SOCIO-ECONOMIC RIGHTS UNDER THE *CANADIAN CHARTER*

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ABSTRACT

The *Canadian Charter* contains no explicit reference to socio-economic rights. However, there are compelling grounds for recognizing these rights as key components of existing *Charter* guarantees. The wording of the right to equality and the inclusion of disability as a prohibited ground of discrimination under section 15, in particular, were the result of disadvantaged groups mobilizing to ensure positive *Charter* obligations on governments to protect socio-economic rights. While corporate economic and property rights were excluded from the *Charter*, the Supreme Court of Canada has left open the possibility that the *Charter* protects a range of rights recognized under the *International Covenant on Economic, Social and Cultural Rights.* Thus, the *Canadian Charter* still has the potential to enhance the domestic and global understanding of socio-economic rights as central to all human rights.

MARTHA JACKMAN AND BRUCE PORTER
Martha Jackman is Professor at the Faculty of Law at the University of Ottawa.
Bruce Porter is Director of the Social Rights Advocacy Centre.

Introduction

Louise Arbour, the UN High Commissioner of Human Rights and a former Justice of the Supreme Court of Canada, has observed in commenting on the scope of constitutional rights in the *Canadian Charter of Rights and Freedoms*[1] (the *Charter*) that 'the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law.'[2] Meeting this challenge is, however, at best a work in progress. The constitutional status of socio-economic rights in Canada remains, to a large extent, an open question – perhaps the most central unresolved issue in *Canadian Charter* jurisprudence.

The *Charter*, marking its twenty-fifth anniversary in 2007, contains no explicit reference to any of the guarantees in the International Covenant on Economic, Social and Cultural Rights[3] (ICESCR). The closest the *Charter* comes to recognising a socio-economic right is the section 23's right to publicly funded minority language education at the primary and secondary levels, 'where numbers warrant.' The minority language education guarantee has been interpreted by the Supreme Court as a 'novel form of legal right' which 'confers upon a group a right which places positive obligations on government to alter or develop major institutional structures.'[4]

As High Commissioner Arbour explains, however, when the *Charter* is considered in light of the historical expectations and broader values surrounding its adoption, it is clear that the obligations of governments to maintain and develop 'major institutional structures' in support of substantive rights need not be limited to minority language rights. Of particular importance in this respect are the equality rights guarantees in section 15 of the *Charter,*[5] and the right to 'life, liberty and security of the person' in section 7.[6] These rights, which might otherwise be classified as 'civil and political' are best understood in the Canadian context as

including both civil and political and socio-economic dimensions. When the *Charter* was adopted in 1982, equality rights experts and advocacy groups considered the adequacy and accessibility of publicly funded programs, such as social assistance, universal healthcare, education and unemployment insurance, as implicit in these broadly framed *Charter* rights.[7]

Historical context of the *Charter*

Canadian rights culture in the 1960s and 70s was significantly affected by the civil rights movement in the US. In this period, broad anti-discrimination guarantees were introduced in federal and provincial human rights legislation across Canada. Considerable attention was paid to emerging civil rights jurisprudence from the US, but at the same time, Canadian rights culture absorbed a distinctive commitment to social rights and to an emerging system of international human rights protections in which Canada was directly engaged.[8] Prime Minister Pierre Elliot Trudeau, who presided over the initiative to adopt a constitutional charter of rights after his re-election in 1980, linked the proposal to his ideal of a 'just society.' In an article on 'Economic Rights' he wrote as a law professor in 1962, Trudeau had affirmed that: 'if this society does not evolve an entirely new set of values … it is vain to hope that Canada will ever reach freedom from fear and freedom from want. Under such circumstances, any claim by lawyers that they have done their bit by upholding civil liberties will be dismissed as a hollow mockery.'[9]

Unlike the US, Canada ratified the ICESCR in 1976 at the same time as the International *Covenant on Civil and Political Rights* (ICCPR)[10] . In 1980-81, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada considered including an explicit reference to ICESCR rights under section 36 of the *Constitution Act*, 1982.[11] As enacted, section 36 states that federal and provincial governments 'are committed to… providing essential public services of reasonable quality to all Canadians.'[12] However, rather than pressing for explicit inclusion of socio-economic rights under section 36 or the *Charter*, most human rights experts and advocacy groups emphasised the importance of framing rights, such as the right to equality, as expansively as possible. The *Charter* could then be applied to require governments to take positive action to address the needs of vulnerable groups, to remedy systemic inequality, and to maintain and improve social programs on which the enjoyment of equality and other *Charter* rights depends.[13]

Section 15 of the *Charter*, originally entitled 'non-discrimination rights' was renamed 'equality rights' and significantly expanded after an unprecedented lobbying campaign by women's groups, disability rights groups and others. Section 15 was reworded to guarantee both equality 'before and under' the law, and the equal 'protection and benefit' of the law. This wording (unique at that time) was intended to ensure that equality rights applied to social benefit programs, such as welfare and unemployment insurance, and that the positive obligations of governments toward disadvantaged groups were constitutionally recognised and affirmed.[14] As the Canadian Bar Association noted at the time: '[it] is an equality rights section, not merely an anti-discrimination section. The difference between an equality purpose and an anti-discrimination purpose is that the former is broader and more positive than the latter.'[15]

In addition, as a result of energetic lobbying by disability rights groups, Canada became the first among constitutional democracies to include disability as a constitutionally prohibited ground of discrimination.[16] This signalled the importation into Canadian constitutional law of an approach to equality that had already been accepted under provincial human rights legislation: remedial in its focus, and recognising that discrimination could include a failure to take positive measures to accommodate the unique needs of protected groups, even in the absence of discriminatory intent.[17] An 'undue hardship' test had been adopted under Canadian human rights legislation as the standard for determining whether 'reasonable steps' or 'reasonable measures' had been taken to accommodate the needs of protected groups in view of cost, health and safety and other relevant factors.[18] However, Canadian courts and tribunals adopted a significantly more rigorous standard than was applied by US courts.[19] In this sense, the type of obligations contained in article 2 of the ICESCR, to take reasonable steps based on a maximum of available resources, had already become familiar to Canadians in their approach to human rights protections. This is particularly true for Quebec, where socio-economic rights were explicitly included under the *Quebec Charter of Human Rights and Freedoms*.[20]

The wording of section 7 of the *Charter*, which guarantees the 'right to life, liberty and security of

the person' and the right not to be deprived thereof 'except in accordance with principles of fundamental justice', similarly reflects historical Canadian values linked with socio-economic rights. A proposed amendment to add a right to 'the enjoyment of property' to the *Charter* was rejected in part because of fears that property rights would conflict with Canadians' commitment to social programs and give rise to challenges to government regulation of the private market. Provincial governments opposed *Charter* recognition of property rights on the grounds that constitutional entrenchment of such rights could give rise to challenges to government regulation of corporate interests and control of natural resources.[21] Similarly, the phrase 'fundamental justice' was preferred over any reference to 'due process of law' because of concerns around the use of the due process clause in the US during the *Lochner* era as a means for propertied interests to challenge the regulation of private enterprise and the promotion of social rights.[22]

Socio-economic rights in sections 7 and 15 of the *Charter*

In light of the *Charter's* wording and historical context there is significant opportunity, as High Commissioner Arbour has suggested, for Canadian courts to interpret substantive *Charter* obligations, particularly under sections 7 and 15, to include most, if not all, components of the rights contained in the ICESCR.[23] While Supreme Court of Canada jurisprudence has not yet moved clearly in this direction, neither has it foreclosed it.

From its earliest decisions under the *Charter* to its most recent, the Supreme Court has been careful to leave open the possibility that the *Charter* may protect a range of socio-economic rights. In its 1986 decision in *Irwin Toy*,[24] the Court rejected attempts by corporate interests to situate their economic claims within the scope of section 7, finding that private property rights had been intentionally excluded from the *Charter*. However, the Court was careful to distinguish what it characterized as 'corporate-commercial economic rights' from 'such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.' The Court found that it would be 'precipitous' to exclude the latter class of rights at so early a moment in *Charter* interpretation. [25]

During the 1990s, most Canadian lower courts called upon to consider socio-economic rights claims rejected such challenges on the basis that economic rights were beyond both the scope of section 7 and the legitimate purview of the courts.[26] At the Supreme Court level, however, the question left unanswered in *Irwin Toy*, about the status of ICESCR rights under section 7, lay essentially dormant for seventeen years. During this period, few socio-economic rights cases reached the appellate level and no case involving poverty or social assistance was heard by the Supreme Court. In the 2003 *Gosselin* case, the Supreme Court considered a challenge to grossly inadequate levels of social assistance benefits in Quebec, paid to employable recipients not enrolled in workfare programs. In an important dissenting judgment (supported by Justice L'Heureux-Dubé), Justice Arbour found that the section 7 right to 'security of the person' places positive obligations on governments to provide those in need with an amount of social assistance adequate to cover basic necessities.[27] The majority of the Court left open the possibility of adopting this 'novel' interpretation of the right to security of the person in a future case, but found that there was insufficient evidence in this case to make such a finding. Chief Justice McLachlin stated, for the majority:

> The question therefore is not whether s.7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s.7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not.[28]

While its approach to section 7 has been inconclusive, in its early section 15 of *Charter* jurisprudence, the Supreme Court of Canada played a leading role, internationally, in affirming and developing a notion of substantive equality that includes important dimensions of socio-economic rights and places positive obligations on governments to remedy disadvantage. The Supreme Court has recognised that programs such as social assistance for single mothers are 'encouraged' by section 15, and has justified positive remedies to under-inclusive benefit programs on that basis. [29] In several key cases, the Court issued positive remedial orders extending or increasing parental, social assistance and pension benefits and extending legislative protections under security of tenure and human rights legislation.[30] These decisions suggested that the Court would fulfil its constitutional mandate to ensure that govern-

ments met their substantive equality rights obligations, notwithstanding a steady stream of media and right wing criticism about the Court's excessive 'judicial activism.' [31]

However, even in its most progressive equality rights decisions, the Supreme Court has insisted on sidestepping the issue of whether, in the absence of an under-inclusive program or benefits scheme, the *Charter* imposes a positive obligation on governments to provide benefits or social programs necessary to address the needs of disadvantaged groups.[32] The Court has stepped back from an explicit affirmation of a key element of the notion of equality that was advanced by groups during the pre-*Charter* debates about the wording of section 15 and that is also at the core of Canada's international human rights obligations – the obligation of governments to protect vulnerable groups through appropriate legislative measures and to take positive action to remedy socio-economic disadvantage that is independent of the obligation to ensure that existing legislation and benefit schemes are not under-inclusive or discriminatory.[33]

Future expectations

In light of the historical expectations of rights holders; the *Charter*'s open-ended and expansive wording; its balancing of individual rights and collective values; the important interpretive role the ICESCR can play both in determining the scope of rights and the responsibilities of governments; and the broad range of remedies available for *Charter* violations; there is no reason why the Canadian courts should not play an active role in safeguarding socio-economic rights in Canada. As yet, however, the courts have largely failed to fulfil the *Charter*'s promise in this regard. As High Commissioner Arbour has pointed out, this may be due to timidity on the part of litigants as well as the courts.[34] Few socio-economic rights cases have been brought before the courts in the first quarter century of constitutional democracy in Canada. And, as the UN Committee on Economic, Social and Cultural Rights (CESCR) points out, one cannot absolve Canadians governments from responsibility either. Why, the CESCR has asked, should governments not be encouraging courts to consider Canada's international human rights obligations when interpreting the *Charter*, rather than arguing against interpretations that would provide effective remedies for these rights?[35]

While there have been some important *Charter* victories for socio-economic rights claimants, there have also been very disappointing losses. Courts have sidestepped the issue, so central to international human rights law in general and to socio-economic rights in particular, of whether governments do indeed have a positive constitutional duty to attend to the needs of those who are without adequate food, housing, healthcare, education or decent work, in a country with such an abundance of resources that all should enjoy these core human rights. As long as the obligation of governments to protect and promote socio-economic rights is considered ancillary to *Charter* compliance rather than as central to it, socio-economic rights will continue to be marginalised in Canada.

If, however, Canadian rights claimants have suffered from the disadvantage of a lack of any explicit *Charter* recognition of socio-economic rights, they have also benefited from the ability to frame socio-economic rights claims as fundamental issues of constitutional inclusion. This is Canada's potential contribution to the field of socio-economic rights – to enhance the understanding of these rights as central to all human rights, rather than as a separate category of rights. Given the historical expectations associated with the adoption of the *Charter*, those who are faced with hunger or homelessness amidst affluence see issues of constitutional interpretation as being linked to underlying issues of equal citizenship and social inclusion. In cases where Canadian courts have suggested that homelessness or poverty do not engage equality rights or the right to security of the person, or that those who can afford to buy it have a right to healthcare while those who rely on publicly funded healthcare do not, the courts have not been seen to be merely deciding the scope of particular words or provisions. Rather, such decisions are considered by rights claimants and by an increasing number of commentators as serious assaults on the very values of dignity and equal citizenship that the *Charter* embodies.

It is in this sense that the constitutional status of socio-economic rights in Canada is much more than a matter of the scope of particular *Charter* guarantees. It is, fundamentally, a question of the integrity with which the *Charter* will be interpreted and applied, and the values that will be conveyed to governments and citizens, as those that are deserving of constitutional status. As Chief Commissioner Arbour has eloquently summarized it:

> Whatever cause there may have been to question the equal status and justiciability of economic, social and cultural rights 60 years ago, one thing is clear: there is no basis for categorical disclaimers today… The legality of judicial review of all human rights is not open to question under the Canadian constitutional system.[36]

Notes

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

[2] Louise Arbour, "'Freedom from want' – from charity to entitlement" (LaFontaine-Baldwin Lecture, Quebec City, 3 March 2005), online: United Nations Commissioner for Human Rights <http://www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument> at 7.

[3] *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESC].

[4] *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at 389, [1990] S.C.J. No. 19, 22 D.L.R. (4th) 24 [*Mahe* cited to S.C.R.].

[5] Section 15 provides 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 and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[6] Section 7 provides that: "Everyone has 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."

[7] Bruce Porter, "Expectations of Equality" (2006) 33 Sup. Ct. L. Rev. 23 [Porter, "Expectations of Equality"].

[8] *Ibid*. at 23-35.

[9] Pierre Elliott Trudeau, "Economic Rights" (1961-1962) 8 McGill L.J. 122 at 125. Subsequently, as federal Minister of Justice, Trudeau released a discussion paper on the Liberal government's proposal for a new *Charter of Rights* in which he suggested that, while a constitutional guarantee of economic rights was desirable and "should be an ultimate objective of Canada" it "might take considerable time to reach agreement on the rights to be guaranteed." On that basis, Trudeau concluded that it was "advisable not to attempt to include economic rights in the constitutional bill of rights at this time." See Pierre Elliott Trudeau, "A Canadian *Charter of Human Rights*" (Ottawa: Queen's Printer, 1968) at 27.

[10] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

[11] Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence* 32nd Parl. 1st sess., No. 49 (30 January 1981), at 65-71. Section 36 is set out in Part III of the *Constitution Act*, 1982.

[12] Canada has stated in its Core Document to UN treaty monitoring bodies that the provisions of section 36: "are particularly relevant in regard to Canada's international obligations for the protection of economic, social and cultural rights." However, the justiciability of the governmental 'commitments' in section 36 has never really been tested. See Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 184-91; Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (1996) 19 Dal. L.J. 306. See also *Winterhaven Stables Ltd. v. Canada (Attorney General)* [1988] A.J. No. 924, 53 D.L.R. (4th) 413 (Alta. C.A.), at 432-434.

[13] Porter, "Expectations of Equality", *supra* note 7 at 23.

[14] *Ibid*.

[15] Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs (Boyer Committee), *Written Submission of the Canadian Bar Association*, 33rd Parl. 1st sess. (National Archives of Canada Accession No. RG14 File No. 6050-331-E1), cited in Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23 Windsor Y.B. Access Just. 145-192 at footnote 83 [Porter, "Reclaiming Expectations"].

[16] See generally Yvonne Peters, "From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada's Constitution", in Deborah Stienstra, Aileen Wight-Felske & Colleen Watters, eds., *Making Equality: History of Advocacy and Persons with Disabilities in Canada* (Concord Ontario: Captus Press, 2003) 119; M. David Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?" (1998) 7 N.J.C.L. 263.

[17] *Ontario (Human Rights Commission) v. Simpsons Sears*, [1985] 2 S.C.R. 536, S.C.J. No. 74.

[18] *Ibid.* paras. 20-29.

[19] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, 141 N.R. 185, 13 B.C.A.C. 245, 6 W.W.R. 193, 71 B.C.L.R. (2d) 145, S.C.J. No. 75.

[20] *Charter of human rights and freedoms*, R.S.Q. 1977, c. C-12. For a discussion of the socio-economic rights guarantees under the Quebec *Charter*, see Pierre Bosset, "Les droits économiques et sociaux, parents pauvres de la Charte? Étude no. 5", in Commission des droits de la personne et des droits de la jeunesse du Québec, ed., *Après 25 ans: La Charte québécoise des droits et libertés, Volume 2: Études* (Montreal: Commission des droits de la personne et des droits de la jeunesse du Québec, 2003) at 229-244, online: Commission des droits de la personne et des droits de la jeunesse du Québec <http://www.cdpdj.qc.ca/fr/droits-personne/bilan_charte.asp?noeud1=1&noeud2=16&cle=0.

[21] Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 Int'l J. Constitutional Law 17.

[22] *Ibid*.

[23] For elaboration of this possibility, see Martha Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20:2 Ottawa L. Rev. 257; Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights" (2000) 15 J.L. & Soc. Pol'y 117 [Porter, "Judging Poverty"]; David Wiseman, "The *Charter* and Poverty: Beyond Injusticiability" (2001) 51:4 U.T.L.J. 425; Reem Bahdi, "Litigating Social and Economic Rights in Canada in Light of International Human Rights Law: What Difference Can it Make?" (2002) 14:1 C.J.W.L. 158; The Honourable Claire L'Heureux-Dubé, "A Canadian Perspective on Economic and Social Rights" in Yash Ghai & Jill Cottrell, eds., *Economic, Social And Cultural Rights In Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interrights, 2004) 42; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539.

[24] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, S.C.J. No. 36.

[25] *Ibid*. at 1003-1004.

[26] See, for example, *Masse v. Ontario Ministry of Community and Social Services* (1996), 134 DLR. (4th) 20 (Ont. Sup. Ct. J.), leave to appeal to Ontario Court of Appeal denied, (1996) 40 Admin. LR 87N, leave to appeal to the Supreme Court of Canada denied, (1996) 39 CRC. (2d) 375. See generally Debra Parkes, "Baby Steps on the Way to a Grown up *Charter*: Reflections on 20 Years of Social and Economic Rights Claims" (2003) 52 U.N.B.L.J. 279; Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993-1994) 19 Queen's L.J. 65; Porter, 'Judging Poverty', *supra* note 23.

[27] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at paras. 82-83, S.C.J. No. 85 [*Gosselin* cited to S.C.R.].

[28] *Ibid*. para. 82.

[29] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at para. 41, S.C.J. No. 68 [*Schachter* cited to S.C.R.].

[30] Melina Buckley, "*Law v. Meiorin*: Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the *Charter*" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 179.

[31] Porter, "Expectations of Equality", *supra* note 7 at 36-38; Bruce Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and Vriend" (1998) 9 Const. Forum 71; Martha Jackman, "'Giving Real Effect to Equality': *Eldridge v. B.C. (A.G.) and Vriend v. Alberta*" (1998) 4 Rev. Const. Stud. 352. For a discussion of the critiques of 'judicial activism' in Canada from a socio-economic rights perspective, see Lorraine Weinrib, "The Canadian *Charter's* Transformative Aspirations", in Joseph Eliot Magnet et al., eds., *The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Toronto: LexisNexis Butterworths, 2003) 17; Martha Jackman, "*Charter* Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party" *Policy Options* 27:1 (December 2005 – January 2006) 72.

[32] *Vriend v. Alberta,* [1998] 1 SCR 493 at para. 64, A.C.S. No. 29 [*Vriend* rcited to S.C.R.]; see generally Porter, "Reclaiming Expectations", *supra* note 15 at 180-185.

[33] For a discussion of substantive equality and positive obligations in Canadian and other jurisprudence, see Sandy Fredman, "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 S.A.J.H.R. 163; Gwen Brodsky & Selagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 C.J.W.L. 185.

[34] Arbour, *supra* note 2 at 7.

[35] CESCR, Concluding Observations on Canada, 2006, Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada, E/C.12/1/Add.31 (1998), para. 11(b), online: United Nations Human Rights Website <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.31.En?OpenDocument>; Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Margot Young et al., eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) [forthcoming].

[36] Arbour, *supra* note 2 at 7 and 9.