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The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?

David Wiseman*

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

~ Anatole France, *The Red Lily*¹

I. INTRODUCTION

Canadian society is characterized by significant and growing socio-economic inequality that forms part of a broader landscape of persistent social injustice. There are regular calls for governmental action to address poverty and other social and economic disadvantages. The issue I consider in this article is to what extent the Constitution of Canada,² including the *Charter of Rights and Freedoms*,³ might play a role, over the longer term, in alleviating socio-economic inequality. Put more briefly, what are the prospects for advancing social justice through constitutional law over the long term?

* Assistant Professor, Faculty of Law (Common Law Section (English)), University of Ottawa. I wish to thank the organizers, Professors Sonia Lawrence and Benjamin Berger, of the 18th Annual Constitutional Cases Conference (April, 2015), at which an earlier version of this article was presented. I also wish to thank Bruce Porter, Martha Jackman and the anonymous reviewer for valuable comments on earlier versions. Finally, thanks to Brad Yaeger for excellent research assistance, funded in part via the Law Foundation of Ontario Fellowships program.

¹ First published in 1894. As quoted in *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, [2015] 1 S.C.R. 245, 2015 SCC 4, *per* Abella J., at para. 56 (S.C.C.) [hereinafter “*Saskatchewan*”].

² *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.), c.11, s. 1, reprinted in R.S.C. 1985, Appendix II, No. 5 [hereinafter “*Constitution*”].

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

For the purposes of this article, the ideal of “social justice” is thus understood as primarily concerned with the eradication of socio-economic inequality. To be clear, in the present context, a distinction is drawn between socio-economic difference and socio-economic inequality, with the distinction being that the former is a descriptive label, whereas the latter is a normative concept involving notions of unjustifiable disadvantage and discrimination. Consequently, not all circumstances of socio-economic difference will necessarily amount to socio-economic inequality and, indeed, some circumstances of socio-economic sameness may not ensure socio-economic equality.⁴ Further, this article also distinguishes between a substantive conception of socio-economic equality and a merely formal or, in the words of Anatole France, “majestic” conception of socio-economic equality. In fact, since it can be argued that it is the very concern for the socio-economic dimension of equality, as opposed to the more traditional civil and political dimensions, that distinguishes substantive equality from formal/majestic equality, there is a degree of redundancy to the use of the “socio-economic” qualifier when distinguishing these conceptions of equality. Therefore, in the context of this article, the key distinction between these conceptions of equality is that the formal version — which is often defined as “treat likes alike” — focuses on a need to address differential treatment in law, whereas the substantive version acknowledges a need to address differential social and economic circumstances in society. Of course, differential treatment in law can often create, reinforce or exacerbate differential social and economic circumstances, and so substantive equality can overlap with or incorporate the demands of formal equality. However, substantive equality transcends formal equality at the point where it demands differential legal treatment in order to ameliorate and overcome inequalities in social and economic circumstances.⁵ France’s ironic aphorism masterfully captures these contrasting conceptions by juxtaposing the social circumstances and

⁴ For discussion of the notions of social justice, socio-economic inequality and substantive equality, and the relationships between them, in the context of constitutional law under the Charter, see Bruce Porter, “Expectations of Equality” (2006) 33 S.C.L.R. (2d) 23 [hereinafter “Porter”]; and Margot Young, “Social Justice and the *Charter*: Comparison and Choice” (2013) 50 Osgoode Hall L.J. 669 [hereinafter “Young, ‘Social Justice’”] and “Unequal to the Task: Kapp’ing the Substantive Potential of Section 15” [hereinafter “Young, ‘Kapp’ing’”] in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010).

⁵ By the same token, it should be noted that some versions of formal equality — those that meaningfully acknowledge the need to not only treat likes alike but also to “treat un-alikes un-alikely” — can potentially incorporate some of the demands for substantive equality.

legal treatment of the rich and poor. The law's identical treatment, prohibiting both from sleeping rough, pan-handling or stealing, accords with formal equality. Yet it ignores the fact that only the poor may be driven by their disadvantaged social and economic circumstances to pursue such desperate survival measures. The result is a hollow equality — it has a formal majesty, but it is not meaningful to the lived reality of poverty. Substantive equality notices this contrast and asks for a legal response that addresses social and economic disadvantage in order to protect people against the need to act so desperately. Writ larger, the demands of substantive equality can be regarded as the social justice aspiration of social democracies like Canada. In turn, the question of what the prospects are for advancing social justice through constitutional law over the long term can be understood as the question of to what extent constitutional law promotes socio-economic equality or, in other words, substantive equality. Given the close association being posited between these three terms (*i.e.*, social justice, socio-economic equality and substantive equality), they will be used somewhat interchangeably.

Lacking a crystal ball, I initially take a “back-to-the-future” approach to that question by reviewing the role of constitutional law over the past three decades or so. My review indicates that at particular moments, and in particular ways, constitutional law can be either positively or negatively involved in the action and inaction of governments in relation to socio-economic inequality and social injustice. This review supports the first part of my argument in this article, which is that, cumulatively, and over the longer term, the role of constitutional law has been predominantly one of facilitating substantive equality. By describing its role as facilitative I mean that constitutional law has not generally blocked governmental action addressing social injustice and, instead, has generally tended to enable or validate it. So, generally speaking, when governments have chosen to use legal measures to improve substantive equality, constitutional law has generally facilitated that choice by upholding the constitutionality of those legal measures. However, at the same time, constitutional law has been decidedly reluctant to compel governments to alleviate socio-economic inequality or to otherwise protect or advance social justice, and it has often refused to stop governments from exacerbating inequality and injustice. Although there are some bright spots, especially under the Charter, where constitutional law has forced or protected some substantive equality measures, judicial support for substantive equality has generally been restrained and cautious. In my view, looking ahead, and especially given

current socio-economic trends, while facilitative constitutional law is good, it is not good enough. This leads me to the second part of my argument, which is that, for constitutional law to play a more meaningful role in advancing substantive equality and social justice in the decades ahead, a key element of constitutional law under the Charter will need to change. Specifically, I argue that the judicial approach to concerns over the social policy complexity of substantive equality claims under the Charter is in danger of trapping those claims between a rock and a hard place and, in so doing, denying constitutional law the potential to move beyond merely facilitating social justice to a more meaningful role of protecting and compelling it. What is needed, I argue, is a new approach to acknowledging and managing the social policy complexity of substantive equality claims.

This article has three parts. In Part II, I provide a brief overview of some indicators of socio-economic inequality in Canada. In Part III, I review the past three decades or so of constitutional law in relation to government action and inaction on social justice and substantive equality. This review includes, but is not limited to, the role of the Charter. In Part IV, I identify and consider the problem of social policy complexity, and responses to it, as an element of constitutional law under the Charter that will need to be addressed if constitutional law is to play a more meaningful role in protecting and advancing substantive equality in the coming decades.

II. SOCIO-ECONOMIC INEQUALITY IN CANADA

For many decades Canadian governments have pursued social welfare policies that have provided a significant degree of both universal and targeted socio-economic support, and that have therefore played an important role in addressing substantive inequality.⁶ Yet, as will be discussed in this part, Canadian society is still marked by persistently significant levels of poverty and by increasing levels of socio-economic inequality. The detrimental impact of significant poverty on individuals and groups has been known and documented for some time. Individuals and groups who experience poverty also disproportionately experience adverse socio-economic circumstances and outcomes. In other words, it is well

⁶ For example, social assistance and unemployment insurance programs. For an historical overview of the establishment and development of these and other governmental initiatives, see Dennis Guest, *The Emergence of Social Security in Canada*, 3d ed. (Vancouver: University of British Columbia Press, 1997).

recognized that absolute levels of income deprivation translate into unequal adverse socio-economic outcomes. More recently though, attention is being paid to how relative levels of income inequality generate their own distinct detriments, both to those individuals and groups who are relatively deprived and to the broader societies within which they live.⁷ Income inequality is now understood to compound the detriment caused by income deprivation. In what follows in this part I provide a brief overview of the situations of both poverty and income inequality in Canada, while also noting the ongoing capacity of Canadian governments to influence these situations through their policy choices. I conclude this section with a brief observation on the significance of this for a constitutional conception of substantive equality.

In terms of poverty, a Statistics Canada research paper on low-income incidence produced in 2012 reported a Canadian low-income rate of 13 per cent in 1976 and 11.7 per cent in 2009,⁸ with an average incidence of 12.6 per cent over the period. This is despite the fact that, over the same basic period (1975 to 2013), Canada's gross domestic product ("GDP") grew by almost 1,000 per cent, from \$173.5 billion to \$1.8 trillion.⁹ There is no question that social welfare or, as they are referred to by the Organization for Economic Co-operation and Development ("OECD"), "social protection" policies, play a significant role in ensuring that the incidence of low-income in Canada is not worse. In 2013, social protection expenditure across the nine categories monitored by the OECD totalled 17.4 per cent of Canada's GDP.¹⁰ Through these types of expenditures, and other redistributive measures, the Gini coefficient measure of income inequality in Canada in 2011 for the aggregate of family units was reduced from 0.436 to 0.313.¹¹ Moreover, governments have had success with policy

⁷ A widely-known recent argument of this nature is provided in R. Wilkinson & K. Pickett, *The Spirit Level* (New York: Bloomsbury Press, 2010) [hereinafter "Wilkinson & Pickett"].

⁸ Brian Murphy, Xuelin Zhang & Claude Dionne, *Low Income in Canada: a Multi-line and Multi-index Perspective* (2012), online: <<http://www.statcan.gc.ca/pub/75f0002m/75f0002m2012001-eng.pdf>> [hereinafter "*StatsCan*"]. These figures are the annual average of the three measures of low-income maintained by Statistics Canada: the Low Income Measure (which calculates the proportion of the population whose income is 50 per cent or less of the median adjusted national income); the Low-Income Cut-Off (which calculates the threshold income below which a family is likely to devote a larger share of its income to the necessities of food, shelter and clothing than the average family); and the Market Basket Measure (which calculates the threshold income needed to purchase a specific basket of goods representing basic living standards).

⁹ The World Bank, "GDP (Current US\$)", online: <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries/CA?display=graph>>.

¹⁰ OECD Databank, online: <https://stats.oecd.org/Index.aspx?DataSetCode=SOCX_AGG>.

¹¹ The Gini coefficient is a measure for income inequality. The Gini is zero if everyone has the same income and is one if a single person has all the income. Statistics Canada, *CANSIM Table*

choices that have prioritized reducing poverty among particular groups. For example, reducing poverty among older adults has been a particular priority and concerted policy attention has produced a long-term decrease in incidence of low-income among this group — from 21 per cent in 1981 to just over 5 per cent in 2010.¹² On the other hand, groups who have not been prioritized, such as recent immigrants, off-reserve Aboriginal people, persons living with disabilities, and unattached individuals under 65, have seen their incidence of low income barely improve or, for the last of these groups, become somewhat worse, over this period. The relationship between governmental policy choices and low-income incidence is attested to in Figure 1, below, which charts five categories of Canadian social protection expenditure, as a proportion of GDP, from 1980 to 2013. As can be seen, expenditure in the “old age” category has risen over one percentage point over the period, whereas expenditure in the “social assistance” category has barely risen over half a percentage point, and expenditure in the “unemployment” and “housing” categories has fallen.

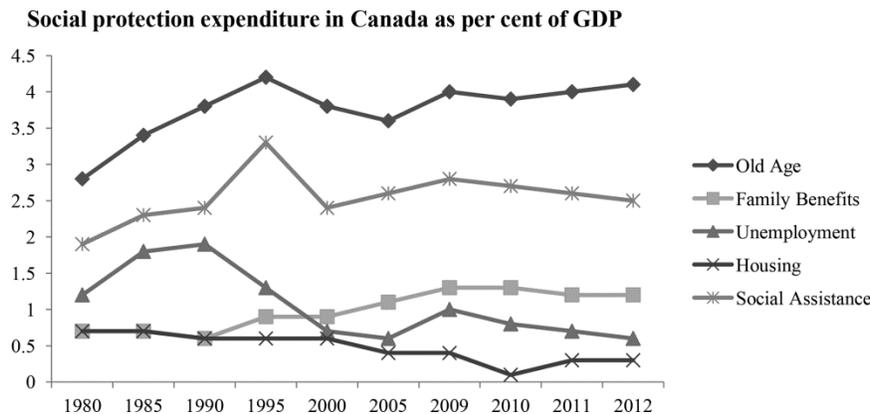


Figure 1: Figure produced with data obtained from OECD Library, “Social Expenditure - Aggregated Data”, obtained May 2015, online: <https://stats.oecd.org/Index.aspx?DataSetCode=SOCX_AGG#>.

The effects of persistent poverty and income deprivation are well known. A review of Canadian literature relevant to the issue of the social

202-0709, online: <<http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2020709&pattern=202-0701..202-0709&tabMode=dataTable&srchLan=-1&p1=-1&p2=31>>.

¹² Citizens for Public Justice, *Poverty Trends Scorecard* (2012), at 6, online: <<http://www.cpj.ca/files/docs/poverty-trends-scorecard.pdf>>.

consequences of economic inequality for Canadian children concluded that there is a “strong relationship between low income and/or socio-economic status and deleterious social outcomes”.¹³ The social outcomes where detriment was evident included: likelihood of physical, sexual and emotional victimization; incidence of lower academic/cognitive educational achievement and undesirable social/behavioural activity; lower life expectancy, risk of illness and other emotional and physical health experiences; and employment outcomes. Moreover, given the over-representation of women, new immigrants, racialized populations and people living with disabilities among the lower income strata, these detrimental social outcomes are disproportionately borne by these groups.¹⁴

In Part IV of this article, I will be referring to a Charter claim that Canadian governments have failed to protect people against homelessness and inadequate housing. Specific statistics in this area are alarming. For example, it is estimated that approximately 35,000 people are homeless on any given night and that over 235,000 people experience homelessness in a year.¹⁵ It is also estimated that nearly one in five renter households experience extreme housing affordability problems, defined as being on low income and spending more than 50 per cent of income on rent.¹⁶ Less extreme affordability problems, defined by Canada Mortgage and Housing Corporation as spending more than 30 per cent of income on rent or similar housing costs (*i.e.*, a mortgage), affect nearly half of all renter households and nearly 20 per cent of owner households. The situations of both homelessness and precarious housing have known detrimental impacts on individual’s physical and mental health, as well as other social outcomes, and this has been recognized by Canadian courts.¹⁷ Households that have to spend a high proportion of income on rent often do not have sufficient funds for other basic necessities, such as food. Food bank use has

¹³ Canadian Council on Learning, *The Social Consequences of Economic Inequality for Canadian Children: A Review of the Canadian Literature* (2006), online: <www.edu.gov.on.ca/eng/research/social_consequences2.pdf>.

¹⁴ See *StatsCan*, *supra*, note 8 generally. See also Meyer Burstein, “Combating the Social Exclusion of At-Risk Groups”, *Policy Research Initiative* (2005), at 7, online: <<http://dSPACE.africaportal.org/jspui/bitstream/123456789/23099/1/Combating%20the%20Social%20Exclusion%20of%20At%20Risk%20Groups.pdf?1>>.

¹⁵ Stephen Gaetz, Tanya Gulliver & Tim Richter, *The State of Homelessness in Canada 2014* (Toronto: The Homeless Hub Press, 2014), at 5.

¹⁶ *Id.*

¹⁷ See *Victoria (City) v. Adams*, [2009] B.C.J. No. 1538, 95 B.C.L.R. (4th) 175, 2009 BCSC 1043, at para. 18 (B.C.S.C.), *aff’d* [2009] B.C.J. No. 2451, 100 B.C.L.R. (4th) 28, 2009 BCCA 563 (B.C.C.A.) [hereinafter “*Adams*”].

climbed steadily and significantly in Canada over the past two decades, with 2012 seeing a record number of 872,379 people using a food bank during the annual counting month of March.¹⁸ The number decreased to 833,098 for 2013, but then climbed to 841,191 for 2014.¹⁹ The March 2014 count represents an increase in usage of 25 per cent over March 2008, which was the last year of a periodic downward trend in food bank use that ended with the 2008-09 global recession.²⁰

The disproportionate detrimental circumstances and outcomes produced by absolute levels of poverty and low-income, such as precarious housing and food insecurity, are then compounded by the detrimental impact of relative income inequality. Although social protection expenditure and other redistributive measures perform a significant ameliorative function on the degree of income inequality in Canada, Canadian society is now materially more income-unequal than it was in the mid-1970s. As shown in Figure 2, below, after declining steadily, if erratically, between 1975 and 1989, Canada's Gini coefficient rose steadily until around 2005, and has since remained at a similar level. Over the same period, Canada's gross national income per capita has risen steadily.

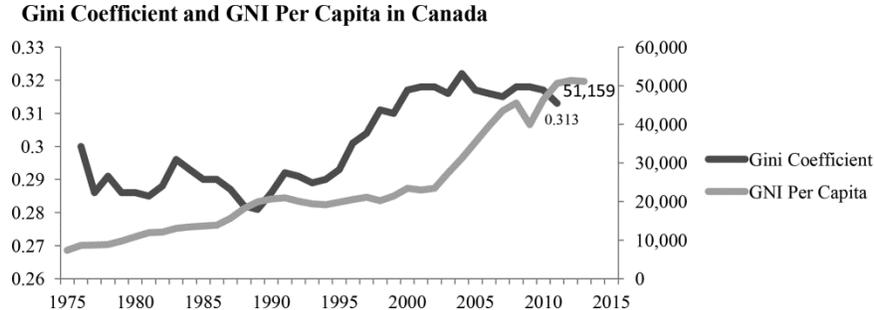


Figure 2: Figure prepared using data obtained from Statistics Canada, *CANSIM Table 202-0705*, “Gini coefficients of market, total and after-tax income, by economic family type” obtained May 2015; and from United Nations Statistics Division, “Per Capita GNI at Current U.S. Prices” obtained May 2015.

The way in which income inequality in Canada has increased is probably not surprising. The share of total income for the richest 20 per cent

¹⁸ Food Banks Canada, *Hunger Count 2012* (Toronto: Food Banks Canada, 2012).

¹⁹ Food Banks Canada, *Hunger Count 2014* (Toronto: Food Banks Canada, 2014).

²⁰ *Id.*

of the population has been steadily increasing since the early 1980s — from 43 per cent to 47.3 per cent. This has come at the expense of both the middle 40 per cent of income earners and the lower 40 per cent group, whose shares have fallen by around 2 per cent each.²¹

The apparent lack of relationship between economic growth and more equal income distribution, as well as the persistence and impact of income inequality itself, have become subjects of investigation in recent economic literature. For instance, in *The Spirit Level*, a study that quickly drew attention, one conclusion reached by authors Wilkinson and Pickett is that as GDP per capita reaches the relatively affluent range of \$30,000 (which it did in Canada in 2004), improvements in societal well-being become more closely related to income distribution than economic growth.²² Wilkinson and Pickett also found a very close and direct correlation between increased incidence of a variety of social problems — including loss of social trust and collaborative relations — and the high levels of income inequality in developed countries.²³ Similarly, the Canadian Index of Wellbeing (“CIW”) reported that although Canadian GDP grew by 28.9 per cent from 1994 to 2010, a measure of the (objective) well-being of Canadians grew by only 5.7 per cent in the same period.²⁴ The authors partly attributed the slower increase in well-being to increasing socio-economic inequality over the period. In addition, the CIW reported that, during the recession of 2008 to 2010, while GDP declined 8.3 per cent, well-being declined 24 per cent.²⁵ More broadly, research by the International Monetary Fund has concluded that economic growth is

²¹ Statistics Canada, CANSIM Table 202-0405, “Upper income limits and income shares of total income quintiles, by economic family type, 2011 constant dollars”, online: <<http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2020405>>.

²² Wilkinson & Pickett, *supra*, note 7, at 8.

²³ *Id.*, at 6.

²⁴ Canadian Index of Wellbeing, *How are Canadians Really Doing?* (Waterloo, Ont.: CIW and University of Waterloo, 2012), at 1, online: <https://uwaterloo.ca/canadian-index-wellbeing/sites/ca.canadian-index-wellbeing/files/uploads/files/CIW2012-HowAreCanadiansReallyDoing-23Oct2012_0.pdf>. The results of the CIW are echoed in the results of a global study of subjective happiness, see John Helliwell, Richard Layard & Jeffrey Sacks eds., *World Happiness Report 2013* (New York: UN Sustainable Development Solutions Network, 2013). In the WHR, Canada ranked 6th in the world and was topped only by Switzerland (3rd) and a collection of Northern European countries (Denmark (1st), Norway (2nd), Netherlands (4th), Sweden (5th)). Nevertheless, the WHR also recognizes that happiness inequality exists in Canada. In fact, the WHR finds that over the five years since the previous report, although overall happiness is at a similar level in Canada, inequality of happiness has increased. The increase in inequality of happiness echoes increases in socio-economic inequality over the same period and, indeed, further back.

²⁵ *Id.*, at 10.

generally more sustainable when income distributions are more equalized.²⁶

The idea that income inequality is a problem in its own right puts the task of defining a constitutional conception of equality in a new light. To the extent that constitutional law seeks to protect and advance substantive equality in the socio-economic realm, this idea means that constitutional law needs to be concerned not only with the relationship between inequality of socio-economic conditions and income deprivation but also with the relationship between adverse socio-economic conditions and income inequality. Constitutional law needs to pay attention to the policy choices of Canadian governments in relation to both the floor of socio-economic well-being and the distance between the floor and the ceiling of socio-economic well-being. In considering the role of constitutional law in relation to socio-economic inequality, it also bears re-emphasizing that, although the degree of socio-economic inequality in Canada is clearly influenced by regional and international economics and other events, and although the causes and impacts of those events are to a significant extent beyond the control of domestic governments, the policy choices of Canadian governments nevertheless remain relevant. This is evident in a negative way in the fact that the general worsening of income inequality in Canada since the mid-1990s corresponds with a significant retrenchment in Canadian social programs brought about through the erosion and eventual elimination of the Canada Assistance Plan.²⁷ But it is also evident in a positive way, as evident in the relative success of the deliberate and concerted policy action taken on poverty among older adults. More recently, the final report on a large scale trial of so-called Housing First strategies across five Canadian locations has shown significant improvement in the life circumstances of the homeless persons who participated, along with significant cost savings to society, as compared to “treatment-as-usual”.²⁸ The persistence of income deprivation and income inequality in Canada is thus in part attributable to the choices that Canadian governments make as to what policy actions and interventions they will undertake.

²⁶ Andrew G. Berg & Jonathan D. Ostry, “Inequality and Unsustainable Growth: Two Sides of the Same Coin?”, *IMF Research Department* (2011), at 3, online: <<https://www.imf.org/external/pubs/ft/sdn/2011/sdn1108.pdf>>. See also, Broadbent Institute, *Towards a More Equal Canada: A Report on Canada's Economic and Social Inequality* (Ottawa: Broadbent Institute, 2012), online: <http://www.broadbentinstitute.ca/towards_a_more_equal_canada>.

²⁷ See discussion below, Part III.1.

²⁸ Paula Goering *et al.*, *National At Home/Chez Soi Final Report* (Calgary: Mental Health Commission of Canada, 2014), online: <<http://www.mentalhealthcommission.ca/English/node/24376>>.

Since constitutional law plays a fundamental role in regulating those choices, it also has the potential to play a role in the prevalence of socio-economic inequality in Canada. In the next part I move to an overview of the role that constitutional law has played over the past few decades.

III. CONSTITUTIONAL LAW AND SOCIAL JUSTICE: LOOKING BACK

The Canadian Constitution and *Charter of Rights and Freedoms* are the foundational infrastructure for the exercise of public legal authority. The constitutional law that emanates from them covers a range of fundamental aspects of democratic governance. The areas of constitutional law that have had greatest relevance to social justice are: the identification and division of powers between different levels of government (under sections 91 and 92 of the Constitution); the definition and jurisdictions of the different branches of government, including the separation of powers (under Parts III, IV and VII of the Constitution); and, the enumeration (and implication) of the fundamental principles, rights and freedoms that all branches and levels of government must respect, including Aboriginal rights (under section 35 of the Constitution) and those guaranteed by the Charter. I will address the relationship between constitutional law and social justice in each of these areas.

1. Division of Powers

The division of powers in Canada has played a facilitative role in relation to governmental action on substantive equality and social justice. At a general level, the constitutional provisions that identify and allocate governmental powers between the federal and provincial layers of government include ample power to regulate socio-economic activity and to implement programs to address substantive inequality. The language of the constitutional division of powers reserves some areas of socio-economic policy to one layer of government or the other and so, at times, a federal or provincial government may find itself somewhat restricted in those areas, but it is never the case that neither layer of government can act.²⁹ Moreover, constitutional law has rejected the idea that the division

²⁹ Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2005), at part 15.9(e) [hereinafter “Hogg”].

of powers creates “watertight compartments”³⁰ and so, due to the multi-dimensional nature of many social justice issues, it is often the case that both the federal and provincial governments can act in the same areas, even though they may technically need to be targeting different dimensions of the same area, in accordance with the differences between their available heads of power. For instance, while health care is regarded as an area of provincial jurisdiction, the federal government’s power over criminal law enables it to actively regulate many activities — such as abortion services³¹ or drug addiction treatment³² — that have both health and criminal/moral dimensions and that also implicate issues of socio-economic inequality. At the same time though, constitutional law includes doctrines relating to federal paramountcy and interjurisdictional immunity that can sometimes thwart the plans of one or other layer of government when seeking to act in an area of mutual attraction.³³

At a more specific level, constitutional law has played a particularly facilitative role through sanctioning conditional and unconditional federal spending in areas that ostensibly lie outside the scope of powers granted to the federal government. Although the Constitution contains no explicit “spending power”, it is taken as a matter of implied constitutional necessity that the federal government has the authority to spend the money it legitimately raises from taxes and other sources.³⁴

³⁰ *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.).

³¹ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at para. 191 (S.C.C.).

³² *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, at para. 52 (S.C.C.) [hereinafter “PHS”].

³³ For instance, the doctrine of interjurisdictional immunity has meant that federal jurisdiction over the so-called federally-regulated undertakings identified in s. 92(10)(a) of the Constitution has led to provincial minimum wage provisions being rendered inapplicable to companies operating in those industries because such provisions intrude on a “vital part” of the management and operation of such undertakings: see, *Quebec (Commission du Salaire Minimum) v. Bell Telephone Co. of Canada*, [1966] S.C.J. No. 51, [1966] S.C.R. 767 (S.C.C.). Nevertheless, the federal government has the legislative power to set minimum wages of employees of those companies (as it did subsequently to the *Commission du Salaire Minimum* case). For provincial intrusions that affected less “vital parts” of federally-regulated undertakings, the doctrine of paramountcy of federal legislation would mean that inconsistent federal regulation would also render the provincial intrusions inapplicable.

³⁴ Hogg contends that a basic spending power “must be inferred from the powers to levy taxes (s. 91(3)), to legislate in relation to ‘public property’ (s. 91(1A)), and to appropriate federal funds (s. 106)”. See Hogg, *supra*, note 29, at part 6.8(a). Doctrinally, the first judicial confirmation of the existence of the spending power has been attributed to Lord Atkin in *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] J.C.J. No. 6, [1937] A.C. 355, [1937] 1 D.L.R. 684, at 5 (P.C.). Lord Atkin appeared to set limits to the scope of the power that now seem to have been

The more contentious issue is whether this power should be regarded as limited to the subject-matters of law-making assigned to the federal government under the division of powers.³⁵ This issue potentially impacts a wide array of cost-sharing and cost-contribution agreements between the federal and provincial governments in areas that directly implicate socio-economic equality and social justice. The prime example is federal spending on provincial social assistance programs. The provision of social assistance is generally regarded as a matter of provincial jurisdiction.³⁶ When initiated in the form of the *Canada Assistance Plan Act* (the “CAP”),³⁷ in 1966, federal government spending in this area occurred through an agreement to an uncapped 50/50 cost-sharing arrangement that included conditions on various aspects of the programs for which cost-sharing was offered. The conditions included, for example, that the level of benefits provided under social assistance programs take account of the costs of basic necessities.³⁸ Almost three decades later, the Supreme Court had to decide *Re Canada Assistance Plan*,³⁹ a constitutional challenge (by way of a reference launched by the government of British Columbia) to unilateral federal changes to the terms of the CAP that limited annual growth in the federal contribution to five per cent for “have” provinces (Ontario, Alberta and British

rejected, see *Reference re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.), and discussion in remainder of this section. Although perhaps still legally debatable, the practical and political validity of the federal spending power is affirmed by, for instance, its specific mention in the *Canadian Agreement - A Framework to Improve the Social Union for Canadians*, online: <<http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=638>>.

³⁵ For an argument as to why a spending power should be at least somewhat limited, see Andrew Petter, “Federalism and the Myth of the Federal Spending Power” (1989) 68 Can. Bar Rev. 448. For analysis of the broader issue of federal jurisdiction over social policy, see Sujit Choudhry, “Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy” (2002) 52:3 University of Toronto L.J. 163-252.

³⁶ Keith G. Banting, *The Welfare State and Canadian Federalism* (Kingston & Montreal: McGill-Queen’s University Press, 1982), at 48.

³⁷ R.S.C. 1985, c. C-1 [rep.]. For an overview of the *Canada Assistance Plan Act* and the nature of the agreements entered into under it (as well as the Social Union Framework Agreement that superseded it) see Barbara Cameron, “Accounting for Rights and Money in the Canadian Social Union” [hereinafter “Cameron”] in Margot Young, Susan B. Boyd, Gwen Brodsky & Shelagh Day (eds.), *Poverty: Rights, Social Citizenship, Legal Activism* (Vancouver: University of British Columbia Press, 2007), ch. 8 [hereinafter “Young, ‘Poverty’”].

³⁸ See *Canada Assistance Plan Act, id.*, at s. 6(2)(a). See also *Finlay v. Canada (Minister of Finance)*, [1986] S.C.J. No. 73, [1986] 2 S.C.R. 607 (S.C.C.), where the citizen-enforceability of this aspect of the agreement was considered.

³⁹ *Reference re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.) [hereinafter “*Re Canada Assistance Plan*”].

Columbia), thus eroding the 50/50 split. The main focus of the challenge was an objection to the unilateral nature of the federal government's actions. The government of British Columbia, joined by other provinces, argued that no amendments to the CAP could occur without provincial consent. In the course of the reference, the province of Manitoba raised an argument that appeared to dispute the power of the federal government to intrude into provincial jurisdiction via conditional grants under the spending power. This argument was directly rejected by Sopinka J. for the unanimous Court.⁴⁰

The judicial validation of a federal spending power that can be used in areas of provincial legislative jurisdiction is an example of the more specific facilitative role of constitutional law in relation to socio-economic inequality. The social assistance programs funded via the CAP can be regarded as governmental actions that promote or improve substantive equality. Fundamentally, social assistance programs acknowledge differential socio-economic circumstances and, in particular, social and economic disadvantage and injustice. Through the creation of programs providing benefits targeted to needs, social assistance programs involve differential legal treatment (not everyone meets the legal criteria for receiving assistance) aimed at ameliorating differential social circumstances. In addition, in the subsequent case of *Finlay v. Canada (Minister of Finance)*, the Supreme Court held that individual Canadians were entitled to bring a court action to enforce the CAP condition of setting benefits at a level that takes into account basic necessities. In this way, constitutional law facilitates a means of citizen accountability for the terms of inter-governmental cost-contribution agreements that relate to substantive equality.

At the same time though, in *Re Canada Assistance Plan*, the Court validated the federal government's liberty to unilaterally alter the terms of the agreement, in part based on the fundamental constitutional principle of parliamentary sovereignty that limits the power of a present Parliament to bind a future Parliament. By validating this governmental liberty in circumstances that involved an erosion of an agreement that supported substantive equality, the Court restrained the ability of constitutional law to go beyond facilitating to protecting substantive equality. In a few short years, the federal government eliminated the CAP altogether, replacing it with new agreements that significantly

⁴⁰ *Id.*, at 567. By the same token, the Court has recognized a similar scope for provincial spending power, see *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.).

reduced the federal share of social program expenditures.⁴¹ The price of provincial acceptance of these agreements was a loosening or abandonment of the federal conditions, including the “basic necessities” reference point, that, in turn, enabled some provinces to pursue drastic cutbacks in levels of social assistance. In Ontario, for example, the Harris government reduced social assistance rates by 22.6 per cent.⁴² This cut had devastating consequences for individuals in receipt of social assistance and significantly increased socio-economic inequality.⁴³ The unwillingness of the courts to allow the Charter-based area of constitutional law to be used to protect the socio-economically disadvantaged from these consequences will be considered below.⁴⁴ Along the way, with the move to largely unconditional transfers, Finlay’s hard won entitlement to hold governments accountable to the terms of their cost-sharing arrangements became meaningless.

2. Separation of Powers

The facilitative role of constitutional law in relation to social justice is also evident in the area of the separation of powers between the constitutionally defined branches of government — legislature, executive/administration and judiciary. Concerns about maintaining an appropriate separation of powers arise in two main contexts: first, in the context of governmental initiatives aimed at deploying the apparatus of the administrative state to improve access to justice in key areas of social justice and socio-economic inequality; and, second, in the context of Charter-based judicial scrutiny of governmental action in relation to socio-economic inequality. In this section I will focus on the first context, leaving the second context to section 4, below. In addition, in this section, I will discuss the recent confirmation that constitutional law on the separation of powers can play a protective role in relation to substantive equality in the sense that the constitutional establishment of the judicial branch has been held to necessitate a measure of protection for access to justice.

⁴¹ For a discussion of the dismantling of CAP and transition to new arrangements, see Cameron, *supra*, note 37 and Lorne Sossin, “Salvaging the Welfare State: The Prospects for Judicial Review of the Canada Health & Social Transfer” (1998) 21 Dalhousie L.J. 141.

⁴² Ian Morrison, “Ontario Works: A Preliminary Assessment” (1998) 13 J. L. Soc. Pol’y 1, at 5.

⁴³ *Id.*

⁴⁴ See section III.4, below.

After a rocky start, the facilitative role of constitutional law in the context of administrative state deployment in social justice areas now seems well entrenched. The key constitutional issue has been to prevent the improper transfer of power from the judicial branch of government, which is established by section 96 of the *Constitution Act 1867*, to the executive/administrative branch in general and to administrative tribunals more specifically. This issue has arisen in relation to the establishment and operation of a variety of administrative tribunals in a number of different social policy areas of special significance for social justice and socio-economic inequality. This includes residential tenancy disputes and cases in that area have established some of the basics of constitutional law on the issue. In the area of residential tenancies, which is generally representative of the aims and methods of administrative state deployment,⁴⁵ all provinces have for some time had legislation that regulates residential tenancy relationships.⁴⁶ In general, this legislation affects both the substantive terms of residential leases and the process by which disputes are resolved. Substantively, the legislation revises or replaces relevant common law principles and doctrines, emanating from property and contract law. The objective of doing so has been, at least in part, to ameliorate the substantive inequality that can exist between landlords and tenants, some of which is bolstered by traditional common law rules.⁴⁷ Procedurally, the legislation substitutes an administrative decision-maker and/or tribunal for the regular courts, with the objective being to provide a more “informal, effective, expeditious and inexpensive”⁴⁸ process that improves access to justice. This multi-pronged objective is achieved, at least in part, by means of establishing a dispute resolution process that is more expert in residential tenancy issues and less constrained by traditional common law approaches (or ideologies). Typically, the regular courts retain a degree of jurisdiction that enables them to undertake some supervision of the decisions of the tribunals, but the role of the courts is significantly reduced. In other words, both substantively and procedurally, the powers of the judicial

⁴⁵ For an overview of the aims and methods of the administrative state, especially in relation to displacement of courts and the common law, see W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

⁴⁶ *Residential Tenancies Act, 2006*, S.O. 2006, c. 17; *Residential Tenancy Act*, S.B.C. 2002, c. 78; *Civil Code of Québec*, CCQ-1991.

⁴⁷ For an overview of the genesis and substance of residential tenancy law reform, see B. Ziff, *Principles of Property Law*, 3d ed. (Toronto: Carswell, 2000), at 276-82.

⁴⁸ *Id.*, at 277.

branch of government are being significantly re-allocated to an organ of the executive/administrative branch.

The judicial consideration of the issue of whether this particular re-allocation of powers violated the constitutional separation of powers got off to a rocky start with the Supreme Court's decision in *Reference re: Residential Tenancies Act 1979 (Ontario)*.⁴⁹ The case arose as a reference by the provincial government as a preliminary step to the introduction of a new residential tenancy regime in Ontario. With its decision, the Supreme Court both initiated a constitutional test for re-allocations of power from courts to administrative tribunals and found that the regime planned in Ontario would violate that test. The Court laid down a three-part test for constitutionality that required examination of: whether the re-allocated powers had historically been exclusively exercised by the province's superior courts; whether the powers were judicial in nature; and, whether the new institutional context had transformed the nature of the powers in any way that might save the re-allocation as being regarded as upsetting the traditional allocation of powers.⁵⁰ In the circumstances of the reference, the Court held that the re-allocation of certain powers — to make orders evicting tenants and to make orders to compel compliance with rent control requirements — failed all three parts. By the Court's own admission, this result went somewhat against the grain of preceding decisions that had generally sanctioned investing administrative tribunals with judicial functions. Moreover, the Court explicitly acknowledged the aim of improving both substantive and procedural justice in residential tenancy matters. Perhaps tellingly though, Dickson J., who wrote on behalf of the Court, noted that representatives of both tenants and landlords objected to the transfer of power.⁵¹

Given this result, constitutional law on the separation of powers had the potential to stand in the way of a significant element of administrative state deployment in the interests of substantive equality. But this potential was relatively quickly quarantined and, within 15 years, all but deflated. Only two years later, the Supreme Court gave constitutional approval to a new residential tenancy regime in Quebec, ostensibly on the grounds that, historically, the relevant powers were not exclusively exercised by the superior courts in that province but, rather, had been shared with provincial

⁴⁹ [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 (S.C.C.).

⁵⁰ *Id.*, at 734.

⁵¹ *Id.*, at 749.

courts.⁵² Six years after that, the Court, by majority, put a “gloss” on the historical inquiry required under the first step by positing that the inquiry should examine the relative exclusivity of jurisdiction at a national level, at the time of Confederation.⁵³ Finally, a further 10 years later, the Court upheld the constitutionality of revisions to the residential tenancies regime in Nova Scotia that involved powers similar to those that were the focus in Ontario.⁵⁴ While this decision was enabled by an adoption of the national perspective on the historical inquiry, it also appeared to involve a reappraisal of the historical record even in Ontario. In the period between the decisions on the Ontario and Nova Scotia references, Ontario had continued to legislatively revise the substantive terms of residential tenancy relationships, but dispute resolution was left in the hand of the courts. Following the Nova Scotia reference decision, the Ontario government established a new administrative tribunal system for residential tenancy disputes.⁵⁵

What looked like a rocky start to the constitutionality of the re-allocation of powers relating to residential tenancy disputes now looks more like a rough patch in a longer term evolution of constitutional law — under the separation of powers — that has generally facilitated deployment of administrative state apparatus to address substantive inequality.

Turning to the protective role of constitutional law on the separation of powers, the Supreme Court, by majority, has recently confirmed that in establishing the judicial branch of government and, more specifically, the courts of superior jurisdiction, the Constitution necessarily protects access to those courts.⁵⁶ On this basis, the Supreme Court held that the provincial power to make laws for the administration of justice in the provinces (under section 92(14)) could not impose hearing fees on parties to litigation if those fees operated to deny access to the superior courts.⁵⁷ While this did not mean that hearing fees were necessarily unconstitutional, it did mean that a hearing fee scheme needed to ensure that it did not prevent any individual litigants from utilizing the superior courts. In the particular case, the hearing fee scheme implemented in

⁵² See *Quebec (Attorney General) v. Grondin*, [1983] S.C.J. No. 78, [1983] 2 S.C.R. 364 (S.C.C.).

⁵³ See *Yeomans v. Sobeys Stores Ltd.*, [1989] S.C.J. No. 13, [1989] 1 S.C.R. 238, at para. 27 (S.C.C.).

⁵⁴ See *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] S.C.J. No. 13, [1996] 1 S.C.R. 186 (S.C.C.).

⁵⁵ This came via the *Tenant Protection Act, 1997*, S.O. 1997, c. 24.

⁵⁶ *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, [2014] 3 S.C.R. 31 (S.C.C.) [hereinafter “*B.C. Trial Lawyers*”].

⁵⁷ *Id.*, at para. 77.

British Columbia was struck down because, although it allowed trial judges to waive the fee for litigants who were in receipt of certain specified social assistance benefits or who were “indigent” or “otherwise impoverished”, the scope of this discretion was regarded as too narrow. This decision thus sees constitutional law on the separation of powers playing a protective role in the sense that it will not allow provincial governments to impose additional burdens on would-be litigants in ways that exacerbate the negative consequences of existing socio-economic inequality in relation to the affordability of access to the courts. In reasoning to this result, the majority in the Supreme Court also invoked the constitutional principle of the rule of law. In the next section I discuss the role of this constitutional principle in relation to substantive equality and access to justice in contexts that do not involve the separation of powers.

3. Fundamental Principles

Constitutional law recognizes a set of constitutional principles that play a limited role in defining the demands of constitutional law. The principles recognized so far are: federalism, democracy, constitutionalism and the rule of law, respect for minorities, and judicial independence.⁵⁸ The principle of the rule of law has the most immediate relevance to substantive equality. Before it was invoked by the Supreme Court in a reinforcing role, in relation to protecting litigants from barriers to access to justice created by hearing fees in the British Columbia litigation, the rule of law principle had been directly relied upon to similar effect by lower courts in other provinces.⁵⁹ The Nova Scotia Supreme Court directly relied upon the principle to deem a hearing fee scheme in that province unconstitutional.⁶⁰ Similarly, the Ontario Divisional Court had required that other types of prescribed court fees could also be found unconstitutional, for violation of the rule of law principle, if they failed

⁵⁸ *Reference re: Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 49 (S.C.C.); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at para. 83 (S.C.C.).

⁵⁹ For a broader discussion of this aspect of the rule of law principle, see Kerri A. Froc, “Is the Rule of Law the Golden Rule? Accessing ‘Justice’ for Canada’s Poor” (2008) 87 Can. Bar Rev. 459 [hereinafter “Froc”].

⁶⁰ *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*, [1998] N.S.J. No. 526, 186 N.S.R. (2d) 1 (N.S.S.C.).

to provide for discretion to waive the fees in the interests of access to justice.⁶¹

The protective role of the rule of law principle evident in these cases on access to justice and court fees is, however, relatively limited and the courts have so far generally refused to allow it to play a more expansive protective role. Thus, the Supreme Court of Canada rejected a claim, based on the rule of law principle, that sought to protect people with low incomes, who needed legal services, from the negative impact on their access to justice of a tax on legal services introduced by the British Columbia government.⁶² Likewise, the Supreme Court of Canada refused leave to appeal from lower court decisions dismissing a claim brought by the British Columbia branch of the Canadian Bar Association seeking, in part, a reversal of cuts to legal aid services in the province on the basis that the cuts worsened barriers to justice and so violated the rule of law principle.⁶³ It is important to note though that, in each of these instances, the dismissal was framed in ways that left open the possibility of claims oriented to similar ends succeeding in the future.⁶⁴

4. Rights and Freedoms

Constitutional law under the Charter has a mixed record in terms of facilitating and furthering substantive equality in the socio-economic sphere. On the one hand, the Supreme Court has long maintained that the

⁶¹ *Polewsky v. Home Hardware Stores Ltd.*, [2003] O.J. No. 2908, 66 O.R. (3d) 600 (Ont. Div. Ct.).

⁶² *British Columbia (Attorney General) v. Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873, 2007 SCC 21 (S.C.C.) [hereinafter “*Christie*”].

⁶³ *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38 (B.C.S.C.), affd [2008] B.C.J. No. 350, 2008 BCCA 92, 290 D.L.R. (4th) 617 (B.C.C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 185 [hereinafter “*CBA*”].

⁶⁴ In *Christie*, *supra*, note 62, the trial judge had upheld the claim but a majority of the British Columbia Court of Appeal overturned that decision. As the claim journeyed up the court hierarchy, it was incrementally re-characterized, by the judiciary, to be less focused on the particular detrimental impact on low income people. Since it was the re-characterized claim that was rejected, this leaves the door open to the possibility of a different result in a future claim that is more narrowly focused, provided that focus can be maintained. For a deeper analysis consistent with this point, see *Froc*, *supra*, note 59. In the *CBA* case, *id.*, the decisions to dismiss focused on the lack of standing of the CBA, rather than the lack of merit to the claim, although the question of standing revolved around the substantive issue of whether there was a serious issue to be tried. A key stumbling block for establishing the seriousness of the issue was, according to the courts, the generalized nature of the claim. This leaves the door open to the possibility of a different result in a future claim that is framed more specifically.

Charter guarantees not merely formal but also substantive equality.⁶⁵ In addition, in an early Charter case it was stated that the section 1 guarantee clause was imbued with the following values that need to be considered when applying the Charter itself: “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”.⁶⁶ In combination, these positions would appear to hold significant potential for constitutional law to validate claims against governmental action that diminishes substantive equality and governmental inaction that fails to improve substantive equality.⁶⁷ Beyond that, the Supreme Court has confirmed that the guarantee of substantive equality is consistent with the introduction of ameliorative programs aimed at and restricted to disadvantaged groups, even where they entail drawing legal distinctions that involve differential treatment on protected grounds.⁶⁸ Moreover, Canadian courts have shown some willingness to revise rules on litigation standing and costs to acknowledge and ameliorate substantive inequality in the capacity of socio-economically disadvantaged individuals and groups to bring forward legal claims under the Charter.⁶⁹

On the other hand, however, governments have strongly resisted attempts to have the Charter applied in ways that would either protect already existing substantive equality measures or require measures to improve substantive equality. For their part, and in terms of the ultimate result in cases, Canadian courts have tended to take the governments’ side and so the Charter has rarely prevented governmental measures

⁶⁵ See, for instance: *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695, at para. 229 (S.C.C.); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, at para. 18 (S.C.C.); *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483, at para. 16 (S.C.C.) [hereinafter “Kapp”]; *Quebec (Attorney General) v. A.*, [2013] S.C.J. No. 5, [2013] 1 S.C.R. 61, at para. 36 (S.C.C.).

⁶⁶ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 64 (S.C.C.).

⁶⁷ This potential is consistent with the expectations for s. 15 that were held by the civil society who engaged its design and drafting, see Porter, *supra*, note 4.

⁶⁸ See *Kapp*, *supra*, note 65. For an analysis of this case and area, which includes some compelling arguments that substantive equality requires much more from the Supreme Court’s approach to ameliorative measures, see Young, “Kapp’ing”, *supra*, note 4.

⁶⁹ See, for instance: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, [2012] 2 S.C.R. 524, at para. 71 (S.C.C.); *Adams*, *supra*, note 17; *British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, [2015] B.C.J. No. 733, 37 M.P.L.R. (5th) 12, 2015 BCCA 142, at para. 31 (B.C.C.A.). But there are counterpoints to these issues as well: *CBA*, *supra*, note 63; *B.C. Trial Lawyers*, *supra*, note 56.

diminishing substantive equality, and has not compelled significant improvements in substantive equality.⁷⁰ At the same time though, the Supreme Court's reasoning has laid doctrinal stepping stones that provide possibilities for progress in protecting or promoting substantive equality in the future. Moreover, the prospects for realizing these possibilities may be strengthened by reasoning in some recent cases in which the Supreme Court has reversed itself on significant rights claims due, in part, to concerns about substantive socio-economic inequality.

The most direct claims to protection or improvement in relation to socio-economic disadvantage and substantive equality are based on either the section 7 guarantee that no person can be deprived of life, liberty or security of the person except in accordance with fundamental justice or the section 15 guarantee of equality before and under the law, as well as of equal protection and benefit of law. Claims that are less directly aimed at specific substantive equality measures, but that have broader relevance for socio-economic inequality, can be advanced under other Charter provisions. In particular, the section 2 guarantee of freedom of association has been relied upon in attempts to protect and promote workers' rights in relation to collective bargaining and the right to strike.

In terms of the most direct claims, the two leading examples of the Supreme Court protecting or requiring substantive equality measures are its decisions in *Eldridge v. British Columbia (Attorney General)*⁷¹ and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*.⁷² The *Eldridge* case raised the general question of whether a universally provided social program — in this case, public health care services — needed to be provided on a basis that ensured equal access for persons with disabilities via a claim that deaf patients were entitled to a reinstatement of medical translation services. The Supreme Court upheld the claim, under section 15, on the general ground that, without the translation services, deaf patients would not receive equal benefit of the universally provided health care system. The provision of the translation services can be regarded as a substantive equality measure, that is, a measure that responds to differential disadvantage in life circumstances that is caused by or corresponds to the protected ground of disability. Therefore, the decision in *Eldridge* is an example of constitutional law

⁷⁰ For a recent overview and critique, see Young, "Social Justice", *supra*, note 4.

⁷¹ [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.) [hereinafter "*Eldridge*"].

⁷² [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.) [hereinafter "*G. (J.)*"].

requiring a substantive equality measure. In the *G. (J.)* case, the Supreme Court upheld a claim that section 7 required that a custodial parent living on low income, who could not afford to retain legal counsel for child protection proceedings, had to be provided with state-funded counsel.⁷³ The entitlement to state-funded counsel in these circumstances was a response to the relative socio-economic disadvantage of people living on low income and so can also be regarded as an instance of constitutional law requiring a substantive equality measure.

In addition, substantive equality has been protected and promoted in some lower court decisions.⁷⁴ An example is the decision in *Adams*,⁷⁵ which upheld a Charter challenge to the impact on people experiencing street homelessness of a municipal by-law that prohibited the overnight erection of temporary shelters in public parks. This decision accepted that the prohibition exacerbated the risks to life and security of the person that street homelessness already posed and thus enabled the claimants to invoke the protection offered by section 7.

Unfortunately, viewed as part of the broader landscape of constitutional law under the Charter, *Eldridge, G. (J.)* and *Adams* appear as relatively isolated moments of support for substantive equality, at least in terms of results. Although the decisions retain important jurisprudential validity and force, they are outnumbered by the instances in which Charter claims seeking to protect or require substantive equality measures have been rejected. Rejected claims include, for instance: a claim to protection against a reduction of over 20 per cent in social assistance rates;⁷⁶ a claim to protection against a conditional reduction in social assistance to unemployed younger adults;⁷⁷ a claim to protection against withdrawal of essential utility services for inability to pay a security deposit;⁷⁸ a claim to provision of therapeutic services for

⁷³ For a deeper and broader consideration of this case and its aftermath, see Kate Kehoe & David Wiseman, "Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases" (2012) 63 *University of New Brunswick L.J.* 163.

⁷⁴ See discussion in Martha Jackman & Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework" in Martha Jackman and Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014), at 81-95.

⁷⁵ *Supra*, note 17.

⁷⁶ *Masse v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 363, 134 D.L.R. (4th) 20 (Ont. Div. Ct.) [hereinafter "*Masse*"].

⁷⁷ *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter "*Gosselin*"].

⁷⁸ *Clark v. Peterborough Utilities Commission*, [1995] O.J. No. 1743, 24 O.R. (3d) 7, (Ont. Gen. Div.).

children with disabilities to enable improved capacity to participate in society in general;⁷⁹ and, a claim to protection against anti-panhandling laws.⁸⁰ In some of these instances the rejection of the claim has been primarily based on purported inadequacies in the evidentiary support for the claims and so there remains a possibility for future progress.⁸¹ But in other instances the scope of the relevant Charter rights have been said to exclude the particular substantive equality claim. In still other instances though, where the results and aspects of the supporting reasoning have gone counter to substantive equality, the reasoning has included other aspects that are potentially promising doctrinal steps.

An example is the decision in *Chaoulli v. Quebec (Attorney General)*⁸² that also addressed the public health care system. In *Chaoulli* it was held, by all six members of the Supreme Court who addressed the issue, that the Charter did not require the provision of a public health care system. At the same time though, they all accepted that, so long as a public health care system was provided, the Charter applied to it. More specifically, they all also agreed that the risks to life and security of the person posed by the combination of undue waiting times for service in the public system and limitations on the availability of private care, via constraints on private health insurance, fell within the protective scope of section 7. Where the judges disagreed with each other was on whether the regulatory framework giving rise to these risks to life and security of the person could be regarded as violating principles of fundamental justice. Three of the six judges found an unjustifiable violation of section 7 and ultimately the result went that way when a similar conclusion was reached by a fourth judge who applied only the (similar) guarantees found in the Quebec Charter. This result thus upheld a challenge by a relatively socio-economically advantaged claimant to a legislative measure designed to restrict the ability of a private market for health care services to undermine the effectiveness of the public health care system. In that sense, the result undermines more than protects or promotes substantive equality.⁸³ Moreover, the judicial position that constitutional law under the Charter would not require a broad substantive equality

⁷⁹ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2008] 3 S.C.R. 657 (S.C.C.).

⁸⁰ *R. v. Banks*, [2001] O.J. No. 3219, 205 D.L.R. (4th) 340 (Ont. C.J.).

⁸¹ For example, *Gosselin*, *supra*, note 77.

⁸² [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter “*Chaoulli*”].

⁸³ The specific measure at issue in *Chaoulli* was one that prohibited private health insurance for services covered by the public system.

program, such as public health care, is troubling. This underlying lack of protection or compulsion at the program level reflects the positions taken in other cases with respect to other types of substantive equality-oriented social programs, such as social assistance and legal aid.⁸⁴ On the other hand though, in recognizing that the operation and impact of the public health care system can be subject to Charter scrutiny under section 7, a doctrinal stepping stone was laid for the possibility of future progress on health-care related claims brought by people experiencing substantive inequality.

To some extent this record casts doubt upon the Supreme Court's basic principle that the Charter guarantees not merely formal but also substantive equality. At a minimum, this record suggests that substantive equality may only impose requirements on governments once they elect to introduce measures to ameliorate socio-economic disadvantage. Moreover, any requirements of substantive equality may not be allowed to reach far beyond the framework of *Eldridge* and so would be quite weak. A troubling sign of the potentially weak force of substantive equality under the Charter is the decision of the Court of Appeal of Nova Scotia that rejected a Charter challenge to legislated provisions that were interpreted as *preventing* the province's monopoly provider of electricity services from establishing differential service rates for reasons of substantive inequality (*i.e.*, charging relatively less to customers with a relatively lower ability to pay).⁸⁵ Even if it might be reasonable to take

⁸⁴ On social assistance, see *Masse*, *supra*, note 76. On legal aid, note that the courts generally refuse to take the position that legal aid is required, although they retain the right to stay any proceedings where a lack of legal aid could render a trial unfair or otherwise violate s. 7 of the Charter: see, for example, *R. v. Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236 (S.C.C.); *R. v. Rushlow*, [2009] O.J. No. 2335, 96 O.R. (3d) 302, 2009 ONCA 461 (Ont. C.A.). One counterpoint to this general refusal to hold that the Charter requires particular programs is provided by the Supreme Court's decision to overturn the federal government's refusal to renew a regulatory exemption that permitted the creation and operation of a safe injection and drug treatment facility and program in Vancouver, see: *PHS*, *supra*, note 32. Canadian courts have also gone to some strange lengths to avoid relying upon ss. 7 and 15 to provide protection from cutbacks to social programs. For example, in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, [2014] F.C.J. No. 679, 2014 FC 651 (F.C.) (under appeal to the F.C.A.), the Federal Court held that the cancellation of health care services to refugee claimants violated the Charter primarily by violating the s. 12 guarantee against cruel and unusual treatment, although it also held that s. 15 had been violated, but not s. 7.

⁸⁵ *Boulter v. Nova Scotia Power Inc.*, [2009] N.S.J. No. 64, 275 N.S.R. (2d) 214, 2009 NSCA 17 (N.S.C.A.), leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 172 (S.C.C.). For a description and analysis of this claim and the circumstances behind it, see Claire MacNeil & Vincent Calderhead, "Access to Energy: How Form Overtook Substance and *Disempowered* the Poor in Nova Scotia" in Martha Jackman and Bruce Porter, eds., *Advancing Social Rights in Canada*, (Toronto: Irwin Law, 2014), at 253.

the position that the Charter's guarantee of substantive equality does not require differential service rates in order to ameliorate substantive inequality, it is very difficult to see how it can tolerate a legislative provision that pre-emptively prohibits consideration of whether substantive inequality ought to be taken into account. It should be noted though that the Supreme Court has at least been careful to enable provincial anti-discrimination human rights codes to advance a notion of substantive equality that is consistent with the *Eldridge* framework. For example, the Supreme Court upheld the decision of the British Columbia Human Right Tribunal that required the government of British Columbia to reinstate the therapeutic services made available to children with disabilities seeking to participate in the public education system.⁸⁶

In terms of the less direct claims to substantive equality that rely upon the section 2 guarantee of freedom of expression, constitutional law under the Charter has done an about-face on the issues of whether the section provides protection for the right to strike and to collectively bargain.⁸⁷ Although those rights have now been held to be protected, the Supreme Court has suggested that the protections may be more procedural than substantive, at least with respect to collective bargaining.⁸⁸ Moreover, and more disturbingly from the perspective of substantive equality, although the Supreme Court has disapproved the wide-ranging denial of freedom of association rights to agricultural workers⁸⁹ — some of the most socio-economically disadvantaged employees — it has nevertheless approved their ongoing exclusion from the regular system of labour relations and

⁸⁶ *Moore v. British Columbia (Education)*, [2012] S.C.J. No. 61, [2012] 3 S.C.R. 360 (S.C.C.). More broadly, the endorsement of the Supreme Court is seen as important because it has been argued that statutory human rights tribunals tend to advance a more robust notion of substantive equality, which may end up informing the Supreme Court's own approach. For a discussion of this interplay, see Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" in B.L. Berger, J. Cameron & S. Lawrence, eds., *Constitutional Cases 2012* (2013) 63 S.C.L.R. (2d) 261.

⁸⁷ *Labour Trilogy: Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.); *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.). The about-face is represented by, on protection of the right to strike, *Saskatchewan*, *supra*, note 1 and, on protection of collective bargaining, *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, 2007 SCC 27 (S.C.C.) and *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] S.C.J. No. 1, [2015] 1 S.C.R. 3, 2015 SCC 1 (S.C.C.) [hereinafter "*Mounted Police Association of Ontario*"].

⁸⁸ *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, *id.*

⁸⁹ *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.).

their relegation to a regulatory regime with relatively minimalist “good faith” protections.⁹⁰ This situation exists despite the explicit reliance on Anatole France’s aphorism in the recent Supreme Court decision that constituted the judicial about-face on Charter protection for the right to strike.⁹¹ Specifically, Abella J. cited the aphorism in the course of rejecting the minority view that, as Her Honour saw it, attributed equivalence between the power of employees and employers. According to Abella J., the minority view “turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour relations legislation has been scrupulously devoted to rectifying”.⁹² On the one hand, this invocation of the need to be vigilant about substantive inequality sits awkwardly with the endorsement of lesser rights for agricultural workers. On the other hand, that a concern for substantive inequality played a role in the decision to reverse the exclusion of significant labour rights from the Charter offers hope for future substantive equality claims in labour and other socio-economic contexts.

Charter-based constitutional law thus has a mixed record on substantive equality and socio-economic inequality. The Charter has generally been allowed to play a facilitative role, consistent with other areas of constitutional law, in the sense that it has not been allowed to be used to block substantive equality measures,⁹³ although *Chaoulli* has raised some concerns about that. At the same time though, the Charter has rarely required substantive equality measures and the courts have regularly refused to allow it to provide protection from measures that diminish substantive equality in the socio-economic realm. Nevertheless, it is worth emphasizing that the accumulated constitutional doctrine contains potentially useful stepping stones for more positive progress on substantive equality claims in the future. Those stepping stones include:

⁹⁰ *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 (S.C.C.).

⁹¹ *Saskatchewan*, *supra*, note 1.

⁹² *Id.*, at para. 56. In a subsequent rejoinder, one of the minority judges (Rothstein J.), noted that the majority’s decisions offered a greater degree of protection to already relatively advantaged groups of workers — public servants and police officers (see *Mounted Police Association of Ontario*, *supra*, note 87, at para. 240).

⁹³ *Per* Dickson J.: “In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons”, *R. v. Edward Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 136 (S.C.C.).

the recognition of a right of patients who are deaf to assistive services for communication with medical practitioners (*Eldridge*); the recognition of a right to state-funded counsel in child protection matters (*G. (J.)*); the recognition of the detrimental impact of a prohibition on erecting temporary shelters on the rights to life and security of the person of people who are street homeless (*Adams*); and the recognition of the relationship between timely access to public medical services and the rights to life and security of the person (*Chaoulli*). The mixed record thus far though is particularly concerning for the future of constitutional law and substantive equality because the Charter is the part of constitutional law that is most directly designed and empowered to regulate the policy choices that governments make with respect to citizens.

It is beyond the scope of this article to undertake a thorough analysis of the reasons for the unwillingness of the courts and governments to support a greater role for the Charter in protecting and requiring substantive equality but the main determining factors can be easily enough drawn from accumulated Charter scholarship. For present purposes, the reasons for the Charter's mixed record can be grouped under three main categories that are mutually-influencing and reinforcing: doctrinal, institutional and ideological. Doctrinally, governments and the courts have often adopted conceptions of particular rights and freedoms, and associated legal concepts and principles, that are inherently or contingently limited in their ability to acknowledge and enable substantive equality. A key example of this is the use of comparator group analysis in section 15 equality jurisprudence.⁹⁴ Another example is the conception of "deprivation" under section 7 as entailing a taking away, rather than a failure to provide,⁹⁵ as well as the preference for a predominantly civil and political, rather than social and economic, understanding of the scope of circumstances that can threaten "life, liberty and security of the person".⁹⁶ Institutionally, governments

⁹⁴ See: Daphne Gilbert, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24:1 *Windsor Yearbook of Access to Justice* 111; Margot Young, "Social Justice and the Charter: Comparison and Choice" (2013) 50:3 *Osgoode Hall L.J.* 669.

⁹⁵ Contrasting interpretations of "deprivation" are evident in *Gosselin*, *supra*, note 77, in the judgments of McLachlin C.J.C. (at para. 81, suggesting limitation to a taking away) and Arbour J. (at para. 321, arguing can also include withholding). See also, Alison M. Latimer, "A Positive Future for Section 7? Children and Charter Change" (2014) 67 S.C.L.R. (2d) 537, at 539 and Martha Jackman, "Charter Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?" in Kent Roach & Robert J. Sharpe eds., *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010), at 281-85.

⁹⁶ Hogg, *supra*, note 29, at para. 44.8.

have been hostile to, and the courts have been wary of, the democratic legitimacy and policy-making competence of judicial intervention in law-making in areas of social regulation that implicate Charter rights and freedoms.⁹⁷ This hostility and wariness has generally operated to reduce the scope of judicial interpretation and enforcement of Charter rights and freedoms and, moreover, that narrowing effect has been applied disproportionately in relation to claims impugning social and economic policy making.⁹⁸ Finally, ideologically, since around the time of the introduction of the Charter, Canadian governments, not to mention others throughout the Western world, have gradually weakened their commitment to, if they have not turned decidedly against, the ideals of the social welfare state, including socio-economic equality.⁹⁹ Canadian courts have, to say the least, not resisted this ideological shift and appear generally ambivalent about lending their doctrinal and institutional power to defending or promoting socio-economic equality and distributive justice.¹⁰⁰ Some Canadian judges, in some cases and in some extra-judicial speeches, express sympathy for the plight of the socio-economically disadvantaged, but that has rarely translated into a courtroom victory.¹⁰¹

⁹⁷ For an overview of the distinction between legitimacy and competency oriented arguments, as well as an analysis of the role of the latter, see David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51 McGill L.J. 503 [hereinafter "Wiseman, 'Competence Concerns'"] and David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, Institutional Competence of Courts and the Prospects for Anti-poverty Charter Claims" (2014) 33 N.J.C.L. 1 [hereinafter "Wiseman, 'Burden of Doubt'"]. See also Hester A. Lessard, "Dollars Versus [Equality] Rights: Money and the Limits on Distributive Justice" in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. 299 [hereinafter "Lessard"].

⁹⁸ See Wiseman, *id.*

⁹⁹ For a discussion of the relationship between the rise of neo-liberalism, welfare reform and notions of social citizenship, with a particular focus on Ontario, see: Janet Mosher, "Welfare Reform and the Re-Making of the Model Citizen" in its role in Margot Young *et al.*, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: University of British Columbia Press, 2007).

¹⁰⁰ See Joel Bakan, *Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Andrew Petter, "Wealthcare: The Politics of the Charter Revisited" in *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010); Lessard, *supra*, note 97.

¹⁰¹ For example, MacLachlin C.J.C. expressed sympathy for the claimant in her judgment in *Gosselin*, while rejecting her claim. In the same case, Arbour J. was a lone voice in support of constitutionalizing protections for social welfare rights.

5. Aboriginal Rights: Section 35

The relationship between constitutional law and social justice for the First Nations, Métis and Inuit peoples of Canada is predominantly characterized by the failure of constitutional law to impede a long history of colonial and neo-colonial governmental action that has created and exacerbated both formal and substantive inequality.¹⁰² Indeed, the Canadian constitutional order is founded upon an assertion of sovereignty over Aboriginal Peoples that is increasingly recognized as lacking legal and political legitimacy,¹⁰³ and yet Canadian constitutional law has generally been unwilling to confront that problem. Moreover, and until recently, constitutional law has tolerated systemic disregard for historic treaties with, and other key undertakings to, Aboriginal Peoples and, in this sense, has acted as a willing facilitator of the social injustice that disproportionately characterizes the situation of many Aboriginal communities and people.¹⁰⁴

It was hoped that Canadian constitutional law might be able to chart a different course with the embedding, as part of the constitutional renewal of 1982, of the section 35 declaration that “existing aboriginal and treaty rights” would be “recognized and affirmed”.¹⁰⁵ The meaning and significance of section 35 remains very much a work-in-progress.

¹⁰² The history of colonialism is amply documented in Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward, Looking Back* (Canada Communication Group: Ottawa, 1996), particularly c. 6 “Stage Three: Displacement and Assimilation” at 130. The contemporary substantive inequality of Aboriginal people is attested to in, for example, David Macdonald & Daniel Wilson, *Poverty or Prosperity: Indigenous children in Canada* (Canadian Center for Policy Alternatives; Ottawa, 2013), online: <<https://www.policyalternatives.ca/publications/reports/poverty-or-prosperity>>. This publication reports that Indigenous children are over two and a half times more likely to live in poverty than non-Indigenous children.

¹⁰³ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), in particular c. 5, “Questioning Canada’s Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism”; B. Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 S.C.L.R. (2d) 433 at 437; Michael Asch, “From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution” (2002) 17:2 C.J.L.S. 23.

¹⁰⁴ In numerous cases the Supreme Court has held that general provincial laws that operate to restrict or prohibit traditional and treaty-based Aboriginal hunting rights are allowed to have that effect under the federal *Indian Act*, R.S.C. 1985, c. I-5 and the associated exclusive federal jurisdiction over Indians (s. 92(24)). In so doing, the Supreme Court has typically dismissed or ignored arguments that treaty rights should be accorded more protection and a higher constitutional status. See, for instance, *R. v. Sikyea*, [1964] S.C.J. No. 42, [1964] S.C.R. 642 (S.C.C.) and *R. v. George*, [1966] S.C.J. No. 7, [1966] S.C.R. 267 (S.C.C.). Prior to the entrenchment of s. 35 of the Constitution, it was accepted that federal legislation could extinguish treaty rights: see Hogg, *supra*, note 29, at 27.5(e).

¹⁰⁵ Constitution, s. 35.

At particular points in time, the potential for positive impact on socio-economic inequality for Aboriginal Peoples and the trajectory of decisions and doctrine in section 35 cases have been assessed optimistically and pessimistically.¹⁰⁶ Rather than survey the ups and downs of what is already a sizeable body of jurisprudence, in this section I will briefly discuss the extent to which constitutional law under section 35 has been formulated to acknowledge and accommodate the already existing socio-economic inequality of those individuals and communities whose rights it articulates and whose negotiations and litigations over those rights it purports to facilitate.

An example of a lack of acknowledgment and accommodation of already existing socio-economic inequality is the judicial formulation of Aboriginal title and the associated encouragement to negotiate rather than litigate the underlying issues. As formulated in *Delgamuukw v. British Columbia*,¹⁰⁷ Aboriginal title is subject to both an inherent limitation and to justified infringement. The inherent limitation is that the title lands cannot be utilized by the holders of Aboriginal title in ways that are “irreconcilable with the nature of the [prior] occupation of that land and the relationship that the particular group has had with the land”.¹⁰⁸ In addition, governments are entitled to infringe on Aboriginal title to advance a wide array of public policy objectives, provided the infringements are not disproportionate to the objectives and that they comply with associated obligations to consult and compensate. Having formulated Aboriginal title in this way, the Supreme Court concluded with an encouragement to negotiate, rather than litigate, Aboriginal title claims. The establishment of a constitutional right to Aboriginal title under section 35 is a development that has significant potential to improve substantive equality for Aboriginal Peoples. Yet the terms of its formulation and the encouragement to negotiate can be criticized for failing to acknowledge or accommodate already existing socio-economic inequality. Specifically, in formulating the inherent limit, the Supreme Court appears to constrain the Aboriginal title-holders to land-uses that are reconcilable with the nature of the relationship they had to the land at

¹⁰⁶ For example, see Darlene Johnston, “Lo, How Sparrow Has Fallen: A Retrospective of the Supreme Court of Canada’s Section 35 Jurisprudence” in Julia Bass, William A. Bogart & Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005).

¹⁰⁷ [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) [hereinafter “*Delgamuukw*”].

¹⁰⁸ *Id.*, at para. 128, *per* Lamer C.J.C.

a time when they were autonomous and sustainable communities not yet subjected to the substantive inequality wrought by colonialism. To prohibit uses of land that may have been inconceivable in the past, but that are appropriate and feasible for a contemporary Aboriginal community that is experiencing significant socio-economic disadvantage, may doom the community to perpetual substantive inequality. Admittedly, an Aboriginal community caught in this bind always has the option of surrendering the land to the government on terms that would enable it to undertake uses that would violate the inherent limit, but that leads to another problematic aspect of the *Delgamuukw* decision. Specifically, whether negotiating the terms of a surrender to circumvent the inherent limit, or negotiating the terms of a proposed infringement of Aboriginal title, or negotiating the settlement of an Aboriginal title claim, an inequality of bargaining capacity may arise for Aboriginal communities that are already experiencing circumstances of socio-economic disadvantage. Moreover, by formulating Aboriginal title in a way that seeks to offer internal mechanisms for balancing Aboriginal and governmental interests — that is, the mechanisms of the inherent limit and justified infringement — the Supreme Court undermines the bargaining position of Aboriginal communities. Aboriginal communities might have had a much stronger bargaining position if Aboriginal title had been formulated without internal limitations, thereby necessitating that governments bargain not merely over how to balance the respective interests but also for the opportunity to balance interests at all. Given the socio-economic disadvantage of many Aboriginal communities, it could be expected that there would ultimately be mutual interest in balancing, but the Aboriginal communities would be starting with a stronger bargaining position that could help them to both compensate for any relative disadvantage in bargaining capacity and to reach a deal that better ameliorates their broader socio-economic inequality.

Some concerns can thus be raised about the extent to which the foundational decision of constitutional law on Aboriginal title acknowledges and accommodates the existing socio-economic inequality of Aboriginal Peoples. On the other hand, and at the other end of the spectrum of acknowledgment and accommodation, Canadian courts have established a doctrinal basis for Aboriginal claimants to seek advanced costs and other cost-sharing and cost-subsidizing arrangements with the governments against whom they are bringing claims under

section 35.¹⁰⁹ In the middle of the spectrum are developing approaches to the impact of socio-economic inequality on the capacity of Aboriginal communities to participate in processes associated with the constitutionally imposed duty on governments to consult on any measures that may impact on rights protected by section 35.¹¹⁰

Overall then, the relationship between constitutional law and substantive equality for Aboriginal Peoples is currently emerging from a long history of colonialism. The associated dispossession and discrimination, which was both tolerated and facilitated by constitutional law, has wrought the worst circumstances of socio-economic inequality in contemporary Canada. The relatively recent constitutional entrenchment of Aboriginal title and rights under section 35 potentially allows constitutional law to make amends by establishing and protecting those entitlements in ways that will lead to improvements in substantive equality for Aboriginal Peoples. But there are already signs of an inconsistent appreciation for the relevance of existing socio-economic inequality.

6. Other Constitutional Provisions and Constitutional Values

Another constitutional provision that has the potential to play a role in relation to ameliorating socio-economic inequality is section 36. This section commits the federal and provincial governments 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”. Since equal opportunity for well-being and the provision of essential public services can both be understood as relevant to protecting and advancing substantive equality, there is potential for either level of government, or individuals, to invoke this provision when governmental action appears inconsistent with these constitutional commitments. Thus far, however, section 36 has rarely been invoked and, to the limited extent that it has

¹⁰⁹ See *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76, [2003] 3 S.C.R. 371, 2003 SCC 71, at paras. 27-31 (S.C.C.). See also: Brian McLaughlin, Cheryl Tobias & Craig Cameron, “Interim Costs: The Impact of Okanagan Indian Band” (2005) 54 U.N.B.L.J. 126.

¹¹⁰ See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.). On capacity-building funding generally, see Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2009), at 38, 73.

been judicially considered, there have been mixed views on whether it is capable of giving rise to enforceable obligations.¹¹¹

Even though section 36 might not be directly enforceable, it could still play a role if regarded as a relevant source of constitutional values that could inform the broader development of constitutional law. This would be akin to the role that Charter values have been allowed to play in the development of the common law in disputes between private parties. As I will now briefly discuss, the role of Charter values in disputes between private parties is a final way in which constitutional law has been relevant to social justice. An example is the recognition that the Charter's guarantee of freedom of expression gives rise to an important corresponding Charter value that needed to be considered when the courts were reviewing the application of the common law on tortious interference with contracting to a situation of secondary picketing associated with a labour dispute.¹¹² While each specific Charter right and freedom would therefore seem to establish a Charter value relevant to the common law, it is also the case that the Charter values recognized as imbued in the section 1 guarantee clause — including the value of “social justice and equality” — could be relevant to development of the common law as well.¹¹³

In sum then, looking back, in a variety of legal areas, constitutional law has generally been willing to facilitate governmental action aimed at improving substantive equality. Very occasionally, under the Charter, it has gone further than facilitating by requiring substantive equality measures. More regularly though, under the Charter, constitutional law has refused to protect or mandate substantive equality in relation to socio-economic inequality and social injustice. Nevertheless, even where courts have rejected substantive equality oriented Charter claims, their reasoning has either left the door open to or laid some stepping stones for future progress. One way to interpret the overall trajectory of the past of

¹¹¹ For a view that s. 36 might create enforceable rights, see *Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board*, [1992] M.J. No. 218, 91 D.L.R. (4th) 554, at para. 10 (Man. C.A.). For a view that it does not, see *CBA*, *supra*, note 63, at para. 118, *per* Brenner C.J.S.C. For a broader discussion of this issue, see Martha Jackman & Bruce Porter, “Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework” (2013-10) *University of Ottawa, Faculty of Law, Working Paper Series* at 11-19, online: <<http://ssrn.com/abstract=2348724>>.

¹¹² *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.).

¹¹³ For a judicial effort to enlist Charter values in adding a substantive equality dimension to the common law conception of trespass as applied to public property, see *R. v. A. (S.)*, [2011] A.J. No. 986, 52 Alta. L.R. (5th) 85, 2011 ABPC 269 (Alta. Prov. Ct.).

constitutional law in relation to social justice is to say that it has been characterized both by a gradual acceptance of the importance of substantive equality and by a very cautious, and not always forward moving, approach to steering constitutional law to that end. In the next section, I consider an element of Charter jurisprudence that may be relevant to determining whether constitutional law will head more, or less, in the direction of the realization of socio-economic equality over the next few decades.

IV. CONSTITUTIONAL LAW AND SOCIAL JUSTICE: MOVING FORWARD (UNDER THE CHARTER)

The relationship between constitutional law under the Charter and social justice reflects the trajectory of the past of constitutional law more generally. In pronouncing the dictates of the Charter, Canadian courts have generally refused to allow it to block governmental measures aimed at addressing substantive inequality. At the same time though, they have only sometimes enabled the Charter to protect or require substantive equality in the face of governmental retrenchment or inaction. This despite a recognition, at least on the part of the Supreme Court's now long-serving Chief Justice, that the expansive wording of the Charter's equality guarantee was meant as an encouragement to meaningful judicial action.¹¹⁴ When understood in terms of the mixed record of the Charter in relation to socio-economic inequality, it can be said that, at least in terms of realization, the constitutional conception of equality is more majestic than substantive. While some steps towards substantive equality have been taken, and some stepping stones for the future have been laid, overall progress has been restrained and cautious.

A certain level of restraint and caution in the judicial expression of constitutional law under the Charter is, in a constitutional democracy, probably as it should be. The Charter enables courts to overrule the products of an electorally-accountable governing institution and there are good reasons to be skeptical about the desirability, legitimacy and capacity of too

¹¹⁴ In extra-judicial writing on the challenges that Canadian judges have faced in giving meaning to the Charter's equality guarantee, McLachlin C.J.C. stated that the expansive wording of the guarantee was the framers' means of giving "the courts clear, unequivocal instructions: This is a guarantee of equality. Take it seriously. Don't cut it down. Interpret it in a meaningful and expansive way." See The Right Honourable B. McLachlin, P.C., "Equality: The Most Difficult Right" (2001) 14 S.C.L.R. (2d) 17, at 17.

great a role for government-by-courts.¹¹⁵ Moreover, in the broader context of national and global social, economic, technological and political forces, the impact of constitutional law and adjudication under the Charter to drive change may be quite limited overall, even if there are also some moments of special significance.¹¹⁶ Nevertheless, the Charter has its own democratic pedigree and the courts have long constituted an essential element of systems of democratic governance. The issue for judicial expression of constitutional law under the Charter is therefore not so much whether the courts should overrule governments in defence of constitutional rights and freedoms but, rather, when and to what degree they should do so.¹¹⁷ To the extent that seeking to protect and advance a constitutional conception of substantive equality is accepted as a touchstone for when and to what degree courts should intervene under the Charter, the question arises of how to steer constitutional law in that direction. In my view, whether meaningful progress can be made in that direction will depend upon the willingness of the courts to undertake a multi-dimensional shift in their approach to the Charter. The shift needs to take place across the doctrinal, institutional and ideological dimensions of Charter adjudication. In this section I will identify and discuss one potential area for change that implicates all of these dimensions, namely, the approach to the problem of polycentricity or, to phrase it more simply, the problem of social policy complexity.

An argument commonly invoked by governments and courts in rejecting claims seeking to protect or require substantive equality measures in the socio-economic realm is that such measures are typically but one aspect of a broader and multifaceted social policy engagement that involves a complex web of interactions among an array of regulatory programs and measures. As such, the design and operation of any one measure will be connected to the design and operation of a network of other measures. Adjustments to one specific measure will have implications and reverberations across at least part of the broader network of measures within

¹¹⁵ For expressions of concern about government-by-courts, see Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishing, Inc., 1994); Janet Heibert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal & Kingston: McGill Queen's University Press, 1996).

¹¹⁶ See W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994). See also Harry W. Arthurs, "Governing the Canadian State: The Constitution in an Era of Globalization, Neo-Liberalism, Populism, De-centralization and Judicial Activism" (2003) 13 *Constitutional Forum* 60.

¹¹⁷ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

which it is situated. In legal scholarship, and in Charter case law, this has at times been referred to as the problem of “polycentricity”, which reference draws on the work of Lon Fuller who identified polycentric situations as posing challenges for adjudicative decision-making processes.¹¹⁸ More commonly, scholars, legal advocates and judges use the more simple nomenclature of social policy complexity.¹¹⁹ Complexity of this sort is seen as a “problem” because it makes it difficult to separately investigate the effect of any one measure or to understand and analyze the impact of adjusting just one measure. In the context of Charter adjudication, this means that it is difficult to assess the extent to which an alleged violation of rights or freedoms can be attributed to any one measure. As well, it is difficult to assess whether adjusting any one measure will necessarily produce a better result for relevant rights and freedoms, either for the immediate claimant or for others who might be impacted as the broader system reacts to the particular adjustment. In a nutshell, the existence of complexity highlights the artificiality of focusing Charter scrutiny on a single governmental action (or inaction), because many governmental actions (and inactions) are undertaken as part of a broader collection of actions.

Government lawyers have regularly raised the problem of social policy complexity as a basis for urging Canadian courts to hold that particular claims, especially in relation to substantive equality measures, ought to be held to be unjusticiable (that is, not within the scope of the rights and freedoms guaranteed by the Charter) or, if violations are found, ought to be held to a lower, more deferential standard of scrutiny under section 1. Canadian courts have often accepted these arguments and, in doing so, have acquiesced in an interlocking set of doctrinal,

¹¹⁸ See Lon L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harvard Law Rev. 353. For a discussion of the idea and impact of polycentricity in social rights adjudication in general, see J. King, “The Pervasiveness of Polycentricity”, *Public Law* (2008) 101-24. The term “polycentricity” was first referred to in Charter case law in *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3, *per Bastarache J.* at para. 310 (S.C.C.). The term was referred to somewhat earlier in an administrative law context in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982, at para. 36 (S.C.C.).

¹¹⁹ An example of a scholar referring to the problems posed by “complex policy issues” is provided by Christopher P. Manfredi, “Déjà vu All Over Again: *Chaoulli* and the Limits of Judicial Policy-making” in Colleen M. Flood, Kent Roach & Lorne Sossin, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005), at 140. For a recent judicial example, see *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, at paras. 35, 37, 53 and 56 (S.C.C.) [hereinafter “*Hutterian Brethren*”].

institutional and ideological positions that, although highly contestable, and sometimes judicially questioned, continue to exert explicit or implicit influence in Charter adjudication.¹²⁰ The doctrinal position is that the traditional focus of constitutional human rights laws, and cases, is singular governmental legal “attacks” or intrusions on the formal equality (and negative liberty) of citizens.¹²¹ As singular events, these legal actions can be impugned and assessed on their own terms and without much attention to broader legal context, let alone broader social context. The corollary of this position is that action or inaction that diminishes or fails to improve substantive equality (or positive liberty) of citizens are more likely to be excluded from the scope of Charter scrutiny or, if included, are more likely to receive a lower degree of Charter regulation. The institutional reinforcement for this position comes through an argument that, as compared to democratically elected legislatures, and their associated governmental policy-making processes, the courts, in conducting Charter review, are comparatively less competent in complex/polycentric policy areas and comparatively less legitimate in non-traditional areas of human rights.¹²² Finally, the ideological reinforcement exists in the libertarian/neo-liberal hostility to the social welfare state, to social and economic human rights, to substantive equality, to positive liberty (and so on), as well as stigmatization and stereotyping of people from historically disadvantaged and vulnerable groups, including those living on low income or in receipt of social assistance.¹²³ To the extent that these ideological tendencies inform the prevailing political winds, they can easily blow into Charter adjudication and decision-making, especially if

¹²⁰ See Wiseman, *supra*, note 97.

¹²¹ This doctrinal position has been expressed in the supposed distinction, oft-repeated by Canadian judges, between individual-antagonizing criminal justice measures and group-mediating social policy measures. Reliance on this distinction has waxed and waned. It was utilized in, for instance, *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.), disavowed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.), but then invoked in *Hutterian Brethren*, *supra*, note 119. For discussion of the distinction, and its incoherence, as well as its apparent revival, see Wiseman, “Competence Concerns” and “Burden of Doubt”, *supra*, note 97.

¹²² For discussion of this argument, see Wiseman, *supra*, note 97.

¹²³ See Martha Jackman, “Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases”, D. Pothier “But It’s For Your Own Good”, D. Schneiderman, “Social Rights and ‘Common Sense’: Gosselin through a Media Lens” in Young, “Poverty”, *supra*, note 37; Marie-Eve Sylvestre & Céline Bellot, “Challenging Discriminatory and Punitive Responses to Homelessness in Canada” in Martha Jackman and Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014).

it is the case, as has been argued, that judges are prone to social and political conservatism.¹²⁴

The point I want to make about the invocation of the problem of complexity in Charter adjudication is not so much that the problem does not exist or is not of real significance. Although I have argued elsewhere, and still maintain, that governments and courts tend to overstate the problem, and tend to over-react to it, especially in social rights cases, that is not to argue that there is not a real problem to be grappled with.¹²⁵ Rather, my point is that the response to the problem needs to be re-thought, at least if there is going to be much hope for constitutional law to protect or advance substantive equality. The prevailing response of governments and courts to the problem of complexity is, as I have outlined, to deny or dilute the scope or degree of Charter protection offered to substantive equality claims that impugn specific governmental actions (or inactions) that are complex.

One strategy pursued by substantive equality claimants and advocates has been to offer an alternative framework for adjudication of substantive equality issues under the Charter. This alternative framework focuses attention on the overall ends or outcomes, rather than any one specific means, of governmental action in complex policy-making areas. The purpose of offering this alternative framework is to enable courts to assess whether the overall ends or outcomes are achieving the realization of substantive equality, without needing to attribute deficiencies to any one particular measure. In addition, this framework would enable courts to identify and declare when action is needed to protect or improve substantive equality, while leaving it to governments to determine which adjustments, to one or more policy measures, will best achieve the required results. In this way, the alternative framework enables the courts to avoid the pitfalls of intervening in polycentric situations.

This alternative framework is evident in a substantive equality-oriented Charter case that has recently been before the courts but was

¹²⁴ Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) in particular c. 7, “Judges and Dominant Ideology”, at 103-17.

¹²⁵ See, Wiseman, *supra*, note 97. That the recognition of and response to the problem of complexity/polycentricity is skewed against substantive equality claims is evident in the apparent willingness of the courts to overlook or overcome the problem in two recent decisions involving the obviously complex situations of prostitution (*Bedford* — although sex-workers do tend to be socio-economically disadvantaged, this was not the prime focus of the case) and physician-assisted suicide (*Carter* — in this case, some attention was given to the substantive inequality argument that only socio-economically advantaged people could avoid the domestic prohibition on physician-assisted suicide by travelling to other international jurisdictions with no such prohibition).

dismissed at the very threshold of Charter adjudication. The case, *Tanudjaja v. Canada (Attorney General)*,¹²⁶ involved a claim that the harms and inequalities afflicting individuals experiencing homelessness and inadequate housing represent a failure of the Canadian and Ontario governments to implement effective strategies to ensure realization of the rights protected by sections 7 and 15 of the Charter. The claim was explicitly aimed at prompting systemic change to improve the outcomes of governmental action in relation to the life circumstances of people experiencing homelessness and inadequate housing and so, in general terms, aimed to improve substantive equality in the socio-economic realm. A key remedy being sought was an order that the respective levels of government must develop and implement an “effective national and provincial strategy to reduce and eliminate homelessness and inadequate housing”.¹²⁷ As such, the claim in *Tanudjaja* offered the courts a framework for applying the Charter to complex circumstances of social injustice without artificially isolating one aspect of governmental action or requiring an impossible level of judicial expertise in assessing the adjustments that would need to be made to ensure the relevant rights and freedoms were realized. The *Tanudjaja* framework achieves this by, first, allowing a court to hold that it is the prevailing circumstances of homelessness and inadequate housing, rather than any particular governmental measure causing them, that constitute the rights violations. Next, the *Tanudjaja* framework allows a court to rely on either the apparent arbitrariness and disproportionality of these circumstances, or the absence of a national strategy that might demonstrably justify them, or both, to refuse to excuse the violations under section 1. Finally, the *Tanudjaja* framework allows a court to adopt a remedial approach — ordering the development and implementation of a national strategy — that acknowledges and respects the social policy complexity and the policy-making expertise of governments.

¹²⁶ *Tanudjaja, Arsenault, Mahmood, Dubourdieu and the Centre for Equality Rights in Accommodation v. Canada (Attorney General) and Ontario (Attorney General)*, Court File No. CV-10-403688. A motion to dismiss was heard and upheld by the Superior Court, see: *Tanudjaja v. Canada (Attorney General)*, [2013] O.J. No. 4078, 116 O.R. (3d) 574, 2013 ONSC 5410 (Ont. S.C.J.). That ruling was upheld by a majority of the Ontario Court of Appeal in *Tanudjaja v. Canada (Attorney General)*, [2014] O.J. No. 5689, 123 O.R. (3d) 161, 2014 ONCA 852 (Ont. C.A.). An application for leave to appeal has recently been dismissed by the Supreme Court of Canada, [2015] S.C.C.A. No. 39 (S.C.C.) [hereinafter “*Tanudjaja*”].

¹²⁷ Notice of Application (*Tanudjaja v. Canada (Attorney General)*), Court File No. CV-10-403688), at 3. This and other court documents for the case are available online: <<http://socialrightscura.ca/eng/legal-strategies.html#charter-challenge>>.

Despite constructively offering this alternative framework for acknowledging and managing the complexity of social policy in relation to homelessness and adequate housing, the *Tanudjaja* claim was met with stiff opposition from the respondent governments who brought motions to have the action summarily dismissed for want of a reasonable cause of action. The motion was accepted by the Ontario Superior Court and that decision was upheld by a majority of the Ontario Court of Appeal (with the Supreme Court of Canada refusing to grant leave to appeal). The crux of the argument as to why there was no reasonable cause of action was the failure of the claimants to direct their challenge at one particular governmental measure.

The judicial willingness to dismiss the *Tanudjaja* claim at the very threshold of Charter adjudication leaves claims to substantive equality trapped between a rock and a hard place. On the one side of the trap — the rock — governments and courts invoke the problem of complexity in order to short circuit judicial scrutiny under the Charter. When claimants impugn a withdrawal of, or failure to provide, a substantive equality measure, governments point to the complex context of the measure to caution the courts against any or much Charter scrutiny. However, on the other side of the trap — the hard place — when claimants attempt to respond to the problem of complexity by impugning not specific measures, but overall outcomes, as in *Tanudjaja*, governments insist that the targeting of a specific measure is a necessary pre-requisite of a valid Charter claim.¹²⁸

For present purposes I am not going to engage the doctrinal debate around whether the courts ought to accept the arguments that create the rock or the hard place.¹²⁹ Rather, my purpose is to highlight the

¹²⁸ Governments also argue that it is necessary to base a claim on a factual record that identifies specific individual claimants whose experience of rights violations can be adequately documented. A failure to do this was part of the reason that an outcome-oriented systemic challenge to inadequacy of legal aid in British Columbia was dismissed for want of a reasonable cause of action a few years before *Tanudjaja* was launched, see *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015, 59 B.C.L.R. (4th) 38, 2006 BCSC 1342(B.C.S.C.) and [2008] B.C.J. No. 350, 2008 BCCA 92, 290 D.L.R. (4th) 617 (B.C.C.A.). The *Tanudjaja* claim is based, in part, on the experiences of identified individuals/applicants and so avoids falling foul of this hurdle. Leaving this difference aside, the Canadian Bar Association was caught by precisely the same trap in that the government respondents argued that, on the one hand, the claim did not challenge any one specific legislative measure affecting legal aid but also that, on the other hand, to the extent that the claim might be challenging one specific measure, it was artificially isolating that measure from its polycentric context. See: *Canadian Bar Assn. v. British Columbia, Statement of Defence (British Columbia)*, para. 8, online: <https://www.cba.org/CBA/Advocacy/pdf/statement_crown.pdf>.

¹²⁹ I have elsewhere more fully analyzed the role of concerns about polycentricity/complexity in judicial conceptions of the institutional competence of courts, along with other concerns, and the issue of how to respond to them, see: Wiseman, *supra*, note 97.

implications that maintaining the rock/hard-place trap has for the future of constitutional law in relation to socio-economic inequality. If Charter claims aimed at protecting or advancing substantive equality remain trapped between the rock and the hard place that I have described, then constitutional law will ultimately be unable to play anything but a facilitative role in efforts to address socio-economic inequality and social injustice. If government arguments on the problem of complexity prevail, then the Charter, and the courts, will be shut out of the social and political debate about socio-economic inequality and social injustice. As mere facilitators, their only role will be to get the Charter, and constitutional law more generally, out of the way of equality-enhancing measures. Although it may be undesirable for constitutional law to aspire to a leadership role on advancing substantive equality, it may also be undesirable to relegate it to a merely facilitative role. Constitutional law ought to at least be able to nudge governments either away from retrenchments in substantive equality or towards advancements in substantive equality — or to reinforce the efforts of others in society as they attempt to nudge governments. Over the longer term, it may be important for constitutional law to maintain a position in support of protecting and advancing substantive equality.

In order to allow constitutional law to play a meaningful role in protecting and advancing substantive equality, a choice must be made about which side of the rock/hard-place trap to chip away. In my view, since the problem of complexity should not be entirely dismissed or ignored, it would be best to choose to soften the hard place by allowing and developing or, at least, exploring, an alternative framework for substantive equality claims, such as put forward in *Tanudjaja*.

V. CONCLUSION

Over the past three decades or more, constitutional law has predominantly played a facilitating role in the improvement of social justice and substantive equality in Canada. When Canadian governments have taken action to ameliorate socio-economic inequality, Canadian courts have generally cleared potential constitutional law roadblocks. At the same time though, Canadian courts have only rarely erected any barriers to governmental action that has exacerbated socio-economic inequality. Although Canadian constitutional law, particularly under the Charter, purports not to be constrained to a merely formal conception of

equality, it has often refused invitations to protect and advance substantive equality. This is not to deny that constitutional law has taken some important steps towards substantive equality, nor to ignore that some significant stepping stones for the future have been laid. But, overall, progress has been, at best, restrained and cautious.

The restrained and cautious approach of constitutional law to protecting and advancing substantive socio-economic equality stands in contrast to the persistence of significant income deprivation and a steady growth in income inequality. The detrimental impacts of poverty and income inequality are far outstripping any beneficial impact of constitutional law. This reality suggests that the constitutional conception of equality is, to date, more majestic than substantive. While it may be ill-advised, in a democracy, to seek judicial leadership on protecting and advancing substantive equality, it ill-befits constitutional law in general, and the Charter in particular, for courts to simply follow along as governmental policy choices exacerbate and entrench significant deprivation and inequality. Indeed, as it becomes increasingly recognized that social trust and participation are eroded by income inequality, an overly restrained and cautious judicial approach to substantive equality ill-befits democracy itself. And yet Canadian courts are in danger of being caught in a jurisprudential trap that threatens to curtail, if not undo, the modest support for substantive equality they have shown so far. If Charter adjudication is so trapped, not only would constitutional law and democracy be vulnerable to further erosion, but so too would be the opportunity that the Charter potentially provides to people living on low-income and experiencing socio-economic inequality to take issue with the governmental policy choices that frame their circumstances. In my view, the best way to avoid this trap is to explore new approaches to acknowledging and managing the social policy complexity that confronts courts when adjudicating substantive equality-oriented claims. If it proceeds that way, the future of constitutional law and social justice has the potential to more meaningfully contribute to advancing substantive over majestic equality.

