

## SECTION 7 AND THE POLITICS OF SOCIAL JUSTICE<sup>‡</sup>

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### I. INTRODUCTION

The concern that animates this paper is recognition of the tremendous social and economic injustice that forms a central fault line of Canadian society. While it is often tempting to feel complaisant about our country's reputation as a "kinder and gentler" nation, this inclination is wisely resisted. The statistics on poverty in Canada,<sup>1</sup> the tight mapping of the demographics of this poverty on to groups targeted in our society by racism, sexism, colonialism, and class exploitation, are profoundly troubling. Indeed, the National Council of Welfare describes this situation as "... a serious problem ... that affects the

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<sup>1</sup> In a report issued November 2004, the National Council of Welfare reported that the overall poverty rate in Canada was 14.4 percent in 2001. In absolute numbers that is an estimated 4,393,000 people classified as poor, out of a total population of 30,467,000. More specific poverty rates are as follows: 15.6 percent for children, 13.6 percent for adults under 65, and 16.8 percent for seniors. Families led by single-parent mothers had a poverty rate of 42.4 percent in 2001. Unattached women 65 and older had a poverty rate of 45.6 percent. Among the provinces, Newfoundland and Labrador had the highest poverty rate for all persons in 2001 at 17.6 percent. Ontario had the lowest rate at 11.7 percent. In terms of depth of poverty, hundreds of thousands of poor Canadians lived on incomes of less than half the poverty line in 2001. This figure includes 466,000 unattached individuals under 65 and 153,000 families with members under 65. Indeed, Canada's total poverty gap—the amount of money needed to bring all poor people up to the poverty line—was \$18.6 billion in 2001. By contrast, Canada's gross domestic product in 2001 was \$1.1 trillion. In terms of income gap or the distribution of income in Canada, even after the impact of government transfer payments and income taxes are taken into account, the poorest 20 percent of the population had only five percent of the income in 2001 while the richest 20 percent had 43 percent of the income. (Canada, National Council of Welfare, *Poverty Profile 2001*, (Ottawa: Minister of Public Works and Government Services Canada, 2004) at 3-5.)

quality of life of all Canadians.”<sup>2</sup> This larger political concern leads me to examine the transformative potential of section 7 of the *Canadian Charter of Rights and Freedoms*:<sup>3</sup> and the potential of this constitutional provision to be useful in the struggle towards a fairer and more humane society.<sup>4</sup> Can section 7 of the *Charter* encompass the protection of social and economic rights? In other words, can section 7 be interpreted to capture the progressive goal of economic redistribution?

My paper wends a circuitous path. I want to consider three separate issues, all relevant to the question of section 7's usefulness to progressive politics but each representative of a different set of perspectives or angles on the issue. The first part of my discussion is doctrinal, a quick, perhaps even glib, recitation of how, from within traditional parameters of doctrinal exegesis, section 7 can encompass substantive claims to economic redistributive justice. Unencumbered by the inevitable comparative requirement and the increasingly rigid and formalistic grounds-based framework of section 15 analysis, section 7 offers hope, perhaps, for anchoring a fundamental entitlement of well-being guaranteed to all residents of Canada. The second part of my discussion is institutional. It addresses itself, again very quickly, to concerns about the institutional appropriateness and judicial competency of such judicial elaboration of section 7. The last, and least upbeat, part of my discussion has a more realist cast and looks to the politics dominant across political, legal, and social elites in Canada. This conclusion returns my discussion to the initial distress with which I begin this paper.

## II. SECTION 7 JURISPRUDENCE

So, to the doctrinal considerations—in many ways the easiest and most straightforward portion of the larger question of the progressive potential of

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<sup>2</sup> *Ibid.* at 132. John Ralston Saul in a recent article writes: “Extreme levels of poverty and the lack of affordable housing and services eat away at our society. It is a form of gangrene.” (“Canada’s Gangrene” *Macleans* 118:9 (22 February 2005) 40 at 41, online: [Macleans.ca](http://www.macleans.ca) <[http://www.macleans.ca/switchboard/essay/article.jsp?content=20050228\\_95680\\_95680#>](http://www.macleans.ca/switchboard/essay/article.jsp?content=20050228_95680_95680#>).)

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 [*Charter*].

<sup>4</sup> Louise Arbour, formerly on the bench of the Supreme Court of Canada and currently the United Nations High Commissioner on Human Rights, recently stated that: “[s]ection 7 ... is particularly relevant in the context of ‘freedom from want.’” (Louise Arbour, “Freedom from Want: From Charity to Entitlement” (Lecture presented at the LaFontaine-Baldwin Symposium, 2 March 2005), online: [Lafontaine-Baldwin.com](http://www.lafontaine-baldwin.com) <[http://www.lafontaine-baldwin.com/lafontaine-baldwin/e/2005\\_speech\\_3.html](http://www.lafontaine-baldwin.com/lafontaine-baldwin/e/2005_speech_3.html)> [Arbour, “Freedom from Want”].)

section 7 of the *Charter*.<sup>5</sup> As Phil Bryden notes in his paper in this collection, the scope of section 7, as elaborated to date, has tended towards the exclusion of harms linked to poverty.<sup>6</sup>

Yet, this outcome is not doctrinally inevitable, or even, arguably, the most reasonable interpretation of section 7. Indeed, the section is open to significantly more expansive and progressive understandings. Nothing in the case law to date, nor any of the standard principles of constitutional interpretation in play, prevent or determinatively speak against a wider scope for section 7. Nor do they convincingly show that such an alternative interpretation would be patently unreasonable or undesirable.

One could, and I would, affirmatively argue for an expansive and creative interpretation of the section. I do think that the *Charter*, if it is to be anything other than simply a deceptive recasting of regressive legitimation of a very unfair and unjust status quo, has to take on more substantive and progressive understandings of the content of rights protection. The fundamental justifications of democracy, citizenship, individual autonomy, equality, and justice that inform why we protect what we protect as constitutional rights are as strongly supportive of social and economic rights as they are of civil and political rights.<sup>7</sup> Social and economic rights are no less, indeed they are arguably more, under siege in our current political world.<sup>8</sup> But, ultimately, this doctrinal question is not really what is critically at issue in relation to section 7 and claims of social and economic justice. And to engage in detailed parsing of its nuances is similar to counting how many angels can fit on the head of a pin, or fiddling while Rome burns (or whatever the reference should be).

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<sup>5</sup> *Supra* note 3. (The text of section 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.")

<sup>6</sup> Phil Bryden, "Section 7 of the *Charter* Outside the Criminal Context" (2005) 38 U.B.C. L. Rev. 507.

<sup>7</sup> I can claim to be among illustrious company in making such a statement. For example, Nelson Mandela recently argued that: "And overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists there is no true freedom." (Simon Jeffrey "Mandela calls for action on 'unnatural' poverty" *The Guardian* (3 February 2005), online: Guardian Unlimited <<http://www.guardian.co.uk/hearfrica05/story/0,,1405146,00.html>>.)

<sup>8</sup> See Cass R. Sunstein, "Social and Economic Rights? Lessons From South Africa" (2001) U. of Chicago, Public Law Working Paper No. 12; U. Chicago Law & Economics, Olin Working Paper No. 124, online: Social Sciences Research Network <<http://ssrn.com/abstract=269657>> [Sunstein, "Social and Economic Rights"]; See also chapter entitled "The Structuring of Protest", Frances Fox Piven & Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (New York: Pantheon Books, 1977) at 1, reprinted in Steven M. Buechler & F. Kurt Cylke, Jr. eds., *Social Movements: Perspectives and Issues* (Mountain View, California: Mayfield Publishing Company, 1997) at 326.

However, that said, it is probably not enough simply to state that there are convincing arguments for reading positive rights to economic welfare into section 7 of the *Charter*.<sup>9</sup> Accordingly, what follows is a quick demonstration of what this kind of argument might look like, in reference to a recent claim of this sort before the Supreme Court of Canada in *Gosselin v. Québec (A.G.)*.<sup>10</sup>

*Gosselin* dealt with a challenge under section 7 and section 15 of the *Charter*, as well as section 45 of the Quebec *Charter of Rights and Freedoms*,<sup>11</sup> to the drastically reduced benefit payment scheme under Québec's social assistance programme for recipients under 30 years of age.<sup>12</sup> More specifically, the claim was that the lower payments to the under-30-year-olds constituted both discrimination on the basis of age and infringement of the right to security of the person.<sup>13</sup> The case was an important one—potentially a landmark case in the progressive evolution of the *Charter*—and the political stakes underpinning this case were significant. Canada has seen very little success in recognition of class or economic justice issues under the *Charter*. For economically marginalized individuals, the “rights revolution” spurred by the enactment of the *Charter* has been of little material consequence.<sup>14</sup> Other disadvantaged groups have had some *Charter* success,<sup>15</sup>

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<sup>9</sup> *Supra* note 3.

<sup>10</sup> [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 2002 SCC 84 [*Gosselin* cited to S.C.R.].

<sup>11</sup> R.S.Q. c. C-12. (The Québec *Charter of Rights and Freedoms* provides in s. 45 a right to “... measures provided for by law, susceptible of ensuring an adequate standard of living.”)

<sup>12</sup> One issue a number of commentators raise is the questionable relevance of, or need for, section 7 in these cases, given the equality rights provision of section 15 of the *Charter*. Two comments are apposite here. First, equality is strictly understood as a comparative concept—it is useful as a tool of critical appraisal only if someone or some group is better off in comparable circumstances. This may not always be the case, so the absolute guarantee of section 7 offers something more than s. 15. Secondly, equality is always, anyway, relevant as one of the extant values of our Constitution. Thus, section 7 must be equally independently available.

<sup>13</sup> For a detailed discussion of the claim and the statutory scheme underlying the claim, see Gwen Brodsky, “*Gosselin v. Québec (Attorney General)*: Autonomy with a Vengeance”, Case Comment (2003) 15 C.J.W.L. 194.

<sup>14</sup> *Supra* note 10 (Factum of the Intervenor Charter Committee on Poverty Issues at para. 2), online: The Charter Committee on Poverty Issues <<http://www.equalityrights.org/ccpi/gosselin/index.html>> [CCPI Factum].

<sup>15</sup> For example, Bruce Ryder, Cidalia C. Faria, and Emily Lawrence, in “What’s Law Good For? An Empirical Overview of Charter Equality Rights Decisions” review successes under section 15 of the *Charter*. ((2004) 24 Sup. Ct. L. Rev. (2d) 103.) For discussion of other sections of the *Charter* and the *Charter* overall, see also Patrick J. Monahan & Nadine Blum, “Constitutional Cases 2002: An Overview” (2003) 20 Sup. Ct. L. Rev. (2d) 3 at 6-7; F.L.

but the poor in Canada have consistently been unable to get any constitutional foothold for judicial recognition of the rights that might matter to them as a group.<sup>16</sup> They are, in the words of the Chief Justice herself from another case, “constitutional castaways.”<sup>17</sup>

In *Gosselin*<sup>18</sup> this trend continued. The Court, by a margin of 5 to 4, and in a decision written by Chief Justice McLachlin herself, rejected Louise Gosselin’s claim. The section 15 judgment lies beyond the scope of this paper, but I can’t resist mentioning that it is a judgment remarkable for its subversion of the economic justice and social citizenship issues at stake in a discourse ironic for its contradictory invocation of both individual responsibility and state paternalism. Section 7, however, received slightly different treatment. Eight out of the nine judges either supported Gosselin’s use of section 7 or left open the future possibility of such an understanding.<sup>19</sup> The majority decision found that there was insufficient evidence in this case to warrant the section 7<sup>20</sup> claim. However, Chief Justice McLachlin specifically held that such a “novel” application of section 7—its use to create positive rights of the sort Louise Gosselin claimed—remained an option in future cases.<sup>21</sup>

Madame Justice Arbour wrote a strong endorsement of positive section 7 obligations to state provision of full benefits under the Quebec income

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Morton, P.H. Russell & T. Riddell, “The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982-1992” (1994) 5 N.J.C.L. 1; James B. Kelly, “The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997” (1999) 37 Osgoode Hall L.J. 625.

<sup>16</sup> CCPI Factum, *supra* note 14 at 3.

<sup>17</sup> *R. v. Prosper*, [1994] 3 S.C.R. 236 at 302, 118 D.L.R. (4th) 154 [*Prosper* cited to S.C.R.].

<sup>18</sup> *Supra* note 10.

<sup>19</sup> Bastarache J. alone took a limited approach to section 7, holding that the section applied to judicial or administrative contexts in which the state was acting against an individual. (*Gosselin*, *supra* note 10 at paras. 205-23.) Gwen Brodsky, in a recent article, notes that Bastarache J.’s restrictive understanding of section 7 runs counter to his prior opinion in *Dunmore v. Ontario (A.G.)*, ([2001] 3 S.C.R. 1016 at paras. 221-23, 207 D.L.R. (4th) 193, 2001 SCC 94 [*Dunmore* cited to S.C.R.]) where Bastarache J. held that the *Charter* may in some circumstances require a government to take positive steps to protect the rights of vulnerable groups (cited in Brodsky, *supra* note 13 at 201.)

<sup>20</sup> *Charter*, *supra* note 3.

<sup>21</sup> *Gosselin*, *supra* note 10. (More specifically, McLachlin J. wrote: “[t]he question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards” at para. 82.)

assistance scheme.<sup>22</sup> She argued that “ ... a minimum level of welfare is so closely connected to issues relating to one’s basic health (or security of the person), and potentially even to one’s survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.”<sup>23</sup>

Madame Justice Arbour’s reading is not inconsistent with the case law. As she noted, the Court has, in past cases, been clear that protected under the various elements of section 7 are such things as “ ... the well-being of the living person ... ”, and the “ ... inherent dignity of every human being.”<sup>24</sup> The Court has also stressed that section 7 prohibits the denial of the opportunity to make “ ... basic choices going to the core of what it means to enjoy individual dignity and independence.”<sup>25</sup> Chief Justice McLachlin, in *Gosselin*, reinforces a similarly open perspective on section 7 by noting that it would be a mistake to regard the section “ ... as having been exhaustively defined in previous cases.”<sup>26</sup>

However, lower courts, particularly, have argued that section 7 must be read to exclude protection for all individual economic related claims<sup>27</sup> and, arguably, claims to certain levels of welfare benefits are such claims. Madame Justice Arbour’s response to this in *Gosselin* was that such a reading of welfare rights is too reductionist. These claims are not merely about economic interests, although they certainly involve economic elements or dimensions. They are better understood as claims to fundamental interests such as basic needs, reasonable prospects of a meaningful life and human dignity, individual autonomy, and personal security. As such they can be “ ... readily accommodated under ... s. 7.”<sup>28</sup> Madame Justice Arbour reminds us of Dickson C.J.’s statement in *Irwin Toy v. Québec (A.G.)* that the courts must be

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<sup>22</sup> *Ibid.* at paras. 307-400. (L’Heureux-Dubé J. generally concurred in this part of Arbour J.’s argument at para. 141.)

<sup>23</sup> *Ibid.* at para. 358, Arbour J. For a significantly more detailed and fully argued discussion of section 7 and its potential to capture positive obligations to do with socio-economic conditions, see Kathy L. Grant, *A New Constitutional Home for Substantive Justice for Women: Deconstructing Firewalls and Stoking the Hearth of Section 7 of the Charter* [unpublished, paper on file with author].

<sup>24</sup> *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 585, 107 D.L.R. (4th) 342, Sopinka J. [*Rodriguez* cited to S.C.R.].

<sup>25</sup> *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844 at para. 66, 152 D.L.R. (4th) 577, La Forest J. [*Godbout* cited to S.C.R.].

<sup>26</sup> *Supra* note 10 at para. 82, McLachlin C.J.

<sup>27</sup> Bryden, *supra* note 6.

<sup>28</sup> *Gosselin*, *supra* note 10 at para. 311.

careful not to too precipitously exclude from section 7 “... such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.”<sup>29</sup> Similar short shrift is given to arguments that would limit section 7 to protection of “legal rights” only<sup>30</sup> or to guarantees of negative state action alone.<sup>31</sup> Madame Justice Arbour’s approach is one that invokes generous and rights-expansive principles of constitutional interpretation, rejecting more “legalistic” interpretations of the section.

The purposive and contextual interpretation Arbour J. gives to the text of section 7 results in revival of the earlier notion that the section actually confers two rights. This interpretation facilitates Arbour J.’s claim in *Gosselin* that the *Charter*<sup>32</sup> rights under section 7 of life, liberty and security of the person include a positive dimension.<sup>33</sup> Her argument is that unless one ignores the structure of section 7—the conjunction that joins the first and second clause of the text in section 7—one must conclude that the first clause of the section affords protection additional to that afforded by reading the first and second clauses together.<sup>34</sup> This additional protection, flowing only from the first clause and therefore unconstrained by the requirement of “deprivation” set out in the second clause,<sup>35</sup> clearly places, Arbour J. asserts, positive obligations on the state. The identification of a separate and distinct right to life, liberty, and the security of the person therefore means that, in some cases, assessment of whether the government action or inaction at issue is in accordance with the principles of fundamental justice has no application. The right is free-standing, not modified by the second clause. Indeed, in cases of government inaction, the tenets of fundamental justice have little relevance as it is the legislative process not the administration of justice under scrutiny.<sup>36</sup>

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<sup>29</sup> [1989] 1 S.C.R. 927 at 1003, 58 D.L.R. (4th) 577 [*Irwin Toy* cited to S.C.R.].

<sup>30</sup> *Gosselin*, *supra* note 10 at paras. 314-18.

<sup>31</sup> *Ibid.* at paras. 319-29.

<sup>32</sup> *Supra* note 3.

<sup>33</sup> *Supra* note 10 at para. 357. (The notion of a positive dimension to a right establishes that government restraint is not always enough to observe the right; sometimes government action can be required such that government inaction will constitute infringement of the right.)

<sup>34</sup> *Ibid.* at paras. 338-41.

<sup>35</sup> In any case, Arbour J. does not hold that this limits application of section 7 to only cases where the state has actively interfered. (*Ibid.* at para. 321.)

<sup>36</sup> *Ibid.* at paras. 386-87.

Madame Justice McLachlin, while not accepting the applicability of section 7 to the facts at hand in *Gosselin*, does acknowledge that it is not settled law whether or not section 7 applies to rights or interests wholly unconnected to the administration of justice.<sup>37</sup> And, further, as already mentioned, McLachlin C.J. leaves open the possibility that the rights in section 7 may “one day” be read to include positive obligations. The majority of the Court thus accepts that the importance of section 7 rights requires a flexible and open-ended understanding of its future interpretation.<sup>38</sup>

Were Canadian courts to hold the *Charter*,<sup>39</sup> in particular section 7, as recognizing basic socio-economic rights, they would create a kind of constitutional protection that is neither anomalous nor unique. Many modern constitutions provide for explicit recognition of social and economic rights.<sup>40</sup> Other courts, in other countries, have demonstrated the ease with which the language of fundamental rights to life, liberty and security of the person can be held to protect fundamental social and economic rights. For instance, Indian courts have read into the right to life such things as a right to food, to housing, and to a healthy environment.<sup>41</sup> And, the right to human dignity has been understood by the Indian Supreme Court to protect health, workplace conditions and maternity leave.<sup>42</sup>

Buttressing such an understanding of section 7 are, of course, a number of international human rights treaties signed onto by Canada. The *Universal Declaration of Human Rights* recognizes the right to social security, and to an adequate standard of living, including food, clothing and housing as fundamental human rights.<sup>43</sup> Similar protections bind Canada in subsequent

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<sup>37</sup> *Ibid.* at para. 80.

<sup>38</sup> *Ibid.* at para. 82.

<sup>39</sup> *Supra* note 3.

<sup>40</sup> For example, in Ireland the Constitution dictates that “[t]he State shall provide for free primary education”. *Constitution of Ireland 1937*, art. 42, s. 4. (This is not a justiciable right.) The Netherlands’ Constitution states that “The authorities shall take steps to promote the health of the population” *Grondwet voor het Koninkrijk der Nederlanden 2002*, c. 1, art. 22, s. 1. [Translated by Ministerie van Binnenlandse Zaken en Koninkrijksrelaties] Translation available online: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties <[http://www.minbzk.nl/contents/pages/6156/grondwet\\_UK\\_6-02.pdf](http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf)>.

<sup>41</sup> Jill Cottrell & Yash Ghai, “The Role of Courts in the Protection of Economic, Social & Cultural Rights,” in Yash Ghai & Jill Cottrell, eds., *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (London: Interights, 2004) 58 at 72.

<sup>42</sup> *Bandhua Mukti Marcha v. Union of India*, 1985 A.I.R. (S.C.) 802 at 811-12, Bhagwati J.

<sup>43</sup> G.A. Res. 217(III), UN GALOR, 3d Sess., Supp. No. 13, A/810 (1948) 71 at art. 22, 25.



international human rights documents.<sup>44</sup> And, while such international promises are not strictly domestically enforceable, they are—or at least should be—influential in judicial and political interpretation of Canada's own legislative and constitutional rights protections.<sup>45</sup>

Canadian courts have come under international criticism for their failure to give full and effective force to these international obligations in interpretation of *Charter*<sup>46</sup> rights. The United Nations Committee on Economic, Social and Cultural Rights, in its Concluding Observations on Canada's 1998 periodic review under the *International Covenant on Economic, Social, and Cultural Rights*, noted with concern that:

provincial courts in Canada have routinely opted for an interpretation which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights.<sup>47</sup>

It is not difficult to set out a reasonable argument for entrenchment of welfare rights under section 7 jurisprudence. At least, case law does not preclude or determinatively defeat such an argument. And, thus, the decision about what content should be given this section, in any particular case, must rest upon some other basis than past case law. What is it about social welfare rights, then, that renders their recognition so far-fetched or repeatedly unsuccessful, despite the relatively easy and straightforward doctrinal argument that can be mounted?

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<sup>44</sup> For example, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, at art. 9, 11; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31, arts., 11(1)(e), 11(2)(b), 13(a).

<sup>45</sup> For judicial statement of the persuasive role such guarantees play in constitutional rights debate, see the *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056, 59 D.L.R. (4th) 416 [*Slaight* cited to S.C.R.]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70, 174 D.L.R. (4th) 193 [*Baker* cited to S.C.R.].

<sup>46</sup> *Supra* note 3.

<sup>47</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN CESCROR, 1998, UN Doc. E/C.12/1/Add.31 at para. 15, online: Office of the United Nations High Commissioner for Human Rights <<http://www.hri.ca/fortherecord1998/documentation/tbodies/e-c12-1-add31.htm>>.

### III. JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

To start, social and economic rights are very often held to be unusual kinds of rights—extraordinary in the sense that they depart from the classical liberal picture that accounts for the more traditional civil and political rights that constitutions unproblematically protect. Three oft cited problems come to mind: the imposition of positive obligations on the state; judicially mandated public spending; and, judicial competency. These problems all raise issues of justiciability—arguments that look to questions of institutional capacity and legitimacy. As Lorne Sossin has written, justiciability “... defines the boundaries between our legal and political systems.” Its invocation involves a determination of “... what matters are appropriate for legal determinations, and what matters must be left for political resolution.”<sup>48</sup> A proper understanding of justiciability ensures the healthy functioning of our political and legal institutions.<sup>49</sup>

Sossin also points out that this question is an important one, not to be lightly decided as: “[a] finding that a matter is non-justiciable may immunize certain government actions and laws from judicial review and may deny parties wronged by government action a judicial remedy.”<sup>50</sup> These are serious consequences, indeed.<sup>51</sup> They threaten, in relation to socio-economic rights, to render the *Charter*<sup>52</sup> unable to address some of the most distressing and profound denials of social and economic citizenship to groups among the most disadvantaged in Canadian society.<sup>53</sup> And this would come at a time when we know claims of the poor have little political purchase or currency.<sup>54</sup> It is not clear, in the words of other constitutional commentators, that the values these rights represent:

could hold their own in wider political discourse. They will be marginalized and categorized as second-class arguments and those most dependent on them for basic

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<sup>48</sup> Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at vi.

<sup>49</sup> Frank I. Michelman, “The Constitution, Social Rights, and Liberal Political Justification” (2003) 1 *International Journal of Constitutional Law* 13 at 15.

<sup>50</sup> Sossin, *supra* note 48 at vi.

<sup>51</sup> David Wiseman, “The Charter and poverty: Beyond injusticiability” (2001) 51 *U.T.L.J.* 425 at 426.

<sup>52</sup> *Supra* note 3.

<sup>53</sup> Wiseman, *supra* note 51 at 427.

<sup>54</sup> Fox Piven & Cloward, *supra* note 8.

survival and for integration into society at large will become or remain second-class citizens.<sup>55</sup>

Given the stakes involved, considerations of justiciability must be clearly delineated and carefully examined. Rights “... hold out the chance of empowerment for the powerless, in opposition to the established political order. And in more democratic systems the empowering function is still needed ... .”<sup>56</sup> Thus issues of justiciability are laden with significant and critical political consequences and implications.

As mentioned, concerns about justiciability generally break down into at least three specific issues. What follows is a brief discussion of these issues. Responses to them indicate that socio-economic rights are no more prone to defeat on these grounds than other types of rights.

#### A. POSITIVE VERSUS NEGATIVE RIGHTS

The first concern about social and economic rights is that they are positive rights. They require government action for their guarantees to be fulfilled. For example, a right to an adequate standard of living will require state initiated programmes of social and income assistance; a right to health will require a state funded medical system.

Yet, the distinction between positive and negative rights, mapped onto the distinction between social and economic rights and civil and political rights, is of dubious credibility.<sup>57</sup> Civil and political rights also place positive obligations on government.<sup>58</sup> For example, in the context of the administration

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<sup>55</sup> C. Scott & Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a Future South African Constitution” (1992) 141 U. Pa. L. Rev. 1 at 35, cited in Wiseman, *supra* note 51 at 438.

<sup>56</sup> Cattrell & Ghai, *supra* note 41 at 59.

<sup>57</sup> The fulfillment of civil and political rights is tightly interwoven with the achievement of social and economic rights. For a discussion of these points, see: Martha Jackman “What’s Wrong with Social and Economic Rights?” (2001) 11 N.J.C.L. 235 at 242. It has been firmly recognized at the international level and in academic writing that the distinction often drawn between civil/political rights and socio-economic rights is a false one. It is well accepted that these two traditional categories of rights are inter-dependant and indivisible. For recent statements of this in the international context, see the UNHCHR, *World Conference on Human Rights: 14-25 June 1993, Vienna, Austria* (Geneva: Office of the High Commission of Human Rights, 1995) online: UNHCHR <<http://www.unhchr.ch/html/menu5/wchr.htm>>, and the UN, *Millennium Summit: 6-8 September 2000* (New York: United Nations, 2000) online: United Nations <<http://www.un.org/millennium/summit.htm>>.

<sup>58</sup> See UN Human Rights Committee, *Zwaan-de Vries v. the Netherlands*, UNHCHROR, 1987 Supp. No. 40, (A/42/40) 160; Craig Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?” (1999) 10 Const. Forum Const. 97 at 104.

of justice, a restriction of section 7 of the *Charter*<sup>59</sup> to situations where the state has impinged on individual interests would clearly be insufficient.<sup>60</sup> The right to vote requires state implementation of the apparatus of elections. And, a right to trial by jury requires a criminal justice system, just as the right to property or contract, requires state policing and enforcement, and so on. As Madame Justice Arbour wrote in *Gosselin*:

[a]s a theory of the Charter as a whole, any claim that only negative rights are constitutionally recognised is of course patently defective. The rights to vote (s. 3), to trial within a reasonable time (s. 11(b)), to be presumed innocent (s. 11(d)), to trial by jury in certain cases (s. 11(f)), to an interpreter in penal proceedings (s. 14), and minority language education rights (s. 23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights (at least in part). By finding that the state has a positive obligation in certain cases to ensure that its labour legislation is properly inclusive, this Court has also found there to be a positive dimension to the s. 2(d) right to associate.<sup>61</sup>

Thus, it is not convincing, at a general level, to say that one form of right requires positive state action while the other does not.<sup>62</sup> Both forms of rights will necessitate different sorts of state action and state forbearance.<sup>63</sup>

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<sup>59</sup> *Supra* note 3.

<sup>60</sup> CCPI Factum, *supra* note 14 at para. 29.

<sup>61</sup> *Gosselin*, *supra* note 10 at para. 320 [footnote omitted]. (It is worth noting that Arbour J.'s notion of positive obligation is a somewhat conservative one. She does express some doubt that positive obligations can arise when there is no initial state action that brings the state under a duty to perform. But her understanding of this initial action is less demanding than traditional conceptions of what triggers obligations under constitutional rights. Clearly the issue of inclusiveness of legislation is one open to judicial review, while, in Arbour J.'s argument, the decision about entry into a particular legislative field may not be. The point however is not to engage fully with such a restrictive sense of state obligation but rather to note that the debate is the same regardless of the type of right. *Ibid.* at para. 328).

<sup>62</sup> Louise Arbour, subsequent to her dissenting judgement in *Gosselin*, has reiterated this point in her current capacity as U.N. High Commissioner for Human Rights. She has stated that: "Each kind of obligation may have cost implications to varying degrees, be it for the infrastructure necessary for the administration of justice, human and technical resources necessary to regulate financial or social sectors, or direct provision of water, sanitation, housing or other services as needed." Arbour, "Freedom from Want", *supra* note 4.

<sup>63</sup> More largely, the distinction between government inaction and action is a difficult one to delineate. Just as the distinction between law and politics, so cherished in classical liberal constitutionalism, breaks down upon close analysis, so too does the distinction between negative and positive obligation. State action is implicated in so many spheres of "private" action already that to say, in practice, that the state in one circumstance forbears from action while in another acts is often meaningless. There may be some virtue in this distinction at a conceptual level, but it certainly is murky in practice. However, the point of my discussion here is not this broader critique of the distinction between positive and negative state action, but,

## B. BUDGETARY IMPLICATIONS

The second distinction drawn between first and second-generation rights—civil and political and social and economic rights—has to do with budgetary implications. Because social and economic rights require state action, they can also have significant financial implications. Judicial review under these rights could impose on the government the obligations of costly or programme provision, dictating how government spends its money.

This is a possible result of judicial review but, again, not a feature consigned solely to review on the basis of social and economic rights. All constitutional rights have budgetary implications.<sup>64</sup> “[L]iberty and political freedoms, as much as basic socio-economic entitlements, depend on taxes.”<sup>65</sup> Rights are costly. The positive state actions required by civil and political rights to protect property, free association, the right to vote, a fair trial all require often very extensive state-funded systems—like the police, or a court system. We don’t think of this because we take these structures for granted, as basic political infrastructure of the liberal democratic state—but social programme or benefit provision is different only in its ideological heritage and thus our political comfort or familiarity with it.

Yet, increasingly judges invoke anxiety about the “public purse” as a constitutional consideration or value.<sup>66</sup> This concern, long an undercurrent in decisions,<sup>67</sup> had its coming out moment in the section 1 discussion of the recent equality decision *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*.<sup>68</sup> Here, the Supreme Court unanimously accepted the Newfoundland and Labrador government’s budget-based justification for renegeing on pay equity promises to female public sector workers. This much criticized decision<sup>69</sup> allows thinly

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rather, the assertion that, whatever sense the contrast might make, it does not track closely the distinction between socio-economic rights and civil and political rights.

<sup>64</sup> Cass R. Sunstein, “Why Does the American Constitution Lack Social and Economic Guarantees?” (2001) U. of Chicago, Public Law Working Paper No. 36 at 5, online: Social Sciences Research Network: <[http://ssrn.com/abstract\\_id=375622](http://ssrn.com/abstract_id=375622)> [Sunstein, “American”].

<sup>65</sup> Arbour, “Freedom from Want”, *supra* note 4.

<sup>66</sup> Thanks to Hester Lessard for this observation.

<sup>67</sup> For example, in *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577, [*Eldridge*] (it seemed to matter to the Court that judicially mandated sign language would cost relatively little).

<sup>68</sup> [2004] 3 S.C.R. 381, 244 D.L.R. (4th) 294, 2004 SCC 66 [N.A.P.E.].

<sup>69</sup> See for example the section by Efrat Abel on this case in (2005) 16 C.J.W.L. [forthcoming]; and Margot Young, “Charter of Rights” in Susan Munro *et al*, eds., *Annual*

substantiated government claims about budget pressures to trump substantive claims of economic justice. The Court fumbles handling the inevitable economic costs of *Charter*<sup>70</sup> rights. To so quickly step aside when government costs are claimed—particularly when the government is put to such little and so questionable an evidentiary proof of its economic claims—threatens to make a mockery out of the whole notion of constitutional rights protected through judicial review. Government budget and spending decisions are the product of many economic and social variables. Respect for social and economic justice, as expressed through rights protections, is properly one of the variables governments should be constitutionally mandated to consider.

Different elaborations of different rights—social and economic, civil or political, or variants within each of the traditional categories—will have different costs and require different degrees or types of state action but it is the individual circumstances of these rights claims, not some general cast lent to them by their nominal designation as civil and political, or social and economic, that is most informative on this count. The South African Constitutional Court agrees:

It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will have such implications. ... In our view, it cannot be said that by including socio-economic rights with a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.<sup>71</sup>

### C. JUDICIAL CAPACITY AND SOCIO-ECONOMIC RIGHTS

The last concern has to do with what Cass Sunstein, an American legal scholar, calls the pragmatic rather than merely aspiration consequences of inclusion of social and economic rights in a constitution.<sup>72</sup> And this is the trickiest question of the three. If we understand the rights elaborated in a constitution as more than unenforceable signals of values central to a society, if we understand these rights, as we do, as requiring their concrete realization by the state, the question is raised about the capacity of the judiciary—not

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*Review of Law & Practice—2005* (Vancouver: The Continuing Legal Education Society of British Columbia, 2005) 13.

<sup>70</sup> *Supra* note 3.

<sup>71</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa, 1996*, [1996] 4 S. Afr. L.R. 744 at 800, 10 B. Const. L.R. 1253, cited in Cottrell & Ghai, *supra* note 41 at 609.

<sup>72</sup> Sunstein, "American", *supra* note 64 at 10.

merely the appropriateness of the judiciary—to sort through the issues these rights raise. Will these rights involve the judiciary in “an impossible managerial position” over large government bureaucracies,<sup>73</sup> in too political and arbitrary a set of policy choices, in too complex an assessment of competing extra-legal claims?

The question is less simple than is often assumed. As David Wiseman convincingly argues, the courts have not been good at:

- 1) Explaining their capacity concerns;
- 2) Justifying “... taking a static view of their capacity ...”; and
- 3) “[D]istinguishing those aspects of poverty-related claims they are capable of adjudicating from those they are not.”<sup>74</sup>

There is support for this notion that judicial competency can be assessed only in the context of specific cases and not relied upon as the basis for full-scale rejection of judicial review of social and economic policy.<sup>75</sup> More specifically, Arbour J. has argued that, while concerns about the appropriateness of courts getting involved in issues of resource distribution are valid, they are not always telling in specific cases. In *Gosselin*, for instance, she argued that this was not so much a problem as evidence suggested that the level of support provided to those under 30 years of age failed to meet what the government’s own legislation has determined was the minimum for survival.<sup>76</sup>

Louise Arbour, after she left the Supreme Court, has elaborated on this point by stating that, while courts are ill-equipped to decide policy matters concerning resource allocation, this does not mean that the question of whether or not a *Charter*<sup>77</sup> right exists is also beyond court competency. The question about the right in *Gosselin* (the right to a level of welfare sufficient to meet one’s basic needs) can be answered without dealing with the question of how much expenditure by the state is necessary to secure that right. It is the latter question, she asserts, that is non-justiciable.<sup>78</sup>

Moreover, the kind of complexities that characterize social and economic claims can also occur in other types of *Charter* claims.<sup>79</sup> Cases such as

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<sup>73</sup> Sunstein, “Social and Economic Rights”, *supra* note 8 at 3.

<sup>74</sup> *Supra* note 51 at 441.

<sup>75</sup> See *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 68, 127 D.L.R. (4th) [RJR-MacDonald cited to S.C.R.]; see also *Symes v. Canada*, [1993] 4 S.C.R. 695 at 753, 127 N.R. 348 [Symes cited to S.C.R.].

<sup>76</sup> *Supra* note 10 at paras. 330-35.

<sup>77</sup> *Supra* note 3.

<sup>78</sup> *Ibid.* at para. 332.

<sup>79</sup> Wiseman, *supra* note 51 at 444.

*Eldridge*,<sup>80</sup> *M. v. H.*,<sup>81</sup> and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*<sup>82</sup> all involve judicial scrutiny of the impacts of complex economic and social policy making. So too did *Irwin Toy*,<sup>83</sup> but there these same concerns were dealt with through more deferential application of section 1 of the *Charter*<sup>84</sup> rather than a finding of non-justiciability. Although, the courts must be more diligent and principled in their use of such deference than was demonstrated in the *N.A.P.E.*<sup>85</sup> decision discussed earlier. In the case of *Eldridge*, shaping of the remedial stage was deferential. Thus, complex social problems are presented by not only social and economic rights claims but also by other types of rights. When such complexity does arise problematically, it can be rendered more manageable through recognition and selective use of the different stages of *Charter* adjudication.<sup>86</sup>

The degree or character of judicial protection can vary. The South African Constitutional Court is a useful example in this regard. The South African Final Constitution provides some social and economic protection.<sup>87</sup> The Constitutional Court has issued three substantial decisions under these rights. The most interesting of these is the decision in *South Africa v. Grootboom*.<sup>88</sup> The *Grootboom* case had 900 plaintiffs, most desperately poor, evicted by the state from a squatter settlement on privately owned vacant land. These individuals claimed that the forcible eviction and destruction of their homes and possessions violated their constitutional rights. (The rights involved were to adequate housing and a child's right to shelter.)

In this case, the Court did not hold the Constitution to require detailed judicial oversight of the welfare system, or to ensure that everyone has full individual access to socio-economic guarantees. Instead, the Court required

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<sup>80</sup> *Supra* note 67.

<sup>81</sup> [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577.

<sup>82</sup> [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124.

<sup>83</sup> *Supra* note 29.

<sup>84</sup> *Supra* note 3.

<sup>85</sup> *Supra* note 68.

<sup>86</sup> Wiseman, *supra* note 51 at 454.

<sup>87</sup> For example, Section 26 of the Final Constitution states:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right (*Constitution of the Republic of South Africa 1996*, No. 108 of 1996).

<sup>88</sup> [2000] 11 B. Const. L.R. 1169, [2001] 1 S. Afr. L.R. 46 (Const. Ct.) [*Grootboom*].



that the government “... at least creates ‘programs’ that ensure minimal attention to basic need.”<sup>89</sup> The obligation was a deliberative one, the right of ‘reasonable review’—ensuring democratic attention to issues commonly neglected in ordinary political debate.<sup>90</sup> One aspect of this test involves asking whether or not short term provision has been made for vulnerable groups in desperate need. Sunstein argues that social and economic rights, fully guaranteed, would strain judicial resources—but they can, as the South African example arguably demonstrates, require that government attention and a degree of legislative priority be assigned such basic needs.<sup>91</sup> The result is, as one South African scholar expert in socio-economic rights states, that:

It allows the Court to respect the role and competencies of the other branches of government - the democratically-elected legislature and the executive - while not abdicating its responsibilities to enforce the positive duties imposed by socio-economic rights.<sup>92</sup>

Thus, this recent decision of the South African Constitutional Court presents one course through the tangle of judicial and legislative competencies.

But the *Grootboom*<sup>93</sup> example is a tricky one. The judgement has been strongly criticized for its failure to articulate a minimum core obligation under the right. A duty to consideration is not a full guarantee. Where a court is dealing with deprivation of essential socio-economic needs, more might be required. Articulation of a minimum core obligation would not require courts to define in abstract the precise basket of goods and services mandated.<sup>94</sup> But it would make the statement that:

When a society has the resources to provide basic levels of socio-economic rights, it constitutes a serious denial of human dignity to neglect to do so. It also undermines society’s efforts to build an inclusive, caring political community.<sup>95</sup>

The point of using this example is not to hold the result in *Grootboom* up as the ideal resolution of judicial enforceability of housing rights but, instead, to

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<sup>89</sup> Sunstein, “American”, *supra* note 64 at 11 [emphasis added].

<sup>90</sup> Sunstein, “Social and Economic Rights”, *supra* note 8 at 1.

<sup>91</sup> Sunstein, “American”, *supra* note 64 at 12.

<sup>92</sup> Sandy Liebenberg, “Basic rights claims: How responsive is ‘reasonableness review’?” (2004) 5 ESR Review 7 at 11, online: Community Law Centre <<http://www.communitylawcentre.org.za/ser/esr2004/esrdecember2004.pdf>>.

<sup>93</sup> *Supra* note 88.

<sup>94</sup> Liebenberg, *supra* note 92.

<sup>95</sup> *Ibid.* at 11.

make the more general point that there is a range of ways by which rights are best understood as justiciable.

Underlying all three concerns discussed in this section on justiciability—positive character, budgetary implications, competence—is regard for preservation of a constitutional separation of powers. The picture of a state forced by judicial review to fulfill positive rights that require enhanced state spending and complex socio-economic questions threatens not only classical understandings of individual freedom, state budgetary autonomy, and judicial expertise but also traditional understandings of the distinct institutional roles for the judiciary and the legislature. At heart, then, it is understood as a challenge to democratic governance. And, while judicial review has long been a feature of Canadian constitutionalism, only since the advent of the *Charter*<sup>96</sup> have such concerns become a political, judicial, and academic preoccupation in Canada.<sup>97</sup> But all rights require a rethinking of, a readjustment of, the boundary between legitimate judicial action and legitimate legislative action. The issue about social economic rights cannot simply be one of judicial interference in the legislative realm, as this is true of traditional civil and political rights as much so as it is true of socio-economic rights.

The Canadian Supreme Court has already demonstrating some ability to think in a more nuanced way about issues of justiciability. In reference cases, such as the *Patriation Reference*<sup>98</sup> and the *Quebec Separation Reference*,<sup>99</sup> the Court had to negotiate explicitly distinctive legal rather than purely political responses to the issues raised.<sup>100</sup> While assessment of the Court's success in this regard is mixed and certainly these cases make obvious the inevitable

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<sup>96</sup> *Supra* note 3.

<sup>97</sup> Judicial review enforcing the division of powers has long been accepted as required by our Constitution's federal structure. The difference, of course, is that the *Charter's* enactment in 1982 ushered in considerable enhancement of judicial review: expansion of the grounds on which judicial review occurs and an outcome that, instead of overturning governmental action on the basis that such action is constitutionally proper to another level of government, now rules out the action in question for all levels of the state. For political commentary concerned about judicial review under the *Charter*, see, for example: "How deferential is the Supreme Court?" *The Globe and Mail*, (24 January 2005) A12. For judicial commentary with similar concerns, see *Newfoundland (Treasury Board) v. Newfoundland Assn. Of Public Employees* (2002), 220 Nfld. & P.E.I.R. 1, 221 D.L.R. (4th) 513, 2002 NLCA 72. For academic commentary of this stripe, see F.L. Morton & Ranier Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

<sup>98</sup> *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1 [*Patriation Reference*].

<sup>99</sup> *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [*Separation Reference*].

<sup>100</sup> Thanks again to Hester Lessard for this example.

imbrication of the political in the legal, these decisions also show that the Court is no stranger to the challenge and can be creative in thinking about its institutional role in a way that also allows a distinct role for the legislative and executive branches of government. This judicial creativity, already demonstrated under the reference jurisdiction of the Supreme Court, and explicitly referenced in South African constitutional law and commentary, is also appropriate and desirable for deliberations under our *Charter*<sup>101</sup> that ask the Court to forge new dynamics of the relationship between democratic concerns and rights protection aspirations.

#### IV. EXTRAJUDICIAL CONSIDERATIONS OR CONSTITUTIONAL POLITICS AT LARGE

So what is it, then, that keeps us from more enthusiastic support for rights that recognize claims to the basic incidents of full social and economic citizenship? Possibly, as Cottrell and Ghai argue, “[t]he fact is that those who are opposed to any form of justiciability of [economic, social and cultural rights] are driven by ideological rather than jurisprudential reasons.”<sup>102</sup> It is not so much a question of what interests are being protected, as much as it is a question of whose interests are being affected. This brings me to the last part of my discussion, the politics of protection of these rights. And my outlook is here considerably bleaker, cognizant as I am of dominant political disregard for social justice in current Canadian society.<sup>103</sup>

It is first important to note the sea-change in the political realm of social welfare provision, change catalyzed by neo-liberal ideas of minimal economic regulation, fiscal discipline, reduced or eliminated welfare provision, lower and more regressive taxation, and privatization of traditional state functions.<sup>104</sup> While Canada’s social union has always been (relative to some other nations, although notably not the United States) underdeveloped and slow to develop, there is a renewed dominance of values of individual liberty and responsibility, of emphasis on notions of choice and autonomy, and the

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<sup>101</sup> *Supra* note 3.

<sup>102</sup> Cottrell & Ghai, *supra* note 41 at 71.

<sup>103</sup> Of course, there are competing strands in Canadian political and constitutional culture, and dominant values are not equally expressive of the politics of all Canadians. Positive conceptions of liberty, or personal security, of the state’s role in ensuring such individual values, do resonate throughout our history. My point is simply that these political understandings are not the dominant ones right now. See Martha Jackman, “The Protection of Welfare Rights” (1988) 20 *Ottawa L. Rev.* 257 at 261-83.

<sup>104</sup> For a fuller discussion of this, see Hester Lessard, “The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring,” (2001) 39 *Osgoode Hall L.J.* 717 at 743-47.

valorization of the market and civil society over the state. Poor-bashing is now not only acceptable rhetoric in political stump speeches, media editorials and lead articles, but has also emerged as a dominant ideological framework for legislative, policy, and administrative actions.<sup>105</sup> Governments act in denial of poverty politically while they stigmatize it socially.<sup>106</sup> The most vulnerable of our fellow citizens, neighbours, and community members face a political environment that writes off the injustice in their lives as personal failings, as inconsequential, and as of no public concern or responsibility. Less influential are the notions of substantive equality and social justice that account for articulation of the visions of social and economic justice that underpin social and economic rights.

And, of course, it is this political environment, and its disregard for equity and redistributive goals, that has encouraged the turn to rights litigation as an important political strategy by equality and justice advocates. It is, in the words of one commentator, a “... pragmatic rethink within the means currently available”<sup>107</sup> for realizing a social democratic agenda.

Constitutional law, in turn, is not autonomous from these larger politics. David Schneiderman has written of the relevance of a broader “constitutional culture,” or system of “... fundamental values and norms as represented through law, custom, and popular culture, ...” to understanding Supreme Court of Canada decision making.<sup>108</sup> These values and norms help organize dominant perceptions of society, of what social arrangements are just, natural, and desirable. And, importantly, on occasion the Court “... give[s] voice to [this] social consensus—‘common sense’—on certain questions.”<sup>109</sup> So, constitutional law has, as well, its own default position of classical liberalism (now perhaps more interestingly termed neo-liberalism), what one commentator refers to as “classical liberal constitutionalism”.<sup>110</sup> The comfort with civil and political rights, with the “primacy of limiting the state”<sup>111</sup> and

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<sup>105</sup> See e.g. the *Safe Streets Act*, S.B.C. 2004, c.75.

<sup>106</sup> Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974) at 104.

<sup>107</sup> Gavin W. Anderson, “Social Democracy and the Limits of Rights Constitutionalism” (2004) 17 *Can. J.L. & Jur.* 31 at 36.

<sup>108</sup> “Social Rights and ‘Common Sense’: *Gosselin* Through a Media Lens” in Margot Young *et al.*, eds., *Poverty: Rights, Social Citizenship, and Governance* (Vancouver: U.B.C. Press) at 3, 17 [Forthcoming, cited to manuscript on file with author].

<sup>109</sup> Schneiderman, *ibid.* at 18.

<sup>110</sup> Anderson, *supra* note 107 at 43; see also Brodsky, *supra* note 12 at 213.

<sup>111</sup> Anderson, *ibid.* at 40.

“prioritisation of negative procedural restraints on the state”<sup>112</sup>, that characterize the case law, all illustrate this fact. It is no real surprise that the attitudes the majority judgement in *Gosselin*<sup>113</sup> displays toward the plight of Louise Gosselin resonate soundly with the stereotypes about welfare recipients at large in the political and social worlds outside the court. In the words of Gavin Anderson: “... the ‘deep grammar’ of constitutional doctrine articulates with broader social forces which favour classical liberal values.”<sup>114</sup> Or, as Louise Arbour herself, now freed from the restraints of her past judicial position, recently stated: “The barriers to rational debate on these matters are probably better explained by underlying ideological preferences, especially those associated with the libertarian ideal of a minimalist State.”<sup>115</sup>

This, then, is the reason for so much of the struggle over social and economic rights. It is not the case that there are not counter tendencies—I have already talked about some of these in my defence of the jurisprudential plausibility of social and economic rights. But alternative understandings are still a minor and contained theme within the politics of judicial rights discourse. And, as Louise Arbour also notes in her recent talk, individuals with stakes in current political and economic arrangements quite rightly feel threatened by the call for constitutional recognition of social and economic rights: “[t]he reason that ‘rights talk’ is resisted by the powerful is precisely because it threatens (or promises) to rectify distributions of political, economic or social power that, under internationally agreed standards and values, are unjust.”<sup>116</sup>

## V. CONCLUSION

So, I am wary of thinking that rights litigation—and the crusade to have the courts recognize under section 7 and section 15 of the *Charter*,<sup>117</sup> socio-economic aspects of liberty, security of the person, equality—will effect much significant progressive change through realignment of judicial perspectives on what rights can do. Our constitutional culture is shaped not by judges in isolation but by a judiciary and a rights tradition very much situated in and shaped by the dominant political consensus. And this dominant political consensus is hostile to the vision of state activity, social and economic

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Supra* note 10.

<sup>114</sup> *Supra* note 107 at 41.

<sup>115</sup> Arbour, “Freedom from Want”, *supra* note 4.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Supra* note 3.

entitlement, and social spending that socio-economic rights presume and require.

Perhaps, Chief Justice McLachlin's comments in *Gosselin*<sup>118</sup> about section 7—that it may at some later day be interpreted to include positive obligations—are less curious than one might originally think. Given different politics at large in Canada, a different constitutional culture with respect to notions of judicial competency and institutional appropriateness, as well as different ideas about social and economic justice, section 7 could very well be interpreted by the Courts to do what Louise Gosselin asked it to do. But, we are certainly not going to reach that day quickly; concerted political effort and political leadership,<sup>119</sup> in addition to jurisprudential adventuring by creative legal activists, will have to be part of the picture.

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<sup>118</sup> *Supra* note 10.

<sup>119</sup> Schneiderman, *supra* note 108 at 18.