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FROM NATIONAL STANDARDS TO JUSTICIABLE RIGHTS: ENFORCING INTERNATIONAL SOCIAL AND ECONOMIC GUARANTEES THROUGH CHARTER OF RIGHTS REVIEW

MARThA JACKMAN*

RÉSUMÉ
Le Comité des Nations Unies sur les droits économiques, sociaux et culturels a recommandé dans son examen de 1998 de la conformité du Canada au Pacte international relatif aux droits économiques, sociaux et culturels que les droits sociaux et économiques soient reconnus par l’intermédiaire d’un examen de la Charte canadienne des droits. Dans cet article, l’auteur traite du bien-fondé et de la viabilité d’une telle approche. La première partie de ce document décrit les droits sociaux et économiques qui sont énoncés dans la Déclaration universelle des droits de l’homme et qui sont réaffirmés dans le Pacte international. La seconde partie de cet article examine les récentes orientations des politiques fédérales et provinciales en matière d’aide sociale et suggère que la disparition des normes nationales en matière d’aide sociale qui a suivi l’abrogation du Régime d’assistance publique du Canada en 1996 a augmenté de manière dramatique le besoin de la reconnaissance judiciaire et de l’application des droits sociaux et économiques au Canada. Dans la troisième partie de ce document, l’auteur traite de la possibilité d’utiliser la Charte comme un moyen d’appliquer les droits sociaux et économiques en faisant l’examen de la jurisprudence des tribunaux canadiens d’instance inférieure et de la Cour suprême du Canada dans ce secteur. L’auteur conclut que, tant dans l’esprit que le texte, la Charte peut en effet être un mécanisme précieux d’application des obligations énoncées dans le Pacte international.

Introduction
The fiftieth anniversary of the Universal Declaration of Human Rights1 provides an important opportunity to examine Canada’s record in implementing the guarantees contained in the Universal Declaration and subsequent international human rights

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agreements ratified by Canada. In light of the recent discussions between the federal government and the provinces relating to the terms of a new "social union", Canada's international commitments in the field of social and economic rights, and in particular those set out under the International Covenant on Economic, Social and Cultural Rights, merit special attention. In a paper marking the 50th anniversary of the Universal Declaration, Professor William Schabas comes to the following conclusion with respect to the current status of social and economic rights in Canada:

Fifty years after its adoption, the economic, social and cultural rights set out in the Universal Declaration of Human Rights are subject to ongoing violation within Canada, as the Committee on Economic, Social and Cultural Rights has pointed out. Judges can and should rectify the situation by adopting a judicial approach to indivisibility, in effect reading in to the Charter and the other relevant instruments human rights that had been marginalised in the past.

Professor Schabas' assessment refers to the findings of the United Nations Committee on Economic, Social and Cultural Rights, in its periodic review of Canada's performance under the International Covenant, in June 1993. While the U.N. Committee prefaced its 1993 report by commenting favourably on the general strengthening of human rights protection in Canada through the Canadian Charter of Rights and Freedoms and other domestic human rights legislation, it went on to question the

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7. Supra note 5 at C/6.
depth of Canada's commitment to the *International Covenant*, particularly in view of the failure to address the persistence and disparate impact of poverty in Canada, notwithstanding the country's enviable economic situation.\(^8\) In terms of the role of the courts in ensuring respect for the guarantees contained in the *International Covenant*, the U.N. Committee criticized the characterization of social and economic rights in Canadian court decisions as mere policy objectives, rather than as enforceable rights under the *Charter*. In order to improve Canada's compliance with the *International Covenant*, the U.N. Committee urged Canadian judges to adopt a broad and purposive approach to the *Charter*, so as to provide appropriate remedies against social and economic rights violations.\(^9\)

Canada's compliance with the *International Covenant* was again subject to scrutiny by the U.N. Committee in December 1998. In its 1998 report\(^{10}\) the Committee reiterated the concerns raised in its 1993 review of Canada's performance under the *International Covenant*. The Committee criticized the position taken by provincial governments in defending against *Charter*-based social and economic rights challenges in the following terms:

> The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and legal remedy.\(^{11}\)

The Committee was equally critical of the lower courts' approach to the *Charter* in the social and economic rights sphere, stating in this regard:

> The Committee is deeply concerned to receive information that provincial courts in Canada have routinely opted for an interpretation which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights.\(^{12}\)

The following paper will discuss the desirability and viability of judicial recognition of social and economic rights through *Charter* review, as has been recommended by the U.N. Committee. The first part of the paper will briefly describe the social and

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8. Ibid. at C/7–C/8.
9. Ibid. at C/9.
12. Ibid. at para 15.
economic rights set out in the *Universal Declaration* and reaffirmed in the *International Covenant*. The second part of the paper will review the recent direction in federal and provincial welfare policy and will suggest that the loss of national welfare standards, following the repeal of the *Canada Assistance Plan*\(^\text{13}\) in 1996, has dramatically increased the need for judicial recognition and enforcement of social and economic rights in Canada. The third part of the paper will consider the potential of the *Charter* as a vehicle for enforcing social and economic rights, through an examination of Canadian lower court and Supreme Court of Canada case law in this area. The paper will conclude that, in both spirit and text, the *Charter* can indeed serve as an invaluable mechanism for implementing the obligations set out under the *International Covenant* — obligations to which Canadian governments are committed under international law, although they may chose to ignore them at home.

1. **CANADA'S SOCIAL AND ECONOMIC RIGHTS UNDERTAKINGS UNDER THE UNIVERSAL DECLARATION AND THE INTERNATIONAL COVENANT**

On December 10, 1948, Canada was among the 48 members of the United Nations General Assembly voting in favour of the adoption of the *Universal Declaration*, thereby endorsing a new international vision of the role of governments in fostering and promoting human rights as a collective value.\(^\text{14}\) Article 1 of the *Universal Declaration* recognizes that “All human beings are born free and equal in dignity and rights”, and Articles 2 and 7 guarantee enjoyment of the rights set out in *Universal Declaration* without distinction or discrimination based on race, sex, property and birth or other status, among other grounds. Article 25(1) provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.\(^\text{15}\)

Other social and economic rights recognized under the *Universal Declaration* include the right to social security and to the realization of social and economic rights indispensable to a person’s dignity and the free development of his or her personality;\(^\text{16}\) the right to work, to free choice of employment, to protection against unemployment and to remuneration ensuring “an existence worthy of human dignity and

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13. R.S.C. 1985, c.C-1, as am.
supplemented, if necessary, by other means of social protection”;17 and the right to
education.18

The social and economic guarantees set out in the Universal Declaration were given
more concrete expression in the International Covenant which, along with its sister
covenant on civil and political rights,19 was adopted by the U.N. General Assembly
in 1966 and ratified by Canada in 1976 after lengthy discussions with the provinces.
Unlike the Universal Declaration, which was intended to stand as a general statement
of principle,20 the International Covenant creates binding obligations for those states
which, like Canada, are parties to it.21 The Preamble of the International Covenant
declares that: “the ideal of free human beings enjoying freedom from fear and want
can only be achieved if conditions are created whereby everyone may enjoy his
economic, social and cultural rights, as well as his civil and political rights.” Article
2(1) of the International Covenant provides that: “Each State Party to the present
Covenant undertakes to take steps ... to the maximum of its available resources, with
a view to achieving progressively the full realization of the rights recognized in the
present Covenant by all appropriate means, including particularly the adoption of
legislative measures.” Article 2(2) guarantees enjoyment of the rights contained in the
International Covenant without discrimination “of any kind as to race, colour, sex,
language, religion, political or other opinion, national or social origin, property, birth
or other status.”

Article 6 of the International Covenant guarantees “… the right to work, which
includes the right of everyone to the opportunity to gain his living by work which he
freely chooses or accepts...” Article 9 recognizes “… the right of everyone to social
security, including social insurance.”22 Article 10 declares that “The widest possible
protection and assistance should be accorded to the family ... particularly .. while it is
responsible for the care and education of dependent children...” Article 11(2), in terms
similar to the Universal Declaration, guarantees: “the right of everyone to an adequate
standard of living for himself and his family, including adequate food, clothing and

17. Ibid., Art. 23.
20. It is now accepted by many legal scholars, however, that the Universal Declaration has achieved the
    status of customary international law and hence applies to Canada to the same extent as conventional
    international law: see for example J. Claydon, “International Human Rights Law and the Interpretation
    of the Canadian Charter of Rights and Freedoms” (1982) 4 Supreme Court L.R. 287 at 288–89.
    tional Covenant on Economic, Social and Cultural Rights” in Alston, supra note 4.
22. These rights are reiterated in their application to children under the Convention on the Rights of the
    Child, 20 November 1989, Can. T.S. 1992 No. 3; UN Doc. A/RES/44/25 (entered into force 2 Sep-
    tember 1990). In particular, Article 26 of the Convention sets out “for every child the right to benefit
    from social security, including social insurance...”. See generally L.J. Leblanc, The Convention on
    the Rights of the Child: United Nations Law-Making on Human Rights (Lincoln: University of
    Nebraska Press, 1995).
housing, and to the continuous improvement of living conditions.” Finally, Article 28 of the International Covenant provides that its provisions “shall extend to all parts of federal States without any limitations or exceptions.”

Taken together, the provisions of the Universal Declaration and the International Covenant impose an obligation on Canadian governments to ensure that Canadians enjoy the full protection and benefit of fundamental social and economic rights, which are not only essential to human dignity and equality, but upon which the enjoyment of more traditional civil and political rights depends.

2. THE LOSS OF NATIONAL STANDARDS UNDER THE CANADA ASSISTANCE PLAN

Until 1996, the Canada Assistance Plan (CAP) provided the statutory framework for federal and provincial compliance with the basic terms of the International Covenant. Enacted in 1966, CAP authorized federal contributions, on a shared-cost basis, towards a wide range of provincial welfare programs and services, including social assistance. In order to be eligible for federal funding under CAP, the provinces were required to meet a number of conditions. In particular, CAP required that social assistance be provided to any person in need, regardless of the reasons of the need for support; that levels of assistance take into account the basic requirements of recipients, in terms of food, shelter, clothing, fuel, utilities, household supplies and personal requirements; that welfare services continue to be developed and extended; that provincial residency requirements and waiting periods not be imposed; and that appeal procedures from decisions relating to assistance be made available. By requiring the provinces to comply with these CAP conditions in order to receive federal welfare funding, the federal government effectively ensured that all Canadians had access to a minimum level of income support and services on relatively equal terms and conditions in all parts of the country. CAP thereby gave effect to the core social and economic entitlements under the Universal Declaration and the International Covenant, including the basic right to social security and to an adequate standard of living for oneself and one’s family.

In what has been widely described as the most important social policy change in almost thirty years, the 1995 federal Budget Implementation Act repealed CAP and its shared-cost approach to federal welfare funding in favour of a new block transfer under the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act: the Canada Health and Social Transfer

23. Supra note 13.
24. Ibid, s.6.
25. Universal Declaration, supra note 1, Art. 25(1); International Covenant, supra note 2, Art. 9.
In contrast to the broad preventive and remedial objectives of CAP, the stated purpose of the CHST is “to finance social programs in a manner that will increase provincial flexibility.” Of the national conditions previously imposed under CAP, only the prohibition against provincial residency requirements continues to apply under the CHST. Whereas federal CAP transfers matched provincial welfare spending, annual CHST amounts are set in advance and the transfer is not in fact tied to any type or level of provincial spending.

Given the current context of social policy reform in Canada, there is no question that abandoning CAP conditions relating to need, adequacy and rights of appeal in favour of “increase[d] provincial flexibility” under the CHST represents a significant step backwards in terms of Canadian compliance with the International Covenant. Enhanced provincial flexibility has become a euphemism, in Canada, for a series of welfare reforms which are highly regressive and discriminatory in their impact on individuals and families in need of assistance. For example, recent program reforms in a number of provinces have heightened distinctions between beneficiaries who are deemed to be “employable” and those who are not. Individuals identified as being “employable”, including sole support mothers in some provinces, have been subject to more onerous conditions for receipt of assistance, have been forced to participate in workfare programs, and have had their benefit levels significantly reduced.

In contrast to the entitlement approach underlying CAP, an approach consistent with the International Covenant’s goal of full realization of social and economic rights through legislative measures, the program orientation promoted by the unconditionality of the CHST revives stereotypic and discriminatory distinctions between the “deserving” and the “undeserving poor”, and encourages reduction of welfare rolls instead of reduction of poverty as the primary focus of welfare policy.

27. R.S.C. 198 c.F-8, as am. [hereinafter Federal-Provincial Fiscal Arrangements Act].
29. Supra note 27, s.13(1)(a).
30. Ibid., ss.14–16.
the CAP funding model and conditions in favour of unconditional provincial transfers under the CHST, the federal government has relinquished its ability to ensure that Canada is in compliance with the terms of the International Covenant.

Not surprisingly, while it was in force, CAP figured prominently in Canada’s periodic reports on Canadian compliance with the International Covenant. In relation to the steps taken by Canada to ensure the right to an adequate standard of living under Article 11 of the International Covenant, for example, Canada’s Second Report refers primarily to CAP as a source of standards and federal assistance to the provinces for the payment of social allowances to persons in need. In the portion of the Second Report dealing with provincial measures to implement the International Covenant, extensive reference is also made to CAP-funded provincial welfare programs. As Professor Craig Scott has pointed out, the repeal of CAP amounts to a “deliberately retrogressive measure” in clear contravention of the requirement under Article 2 of the International Covenant that: “[E]ach State Party ... take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ... Covenant by all appropriate means.”

The concern of the U.N. Committee on Economic, Social and Cultural Rights in this regard is reflected in the fact that, shortly after the tabling of the 1995 Budget Implementation Act, the Committee granted a special hearing to a coalition of Canadian anti-poverty groups to present a brief on the implications of the repeal of CAP in terms of Canada’s obligations under the International Covenant. The Committee reiterated its concerns about the loss of CAP in its Concluding Observations on Canada’s compliance with the International Covenant, in December 1998. The
Committee began its review of Canada’s Third Report by referring to the federal government’s own earlier submissions on the role of CAP vis-à-vis the International Covenant:

The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that the CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living, and facilitated court challenges to federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act.

The Committee went on to criticize the impact of the changes under the CHST on social and economic rights in Canada:

In contrast, the CHST has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance. It did, however, retain national standards in relation to health under CHST, thus denying provincial “flexibility” in one area, while insisting upon it in others. The delegation provided no explanation for this inconsistency. The Committee regrets that, by according virtually unfettered discretion in relation to social rights to provincial Governments, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced.

Foremost among the Committee’s recommendations to ameliorate Canada’s compliance with the International Covenant was the reestablishment of “a national programme with designated cash transfers for social assistance and social services which include universal entitlements and national standards, specifying a legally enforceable


41. Ibid. At para. 23 of its Concluding Observations, 1998 the Committee also remarked on the particularly harsh impact which the repeal of CAP and social welfare program cuts has had on women and in particular single mothers.
right to adequate assistance for all persons in need, a right to freely chosen work, a right to appeal and a right to move freely from one job to another.\textsuperscript{42}

In the amendment to the \textit{Federal-Provincial Fiscal Arrangements Act} establishing the CHST, the federal government undertook to enter into discussions with the provinces to develop a set of "shared principles and objectives" for CHST-funded welfare programs and services.\textsuperscript{43} The \textit{Federal Plan for Gender Equality}, developed in preparation for the Fourth World Conference on Women in Beijing, also suggested that the federal government would address gender-related concerns in negotiations with the provinces over new program conditions to be included in the CHST.\textsuperscript{44} This commitment was reiterated in Canada's \textit{Third Report} on Canada's compliance with the \textit{International Covenant}.\textsuperscript{45} To date, however, no such federal-provincial agreement has been reached.\textsuperscript{46} Instead, the provinces have taken the lead in discussions relating to the future direction of Canadian social policy, and have expressed unequivocal objection to any attempt by the federal government to re-introduce conditionality into federal social program transfers.\textsuperscript{47} In light of the provinces' position and continued inaction by the federal government, it appears highly doubtful that any new national program conditions will be adopted which would re-establish a right to social security within the meaning of the \textit{International Covenant}, whatever the outcome of the current social union talks.

3. \textbf{THE CHARTER'S POTENTIAL IN THE SPHERE OF SOCIAL AND ECONOMIC RIGHTS}

The loss of national standards under \textit{CAP}; the policy and program orientation reinforced by the CHST; and the tone of current federal-provincial discussions relating to the "social union", lend even greater urgency to the call for judicial enforcement of

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\textsuperscript{42} Ibid. at para. 40.

\textsuperscript{43} Supra note 27, s. 13(3).

\textsuperscript{44} Status of Women Canada, \textit{Setting the Stage for the Next Century: The Federal Plan for Gender Equality} (Ottawa: Status of Women Canada, 1995) at 23.

\textsuperscript{45} Supra note 39 at 21.


international social and economic rights guarantees through Charter review. What then is the Charter's potential as a mechanism for enforcing Canada's commitments under the International Covenant? And what are the obstacles to Charter-based social and economic rights claims?

In principle the Charter, and in particular the right to life, liberty and security of the person under section 7 and the right to equal protection and equal benefit of the law under section 15, provide a solid basis for challenges to social and economic rights violations. The Supreme Court of Canada has emphasized that the Charter must be read in a broad and purposive manner, which promotes the underlying values, commitments and aspirations of Canadian society. The Charter should therefore be interpreted in a way which reflects and reinforces Canada's longstanding social welfare traditions; the importance individual Canadians attach to social and economic security as an underlying social value; the preeminence of health care, income support and other social services in our social and political landscape; and our collective vision of the state and its responsibility for protecting and promoting individual social and economic well-being.

Throughout our history Canadians have accepted an active role for governments in the pursuit of social and economic objectives, and have seen state intervention as necessary for ensuring human rights. We not only understand that liberty is not necessarily incompatible with state power, we expect governments to act affirmatively to support and expand individual rights by providing the means for their exercise. As Frank R. Scott expressed it in an early commentary on the Canadian Bill of Rights:

> In the early struggles for liberty, it was nearly always the state or some part of it that was the enemy ... Hence the very strong tradition grew up ... that it was liberty against government that mattered.

> ... This concept, however, has had in recent times to be supplemented by another idea, which I may call liberty through government. Certain human rights, of great value to a number of people, can only be realised through government action.49

Such arguments have been made with even greater force in connection with the Charter. As Rod Macdonald puts it: "The most important right for the majority of Canadians is not a right to be free from certain kinds of governmental activity, but rather the right to be free to benefit equally from the advantages that organized government fosters."50 This positive approach to the Charter is reinforced by the

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language of section 36(1) of the Constitution Act, 1982, which entrenches an express commitment by the federal and provincial governments to: “promoting equal opportunities for the well-being of Canadians”; “furthering economic development to reduce disparity of opportunities”; and “providing essential public services of reasonable quality to all Canadians.” Interpreted in light of section 36 and the expectations of Canadians in regard to personal security and equality, the Charter should be a significant avenue for the pursuit of social and economic rights claims.

a) Social and Economic Rights Claims Before the Lower Courts
While, in theory, the Charter should provide a solid basis for challenges to laws, policies and government programs which infringe social and economic rights, in practice few cases involving such issues have been decided by the courts, and even fewer have been successful.51 In the case of section 7, lower courts have characterized claims brought by low income plaintiffs in relation to health care, housing, unemployment insurance, and social assistance as “economic” in nature, and therefore beyond the scope of the Charter. The courts have based this conclusion on the legislative history of section 7, and in particular on the failure to include the right to property along with the right to life, liberty and security of the person under section 7. Typical is the reasoning of the British Columbia Supreme Court in Brown v. British Columbia (Minister of Health), where a challenge to the government’s refusal to include the AIDS drug AZT under the province’s pharmacare regime was rejected on the basis that section 7 does not protect against economic deprivations or guarantee benefits which might enhance life, liberty or security of the person.52

In the case of section 15 of the Charter, health care, housing, social assistance and other social and economic rights-related claims have founndered on a formalistic reading of the Charter’s equality guarantees. In some cases the courts have upheld discriminatory legislation on the grounds that everyone was being treated equally. In other cases, the courts have failed to recognize poverty as a prohibited ground of discrimination; disadvantage suffered by the claimants has been attributed to sources outside the impugned legislation; or the courts have refused to find government action sufficient to ground a Charter claim. In Masse v. Ontario (Ministry of Community and Social Services), for example, the Ontario Divisional Court rejected a section 15 challenge to a 20 percent cut in provincial welfare rates on the grounds that claimants were receiving rather than being deprived of a benefit; that there was no legal obligation on the government to provide social assistance in the first place; and that poverty was not a prohibited ground of discrimination under the Charter.53

Underlying the judicial unwillingness to accept *Charter*-based social and economic rights claims are a number of concerns. First, the courts do not want the *Charter* to be seen as imposing a duty on governments to remedy all forms of social and economic inequality. As the Newfoundland Court of Appeal expressed it, in rejecting a challenge to discrimination against public housing tenants under provincial residential tenancies legislation, in *Newfoundland and Labrador Housing Corporation v. Williams*: "The Charter should not be seen as a cornucopia from which all good things flow ... It is not a perfect world. Full equality will never be accomplished. It is not possible and probably not desirable."54

An important corollary to this view is the notion that, where the state does open the "public purse" to dispense social programs or benefits in the interests of remedying disadvantage, the courts should be reluctant to use the *Charter* to intervene. In the courts' view, governments are attempting to address complex problems in the face of severe fiscal constraints and must be granted a wide margin of manoeuvre in setting up and administering programs. Plaintiffs who avail themselves of social programs and benefits do so fully cognizant of the attendant disadvantages and should not later be heard to complain. As the Manitoba Court of Appeal asserts in *Fernandes v. Director of Social Services (Winnipeg Central)*, in rejecting a claim by a disabled welfare recipient for an increase in his benefits to enable him to remain living at home rather than in a hospital, "[T]he particular choices of a particular individual are not generally to be considered when those choices affect the public purse."55

Finally, judges are preoccupied by the potential implications of recognizing social and economic entitlements under the *Charter* at an institutional level. Whether tacitly or explicitly, judges express concern that, should they involve themselves in fundamental issues of social and economic policy in addressing *Charter*-based social and economic rights claims, they will risk usurping the democratic authority of elected governments. As the Québec Superior Court expressed it, in rejecting a *Charter* challenge to discriminatory workfare requirements under Québec’s social assistance regime, in *Gosselin v. Québec (Procureur général)*:

La Charte ne fait pas obstacle à la souveraineté du parlement ... s’il fallait y voir des obligations positives ce serait les tribunaux qui, par leur approbation ou non, viendraient ultimement déterminer les choix de l’ordre politique ... Or, pareil rôle n’est pas donné au pouvoir judiciaire par la Charte. Les tribunaux ne doivent pas substituer leur jugement en matière sociale et économique au jugement des corps législatifs élus à cette fin.56


Taken together, such reservations have led the lower courts to take an extremely restrictive view of the Charter as a vehicle for pursuing social and economic rights claims.

b) Social and Economic Rights Claims in the Supreme Court of Canada

While the lower courts have been largely unsympathetic to social and economic rights challenges under the Charter, several factors suggest that Charter-based claims for domestic recognition and enforcement of international social and economic rights guarantees may receive a more favourable reception before the Supreme Court of Canada. As a general matter, the Supreme Court has recognized that the international human rights treaties which Canada has ratified are an important point of reference in interpreting and applying the Charter. In Re Public Service Employee Relations Act, former Chief Justice Dickson argued that:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "full benefit of the Charter's protection." I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.57

In a recent keynote conference address, Chief Justice Lamer asserted that "the Charter should be, and has been, understood as part of the international human rights movement."58 Justice Lamer went on to argue that "by looking to international treaties and the jurisprudence of international human rights bodies in the interpretation of domestic human rights norms ... judges raise the profile of those international treaties and further the creation of a human rights culture." In similar terms, Justice LaForest has suggested that:

> ... We are absorbing international legal norms affecting the individual through our constitutional pores. ... Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become more so, and they continue to rely on and benefit from one another's experience. Consequently, it is important that ... national judges adopt an international perspective.59

This growing openness to international human rights norms as a guide to Charter interpretation is particularly promising in the social and economic rights sphere, since the legitimacy and importance of such rights is fully recognized and accepted in the international law context.60

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i) Section 7 of the Charter

The Supreme Court has also been less inclined than Canadian lower courts to categorize and to dismiss automatically cases involving social and economic related interests. While it has not yet been called upon to directly address the issue of whether the right to life, liberty and security of the person protects fundamental social and economic interests guaranteed under the International Covenant, the Supreme Court has put the lower courts' narrow approach to section 7 in social and economic rights cases into serious question. In her decision in Singh v. Canada (Minister of Employment and Immigration), for instance, Justice Wilson referred to the Law Reform Commission of Canada's argument that "the right to security of the person means not only protection of one's physical integrity, but the provision of necessaries for its support."\(^1\) And, in Irwin Toy v. Québec (A.G.), the Court refused to read section 7 as excluding all interests of an economic nature. Rather it suggested that "economic rights fundamental to human life or survival" may be included under section 7. The Court argued in this regard:

Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.\(^2\)

In his dissenting opinion in the New Brunswick Court of Appeal decision in J.G. v. Minister of Health and Community Services,\(^3\)

a case involving a challenge to inadequacies in New Brunswick's civil legal aid program, now Supreme Court Justice Bastarache also put forward a more expansive reading of section 7, asserting "that the policy of human rights has evolved internationally and domestically and that both the protective and integrative functions of human rights must be constitutionally accepted under the Charter".\(^4\)

As Justice Bastarache explained:

In modern societies, rights cannot be fully protected by preventing government intrusions in the lives of citizens. Some rights in effect require governmental action for their integration into the concept of fundamental justice. It is also important to

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63. (14 March 1997), 2/96/CA (N.B.C.A.) [hereinafter J.G.]. The J.G. case involved a section 7 challenge to the province of New Brunswick's failure to provide legal aid to parents in child apprehension proceedings taken against them.

64. Ibid. at 12.
look at individual international instruments with regard to the text of companion instruments. While section 9(1) of the *International Covenant on Civil and Political Rights* seems to limit “liberty” and “security” to their physical aspect, for instance, section 25 of the *Universal Declaration of Human Rights* ... speaks of “the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond [one’s] control.\footnote{Ibid.}

Leaving aside the issue of the relevance of the framers’ intent in *Charter* interpretation,\footnote{In his decision for the Court in *Reference Re s.94(2) of Motor Vehicle Act (B.C.),* [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, Chief Justice Lamer suggests that, while evidence of legislative history is admissible in *Charter* interpretation, it is in no way determinative. As Justice Lamer cautioned, at 509:}


While it is therefore accurate to suggest that the omission of property rights from section 7 was intended to forestall *Charter*-based objections to government regulation of private property, it is incorrect to read the legislative history of section 7 as a basis for rejecting all individual social and economic rights claims, as the lower courts have so far done.

**ii) Section 15 of the Charter**


...Even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen ... If the newly planted “living tree” which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee do not stunt its growth.
involving social and economic rights claims. In doing so, the Court put the notional distinction between government action and inaction, upon which the dichotomy between social and economic and civil and political rights generally rests, into serious doubt.\textsuperscript{70}

The respondents in \textit{Vriend} argued that because the case involved a legislative omission, that is, the failure by the Alberta government to include sexual orientation as a prohibited ground of discrimination under the province’s \textit{Individual’s Rights Protection Act}, the \textit{Charter} did not apply. Speaking for a unanimous Court on section 15, Justice Cory argued that there was no legal basis for drawing a distinction between positive government action and legislative omission in the context of \textit{Charter}-based claims. As he explained:

\begin{quote}
McClung J.A.’s position that judicial interference is inappropriate in this case is based on the assumption that the legislature’s “silence” in this case is “neutral”. Yet, questions which raise the issue of neutrality can only be dealt with in the context of the s. 15 analysis itself. Unless that analysis is undertaken, it is impossible to say whether the omission is indeed neutral or not. Neutrality cannot be assumed. To do so would remove the omission from the scope of judicial scrutiny under the \textit{Charter}.\textsuperscript{71}
\end{quote}

Justice Cory held that the language of section 32(1) did not support the “narrow view” that there must be some affirmative exercise of legislative authority in order to bring the government’s decision within the purview of the \textit{Charter}.\textsuperscript{72} He suggested instead that the application of the \textit{Charter} “is not restricted to situations where the government actively encroaches on rights”,\textsuperscript{73} and that the issue whether the \textit{Charter} imposes an affirmative obligation on Parliament and the legislatures remains an open one.\textsuperscript{74} In coming to this conclusion, Justice Cory pointed to Justice LaForest’s decision for the Court in \textit{Eldridge}, where the latter also found that the question whether the \textit{Charter} “oblige[s] the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality” has yet to be decided.\textsuperscript{75} The Court went on to conclude that the Alberta government’s failure to ensure gays and lesbians equal protection of the provincial human rights regime offended section 15 of the \textit{Charter}.

Government efforts to avoid \textit{Charter} liability by pointing to broader social circumstances rather than government action as the real source of inequality or discrimination experienced by the claimants, were also rejected by the Supreme Court in \textit{Eldridge}. The respondents in \textit{Eldridge} countered the appellants’ section 15 challenge to the B.C.

\textsuperscript{70} For an in-depth analysis of this aspect of the \textit{Eldridge} and \textit{Vriend} decisions, see B. Porter, “Beyond Andrews: Substantive Equality and Positive Obligations After Eldridge and Vriend” \textit{Constitutional Forum} 9:3 (1998) 71.

\textsuperscript{71} \textit{Supra} note 69 at 532.

\textsuperscript{72} \textit{Ibid.} at 532.

\textsuperscript{73} \textit{Ibid.} at 532–533.

\textsuperscript{74} \textit{Ibid.} at 534.

\textsuperscript{75} \textit{Supra} note 68 at 678.
government’s failure to provide interpreter services within the provincial medicare system by arguing that any disadvantage suffered by the Deaf was owing, not to provincial health and hospital insurance legislation, but to their deafness. Rather than imposing a disadvantage, the respondents asserted, the provincial medicare scheme provided a benefit: access for all B.C. residents to medical and hospital services free of charge. The respondents claimed that, since the Deaf were no worse off than before the introduction of universal medicare, no violation of section 15 had occurred.

In his decision for the unanimous Court, Justice LaForest rejected this reasoning. In response to the argument that any inequality experienced by the Deaf within the provincial health care system existed independently of the government’s actions, Justice LaForest argued that: “the social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government.”

Justice LaForest also dismissed the respondents’ suggestion that benefit-conferring legislation only offends the Charter where it exacerbates pre-existing disparities between a disadvantaged group and others. Justice LaForest characterized the respondents’ position “that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits” as “a thin and impoverished vision” of section 15. On that basis, Justice LaForest found that the B.C. government’s failure to ensure equal benefit of provincial health programs and services for the Deaf violated the Charter’s equality guarantee.

In its decisions in Vriend and Eldridge, the Supreme Court has affirmed that the precise form of state action or inaction is not the proper focus of enquiry under section 15. Rather it is the substantive impact of the government’s failure to meet the particular needs of a disadvantaged individual or group which must be assessed. The Court has also confirmed that positive government intervention will often be required to equalize the situation of disadvantaged groups, and that governments cannot avoid their Charter obligations simply because inequality is deeply rooted in society, or because no one is worse off than they were before an inadequate or discriminatory social policy or program was put in place. The Court’s approach to section 15 in Vriend and in Eldridge is fully consistent with the principles underlying the International Covenant, including with recognition of the state’s positive obligation to adopt legislative measures designed to achieve full and equal realization of social and economic rights.

76. Ibid. at 677–678.
77. Ibid. at 679–680.
78. Ibid. at 676.
4. **THE CHARTER AS A VEHICLE FOR ENFORCING INTERNATIONAL SOCIAL AND ECONOMIC RIGHTS**

With the repeal of *CAP* and the adoption of the CHST, fundamental social and economic safeguards, including the right to a level of social assistance which meets basic needs, the right to assistance irrespective of the reasons for the need for support and the right to appeal unfavourable welfare determinations, are no longer a matter of entitlement in Canada, but of privilege. The change in the direction and content of Canadian welfare policy and programs, reflected in and reinforced by the abandonment of *CAP* in favour of the CHST, violates both the letter and the intent of the *Universal Declaration* and the *International Covenant.* 80 The Charter can provide an important avenue for redressing this situation. In particular, judicial enforcement of the right to life, liberty and security of the person under section 7 and the right to equal protection and equal benefit of the law under section 15 can give concrete meaning and legal effect to Canada’s international social and economic rights undertakings.

An approach to the Charter informed by Canada’s obligations under the *International Covenant* would, for example, have led to differing analyses in each of the lower court decisions described above. In *Brown,* 81 the plaintiff’s challenge to the discriminatory under-inclusiveness of B.C.’s pharmacare regime would have been assessed in light of the right, under the *International Covenant,* to the highest attainable standard of physical health 82 and to medical care in the event of sickness, 83 without discrimination. 84 In *Masse,* 85 the 20 percent cut in Ontario welfare rates would have been assessed in light of the government’s obligation to take steps “to the maximum of its available resources” to achieve progressively the “full realization” of the rights recognized under the *International Covenant,* including the right to social security, 86 to an adequate standard of living, 87 and to “the continuous improvement of living conditions.” 88 In *Williams,* 89 discrimination against public housing tenants under Newfoundland’s residential tenancies legislation would have been examined in light of the right to adequate housing, 90 without discrimination based on social status. 91

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81. *Supra* note 52.

82. *Supra* note 2, Art. 12(1).


84. *Ibid.,* Art. 2(2).

85. *Supra* note 53.

86. *Supra* note 2, Art. 9.

87. *Ibid.,* Art. 11(1).


89. *Supra* note 54.
Québec’s discriminatory welfare and workfare regime would have been scrutinized in light of the right to social security, to an adequate standard of living, and to work which one “freely chooses or accepts”. And, in Fernandes, the plaintiff’s Charter claim with respect to the province’s refusal to provide him with adequate funding for attendant care would also have been considered in light of the International Covenant’s guarantees relating to social security, to an adequate standard of living, to the highest attainable standard of physical and mental health, and to equality.

Instead of denying the plaintiffs’ Charter claims outright the courts would, in each case, have required governments to justify social and economic rights violations under section 1 of the Charter, in accordance with the Supreme Court’s analysis in the Oakes case. Only where it could be shown that the plaintiffs’ social and economic rights were violated in pursuit of important governmental objectives; that violation of the plaintiffs’ rights was a rational means of achieving those objectives; and that the harm to the individual resulting from the rights violation was outweighed by the benefits to the community, could the government’s actions be justified. In other words, consistent with the text and intent of the International Covenant, social and economic rights violations would be subject to the same degree of scrutiny as applied to other Charter breaches.

The earlier analysis of the Supreme Court’s approach to sections 7 and 15 of the Charter suggests that there is reason to hope that the U.N. Committee’s continuing exhortations to Canadian courts to interpret the Charter in a manner which gives effect to international social and economic rights guarantees may yet be heard. With the Supreme Court’s analysis in Eldridge and Vriend, it will be difficult for governments to continue to successfully assert that they are under no constitutional obligation to act, even where their inaction results in serious violations of social and economic rights. The Court’s decision in Irwin Toy has confirmed that a proper reading of the

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90. Supra note 2, Art. 11(1).
91. Ibid., Art. 2(2).
92. Supra note 56.
93. Supra note 2, Art. 9.
94. Ibid., Art. 11(1).
95. Ibid., Art 6(1).
96. Supra note 55.
97. Supra note 2, Art. 9.
98. Ibid., Art. 11(1).
99. Ibid., Art. 12(1).
100. Ibid., Art. 2(2).
102. Consider for example the Supreme Court’s rigorous section 1 analysis in R.J.R.-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, a case involving limits to the freedom of expression of cigarette manufacturers under federal tobacco products control legislation.
legislative history of section 7 does not preclude recognition of the social and economic rights included in the *International Covenant*, which are essential to human survival and well-being.

In his Court of Appeal decision in *J.G.*, Justice Bastarache underlined the fact that the *Charter* must not only prevent government interference in the lives of citizens, it must also require government action to ensure that individual rights are fully protected and realized. In this regard Justice Bastarache pointed to growing international and domestic acceptance of the fundamental interdependence and permeability of all human rights, and he suggested that this understanding must also be reflected in *Charter* interpretation. The “protective and integrative” approach to human rights described by Justice Bastarache, and given concrete expression in the *International Covenant*, recognizes that without access to basic social goods, such as food, shelter and education, which social and economic rights are designed to guarantee, it is impossible to derive meaningful benefit from more traditional civil and political rights. Like the right to speak, to assemble, or to vote, social and economic rights are intimately connected to the *Charter*’s underlying goal of fostering the dignity and security of every individual, and of ensuring that each can participate as full and equal members in Canadian society.

During his testimony as a witness before the Special Joint Committee on the Constitution in its hearings on *Bill C-60*, then federal Justice Minister Jean Chrétien asserted that: “the rights that we have agreed upon in international agreements should be reflected in the laws or the Charter of Rights that we will have in Canada.” In argument before the Supreme Court of Canada in the Québec Secession *Reference*, the federal government asserted that “Canadian constitutional structures are fully in compliance with” the *Universal Declaration* and the *International Covenant*. In its recent pleadings in *Baker v. The Minister of Citizenship and Immigration*, the

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103. *Supra* note 63.

104. For an in-depth discussion of this issue, see C. Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights” (1989) 27 Osgoode Hall L.J. 769; see also *supra* note 60.


108. *Baker v. The Minister of Citizenship and Immigration*, 25823 (Supreme Court of Canada). The *Baker* case involved a challenge by Mavis Baker, a Jamaican citizen employed as a domestic worker in Canada, to the denial of her application for permanent residence on humanitarian and compassionate grounds, notwithstanding that her deportation would separate her from her Canadian-born children in contravention of articles 3, 9(1) and 10(1) of the *Convention on the Rights of the Child*, *supra*, note 22. The case was heard by the Supreme Court of Canada on November 4,1998. For a summary of the Charter arguments in the *Baker* case see Charter Committee on Poverty Issues, *Factum of the Intervener Charter Committee on Poverty Issues in Baker v. The Minister of Citizenship*
federal government conceded that “[i]t is a well-established principle in Canadian law that domestic statutes should be interpreted so as to avoid, if possible, interpretations which would put Canada in breach of its international obligations.”

Through their interpretation of the Charter right to life, liberty and security of the person and the right to equality, Canadian courts can ensure that governments are in fact called to account domestically for their failure to meet basic needs, for regressive and discriminatory social welfare policies and for other violations of fundamental social and economic rights guaranteed under the International Covenant.

To accomplish this task, judges will have to break with current practice, which denies the importance of Charter-based social and economic rights claims and which dismisses as inappropriate and illegitimate the pursuit by low-income claimants of legal redress for the rights violations which most affect them. Judges will have to read the Charter in a manner which reflects and reinforces, rather than ignores or undermines, international human rights principles. They also will be required to accord social and economic rights the same respect granted to other Charter-based claims. Whether and to what extent Canadian courts are willing to meet the challenge of providing remedies for social and economic rights violations through Charter review will be a significant determinant of Canada’s future compliance with the Universal Declaration and the International Covenant. Given the waning commitment of Canadian governments to the reduction of inter-personal and inter-regional disparities, it will also be a significant factor in the shape of the Canadian community in the century to come.

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