

The Subversion of Human Rights by Governments in Canada

Gwen Brodsky

Rights to equality and life, liberty, and security of the person in our modern Canadian Constitution must be understood to encompass an obligation on governments to ensure that everyone has adequate food, clothing, and housing. If the social and economic dimension of these rights is excised from the *Canadian Charter of Rights and Freedoms*, the values and principles that underlie it – respect for human dignity and personal autonomy, commitment to social justice and substantive equality, and faith in social and political institutions – are betrayed.¹ Various forms of disadvantage experienced by women and other major groups that are subject to entrenched discrimination become magnified, and poor people are treated as though they are “constitutional castaways.”² For these groups, strong social programs are necessary to the fulfilment of the rights to equality and security. The most marginalized people simply cannot enjoy these rights absent a foundation of strong social supports. On this basis alone, the *Charter* should be understood to require governments to ensure that everyone has an adequate standard of living.

The view that the *Charter* encompasses social and economic entitlements is reinforced by Canada’s international human rights treaty obligations, which include explicit social and economic rights. Canada is a signatory to the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, which is a treaty that recognizes the right of everyone to an adequate standard of living, including adequate food, clothing, and housing.³ Being a signatory commits Canada to take appropriate steps to ensure the realization of this right.⁴ Canada is also a signatory to the *International Covenant on Civil and Political Rights (ICCPR)*.⁵ The *ICESCR* and the *ICCPR* both explicitly draw on the *Universal Declaration of Human Rights*, which recognizes that freedom from fear and freedom from want can only be enjoyed if both civil and political rights and economic and social rights are fully realized.⁶

In Canadian jurisprudence, it is well established that the *Charter* should generally be presumed to provide protection that is at least as great as that

afforded by similar provisions in the international human rights documents that Canada has signed.⁷ Yet, the question is whether it will become recognized that the *Charter* encompasses positive obligations on governments to provide social assistance benefits and other key social programs that are the established means of ensuring that even the poorest people in Canada have an adequate standard of living. A central thesis of this chapter is that a lot depends on what messages governments send to courts about the relationship between *Charter* rights and the actual material conditions of people's lives.

In the ongoing process of *Charter* interpretation, the role of courts is crucial. Much valuable commentary about the challenge of achieving progressive constitutional jurisprudence has focused on the interpretive role of the courts.⁸ However, the *Charter* is not interpreted by courts alone. Governments are also central participants in the processes through which *Charter* rights are interpreted. Governments are litigants. Persistent campaigning in the courts by governments to drain *Charter* rights of any material content is bound to have an influence on the judiciary. Governments are also funders of constitutional litigation, serving as the principal gate-keepers to courts, determining what issues are litigated, and which Canadians have access to the exercise of their constitutional rights and can participate in the adjudicative processes through which the contours of constitutional rights become defined.

It is time to take a closer look at what governments are doing to shape constitutional human rights, particularly as these rights relate to social program entitlements and the integration of Canada's international human rights obligations into *Charter* jurisprudence. This chapter is animated by two goals. The first is to provide a fuller explanation for the somewhat impoverished state of *Charter* jurisprudence on social program entitlements than can be arrived at by looking exclusively at jurisprudence. The second is to question the morality and wisdom of Canadian governments advancing arguments in *Charter* litigation that are intended to drain *Charter* rights of their social and economic content. How governments choose to discharge their responsibilities as funders of constitutional litigation (controlling citizen access to the exercise of their constitutional rights) and as litigants (speaking authoritatively to courts about central social values) significantly determines how effective constitutional rights will be as vehicles for giving effect to the fundamental values that are at the heart of our Constitution and of the obligations that Canada has assumed under international human rights law.⁹

This chapter consists of three parts. The first part points to the necessity of departing from the tradition of classical constitutionalism. The second part advances the thesis that, in Canada, government conduct is an obstacle

to this transformative endeavour. The third and final part calls for change in government behaviour towards rights-enforcement institutions.

The Challenge of Classical Constitutionalism

From the earliest days of the *Charter*, it has been clear that if *Charter* jurisprudence is to be useful to disadvantaged groups it must depart from the tradition of nineteenth-century US classical constitutionalism.¹⁰ This tradition has at its heart central tenets of classical liberalism: an image of the state as hostile to human flourishing, an image of the individual as autonomous, and a view that intervention by the state to redress material inequality between groups is antithetical to human liberty. In turn-of-the-century US constitutional law, these tenets of liberal political thought gave rise to a conception of constitutional rights that was devoid of any sense of positive obligation on governments to ameliorate social inequality and was primarily concerned with restraining government action, ostensibly to protect individual freedom.

The majority decision of the Supreme Court of Canada in *Gosselin v. Québec (Attorney General)* shows that Canadian constitutional decision making of the twenty-first century is not immune to the highly individualistic and anti-statist tendencies of classical constitutionalism.¹¹ The majority rejected all aspects of the claim and viewed reliance on social assistance as a trap for recipients and state cuts to social assistance, combined with workfare incentives, as liberatory. The *Gosselin* decision allows no space for individual need or for a sense of state obligation to protect the citizenry from the extreme manifestation of social inequality that poverty represents. Nor, ironically, does the majority decision acknowledge the multiple ways in which lack of access to the means of subsistence constrains individual autonomy and exacerbates conditions of inequality, especially for women.¹² *Gosselin* is thus founded on an outdated view of constitutional rights that will never be able to address some of the most serious injustices of our time.

It is beyond the scope of this chapter to canvass all *Charter* case law. Suffice it to say that after more than twenty years of equality rights litigation, and sustained effort by dedicated people involved in the equality rights movement, the transition to a substantive equality jurisprudence is uneven and incomplete.¹³ *Charter* jurisprudence concerning issues of social and economic entitlements is particularly thin and impoverished. By substantive equality, I mean a conception of equality that understands unequal power relations between groups to be the problem, material inequality (including poverty systematically concentrated among particular groups) as the manifestation of these power relations, and governmental measures to redress conditions of inequality as a necessary response.

The jurisprudential developments that have occurred to create a real home for substantive equality in Canadian jurisprudence are at best modest compared with the speed and depth with which governments have rolled back programmatic embodiments of social and economic rights. The entire body of *Charter* jurisprudence reveals very few cases that address poverty issues and even fewer in which advocates for poor people prevail.¹⁴ In the lifetime of the *Charter*, the social safety net, which is so vital to the realization of the rights to equality and security of the person, has been savaged.¹⁵ And courts have not served as an effective bulwark against regressive government conduct.

Why is the jurisprudence so inadequate? One possible explanation is the inevitability thesis, which holds that judicial consciousness is hard-wired for classical constitutionalism.¹⁶ If this premise is correct, it is futile to talk to judges about problems of substantive inequality. In short, that is how judges think. It is undeniable that classical constitutionalism is an influence on thinking about rights. The influence of classical constitutionalism particularly within US political culture and legal thought is very pronounced. However, in Canadian political culture and internationally, classical constitutionalism, although a powerful set of ideas, is not the only understanding of human rights. Human rights have complex associations, which include the right to an adequate standard of living. Even in American jurisprudence, classical constitutionalism is not hegemonic.

A premise of legally focused substantive equality rights activism in Canada is that judicial consciousness can change. For the past twenty years, in the courts in Canada, the equality rights movement, at least parts of it, has been providing a counter-refrain to classical constitutionalism. Understanding why the substantive equality counter-refrain has not developed stronger roots in the jurisprudence requires going beyond the judicial mindset as the sole determining factor. There are other contingencies at work that reinforce the dominance of classical constitutionalism. Two under-considered contingencies are the kinds of cases that reach the courts and the arguments that governments make about the content of rights and the role of the courts. It is to these contingencies that I now turn.

Government Subversion of Rights

Governments bear responsibility for the dual problems of inadequate and unequal access to the exercise of *Charter* rights and for the rights-subverting thrust of their own arguments in *Charter* litigation.

Inadequate and Unequal Access to the Exercise of *Charter* Rights

Just how much opportunity is there for disadvantaged groups to take cases about key social program areas – health, education, social assistance, housing, and employment – before the courts? Overwhelmingly, the *Charter* cases that reach the courts are criminal, and almost never anti-poverty, cases.¹⁷

Governments play an important role in determining which litigants and what types of cases reach the courts in Canada. Governments have structured public funding schemes so that funding for *Charter* litigation that addresses issues of health, education, social assistance, housing, and employment is extremely limited. This limited access comes about in two ways. First, the primary source of *Charter* test case funding for equality rights cases is the Court Challenges Program of Canada (CCP). This program was founded in 1978 to provide funds for minority language rights cases and then expanded in 1985 to include funding for equality rights test cases. It enjoys broad political support, except from the right wing of the Conservative party. When in office, first in 1992 and now again in 2006, the Conservatives cancelled the program on the grounds that it had done its job or that it was not providing value for money.¹⁸ When this program is not in place, there is virtually no access to the use of constitutional equality rights for anyone but the very well-off. Organizations and individuals who would bring forward cases to challenge laws and policies that exacerbate or maintain poverty are shut out. When there is no CCP, the government is barring the door to the exercise of constitutional equality rights. But even when the program is in place, its mandate with respect to equality rights has, thus far, been restricted to funding challenges to federal laws, policies, and practices only.

This mandate restriction has effectively excluded many poverty law issues because most social programs are delivered by provincial governments, pursuant to provincial legislative schemes, and therefore fall outside the scope of the CCP equality test case funding. This jurisdictional restriction is also anomalous. The CCP funding for language rights cases is not subject to the restriction that only challenges to federal laws, policies, and practices can be funded.¹⁹ In fact, most of the language rights cases funded by the program are ones in which provincial governments are respondents.

Second, restrictions on access to legal aid exacerbate the CCP funding restrictions. In British Columbia, for example, legal aid is generally available in criminal law matters where there is a risk of incarceration, but coverage for civil legal aid is severely restricted. Funding for poverty law matters has been eliminated, and coverage for other non-criminal areas such as family law and immigration and refugee law is minimal.²⁰ The delineation of funded cases (mostly criminal) versus non-funded cases (mostly civil), according to the provincial government, is justified by the fact that legal aid is constitutionally required in cases where liberty is threatened, but otherwise it is not.²¹ This governmental position both reflects and reinforces the priority accorded by classical constitutionalism to freedom from state persecution and the concomitant non-recognition of any rights, including certain dimensions of the right to liberty, that are dependent on positive state intervention for their realization.

Admittedly, constitutional jurisprudence is more developed in its articulation of the right to publicly funded counsel in criminal cases than it is in relation to civil cases.²² The law on the right to a fair criminal trial is much more developed than the right to access to justice in other matters. However, this is not necessarily indicative of where the law would be if governments had provided funding to *Charter* claimants to ensure that they could launch test cases that advance well-developed and well-argued claims to a constitutional right to access to justice in relation to civil matters where fundamental interests are at stake.²³ Government reliance on gaps in the jurisprudence as the foundation for its social policy is, in itself, problematic, implying that governments do not have any responsibility or capacity to interpret rights progressively or that the very human rights obligations to which they have agreed do not actually exist until such time as court orders are made. This approach is not consistent with the social project of creating a more egalitarian society, of which disadvantaged groups have understood the *Charter* to be a part.

At first blush, the adequacy of civil legal aid may seem unrelated to the question of access to *Charter* rights, but it is not if one understands that in criminal cases *Charter* issues are routinely raised and, in effect, counsel are funded under legal aid to make the *Charter* arguments. However, in non-criminal matters, involving, for example, governmental refusal to provide adequate social assistance to persons in need, no such opportunity arises if there is no legal aid funding or the funding is inadequate, even though the resulting deprivations may be no less serious than the loss of liberty through incarceration.

In *Gosselin*, on the question of whether there is a constitutional right to social assistance, the majority spoke of the “need to safeguard a degree of flexibility in the interpretation and evolution of section 7 of the *Charter*” and, quoting Justice Louis LeBel in *Blencoe v. British Columbia (Human Rights Commission)*, warned that “it would be dangerous to freeze the development of this part of the law.”²⁴ This recognition in *Gosselin* that the *Charter* needs to be allowed to evolve is positive. Yet if disadvantaged groups do not have access to the courts to put issues of serious disadvantage before the judiciary, it is difficult to imagine how this desired evolution is going to take place. The reality of how minimal access to the courts has been in relation to litigation of poverty issues is driven home by the fact that *Gosselin*, which was decided in December 2002, was the first anti-poverty *Charter* case to reach the Supreme Court of Canada in over twenty years of the *Charter* being in force. This statistic contrasts sharply with the volume of criminal law constitutional appeals heard by the Supreme Court of Canada since the advent of the *Charter*.²⁵

The absence of anti-poverty cases reflects a lack of resources, not simply for litigation itself but also for case development, identification, and mobil-

ization. Thus, the importance of CCP funding lies not only in the funding for legal fees for counsel representing the main parties to a piece of litigation. The CCP has provided funding for community-based case development and research activities and for court interventions by community organizations representing disadvantaged groups whose interests and perspectives might otherwise be overlooked. In the area of gay rights litigation, for instance, where access to CCP funding has been provided for challenges to discrimination in federal benefit schemes, the funding has made a very significant difference to community mobilizing and community capacity to critique discrimination against gays and lesbians, and it has influenced the political climate surrounding judicial decision making.²⁶ These uses for CCP funding are all important, and, yet, because of the limited jurisdictional mandate of the program, the funds have not generally been available in the field of anti-poverty litigation.

Parliamentary committees and United Nations treaty bodies have remarked upon both the importance and the limited role of the CCP. A Parliamentary Standing Committee on Human Rights and the Status of Disabled Persons recommended expansion of the CCP mandate in 1989.²⁷ UN treaty-monitoring bodies have also commented on the need for public funding to assist poor men and women in Canada in gaining access to the courts to address issues relating to the exercise of rights recognized under international human rights law.²⁸ Yet, to date, no changes have occurred. The CCP first came into the international spotlight in 1993 when the federal government cancelled it altogether. In its 1993 report reviewing Canada's compliance with the *ICESCR*, the Committee on Economic, Social and Cultural Rights (CESCR) recommended that the CCP be restored and that "funding also be provided for Charter challenges by disadvantaged Canadians to provincial legislation."²⁹ The CESCR particularly noted the value of the CCP in relation to the "importance of effective legal remedies against violations of social, economic and cultural rights, and of remedying the conditions of social and economic disadvantage of the most vulnerable groups and individuals."³⁰

In 1999, the CCP was reinstated, but it continued to suffer from its limited mandate. In 1998, the CESCR recommended correction of this defect in the CCP's mandate. The CESCR also identified as a principal subject of concern the lack of access to legal aid by women in family law and poverty law matters.³¹ In 2003, the restricted mandate of the CCP and lack of access to legal aid by women for family law and poverty law matters was also criticized by the UN committee that presides over the *Convention on the Elimination of Discrimination against Women*.³² A very direct connection often exists between access to legal aid in family law and poverty law matters and the enjoyment of an adequate standard of living, as the CESCR recognized in the 1998 concluding observations.³³ Lack of access to legal aid can render illusory statutory rights to social benefit programs, spousal and child

maintenance, and family property. The committee recommended that federal-provincial agreements should be adjusted to ensure that legal aid for non-criminal matters is “available at levels that ensure the right to an adequate standard of living.”³⁴

In May 2006, Canada was again reviewed by the CESCR, which reiterated its concerns and expressed its regret that “most of its 1993 and 1998 recommendations had not been implemented.”³⁵ Ignoring the concerns of the CESCR about the limitations on access to justice in Canada, in September 2006, the government of Canada cancelled the Court Challenges Program.

It seems unlikely that the under-representation of anti-poverty cases in Canadian courts, which is a by-product of inadequate and unequal public funding, does not influence the thinking of judges about the legal status of anti-poverty claims and what counts as a *Charter* violation. As Andrew Petter has said, “[t]he institutional barrier created by money not only denies the disadvantaged access to the courts; in doing so, it serves to shape the rights themselves.”³⁶ Hard questions must be asked about governmental resistance to making *Charter* rights accessible to the poorest people to initiate and participate in litigation that raises issues of vital concern to their security and equality.

Government Arguments in Constitutional Litigation

Governments do not only control access to the use of constitutional rights. As litigants in *Charter* cases, they also have significant influence over the development of constitutional rights. Here, governments have attempted to fossilize constitutional rights theory to prevent recognition of substantive inequality, including poverty, and to dissuade the judiciary from dealing with such issues. Governments do so by consistently advancing arguments in the courts that draw on central themes of classical constitutionalism that are antithetical to substantive equality rights theory and that deny or ignore Canada’s obligations under international human rights treaties. The arguments that government lawyers make typically involve one or more of the following themes:

- The right to equality does not impose any positive obligation on governments to redress social inequality or to alleviate poverty. Equality rights require only that governments refrain from exclusionary stereotyping. The *Charter* restrains state action but does not compel it.
- Rights have no economic content. Thus, neither section 7 nor section 15 protect against economic inequality or economic deprivation.
- Rights under international treaties are not real rights but only policy objectives and, as such, are not enforceable by the courts.
- Governmental choices regarding issues such as social welfare are beyond the competence of the courts, and, therefore, claims relating to such

choices should be regarded as non-justiciable. Alternatively, governmental justifications offered for such choices should be accorded an extraordinarily high level of judicial deference.

The *Gosselin* case provides a clear example of government efforts to diminish *Charter* rights. Three provincial governments (Alberta, British Columbia, and Ontario) intervened at the Supreme Court of Canada, filing written briefs and sending lawyers to the Court to advance these very arguments.³⁷ The position of the attorney general of New Brunswick in *Gosselin* stood out as being highly unusual. New Brunswick informed the Court that it did not object to judicial enforcement of social and economic rights because it wished to provide residents of New Brunswick with “essential public services of reasonable quality,” as section 36(1)(c) of the Constitution promises.³⁸ However, as a “have-not” province, New Brunswick noted that its capacity to realize social and economic rights was dependent on the enforcement of section 36(2) of the Constitution, which provides for “equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”³⁹

Newfoundland (Treasury Board) v. N.A.P.E., which concerned women’s right to equal pay for work of equal value, provides another illustration of government efforts to drain *Charter* rights of any social and economic rights content.⁴⁰ In *N.A.P.E.*, the Newfoundland and Labrador Association of Public Employees brought a section 15 challenge to section 9(3) of the *Public Sector Restraint Act*, which erased the government’s obligation to compensate women health care workers for wage discrimination during the 1988-91 period.⁴¹ In 1988, the provincial government had signed a pay equity agreement with *N.A.P.E.* Yet, in 1991, before it had made any payments to the women employees, the government had declared that it was experiencing a financial crisis and rolled back the pay equity agreement, permanently erasing \$24 million that it owed to women to compensate for wage discrimination during the 1988-91 period.

The arguments advanced by the government lawyers in *N.A.P.E.* are typical of government arguments in *Charter* cases involving social program entitlements and equality-promoting measures.⁴² The attorney general of Newfoundland argued first that section 15 does not impose a positive obligation on a government to address sex discrimination in wage scales because the source of the discrimination lies in societal attitudes rather than in law.⁴³ The attorney general argued further that since there is no positive obligation to address pay inequity the “post-ponement or repeal” of a non-obligatory scheme cannot constitute discrimination.⁴⁴ Legislation that repeals a non-obligatory scheme will not be discriminatory unless discriminatory distinctions are made within the repealing legislation, argued the attorney

general's counsel.⁴⁵ The attorney general of Newfoundland advanced a second line of argument under section 1 of the *Charter*, claiming that the judiciary must defer to the legislature regarding decisions about how to balance competing claims of disadvantaged groups for the allocation of scarce resources.⁴⁶

The attorney general of Newfoundland was not alone in making these arguments. The attorney general of British Columbia intervened in *N.A.P.E.* not only to echo claims made by the attorney general of Newfoundland but also to add to the section 15 arguments. The "deferral" of pay equity adjustments is not discriminatory, argued the attorney general of British Columbia, because there is no constitutional obligation to achieve pay equity and the government did not create the inequality. A budget restraint measure that is directed at the wages of *all* public sector employees and that defers pay equity adjustments, properly viewed from the perspective of the reasonable person does not constitute discrimination. Courts cannot spend public money.⁴⁷ The principle that courts are not allowed to spend public money must be incorporated into section 15. Where there is no section 15 remedy, there is no section 15 right, the argument proceeds. The position of the attorney general of British Columbia is, in essence, that the courts can only review governments for their adherence to formal equality, since this is the only human rights obligation that can be achieved without impinging on government spending priorities.⁴⁸ The factum quotes Justice Mary Southin of the British Columbia Court of Appeal: "I cannot accept that the framers of the *Charter* intended the courts should have the power to, whether by direct or indirect means, subvert parliamentary control of the public purse."⁴⁹

If we cast the governments' arguments in *N.A.P.E.* in generic terms, they conform to a template that governments in Canada have used repeatedly to resist substantive *Charter* equality claims that call on governments to act positively to ameliorate poverty and group-based relations of inequality. It would be surprising if the practice of governments repeatedly telling judges that courts lack the political legitimacy and epistemological competence to make certain kinds of decisions did *not* have an influence on judicial thinking,⁵⁰ especially when the rhetoric invoked by governments is based on the themes of classical constitutionalism, which, while not hegemonic, still has significant credibility.⁵¹

Here, the problem of lack of access by disadvantaged groups and the problem of what governments say to courts come together. On the one hand, because of the problem of restricted access by disadvantaged groups, judges get very little exposure to well-developed and well-argued substantive equality and social rights claims. On the other hand, they are being instructed by governments, through facta and oral submissions presented by government lawyers in constitutional cases, that courts must not overstep their bounds

by doing politics rather than law. The governmental instruction to courts to stay away from poverty issues and to defer to government decision making about social programs and resource allocation is also strongly reinforced by a right-wing dominated media that selectively rails against "judicial activism." For example, the media and right-wing political commentators were very quick to claim and publicize *Gosselin* as a victory establishing that there is no right to welfare.⁵²

It would seem, then, that governments in Canada want to create rights and rights-enforcement institutions, but they do not want to uphold the rights and acknowledge the legitimacy of the institutions that they have created in order to establish a measure of accountability. Canadian governments will not say publicly that they do not believe that Canadians should enjoy human rights or that they never intended social and economic rights commitments to be enforced domestically. On the contrary, Canada enjoys being seen on the international stage as a proud defender of human rights.⁵³ Moreover, in successive periodic reports to UN treaty bodies, Canada has repeatedly affirmed that its social and economic rights obligations under the *ICESCR* are enforceable, specifically through the *Charter*. In 1993, and again in 1998, Canadian government officials representing Canada gave assurances to the CESCR that violations of *ICESCR* rights could be remedied through sections 7 and 15 of the *Charter*. In 1993, the federal government, in response to committee questions, said that section 7 of the *Charter*, "ensured that persons were not deprived of the basic necessities of life."⁵⁴ Canada reaffirmed this position in 1998, noting that *Slaight Communications v. Davidson*⁵⁵ and *Irwin Toy v. Québec (Attorney General)*⁵⁶ had confirmed that section 7 of the *Charter* guarantees that people will not be deprived of the basic necessities.⁵⁷ However, as noted earlier, in Canada's domestic courts, governments regularly take the opposite position, denying that the *Charter* is intended to give effect to *ICESCR* obligations.

There is thus a deep contradiction between the commitments that Canadian governments have made in official reports to UN committees regarding the *Charter* as a vehicle for the enforcement of the *ICESCR* right to an adequate standard of living and government efforts to ensure that Canadian courts do not interpret the *Charter* as encompassing the social and economic dimensions of section 7 and section 15 rights. This inconsistency has been noticed by the CESCR.⁵⁸ Specifically, the CESCR has criticized provincial governments in Canada for urging upon courts "an interpretation of the *Charter* that would deny the protection of Covenant rights and ... leave the complainants without the basic necessities of life and without any legal remedy."⁵⁹

Lack of funding for access and hostile rights-reducing argumentation are not the only means by which governments attempt to block the application of *Charter* rights to their conduct, but they are central ones. Government

lawyers also bring motions and make other procedural manoeuvres that can render litigation unaffordable, even if partial public funding is available. Advocates sometimes refer to the experience of contending with such litigation practices by the federal Department of Justice as being fed-ed. The efforts of governments to subvert constitutional human rights must be recognized as exemplifying an unhealthy appetite for unconstrained power, intolerance for the dissent of the disadvantaged, and hypocrisy.

Conclusion

Government is not the only player in the dynamic of rights adjudication, but it is a key one. As we have seen, governments have a lot to account for, in both an explanatory sense and in a prescriptive sense. The influence of governments on rights interpretation is especially prominent in the area of *Charter* litigation, both because of the high expense factor in *Charter* litigation, which makes access by disadvantaged groups dependent on public funding, and because governments are almost always key respondents in *Charter* litigation. Government conduct in regard to funding and legal argumentation is at least part of the explanation for the current inhospitability of the constitutional jurisprudence to claims regarding social program entitlements and for the observance of obligations under international human rights treaties. Governments should be required to account for the subversion of these rights.

It may be unrealistic to think that the *Charter* jurisprudence is going to improve a great deal until governments signal that they believe that courts should enforce social and economic rights. In this volume, David Schneiderman claims that in order for there to be any reasonable expectation that the courts in Canada would provide assistance to disadvantaged groups on social rights questions, leadership is needed from governments.⁶⁰ He argues that intergovernmental cooperation in the articulation of national standards in the provision of critical social services, such as welfare and education, would be helpful. This articulation of national standards would send a positive message to the courts about the enforcement of social rights, and it should be done. Further, to make such standards strong, governments must also agree to support rather than undermine a rights-enforcement institution to which citizens can have recourse when they believe that standards are being breached.

The central challenge is to instill in governments a sense of responsibility for real, credible leadership on questions of rights. A first step is to lay bare the problem of governmental dishonesty about rights and rights accountability institutions. Canadians and Canadian courts should be seriously disturbed when our governments say one thing to the CESCR concerning the content of *Charter* rights, holding out *Charter* rights as a means of implementing *ICESCR* rights, but, at home in domestic courts, seek to achieve the

opposite interpretation. The spectre of Canadian governments working as hard as they do to persuade courts that social and economic rights are not enforceable would be deeply troubling, even if hypocrisy were not a factor. Disadvantaged groups should not have to do battle with governments about such a basic tenet of a constitutional democracy – that courts provide to the citizenry a government-created forum for the vindication of human rights and should be allowed to fulfil their mandate. The very point of governments making human right commitments, from the time of the adoption of the *Universal Declaration of Human Rights* onwards, has been to ensure some measure of accountability by governments to citizens with respect to fundamental values, including the government obligation to ensure that everyone has an adequate standard of living.

It is not enough for governments to make rhetorical commitments to values such as equality, security, and the right of everyone to an adequate standard of living. In addition, governments must ensure that there are the institutional means to realize the commitments. One way in which Canada fulfils its social and economic rights commitments is through social programs. Yet during periods when governmental commitment to social programs is weak and the pendulum of political fashion swings in an unegalitarian direction, venues must be provided for the voices of disadvantaged groups to be heard and for governments to be recalled to their human rights obligations. This is why the struggle to advance and protect rights-accountability institutions, such as courts and tribunals, is of enduring importance to the democratic process. It is also the reason why governments should facilitate access to courts by disadvantaged groups and support rather than subvert efforts to develop a rich *Charter* jurisprudence that recognizes that adequate social programs are an essential component of *Charter* rights to equality, life, liberty, and security of the person.

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Notes

- 1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. This is a subject about which I have written elsewhere. See Gwen Brodsky, *The Transformation of Canadian Equality Rights Law* (D. jur. dissertation, York University, 1999); and Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 *Canadian Journal of Women and the Law* 185.
- 2 See Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship," in this volume; and McLachlin C.J. in *R. v. Prosper*, [1994] 3 S.C.R. 236 at para. 102.
- 3 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976; accession by Canada 19 August 1976) [ICESCR].

- 4 *Ibid.*, Article 11(1) states: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."
- 5 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].
- 6 *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) at 71, Article 25, recognizes the right of everyone to an adequate standard of living. The indivisibility and interdependence of human rights was reaffirmed in the *Proclamation of Teheran*, Final Act of the International Conference on Human Rights, Teheran, UN Doc. A/CONF. 32/41 (1968) at 3. Article 13 provides: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."

Similarly, the *Vienna Declaration and Program of Action*, UN Doc. A/Conf. 157/24 (Part I), cap. III, reprinted in (1993) 14 *Human Rights Law Journal* 352 at 354, which was adopted in 1993, states: "All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities ... must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." Subsequently, negotiated human rights instruments, such as the *Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195, the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13 [CEDAW]; and the *Convention on the Rights of the Child*, 20 November 1989, Can. T.S. 1992 No. 3, when setting out the rights of vulnerable groups, include both civil and political and economic, social, and cultural rights. For example, Article 3 of the CEDAW obligates governments in Canada to "take all appropriate measures in all fields, including the political, economic, social and cultural fields to ensure the full development and advancement of women."
- 7 *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 [Slaight]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 860-2; and *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 365 (L'Heureux-Dubé J.) [Ewanchuk].
- 8 See, for example, chapters by Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases," Ken Norman, "The *Charter* as an Impediment to Welfare Rollbacks: A Meditation on 'Justice as Fairness' Adding as a 'Bedrock Value' of the Canadian Democratic Project," Dianne Pothier, "But It's for Your Own Good," and Margot Young, "Why Rights Now? Law and Desperation," all in this volume.
- 9 In *Ewanchuk*, *supra* note 7, L'Heureux-Dubé J. stated: "Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect ... In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity" (at para. 73).
- 10 For a critique of classical constitutionalism, see Brodsky, *supra* note 1 at 6-22; and Brodsky and Day, *supra* note 1 at 206-13.
- 11 *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429 [Gosselin].
- 12 See Gwen Brodsky, "*Gosselin v. Québec (Attorney General)*: Autonomy with a Vengeance" (2003) 15 *Canadian Journal of Women and the Law* 194.
- 13 Brodsky, *supra* note 1.
- 14 Notable exceptions include *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.), holding that it is a violation of the *Charter* to deny residents of public housing the benefit of security of tenure protections available to other tenants; and *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), in which the court struck down the "spouse in the house" rule in Ontario's social assistance scheme.

- 15 For documentation regarding the extent of the cuts and their impact on women, see Canadian Feminist Alliance for International Action, *Canada's Failure to Act: Women's Inequality Deepens*, submission to the United Nations Committee on the Elimination of All Forms of Discrimination against Women on the Occasion of the Committee's Review of Canada's Fifth Report (January 2003), <http://www.fafia-afai.org/Bplus5/natFAFIareport012103.pdf> (12 July 2004). See also Janet E. Mosher, "Welfare Reform and the Re-Making of the Model Citizen," in this volume.
- 16 By hard-wired, I mean not modifiable. The suggestion that judicial interpretation of constitutional rights is determined by classical constitutionalism finds expression, in various ways, in Judy Fudge, "The Public/Private Distinction: The Possibilities of and Limits to the Use of *Charter* Litigation to Further Feminist Struggles" (1985) 25 *Osgoode Hall Law Journal* 485; Andrew Petter, "The Politics of the *Charter*" (1986) 8 *Supreme Court Law Review* 473 at 493-4; Harry Glasbeek, "A No-Frills Look at the Canadian Charter of Rights and Freedoms, or How Politicians and Lawyers Hide Reality" (1989) 9 *Windsor Yearbook of Access to Justice* 293; and Joel Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 *Canadian Bar Review* 307.
- 17 See *infra* note 25.
- 18 For information regarding the 1992 cancellation, see *Court Challenges of Canada: Annual Report 1994-1995*, <http://www.ccpcj.c/documents/annrep9495.html>. For information regarding the 2006 cancellation, see Treasury Board of Canada, *Background – Effective Spending*, http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925_e.asp.
- 19 "Cases which receive funding must involve federal and provincial language rights protected by the Constitution of Canada," Court Challenges Program, <http://www.ccpcj.ca/e/i-fundlanguage.html> (7 November 2005).
- 20 See Legal Services Society, *Fact Sheet: Poverty Law Changes* (Vancouver: Legal Services Society, 2002), http://www.lss.bc.ca/whats_new/Archived_noninclude-asp/FactSheet_PovertyLawChanges.asp (12 July 2004).
- 21 See Memorandum of Understanding between the Province of British Columbia and the Legal Services Society of British Columbia, 1 April 2005, Legal Services Society, http://www.lss.bc.ca/_shared/assets/MOU1170.pdf (16 September 2006).
- 22 It is a well-established principle that legal aid is generally available for criminal matters, as was recently noted in *R.C. v. Québec (Attorney General); R. v. Beauchamps*, [2002] 2 S.C.R. 762 at para. 16: "In criminal law, it has been common for several years for *Rowbotham* orders to be made by the criminal courts, to provide for future legal services to be funded and made available; see: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)." The right to legal aid in civil matters has also been recognized in some circumstances. See *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.
- 23 Melina Buckley, "The Challenge of Litigating the Rights of Poor People: The Right to Legal Aid as a Test Case," in this volume, considers the constitutional deficiencies of legal aid funding in Canada. On 17 June 2005, the Canadian Bar Association (CBA) launched a suit in the British Columbia Supreme Court, which sought to establish that governments have a positive obligation to maintain an adequate system of legal aid, recognizing the inability of poor people to bring such a suit. On 5 September 2005, Brenner C.J. held that the CBA lacks standing to bring this systemic challenge. At the time of writing, the decision was under appeal. See *The Canadian Bar Association v. HMTQ et al.*, 2006 B.C.S.C. 1342.
- 24 *Gosselin*, *supra* note 11 at para. 82, citing *Blencoe v. British Columbia (Human Rights Commission)*, [2002] 2 S.C.R. 307 at para. 188.
- 25 While *Gosselin*, *supra* note 11, is the first and only anti-poverty *Charter* case to be decided by the Supreme Court of Canada since 1982 when the *Charter* came into force, the Supreme Court of Canada has decided over 100 *Charter* cases involving the *Criminal Code*, R.S.C. 1985, c. C-46, and has decided many more about the application of the *Charter* to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the *Young Offenders Act*, R.S.C. 1985, c. Y-1, and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (formerly the *Narcotics Control Act*, R.S.C. 1985, c. N-1). This account is based on a review of judgments posted on the Supreme

- Court of Canada website as of July 2004, <http://www.lexum.umontreal.ca/csc-scc/en/> (12 July 2004).
- 26 The *Court Challenges Annual Report of 2001-2* reports that between 24 October 1994 and 31 March 2002, the Court Challenges Program (CCP) provided funding in cases on twenty-three occasions. Among the cases funded were challenges to laws restricting access to marriage by same-sex couples. See Court Challenges Program of Canada, <http://www.ccppcj.ca/documents/annrep0102.html> (7 November 2005).
 - 27 See CCP, *First Report of the Standing Committee on Human Rights and the Status of Disabled Persons* (Ottawa: House of Commons, 1989) at 32. The CCP website contains a "Law Talk" section, where visitors can contribute to an online discussion about CCP issues. A topic currently under discussion is a potential expansion of the program's mandate to cover challenges to provincial laws, indicating that this is still a very real concern. See CCP, <http://www.ccppcj.ca/e/talk.html> (12 July 2004). Most of the contributors to the website have written in favour of mandate expansion.
 - 28 *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, 19th Sess., UN Doc. E/C.12/1/Add.31 (1998) at paras. 16, 42, 51, and 54.
 - 29 *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, 18th Sess., UN Doc. E/C.12/1993/5 (1993) at paras. 6, 22, 28, and 29.
 - 30 *Ibid.* at para. 6.
 - 31 *Concluding Observations* 1998, *supra* note 28 at paras. 8, 54, and 59.
 - 32 Committee on the Elimination of Discrimination against Women, *Report on the Twenty-Eighth Session and Report on the Twenty-Ninth Session*, UN GAOR, 58th Sess., Supp. No. 38, UN Doc. A/58/38 (1997) at paras. 355-6.
 - 33 *Concluding Observations* 1998, *supra* note 28.
 - 34 *Ibid.* at para. 42.
 - 35 *Concluding Observations on Canada*, UN ESCOR, 36th Sess., UN Doc. E/C.12/CAN/CO/5 (22 May 2006) at para. 11(a)-(g).
 - 36 Petter, *supra* note 16 at 486. Ironically, Petter opposes expanded funding for access to *Charter* rights. For general discussions about how access shapes the landscape of justice, see Jack B. Weinstein, "Adjudicative Justice in a Diverse Mass Society" (2000) 8 *Journal of Law and Policy* 385; and Raj Anand, "Putting Theory into Practice: Obstacles to Access to Justice" (2002) 21 *Windsor Yearbook of Access to Justice* 539. A related discussion of the relationship between judicial legitimacy and the need to give adequate court time to the discussion of rights of interest to society's poorer members can be found in Martha Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20 *Ottawa Law Review* 257 at 332-6.
 - 37 *Gosselin*, *supra* note 11 (facta of the intervenors, attorney general of Ontario, attorney general of British Columbia, and attorney general of Alberta).
 - 38 Constitution, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
 - 39 *Gosselin*, *supra* note 11 (oral argument of the intervenor, attorney general of New Brunswick) [tape recordings of the hearing on file with the author].
 - 40 *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 [N.A.P.E.]. Prior to 1991, the province was known as Newfoundland; today, it is Newfoundland and Labrador.
 - 41 *Public Sector Restraint Act*, S.N. 1991, c. 3.
 - 42 Because of access to justice barriers noted earlier, this is a relatively small group of cases compared to criminal law cases. See, for example, the facta of the government parties and intervenors in *Auton v. British Columbia (Attorney General)* (2002), 6 B.C.L.R. (4th) 201 (C.A.), [2004] 3 S.C.R. 657; *Chaoulli v. Québec (Procureur Général)*, [2002] R.J.Q. 1205 (C.A.), 2005 S.C.C. 35; and *N.A.P.E.*, *supra* note 40. See also Gwen Brodsky and Shelagh Day, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998) at 70-108, for a discussion of government arguments advanced in other key *Charter* cases.
 - 43 *N.A.P.E.*, *supra* note 40 at paras. 24-6 (factum of the attorney general of Newfoundland in the Supreme Court of Canada).
 - 44 *Ibid.*

- 45 *Ibid.* (oral argument of the attorney general of Newfoundland in the Supreme Court of Canada, 5 December 2004, Supreme Court Tape #29597).
- 46 *Ibid.* at paras. 38-103.
- 47 *Ibid.* at para. 26 (factum of the attorney general of British Columbia in the Supreme Court of Canada) [emphasis in the original].
- 48 *Ibid.* at paras. 26-45.
- 49 *Ibid.* at para. 33, citing *R. v. Ho*, 2003 B.C.C.A. 663 at para. 70.
- 50 See David Wiseman, "Taking Competence Seriously," in this volume.
- 51 Regarding US constitutionalism, see Michael J. Sandel, ed., *Liberalism and Its Critics* (New York: New York University Press, 1984).
- 52 Janice Tibbetts, "Welfare Is Not a Right, Canada's Top Court Rules," *Vancouver Sun* (20 December 2002) at A5; "What the *Charter* Doesn't Guarantee," Editorial, *Globe and Mail* (20 December 2002) at A22; and "Welfare Ruling on Right Track," Editorial, *Saskatoon Star Phoenix* (9 January 2003) at A10. See also David Schneiderman, "Social Rights and 'Common Sense': *Gosselin* through a Media Lens," in this volume, in which Schneiderman discusses the media coverage of *Gosselin*.
- 53 See, for example, Alan Kessel, Foreign Affairs Canada, "Presentation of Canada's Fifth Report to the Human Rights Committee HOD Opening Statement," Canadian Heritage, http://www.pch.gc.ca/progs/pdp-hrp/docs/2005-10/discours-speech_e.cfm (7 November 2005).
- 54 *Summary Record of the Fifth Meeting: Canada*, UN ESCOR, UN Doc. E/C.12/1993/Special Rapporteur (1993) 5 at para. 21.
- 55 *Slaight*, *supra* note 7.
- 56 *Irwin Toy v. Québec (Attorney General)*, [1989] 1 S.C.R. 927.
- 57 Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, UN Doc. HR/CESCR/NONE/98/8 (1998) at 33.
- 58 However, perhaps Canadians are not aware of the extent of Canada's hypocrisy with respect to its *ICESCR* commitments. Another example arose in the process of CESCR reviews of Canada's compliance with the *ICESCR*, *supra* note 3. In 1982 and again in 1992, Canada filed reports with the CESCR, claiming that the *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1, s. 1 [CAP], was a means of implementing the right to an adequate standard of living under Article 11 of the *ICESCR* and that the CAP established minimum national standards for social assistance and other social services, thus ensuring that there was pan-Canadian compliance with treaty obligations. However, in 1998, when the UN committee considered Canada's third periodic report, the CAP had been repealed and replaced by the unconditional block funding scheme of the Canada Health and Social Transfer (CHST). The CHST drastically cut federal transfer payments to the provinces for social programs and eliminated the entitlement to adequate social assistance for persons in need as well as other standards that had been particularly important for social assistance programs.
- In its 1998 written report, Canada made scant mention of the fact that it had eliminated the very law that it had previously claimed was a central means of fulfilling the right to an adequate standard of living. In Geneva, under intense oral questioning by the CESCR about the abandonment of national standards regarding social assistance, including the basic right to social assistance, Canadian government officials denied that the CAP had ever contained entitlements and national standards and argued that since it had not, the CHST could not be regarded as a retrogressive measure. Referring to representations made by Canada in its previous reports, committee member Virginia Dandan (now chairperson of the CESCR) bluntly asked how these contradictory positions could be reconciled. Canada was not able to provide a credible answer. See Canada, *International Covenant on Economic, Social and Cultural Rights: Report of Canada on the Implementation of Articles 10 to 12 of the Covenant* (Ottawa: Department of the Secretary of State, 1982); Canada, *International Covenant on Economic, Social and Cultural Rights: Second Report of Canada, Articles 10-15* (Ottawa: Human Rights Directorate, Multiculturalism and Citizenship Canada, 1992); *Third Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Canada*, UN ESCOR, UN Doc. E/1994/104/Add.17 (1998) at paras. 83-7; and *Human Rights: Use Them or Lose Them* (Toronto: Low Income Families Together and CineFocus Canada, 2000), which is a

video recording that includes relevant portions of the 27 November 1998 session of the CESCR meeting, at which Canada's third report was considered. Regard may also be had to the *Summary Record of the Forty-Seventh Meeting: Canada*, UN ESCOR, 47th Sess., UN Doc. E/C.12/1998/SR.47 (1998), United Nations High Commissioner for Human Rights, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/4765de37da9712a9802568740033d345?opendocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/4765de37da9712a9802568740033d345?opendocument) (12 July 2004).

59 *Concluding Observations* 1998, *supra* note 28 at para. 14.

60 David Schneiderman, "Social Rights and 'Common Sense': *Gosselin* through a Media Lens," in this volume.