

# ***Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?***

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INTRODUCTION .....	281
I. THE IMPACT OF A POSITIVE/NEGATIVE RIGHTS FRAMEWORK AT A REMEDIAL LEVEL .....	284
II. A SUBSTANTIVE EQUALITY APPROACH TO REMEDIES IN THE SOCIO-ECONOMIC RIGHTS CONTEXT .....	293
CONCLUSION.....	300

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“The right to a remedy has often been considered one of the most fundamental and essential rights for the effective protection of all other human rights.”<sup>1</sup>

## INTRODUCTION

Section 24(1) of the *Canadian Charter of Rights and Freedoms* guarantees that anyone whose rights have been infringed may “apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”<sup>2</sup> Notwithstanding this promise of judicial enforcement of *Charter* rights, obtaining an “appropriate and just” remedy for socio-economic rights violations in Canada poses significant challenges. In particular, the historic distinction between positive and negative rights, long abandoned under international human rights law and increasingly rejected in other constitutional democracies, continues to be relied upon by Canadian tribunals and courts as a basis for refusing to remedy violations of the right to health, housing, social assistance and other socio-economic rights that are crucial to *Charter* guarantees of life, liberty, security of the person, and equality. Even in those infrequent cases where socio-economic rights violations have been found, judicial adherence to a positive/negative rights framework has also had an impact upon the *Charter* remedies that have been ordered by the courts.

In a 2008 report on the legal enforcement of economic, social and cultural rights, the International Commission of Jurists (ICJ) undertook a comprehensive review of socio-economic rights jurisprudence from Europe, Africa, Asia and the Americas, including cases from the United States, Germany, Israel, and the United Kingdom, among other jurisdictions.<sup>3</sup> The ICJ report documents that, while the constitutions of

<sup>1</sup> International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) [ICJ, *Comparative Experiences*].

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*].

<sup>3</sup> ICJ, *Comparative Experiences*, *supra* note 1.

some of the nations surveyed include explicit protection for socio-economic rights,<sup>4</sup> courts and tribunals in many other countries rely on more general constitutional guarantees, such as the right to life and the right to non-discrimination, as a basis for enforcing socio-economic rights.<sup>5</sup> Perhaps surprising to international observers, if not to human rights activists in Canada, the ICJ report underscores the degree to which Canadian courts and tribunals stand out in terms of their continuing conservatism in regards to the recognition and enforcement of socio-economic rights set out under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, to which Canada has been a party for over 30 years.<sup>6</sup> Of the 200-plus trial, appellate and supreme court cases contained in the ICJ's report, only one Canadian case can be found: the 1997 Supreme Court of Canada decision in *Eldridge v. British Columbia (Attorney General)*.<sup>7</sup>

In a paper I presented at the CIAJ's annual conference in 1993, assessing the disappointing record of socio-economic rights jurisprudence after ten years under the *Charter*, I called upon the judges and tribunal members present to reject stereotypic views of poverty and to question conventional explanations of how state action or inaction impacts on the lives of the poor. Instead, I urged those in attendance to look to the voices and experiences of the low-income plaintiffs who appear before them to inform and ultimately to transform accepted meanings and traditional notions of rights. Only in this way, I argued, could the poor begin to enjoy the equal protection of *Charter* rights and the equal benefit of *Charter* remedies.<sup>8</sup> Regrettably, little has changed in the intervening 15

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<sup>4</sup> *Ibid.* at p. 4, footnote 7.

<sup>5</sup> *Ibid.* at pp. 65–72; see also Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) [Langford, *Social Rights Jurisprudence*].

<sup>6</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 [ICESCR]. The ICESCR entered into force on January 3, 1976 and was ratified by Canada the same year.

<sup>7</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*].

<sup>8</sup> Martha Jackman, "Open Justice or 'Just Us'?: The Poor, the Courts and the Charter" in Yves-Marie Morissette, Wade MacLauchlan and Monique Ouellette, eds., *Open Justice/La transparence dans le système judiciaire* (Montreal: Les Éditions Thémis/Canadian Institute for the Advancement of Justice, 1994), at p. 281; see also Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases" in Margot Young et al, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: University of British Columbia Press, 2007), at p. 23.

years. For people living in poverty who, unlike affluent Canadians, lack alternate social, economic or political means of holding elected governments to account, continued reliance by Canadian courts and tribunals on the distinction between positive and negative rights as a basis for dismissing socio-economic rights claims represents a fundamental failure of constitutionalism and of the rule of law.<sup>9</sup> As the United Nations Committee on Economic, Social and Cultural Rights observed in its *General Comment No. 9* on domestic enforcement of the *ICESCR*:

While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. 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.<sup>10</sup>

In this paper I will focus on the negative consequences judicial adherence to a positive/negative rights framework can have in those cases where courts and tribunals do intervene to address socio-economic rights claims, whether at the behest of low-income plaintiffs or of more advantaged *Charter* litigants. In the first part of the paper I will discuss two cases in which judicial adherence to a positive/negative rights framework has had adverse effects at a remedial level: the Supreme Court of Canada's 2005 decision in *Chaoulli v. Quebec (Attorney General)*<sup>11</sup> and the recent B.C. Supreme Court decision in *Victoria (City) v. Adams*.<sup>12</sup>

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<sup>9</sup> ICJ, *Comparative Experiences*, *supra* note 1, at pp. 3–4, 82–83. See also Louise Arbour, "Freedom From Want: From Charity to Entitlement" (LaFontaine-Baldwin Lecture delivered at the Capitole de Québec, 4 March 2005), online: The Institute for Canadian Citizenship <<http://www.icc-icc.ca/en>> [Arbour, "Freedom From Want"]; *General Comment No. 9, The Domestic Application of the Covenant*, UN ESCOR, 19th Sess., Annex, Agenda Item 3, UN Doc. E/C.12/1998/24 (1998), at para. 14 [*General Comment No. 9*]; Kerri A. Froc, "Is the Rule of Law the Golden Rule? Accessing 'Justice' for Canada's Poor" (2008) 87 *Can. Bar Rev.* 459; Bruce Porter, "Expectations of Equality" (2006) 33 *Sup. Ct. L. Rev.* 23.

<sup>10</sup> *General Comment No. 9*, *ibid.* at para. 10.

<sup>11</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 [*Chaoulli* (S.C.C.)].

<sup>12</sup> *Victoria (City) v. Adams*, 2008 BCSC 1363 [*Adams*].

I will go on to propose an alternative approach to remedies in the socio-economic rights context. In particular, I will argue that judicial scrutiny of remedial claims in light of section 15 of the *Charter* is more likely than a traditional positive/negative rights framework to yield remedies that vindicate, rather than undermine the values and purposes of the *Charter*.

### I. THE IMPACT OF A POSITIVE/NEGATIVE RIGHTS FRAMEWORK AT A REMEDIAL LEVEL

The distinction traditionally drawn between civil and political rights on the one hand, and socio-economic rights on the other, is premised on the idea that the state is merely required to refrain from interfering with individuals' exercise of the former class of rights, while socio-economic rights impose positive obligations on governments to act, whether by providing services, money or other benefits necessary to ensure that such rights can in fact be enjoyed. While the enforcement of negative rights is seen to be within the traditional purview of the courts, it is argued that judicial enforcement of positive rights raises issues of institutional legitimacy and competence so problematic as to render socio-economic rights non-justiciable. Instead, socio-economic rights violations are characterized as matters of social policy, rather than fundamental human rights, which governments alone are empowered to address free from judicial interference and the constraints of *Charter* review.<sup>13</sup>

As suggested at the outset of the paper, the traditional distinction between positive and negative rights has been discredited under international human rights law, replaced by the recognition that all human rights are interdependent and indivisible, and that governments have a corresponding duty to respect, protect and fulfil socio-economic rights on an equal footing with civil and political rights.<sup>14</sup> The ICJ explains:

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<sup>13</sup> Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory" in Langford, *Social Rights Jurisprudence*, *supra* note 5 at p. 3; Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-economic Rights," in Langford, *ibid.* at p. 46; Charter Committee on Poverty Issues, *The Right to Effective Remedies: Submission of the Charter Committee on Poverty Issues to the United Nations Committee on Economic, Social and Cultural Rights Review of Canada's Fourth and Fifth Periodic Reports Under the ICESCR (May 5<sup>th</sup> & 8<sup>th</sup>, 2006)* (N.p. 2006) [CCPI, *Right to Effective Remedies*]; Martha Jackman, "What's Wrong with Social and Economic Rights?" (2000) 11 N.J.C.L. 235.

<sup>14</sup> *General Comment No. 9*, *supra* note 9; ICJ, *Comparative Experience*, *supra* note 1, at pp. 42–49.

Neither ESC rights nor civil and political rights as a whole offer a single model of obligations or enforcement.... The traditional distinction that civil and political rights impose only negative duties and ESC rights entail only positive duties, for States, is inaccurate. Every human right imposes an array of positive and negative obligations.... This challenge to the justiciability of ESC rights as a whole is based on a false distinction that overestimates the differences between civil and political rights and ESC rights on this basis.<sup>15</sup>

As the ICJ's report documents, tribunals and courts around the world have increasingly rejected the false dichotomy between positive and negative rights and have ordered governments to remedy socio-economic rights violations in the areas of employment, health, housing, education, food and other fundamental socio-economic rights.<sup>16</sup> Against this international trend, however, Canadian courts and tribunals remain largely wedded to the positive/negative rights paradigm universally urged upon them by Attorneys General attempting to justify socio-economic rights violations by Canadian governments at all levels.<sup>17</sup> While this judicial attitude results in the outright dismissal of many socio-economic rights claims, it also affects the way in which courts and tribunals remedy those rare socio-economic rights violations which they find to have been proven.

The Supreme Court of Canada's decision in *Chaoulli v. Quebec (Attorney General)* provides a clear illustration of this problem.<sup>18</sup> In her trial judgment in *Chaoulli*, Justice Piché affirmed that: "S'il n'y a pas d'accès possible au système de santé, c'est illusoire de croire que les droits à la vie et à la sécurité sont respectés."<sup>19</sup> Justice Piché agreed with

<sup>15</sup> ICJ, *Comparative Experiences*, *ibid.* at p. 10.

<sup>16</sup> ICJ, *Comparative Experiences*, *ibid.*; see also Langford, *Social Rights Jurisprudence*, *supra* note 5 at pp. 649–76.

<sup>17</sup> See *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, 19th Sess., UN Doc. E/C.12/1/Add.31 (1998), at paras. 14–15; *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, 36th Sess., UN Doc. E/C.12/CAN/CO/5 (2006), at para. 11(b).

<sup>18</sup> *Chaoulli* (S.C.C.), *supra* note 11.

<sup>19</sup> *Chaoulli c. Québec (Procureure générale)*, [2000] J.Q. no. 479 (C.S.), at para. 223 [*Chaoulli* (C.S.)]. Author's translation: "If there is no possible access to the health system, it is illusory to believe that rights to life and to security are respected."

the applicants that, where an individual whose health was at risk could not access medically necessary care within the public system, Quebec's statutory prohibition on private health insurance might interfere with life, liberty and security of the person.<sup>20</sup> However she rejected the applicants' claim that they had a right to buy private health care, free from all government restraint. As she put it: "Le Tribunal ne croit pas ... qu'il puisse exister un droit constitutionnel de choisir la provenance des soins médicalement requis."<sup>21</sup> On the evidence presented, Justice Piché concluded that removing existing statutory restrictions on private insurance would have a deleterious effect on the publicly funded health care system and on those who depend upon it for access to care without discrimination based on their economic condition.<sup>22</sup> As she explained:

La preuve a montré que le droit d'avoir recours à un système parallèle privé de soins, invoqué par les requérants, aurait des répercussions sur les droits de l'ensemble de la population. Il ne faut pas jouer à l'autruche. L'établissement d'un système de santé parallèle privé aurait pour effet de menacer l'intégrité, le bon fonctionnement ainsi que la viabilité du système public.<sup>23</sup>

Based on this evidentiary finding, Justice Piché held that Quebec's prohibition on private insurance was in accordance with section 7 principles of fundamental justice and justifiable under section 1 of the *Charter*.<sup>24</sup> Justice Piché further found that the ban on private insurance promoted rather than undermined the purposes of section 15 of the *Charter*, reinforcing the dignity of Quebecers by guaranteeing medical care for all.<sup>25</sup>

A majority of the Supreme Court agreed with the Appellants that waiting times for publicly funded health care in Quebec were too long and so threatened individual life and personal security. Contrary to Justice

<sup>20</sup> *Ibid.* at para. 225.

<sup>21</sup> *Ibid.* at para. 227. Author's translation: "The Court does not believe ... that there can be a constitutional right to choose the source of medically necessary care."

<sup>22</sup> *Ibid.* at para. 258.

<sup>23</sup> *Ibid.* at para. 263. Author's translation: "The evidence has shown that the right to have recourse to a parallel private health system, invoked by the applicants, would have repercussions for the rights of the entire population. We can't stick our heads in the sand. The creation of a parallel, private health system would threaten the integrity, the effective operation and the viability of the public system."

<sup>24</sup> *Ibid.* at paras. 267–68.

<sup>25</sup> *Ibid.* at para. 306.

Piché and the Quebec Court of Appeal,<sup>26</sup> however, the majority went on to conclude that Quebec's statutory prohibition on private health insurance and funding violated both the Quebec *Charter of Human Rights and Freedoms*<sup>27</sup> and the Canadian *Charter*. The question, according to Justice Deschamps, was "whether Quebecers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state."<sup>28</sup> The answer, in her view, was no. In assessing the Appellants' remedial demand that the province's ban on private insurance must be struck down, Justice Deschamps asserted:

The relief sought by the appellants does not necessarily provide a complete response to the complex problem of waiting lists. However, it was not up to the appellants to find a way to remedy a problem that has persisted for a number of years and for which the solution must come from the state itself. Their only burden was to prove that their right to life and to personal inviolability has been infringed. They have succeeded in proving this.<sup>29</sup>

In their concurring judgment Chief Justice McLachlin, Justice Major and Justice Bastarache found that, since two-tier health care systems exist in other western democracies, Quebec's ban on private insurance was arbitrary and thus infringed section 7 principles of fundamental justice and could not be justified under section 1 of the *Charter*. Chief Justice McLachlin described the remedy being sought by the Appellants as follows:

The appellants do not seek an order that the government spend more money on health care nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to allow them to access private services.<sup>30</sup>

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<sup>26</sup> *Chaoulli c. Québec (Procureur général)*, [2002] J.Q. No. 759 (C.A.).

<sup>27</sup> *Charter of human rights and freedoms*, R.S.Q. 1977, c. C-12.

<sup>28</sup> *Chaoulli* (S.C.C.), *supra* note 11 at para. 4.

<sup>29</sup> *Ibid.* at para. 100.

<sup>30</sup> *Ibid.* at para. 103.

Chief Justice McLachlin concluded that while the *Charter* “does not confer a free standing constitutional right to health care,”<sup>31</sup> Quebec’s ban on private insurance was objectionable under section 7 because it prevented ‘ordinary’ Quebec residents from securing private insurance that would enable them to obtain private health care in order to avoid delays in the public system.<sup>32</sup> On that basis she agreed with Justice Deschamps that the prohibition on private insurance was unconstitutional.<sup>33</sup>

The conception of the right to health care put forward by the majority in *Chaoulli* is clearly a negative rather than a positive one, one that falls far short of Canada’s obligations under the *ICESCR* to guarantee ‘to the maximum of its available resources’ the right of everyone to the highest attainable standard of health, including access to medical service without discrimination based on “social origin, poverty, birth or other status.”<sup>34</sup> In the majority’s view, rather than requiring the government to take affirmative measures to ensure universal access to health care, section 7 of the *Charter* demands state inaction; the appellants must be free to buy their own health care without government interference. On appeal, Justice Delisle pointed out the problems of such an approach:

Il ne faut pas inverser les principes en jeu pour, ainsi, rendre essentiel un droit économique accessoire auquel, par ailleurs, les gens financièrement défavorisés n’auraient pas accès. Le droit fondamental en cause est celui de fournir à tous un régime public de protection de la santé, que les défenses édictées ... ont pour but de sauvegarder.<sup>35</sup>

The implications of the majority’s negative conception of the right to health care are even more stark at a remedial level. The majority found

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<sup>31</sup> *Ibid.* at para. 104.

<sup>32</sup> *Ibid.* at paras. 111, 124.

<sup>33</sup> *Ibid.* at para. 159.

<sup>34</sup> *ICESCR*, *supra* note 6, articles 2, 12; see generally *General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 22d Sess., Annex, Agenda Item 3, UN Doc. E/C.12/2000/4 (2000).

<sup>35</sup> *Chaouilli (C.A.)*, *supra* note 26 at para. 25. Author’s translation: “The principles at issue must not be inverted so as to make an ancillary economic right essential, and further, one to which economically disadvantaged people would not have access. The fundamental right at issue is that of providing a public health protection system to all, a right that the [impugned] prohibitions are designed to safeguard.”

that “patients die as a result of waiting lists for public health care.”<sup>36</sup> To remedy this *Charter* violation, it concluded that the prohibition on private insurance must immediately be struck down. The result of the *Chaoulli* decision is a constitutional remedy only for those who can buy their way out of the public system. As Justices Binnie, LeBel and Fish point out in their dissenting judgment: “Those who seek private health insurance are those who can afford it and can qualify for it.... They are differentiated from the general population, not by their health problems, which are found in every group in society, but by their income status.”<sup>37</sup> The majority’s decision offers no remedy for the poor, the chronically ill, the elderly or the disabled, who remain in the very situation decried by the majority: left to languish and possibly die on public waiting lists. Not only are those who cannot afford, or who are ineligible for, private insurance left without a remedy, the evidence accepted by Justice Piché at trial demonstrates that their situation will worsen as waiting lists in the public system become even longer once private health insurance and funding are allowed.<sup>38</sup>

The recent B.C. Supreme Court decision in *Victoria (City) v. Adams* provides another illustration of the remedial implications of the positive/negative rights paradigm for those experiencing violations of basic socio-economic rights.<sup>39</sup> The *Adams* case arose from an application by the City of Victoria for an injunction authorizing it to evict a number of homeless people, including the defendants, from a tent city they had created in a public park. In response, the defendants challenged the constitutionality of the municipal bylaw that prohibited the erection of temporary structures, such as tents and tarps attached to trees, overnight in public places. Relying on *Chaoulli*,<sup>40</sup> the defendants argued that the bylaw violated section 7 of the *Charter* by prohibiting homeless people from erecting shelter to protect themselves in circumstances where no alternative shelter was available.<sup>41</sup>

<sup>36</sup> *Chaoulli* (S.C.C.), *supra* note 11 at para. 123.

<sup>37</sup> *Ibid.* at para. 274.

<sup>38</sup> *Chaoulli* (C.S.), *supra* note 19 at paras. 104–107; see generally Marie-Claude Prémont, “L’affaire *Chaoulli* et le système de santé du Québec: cherchez l’erreur, cherchez la raison” (2006) 51 McGill L.J. 167; Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: the Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

<sup>39</sup> *Adams*, *supra* note 12.

<sup>40</sup> *Chaoulli* (S.C.C.), *supra* note 11.

<sup>41</sup> *Adams*, *supra* note 12 (Factum of the Defendants, at para. 108).

In its intervention in the case, the Attorney General of B.C. warned of the dangers of judicial interference in regards to the problem of homelessness:

The AGBC says that the solutions to the difficult and challenging circumstances faced by the homeless lie in the hands of the democratically elected legislative and executive arms of government, and not in the courts creating a constitutionally entrenched 'right.' The courts are not equipped with the resources or the expertise to address the many challenging issues raised by the phenomenon of homelessness, and ought not to extend the reach of the Canadian constitution in an attempt to moderate the effects of homelessness in a manner that inevitably creates more problems than it can resolve.<sup>42</sup>

The Attorney General went on to argue that, because the government did not cause the defendants' homelessness, section 7 of the *Charter* was in no way engaged: "the deprivation must arise as a result of state action.... A s. 7 claim is not made out where, as a result of the impugned state inaction or insufficient action, the claimant merely remains in a state of insecurity."<sup>43</sup> The Attorney General also rejected the suggestion that Canada's international obligations, which include the right to housing under the *ICESCR*,<sup>44</sup> had any bearing in the case: "international documents to which Canada is a party do not assist the defendants in the circumstances of this case.... They cannot be enforced in Canadian courts."<sup>45</sup>

In her judgment, Justice Ross disagreed with the Attorney General's characterization of the defendants' *Charter* argument as a positive rights claim to the allocation of scarce government resources.<sup>46</sup> As she put it:

The defendants are not seeking to have the City compelled to provide the homeless with adequate shelter. Rather the claim is that in the present circumstances, in which the number of homeless people exceeds the available shelter space, it is a breach

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<sup>42</sup> *Adams, ibid.* (Factum of the Intervenor the Attorney General of British Columbia, at para. 3 [*Adams, Factum of the Attorney General*]).

<sup>43</sup> *Ibid.* at para. 39.

<sup>44</sup> *ICESCR, supra* note 6, article 11.

<sup>45</sup> *Adams, Factum of the Attorney General, supra* note 42 at paras. 56-57.

<sup>46</sup> *Adams, supra* note 12 at para. 123.

of s. 7 for the City to use its Bylaws to prohibit homeless people from taking steps to provide themselves with adequate shelter ... this case is in my view analogous to the circumstances in *Chaoulli*....<sup>47</sup>

Based on the evidence, Justice Ross found that there were only 141 permanent and 185 temporary extreme weather shelter spaces in the city while the homeless population exceeded 1,500,<sup>48</sup> thus: “hundreds of people are left to sleep in public places in the City.”<sup>49</sup> Given the shortage of shelter spaces, Justice Ross held that prohibiting homeless people from using overhead shelter exposed them to a risk of serious harm, including death by hypothermia.<sup>50</sup> In her view: “the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s. 7 provision ‘life.’”<sup>51</sup> Justice Ross found that the prohibition on erecting temporary shelter was arbitrary and overbroad, and hence inconsistent with section 7 principles of fundamental justice,<sup>52</sup> and she concluded that being neither a minimal nor a proportionate impairment of the rights of homeless people, the bylaw could not be justified under section 1 of the *Charter*.<sup>53</sup> Having concluded that the *Charter* violation at issue was a purely negative one—the government’s interference with a homeless person’s ability to provide him or herself with a temporary shelter, such as “a tent, strung-up tarp or a cardboard box”<sup>54</sup> while sleeping outdoors at night—Justice Ross issued a declaratory order that the impugned bylaw provisions were “of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter.”<sup>55</sup>

In the *Adams* case, like in *Chaoulli*, the *Charter* claim was framed and decided in a way that reinforced, rather than challenged, the traditional positive/negative rights framework. As argued above, the discriminatory remedial implications of the negative conception of the right to health care in *Chaoulli* are evident: those who are eligible for,

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<sup>47</sup> *Ibid.* at paras. 119–120.

<sup>48</sup> *Ibid.* at para. 45.

<sup>49</sup> *Ibid.* at para. 58.

<sup>50</sup> *Ibid.* at para. 142.

<sup>51</sup> *Ibid.* at para. 145.

<sup>52</sup> *Ibid.* at para. 194.

<sup>53</sup> *Ibid.* at para. 216.

<sup>54</sup> *Ibid.* at para. 46.

<sup>55</sup> *Ibid.* at para. 239.

and who have the means to purchase private health insurance, receive *Charter* protection; those who can't, do not. In *Adams*, the remedial implications of the negative conception of the right to shelter are equally significant. So long as the number of shelter spaces in Victoria remains inadequate, homeless people sleeping outdoors at night cannot be prevented from covering themselves with some form of temporary shelter. However, like Quebeckers who can't afford or obtain private health insurance, those among the City's 1,500-plus homeless people who are unable to obtain a shelter space, but for whom sleeping out-of-doors is not an option, are left without a remedy. In particular, the evidence accepted by Justice Ross at trial shows that women are disproportionately likely to be homeless because they have fled domestic violence or unsafe housing.<sup>56</sup> Youth and families with children were also found to be largely or entirely ineligible for the limited number of shelter spaces that do exist.<sup>57</sup> Like the right to buy private health insurance for the poor in *Chaoulli*, homeless women, youth and children have little to gain from a *Charter* right to sleep outdoors at night under a tarp or a cardboard box.

Justice Ross engaged in a thorough review of the evidence in the *Adams* case, and issued a carefully reasoned judgment. She rejected the many stereotypes of homelessness and homeless people put forward by the plaintiffs, including the Attorney General's suggestion that "living in a 'tent city' in a public park is an attractive, and even preferable alternative to many homeless people in Victoria"<sup>58</sup> or the prediction, unsupported by any evidence, "that the number of 'homeless' persons will rise (independently of any other cause) as parks become, in effect, a 'risk-free' housing option, creating a self-fulfilling process that makes it difficult or impossible for government at any level to address the real problem of homelessness."<sup>59</sup> However, by responding to the government's challenge to the justiciability of the defendants' *Charter* claim by emphasizing that it in no way engaged issues of positive rights or the allocation of resources, and by granting a remedy that demanded only government inaction in relation to homelessness, the *Adams* decision reflects and

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<sup>56</sup> *Ibid.* at para. 54.

<sup>57</sup> *Ibid.* at para. 56. See generally *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*, Miloon Kothari: Addendum, UN GA, 10th Sess., Annex, Agenda Item 3, UN Doc. A/HRC/10/7/Add.3 (2009) [*Report of the Special Rapporteur*].

<sup>58</sup> *Adams*, Factum of the Attorney General, *supra* note 42 at para. 119.

<sup>59</sup> *Ibid.* at para. 120.

potentially reinforces the discriminatory effects of the positive/negative rights paradigm that continues to undermine equal protection and benefit of *Charter* rights in Canada.

## II. A SUBSTANTIVE EQUALITY APPROACH TO REMEDIES IN THE SOCIO-ECONOMIC RIGHTS CONTEXT

As Chief Justice McLachlin has observed, section 24(1) “confer[s] the widest possible discretion on a court to craft remedies for violations of *Charter* rights.”<sup>60</sup> While both the victim of a *Charter* violation and the defendant may request a particular remedial order, the language of section 24(1) makes it clear that it is for the ‘court of competent jurisdiction’ to decide what remedy would best respect and promote “the purposes and values of the *Charter*.”<sup>61</sup> As Justice Sopinka affirmed in *Osborne v. Canada (Treasury Board)*:

In selecting an appropriate remedy under the *Charter*, the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective.<sup>62</sup>

Section 24(1) must be interpreted in a way that provides an effective remedy for the *Charter* claimant.<sup>63</sup> If it is to achieve the overarching objective of “vindicat[ing] the values expressed in the *Charter*,”<sup>64</sup> however, that remedy should not be one that perpetuates or reinforces the rights violation suffered by victims who are not present before the court and whose interests have not been represented. Both the constitutional principle of the rule of law and the equality guarantee under section 15 of the *Charter* suggest that a remedy that is substantively discriminatory in its effects cannot be ‘appropriate and just’ within the meaning of section 24(1). Thus, in deciding whether to grant a remedy that is requested by either a *Charter* claimant or by the government defendant in a particular case, a court should first ask whether the

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<sup>60</sup> *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para. 18 [*Dunedin*].

<sup>61</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679, at 700–701 [*Schachter*].

<sup>62</sup> *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at 104 [*Osborne*].

<sup>63</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para 25 [*Doucet-Boudreau*], citing *Dunedin*, *supra* note 60, at paras. 19–20.

<sup>64</sup> *Osborne*, *supra* note 62.

proposed remedy provides equal protection and equal benefit to all victims without discrimination based on grounds prohibited under section 15. If the answer is no, the Court should reject the proposed remedy in favour of one that respects substantive equality principles.

Existing *Charter* jurisprudence provides several examples of such equality-informed remedial analysis. In his judgment in *Schachter v. Canada*,<sup>65</sup> Chief Justice Lamer reviewed the Nova Scotia Court of Appeal's exercise of its remedial powers in *Attorney-General of Nova Scotia v. Phillips*.<sup>66</sup> In that case the Court of Appeal found that the province's family allowance regime violated section 15 of the *Charter* because sole support fathers were ineligible for benefits available to mothers under the program. Instead of reading fathers into the legislation, the Court of Appeal chose to strike down the family benefits program as a whole, even though low-income single mothers and their children were thereby deprived of support. Chief Justice Lamer criticized the Court of Appeal's decision on the grounds that it failed to respect the overall purposes of the *Charter*, a key consideration in selecting a 'just and appropriate' remedy. As the Chief Justice explained:

[T]he nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter*.... While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the *Charter*.<sup>67</sup>

In *Vriend v. Alberta*,<sup>68</sup> a majority of the Alberta Court of Appeal concluded that the province's failure to include sexual orientation as a prohibited ground of discrimination under Alberta's human rights legislation was constitutionally unobjectionable. Justice McClung nevertheless considered what would have been the appropriate remedy had a *Charter* violation been found. He concluded that reading sexual orientation into the *Individual's Rights Protection Act* would represent "an undesirable arrogation of legislative power by the court"<sup>69</sup> and that the

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<sup>65</sup> *Schachter*, *supra* note 61.

<sup>66</sup> *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4<sup>th</sup>) 633 (N.S.C.A.).

<sup>67</sup> *Schachter*, *supra* note 61 at pp. 701–702.

<sup>68</sup> *Vriend et al. v. Alberta* (1996), 181 A.R. 16 (C.A.).

<sup>69</sup> *Ibid.* at para. 37.

preferable remedy would be to strike down the *IRPP* in its entirety.<sup>70</sup> On appeal, the Supreme Court of Canada unanimously held that failure to extend human rights protections based on sexual orientation violated section 15(1) of the *Charter*.<sup>71</sup> In his dissenting judgment on the issue of remedy, however, Justice Major agreed with the Alberta Court of Appeal that, since it was unclear whether the “Legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination,”<sup>72</sup> the impugned provisions should be declared unconstitutional.<sup>73</sup>

In his judgment for the majority on the issue of remedy, Justice Iacobucci disagreed with this highly deferential approach to the court’s remedial powers under the *Charter*. As he affirmed, “Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly.”<sup>74</sup> Justice Iacobucci concluded that the appropriate remedy under the circumstances was to read sexual orientation in as a prohibited ground of discrimination under the *IRPP*.<sup>75</sup> Thus, instead of striking down Alberta’s human rights legislation in whole or in part, a remedy that would have deprived all disadvantaged minorities in the province of protection against discrimination in employment, housing and other areas, the majority in *Vriend* chose the *Charter* remedy that best promoted substantive equality principles: extending human rights protection to a historically disadvantaged group.

The importance of selecting a remedy that promotes *Charter* equality values was also underscored by Justice l’Heureux-Dubé in her judgment in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, where she affirmed that “Constitutional remedies should encourage the government to take into account the interests, and views, of minorities.”<sup>76</sup> In considering how best to remedy the unconstitutional

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<sup>70</sup> *Ibid.* at para. 64.

<sup>71</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 21.

<sup>72</sup> *Ibid.* at para. 196.

<sup>73</sup> *Ibid.* at para. 201.

<sup>74</sup> *Ibid.* at para. 175.

<sup>75</sup> *Ibid.* at para. 119.

<sup>76</sup> *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 117 [*Corbière*].

exclusion, under the federal *Indian Act*,<sup>77</sup> of band members living off-reserve from voting in band elections, Justice l'Heureux-Dubé concluded:

There are a number of ways this legislation may be changed so that it respects the equality rights of non-resident band members. Because the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal peoples affected by it.<sup>78</sup>

The equality affirming dimensions of a remedial order in favour of a disadvantaged group are also evident in the Supreme Court's decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.<sup>79</sup> There, the Court upheld the trial judge's order retaining jurisdiction to hear reports from the provincial Department of Education on the progress of construction of French-language schools in Nova Scotia.<sup>80</sup> The Court concluded that this remedy was necessary to deal with the government's inaction in failing to provide the funding necessary to address the violation of a crucial socio-economic right guaranteed to francophone minority parents under section 23 of the *Charter*.<sup>81</sup>

What might a remedial approach informed by substantive equality principles, rather than by a traditional positive/negative rights framework, have produced in the *Chaoulli* or *Adams* cases? In *Chaoulli*, Justice Piché found, and the majority of the Supreme Court agreed, that undue waiting times for publicly funded health care threatened Quebec residents' rights to life and to personal security. As discussed above, the remedy demanded by the Respondents and granted by the majority—forcing the government of Quebec to allow the development of a parallel private system while requiring it to do nothing about waiting lists within the public health care system—clearly undermines rather than promotes *Charter* equality values. A remedial analysis informed by section 15 would instead have dictated an order that the province take whatever steps were necessary to ensure timely access to care for all. Like in *Doucet-Boudreau*, the province could have been ordered to report back to the court with a plan outlining the measures it proposed to take to bring the

<sup>77</sup> R.S.C. 1985, c. I-5.

<sup>78</sup> *Corbière*, *supra* note 76 at para. 116.

<sup>79</sup> *Doucet-Boudreau*, *supra* note 63.

<sup>80</sup> *Ibid.* at para 88.

<sup>81</sup> *Ibid.* at para. 43.

public health care system into compliance with the *Charter*, with specific attention to the situation of those unable to afford private insurance or care.<sup>82</sup> Consistent with the Supreme Court's conclusion in *Eldridge* that "the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services"<sup>83</sup> and that medical interpretation services for the deaf had to be publicly funded,<sup>84</sup> a remedy in the *Chaoulli* case that focussed on the public system would have guaranteed the equal protection and equal benefit of a *Charter* remedy to all Quebec residents, without discrimination based on disability, age, or poverty, among other grounds.<sup>85</sup>

The Constitutional Court of South Africa's decision in *Government of the Republic of South Africa v. Grootboom* provides an instructive parallel to the *Adams* case.<sup>86</sup> In *Grootboom*, the homeless respondents, who had taken up temporary shelter on a municipal sports field after they had been forcibly evicted from an informal squatter settlement, applied to the court for an order directing the government to provide them with adequate basic temporary shelter until they and their children obtained permanent housing. The Respondents based their claim on the state's obligation to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of the "right to have access to adequate housing," a right

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<sup>82</sup> See generally *Chaoulli* (S.C.C.), *supra* note 11 (Factum of the Intervener the Charter Committee on Poverty Issues and the Canadian Health Coalition).

<sup>83</sup> *Eldridge*, *supra* note 7 at para. 77.

<sup>84</sup> *Ibid.* at paras. 94–95.

<sup>85</sup> See generally Martha Jackman, "'The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44 Osgoode Hall L.J. 349.

<sup>86</sup> *Government of the Republic of South Africa v. Grootboom*, [2001], 1 S. Afr. L.R. 46 (S. Afr. Const. Ct.) [*Grootboom*].

guaranteed under section 26 of the South African Constitution<sup>87</sup> in similar terms to the obligations imposed on Canada under the *ICESCR*.<sup>88</sup>

In his judgment for the Constitutional Court, Justice Yacoob held that the state had breached its negative obligation to protect the Respondents against “arbitrary evictions,” a rights violation that was compounded by the lack of effective mediation or consultation with those affected before the forcible eviction occurred.<sup>89</sup> Justice Yacoob also found that, while housing plans and legislation had been adopted at the national, state and local levels, no effective measures were in place to provide relief for those, like the Respondents, “in desperate need [who] are left without any form of assistance with no end in sight.”<sup>90</sup> Justice Yacoob concluded that the legislative and other measures taken by the government to meet its positive obligations in relation to the right to housing did not meet the constitutional requirement of reasonableness.<sup>91</sup> As he explained:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realize.... Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.<sup>92</sup>

In response, Justice Yacoob issued a declaratory order requiring the “the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realize the

<sup>87</sup> *The Constitution of the Republic of South Africa 1996*, No. 108 of 1996, s. 26 provides that: “26 (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit such evictions.”

<sup>88</sup> *ICESCR*, *supra* note 6, articles 2.1, 11; see generally Bruce Porter, “Homelessness, Human Rights, Litigation and Law Reform: A View from Canada” (2004) 10 *Austl. J. H. R.* 133.

<sup>89</sup> *Grootboom*, *supra* note 86 at para. 88.

<sup>90</sup> *Ibid.* at para. 65.

<sup>91</sup> *Ibid.* at paras. 63–69.

<sup>92</sup> *Ibid.* at para. 44.

right of access to adequate housing” including but not limited to the measures required to provide relief to “people who have ... no roof over their heads, and who are living in intolerable conditions or crisis situation.”<sup>93</sup> In addition, noting that South Africa’s Human Rights Commission had the power and was prepared assume this role, Justice Yacoob ordered the Commission to “monitor and, if necessary, report ... on the efforts made by the state to comply with its section 26 obligations in accordance with this judgment.”<sup>94</sup>

Like in *Grootboom*, the forced eviction of Nathalie Adams and the other homeless Respondents from the Victoria park in which they had erected temporary shelter, in circumstances where no alternative housing was available to them, amounted to a negative violation of their right to housing. However, a narrow declaration that the impugned bylaw provisions in *Adams* were “of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter”<sup>95</sup> was, at best, an incomplete remedy for the rights violation at issue. Similar to Justice Yacoob’s decision in *Grootboom*, a remedial order requiring the government to take concrete steps to provide relief to those desperately in need of access to housing, and especially to those for whom sleeping out of doors was not an option, would have been far more consistent with the overarching values of the *Charter*. Like in *Grootboom*, and analogous to the situation in *Doucet-Boudreau*, a declaratory order requiring the government to “devise, fund, implement and supervise”<sup>96</sup> a plan to provide housing to the Respondents and others in immediate need of housing could also have been coupled with a requirement that the government report back either to the court, or to another rights monitoring agency, such as the provincial Human Rights Tribunal, on the progress of the measures being taken to comply with the court’s remedial order. Such a remedial order would be well within the court’s discretion under section 24(1) of the *Charter*. It would address rather than perpetuate the rights violations experienced by the most vulnerable victims of governments’ inaction in relation to homelessness, including homeless women and their children. And it would respond to a human rights failure that has been identified by the United Nations

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<sup>93</sup> *Ibid.* at para 99.

<sup>94</sup> *Ibid.* at para. 97.

<sup>95</sup> *Adams*, *supra* note 12 at para. 239.

<sup>96</sup> *Grootboom*, *supra* note 86 at para. 96.

Committee on Economic, Social and Cultural Rights as a matter of 'national emergency' in Canada.<sup>97</sup>

## CONCLUSION

The *Adams* decision represents a rare socio-economic rights victory in Canada. To win their case, Natalie Adams and the other homeless defendants mounted a *Charter* argument that was utterly devoid of any positive rights dimension. Their victory required a courageous trial judge to reject a series of procedural<sup>98</sup> and substantive challenges to the justiciability of the defendants' *Charter* claim, including that Canadian courts do not have the legitimacy or competence to intervene in the area of housing;<sup>99</sup> that governments do not cause homelessness and so have no responsibility to do anything about it;<sup>100</sup> and that Canada's international human rights treaty obligations are essentially irrelevant.<sup>101</sup> Such arguments are regularly advanced by governments in socio-economic rights cases and, most-often, are successful.<sup>102</sup> Nevertheless, Justice Ross found against the government in the *Adams* case and, exceptionally, she upheld the defendants' *Charter* claim. The result: a *Charter* right to sleep outside at night under a box. The City of Victoria and the Attorney General of B.C. have appealed this decision. What, in our land of plenty, is wrong with this picture?

In her 2005 LaFontaine-Baldwin lecture, former Supreme Court Justice and U.N. High Commissioner for Human Rights, Louise Arbour, observed that:

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<sup>97</sup> CCPI, *Right to Effective Remedies*, *supra* note 13 at para. 62; see also *Report of the Special Rapporteur*, *supra* note 57; see generally Poverty and Human Rights Centre, *Victoria (City) v. Adams: Advancing the Right to Shelter – Law Sheet* (Vancouver: Poverty and Human Rights Centre, 2009); *The Corporation of the City of Victoria v. Adams*, 2009 BCCA 172 (Factum of the Intervenor, The Poverty and Human Rights Centre).

<sup>98</sup> *Adams*, *supra* note 12 at paras. 10–28.

<sup>99</sup> *Adams*, *ibid.* (Factum of the Plaintiff, at paras. 8, 60); *Adams*, Factum of the Attorney General, *supra* note 42 at paras. 3, 123.

<sup>100</sup> *Adams*, Factum of the Attorney General, *ibid.* at paras. 39–41.

<sup>101</sup> *Ibid.* at paras. 56–58.

<sup>102</sup> See *supra* note 9; see generally Young, *Poverty: Rights, Social Citizenship, and Legal Activism*, *supra* note 8.

[S]ixty years of disclaiming or belittling the equal status of socio-economic rights as enforceable human rights, fundamental to the equal worth and dignity of all Canadians, rings hollow and disingenuous in the light of international and comparative experience. There is nothing to fear from the idea of socio-economic rights as real, enforceable human rights on equal footing with all other human rights.<sup>103</sup>

I have suggested that judicial adherence to a traditional positive/negative rights paradigm in Canada has had perverse effects at a remedial level, illustrated most glaringly in the Supreme Court of Canada's decision in the *Chaoulli* case. I have argued that existing *Charter* jurisprudence, such as the decisions in the *Schachter*, *Vriend* and *Doucet-Boudreau* cases, points the way to an alternative approach to remedies in the socio-economic rights context. In particular, I have argued that judicial scrutiny of remedial claims in light of section 15 of the *Charter* is more likely than a traditional positive/negative rights framework to yield remedies that vindicate, rather than undermine the values and purposes of the *Charter*. As the ICJ has documented, judges and tribunals in other constitutional democracies are increasingly calling their governments to account for socio-economic rights violations. In Canada, however, governments continue to escape judicial scrutiny for discriminatory action or inaction in relation to poverty, homelessness, hunger and other serious socio-economic rights violations. By ensuring that remedies granted in socio-economic rights cases promote rather than undermine *Charter* equality rights principles, Canadian courts and tribunals can begin to address this serious and longstanding failure in human rights protection in Canada. Surely it is past time for the Canadian *Charter* to wake up from under its box?

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<sup>103</sup> Arbour, "Freedom from Want," *supra* note 9.