BABY STEPS ON THE WAY TO A GROWN-UP *CHARTER*: REFLECTIONS ON 20 YEARS OF SOCIAL AND ECONOMIC RIGHTS CLAIMS

Debra Parkes*

The twenty-first year of the *Canadian Charter of Rights and Freedoms*[1] presents an opportunity to reflect on the successes and failures of our "rights revolution." In addressing that topic recently, Canadian-born writer and historian, Michael Ignatieff[2] opined that one of the contradictions and challenges of a vibrant rights culture is the way that the rise of rights talk, with its individualistic, litigious focus, has coincided with the increasing disappearance of social and economic equality issues from the political landscape. Ignatieff says that "rights talk can capture civil and political inequalities, but it can't capture more basic economic inequalities, such as the way in which the economy rewards owners and investors at the expense of workers."[3] While Ignatieff's observation about the decline of Canada's political discourse may be correct, this essay explores an emerging body of *Charter* jurisprudence and theory that seeks to address at least some social and economic inequality through the language of rights.

The concept of "social and economic rights" includes rights based in international and domestic law to an adequate standard of living, food, health care,

---

* Assistant Professor, Faculty of Law, University of Manitoba. This paper is a revised version of a presentation made at the 2002 Isaac Pitblado Lectures, November 22, 2002 in Winnipeg, Manitoba. The author thanks the participants at the Pitblado Lectures for their insightful comments on that presentation.

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

[2] Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000).

[3] *Ibid.* at 19-20. The view that poor and otherwise disadvantaged Canadians are more likely to achieve redress and redistribution through the political process than through *Charter* litigation has been articulated by a number of constitutional scholars. See Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995). *Contra* Roland Penner, "The Canadian Experience with the *Charter of Rights*: Are there Lessons for the United Kingdom" (1996) Public Law 104.

shelter, education, and rights to fair working conditions and the formation of unions.[4] Anyone who has read the *Charter* knows that such rights are not set out explicitly in our constitution. In that way, the *Charter* differs from the *Bill of Rights*[5] in the new South African Constitution, which contains explicit rights to adequate housing, water, food, health care, education and social security, as well as rights to form trade unions and to strike.

However, the *Charter* does contain certain broad guarantees such as rights to equality, life, liberty and security of the person, as well as freedom of association. It is these rights that have formed the basis of claims to minimal levels of social assistance, other benefits such as Employment Insurance, Old Age Security, publicly-funded health care services, and the right to form trade unions and participate in activities central to trade unions. Claimants and interveners in these cases argue that these broad *Charter* rights must be interpreted in light of Canada's international commitments such as those contained in the *International Covenant on Social, Economic and Cultural Rights* [*ICSECR*]. Domestically, such social and economic rights claims have not met with overwhelming success in the courts. Yet the number and diversity of such claims, together with the potential impact of successful claims on Canada's political and economic landscape, are reasons to believe that they may play a key role in coming years as the *Charter* "comes of age."

In order to understand what the future might hold, Part I of this essay tells the stories of three recent social and economic rights cases, variously relying on a right to an adequate standard of living, a right to public funding for particular health care treatment, and a right to protective labour legislation for the formation of trade unions. Part II highlights three significant obstacles facing *Charter* claims raising social and economic rights and points to some recent trends that have at least partially addressed them. Those obstacles include concerns about the justiciability of social and economic rights claims, legitimacy concerns relating to the courts' institutional capacity to adjudicate social and economic rights claims, and judicial deference to social policy decisions of governments in allocating finite resources among competing groups. Finally, Part III speculates about the future of social and economic rights claims in the next decade of *Charter* litigation.

---

[4] The *International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/RES/34/180 (1979)[*ICESCR*], which Canada has signed and ratified, includes rights to freely-chosen work (Article 6), fair remuneration, safe and health working conditions (Article 7), the right to form trade unions and to strike (Article 8), an adequate standard of living, including adequate food, clothing and housing (Article 11), and the highest attainable standard of physical and mental health (Article 11).

[5] *Constitution of the Republic of South Africa* 1996, No. 108 of 1996, c. 2., ss. 23, 26-27, 29.

I. The Faces of Social and Economic Rights Claims

(i) Louise Gosselin[6]

In the late 1980s, Louise Gosselin was a young woman who lived in Montreal and received social assistance. She was single and under 30 years old. As part of sweeping "welfare reform" initiatives in Quebec at that time, benefits for single "employable" individuals under 30 were reduced from $434 per month to $158 per month. That amount constituted less than 20% of the Statistics Canada Low Income Cut-Off (one measure of the "poverty line") at the time. As part of sweeping 'welfare reform' initiatives in Quebec, Gosselin's benefits as a single 'employable' individual under 30 were reduced from $434 to $158 per month. It was generally undisputed that no one could find adequate food, clothing and housing in Montreal for that amount. As a result of the drastic cut in her benefits, Gosselin slept in shelters and was periodically homeless. When she rented a room in a boarding house, a man attempted to rape her. She resorted to prostitution, and later, to making herself sexually available to a particular man in exchange for food and shelter.

In 1989, Gosselin launched a *Charter* challenge to the level of benefits provided under the new regime. She alleged that her rights under sections 7 and 15 of the *Charter of Rights and Freedoms*, as well as a provision of the *Quebec Charter*,[7] were violated by the reduction in social assistance rates to a level that did not meet her very basic needs. Before the Quebec Superior Court and the Quebec Court of Appeal, Gosselin and a number of intervenors argued, ultimately unsuccessfully, two points. First, the section 7 right to life, liberty and security of the person includes the right to an adequate level of social assistance in the case of need, essentially claiming that there is an irreducible minimum below which state assistance cannot fall without violating the right to security of the person. Second, the section 15 right to substantive equality is violated where a government fails to provide an adequate benefit to a vulnerable group, in this case, young people who require social assistance.[8]

---

[6] *Gosselin* v. *Québec (A.G.)*, 2002 SCC 84.

[7] Section 45 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, guarantees a right to "measures of financial assistance and social measures provided for by law that are susceptible of ensuring such person an acceptable standard of living."

[8] A majority of seven judges found no violation of section 7, while five judges formed a majority to reject the section 15 claim. Chief Justice McLachlin wrote the majority opinion dismissing both arguments, as well as the *Quebec Charter* claim. It is significant for a discussion of the future of social and economic rights claims that two dissenting judges, Arbour and LeBel JJ., would have found section

(ii) Connor Auton[9]

Connor Auton is a child living in British Columbia who has been diagnosed with autism. Unless successfully treated, children with autism experience severe physical, social, emotional and intellectual isolation. Most are eventually institutionalized. Fortunately, researchers have developed a form of treatment called "intensive early behavioral intervention," particularly the Lovaas Autism Treatment pioneered at the University of California. This method has achieved considerable success in treating autism in the early developmental stages. A number of U.S. states and Canadian provinces fund the Lovaas Autism Treatment for autistic children. The British Columbia government refused to fund such treatment, either through its Ministry of Education or Ministry of Health.

In 1999, Connor Auton's parents initiated, on Connor's behalf, a *Charter* challenge to the refusal to fund treatment for autism. A number of other autistic children were added as plaintiffs. All of the children had made significant gains as a result of Lovaas Autism Treatment, which had been privately funded by their parents. Connor's parents could not afford to continue paying for the treatment, so the treatment was discontinued and Connor's progress was halted. Auton alleged that the B.C. government's refusal to fund autism treatment violated the section 7 and section 15 rights of autistic children.

The B.C. Supreme Court found that Auton's section 15 equality rights were violated by the refusal to fund autism treatment. That decision was recently upheld by the B.C. Court of Appeal and the B.C. government has been ordered to fund early intensive behavioural therapy for children with autism and to pay the adult Petitioners (the parents of the autistic children) $20,000.00 each in monetary damages.

---

7 violated because the "evidence shows that the underinclusion of welfare recipients aged 18-30 ... substantially impeded their ability to exercise their right to personal security (and potentially their right to life)," *supra* note 6 at para. 383. In addition, the majority left open the question of whether "a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances," above at para. 83.

[9] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2002] B.C.J. No. 2258 (C.A.), leave to appeal to S.C.C. requested, [2002] S.C.C.A. No. 1510.

(iii) Tom Dunmore[10]

Tom Dunmore, a worker in a factory farm in Ontario, challenged the exclusion of agricultural workers from the protections for unionization and collective bargaining contained in the *Ontario Labour Relations Act*.[11] Without protective labour legislation, the common law "self help" remedies available to employers enable union organizers to be discharged with impunity and unionization to be thwarted. By the late 1990s, only Ontario and Alberta maintained the historic exclusion of agricultural workers from their respective labour relations laws. In the early 1990s, the Ontario NDP government had followed the lead of most other provinces and repealed the exclusion which had been defended on the basis of a need to protect family farms from unionization and on the seasonal nature of agricultural work. The NDP government had established a separate legal regime for agricultural labour relations[12] that banned strikes and lock-outs, requiring arbitration of contract disputes instead.

Dunmore and the United Food and Commercial Workers alleged that the repeal of the *Agricultural Labour Relations Act* and the reintroduction of the exclusion of agricultural workers from the *Ontario Labour Relations Act* violated agricultural workers' section 2(d) freedom of association rights, as well as their section 15 right to equality. They were unsuccessful at trial and before the Ontario Court of Appeal. However, a majority of the Supreme Court of Canada found that the exclusion amounted to a violation of section 2(d) that was not justified by section 1. On December 21, 2001, the Ontario government was given 18 months to remedy the discrimination. Although the section 15 equality claim was unsuccessful, Justice L'Heureux-Dubé wrote concurring minority reasons in which she would have found a violation of section 15.

I will return to the facts and holdings in each of these cases, as well as others raising similar issues, as I discuss three of the key themes that run through social and economic rights cases.

---

[10] *Dunmore v. Ontario (A.G.)*, [2002] S.C.R. 1016.

[11] *Labour Relations Act*, S.O. 1995, c. 1, Sch. A.

[12] *Agricultural Labour Relations Act*, S.O. 1994, c. 6.

II. All Rights are Not Created Equal? Obstacles to Social and Economic Rights Claims

All rights are not created equal, at least not in current North American liberal rights theory. The idea that civil and political rights (such as freedom of expression and the right to vote) are justiciable, while social and economic rights are merely injusticiable policy objectives, has its roots in Cold War divisions between American and Soviet political systems and the power struggles over the United Nations and its instruments.[13]

On the domestic front, the historically-rooted second class status of social and economic rights arises in *Charter* jurisprudence where rights to certain state benefits or publicly-funded services are claimed on the basis of broad rights to equality and security of the person. In these cases, a dichotomy is often drawn between "negative" civil and political rights (which only limit state action) and "positive" social and economic rights (which require affirmative state action for their fulfillment). The former are justiciable; the latter are not. Commonly accepted wisdom holds that the *Charter* was not created to impose positive obligations on governments (*i.e.*, it is a shield against coercive state power, not a sword to compel state action). Furthermore, it is argued that courts lack the institutional capacity to address such claims and are, therefore, inappropriate fora for their consideration.

(a) The Positive/Negative Rights Distinction is Eroding

In *Gosselin*, one of the government intervenors argued that section 7 protects individuals from state action intruding on their security of the person, but does not protect against state *inaction* leading to the same result. So the argument goes, the state has no constitutional obligation to promote or ensure the security of persons.[14]

---

[13] See William Schabas, "Freedom From Want: How Can We Make Indivisibility More Than a Mere Slogan?" (1999) 11 Nat. J. Const. L. 189 (describing Canada's role in the power struggle that led to bifurcation of the International Covenant to implement the *Universal Declaration of Human Rights* into the *ICCPR* and the *ICESCR*, and the subsequent relegation of social and economic rights to second-class status in North American rights jurisprudence).

[14] Factum of the Attorney General of Ontario, online: <http://www.equalityrights.org/ccpi/agofact.htm>. A majority of the Supreme Court in *Gosselin* did not accept this argument in its entirety, noting that thus far, the courts have not found that section 7 places positive obligations on the state, but refusing to foreclose the possibility that the Supreme Court might find such a positive obligation in an appropriate case. *Supra* note 6 at para. 82.

Similarly, in *Masse v. Ontario (Ministry of Community and Social Services)*,[15] the Ontario Divisional Court held that cuts of some 22% in provincial welfare rates were policy decisions that did not engage any rights under the *Charter*, including rights to security of the person and equality. According to Justice O'Driscoll, "[i]t is, in my view, government inaction that is complained of by the Applicants and not 'government action' within the meaning of section 32 of the *Charter*. Government inaction cannot be the subject of a *Charter* challenge."[16]

However, upon closer scrutiny, and in light of a number of recent developments in Canadian and international human rights law, these assumptions about the injusticiability of social and economic rights can be seen to break down.

First, the United Nations Committee on Economic, Social and Cultural Rights, the body charged with monitoring compliance with the *ICESR*, has criticized Canadian court decisions like *Masse* for maintaining the positive/negative rights dichotomy and relying on arguments of judicial incapacity to adjudicate social and economic rights claims.[17]

---

[15] *Masse v.Ontario (Ministry of Community and Social Services)* (1996), 143 D.L.R. (4th) 20, leave to appeal to the Ont. C.A. refused: [1996] O.J. No. 1526.

[16] *Ibid.* at para. 347.

[17] For example, in its Concluding Observations on Canada's compliance with the *ICESCR*, the UN Committee on Economic, Social and Cultural Rights (CESCR) said:

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

See CESCR, Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant (Canada), Concluding Observations, 4 December 1998, online: <http://www.equalityrights.org/ngoun98/conclud98.htm>.

Similarly, there exists a rich body of international[18] and domestic[19] scholarship presenting historical, doctrinal and normative arguments for the justiciability of social and economic rights claims under the *Canadian Charter of Rights and Freedoms*. For example, Martha Jackman has argued that the very distinction between positive and negative rights operates to discriminate against poor people:

> It is important to realize that traditional distinctions between classical or negative rights, and social and economic or positive rights, and the willingness to provide for judicial enforcement of one, but not the other, operate in fact to discriminate against the poor. To be in a position to complain about state interference with rights, one has to exercise and enjoy them. But without access to adequate food, clothing, income, education, housing and medical care, it is impossible to benefit from most traditional human rights guarantees.[20]

On the judicial front, the distinction between positive and negative rights has been greatly eroded in recent Supreme Court cases. As a practical matter, many classic civil rights require considerable and costly state spending to be realized. For example, the 1985 *Singh*[21] decision found that section 7 includes a right to a fair hearing for refugee claimants required the allocation of millions of additional dollars to the Ministry of Immigration. Similarly, in 1998 the Supreme Court held in *J.G.*[22] that section 7 entails a right to publicly-funded legal aid to ensure a fair hearing in certain child protection proceedings. To comply with *J.G.*, governments must allocate the requisite funds to legal aid programs.

The 1997 decision of the Supreme Court of Canada in *Eldridge* v. *British Columbia*[23] explicitly rejected the proposition that the right to equality only protects against inequalities created by government action and does not impose positive

---

[18] See Albie Sachs, "Human Rights in the 21st Century: Prospects, Institutions and Process" (1996) Canadian Institute for the Administration of Justice 1 (commenting on the importance of social and economic rights in post-Apartheid South Africa). Sachs, now a Justice of the South African Constitutional Court, argues that without meaningful social and economic rights, civil and political rights remain abstract and unattainable.

[19] See Schabas, *supra* note 15; Martha Jackman, "What's Wrong with Social and Economic Rights?" (1999), N.J.C.L. 235; and David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2000) 51 U.T.L.J. 425, reviewing Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).

[20] Jackman, *ibid.* at 243.

[21] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

[22] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

[23] *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624.

duties on the government to reallocate resources. On behalf of the unanimous Court, Justice La Forest said:

> To argue that governments should be entitled to provide benefits to the general population without ensuring disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished view of s. 15(1).[24]

In *Dunmore*, the Ontario agricultural workers' case, the distinction between positive and negative rights was similarly disavowed by the Supreme Court. The government had argued that section 2(d) of the *Charter* did not create any positive right to legislative protection to facilitate freedom of association. The government submitted that any interference with farm workers' ability to unionize came from the private realm (*i.e.*, their employers) and not from government. This argument was accepted by the lower court in *Dunmore*. However, in rejecting the positive/negative rights distinction, the majority of the Supreme Court noted that in a number of cases, a "posture of restraint" on the part of the government is insufficient to comply with the *Charter*. The fact that the Ontario government had labour laws in place, thereby recognizing that workers could not generally organize and bargain collectively without legislative protection, meant that they could not exclude this group of particularly vulnerable workers from that source of protection. Without positive government action, agricultural workers did not have freedom to associate (particularly the "freedom to organize") in the workplace.

In a similar vein, the British Columbia Court of Appeal recently held in the potentially ground-breaking *Auton* case that, having established a universal, publicly-funded health care system, the British Columbia government had an obligation to fund therapy for autistic children as part of its "core mental health services." However, it is important not to over-estimate the immediate impact of this case. The court made its decision on the basis of equality rights and not on the basis of a right to health care *per se*. The appeal court affirmed that trial court's finding that the primary health care needs of children with autism included early intensive behavioural intervention. In refusing to fund that treatment, the government denied children with autism their right to equal benefit of the law without discrimination.

---

[24] *Ibid.* at 677-678.

(b) Institutional Capacity Concerns Need Not Lead to Findings of Injusticiability

A 1995 Ontario decision exemplifies the classic objection to social and economic rights claims based on the courts' institutional capacity. In *Clark v. Peterborough Utilities Commission*,[25] recipients of social assistance in Ontario challenged a public utility's requirement of a security deposit, failing payment of which the individuals' heat and hydro were disconnected. In finding the section 7 claim injusticiable, Justice Howden said:

> This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by the courts under the guise of 'principles of fundamental justice' under s. 7. I want to be very clear. *This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judiciary in a democracy* ... I think in these submissions the applicants seek to introduce social and economic ideas and policies which were intended to be considered and debated in a political forum when property-economic rights were excluded from s. 7. It is equally dangerous to attempt to introduce personal beliefs or agendas to a good end through improperly or ill-suited means as to do so to a less agreeable end, as exemplified by the judicial frustration of social welfare legislation for decades in the United States in the name of freedom of contract and the Fourteenth Amendment"[26]

The Court in *Clark* rejected the plaintiffs' argument that depriving people of electricity would make their homes uninhabitable and, as a result deprive them of the dignity, equality, freedom and security that are at the core of section 7 and 15 *Charter* rights. The Court seemed particularly concerned about the use of social science evidence and the introduction of "personal beliefs and agendas" in this litigation.

Concerns about courts' institutional capacity in lower court *Charter* cases can be traced, at least in part, to earlier Supreme Court of Canada decisions. In the 1985 *Andrews* decision, that established the Supreme Court's approach to section 15 equality claims, Justice La Forest warned that "[m]uch economic and social policy-making is simply beyond the institutional capacity of the courts."[27] In his dissent in

---

[25] *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen. Div.).

[26] *Ibid.* at 28 [emphasis added].

[27] *Law Society of British Columbia v. Andrews* [1989] 1 S.C.R. 143 at 194.

RJR MacDonald Inc. v. *Canada (A.G.)*,[28] Justice La Forest went on to say:

> Courts are specialists in the interpretation of legislation and are, accordingly, well placed to subject criminal legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the peoples, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing interests and to reach out and protect vulnerable groups.[29]

However, while concerns about courts' institutional capacity must be meaningfully considered by courts, they need not be seen as wholesale barriers to judicial adjudication of social and economic rights claims. A number of legal decisions and doctrines provide grounds for distinguishing between those claims that courts may be capable of adjudicating and those they are not.[30] In many cases, courts seem to apply a subjective "smell test" rather than considering institutional capacity concerns according to "a set of established principles in a pragmatic and coherent fashion."[31] The reasons that claims may be considered injusticiable on the basis of judicial incapacity must be disaggregated and addressed on their own terms.

For example, the distinction between "political" and "legal" matters (the former being injusticiable and the latter being justiciable) is a key element of institutional capacity arguments against adjudicating social and economic rights claims. Yet is the distinction between political and legal matters a stable one? Why is the Supreme Court's consideration of a deeply political matter like Quebec secession[32] justiciable while a claim to adequate housing as part of a substantive right to security of the person is too political to be justiciable?

There is also an assumption underlying institutional incapacity arguments that injusticiable "political" matters will, in fact, be addressed in the political realm. In

---

[28] *RJR MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199.

[29] *Ibid.* at para. 68.

[30] For a detailed response to institutional capacity arguments in the context of poverty-related *Charter* claims, see David Wiseman, *supra* note 19 at 440-449.

[31] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 237. See also Wiseman, *supra* note 19 at 448.

[32] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

the leading text on the law of justiciability in Canada, Lorne Sossin says that a key factor in finding a matter injusticiable is the "likelihood that the dispute could be resolved through political means."[33] However, it is not at all clear that the people who are most affected by social policy decisions in the realm of social assistance, housing and other basic human needs have any meaningful access to the political process. As Martha Jackman notes, "while the poor may not be well represented by the courts, neither are they well represented by the legislature."[34] Still, others argue that courts may actually enjoy a situational advantage over legislatures in hearing "voices from the margins" such as those of poor claimants in social and economic rights cases.[35]

In addition, the "political" decisions at issue in many social and economic rights claims, such as levels of social assistance benefits (*Gosselin*), requirements for access to public utilities (*Clark*) and funding for particular health care procedures (*Auton*), are made by regulation or otherwise without legislative consultation. Therefore, as Justice Bastarache has noted, unelected delegated decision makers "are presumptively less likely [than elected officials] to have ensured that their decisions have taken into account the legitimate interests of the excluded group."[36]

Finally, the Supreme Court of Canada's own approach to institutional capacity concerns in *Charter* cases leads to the conclusion that these matters should not lead courts to reject social and economic rights claims as injusticiable. Rather, institutional capacity concerns may be relevant to the level of deference to be accorded to legislative decisions or to the appropriate remedy should a court find that a *Charter* right has been unjustifiably infringed.[37] For example, in *Irwin Toy*,[38] a

---

[33] Sossin, *supra* note 31 at 200. Other factors in Sossin's analysis include the nature of the issue and its seriousness for the party seeking judicial review.

[34] Martha Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Rev. 257 at 336.

[35] See Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter Rights*" (2000) 15 J. Law & Social Pol'y 117 at 157, citing Frank Michelman, "Law's Republic" (1988) 97 Yale L.J. 1493 at 1537.

[36] *M. v. H.*, [1999] 2 S.C.R. 3, at para. 315, cited in Wiseman, *supra* note 19 at 446-47.

[37] See *e.g.*, *Auton, supra* note 9, the B.C. Court of Appeal was clearly conscious of the potential implications of ordering a government to fund a particular form of treatment as part of its health care budget. However, it dealt with these issues at the remedial stage and not at the stage of considering whether Connor Auton's claim was justiciable.

[38] *Irwin Toy v. Attorney General (Quebec)*, [1989] 1 S.C.R. 927.

majority of the Supreme Court considered institutional legitimacy and capacity concerns at the section 1 stage in upholding a ban on advertising directed at children:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of legislative deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.[39]

In a similar vein, a recent South African Constitutional Court case demonstrates that institutional capacity concerns can be adequately addressed by deference at the remedial stage rather than by dismissing social and economic rights claims as injusticiable. In *South Africa v. Grootboom*,[40] the unanimous Court declared that the government had infringed section 26 of the *Bill of Rights*, the right to have adequate access to housing, by not having a reasonable plan to provide housing for hundreds of homeless individuals who were squatting on a public sports field after their shantytown had been bulldozed. The South African government was ordered to "devise and implement within its available resources a comprehensive and coordinated programme to progressively realize the right of access to adequate housing,"[41] including temporary relief to those in desperate need.[42] Such an order was made even though that country's government faces enormous fiscal challenges due to the prevalence of AIDS, persistent extreme poverty inherited from the Apartheid era, and a depleted tax base in recent years. The Court recognized that it was an "extremely difficult task" for the government to meet its obligations under the Constitution, yet the Court could not abdicate its responsibility to interpret those rights in a meaningful way.[43]

---

[39] *Ibid.* at 993.

[40] *South Africa v. Grootboom*, [2000] S.A.J. No. 57 (Const. Court).

[41] *Ibid.* at para. 99.

[42] *Ibid.* at para. 96.

[43] *Ibid.* at para. 94.

(c) Judicial Deference in Social and Economic Rights Cases

While some might argue that allowing any social and economic rights claims opens up a Pandora's box leading to judicial micro-managing of health care and other social and economic policy decisions, we have not seen the floodgates open after successful claims such as *Eldridge* and *Dunmore*. Even where a court finds an infringement of a right as a result of a social policy decision, it must consider whether the limit on that right is "demonstrably justifiable in a free and democratic society"[44] and must decide on an appropriate remedy. In the course of both the section 1 and remedial inquiries, courts tend to accord considerable deference to legislatures where social and economic policy decisions are concerned.

As noted above, the Supreme Court explicitly adopted a deferential position toward social and economic policy decisions in *Irwin Toy* due to the claims of competing groups over scarce government resources. Perhaps not surprisingly, courts pay close attention to arguments for deference at the section 1 stage in adjudicating social and economic rights claims. While this approach is fraught with difficulty[45] and can seriously undermine *Charter* rights,[46] advocates of social and economic rights cases have faced such difficulty getting those claims "in the door" of *Charter* justiciability, that the tendency toward deference has been seen as a secondary hurdle to overcome.

After reviewing all *Charter* cases involving rights to health care and particular treatments, Donna Greschner concludes that "[c]ourts have shown considerable sensitivity to the dynamics of Canada's health care system, recognizing the importance of accessible health care for everyone, the unbelievably complex system in place for its delivery, and the need to give governments a wide margin of

---

[44] *Supra* note 1 at s. 1.

[45] For a view that deferential approaches to *Charter* interpretation are fundamentally at odds with the concept of constitutional supremacy and the *Charter*'s explicitly activist nature, see Lorraine Weinrib, "Canada's Charter of Rights: Paradigm Lost?" (2002) Rev. Constitutional Studies 119.

[46] For example, in *R.* v. *Egan*, [1995] 2 S.C.R. 513, the plurality opinion of Sopinka J. upheld the discriminatory exclusion of same-sex partners from spousal allowances under the *Old Age Pension Act* on the ground that courts must defer to social policy decisions allocating public funds. Sopinka J. said that "government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships" and that "[i]t is not realistic for the Court to assume that there are unlimited funds to address the needs of all" (at 572). In effect, discrimination against gays and lesbians was constitutionally justified because of a presumed governmental decision that we could not afford equality. This approach has been widely criticized. See, *e.g.*, Hester Lessard et al., "Developments in Constitutional Law: The 1994-95 Term" (1996) 7 Sup. Ct. Law Rev. (2d) 81.

appreciation."[47] Yet while government objectives and policy decisions to allocate scarce resources tend to attract judicial deference, some claims will withstand this sort of harsh scrutiny. For example, the Court of Appeal in *Auton* was mindful of the fact that health care resources are limited and attempted to address the concern that its decision would essentially "constitutionalize" a particular form of treatment and lead to health care funding decisions being made on a case-by-case basis rather than on a comprehensive and systematic one. However, the Court held that on the facts of that case, where there was evidence that funding early treatment for autistic children might actually be cheaper in the long run for the public health care system, the government had not discharged its burden of proving that the discrimination[48] was justified.

When it comes to providing a remedy for violations of *Charter* rights, courts also tend to adopt a deferential stance in social and economic rights cases. In *Eldridge*, where the exclusion of sign language funding from B.C.'s publicly funded health care plan unjustifiably infringed the equality rights of deaf patients, a unanimous Supreme Court invoked the language of deference in refusing to issue an injunction. According to the Court:

> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the constitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. ...[I]t is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response.[49]

Similarly, in *Dunmore*, the Supreme Court of Canada refused to order that agricultural workers be included in Ontario's *Labour Relations Act* even though it held that their exclusion from that regime unjustifiably infringed their freedom of association. Instead, it issued a declaration that the exclusion was invalid, but suspended the effect of that declaration for 18 months to give the Ontario legislature

---

[47] Donna Greschner, "How Will the *Charter of Rights and Freedoms* and Evolving Jurisprudence Affect Health Care Costs?" *Commission on the Future of Health Care in Canada*, Discussion Paper No. 20 (September 2002) at 21, online:< www.healthcarecommission.ca >.

[48] The Court of Appeal did not find a right to the particular treatment under s. 7 of the *Charter*. Rather, it only held that the exclusion of autism treatment from publicly funded mental health treatments amounted to discrimination against autistic children on the basis of their particular mental disability.

[49] *Supra* note 23 at para. 96.

an opportunity to fashion an appropriate legislative response to the decision.[50] In response to the latitude accorded to it, Ontario introduced legislation[51] that protects the right of agricultural workers to form an association (not a union) and does not include any of the usual features of labour law, such as certification, exclusive bargaining rights, collective bargaining, or access to the Labour Board for the resolution of disputes. While this legislative response has been criticized by labour groups as contrary to the spirit of *Dunmore*,[52] it illustrates that deference at the remedial stage preserves a role for both courts and legislatures in considering the constitutionality of controversial social and economic policy decisions.

III. The Future of Social and Economic Rights Claims

This brief survey of social and economic rights claims, including obstacles to their adjudication and recent inroads in favour of their justiciability, leads to the conclusion that the *Charter* has the potential for a more meaningful form of rights protection that addresses the tangible needs and reasonable expectations of Canadians.

Social and economic rights are increasingly making their way onto the international stage as well as onto the agenda of provincial and federal human rights bodies. At the international level, there is considerable discussion and movement toward the adoption of a protocol to permit individual and group petitions alleging violations of rights contained in the *International Covenant on Social, Economic and*

---

[50] *Dunmore, supra* note 10 at para. 66. Justice Bastarache, for a majority of the Court, describes labour relations as "an extremely sensitive subject" in which the Court will "only interfere with policy choices where a more fundamental value is at stake and where it is apparent that a free and democratic society cannot permit the policy to interfere with the right in the circumstances of the case."

[51] Bill 187, *Agricultural Employees' Protection Act*, (assented to 19 November 2002), S.O. 2002, c. 16.

[52] See *e.g.*, "When is a right not a right? When you are an agricultural worker in Ontario," Canadian Labour Congress, News Release, October 24, 2002, online: <http://www.newswire.ca/releases/October2002/24/c4609.html.>. It is beyond the scope of this essay to consider the merits of a new *Charter* challenge that may be brought against Bill 187. However, it is arguable that the new Bill suffers from some of the same constitutional defects as the blanket exclusion of agricultural workers from the *LRA*. *Dunmore* held that by selectively excluding these workers from the *LRA*, the government put a chilling effect on agricultural workers' non-statutory union activity. By continuing to exclude this class of vulnerable workers from the *LRA* and from a meaningful form of protection for organizing efforts, the Ontario government has arguably failed to protect the workers' "freedom to organize" recognized in *Dunmore*.

Cultural Rights.[53] As discussed earlier, such an Optional Protocol exists in relation to the *International Covenant on Civil and Political Rights*, making individual and group complaints of civil and political rights violations expressly justiciable in the international context. The impact of subjecting social and economic policies to the adjudicative scrutiny of international bodies does not sit well with many state parties, including Canada, which has argued that while "[a]ll human rights are universal, it does not necessarily follow that all rights are easily amenable to or best implemented by an adjudicative-type process."[54] In that context, debates over the proposed *ICESCR* optional protocol continue while other international bodies have already enacted mechanisms for the adjudication of some social and economic rights claims.[55]

At the domestic human rights level, provincial and federal human rights commissions are considering the addition of "social condition" as a prohibited ground of discrimination.[56] Currently, Quebec is the only jurisdiction that prohibits discrimination on the basis of "social condition." In recommending that the British Columbia Human Rights Commission add "social condition" to its legislation, William Black described the ground as protecting "people living in poverty, people with certain occupations such as domestic workers, people branded as inferior because they have difficulty reading and writing, and people whose dress or speech identify them as coming 'from the wrong side of the tracks.'"[57]

Calls to add "social condition" to human rights acts come at a time when courts are also considering claims of discrimination based on poverty as a source of social stigma and discrimination. The Ontario Court of Appeal recently became the first appellate court in Canada to recognize "receipt of social assistance" as an analogous

---

[53] See the Report by the U.N. Human Rights Committee to the U.N. High Commission on Human Rights: UN Doc. E/CN.4/1997/105, online: <http://www.unhchr.ch/html/menu2/cescr.htm.>.

[54] See *e.g.*, William Schabas' discussion of the Canadian government's response to the proposed optional protocol. Schabas, *supra* note 13 at 208-210.

[55] See *e.g.*, *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, Eur. T.S. No. 158, cited in *Schabas, ibid.* at 208.

[56] See *e.g.*, Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Minister of Justice and the Attorney General of Canada, 2000), Chair: Hon. Gerard La Forest, online: <http://www.chrareview.index.html> and Ontario Human Rights Commission, *Human Rights Commissions and Economic and Social Rights*, February 2002, online: <http://www.ohrc.on.ca/english/consultations/economic-social-rights-paper.shtml.>.

[57] William Black, *Human Rights Review: Report on Human Rights in British Columbia* (Vancouver: Government of British Columbia, 1994) at 170.

ground of discrimination contrary to *Charter* equality guarantees.[58] In that case, the Court declared the "spouse in the house" provision of Ontario's welfare law invalid,[59] holding that it contributed to the stigma and disadvantage experienced by social assistance recipients.

In the next few years, we will likely see an increasing number of *Charter* claims in the realm of health care funding[60] as well as other areas of social policy. However, while equality-based claims for inclusion in a particular legislative regime[61] will continue to meet with some success, it is not likely that claims for rights to social assistance, health care or protective labour legislation *per se* will succeed, at least not in the short term.

None of the claims relying on substantive rights under section 7, such as a right to have one's basic needs met (*Gosselin*), or a right to health care (*Auton*)[62] have been allowed. It is only when claimants can prove, according to established section 15 doctrine, that denying them a particular publicly funded social benefit available to other Canadians offends their dignity, that a court may be convinced to require the

---

[58] *Falkiner* v. *Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* (2002), 212 D.L.R. (4th) 633 (Ont. C.A.).

[59] Under that provision, any adult person living with a social assistance recipient (most of whom are sole-support mothers) was presumed to be a spouse. Social assistance benefits were deducted or cancelled altogether on the basis of the presumed spouse's income.

[60] In her report to the Romanow Commission on the Future of Health Care in Canada, Donna Greschner concludes that governments can expect an increasing amount of litigation, including claims that use the *Charter* as a shield to preserve publicly funded services and as a sword to require change in a different direction. Greschner, *supra* note 47 at 21.

[61] See, *e.g.*, *Dunmore, supra* note 10, *Eldridge, supra* note 23, and *Auton, supra* note 9.

[62] Justice Saunders said of the section 7 claim in that case:

> When the *Charter* was first presented considerable debate ensued as to whether it could apply to provide a positive entitlement to health care. In my view, in the context of this case, it does not. ... I consider that the underinclusiveness of the health care system, even as it relates to children, would not violate a principle of fundamental justice" (*Auton, supra* note 15 at para. 73).

On this point, the Court is consistent with the 1990 decision in *Brown v. British Columbia (Minister of Health)*, [1990] B.C.J. No. 151 (S.C.) where the court rejected an argument that the B.C. government's decision not to fund the HIV/AIDS drug AZT violated the section 7 rights of people living with AIDS.

government to remedy the discrimination.[63]

Of course, there is always a danger when making equality-based claims for inclusion in a particular regime that the court will resolve any inequality between competing groups by withdrawing the benefit from everyone such that all parties are "equal" at the lower level. An example of this sort of "equality with a vengeance" can be found in the 1986 *Phillips*[64] case in which a court found that disparities between eligibility of single mothers and single fathers for welfare benefits amounted to unjustified discrimination. The court's remedy was to strike down the benefits available to single mothers rather than to extend them to single fathers.

On the labour front, the *Dunmore* decision may not signal a shift from Canadian courts' relatively deferential approach to labour and employment policies. The decision itself was made on the relatively narrow basis that excluding agricultural workers from protective labour laws meant that they were incapable of forming an association to promote their interests. A majority of the Court rejected the agricultural workers' section 15 equality claim and refused to budge from its holdings in earlier labour cases that the *Charter* does not protect the right to strike or to bargain collectively. As the Ontario government's legislative response to *Dunmore* demonstrates,[65] the victory may be a hollow one.

Finally, even where a successful *Charter* claim has been made out, courts are likely to show considerable deference to legislative choices involving the allocation of public funds as part of their section 1 and remedial inquiries. In none of the successful section 15 social and economic rights claims has the government been able to prove that a finding of unjustified discrimination will have unacceptable financial costs. The courts in both *Eldridge* and *Auton* were unconvinced by the government's dire predictions. In *Eldridge*, the cost of providing sign language interpretation to deaf patients was estimated to cost approximately $150,000 per year. In *Auton*, the Court favourably cited evidence that the long-term savings to be achieved by early treatment of autism might actually outweigh the cost of requiring

---

[63] Examples of significant equality-based claims that are currently working their way through the system include: *Hodge v. Canada (Minister of Human Resources Development)*, [2002] F.C.J. No. 900 (C.A.) (where the denial of *Canada Pension Plan* survivors' pensions to separated common law spouses but not to married spouses was held to be unjustifiable discrimination on the basis of marital status) and *Collins* v. *Canada*, [2002] F.C.J. No. 305 (C.A.) (where the denial of spousal benefits under the *Old Age Security Act* was found to be justified discrimination on the basis of marital status).

[64] *Phillips v. Nova Scotia* (1986), 27 D.L.R. (4th) 156 (S.C.).

[65] Bill 187, *supra* note 51.

public funding of the treatment itself. In none of the successful cases to date has the potential cost been as high as that represented by the *Gosselin* litigation where a finding that section 7 or section 15 entails a right to a minimal level of social assistance could cost $430,000,000 in damages in Quebec alone. Similarly, in *Collins* v. *Canada*,[66] the Federal Court of Appeal found discrimination on the basis of marital status where separated spouses were denied *Old Age Security* benefits paid to married spouses, but held that the discrimination was justified under section 1 due to the potential costs of including common law spouses in the legislative regime.[67]

The first twenty years of social and economic rights claims under the *Charter* have significantly altered Canadian law, not to mention the relationship between courts and legislatures. Claims that are justiciable (and sometimes successful) now would have been unthinkable to many judges in the early days of the *Charter*. And while the recent decision in *Gosselin* may be seen as evidence of the *Charter*'s stunted growth where social and economic rights claims are concerned, Chief Justice McLachlin was careful to say that "[o]ne day s. 7 may be interpreted to include positive obligations" since "the *Canadian Charter* must be viewed as a 'living tree capable of growth and expansion within its natural limits.'"[68] The trends discussed in this paper will likely lead to an increasing number of successful social and economic rights cases, particularly in the equality context, but it remains to be seen whether, as anti-poverty lawyer Bruce Porter suggests, the most disadvantaged members of Canadian society will truly benefit from this country's "rights revolution."[69]

---

[66] *Collins, supra* note 63.

[67] The potential cost was somewhere between $53.4 and $78.4 million, according to plaintiff's counsel. However, the Court was also concerned that a successful ruling could be applied in some other *OAS* contexts which could amount to up to $1,275 million in increased costs. See *Collins, ibid.* at para. 65.

[68] *Gosselin, supra* note 6 at para. 82, citing Lord Sankey in *Edwards* v. *Attorney General for Canada*, [1930] A.C. 124.

[69] Bruce Porter, "ReWriting the *Charter* at 20 or Reading it Right: The Challene of Poverty and Homelessness in Canada," Plenary Presentation, *The Canadian Charter of Rights and Freedoms: 20 Years Later* (Toronto: Canadian Bar Association, 2001), online: <www.equalityrights.org/cera/docs/charter20.rtf.>. Porter's reference is to Ignatieff, *supra* note 2.