy and resource allocation.<sup>286</sup> Jennifer Nedelsky explains the importance of due process guarantees in the social assistance context:

The opportunity to be heard by those deciding one's fate, to participate in the decision ... means ... that the recipients will experience their relations to the agency in a different way. The right to a hearing declares their views to be significant, their contribution to be relevant. In principle, a hearing designates recipients as part of the process of collective decision making, rather than as passive, external objects of judgment. Inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power.<sup>287</sup>

The Supreme Court of Canada has held that, aside from the substantive requirements of fundamental justice such as the limit on arbitrary government action discussed above, section 7 also includes the procedural guarantees provided under common law principles of natural justice and fairness.<sup>288</sup> Among these are the right to adequate notice of a decision, the right to respond, and the right to be heard by a fair and impartial decision-maker.<sup>289</sup> In *G(J)*, Chief Justice Lamer held that, in order to comply with the requirements of fundamental justice, a person “must be able to participate meaningfully” and “effectively” in a decision-making process that engages his or her section 7 rights.<sup>290</sup> He concluded in that case that the government of New Brunswick had a positive obligation to provide legal aid to the appellant, a mother in receipt of social assistance who was threatened with the loss of custody of her children, and who could not afford a lawyer to represent her.<sup>291</sup>

---

<sup>285</sup> See above at pp 7-14.

<sup>286</sup> Martha Jackman, “The Right to Participate in Health Care and Health Resource Allocation Decisions Under Section 7 of the *Canadian Charter*” (1995/1996) 4:2 Health L Rev 3 at 5 [Jackman, “Health Care”].

<sup>287</sup> Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 Yale JL & Feminism 7 at 27.

<sup>288</sup> *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 212-216; *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631 at 656.

<sup>289</sup> See generally JM Evans, “The Principles of Fundamental Justice: The Constitution and the Common Law” (1991) 29:1 Osgoode Hall LJ 51; Jackman, “Welfare Rights”, *supra* note 235 at 305-322.

<sup>290</sup> *G(J)*, *supra* note 252 at paras 81, 83.

<sup>291</sup> *Ibid* at para 107.

The procedural safeguards imposed by section 7 are designed not only to ensure that the decision-maker has all the information he or she needs to make an accurate and appropriate decision, but also to guarantee that the decision-making process itself respects the dignity and autonomy of the person whose life, liberty or security-related interests are at stake.<sup>292</sup> Thus the Court has held that decisions implicating section 7 rights which are made without adequate and uniform standards (such as failure by the decision-maker to consider all of the relevant circumstances or to fairly consider the affected person's representations), would not be in accordance with the principles of fundamental justice.<sup>293</sup>

In addition to participatory rights demanded in individualized decision-making, the way in which a program or policy is implemented at a systemic level may also violate section 7 principles of fundamental justice. For instance, in *Wareham v Ontario (Ministry of Community and Social Services)* the Ontario Court of Appeal held that “there is a potential argument to be made that a delay in processing applications for welfare benefits, essential for day-to-day existence and to which the applicants are statutorily entitled, could engage the right to security of the person where that delay has caused serious physical or psychological harm.”<sup>294</sup> The Court accepted Lorne Sossin’s view that bureaucratic disempowerment includes “structural and situational features of the welfare eligibility process which together have the effect of discouraging applicants and demoralizing recipients.”<sup>295</sup> Sossin contends that: “applicants for benefits, many of whom are seriously disadvantaged and vulnerable, face difficulties and unnecessary barriers to an expeditious and fair determination of their claim on its merits” and that this amounts to a violation of procedural fairness guarantees.<sup>296</sup> The plaintiffs in *Wareham* were thus given the opportunity to amend their pleadings to include a claim for breaches of section 7 of the *Charter* based on the government’s failure to comply with the procedural requirements of the principles of fundamental justice.<sup>297</sup>

Section 7 principles of fundamental justice should be read as requiring the kinds of participatory rights demanded by international human rights bodies to ensure that those whose interests are at stake are accorded access to key decision-making processes in the design,

---

<sup>292</sup> Jackman, “Health Care”, *supra* note 286 at 22-23.

<sup>293</sup> *R v Jones*, [1986] 2 SCR 284, cited in Jackman, “Health Care”, *supra* note 286 at 24; *R v Morgentaler*, [1988] 1 SCR 30 at 63-73.

<sup>294</sup> *Wareham v Ontario (Ministry of Community and Social Services)*, 2008 ONCA 771 at para 17, 93 OR (3d) 27 [Wareham].

<sup>295</sup> Lorne Sossin, “Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance” (2004) 42:3 Osgoode Hall LJ 363 at 399, cited in *Ibid* at 30 [Sossin, “Boldly Going”].

<sup>296</sup> *Ibid*.

<sup>297</sup> *Wareham*, *supra* note 294 at para 34.

implementation and administration of strategies and programs addressing poverty and housing need. For example, in *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (Guidelines)*, the High Commissioner for Human Rights has called for States to set targets, benchmarks and priorities in a participatory manner “so that they reflect the concerns and interests of all segments of the society” when creating human rights-based strategies.<sup>298</sup> The UN’s former Special Rapporteur on adequate housing, Miloon Kothari, emphasized the importance of using participatory mechanisms for accessing necessary information and for providing accountability to stakeholders in the evaluation of housing programs and strategies.<sup>299</sup> In the context of determining what steps a state must take to meet the “reasonableness standard” set out in the *OP-ICESCR*,<sup>300</sup> the *CESCR* has also stated that it will examine whether the decision making process with regard to the implementation of a policy or program is transparent and participatory.<sup>301</sup>

These types international human rights law obligations should inform domestic courts’ and decision-makers’ interpretation and application of the right to participation guaranteed under section 7. Individual dignity, security and autonomy must be protected through meaningful opportunity to participate in decision-making at both an individual and broader public policy level. Adequate notice must be provided regarding any changes to benefits or programs, ensuring that individuals have a right to be heard by decision makers; a right to appeal decisions; and a right to judicial review.<sup>302</sup> In the broader policy and regulatory setting, generalized decisions relating to poverty and homelessness and the allocation of resources and services should be open to hearings and rights-based adjudication and review for compliance with human rights norms, with meaningful engagement with stakeholders. Those whose section 7 interests are most directly at risk in the regulatory and policy-making process should be given full participatory rights in decision-making. In particular, active steps should be taken to guarantee the inclusion of disadvantaged groups – those whose members are lacking in resources and who do not have an established history of participation (or grounds for confidence in its value). Such measures are required to ensure that collective involvement in decision-making actually results in a more equitable and efficient distribution of decision-

---

<sup>298</sup> United Nations Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) at para 55.

<sup>299</sup> *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kothari, UN Human Rights Council, 4th Sess, UN Doc A/HRC/4/18, (2007).

<sup>300</sup> *OP-ICESCR*, *supra* note 10.

<sup>301</sup> United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007).

<sup>302</sup> See Sossin, “Boldly Going”, *supra* note 295; Jackman, “Welfare Rights”, *supra* note 235.

making authority, and does not simply reinforce existing decision-making patterns and structures.<sup>303</sup>

Participatory processes in accordance with procedural guarantees of fundamental justice must therefore be grounded in rights. As Louise Arbour has affirmed in reference to access to justice as a procedural guarantee, “the possibility for people themselves to claim their human rights entitlements through legal processes is essential so that human rights have meaning for those most at the margins, a vindication of their equal worth and human agency.”<sup>304</sup> The constitutional entitlement to rights-informed accountability frameworks to address homelessness and poverty, ensuring that decision-makers provide proper hearings to rights-holders and make decisions in accordance with the full recognition of their rights, is particularly important when addressing systemic concerns in relation to vulnerable groups.

## H. Section 15 of the *Charter*: Equality Rights

Section 15(1) of the *Charter* states 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.<sup>305</sup>

As noted above, civil society organizations in Canada, parliamentary committees as well as international human rights bodies, have emphasized that strategies to address poverty and homelessness should be informed by an equality rights framework.<sup>306</sup> An emphasis on equality rights ensures appropriate attention is paid to the situation of disadvantaged and marginalized groups – one of the key requirements of “reasonable” policies and programs in international human rights law, as well as in domestic regimes, such as South Africa.<sup>307</sup> An equality framework is also critical to addressing the structural and systemic patterns of discrimination

---

<sup>303</sup> Jackman, “Health Care”, *supra* note 286 at 31, 33.

<sup>304</sup> Arbour, *supra* note 238.

<sup>305</sup> *Charter*, *supra* note 185, s 15(1).

<sup>306</sup> See above at pp 19 – 34.

<sup>307</sup> See *Grootboom*, *supra* note 124; Geo Quinot & Sandra Liebenberg, “Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa” (Paper delivered at the Law and Poverty Colloquium, Stellenbosch University, South Africa, 29-31 May 2011), [unpublished, on file with authors].



and exclusion that underlie the problems of homelessness and poverty. As noted by the HUMA Committee's *Federal Poverty Reduction Plan*, a human rights approach "limits the stigmatization of people living in poverty."<sup>308</sup> By making more transparent the ways in which people living in poverty or homelessness are stigmatized and marginalized, an equality framework assists in understanding poverty and homelessness as more than simply a matter of unmet needs but also, fundamentally, as a denial of dignity and rights. As the Senate Sub-Committee on Cities notes in its report, *In from the Margins*:

The Charter, while not explicitly recognizing social condition, poverty or homelessness, does guarantee equality rights, with special recognition of the remedial efforts that might be required to ensure the equality of women, visible minorities (people who are not Caucasian), persons with disabilities, and Aboriginal peoples. As the Committee has heard, these groups are all overrepresented among the poor – in terms of both social and economic marginalization.<sup>309</sup>

#### **i) Substantive Equality and the Social Construction of Need**

In Canada, the field of disability rights has been at the forefront in developing the concept of substantive equality through which positive obligations of governments and other actors can be affirmed and enforced as rights. Substantive equality takes as its starting point equal citizenship and inclusion, rather than the notion of 'impairment' requiring assistance or charity. It demands that the different needs of persons with disabilities be included in program design and implementation, in a manner that ensures the rights and capacities of people with disabilities are equally valued. Disability rights organizations have emphasized the importance of understanding the 'social construction' of disability and of rejecting the 'medical' model. They have had some success in promoting judicial understanding of how discrimination and social exclusion constitute people with disabilities as "impaired" and how these systemic structures must be effectively challenged if section 15 of the *Charter* is to fulfill its promise. As Justice Binnie explained in *Granovsky v Canada (Minister of Employment and Immigration)*:

The true focus of the s. 15(1) disability analysis is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the "large

---

<sup>308</sup> HUMA Committee, *Poverty Reduction Plan*, *supra* note 227 at 2.

<sup>309</sup> *In from the Margins*, *supra* note 76 at 69.



remedial component” ... that creates the legally relevant human rights dimension to what might otherwise be a straightforward biomedical condition.<sup>310</sup>

A remedial approach based on substantive equality principles requires a fundamental reformulation, focused on rights rather than simply on needs. The fact that a wheelchair user is unable to access a workplace because there is no ramp was understood, in earlier discourse on disability, simply as a ‘need’ that required ‘accommodation’. Under a substantive equality framework, however, the need for a ramp, and for positive measures to accommodate the need, is understood as flowing from a more profound exclusion and devaluing of people with disabilities. In this example, architecture and building design has failed to recognize the equal right of mobility-impaired workers to inclusion in workplaces. By universalizing an able-bodied norm, and by designing workplaces on the basis of the stereotype that people with disabilities are not an integral part of the work-force, exclusionary architecture created a “need” for a wheelchair ramp, with cost consequences that could have been avoided had more inclusionary design been implemented at the outset.<sup>311</sup>

The same approach applies to other grounds of discrimination. To address the structural and systemic issues underlying the inequality of disadvantaged groups, it is important to consider whether unmet needs are linked to discriminatory exclusions and devaluing of the group. This is how the Supreme Court of Canada dealt with an aerobics requirement that disproportionately disqualified women from positions as firefighters in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*.<sup>312</sup> In *Granovsky*, Justice Binnie notes that the Court concluded in *BCGSEU* that: “[t]he ‘problem’ did not lie with the female applicant but with the state’s substitution of a male norm in place of what the appellant was entitled to, namely a fair-minded gender-neutral job analysis.”<sup>313</sup>

An equality framework provides a similar conceptual basis for rights-based challenges to structural and systemic causes of poverty or homelessness, and provides the critical foundation for transforming a needs-based approach to poverty and homelessness into a rights-based approach, consistent with international human rights norms. Women do not have a need to be accommodated in order to become firefighters, but rather have a ‘right’ to a fair policy that

---

<sup>310</sup> *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 26, 186 DLR (4th) 1 [Granovsky].

<sup>311</sup> There will, of course, be competing needs and entitlements requiring a balancing. Positive measures necessary to address the needs of disadvantaged groups, even when these are linked to social exclusion and previous discrimination, may have budgetary implications. The balancing of competing needs for positive measures is to be conducted under section 1, as described below.

<sup>312</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [BCGSEU].

<sup>313</sup> *Granovsky*, *supra* note 310 at para 40.

values their right to inclusion. So too do those living in poverty and homelessness have a right to housing and anti-poverty strategies, and to reasonable social policies and programs that implement access to housing and income adequacy, as rights to equal citizenship and inclusion. An equality analysis challenges the devaluing of the rights claims of the group in comparison to those of more advantaged members of society. It is this devaluing of rights that Amartya Sen described as “entitlement system failures”, leading to hunger or homelessness even in circumstances when adequate resources are available to ensure that no one is denied these rights.<sup>314</sup>

A number of negative section 15 decisions, including at Supreme Court of Canada level, has left many commentators in doubt as to the value of pursuing substantive equality before Canadian courts.<sup>315</sup> However, a firm basis can still be found in the Supreme Court’s equality jurisprudence for a conceptual framework that can ground a renewed rights-based approach to poverty and homelessness in Canada. In *R v Kapp*,<sup>316</sup> the Court eschewed the formalism of the analytical framework laid out in its earlier *Law v Canada (Minister of Employment and Immigration)* decision.<sup>317</sup> In *Law*, based on the premise that equality is an inherently comparative concept,<sup>318</sup> the Court formalized the requirement that claimants establish an appropriate comparator (or mirror) group with whom they wished to be compared for the purposes of advancing their discrimination claim.<sup>319</sup> This requirement frequently translated into a rigid judicial analysis of which group the claimant should properly be compared to, in order to determine if the respective groups were being treated the same, leaving those without a clear comparator group without any protection under section 15.<sup>320</sup> In *Kapp* however, the Court

---

<sup>314</sup> Amartya Sen, “Property and Hunger” (1988) 4:1 *Economics and Philosophy* 57 reprinted in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004) 402.

<sup>315</sup> For critiques of recent Canadian equality jurisprudence, see Sheila McIntyre & Sanda Rogers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis Butterworths, 2006); Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

<sup>316</sup> *R v Kapp*, [2008] 2 SCR 483 [*Kapp*].

<sup>317</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*].

<sup>318</sup> In *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164 [*Andrews*], the Supreme Court explained that differential treatment can only be discerned by comparing the condition of the claimant against others in a similar social and political circumstances. In *Hodge v Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357 at para 23, the Court explained that an appropriate comparator group is one that: “mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes or omits a personal characteristic in a way that is offensive to the *Charter*.”

<sup>319</sup> *Law*, *supra* note 317 at 56.

<sup>320</sup> An example of the rigid approach to mirror comparator analysis is found in the Supreme Court of Canada’s decision in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657, in which the petitioners sought coverage of controversial intensive behavioural therapy for their children’s autism. Chief Justice McLachlin stated that, to establish a violation of section 15, the petitioners must find a comparator group which “should mirror the characteristics of the claimant or claimant group relevant to the benefit or

rejected such a formal approach, acknowledging the criticism of the *Law* decision as having narrowed equality analysis to “an artificial comparator analysis focused on treating likes alike.”<sup>321</sup> The Court reiterated the ideal of substantive equality as it was affirmed in the Court’s landmark judgment in *Andrews v Law Society of British Columbia*, which often involves treating groups differently in order to address unique needs.<sup>322</sup> As Justice McIntyre found in that case, in contrast to formal equality, substantive equality is grounded in the idea that “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”<sup>323</sup>

In its decision in *Kapp*, the Court established a simplified two-step framework for assessing section 15 claims: it must be determined, first, whether a policy or provision creates a distinction on an enumerated or analogous ground and, second, whether the distinction is discriminatory in a substantive sense. In *Withler v Canada (Attorney General)*,<sup>324</sup> the Court further clarified that the equality analysis does not depend on identifying a particular comparator group, which mirrors the claimant’s characteristics.<sup>325</sup> The Court explained the faults of mirror comparator group analysis, noting that it may “fail to capture substantive inequality and .... may fail to identify — and, indeed, thwart the identification of — the discrimination at which s. 15 is aimed.”<sup>326</sup>

More recently, in the case of *Moore*<sup>327</sup> the Supreme Court reaffirmed its rejection of the comparator group approach, rejecting the finding of the BC Court of Appeal in that case that a refusal to provide special education to a student with particular learning disabilities can only be found to constitute discrimination by comparing the effect of the policy on other students with learning disabilities.<sup>328</sup> Abella J. noted that comparing the claimant in that case only with other special needs students “would mean that the District could cut *all* special needs programs and

---

advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised.” Thus, the Chief Justice held, the petitioners must demonstrate differential treatment in comparison to “a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.” For a critique of the decision see Martha Jackman, “Health and Equality: Is There a Cure?” (2007) 15 Health LJ 87.

<sup>321</sup> *Kapp*, *supra* note 316 at para 22.

<sup>322</sup> *Andrews*, *supra* note 318.

<sup>323</sup> *Ibid* at para 34.

<sup>324</sup> [2011] 1 SCR 396 [*Withler*].

<sup>325</sup> *Ibid* at para 60.

<sup>326</sup> *Ibid*.

<sup>327</sup> *Moore v. British Columbia (Education)*, SCC 2012 61

<sup>328</sup> *Ibid*.

yet be immune from a claim of discrimination.”<sup>329</sup> “If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to.”<sup>330</sup>

As noted in the Senate Sub-Committee’s Report, *In from the Margins*, governments’ failures to adequately address homelessness and poverty engage the equality rights of groups protected from discrimination under section 15, such as women, people with disabilities, Aboriginal people and racialized groups, because these groups are over-represented among the poor and the homeless.<sup>331</sup> However, to better understand and expose the way in which needs related to poverty and homelessness are themselves socially constructed based on stereotype and stigmatization, it is also important to consider whether poverty or homelessness should be directly recognized as prohibited grounds of discrimination, analogous to the grounds that are expressly enumerated under section 15.

## **ii) Analogous Grounds: The “Social Conditions” of Poverty and Homelessness**

The analogous grounds inquiry, according to the Supreme Court, is to be undertaken in a purposive and contextual manner.<sup>332</sup> The “nature and situation of the individual or group, and the social, political, and legal history of Canadian society’s treatment of that group” must be considered;<sup>333</sup> specifically, whether persons with the characteristics at issue are lacking in political power, disadvantaged, or vulnerable to having their interests overlooked.<sup>334</sup> In its decision in *Miron v Trudel*,<sup>335</sup> the Court identified a number of factors that may be considered in determining whether an analogous ground of discrimination should be recognized under section 15, including whether:

- the proposed ground may serve as a basis for unequal treatment based on stereotypical attributes;
- it is a source of historical social, political and economic disadvantage;
- it is a “personal characteristic”;
- it is similar to one of the enumerated grounds;
- the proposed ground has been recognized by legislatures and the courts as linked to discrimination;

---

<sup>329</sup> *Ibid.* at para. 30-31.

<sup>330</sup> *Ibid.* at para. 30-31.

<sup>331</sup> *In from the Margins*, *supra* note 76 at 69-70.

<sup>332</sup> *Law*, *supra* note 317 at para 6; *Andrews*, *supra* note 318 at para 46.

<sup>333</sup> *Law*, *supra* note 317 at para 93.

<sup>334</sup> *Ibid.* at para 29; *Andrews*, *supra* note 318 at para 152.

<sup>335</sup> *Miron v Trudel*, [1995] 2 SCR 418.

- the group experiencing discrimination on the proposed ground constitutes a discrete and insular minority; and
- the proposed ground is similar to other prohibited grounds of discrimination in human rights codes.<sup>336</sup>

Noting that “it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1)”, the Court in *Miron* cautioned that “while discriminatory group markers often involve immutable characteristics, they do not necessarily do so.”<sup>337</sup>

In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, the Court broadened the concept of immutability by introducing the notion of “constructive immutability” linked to identity and prevailing social attitudes.<sup>338</sup> While reiterating that the analogous ground inquiry must consider the general purpose of section 15, the majority of the Court went on to suggest that analogous grounds must either be “actually immutable, like race, or constructively immutable, like religion” and that other factors to be considered in the analogous grounds analysis “may be seen to flow from the central concept of immutable or constructively immutable personal characteristics ...”<sup>339</sup> The Court explained that the basis for recognizing constructively immutable characteristics as analogous grounds is that these characteristics either cannot be changed or “the government has no legitimate interest in expecting us to change to receive equal treatment under the law.”<sup>340</sup> The Court concluded that the distinction between on-reserve and off-reserve residential status, at issue in *Corbiere*, “goes to a personal characteristic essential to a band member’s personal identity, which is no less constructively immutable than religion or citizenship.”<sup>341</sup>

There are compelling reasons for recognizing that the socially constructed dimension of homelessness and poverty make these characteristics constructively immutable in the same way as off-reserve residential status was found to be constructively immutable in *Corbiere*. In considering whether homelessness or poverty are analogous grounds of discrimination under section 15, a purposive approach must distinguish the economic deprivation linked to homelessness or poverty from the “social condition” or the socially constructed identities and characteristics of those who are poor or homeless which are embedded in broader historical and societal structures. Quantifiable measures of income level,

---

<sup>336</sup> *Ibid* at paras 144-155.

<sup>337</sup> *Ibid* at paras 148-149.

<sup>338</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203[*Corbiere*].

<sup>339</sup> *Ibid* at paras 5,13.

<sup>340</sup> *Ibid* at para 13.

<sup>341</sup> *Ibid* at para 14.

like measures of biomedical impairment connected with disability, may accurately identify needs that must be addressed. However, as with disability, it is the social dimension of poverty or homelessness, including social relationships characterized by exclusion and stigmatization, which is linked to the patterns of discriminatory treatment and failures to recognize the groups' unique capacities and needs.

This social dimension of poverty and homelessness has been recognized under the prohibited ground of "social condition" in Canadian human rights legislation. All provincial and territorial human rights statutes in Canada provide protection from discrimination because of "social condition" (New Brunswick, Northwest Territories, Quebec) or a related ground such as "social origin" (Newfoundland); "source of income" (Alberta, British Columbia, Manitoba, Nova Scotia, Nunavut, and Prince Edward Island), or "receipt of public assistance" (Ontario and Saskatchewan).<sup>342</sup> These different grounds have been interpreted broadly to provide protection against discrimination on the basis of poverty, low level of income, reliance on public housing, and homelessness.<sup>343</sup> The only human rights legislation in Canada that does not provide protection from discrimination because of social condition or a similar ground is the *Canadian Human Rights Act*.<sup>344</sup> The Canadian *Human Rights Act* Review Panel, chaired by former Supreme Court of Canada Justice Gérard LaForest, was asked by the federal Minister of Justice to consider this exclusion, among other issues, and found that there was "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy."<sup>345</sup> The Panel recommended "the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the Act in order to provide protection from discrimination because of disadvantaged socio-economic status, including homelessness."<sup>346</sup> The LaForest Panel's recommendations have not

---

<sup>342</sup> Russel W Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, loose-leaf (consulted on June 2, 2010) (Aurora, Ont: Canada Law Book, 1996), ch 13:30.

<sup>343</sup> See e.g. *Ontario (Human Rights Commission) v Shelter Corp* (2001), 143 OAC 54, [2001] OJ no 297 (QL); *Québec (Commission des droits de la personne) c Whittom* (1997), 73 ACWS (3d) 490, [1997] JQ no 2328 (CA Qc), confirmant (1994) 20 CHRR D/349, (1993) RDLPD 55-1 (Tribunal des droits de la personne du Québec); *Quebec (Commission des droits de la personne) v Gauthier*, (1994) 19 CHRR D/312, (1993) RDLPD 47-1 cited in *ibid* at 13-14. See also the Honourable Lynn Smith & William Black, "The Equality Rights" in Gerald A Beaudoin & Errol Mendes, eds, *Canadian Charter of Rights and Freedoms*, 4th ed (Markham, Ont: LexisNexis Butterworths, 2005) at 1010-1011.

<sup>344</sup> *Human Rights Act*, RSC 1985, c H-6.

<sup>345</sup> Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 107.

<sup>346</sup> *Ibid* at 106-112.

been implemented. Although strongly supported by civil society organizations and UN human rights bodies, the LaForest Panel's recommendations have not been implemented.<sup>347</sup>

Poverty and homelessness have also been linked to grounds of discrimination under international human rights law. In *General Comment No. 20* on non-discrimination, the CESCR lists a number of grounds of discrimination, which are comparable to enumerated grounds under the *ICESCR*.<sup>348</sup> Along with grounds such as disability and sexual orientation, the Committee lists "economic and social situation" noting that "[a] person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping."<sup>349</sup> In a recent report presented to the UN General Assembly, the UN Special Rapporteur on Extreme Poverty, Magdalena Sepulveda, described patterns of stigmatization and penalization of poor people as common to both developed and developing countries:

Penalization measures respond to discriminatory stereotypes that assume that persons living in poverty are lazy, irresponsible, indifferent to their children's health and education, dishonest, undeserving and even criminal. Persons living in poverty are often portrayed as authors of their own misfortune, who can remedy their situation by simply "trying harder". These prejudices and stereotypes are often reinforced by biased and sensationalist media reports that particularly target those living in poverty who are victims of multiple forms of discrimination, such as single mothers, ethnic minorities, indigenous people and migrants. Such attitudes are so deeply entrenched that they inform public policies and prevent policymakers from addressing the systemic factors that prevent persons living in poverty from overcoming their situation.<sup>350</sup>

The Special Rapporteur recommended that States "ensure that discrimination on the basis of economic and social status is prohibited by law and the law applied by courts."<sup>351</sup>

Characterizing homelessness or poverty as including not only economic deprivation, but also a socially created identity, encourages an appreciation of the systemic or structural obstacles which prevent equal participation, including prevailing patterns of marginalization,

<sup>347</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 19th Sess, UN Doc E/C.12/1/Add.31, (1998) at para 51.

<sup>348</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art 2 para 2)*, UNCESCROR, 42d Sess, UN Doc E/C.12/GC/20, (2009).

<sup>349</sup> *Ibid* at para 35.

<sup>350</sup> *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda*, UNGAOR, 66th Sess, UN Doc A/66/265, (2011) at para 7.

<sup>351</sup> *Ibid* at para 82(b).



stereotype and social exclusion linked to the devaluation of the group's rights and, as a consequence, unmet needs. Understanding the social construction of the group's imputed characteristics, often through stigmatization, stereotyping and prejudice, brings into focus the social relations and attitudes which often accompany and exacerbate physical and material deprivations.

The Supreme Court of Canada has yet to consider the question of whether the social conditions of homelessness and of poverty are analogous grounds under section 15. Lower court jurisprudence on the issue is mixed. As described below, where courts have considered evidence of the socially constructed exclusion and devaluing of poor people and homeless people, including evidence of stereotyping and stigma, these have been recognized as analogous grounds of discrimination.<sup>352</sup> However, in cases where the courts have focused solely on the characteristic of economic need or income level, analogous grounds claims have been rejected. In this latter category of cases, courts have found that income level or economic circumstances can change and on that basis, that poverty does not satisfy the "immutability" requirement for analogous grounds identified by the Supreme Court in *Corbiere*.<sup>353</sup> In some of these cases the courts have focused on income level, in relation to a generalized poverty line, and found that income level may change. In others, the courts have considered economic activities linked to poverty and homelessness, such as "begging" or "panhandling", and concluded that economic activity is not an immutable personal characteristic that can be protected under section 15.<sup>354</sup>

The denial of analogous grounds claims on the basis that people may move in and out of poverty or homelessness represents a misapplication of the concept of immutability as set out in *Corbiere*. In *Corbiere*, the Supreme Court considered whether the status of living off-reserve

---

<sup>352</sup> *Federated Anti-Poverty Groups of BC v Vancouver (City)*, 2002 BCSC 105 at paras 201-202, 40 Admin LR (3d) 159 [Federated Anti-Poverty Groups]; *Falkiner v Ontario (Ministry of Community and Social Services)* (1996), 140 DLR (4th) 115 at 130-139, 153, 94 OAC 109, Rosenberg J, dissenting (Ont Ct J (Gen Div)); *Falkiner v Ontario (Ministry of Community and Social Services)* (2000), 188 DLR (4th) 52, 134 OAC 324 (Ont Div Ct); *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (Ont CA) [Falkiner CA]; *Schaff v Canada* (1993), 18 CRR (2d) 143 at para 52, [1993] TCJ no 389 (QL); *Dartmouth/Halifax County Regional Housing Authority v Sparks* (1993), 119 NSR (2d) 91, 101 DLR (4th) 224 (NSCA) [Sparks]; *R v Rehberg* (1993), 127 NSR (2d) 331, 111 DLR (4th) 336 (NSSC) [Rehberg].

<sup>353</sup> *Supra* note 338.

<sup>354</sup> *R v Banks*, 2007 ONCA 19 at para 104, 84 OR (3d) 1, leave to appeal to SCC refused, [2007] SCCA no 139 [Banks]; *Thibaudeau v Canada*, [1995] 2 SCR 627; *Donovan v Canada*, [2006] 1 CTC 2041 at para 18, 59 DTC 1531 (TCC) (the amount of a child support payment is a question of economic status which is not an immutable personal characteristic); *Dunmore v Ontario (AG)*, (1997), 37 OR (3d) 287 (Ont Gen Div), aff'd (1999), 182 DLR (4th) 471 (ONCA), rev'd on other grounds 2001 SCC 94 (working in a particular economic sector, namely as an agricultural worker, is not a personal characteristic); *Bailey v Canada*, 2005 FCA 25 at para 12, 248 DLR (4th) 401 (FCA) (income level is not to be considered a personal characteristic).

constituted an analogous ground. It concluded that this ground was immutable and qualified as analogous.<sup>355</sup> The Court did not, however, consider the question of immutability in relation to mere residency status as such, or rely on any data quantifying the frequency of movement between on-reserve and off-reserve residence. Rather, the immutability analysis was focused on the socially constructed characteristics associated with on-reserve and off-reserve status. The Court considered how residency status was tied to social identity and social relations, such that it may “stand as a constant marker of potential legislative discrimination” and serve as a marker for “suspect distinctions.”<sup>356</sup> The majority in *Corbiere* was also anxious to preserve the principle first enunciated in the *Andrews* decision, that the analogous grounds analysis should not be restricted to the facts of a particular case, but rather must be conducted “in the context of the place of the group in the entire social, political and legal fabric of our society.”<sup>357</sup> The majority of the Court insisted that a ground found to be analogous must be considered analogous in all cases, pointing out that distinctions made on the basis of an enumerated or analogous ground will not always constitute discrimination within the meaning of section 15.<sup>358</sup> The contextual analysis of the effects of a particular provision, action, or failure to act must be carried out under the second part of the section 15 analysis, in considering whether a distinction on the basis of an enumerated or analogous ground is discriminatory.<sup>359</sup>

Judicial decisions predating *Corbiere*, which recognize poverty as an analogous ground, are not inconsistent with the focus on socially constructed identity which the majority in *Corbiere* relied on in developing the concept of ‘constructive immutability’. In its decision in *Dartmouth/Halifax County Regional Housing Authority v Sparks*, involving a challenge to provincial residential tenancies legislation that excluded public housing tenants from “security of tenure” protections afforded to private sector tenants, the Nova Scotia Court of Appeal found that poverty and reliance on public housing constituted analogous grounds under section 15.<sup>360</sup> While acknowledging that people may move in and out of public housing, the Court recognized that social attitudes towards residency in public housing attach to personal identity in a way that attracts stigma and discriminatory treatment. Writing for the Court, Justice Hallett noted that attitudes toward public housing tenants were linked to the over-

---

<sup>355</sup> *Corbiere*, supra note 338.

<sup>356</sup> *Ibid* at paras 10-11.

<sup>357</sup> *Ibid* at para 60, citing *Andrews*, supra note 318 at 152.

<sup>358</sup> *Corbiere*, supra note 338 at para 10. Some lower courts have ignored this directive, however, distinguishing circumstances in which poverty or receipt of social assistance is not an analogous ground from cases in which it has been found to be one. See *Guzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134 at para 21, [2007] 3 FCR 411; *Toussaint v Minister of Citizenship and Immigration* 2009 FC 873 at paras 81-82, [2010] 3 FCR 452.

<sup>359</sup> *Corbiere*, supra note 338.

<sup>360</sup> *Sparks*, supra note 352.

representation of racialized households and single mothers among those living in poverty and relying on public housing.<sup>361</sup> He concluded that: “the impugned provisions amount to discrimination on the basis of race, sex and income.”<sup>362</sup> The Court of Appeal’s reasoning in the *Sparks* case was later applied by the Nova Scotia Supreme Court in *R v Rehberg*, in which the Court upheld a section 15 challenge to a “spouse in the house” rule that disentitled sole support parents, largely women, from receiving social assistance benefits if they were co-habiting with a man. The Court found that the differential treatment of co-habitants when they rely on social assistance constituted discrimination on the ground of poverty.<sup>363</sup>

The *Sparks* and *Rehberg* decisions were cited by the Ontario Court of Appeal in *Falkiner v Ontario (Ministry of Community and Social Services)*, which involved a similar challenge to “spouse in the house” rules in Ontario.<sup>364</sup> Justice Laskin likewise found that there was significant evidence of historical disadvantage and continuing prejudice against social assistance recipients, concluding that “recognizing receipt of social assistance as an analogous ground of discrimination under s. 15(1) would further the protection of human dignity.”<sup>365</sup> Also in Ontario, in *R v Clarke*,<sup>366</sup> Justice Ferrier considered whether, in the context of jury selection, discriminatory attitudes toward those living in poverty or who are homeless ought to be recognized as a basis for challenges to prospective jurors. Noting the findings of the Ontario Court of Appeal in *Falkiner*, Justice Ferrier concluded that “there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight.”<sup>367</sup> He further found that “the prejudice against the poor and homeless is similar to racial prejudice.”<sup>368</sup>

As the Senate Sub-Committee observed in *In from the Margins*, homelessness and poverty must also be understood as intersecting with other grounds of discrimination: “These and other characteristics, including gender and race, interact to create particularly complex challenges.”<sup>369</sup> The CESCR has pointed out that women, especially single mothers, people with disabilities, racialized groups, Aboriginal people, newcomers and youth, are disproportionately

---

<sup>361</sup> *Ibid* at para 31.

<sup>362</sup> *Ibid* at paras 26-27.

<sup>363</sup> *Ibid* at para 83.

<sup>364</sup> *Falkiner CA*, *supra* note 352 at para 90.

<sup>365</sup> *Ibid* at para 86.

<sup>366</sup> *R v Clarke* (2003), 61 WCB (2d) 134, [2003] OJ No 3883 (QL).

<sup>367</sup> *Ibid* at para 18.

<sup>368</sup> *Ibid*.

<sup>369</sup> *In from the Margins*, *supra* note 76 at 27.

affected by homelessness and poverty in Canada.<sup>370</sup> An equality framework must be informed by an understanding of systemic patterns of discrimination against these groups as well. A purposive equality rights analysis must consider, for example, how attitudes toward people with mental health disabilities, youth or racialized immigrants, are manifested in government and public responses to homelessness and poverty. As UN human rights monitoring bodies have underscored,<sup>371</sup> the disaggregated data called for in monitoring and implementation strategies for poverty and housing strategies, as well as provisions ensuring representation of these groups in decision-making processes, are critical components of strategies and programs addressing poverty and homelessness. In the context of Ontario, an equality framework consistent with section 15 of the *Charter* is commensurate with these international human rights obligations.

### iii) Substantive Discrimination

The second stage of the Supreme Court's equality analysis under section 15 involves a consideration of whether a law or policy that draws a distinction on a prohibited ground is discriminatory in the substantive sense. An understanding of the social construction of poverty and homelessness is critical to the section 15 analysis at this stage as well. This does not mean that material deprivation or the adverse effects of governments failing to address economic need may not be found to be discriminatory in the substantive sense. Rather, failure to adequately address the economic needs of those living in poverty should be understood in light of the discrimination, exclusion and the devaluation of rights that lies behind the denial of adequate benefits.

An example of the link between government failure to address needs, and social patterns of stigma and stereotype is provided in Marie-Eve Sylvestre's affidavit in *Tanudjaja*,<sup>372</sup> in support of the section 15 challenge to governments' failure to implement effective housing

---

<sup>370</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCOR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006).

<sup>371</sup> See United Nations Committee On Economic, Social And Cultural Rights, *Guidelines on Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights*, UNESCOR, 2009, UN Doc E/C.12/2008/2 (24 March 2009) at paras 3, 10; *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kothari, UN Human Rights Council, 4th Sess, UN Doc A/HRC/4/18, (2007); *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Paul Hunt, Commission on Human Rights, 62d Sess, UN Doc E/CN.4/2006/48 (2006).

<sup>372</sup> Sylvestre, *supra* note 280.

strategies. Sylvestre's research shows how the proliferation of false stereotypes about homeless people and the devaluing of their rights are inextricably linked to government neglect of the needs of this vulnerable group. She points, as one example, to the Mayor of Ottawa's allegation that the city was attracting the homeless "like seagulls at the dump" by offering too many services. On another occasion, the Mayor compared homeless people to pigeons, saying that if Ottawa would stop feeding them, they would stop coming.<sup>373</sup> Sylvestre notes that these attitudes create socially constructed identities, as well as significant barriers to any conception of equal rights to services or programs, for members of this stigmatized group. Governments at every level are dissuaded from reasonably addressing the needs of the homeless on the basis of the stereotype that the groups' moral unworthiness and laziness means that, the more their needs are addressed, the more of a 'problem' they will become. As Sylvestre explains:

Because of the prevalence of stereotypes and stigma applied to homeless people, the lived experience of homelessness involves far more than economic deprivation and absence of housing. It becomes an all-encompassing social identity or social label for individuals. It defines one's personhood in a way that is socially constructed and difficult to change. Virtually every part of society perceives and treats a person differently once they become homeless. Law enforcement officials treat them as potentially dangerous and disorderly and in need of severe regulation: they apply measures in a discriminatory fashion, on the basis of visible signs of poverty. Politicians tend to treat them as a "problem" to be kept out of a neighbourhood by denying basic sustenance or other services, rather than equal citizens entitled to programs and services to meet their unique needs.<sup>374</sup>

While homelessness is not 'immutable' in the manner of race or sex, Sylvestre describes how this all-encompassing personal identity constitutes a relatively inflexible socially constructed characteristic that is difficult to escape:

The broader category of homelessness defines a disadvantage that is very difficult for an individual to overcome. Street exit is a long and difficult process which involves considerable movement back and forth from being homeless and being "vulnerably housed." When applying for a job, it is hard to justify the period of time that the individual remained unemployed because he or she was homeless. When applying for an apartment, the homeless person often has difficulties providing references to future landlords and is seen as an undesirable tenant. As mentioned before, homeless people will carry several thousands of dollars in unpaid fines as a result of their criminalization. This has a major impact on their ability to exit the

---

<sup>373</sup> "'Pigeons' squawk over mayor's comments on homeless", *CBC News* (25 April 2007), online: CBC.ca <<http://www.cbc.ca/news/canada/ottawa/story/2007/04/25/pigeon-070425.html>>.

<sup>374</sup> Sylvestre, *supra* note 280 at para 51.

street and change their position. In Ontario, the fact that a fine remains unpaid affects the person's credit rating. As noted above, landlords routinely check prospective tenants' credit before renting an apartment, and debt collection on unpaid fines may compromise a tenant's ability to pay rent.<sup>375</sup>

The Supreme Court has recognized that discrimination occurs when a policy fails to take into account "the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society."<sup>376</sup> The principle was first enunciated in *Andrews*, where Justice McIntyre explained that "[i]t will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances."<sup>377</sup> In *Eaton v Brant County Board of Education*<sup>378</sup> Justice Sopinka warned that ignoring the needs and capacities of people with disabilities may be "a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."<sup>379</sup> Governments must similarly recognize unique needs, capacities and circumstances and, in particular, must meet needs that are linked to economic deprivation. At the same time, however, governments and other actors must remedy the devaluing of rights and capacity that is the underlying cause of, and fuel for, the perpetuation of inequality. A rights-based approach, which restores equal citizenship to members of the group, is critical to a remedial, purposive approach to addressing homelessness and poverty amidst affluence. At a fundamental level, such an approach recognizes and addresses homelessness and poverty as denials of "a basic aspect of full membership in Canadian society"<sup>380</sup> to those who are affected.

---

<sup>375</sup> *Ibid* at para 52.

<sup>376</sup> *Law, supra* note 317 at para 70.

<sup>377</sup> *Ibid*.

<sup>378</sup> *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

<sup>379</sup> *Ibid* at paras 66-67 cited in *Eldridge, supra* note 211.

<sup>380</sup> *Law, supra* note 317 at para 74.

## **I. Section 1 of the *Charter*: The Guarantee of Reasonable Limits**

Section 1 of the *Charter* provides that:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court has affirmed that section 1 plays a dual role, both as a limit to rights and a guarantee of rights.<sup>381</sup> As Justice Arbour observed in *Gosselin*, “[w]e sometimes lose sight of the primary function of s. 1 – to constitutionally guarantee rights – focussed as we are on the section’s limiting function.”<sup>382</sup> Thus while section 1 provides a means by which governments can justify infringements of *Charter* rights, it also serves as a guarantee that laws, policies, government programs and administrative decision-makers will limit rights and balance competing societal interests in a “reasonable” manner. In this sense, section 1 serves as a potential domestic source for the international law obligation to adopt reasonable measures, commensurate with available resources and in light of competing needs, to implement and realize social and economic rights.<sup>383</sup>

Under section 1, a government seeking to defend the violation of a *Charter* right bears the onus of demonstrating that the infringement is reasonable and demonstrably justified, pursuant to a two-part test developed by the Supreme Court in *R v Oakes*.<sup>384</sup> First, the objective being pursued must “relate to concerns which are pressing and substantial.”<sup>385</sup> In other words, the objective must be sufficiently important to justify overriding a *Charter* right. Second, the means chosen must be “reasonable and demonstrably justified,” which involves a proportionality test.<sup>386</sup> In *Oakes*, the Court identified three important components of this analysis: first, the measures adopted must be “rationally connected to the objective”; second, the means adopted must impair the *Charter* right as little as possible, and; third, there must be “proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified.”<sup>387</sup>

---

<sup>381</sup> *R v Oakes*, [1986] 1 SCR 103 at 135 [*Oakes*].

<sup>382</sup> *Gosselin*, *supra* note 244 at para 352.

<sup>383</sup> See above at 41-46.

<sup>384</sup> *Oakes*, *supra* note 381.

<sup>385</sup> *Ibid* at para 69.

<sup>386</sup> *Ibid* at para 70.

<sup>387</sup> *Ibid*.



Implicit in the *Oakes* test is what Leon Trakman describes as a normative standard of justification” which serves as its backdrop.<sup>388</sup> In the words of Chief Justice Dickson, “[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter, and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justifiable.”<sup>389</sup> Chief Justice Dickson has identified the underlying *Charter* values that must guide the section 1 analysis as including social justice and equality, enhanced participation of individuals and groups in society, and Canada’s international human rights obligations.<sup>390</sup>

### **i) Section 1 and Positive Obligations to Adopt Reasonable Measures to Protect Vulnerable Groups**

In interpreting and applying section 1, the Supreme Court has underscored governments’ obligations to protect the rights of vulnerable groups. In *Irwin Toy*, for example, restrictions on advertising aimed at children under the age of thirteen were found to be a justifiable infringement of 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.<sup>391</sup> While evidence in the case suggested that other less restrictive means were available to the government to achieve its objectives, the Court affirmed it would not “in the name of minimal impairment [of a *Charter* right] ... require legislatures to choose the least ambitious means to protect vulnerable groups.”<sup>392</sup> The Court’s emphasis on the primary importance to be accorded protection of vulnerable groups in the assessment of ‘reasonable limits’ parallels the emerging standard of reasonableness under international human rights law, illustrated by requirements of a ‘reasonable’ housing policy established by the South African Constitutional Court in the *Grootboom* case.<sup>393</sup>

International human rights law generally, and the *ICESCR* in particular, are central to the values that underlie section 1. In *Slaight Communications*,<sup>394</sup> the Court found

---

<sup>388</sup> Leon E Trakman, William Cole-Hamilton & Sean Gatien, “*R v Oakes* 1986-1997: Back to the Drawing Board” (1998) 36:1 Osgoode Hall LJ 83 at 85.

<sup>389</sup> *Oakes*, *supra* note 381 at para 64.

<sup>390</sup> *Oakes*, *ibid*; *Slaight Communications*, *supra* note 189 at 1056-1057.

<sup>391</sup> *Irwin Toy*, *supra* note 240.

<sup>392</sup> *Ibid* at 999. But see *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at para 136, 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.

<sup>393</sup> *Grootboom*, *supra* note 124.

<sup>394</sup> *Slaight Communications*, *supra* note 189.

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. The Court concluded that an appropriate balancing of the two rights by the adjudicator properly came out on the side of protecting the right to work, as guaranteed in the *ICESCR*. 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 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.<sup>395</sup>

The assessment of what positive measures are reasonably required to accommodate disability or other characteristics of disadvantaged groups, in line with similar obligations under domestic human rights legislation, has been situated by the Supreme Court within the section 1 guarantee of reasonable limits.<sup>396</sup> In the *Eldridge* case,<sup>397</sup> for example, the Court considered a challenge brought by deaf patients in British Columbia to the provincial government's failure to provide sign language interpretation services within the publicly funded health insurance system. Having determined that the failure to provide interpretation services violated the section 15 of the *Charter*, the Supreme Court considered the cost of providing interpreter services to deaf patients in relation to the overall provincial health care budget. The Court concluded that the government's refusal to fund such services was not reasonable.<sup>398</sup> In the course of its section 1 analysis the Court noted that:

It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see *Simpsons-Sears, supra*, and *Central Alberta Dairy*

---

<sup>395</sup> *Ibid* at 1056-1057.

<sup>396</sup> *Schachter v Canada*, [1992] 2 SCR 679 at 709; *Egan v Canada*, [1995] 2 SCR 513 at para 99; *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 SCR 504 at para 109.

<sup>397</sup> *Eldridge*, *supra* note 211.

<sup>398</sup> *Ibid*.

*Pool, supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of “reasonable limits.”<sup>399</sup>

The “undue hardship” standard is thus found by the unanimous Court in *Eldridge* to fit within the “reasonable limits” standard of section 1. The standard of undue hardship as it has been developed in Canadian human rights law is a rigorous one in relation to the allocation of budgetary resources. In *Central Okanagan School District v Renaud*,<sup>400</sup> the Supreme Court considered the ‘undue hardship’ analysis under human rights legislation and rejected the *de minimus* test adopted in some American cases, suggesting that it “seems particularly inappropriate in the Canadian context.”<sup>401</sup> In the Court’s view:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term ‘undue’ infers that some hardship is acceptable; it is only ‘undue’ hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words ‘reasonable’ and ‘short of undue hardship.’ These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*,<sup>402</sup> the Court held that the standard of reasonableness under human rights legislation must be particularly high in relation to costs defenses put forward by governments. The Court cautioned that: “it is all too easy to cite increased costs as a reason”; that “impressionistic evidence of increased expenses will not generally suffice”; and that courts must consider that “there may be ways to reduce costs.”<sup>403</sup>

In those *Charter* cases in which the Court has approached issues of positive obligations and budgetary measures without reference to the human rights standard of “undue hardship”, the standard that has been applied under section 1 proportionality analysis has, like in *Eldridge*, been described as a rigorous one. In *G(J)*, the Court held that the government had a positive obligation under section 7 of the *Charter* to provide legal aid to parents who could not afford a lawyer when the parent’s life, liberty, or security is at stake in child custody proceedings.<sup>404</sup>

---

<sup>399</sup> *Ibid* at para 79.

<sup>400</sup> *Central Okanagan School District v Renaud*, [1992] 2 SCR 970.

<sup>401</sup> *Ibid* at para 19.

<sup>402</sup> [1999] 3 SCR 868.

<sup>403</sup> *Ibid* at para 41.

<sup>404</sup> *G(J)*, *supra* note 252.

Noting that violations of section 7 rights will only rarely be overridden by competing social interests, and hence are unlikely to be found to be constitute reasonable limits under section 1, the Court found that “a parent’s right to a fair hearing when the state seeks to suspend such parent’s custody of his or her child outweighs the relatively modest sums, when considered in light of the government’s entire budget, at issue in this appeal.”<sup>405</sup> Even in *Newfoundland (Treasury Board) v NAPE*, in which the Supreme Court found the provincial government’s decision not to honour a pay equity award in favour of public sector workers, largely women, in the amount of \$24 million, was reasonable and justifiable under section 1, the Court claimed to be applying a rigorous standard.<sup>406</sup> The impugned decision was made as part of an across-the-board reduction of government expenditures, in response to a perceived provincial debt crisis, characterized by the government and accepted by the Supreme Court as constituting a “financial emergency.”<sup>407</sup> While the Court found that a budgetary crisis justified an infringement of section 15 of the *Charter* in that case, Justice Binnie, cautioned that courts must remain sceptical of attempts by governments to justify infringements of rights on the basis of budgetary constraints, noting that “there are *always* budgetary constraints and there are *always* other pressing government priorities.”<sup>408</sup> At the same time Justice Binnie noted the important social values that are engaged in budgetary decision-making:

It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise “whose sole purpose is financial”. The weighing exercise has as much to do with social values as it has to do with dollars. In the present case, the “potential impact” is \$24 million, amounting to more than 10 percent of the projected budgetary deficit for 1991-92. The delayed implementation of pay equity is an extremely serious matter, but so too (for example) is the layoff of 1,300 permanent, 350 part-time and 350 seasonal employees, and the deprivation to the public of the services they provided.<sup>409</sup>

The Supreme Court has recognized that, in these kinds of “weighing” exercises, a certain amount of judicial deference is mandated, since “there may be no obviously correct or obviously wrong solution, but a range of options each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives.”<sup>410</sup> Recognizing that there may be a range of policy measures which are

---

<sup>405</sup> *Ibid* at para 100.

<sup>406</sup> [2004] 3 SCR 381 [*NAPE*].

<sup>407</sup> *Ibid* at para 1.

<sup>408</sup> *Ibid* at para 72.

<sup>409</sup> *Ibid*.

<sup>410</sup> *Ibid* at para 83.

reasonable does not, however, justify blanket deference to legislatures in relation to budgetary allocations or socio-economic policy. Such deference would be inconsistent with the constitutionally mandated role of courts to assess whether governments have acted within the range of reasonable or constitutional options, in accordance with *Charter* or human rights values. Section 1 calls for rigorous and independent judicial assessment and oversight of government choices, where these infringe *Charter* protected rights. Thus in *NAPE*, Justice Binnie rejected the Newfoundland Court of Appeal's suggestion that budgetary decisions are inherently political and should be subject to a unique deferential standard based on the separation of powers.<sup>411</sup> Writing for the Court, Justice Binnie noted that such a broad deference in relation to budgetary decisions or socio-economic policy would essentially transfer the judicial mandate of assessing reasonableness under section 1 onto the legislature:

No doubt Parliament and the legislatures, generally speaking, *do* enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render superfluous the independent second look imposed on the courts by s. 1 of the *Charter*.<sup>412</sup>

In this regard, the Supreme Court's approach to 'deference' under section 1 is similar the standard set out under the *OP-ICESCR*, which directs the Committee on Economic, Social and Cultural Rights adjudicating complaints to "consider the reasonableness of the steps taken by the State Party" and to "bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."<sup>413</sup>

In light of the standard that the Supreme Court has proposed for the assessment of reasonable measures and budgetary allocations, particularly where these are required for the protection of the rights of vulnerable groups, it is hard to imagine how Canadian governments could successfully argue that their refusal to adopt measures to address increasing poverty and homelessness in the midst of affluence constitutes a reasonable limit under section 1. The overwhelming evidence suggests that governments are wasting significant amounts of money by failing to adopt anti-poverty and housing strategies called for by international treaty monitoring bodies.<sup>414</sup> Marie-Ève Sylvestre notes that the cost of services for homeless people

---

<sup>411</sup> *Newfoundland (Treasury Board) v NAPE*, 2002 NLCA 72, 221 DLR (4th) 513.

<sup>412</sup> *NAPE*, *supra* note 406 at para 103.

<sup>413</sup> *OP-ICESCR*, *supra* note 10 at art 8(4).

<sup>414</sup> See above at pp 82-83.

has been estimated at \$4,000 per month.<sup>415</sup> Incarceration costs are about the same amount for adults (and significantly higher for youth).<sup>416</sup> By comparison, a program involving rent supplements and support services, which provided access to adequate and stable housing for former homeless residents of tent-city in Toronto, cost about \$1,000/month – a quarter of the estimated cost of incarceration or homelessness services.<sup>417</sup> Governments’ refusals to implement effective strategies to ensure access to adequate housing is thus a fiscally irresponsible response to a problem which could be more economically and reasonably addressed in accordance with human rights and values of social inclusion, rather than through perpetuation of patterns of criminalization and stigmatization.

It is precisely in these types of situations that an “independent second look” at government policies, through a human rights lens, is important to the proper functioning of a constitutional democracy.<sup>418</sup> The section 1 standard of reasonable limits, properly applied in a manner consistent with Canada’s international human rights obligations, would ensure more effective governmental accountability in this area.

## **ii) Section 1 Reasonableness and Administrative Decision-Makers**

As described above, the section 1 guarantee of reasonable limits may provide an important vehicle for the domestic implementation of international obligations to take reasonable measures to address poverty and homelessness and to respond to the needs of vulnerable groups more generally. This is not a standard which should be applied solely by courts. Rights-based strategies proposed internationally seek to ensure that social rights are claimable and adjudicated in multiple *fora*: from local community mechanisms and city charters to provincial and national mechanisms of oversight and monitoring. This decentralized or ‘disseminated’ model for the adjudication of rights is consistent with the Supreme Court’s more recent *Charter* jurisprudence, in which an increasing number of administrative bodies and decision-makers are charged with the mandate and responsibility to consider *Charter* rights and to adjudicate *Charter* claims. As Chief Justice McLachlin noted in *Cooper v Canada (Human Rights Commission)*,<sup>419</sup> administrative decision-makers, tribunals and commissions, play a critical role in adjudicating fundamental rights of many citizens, including many *Charter* rights.

---

<sup>415</sup> Sylvestre, *supra* note 280.

<sup>416</sup> *Ibid.*

<sup>417</sup> Gloria Gallant, Joyce Brown & Jacques Tremblay, *From Tent City to Housing: An Evaluation of The City of Toronto’s Emergency Homelessness Pilot Project* (Toronto: City of Toronto, 2004).

<sup>418</sup> NAPE, *supra* note 406 at para 103.

<sup>419</sup> *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854.

In keeping with this view, the Supreme Court has confirmed the authority of a wide range of administrative bodies to consider and apply the *Charter*.<sup>420</sup>

In the recent decision of *Doré v Barreau du Québec*<sup>421</sup> the Court departed from some of its earlier jurisprudence<sup>422</sup> by proposing that, in cases where administrative decision-making under statutory authority is alleged to have been exercised in a manner that is contrary to the *Charter*, judicial review of such decisions may be conducted under an administrative law test of reasonableness, rather than by way of section 1 and the *Oakes* test. Writing for the Court, Justice Abella argues that the modern view of administrative tribunals has given rise to a more robust form of administrative law reasonableness, nurtured by the *Charter*, which can provide essentially the same level of protection of *Charter* rights as does a section 1 analysis.<sup>423</sup> Justice Abella suggests that this approach is better suited to reviewing whether administrative decisions have properly ensured *Charter* “guarantees and values” in particular factual contexts. She further contends that the deference accorded to administrative decision-makers under administrative law reasonableness analysis is consistent with the degree of deference accorded to legislative decision-makers under section 1 of the *Charter*. Justice Abella explains:

As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, “courts must accord some leeway to the legislator” in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure “falls within a range of reasonable alternatives”. The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, “falls within a range of possible, acceptable outcomes” (para. 47) ...

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play ... If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.<sup>424</sup>

---

<sup>420</sup> *R v Conway*, [2010] 1 SCR 765.

<sup>421</sup> *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

<sup>422</sup> *Multani*, *supra* note 211.

<sup>423</sup> *Doré*, *supra* note 421 at para 29.

<sup>424</sup> *Ibid* at paras 56-58.



As Lorne Sossin has pointed out, there remain ambiguities in this new approach to protecting *Charter* rights in the administrative context.<sup>425</sup> For example, under human rights law and pursuant to section 1 of the *Charter*, the onus is placed on the respondent to establish the reasonableness of measures taken, or to justify any limitations on rights. It is not clear whether this “reverse onus”, which has been fundamental in adjudicating both “reasonable accommodation” and *Charter* claims, will become a universal feature of administrative law reasonableness review or will only apply in certain cases. Irrespective of how this issue is resolved, *Doré* provides strong grounds for insisting that administrative decision-makers consider both explicit *Charter* rights and the foundational “*Charter* values” that have been closely linked to Canada’s international human rights obligations, including socio-economic rights. The challenge will be to ensure that this obligation is taken seriously by administrative decision-makers, particularly where decisions are being made affecting such fundamental rights as the right to adequate housing or to an adequate standard of living. As Lorne Sossin notes:

If the principle that discretion should be exercised in a manner consistent with *Charter* values is incorporated into the guidelines, directives and practices of tribunals, this could have a profound effect on the opportunity for these adjudicative spaces to advance social rights. By contrast, if such values turn out not to be relevant in the everyday decision-making of such bodies, then the Court’s rhetoric in *Doré* will suggest a rights orientated framework that is illusory.<sup>426</sup>

It is beyond the scope of this paper to address the complex and evolving question of the relationship between administrative law standards of reasonableness, particularly as applied to standards of judicial review, and the section 1 standard of reasonable limits.<sup>427</sup> However, the expanded role of administrative bodies in relation to *Charter* adjudication means that a “robust” standard of reasonableness, articulated in very similar terms as those of the Constitutional Court in South Africa and international human rights bodies, has become an important framework for the accountability of administrative decision-makers. This is particularly true for decisions affecting the circumstances of disadvantaged groups, including decision-making that engages issues of resource allocation and other positive measures required to protect equality or security of the person.

---

<sup>425</sup> Lorne Sossin, “Social Rights and Administrative Justice” in Martha Jackman & Bruce Porter, eds, *Social Rights Theory and Practice in Canada* (Ottawa: Irwin Law, forthcoming).

<sup>426</sup> *Ibid.*

<sup>427</sup> For consideration of this issue see Susan L Gratton, “Standing at the Divide: the Relationship Between Administrative Law and the Charter Post-*Multani*” (2008) 53:3 McGill LJ 477; Susan L Gratton & Lorne Sossin, “In Search of Coherence: The Charter and Administrative Law under the McLachlin Court” in A Dodek & D Wright, eds, *The McLachlin Court’s First Ten Years: Reflections of the Past and Projections of the Future* (Toronto: LexisNexis, 2010).

While the Supreme Court has placed increased emphasis on the authority of a wide range of administrative actors to address *Charter* claims, in *Doré* and other recent cases, it has recognized the role of administrative decision-makers in this regard for some time. In *Slaight Communications*, the primary responsibility for balancing the right to freedom of expression with the right to work under the *ICESCR* was found to lie with an appointed adjudicator, exercising conferred decision-making authority under the *Canada Labour Code*.<sup>428</sup> In *Baker*, the Supreme Court was of the view that the exercise of reasonable discretion, which in that case involved balancing the best interests of the child against anticipated health care and social assistance costs that might be incurred by a parent threatened with deportation, was within the discretionary authority granted to an immigration officer. Justice l'Heureux-Dubé further found that the immigration officer providing an opinion to the federal Minister was obliged to make a reasonable decision, in conformity with international human rights principles.<sup>429</sup> In *Eldridge*, the Supreme Court concluded that provincial health and hospital insurance legislation did not prevent administrative decision-makers from taking positive measures to provide interpreter services. Instead, the Court held that it was decision-making by those administering hospitals and medical services and determining what services should be insured, that violated section 15 of the *Charter*.<sup>430</sup> More recently, in the *Insite* case, the Court again rejected a claim that the law itself was unconstitutional in favour of a finding that the exercise of conferred discretion, in that case by the Minister, was inconsistent with the *Charter*. The Court found that the Minister was obliged to grant a discretionary exemption to Insite, based on a proper consideration of the evidence of the needs of vulnerable groups for service it provided.<sup>431</sup>

A basic *Charter* requirement applying to all provincial officials and administrative tribunals has been that those making decisions pursuant to conferred statutory authority must operate within a human rights framework, informed by international human rights and *Charter* values, so as to ensure that reasonable steps are taken to ensure equality, dignity and security and to balance competing needs and interests.<sup>432</sup> Reasonable priority must be accorded to those who are most in need, and whose *Charter* rights would be most severely infringed by a failure to act. The *Charter* requires that administrative decision-makers must not only be authorized but required to engage in assessments of what measures may be reasonably

<sup>428</sup> *Slaight Communications*, *supra* note 189.

<sup>429</sup> *Baker*, *supra* note 186 at paras 64-71.

<sup>430</sup> *Eldridge*, *supra* note 211 at paras 22-24.

<sup>431</sup> *PHS Community Services*, *supra* note 251.

<sup>432</sup> The application of section 1 of the *Charter* to administrative decision-makers exercising conferred discretion was reaffirmed by the majority in *Multani*, *supra* note 211 at paras 22-23. In *Doré*, *supra* note 423 the Supreme Court found that the same standard can be ensured through a robust standard of reasonableness informed by *Charter* rights and values.

necessary to ensure both the substantive and participatory rights of those whose rights are at stake. Thus the adjudicator in *Slaight Communications* was required to ensure that his decision to limit the right to freedom of expression was consistent with the right to work under the *ICESCR*.<sup>433</sup> The Medical Services Commission in *Eldridge* was required to allocate resources to interpreter services so as to ensure that the needs of disabled healthcare consumers were accommodated, where such accommodation did not impose undue strain on government resources.<sup>434</sup> In the same manner, other administrative decision-makers may be called upon to consider the right to housing and the right to adequate income when making decisions that impact on these interests, under conferred statutory authority. Like the courts, delegated decision-makers must adopt a rigorous standard of review where *Charter* rights are at stake. Such administrative decision-making must be consistent with standards of undue hardship under human rights legislation and must apply a high level of scrutiny of any governmental claim that budgetary constraints justify *Charter* rights infringements under section 1 of the *Charter*, consistent with the “maximum of available resources” standard for the realization of rights to housing and adequate living standards under international human rights law.

## **J. Beyond the Positive - Negative Rights Distinction**

The obligation to implement effective measures to address poverty or homelessness has not yet been directly addressed by the Canadian courts. However, as described in previous parts of the paper, the text of section 36 of the *Constitution Act, 1982*, sections 7 and 15 of the *Charter*, the domestic and international human rights context within which these provisions must be interpreted, and the guarantees implicit in the notion of ‘reasonable limits’ under section 1, have the potential to provide a robust constitutional framework for a rights-based approach to poverty and homelessness in Ontario and Canada. Unfortunately, as Louise Arbour has pointed out,<sup>435</sup> there remains a prevailing domestic judicial bias against applying the *Charter* to require governments to act in response to human rights crises of this sort.

For example, although homeless people were successful in their *Charter* claim in the *Adams* case, this judicial bias is evident even in that case – the first to consider the relevance of international human rights law, including concerns and recommendations from the CESCR, to

---

<sup>433</sup> *Slaight Communications*, *supra* note 189.

<sup>434</sup> *Eldridge*, *supra* note 211.

<sup>435</sup> Arbour, “‘Freedom from want’, *supra* note 81.

section 7 of the *Charter*.<sup>436</sup> The BC Court of Appeal in *Adams* upheld the trial judge's decision that the City of Victoria was violating homeless persons' constitutional rights to life, liberty and security of the person by prohibiting them from erecting temporary overhead shelters in public parks.<sup>437</sup> However the Court of Appeal was insistent on framing its decision as a negative 'restraint' on government, rather than as a positive obligation. Although the Court recognized that the trial court's ruling would likely require some responsive action by the city to address the inadequate number of shelter beds in Victoria, it declared that: "[t]hat kind of responsive action to a finding that a law violates s. 7 does not involve the court in adjudicating positive rights."<sup>438</sup>

So long as courts and governments in Canada restrict their understanding of *Charter* and human rights obligations to "negative rights" – focusing exclusively on government action that violates rights while ignoring the violations that result from inaction – they will not be applying the *Charter* as an effective human rights framework for addressing poverty and homelessness. As argued above, there is no constitutional basis for excluding a requirement of positive action by governments to remedy *Charter* violations. In discussing the application of the *Charter* pursuant to section 32, the Supreme Court has emphasized that the distinction between government action and inaction is "very problematic."<sup>439</sup> Section 32 states that the *Charter* applies:

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In *Vriend*<sup>440</sup>, quoting Dianne Pothier, the Supreme Court of Canada pointed out that section 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority."<sup>441</sup> The Court went on to state that "[t]he application of the *Charter* is not restricted to situations where the government actively encroaches on rights."<sup>442</sup>

---

<sup>436</sup> *Adams*, *supra* note 246.

<sup>437</sup> *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29.

<sup>438</sup> *Ibid* at paras 95-96.

<sup>439</sup> *Vriend*, *supra* note 390 at para 53.

<sup>440</sup> *Ibid*.

<sup>441</sup> Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7 Const Forum Const 113 at 115, cited in *ibid* at para 60,

<sup>442</sup> *Vriend*, *supra* note 390 at para 60.

The Supreme Court has also been consistent in rejecting the idea that, because such decisions are inherently political in nature, the *Charter* should not apply to executive or legislative choices about what policies or legislation to enact. In *R v Operation Dismantle*, the Court established that “political” questions are not immunized from *Charter* review.<sup>443</sup> In *NAPE*, where the Newfoundland Court of Appeal invoked the principle of the separation of powers as a barrier to judicial interference with “policy initiatives within the purview of the political branches of government,”<sup>444</sup> Justice Binnie responded for the majority:

The “political branches” of government are the legislature and the executive. Everything that they do by way of legislation and executive action could properly be called “policy initiatives”. 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.<sup>445</sup>

Governmental authority to act, or not to act, in response to poverty and homelessness must be exercised consistently with the *Charter*, whether through positive measures to ensure equality or to protect life and security, or through ‘negative’ obligations of restraint, by refraining from actively interfering with such rights.

In the final analysis, however, whether or not the courts are willing to exercise their constitutional mandate to address homelessness and poverty in Ontario should not be determinative of whether the domestic constitutional rights framework is embraced by rights claimants, civil society organizations and legislators. It is up to those who are demanding, and those who are designing and implementing strategic responses to these widely recognized human rights violations, to reclaim *Charter* rights.<sup>446</sup> In doing so, they must challenge judicial resistance to positive rights and advance the legitimate claims of those who are homeless and living in poverty in light of the courts’ own jurisprudence, properly informed by evolving international human rights norms and longstanding Canadian values. A meaningful engagement of *Charter* rights with housing and anti-poverty strategies need not rely on the courts as the sole trustees of rights. Rights-based strategies should disseminate the adjudicative and remedial role previously restricted to courts more broadly, among other actors

---

<sup>443</sup> *R v Operation Dismantle*, [1985] 1 SCR 441 at para 64.

<sup>444</sup> *NAPE*, *supra* note 406 at para 110.

<sup>445</sup> *Ibid* at para 111.

<sup>446</sup> See generally Bruce Porter, “Expectations of Equality” (2006) 33 Sup Ct L Rev 23.

and decision-makers, in order to implement a participatory and empowering model of rights-based strategies consistent with the international norms described above.

Governments, of course, are the ultimate “duty-bearers” and courts the final arbiters of constitutional rights. But to become meaningful to homeless people and those living in poverty, *Charter* rights must inform the ongoing implementation of programs and strategies, not merely the final review of their constitutionality, and they must guide decision-making at every level, not merely in courts.

## **K. Strategies for Claiming and Enforcing Social Rights in Ontario**

### **i) Social Rights and Program Design in Ontario: Aspirational Targets or Human Rights Obligations?**

As has been seen from the review of developments under international human rights, the modern conception of social rights understands them as rights which can be claimed and enforced in the same way as civil and political rights. This new understanding of social rights provides a critical new paradigm for both legal practice and program design in Ontario.

In Ontario’s section of Canada’s recently submitted Sixth Periodic Report to the UN Committee on Economic, Social and Cultural Rights, its housing and anti-poverty strategies are presented as evidence of compliance with the right to an adequate standard of living and the right to adequate housing guaranteed in Article 11 of ICESCR). With respect to the right to adequate housing, the Report states that:

Ontario has committed to developing a Long-Term Affordable Housing Strategy, to improve the delivery of housing and homelessness programs and to guide the development of affordable housing. A key element of the Strategy is working with municipal partners to consolidate housing and homelessness programs into an outcomes-focused housing service that is more responsive to client needs.<sup>447</sup>

In relation to the right to an adequate standard of living the Report states that:

---

<sup>447</sup> Government of Canada, *International Covenant on Economic, Social and Cultural Rights: Sixth Report of Canada* UN Doc E/C.12/CAN/6, para 363. (Advance Unedited Version). Online [http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C-12-CAN-6\\_en.doc](http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C-12-CAN-6_en.doc).

Ontario's Poverty Reduction Strategy, introduced in 2008, focused initially on giving children and their families the support they need to achieve their full potential. The target for the Strategy is to reduce the number of children living in poverty by 25 percent over five years, based on poverty reduction indicators such as: school readiness, educational progress, high school graduation rates, birth weights, Ontario housing measure, standard of living indicator (deprivation index), low-income measure and depth of poverty measure.<sup>448</sup>

By the time the UN Committee on Economic, Social and Cultural Rights (CESCR) holds its actual review of Canada's Sixth Periodic Report, probably late in 2014, the five year target of reducing child poverty by 25% in five years will have been passed. While advocates are currently urging Ontario to make a last ditched effort to meet this relatively modest target within the one remaining year, it is unlikely, based on performance to date, that the target will be met.<sup>449</sup> Although there has been some slight progress in reducing child poverty through the introduction of the Ontario Child Benefit, it is difficult to find evidence of much success in either Ontario's anti-poverty or its housing strategies to date. An unprecedented 400,000 individuals now rely on food banks in Ontario. There have been significant increases in the number of homeless families seeking emergency shelter in Toronto. Record numbers of households are now on the waiting list for subsidized housing.<sup>450</sup> Behind these numbers, of course, are hundreds of thousands of personal experiences of deprivation, serious mental and physical health consequences, broken families, violence and prematurely ended lives.

The CESCR is likely to be concerned that strategies to improve program coherence and service delivery, even to reduce poverty among children, are not addressing seriously enough the continuation of such serious and widespread human rights violations. Ontario's strategies are described primarily in terms of improved, outcome-focused service delivery and provision of support. They do not seem to respond effectively to the extreme level of concern, even shock, expressed during previous reviews of Canada that homelessness and poverty have been allowed to reach such critical proportions in one of the most affluent countries to appear before the CESCR. There seems to be a serious asymmetry between the concerns about a

---

<sup>448</sup> *Ibid*, para 366.

<sup>449</sup> 25 in 5: Network for Poverty Reduction, *Meeting the Poverty Reduction Target: Strong Leadership and Good Policy Required: Fourth Annual Progress Report on Poverty Reduction in Ontario* (December 4, 2012) Online <http://25in5.ca/wp-content/uploads/2012/12/Meeting-the-Poverty-Reduction-Target-Dec-4-2012.pdf>.

<sup>450</sup> Food Banks Canada, *Hunger Count 2012* Online <http://foodbankscanada.ca/getmedia/3b946e67-fbe2-490e-90dc-4a313dfb97e5/HungerCount2012.pdf.aspx>; City of Toronto Quick Facts About Homelessness and Social Housing Online at <http://www.toronto.ca/housing/quickfactshomelessness.htm>; Housing Connections, *Quarterly Activity Report July 1 – September 30, 2012*. Online <http://www.housingconnections.ca/pdf/QuarterlyReports/2012/Quarterly%20Activity%20Report%20-%20Q3%202012.pdf>



systemic human rights crisis and the presentation of strategies aiming at somewhat modest improvements in program and service delivery.

There is nothing wrong, of course, with governments making efforts to ensure improved program coherence, to encourage better outcomes from housing or income support programs or committing to making progress on addressing child poverty based on agreed measures and indicators. Ontario's anti-poverty strategy was a positive result of concerted advocacy by many groups concerned about poverty, hunger and homelessness in Ontario. Similarly, the requirement imposed on all municipalities across Ontario by the *Strong Communities Through Affordable Housing Act* (2011)<sup>451</sup> to develop housing and homelessness plans may have important results. The absence of any reference to the human rights at stake in strategies to address violations of the right to adequate housing and to an adequate standard of living, however, is significant. There is no reference to the right to an adequate standard of living or to any other human rights—either domestic or international—in Ontario's 2008 "Breaking the Cycle: A Poverty Reduction Strategy,"<sup>452</sup> or in the *Poverty Reduction Act* (2009).<sup>453</sup> Ontario's "Long Term Affordable Housing Strategy"<sup>454</sup> makes no reference at all to Ontario's obligations to ensure the right to adequate housing under the ICESCR. It makes passing reference to the right to equal treatment without discrimination. The *Strong Communities Through Affordable Housing Act* (2011) makes no reference at all to human rights.

Strategies for effective public management should not displace or be mistaken for commitments to implement human rights. As the human and health-related costs of homelessness and poverty in Ontario become increasingly evident with every new study, it is clear that what are being measured as program "outcomes" go to the very core of fundamental rights to security, dignity and life itself. It is important to distinguish between strategies for effective program management and strategies to ensure peoples' rights to dignity, security, life and health.

Ontario's *Poverty Reduction Act* affirms a number of principles which resonate with human rights values and with the principles described above as components of rights-based approaches, such as:

- Eliminating barriers to full participation of groups facing discrimination

---

<sup>451</sup> *Strong Communities through Affordable Housing Act*, *supra*, note 56.

<sup>452</sup> Government of Ontario, "Breaking the Cycle: Ontario's Poverty Reduction Strategy" (2008), online: Ontario Canada <[www.gon.ca](http://www.gon.ca)>.

<sup>453</sup> *Poverty Reduction Act*, *supra*, note 55.

<sup>454</sup> *Building Foundations: Building Futures: Ontario's Long-term Affordable Housing Strategy* (2010) [*Long-term Affordable Housing Strategy*] online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=8590>>.

- Respect for individual dignity
- Recognizing diversity and heightened risk of poverty among particular groups
- Ensuring ongoing involvement of those affected in program and policy design
- Recognizing the role of civil society organizations
- Ensuring co-operation among various levels of government and non-governmental actors.<sup>455</sup>

Ontario's *Long Term Affordable Housing Strategy* similarly affirms that housing programs must be:

- "People-centred" ("focusing on positive results for individuals and families")
- Based on strong partnerships of all levels of government, housing providers and those in need of housing;
- "Locally driven"
- Inclusive of groups facing discrimination;
- Provide necessary support services, and
- "Fiscally responsible."<sup>456</sup>

The *Strong Communities Through Affordable Housing Act* (2011) requires that all municipalities in Ontario develop local housing and homelessness plans by January 2014. These plans must address issues defined as "provincial interests". Service Managers will ensure that housing and homelessness plans:

- provide measures to prevent homelessness including eviction prevention measures and the provision of supports appropriate to clients' needs;
- are based on a Housing First philosophy;
- support innovative strategies to address homelessness; and
- facilitate transitioning people from the street and shelters to safe, adequate and stable housing.<sup>457</sup>

Significantly, however, these "principles" of the anti-poverty strategy and "provincial interests" in the homelessness strategies are not linked to any human rights obligations under international human rights or domestic law. Even the obligation to provide supports necessary for people with disabilities and obligations to address the needs of groups facing discrimination, which are existing legal obligations under human rights legislation and the *Charter* are affirmed

---

<sup>455</sup> *Poverty Reduction Act*, *supra*, note 55.

<sup>456</sup> *Long-term Affordable Housing Strategy*, *supra* note 8 p.3.

<sup>457</sup> Ontario Ministry of Municipal Affairs and Housing, *Ontario Policy Statement, 2011*, Online: <http://www.mah.gov.on.ca/AssetFactory.aspx?did=9262>

only as “principles” with no provision for those whose rights are at stake to claim and enforce their rights.

The inclusion of measurable goals and timetables and the emphasis on consultation and collaboration with affected communities are additional components of both strategies which have resonance with rights-based approaches recommended to Canadian governments by the CESCR and promoted by the UN Office of the High Commissioner on Human Rights (OHCHR).<sup>458</sup> In Ontario’s strategies, however, indicators and targets remain largely aspirational, with no meaningful accountability mechanisms to ensure that decisions are made or policies implemented to ensure that goals or targets are met. Goals, timelines and targets as recommended by the CESCR, on the other hand, must be situated in a human rights framework, and be reinforced with “complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards.”<sup>459</sup>

The distinction between governmental aspirations and human rights obligations is critical to assessing whether anti-poverty and housing strategies comply with international human rights. It has been at the core of concerns from UN human rights bodies about the status of social rights in Canadian provinces for many years. In all of its periodic reviews of Canada, dating back to 1993, the CESCR has emphasized that social rights such as the right to adequate housing, food and an adequate standard of living must not be reduced to mere commitments, policy objectives or aspirational goals.<sup>460</sup> The CESCR has emphasized in its recommendations to Canada “that Covenant rights should be enforceable within provinces and territories through legislation or policy measures, and that independent and appropriate monitoring and adjudication mechanisms be established in this regard.”<sup>461</sup> According to UN human rights bodies, a normative human rights framework is critical if governments are to be held

---

<sup>458</sup> United Nations Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) [OHCHR, *Guidelines*].

<sup>459</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) [*Concluding Observations* 2006] para 60.

*Ibid* at para 62.

<sup>460</sup> United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/1993 (10 June 1993) at para. 21; Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/1/Add.31 (1998), paras. 14-15; Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/CAN/CO/5 (2006), para. 11.

<sup>461</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Session, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) [*Concluding Observations* 2006] at para 35.

accountable to obligations to make reasonable progress commensurate with available resources. As noted by the Office of the High Commissioner on Human Rights (OHCHR) in its *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*: “Experience from many countries teaches us that human rights are most readily respected, protected and fulfilled when people are empowered to assert and claim their rights.”<sup>462</sup>

## **ii) Why do Homelessness and Poverty Require Social Rights-Based Approaches?**

While rights-based approaches have been widely recommended, it is not always clear to policy makers and legislators what the value added would be of implementing a new framework based on enforceable human rights. Poverty and homelessness in Ontario and throughout Canada are certainly linked to programmatic failures. Strategies that implement commitments to improve programs and create at least some modest accountability to indicators of success would seem to be at least a step in the right direction. Why is it necessary to incorporate legally binding human rights and constitutional norms in such strategies? Is this not simply an invitation to courts and lawyers to intrude into spheres of social policy better left to the experts?

The answer to this question is, in part, related to the nature of the problem that is being addressed by housing and anti-poverty strategies. Emerging conceptions of social rights-based strategies understand poverty and homelessness as more than problems of inadequate or badly designed programs. Drawing on the early work of Amartya Sen, it was suggested above that social rights approaches understand the emergence of hunger or homelessness -- whether in developing or developed countries -- as resulting from broadly based “entitlement system failures”<sup>463</sup> rather than the previously assumed causes such as faulty design or administration of food distribution programs, crop failure or scarcity of government resources. Sen discovered that famines are caused by systemic failures of social and economic organizations of entitlements – eg. property laws, minimum wages, benefit programs, land rights, social security, etc.<sup>464</sup>

When access to food is not given the status of a fundamental right within a broader system of entitlements and socio-economic relationships, then the right to adequate food is not prioritized over other interests. In some circumstances, many people may be left without access to food. Similarly, homelessness, hunger, and poverty in Ontario can be seen to flow not

---

<sup>462</sup> UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) [OHCHR, *Guidelines*].

<sup>463</sup> Amartya Sen, “Property and Hunger” (1988) 4:1 *Economics and Philosophy* 57 reprinted in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004) 402

<sup>464</sup> *Ibid.*

from a scarcity of food or affordable housing per se, but from systemic entitlement system failures, tied to a broad range of policy choices, legislation, and program administration decisions in which access to adequate housing, food, or other requirements have not been considered as fundamental human rights.

A vast array of decisions made by a myriad of decision-makers combine to create systemic entitlement system failures in Ontario that leave particular groups and individuals without adequate housing, food or other requirements of an adequate standard of living. Access to adequate housing, for example, may be affected by decisions such as the determination of the shelter component of social assistance; the setting of minimum wage; the regulation of benefits of part-time and temporary workers; regulation of rent increases; budgetary allocations to subsidized housing and rental assistance; zoning and planning bylaws; access to mortgages and credit; the level of the Ontario Child Benefit; funding of the Community Start-up and Maintenance Benefit, or a determination by a member of the Landlord and Tenant Board of what constitutes reasonable grounds for exercising discretion not to terminate a tenancy under the *Residential Tenancies Act*<sup>465</sup> when no alternative housing is available. All of these decisions impact access to adequate housing, but are likely made without any reference to adequate housing or food or an adequate standard of living as human rights. Entrenching these rights firmly in provincial law and policy would affect decision-making and program design in all spheres which impact on the enjoyment of the right to adequate housing, food or an adequate standard of living. These social rights would be accorded the same status as human rights which currently have legal status, such as rights to freedom from discrimination on the prohibited grounds of race or sex.

Framing what are in fact legal obligations and human rights norms as mere principles and aspirations may have the effect of disempowering those whose rights are at stake. Ontario's *Poverty Reduction Strategy* has been criticized for lacking "teeth." Critics have noted that little attention has been paid to equality issues for disadvantaged groups (women, people with disabilities, racialized groups, single mothers, aboriginal people, youth and the elderly, to name a few) and that the strategy lacks independent monitoring of progress in meeting targets.<sup>466</sup>

---

<sup>465</sup> *Residential Tenancies Act*, 2006, SO 2006, c 17.

<sup>466</sup> See, for example, the Registered Nurses' Association of Ontario, "Submissions on Bill 152: Poverty Reduction Act (2009)" made to the Standing Committee on Social Policy (21 April 2009), online: <<http://rnao.ca/policy/submissions/bill-152-poverty-reduction-act>>.

Similar concerns were expressed by many organizations about the lack of a rights-based framework in the *Long Term Affordable Housing Act*.<sup>467</sup> The missing ingredients in the Housing Strategy were most clearly laid out by Miloon Kothari, who in 2008, as the UN Special Rapporteur on Adequate Housing, had conducted a Mission to Canada. Special Rapporteur Kothari's Mission included meetings with representatives of the Ontario Government and the Ontario Human Rights Commission. In the Report on his Mission presented to the UN Human Rights Council in 2009 a national rights-based housing strategy engaging both provincial and federal governments was the centerpiece of recommendations to address what was found to be a serious human rights crisis.<sup>468</sup><sup>469</sup> When Ontario's *Long Term Affordable Housing Act* was subsequently introduced without any reference to the right to adequate housing, Kothari wrote to Minister Bartolucci urging that the Government consider amendments to include an improved human rights framework.

Kothari's central concern was that the government had failed to address what he had described in his Report as "the need for national and provincial housing strategies, based on legislative recognition of the right to adequate housing."<sup>470</sup> Kothari noted further that Ontario's housing strategy lacked any targets for the reduction and elimination of homelessness, had no independent monitoring and complaints mechanism and failed to identify or address the obstacles facing vulnerable groups, including persons with disabilities. Mr. Kothari urged the government to consider amendments which would:

- Include firm goals and timetables for the elimination of homelessness and the realization of the right to adequate housing;
- Provide for independent monitoring and review of progress and for consideration of complaints of violations of the right to adequate housing;

---

<sup>467</sup> Ontario, Legislative Assembly, Standing Committee on Justice Policy, "Bill 140, Strong Communities through Affordable Housing Act, 2011" in *Official Report of Debates (Hansard)*, No JP-8 (24 March 2011) at 164 (Centre for Equality Rights in Accommodation); at 166-169 (Social Rights Advocacy Centre); Ontario, Legislative Assembly, Standing Committee on Justice Policy, "Bill 140, Strong Communities through Affordable Housing Act, 2011" in *Official Report of Debates (Hansard)*, No JP-9 (31 March 2011) at 162 (Registered Nurses' Association of Ontario); at 198 (Federation of Metro Tenants' Associations).

<sup>468</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)*, UN Human Rights Council OR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 90.

<sup>469</sup> *Ibid.*

<sup>470</sup> Letter from Miloon Kothari to Honourable Rick Bartolucci, Minister of Municipal Affairs and Housing (6 April 2011). Online <http://www.socialrights.ca/docs/bill%20140/Kothari%20letter%20to%20Minister.pdf>

- Prioritize the needs of groups most vulnerable to homelessness and discrimination; and
- Ensure meaningful follow-up to concerns and recommendations from UN Human Rights Bodies<sup>471</sup>

These key components of a rights-based approach identified by the UN Special Rapporteur on Adequate Housing have been recommended by many other experts and organizations in Canada in relation to both housing and anti-poverty strategies. The House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA), after holding extensive hearings into poverty reduction plans concluded that poverty reduction strategies must not “only be guided by moral principles, but must be set within a human rights framework, specifically the recognition that governments have a duty to enforce socio-economic and civil rights.”<sup>472</sup> In May, 2012 the Parliament of Canada passed, with unanimous support, a Motion stating that the Government “should keep with Canada’s obligation to respect, protect and fulfill the right to adequate housing as guaranteed under the International Covenant on Economic, Social and Cultural Rights.” The Ontario Human Rights Commission has recommended that the Government of Ontario pass legislation affirming the right to adequate housing as a legal right, as well as adopting a provincial housing strategy “ensuring access of all Ontarians, including those of limited income, to housing of an adequate standard without discrimination.”<sup>473</sup> The new Premier of Ontario, Kathleen Wynne, has recently voiced support for demands for a national affordable housing strategy.<sup>474</sup>

Additionally, the UN Special Rapporteur on the Right to Food, Olivier De Schutter, in the Report on his 2012 Mission to Canada to be presented to the UN Human Rights Council on March 4, 2013, leads off his recommendations with a plea that access to adequate food be recognized in Canadian law as a “legal entitlement.” The Special Rapporteur urges Canadian governments to “formulate a comprehensive rights-based national food strategy clearly delineating the responsibilities of public officials at the federal, provincial/territorial, and

---

<sup>471</sup> *Ibid.*

<sup>472</sup> HUMA Committee, *Poverty Reduction Plan*, *supra* at 227

<sup>473</sup> Ontario Human Rights Commission (OHRC), *Right at Home: Report on the consultation on human rights and rental housing in Ontario*, May 2008, <http://www.ohrc.on.ca/>.

<sup>474</sup> Adrian Morrow, “Ontario’s next premier promises she won’t be like McGuinty”, *The Globe and Mail*, Jan. 31 2013 Online: <http://www.theglobeandmail.com/news/politics/ontarios-next-premier-promises-she-wont-be-like-mcguinty/article8031179/>



municipal/local levels, identifying the measures to be adopted and the associated time frames...”<sup>475</sup>

The key components of a rights-based strategy as identified by the Special Rapporteurs and by the CESCR have been included in a private member’s bill that was first introduced in the previous parliament under the minority Conservative Government. Bill C- 304 required the negotiation of a rights-based national housing strategy jointly with provincial/territorial and First Nations representatives, as well as key stakeholders and housing providers. The bill received significant support from communities across Canada and had the support of the majority of members of the last Parliament.<sup>476</sup> It has been reintroduced as a private member’s bill (C-400) in the new Parliament.<sup>477</sup> Even if Bill C-400 is not passed in the current parliament, it provides a useful model for Ontario to follow in designing provincial rights-based housing and anti-poverty strategies. Bill C-400 requires that the national housing strategy be “designed to respect, protect, promote and fulfil the right to adequate housing as guaranteed under international human rights treaties ratified by Canada.” It includes, within this human rights framework, the following requirements:

- ➔ Engagement with multiple stakeholders: all levels of government, Aboriginal communities, and civil society.
- ➔ Focus on marginalized groups particularly vulnerable to homelessness
- ➔ Private sector as well as governmental engagement
- ➔ Financial supports for those who cannot otherwise afford housing
- ➔ Clear targets and timelines to eliminate homelessness
- ➔ Monitoring of progress by an independent agency to ensure ongoing accountability
- ➔ Mechanisms to ensure that affected individuals and groups can identify violations of the right to housing and get needed responses and actions.

These components are consistent with the requirements of international human rights and constitutional norms outlined above.

A rights-based approach to housing and anti-poverty strategies in Ontario must affirm that social rights can be claimed and enforced. Rather than functioning as aspirational goals or

---

<sup>475</sup> Report of the Special Rapporteur on the right to food, Olivier De Schutter, Human Rights Council Twenty-second session A/HRC/22/50/Add.1 Addendum 1, Mission to Canada\*

<sup>476</sup> Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 3d Sess, 40th Parl, 2011 (Committee report presented in House of Commons 21 March 2011).

<sup>477</sup> Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 42st Parl, 2012 (First Reading February 16, 2012).

values, social rights should be embedded within housing and anti-poverty strategies and programs themselves as central and indispensable to the process of progressive implementation and fulfillment of these rights. Social rights such as the right to adequate housing, adequate food and an adequate standard of living must be incorporated in provincial policy and legislation as both the goals and purposes of social programs and as tools through which rights-holders are able to become agents of the social transformation needed to fully realize social rights.

### iii) Claiming and Enforcing Social Rights Under Existing Law in Ontario

Legal strategies for claiming and enforcing social rights in Ontario will be built upon the international and constitutional frameworks described above. The cornerstone of such legal advocacy will be what has been as the “interpretive presumption” - the principle of interpretation affirmed by the Supreme Court of Canada, according to which the rights contained in the *Canadian Charter of Rights and Freedoms* and all other statutes, laws and policies should be interpreted, where possible, in a manner which provides protection of international human rights ratified by Canada. On the basis of this interpretive presumption, rights to life, security of the person and equality in the *Charter* as well as all law and policy in Ontario that affects access to adequate food, clothing and housing can and should be interpreted to include protection of the rights to adequate food, adequate housing and an adequate standard of living as contained in article 11 of the ICESCR. Provincial statutes should be interpreted consistently with Ontario’s commitments to respect, protect and fulfill the right to an adequate standard of living.

Critical to advocacy strategies will be the seminal case of *Baker v Canada (Minister of Citizenship and Immigration)*, in which Justice L’Heureux-Dubé found for the majority of the Supreme Court of Canada that the values reflected in international human rights should inform how statutes are interpreted.<sup>478</sup> The presumption explained by Ruth Sullivan in *Driedger on the Construction of Statutes* cited in *Baker* must become the critical principle of social rights legal advocacy:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.<sup>479</sup>

---

<sup>478</sup> *Baker*, *supra* note 186 at paras 69-71.

<sup>479</sup> *Ibid* at para 70, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Markham, Ont: Butterworths, 1994) at 330.

The impact of this interpretive principle extends well beyond the role that courts can play in interpreting and applying domestic law. Its application to administrative decision-making by anyone exercising conferred authority, administering public benefits or adjudicating claims before administrative tribunals is equally critical. In *Baker*, the Supreme Court found that the exercise of conferred ministerial discretion failed to meet a standard of reasonableness because the immigration officer did not consider the best interests of the child – a principle that is well recognized in international human rights law ratified by Canada.<sup>480</sup> As noted above, the Supreme Court has now established that the standard of “reasonableness” in administrative decision-making should now be a “robust” standard that is capable of promoting and protecting the rights and values in the *Charter*.<sup>481</sup> The Court has held that “If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.”<sup>482</sup> This robust standard of reasonableness provides a critical lever for demanding decision-making across a range of policies, programs and administrative officials and tribunals which is consistent with the obligation to respect, protect and fulfill the right to an adequate standard of living including the rights to adequate food and housing. All decision-makers operating under provincial statutes should consider the right to an adequate standard of living and the right to adequate housing both as fundamental values to be considered and applied in the exercise of decision-making authority and also as components of *Charter* rights. Courts, tribunals, delegated decision-makers, and municipalities have obligations to act in a manner that conforms with commitments to international human rights and constitutional obligations, including the right to adequate housing, food, and an adequate standard of living. The Supreme Court of Canada’s decision in *Dore* creates not only the possibility but also a responsibility for advocates to raise issues related to social rights under ratified international human rights law before a wide range of administrative decision-makers. A consistent strategy of raising these arguments is the only way to address the systemic or structural human rights failures which lie behind the continued existence of widespread hunger and homelessness in Ontario. Sustained advocacy for social rights must ripple out to the myriad of decisions by administrative bodies and individual administrators that determine how Ontario’s ‘entitlement’ system interacts with homelessness and poverty.

---

<sup>480</sup> *Baker*, *supra* note 186 at paras 64-71.

<sup>481</sup> *Constitutional Framework*, *supra* note 2, p.62.

<sup>482</sup> *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] at paras 56-58.

## L. Conclusion

To a large extent, new rights-based strategies can rely on existing institutions and decision-making bodies to provide adjudicative space for social rights. Whether it is the executive branch exercising its regulation-making powers, program administrators exercising conferred discretion, administrative tribunals hearing appeals of decisions regarding access to social assistance, or the Landlord and Tenant Board determining whether it would be unfair to order a family evicted “having regard to all the circumstances”<sup>483</sup>, social rights must become central to decision-making. A rigorous adherence to the requirement that statutory authority be exercised in a manner that is consistent with the protection and fulfillment of the rights to housing and an adequate standard of living, and with the right to a hearing of those whose rights are at stake, is where the truly transformative effect of the new social rights paradigm will be found.

It is hoped that within a reasonable period of time, decisions which would reasonably be expected to cause homelessness, hunger or other deprivations, will no longer be made – at least not without more angst than is the case currently. Whether it is an executive decision to set the shelter component of social assistance at a rate that is known to be unmanageable in today’s rental market, or a Residential Tenancy Board member’s decision to evict a family into homelessness when they owe only a month’s rent, these kinds of decisions will seem unreasonable (and therefore challengeable on the basis of judicial review) once social rights obligations are taken as seriously as Supreme Court of Canada jurisprudence would suggest they should be.

Will it be difficult to gain acceptance for the idea that the right to adequate housing and the right to an adequate standard of living should be taken seriously in this way? Perhaps. Over the course of thirty years, since Canada ratified the ICESCR in 1976, we have become used to food banks and homeless families and other violations of social rights that would not have been imagined when Canada ratified the ICESCR. We have become accustomed to hearing Canada oppose all of the developments at the UN that ushered in the new paradigm of social rights at the UN. The Attorney General of Ontario continues to fight against any attempt by people living in poverty or homelessness to claim social rights under the *Charter*.

The perspective of international human rights is critically important if we are to challenge the current complacency. It is sometimes only with the benefit of some reflective distance that

---

<sup>483</sup>*Residential Tenancies Act*, 2006. S.O. 2006, c. 17 s 83.

we are able to see the absurdity or the injustice of aspects of our society which we have gotten too used to. When NGOs travel to Geneva for reviews of human rights in Canada, we often find ourselves somewhat haunted by the questions from UN Committee members, particularly the experts from relatively poor countries. These members of UN Committees are particularly incredulous at the spectre of homelessness and hunger, shelters and food banks, in the midst of so affluent a country, with so rich a history of human rights. Why are Canadian governments more determined than other governments to refuse to accept that the right to housing or food or water should be given the status of legal rights and made subject to claims and adjudication? We now know the cost of these violations, not just to the victims, but to governments themselves of suppressing social rights.

Poverty, hunger and homelessness in Ontario are not only contrary to fundamental values and democratic aspirations. They are violations of fundamental human rights that are central pillars of Canada's constitutional democracy. It is time to give social rights a try in Ontario.

=====