Chapter 40

Social and Economic Rights in Canada

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1. Introduction

The constitutional status of socio-economic rights in Canada is an unresolved issue, connected to historic expectations and continuing struggles by marginalized groups for access to justice and social inclusion, as much as it is to evolving jurisprudence under the *Canadian Charter of Rights and Freedoms*.[1] Since the enactment of the *Charter*, in every case addressing the effects of poverty, homelessness, or other forms of socio-economic deprivation, judges have been confronted with two opposing paradigms of constitutional rights. Governments have argued that the absence of explicit constitutional protection for socio-economic rights reflects a political choice to leave social and economic policy exclusively to legislatures, largely immune from *Charter* review. They have characterized Canada's international human rights commitments as aspirational goals that are beyond the competence of the courts. And they have alleged that the *Charter* imposes no positive obligations on governments to implement social programs or to take action necessary to protect the life, security of the person, or equality rights of the most disadvantaged members of Canadian society.

Those who are homeless, refugees and migrants, people with disabilities, and others living in poverty, have advanced a different view of the *Charter*. They maintain that all aspects of government decision-making must be subject to *Charter* scrutiny and that broadly framed *Charter* guarantees should be read to include, rather than exclude, human rights violations experienced by disadvantaged individuals and groups. They argue the

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Charter must do more than restrain government action: it must also require governments to adopt measures to protect *Charter* rights to life, security of the person, and equality including, where necessary, health care, housing, food security, or social assistance. People living in poverty contend that the *Charter* must be interpreted in light of Canada's obligations under the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*),[2] in a manner that recognizes social and economic rights not simply as aspirational goals, but as human rights that courts are competent to adjudicate and enforce.

As this chapter documents, judicial responses to these opposing constitutional paradigms have been inconsistent. Lower courts, including in several recent cases, have often sided with governments in dismissing *Charter* claims to positive measures in the context of access to health care, housing, or adequate income. For its part, the Supreme Court of Canada has resisted efforts to circumscribe the positive scope of *Charter* guarantees and it has refused to rule that socio-economic rights fall beyond the ambit of the *Charter*. At the same time, the Supreme Court has shied away from engaging the key issues raised in cases involving socio-economic rights and it has dismissed applications to appeal lower court decisions in which the *Charter* rights claims of people living in poverty have been rejected.[3] The new millennium has seen significant international, regional, and comparative law developments in advancing access to justice for socio-economic rights claimants, disproving earlier suggestions that socio-economic rights are beyond the competence of courts to adjudicate or enforce.[4] These advances have not, as yet, been absorbed in Canadian jurisprudence, where the constitutional status of socio-economic rights remains an open question.

This chapter will first present the historical context and legislative history of the *Charter* as a source of socio-economic rights protection. It will then describe the Supreme Court of Canada's approach to interpreting the *Charter* in light of Canada's international human rights obligations, including those set out in the *ICESCR*. The chapter will next consider sections 7 and 15 of the *Charter* in particular, with specific reference to the positive versus negative rights debate to which social and economic rights claims have frequently given rise. The chapter will go on to discuss several recent *Charter* challenges in two of the most active areas of current socio-economic rights litigation in Canada: housing and health.[5] In conclusion, the chapter will refer to the recommendations of the UN Committee on Economic, Social and Cultural Rights (CESCR), in its

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

[3] Martha Jackman, 'Constitutional Castaways: Poverty and the McLachlin Court' (2010) 50 Supreme Court Law Review (2d) 297.

[4] Malcolm Langford et al. (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press, 2016) also online http://www.pulp.up.ac.za/edited-collections/the-optional-protocol-to-the-international-covenant-on-economic-social-and-cultural-rights-a-commentary.

[5] Although minority language education, labour, and Indigenous rights also engage important socio-economic rights issues, these constitutional guarantees are addressed in other chapters of this *Handbook*.

latest review of Canada's compliance with the *ICESCR*, for resolving the opposing paradigms that characterize this important area of constitutional rights.

A. Historical Context and Legislative History of the *Charter*

Acceptance of a positive role for governments in the promotion of human rights is a key feature of Canadian rights culture. Since the Second World War, Canadians have come to expect governments to act affirmatively to support and expand individual and collective freedom and welfare, and the view that socio-economic rights are integral to rights to life, security of the person, and equality is firmly rooted in the human rights movement in Canada.[6] Prior to the adoption of the *Charter* in 1982, positive measures to accommodate needs of disadvantaged groups and to address systemic inequality in housing, employment, and private sector and government services had already been recognized as components of the right to non-discrimination under federal and provincial human rights legislation in place across Canada by 1977.[7] In Quebec, socio-economic rights were explicitly included in the Quebec *Charter of Human Rights and Freedoms* when it was enacted in 1975.[8] Unlike the United States, Canada ratified the *ICESCR* in 1976, at the same time as the *International Covenant on Civil and Political Rights* (*ICCPR*),[9] shortly before the Trudeau government began the federal-provincial constitutional reform discussions that culminated in the adoption of the *Constitution Act, 1982*.

No proposal to include social and economic rights in the *Charter* was made during the 1980–1981 hearings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. An amendment was put forward to what is now section 36 of the *Constitution Act, 1982* to add a "commitment to fully implementing the *International Covenant on Economic, Social and Cultural Rights* and the goals of a clean and healthy environment and safe and healthy working conditions."[10] Although the Special Joint Committee members expressed agreement on the "principles embodied

[6] Martha Jackman and Bruce Porter, 'Introduction: Advancing Social Rights in Canada' in Martha Jackman and Bruce Porter (eds), *Advancing Social Rights in Canada* (Irwin Law, 2014); Martha Jackman, 'The Protection of Welfare Rights under the Charter' (1988) 20 Ottawa Law Review 2.

[7] See eg, *CN v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114.

[8] *Quebec Charter of Human Rights and Freedoms*, RSQ 1977, c C-12; see generally Pierre Bosset and Lucie Lamarche (eds), *Droit de cité pour les droit économiques, sociaux et culturels: La Charte québécoise en chantier* (Éditions Yvon Blais, 2011); David Robitaille, *Normativité, interprétation et justification des droits économiques et sociaux: les cas québécois et sud-africain* (Éditions Bruylant, 2011).

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

[10] Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-second Parliament, 1980–1981, Issue no. 49 (30 January 1981) 65–71.

in the amendment," it was noted that Canada was already committed to implementing the *ICESCR* and the amendment was not adopted.[11] Rather than pressing for explicit inclusion of socio-economic rights in the *Charter*, human rights experts and equality-seeking organizations generally referred to Canada's obligations under the *ICESCR* as components of the right to equality. They argued that *Charter* equality guarantees should be framed to impose clear governmental obligations to address socio-economic disadvantage through positive measures, including adequate social programs. They underscored the importance of providing strong interpretive direction to the Canadian courts to apply the *Charter* to take into account not only the potential harms but also the benefits of government action. In a sharp departure from their *Canadian Bill of Rights* record,[12] courts were expected to interpret section 15 of the *Charter* to require governments to address the needs of vulnerable groups, to remedy systemic inequality, and to maintain and improve social programs on which the enjoyment of equality and other *Charter* rights was seen to depend.[13]

Following an unprecedented lobbying campaign by women's, disability, and other human rights organizations, in and beyond the Special Joint Committee hearings, section 15 "non-discrimination rights" were renamed "equality rights" and significantly expanded to guarantee both equality "before and under" the law, and the equal "protection and benefit" of the law. This wording was designed to make it clear that equality rights applied to social benefit programs, such as welfare and unemployment insurance, and that governments' positive obligations toward disadvantaged groups were constitutionally affirmed.[14] As a result of concerted efforts by disability rights organizations, newly organized in the ferment of the International Year of Persons with Disabilities in 1981, Canada also became the first constitutional democracy to include mental and physical disability as a constitutionally prohibited ground of discrimination.[15] In their submissions to the Special Joint Committee, disability rights advocates made explicit reference to the rights to education, work, and social security under the *ICESCR*, in support of the need to add disability as a prohibited ground of discrimination under the *Charter*.[16]

The wording of section 7 of the *Charter*, which guarantees the "right to life, liberty and security of the person" drew on the text and unified framework of article 3 of the *Universal Declaration of Human Rights*.[17] A proposed amendment to add a right to "the enjoyment of property" to section 7 was rejected in part because of fears that property rights would conflict with Canadians' commitment to social programs and could give

[11] Ibid 49: 68–70.

[12] *Bliss v Attorney General of Canada* [1979] 1 SCR183 [191]–[194].

[13] Bruce Porter, 'Expectations of Equality', (2006) 3 Supreme Court Law Review 23.

[14] Ibid 25–29.

[15] See generally Yvonne Peters, 'From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution', in Deborah Stienstra and Aileen Wight-Felske (eds), *Making Equality—History of Advocacy and Persons with Disabilities in Canada* (Captus Press, 2003) 119–136.

[16] Special Joint Committee (n 10), No. 10 (21 November 1980) 10:10.

[17] Annex to GA Res 2200A, 21 UN GAOR, supp (No 16) 52, UN Doc A/6316, (1976).

rise to challenges to government regulation of corporate interests, including environmental protection measures and provincial control over natural resources.[18] The wording of the section 7 requirement that any deprivation of life, liberty, or security of the person be "in accordance with the principles of fundamental justice" was preferred over a reference to "due process of law" because of concerns around the use of the due process clause in the United States during the *Lochner* era as a means for propertied interests to challenge the regulation of private enterprise and the promotion of social rights.[19]

In the period leading up to and following its adoption, women's, anti-poverty, disability, and other human rights and equality-seeking organizations became vocal advocates for their interpretive expectations of the *Charter*.[20] In submissions to a parliamentary sub-committee charged with examining the new constitutional responsibilities imposed on governments by section 15,[21] women's organizations asserted that "the poverty of women in Canada is a principal source of inequality in this country" and that "the goal of the section is equality, a positive concept, as opposed to non-discrimination, a negative concept."[22] People with disabilities affirmed that equality meant a decent place to live, access to meaningful work and an adequate income, and a full range of social opportunities.[23] In short, the interdependence between socio-economic and *Charter* rights was widely accepted by disadvantaged groups from the *Charter*'s inception, although, as outlined below, this rights paradigm has met with significant resistance from governments and in the courts.

2. The International Human Rights Framework

Rights contained in the *ICESCR* and other international human rights treaties ratified by Canada are not directly enforceable by Canadian courts unless they are incorporated into Canadian law by Parliament or provincial legislatures—something that has not been seriously considered in Canada.[24] As the CESCR explains, Canada's obligation as a State party is not to incorporate but rather to implement *ICESCR* guarantees: "Covenant norms must be recognized in appropriate ways within the domestic legal order,

[18] Martha Jackman, 'Poor Rights: Using the Charter to Support Social Welfare Claims' (1993) 19 Queen's LJ 65, 76.

[19] Sujit Choudhry, 'The *Lochner* Era and Comparative Constitutionalism', (2004) 2 *International Journal of Constitutional Law* 1, 16–24.

[20] Porter, 'Expectations of Equality' above (n 13) 23.

[21] Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings* First Session of the 33rd Parliament, Vol. 3 (17 April 1985).

[22] Porter, 'Expectations of Equality', above (n 13) 30.

[23] Ibid 33.

[24] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 [69]–[71].

appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."[25]

In his dissenting judgment in *Reference Re Public Service Employee Relations Act (Alberta)*, Chief Justice Dickson declared 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."[26] This interpretive presumption, which has been reiterated by the majority of the Court,[27] applies not only to rights with direct counterparts in the *Charter*, such as the right to life or to non-discrimination under the *ICCPR*, but has also been invoked in cases involving socio-economic rights guaranteed under the *ICESCR*.

For example, in its 1989 decision in *Slaight Communications*, the Court pointed to Canada's ratification of the *ICESCR* as evidence that the right to work is a fundamental human right, that had to be balanced against the section 2(b) *Charter* right to freedom of expression in that case.[28] In its 2015 ruling in *Saskatchewan Federation of Labour*, the Court reversed its previous jurisprudence on the right to strike as a component of the right to freedom of association under section 2(d) of the *Charter*, relying, inter alia, on the CESCR's interpretation of the right to strike under the *ICESCR*.[29] Referring to the *ICESCR* as one of the most important sources for the interpretation of section 2(d), Chief Justice McLachlin and Justice Lebel explained in *Health Services Bargaining Assn* that "the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."[30]

3. Sections 7 and 15 as a Source of Protection for Socio-economic Rights

The Supreme Court has explicitly left open the possibility that the *Charter* may protect a range of socio-economic rights. In its 1986 decision in *Irwin Toy*, the Court rejected a section 7 challenge to government regulation of corporate activities on the grounds that

[25] Committee on Economic, Social and Cultural Rights, *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), E/C.12/1998/24 (1998), [2].

[26] *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313 [59].

[27] See eg *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia* 2007 SCC 27 [70]; *Ontario (Attorney General) v Fraser* 2011 SCC 20 [92]; *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4 [62]–[65].

[28] *Slaight Communications v Davidson* [1989] 1 SCR 1038, 1056–1057.

[29] *Saskatchewan Federation of Labour*, above (n 27) [65], [68].

[30] *Health Services Assn,* above (n 27) [78].

private property rights had been intentionally excluded from the *Charter*.[31] However, the Court was careful to distinguish what it characterized as "corporate-commercial economic rights" from "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter."[32] The Court found that it would be "precipitous" to exclude the latter class of rights at so early a moment in *Charter* interpretation.[33]

Despite the Supreme Court's caution, most Canadian lower courts called upon to consider poverty, homelessness, or other socio-economic rights claims during the first two decades of the *Charter* rejected such challenges on the basis that economic rights were excluded from section 7 and so beyond the purview of the courts.[34] At the Supreme Court level, however, the question left unanswered in *Irwin Toy*, about the status of *ICESCR* rights under section 7, lay essentially dormant until the 2003 *Gosselin* case. In *Gosselin*, the Court considered the constitutionality of a Quebec regulation that dramatically reduced benefits for welfare recipients under the age of 30 who were not participating in training or work experience programs.[35] In her dissenting judgment, Justice Arbour found that the section 7 right to security of the person imposed a positive obligation on governments to provide those in need with an amount of social assistance adequate to cover basic necessities.[36] The majority of the Court left open the possibility of such an interpretation in a future case, but it concluded there was insufficient evidence to make this finding on the facts of *Gosselin*, as compensatory "workfare" provisions were available and, in the majority's view, "the evidence of actual hardship is wanting." [37] As Chief Justice McLachlin explained:

> The question therefore is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not.[38]

Although the Supreme Court's approach to section 7 has been inconclusive, in its early section 15 jurisprudence the Court played a leading role, internationally, in affirming

[31] *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, 1003.

[32] Ibid 1003–1004

[33] Ibid.

[34] David Wiseman, 'Methods of Protection of Social and Economic Rights in Canada' in Fons Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia, 2006) 173; Jackman, 'Poor Rights', above (n 18).

[35] *Gosselin v Quebec (Attorney General)* 2002 SCC 84.

[36] Ibid [82]–[83].

[37] Ibid [83].

[38] Ibid [82]. For critiques of *Gosselin* and the Court's post-*Gosselin* record see Sanda Rodgers and Sheila McIntyre (eds), *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat?* (LexisNexis, 2010); Kerri Froc, 'Is The Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor' (2008) 87 Canadian Bar Review 459; Margot Young et al. (eds), *Poverty: Rights, Social Citizenship, and Legal Activism* (University of British Columbia Press, 2007).

and developing a notion of substantive equality that includes important dimensions of socio-economic rights as well as positive governmental obligations to remedy disadvantage. The Court recognized that programs such as social assistance for single mothers are "encouraged" by section 15 and it ordered positive remedies to under-inclusive benefit programs on that basis.[39] Following the Supreme Court's lead, in the 1993 *Sparks* case, the Nova Scotia Court of Appeal extended security of tenure protection to approximately 10,000 public housing tenants, after finding that restrictions on the scope of the province's residential tenancies legislation discriminated on the grounds of poverty, race, sex/marital status, and public housing residence.[40] Likewise, in the 2002 *Falkiner* case, the Ontario Court of Appeal found that "spouse-in-the-house" rules limiting social assistance eligibility of single mothers living with male partners was discriminatory based on sex and receipt of public assistance, and the Court ordered that benefits be extended to include this group.[41] In these cases appellate courts recognized the existence of systemic discrimination on the grounds of poverty, or reliance on social assistance or public housing, and accepted these as analogous grounds of discrimination that are prohibited under section 15.

However, even in its most progressive judgments, the Supreme Court has stepped back from explicitly affirming a key element of equality that was advanced by human rights advocates and equality-seeking organizations during pre-*Charter* debates over the wording of section 15, and that is also at the core of Canada's international human rights obligations. Although repeatedly declaring its commitment to substantive equality the Court has yet to rule that, in the absence of an under-inclusive program or benefits scheme, the *Charter* imposes a positive obligation on governments to provide benefits or social programs necessary to address the needs of disadvantaged groups.[42] The Court has also failed to address the question of whether socio-economic status, or the "social condition of poverty" should be recognized as a prohibited ground of discrimination under section 15, having refused leave to appeal a number of lower court decisions in which this argument was made and rejected.[43]

[39] *Schachter v Canada* [1992] 2 SCR 679 [41].

[40] *Dartmouth/Halifax (Country) Regional Housing Authority v Sparks* (1993) 119 NSR (2d) 91 (NS CA).

[41] *Falkiner v Ontario (Ministry of Community and Social Services)* (2002) 59 OR (3d) (ON CA).

[42] See generally Sanda Rodgers and Sheila McIntyre (eds), *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis Butterworths, 2006); Porter, 'Expectations of Equality', above (n 13) 40–41; David Wiseman, 'Managing the Burden of Doubt: Social Science Evidence, the Institutional Competence of Courts, and the Prospects for Anti-poverty *Charter* Claims' (2014) 33 National Journal of Constitutional Law 1.

[43] See eg *Boulter v Nova Scotia Power Assn Inc* 2009 NSCA 17, leave to appeal to SCC refused, 33124 (10 September 2009); Claire McNeil and Vincent Calderhead, 'Access to Energy: How Form Overtook Substance and Disempowered the Poor in Nova Scotia' in Jackman and Porter, *Advancing Social Rights*, above (n 6) 253. For a review of socio-economic status as an analogous ground see Wayne MacKay and Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Canadian Human Rights Commission, 2009); Kerry Froc, 'Immutability Hauntings: Socio-economic Status and Women's Right to Just Conditions of Work under Section 15 of the *Charter*' in Jackman and Porter, *Advancing Social Rights*, above (n 6) 187.

4. Positive and Negative Duties in Relation to Socio-economic Rights

The Supreme Court has acknowledged that the *Charter* places duties on governments that can be categorized as both positive and negative. In its 1998 ruling in *Vriend*, that the Alberta government's failure to prohibit discrimination based on sexual orientation under its human rights legislation was unconstitutional, the Court addressed the argument that government inaction could not be subject to *Charter* review:

> The relevant subsection, s. 32(1) (b), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a positive act encroaching on rights is required … s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" … The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.[44]

In the 1997 *Eldridge* case the claimants, who were born deaf, argued that the government of British Columbia's failure to fund sign language interpretation services within the publicly funded health care system violated section 15.[45] In response, the Attorney General of British Columbia and other government interveners insisted that "s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action."[46] Writing for a unanimous Court, Justice LaForest stated that "this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence."[47]

Similarly, the Supreme Court has recognized that section 7 of the *Charter* has both negative and positive dimensions. In the health care context, for example, the Court found in the 1988 *Morgentaler* case,[48] dealing with women's access to reproductive health services; in the 2015 *Carter* case,[49] dealing with access to physician-assisted death; and in the 2015 *Smith* case, dealing with access to medical marihuana,[50] that section 7 imposes negative duties on governments to refrain from adversely affecting individual physical or psychological health or security. From a positive rights perspective, in the 1999 *G.(J.)*

[44] *Vriend v Alberta* [1998] 1 S.C.R. 493 [60], citing Dianne Pothier, 'The Sounds of Silence: *Charter* Application When the Legislature Declines to Speak' (1996) 7 Constitutional Forum 113, 115.

[45] *Eldridge v British Columbia (AG)* [1997] 3 SCR 624. In particular, one of the applicants underwent an emergency caesarean section with no hospital staff able to communicate with her about the procedure or her newborn twins' survival or state of health.

[46] Ibid [72].

[47] Ibid [73].

[48] *R v Morgentaler* [1988] 1 SCR 30.

[49] *Carter v Canada (Attorney General)* 2015 SCC 5.

[50] *R v Smith* 2015 SCC 34.

case, the Court rejected the New Brunswick government's argument that it had no obligation to provide legal aid to the appellant, a single mother in receipt of social assistance who was unable to afford a lawyer to represent her in child welfare proceedings.[51] The Court found that in circumstances where her security of the person was under threat, section 7 imposed "a positive constitutional obligation to provide state-funded counsel" so that the appellant could participate meaningfully in the proceedings in conformity with section 7 principles of fundamental justice.[52] Justice Arbour summarized the Court's position on the justiciability of the positive rights claim in *Gosselin*:

> This Court has never ruled, nor does the language of the Charter itself require, that we must reject any positive claim against the state—as in this case—for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7.[53]

In the 2011 *PHS Community Services (Insite)* case, the claimants challenged the Government's refusal to grant an exemption from federal narcotics control legislation that the Insite supervised safe injection clinic required in order to offer services to intravenous drug users in Vancouver's Downtown Eastside.[54] The Supreme Court found that, by putting their lives and health at risk, the Government had violated the claimants' rights to life and security of the person.[55] Given clear evidence of the benefits of Insite's safe injection and related health services, both for individual and community health and safety, the Court concluded that the Government's failure to grant the exemption was arbitrary and so in violation of section 7 principles of fundamental justice.[56] On that basis, the Court ordered the federal Minister of Health to act immediately to provide the exemption that Insite needed to continue offering its services.[57]

At the same time, the negative rights paradigm that human rights advocates and equality-seeking organizations criticized during pre-*Charter* debates, and that textual changes to the language of the *Charter* were designed to overcome, remains a serious obstacle in socio-economic rights litigation. For instance, in the 2004 *Auton* case, the claimants relied on the Supreme Court's earlier decision in *Eldridge* to argue that the British Columbia government's failure to fund their autistic children's intensive behavioural treatment violated section 15 of the *Charter*.[58] In rejecting that claim, Chief Justice McLachlin stated that: "this Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes

[51] *New Brunswick (Minister of Health and Community Service) v G(J)* [1999] 3 SCR 46.
[52] Ibid [81], [108].
[53] *Gosselin* above (n 35) [309] (Arbour J), [83] (McLachlin CJ).
[54] *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44 [hereinafter *Insite*].
[55] Ibid [93].
[56] Ibid [130]–[132].
[57] Ibid [150], [156].
[58] *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78.

to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner."[59]

In the 2005 *Chaoulli* case, the appellants, backed by interveners representing a number of private clinics, argued that Quebec's prohibition on private health insurance deprived them of access to timely care, thereby violating their section 7 rights to life and security of the person as well as their right to life under section 1 of the *Quebec Charter*.[60] In response to the dissenting justices' concern that "[t]he resolution of such a complex fact-laden policy debate does not fit easily within the institutional competence or procedures of courts of law"[61] Chief Justice McLachlin and Justice Major argued that:

> While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it.[62]

In their view, although the *Charter* "does not confer a freestanding constitutional right to health care" nevertheless, "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[63] The Chief Justice and Justice Major went on to find that delays in obtaining health care posed a threat to life, and to physical and psychological security, and that the government's failure to ensure timely access to health care of reasonable quality triggered the application of section 7.[64] Emphasizing that the appellants were not seeking "an order that the government spend more money on health care" or "that waiting times for treatment under the public health care scheme be reduced" but only that "they should be allowed to take out insurance to permit them to access private services" Chief Justice McLachlan and Justice Major agreed with Justice Deschamps that Quebec's ban on private insurance must be struck down.[65] In contrast, the three dissenting justices referred to evidence accepted by the trial judge that the prohibition was necessary to protect the publicly funded system, upon which everyone relies,[66] and they warned that: "the *Canadian Charter* should not become an instrument to be used by the wealthy to 'roll back' the benefits of a legislative scheme that helps the poorer members of society."[67]

[59] Ibid [41].
[60] *Chaoulli v Quebec (Attorney General)* 2005 SCC 35.
[61] Ibid [164].
[62] Ibid [107].
[63] Ibid [104].
[64] Ibid [102], [111]–[119].
[65] Ibid [103]. Four of seven justices ruled the ban violated the *Quebec Charter* [100] (Deschamps J), [102] (McLachlin CJ, Major and Bastarache JJ); three of seven justices found it also offended section 7 [159] (McLachlin CJ, Major and Bastarache JJ).
[66] Ibid [240]–[241].
[67] Ibid [274].

5. Recent Socio-economic Rights Litigation in the Areas of Health and Housing

Charter claims by disadvantaged individuals in need of publicly funded health care or protection from the consequences of homelessness, although raising similar life and security of the person interests to those recognized by the Supreme Court in *Chaoulli*, have been treated very differently by lower courts. The recent *Toussaint*[68] and *Canadian Doctors for Refugee Care*[69] health care challenges, and the *Adams*,[70] *Abbotsford*,[71] and *Tanudjaja,*[72] decisions in the homelessness context, illustrate the tension between competing constitutional paradigms that continues to underlie socio-economic rights adjudication in Canada.

In the 2010 *Toussaint* case the applicant, who had worked in Canada for a number of years as an undocumented migrant, developed several life-threatening medical conditions related to untreated diabetes and hypertension.[73] Her application under the Interim Federal Health Benefit Program (IFHP) was denied, on the grounds that she did not fall within the four classes of immigrants eligible for coverage.[74] On a judicial review application to the Federal Court, the applicant alleged that the denial of health care violated sections 7 and 15 of the *Charter*. Citing *Chaoulli* the Attorney General of Canada claimed that, as there is no freestanding right to publicly funded health care under the *Charter*, "it clearly follows that non-citizens residing illegally in Canada certainly do not" possess such rights. [75] Justice Zinn rejected the Government's argument that section 7 cannot be applied to the denial of publicly funded health care and instead found that, by "expos[ing] her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences," exclusion from the IFHP violated the applicant's rights to life and to security of the person.[76]

Nevertheless, Justice Zinn went on to decide that denying health care benefits to the applicant and others who have chosen to enter or remain in Canada illegally was not arbitrary as, "to grant such coverage to those persons would make Canada a health-care safe haven for all who require health care and health care services."[77] In response to the

[68] *Toussaint v Canada* 2011 FCA 213, aff'g *Toussaint v Canada* 2010 FC 810.
[69] *Canadian Doctors for Refugee Care v Canada* (AG) 2014 FC 651.
[70] *Victoria (City) v Adams* 2009 BCCA 172, aff'g *Victoria (City) v Adams* 2008 BCSC 1363.
[71] *Abbotsford (City) v Shantz* 2015 BCSC 1909.
[72] *Tanudjaja v Canada (Attorney General)* 2013 ONSC 5410, aff'd 2014 ONCA 852, leave to appeal to SCC refused, 36283 (25 June 2015).
[73] *Toussaint* (FC), above (n 68).
[74] Ibid [19].
[75] Ibid [73].
[76] Ibid [91].
[77] Ibid [94].

applicant's reliance on the right to health guaranteed under article 12(1) of the *ICESCR*, Justice Zinn stated that: "This application cannot succeed on the basis of the alleged international law obligations of Canada because Canada has not expressly implemented them."[78] On appeal, the Federal Court of Appeal accepted Justice Zinn's finding that "the appellant was exposed to a … risk significant enough to trigger a violation of her rights to life and security of the person."[79] However, the Court of Appeal ruled that the appellant's own conduct was the "operative cause" of any injury to her section 7 rights,[80] and it agreed with the trial court that the appellant's exclusion from the IFHP did not violate section 7 principles of fundamental justice.[81]

Less than three weeks after the Supreme Court refused leave to appeal the decision in *Toussaint*, the federal government announced revisions to the IFHP to exclude further classes of migrants from health care coverage, including refugee claimants from designated countries of origin, and failed refugee claimants.[82] These IFHP changes were challenged by a number of individuals and organizations in the 2014 *Canadian Doctors for Refugee Care* case.[83] In her decision at the Federal Court trial level, Justice Mactavish found that the deliberate exclusion of the targeted groups constituted "cruel and unusual treatment or punishment" under section 12 of the *Charter*, and was also discriminatory on the ground of national or ethnic origin under section 15.[84]

However, Justice Mactavish dismissed the applicants' claim that the IFHP cuts violated section 7.[85] She pointed out that, in *Chaoulli*, the applicants were not asking the court to order the Government to pay for, but rather were challenging limits on their ability to obtain their own private care.[86] With reference to the *Insite* case, although Insite's safe injection program was publicly funded, she suggested that "there is … a world of difference between requiring the state to grant an exemption that would allow a health care provider to provide medical services funded by others and requiring the state itself to fund medical care."[87] After reviewing a series of cases in which positive rights-based claims had, as in *Toussaint*, been unsuccessful,[88] Justice Mactavish concluded that

[78] Ibid [70].
[79] Ibid [61].
[80] Ibid [72]–[73].
[81] Ibid [82].
[82] Ibid leave to appeal to SCC refused, 17813 (5 April 2012). The changes to the IFHP were announced on 25 April 2012. *Canadian Doctors for Refugee Care* above (n 69) [54]. After the Supreme Court denied her leave to appeal, Toussaint filed a petition to the UN Human Rights Commission under the *Optional Protocol* to the *ICCPR; Nell Toussaint v Canada* HRC No 2348-2014 http://www.socialrightscura.ca/eng/legal-strategies-right-to-healthcare.html.
[83] *Canadian Doctors for Refugee Care*, above (n 69).
[84] Ibid [12]–[14].
[85] Ibid [510].
[86] Ibid [533]–[534].
[87] Ibid [538].
[88] Ibid 539–570.

"the Charter's guarantees of life, liberty and security of the person do not include the positive right to state funding for health care."[89]

Litigation with respect to the right to adequate housing under section 7 is in a similar state of uncertainty—claims against interference with the right to shelter under section 7 having been upheld by lower courts whereas claims to positive measures to ensure access to housing have been rejected.[90] In the 2008 *Adams* case, residents of a tent city in Victoria successfully challenged the constitutionality of a municipal bylaw that prohibited the erection of temporary structures in public parks at night.[91] At trial, Justice Ross found that the shortage of shelter spaces in Victoria meant that "hundreds of people are left to sleep in public places in the City"[92] and that the Government's interference with the ability of homeless people to provide themselves with temporary shelter while sleeping outdoors exposed them to a risk of serious harm, including death by hypothermia.[93] On that basis she found that the prohibition on erecting temporary shelter violated section 7 of the *Charter*.[94]

In arriving at her decision, Justice Ross underlined the fact that the defendants were not seeking to compel the government to provide them with adequate shelter, but instead were challenging restrictions on their ability to shelter themselves, akin to the situation in *Chaoulli*.[95] Likewise, in upholding Justice Ross's ruling on appeal, the British Columbia Court of Appeal emphasized that it was applying section 7 as a negative "restraint" on government action, rather than as a source of positive obligations to address the problem of homelessness or the rights of the homeless.[96] Whereas the Court of Appeal recognized that the trial court's decision would likely require some responsive action by the City to deal with the inadequate number of shelter beds and the lack of housing options available to homeless people in Victoria, the Court declared "[t]hat kind of responsive action to a finding that a law violates s. 7 does not involve the court in adjudicating positive rights."[97]

The British Columbia Supreme Court relied on the *Adams* decision in coming to a similar finding in the 2015 *Abbotsford* case, that a bylaw prohibiting the erection of

[89] Ibid 571. Following the electoral defeat of the Conservative government in 2015, the new Liberal government announced that it would withdraw the appeal to Justice Mactavish's ruling and review the Government's position in future *Charter* litigation. Statement from the Minister of Immigration, Refugees and Citizenship and the Minister of Justice and Attorney General of Canada Ottawa, 16 December 2015 http://news.gc.ca/web/article-en.do?nid=1025029.

[90] See generally Martha Jackman, '*Charter* Remedies for Socio-economic Rights Violations: Sleeping under a Box?' in Robert J Sharpe and Kent Roach (eds), *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice, 2010) 279; Margot Young, '*Charter* Eviction: Litigating out of House and Home' (2015) 24 Journal of Law & Social Policy 46.

[91] *Adams* (SC), above (n 70).

[92] Ibid [58].

[93] Ibid [142].

[94] Ibid [216].

[95] Ibid [119]–[120].

[96] *Adams* (CA) (n 70) [95].

[97] Ibid [96]. See also *British Columbia v. Adamson*, 2016 BCSC 584.

temporary shelter or sleeping in parks overnight violated section 7.[98] The challenge arose following the City of Abbotsford's efforts to evict residents from homeless encampments, using "displacement tactics" that included damaging tents and personal property and spreading chicken manure.[99] In response to the City's submission that many of those who are homeless have a "disinclination … to rules" and prefer to sleep outside "over other viable options"[100] Chief Justice Hinkson pointed out that, "to assert that homelessness is a choice ignores realities such as poverty, low income, lack of work opportunities, the decline in public assistance, the structure and administration of government support, the lack of affordable housing, addiction disorders, and mental illness."[101] In striking down the bylaw, Chief Justice Hinkson underlined the fact that the claimants were "not seeking to impose any positive obligations on the City"[102] and that "the obligation to provide housing for the homeless, if it exists, is not a burden that the City must discharge in these proceedings."[103]

In the 2013 *Tanudjaja* case the applicants, who had experienced inadequate housing and homelessness, challenged the federal and Ontario governments' failure to take positive measures to address the problem of homelessness.[104] In particular, in collaboration with a number of human rights, anti-poverty, and housing organizations participating as public interest interveners, the applicants argued that the federal government's failure to implement a national strategy to address homelessness violated sections 7 and 15 of the *Charter*.[105] The Attorneys General of Ontario and Canada brought a successful motion before the Ontario Superior Court to dismiss the claim, on the grounds that section 7 does not require governments to adopt positive measures, and that the right to housing is non-justiciable. In granting the motion to strike, Justice Lederer held that the *Charter* imposes neither positive obligations on governments in general, nor any particular requirement to provide "affordable, adequate, accessible housing."[106] In Justice Lederer's view:

> The *Charter* does nothing to provide assurance that we all share a right to a minimum standard of living. Any Application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived … General questions that reference, among many other issues … the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.[107]

[98] *Abbotsford*, above (n 71).
[99] Ibid [94]–[115].
[100] Ibid [76]–[77].
[101] Ibid [81].
[102] Ibid [148].
[103] Ibid [271].
[104] *Tanudjaja* (ONSC) above (n 72).
[105] Ibid [2].
[106] Ibid [59].
[107] Ibid [120].

Justice Lederer's dismissal of the *Tanudjaja* application was upheld by a 2-1 majority of the Ontario Court of Appeal. In her dissenting judgment, Justice Feldman found that the motions judge had characterized the applicants' claim "in an overly broad manner," that he erred in finding that the section 7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness was settled, and that the issues raised in the case should not have been determined without a full hearing on the evidence.[108] Writing for herself and Justice Strathy, Justice Pardu did not comment on the issue of positive obligations. Instead she found that that the applicants' failure to challenge a specific law meant there was "no sufficient legal component to engage the decision-making capacity of the courts."[109] As she saw it, the application amounted to a claim to a "free-standing right to adequate housing"[110] which "is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures"[111] and was therefore non-justiciable.[112]

The lower courts' decisions in *Tanudjaja* amount to a finding that some violations of the right to life and equality—those involving interconnected laws, policies, and programs in complex areas of social and economic policy—are beyond the scope of the *Charter*. With the denial of a hearing on the evidence, and the Supreme Court of Canada's refusal to grant leave to appeal the motion to dismiss in *Tanujaja*, socio-economic rights remain in the unsettled state that has prevailed since *Gosselin*: caught between two contrasting constitutional rights paradigms. Unless there is a significant change in the way governments defend against such claims, government lawyers will continue to insist that socio-economic rights ought not to be "read in" as components of sections 7 and 15 of the *Charter*. Claimants, for whom deprivations of life, security of the person, and equality result from government action and inaction in the socio-economic sphere will continue to maintain that their rights should not be "read out."[113]

6. Conclusion

In states where the protection of socio-economic rights relies on the interpretation and application of rights to life and to non-discrimination, efforts to secure remedies for social and economic rights violations as components of these rights have been criticized by some as attempts to supplement inadequate constitutional provisions through unduly expansive

[108] Ibid [52].
[109] Ibid [27].
[110] Ibid [33].
[111] Ibid [33].
[112] Ibid [36].
[113] Gwen Brodsky, 'The Subversion of Human Rights by Governments in Canada' in Jackman and Porter, *Advancing Social Rights* above (n 6) 355; Bruce Porter, 'Inclusive Interpretations: Social and Economic Rights and the Canadian Charter' in Helena Alviar García, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Enquiries* (Routledge, 2014) 215.

judicial interpretation. Given the historical context and legislative history of the *Charter*, this critique is especially misplaced in Canada. Such strategies are better understood as claims to the same rights advanced in different circumstances, calling for equal protection and benefit of *Charter* guarantees of life, liberty, security of the person, and equality without discrimination based on socio-economic disadvantage. This was indeed the expectation of human rights advocates and equality-seeking organizations when the content of the *Charter* was being negotiated 35 years ago.

During her tenure as UN High Commissioner for Human Rights, Justice Louise Arbour observed that: "the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law."[114] Yet, as Justice Arbour acknowledged from her experience on the Supreme Court of Canada, section 15 has yet to fully deliver on its promise of substantive equality for disadvantaged groups seeking remedies not only for inequitable but for inadequate social programs and policies. The question, left open by the Supreme Court in *Irwin Toy*, of whether section 7 should be interpreted to include social and economic rights such as the right to food, housing, or social security, also remains unanswered.

The status of socio-economic rights under the *Charter* and the related demand for equal recognition of the rights to life, security of the person, and equality of the most disadvantaged need not, however, be left exclusively to the courts to decide. Civil society groups have begun to take up the issue of rights interpretation in a manner reminiscent of their role in the pre-*Charter* debates over the scope of the new Canadian Constitution. In the most recent CESCR review of Canada in February 2016, dozens of organizations representing Indigenous people, people with disabilities, women, those living in poverty, and racialized and other disadvantaged groups, appeared before the Committee to reassert that access to justice for violations of socio-economic rights in Canada relies on inclusive interpretations of existing *Charter* rights. In its *Concluding Observations*, the CESCR held both Canadian governments and courts responsible for their respective roles in denying access to effective remedies for socio-economic rights violations within the domestic constitutional framework.[115]

As in previous reports,[116] the Committee underscored the need to improve the accountability of the judiciary and administrative decision-makers to socio-economic rights norms, recommending that Canada: "improve human rights training programmes in order to ensure better knowledge, awareness and application of the Covenant, in particular among the judiciary, law enforcement and public officials.[117] In

[114] Louise Arbour, ' "Freedom from Want"—From Charity to Entitlement', LaFontaine-Baldwin Lecture, Quebec City (2005) 7. Accessed at: https://www.icc-icc.ca/site/site/uploads/2016/11/LaFontaineBaldwinLecture2005_LouiseArbour.pdf .

[115] United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of Canada*, UN Doc E/C.12/CAN/CO/6 (4 March 2016) [5].

[116] Porter, 'Inclusive Interpretations', above (n 113).

[117] CESCR, *Concluding Observations*, above (n 115).

addition, the Committee urged Canadian governments to engage directly with rights-claiming constituencies and to alter their own approach to the justiciability of social and economic rights under the *Charter*, in order to better reflect and respect Canada's international human rights undertakings and to promote a more inclusive and democratically accountable engagement with this fundamental issue of constitutional interpretation:

> The Committee recommends that the State party implement its commitment to review its litigation strategies in order to foster the justiciability of the economic, social and cultural rights. The State party should engage civil society and organizations of indigenous peoples in this revision with a view to broadening the interpretation of the Canadian Charter of and Freedoms, notably sections 7, 12 and 15, to include economic social and Rights cultural rights, and thus ensure the justiciability of Covenant rights.[118]

The Committee's recommendations remind us that the constitutional status of socio-economic rights in Canada remains a matter of choice. If Canadian governments decided to affirm such rights in courts, if Canadian courts attended to their role in ensuring effective implementation of international human rights through the interpretation and application of domestic law, and if Canada's legal culture were to better align with the views and expectations of civil society and Indigenous peoples, socio-economic rights would achieve more equal constitutional recognition and the most disadvantaged Canadians more equal benefit of Canada's post-*Charter* democracy.

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