Martha Jackman and the Charter Committee on Poverty Issues: A Personal Reflection

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I often think back to my first meeting with Martha Jackman. It laid the foundations of an incredibly rewarding collaboration including test case litigation, co-authoring articles and book chapters, co-editing a book and co-directing national research projects into social rights.

It was at the first meeting of the Charter Committee on Poverty Issues (CCPI) in 1988. CCPI had been established the previous year at a meeting convened by the Federal Court Challenges Program to address the absence of poverty-related claims under the *Canadian Charter of Rights and Freedoms* (*Charter)*.[1] A twelve-member committee was struck to coordinate test-case litigation on poverty issues, made up of low-income advocates appointed by the National Anti-Poverty Organization[2] along with a number of constitutional and human rights advocates and experts.

Martha's seminal article "The Protection of Welfare Rights under the Charter"[3] had been published the year before and had already become a kind of sacred text for any consideration of *Charter* litigation on poverty issues, so who better to invite to speak at our first meeting than Martha?

In that article, Martha challenged the skepticism and critique of *Charter* activism, led by male critical legal scholars such as Michael Mandel, Andrew Petter and Joel Bakan, who denounced the hopes of promoting social justice through *Charter* litigation before conservative and elitist judges as a distraction from legitimate political action.[4] She did not challenge the critics' assessment of the conservative and elitist nature of courts. She was and remains a committed critic of courts and has provided an important counterweight over the years to my more optimistic assessment of the outcomes of effective advocacy. However, instead of allowing *Charter* interpretation to be restricted by how courts were predicted to respond, Martha insisted

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[1] For a history of the Court Challenges Program, see House of Commons, Standing Committee on Justice and Human Rights, Access to Justice Part 1: Court Challenges Program, Report of the Standing Committee on Justice and Human Rights, 42nd Parl, 1st Sess, September 2016 (Chair: Karen McCrimmon) [HC JHR Report] https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP8377632/justrp04/justrp04-e.pdf.

[2] The National Anti-Poverty Organization (NAPO) was formed in 1973 and was the primary political voice for people living in poverty. It changed its name to Canada Without Poverty in 2009. Canada Without Poverty (formerly the National Anti-Poverty Organization), "History in Highlights" https://cwp-csp.ca/history-in-highlights.

[3] Martha Jackman, "The Protection of Welfare Rights under the Charter" (1998) 20 Ottawa L Rev 257.

[4] For critiques of ***Charter*** activism, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishers, 1994); Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) The Advocate 45 at 857; Joel Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can Bar Rev 307. On the expectations of feminists and other equality seeking groups at the time, see Bruce Porter, "Expectations of Equality" (2006) 33 Supreme Court Law Reviewat 23. ["Expectations of Equality"]

that the *Charter* must be interpreted in light of what people living in poverty and Canadians as a whole had a right to expect from it.[5]

Martha began her analysis with a personal affirmation that has guided all of her advocacy and scholarship. "I cannot accept the view that the *Charter* has nothing to say to those Canadians who are most in need of its protection." She argued that the interpretation of rights to life, liberty and security of the person in section 7 of the *Charter* must be grounded in Canada's recognition of economic social and cultural rights in international human rights law and in expectations, "deeply rooted in Canadian culture" that the state, acting on behalf of the community, has an obligation to guarantee that every Canadian is ensured a decent standard of living as a right of "social citizenship."[6] Martha presented extensive evidence that these expectations were linked to fundamental values "shared by individual welfare claimants and by the general public alike."[7]

Denial of Access to Adjudication: It's Not Just the Courts

Martha's insistence that *Charter* interpretation be grounded in the legitimate expectations of rights holders — and in Canada's historical commitments to international human rights — had a strong resonance for me in 1988. I had transitioned from graduate work in social and political thought to working with low-income tenants lobbying for changes to Ontario's *Human Rights Code* (the *Code*) in omnibus legislation designed to amend provincial law to conform with section 15 of the *Charter.*[8] In the process I had learned that human rights legislation had rarely been applied to address widespread discrimination in housing experienced by low-income tenants and I worked with others to establish an organization to ensure that human rights protections in housing could be claimed and enforced by those who had been denied access to justice. The Centre for Equality Rights in Accommodation (CERA), which I directed, provided advice and representation to human rights claimants in housing.[9]

My early experience at CERA convinced me that the obstacles to rights claims on poverty issues were not just conservative tribunals and courts. Canada's dominant legal culture, endorsed by left-leaning critics, mainstream commentators and conservatives, had adopted the proposition that poverty-related claims should not be advanced before courts and tribunals because socio-economic policy is outside of the legitimate role of courts vis-a-vis legislators. Peter Hogg was the most frequently cited authority, relying on no lesser an authority than Oliver Wendell Holmes, to insist that "these are issues on which elections are won and lost" -- which was

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[5] Bruce Porter, "Expectations of Equality" supra note 4.
[6]Martha Jackman, in Michael Drache & John Cameron, eds, *The Other Macdonald Report* (Toronto: James Lorimer & Co, 1985) at 51, citing Social Planning Council of Metropolitan Toronto, *The Rise and Fall of the Welfare State*.
[7] "Protection of Welfare Rights Under the Charter" supra note 3 at 305.
[8] *Equality Rights Statute Law Amendment Act*, SO 1986, c 64.
[9] Centre for Equality Rights in Accommodation (now Canadian Centre on Housing Rights), "History" https://housingrightscanada.com.

proven all too true with the recession era rise of welfare-bashing and scapegoating of people living in poverty in the 1990s, leading to the election of the Mike Harris government in 1995.[10]

At CERA, we found that human rights claims linked to poverty were screened out long before reaching adjudication and that people living in poverty were being denied the benefit of representation to advance claims, even when based on the plain wording of human rights protections and on established jurisprudence.

Receipt of public assistance, for example, had been a prohibited ground of discrimination under the *Human Rights Code* since 1982 and this was the most frequent form of discrimination in housing that was reported to us. Yet no claims had been adjudicated in the first five years after the provision came into effect.

Negative stigma and hostility toward people on welfare were widespread, but when landlords or property managers were challenged for discriminating on this ground they simply cited concerns about applicants' ability to afford the rent.

Most lawyers assumed a tribunal would find landlords' affordability concerns reasonable and discouraged potential complainants from filing. In the rare cases of complaints being filed, the Human Rights Commission would deam the refusal to be based on legitimate concerns about affordability, applying the rule that rent should not exceed thirty per cent of household income.

However, social assistance rates ensured that—even for the most affordable apartments available, recipients would still spend over fifty per cent of their income on rent. A qualification effectively excluding an entire protected group was simply accepted as reasonable, and the Commission declined to refer complaints for adjudication. The *Code*'s protection on a poverty-related ground had simply been read out entirely and the protections on other grounds were only applied to more affluent members of protected groups because refusals of tenants who allegedly could not afford the rent were deemed to be non-discriminatory.

What frustrated me the most was the reluctance of legal experts to apply accepted human rights principles and the plain wording of the legislation to those who lived in poverty. Even if a policy that disqualified all social assistance recipients solely because of their poverty could be framed as a facially "neutral" qualification with respect to the ground of "receipt of public assistance," the law was clear: the Supreme Court of Canada's adverse-effect discrimination doctrine had been explicitly incorporated it.Ontario's *Human Rights Code*.[11] "The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member

[10] This trend was well documented by the Canadian Human Rights Act Review Panel in *Promoting Equality: A New Vision, Report of the Canadian Human Rights Act Review Panel*, (Ottawa: Department of Justice and Attorney General, 2000) 109 - 116

[11] *Ont. Human Rights Comm. v. Simpsons-Sears* (1985) 2 S.C.R. 536.

cannot be accommodated without undue hardship..."[12] Whether relinquishing affordability qualifications would impose any undue hardship on landlords had never been tested on the evidence.

When pressed on why accepted human rights principles were not applied to people living in poverty, most lawyers relied on negative predictions about outcomes: "Why subject low-income claimants to hostile legal processes if their claims are likely to be rejected?"

However valid complaints of discrimination were, the prevailing view of lawyers and critical legal scholars suggested that we should deny representation to impoverished claimants—"for their own good"—because poverty-related claims were certain to fail.

I had begun to realize, though, that pessimistic predictions also reflected lawyers' and scholars' own assumptions about reasonableness rather than any rigorous analysis of how legitimate claims ought to be framed that reasonably engaged with the experience of poverty. At CERA, where we spent hours on the phone with those who were suffering from almost complete exclusion from affordable housing, and who wished to pursue justice, the notion that we should tell potential claimants to lobby the legislature instead of pursuing judicial remedies—or to accept that their rights should be "read out" of clearly worded legislation based on prevailing assumptions about the role of tribunals and courts —was unthinkable.

Fortunately, Raj Anand was appointed Chief Commissioner of the Ontario Human Rights Commission in 1988. Raj acknowledged that convincing a tribunal that widely accepted affordability criteria violated the *Huma Rights Code* would be difficult, but agreed that our arguments were sound and merited a hearing. The Commission requested the appointment of a special three-person board of inquiry into complaints that income criteria disproportionately excluded protected groups—including social assistance recipients—from the most affordable housing available.

The landlords' organization enlisted top counsel— Ian Scott (former Attorney General) and Stephen Goudge (renowned labour lawyer and future Appeal Court judge)—and retained Michael Trebilcock, the University of Toronto's leading law-and-economics expert, to advance the central argument that poverty issues are beyond the legitimate scope of human rights adjudication. They maintained that our claimants should be addressing inadequate income before the legislature rather than appearing before a tribunal or court. After 60 days of hearings, the inquiry found that affordability criteria discriminated on multiple grounds—receipt of public assistance, sex, family status, age, citizenship, race, immigration status, and place of origin. The evidence showed no link between the 30% rent-to-income threshold and default risk. Eliminating income criteria had no impact on costs, let alone constituting undue hardship.[13] It turned out that

[12] The standard was incorporated directl y into Ontario's *Human Rights Code* by the *Equality Rights Statute Law Amendment Act*. *Human Rights Code*, R.S.O. 1990, c. H.19 s. 11,
[13] *Kearney v. Bramalea Ltd. (No. 2)*, 1998 CanLII 29852 (ON HRT)

those who were low-income at the time they rented an apartment would do everything they could to avoid default and eviction, even go hungry, because they knew what they would face in the housing market if they lost their housing. Crucially, it was the claimants' moving testimony that shifted the analysis from landlords' notion of "reasonable" to rights-holders' lived experience. To everyone's surprise, a conservative Divisional Court panel later upheld the decision on appeal.[14]

Reality Checks

What I had encountered in my early work in human rights advocacy was accurately described by Martha in her article "Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases."[15] In that article, Martha described how impoverished rights claimants are considered suspect for seeking legal remedies to poverty-related injustice, illegitimate interlopers bringing grievances to courts that belong in the hallways and committee rooms of legislatures or on the streets, painted on banners. Rights claimants advancing poverty-related claims are subject to a reverse onus. They must first establish themselves as legitimate rights claimants, convince a court that they have a right to be there, before lawyers or courts are even willing to apply established jurisprudence or the plain wording of *Charter* or human rights protections to their experiences of inequality, deprivation and injustice.

Martha recognized that the proposed Hobbesian choice between law or politics, courts or legislatures, misunderstood the relationship between rights and politics in Canada's new constitutional democracy. Human rights claims within the justice system did not detract from political advocacy; they enhanced it. Feminist, disability rights, anti-racism and LGB rights groups were mobilizing politically around the legal recognition of their rights in the early years of the *Charter*.[16] Women's organizations had gained significant momentum after the Supreme Court's decision on abortion rights in the *Morgentaler* decision of 1988[17] and groups like EGALE wove legal recognition of sexual orientation into their political campaigns.[18] The Council of Canadians with Disabilities paired rights claims with advocacy to transform a charity model into a rights-based paradigm.[19]

People living in poverty also faced widespread discrimination, both overt and through governmental neglect**.** They were vilified by politicians as "welfare cheats," and were the

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[14] *Shelter Corp. v. Ontario (Human Rights Cmm.)*, 2001 CanLII 28414 (ON SCDC).
[15] Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases" (2006) 20 Natl J Const L 115 a**t** 36 ["Reality Checks"]
[16] Bruce Porter, "Expectations of Equality" supra note 4.
[17] *R v Morgentaler* [1988] 1 S.C.R. **30**; Diana Majury, "The Charter, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall LJ 297.
[18] EGALE (Originally Equality for Gays and Lesbians Everywhere), founded in 1986. See John Fisher, "Outlaws or Inlaws?: Successes and Challenges in the Struggle for LGBT Equality" (2004) 49 McGill LJ 1183.
[19] Yvonne Peters, "From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution," in *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Toronto: Captus Press, 2003) **119 at** 119–36.

victims disproportionately punitive measures both under criminal law and in social legislation, yet they remained largely excluded from the burgeoning human rights movement.[20]

Martha recognized that effective advocacy addressing poverty issues required first establishing people in poverty as equally deserving of human rights protections and ensuring claims were grounded in their lived experience of discrimination and deprivation. "It is only through our connection with our clients and others living the day-today indignities and injustices of the current welfare system that we can expose and test our own presumptions of innocence and guilt and grasp the reality that, as advocates, we must in turn attempt to convey to judges hearing *Charter* welfare cases."[21]

CCPI and Positive Obligations Under the *Charter*

In preparing her remarks for CCPI's first meeting in 1988, Martha assumed that CCPI's members were not interested in hearing her eloquent, scholarly exposition of poverty rights under the *Charter* and only in receiving practical guidance on litigation priorities. Perhaps the admonishions from critical legal scholars about raising false hopes for social justice through litigation were also on her mind. I have also learned over the years that Martha has periodic "dark moments" of pessimism – something I have learned to navigate.

For whatever reason, her presentation to the CCPI members did not affirm litigation based on the legitimate expectations of rights holders as described in her article and instead described the hostile legal terrain we would face in advancing claims linked to poverty. She emphatically declared that courts would not interpret the right to life or security of the person in 7 as conferring any positive entitlements to adequate financial assistance, housing, or other necessities of life, so we should avoid advancing such claims, at least in our early initiatives.

To Martha's surprise, the low-income members of the Committee reacted with hurt and resentment. How could any judge deny that homelessness or hunger violated their right to life and security-of-the-person? They did not like the idea of deferring or avoiding direct challenges to poverty and were offended by the idea that in a country as affluent as Canada, hunger or homelessness would go unrecognized as a violation of fundamental-rights. Wasn't that very approach destined to entrench the long-standing marginalization of poverty issues from Canada's human-rights movement—the very wrong CCPI was created to right?

I realized that some of the negative reactions stemmed from the simple fact that not everyone had read Martha's article and grasped our shared assumptions. Once she clarified that she agreed with all of the concerns raised and voice more of what she, herself, had affirmed in her work, misunderstandings were quickly corrected. Martha became CCPI's staunchest all. She has

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[20]Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision—Report of the Canadian Human Rights Act Review Panel* (Ottawa: Dept of Justice and Attorney General, 2000) 106–13.
[21] Ibid at 36**.**
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appeared as counsel for CCPI in multiple cases and her scholarship has been essential to its litigation. That first interaction with the low-income members of CCPI, however, taught us both a vital lesson that has shaped every aspect of our collaboration since.

That first meeting reminded us that for people living in poverty, claiming rights in court represents a profound assertion of equal status, in the words of the Universal Declaration of Human Rights – as being "equal in dignity and rights. They view widespread poverty and homelessness in Canada not as material deprivation to be remedied by whatever legal strategy works, but as stemming from a human-rights framework that had long excluded them by defining them as recipients of charity. This changed the understanding of the practice of "poverty law", in which the role of lawyers was seen as providing expertise in simply using law for instrumental purposes. .

We took to heart the skepticism voiced at that first meeting over a litigation strategy that sidestepped the positive-rights obligations central to an inclusive human-rights approach. We began to ask what underlay the widespread assumption among lawyers and experts that courts would never recognize that the *Charter* imposes positive obligations on governments to secure basic dignity, security, and equality. Was this not simply another example of the rights of people living in poverty simply being read out of the text and jurisprudence on the basis of untested assumpions?

In its 1989 decision in *Irwin Toy*, the Court found that the deliberate exclusion of property rights from section 7 meant that corporate economic rights were not protected, but went out of its way to clarify that this did not rule out the possibility that socio-economic rights recognized under international law as fundamental to human life and survival may be included in section 7.[22] The Court noted that section 7 "was intended to confer protection on a singularly human level."[23] That sentence resonated for low-income claimants differently, because they saw access to adequate financial assistance, housing and food not as economic benefits but as recognition of their personal dignity and humanity.

In the *Schachter* case, the Supreme Court commented on the "irony" of a decision of the Nova Scotia Court of Appeal in which that Court found that providing a welfare benefit to single mothers while denying it to single fathers, violated section 15. The Court of Appeal had found that to extend the benefit to single fathers would exceed the proper role of a court, so the only way to achieve compliance with section 15 was to nullify the benefit to single mothers.[24] The Court in *Schachter* noted that

> the nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter* and for s. 15 to have such a result clearly amounts

[22] *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927.
[23] Ibid at paras 1003–04.
[24] *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 NSCA.

> to "equality with a vengeance," as LEAF, one of the interveners in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the *Charter*.[25]

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The Court therefore esstablished in *Schachter* that courts may in some cases extend benefits to previously excluded groups through "reading in" so as to respect the purposes of the *Charter*.[26]

It is unfortunately common for courts and advocates, even where recognizing positive obligations, to do so with the caveat that is no constitutional obligation to adopt legislation or provide a benefit such as social assistance, once to ensure that once a government chooses to provide a benefit, it complies with the *Charter.* This paradigm permits of "read-in" remedies that to extend benefits but also perpetuates the absurd notion, as described in *Schacter*, that in the name of *Charter* compliance, governments may be encouraged to commit the most egregious human rights violations under international law, such as providing no social assistance at all. Under this model, constitutional rights to life, security and equality of those who rely on government programs for their very survival are only triggered by a charitable *choice* by governments not to allow them to starve, to die without health care or to remain homeless. For people living in poverty, a paradigm that grounds inherent rights in voluntary government largesse simply perpetuates their exclusion from human rights. It renders them suspect as rights claimants because they are denied any inherent right to dignity, life or security, to be protected from starvation, homelessness or lack of access to publicly funded health care. Their rights claims are reconstituted as complaints about programs that were implemented for their own benefit, provided to them out of charity.

I have been puzzled over the years by the hostility that positive rights claims related to poverty provoke, particularly among lawyers for governments. Their behaviour and discourse in court suggest that there is something they actually find offensive in such claims, which they characterize in the most pejorative fashion, treating claimants almost like spoiled children. I have been reminded of the song from "Oliver" in which Fagan is astonished at the arrogance of Oliver when he pleads: "Please sir, may I have some more?" Government lawyers believe they have clinched their argument if they can establish that claimants are simply complaining that what they are receiving is not enough, and they invariably move to strike such claims as unworthy of judicial resources.

This was made clear in the *Charter* challenge to the 21.6 per cent cuts to social assistance rates in Ontario in *Masse v Ontario*, in which the court characterized the claim as a

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[25] *Schachter v Canada* [1992] 2 SCR 679 at 701–02.
[26] Ibid.

complaint that the social assistance payments are "not enough" and noted that "in the absence of the reduced social assistance payments, the applicants would face an even greater burden brought about by the cost of rent and food, non-governmental activity."[27]

In light of widespread prejudices, most lawyers remain convinced that poverty-related litigation should not assert any positive obligation to address systemic socio-economic inequality or deprivation. They routinely reassure courts that *Charter* rights apply only after legislation is enacted or a benefit is conferred. In a few critical cases, we have urged claimant and intervener counsel not to concede this, yet once in court, lawyers almost invariably assure the court that they do not claim governments must provide any benefits, even when those whom they represent would not be able to survive without them. Lawyers acting for other groups would not contemplate reassuring the court that the group they represent could be deprived of any semblance of security, dignity or equality without violating their *Charter* rights as a starting point for a *Charter* claim, but that is what is routinely conceded in poverty-related cases.

The members of CCPI were right to be skeptical at that first meeting about accepting an exclusionary paradigm in order to claim rights at its margins. These strategies often backfire. As the Court found in *Masse*, if governments have no obligation to provide social assistance, then it is hard to understand why they would be obliged to provide some minimal level of assistance. When lawyers acting for people living in poverty disavow positive obligations to address socio-economic inequality and deprivation, they inadvertently disenfranchise their clients from the most basic rights to human dignity and security.

Since its first meeting, CCPI has consistently argued for a paradigm of rights under sections 7 and 15 premised on positive obligations to address socio-economic inequality and deprivation. We have become convinced that this is not only the most principled way in which to advance *Charter* claims of those living in poverty, but also the most strategic approach most likely to give rise to positive outcomes.

All of our interventions at the Supreme Court, however, have been in cases that others have brought forward, and we have often intervened to try to keep the question of positive obligations open rather than have it decided pre-emptively.

Positive Rights Claims Under Section 15

CCPI's first intervention before the Supreme Court of Canada was in **Symes v. Canada**, in which Beth Symes argued that denying the deduction of childcare expenses as business costs under the Income Tax Act violated women's equality rights.

CCPI intervened to challenge the Federal Court of Appeal's finding that a section 15 review of socio-economic or taxation measures "overshoots" and "trivializes" the purposes of the *Charter* and that section 15(1) imposes no positive obligation on governments to remedy social and

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[27] *Masse v Ontario (Minister of Community and Social Services)* (1996) 89 OAC 81 (Div Ct) at para 71.

economic disadvantages—such as those arising from women's disproportionate childcare burden.[28] We argued that equality rights under the *Charter* apply equally to social and economic legislation and policy and may require ameliorative measures in the context of taxation, social programs, and other socio-economic policies. Iacobucci J., for the Court, confirmed that socio-economic legislation is not immune from Charter scrutiny but noted that the appeal did not raise whether governments owe a positive obligation to address childcare costs, leaving that issue open.[29]

CCPI intervened again at the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)* [30] **to challenge the BC Court of Appeal's conclusion** that section 15 **imposes no obligation to provide benefits necessary to remedy inequalities not caused by governments.**

The Court of Appeal **held that because** the need for interpretation services for people with hearing impairments was not caused by the **challenged health-insurance law**, section 15 **imposes no positive obligation to provide those services**.[31] CCPI argued in the appeal to the Supreme Court that there was no basis in the Court's jurisprudence for limiting positive obligations under section 15 to ameliorating only the direct effect of particular legislation or government action. Referring to the recognition of positive obligations under human rights legislation, international human rights law and previous section 15 jurisprudence, CCPI argued that

> When governments fail to act, thereby violating equality rights, the same level of scrutiny is required as in cases of direct state action. Otherwise, the *Charter* would be drained of meaningful content for most disadvantaged Canadians, including the poor and people with disabilities. CCPI submits that these are the claims which are most central to the purpose of section 15 as the Court enunciated it in *Andrews* and subsequent decisions: "to ensure ... a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.[32]

Justice LaForest, writing for a unanimous Court agreed. In response to the Respondent's argument "that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action,"[33] he wrote that "this position bespeaks a

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[28] Symes v Canada (FCA) 1991 CanLII 13553; [1991] 3 FC 507.
[29] *Symes v. Canada*, [1993] 4 S.C.R. 695 at 753
[30] *Eldridge v British Columbia (AG)* [1997] 3 SCR 624.
[31] *Eldridge v British Columbia (AG)* 1995 CanLII 2964 (BC CA)
[32] *Eldridge v British Columbia (AG),* SCC No 4896, Factum of the Charter Committee on Poverty Issues at para 21 https://www.povertyissues.org/cases/eldridgefac.html.
[33] *Eldridge*, supra note 30 at para 72.

thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence."[34]

While the *Eldridge* case represented a significant advance in the recognition of positive obligations to implement programs to address systemic disadvantage existing outside of state action, the Court dodged the question of whether governments must enact programs or benefits to remedy socio-economic inequality. The actual cause of the violation in *Eldridge* was a cabinet decision not to provide funding requested by an independent organization to provide interpreter services. Although the claim was framed as an issue of under-inclusion in health care legislation, Justice LaForest found that it was not the legislation but the decision of the delegated authorities not to fund interpreter services as medical services that was constitutionally suspect.[35] Yet when it cam to remedy, he recognized that the issue wasn't whether such services should be provided as medical services but simply whether they should be provided through "myriad options available to the government that may rectify the unconstitutionality of the current system."[36] Nevertheless, the Court insisted on framing the positive obligations at issue in *Eldridge* as deriving from the obligation to provide a benefit in a non-discriminatory manner. Justice La Forest therefore left the broader question of positive obligations formally unresolved:

> It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau*, *supra*, at para. 37 (*per* L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner [citations omitted].[37]

Justice LaForest's reluctance to frame the decision in *Eldridge* more substantively, in line with the facts and the remedy provided, allowed Justice McLachlin, in the *Auton* decision, to distinguish the *Eldridge* decision from the positive rights claim in *Auton* to programs alleged to be necessary for the effective treatment of autism. "*Eldridge* was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred."[38]

As Martha noted in her article "Health Care and Equality: Is There a Cure?" "if the Supreme Court maintains the formal approach to equality it adopted in *Auton*, the health care rights and needs of many disadvantaged Canadians will fail to receive the *Charter* scrutiny and protection

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[34] Ibid at para 73.
[35] Ibid at para 29.
[36] Ibid at para 96; Bruce Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend" (1998) 9(3) Const Forum.
[37] Eldridge supra note 30 at para 73,
[38] *Auton (Guardian ad litem of) v British Columbia (AG)* [2004] SCC 78 at para 38.

they deserve."[39] *Auton,* in which CCPI did not intervene, was the low point of the Court's equality rights jurisprudence and must be considered an outlier.

Still, the issue of positive obligations under section 15 remains both contentious and confused. In the recent decision of the Supreme Court of Canada in *Sharma*, the majority stated that "section 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation."[40] The dissenting judgment in *Sharma,* however found that the majority had conducted a wholesale revision of existing section15 jurisprudence by, among other things "pre-emptively foreclosing the possibility of "general, positive obligation[s] on the state to remedy social inequalities or enact remedial legislation" (para. 63).[41]

CCPI has taken the position in its interventions that the question of substantive equality and positive obligations was definitively resolved by the Supreme Court of Canada in *Vriend* and we are hopeful that the Court will return to that framework.[42] The inequality being addressed in *Vriend* was discrimination on the ground of sexual orientation that occurs largely in the private realm and what was challenged was the legislature's refusal to provide protection from such discrimination in human rights legislation. The systemic inequality being addressed was thus not within a government service, as in *Eldridge*, and would continue to exist if the government declined to act. The late and much missed Dianne Pothier, quoted by the Court, referred to the effect of legislative inaction in the case as "the sounds of silence".[43]

Importantly, in *Vriend*, the Court distinguished between two types of "distinctions" to be considered in the section 15 analysis, both of which could be applied in that case. In a formal equality analysis, the distinction to be considered was between LGB persons and members of groups that were included for protection under the legislation. Exclusion of sexual orientation as a ground in human rights legislation adversely affected LGB persons in comparison to other groups such as racial minorities, who faced similar discrimination and had been provided the necessary protection. In this formal equality comparison, there need be no obligation to enact human rights legislation. Once enacted, section 15 requires that it provide equal benefit for LGB persons as for included groups. Under the formal equality analysis, it could be contemplated, and indeed it was contemplated by Justice Major in dissent regarding the read-in remedy, that the legislature could choose to comply with section 15 by revoking the legislation altogether, leaving all groups facing invidious discrimination equally vulnerable to discrimination without any remedy at all.[44]

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[39] Martha Jackman, "Health Care and Equality: Is There a Cure?" (2007) 15 Health LJ 87 at 87.
[40] *R v Sharma* 2022 SCC 39 at para 63.
[41] Ibid at para 205.
[42] *Vriend v Alberta* [1998] 1 SCR 493 [*Vriend*]
[43] Dianne Pothier, "The Sounds of Silence: Charter Application when the Legislature Declines to Speak" (1996) 7 Const Forum 113 at 115, quoted in *Vriend* supra note 42 at para 60.
[44] *Vriend* supra note 42 at para 96 per Major, J.

It is the substantive equality distinction that is affirmed by the Court in *Vriend* as "the more fundamental one," however, which resolves the apparent Gordian knot of equality rights encouraging governments to provide "equal graveyards". The substantive equality analysis affirmed in *Vriend* is more than what is often described simply as recognizing that equality may sometimes require differential, rather than same treatment. It also means that a failure to provide necessary legislative protection or benefit of the law to address systemic inequality may constitute a violation of section 15 because a failure to provide a benefit may have a discriminatory impact. The Court explained that the substantive equality analysis considers a different distinction from the formal equality comparison:

> The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more difficult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group.[45]

Under the substantive equality analysis, a failure to provide any human rights protections would in no way remedy the violation of section 15. It would simply create further discriminatory distinctions between those who are harmed by the absence of the legislative protection from discrimination and those who are not. While the Court in *Vriend* continued to insist that it need not decide the question of whether a failure to act at all to protect affected groups from discrimination would violate section 15, the substantive equality analysis of the results of a failure to act *does* answer that question. The obligation to provide human rights protection to LGB persons is not triggered by the enactment of human rights legislation. It exists independently of any statutory enactment, in their right to the equal benefit and protection of the law and derives, in the section 15 analysis, from the distinctive effects (or sounds) of silence experienced by groups guaranteed equality under section 15.

The issues that arose most clearly in *Vriend* are at the time of writing, back before the Supreme Court in the *Kanyinda* case. The Court is cosnsidering in that case whether denying a woman, an asylum seeker awaiting adjudication of her claim to refugee status, access to subsidized childcare because of her immigration status, violates section 15 on the grounds of immigration status and sex. CCPI, ably represented by Martha, argued that, as in *Vriend*, there are two distinctions at issue in the section 15 analysis in this case, both of which should lead to a finding

[45] Ibid at para 82.

of a violatoin: a formal equality distinction on the basis of immigration status and a substantive equality distinction on the basis of sex -- the latter deriving from the differential effect on women of being denied access to subsidized childcare compared to men. CCPI urged the Court to recognize that the substantive equality analysis recognizes a positive obligation to ensure women's access to affordable childcare:

> If the absence of affordable childcare is found to create a discriminatory distinction between women and men, then compliance with section 15 cannot be achieved by denying the benefit equally to all parents, or by "equality with a vengeance."
>
> Drawing on the critical analysis in *Vriend*, this Court should not simply find that section 15 requires equal treatment because the childcare program is already in place. Instead, it should affirm that section 15 requires the positive measures the program provides because they are necessary to address the systemic inequality faced by women in the labour market as a result of their disproportionate responsibility for childcare and their inability to afford it.

Lawyers for the Attorney General of Quebec and for other provinces, as well as two conservative non-governmental interveners, argued that the Court should clarify that section 15 does not impose any positive obligation to provide a benefit and that requiring the government to provide a subgroup of women with access to subsidized childcare would wrongly constitute such an obligation.[46] Of the fourteen lawyers making submissions in support of the claim, however, Martha, for CCPI, was the only one who clearly affirmed the opposite – that section 15 *does* impose positive obligations to provide necessary benefits to ensure substantive equality in this and other cases. Counsel for Kanyinda led off her submissions by reassuring the Court that "the government is under no obligation to provide this subsidy or to adopt particular legislation."[47] Without support from counsel for civil society allies and rights claimants it is difficult to persuade the Supreme Court of Canada to renounce an entrenched exclusionary paradigm of equality.

Positive Obligations under Section 7

CCPI has also intervened in a number of cases to argue for positive obligations under section 7 to ensure access to adequate social assistance, housing and health care. While it is discouraging that thirty-five years after the Supreme Court left the issue of protections of socio-economic rights under section 7 open in *Irwin Toy*[48] this issue remains unsettled, it is also a relief that the predicted demise of positive rights claims under section 7 has not materialized.

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[46] All submissions in *Kanyinda v Quebec* are available at https://www.socialrights.ca/Kanyinda.htm..
[47] Webcast of the hearing in *Kanyinda v Quebec* (Day 2), online at https://www.scc-csc.ca/cases-dossiers/search-recherche/41210/ (time code 104:30).
[48] *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927 at paras 1003–04.

The first two section 7 cases in which CCPI intervened to argue for recognition of positive obligations were in the criminal law context. In *R. v Prosper* (1994) the Court considered whether the right to retain and instruct counsel without delay in s. 10(b) of the *Charter* imposes a positive obligation on governments to provide access to state funded counsel.[49] CCPI argued that for those living in poverty, the right to counsel when detained must include access to state funded duty counsel, otherwise the right is illusory for them.[50] The Court, however, considered the drafting history of the *Charter* and found that "the framers of the *Charter* decided not to incorporate into s. 10 even a relatively limited substantive right to legal assistance so it would be "a very big step for the Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments." [51] The Court avoided this "big step" by finding that a detained person must be provided with a reasonable opportunity to consult counsel, and in assessing what constitutes reasonable opportunity, courts will consider ithe availability of duty counsel services in the jurisdiction.[52]

We had another kick at the can of positive obligations and the right to counsel, however, in the case of Jeannine Godin or G.(J.) as the Court insisted on calling her.[53] In that case the Supreme Court considered whether section 7 imposed a positive obligation on New Brunswick to provide public legal aid or state funded counsel in child custody hearings. CCPI argued that "it is imperative that this Court affirm the broad ambit of positive obligations on governments emanating from s. 7." We argued that, where a child may be removed from a parent's custody, the State's obligations extend to providing necessary legal aid and support to determine the child's best interests fairly, and to ensure that the voices of low-income parents (usually mothers) are not silenced.[54]

Martha and low-income members of CCPI insisted that in oral submissions, our lawyer highlight the prejudicial treatment Jeannine had received from the trial judge. Particularly concerning was the judge's comment that she had held a bake-and-craft sale to raise funds for legal representation. Instead of recognizing this as evidence of a commitment to secure a fair hearing to retain custody of her children, Athey **J.** observed that, Athey J. observed that "she had complained of having her children for only 31 hours a week, but had used that time to take them to her bake sale to raise money for a lawyer."[55] Athey, J ordered that the children be placed in foster care while Ms. Godin would be provided with visitation rights and courses in parenting

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[49] R. *v. Prosper*, [1994] 3 SCR 236 [*Prosper*]
[50] Factum of the Charter Committee on Poverty Issues, *R v. Prosper*, SCC File No. 23178.
[51] *Prosper* supra note 49 at 267.
[52] Ibid at 246.
[53] *New Brunswick (Minister of Health and Community Services) v G (J.)* [1999] 3 SCR. [G(J)] Jeannine preferred to be identified by her name.
[54] Factum of the Charter Committee on Poverty Issues, *New Brunswick (Minister of Health and Community Services) v G (J.)*, SCC No. 26005.
[55] *New Brunswick (Minister of Health and Community Services) v JG and DV* (1995) NB QB Fam Div (Fredericton), Athey J, 3 January 1995 at para 30.

and budgeting.[56] Predictably, as our lawyer had warned, Justice Major took issue with criticizing the trial judge's comment but the members of CCPI were relieved that it was not ignored.

The result in G(J) was more positive than in *Prosper*. Although we argued that the court should recognize a right to counsel provided by an adequate civil legal aid system, the Court at least rejected the argument that section 7 could not impose a positive obligation on governments and found that where necessary to a fair hearing, courts must order that the government provide the parent with state-funded counsel.

> The omission of a positive right to state-funded counsel in s. 10, which, as I said in *Prosper*, should be accorded some significance, does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing. To hold otherwise would be to suggest that the principles of fundamental justice do not guarantee the right to a fair hearing or, alternatively, that under no circumstances would the requirements of a fair hearing obligate governments to pay for an individual to be represented by counsel. Both of these positions are untenable.[57]

Gosselin v Quebec

In 2001 CCPI intervened in *Gosselin v Quebec*,[58] the first (and still the only) case in which the Supreme Court considered the application of the *Charter* to social assistance programs or access to the basic requirements of life. Louise *Gosselin* challenged a regulation under Quebec's social assistance legislation that had required all social assistance recipients under age thirty and without dependent children to participate in educational upgrading or on-the-job training programs or face drastic cuts to their benefits. By the time the case was heard by the Supreme Court the regulation was no longer in force, but many young people, including Louise Gosselin, had suffered serious deprivation as a result of it, including homelessness and hunger.[59]

In assessing what is generally viewed as a disappointing outcome, it is important to understand the historical context of CCPI's intervention. *Gosselin* was the first case in which the Supreme Court considered positive obligations under section 7 outside of the context of the right to counsel and the right to a fair hearing—which fell within the narrow understanding of section 7 prevalent at the time, derived from its placement under the heading of "legal rights" in the *Charter*. The section 15 claim required the same positive remedy sought under section 15 but it fell within an established paradigm of equality rights, that a benefit, once provided, must not be provided in a discriminatory manner. The section 7 claim, on the other hand, aske the Court to reject the dominant paradigm of section 7 rights at a time when it was widely accepted, even among our allies, that section 7 rights did not did not impose positive obliations in the context of

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[56] Ibid at paras 32 and 34.
[57] *G(J)* supra note 53 at para 107.
[58] *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429 [*Gosselin*].
[59] Ibid at para 371.

social programs. The general view was that the section 15 claim would succeed and the section 7 claim would fail.

Moreover, *Gosselin* involved an additional challenge because it included issues related to participation requirements in work and training programs. The section 7 claim could be viewed as requiring an unprecedented judicial intrusion into social policy, affirming a constitutional right to an adequate income without any conditions designed to promote social inclusion—something no court in any other country had found, or has found since, even under constitutions containing social and economic rights. While we hoped that the majority would find in favour of positive obligations under section 7 to ensure an income providing for basic requirements of life, security, and dignity, a more realistic hope at the time was that the Court would declare the age discrimination in the impugned regulations to be a violation of section 15, while not closing the door on positive obligations under section 7.

As Martha has explained, the section 7 decision in *Gosselin*, with the multiple decisions parsed, was actually a step forward in terms of section 7 jurisprudence. Eight of nine justices rejected the Respondent's argument, supported by all other Attorneys General, that s. 7 could not be applied by courts to impose positive obligations on governments to protect, life, liberty and security of the person by ensuring access to basic requirements.[60] It Justice McLachlin's assessment of the evidence, by contrast, that Martha characterizes as "two steps back." "The Chief Justice's inattention to, if not callous disregard for, the actual experience of the claimants, exhaustively documented in the expert and Louise Gosselin's own evidence. produced a decision completely out of touch with the reality of the impugned regime and young welfare recipients' lives."[61]

As advocates for the *Charter* rights of persons living in poverty, we are loath to accept Justice McLachlin's mischaracterization of the evidence. However, if we are to build on the jurisprudencial progress Louise Gosselin secured at great sacrifice we cannot afford to ignore it. Justice McLachlan's finding with respect to section 7 derives from her assessment of the facts. "The question therefore is not," Justice McLachlin wrote, "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." She concluded that "the impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support."[62]

However much we may object to this assessment of the facts, the implication for future claims is clear. Where inadequate social assistance rates result not from non-compliance

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[60] Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin" (2022) 39 Natl J Const L 85 at 102.
[61] Ibid at 105.
[62] *Gosselin* supra note 58 at para 83.

with participation requirements and the evidence of hardship is compelling, a section 7 claim challenging such rates—for example, shelter allowances in Ontario so low they condemn recipients to homelessness in any cities and muncipalities—has a reasonable chance of success and ought to be heard. Yet no such challenges have been forthcoming, and the gross inadequacy of social assistance rates has largely disappeared even from policy advocacy in the post-*Gosselin* era.

What has been most distressing about the outcome of our intervention in *Gosselin* is not the Court's decision on section 7 but rather, that a door that the Supreme Court left decidedly open on positive obligations to protect life and security has been widely pronounced closed. *Gosselin* is routinely cited by lawyers and courts as having effectively settled the issue of positive obligations under section 7.[63] Twenty years after Justice McLachlin affirmed that positive obligations could be recognized within the living tree of section 7 jurisprudence, the tree has been deprived of the most essential nutrient of jurisprudence – innovative and compelling claims.

> One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.[64]

As Justice Arbour affirmed in her dissent in *Gosselin*, and as Martha has documented in her scholarship, there is nothing in the text or in the drafting history of section 7 to exclude claims to positive measures to protect life, liberty and security of the person. As Justice Arbour affirmed: "The role of the courts, as interpreters of the *Charter* and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims."[65] Yet the courts can only adjudicate positive rights claims if they are advanced as such. As Justice Arbour noted a few years after the *Gosselin* decision, it not only courts but also lawyers for claimants that are reluctant to affirm positive obligations under section 7 that are central to international human rights. "The first two decades of *Charter*

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[63] See, for example, *Chung v British Columbia (Minister of Health)* 2023 BCCA 294 at para 67; *R v Long* 2008 CanLII 64390 (ON SC) at para 5; *Fulton v Guan* 2025 HRTO 1109 at paras 77–78; *A P c Attorney General of Québec* 2022 QCCS 2875 at para 546; *Canadian Doctors for Refugee Care v Canada (AG)* 2014 FC 651 at para 562. *Leroux v Ontario* 2021 ONSC 2269 was reversed on appeal 2023 ONCA 314 at paras 76–89.
[64] *Gosselin* supra note 58 at para 82.
[65] Ibid at para 333.

litigation testify to a certain timidity – both on the part of litigants and the courts – to tackle head on the claims emerging from the right to be free from want."[66]

Importantly, in charting a path forward in future claims, Justice Arbour rejected the suggestion that gained currency through Auton, that it is only if the legislature chooses to provide a benefit necessary for life or security of the person that any *Charter* obligations come into effect. Justice Arbour clarified in *Gosselin* that it is not only exclusion from a statutory regime that triggers positive obligations under section 7, but the claimants' fundamental rights to security of the person and life, which exist independently of any statutory enactment.[67]

Positive rights claims of this sort, of course, are not simple. They must be presented to courts as legal questions regarding compliance with the *Charter*, subject to the same kind of legal analysis as other rights claims. There are important justiciability and remedial issues that arise with respect to separation of powers and judicial competence concerns, but these are to be addressed on a case-by-case basis to identify the alleged violation and determine the appropriate remedy in a manner that is within the competence of courts and respectful of the separation of powers. The issues of how positive obligations are to be assessed by courts within the framework of law must be kept distinct from the broader question of whether positive measures are required by section 7. Justice Arbour noted that in *Gosselin* the government had already determined the adequate amount of social assistance, so the court did not need to make that determination. In other cases, identifying with some precision what governments are required to do and how they have failed to ensure section 7 rights may draw on clearly defined obligations under international human rights law, nationally agreed-upon standards, or expert evidence. Positive obligations, in other words, can and should be presented as legal obligations, properly subject to judicial review.

When courts reject positive rights claims under section 7, they invariably suggest that such claims engage social-policy aspirations that are the preserve of legislatures rather than justiciable rights. The rights to food, water, housing, health care, and environmental protection, however, are recognized as justiciable rights under international law and are adjudicated based on established legal norms by international bodies and domestic courts around the world. Martha has long emphasized that, as suggested in the *Irwin Toy* decision, the connection between positive measures required under section 7 and international human rights law is critical to judicial determinations of the scope of section 7 protections—both with respect to the scope of the rights and the principles of fundamental justice.

Courts charged with interpreting domestic law based on a presumption of conformity with international law should not downgrade fundamental human rights for which there is a right to effective remedies under ratified international treaties to the status of unreviewable policy

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[66] Louise Arbour, "Freedom from Want – From Charity to Entitlement" (LaFontaine-Baldwin Lecture, Quebec City, 2005) https://www.ohchr.org/en/statements-and-speeches/2009/10/lafontaine-baldwin-lecture-2005-freedom-want-charity-entitlement.

[67] *Gosselin* supra note 58 at para 367.

choices of governments within Canadian law. Rather, they should draw on international human rights law to inform the adjudication of positive rights claims in the context of social policy, as has been done with civil and political rights claims when they have been framed as negative rights. Adjudicating positive rights claims—either with respect to rights to life and equality or more explicit ESC and environmental rights—is a critical area of evolving international and comparative jurisprudence, from which Canadian domestic courts should draw.[68]

Tanudjaja v Canada

Of all ESC rights, the right to adequate housing has received the most attention by domestic courts in other countries and in international human rights jurisprudence. Although the realization of the right to housing involves a wide range of laws and policies, it has long been established by the CESCR that a core state obligation for implementing obligations that are subject to progressive realization is the adoption and maintenance of a national housing strategy. Such a strategy must include clear goals and timelines for the elimination of homelessness and for improving the housing outcomes of those in the greatest need of housing, allocate necessary resources and establish responsibilities of different orders of government.[69] During the 1990s and early two thousands, the CESCR, the UN Special Rapporteur on Adequate Housig and many experts pointed out that Canada was one of the few countries that had no national housing strategy and urged Canada to comply with its international human rights obligations in this respect in order to address a growing crisis of homelessness as a human rights violation.[70] Significantly for the interpretation of section 7 of the *Charter*, the UN Human Rights Committee also weighed in with concerns about homelessness, establishing for the first time in 1998 that Canada must adopt positive measures to address homelessness in order to comply with the right to life under article 6 of the ICCPR.

When I was at CERA, we received a small grant from the Court Challenges Program to research the possibility of a *Charter* challenge to homelessness, focusing on Canada's failure to adopt a comprehensive national housing strategy as required by international human rights law. Years later, in 2009, after having left CERA, joined a team with CERA, the Advocacy Centre for Tenants in Ontario (ACTO), and several other groups and experts to develop a *Charter* challenge

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[68] Bruce Porter, "The Interdependence of Human Rights" in Jackie Dugard et al, eds, *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Cheltenham, UK: Edward Elgar, 2020).
Martha Jackman & Bruce Porter, "Social and Economic Rights" in Peter H. Oliver, Patrick Macklem & Nathalie DesRosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 843–61.

[69] UN Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant), UN Doc E/1992/23 (13 Dec 1991) at para 12;
Report of the Special Rapporteur on Adequate Housing, UN Doc A/HRC/37/53 (15 Jan 2018).

[70] UN Human Rights Committee, Concluding Observations: Canada, UN Doc CCPR/C/79/Add.105 (7 Apr 1999) at para 12;
Bruce Porter, "Social Rights in Anti-Poverty and Housing Strategies: Making the Connection" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 19–29.

along these lines, combining CERA as the organizational applicant with individual applicants with lived experience of homelessness.

After the applicants had served sixteen volumes of evidence, the respondent governments moved to strike the claim—before any evidence could be heard—on the basis that section 7 did not impose positive obligations to address homelessness, that claim relied on a right to housing that is not contained in the *Charter*, that the claim was non-justiciable and judicially unmanageable and raised policy issues that are within the preserve of legislatures.[71] The motion to strike was granted by the Superior Court and by the Court of Appeal with a 2-1 majority.[72] CCPI, with Martha as counsel, intervened on the issue of positive obligations at both the Ontario Superior Court and the Ontario Court of Appeal.

As with *Gosselin*, the decision in this case is often mischaracterized as a more negative outcome for positive-rights claims than it actually was. It is frequently referred to as having established that section 7 does not impose positive obligations to address homelessness and that homelessness is not an analogous ground of discrimination.[73] It is true that the Superior Court motions judge relied on lower-court section 7 jurisprudence and a narrow reading of *Gosselin* to find that "[t]here is no positive obligation on Canada or Ontario to act to reduce homelessness and there are no special circumstances that suggest that such an obligation could be imposed in this case."[74] Justice Lederer also found that homelessness is not an analogous ground of discrimination. Those critical elements of Justice Lederer's decision, however—which attracted considerable criticism from interveners at the Ontario Court of Appeal—were not upheld on appeal; the appellate court found the claim non-justiciable on other grounds.

> Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin v. Quebec (Attorney General)*. Nor is it necessary to determine

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[71] Attorney General of Canada, Notice f Motion (11 June 2012) *Tanudjaja v Canada* (SCJ File No V-10-403688), online: https://socialrightscura.ca/documents/legal/motion%20to%20strike/Notice%20of%20Motion%20to%20Strike%20-%20R2H.pdf.

[72] *Tanudjaja v Canada (AG)* 2014 ONCA 852;
Tanudjaja v Attorney General (Canada) (Application) 2013 ONSC 5410.

[73] Decisions misapplying *Tanudjaja* as foreclosing positive obligations under section 7 include:

- *Leroux v Ontario* 2021 ONSC 2269 at para 116 (motion judge's finding on positive obligations not upheld on appeal);
- *Abbotsford (City) v Shantz* 2015 BCSC 1909 at paras 144, 177;
- *KO v British Columbia (Ministry of Health)* 2022 BCSC 573 at para 30;
- *Clinique juridique itinérante c Procureur général du Québec* 2023 QCCS 1949 at para 48;
- *AC and JF v Alberta* 2021 ABCA 24 at para 98

[74] *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 at para 82.

> whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.[75]

With a strong dissent finding that there was a reasonable prospect of success with respect to both arguments left unresolved by the two-judge majority, the outcome on appeal constitutes a definitive rejection of positive-rights claims regarding homelessness.

Moreover, the reason the Court found the claim non-justiciable was not because it relied on positive obligations under section 7 but rather the opposite — that the alleged violation was framed in a manner that was not judicially manageable, as a negative rights violation engaging a vast array of government actions and changes to law and policy over decades.

There were two litigation strategies at play in *Tanudjaja* and in some degree of competition. The organizational appellant, CERA, advocated a straight up positive-rights approach that identified the violation as a failure to implement a precise obligation, analogous to the failure to provide interpreter services in *Eldridge*, the failure to provide legislative protection from discrimination in *Vriend* or the failure to provide funded counsel in G.(J.). CERA's approach relied on Canada's clear obligation under international humanrights law to adopt a housing strategy with plans and timelines to reduce and ultimately eliminate homelessness and referenced Canada's refusal to comply with the explicit recommendations of international human rights bodies to that effect.

The lawyers who generously took on the task of arguing the case, however, wanted to avoid relying on positive obligations and preferred to frame the violation as a negative rights violation, in reference to government actions causing homelessness. Under their approach, international human rights law was only referenced generally as recognizing a right to housing and the housing strategy was proposed in the context of remedy, not in identifying the violation. Both arguments were included in the Notice of Application and to some extent in the facta but the case was ultimately argued on the basis that government action caused homelessness and the court should therefor order a positive remedy.

At the Court of Appeal it seemed that after a full day of argument from interveners, including Martha's argument for CCPI on positive obligations, that the judge who would determine the majority, Justice Strathey, was not troubled so much by positive obligations as by the lack of precision in the alleged violation framed as government action. Counsel was pressed on the third day to provide more precision as to what action or inaction was being challenged and what it was that the government would need to justify under section one. Counsel continued to list a wide range of interactive programs, policies and laws, acknowledging that the list would be virtually endless. No mention was made of the decision not to implement the housing strategy required under international law. It was in response this characterization of the violation that the majority of the Court concluded that "the diffuse and broad nature of the claims" did not permit an analysis under s. 1 of the *Charter* and made it unsuitable for legal analysis. The proposed

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[75] *Ibid* at para 37.

remedy of a declaration requiring the adoption of "a housing policy" was seen, without reference to the precise requirements of international human rights law to be "so devoid of content as to be effectively meaningless."[76]

It was only Justice Feldman, in her compelling dissent, who addressed the issue of positive obligtions, finding that Justice Lederer erred in concluding the issue of positive obligations under section 7 to be settled law. With respect to the majority's concerns about justiciability, she conceded that "the broad approach taken in this application is novel and a number of procedural as well as conceptual difficulties could arise when the court addresses whether the *Charter* has been infringed, and if appropriate, determines and applies a reasonable and workable remedy."[77] Justice Feldman correctly noted that those challenges should be considered and addressed in the context of a full hearing based on the evidence.[78]

There are invariably difficult decisions about how best to navigate conservative courts, and the concerns within the legal team in *Tanudjaja* about the risks of a positive-rights approach drawing on international law were understandable. What is most painful about the outcome of *Tanudjaja*, as with *Gosselin*, is that it has been so widely mischaracterized as a definitive rejection of positive-rights claims related to homelessness. It is routinely cited by lawyers as a reason to confine claims from encampment residents, for example, to negative rights challenges to eviction without any claim to positive measures to ensure access to adequate shelter and housing. There is certainly an argument to be made that the lesson from *Tanudjaja* is not to try to avoid positive obligations, but rather to more clearly commit to ensuring that they are affirmed in a way that gives claims meaningful, judicially manageable content.

The *Tanudjaja* case did, in the end**,** yield the the remedy denied by the courts by mobilizing civil society politically. As a result of sustained advocacy, the *National Housing Strategy Act* [79] (NHSA), adopted in 2019, explicitly commits to international human rights legal standards for the progressive realization of the right to adequate housing. It requires that a national housing strategy be developed and maintained based on core requirements — including including clear goals, timelines, and priorities for those most in need.

The current National Housing Strategy does not comply with these requirements; the federal government is therefore failing not only to honour its international human rights obligations but also its statutory duties. The door to challenging failures to address homelessness based on clearly defined obligations remains wide open.

Nell Toussaint v Canada

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[76] Ibid at para 34.
[77] Ibid at para 83.
[78] Ibid.
[79] *National Housing Strategy Act* S.C. 2019, c. 29, s. 313. Assented to 2019-06-21

A more recent case that Martha and I have worked on together for CCPI has directly tied positive obligations under the *Charter* to international human-rights norms**.** The case involves an irregular migrant, Nell Toussaint, who, after working in Canada for a number of years, became seriously ill and sought access to health care through the federal government's Interim Federal Health Program but was denied because of her immigration status. After the Federal Court of Appeal rejected her *Charter* claim alleging violations of her rights to life and equality under the *Charter*, on the basis that "the *Charter* does not confer a freestanding constitutional right to health care," she filed a complaint with the UN Human Rights Committee.[80] The Committee found that Canada had violated her right to life and to non-discrimination under the ICCPR and that it must take all measures necessary to ensure access to essential health care for irregular migrants when life or long-term health is at risk.[81]

After several years of attempting to convince Canada to comply with the UN Human Rights Committee's decision with the support of multiple UN human rights bodies, Nell Toussaint returned to court to challenge Canada's refusal to implement the UN Human Rights Committee's decision, arguing that this decision resulted in ongoing systemic violations of sections 7 and 15 of the *Charter.* Canada brought a motion to strike the claim on the basis that Nell claimed a positive right to "free health care" and a non-justiciable socio-economic right. Justice Perell of the Ontario Superior Court dismissed the motion to strike and was harshly critical at Canada's mischaracterization of the Nell's claim to a right to life and equality:

> In a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system, Canada mischaracterizes Ms. Toussaint's *Charter* claim as a right to receive free health care anywhere in the world, regardless of one's lack of status" or as a right to receive "an optimum level of health insurance and as a claim for a purely socio-economic right which is outside the guarantees of the *Canadian Charter of Rights and Freedoms*.[82]

This was the first time we have convinced a court to call out a respondent government on the derogatory manner in which rights claimants in poverty-related, positive rights claims are mischaracterized—precisely as described in Martha's article "Reality Checks" —as being morally suspect for seeking to obtain benefits through litigation that they should be thankful to receive through government benevolence. Nell tragically died shortly after celebrating Justice Perell's ruling but her mother has stepped in to continue the action, supported by CCPI and a number of other interveners. The case is central to our attempts to hold governments in Canada accountable under the *Charter* for failures to comply in good faith with international humam rights or environmental commitments, where these failures result in systemic violations of *Charter* rights. As Justice Perell found, decisions

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[80] *Toussaint v. Canada (Attorney General)* 2011 FCA 213, at para 77.
[81] *Toussaint v Canada* CCPR/C/123/D/2348/2014 (30 August 2018)
[82] *Toussaint v. Canada* (Attorney General), 2022 ONSC 4747 at para 134.

not to comply with particular obligations under international human-rights law, even where exercises of prerogative powers, are subject to judicial review for *Charter* compliance.[83]

Conclusion: Retirement and Return

In this article, I have provided a more positive assessment of the outcome of strategic litigation in which Martha has been involved with CCPI than others—or even she—might generally describe. This is not to suggest, however, that we are not haunted by the ways in which we have failed. All of the societal issues of poverty, hunger, and homelessness that low-income members of CCPI sought to challenge as human rights violations at our first meeting in 1988 have only worsened since we began our work, without being effectively addressed politically or in court.

Martha is particularly affected by the human dimension of these cases. She always searches the trial record for details of claimants' lives, seeks out their voices, and infuses legal argument with her own emotional connection to claimants such as Louise Gosselin, Jeannine Godin, Jennifer Tanudjaja, and Nell Toussaint, feeling the injustices done to them personally.

On the other hand, we have learned from CCPI's members and claimants living in poverty that rights claimants are in it for the long haul. While legal counsel reel from disappointing outcomes, they remain invariably resilient and appreciative. For them, there is a victory just in gaining access to the courts and contrary to critics' concerns, they have never been deluded into thinking that courts offer an easy shortcut to social justice. They understand rights-claiming as an essential part of longer term struggle.

So far, we have managed to avoid honouring Martha's announced retirement and we continue to rely on her in a number of critical ongoing cases. She is irreplaceable, not only as the leading scholar in this field, but as an advocate with singular integrity and moral clarity. Time and again I have seen courts, scholars, and students respond to her unflinching honesty and her refusal to dilute the core claims of those she represents to to equal access to justice and rights. Martha pioneered an inclusive paradigm in the Charter's in the early days of the Charter, based on the legimate expectations of those who most needed its protections. Ater it became clear at the first meeting of CCPI that we wanted her to advance that paradigm stubbornly and consistently, she has never wavered. Her legacy is well established, but the project is ongoing.

[83] Ibid at paras 96 and 104.