

TWENTY YEARS OF EQUALITY RIGHTS: RECLAIMING EXPECTATIONS

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April 17, 2005 marked the twentieth anniversary of section 15 of the Canadian Charter of Rights and Freedoms. In this paper, the author reviews the writings of equality specialists in 1985 and the submissions of equality-seeking and other groups before the Parliamentary Sub-Committee on Equality Rights in 1985. The author assesses the expectations of the new guarantee of equality rights at the time of enactment. The author finds that the expansive wording and coverage of section 15 for which equality-seeking groups had lobbied, including the words "equal benefit of the law" and a guarantee of equality rights for people with mental and physical disabilities that was unprecedented, was understood as having effected a dramatic shift in the idea of equality. It was believed that successful lobbying had moved the protection of equality beyond a right to freedom from discrimination, even in benefit programs, to a broadly framed guarantee of equality as a positive social right. Section 15 was thus understood by equality-seekers to impose obligations on governments to take positive measures to address systemic patterns of socio-economic disadvantage and to incorporate social and economic rights which Canada had affirmed under international law such as the right to housing, to education, to an adequate income and to fulfilling work. These types of positive obligations were expected to be enforced by courts where necessary, but equality-seekers also envisioned a new model of participatory and accountable governance in which disadvantaged groups would be newly empowered as rights-holders.

Reviewing developments in courts and in governance in Canada over the last twenty years, the author concludes that these central expectations have remained largely unrealized. Despite some significant victories in Charter litigation with positive remedial implications, the Supreme Court of Canada has ultimately failed to hear or to honour the central claim to equality that rights-holders expected of the right to equality in 1985. Similarly, governments have marginalized, rather than mainstreamed, equality rights in governance. Human rights institutions have failed to promote and enforce the broad right to equality envisioned in 1985. Considering whether, in light of these disappointments, Canadians have perhaps expected too much of the right to equality, the author concludes that we ought not to be talked out of our expectations. A unique feature of Canada's emerging constitutional democracy, which ought not to be lost, is the expectation that the right to equality can act as a vehicle for a guarantee of social and economic rights protection as well as protection from discrimination.

Le 17 avril 2005 marquait le vingtième anniversaire de l'article 15 de la Charte canadienne des droits et libertés. Dans cet article, l'auteur passe en revue les écrits de 1985 de spécialistes des questions d'égalité et les présentations faites en 1985 par des groupes visant l'égalité et par d'autres groupes au Sous-comité parlementaire sur les droits d'égalité. L'auteur examine

les attentes créées au moment de l'adoption de la Charte par la nouvelle garantie de droits d'égalité. Il trouve que l'on concevait que la grande portée des termes et de la couverture de l'article 15 pour lequel les groupes visant l'égalité avaient fait du lobbying, y compris les mots « même bénéfice de la loi » et la garantie sans précédent de droits d'égalité pour les personnes ayant des déficiences mentales ou physiques, avait produit un changement dramatique à l'idée d'égalité. On croyait que le succès du lobbying avait poussé la protection de l'égalité au delà du droit à la protection contre la discrimination, même pour les programmes de prestations, à une garantie d'égalité largement définie comme droit social positif. Ainsi, ceux et celles qui visaient l'égalité concevaient que l'article 15 impose aux gouvernements des obligations d'entreprendre des mesures positives pour s'attaquer aux formes systémiques de désavantage socio-économique et d'incorporer les droits sociaux et économiques qu'avait affirmé le Canada en droit international, tels que le droit à l'hébergement, à l'éducation, à un revenu adéquat et à un travail valorisant. On s'attendait à ce que, au besoin, les cours mettent en vigueur ces genres d'obligations positives, mais ceux et celles qui visaient l'égalité envisageaient aussi un nouveau modèle de gouvernance participative et redevable où les groupes désavantagés jouiraient de nouveaux pouvoirs en tant que détenteurs de droits.

Passant en revue les développements dans les cours et en gouvernance au Canada au cours des vingt dernières années, l'auteur conclut que ces attentes centrales demeurent largement irréalisées. Malgré des victoires juridiques importantes en rapport avec la Charte comprenant des aspects correctifs positifs, en fin de compte, la Cour Suprême du Canada n'a pas entendu ni honoré la réclamation centrale à l'égalité à laquelle s'attendaient les détenteurs de droits du droit à l'égalité en 1985. De la même façon, les gouvernements ont marginalisé plutôt que d'incorporer aux pratiques courantes les droits d'égalité en gouvernance. Les institutions de droits de la personne n'ont pas fait la promotion ni fait respecter le droit général à l'égalité envisagé en 1985. En se demandant si, à la lumière de ces déceptions, les Canadiens et Canadiennes ont peut-être eu des attentes trop élevées en rapport au droit d'égalité, l'auteur conclut qu'il ne faut pas se laisser dissuader de maintenir nos attentes. Un aspect unique de la démocratie constitutionnelle qui se dessine au Canada, et qu'il ne faut pas perdre, c'est l'attente que le droit à l'égalité peut être un moyen de garantir la protection des droits sociaux et économiques ainsi que la protection contre la discrimination.

I. INTRODUCTION

April 17, 2005, marked the 20th anniversary of section 15, three years after the 20th anniversary of the *Charter* as a whole. Section 15 was delayed in coming into effect for three years after the rest of the *Charter* became law on April 17, 2002, to provide governments with an opportunity to review and change legislation and policy to conform with the requirements of the new equality rights.

Toward the end of the three-year moratorium, in 1985, the Federal Government established a Sub-committee, chaired by Patrick Boyer M.P., of the Standing Committee on Justice and Legal Affairs, with authority to hold consultations and make recommendations for changes to federal legislation, policies and programs so that they would conform with section 15. Looking at what equality seekers put forward as expectations associated with section 15 at that time, provides us with a rare opportunity to assess what equality meant to the new rights holders before courts had the chance to interpret it.

One worries, of course, that if we look back on 1985 and find that equality-seeking groups expected more than they eventually received from section 15, we may invite those who were critical or skeptical of the value of the *Charter* in the first place to say ‘We told you so. Didn’t we tell you not to invest so heavily in illusory rights?’ In anti-poverty *Charter* litigation, where one is constantly under scrutiny for symptoms of naive *Charter* optimism and ‘false hope syndrome’, one is hesitant to document naivety or unrealistic expectations for section 15.

The prospect of naivety or false expectations turned out not to be a problem, however. The submissions of equality seekers to the Sub-committee on Equality Rights back in 1985 were anything but naive. There were, to be sure, significant expectations for section 15. But at the same time there was an acute awareness that the right to equality in the *Charter* would mean little if the make-up and training of the judiciary were not altered; if equality seekers were not provided with resources to take claims forward; if parliamentary and other institutional mechanisms were not put in place to retain equality issues on the political agenda; if human rights commissions did not actively promote the new vision of equality; if everything were left to the courts; and if equality were reduced to legal rules. Equality seekers in 1985 expected very little to *automatically* flow from the mere fact of winning constitutional protection of equality.

In reflecting on ‘expectations of equality’ it is worth reminding ourselves that the word “expect” in English has two different meanings. One meaning refers to the prediction of a probable outcome of something entirely beyond our control, as when we say ‘Hurricane Ivan is expected to diminish to a category three hurricane by tomorrow.’ Another meaning, however, is perhaps closer to the original meaning of the word and whose etymology, in Latin, means “to await” or “to look forward to”. It refers not to a predicted outcome, but to what is considered an entitlement. So we say: ‘We expect government officials to act with honesty and integrity’ or ‘We expect participants to be punctual.’ These statements are not predictions of probable outcomes but rather moral imperatives, designed to produce appropriate outcomes through the claiming of entitlements. The entitlements may or may not be honoured, but they are ‘expectations’ nonetheless.

It is the second meaning of “expect” that is most usefully considered when we reflect on what equality seekers voiced as expectations of equality in 1985 - not what was predicted as the outcome of section 15 coming into force, but what was legitimately claimed and expected by new rights-holders. Over a decade later, in *Vriend*, when the Supreme Court finally applied section 15 to one of the important substantive issues before the Boyer Committee - the obligation to legislate human rights protections from discrimination because of sexual orientation - Justice

Iacobucci, writing for the majority, responded to critics of “judicial activism” by describing the *Charter* as a new social contract: “so courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen.”¹ It is only appropriate that the expectations of the rights holders in the new social contract should inform the meaning of section 15. What equality seekers might have predicted twenty years ago about how “the arduous struggle”² to realize equality would turn out is not terribly important. What they expected from the right to equality as a framework for new entitlements of citizens and obligations of governments, however, is critical to an assessment of whether the new social contract has been properly implemented by governments and correctly interpreted and applied by Courts.

II. EXPECTATIONS OF “THE EQUAL BENEFIT OF THE LAW” - A RIGHT TO MORE THAN FREEDOM FROM DISCRIMINATORY EXCLUSION FROM BENEFIT PROGRAMS

A. Drafting History of Section 15

The wording of section 15 went through some critical changes from the time that a draft Charter was tabled by the Trudeau Government in the House of Commons and the Senate on October 6, 1980 to its final adoption.³ When a draft Charter was first tabled, 15(1) was labelled “non-discrimination rights”, section 15(1) read as follows:

Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

The following year saw a massive public response to the first draft of the Charter. The response forced the government to expand a proposed one month hearing before the Special Joint Committee on the Constitution to nearly four months, with a thousand briefs and three hundred oral submissions. Women's groups and other equality-seeking groups sprang into action to demand changes to the wording of section 15. In response to concerted and effective lobbying⁴ led by the National Action Committee on the Status of Women (NAC), the National Association of Women and the Law (NAWL) and the Canadian Advisory Council on the Status of Women (CACSW)⁵, the version of section 15 that was placed by Justice Minister Chrétien before the Special Joint Committee on January 12, 1981, was substantially altered. It had been renamed, as

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¹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 135, Iacobucci, J. [*Vriend*].

² *Ibid.* at para. 68, Cory, J.: “The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain.”

³ The complete text of the earlier versions of s.15 can be found in Robin Elliot, “Interpreting the Charter – Use of the Earlier Versions as an Aid” (1982/Charter Edition) U.B.C.L. Rev. 11 at 37-39.

⁴ One notices, in reading submissions and writing from 1985, that the term “lobbying” was a term of respect in those days. The lobby was the meeting place where citizens had the chance to interact directly with politicians.

⁵ For a description of the lobbying efforts during this time, see Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women’s Educational Press, 1983).

had been proposed by NAWL, “equality rights”. Section 15 was widened to include analogous grounds of discrimination as well as to include a new reference to equality “under” the law and to the “equal benefit” of the law:

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 or age.

Explanatory notes released with the new draft explained that adding the reference to equality “under” the law “would ensure that the right to equality would apply in respect of the substance as well as the administration of the law” and that the addition of the phrase “equal benefit of the law” “would extend the right to ensure that people enjoy equality of benefits as well as protection of the law.”

And finally, after further energetic and effective lobbying for the inclusion of disability rights, led by the COPOH (now, the Council of Canadians with Disabilities) ⁶ the section, still labelled “equality rights” as tabled in the House of Commons on February 13, 1981, read as it does now:

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.

As noted by the Supreme Court of Canada in the *Andrews* decision, the addition of “under the law” and the “equal benefit of the law” was a safeguard against a line of decisions, under the *Canadian Bill of Rights*, in which the courts held that discriminatory exclusions from entitlements to benefits were not covered by the guarantee of equality “before the law.”⁷ In the infamous *Bliss* case, the denial of unemployment insurance benefits to women during pregnancy was found not to violate the guarantee of equality before the law in part because it did not involve a discriminatory imposition of a penalty but rather “a definition of the qualifications required for entitlement to benefits.”⁸ In order to safeguard against any similar narrowing of the scope of section 15, NAWL and the Canadian Advisory Council on the Status of Women advocated before the Joint Parliamentary Committee for the explicit inclusion of a right to the “equal benefit of the law” in order to ensure that section 15 be applied to social benefit programs such as welfare.”⁹

B. What the Words Were Expected to Mean

⁶ COPOH was an acronym for the Coalition of Provincial Organizations for the Handicapped. For a description of COPOH’s lobbying efforts for the inclusion of disability as an enumerated ground, see Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference? An Assessment by the Council of Canadians with Disabilities* (Winnipeg: Council of Canadians with Disabilities, 2004) online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/publications/20yrs/20yrs.htm>> and “From Charity to Equality: Canadians with Disabilities Take Their Rightful Place in Canada’s Constitution” in Deborah Stienstra, Aileen Wight-Felske and Colleen Watters., eds, *Making Equality - History of Advocacy and Persons with Disabilities in Canada* (Concord, Ontario: Captus Press, 2003) at 119-136.

⁷ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 170.

⁸ *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 at 190-92.

⁹ Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parliament, No. 9 (20 November 1980) at 9:127; (9 December 1980) at 22:56-22:59.

There was a much broader dimension to the meaning of “the equal benefit of the law”, however, both for legal experts involved in the drafting process, and for equality-seeking groups mobilizing in support of the changes, than a guarantee that the right to freedom from discrimination would be applied by the courts to benefit programs as well as to other legislation and government action.¹⁰ The wording of section 15 had been made broader than any comparable constitutional guarantee of equality in other jurisdictions. Canada had become the first democracy to give constitutional status to the equality rights of persons with mental and physical disabilities.¹¹ As the change in the name of the section implied, the more expansive wording of section 15 was seen at the time as having altered the entire orientation of the right to equality from a negatively oriented right to non-discrimination to a positively oriented right to equality. As Beth Symes said after the rewording of section 15 had been secured, “it is essential to fashion a remedy involving positive action. An order to cease discriminating is not enough. We want to press the court for new remedies.”¹²

A negatively oriented understanding of the constitutional right to equality conceptualizes the right predominantly as protection from discriminatory harm or penalty. That is, a negative understanding restricts government action so as to prevent the discriminatory imposition of a penalty or the discriminatory exclusion from a benefit. A positively oriented understanding of the right, on the other hand, affirms obligations of governments and other actors not only to cease discriminatory action, but also to act affirmatively, to take positive measures to address pre-existing inequality and disadvantage. According to a negative rights paradigm, the right to equality would not place obligations on governments to take any particular action to address disadvantage or to provide particular benefits – this would be a matter for legislatures alone to decide. The right to equality would require only that once governments decide to act, they would do so in a non-discriminatory manner.

There is, of course, significant overlap between negative and positive conceptions of the right to equality. Including benefit programs within the scope of protections from discrimination may, even within a negative rights approach, require positive remedial action by government. Benefits that have been denied to particular groups on a discriminatory basis may have to be extended to that group to remedy discriminatory harm. It is in this sense that the Supreme Court of Canada affirmed in *Schachter* that the right to equality is a “hybrid” of negative and positive

¹⁰ The principle that protection from discrimination should be accorded in all areas of law, including benefit programs, was not a particularly radical idea at that time. The U.S. Supreme Court established in the same year that the *Canadian Charter* became law that unequal distribution of benefits is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. See *Zobel v. Williams*, 457 U.S. 55 at 60 (1982).

¹¹ M. David Lepofsky, “Discussion: The Charter’s Guarantee Of Equality To People With Disabilities - How Well Is It Working?” (1998) 16 Windsor Y.B. Access Just. 155 at 161.

¹² Cited in Kome, *supra* note 5 at 117. Ironically, a decade later, the Federal Court of Appeal would reject a section 15 claim brought by Ms. Symes challenging the exclusion of childcare as a business expense, on the basis that applying section 15 to “socio-economic legislation” is “overshooting” the Charter - precisely the danger that the amendments to section 15 were meant to protect against. But the court was more disturbed by the positive social rights dimension it saw in the case. As Iacobucci, J. noted, “Décary J.A. recoiled from the idea that the taxpayer could use s. 15 of the Charter to obtain a positive guarantee of equality, one which would compel ‘legislatures to adopt measures enabling... her to work’. Thankfully, the Supreme Court, while dismissing the appeal, affirmed that socio-economic legislation is equally subject to section 15. *Symes v. Canada*, [1993] 4 S.C.R. 695 at 717-18, 753; [1991] 3 F.C. 507 at 530. Whether s.15 encompasses the positive right to equality linked with social rights such as the right to work, however, remains, at best, unresolved by the Supreme Court. See text accompanying notes 130-140, below.

rights.¹³ In that case, the Court accepted that in some cases courts should extend benefits to groups that have previously been denied them rather than imposing “equality with a vengeance” by striking down the benefit scheme altogether.¹⁴

Equality seekers twenty years ago, however, articulated a positive dimension to equality rights that went well beyond the positive remedial approach to under-inclusive benefit programs developed by the Supreme Court in *Schachter*. Equality rights were seen twenty years ago as requiring positive government action directed at remedying pre-existing disadvantage and entrenched systemic inequality, whether or not that disadvantage was the result of a particular provision of law or prohibited discriminatory exclusion from a benefit scheme. A positive remedial approach to equality was considered essential, not simply in respect of remedying discriminatory exclusions within particular programs, but as remedying systemic inequality and disadvantage more generally. Rather than considering equality as a rule of non-discrimination against which existing legislation and government action were to be measured and corrected, equality seekers articulated the right to equality as, more fundamentally, a set of societal values linked with dignity, security and social inclusion which, they believed, must animate and mobilize concerted government initiatives and enhanced programs to eliminate entrenched patterns of inequality and injustice.

Equality seekers of twenty years ago thus argued that transcending the impoverished vision of equality that had defined the jurisprudence under the *Canadian Bill of Rights* in cases such as *Bliss* would require more than non-discriminatory provision of benefits such as unemployment insurance. It would require a change in the paradigm of equality in order to understand the term “equal benefit of the law” in its broader social dimension. Equality seekers envisaged a positive notion of equality encompassing what had been categorized in international law as economic and social rights such as the right to work, the right to housing, the right to healthcare and the right to an adequate standard of living. They articulated the new right to equality as a social right, a guarantee that both government action and inaction would be assessed for compatibility with constitutionally affirmed values of enhanced social participation and economic justice. The duty was to be enforced by courts, by governments and by newly empowered citizens as rights-holders.

Lynn Smith, who had been Stella Bliss’s lawyer in the *Bliss* case and now a judge, delivered a paper to a National Symposium on Equality Rights held in January 1985. She said that while it was well accepted that the wording of section 15 demanded a clear departure from *Canadian Bill of Rights* discrimination cases such as *Bliss*, consideration of the kinds of issues raised by equality seekers before the Joint Committee had suggested that the real impact was that section 15 “is an equality rights section, not just an anti-discrimination section.”¹⁵ She argued that the unique wording of section 15 represented a radical “paradigm shift” that was necessary to meet

¹³ *Schachter v. Canada* [1992] 2 S.C.R. 679 at 721. “Other rights will be more in the nature of ‘negative’ rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the ‘fundamental principles of justice’ may provide a basis for characterizing s. 7 as a positive right in some circumstances. Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.”

¹⁴ *Ibid.* at 701-702. The term “equality with a vengeance” was coined by the Women’s Legal Education and Action Fund, one of the interveners in the case.

¹⁵ Lynn Smith, “A New Paradigm for Equality Rights”, in Lynn Smith, ed., *Righting the Balance: Canada’s New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 353 at 368.

the expectations of women, people with disabilities and other equality-seeking groups at the time. As she explained, “section 15 equality rights are meant to create and should create a new paradigm for the definition and solution of inequality problems, new both in Canada and in comparison to other jurisdictions.”¹⁶ Under the new paradigm, Smith suggested, it is not enough to try to correct the *Bliss* decision simply by ensuring that the courts apply principles of non-discrimination to unemployment insurance benefits. Rather, the assumption that the male worker is the norm and maternity benefits that entail “special treatment” must be challenged:

The profound effect of a paradigm shift would be felt when measures such as those would no more be seen as an example of “special treatment” than would measures necessary to ensure an adequate supply of air for the non-robotic work force, or to provide hearing protection for the non-deaf workers in a high-noise industry.¹⁷

In another presentation to the 1985 symposium, Dale Gibson agreed that the wording of section 15 imposed legal obligations on governments to implement positive measures to address historic disadvantage:

In my opinion, the constitutional guarantee of a positive right to “equal benefit of the law” establishes a legal obligation on the part of governments to ensure that those who do not enjoy equal benefits because they are members of groups that have been disadvantaged due to past discrimination or other circumstances are given the benefit of special measures designed to erase that historic disadvantage and place members of the group on a truly equal footing with other members of society.¹⁸

Arguing that this new positive concept of equality rights would require a different relationship between courts and legislatures to implement it, Gibson playfully conjured up the image of “The Two Brians” (Chief Justice Brian Dickson and Prime Minister Brian Mulroney) with a supporting cast of politicians and judges singing the song, ‘You Gotta Accentuate the Positive and Eliminate the Negative.’¹⁹

Francine Fournier emphasized the commonality of the right to equality in the *Québec Charter of Rights and Freedoms* with the equality rights in section 15 of the *Canadian Charter*. Both, she argued, incorporated not only civil and political rights but also economic, social and cultural rights:

Policies, measures and legislation aimed at ensuring a more equal and therefore a more equitable distribution of wealth must go hand in hand with those promoting the fight against discrimination if a society is to be built which respects equality rights both from the point of view of civil and political rights and from the point of view of social, economic, and cultural rights.²⁰

Anne Bayefsky, in her influential article of the same year on “Defining Equality Rights” similarly argued that the concept of equality embedded in the term “equal benefit of the law” went beyond traditional notions of non-discrimination to positive obligations to ensure that social

¹⁶ *Ibid.* at 355.

¹⁷ *Ibid.* at 368.

¹⁸ Dale Gibson, “Accentuating the Positive and Eliminating the Negative,” in Smith, *supra* note 15, 311 at 332.

¹⁹ *Ibid.* at 312.

²⁰ Francine Fournier, “Égalité et droits à l’Égalité”, *supra* note 15 at 25-26.

programs are not only provided in a non-discriminatory manner, but also that they are adequate to meet the needs of disadvantaged groups:

This understanding of a goal or purpose of “equal benefit of the law” in section 15 is consistent with the modern Canadian conception of the capacities and responsibilities of government. We are not burdened with visions of the equality Lincoln sought. Minimum standards of welfare - welfare payments, subsidized housing, unemployment insurance, public health insurance; legal aid - are expectations which distinguish us from American society, even now.²¹

The fact that people with disabilities had successfully mobilized to win the battle for the inclusion of the ground of mental and physical disability in section 15 was also seen by commentators at the time as confirmation that a new paradigm of equality had been entrenched in the *Charter* consistent with the social goals of the modern disability rights movement. These goals had been dominant in submissions to the Joint Parliamentary Committee urging inclusion of disability as an enumerated ground. David Vickers, presenting for the Canadian Association for the Mentally Retarded in 1980, for example, had referenced the principle of equality for people with disabilities to the equal enjoyment of economic, social and cultural rights which are fundamental to Canadian citizenship:

Our plea to you is not a plea for special rights. Our plea as advocates of people with a handicap is that they too will be afforded the full opportunity that attaches to their Canadian citizenship; in short, a plea that they will not be forgotten in education; Article 7 [of the *International Covenant on Economic, Social and Cultural Rights*], the right to an opportunity to work, and just and favourable conditions of work; Article 8, the right to participate in trade unions and Article 9, the right to social security.²²

David Lepofsky and Jerome Bickenbach noted that discrimination because of disability often does not conform with earlier approaches to discrimination in that it demands a positive framework for equality rights, recognizing that the right is most often violated by a failure to accommodate unique needs.²³ David Vickers and Orville Endicott, commenting on the meaning of the new equality rights for people with mental disabilities in 1985, noted that the social movements generated around the International Year of the Disabled Person (1981) played an important part in winning the historic inclusion of mental and physical disability in the *Charter*. Section 15, they suggested, should be interpreted so as to “represent continuity with a movement which has touched all free and democratic societies over the past several decades.”²⁴ The new provisions, they argued, need to be interpreted and applied consistently with international human rights, particularly social and economic rights such as the right to an adequate standard of living recognized in article 25 of the *Universal Declaration of Human Rights*, the right to “the highest attainable standard of physical and mental health” in article 12 of the *International Covenant on*

²¹Anne Bayefsky, “Defining Equality Rights” in Anne Bayefsky & Mary Eberts, eds. *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 24.

²²Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parliament, No.10 (21 November 1980) at 10:10.

²³David Lepofsky & Jerome Bickenbach, “Equality Rights and the Physically Handicapped” in Bayefsky & Eberts, *supra* note 21, 323 at 326-27, 354-55.

²⁴David Vickers & Orville Endicott, “Mental Disability and Equality Rights” in Bayefsky & Eberts, *supra* note 21, 381 at 387.

Economic, Social and Cultural Rights (ICESCR), and the right to education recognized in article 13 of the ICESCR.²⁵

Raj Anand wrote in 1985 that section 15 of the *Charter* should also be seen as an implementation of Canada's international legal obligations with respect to racial and ethnic equality, including the obligation, recognized in the *International Covenant on Civil and Political Rights* (ICCPR), to take “affirmative action designed to ensure the positive enjoyment of rights.”²⁶ Anand argued that the expansive wording of section 15(1), the provision for affirmative action in 15(2), and the broad remedial powers available to courts in section 24(1) of the *Charter* “provide broad scope for governments and courts to remedy individual, institutional, systemic and cultural discrimination. The wide latitude of these provisions can again be seen as a response to the state of ethnic inequality in Canada when the *Charter* was enacted.”²⁷ He continued that

Particularly in the case of Canada's native peoples, ethnic discrimination has become too entrenched in the operation of our society to permit its redress on a completely individual basis. As a Royal Commission report concluded in 1984, “systemic discrimination requires systemic remedies.”²⁸

In summary, the phrase “the equal benefit of the law”, which equality-seeking groups had so strenuously fought for, had much more potential meaning in terms of the substance, scope and application of equality rights than a more narrowly defined guarantee of the application of a non-discrimination paradigm to under-inclusive benefit programs, even if the latter paradigm included positive remedies of extending benefits to groups previously excluded. A prevailing view among equality specialists in 1985 was that section 15, as it had been transformed and adopted, affirmed not only protection from discriminatory exclusion from benefit programs but also, and more fundamentally, a positive right to appropriate and adequate government programs and positive measures to address socio-economic disadvantage. It was emphasized that interpretations of equality should be linked to the social and political goals of equality-seeking communities and anchored in an emerging international human rights jurisprudence, not simply in the area of civil and political rights but also, and perhaps more centrally, economic, social and cultural rights.

Equality thinkers did not anticipate, however, that this new paradigm of equality would be implemented without significant resistance. Jill McCalla Vickers noted that the new approach to equality had been defined by, and would continue to rely on a dynamic relationship with emerging social movements or “equality projects.” These would be opposed, she noted, by notions of formal equality and “fair play”, particularly by neo-liberal economic theory’s reliance on competition in the labour market as “the great equalizer” where, as Barbara Cameron had pointed out, for women and other equality-seeking groups, “the equalization is downwards.”²⁹

²⁵ *Ibid.*

²⁶ Raj Anand, “Ethnic Equality” in Bayefsky & Eberts, *supra* note 21, 81 at 104.

²⁷ *Ibid.* at 116.

²⁸ *Ibid.* at 117.

²⁹ Barbara Cameron, “Labour Market Discrimination and Affirmative Action,” in Jill McCalla Vickers, ed., *Taking Sex into Account: The Policy Consequences of Sexist Research* (Ottawa: Carleton University Press, 1984) 135 at 138, cited in Jill McCalla Vickers, “Equality-Seeking in a Cold Climate,” in Smith, *supra* note 15, 3 at 18, n. 45 (Vickers, “Equality-Seeking”).

Vickers emphasized that it would be essential to maintain a strong link between theories of equality and the evolving equality projects that had redefined constitutional equality during the drafting process in order to sustain an alternative vision of equality to neo-liberalism's insistence on restricting equality to formal 'equality of opportunity'.³⁰

III. EXPECTATIONS OF EQUALITY-SEEKERS: THE BOYER COMMITTEE HEARINGS

At the same time that legal experts were assessing the meaning and impact of the unique wording of section 15, equality-seeking groups were engaged in defining their own equality initiatives, developing their own approaches to and understanding of the new equality rights, and engaging in a direct dialogue with the Parliamentary Committee on Equality Rights about what needed to be done to implement their understanding of the new constitutional equality rights.

What emerged from the submissions to the Boyer Committee was a remarkably strong agreement among the major equality-seeking constituencies about what equality rights ought to mean and what governments and other actors ought to do to implement the rights. At the centre of the consensus was the idea that the right to equality must extend beyond a right to non-discrimination, even in benefit programs, to include a more general 'social rights' dimension, addressing the real lives of people and ensuring access to decent work, adequate housing, appropriate healthcare, inclusive education and universal income security. The submissions thus supported the sense of legal commentators writing at the time that section 15 embodied a historically and geographically unique paradigm of equality that had emerged from equality-seeking social movements in Canada, as well as from a new international human rights movement with which the Canadian social movements increasingly interacted.

A. Women's Groups

Shelagh Day, addressing the Boyer Committee on behalf of the Women's Legal Education and Action Fund (LEAF) on Wednesday April 17th, the day section 15 came into force, summarized the expectations of the equality-seeking communities in Canada: namely, that section 15 would introduce a new way of looking at equality, informed by the context of women's concrete equality struggles, and requiring a radical reassessment of the constitutional responsibilities of governments:

We believe this is the time when we should be looking for the broadest and most practical and most effective interpretations of equality, both from this committee and from governments and indeed, we will be suggesting, from the courts.

We believe we should have definitions of equality that deliver real results that will affect the lives of Canadians. Narrow interpretations or technical pathways that lead us away from what is really happening to the lives of Canadians and to the lives of Canadian women we think is not what we need at this time. We think this is a fresh beginning and that the reason why these guarantees are now here in this fundamental document of the nation is because there is a need for real change.³¹

Jane Shackell, co-presenting for LEAF on April 17th, noted that the Discussion Paper released by the Department of Justice prior to the hearings had focused on identifying more

³⁰ Vickers, *ibid.* at 18.

³¹ Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings*, 33rd Parl., No. 3 (17 April 1985) at 3:9.

traditional forms of discrimination against women in benefit programs, such as distinctions in eligibility requirements between regular unemployment insurance and maternity benefits, access to employment in the armed forces, sex-based distinctions in the *Family Allowance Act*, the use of sex-based mortality tables in determining pension contributions, and sex-based distinctions in the age of eligibility for Veterans' Allowances.³² “If the agenda set in the sexual discrimination section of that paper is the equality agenda for women, then the most important issues have been ignored,” Shackell said.³³ She continued that

The issues discussed in the paper are not unimportant, but they are not as important, they are not as real, to many women in Canada. They divert attention from the issues that are real and that do affect women in a more real way. It is our view that the poverty of women in Canada is a principal source of inequality in this country, and the issues that give rise to the poverty of women are not really addressed in this paper. Issues such as equal pay for work of equal value, universal access to quality day-care, the control of a woman's body and her reproductive function, legalized prostitution, pension rates, restricted unemployment insurance benefits based on length of participation in the work force, the differential treatment of pregnancy as opposed to temporary disability: all these things contribute to the poverty of women relative to the poverty of men in this country and contribute to the unequal status of women. These are the issues that affect women's lives every day in a real way and are not addressed by this paper. In some cases they are being hived off to other committees and really ignored.³⁴

The National Action Committee on the Status of Women (NAC) similarly emphasized that focusing on the more obvious issues of discrimination in legislation “avoids rather than faces the difficult task of assessing and defining what equality means as well as considering the most effective legislative approach to accomplish the ends required by the *Charter*.”³⁵ Referring to the “intense lobbying and submissions by women's groups in Canada during the drafting process of the Charter” NAC argued that Parliament must act in accordance with the political decision to ensure that “the goal of the section is equality, a positive concept, as opposed to non-discrimination, a negative concept forbidding certain governmental activity but without creating the same sense of government's obligation to act positively.”³⁶ Section 15, they argued, “imposes a positive duty on the federal government as well as provincial governments to provide equal benefit of the law, meaning that its use of its funds and legislation must equally benefit women.”³⁷ This was consistent, NAC argued, with Canada's obligations under international human rights law:

We take the Charter as reaffirming and incorporating the obligations of Canada under the international conventions, particularly the United Nations Convention on the Elimination of All Forms of Discrimination against Women. This Convention is a broadly worded document which establishes that the federal government has already committed itself to doing more than just

³² Department of Justice Canada, *Equality Issues in Federal Law: A Discussion Paper* (Ottawa: Minister of Supplies and Services Canada, 1985).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Canada, The Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, Written Submissions (National Archives of Canada Accession No. RG14 File No. 6050-331-E1 [Boyer Committee Written Submissions], Submissions of the National Action Committee on the Status of Women, Box 135, Wallet 16, Submission B-577 at 6.

³⁶ *Ibid.* at 7.

³⁷ *Ibid.*

prohibiting discrimination. This means that the approach it must take to the Charter is one of positive action.³⁸

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), NAC pointed out, obligates governments in Canada:

to take in all fields and in particular in the political, economic, and social fields, all appropriate measures, , including measures to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise of human rights and fundamental freedoms on a basis of equality with men.³⁹

Prominent among NAC's list of necessary reform of government programs were a federal child-care financing act; measures to ensure access to education and training for low income women and sole support mothers; improved maternity and parental benefits and leave provisions; equal pay for work of equal value; increased commitment to social services and social housing; and comprehensive income support and supplementation to ensure an adequate guaranteed income for all Canadians.⁴⁰

The Charter of Rights Educational Fund (CREF),⁴¹ which had carried out a far-reaching audit of Federal and Ontario statutes for conformity with women's equality rights under section 15, similarly emphasized the role of section 15 in implementing international obligations such as the right to an adequate standard of living provided in article 25 of the *Universal Declaration of Human Rights*. The “equal benefit of the law”, they submitted, guaranteed “result equality”, not “rule equality.”⁴² Implementing “result equality” required, according to CREF, a reassessment of the poverty of women and redress of economic and other disadvantages in areas such as the process of proving welfare entitlement, the allocation of subsidized housing units and decision-making within welfare-bureaucracies. Government programs would need to be reformed to ensure that maternity leave, improved access to collective bargaining, revamped unemployment insurance, better protection of part-time workers and immigrant domestic workers, and affirmative action would improve equality in employment; that healthcare funding would better meet the needs of women; and a reformed tax system would begin to address the way the current system reinforced and extended the economic inequalities of women.⁴³

NAWL's submissions, presented by Gwen Brodsky, reiterated the prominent theme that positive action to remedy social and economic disadvantage and systemic discrimination was central to the commitment to equality in section 15. “Unless the Government implements

³⁸ *Ibid.* at 2.

³⁹ *Ibid.* Citing article 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, Can. T.S. 1982 No. 31.

⁴⁰ *Ibid.* Appendix.

⁴¹ The Charter of Rights Education Fund was formed during the 1982-85 moratorium on section 15 to examine the implications of s.15 for federal and Ontario's legislation and programs. Presenting for CREF before the Boyer Committee were Kathleen Lahey from the University of Windsor, Diana Majury, then at the University of Wisconsin, Linda Gehrke from Jane-Finch Community Legal Services in Toronto, and from private practice, Mary Cornish, Elizabeth Atchesan and Peter Maloney. CREF wound down after 1985.

⁴² Boyer Committee Written Submissions, *supra* note 35, Submission of the Charter of Rights Education Fund, Box 131, Wallet 8, Submission B-422 at p. 2 of section entitled “Women, Poverty and Income Assistance Programs” [Each section begins with page 1].

⁴³ *Ibid.* Under sections entitled “Women's Health”, “Employment”, “Women, Poverty and Income Assistance Programmes”, “Sex Discrimination in Immigration” and “Women and Taxation”.

positive programs to remove barriers to equality,” NAWL’s Brief stated, “ it will be signaling tolerance of discrimination and indifference to the expectations of Canadian women.”⁴⁴ The Brief continued that

This Charter imposes a moral obligation on government to take positive steps to end the tradition of women's inequality. History has revealed the inadequacy of passive anti-discrimination laws. The Charter is a signal to government to use creative and innovative means to achieve a vision of equality. The effectiveness of this Government will be judged by its success in making the equality guarantees of the Charter more than just words on paper.⁴⁵

The Canadian Advisory Council on the Status of Women (CACSW), represented by Donna Greschner, though concentrating primarily on s.28 of the *Charter*, similarly argued for positive obligations to eliminate the effects of systemic discrimination. Like other women's groups, CACSW relied on the substantive obligations in *CEDAW* as evidence that the *Charter* requires positive measures to address the effects of systemic discrimination.⁴⁶

These predominant concerns from national women's groups to the effect that section 15 must be applied to the concrete social and economic issues of inequality faced by women in Canada were echoed by women's groups from across the country. The Nova Scotia Chapter of the Canadian Research Institute for the Advancement of Women, for example, emphasized the need for new laws and programs to ensure proportional pay and benefits for part-time workers, access to affordable childcare, and more funding for women’s transition houses.⁴⁷ The New Brunswick Advisory Council on the Status of Women emphasized that “women's right to equality must be understood as an obligation on society to achieve equality and not just to end discrimination.”⁴⁸ The North Shore Women's Centre in Vancouver drew the Parliamentary Committee’s attention to the fact that the issue of systemic discrimination had been allocated only half a page in the Federal *Discussion Paper on Equality*. The *Discussion Paper* had stated that “this form of discrimination is often not readily identified; it commonly takes statistical analysis to detect it.” The NSWC responded that in fact “the empirical data are well documented in the reams of paper work that women's groups have been putting out for years.” The NSWC explained that

but we also believe that women do not need statistical analysis to know that these inequalities exist. Women experience them; women have been fighting them; women have been telling governments about them for many, many years. Are you listening to them now? We do not believe that it is enough to make a simple change in the laws. We do believe that it is necessary to change the laws as a first step in a long process of unraveling the sex-based discrimination in our society.

⁴⁴ Boyer Committee Written Submissions, *supra* note 35, Submission of the National Association of Women and the Law, Box 135, Wallet 16, Submission B-583 at p. 2 of section entitled “Women, Poverty and Income Assistance Programs” [each section begins with page 1].

⁴⁵ *Ibid.* at 48.

⁴⁶ Boyer Committee Written Submissions, *supra* note 35, Submission of the Canadian Advisory Council on the Status of Women, Box 130, Wallet 6, Submission B-422 at p. 2 of section entitled “Women, Poverty and Income Assistance Programs” [each section begins with page 1].

⁴⁷ Boyer Committee Written Submissions, *supra* note 35, Submission of Barbara Cotrell on behalf of the Membership of The Canadian Research Institute for the Advancement of Women, Nova Scotia, Box 131, Wallet 8, Submission A-151 at p. 2 of section entitled “Women, Poverty and Income Assistance Programs” [Each section begins with page 1].

⁴⁸ Boyer Committee Written Submissions, *supra* note 35, Written Submission of New Brunswick Advisory Council on the Status of Women, Box 135, Wallet 16, Submission B-672 at 9. [each section begins with page 1].

If the existence of systemic discrimination is recognized, changes in the law must therefore not simply aim at denying that differences exist in the treatment and experience of men and women, by changing wife to spouse and men to persons.⁴⁹

The Saskatchewan Action Committee Status of Women (SACSW) noted that legislation introduced in Saskatchewan to ensure conformity with section 15 had “for the most part, played with semantics,” noting that “little resulted from the Bill that bettered, in any way, the social or economic condition of women in Saskatchewan.” As SACSW put it,

increasingly in this country, poverty is becoming a women's issue. The poorest in Canada are elderly women, native women, single mothers and their children. ...
Our issues are economic issues: equal pay for work of equal value, support services for working parents, employment conditions, pensions, part time work.⁵⁰

The SACSW concluded its presentation with an exhortation to parliamentarians to be prepared to challenge the accepted legal and social order in order to realize the promise of section 15:

You will need the guts to spend money in ways some will call foolish, and the vision to persevere on a straight course in pursuit of equality. Women in Canada expect and deserve no less, and we will be watching.⁵¹

B. Racial and Ethnic Minorities and Immigrants

Issues of racialized groups were shockingly ignored in the Federal Government's *Discussion Paper* and largely ignored in the hearings and the Parliamentary Committee's recommendations. As was pointed out by the Chinese Canadian Council,

Indeed, a perusal of the discussion paper shows a mere 1 ½ pages, out of 65, devoted to discrimination on the basis of race, and exclusively with respect to the native peoples. How are the visible minorities encouraged to feel that Section 15 of the Charter holds opportunity for change if this public document fails to address the potential which the Charter has to ameliorate their condition?⁵²

A major focus of equality advocacy by racialized groups in 1985 was to receive adequate recognition of the prevalence of racial discrimination in Canadian society. The Urban Alliance on Race Relations and the Social Development Council in Toronto published two studies that year to expose the prevalence of racial discrimination in employment.⁵³ A Parliamentary Special Committee on Participation of Visible Minorities in Canadian Society had released its report

⁴⁹ Boyer Committee Written Submissions, *supra* note 35, Written Submission of North Shore Women's Centre, Box 135, Wallet 17, Submission B-743 at 2.

⁵⁰ Boyer Committee Written Submissions, *supra* note 35, Written Submission of the Saskatchewan Action Committee on the Status of Women, Box 136, Wallet 19, Submission B-572 at 4.

⁵¹ *Ibid.* at 6.

⁵² Boyer Committee Written Submissions, *supra* note 35, Submission of the Chinese Canadian National Council, Box 131, Wallet 9, Submission B-507 at 9.

⁵³ Brenda Billingsley & Leon Muszynski, *No Discrimination Here: Toronto Employers and the Multiracial Workforce* (Toronto: The Urban Alliance on Race Relations and the Social Planning Council of Metropolitan Toronto, 1985); Frances Henry & Effie Ginzberg, *Who Gets the Work? A Test of Racial Discrimination in Employment* (Toronto: Social Planning Council & Urban Alliance on Race Relations, 1985).

Equality Now! the year before. As well, in 1983, Rosalie Silberman Abella now a Supreme Court Justice, had been appointed through the Royal Commission on Equality in Employment to “explore the most efficient, effective and equitable means of promoting employment opportunities for and eliminating systemic discrimination against four designated groups: women, native people, disabled persons, and visible minorities.” Her report, *Equality in Employment*, had adopted the term “employment equity” rather than “affirmative action”, proposing employment equity as a “strategy to obliterate the present and the residual effects of discrimination and to open equitably the competition for employment opportunities to those arbitrarily excluded.”⁵⁴

Presentations to the Boyer Committee from groups representing racialized and ethnic minorities affirmed the recommendations for positive measures contained in the *Abella Report* as a critical component of the new guarantee of equality in section 15. They argued that section 15 must be framed expansively so as to include recognition of the necessity of sweeping positive measures to address the long-term effects of systemic ethnic and racial discrimination. The Chinese National Canadian Council noted that “a main drawback to the apparent framework of the Committee’s task and to the typical approach to the Charter is its reactive nature. We should not merely analyze existing laws and policies; we must also take the initiative and move ahead with laws and policies that actively counter the effects of discrimination.”⁵⁵ The Council continued that “the Government must use the Charter as a guide for action, not merely as a set of limiting rules to which it must ensure legal adherence whenever it wishes to do something.”⁵⁶

Similarly, the Committee for Racial Justice argued that “the Charter must be seen as more than a constitutional document which requires that some existing legislation and practices be revamped.” Rather, it is a “contract between the people of Canada and the state” and “a statement of national conscience against which all public actions and many private ones will be judged by the future.”⁵⁷ “The spirit of equality that informs the Charter,” the Committee argued, “cannot be realized for visible minorities by amending existing legislation alone ... [W]e must recognize that a series of initiatives are needed to overcome a chronic condition of inequality.”⁵⁸

The Canadian Ethno-Cultural Council (CECC) and many other groups demanded a comprehensive reform of the *Immigration Act* to eliminate discrimination against people with mental and physical disabilities, women, adopted children, common law spouses, and discrimination on the basis of ethnic and national origin. Other concerns raised by a number of groups related to discrimination against women in determining eligibility for language training and the vulnerability of immigrant women in sponsorship situations. The CECC affirmed the need for a broad and purposive interpretation of section 15 that would mandate effective remedies to discrimination through human rights legislation as well as through improved social programs to address the socio-economic disadvantage of visible minorities and immigrants.⁵⁹

⁵⁴ Rosalie Silberman Abella, *Equality in Employment: The Report of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984) at 254.

⁵⁵ Submission of the Chinese Canadian National Council, *supra* note 52 at 4.

⁵⁶ *Ibid.* at 5-6.

⁵⁷ Boyer Committee Written Submissions, *supra* note 35, Written Submission of the Committee for Racial Justice, Box 131, Wallet 9, Submission B-578 at 4-5.

⁵⁸ *Ibid.* at 5.

⁵⁹ Boyer Committee Written Submissions, *supra* note 35, Submission of the Canadian Ethno-Cultural Council, Box 130, Wallet 6, Submission B-185.

The CECC's demands for changes to conform to section 15 included a number of positive measures, such as:

- Measures to ensure adequate pensions and old age security for newcomers;
- Mandatory employment equity in both the public and private sectors;
- Expanded federal support to ethnic women in the areas of ESL and adult basic education;
- Instruction in an official language to all immigrants, with a reasonable living allowance and childcare during this process;
- Universal quality childcare and access to childcare in the workplace and in community settings;
- Assistance to ethnic communities to establish credit unions and other locally controlled development finance institutions to service ethnic communities; and
- An increase in grant and loan funds available to students from low-income families to enhance access to education.⁶⁰

The demand from equality-seeking organizations that positive measures flow from section 15 was echoed by individual presenters such as Rabab Naqvi who presented to the Committee speaking "both as a woman and as a person belonging to a visible minority." She emphasized the need to address "individual, institutional, and systemic discrimination in economic, political and social life through "active government intervention." Concerned that subsection 15(2) does not appear to provide any requirement for enforcing affirmative measures, she said mandatory employment equity must be implemented in both the public and private sectors, the Human Rights Commission must be given greater powers and special provisions should be made available "to give concrete meaning and substance to the law."⁶¹

C. Disability Rights Groups

Groups representing people with disabilities played a central role in the Boyer Committee hearings in promoting a new vision of equality as a substantive right to social inclusion and meaningful social and political participation.

Many disability rights groups referred back to the wide-ranging recommendations of the 1981 Report of the Special Committee on the Disabled and the Handicapped, *Obstacles*,⁶² released in the International Year for the Disabled Person (1981). The Committee, its Report, and the active engagement by Committee members had been important factors in the ultimate inclusion of mental and physical disability in section 15. The *Obstacles* Report had approached disability equality rights within a broad human rights framework, affirming both civil and political as well as economic, social and cultural rights of persons with disabilities as fundamental to their equal

⁶⁰ *Ibid.*

⁶¹ Boyer Committee Written Submissions, *supra* note 35, Written Submission of Rahab Naqvi, Box 135, Wallet 16, Submission B-569.

⁶² *Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (Ottawa: Ministry of Supply and Services: Ottawa, 1981) online: Government of Canada

<http://www.sdc.gc.ca/en/hip/odi/documents/obstacles/obstacles_full.pdf>

citizenship. It had recommended, for example, extensive reform of human rights legislation to ensure a more rigorous standard of affirmative action and accommodation of disability, and also recommended that “the Federal Government encourage all provinces to include in their human rights legislation the right to an education that ensures disabled children the opportunity to reach and exercise their full potential.”⁶³ Other recommendations in the *Obstacles* Report had affirmed the right to an adequate income through a comprehensive disability insurance program, health-care reform, employment equity and accessible transportation systems.⁶⁴ These had been reinforced by recommendations in the *Abella Report* for employment equity for people with disabilities.

The Coalition for Employment Equity for Persons with Disabilities drew attention to the absence in the Government’s *Discussion Paper* of many of the significant positive measures and reforms proposed in the *Abella Report* and the *Obstacles* Report.⁶⁵ An assumption of importance to disabled people, it stated, “relates to the kind of equality that we wish to achieve.” Employment equity is necessary to address the common characteristics of Aboriginal people, women, disabled people and visible minorities: “high levels of unemployment, low socio-economic status, concentration in low level jobs and limited access to the decision-making processes which critically affect them.”⁶⁶ Along the same lines, the Coalition of Provincial Organizations for the Handicapped (COPHO) reviewed a large number of legislative changes that were required for improved access for persons with disabilities. COPHO expressed the hope that where governments failed to implement necessary programs for people with disabilities, the Courts would order special programs, as described under section 15(2) of the *Charter*, as required remedies.⁶⁷

The Canadian Mental Health Association emphasized that: “systemic discrimination requires systemic remedies.”⁶⁸ Such remedies included “support in the whole process of community living and in areas related to employment,” “individualized and coordinated support systems,” and “expanding the concept of work to include a wide range of work options.”⁶⁹ The Canadian Paraplegic Association also emphasized previous failures to address systemic discrimination under human rights legislation: “in treating the obvious symptoms [of discrimination] we have virtually ignored the disease which, intentional or not, will continue to surface in perpetuity in our present civil liberties system.”⁷⁰ Systemic discrimination in the area of employment, it noted, “will require what some would consider extraordinary measures to remedy.”⁷¹ The Canadian Association of Community Living affirmed that equality for people with disabilities means a decent place to live; an education which nurtures and prepares children for full lives as adults; access to meaningful work and an adequate income; access to a full range of social opportunities; having fundamental rights of citizenship recognized and protected; being able to

⁶³ *Ibid.* at c.1, Recommendation 14.

⁶⁴ *Ibid.*

⁶⁵ Boyer Committee Written Submissions, *supra* note 35, Submission of the Coalition on Employment Equity for Persons with Disabilities, Box 132, Wallet 11, Submission B-433 at 1-2.

⁶⁶ *Ibid.* at 4.

⁶⁷ Coalition of Provincial Organizations of the Handicapped, *Presentation to the Sub-Committee on Equality Rights. Chairman Patrick Boyer.* (Winnipeg: C.O.P.O.H, 1985) (on file with author) at 11.

⁶⁸ Submission of the Coalition on Employment Equity for Persons with Disabilities, *supra* note 35 at 4.

⁶⁹ *Ibid.*

⁷⁰ Boyer Committee Written Submissions, *supra* note 35, Submission of the Canadian Paraplegic Association, Box 131, Wallet 8, Submission B-420 at 2.

⁷¹ *Ibid.* at 4.

advocate for rights; and having services available and responsive to their own strengths and needs.⁷² The PEI Council for the Disabled, PEI Association of the Hearing Impaired, PEI Association for the Mentally Handicapped and the Disabled Women's Network emphasized "that government programs and policies must create an infrastructure where rights are entrenched, and that accountability must be a part of that infrastructure for these rights to become reality for our members, and for all Canadians."⁷³

D. Aboriginal Groups

There were relatively few submissions to the Boyer Committee from Aboriginal groups, and all were from Aboriginal women's groups. *Bill C-31*, enacting changes to the *Indian Act*, was before parliament at the time, and concern about the failure of *Bill C-31* to eliminate discrimination against aboriginal women and their children were predominant in submissions to the Boyer Committee.⁷⁴ Gayle Stacey More, presenting for the Quebec Native Women's Association, observed that "when one cuts through much of the rhetoric surrounding Bill C-31, one finds that one of the real causes of concern is that of money."⁷⁵ She took encouragement from early judgments under the other sections of the *Charter*, however, in which Courts had found that the *Charter* "must be interpreted broadly." "The Courts" she noted, "have also looked to the various International Covenants to which Canada is a party both as background material to the enactment of the *Charter* as well as a means of interpreting or enlarging upon the actual provisions of the *Charter*."⁷⁶ On this basis, she urged the Committee to consider *Bill C-31* "in the light of both the *Charter* and these International Covenants" in considering whether Federal legislation is in conformity with section 15. In that light "we can only hope that the work of this sub-committee will convince the Government that to refuse to act positively to undo injustice is, in fact, to accept that injustice persist."⁷⁷ The Indian Homemakers of B.C. echoed this theme by claiming that equality would also mean addressing discrimination based on "lifestyles" or poverty:

What we mean here by "lifestyles" may include culturally determined factors but for most Indian women the problem that we wish to describe here has more to do with poverty and powerlessness, which we do not choose, and the consequent imposition of the values of a dominant society on us

⁷² Boyer Committee Written Submissions, *supra* note 35, Submission of the Canadian Association for Community Living, Box 130, Wallet 6, Submission B-730.

⁷³ Boyer Committee Written Submissions, *supra* note 35, Submission of the PEI Council for the Disabled, PEI Association of the Hearing Impaired, PEI Association for the Mentally Handicapped and the Disabled Women's Network, Box 135, Wallet 18, Submission B-693 at 2-3.

⁷⁴ Primary concerns were that it failed to reinstate band membership and deprived children of women who had their status reinstated under Bill C-31 of status. Groups addressing discrimination against Aboriginal women in Bill C-31 included the Human Rights Institute of Canada, Indian Homemakers' Association of B.C., National Action Committee on the Status of Women (Toronto), Native Women's Association, Quebec Native Women Inc and Saskatchewan Native Women's Association. A large number of groups made submissions on discrimination in the Indian Act, including the Canadian Bar Association, the Canadian Jewish Congress and Quebec Native Women Inc.

⁷⁵ Gayle Stacey More and Sharon McIvor subsequently took the Native Women's Association of Canada constitutional claim forward, challenging the exclusion of Native Women's organizations from direct funding and from participation in constitutional discussions with the Aboriginal communities leading up to the Charlottetown Accord. *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627.

⁷⁶ Boyer Committee Written Submissions, *supra* note 35, Submission of the Quebec Native Women's Association, Box 135, Wallet 18, Submission B-539 at 4.

⁷⁷ *Ibid.* at 5.

than it has to do with culture. More concretely this problem is manifested in the continuing removal of Indian children from their families and their communities by social workers acting under provincial welfare legislation...⁷⁸

E. Gay and Lesbian Rights Groups

The predominant concern of groups representing gays and lesbians in 1985, of course, was that sexual orientation be recognized as an analogous ground of discrimination under section 15. Among legislative changes urged upon the Committee by gay and lesbian groups were the following: a recommendation for the inclusion of sexual orientation in the *Canadian Human Rights Act*, changing discriminatory definitions of spouse, removing discriminatory security clearance guidelines, and amending the Criminal Code with respect to age of consensual sexual activity. Most of these recommendations, with the exception of the changes to the definition of “spouse”, were accepted by the Boyer Committee and received relatively favourable responses from the Government - though certainly no prompt action. Submissions also emphasized the need for positive measures and broader consciousness raising efforts.

In light of the subsequent judicial consideration of the issue of the obligation to provide human rights protections from discrimination because of sexual orientation, it is noteworthy that the obligation to provide protection from discrimination was generally seen to flow directly from the right to equality rather than relying on an argument based on comparator groups. The obligation to protect gays and lesbians from discrimination was not generally seen as deriving from their right to equal treatment in comparison to groups such as racial, ethnic and religious minorities. Rather, the existence of widespread discrimination against gays and lesbians, denying access to employment, services and housing, was simply seen as something which section 15 required the Government to address through positive legislative action. The basis for the recommendation of the Boyer Committee for an amendment to the *Canadian Human Rights Act* to add sexual orientation was simply that such protections were required in order to provide necessary protection from discrimination, rather than to remedy under-inclusion by providing the same benefit of human rights legislation as was provided to other groups facing discrimination.⁷⁹

F. Anti-Poverty Groups

⁷⁸ Boyer Committee Written Submissions, *supra* note 35, Submission of the Indian Homemakers of B.C., Box 133, Wallet 13, Submission B-741 at 4-6.

⁷⁹ Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Equality for All: Report of the Parliamentary Committee on Equality Rights*, (Ottawa: Queen's Printer, 1985) at 30. Gay and lesbian organizations making submissions to the Boyer Committee included Gay Alliance for Equality, Gay and Lesbian Awareness, Gay and Lesbian Legal Advocates, Calgary, Gay Association in Newfoundland, Gay Community of Regina, Gays and Lesbians of the University of British Columbia, Gays of Ottawa, Gays of Wilfrid Laurier University, Manitoba Gay Coalition. The notion that an obligation to provide legislative protection from discrimination in the private sphere flows directly from section 15 confirms my own recollection of lobbies I was involved with at the time in Ontario for improvements to Ontario's *Human Rights Code* for conformity with section 15. My sense is that both equality-seeking groups and politicians at the time operated under the assumption that if discrimination against a disadvantaged group existed and was a significant factor in denying members of the group enjoyment of equality in access to housing, employment or services, then the new *Charter* guarantee of equality imposed on governments an obligation to provide appropriate protections in the form of expanded human rights legislation. We did not feel the need for comparator groups or an analysis of under-inclusion. The adequacy of protections from discrimination, such as in the definition of positive measures required under the undue hardship standard, was seen as being as much of an equality issue as any formal under-inclusion in terms of listed grounds.

Anti-poverty groups were also noticeably under-represented in submissions to the Boyer Committee. The National Anti-Poverty Organization did not submit a Brief or appear before the Committee. The Regent Park Women's Group appeared before the Committee to express concern that "anti-discrimination laws have traditionally excluded groups disenfranchised politically and economically by poverty and its attendant liabilities - namely discrimination in education, housing, health care, nutrition, and all areas of life that would secure for us a future in this society." The Regent Park Women's Group explained that

within any group of poor women there will of course be those who face discrimination because of race, age, national origin, sex, or mental or physical disability. In that sense we support the work of your committee. As poor women, however, we believe that the economic, political and social system that exists today in Canada will continue to work against us and that our struggle remains outside the confines of the fight under Section 15 of the Charter.⁸⁰

Thus, while other equality seeking and social policy groups defended an approach to equality that placed issues of socio-economic inequality within an equality framework, anti-poverty groups seemed to consider section 15 to be of less relevance to them, in part because of the absence of protection from discrimination because of poverty. The Canadian Bar Association supported the recognition of "property and income" as an analogous ground, the Solidarity Coalition in B.C. proposed the term 'economic status', and the Charter of Rights Education Fund suggested that 'poverty' ought to be recognized as an analogous ground of discrimination.⁸¹

G. Other Groups

Many other groups appearing before the Boyer Committee, though not equality-seeking groups themselves, bolstered the general consensus of equality seekers that the right to equality, in the Canadian context, ought to go beyond the right to non-discrimination so as to encompass social rights and positive obligations consistent with international human rights instruments ratified by Canada. Social development groups saw potential in section 15 to address broader issues than had previously been addressed through the legal system, noting "an awakening interest in the voluntary sector that the achievement of human services goals could be assisted by the law"⁸² The Canadian Bar Association noted that section 15 "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."⁸³

The Canadian Teachers' Federation observed that while the *Charter* made no specific promise to remedy poverty, "the basic problem in Canada is the persistence of socio-economic inequalities, which are intertwined with the educational system." A guaranteed minimum income for families and universal access to childcare programs were essential, in the Federation's submission, to breaking the poverty cycle.⁸⁴

⁸⁰ Boyer Committee Written Submissions, *supra* note 35, Submission of the Regent Park Sole Support Mothers' Group, Box 136, Wallet 19, Submission B-333.

⁸¹ Boyer Committee Written Submissions, *supra* note 35, Submission of the Canadian Bar Association Box 130 Wallet 7 Submission B-418 at 52; Submission of the Solidarity Coalition (British Columbia) Box 136 Wallet 20 Submission B-541 at 5-6; and Submission of the Charter of Rights Education Fund, *supra* note 42.

⁸² Boyer Committee Written Submissions, *supra* note 35, Submission of the Social Planning Council of Metropolitan Toronto, Box 136, Wallet 29, Submission B-727 at 26.

⁸³ Submissions of the Canadian Bar Association, *supra* note 81 at 15.

⁸⁴ *Ibid.*

The Saskatchewan Association of Human Rights noted that many of the rights in the *Universal Declaration of Human Rights*, such as the right to social security, to equal pay for work of equal value, to just and favourable conditions of work, and to an adequate standard of living were not enumerated in the *Charter*:

Without an income, without an adequate standard of living, all of the individual civil and political rights are meaningless. We now have little constitutional protection against vicious attacks on the unemployed, welfare recipients, and senior citizens, unless the interpretation of Section 15 is broad enough to include these situations. We must insist on this interpretation.⁸⁵

H. Access to Justice and Participatory Rights

Broadened participatory rights, which enhanced both access to adjudication and enforcement of equality rights through courts and tribunals and which institutionalized access to political processes to promote equality rights for disadvantaged groups were seen by equality-seeking groups presenting to the Boyer Committee as a critical component of the equality guarantee. The new guarantee of equality was seen as creating a newly empowered rights holder, both through the interpretation and application of law in light of the new equality rights of disadvantaged groups, and in the more participatory processes of governance through which governments could be held accountable to new entitlements of groups which had previously lacked political influence over social and economic policy.

Virtually all of the major equality seeking and human rights groups included in their submissions arguments in support of extending the Court Challenges Program, which at the time was limited to language rights, to include court challenges brought under section 15 of the *Charter*.⁸⁶ The Coalition for Employment Equity Brief noted that “if *Charter* litigation is to be mounted in any sustained way on behalf of disabled people it will be necessary to establish a sizeable resource which is administered at arms length from government in order to finance cases of widespread importance for disabled people.”⁸⁷ Shelagh Day, in a return appearance before the Boyer Committee on June 18th, 1985, focused LEAF’s submissions on the fact that “access to justice is essential if the *Charter* guarantees are to be meaningful.”⁸⁸ The Canadian Bar Association supported the idea of a litigation fund administered by an independent agency and also recommended a minimum national standard for legal assistance in equality rights litigation

⁸⁵ Boyer Committee Written Submissions, *supra* note 35, Submission of the Saskatchewan Association of Human Rights, Box 136, Wallet 19, Submission B-530 at 1-8.

⁸⁶ Groups supporting a Court Challenges Program covering section 15 included the Coalition for Employment Equity, the Canadian Association for Children and Adults with Learning Disabilities, the Canadian Bar Association, the Canadian Council of the Blind, the Canadian Council on Social Development, the Canadian Ethno-cultural Council, the Coalition of Provincial Organizations of the Handicapped, the Canadian Bar Association, the Canadian Research Institute for the Advancement of Women, Nova Scotia, the Canadian Legal Advisory and Research Association of the Disabled (CLAIR), the Charter of Rights Education Fund, the N.D.P. Women's Rights Committee (Halifax, Nova Scotia), the National Action Committee on the Status of Women, the National Union of Provincial Government Employees, the Canadian Jewish Congress, Quebec Native Women Inc, Saskatchewan Native Women's Association, Social Planning Council of Metropolitan Toronto and the Women's Legal Education and Action Fund.

⁸⁷ Submission of the Coalition for Employment Equity, *supra* note 68 at 79.

⁸⁸ Canada, The Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings First Session of the 33rd Parliament*, Vol.17 (June 18, 1985) at 17:4.

be established by the Federal Government “at such a level that no person will be denied the right to put forward a reasonable case under section 15 of the *Charter*.”⁸⁹

Adequate funding of equality-seeking groups themselves, required for groups and individuals to participate meaningfully in both political and legal action to promote equality, was also seen as critical by equality-seeking groups. Aboriginal women’s groups noted that inequities in funding between male-dominated Aboriginal groups and Aboriginal women’s groups denied them an effective voice.⁹⁰ The Toronto Social Planning Council observed, for example, that

if the Charter is to be an instrument not simply for the legal profession and the judiciary to interpret our rights and freedoms, it is necessary for government to support initiatives which will give wider access for the public to the provisions and protections of the Charter. ... We do not as yet in Canada have sufficient infrastructure in place to ensure that our social development interests can be advanced through the Charter. It is our contention that government must support initiatives from organizations within the voluntary sector which have the capacity to advance the interests of social development vis-a-vis the Charter.⁹¹

Access by the poor to *Charter* challenges was seen as particularly critical. The Solidarity Coalition (British Columbia) noted that “equality issues cannot be considered in splendid isolation from social and economic issues.” The Coalition explained that

most often where discrimination exists there are underlying differences in income distribution. Obviously, accessibility to rights is seriously impaired without the financial capacity to fight for those rights. ... If our government is serious about public participation, it must ensure that Canadians have the necessary resources to participate.⁹²

Submissions also consistently emphasized that equality cannot be left up to courts to implement and that “we do not want to litigate our way to equality.”⁹³ It was emphasized that the Government should be acting immediately to implement the equality guarantee through positive measures such as those contained in recommendations of the *Abella Report*, rather than waiting to have these positive duties of equality litigated.⁹⁴ A more inclusive and open governance, with ongoing consultation with people with disabilities and other equality-seeking groups should be the norm of Canada’s new constitutional democracy.⁹⁵ The Committee for Racial Justice recommended the establishment of a permanent, non-partisan committee or agency to monitor the implementation of the equality rights provisions of the *Charter*, conduct ongoing consultations with equality-seeking groups and report directly to parliament.⁹⁶

Equality thinkers also believed that section 15 would require a re-thinking of the traditional adversarial relationship in court cases so that courts could function as a constructive means by which a Government could have issues of inequality brought to its attention. Shelagh Day, for LEAF, argued that

⁸⁹ Submissions of the Canadian Bar Association, *supra* note 81 at 12, 14-15.

⁹⁰ Submissions of the Indian Homemakers of B.C., *supra* note 78 at 5-6.

⁹¹ Submission of the Social Planning Council of Metropolitan Toronto, *supra* note 82 at 26-28.

⁹² Submission of the Solidarity Coalition (British Columbia) *supra* note 81 at 7-8.

⁹³ *Supra* note 31.

⁹⁴ *Ibid.*

⁹⁵ Submission of the Canadian Paraplegic Association, *supra* note 70.

⁹⁶ Submission of the Committee for Racial Justice, *supra* note 57 at 16.

this document belongs to everyone and we ought not to see the government of Canada going in to argue against equality rights, unless it is a frivolous issue. We ought to see the Government of Canada on the side of equality-seekers, not simply acting as a lawyer for its department in a particular case. ... It seems to me this is something which ought to be considered, what kinds of instructions are being given when litigation comes up. I believe, as I have said, - and I think women across the country hope - that we do not find ourselves fighting our government, that we find our governments on our side.⁹⁷

I. Contours of Equality, 1985

While the submissions of equality-seeking groups before the Boyer Committee raised a diversity of issues and included very explicit demands for legislative and policy change, we can discern, from a distance of twenty years, a very distinctive common shape in the way equality seekers and other groups saw the new right to equality.

A central component was a demand that courts and governments move beyond a negative framework of equality as non-discrimination to a more positive conception of equality, placing new responsibilities on governments to identify and proactively address issues of socio-economic disadvantage and systemic discrimination and to implement positive legislative and programmatic measures in both the public and private sectors to realize the new vision of equality.

A second common theme was the importance of making the right to equality reach the level of peoples' lives, engaging the concrete struggles for dignity and security, an adequate income, a decent job, access to childcare, transportation, adequate housing, education and healthcare. These interests were affirmed not just as spheres of government activity in which discrimination ought to be prohibited. In addition, the interests involved positive social and economic rights in themselves, inseparable from the right to equality, and linked to the notion of dignity and to meaningful participation in society as equal citizens.

A third common theme was that the right to equality must be interpreted in light of positive obligations on governments under international human rights law. Evolving international human rights norms, particularly in the area of social and economic rights, were seen as providing the foundation for assessing positive requirements on governments to act. It was seen as particularly important to link equality to social and economic rights in international law in order to provide substance to the social rights dimensions of equality.

And finally, it was affirmed that equality demanded a new form of participatory governance and improved access to adjudication and enforcement of rights. In order to identify necessary proactive measures to address systemic inequality and socio-economic disadvantage, governments would have to develop new models of accountability to groups that had previously had little democratic voice. A critical aspect of this accountability would be through courts, and this new role for courts was seen as requiring new guarantees of access to legal assistance, effective advocacy and judicial training, as well as important changes in the relationship between courts, legislatures and disadvantaged groups. There was a consensus that governments must allocate new resources to ensure access to courts and that the relationship between courts and governments would have to be redefined by a new approach to litigation and positive remedies to systemic inequality. It was felt that governments must play an equality-promoting role in courts, even in cases in which their policies were being reviewed for compliance with section 15.

⁹⁷ Testimony of Shelagh Day, see text accompanying note 88, above.

This consensual paradigm of equality among the new rights-holders in 1985 was a somewhat unique feature to Canada. The concept of equality and non-discrimination that had been imported from the American civil rights movement had been transformed, in the Canadian context, to incorporate a distinctive social rights tradition and the values of an emerging international human rights movement that found strong resonance with Canadian notions of equality and social rights. The application of a positive conception of equality rights to social and economic policy, not just to remedy under-inclusive benefit programs but to coherently address and remedy systemic socio-economic disadvantage, was seen by equality seekers as essential to the way Canadians understood rights and governmental responsibility in the new ‘social contract’.

This is not to suggest that disadvantaged groups in Canada were unique in the world for the value they placed on social rights. What was perhaps unique, however, was the idea that the right to equality, as it had been reformulated during the repatriation debate with the direct involvement of equality seeking constituencies, was expansive enough to encompass the kinds of social and economic rights that, in other jurisdictions and in international law, would be enumerated separately. While there had been a few lonely voices during the repatriation process advocating inclusion of explicit reference to the rights in the *International Covenant on Economic, Social and Cultural Rights*,⁹⁸ the primary energy surrounding social rights protections in Canada was focused on the entrenchment of a broad right to substantive equality that would include social and economic rights in order to be meaningful to peoples’ real struggles for dignity, security and social inclusion. Thus, a recurrent theme in the submissions from the major equality-seeking groups to the Boyer Committee was that equality must be interpreted and applied broadly enough to adequately implement Canada's obligations under international law with respect to social and economic rights, as well as civil and political rights, and to provide political, judicial and administrative remedies to the concrete issues of inequality faced in peoples’ everyday lives.

IV. ASSESSING OUTCOMES

A. Celebrating Victories

In assessing the success of the new positive rights paradigm of equality that was presented so eloquently before the Boyer Committee, it is noteworthy that many of the significant litigation victories for equality-seeking groups in the last twenty years have been celebrated, in part, for their positive, social rights dimensions, as victories for a concept of substantive equality which addressed broad patterns of disadvantage rather than of formal equality.⁹⁹

The area of discrimination because of sexual orientation stands out when one reflects on positive developments emerging from section 15, especially when one considers that in 1986

⁹⁸ See the submissions from Nick Schultz of the Public Interest Advocacy Centre on behalf of the National Anti-Poverty Organization, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., No. 29 (18 December 1980) at 29:21. The Special Joint Committee subsequently considered an amendment proposed by Svend Robinson to include a reference to the *International Covenant on Economic, Social and Cultural Rights* in section 36 of the Constitution. Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., No. 49 (30 January 1981) at 65-71.

⁹⁹ See e.g. Sarah Armstrong, “Disability Advocacy in the Charter Era” (2002) 2:1 J.L. & Equality 1; Yvonne Peters, *Twenty Years of Litigating for Disability Equality Rights*, *supra* note 7.

only one province, Québec, protected gays and lesbians from discrimination and virtually all benefit programs excluded same-sex partners. The law reform victories across the country in this area, bolstered by precedent-setting victories in court in cases such as *Vriend*¹⁰⁰ and *M v. H*,¹⁰¹ have been at the forefront of equality rights world-wide. The Court's affirmation in *Vriend* that the right to equality may be infringed by Government inaction as well as by action, and that "s.32 is worded broadly enough to cover positive obligations on a legislature such that the Charter will be engaged even if the legislature refuses to exercise its authority"¹⁰² resonated with the positive rights approach to equality advocated by equality seekers before the Boyer Committee. In the area of disability rights, as Yvonne Peters has described,¹⁰³ significant advances have been made, with the *Eldridge*¹⁰⁴ decision representing a high water mark, in the recognition of the requirement of positive measures to ensure substantive equality. In that case, a unanimous Court rejected arguments of governments that section 15 "does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action" as a "thin and impoverished vision of s. 15(1)."¹⁰⁵

In the area of sex equality, successful challenges to "spouse in the house" rules first in Nova Scotia in the *Rehburg*¹⁰⁶ case, and more recently, in Ontario in the *Falkiner*¹⁰⁷ decision, represent important litigation successes recognizing the intersectionality of poverty and sex discrimination in a manner that was emphasized by women's groups in 1985. In the area of race, the *Sparks*¹⁰⁸ case in Nova Scotia, finding that the exclusion of public housing tenants from security of tenure provisions constitutes discrimination because of race sex and poverty and extending protections to conform with section 15, represents, again, a leading case internationally in the area of race, housing and poverty. In the area of immigration, though not explicitly a section 15 case, the *Baker*¹⁰⁹ case, overturning an immigration officer's discriminatory¹¹⁰ decision not to reverse a deportation order on humanitarian and compassionate grounds, was ground-breaking in establishing the link between international human rights law and *Charter* equality values - a basic tenet of the submissions from equality-seeking groups before the Boyer Committee. The requirement that the exercise of discretion be consistent with *Charter* values has immense repercussions for ensuring that equality values inform the day-to-day exercises of administrative discretion that affect access to income security, work, housing, daycare, education and healthcare - all of the critical interests at the heart of the notion of equality advocated in submissions before the Boyer Committee in 1985.

¹⁰⁰ *Vriend*, *supra* note 1 at para. 64

¹⁰¹ *M. v H.*, [1999] 2 S.C.R. 3.

¹⁰² *Ibid.* at para. 60, quoting from Dianne Pothier, "The Sounds of Silence: Charter Application when the Legislature Declines to Speak" (1996) 7 Const. Forum Const. 113 at 115.

¹⁰³ Yvonne Peters, *supra* note 7.

¹⁰⁴ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*].

¹⁰⁵ *Ibid.* at para.73

¹⁰⁶ *R. v. Rehberg* (1994), 111 D.L.R. (4th) 336 (S.C.)

¹⁰⁷ *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 212 D.L.R (4th) 633 (C.A.).

¹⁰⁸ *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 244 (C.A.).

¹⁰⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

¹¹⁰ *Ibid.* at para 5. The officer's reasoning for the refusal was the following: "The PC is a paranoid schizophrenic and on Welfare. She has no qualifications other than as a domestic. She has *four children in Jamaica and another four born here*. She will of course be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her *Four Canadian-born children*. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity." Officer's emphasis.

There have been a number of other significant victories which, though not explicitly section 15 cases, were clearly informed by the kind of equality values which were promoted by equality-seeking groups before the Boyer Committee. The *Morgentaler*¹¹¹ decision, which established women's right to abortion, the *Dunmore*¹¹² decision, which required protections of labour rights for agricultural workers, the *Marshall*¹¹³ decision, which established the right to earn a moderate livelihood as an Aboriginal treaty right, and *G(J)*, which found that legal aid must be provided to low income parents in custody cases have all been important victories under s. 15. Such decisions are consistent with themes that were emphasized by equality-seeking groups before the Boyer Committee.

These and other victories for equality-seeking groups under s.15 have owed a great deal to equality-seeking groups playing an active role in affirming a vision of equality as both a right to non-discrimination and as a positive social right. Indeed, when we consider how much these victories have owed to the constant presence of equality-seeking groups intervening, particularly at the Supreme Court of Canada, to defend a broader vision of equality against the "thin and impoverished" vision propounded by respondent governments and their numerous supporting interveners, we can recognize that one of the most significant victories emerging directly from the Boyer Committee hearings was the extension of the Court Challenges Program to cover section 15 challenges to federal law, policy or action. Without that program, it is doubtful that the original vision of equality could have been sustained over the last two decades, at least among equality-seeking groups. The strength of the commitment of equality seekers to a program that is critical to the development of equality jurisprudence in Canada was evidenced when the Federal Government cancelled the program in February 1992, as part of a deficit reduction effort, suggesting that there was already a "substantial body of case law." Massive protests from equality-seeking and official language minority groups led to special hearings of the Standing Committee on Human Rights and the Status of Disabled Persons which recommended, in June, 1992, that the program be reinstated. The U.N. Committee on Economic, Social and Cultural Rights¹¹⁴ and a myriad of other organizations and bodies also recommended reinstatement of funding, and that funding be extended to include challenges to provincial government legislation and programs. The Program was reinstated in October 1994, although the Program has still not, unfortunately, been extended to cover provincial challenges where many of the most important issues related to poverty and social rights arise.

Despite its limited mandate, the Court Challenges Program has also played a critical role in promoting the kind of participatory vision of governance and the use of courts that was put forward by equality-seeking groups before the Boyer Committee in 1985, not simply by funding litigation, but by actively promoting a more inclusive equality rights movement. It was at the initiative of the Court Challenges Program in 1988, for example, that a meeting of anti-poverty organizations and legal advocacy organizations was organized in conjunction with a national meeting of other equality-seeking groups, to address the lack of participation by anti-poverty

¹¹¹*R. v. Morgentaler*, [1988] 1 S.C.R. 30.

¹¹²*Dunmore v. Ontario* (Attorney General), [2001] 3 S.C.R. 1016

¹¹³*R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 7-8, 59.

¹¹⁴United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C 12/1993 (10 June 1993) at para. 28: "The Committee recommends that the federal Government implement the recommendations of the Standing Committee on Human Rights and the Status of Disabled Persons, of June 1992, to restore the "Court Challenges Programme", and that funding also be provided for Charter challenges by disadvantaged Canadians to provincial legislation.

groups in equality litigation. The Charter Committee on Poverty Issues (CCPI) was formed, with strong support from the National Anti-Poverty Organization (NAPO) and a number of other organizations involved in poverty law. Since that time, CCPI has intervened in a number of cases, including eleven cases at the Supreme Court of Canada. CCPI has taken forward a number of litigation initiatives to promote the kind of integration of social rights and equality that came through so clearly from other equality-seeking groups at the Boyer Committee hearings.¹¹⁵ The recognition of poverty as a critical issue of inequality, and of the importance of including people living in poverty in equality rights litigation has become a distinctive and positive feature of the Canadian equality rights movement, which clearly showed its origins in the submissions before the Boyer Committee.¹¹⁶

There is, in short, a lot for equality-seeking groups to be proud of in what they have accomplished in the twenty years since many of them appeared before the Boyer Committee to advance a new and unique vision of equality. However, we must also confront, as we look back at all of this, a profound sense of unfulfilled expectations - not in the sense of false hopes, but of continued and recurrent failures of governments, courts and other institutions to live up to what was legitimately expected of them under the “new social contract”.

B. Sidetracking, Rather than Mainstreaming Equality Rights in Political Institutions

In comparison to 1985, when there were numerous commissions and committees that had consulted with equality seeking groups and that had assisted in making their voices heard within the democratic process, there is now virtually nothing in our parliamentary system to ensure that equality-seeking voices are heard or that equality rights will frame government policy and legislation in a pro-active way. While international institutions work on “mainstreaming” human rights, our governmental institutions have largely sidetracked them. Canada signed onto a commitment at the Beijing Conference to gender mainstreaming, with every federal government department required to conduct gender analysis of every program, practice, policy, regulation or law.¹¹⁷ Yet contrary to recommendations by U.N. treaty monitoring bodies, the Department of Finance has failed to review the effects of social program cuts on women.¹¹⁸

¹¹⁵ The Charter Committee on Poverty Issues has intervened in the following cases at the Supreme Court of Canada: *Jacques Chaoulli and George Zeliotis v. Attorney General of Québec and Attorney General of Canada*, 2004 SCC 29272; *R. v. Wu*, [2003] 3 S.C.R. 530; *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 [Gosselin]; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *R. v. Prosper*, [1994] 3 S.C.R. 236; and *Symes v. Canada*, [1993] 4 S.C.R. 695. A recent cases in which CCPI was a full party is Dale Clark, Deborah Bourque, And George Kuehnbaum on their own behalf and on behalf of all members of the Canadian Union Of Postal Workers; Bruce Porter And Sarah Sharpe, on their own behalf and on behalf of all members of the Charter Committee On Poverty Issues; and the Council of Canadians v. Canada (Attorney General), (Ontario Superior Court Of Justice File No.01-CV-208141) (Heard in Toronto, January 24-26, 2005).

¹¹⁶ Though, as noted, the limited mandate of the Program, excluding challenges to provincial legislation or policy, limits the ability of the program to fund cases relating to poverty. It is critical that the mandate of the program be extended to include these challenges if the poor people are to have equal access to its benefits.

¹¹⁷ Margot Young, *Institutional Mechanisms (National Machinery) for the Advancement of Women* (1999). Prepared for Canadian Feminist Alliance for International Action. Online: <http://www.fafiaafai.org/resources/doc1_e.htm>

¹¹⁸ See Canadian Feminist Alliance for International Action, *Canada's Commitment to Equality: A Gender Analysis of the Last Ten Federal Budgets (1995 - 2004)*, online: <<http://www.fafia-afai.org/proj/gb/comeq.php>>. The U.N. Human Rights Committee recommended a review of the impact of social program cuts on women at its last review

It was clear to equality seekers in 1985 that mainstreaming equality rights in governance would require more than compulsory review of policies from an equality framework as an internal governmental process. It would require a more participatory form of governance in which equality-seeking groups would be able to identify critical issues and play a central role in developing solutions. Twenty years later we do not, however, even have a parliamentary committee focused on equality rights, as was suggested to the Boyer Committee. Such a committee, with an ongoing mandate and staff to hear from affected constituencies and oversee the ongoing implementation of the right to equality, would surely be a critical first step in bringing the unique Canadian vision of equality back into the mainstream of governance.¹¹⁹ Is it too much to expect that the pre-eminent right of the *Charter* might enjoy the devoted attention of one parliamentary committee?

C. The Role of Human Rights Institutions

It was also recognized in 1985 that while equality seekers needed resources to take claims forward on their own, they also needed support from equality-promoting and enforcing institutions such as human rights commissions. Groups appearing before the Boyer Committee recommended an expanded mandate for the Canadian Human Rights Commission and major improvements to the *Canadian Human Rights Act* so that the Commission could act as a positive force for the new vision of equality. In 2000, the Canadian Human Rights Act Review Panel, chaired by Justice LaForest, toured the country to hear from equality seekers and others about the need for changes to the *Canadian Human Rights Act*. The panel reported that “we heard more about poverty than any other single issue.”¹²⁰ Yet proposals submitted by the panel to the Ministry of Justice for reform of the Commission—ensuring access to adjudication, improving the *Act* to prohibit discrimination because of ‘social condition,’ and conferring upon the Commission a mandate to address issues of compliance with international human rights law—have been gathering dust at the Ministry of Justice for four years.¹²¹

The UN Committee on Economic Social and Cultural Rights has twice recommended adding social and economic rights to the *Canadian Human Rights Act*,¹²² and this recommendation has been endorsed by the Canadian Human Rights Commission¹²³ as well as the majority of major

of Canada. (UN Human Rights Committee, *Concluding Observations on Canada*, CCPR/C/79/Add. 105 (1999) (7 April 1999) at para. 20. The Committee on the Elimination of Discrimination Against Women, at its most recent review of Canada, recommended that Canada conduct a more rigorous gender analysis of restrictions on eligibility for Employment Insurance. (Committee on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women* (March 4, 2003) A/58/38 part I para 382.)

¹¹⁹ Currently, domestic human rights issues are considered by the Parliamentary Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, with the consequence that equality rights do not receive focused attention.

¹²⁰ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 114.

¹²¹ *Ibid.*

¹²² United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Concluding Observations of the committee on Economic, Social and Cultural Rights (Canada)*, Geneva, 10 June 1993, *supra* note 114 at para. 25; Committee on Economic, Social and Cultural Rights, *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)*, 10 December 1998, E/C.12/1/Add.31) at para.51.

¹²³ Canadian Human Rights Commission, *Annual Report 1997* (Ottawa: Canadian Human Rights Commission, 1998) at 2.

equality-seeking groups across Canada.¹²⁴ Yet the Commission still has no mandate to receive complaints alleging violations of social and economic rights or even to review compliance with international human rights law binding on Canada. A country which used to provide leadership in the area of human rights institutions internationally is in blatant contravention of the *Paris Principles*, endorsed by the United Nations Human Rights Commission and the General Assembly, which provide that a national human rights institution shall have “as broad a mandate as possible” with particular responsibility “to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.”¹²⁵

Rather than promote an integration of international obligations with the right to equality, as advocated by equality seekers in 1985, our human rights institutions seem to proceed as if their mandate is to promote as narrow a mandate as possible. An example is the treatment by Ontario’s Human Rights Commission of a recent complaint under Ontario’s *Human Rights Code* submitted by a number of social assistance recipients who were denied access to adequate housing because of the gross inadequacy of shelter components of social assistance in Ontario. The complainants alleged that the Government’s refusal to adjust the shelter component of welfare to the rising costs of housing, forcing growing numbers of recipients into homelessness, violated the rights of welfare recipients (an enumerated group in housing in Ontario’s *Code*) to equality in housing. The complainants relied, in part, on the argument that the substantive right to equality in housing in Ontario’s *Code*, and the duties of those responsible to accommodate the needs of enumerated groups, ought to be interpreted in light of international human rights law to include positive obligations on governments to address this kind of systemic denial of access to housing of a protected group. The Ontario Human Rights Commission dismissed the complaints as ‘frivolous’, thereby denying the complainants access to a hearing before a Human Rights Tribunal.¹²⁶

D. The Role of Governments in Equality Cases

Equality-seeking groups in 1985 also maintained that they expected governments to be allies, rather than adversaries, in the struggle for substantive equality. Yet as the UN Committee on Economic, Social and Cultural Rights has observed,

the Committee has received information about a number of cases in which claims were brought by

¹²⁴ Among the organizations supporting the inclusion of social and economic rights were the Charter Committee on Poverty Issues (CCPI), the National Anti-Poverty Organization (NAPO), Equality for Gays and Lesbians Everywhere (EGALE), The African Canadian Legal Clinic, Action travail des femmes, La table féministe de concertation provinciale de L’Ontario, the National Association of Women and the Law (NAWL), the Council of Canadians with Disabilities (CCD), Coalition of Persons with Disabilities (Newfoundland and Labrador) and Independent Living Resource Centre (St. John’s, Newfoundland), Metro Toronto Chinese & Southeast Asian Legal Clinic, Affiliation of Multicultural Societies & Service Agencies of B.C. (AMSSA) and the Canadian Council for Refugees (CCR). Submissions to the Canadian Human Rights Act Review Panel, on file with the Panel.

¹²⁵ *National Institutions for the Promotion and Protection of Human Rights*, GA Res. 48.134, UN GAOR, 48th Sess., 8th Plenary Mtg, UN Doc. A/RES/48/134 (20 December 1993); *National Institutions for the Promotion and Protection of Human Rights*, Res. 1994/54, UN HRC, 56th Meeting, UN Doc. E/CN.4/RES/1994/54 (4 March 1994) at paras. 2-3(b).

¹²⁶ *Candace. Beale. v. Ontario (Minister of Community Family and Children’s Social Services)* (17 March 2004), File No JWIS-5JUR3L (OHRC), Decision to Dismiss the Complaint Pursuant to s.34(1)(b) of the Human Rights Code [On file with the author].

people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.¹²⁷

Time and again equality-seeking groups have faced benches full of lawyers for attorneys-general intervening to oppose equality claims. It is amazing how governments that seem only to bicker at each other at inter-governmental meetings on health-care suddenly become very cozy when these divisive issues are addressed in court. In the *Eldridge* case, the Federal Government was not even prepared to defend the equal application of the principles of the *Canada Health Act* to the deaf and hard of hearing, arguing instead, in support of the Government of Alberta, that denying the deaf and hard of hearing access to essential communication in healthcare delivery, while clearly a violation of section 15, can be justified under section 1 of the *Charter* because “available funds were used in a manner which government had determined to be a reasonable balancing of competing social demands.”¹²⁸ When provincial governments have intervened in cases like *Gosselin*,¹²⁹ to argue that the right to equality implies no positive obligation to comply with international human rights law or to ensure that vulnerable individuals are not left homeless and hungry, the Federal Government, which ratified the treaties, has been nowhere to be seen.

E. The Role of Courts: A Claim Unheard or a Claim Denied?

Despite the significant victories of equality-seeking groups over the last two decades, many of which, as noted above, had important “positive rights” dimensions, one is ultimately left with a sense, on surveying section 15 jurisprudence over the first twenty years, that the central claim to equality as a social right, articulated before the Boyer Committee in 1985, has never really received a judicial hearing. Equality-seeking groups, through their interventions, writings, and advocacy, have succeeded in keeping the door open to the positive vision of equality advanced before the Boyer Committee, but there has not yet been a case in which the Supreme Court of Canada has been prepared to hear this claim or to clearly affirm that the right to equality places positive obligations on governments to meet the needs of disadvantaged groups and remedy systemic inequality.

The Court could have chosen to affirm more clearly in *Eldridge* a positive obligation on governments to provide appropriate health-care that meets the unique needs of patients who are deaf or hard of hearing. The right to equality could thus have been framed around a consensus in Canada that appropriate health-care is a social right, linked to equal citizenship. Similarly, the Court could have affirmed in *Vriend* that governments have an obligation to legislate human rights protections for all groups facing discrimination. This could have been framed as a positive duty on governments, emanating from the equality guarantee. Such an approach would be consistent with the obligations of Canadian governments under international human rights law,

¹²⁷ United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, (10 December 1998), *supra* note 114 at para. 14.

¹²⁸ See the Government’s attempt to defend its position to the UN Committee on Economic, Social and Cultural Rights in United Nations Committee on Economic, Social and Cultural Rights, Government of Canada, *Responses to the Supplementary Questions to Canada’s Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8 (October, 1998) at Question 6.

¹²⁹ *Gosselin*, *supra* note 115.

and with the expectations of equality seekers.¹³⁰

In both the *Eldridge* and *Vriend* cases, there were indications that this might be the direction that the Court was headed. In both cases, the Court affirmed that government inaction may violate the right to equality. In both cases, the Court rejected arguments from governments that they have no positive obligation to address disadvantages that are not caused by governments but are rather caused by ‘nature’ or by the private market. In both cases, the Court expressed reservations about a more formalistic under-inclusion model of analysis. The Court in *Eldridge*, in fact, rejected the appellants’ allegation that the *Medical Services Act* was under-inclusive. The issue, in the Court’s view, was not that the *Medical Services Act* was under-inclusive but rather that discretionary decision-making about the allocation of resources had not been in accord with the right to equality of persons who are deaf and hard of hearing.¹³¹ The government could choose from a “myriad of options” to meet the unique needs of the deaf and hard of hearing in the healthcare system.¹³² Similarly, in *Vriend*, the Court affirmed the value of a “substantive equality” analysis, not based on the ‘included – excluded’ distinction. Instead the Court compared the situation of those in need of human rights protections to that of more advantaged groups (heterosexuals) who are not in need of them because they do not face discrimination on the ground in question. All of these statements are consistent with the “big picture” view of inequality which equality seekers emphasized before the Boyer Committee, a picture which analyzed positive obligations emanating from the new right to substantive equality, rather than a focus on discriminatory under-inclusion.

Yet in the end, the Court in both cases stepped back from affirming positive obligations within a broader framework and, in tension with its own substantive equality reasoning, affirmed that these cases could be resolved within a framework of under-inclusion without considering the question of broader positive obligations.

At the same time as condemning the governments’ argument that there is no obligation to address pre-existing disadvantage in *Eldridge*, the Court insisted that it need not answer the question of positive obligations to provide benefits in that case:

[T]he respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, 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. It has been suggested that s. 15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau, supra*, at para. 37 (per

¹³⁰ See e.g. U.N. Committee on Economic, Social and Cultural Rights, 11th Sess., 38th Mtg., U.N. Doc. E/C.12/1994/13 (1994) at para. 9 on obligations with respect to people with disabilities. With respect to the obligation to legislate human rights protections, treaty monitoring bodies have been clear that providing legal remedies to discrimination in the private sphere is a positive duty of states parties. The *International Covenant on Civil and Political Rights* establishes that “where not provided for by existing legislative or other measures” governments are obliged to “to adopt such legislative or other measures as may be necessary to give effect to the rights” (article 2).

¹³¹ *Eldridge, supra* note 104 at 599-600.

¹³² *Ibid.* at 631.

L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; ... In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons...¹³³

Similarly, in *Vriend*, the Court avoided dealing with the critical remedial issue in that case. The remedial issue, as suggested by Justice Major, asked whether the legislature could choose to comply with section 15 simply by revoking all human rights protections for all protected groups.¹³⁴ Instead of making it clear that such a cynical and draconian move would simply violate the rights of additional groups under section 15, the Court opted to leave the question open, again affirming that the issue before them could be adequately resolved within a framework of discriminatory under-inclusion:¹³⁵

it has not yet been necessary to decide in other contexts whether the Charter might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the Charter. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney*, Wilson J. made a comment in obiter that “[i]t is not self-evident to me that government could not be found to be in breach of the Charter for failing to act” (p. 412). In *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038, L'Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, suggested that in some situations, the Charter might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question whether the Charter might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.¹³⁶

Thus, in the two high water mark cases for substantive equality, the Court still left unanswered a question which most equality-seeking groups in 1985 would not have even posed as a question - whether section 15 would require governments to provide any health-care at all for persons with disabilities, or any human rights protections against discrimination for groups facing discrimination in the private sector. In 1985, equality seekers assumed the core obligations of governments to provide health-care or protection from discrimination to be at the centre of the positive concept of equality that had been entrenched in the *Charter*. It would have been unthinkable that the broad right to equality for which equality seekers had fought so hard could ever be interpreted to invite legislatures to refuse to provide healthcare or legislative protections from discrimination in order to ‘comply’ with the right to equality. The silence of the Supreme Court on this issue and its apparent reluctance to hear the central claim of equality-seekers of twenty years ago, has created a deep divide between section 15 jurisprudence on the one hand and the expectations of those for whose rights the Court acts as trustee on the other.

In the recent decision in *Auton*,¹³⁷ we see worrying signs that the McLachlin Court may in

¹³³ *Ibid.* at paras 72-73.

¹³⁴ *Vriend*, *supra* note 1 at para. 196.

¹³⁵ *Ibid.* at paras 63-64. For further examination of the contradictions in the Court’s approach, see Bruce Porter, “Beyond Andrews: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*” (1998) 9:3 *Const. Forum Const.* 71.

¹³⁶ *Eldridge*, *supra* note 104 at paras 72-73.

¹³⁷ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657.

fact wish to increase the divide between expectations and the Court's approach, by closing the door that was quite explicitly left open to a more positive rights approach to equality in *Eldridge* and *Vriend*. One is tempted to give the *Auton* decision less weight than others because the nature of the treatment sought by the parents in the case was controversial, and the reasoning of the Chief Justice appears so much at odds with earlier section 15 jurisprudence. One imagines the illogical and regressive reasoning may just have been a convenient way to reach the desired result. However, the decision may nevertheless be telling in terms of the Court's reaction to a more explicit positive rights claim than it had previously had occasion to consider under section 15.

The appellants in *Eldridge* and *Vriend* had largely framed their claims within a paradigm of discrimination through under-inclusion. It was the Court, in response to government arguments against positive obligations emanating from the equality guarantee, which decided to address, and then leave undecided, the question of a more positive rights approach. The parents of children with autism in the *Auton* case, on the other hand, argued quite clearly that section 15 imposes an obligation to fund the treatment for their children irrespective of any particular statutory framework or under-inclusive benefit scheme. It did not matter, they argued, whether the treatment was funded through the Health Ministry, as a core or non-core service, as a form of special education or, as in the Province of Alberta, as a component of social services. The point that is central to the equality analysis, they argued, was not whether there was a similarly situated group receiving, under a particular healthcare or other program, a service similar to the one they were denied. Rather, they argued that children with autism have unique needs and that a refusal by governments to meet those needs has a discriminatory consequence in terms of fundamental issues of dignity, security and human development.

In this sense, the central concern of equality seekers twenty years ago, that equality rights not be reduced to a right to freedom from discrimination within particular programs or benefit schemes, or that equality rights not be undermined by a search for similarly situated comparators, was squarely at issue in *Auton*. Though the remedial questions may have been controversial, the critical question with respect to the approach to equality in *Auton* was how the Court would address the claim that governments have an obligation to meet the unique needs of a clearly disadvantaged group. The Court was asked by the equality claimants, and supported by interveners such as the Council of Canadians with Disabilities in this approach, to consider the claim within a broader framework of social inclusion and the dignity interests at the heart of section 15, rather than in relation to a discriminatory denial of a benefit that is provided to others.

The Court, apparently, simply refused to hear or to take this kind of core equality claim seriously. The Chief Justice, writing for a unanimous Court, reverted to precisely the kind of non-discrimination analysis that had been rejected during the drafting of section 15. Disregarding the Court's openness on earlier occasions to the possibility that section 15 may impose positive obligations to provide benefits or programs needed by disadvantaged groups, McLachlin, C.J. declared that "this Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner."¹³⁸ The Chief Justice then stated that the petitioners in *Auton*, to establish a violation of

¹³⁸ The Chief Justice cites *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 at para. 61; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83 at para. 55

section 15, must show differential treatment in comparison to a “a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.” One is reminded, of course, of the futile quest for the “pregnant man” comparator in the infamous *Bliss* case. Without a comparator, the Chief Justice ‘reasons’, an equality analysis does not even get to the question of dignity, or the fundamental interests which the right to equality was expected to protect. The “more fundamental” distinction described in *Vriend*, between those in need and those who are not in need of the benefit in question is not even on the radar screen. The ‘big picture’ of systemic inequality, social exclusion and the role of governments in addressing these issues is nowhere to be seen.

However controversial the specific treatment sought in *Auton* might be, it is difficult to explain the decision merely as a way of avoiding a remedy the Court did not like. The Supreme Court was considering, in *Auton*, really for the first time, the constitutionality of doing nothing to meet the needs of an extremely disadvantaged group in society. It appears to have affirmed, in a shocking fashion, the government’s ‘right’ to do nothing. As such, the decision appears to be an unprecedented betrayal of the expectations of equality seekers that the right to equality ought to mean something to those who have unique and significant needs – in fact, that it ought to mean the most to those groups. The Chief Justice simply declined to assess the effect of a government’s refusal to provide for a unique need on the group in need. Unique needs, it would seem, are *a priori* excluded from equality claims because they lack comparators. The Chief Justice simply declared that “there can be no administrative duty to distribute non-existent benefits equally.”¹³⁹

The *Auton* decision thus appears to be the realization of the worst nightmare of those who appeared before the Boyer Committee. The holistic approach to governments’ equality obligations, based on an assessment of the unique situations and needs of disadvantaged groups and what measures were reasonably required by governments to address those needs, is entirely absent from the Court’s reasoning. We can only hope that the decision really did not mean what it appeared to say. Perhaps, it is simply another in a long line of cases, in which the Court simply declined to hear, or to rule upon, the central claim of equality seekers as it was originally articulated before the Boyer Committee. We can only hope so. Either that claim has not been heard in courts for the first twenty years of equality rights, or it has now, perhaps, after twenty years, been heard and rejected. We cannot quite tell from the *Auton* decision. But it is clear that the unique vision of equality behind section 15 is in serious jeopardy.

E. The Experience at International Treaty Monitoring Bodies and the Question of Judicial Competence

Some would say that courts are legitimately reluctant to hear social rights equality claims, or in limiting the scope of section 15 to exclude them, because courts lack the competence to adjudicate social rights claims.¹⁴⁰ The experience of equality seekers in international *fora*,

and *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65 at para. 16 in support of this statement.

¹³⁹ *Auton*, *supra* note 137 at para. 46.

¹⁴⁰ Though the Supreme Court of Canada has not endorsed the idea that social and economic policy issues are, as a category, beyond the competence of courts, a number of lower courts have relied, in rejecting social and economic rights claims, on the comments of Justice La Forest in *Andrews* that “Much economic and social policy-making is

however, has suggested the opposite, that the adjudication of social rights claims is not at all beyond the competence of courts or other adjudicative bodies.

In the last decade equality-seeking groups in Canada have increasingly turned to international review procedures as an adjudicative forum for substantive rights claims that have not been heard domestically. Understaffed and part-time UN Committees, with only a couple of days of a session every five years or more allocated to reviewing the implementation of a broad range of rights in Canada, have been inundated with lengthy briefs and oral submissions from a wide range of equality seeking groups in Canada.¹⁴¹ These have documented issues of policy and legislation bearing on social rights of disadvantaged groups of the sort that were presented to the Boyer Committee. By and large, the treaty monitoring bodies have risen above their significant institutional limitations. They have done a remarkable job of identifying the critical areas in which governments in Canada have failed to meet their human rights obligations, and provided sensible and reasoned recommendations for remedying them.¹⁴²

If a treaty monitoring body sitting in Geneva or New York can demonstrate this level of competence, consistency and coherence in adjudicating complex social rights issues in Canada, there is no reason that courts and tribunals in Canada could not rise to the task. Evolving international jurisprudence, bolstered by domestic experiences in countries with explicit protection of social and economic rights, such as South Africa, have made protestations around lack of judicial competence increasingly less convincing. While the direct engagement of equality-seeking groups with international treaty monitoring and adjudication of social rights is critical, this should not be a substitute for what was expected to be the core guarantee of equality in domestic law, adjudicated and remedied on an ongoing basis before domestic courts and tribunals.

F. Outcomes Assessment

These days, when equality-seeking groups are lucky enough to secure funding from

simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.” (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 123 at 194). Even in *Eldridge*, at the same time as affirming positive obligations under the Charter, Justice La Forest noted that courts must afford legislatures “wide latitude” when it comes to the distribution of resources, suggesting that “This is especially true where Parliament, in providing social benefits, has to choose between disadvantaged groups ... (*Eldridge*, *supra* note 104 at para. 85). The Supreme Court has generally balanced these concerns about competence with competing concerns that the court not abdicate its constitutional mandate to protect and enforce constitutional rights, even in complex areas of social and economic policy. As Chief Justice McLachlin noted in *RJR Macdonald*: “To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.” (*RJR-MacDonald Inc. v Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 136. See David Wiseman, “The Charter and Poverty: Beyond Injusticiability” (2001), 51(4) U.T.L.J.; Bruce Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights” (2000) 15 J. Law & Soc. Pol’y 117; Martha Jackman, “Poor Rights: Using the Charter to Support Social Welfare Claims” (1993) 19 Queen’s L.J. 65.

¹⁴¹ See e.g. the collection of submissions made to the Committee on Economic, Social and Cultural Rights by Canadian NGOs at the last periodic review of Canada, in 1998, online: equalityrights.org <<http://www.equalityrights.org/ngoun98>>

¹⁴² For an analysis of these concerns and recommendations, see Bruce Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights” *supra*, note 140 note and Craig Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight” (1999) 10 Const. Forum Const. 97.

governments, we usually receive a contract which requires us to be accountable to measures of “outcomes”. The focus of outcomes assessment, as I understand it, is not to show that we did what we said we were going to do, in terms of specific contracted ‘deliverables’ but rather to show that what we did actually made a difference in terms of realizing outcomes that were expected or hoped for. Such assessment is supposed to allow us to reconsider how we do things and to design more effective strategies in the futures. Perhaps our governments, as a party, and our courts, as trustees of the ‘social contract’ of equality rights that came into force twenty years ago, should themselves be asked whether their approach to equality has generated the outcomes expected by citizens. As Jane Shackell of LEAF said on April 17th 1985, equality seekers most of all expect the right to equality to make a real difference in the lives and everyday struggles of women and other equality-seeking groups for decent paying jobs, income security, daycare, housing. Those were the expected outcomes. Have these expected outcomes been realized?

Since the Supreme Court issued its first decisions under section 15 in *Andrews*, half a million more households have fallen into poverty.¹⁴³ The number of single mothers living in poverty has increased by more than 50% and their poverty has in many cases deepened to the point of extreme destitution. Food banks, a rare phenomenon in the early 1980’s and unheard of when the *Charter* was first being debated, are now a critical means of survival for three quarters of a million people every month, including over 300,000 children. They still fail to come close to meeting the needs of an estimated 2.4 million hungry adults and children.¹⁴⁴ Women and children have been the most dramatically affected by the epidemic of homelessness, with the number of homeless women and children living in shelters in Toronto more than doubling since 1989.¹⁴⁶ The poverty rate for visible minority women is now as high as 37%. One third of households in which one parent is an immigrant now live in poverty, which includes 231,000 children. The average income of Aboriginal women is \$13,300.¹⁴⁷

These are not the outcomes equality-seeking groups expected of the new right to equality when it came into force in 1985 and they are not the outcomes they are entitled to expect twenty years later.

V. SOME POSSIBLE TWENTIETH ANNIVERSARY STRATEGIES FOR RECLAIMING EXPECTATIONS OF EQUALITY

A. Taking Forward More Explicit Positive Rights Equality Claims

Faced with very diminished resources, most equality seeking groups have largely given up on advancing cases on their own, at the trial to the appellate level. Many of us have focused on intervening in cases that reach higher levels of court as a way of achieving maximum effect with scarce resources. During very regressive years for equality rights, equality-seeking groups have successfully defended a broader equality paradigm through interventions and have built up some

¹⁴³ National Anti-Poverty Organization (2003) *Face of Poverty: An Overview* online: <<http://www.napop.ca/en/issues/face%20of%20poverty.pdf>>.

¹⁴⁴ L. Orchard, R. Penfold & D. Sage D, *Hunger Count 2003: A Surplus of Hunger* (Canadian Association of Food Bank, Toronto, 2003), online: <www.cafb-acba.ca/pdfs/other_documents/HC2003_ENG.pdf>.

¹⁴⁶ City of Toronto, *Toronto Report Card on Housing and Homelessness 2003*, online: [toronto.ca <www.toronto.ca/homelessness/pdf/reportcard2003.pdf>](http://toronto.ca/homelessness/pdf/reportcard2003.pdf).

¹⁴⁷ *Supra* note 143.

helpful equality jurisprudence.

We have used international human rights bodies to develop a much fuller body of jurisprudence on Canadian equality issues than was available to equality seekers in 1985. In those days, it was primarily only the provisions of the treaties which could be cited in support of substantive equality claims. We now have detailed jurisprudence from treaty monitoring bodies emerging from periodic reviews of Canada, addressing many of the issues that we might want to take forward as positive social equality claims, as well as other sources of interpretation emerging from world conferences and declarations of international and regional bodies.¹⁴⁸

In light of these accomplishments, it may be the time to more actively assert the claim to equality as a positive social right. By collaborative approaches, equality seekers might together take forward cases which are framed unambiguously as positive social equality claims, with no reference at all to an under-inclusive law, program or benefit. This need not involve setting aside current equality jurisprudence. Rather, it may merely involve just framing the notion of under-inclusion and equal benefit more broadly, as it was understood in 1985, as a challenge to under-inclusive governance and failures to take appropriate measures to protect and enhance the social rights of groups guaranteed equality in section 15. Such cases could build on victories that have

¹⁴⁸ The Committee on Economic, Social and Cultural Rights, for example, has expressed concern about a number of areas of discrimination in Canada affecting the enjoyment of rights under the ICESCR. In its last review of Canada, the Committee expressed concern about detrimental effects of the revoking of the Canada Assistance Plan Act on disadvantaged groups, particularly single mothers; the failure to address the systemic social and economic deprivation among Aboriginal people and discrimination against Aboriginal women; failure to ensure access to social programmes for refugees; inadequate protection of equal pay for work of equal value for women; inadequate legal aid in civil matters; failure to meet the housing and other needs of women escaping violence; the discriminatory effect of the “clawback” of the National Child Benefit Supplement from social assistance recipients in most provinces; the adverse effects of restrictions on eligibility for unemployment insurance on part-time and marginal workers; the implementation of workfare and other discriminatory provisions against welfare recipients; the failure to protect the labour rights to those in workfare programs, such as the right to organize and bargain collectively; the discriminatory impact of social programme cuts on women; the disproportionate homelessness and unemployment among youth; and failure to enforce non-discrimination laws. (Committee on Economic, Social and Cultural Rights, *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, 10 December 1998, UN Doc. E/C.12/1/Add.31). The following year the U.N. Human Rights Committee reiterated many the concerns of the CESCR, noting the discriminatory consequences of social program cuts on women, the discriminatory clawback of the National Child Benefit, ongoing discrimination against Aboriginal women; the failure of Canadian governments to take positive measures to address Aboriginal poverty; discriminatory treatment of welfare recipients in workfare programs; failure to take positive measures to address the crisis of homelessness and failure to ensure access to effective remedies to discrimination before competent tribunals. (United Nations Human Rights Committee, *Concluding Observations on Canada*, CCPR/C/79/Add. 105 (1999) (7 April 1999). As Craig Scott has observed, these two sets of concluding observations are “pathbreaking in their focused treatment of the overlapping and shared obligations which emanate from the two Covenants as a partly fused legal order. In particular, the rich potential meaning the HRC has already given to the right to life and the right to non discrimination in the above-mentioned General Comments has moved from the realm of potential to the realm of firm legal obligations vis-à-vis the less advantaged in an affluent state like Canada.” (Craig Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?” (1999) 10:4 Constitutional Forum 97. Other treaty monitoring bodies, including the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women CEDAW), have subsequently voiced similar concerns. See, particularly, the 2003 Concluding Observations on Canada of CEDAW (Committee on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women* (March 4, 2003) A/58/38 part I (2003) paras 325-389.

previously been won, but insist on placing them in a new conceptual framework, considering the larger frame of systemic socio-economic inequality rather than the smaller frame of statutory under-inclusion.

B. Infiltrating Other Decision-Makers with Equality Rights Arguments

We might also try to more stubbornly assert the positive rights paradigm in other areas of law, using section 15 in conjunction with international law as a requirement of reasonable decision-making. The Charter of Rights Education Fund in 1985 emphasized that section 15 needs to be applied to concrete decisions related to eligibility for welfare and housing. There are hundreds of decisions made every day in Canada, to deny a discretionary benefit needed for healthcare or to evict families into homelessness which are in violation of international human rights law and arguably of section 15. Such decisions can and should be challenged for their inconsistency with section 15 and with international human rights values.

A strategy of requiring administrative bodies to deal more directly with section 15 and international human rights law may be helpful in reclaiming the kind of equality culture which was expected, in 1985, to infuse all levels of decision-making. Arne Peltz pointed out a number of years ago in a paper prepared for the Court Challenges Program that when we talk about claiming our *Charter* rights, we typically think about “going to court” and not “going to the board.”¹⁴⁹ The Supreme Court’s revisiting of the issue of the jurisdiction of administrative bodies to consider *Charter* issues in *Martin*¹⁵⁰ may provide an opportunity for a more diverse strategy of advancing section 15 claims before the bodies that are making the decisions of first instance - those which are most likely, in fact, to affect peoples’ access to income security or housing. Rather than taking issues related to income security or housing policy to courts for section 15 review, when the courts may be unfamiliar with the issues (and not great on equality, either) it may be helpful to work in the other direction, and take section 15 and international law more consistently before administrative bodies.¹⁵¹ In addition, we may now be able to use human rights tribunals again as a nurturing ground for progressive *Charter* equality jurisprudence.

A recent consent court order in a case in Nova Scotia sending a decision back to the Social Assistance Appeal Board for a re-hearing of a decision to deny access to dental surgery is a good example of this strategy of “infiltration”. The order contained a provision under the heading “Guidance to the Board When Interpreting and Applying the Law to the Facts of the Case” requiring that the Board ensure that the exercise of discretion under the statute be in accordance with the purposes of section 15 of the *Charter* and with Canada’s international human rights obligations, particularly the right “to the enjoyment of the highest attainable standard of physical and mental health” as provided in the *International Covenant on Economic, Social and Cultural Rights*.¹⁵² On rehearing the Tribunal ordered that appropriate dental surgery be provided so that

¹⁴⁹Arne Peltz, *Deep Discount Justice: The Challenge of Going to Court with a Charter Claim and No Money* (unpublished manuscript on file with the author).

¹⁵⁰*Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

¹⁵¹ Though the independence and competence of administrative tribunals is negatively affected by political appointments, a strategy of appealing decisions that are inconsistent with section 15 and with international law may begin to improve decision-making in a number of areas.

¹⁵² *Sandra McKeigan v. Department of Community Services*, Province of Nova Scotia (17 August 2004), Halifax File No. S.H.205270. (N.S.S.C.) Consent Order Leblanc, J.

the appellant would not be forced to have her teeth extracted and rely on dentures.¹⁵³

C. Diverse Claims within a Common Framework

There are many other strategies we might develop to reclaim the expectations of equality-seekers in 1985. But perhaps the key is to realize that the greatest strength of the movement was, and continues to be, that equality seekers speak with many and diverse voices, from within a shared vision.

This convergence of visions of equality is what I recall somewhat nostalgically from my own early involvement with lobbying for changes to Ontario's *Human Rights Code* in that province's hearings into what was required for conformity with section 15 in 1985-86. There were so many groups working on so many different issues, but the shared framework and vision grew stronger as the hearings before the Standing Committee on the Administration of Justice into Ontario's *Equality Rights Statute Law Amendment Act* (Bill 7)¹⁵⁴ progressed. The agenda mixed all equality issues together. Four women living on social assistance in a shelter might be followed by the Coalition for Gay Rights in Ontario, followed by the United Senior Citizens, followed by Women Working with Immigrant Women, followed by several women with disabilities. Each submission seemed to strengthen and resonate with the others. A shared vision of equality was nurtured by the hearing process and become contagious among participants. Committee members found themselves energized by the process, as they continually returned to caucus with more suggested additions to the statute. There was a feeling of being involved in something important that was happening to the country.

VI. CONCLUSION

Some, of course, might suggest that in light of the "outcomes" of the expectations of equality in 1985, we should reconsider the value of this unique Canadian paradigm of equality, this idea that the right to equality can carry with it so broad an array of social rights and government obligations. Should we question whether there were too many and too high expectations placed on the new right to equality in section 15?

In other jurisdictions such as in South Africa, social and economic rights are explicitly enumerated as justiciable rights.¹⁵⁵ Yet in order to establish a foundation of justiciability and

¹⁵³ *Sandra McKeigan v. Department of Community Services* (28 December 2004), Halifax File No. 127455 (Nova Scotia Assistance Appeal Board) Chairperson Robert Covert.

¹⁵⁴ S.O. 1986, c. 64.

¹⁵⁵ *Constitution of the Republic of South Africa*, Act 108 of 1996. As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly; and amended by the Constitution of the Republic of South Africa Amendment Act, 1997 (Act No. 35 of 1997) Chapter 2, Bill of Rights. See especially s 7(2) "state must respect, protect, promote and fulfill the rights in the Bill of Rights; s. 24 (environment); s. 25 (land and property); s. 26 (housing); s.27 (healthcare, water, food, social security); s. 28(1)(c) children's rights to basic nutrition, shelter, basic health care services and social services; article 28 (education); article 30 (language and culture). Section 38 states that "Anyone listed in this section has the right to apply to a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights." The Constitutional Court reviewed the question of the justiciability of economic and social rights in the First Certification Reference and found that the fact that social and economic rights claims almost invariably have budgetary implications is not a bar to their justiciability. (*Ex parte Chairperson of the Constitutional Assembly of South Africa in re: Certification of the Constitution of the Republic of South Africa* 1996 4 South Afr. L. R. 744 (CC) at paras. 76-78.) In the *Grootboom* case, the Court held that "the justiciability of economic and social rights had been put "beyond question by the text of the Constitution as construed in the Certification judgment" and found

effective review of such rights, and to ground an understanding of where governments must begin in the process of implementing them, in the face of massive problems and scarce resources, my sense is that social and economic rights have been approached by advocates and courts in South Africa within what we in Canada think of as an ‘equality’ paradigm. In the *Grootboom* and *Treatment Action Campaign* cases in South Africa, for example, the Constitutional Court adopted a standard of “reasonableness” which incorporated as a central principle the obligation to take positive measures to address the needs of disadvantaged groups in particular, in relation to the enjoyment of fundamental social rights such as housing and healthcare.¹⁵⁶ It is equally true that for us in Canada to find a starting place for our broad vision of substantive equality, and to give courts and governments guidance about where to start in identifying the nature and extent of positive obligations to address socio-economic disadvantage and ensure that the right makes a difference in the real struggles of disadvantaged groups for dignity and security, equality seekers in Canada have tended to approach equality within a social rights paradigm.

Whether equality is read into explicit social rights or whether implied social rights are read into the right to equality does not really matter. A purposive approach, recognizing the interdependence of rights, moves in the same direction and ends up in the same place. The point, as the submissions to the Boyer Committee made clear, is to make the rights real, to ensure that they address peoples’ real lives and struggles, to solve, in Lynn Smith’s words, the real inequality problems of our society.

In Canada, in 1982-85, the right to equality was written and read as a fundamental social right, capable of including a broad range of rights to which Canada had committed itself under international law and which the equality-seeking movement saw as being central to the meaning of equality. That became the uniqueness of Canada’s constitutional democracy. The insight into the special relationship between equality and social and economic rights has underpinned many of the important contributions of equality-seeking groups in Canada and of equality rights specialists here to developments in both domestic and international law *Charter*. However, to steal a metaphor from the right wing Republican attempts to roll back New Deal constitutional reform in the U.S., Canadians’ unique understanding of the right to equality is now in danger of being forced into constitutional ‘exile’ by a Canadian brand of judicial conservatism and right wing attacks on so-called judicial activism.¹⁵⁷ The poor and other disadvantaged groups are at risk of becoming, to borrow a phrase of our own Chief Justice McLachlin, “constitutional castaways” in a country which was determined twenty years ago to place their interests at the core of the constitutional right to equality.¹⁵⁸

Equality meant a lot to people in Canada when section 15 of the *Charter* came into effect

that under s.7(2) the courts are “constitutional bound” to ensure that rights in the Bill of Rights “are protected and fulfilled.” (*Government of the Republic of South Africa v. Grootboom*, (2000), [2001] 1 S. Afr. L. R. 46 (CC) at para. 20). On the justiciability of social and economic rights in the South African constitution, see Sandra Liebenberg, “The Interpretation of Socio-Economic Rights” in Mathew Chaskalson et al eds *Constitutional Law of South Africa*, 2d ed. (Capetown: Juta & Co., 2004 Update Loose-leaf Service: Original Service:12-03), 33.1 to 33-66.

¹⁵⁶ *Government of the Republic of South Africa v. Grootboom*, (2000), [2001] 1 S. Afr. L. R. 46 (CC); *Minister of Health and Others v. Treatment Action Campaign and Others*, [2002] 5 S. Afr. L. R. 721 (CC).

¹⁵⁷ See Cass Sunstein, “Hoover’s Court Rides Again” *Washington Monthly* (September 2004), online: <<http://www.washingtonmonthly.com/features/2004/0409.sunstein.html>>

¹⁵⁸ *R. v. Prosper*, [1994] 3 S.C.R. 236 at 302.

twenty years ago, and it still means a lot to us. We should not to be talked out of our expectations.