

Social and Economic Rights and the Canadian Charter of Rights and Freedoms

Bruce Porter
Social Rights Advocacy Centre

Canada is appropriately situated in the middle of this panel, between South Africa, a relatively young constitutional democracy, and Ireland, a relatively old one. The Canadian Charter of Rights and Freedoms is now 23 years old. I would say we are at the stage of young adulthood - young enough to think there is still hope for better things to come but old enough to have had at least some of our youthful hopes dashed.

As John O'Dowd explained this morning, social and economic rights were not explicitly included as rights in the Canadian Charter. For poor people and other constituencies in Canada, the critical struggle is to have the protection of social and economic rights recognized as a component of rights such as the right to equality and the right to "life, liberty and security of the person". To be clear, if we were to have the opportunity to redraft the Canadian Charter today, these constituencies would undoubtedly argue energetically for the inclusion of explicit reference to social and economic rights, if, for no other reason, than to give courts better direction as to their proper role. And as John O'Dowd pointed out this morning, recent decisions from the Supreme Court of Canada give us cause for alarm about the future of broad readings of Charter rights to include social and economic rights.

Nevertheless, I think there are some lessons that can be learned from Canadian jurisprudence other than the lesson that if one has the choice, the South African model of constitutional protection of economic and social rights is preferable. Social and economic rights are claimed in a wide range of constitutional settings. Advocates and claimants work with what is available to them. There are, I think, some common lessons that we learn about justiciability that go beyond the question of whether social and economic rights are given explicit constitutional

protection, related to issues of inclusion and equality within the human rights movement itself.

The first two decades of the Charter have been defined, for the poor in Canada, as a struggle to claim adjudicative space for social and economic rights as central components of rights to equality, security and dignity. For these groups, it is not a question of reading additional rights into the Charter that were excluded at the time of drafting, but of reading the rights that are there in a manner which is inclusive of the rights of the poor. The point that becomes clear in a review of the Canadian experience, particularly when viewed from the perspective of rights claimants from marginalized constituencies, is that where courts fail to include social and economic rights in broadly framed rights such as the right to equality and the right to life or security of the person, they are applying fundamental rights in a discriminatory manner. They are excluding from protection those groups who most need the protection of human rights, and have the most legitimate claim for judicial intervention on their behalf.

When we look back at the debates over the content of Canada's Charter almost twenty-five years ago, it is clear that even then, the notion that social and economic rights are key components of broadly framed rights to equality and security of the person was central to the expectations of the groups lobbying for expansive protections in the Charter.¹ Women's groups, people with disabilities and others mobilized, lobbied and won a re-naming and a reorientation of section 15 of the Charter from a right to non-discrimination to a positive right to equality, including not only the equal protection of the law, and equality before the law, but also equality *under* the law and the equal *benefit* of the law, emphasizing the positive, or substantive dimension of the right to equality. Canada was also the first constitutional democracy to include disability as a prohibited ground of discrimination. The addition of this ground was seen by experts and by equality seeking group as importing evolving equality jurisprudence from human rights legislation that recognized positive obligations on governments and other actors not only to refrain from discrimination but also to take positive measures to accommodate the unique needs

¹ B. Porter "Twenty Years of Equality Rights: Reclaiming Expectations" 23(1) *Windsor Yearbook on Access to Justice* (2005) 145 also available at < <http://www.20years.ca/Porter-revised.pdf>>

of people with disabilities and other groups.

The new paradigm of equality promoted by equality seeking groups in Canada merged what came north from the civil rights movement in the U.S. into Canada's distinctive social rights traditions, recognizing the positive roles and obligations of governments in relation to disadvantaged groups in areas such as public healthcare, unemployment insurance and income assistance.² Submissions from virtually all constituencies during the debates on the Charter made frequent reference to social and economic rights in the Universal Declaration, the ICESCR, CEDAW and CERD in explaining why the right to equality must be seen as a substantive right, placing a range of obligations on governments to address and ameliorate social and economic disadvantage.

This distinctive vision of the right to equality and other rights, particularly the right to life liberty and security of the person as what the Supreme Court has described as "hybrid" rights, including both positive and negative dimensions³, provided a solid foundation and indeed, an expectation, that social and economic rights would be situated within the scope of these broadly framed rights. They were expected to function, as they do in the Universal Declaration of Human Rights, as the over-arching rights linked to the central values of human dignity, equality and security.

Something that the Canadian experience constantly reminds us, and which is clear to any human rights practitioner working with those living in poverty, is that the division of human rights into two categories really makes no sense from the perspective of rights holders. Poor people in Canada find it obvious that the right to equality and security of the person includes protection from hunger and homelessness in such an affluent country. One does not have to do cartwheels to read into the right to security of the person the right to be free from hunger or homelessness in a cold climate. Rather, it takes some contortions of logic to read such protections *out* of these

² *Ibid.*

³ *Schachter v. Canada* [1992] 2 S.C.R. 679 at 721.

rights. One has to take the plain meaning of the words and distort them so as to exclude certain dimensions of experience, in the name of a preconceived idea of the appropriate role of courts. The excluded dimensions of experience, of course, end up being those of the most marginalized and impoverished in society. From this perspective, we have come to understand the question of the justiciability of social and economic rights as a question of the constitutional status of the most vulnerable and disadvantaged groups to an equal claim to the enjoyment of these broadly framed rights to dignity, security and equality. It is a question of whether the poor, to use the phrase of our Chief Justice, are to be made into “constitutional castaways” in the service of a what really amounts to a discriminatory restriction of the role of courts in relation to the protection of fundamental rights.

The Supreme Court of Canada recognized in one of its earliest decisions, in a challenge to advertising restrictions designed to protect children, brought by the Irwin Toy Company, that vulnerable groups will tend to turn to the courts for positive measures of protection of rights by governments while more advantaged groups will tend to challenge governmental interference.⁴ To privilege ‘negative rights’ challenges to government action over positive rights challenges to inaction, or to exclude claims to adequate food, housing or healthcare from the scope of the right to security of the person or equality simply excludes the kinds of claims that emerge from social and economic disadvantage. This led the Court in the *Irwin Toy* case to make the important distinction between corporate economic rights, which were deliberately excluded from the Canadian Charter and social and economic rights recognized in international law, such as the right to housing, social security or to work, on which vulnerable groups may rely, and which may be seen as components of Charter rights such as the right to security of the person.

The Supreme Court has also emphasized that broadly framed Charter rights must be interpreted consistently with Canada’s international human rights commitments to social and economic rights. While international human rights are not directly enforceable as law, the Court has emphasized that international human rights articulate the values and rights that are behind the

⁴ *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 SCR 927 at 993.

Charter itself, and that the reasonable exercise of conferred decision-making authority must conform with these values. In the *Slaight Communications* case the Court found that the Charter should be presumed to provide protections that are as broad as those in international human rights instruments ratified by Canada. In that case the Court considered the right to work under the ICESCR in upholding a labour arbitrator's order that an employer write a letter of recommendation for a dismissed employee. The Court held that the protection of workers as a vulnerable group and recognition of the right to work in international law must limit the employers' enumerated right to freedom of expression under the Charter.

In a more recent case, dealing with compassionate and humanitarian grounds for reconsideration of a deportation order, the Court considered the case of a Jamaican woman working illegally as a domestic worker who had 4 Canadian-born children. The Court reversed the immigration officer's decision to deport, finding that discretionary decision-making must be properly informed by reference to the values of international human rights law, in this case, the Convention on the Right of the Child.⁵

While this approach provides for only indirect or interpretive effect of social and economic rights under international human rights law on the standards of "reasonable" decision-making, the potential impact for vulnerable groups should not be underestimated. Many of the most critical decisions affecting the lives of those living in poverty, whether it be to order an eviction into homelessness for a small amount of rental arrears, or to deny emergency discretionary assistance for health or dental needs of welfare recipients, involve some component of discretion or statutory interpretation. These can be challenged as unreasonable if they are inconsistent with rights such as the right to housing or to health as recognized in international human rights law.

It has been a matter of significant concern from the UN Committee on Economic, Social and Cultural Rights (CESCR) that governments in Canada have frequently argued in court, in response to social and economic rights claims under the Charter, that these rights are merely

⁵ *Baker v. Canada (Minister of Citizenship and Immigration)* (1997), 174 D.L.R. (4th) 193.

‘policy objectives’ and ought not to be subject to judicial remedies.⁶ The Committee has pointed out that such submissions are incompatible with Canada’s obligations to provide effective remedies in domestic law to violations of Covenant rights. The Committee has made it clear that ratifying the ICESCR obliges states to treat social and economic rights as human rights, subject to effective remedies, not as mere policy objectives. The CESCR has emphasized that the right to equality, in particular, must be interpreted wherever possible to provide remedies to violations of social and economic rights.⁷

Disadvantaged groups in Canada have had some success in remedying violations of social and economic rights by way of a substantive approach to equality. In the *Eldridge*⁸ case, where deaf patients in British Columbia challenged the absence of sign language interpretation in the provision of healthcare, the Court considered whether the failure to allocate resources to fund a program providing interpreter services constituted discrimination against the deaf. Significantly, the comparator group used to assess whether there was discrimination was not, as I think John O’Dowd may have suggested, those who receive official language linguistic translation, but rather, those who are not deaf or hard of hearing, and on that account, do not need the service in question. The idea that a failure to provide a service needed by a disadvantaged group constitutes discrimination against the group that needs the service in comparison to the group that does not is central to a substantive equality approach, and it can subsume most social rights claims to positive government measures by vulnerable groups.⁹

The Court in *Eldridge* considered the cost of the program and the government’s argument that

⁶ United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/1993 (10 June 1993) at para. 21; B. Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights” (2000) 15 *J. Law & Soc. Pol’y* 117 at 139-40.

⁷ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 9*, E/C.12/1998/24 (4 December, 1998) at para. 15.

⁸ *Eldridge v. British Columbia* [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

⁹ B. Porter “Beyond Andrews: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*” (1998) 9:3 *Constitutional Forum* 71.

upholding the Appellants' claim in this case would represent the "thin edge of the wedge."

The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.

Viewed in this light, it is impossible to characterize the government's decision not to fund sign language interpretation as one which "reasonably balances the competing social demands which our society must address"; see *McKinney*, *supra*, p. 314.¹⁰

However, the Court left it up to the legislature to choose from the "myriad options available to the government that may rectify the unconstitutionality of the current system."¹¹

While this case, in the Canadian context, was framed as an equality claim in the area of health, it could, in another context, have been framed around the right to health. The kind of reasonableness review of resource allocation in light of the needs of vulnerable groups adopted by the Supreme Court of Canada in the *Eldridge* case significantly converges with the approach that has been taken in by the South African Constitutional Court with respect to the right to housing or to health. There, an equality framework has informed the assessment of reasonableness, focusing on whether housing or health programs have adequately addressed the needs of the most disadvantaged groups.¹² In Canada, a social rights framework can inform the assessment of positive obligations toward vulnerable groups, linked with the protection and promotion of fundamental dignity interests.

There have been a number of other decisions under the Charter's equality rights section which

¹⁰ *Eldridge*, *supra* note 8, at paras 92-93.

¹¹ *Ibid.*, at 631-32.

¹² *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).

can be seen as providing positive remedies to violations of social and economic rights. The Nova Scotia Court of Appeal extended security of tenure provisions to public housing residents which had previously been denied to them, on the basis that residents of public housing tenants in Nova Scotia are predominantly poor, Black and single mothers.¹³ The Ontario Court of Appeal extended full social assistance benefits to single mothers who had previously been denied benefits because of a “spouse in the house” rule. The Court found that social assistance recipients should not be forced into economic dependence in the early stages of a relationship or deprived of basic necessities on the basis of a definition of ‘spousal’ relationships that is applied only to welfare recipients.¹⁴ These cases are also important for their recognition of poverty and reliance on social assistance as grounds of discrimination, allowing us to articulate the link between hostility and discrimination toward the poor and increasing violations of their social and economic rights through deliberate government measures. Here too, I think an equality framework can be helpful to the understanding of social and economic rights violations, particularly in affluent countries like Ireland or Canada, as being more a function of hostile or discriminatory attitudes toward disadvantaged groups than of neutral resource allocation decisions.

In other cases, even though the Court did not apply the right to equality, it has employed the notion of ‘under-inclusive’ enjoyment of rights to extend protections required for the enjoyment of social and economic rights. In the *Dunmore*¹⁵ case, for example, the Supreme Court found unconstitutional a decision by a newly elected government in Ontario to remove protections of the rights of agricultural workers that had only recently been passed. The Court found that excluding this group from labour relations legislation violated the right to freedom of association, and gave the government 18 months to remedy the exclusion.¹⁶

¹³*Dartmouth /Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 at 232-235.

¹⁴ *Falkiner v. Ontario* (2002), 59 O.R. (3d) 481 (C.A.) at para. 84.

¹⁵ *Dunmore v. Ontario (Attorney-General)*, [2001] 3 SCR 1016.

¹⁶ *Ibid.*

The Right to Life, Liberty and Security of the Person

Along with the right to substantive equality, the other broadly framed Charter right of particular significance for social and economic rights is the right to “life, liberty and security of the person”, under section 7 of the Charter. In distinguishing social and economic rights under the ICESCR from corporate economic rights in the *Irwin Toy* case, the Supreme Court left open the possibility of a substantive reading of this right that would include many social and economic rights. Lower courts during the 1990’s however, rejected claims to adequate housing or to an adequate level of social assistance as beyond the scope of the right to life and security of the person, and beyond the competence and legitimate role of courts. Challenges to a denial of special assistance required for a person with a serious disability to continue to live at home, to welfare cuts that left many homeless and to inadequate social assistance rates imposed on young welfare recipients in Quebec were rejected by lower courts on the basis that these are economic rights that are beyond the scope of the right to life, liberty and security of the person.¹⁷

As John O’Dowd pointed out this morning, the first such case to reach the Supreme Court of Canada was also unsuccessful, but the result was somewhat different. Louise Gosselin challenged grossly inadequate social assistance rates in Quebec for recipients under the age of thirty who were not enrolled in a work or training program which had left her and many others living in abject poverty. A slim majority of the Court dismissed her challenge under the equality section of the Charter and 7 of 9 justices dismissed the claim under section 7, the right to “life liberty and security of the person”. The Court was deeply divided on the interpretation of evidence as to whether the lower rate could be justified as providing an incentive to participate in work programs. The treatment of the dignity issues related to poverty by Chief Justice McLachlin in her majority decisions was extremely disappointing, even disturbing, in its reliance

¹⁷ *Re Fernandes and Director of Social Services (Winnipeg Central)* (1992), 93 DLR (4th) 402 at 414 (CA); *Masse v. Ontario Ministry of Community and Social Services* (1996), 134 D.L.R. (4th) 20, leave to appeal to Ontario Court of Appeal denied (1996), 40 Admin. L.R. 87N, leave to appeal to the Supreme Court of Canada denied (1996), 39 C.R.C. (2d) 375; *Gosselin v. Québec*, [1992] R.J.Q. 1647 (C.S.) at 1669, aff’d (6 April 1999) Montreal 500-09-001092-923 (C.A.).

on discriminatory stereotypes of the poor. However, on the positive side, there is a noticeable absence in any of the judgments of the majority or dissenting judges in the *Gosselin* case of any categorical exclusion of a claim to an adequate level of assistance from the scope of the right to life, liberty and security of the person, as had been argued by governments and accepted by courts below in this and other cases. Justice Arbour wrote a powerful dissent, finding the right to adequate assistance for those in need to be a component of the guarantee of the right to security of the person. She was supported by Justice L'Heureux Dubé and, significantly, six of the remaining seven justices went out of their way to say that they would not rule out such a 'novel' interpretation of the right to security of the person in a future case. So the door is still open in Canada to a substantive reading of the right to life, liberty and security of the person to include many components of social and economic rights, including the right to an adequate standard of living.

Judicial Responses to Arguments against Adjudicating Social and Economic Rights

Where courts in Canada have ventured into the realm of substantive equality and social and economic rights, they have had to address many of the common concerns raised with respect to the justiciability of social and economic rights.

In general, the Supreme Court of Canada has been resistant to arguments advanced by governments that courts ought not to get involved in resource allocation decisions or require positive measures to address disadvantage. This was made particularly clear in the *Eldridge* case, in which Justice La Forest, on behalf of a unanimous Supreme Court of Canada, forcefully rejected the governments' argument that courts should not impose positive obligations on governments in relation to allocation of resources:

[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. ... 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) [equality rights].¹⁸

In this and other cases, the Court has taken the approach that where a Charter right places positive obligations to provide or design services or programs, the court cannot, on that account, simply defer to legislative choices so as to render Charter rights illusory in these areas. Rather, the Court can review government action for consistency with the Charter and, if necessary, defer to government in the fashioning of an appropriate remedy.

In the *Vriend*¹⁹ case, in which the Supreme Court extended human rights protections in Alberta to include protection from discrimination because of sexual orientation in employment, housing and services, the Court responded at some length to critics of “judicial activism”. That case highlighted the question of whether courts should restrict constitutional review to the the constitutionality of government *action* and should review *inaction* or require governments to legislate in a particular fashion. The Court insisted that no category of government decision-making is exempt from constitutional review, and that the Court has a constitutional duty to uphold rights, including where these are infringed by governments’ failures to act.²⁰ “It is not a question” Justice Cory wrote “... of the courts imposing their view of "ideal" legislation, but rather of determining whether the challenged legislative act or omission is constitutional or not.”²¹

Addressing the question of the democratic legitimacy of courts requiring governments to take positive measures to protect rights, the Court pointed out in *Vriend* that the Charter was chosen democratically, and imposes on the Court the responsibility to uphold and protect constitutional

¹⁸*Ibid.* at 677-78.

¹⁹ *Vriend v. Alberta*, [1998] 1 S.C.R.

²⁰ *Ibid.*, at paras 54 – 64.

²¹ *Ibid.*, at para. 56.

rights in a new “social contract”. Rather than seeing judicial review of legislative omission or failure to act as a contest between courts and legislatures, the Court urged that it be understood in terms of the relationship between citizens and governments based on rights of which courts are the final arbitrator. It is the rights of citizens in the constitution that limit legislative sovereignty, the Court has repeatedly emphasized, not the courts. This applies whether Charter rights require government restraint or, alternatively, positive action by governments.²²

More recently, in a case involving a challenge under section 15 equality rights to a decision by the Government of Newfoundland to renege on the payment of a pay equity award, the Supreme Court responded to criticism, this time by the Newfoundland Court of Appeal, with respect to the division of powers. The Court of Appeal challenged existing Supreme Court jurisprudence, holding that involving courts in the review and of social and economic policy initiatives and the allocation of resources fails to properly respect the doctrine of the separation of powers between the political and judicial branches of government. Justice Binnie, writing for a unanimous court, responded forcefully, noting that in reviewing the constitutionality of social and economic policy, the Court is simply occupying the same role, as arbiter of rights, that it has always played. Indeed, to make the political branch solely responsible for assessing the compliance of its own social and economic policy with Charter rights would assign the role of arbiter and interpreter of rights that is properly that of the court to the legislature. “*Charter* rights and freedoms, on this reading, would offer rights without a remedy.”²³

Responding to common concerns about the competence of courts to adjudicate social and economic rights, the Supreme Court of Canada has emphasized that while recognizing distinctive legislative competence in social and economic policy is important, deference cannot be extended to the point of interference with the Court’s mandate and responsibility to uphold rights in all spheres of governmental decision-making, including those dealing with the protection of social rights through social benefits or programs. The court has emphasized that deference ought not to

²² *Ibid*, at para. 56.

²³ *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at paras 105, 111.

be applied to entire categories of decision-making, but rather to assessed on a case by case basis. Factors such as the interest at stake, the vulnerability of the group involved and the extent to which the interests were considered in the legislative process must be assessed in the context of each case.²⁴

There is ample evidence in Canadian jurisprudence that if courts decide that it is within their mandate to consider controversial social issues such as what constitutes an “adequate” standard of living, they are quite capable of carrying out this function. In a case brought by a welfare recipient under the previous Canada Assistance Plan Act governing cost-shared provincial social assistance programs, the Court found that it was authorized to review provincial social assistance programs to consider whether they had set social assistance rates so as to reasonably comply with the obligation to cover basic requirements. In a more recent decision on aboriginal treaty rights, the Court found that a treaty agreement should be interpreted to require that an aboriginal community have access to natural resources for the provision of necessities. The term ‘necessaries’, according to the Court, should be interpreted according to the standards of the present day, as “food, clothing and housing, supplemented by a few amenities It addresses day-to-day needs.”²⁵

Conclusion

Courts in Canada have a tool box at their disposal which allows them to interpret and apply rights such as the right to equality and to security of the person consistently with Canada’s international obligations, and with an inclusive approach to the interpretation of Charter rights, so as to provide effective protection for the most disadvantaged groups, and to provide remedies to violations of social and economic rights. Supreme Court jurisprudence has effectively dismissed all of the common misconceptions and concerns about adjudicating claims to positive measures of protection or challenges to government ‘inaction’, to unreasonable allocation of

²⁴ *M. v H.*, [1999] 2 S.C.R. 3 at paras. 305-321, *per* Bastarache J.

²⁵ *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 7, 8 and 59.

resources, or to inadequate social programs.

Yet it can certainly not be said that the expectations of women, people with disabilities and other human rights advocates have been realized. The expectations, voiced when the Charter first came into being, that the Canadian Charter would include a distinctive guarantee to substantive equality and ensure that governments met their positive obligations under international human rights law have been far from realized. We have witnessed unprecedented assaults on social and economic rights since the inception of the Charter in Canada. The rise of poverty, hunger and homelessness in Canada, during a period of unprecedented economic growth and prosperity, has become a central focus of concern among all treaty monitoring bodies reviewing Canada's human rights record – not simply the CESCR, which has expressed growing alarm at developments in Canada in its last two reviews, but also the HRC, the CRC and CEDAW.

The drafters of the *Canadian Charter* would likely never have heard of a “food bank.” Now every town and every neighbourhood has a “food bank” for the distribution of emergency food. Three quarters of a million people in Canada, including over 300,000 children rely on these.²⁶ Similarly, when the Charter was drafted, homelessness in Canada consisted of a relatively small number of transient men living in temporary accommodation in cities like Toronto²⁷ Today, homelessness has been declared a “national disaster” by the majors of the ten largest cities in Canada, with its most dramatic effects on women and children. Increasing numbers of children are born into shelters. Homeless people die on the cold streets of Canada's cities every winter and high rates of Tuberculosis, Hepatitis B and HIV are common features of a large homeless population. Inadequate housing or homelessness is a factor in one of five admissions of children

²⁶Canadian Association of Food Banks, *Hunger Count 2000: A Surplus of Hunger*, Prepared by Beth Wilson and Carly Steinman (Toronto, October, 2000). The first food bank in Canada opened in 1981 in Edmonton.

²⁷Social Planning Council of Metropolitan Toronto, Report of Committee on Homeless and Transient Men (June, 1960) at p. 1; City of Toronto Planning Board, *Report on Skid Row*, (1977)

into foster care in Toronto.²⁸ Aboriginal people in Canada continue to suffer living conditions described as “intolerable” by a Royal Commission on Aboriginal Peoples. All of this, of course, is in the context of one of the most affluent countries in the world, and one which prides itself on its commitments to human rights.

Addressing these realities as violations of the right to life, security of the person and equality would seem obvious. Yet as John O’Dowd pointed out this morning, there are disturbing indications in some recent decisions of the Supreme Court that many of the most important advances made under the Charter, particularly related to the notion of substantive equality, are now at risk in the McLachlin court.

Last year the Court rejected a claim by autistic children to a somewhat controversial and costly form of therapy, but did so not on the basis of concern about the remedy, but rather, found that there is no obligation to provide a unique service required by autistic children if there is no differential treatment in comparison with another group. The Court reverted to the kind of formal discrimination analysis that was rejected when the Charter was negotiated and which we thought had long been rejected in Canadian equality jurisprudence. It found that a successful claim of discrimination by autistic children in this circumstance would rely on differential treatment, not in relation to those without the unique needs of autistic children, but rather, with “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.”²⁹

Similarly, in the recent case in which a more affluent patient challenged the prohibition of private health insurance in Quebec, designed to protect the public health service from the detrimental

²⁸S. Chau, A. Fitzpatrick, J. D. Hulchanski; B. Leslie and D. Schatia, *One in Five: Housing as a Factor in the Admission of Children into Care. A Joint Research Project by the Children’s Aid Society of Toronto and the Faculty of Social Work, University of Toronto.*

²⁹ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at para. 55.

effect of a parallel, private healthcare service, the Court entirely ignored the needs of the most vulnerable groups, who would be unable to pay for or qualify for private healthcare insurance, and upheld the claim. A slim majority of the Court found that it was a violation of the right to life and personal security under Quebec's Charter to deny more affluent patients the option of shorter waits in a parallel private system by prohibiting private healthcare insurance for such a system.

Both of these recent decisions were premised on an implicit rejection of social and economic rights and of the role of courts in holding governments to positive obligations in relation to disadvantaged groups. In her decision for the majority about services for autistic children, Chief Justice McLachlin wrote 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."³⁰ Similarly, in the challenge to public healthcare protections, the Chief Justice wrote that "The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."³¹ These statements are a kind of judicial code for ruling out substantive claims to adequate and inclusive enjoyment of social and economic rights, and for a reversion to a predominantly negative rights framework that disqualifies the claims of those who need positive measures by governments.

These recent decisions represent a complete betrayal of the expectations of rights holders 23 years ago. The discriminatory result of the Court's reasoning in the autism case is that autistic children may, according to a perverse logic, be deprived of services with impunity as long as there are no similar services that are provided to another similarly disadvantaged group. The more governments neglect the needs of disadvantaged groups, the less likely are equality claims to succeed. And result of the healthcare decision is that the Court will intervene to protect the affluent from violations of their right to life and security resulting from excessive wait times for

³⁰ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at para. 46

³¹ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 104.

services, but will simply ignore the plight of those who cannot pay for or qualify for private health insurance, because these latter needs rely on positive government measures to provide adequate healthcare within a public system.

Some critics in Canada are now suggesting, on the basis of these decisions, that attempts by poor people to claim social and economic rights under the Charter were misguided. But as was noted by Fionnuala Ni Aolain, we have to consider the fact that the courts are in this area anyway. The Court dealt with the right to health after affluent patients brought forward a claim that defined the right in discriminatory terms. If the courts never hear from disadvantaged claimants denied social and economic rights, the discriminatory bent of these kinds of decisions will remain unchallenged. Without a framework that includes social and economic rights of vulnerable groups, the administration of justice and the adjudication of fundamental rights simply becomes more discriminatory and exclusionary.

I think the Canadian experience tells us that we must continue to situate the question of the justiciability of social and economic rights in a broad framework of inclusive citizenship and rights. In the context of emerging trade and investment law, it is hard to give much credence to governments' arguments in court against the justiciability of the right to be free from hunger or homelessness on the grounds that these matters are too complex to be adjudicated or that it is an intrusion on the democratic sovereignty of parliament to do so. Under the North American Free Trade Agreement, the majority of corporate investors in Canada enjoy fully justiciable rights on the basis of which they can challenge complex social and economic regulatory or environmental measures, and be awarded millions of dollars in compensation if these are found to contravene their rights. No deference is given to the legislative role in designing social and economic policy in these cases and there is no limitation on the mandate of NAFTA tribunals because of concerns about their competency or legitimacy in reviewing complex social and economic policy and programs.³²

³² B. Porter, "Canadian Constitutional Challenge to NAFTA Raises Critical Questions of Human Rights in Trade and Investment Regimes" in *ESCR Litigation Quarterly* Vol.2, No.3, forthcoming.

The question of justiciability is really a question of whose rights are heard and adjudicated and whose are not. It has immense implications for governmental accountability. It is quite clear that policy makers in Ottawa now pay considerably more attention to ensuring that social policy complies with NAFTA, in order to avoid costly challenges by corporate investors, than to any possible challenge by disadvantaged groups based on the Charter of Rights. The question of whether the courts will recognize social and economic rights under Canada's Charter is thus not a peripheral issue for poor people related to the outcome of the relatively few issues that go before courts. It goes to the heart of challenging a discriminatory exclusion from equal citizenship that is reverberating through all levels of democratic accountability to rights and values. The exclusion of those living in poverty, homelessness or hunger in the midst of affluence must be challenged in a multiplicity of ways, in a variety of forums. But it must be challenged as a violation of human rights, regardless of whether social and economic rights have been enumerated for explicit constitutional protection.