HUMAN RIGHTS COMMISSIONS AND ECONOMIC AND SOCIAL RIGHTS

Research Paper
Policy and Education Branch

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EXECUTIVE SUMMARY

This paper is one of several initiatives by the Ontario Human Rights Commission to explore ways in which human rights commissions can become more involved in protecting and promoting economic and social rights and in implementing international treaties to which Canada is a party. The challenge for human rights commissions is to find ways to maximize the potential of their mandates to promote international standards, including those contained in the *International Covenant on Economic, Social and Cultural Rights*.

Internationally and, more recently, domestically there is a growing recognition that all human rights are universal, indivisible, interdependent and interrelated. Vulnerable groups protected by human rights legislation are more likely to experience low economic and social status. Poverty is inextricably linked with inequality, particularly for women (especially single mothers and elderly women), Aboriginal persons, racial minorities and persons with disabilities, and so it is becoming increasingly clear that, in order to effectively address the complex experience of those who are disadvantaged, human rights commissions must address social and economic rights to the greatest extent possible.

The goal of this paper is to identify specific measures that can be undertaken by human rights commissions within existing mandates. By way of example, the paper identifies some successes in the areas of policy development and litigation. The paper also explores the concept of "social condition" as a prohibited ground of discrimination as one way that social and economic rights may be protected. The paper highlights Canada's international obligations, international concerns about Canada's record in implementing social and economic rights, and problems that have been encountered in attempts to litigate social and economic rights claims before Canadian courts to punctuate the need for human rights commissions to do more.

This paper is a research document prepared by staff of the Ontario Human Rights Commission and is not a Commission approved policy statement. It is hoped that it will provide valuable background information and serve as a resource in the debate around social condition and other measures that can be adopted by commissions within existing mandates.

INTRODUCTION

The purpose of this paper is to discuss and reflect on the emerging role of human rights commissions in the 21st century. The new millennium finds human rights commissions increasingly under pressure to respond to government restructuring, new grounds or mandates, globalisation and the growing role and expectations of civil society. These developments have implications for human rights generally and for human rights commissions in particular.

At the same time, the international community has made it clear that human rights commissions are, in some respects, "trustees" of human rights at the national level, along with a range of other partners. By "human rights" we mean, of course, not only civil and political rights but also economic, social and cultural rights. Increasingly, the distinctions between the two sets of rights are falling away. The United Nations and other international bodies have declared that all human rights are universal, indivisible, interdependent and interrelated. As a result, we are taking a fresh look at the rights that need protection and how this can and should be achieved.

In the industrialized West, civil and political rights have historically received more attention, legal codification, protection and judicial interpretation than have economic, social and cultural rights. Economic, social and cultural rights are often seen as unenforceable, non-justiciable norms that are only to be fulfilled "progressively" over time.[1] They are often viewed as rights that may require state action for their realisation and, hence, are more appropriately left to the legislatures to address. However, there is a remarkable degree of interrelationship between the two sets of rights, and full realisation of both may be seen as a common ideal.[2]

Indeed, economic, social and cultural rights are especially relevant to human rights dialogue today. While the *International Covenant on Economic Social and Cultural Rights*[3] sets out an international framework for protection of these rights, there are few mechanisms for enforcement. By ratifying the Covenant in 1976, Canada undertook international obligations to uphold economic, social and cultural rights. But the perceived lack of enforceability of these rights has created growing international concern about their protection. The emerging socio-economic pressures on Canadian society, coupled with judicial restraint in the area of social and economic rights, have caused many human rights commissions to look at their own mandates in an effort to determine how more can be done. In Quebec, of course, the legislation[4] specifically provides for protection against discrimination on the ground of social condition, while the

[1] The United Nations Committee on Economic, Social and Cultural Rights, *Fact Sheet No. 16 (Rev. 1)* (1991), online: United Nations Office of the High Commissioner for Human Rights Homepage <http://www.unhchr.ch/html/menu6/2/fs16.htm> (date last accessed: 02 January 2001) [hereinafter *Fact Sheet No. 16*].

[2] Dr. M.K. Addo, "The Justiciability of Economic, Social and Cultural Rights" (1988) 14 Commonwealth Law Bulletin 1425 at 1425.

[3] 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 03 January 1976, accession by Canada 19 August 1976) [hereinafter *ICESCR*].

[4] Quebec *Charter of human rights and freedoms*, R.S.Q. c. C-12 [as amended].

Canadian Human Rights Act Review Panel has studied a similar option and, in its report released in June 2000[5], recommended the addition of social condition, as a prohibited ground of discrimination, to the federal Act.

The issue is timely for discussion in Canada. Recent statistics show that, using Statistics Canada's Low-income Cut-offs as a measurement of poverty, 17.9 percent of Canadians live in poverty.[6] For five years in a row, Canada has been ranked at the top of the United Nations Development Programme's ("UNDP") Human Development Index while the UNDP Human Poverty Index ranks Canada tenth on the list of industrialised countries.[7]

In 1995, 57 percent of persons living in low-income situations were women.[8] Involuntary reliance on part-time or minimum wage employment, being a member of a mother-led single-parent family, being an elderly woman, a person with a disability, a racial minority, a recent immigrant or an Aboriginal person greatly increases the likelihood of being poor.[9] Among the major problems facing those who are poor include obtaining adequate food and affordable housing. Poverty has been shown to have a direct bearing on individual health and a negative impact on educational achievement, which in turn has a significant influence on the risk of being poor.[10]

In Ontario, homelessness, particularly in large urban centres, has emerged as a significant social and political issue. In many areas, the affordable rental housing supply has been diminishing. Despite some recent advances through new initiatives to support housing at the federal and municipal levels (notably funding earmarked by the federal government for housing and the implementation by Toronto City Council of several of the recommendations in the Golden Report[11]), the resources are outstripped by demand. There have been reported increases in reliance on food banks[12] and

[5] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Minister of Justice and the Attorney General of Canada, 2000) (Chair: Honourable Gérard La Forest), online: Canadian Human Rights Act Review Homepage <http://www.chrareview.indexe.html> (date last accessed: 02 January 2001) [hereinafter Review Panel Report].

[6] From S. Day, M. Young & N. Won, "The Civil and Political Rights of Canadian Women" Research prepared for the Honourable Lois M. Wilson, the Senate of Canada (Spring 1999), citing Statistics Canada, "The Daily", (03 March 1999), online: Hon. Lois M. Wilson's Homepage <http://sen.parl.gc.ca/lwilson/default.htm> (date last accessed: 02 January 2001).

[7] United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations – Canada)*, 10 December 1998, E/C.12/1/Add.31. at para. 3 [hereinafter *1998 Concluding Observations*].

[8] See Day, Young & Won, *supra*, note 6, citing National Council of Welfare, *Poverty Profile 1995* (Ottawa: Supply and Services Canada, 1997) at 34, 84 and 85.

[9] M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law" (1994) 2 Review of Constitutional Studies 76 at 83 [hereinafter Constitutional Contact with the Disparities in the World].

[10] *Ibid.* at 84 - 88.

[11] Mayor's Homelessness Action Task Force, *Taking Responsibility for Homelessness: An Action Plan for Toronto* (Chairperson: A. Golden), online: City of Toronto Homepage <http://www.city.toronto.on.ca/mayor/homelessnesstf.htm> (date last accessed: 11 January 2001).

[12] The Association of Canadian Food Banks has stated that food banks have seen a steady increase in demand for their services. In Ontario, in less than two months following welfare rate reductions, food

temporary shelters[13]. These trends are occurring despite a strong economy and a time of unprecedented employment rates. These contradictions raise important questions about the meaning of "economic rights" and "social rights" and about whether human rights commissions can or should have a role in protecting them.

Concern has been expressed at the international level about Canada's record in implementing social and economic rights. Concerns include Canada's response to homelessness, cuts to social programs, the decline in social assistance rates and the discriminatory impact of such cutbacks on certain disadvantaged groups such as women, children and persons with disabilities.[14] The *1998 Concluding Observations* of the United Nations Committee on Economic Social and Cultural Rights (the "*ICESCR* Committee") are also critical of provincial governments for urging on their courts an interpretation of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") which would deny protection of Covenant rights and leave litigants without basic necessities of life and without any legal remedy.[15]

The *1998 Concluding Observations* contain a number of recommendations to enhance the implementation of social and economic rights. The *ICESCR* Committee reiterates that economic and social rights should not be reduced to "principles and objectives" in social policy and programs. The Committee urges the federal government to ensure that the provinces are made aware of their obligations and that *ICESCR* rights are enforceable in the provinces through legislation, policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.[16] Further, the *ICESCR* Committee suggests that there is a need for education with respect to treaty obligations.[17] Other recommendations about specific issues are also included, for example with respect to women's economic and social rights, the right to an adequate standard of living, workers' rights and homelessness.

This paper will begin with a brief discussion of social and economic rights under international law. It will review these rights as they have been implemented in Canada and will explore the concept of "social condition" or related concepts as an expression of social and economic rights that may be protected by human rights commissions.

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banks reported increases in use of up to 70%; from The National Anti-Poverty Organization's Submission to the U.N. Committee on Economic, Social and Cultural Rights (February 1996), online: Charter Committee on Poverty Issues Homepage <http://www.web.net/ccpi/un/napo.html> (date last accessed: 02 January 2001).

[13] See, for example, Toronto Disaster Relief Committee, *State of Emergency Declaration: An Urgent Call for Emergency Humanitarian Relief & Prevention Measures* (October 1998), online: Toronto Disaster Relief Committee Homepage <http://www.tao.ca/~tdrc/booklet.shtml> (date last accessed: 02 January 2001) which states that on any given day in 1996, about 3,100 different people used Toronto's emergency shelters. This is an increase from 2600 in 1994 and 2100 in 1988.

[14] See the *1998 Concluding Observations*, *supra*, note 7; for example, paragraphs 16, 19, 20, 21, 23-25, 27, 28, 32, 33, 35, 36.

[15] *Ibid*. at para. 14.

[16] *Ibid.* at para. 52.

[17] *Ibid*. at para. 58.

Although cultural rights are often grouped with social and economic rights, they will not be considered as they raise a series of very distinct issues and questions that are beyond the scope of the paper.

SOCIAL, CULTURAL AND ECONOMIC RIGHTS UNDER INTERNATIONAL LAW

Key International Instruments

The *Universal Declaration of Human Rights*[18], adopted by the United Nations General Assembly in December 1948, proclaimed the inviolability of social and economic rights. Social and economic rights contained in the *Declaration* include the right to own property (Article 17), the right to social security and to the realization of social and economic rights "indispensable for [a person's] dignity and the free development of his [or her] personality" (Article 22), rights with respect to employment (Article 23) and rights with respect to education (Article 26). Article 25 recognizes a right to a certain standard of living:

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

Article 2 of the *Declaration* states that everyone is entitled to these rights without distinction of any kind based on grounds such as race, colour, sex, religion and so on.

The moral statements expressed in the *Declaration* were given legal force through two covenants: the *International Covenant on Civil and Political Rights*[19] and the *ICESCR*. The division of these two categories of rights into different instruments has been blamed in part for establishing a distinction between the rights that has "ever since hovered like an albatross over the development of human rights protection".[20]

The *ICESCR* is one of the most influential and comprehensive international documents in the area of social and economic rights.[21] In addition, there are a series of international conventions, declarations and agreements that address economic, social and cultural rights.[22] These instruments have further refined international legal norms

[18] 10 December 1948, General Assembly resolution 217A (III), UN Doc. A/810 [hereinafter the *Declaration*].

[19] 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter the *ICCPR*].

[20] C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10 Constitutional Forum 1 at 1 [hereinafter Canada's International Human Rights Obligations].

[21] Ontario Ministry of the Attorney General, Constitutional Law and Policy Division, *The Protection of Social and Economic Rights: A Comparative Study*, Staff Paper (19 September 1991) at 34.

[22] In 1995, the United Nations estimated that there were no fewer than 81 formal agreements which address such issues as poverty eradication, employment generation and social integration; J.W. Foster,

relating to a wide range of socio-economic issues.[23]

The economic, social and cultural rights embodied in the *ICESCR* are based on a perspective according to which people can enjoy rights, freedoms and social justice simultaneously.[24] Protection of economic, social and cultural rights has been deemed necessary as the right to live a dignified life can never be attained unless all basic necessities of life – work, food, housing, health care, education and culture – are adequately and equitably available to everyone.[25]

Scope of *ICESCR*

The *ICESCR* guarantees a comprehensive range of substantive rights including:

- The right to self-determination (Article 1);
- Equal rights for men and women (Article 3);
- The right to work (Article 6);
- The right to just and favourable conditions of work (Article 7);
- The rights of workers to organize and bargain collectively (Article 8);
- The right to social security and social insurance (Article 9) and protection and assistance for the family (Article 10);
- The right to an adequate standard of living (Article 11) which includes:
  - Adequate food
  - Adequate clothing
  - Adequate housing;
- The right to freedom from hunger (Article 11);
- The right to the highest attainable standard of physical and mental health, including the right to health care (Article 12);
- The right to education (Article 13); and
- The right to culture and to benefit from scientific progress (Article 15).

Article 2 binds States parties to guarantee that all rights within the *ICESCR* will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is not exhaustive. This provision of the *ICESCR* has been interpreted to require States parties to prohibit private persons and bodies from practising discrimination in any field of public life.[26]

"Meeting the Challenges: Renewing the Progress of Economic and Social Rights" (1998) 47 U.N.B.L.J. 197 at 197.

[23] *Fact Sheet No. 16*, *supra,* note 1.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

State Obligations under the *ICESCR*

Canada became a State party to the *ICESCR* in 1976.[27] The *ICESCR* is a legally binding instrument with States parties accepting the responsibility to implement and maintain the rights guaranteed therein. Article 28 provides that the Covenant's provisions "shall extend to all parts of federal States without any limitations or exceptions." Accordingly, the *ICESCR* is binding on the federal government and each of the provinces and territories, and rights that are within provincial competence are the obligation of the provincial and territorial governments[28]. Before ratification of both the *ICESCR* and the *ICCPR*, there was extensive consultation between the federal government and the provinces. After a 1975 Federal-Provincial Ministerial Conference on Human Rights, all the provinces gave their consent to Canada's ratification of both covenants. At the same conference, the federal government and the provinces reached an agreement with respect to ratification of all international human rights covenants which is based upon the principle of federal-provincial and inter-provincial "concertation", *i.e.* acting together to implement human rights treaties ratified by Canada.[29]

Article 2 describes the nature of the legal obligations under the *ICESCR* and the manner in which States parties should approach implementation of the substantive rights. States parties are required to take steps to the maximum of their available resources with a view to achieving progressively the full realization of *ICESCR* rights by all appropriate means. The *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* state that legislative measures alone are not sufficient: administrative, judicial, policy, economic, social and educational measures will be required by governments to ensure *ICESCR* rights.[30]

International Mechanisms for Enforcement

Scholars have noted the relative weakness of the international system in ensuring compliance with international norms generally, and in the area of social and economic

[27] Canada also ratified the *ICCPR* at the same time.

[28] From M. Jackman & B. Porter, "Women's Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act*" (Ottawa: Status of Women Canada, October 1999), online: Status of Women Canada Homepage <http://www.swc-cfc.gc.ca/research/1-8-99e.html> citing the *Vienna Convention on Law of Treaties*, 23 May 1969; 115 U.N.T.S. 331; 8 I.L.M. 679 (entered into force 27 January 1980), art. 27.

[29] For a detailed discussion of the process leading up to Canada's ratification of the covenants, the "modalities and mechanisms" for implementing the covenants and the creation of a continuing federal-provincial committee of officials responsible for human rights, see P. LeBlanc, "Canada's Experience with United Nations Human Rights Treaties" *The Agendas for Change Series: Perspectives on UN Reform* No. 3 (research commissioned by United Nations Reform Programme of the Canadian Committee for the 50th Anniversary of the U.N., November 1994).

[30] *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17, Annex at para. 17 and 18 [hereinafter the *Limburg Principles*].

rights in particular. To the extent that procedures exist, they are inquisitorial and supervisory in nature and rely on persuasion rather than coercion.[31]

The *ICCPR* contains a provision that allows states or individuals to complain to a reviewing body. There is no similar complaint procedure under the *ICESCR*.[32] The *ICESCR* Committee has noted that the absence of such a procedure "places significant constraints on the ability of the Committee to develop jurisprudence or case-law and, of course, greatly limits the chances of victims of abuses of the *ICESCR* obtaining international redress."[33] To address this, the *ICESCR* Committee has promoted a draft optional protocol which would enhance the practical implementation of the *ICESCR*. The *ICESCR* Committee has signaled that pending the addition of this protocol, beneficiaries of the rights in the *ICESCR* may still have recourse to the general procedures of the Committee, and may utilize what has been called an "unofficial petition procedure" based on the modalities of the Committee.[34] Similarly, the Human Rights Committee, which studies reports and hears complaints under the *ICCPR*, has indicated that economic and social rights may, in some instances, be protected as civil and political rights.[35]

As there is no complaint procedure under the *ICESCR*, the primary mechanism for its enforcement is the state reporting process. Pursuant to Articles 16 and 17, States parties undertake to submit periodic reports to the *ICESCR* Committee on the programmes and laws they have adopted and the progress made in protecting Covenant rights. The U.N. has promulgated guidelines for the preparation of reports.[36]

The State reporting procedure is quite complex but some aspects merit discussion. State reports receive initial consideration by a pre-sessional working group of the *ICESCR* Committee which develops a list of questions. The States parties must provide a written reply before their delegation appears before the *ICESCR* Committee. At meetings of the *ICESCR* Committee, State delegations and U.N. specialized agencies

[31] See for example *The Protection of Social and Economic Rights: A Comparative Study*, *supra*, note 21 at 37.

[32] This may in part explain the widely held belief that economic, social and cultural rights are non-justiciable and unenforceable and are 'positive' rights to be fulfilled 'progressively' over time. The justiciability of these rights will be discussed later in the paper.

[33] *Fact Sheet No. 16*, *supra*, note 1.

[34] *Ibid*. The *1998 Concluding Observations* are illustrative of the Committee's use of the reporting mechanism to enhance economic and social rights in Canada through strong moral persuasion. Some scholars have noted that the Committee has increasingly assumed more of an adjudicative role, thus indicating that the international community has begun to feel more comfortable with the idea of social and economic rights being claimed and adjudicated in the same manner as other human rights. See Jackman & Porter, *supra*, note 28 at 52.

[35] *The Protection of Social and Economic Rights: A Comparative Study, supra*, note 21 at 38. This study notes that, in deciding two cases, the Human Rights Committee has held that excluding a person from social security benefits (protected under the *ICESCR*) is a violation of the right to equality under the *ICCPR* for which the state must provide a remedy. As well, the Human Rights Committee has given some indication in a General Comment that the right to life under the *ICCPR* could require a state to adopt positive measures, *e.g.* to reduce infant mortality or eliminate malnutrition.

[36] For example, United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 1: Reporting by States Parties*, 24 February 1989, E/1989/22.

provide information relevant to the report being considered. Committee members then put questions and observations to the State party and responses are provided. The Committee may request supplemental information for consideration at forthcoming sessions.[37]

The Committee has formalized a procedure for participation by Non-Governmental Organizations ("NGOs") in the process. NGOs are given an opportunity to make oral submissions about State parties' implementation of Covenant rights before the pre-sessional working group and the regular session of the *ICESCR* Committee. The Committee will receive oral testimony from NGOs provided it is reliable, relevant and not abusive. The Committee will also receive written materials from NGOs.[38]

The *ICESCR* Committee concludes its consideration of the State party's report by issuing Concluding Observations which constitute the decision of the Committee regarding the status of the *ICESCR* in the country. The Concluding Observations include positive aspects of implementation, principal subjects of concern and suggestions and recommendations. The Committee may conclude that a State party has failed to comply with an obligation and, hence, a violation of the *ICESCR* has taken place. The *Limburg Principles* and more recently the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*[39] set out what may constitute a violation of the *ICESCR*[40].

It is important to note that the *ICESCR* Committee's Concluding Observations are not legally binding and there is no method for enforcement. However, the Committee has stated that for a State party to ignore the views contained in the Concluding Observations would be to show bad faith in implementing Covenant-based obligations.[41]

DOMESTIC IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS

The *ICESCR* does not stipulate the specific means by which it is to be implemented and the precise method by which Covenant rights are to be given effect in national law is a matter for each State party to decide. However, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of the State party's obligations.[42] Social and economic rights impose three types of

[37] *Fact Sheet No. 16*, *supra*, note 1.

[38] *Ibid.* citing the ICESCR Committee's *Procedure re NGO Participation in the Activities of the Committee on Economic, Social and Cultural Rights*, 8th Sess., May 1993, E/1994/23, para. 354.

[39] *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, reprinted in (1998) 20 *Human Rights Quarterly*691 [hereinafter the *Maastricht Guidelines*].

[40] *Limburg Principles, supra*, note 30 at principle 72.

[41] *Fact Sheet No. 16*, *supra*, note 1.

[42] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant,* 3 December 1998, E/C.12/1998/24 at para. 5 [hereinafter *General Comment No. 9*].

obligations on States: (1) the obligation to respect; (2) the obligation to protect; and (3) the obligation to fulfill.[43]

(1) The obligation to respect

A government must not infringe, or interfere with, the enjoyment of economic, social and cultural rights. For example, the government cannot engage in forced evictions or confiscate land without appropriate compensation.

(2) The obligation to protect

A government must prevent third parties from infringing economic, social and cultural rights. Human rights legislation and human rights commissions have a critical role in fulfilling this obligation.[44] Human rights legislation is designed to prevent private actors and even the government from infringing certain rights and human rights commissions are charged with administering and enforcing the legislation.

(3) The obligation to fulfill

A government has a duty to take appropriate legislative, administrative, budgetary, judicial and other measures to fulfil the rights; *i.e.* the government must provide food, shelter, health, education or other necessities to individuals without the means to provide for themselves. Canada has responded to these obligations through a variety of social and public policy measures provincially and nationally. A discussion of the broad range of such programs is beyond the scope of this paper; however, examples include social assistance, public health care and public education.

However States parties choose to meet their obligations under the *ICESCR*, the *ICESCR* Committee has set out several principles which must be respected. Firstly, the means chosen must be adequate to ensure fulfillment of the obligations. The need to ensure justiciability is relevant in this regard. Secondly, the means which have been most effective in ensuring the protection of other human rights in the country must be considered.[45] Third, while the Covenant does not formally oblige States to incorporate its provisions into domestic law, this approach is desirable.[46] As the *Maastricht Guidelines* state:

[43] This approach to States' obligations was first defined by American scholar, Henry Shue; see *The Protection of Social and Economic Rights: A Comparative Study, supra,* note 21 at 10. It has been adopted by scholars in their writing on the realization of social and economic rights and followed by the United Nations in its work in relation to these rights; see for example A. Eide, "Realization of Social and Economic Rights and the Minimum Threshold Approach" (1989) 10 Human Rights L. J. 35 at 37 and also the *Maastricht Guidelines, supra,* note 39 at para. 6.

[44] Legislation with respect to the workplace, such as employment standards laws, occupational health and safety laws, labour relations laws and workers compensation laws, provide other examples of steps taken by governments to protect against infringement of rights by third parties.

[45] *General Comment No. 9, supra,* note 42 at para. 7.

[46] *Ibid*. at para. 8.

> The direct incorporation or application of international instruments recognizing economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.[47]

General Comment No. 9 notes that States have used a variety of approaches. Some have failed to do anything specific at all. Others have supplemented or amended existing legislation but without invoking the specific terms of the Covenant, or have adopted or incorporated it into domestic law so that its terms are retained intact and given formal validity in the national legal order.[48]

The Experience of Other Countries in Implementing Economic and Social Rights

In recent years, there has been a growing trend around the world toward improved enforcement and adjudication procedures for social and economic rights. For example, the 40-member Council of Europe has recently adopted a revised *European Social Charter* which came into force on July 1, 1999.[49] The revised *European Social Charter* provides protection for economic and social rights, for example, through the right to decent housing[50] and protection against poverty and social exclusion.[51] The rights are subject to a complaint procedure which allows employer organizations and NGOs to file complaints against governments which are then considered by a Committee of Independent Experts.[52] The history of social and economic rights under the earlier version of the *Social Charter* is not unlike that of Canada, namely they assumed the character of 'policy objectives' rather than fully justiciable, substantive rights. This is in stark contrast to the civil and political rights, which are outlined in the *European Convention on Human Rights*, whose protection is carried out in part by the European Court of Human Rights (the "ECHR").[53]

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[47] *Maastricht Guidelines, supra*, note 39 at para. 26.

[48] *General Comment No. 9, supra,* note 42 at para. 6.

[49] *European Social Charter (Revised)*, 3 May 1996, ETS No. 163 (entered into force 1 July 1999).

[50] *Ibid.* at Article 31. This provision obliges Parties to take measures in so far as possible aiming to progressively eliminate homelessness, to promote access to housing of an adequate standard and to make the price of housing accessible to those without adequate resources. Housing of an "adequate standard" means housing which is of an acceptable standard with regard to health requirements. It will be for the competent authorities of each State to decide, at national level, on appropriate housing standards.

[51] *Ibid* at Article 30. The term "poverty" in this context covers persons who find themselves in various situations ranging from severe poverty, which may have been perpetuated for several generations, to temporary situations entailing a risk of poverty. The term "social exclusion" refers to persons who find themselves in a position of extreme poverty through an accumulation of disadvantages, who suffer from degrading situations or events or from exclusion. Social exclusion also strikes, or risks striking, persons who without being poor are denied access to certain rights or services as a result of long periods of illness, the breakdown of their families, violence, release from prison or marginal behaviour, for example, as a result of alcoholism or drug addiction.

[52] *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, 9 November 1995, E.T.S. No. 158 (entered into force July 1, 1998).

[53] A. Eide, "Future Protection of Economic and Social Rights in Europe", in A. Bloed, L. Leicht, M. Nowak & A. Rosas, eds., *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Dordrecht: Martinus Nijhoff, 1993).

Traditionally, the enforcement of the *European Social Charter* has been through a reporting system, similar to that under the *ICESCR*. In 1995, an Additional Protocol was adopted which allows for a system of collective complaints to be brought to the Committee of Independent Experts by national and international labour and employer's organizations and NGOs. Nevertheless, there is significant concern that such a mechanism of enforcement is insufficiently robust to entail the full implementation of the *Social Charter*. Many commentators have argued for an individual petition system and a European Court of Social Rights, or a Social Rights Commission.[54]
Some writers have considered the possibility that the *Social Charter* may be given effect by courts, not by directly upholding the positive state obligations outlined in the *Social Charter*, but rather by employing it in the interpretation of other areas of European Community Law. Examples of such developments can be found in both the case law of the European Court of Justice (the "ECJ") and of the ECHR.[55] For instance, the ECHR found in the *Airey*[56] case that the provision of free legal aid is a necessary precondition for the efficient exercise of an individual's civil rights. In the *Feldbrugge*[57] case and the *Deumeland*[58] case, the ECHR suggested that decisions concerning social security benefits must satisfy the guarantees of a fair trial. This jurisprudence was affirmed in a more recent decision related to public assistance benefits.[59]

A similar approach can be seen in the case law of the ECJ. In the case of *Defrenne v. Sabena* [60] the ECJ explicitly referred to the *Social Charter* as an important source of the fundamental principles of European Community law to support its finding of sexual discrimination arising from the unequal retirement ages of women and men in the Belgian aviation industry. Accordingly, consistent with the interdependence of economic and social rights with civil and political rights, European courts have used the *Social Charter* when giving effect to civil rights under the *European Convention on Human Rights*.

It appears there is an increasing willingness by the European courts to uphold positive obligations of member states of the European Community. European developments appear to be moving in the direction of enforcing state action in the provision of entitlements, benefits or social services rather than in constraining state or private action which discriminates against people on the basis of poverty or social condition.

[54] For example, M. Gomez, "Social Economic Rights and Human Rights Commissions" (1995) 17 Human Rights Q. 155.
[55] One author notes that the ECHR has exerted a strong influence on the interpretation of human rights with decisions affirming that a number of positive obligations on the States stem from the *European Convention on Human Rights*, although the Convention does not contain any specific social rights; G.S. Katrougalos, "The Implementation of Social Rights in Europe" (1996) 2 Columbia Journal of European Law 277 at 303.
[56] *Airey v. Ireland*, European Court of Human Rights, Judgment of 9 October 1979, Series A, vol. 32.
[57] European Court of Human Rights, Judgment of 29 May 1986, Series A, vol. 99.
[58] European Court of Human Rights, Judgment of 29 May 1986, Series A, vol. 100.
[59] *Salesi v. Italy*, European Court of Human Rights, Judgment of 26 February 1993, Series A, vol. 257-E. For a discussion of these four ECHR cases, see Katrougalos, *supra*, note 55 at 303-4.
[60] European Court of Justice, Case 149/77 [1978] ECR 1365.

The Indian Supreme Court has tried to give some protection for aspects of social and economic rights by infusing these rights into protections for civil and political rights. The Indian Constitution makes civil and political rights expressly enforceable in the courts. Social and economic rights are set out in a section of the Constitution called "Directive Principles of State Policy" and are made expressly unenforceable in court. Nevertheless, the Indian Supreme Court has given indirect effect to the Directive Principles by interpreting civil and political rights, such as the right to life, to mean the right to an adequate quality of life, including adequate nutrition, clothing and shelter.[61] The approach adopted in South Africa[62] is worth examining as that country has recently had the opportunity to define a new approach to human rights. South Africa's final Constitution lists a broad range of social and economic rights such as access to adequate housing, health care services, including reproductive health care, sufficient food and water and social security, including appropriate social assistance. Some components of these rights are subject to limitations related to available resources, but all aspects are subject to judicial review. In come cases, it may also be possible to pursue social and economic rights claims against private entities. In a recent decision, the Constitutional Court confirmed that the Constitution obliges the state to act positively with respect to social and economic rights. These rights and the advancement of race and gender equality were found to be inter-related and mutually supporting. The decision confirmed that in appropriate circumstances, the courts can and must enforce social and economic rights. The Human Rights Commission appears to have played an important role in this case as *amicus curiae*.[63]

The South African Human Rights Commission has a broad mandate with special responsibilities with respect to social and economic rights. For example, each year it must require "relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."[64]

It is clear that the vast majority of countries already have domestic recognition of social and economic rights, either through the application of international treaties in domestic law or through constitutional or human rights provisions which refer to social and economic rights.[65] A 1991 Comparative Study prepared by the Constitutional Law and Policy Division of the Ontario Ministry of the Attorney General notes that over one-half

[61] This discussion of the experience in India is from the 1991 study, *The Protection of Social and Economic Rights: A Comparative Study*, *supra*, note 21 at 11. In one case a Bombay municipality tried to forcibly evict street dwellers from their shacks. The Court found this to be an infringement of the dwellers' right to life which could only be reasonably justified if it were required for the achievement of a necessary state objective. In this case, the Court found a reasonable justification but laid down stringent limitations on the State's ability to restrict access to housing and, perhaps, other social goods deemed necessary to life; *Olga Tellis v. Bombay Municipal Corporation* AIR (1987) LRC 351.

[62] The discussion of the South African experience is from Jackman & Porter, *supra*, note 28 at 65.

[63] *Government of RSA and others v. Grootboom and others*, (4 October 2000) Constitutional Court – CCT 11/00. The case involved the right of access to adequate housing.

[64] *Constitution of the Republic of South Africa 1996*, Act 108 of 1996 at section 184(3) as cited in Jackman & Porter, *Ibid.* at 65.

[65] *Ibid.* at 66.

of the constitutions of the countries of the world contain express provisions regarding social and economic rights or principles. For example, more than 55 constitutions refer to a right or state duty with respect to social assistance, over 30 constitutions refer to the right to a minimum standard of living, more than 30 constitutions enshrine a right or state duty with respect to housing and so forth.[66] Although these provisions are not always enforceable in the courts, their entrenchment serves as an expression of shared values and aspirations and as a guide for national policy-making.[67]

Canada's Approach to Implementation of Economic and Social Rights

In Canada, international instruments are not part of domestic law unless implemented by statute. Canada's treaty obligations can bind domestic courts if: (i) international law is specifically incorporated in domestic legislation or is incorporated by necessary implication, and (ii) where such legislation is itself enacted by the legislature with jurisdiction over the subject matter of the treaty.[68] As well, the Supreme Court of Canada has confirmed the interpretive value of international instruments, even where they have not been made part of domestic laws, particularly in the areas of *Charter* interpretation and the interpretation and application of administrative law.
In 1983, in his dissenting opinion in *Reference Re Public Service Employee Relations Act*, Chief Justice Dickson said the following about Canada's international obligations and constitutional interpretation under domestic law:

> …Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its border the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation.[69]

Shortly afterwards, writing for the majority of the court, Chief Justice Dickson reaffirmed this position in *Slaight Communications Inc. v. Davidson*[70]. He found that the *Charter* is to be interpreted in such a way as to give effect to a presumption that the *Charter* offers at least as much protection as rights Canada is bound to ensure under international human rights law. The right that was being in the decision was the right to work contained in Article 6 of the *ICESCR.*[71]

In the ten years since *Slaight Communications*, very few lower courts have considered international law in their decision-making process or applied the approach articulated in

[66] *The Protection of Social and Economic Rights: A Comparative Study, supra*, note 21 at 6-7.
[67] *Ibid.* at 17.
[68] M. Cohen & A. Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law* (Canadian Bar Review: 1983-6) 265 at 288.
[69] *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 349.
[70] [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*].
[71] The issue was whether a court could order an employer to give a positive reference letter to a former employee or whether such a remedy would infringe the employer's right to freedom of expression in a way that could not could be justified under s.1 of the *Charter.*

the case.[72] Recently, the Supreme Court of Canada had an opportunity to reiterate the *Slaight Communications* interpretive presumption and to elaborate on the position of international human rights instruments in domestic law. In *Baker v. Canada (Minister of Citizenship and Immigration)*[73], the Court considered the effect of Canada's ratification of the *Convention on the Rights of the Child* in the immigration context. Ms Baker had four Canadian-born dependent children and had been ordered deported. She applied for an exemption, based on humanitarian and compassionate grounds, from the requirement that an application for permanent residence be made from outside Canada. At issue was whether the best interests of the child, as defined in the *Convention on the Rights of the Child*, had to be taken into account when deciding whether to grant the exemption.

Writing for the majority, L'Heureux-Dubé J. noted that international treaties and conventions are not part of Canadian law unless they have been implemented by statute. As the *Convention on the Rights of the Child* has not been implemented by Parliament, its provisions have no direct application within Canadian law. However, an interpretation of domestic laws that reflects the values and principles contained in international law is to be preferred:

> …the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review…[International law] is also a critical influence on the interpretation of the scope of the rights included in the *Charter*…[74]

Accordingly, this more recent pronouncement from the Supreme Court of Canada confirms the importance of international instruments in the interpretation of domestic law. Some commentators argue that *Baker* affirms that the interpretation and application of administrative law, whether federal or provincial, must be consistent with international human rights treaties ratified by Canada and that this will have important implications for human rights legislation.[75]

The 'Problem' of Justiciability: Litigating Social and Economic Rights

An important aspect of domestic implementation and of each of the obligations to respect, protect and fulfill social and economic rights is the issue of whether these rights are justiciable. Justiciability refers to those matters which are appropriately resolved by the courts. *General Comment No. 9* addresses the issue of justiciability and the provision of legal remedies. *General Comment No. 9* rejects the commonly held belief that social and economic rights are unsuitable for judicial enforcement:

> In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not

[72] See Canada's International Human Rights Obligations, *supra* note 20.
[73] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [hereinafter *Baker*].
[74] *Ibid*. at para. 70.
[75] Jackman & Porter, *supra*, note 28 at 57.

> warranted either by the nature of the rights or by the relevant Covenant provisions… The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[76]

General Comment No. 9 asserts that states are to provide for legal remedies in two ways: through consistent interpretation of domestic law and through the adoption of legislative measures to provide legal remedies for violations of social and economic rights. Courts should take Covenant rights into account to ensure that the State's conduct is consistent with its obligations. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, to facilitate protection of economic and social rights.

The Supreme Court of Canada has refused to rule out an interpretation of section 7 of the *Charter* that would protect social and economic rights. In the case of *Irwin Toy Ltd. v. Quebec (Attorney General)*[77], the Supreme Court considered the scope of s. 7 of the *Charter*[78]. The Court left open the question of whether s. 7 rights can include rights to material assistance and support:

> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person"….leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with a economic component can fall within "security of the person".[79]

The Court stated that it would be "precipitous" to limit the scope of s. 7 to rule out "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter."[80]

The *ICESCR* Committee has interpreted this decision, along with the decision in *Slaight Communications*, as a statement by the Supreme Court that the *Charter* can be interpreted to protect an adequate standard of living and other *ICESCR* rights.[81] However, this is not entirely accurate as the Supreme Court has not yet positively affirmed this interpretation, it has simply refused to rule it out. This perception as to the significance of *Slaight Communications* and *Irwin Toy* probably arose from the Government of Canada's response to a question by the *ICESCR* Committee:

> The Supreme Court of Canada has stated that section 7 of the *Charter* may be interpreted to include the rights protected under the Covenant (…*Slaight*

[76] *General Comment No. 9, supra*, note 42 at para. 10.
[77] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].
[78] Section 7 guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
[79] *Irwin Toy, supra,* note 77 at 1003-1004.
[80] *Ibid*.
[81] *1998 Concluding Observations*, *supra*, note 7 at para. 15.

> *Communications*…). The Supreme Court has also held section 7 as guaranteeing that people are not to be deprived of basic necessities (…*Irwin Toy*…). The Government of Canada is bound by these interpretations of section 7 of the *Charter*.[82]

The Supreme Court's evolving approach to equality rights under s. 15 of the *Charter* also appears consistent with the protection of economic and social rights under both the *Charter* and human rights legislation. The Supreme Court has identified substantive equality as a fundamental societal value against which the objects of all legislation must be measured. It has affirmed that s. 15 of the *Charter*, which states that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, is the broadest of guarantees which applies to and supports all other rights.[83] Equality rights may create positive obligations to address needs related to disadvantage and the right to equality may be breached by an omission or failure to act to address the needs of disadvantaged or vulnerable groups. Such positive obligations are not new but are well established under human rights legislation.[84] As LaForest J. declared in *Eldridge*:

> …the respondents…maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action…[and] that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits. In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.[85]

In *Eldridge*, the ground of discrimination was disability. It is a significant case for its approach to substantive equality and its recognition that the purpose of s. 15(1) of the *Charter* is not just to prevent discrimination by the attribution of stereotypes, but also to ameliorate the position of groups that have suffered disadvantage by exclusion from mainstream society.

It can be argued that a constitutional commitment to the provision of basic needs is contained in s. 36(1) of the *Charter*:

> …the government of Canada and the provincial governments are committed to
>
> (a) promoting equal opportunity for the well-being of Canadians;
>
> (b) furthering economic development to reduce disparity in opportunities;
>
> (c) providing essential public service of reasonable quality to all Canadians.

[82] From Jackman & Porter, *supra,* note 28 at 57.
[83] *Ibid.* at 55.
[84] See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].
[85] *Ibid.* at 677-78.

It is unclear whether this section creates any legally enforceable obligations for federal or provincial governments.[86] Nevertheless, the section does represent an affirmation of Canadian governments' commitment to certain economic rights and may be used as an interpretative tool under the *Charter*.

Taken together, the Supreme Court's decision in *Irwin Toy*, its evolving equality rights analysis under s. 15 of the *Charter*, its emerging jurisprudence on the role of international instruments in interpreting the *Charter* and s. 36(1) of the *Charter* all appear to support the justiciability of social and economic rights under the *Charter*.[87] However, lower courts in Canada have consistently preferred narrow interpretations of *Charter* rights which put economic and social rights beyond their reach. Founded, in part, on concerns for parliamentary sovereignty and the various degrees of expertise of legislatures versus the courts, Canadian courts have declined to play a role in the justiciability of these rights. A discussion of the most significant cases follows.[88]

Social Assistance Cases

In *Masse v. Ontario (Ministry of Community and Social Services)*[89], an Ontario superior court considered a challenge to a 21 percent cut to provincial social assistance rates. The court accepted uncontroverted evidence that the cuts would have a significant adverse impact on vulnerable groups:

> … [the applicants] are single parents who fear losing their existing accommodation, and the deprivations associated with lower income such as less money for food, clothing and educational needs…This brief overview does not sufficiently capture the extent of the effects of the reductions on these applicants and their children. The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of social assistance and their dependents will suffer in some way from the reduction in assistance. Many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available…many may soon become homeless.[90]

Despite this, and the argument that the applicants' rights to security of the person and equality under the *Charter* should be interpreted in light of Canada's international human rights obligations, the Court rejected the claim and relied on the principle that social and economic rights are not justiciable. O'Brien J. commented that "much economic and social policy is simply beyond the institutional competence of the

[86] M. Certosimo, "Does Canada Need a Social Charter?" (1992) 15 Dalhousie L.J. 568 at 605-6.

[87] Several noted scholars have argued that the *Charter* may encompass at least some social rights claims. See for example: R. Howse, "Another Rights Revolution? The Charter and the Reform of Social Regulation in Canada" in P. Grady, R. Howse & J. Maxwell, *Redefining Social Security* (Kingston: School of Policy Studies, 1995) and M. Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65.

[88] The discussion of the cases is drawn mostly from the secondary sources cited in this paper.

[89] (1996), 134 D.L.R. (4th) 20 (Ont. Gen. Div.), leave to appeal to C.A. refused [1996] O. J. No. 1526, leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 373 [QL] [hereinafter *Masse*].

[90] *Ibid*. at 69.

courts"[91] and in a separate concurring judgment, O'Driscoll J. stated that the court has no jurisdiction "to second guess policy/political decisions".[92]

With respect to the equality analysis, the Court declined to find receipt of social assistance an analogous ground of discrimination under s. 15, citing the fact s. 15 requires a comparison of government treatment of classes of individuals based on personal characteristics. The court reasoned that recipients receive a government benefit not received by others, so there is no valid comparison. As well, the Court found that the group is not defined by any particular personal characteristic and that for receipt of social assistance to be an analogous ground, it must relate to personal characteristics.

In another Ontario case, *Mohamed v. Metropolitan Toronto (Department of Social Services)*[93], the social assistance scheme was found discriminatory on the basis of age as it did not provide for direct welfare payments or equivalent benefits for persons under 16. However, it was found to be a justifiable limit on the right under s.1 of the *Charter*. A different result was reached in *Silano v. British Columbia*[94], where social assistance regulations which provided $25 per month less to those under 26 were found to be discriminatory. As the distinction based on age was not reasonable or just, the age discrimination could not be saved under s. 1.

In Quebec, a woman challenged the reduction of the social assistance entitlement for single employable persons aged 18 to 30 to one-third of that of single persons over 30.[95] She argued that the payment of $170 per month was so low as to constitute a deprivation of life, liberty and security of the person. She testified that she was hungry, homeless for a time and eventually had to live in an intimate relationship, contrary to her wishes, in exchange for shelter and food. The Quebec Superior Court dismissed the claim, stating that s. 7 did not protect economic rights.

The Court justified its decision in several ways. The Court deferred to the intent of the framers of the *Charter* to exclude social and economic rights from the ambit of s. 7. The Court declined to interpret the *Charter* to include positive rights requiring deployment of public resources and noted that "The courts cannot substitute their judgment in social and economic matters for that of legislative bodies…".[96] Finally, taking the same "impoverished" approach which was rejected by the Supreme Court in *Eldridge*, the Court noted that poverty was not created by the state but by other conditions or circumstances, and it was the poverty that created the deprivation of life, liberty and security of the person. Hence, the ineffectiveness of government action to eliminate poverty was not itself the cause of the deprivation. The Quebec Court of Appeal recently upheld the view that social and economic rights are not justiciable under the

[91] *Ibid.* at 46.
[92] *Ibid.* at 46-47.
[93] (1996), 133 D.L.R. (4th) 108 (Ont. Div. Ct.).
[94] (1987), 42 D.L.R. (4th) 407 (B.C.S.C.).
[95] *Gosselin v. Québec (Procureur Général*, [1999] R.J.Q. 1033 (C.A.), [1992] R.J.Q. 1647 (Superior Ct.), leave to appeal to S.C.C. granted [1999] S.C.R. No. 364.
[96] *Ibid.* at 1670 (Superior Ct.) [translation].

Charter and that courts are not empowered to review the adequacy of provincial social security measures.[97] The Supreme Court of Canada has granted leave to appeal.

A Nova Scotia woman challenged a denial of interim social assistance to cover basic necessities of food and housing for herself and her child while an allegation that she had been living with a man was investigated. The Court of Appeal found that the *Charter* cannot provide protection for economic interests.[98] However, on a more positive note, a recent Ontario decision found a similar 'spouse-in-the-house' rule, which deemed cohabiting persons of the opposite-sex to be spouses whether or not a true spousal relationship existed, discriminatory on the basis of sex and the analogous ground of 'sole support mothers on social assistance'.[99]

In *Fernandes v. Director of Social Services (Winnipeg Central)*[100] the plaintiff, who required permanent use of a ventilator, challenged a decision by Manitoba welfare authorities to deny him additional assistance for in-home care. Fernandes argued that this forced him to live in a hospital which infringed his s. 7 rights. The Manitoba Court of Appeal dismissed the claim stating that "[t]he desire to live in a particular setting" and "rights to a particular style of living" were not protected by s. 7.[101] The s. 15 claim was also rejected on the basis that the plaintiff was being treated the same as all social assistance recipients as his basic needs were being met.

Charter arguments made on behalf of social assistance recipients were successful to defeat a motion to strike the plaintiffs' claim in *Federated Anti-Poverty Groups v. British Columbia (A.G.)*[102]. As a condition for children and spouses to receive welfare, the impugned legislative provisions transferred any maintenance rights they had to the Crown. The Court refused to find it "plain and obvious" that the plaintiffs' s. 7 rights were not being violated. With respect to s. 15, the Court stated: "[I]t is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s. 15." This case was a success for advocates of the justiciability of social and economic rights under the *Charter*, but only a limited one as the decision was not a final adjudication of the rights of the parties.

Health Care Cases

Sections 7 and 15 of the *Charter* have also been invoked, unsuccessfully, to challenge provincial health care funding decisions. In *Ontario Nursing Home Association v. Ontario*[103] the plaintiffs argued that the level of funding to nursing homes was

[97] *Ibid.* at 18 (C.A.) [translation].
[98] *Conrad v. Halifax (County)* (1994), 130 N.S.R. (2d) 305 (C.A.), affirming (1993), 124 N.S.R. (2d) 251, leave to appeal to S.C.C. denied [1994] S.C.C.A. No. 264.
[99] *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2000] O.J. No. 2433 (Div. Ct.) [QL]. The Ontario government is appealing the decision.
[100] (1992), 93 D.L.R. (4th) 402 (Man. C.A.), leave to appeal to the S.C.C. denied [1993] 2 S.C.R. vii [hereinafter *Fernandes*].
[101] *Ibid.* at 414.
[102] (1991), 70 B.C.L.R. (2d) 325 (B.C.S.C.).
[103] (1990), 72 D.L.R. (4th) 166 (Ont. H.C.J.) [hereinafter *Ontario Nursing Home Association*].

inadequate, violating the residents' s. 7 rights, and that s.15 rights were violated because of a different level of funding than that provided to homes for the aged. The Court noted that the plaintiffs had not argued that the standard of care that existed was unconstitutional or that the residents were not being adequately cared for. The Court held that s. 7 did not guarantee "additional benefits" which might enhance life, liberty or security of the person. The s. 15 claim failed as the funding distinction was based on the type of residence rather than an enumerated or analogous ground under s. 15.

In *Brown v. British Columbia Minister of Health*[104], a *Charter* challenge to the provincial government's decision not to fully subsidize the costs of an AIDS treatment was rejected. The plaintiffs argued that the failure to pay for the drug constituted a deprivation of life, liberty and security of the person. The Court again found that s.7 did not protect against economic deprivations or guarantee benefits which might *enhance* life, liberty or security of the person. Section 15(1) was not violated because the Pharmacare Plan applied to all residents of the province and everyone receiving similar drug treatment was required to contribute to the cost of needed drugs.

An Ontario court declined to find residency rules for OHIP eligibility discriminatory.[105] The applicants were not covered by OHIP as they either lacked the requisite immigration status or their medical claims arose within a three-month waiting period. Many of the applicants couldn't achieve the necessary immigration status because of a pre-existing disability. The applicants argued that the rules were discriminatory on the basis of immigration status and had a particularly negative impact on pregnant women, children and persons with disabilities. The decision at first instance was largely based on s. 6 of the *Charter* (mobility rights) with s. 15 receiving little attention. On appeal, the Court of Appeal focused more on the s. 15 arguments. However, the Court rejected the appellants' characterization of the distinctions being drawn in the impugned regulation, instead finding that the distinctions were based on factors that could not be considered analogous grounds. While the court agreed that but for their disabilities, three of the appellants would have been granted landed immigrant status and would have been eligible for OHIP, it noted that the federal immigration authorities had decided that their physical disabilities rendered them ineligible. The Court did not consider that the provincial government knew that by relying on immigration status, it would be excluding persons who could not achieve landed immigrant status due to disability.

In contrast to the approach in these decisions, in the *Eldridge* case, the Supreme Court of Canada held that, under s. 15(1) of the *Charter*, governments have an obligation to take special measures to ensure that members of disadvantaged groups benefit equally from services offered to the general public. Policy reasons for limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services should only be considered in determining whether a violation of s. 15(1) is saved by s. 1 of the *Charter*. The failure of the British Columbia Medical Services Commission and hospitals to provide sign language interpretation, where necessary for

[104] (1990), 66 D.L.R. (4th) 444 (B.C.S.C.) [hereinafter *Brown*].

[105] In *Irshad (Litigation guardian of) v. Ontario (Minister of Health)* (1999), 60 C.R.R. (2d) 231 (Ont. Gen. Div.); aff'd 197 D.L.R. (4th) 103 (Ont. C.A.).

effective communication, was found to be a *prima facie* violation of the s. 15(1) rights of deaf persons that was not saved by s. 1 of the *Charter*.

Housing Cases

In a landmark equality rights case, the Nova Scotia Court of Appeal found that public housing tenants constitute a protected class analogous to those enumerated in s. 15 of the *Charter.* In *Dartmouth/Halifax County Regional Housing Authority v. Sparks*[106], the Court struck down two sections of the *Residential Tenancies Act*, which treated public housing tenants differently from other tenants, as being unjustifiable infringements of s. 15 of the *Charter*. The Court found that the plaintiff, a black sole support mother, had been placed at a disadvantage due to this differential treatment. The Court identified poverty as a characteristic shared by all residents of public housing and noted that single mothers "are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in *Andrews*."[107] The Court recognized that discrimination is the combined effect of multiple factors, including poverty:

> As a general proposition, persons who qualify for public housing are the economically disadvantaged and are so disadvantaged because of their age and correspondingly low incomes (seniors) or families with low incomes, a majority of whom are disadvantaged because they are single female parents on social assistance, many of whom are black. The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1).[108]

It is important to note that the plaintiff had produced empirical evidence as to the typical characteristics of public housing tenants, including sex and racial composition. The Court concluded that the s. 15 violation was not justified under s. 1 of the *Charter* as the policy objective could have been achieved with a lesser impairment of rights.

The *Sparks* Court used a flexible and broad approach to the claim and recognized discrimination based not only on poverty but also on grounds closely related to poverty. The Court considered the disadvantaging effect of the provision on members of enumerated or analogous groups under s. 15.[109] A similar approach was used in *Kearney v. Bramalea Ltd. (No. 2)*, [110] a Board of Inquiry decision under the Ontario *Human Rights Code* (see the section on the role of human rights commissions).

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[106] (1993) 101 D.L.R. (4th) 224 (N.S.C.A.) [hereinafter *Sparks*].

[107] *Ibid*. at 233-234.

[108] *Ibid.* at 234.

[109] Although *Sparks* represents a successful challenge to discrimination against subsidized housing tenants, several other challenges by subsidized tenants to distinctions in provincial residential tenancy laws have been unsuccessful; see for example: *Newfoundland and Labrador Housing Corporation v. Williams* (1987), 62 Nfld. & P.E.I.R. 269 (Nfld. C.A.), *Bernard v. Dartmouth Housing Authority* (1988), 53 D.L.R. (4th) 81 (N.S. Sup. Ct. – App. Div.). Unlike *Sparks*, these cases were decided before *Irwin Toy* and the Supreme Court's equality rights decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 43.

[110] *Infra,* note 134.

In another case related to housing, an Ontario Court rejected a claim that charging security deposits for utilities to tenants with unsatisfactory payment histories infringed *Charter* rights.[111] The applicants relied, in part, on the right to adequate housing under the *ICESCR*. The Court held that s. 7 did not guarantee housing and utilities as part of a right to life or security of the person, and that these types of matters must be dealt with by the legislature and not the courts. With respect to s. 15, the Court found that there was insufficient evidence that the policy disproportionately affected anyone because they were single mothers, received social assistance or were poor, unlike the situation in *Sparks* where public tenancy was shown to be closely related to race, sex, age and poverty. The appeal of the decision was decided on the basis of mootness and so the Court of Appeal did not consider the matter on its merits.

Employment Cases

The Ontario Court of Appeal recently considered the repeal of Ontario's *Employment Equity Act*[112], a statute that targeted systemic discrimination against Aboriginal persons, persons with disabilities, members of racial minorities and women. The Court stated that if s. 15 of the *Charter* imposes a positive duty on legislatures to enact legislation to combat systemic discrimination in employment, the Ontario *Human Rights Code* satisfies that duty. In light of this conclusion, the Court found it unnecessary to determine whether s. 15 imposes this obligation. Nevertheless, after noting that the Supreme Court has left open the possibility, in some cases, that s. 15(1) may oblige the state to take positive actions to ameliorate the symptoms of systemic or general inequality, the court commented that it would seem that no such obligation is imposed in the case of legislation to combat systemic discrimination in employment. The Court noted that courts are not competent to determine the nature or scope of positive obligations: "Legislatures require substantial freedom in designing the substantive content, procedural mechanisms, and enforcement remedies in legislation of this kind. They are the appropriate branch of government to make these decisions, not courts…".[113] This decision has been interpreted to stand for the proposition that "if there is no constitutional imperative for a policy in the first place, reversing it cannot be unconstitutional".[114]

Courts have consistently found that occupational status is not an analogous ground for the purposes of s. 15.[115] In a recent decision, confirmed on appeal, an Ontario court

[111] *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen. Div.), appeal quashed (1998), 40 O.R. (3d) 409 (C.A.).

[112] *Ferrel v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied [1999] S.C.C.A. No. 79.

[113] *Ibid.* at 113.

[114] *Russell v. Ontario (Health Services Restructuring Commission)* (1999), 175 D.L.R. (4th) 185 at para. 23 (C.A.), leave to appeal to S.C.C. denied [1999] S.C.C.A. No. 395.

[115] There are many examples of this; see for example *George v. M.N.R.* (1990), 116 N.R. 185 (F.C.A.). The plaintiff, who had worked enough weeks to be eligible for unemployment insurance but in three different jobs, was unsuccessful in challenging the exclusion of casual employment from the UI

found that the classification "agricultural workers" is not an analogous ground and that many causes of economic disadvantage do not attract the scrutiny of s. 15. The Supreme Court has granted leave to appeal.[116]

In *Fenton v. British Columbia (Forensic Psychiatric Services Commission)*[117] a patient in a psychiatric institution challenged a provincial employment standards regulation which exempted employers from paying minimum wage to disabled employees who were receiving occupational rehabilitation, education or therapy. The B.C. Superior Court found a s. 15 violation. However, the Court of Appeal reversed the decision, without considering the constitutional issue, on the basis that patients were not employees under the legislation.

Other Cases

In several taxation cases, courts have declined to make findings that would promote the economic and social rights of female taxpayers. In *Symes v. Canada*[118], the Supreme Court held that s. 15 of the *Charter* was not violated by the exclusion of childcare expenses from business deductions. The exclusion was not found to be adverse effect discrimination against women because, although it was clear that women's share of the childcare burden in society was disproportionate, the plaintiff had not shown that women bore a disproportionate share of childcare expenses. In *Thibaudeau v. Canada*[119], the Supreme Court held that provisions of the *Income Tax Act* requiring persons receiving child support payments to include them in their income for tax purposes, and permitting those making the payments to deduct them from income, did not contravene s. 15 of the *Charter*. The Court found that the provisions are designed to minimize tax consequences of child support payments and to promote the best interests of the child (by ensuring that more money is available for the child). In the *Schaff*[120] case, the Tax Court of Canada found that taxation of a poor single mother's maintenance payments from her estranged husband did not constitute a violation of s. 7. As in the *Ontario Nursing Home Association, Brown* and *Fernandes* cases, the Court preferred to characterize the claim as a complaint about quality of life and not about the necessaries of life in the sense of food, clothing and shelter.

There have been several cases related to the now repealed *Canada Assistance Plan*, a legislative scheme which established minimum benefits for social assistance programs.

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scheme. The Court held that the *Unemployment Insurance Act* created a distinction between classes of employment and not between classes of people so there was no s. 15 infringement.

[116] *Dunmore v. Ontario (Attorney General)* (1999), 37 O.R. (3d) 287 (Gen. Div.); (1999), 49 C.C.E.L. (2d) 29 (C.A.); leave to appeal to S.C.C. granted [1999] S.C.C.A. No. 196. The case also involves a claim under s. 2(d) of the *Charter*, the right to freedom of association.

[117] (1991), 82 D.L.R. (4th) 27 (B.C.C.A.), reversing (1989), 29 C.C.E.L. 168 (B.C.S.C.); leave to appeal to S.C.C. refused [1992] 1 S.C.R. vii.

[118] [1993] 4 S.C.R. 695 [hereinafter *Symes*].

[119] [1995] 2 S.C.R. 627.

[120] *Schaff v. Canada*, [1993] 2 C.T.C. 2695 (T.C.C.) [hereinafter *Schaff*].

Once again, the courts have been deferential to government decisions. In *Reference re: Canada Assistance Plan*[121], the Supreme Court ruled that the federal government's unilateral decision to reduce its contribution to the Plan was not reviewable by the courts. In *Canada (Minister of Finance) v. Finlay*[122] the Supreme Court considered a claim that deductions from the plaintiff's social assistance payments to recover overpayments previously made by the province resulted in his basic needs not being met, contrary to the *Canada Assistance Plan*. The Court held that the Manitoba government had fulfilled the requirement that it "take into account the basic requirements" of Mr. Finlay in determining the amounts of the deductions.

Analysis

With respect to claims that government action (or inaction) has resulted in a violation of a s. 7 right to life, liberty or security of the person, the tendency of courts has been to conceptualize the claim as being for the "enhancement" of benefits, and therefore related to purely economic interests. Most lower courts have tended to accept the notion that, as a general rule, s. 7 does not encompass positive "economic" rights, and that social policy is not an appropriate domain for judicial application of the *Charter*. Other courts have erroneously reasoned that the underlying threat to life or security of the person is a result of some underlying condition of the person (*e.g.* poverty, disability) that is not causally related to the state action complained of. Section 15 claims tend to fail because of a finding that the group to which the applicant belongs is not an analogous one or because, as in *Masse*, the applicant is receiving a benefit which others do not receive.

Where governments dispense social programs or benefits to remedy disadvantage, the trend is for the courts to refuse to intervene on behalf of the beneficiaries. Courts will grant governments a wide berth when setting up programs to address complex problems in the face of fiscal constraints. Judges are concerned with the role of courts in considering social welfare programs and are reluctant to usurp what they see as the role of the elected legislatures.[123]

On the other hand, cases like *Sparks* recognize the interdependence between social and economic rights and the substantive right to equality. There is often a relationship between the vulnerable groups who already receive protection under s. 15 of the *Charter* and human rights legislation and socio-economic disadvantage. Fundamentally, the concepts of liberty and freedom - positive rights which **are** universally considered to be justiciable and which are at the centre of the *Charter* - must include economic equality. As one author writes:

[121] (1991), 2 S.C.R. 525.

[122] [1993] 1 S.C.R. 1080. Before this case was considered on the merits, it went all the way up to the Supreme Court on the issue of whether a provincial resident on social assistance had standing to bring the action. The federal government argued that individuals do not have standing to challenge financial arrangements between the federal and provincial governments. The Supreme Court found that Mr. Finlay did have standing.

[123] Poor Rights: Using the Charter to Support Social Welfare Claims, *supra*, note 87 at 86-87.

> An economic order which denies such goods as [food, housing, the opportunity to work] to some persons, or which systematically distributes them in grossly unequal measure, is as inimical to the equal claim of every person to self-respect as is a political order which represses liberty unduly or distributes it in systematically unequal shares.[124]

Furthermore, these decisions are more consistent with the Supreme Court's evolving approach to equality analysis and to the role of international law. In fact, as L'Heureux-Dubé J. pointed out in *R. v. Ewanchuk*, sections 7 and 15 of the *Charter* will be especially important in giving domestic effect to international human rights obligations[125]: "In particular, s. 15…and s. 7…embody the notion of respect of human dignity and integrity."[126]

The non-justiciability of social and economic rights has been the trend in Canadian jurisprudence. However, it seems clear that this approach, which has been described by the *ICESCR* Committee in *General Comment No. 9* as relying on an outdated and artificial distinction between positive and negative rights, is not mandated by the Supreme Court or by the *Charter*. In fact, the more appropriate approach is to permit judicial consideration of these rights. The U.N. has identified the failure of Canadian courts to provide remedies for violations of social and economic rights as a significant concern. Domestically, some commentators have noted that the debate about the justiciability of social and economic rights is not simply academic. It is an issue with real consequences for vulnerable groups.[127]

The Role of Human Rights Commissions and Human Rights Legislation

The judicial reluctance to adjudicate social and economic rights has, in part, led to an increased focus on the role of human rights commissions and human rights legislation in protecting these rights. The *ICESCR* Committee has made specific reference to the role of human rights institutions in State party efforts to achieve the realization of social and economic rights. The Committee notes that, while national human rights institutions "have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights", this role has too often been neglected.

In *General Comment No. 10*[128] the *ICESCR* Committee recommends a number of actions that human rights institutions may undertake:

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[124] N. MacCormick, *Legal Rights & Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982) at 43, as quoted in Does Canada Need a Social Charter?, *supra*, note 86 at 613.

[125] Jackman & Porter, *supra*, note 28 at 58.

[126] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 365.

[127] Jackman & Porter, *supra,* note 28 at 63.

[128] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, 3 December 1998, E/C.12/1998/25 [hereinafter *General Comment No. 10*].

- Promotion of educational and information programs to enhance awareness and understanding of economic, social and cultural rights within the public at large, the public service, the judiciary, the private sector and the labour movement;

- Review of existing laws and administrative acts, draft bills and other proposals to ensure they are consistent with commitments under the Covenant;

- Provision of technical advice and undertaking of surveys in relation to the rights;

- Identification of national level benchmarks against which the realization of *ICESCR* obligations can be measured;

- Conducting research and inquiries designed to ascertain the extent to which particular rights are being realized, either within the state or with respect to vulnerable communities;

- Monitoring compliance with specific rights under the Covenant and providing reports; and

- Examining complaints alleging infringements.

In addition to this general guidance, the *ICESCR* Committee has offered specific suggestions with respect to human rights institutions in Canada. The *1998 Concluding Observations* state:

> The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status. Moreover, enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups.[129]

Under the Ontario *Human Rights Code* (the "*Code*"), the Ontario Human Rights Commission has a mandate for the investigation and enforcement of discrimination and harassment complaints. The *Code* applies to private actors as well as to government, including government actions, policies, programs and legislation. Under the rubric of enforcement, the *Code* addresses social and economic rights in several ways. Section 2(1) of the *Code* provides for equal treatment with respect to the occupancy of accommodation, without discrimination because of receipt of public assistance.[130] This

[129] *1998 Concluding Observations*, *supra*, note 7 at para. 51.

[130] It is important to note that since human rights commissions are creatures of statute, they are limited by their statutory framework and cannot recognize new grounds of discrimination unless their enabling legislation allows them to do so. Even if the omission of a ground of discrimination is unconstitutional, human rights commissions cannot read the ground in as they are prohibited from considering the constitutionality of their enabling legislation; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

provision includes not only the right to enter into an agreement and occupy a residential dwelling, but also the right to be free from discrimination in all matters relating to the accommodation. The protection includes adverse impact on the basis of receipt of public assistance as a result of a neutral rule (s. 11). The *Code* also protects against harassment in accommodation based on receipt of public assistance.

In the area of accommodation, receipt of public assistance has consistently been the second most cited ground in complaints to the Commission over the past ten years. Most of the complaints deal with either outright denial of accommodation or adverse impact/constructive discrimination. Some examples of Ontario Board of Inquiry decisions where discrimination was found include a 1987 case in which the Board found that when the complainant took occupancy and offered to pay the second month's rent, she was told by the owner that he did not want to rent to her because she was on welfare[131] and a more recent decision involving a single mother on welfare who was denied an apartment[132].

Socio-economic status may also be a factor in complaints of discrimination in accommodation based on other *Code* grounds. For example, denial of a one-bedroom apartment to a single working mother with several children - who may not be able to afford a larger apartment - may be discrimination on the basis of family status. Although the ground for the complaint would be family status (receipt of pubic assistance is not applicable as the woman is working), it is the woman's socio-economic status that forces her to rent a one-bedroom apartment. A British Columbia case provides another example of making a link between socio-economic status and a prohibited ground of discrimination. In *Trudeau v. Chung,*[133] the complainant was on long-term disability pension owing to his disability. He was refused an apartment on the basis that he was unemployed and on sick leave. The status of being unemployed or on sick leave was not a prohibited ground of discrimination yet the Council found that the policy of refusing unemployed tenants had an adverse impact on the complainant due to his disability.

An important example of the protection of social and economic rights in the human rights context is the decision of an Ontario Board of Inquiry in *Kearney v. Bramalea Ltd. (No. 2)*.[134] The case involved the use by several landlords of minimum income criteria or rent-to-income ratios when assessing applications for tenancy. Statistical evidence showed that the landlords' use of such criteria had a disparate impact on individuals based on their sex, race, marital status, family status, citizenship, place of origin, age and the receipt of public assistance. The landlords could not establish a defence as they could not demonstrate that the use of the criteria was reasonable and *bona fide* or that stopping the use of the criteria would cause undue hardship.

[131] *Willis v. David Anthony Philips Properties* (1987), 8 C.H.R.R. D/3847 (Ont. Bd. Inq.).
[132] *Kostanowicz v. Zarubin* (March 7, 1994), #593 (Ont. Bd. Inq.) [unreported].
[133] (1991), 16 C.H.R.R. D/25 (B.C. Human Rights Council).
[134] (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.); aff'd *Shelter Corp. v. Ontario (Human Rights Comm.)* (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.) [hereinafter *Kearney*].

The approach used in *Kearney* recognized the intersection between socio-economic status and grounds that are protected in the *Code*. The case sets a very important precedent for adjudicating social and economic rights before Boards of Inquiry where evidence exists that discrimination based on socio-economic status disproportionately affects groups that have been traditionally protected under human rights legislation.[135] The case has already been cited in several other decisions involving denial of rental accommodation[136] and has been referred to extensively in papers and articles as an example of a crucial victory for the poor[137].

After the case was heard by the Board of Inquiry and before the decision was rendered, the Ontario government passed legislation amending the *Code* to expressly permit the use of income information, credit checks, credit references, rental history, guarantees or other similar business practices in selecting tenants.[138] O. Reg 290/98 under the *Code*, made on May 13, 1998, permits landlords to request and consider income information from a prospective tenant if credit references, credit checks and rental history information are also requested and considered in the screening process.

In *Vander Shaaf,* an Ontario Board of Inquiry found discrimination on the basis of marital status, as two single women were not permitted to combine their incomes for the purposes of a rent-to-income ratio. However, the Board declined to find that the complainant, a 23 year-old single woman earning $30,000, experienced discrimination by virtue of her age or sex. In this case, there was no evidence adduced regarding the impact of rent-to-income ratios for the 20-24 age group and, although the rent-to-income ratio affected the complainant negatively as a woman, had the rent-to-income ratio been correctly applied, by combining the incomes of the complainant and her prospective room-mate, she would have qualified. The Board went on to comment on the impact of the post-*Kearney* amendments to the *Code* and O. Reg. 290/98. While recognizing that this part of the decision is *obiter dicta*[139], the Board concluded that the *Code* and regulation do not permit landlords to use income information to apply rent-to-income ratios. However, the decision of the Divisional Court in *Kearney* would appear to suggest that rent-to-income ratios may be applied if used in accordance with the provisions of O. Reg. 290/98.

[135] It is not clear what type of evidence is required to make the connection to a prohibited ground of discrimination. However, in both *Sparks* and *Kearney* statistical evidence was presented and some cases have failed in the absence of empirical evidence (for example, *Symes* and *Vander Schaaf*).

[136] See *Vander Schaaf v. M & R Property Management Ltd.* (2000), 38 C.H.R.R. D/251 (Ont. Bd. Inq.) [hereinafter *Vander Schaaf*] and *Birchall v. Guardian Properties Ltd.* (2000), 38 C.H.R.R. D/83 (B.C.H.R.T.).

[137] Recognition for the case is not just limited to Canadian publications; see for example, Jackman & Porter*, supra* note 28. The case has caught the attention of international experts; see for example, International Human Rights Internship Program and Asian Forum for Human Rights and Development, *Circle of Rights, Economic, Social & Cultural Rights Activism: A Training Resource* (International Human Rights Internship Program, 2000) at 169.

[138] *Tenant Protection Act*, S.O. 1997, c. 24 amending sections 21 and 48 of the *Code*.

[139] As the Board concluded that the use of rent-to-income ratios was not causally connected to the complainant's failure to get the apartment (if the ratio had been applied properly, combining the two incomes, she would have qualified), the analysis of whether the legislative amendments allow income information to be used in rent-to-income ratios was not determinative in the case and, therefore, *obiter.*

Other *Code* protections for social and economic rights include:

- Protection of workers who have made a workers compensation claim because of a work-related injury from discrimination on the basis of handicap;
- Requiring accommodation, up to the point of undue hardship, for various people identified by a ground in the *Code*, for example persons with disabilities, in relation to services, facilities, accommodation, contracts, employment and membership in vocational associations; and
- Allowing special programs designed to relieve hardship, economic disadvantage, or to assist disadvantaged persons or groups to achieve equality of opportunity.

This final point is an important one in relation to the promotion of socio-economic rights under the *Code*. Section 14 of the *Code* permits employers, landlords, service-providers and others to adopt special measures to help people who experience discrimination, economic hardship and disadvantage. A special program is a program that is (1) designed to relieve hardship or economic disadvantage; (2) designed to assist disadvantaged persons or groups to achieve equal opportunity; or (3) likely to contribute to the elimination of the infringement of rights protected under the *Code*. In order to assist those who are contemplating adopting special programs and to encourage the voluntary use of special programs, the Commission has developed *Guidelines on Special Programs*.[140] Examples of special programs include job programs to combat youth unemployment, organizations that only provide services to persons with disabilities to help them fight systemic barriers and housing co-ops that reserve spaces for women who are leaving abusive relationships.

The *ICESCR* requires that States parties ensure that Covenant rights will be exercised without discrimination. The Ontario *Code* protects against discrimination on a number of grounds and thus can be used to ensure that social and economic rights will be provided equally to everyone.[141] This helps to fulfill one of the obligations under the *ICESCR*. The areas protected by the *Code* also encompass social and economic interests. For example, employment, housing, services (such as health care, social programs and public transportation) and membership in unions and vocational associations are all areas in which economic interests are engaged. Moreover, the Saskatchewan Court of Appeal has held that social assistance is a service to the public

[140] Ontario Human Rights Commission, *Guidelines on Special Programs* (1997), published in *Human Rights Policy in Ontario* (Toronto: CCH Canadian Limited, 2001).

[141] By way of example, if an employer paid female employees less than their male counterparts because of a perception that women are supported by male family members, this economic interest would be covered under the *Code* as discrimination on the basis of sex. This example of the way in which the *Code* may protect enjoyment of an economic right is not farfetched. In 1984, two Dutch women challenged the denial of unemployment insurance on the basis of a presumption that married women would be maintained by their husbands. The *ICCPR* Human Rights Committee "expanded the protection of the non-discrimination provision in article 26 of the *ICCPR* to cover discrimination in the enjoyment of economic and social rights"; from Jackman & Porter, *supra,* note 28 at 89 citing Communications 182/1984 (*Zwaan-de Vries*) and 172/1984 (*Broeks*), Selected Decisions of the Human Rights Committee under the Optional Protocol, vol 2. (1990) at 209 and 196, respectively.

and is within the ambit of the Saskatchewan *Human Rights Code*.[142] This case provides a precedent for the challenge of discrimination, on the basis of a prohibited ground, in the provision of public assistance. Social assistance is one of the key rights recognized in the *ICESCR.*

In addition to enforcement, the *Code* grants the Commission a broader mandate to advocate for and promote human rights through policy and education. The Preamble of the *Code* and its quasi-constitutional status sets the tone for the Commission's work in this area. Section 29 enumerates some of the specific aspects of the Commission's mandate. It states that it is the function of the Commission to, among other things, forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination. It is also the function of the Commission to conduct public education, undertake research, examine statutes, regulations, programs and policies and make recommendations on any provision that is inconsistent with the intent of the *Code*. This aspect of the Commission's mandate provides opportunities to provide leadership in policy development and to act as an agent of positive change. It also allows integration of international principles of human rights law into the Commission's daily work.

The Commission has engaged in several policy initiatives that deal directly or indirectly with the rights of persons who are socially and economically disadvantaged. With respect to the *Tenant Protection Act*, the Commission wrote to the Minister of Housing and Municipal Affairs and Ontario party leaders and also appeared at a legislative hearing to express concerns about the draft legislation which would permit landlords to screen potential tenants based on income information. The Commission cautioned that such a provision would have the effect of allowing discrimination against people on public assistance and people identified by other grounds, thus contravening the *Code*. Similarly, on the issue of drug testing for welfare recipients, the Commission has written to and met with the Minister of Community and Social Services to express concern about the possible contravention of the *Code*. The Chief Commissioner has publicly gone on record with concerns about the proposal.

The Commission has also been actively involved in pursuing social and economic rights for individuals in same-sex relationships. Until very recently, same-sex couples in Ontario had not been accorded the same social and economic rights as opposite-sex couples. The list of rights that had been denied is lengthy, but included workplace pension and survivor benefits, the right to monetary support in case of breakdown of the relationship and the right to qualify as a beneficiary under workplace safety and insurance legislation to name just a few. The Commission's efforts in this regard included intervening in the case of *M. v. H.*[143] before the Supreme Court of Canada, challenging laws which contained an opposite-sex definition of spouse at Boards of Inquiry and writing numerous letters to Ontario's Attorney General urging that the laws

[142] *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)* (1988), 9 C.H.R.R. D/5181 (Sask. C.A.).

[143] [1999] 2 S.C.R. 3.

be changed. Effective March 1, 2000, 67 Ontario statutes have been amended to accord same-sex partners the same rights and responsibilities as opposite-sex couples.

The Commission has conducted an analysis of the accessibility of Ontario's mass transit systems and has taken a policy position that transit services for the disabled are not special programs but rather are an accommodation which allows persons with disabilities to access transportation services.[144] This has the effect of ensuring that the services are provided in accordance with the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*[145], are subject to the undue hardship standard, and are not insulated from careful scrutiny on the basis of being a special program that transit providers are opting, but are not required, to provide. The Commission's new *Policy and Guidelines* maintain the high standard for undue hardship and affirm the need to adapt society so that its structures and attitudes include persons with disabilities. The revised *Policy and Guidelines* recognize the historical disadvantage experienced by persons with disabilities, including exclusion from employment and access to social goods related to an adequate standard of living, and seek to maximize the principles of integration and full participation in society. This is significant as it is only through meaningful equal opportunity and access that the social and economic disadvantages faced by persons with disabilities can begin to be addressed.

The Commission's recent initiative with respect to age discrimination faced by older persons in Ontario includes a consideration of socio-economic issues, *e.g.* poverty experienced by single elderly women, and refers to *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*[146] under the *ICESCR*. The Commission has stated that policy development in relation to age will take into account international work in this area.[147]

Through the efforts of the Commission before Boards of Inquiry and in policy development, the *Code* has been afforded a broad, liberal and purposive interpretation in order to provide protection in cases where the law was unclear. These efforts provided an impetus for policy changes in Ontario and ultimately for legislative change in some cases.

Beginning in 1996, the Commission began a comprehensive review of its entire policy framework in order to ensure that staff and the general public have up-to-date

[144] Ontario Human Rights Commission, *Discussion Paper on Accessible Transit Services in Ontario* (16 January 2001), online: Ontario Human Rights Commission homepage <http://www.ohrc.on.ca> (date last accessed: 15 October 2001).

[145] Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (2001) published in *Human Rights Policy in Ontario*, *supra* note 140 [hereinafter *Policy and Guidelines*].

[146] United Nations Committee on Economic, Social and Cultural Rights, E/C.12/1995/16/Rev.1 (1995).

[147] See Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (Discussion Paper, 31 May 2000) and Ontario Human Rights Commission, *Time for Action: Advancing Human Rights of Older Ontarians* (Consultation Report, 28 June 2001) online: Ontario Human Rights Commission homepage <http://www.ohrc.on.ca> (date last accessed: 15 October 2001).

information about the *Code* and the Commission's policy decisions. Much of the new policy work has been informed by international standards. For example, the Commission's policy on *Female Genital Mutilation*[148] was introduced to respond to specific provisions under the *Convention on the Rights of the Child* that prohibit traditional practices that are harmful to girl children. International standards have been incorporated directly into Commission policies that deal with rights that are explicitly protected under the *Code*. For example, the *Convention on the Elimination of All Forms of Discrimination Against Women* sets out equality rights of pregnant and lactating women, as well as related rights in the post-natal period. This standard is now being used in the Commission's *Policy on Discrimination Because of Pregnancy*.[149]

The forgoing discussion represents some examples of policy and litigation successes. However, one of the goals of this paper is to explore how more can be done, especially within existing mandates.

Other Provinces

Like Ontario, Saskatchewan also protects against discrimination on the basis of "receipt of social assistance"; however, the areas covered are broader and include contracts, education, employment, housing, professional trades and associations, public services (restaurants, stores, hotels, government services, *etc.*), publications, purchase of property, occupations and trade unions. The other provinces use different variations on this ground. For example, Manitoba, Alberta, Nova Scotia and the Yukon prohibit discrimination based on "source of income". A 1994 amendment to British Columbia's *Residential Tenancy Act* effectively adds protection against discrimination based on source of income in the provision of tenancy. "Source of income" typically includes all lawful sources of income, such as employment earnings, social assistance (welfare), pensions, spousal support, child support, employment insurance, student loans, grants and scholarships, and is broader than "receipt of public assistance", which does not protect the working poor or those who may be discriminated against because of another source of income such as spousal support or receipt of pension benefits.

In Newfoundland, the human rights statute incorporates the term "national or social origin" as a protected ground. Social origin differs from "social condition" in that it relates more to a person's birth status than his or her current situation.

It is only in Quebec, within the Quebec *Charter of human rights and freedoms* (the "Quebec *Charter*"), that one finds specific provisions protecting people on the basis of "social condition". The Quebec *Charter* describes the right to equal recognition and exercise of rights as follows:

> 10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour,

[148] Ontario Human Rights Commission, *Policy on Female Genital Mutilation (FGM)* (1996, revised 2000), published in *Human Rights Policy in Ontario*, *supra* note 140.

[149] Ontario Human Rights Commission, *Policy on Discrimination Because of Pregnancy* (1996, revised 1999) published in *Human Rights Policy in Ontario, supra* note 140.

> sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Chapter IV of the Quebec *Charter* integrates the social and economic rights that address issues of social condition within the Quebec context. The key rights guaranteed include:

- The rights of the child to protection, security and attention provided by a parent or guardian (para. 39);
- The right to free public education (para. 40);
- The right of a parent to request religious or moral education in conformity with his or her convictions in the context of public education establishments (para. 41);
- The right of every person and their family to financial and social measures that will ensure an adequate standard of living (para. 45);
- The right to fair and reasonable conditions of employment (para. 46);
- The right to protection against exploitation, and the right to protection and security for older persons and persons with disabilities (para. 48).

A review of the Quebec cases on social condition reveals that the majority of successful complaints on this ground relate to rental accommodation. As well, the majority of successful claimants have been persons on social assistance (most cases have involved women with children).[150] In a recent decision, discrimination on the basis of social condition was found to include refusing to rent to a casual worker based on negative stereotypes.[151]

There have also been some Quebec cases alleging discrimination in employment. In *Lambert v. Québec (Ministère du tourisme) (No. 3),*[152] a Quebec tribunal found a legislatively sanctioned workfare agreement, where the complainant received only his social assistance cheque despite working full-time at the Department of Tourism's photo library, discriminated on the basis of social condition. The decision is currently under appeal.[153]

With respect to services, a Quebec Tribunal found a refusal by a provincially regulated financial institution to consider a mortgage application from a welfare recipient to be

[150] S. Day & G. Brodsky, "Women's Economic Inequality and the *Canadian Human Rights Act*" (Status of Women Canada: October 1999), online: Status of Women Canada Homepage <http://www.swc-cfc.gc.ca/research>.

[151] *Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Sinatra* (1999), C.H.R.R. Doc. 99-218f (Trib. Qué.).

[152] (1997), 29 C.H.R.R. D/246 (Que. Trib.).

[153] The discussion of the *Lambert* decision is from Women's Economic Inequality and the *Canadian Human Rights Act*, *supra,* note 150.

discrimination based on social condition.[154] The complainant was a single mother on social assistance. The Tribunal found that she had sufficient means to qualify for a mortgage loan.

There have also been cases where claims of discrimination based on social condition have failed. For example, in the context of a law which made the complainant, an unmarried student, ineligible for welfare, the Quebec Court of Appeal found that being a full-time college or university student was not a social condition. However, the Court did not rule out that being a student might in certain circumstances be considered a social condition.[155]

SOCIAL CONDITION – AN OPTION FOR HUMAN RIGHTS COMMISSIONS

The Concept of "Social Condition"

The addition of "social condition" to human rights legislation has been proposed as one option for addressing economic inequality in Canada.[156] As well, it is a possible response to the *ICESCR* Committee's recommendation that social and economic rights be expressly incorporated into federal and provincial human rights legislation. Social condition is only one aspect of social and economic rights. It refers to a prohibited ground of discrimination and harassment in human rights legislation, similar to other grounds such as "sex", "age", and "place of origin", for example. The precise term "social condition" as a prohibited ground of discrimination is not widely used either domestically or internationally.[157] As discussed above, Quebec is the only Canadian jurisdiction that prohibits discrimination based on the precise term "social condition".

Internationally, the literature indicates that only Spain's constitution presently uses the term "social condition" as a prohibited ground of discrimination. An early version of Portugal's constitution used the term, however the revised 1992 version does not. It would appear that only one regional human rights instrument, the American Convention on Human Rights uses the term "birth or any other social condition". The preamble of the World Health Organization's constitution reads, "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".[158]

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[154] *D'Aoust c. Vallières* (1993), 19 C.H.R.R. D/322 (Que. Trib.) [hereinafter *D'Aoust*].

[155] *Lévesque v. Québec (A.G.)*, [1998] R.J.Q. 223 (Que. C.A.).

[156] One author has suggested that the term "poverty" be added to the Ontario *Code* as a prohibited ground of discrimination in all social areas. The author notes that the underlying philosophy of the *Code*, as stated in its preamble, the remedies that can be ordered by Boards of Inquiry and the ability of the Commission to pursue an active community role, for example through education, make the *Code* a suitable tool to address issues of poverty. See S. Turkington, "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism" (1993) 9 J.L. & Social Pol'y 134 [hereinafter Recognizing Povertyism].

[157] H. Berry & M.M. Lepage, "Social Condition – Literature Search" (Canadian Human Rights Act Review, 2000), online: Canadian Human Rights Act Review Homepage <http://www.chrareview.org> (date last accessed: 11 January 2001).

[158] *Ibid.*

In Quebec, there is no statutory definition for social condition. It has largely been defined by jurisprudence. Earlier cases focused on formal equality; however, in the 1990's the focus shifted to a more purposive and liberal definition, with a greater emphasis on substantive equality.[159] The standard definition used by the Quebec Human Rights Tribunal comes from a 1993 decision.[160] The tribunal recognized an objective and subjective component to the term:

> The definition of "social condition" contains an objective component. A person's standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with the perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.[161]

The Quebec human rights commission's 1994 policy position on social condition[162] describes it as referring to a rank, a social position or class attributed to someone principally because of his or her level of income, occupation and education, having regard to the objective and subjective components of each. Quebec courts have found social condition to include temporary situations[163] such as unemployment. As well, social condition is distinct from "social origin", a term that is used in Newfoundland's human rights legislation, as "social origin" relates to a person's birth and past and not a person's current rank and position in society.

The difficulty associated with defining and operationalizing the concept has been identified both by the Quebec commission and by those who have considered including the concept as a ground within federal or provincial human rights legislation. In a 1994 Report on Human Rights in British Columbia, author William Black described it as a ground to protect poor people. As a concept it applies to:

> …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 patterns of speech identify them as coming "from the wrong side of the tracks…".[164]

It is a term that lacks a well-accepted meaning and does not lend itself to a precise definition. Rather, it must be interpreted in a broad, liberal and flexible manner and

[159] A.W. Mackay, T. Piper & N. Kim, "Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act" (Canadian Human Rights Act Review, 2000), online: Canadian Human Rights Act Review Homepage, *supra* note 157.

[160] From Social Condition – Literature Search, *supra*, note 157.

[161] *Québec (Comm. des droits de la personne) v. Gauthier* (1993), 19 C.H.R.R. D/312 [English summary].

[162] Commission des droits de la personne et des droits de la jeunesse, "Lignes Directrices sur la Condition Sociale" (31 mars 1994) Cat. 2.120.8.4.

[163] *D'Aoust, supra,* note 154.

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

must take into account a variety of factors including social origins, level of education, occupation and income. The factors may not be exhaustive and may need to be adjusted to meet the circumstances of the particular case.

Calls for Reform: Arguments for Adding Social Condition

It is well recognized that poverty has historically been and continues to be a significant source of social stigma:

> For people who are poor, negative stereotypes and social stigma are a constant fact of life: in the popular media, in their dealings with landlords, with financial institutions, with school officials, with stores and sales staff, with neighbours and strangers, with social welfare agencies, with other government officials, and with the legal system.[165]

Poverty is a source of serious material, social and political disadvantage in Canadian society. People who are poor are subjected to stereotyping, prejudice and discrimination in all aspects of life including employment, the provision of goods and services and in accommodation. However, the systemic disadvantaging which poverty brings had no explicit recognition in most Canadian anti-discrimination laws.

The Canadian Bar Association (British Columbia Branch) has eloquently summarized the plight of the poor:

> People who live in poverty are subject to widespread systemic discrimination. These people are routinely denied housing and access to services and they are reviled in popular culture as being morally inferior. People who live in poverty are not even on the political agenda. They are marginalized to the point of invisibility. This is precisely the kind of societal disadvantage and exclusion that human rights legislation is meant to alleviate. [166]

There is a frequent intersection of poverty and other forms of disadvantage explicitly recognized under human rights legislation, including poverty and gender, poverty and disability, poverty and race, to name a few. Without protection on the basis of poverty, human rights legislation may be unable to truly address the complex experience of those who are most disadvantaged.[167] The poor also comprise a discrete and identifiable group that is subject to its own particular forms of discrimination and disadvantage.[168] Given the socially and politically marginalized status of the poor, commentators have highlighted the fact that legislation designed specifically to ameliorate the condition of groups facing historic and continuing discrimination does not

[165] Constitutional Contact with the Disparities in the World, *supra*, note 9 at 94.

[166] Canadian Bar Association - BC Branch, Human Rights Working Group as cited in BC Human Rights Commission, *Human Rights for the Next Millennium* (19 January 1998), online: BC Human Rights Commission Homepage <http://www.bchrc.gov.bc.ca> (date last accessed: 11 January 2001).

[167] Recognizing Povertyism, *supra*, note 156 at 186.

[168] Although housing is a major area where the poor experience discrimination, it is not the only area. The poor have difficulty accessing services and facilities (including health care and education) and face discrimination in employment.

contain protection for low socio-economic status. This omission "reflects, reinforces, and facilitates continued systemic bias" against the poor in Canadian society.[169]

In addition to the obvious advantages to be gained from inclusion of social condition as a prohibited ground of discrimination, commentators have noted subtle benefits. For example, as the Supreme Court of Canada has traditionally taken significant guidance from human rights tribunals on issues of equality, including social and economic rights in human rights legislation will promote the development of equality jurisprudence that can be carried over to *Charter* claims.[170]

There has been strong support for the inclusion of "social condition" in the *Canadian Human Rights Act* by the Canadian Senate and the Canadian Human Rights Commission. The Canadian Human Rights Commission has acknowledged that poverty is a fundamental human rights issue in Canada, inextricably linked with violations of the right to equality guaranteed under the *Canadian Human Rights Act*. Chief Commissioner Michelle Falardeau-Ramsay stated in her introduction to the Canadian Human Rights Commission's 1997 Annual Report:

> [P]overty is a serious breach of equality rights which I believe has no place in a country as prosperous as ours. Experience suggests that it is largely those who are most vulnerable in our society by virtue of the various prohibited grounds of discrimination – for example, women, Aboriginal people or people with disabilities - who are also more likely to be poor…[I]t is difficult to argue that poverty is not a human rights issue…The international community has recognized for some time that human rights are indivisible, and that economic and social rights cannot be separated from political, legal or equality rights. It is now time to recognize poverty as a human rights issue here at home as well.[171]

In the preface to the 1998 Annual Report, Ms Falardeau-Ramsay reiterated the need to consider social and economic rights within a human rights framework in Canada.[172]

In 1998, Senator Erminie Cohen introduced Bill S-11 which would have added social condition as a prohibited ground of discrimination to the *Canadian Human Rights Act*. The Bill passed unanimously through the Senate and, on October 19, 1998, received first reading in the House of Commons. On April 8, 1999 Justice Minister Anne McLellan announced the creation of the Canadian Human Rights Act Review Panel to consider, among other things, the addition of "social condition" to that Act. Five days later, Bill S-11 was defeated on second reading.

In June 2000, the Review Panel released its report recommending the addition of social condition as a ground in the *Canadian Human Rights Act*. The report summarizes the

[169] Constitutional Contact with the Disparities in the World, *supra*, note 9 at 117.
[170] Jackman & Porter, *supra*, note 28 at 66-67.
[171] Canadian Human Rights Commission, *Annual Report 1997*, (Ottawa: Canadian Human Rights Commission, 1997) at 2.
[172] Canadian Human Rights Commission, *Annual Report 1998*, (Ottawa: Canadian Human Rights Commission, 1998).

results of the Review Panel's research and consultations and notes the societal barriers and widespread discrimination faced by the poor. It states that while some barriers related to poverty can be challenged using existing grounds, this approach is simply a "piecemeal solution that fails to take into account the cumulative effect of the problem"[173]. Accordingly, it recommends the inclusion of social condition, defined in a manner similar to the Quebec definition but limited only to disadvantaged persons. The report acknowledges a need for exemptions and some deference to government where complex social-policy issues are involved but also recommends that Cabinet engage in a process of reviewing government programs to reduce discrimination against the poor.

The Review Panel declined to recommend the addition of social and economic rights recognized in international covenants, such as the right to adequate food, housing and health care. However, it did state that the Canadian Human Rights Commission should have the duty to monitor and report to Parliament and the UN on the federal government's compliance with international human rights treaties and that "Provincial and territorial human rights commissions…may wish to comment on matters within their respective jurisdictions."[174] The Minister of Justice has indicated that the government of Canada will review the report in detail. To date, there has been no indication as to whether the recommendation with respect to social condition will be adopted.

Incorporation of social condition in the *Canadian Human Rights Act* is seen as a starting point, as many of the most important areas such as health, education and housing, and the majority of human rights claims, fall under provincial jurisdiction. Some of the provinces have also considered the issue. Human rights reform proposals in New Brunswick, Saskatchewan and British Columbia have indicated strong support for inclusion of social condition in their human rights legislation. Alberta, British Columbia, Newfoundland and Prince Edward Island have also had recommendations to include some form of protection for level or source of income.[175] The Northwest Territories is contemplating including the ground in its new human rights law.

Building on a the 1994 report by Bill Black, in a January 1998 document entitled *Human Rights for the Next Millennium*, the BC Human Rights Commission recommended a number of amendments to the BC *Human Rights Code*. The BC Commission's primary recommendation was for an amendment that would add protection from discrimination based on "social condition". In the alternative, the BC Commission recommended adding "lawful source of income" as a prohibited ground of discrimination. In support of the primary recommendation, *Human Rights for the Next Millennium* states:

> An overwhelming majority of submissions stated that "lawful source of income" does not adequately protect poor people in general from discrimination in accommodation, service, facility, purchase of property, employment and by unions and associations. They suggest that a more appropriate term would be "social condition", which has been judicially interpreted to include people in receipt of social assistance, as well as single

[173] *Promoting Equality: A New Vision, supra* note 5 at 108.
[174] *Ibid.* at 116.
[175] Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act, *supra,* note 159.

> women and single mothers. This amendment would also be in keeping with our obligations as a signatory of the United Nations' International Covenant on Economic, Social and Cultural Rights.[176]

With the exception of the Northwest Territories, thus far, none of the reform proposals have been acted on by any province.

Concerns with Adding Social Condition

In the debate over social condition, several arguments against its inclusion in human rights legislation have been advanced. One concern is the lack of a broadly accepted meaning or definition for the concept. Due to this lack of clarity, it is argued that including social condition could lead to a flood of tribunal cases and lengthy court litigation aimed at defining and implementing the ground. A related argument is that this new ground would overshadow and detract from traditional grounds of discrimination that require equal attention.[177] A more practical concern is the fact that human rights commissions have limited resources and, in most cases, an existing backlog of cases. The addition of social condition could be an added drain on these resources and could add to the backlog problem.[178]

Another area of concern is that the addition of social condition would give too much discretionary power to an administrative agency and that complainants could abuse such potentially broad jurisdiction. A related issue is whether the new ground would permit human rights commissions to take governments to task for not providing an adequate standard of living for citizens. This raises the same issues faced traditionally by courts in the adjudication of economic and social rights.

In response, advocates for inclusion have noted that including social and economic rights in human rights legislation does not give tribunals unrestricted authority to determine social policy or send a message to decision-makers that they should abandon their concerns about deference to parliamentary sovereignty. It will simply provide much needed guidance about appropriate intervention in matters related to social and economic rights.[179] With respect to concerns that the protection of socio-economic rights will result in decision-makers forcing governments to spend money, it is argued that that the judicial protection of civil and political rights at times imposes positive fiscal obligations on governments.[180]

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[176] *Human Rights for the Next Millennium, supra*, note 166 at section 9(a).

[177] *Report on Human Rights in British Columbia*, *supra*, note 164 at 171.

[178] Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act, *supra*, note 159.

[179] Jackman & Porter, *supra*, note 28 at 62.

[180] See for example *Schachter v. Canada (Employment and Immigration Commission)*, [1992] 2. S.C.R. 679.

Limitations of Social Condition as a Means of Addressing Inequality

As mentioned earlier, social condition as a prohibited ground of discrimination in human rights legislation deals only with one aspect of social and economic rights. It deals solely with the proscription of discrimination against the poor[181]. It does not make poverty a violation of domestic human rights legislation or allow human rights commissions to take governments to task for failing to ensure an adequate standard of living. It may have only a limited use in combating homelessness, for example.

Shelagh Day and Gwen Brodsky, two noted experts on women's equality issues, have examined the Quebec experience with social condition and have concluded that based on the judicial interpretations of social condition in Quebec, the usefulness of the ground may be limited. While social condition might provide an effective avenue to challenge laws and practices that negatively categorize and stereotype the poor, it may not allow challenge to laws and practices that cause, maintain or exacerbate poverty and economic inequality.[182] They warn that including a ground that deals only with negative stereotyping could send a message that this is the only thing human rights legislation needs to address in relation to social and economic rights:

> …if nothing else is done in the Act to signal that women's economic inequality is not consistent with guarantees of equality and non-discrimination, including the ground social condition could, in our view, be misleading and hazardous.[183]

The Review Panel report also confirms that adding social condition to human rights legislation would be only one aspect of finding solutions to the problems experienced by people who are poor. However, the ground would provide a means to challenge stereotypes against the poor and would perform an important educational function.

Anti-poverty groups have supported social condition as a means to combat prejudice and discrimination against the poor. In addition to the practical impact, inclusion of social condition in human rights legislation would have an important symbolic significance:

> It would give recognition to the idea that differences in economic status are as much a source of inequality in our society as race, gender or disability…[P]oor Canadians live daily with social stigma and negative stereotypes and face prejudice similar to those who are discriminated against on the other grounds enumerated in the [Canadian Human Rights] Act…Adding "social condition" to the CHRA would send the message to

[181] Some have suggested that it should be a neutral ground that would apply to everyone, rich or poor. In other words, it could provide protection to those whose social condition is one of disadvantage as well as those whose social condition is one of privilege. [For example, Senator Grafstein, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (June 4, 1998)].

[182] Women's Economic Inequality and the *Canadian Human Rights Act, supra,* note 150. These conclusions are in the particular context of women's inequality but appear equally applicable to everyone who is poor.

[183] *Ibid.* at 133.

> Canadians that prejudice against people who are poor is as unacceptable in our society as prejudice against people who are black or aboriginal or disabled or female.[184]

As Chief Commissioner Falardeau-Ramsay has noted, including "social condition" in human rights legislation is a small part of a much broader issue: how to make the link between the overall question of poverty and the effective enjoyment of human rights.

CONCLUSION

Adding social condition to human rights legislation may be one way to ensure greater protection for social and economic rights in Canada. However, the Quebec experience has shown that social condition as a prohibited ground of discrimination has its limits and is not a panacea for all aspects of socio-economic inequality in Canadian society. Other measures are needed as well. The Canadian Human Rights Act Review Panel has recommended the addition of social condition to the *Canadian Human Rights Act*. The federal Parliament and provincial legislatures may see fit to amend human rights laws accordingly. Whether or not this occurs, human rights commissions have had and can continue to have a role in the protection of social and economic rights.
Relying on the interpretive presumption in *Slaight Communications* and *Baker*, human rights legislation can be interpreted, and administrative discretion can be exercised, in a manner that is most consistent with international human rights norms. On the enforcement side of human rights commissions' mandates, there is some room to adjudicate social and economic rights through grounds such as "receipt of public assistance", by making links between other grounds and socio-economic status as in the *Kearney* case and by ensuring that socio-economic interests and benefits, such as social assistance, are provided equally to everyone.

With respect to the public policy and public education mandates given to commissions, various proactive measures can be taken in the area of social and economic rights. Such measures could include:

- conducting education campaigns to combat prejudice and discrimination against low-income persons within the public at large but also specific groups such as landlords;

- engaging in policy development in areas related to socio-economic interests such as housing with a particular emphasis on discrimination on grounds that are most closely related to socio-economic status (*e.g.* receipt of public assistance, family status, marital status, sex, race, place of origin, disability, ancestry);

- ensuring policy development in all areas is consistent with and recognizes Canada's international human rights commitments and taking policy positions that, as much as possible, promote social and economic interests;

[184] Michelle Falardeau-Ramsay, Chief Commissioner, Canadian Human Rights Commission, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 27, 1998).

- reviewing both private programs and government action to ensure they are respectful of social and economic rights and raising concerns as appropriate;

- undertaking research and surveys in relation to social and economic rights.

These are just a few examples of ways in which human rights commissions, even under their current mandates, can have a greater role in promoting social and economic rights.

The goal of human rights legislation and s. 15 of the *Charter* is to protect vulnerable and disadvantaged groups from discrimination and to provide for equal rights and opportunities. These same vulnerable and disadvantaged groups – for example, women, persons with disabilities and racial minorities – are more likely to be poor. As such, the interdependence and indivisibility of the rights which are already recognized in human rights legislation and social and economic rights, which are gaining increasing attention and recognition, mandates an approach that treats the protection of both sets of rights as a common ideal. The addition of a prohibited ground of discrimination that deals directly with poverty, such as social condition, will no doubt give human rights commissions more latitude to protect and promote social and economic rights. However, even in the absence of legislative amendments to human rights legislation, commissions can play a role.