

Inclusive Interpretations: Social Rights and Judicial Accountability*

Bruce Porter

INTRODUCTION: JUDICIAL INTERPRETATION AND THE REALIZATION OF SOCIAL AND ECONOMIC RIGHTS

According to the traditional conception of separation of powers between legislatures and judiciaries, legislatures make law while courts interpret it. When it comes to the protection of fundamental rights, however, this conception is slightly adjusted. Legislatures do not make or revise constitutional or international human rights law in the same manner as they make or revise statutes and regulations. Fundamental rights bind legislatures in relation to the making of law. Nevertheless, courts continue to be conceived as having the restricted mandate of interpreting and applying law that is not of their own making. Rights are conceived as pre-existing and external to acts of interpretation and adjudication, inscribed in negotiated texts, constitutional bills of rights or transnational treaties and permanently guaranteed to citizens through democratically legitimated constitutional or ratification processes. Courts can then be seen as the referees of immutable rules to which legislative players have agreed to be bound. They are not themselves players and they did not make the rules.

This traditional understanding of the separation of the judicial and legislative functions is, however, at odds with our actual experience of human rights. Broadly framed rights to life, security of the person, or equality, or more recently, constitutionalized social and economic rights such as the rights to housing or an adequate standard of living have acquired legitimacy as fundamental rights not because they function as immutable guarantees or universally applicable rules but rather because they carry with them interpretive histories and provide gateways to new* interpretations. Rights are given meaning and content *through* interpretation, and judges engage directly in the making of rights through interpretive practices. Rights are constitutionalized or negotiated at particular moments in time, but they are continually re-constituted and re-negotiated in response to claims from previously unheard voices and elaborated anew in varied and unforeseen circumstances. Rights may be theorized as immutable Platonic forms but in the material and temporal world of human rights practice they are moving shapes and shades. Rights engage with and project a multitude of diverse visions, identities, social projects, historical struggles, political protests and unpredicted events. As Jill Lepore has written of the U.S. Constitution:

The Constitution is ink on parchment. It is forty-four hundred words. And it is, too, the accreted set of meanings that have been made of those words, the amendments, the failed amendments, the struggles, the debates—the course of events—over more than two centuries. It is not easy. It is the stripes on William Grimes's back, the rule of law, a shrine in the National Archives, a sign carried on the Washington Mall, the opinions of the Court and the noise all of us make when we disagree (Lepore 2012: 89-90).

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What are the implications for understanding the judicial mandate and the separation of powers if human rights are no longer understood as immutable guarantees but rather as an “accreted set of meanings” linked to historical struggles, individual voices, social movements, international institutions and a myriad of interpretive acts? Courts engaged in constantly refashioning the meaning of rights cannot be understood as merely refereeing other branches of government on the basis of pre-negotiated rules. Like the croquet game in *Alice in Wonderland*, the rules keep changing in response to the play, and the referees are themselves players. Yet if judicial authority to interpret law is not circumscribed by a clear proscription against courts making or refashioning law and thus trespassing into the legislative domain, where are its boundaries? If judicial accountability is not referenced exclusively to externally defined, pre-negotiated guarantees, then to what are courts accountable in exercising their interpretive authority?

A primarily negative rights orientation has frequently been used by courts to distinguish the judicial function of interpreting law from the legislative function of making it. Courts have often refused, in the name of separation of powers, to engage with the transformative dimensions of rights leaving to legislatures all decisions as to what positive measures, systemic change or new laws or programs may be necessary to realize rights. While it is important for courts to demarcate their interpretive role from the policy and law-making role of legislatures, it is also important for courts to ensure the legitimacy and integrity of their interpretations of rights. It does not make interpretive sense to restrict the meaning of rights such as the rights to life, equality or security to those aspects that require only non-interference by governments rather than positive measures such as legislative protection or enhanced social programs. Negative rights interpretations have been adopted not on the basis of coherent or reasonable principles of interpretation but rather in the service of preconceived ideas of a restricted role of courts. The consequences of such restrictive interpretations for the integrity of the meanings of rights are severe. By retreating from understandings that may require positive measures or transformative change, courts stultify interpretation around existing patterns of discrimination, marginalization and exclusion. They exclude from their interpretation of rights the circumstances of disadvantaged and marginalized groups – those whose rights are most frequently denied by existing patterns of exclusion and by governments’ failures to take positive measures to address them. Rather than enhancing the democratic legitimacy of the judicial interpretive role, negative rights restrictions undermine democratic legitimacy by denying marginalized groups access to justice and disenfranchising them from meaningful inclusion in interpreting and fashioning of rights – a core component of equal citizenship in rights-based democracies.

Using the example of jurisprudence under the *Canadian Charter of Rights and Freedoms*¹ (the *Canadian Charter*) this paper will consider the role and responsibilities of courts in the context of the evolving meanings and transformative goals of human rights. It will propose a different understanding of the separation of powers and judicial accountability in which courts need not disengage rights interpretation from systemic change or the positive roles governments must play in realizing rights. It will assess courts’ performance of their interpretive responsibilities according to the transformative spirit and historically constituted meanings embodied in the adoption of open ended human rights texts. It will assume that courts must provide fair hearings to rights claimants allowing them to bring to light previously ignored circumstances that may warrant positive measures and systemic change. Courts should nourish the collaborative social project of fashioning and refashioning the meaning of rights and eschew patterns of social exclusion that deny some groups an equal voice in that project. Interpretation should be guided by principles of democratic participation and social citizenship. Courts, it will be proposed, should apply principles of interpretation aimed at ensuring that marginalized groups are equal participants in and receive the full benefit of rights interpretation - what may be termed a

“hermeneutic of inclusion” in which rights interpretation remains open to previously untold stories and to new meanings articulated by previously unheard voices.

This paper will also propose that judicial accountability for rights interpretation be strengthened by aligning this work with international human rights jurisprudence and in particular, with recent developments at the United Nations in the field of social and economic rights. The United Nations has finally recognized the importance of hearing and adjudicating social and economic rights claims, adopting new complaints and adjudication procedures under the International Covenant on Economic, Social and Cultural Rights (ICESCR)² (Porter 2009; Brown et al. forthcoming 2014), as well as complaint procedures inclusive of SER under the Convention on the Rights of Persons with Disabilities (CRPD)³ (Langford and Stein forthcoming) and the Convention on the Rights of the Child (CRC) (Nolan 2013).⁴ These developments, appropriately described by the Canadian jurist Louise Arbour when she was the UN High Commissioner of Human Rights as “human rights made whole” (Arbour 2008), offer new opportunities for a dynamic interaction and a framework of accountability between domestic and international rights interpretation that is fully inclusive of SER and those who claim them.

SOCIAL AND ECONOMIC RIGHTS AND INTERPRETIVE CONSTITUTIONALISM IN CANADA

The Canadian experience makes particularly transparent the importance of rights interpretation to the realization of social rights. The *Canadian Charter* was adopted in 1982 before the international trend toward the explicit inclusion of social and economic rights in new constitutions took hold. Human rights organizations had begun to focus on issues of poverty, access to housing and decent work as the most critical human rights issues in Canada, and they demanded that the new *Charter* address these problems as human rights issues (Porter 2006). Canada had ratified the ICESCR in 1976, and NGOs made frequent reference to social and economic rights under international human rights law. However, the dynamic human rights movement that emerged during the 1970s in Canada had addressed social and economic rights in domestic law primarily within the framework of rights to equality and non-discrimination. As a result, they understood constitutional protection of SER as an issue of how the right to equality and other broadly framed rights then accepted as fully justiciable should be interpreted. They wished to ensure that courts would not adopt a negative rights approach to the interpretation of Charter rights and would instead recognize positive obligations of governments to ensure social and economic equality and security as components of broadly framed traditional rights. Rather than advocating for the inclusion of specifically enumerated social and economic rights, therefore, human rights groups focused their attention on interpretive issues arising in relation to rights to equality, life and security of the person. While in retrospect it may seem clear that explicitly enumerated SER would have been helpful in giving Canadian courts direction in recognizing positive government obligations, progressive movements were nevertheless correct in their assessment that the primary issue would be the spirit and orientation of the process of interpretation by which constitutional rights would be given content rather than the specific list of rights enumerated for protection.

Prior to the adoption of the Charter, positive measures to ensure disadvantaged groups access to housing, employment and services had been recognized as components of the right to equality and non-discrimination under human rights legislation.⁵ On the other hand, formalistic negative rights interpretations under an earlier statutory Canadian Bill of Rights⁶ had deprived equality-seeking groups of meaningful protections. Most infamously, the Supreme Court of Canada had held in *Bliss* that the denial of unemployment benefits to women during pregnancy did not constitute discrimination because there is no male comparator for pregnant women.⁷ During the

negotiation of the Charter, human rights groups focused on combating this kind of discriminatory interpretation of rights and promoting inclusive, positive rights interpretations.

Women's organizations lobbied successfully for changes to the proposed right to "non-discrimination" in section 15 of the new Charter so as to have the section renamed positively as "equality rights." They mobilized across the country to press for an unprecedented additional reference in section 15 to the right to the equal *benefit* of the law to ensure that equality would be interpreted to include positive rights to social assistance, unemployment benefits, adequate social programs and regulatory legislative measures (Porter 2006: 25-29).⁸ Disability rights groups, newly organized in the ferment of the International Year of Persons with Disabilities in 1981, organized to press for the inclusion of mental and physical disability as a prohibited ground of discrimination in section 15. While positive obligations to reasonably accommodate disability had been recognized under human rights legislation in Canada, there was no precedent in other countries at that time for constitutional recognition of the rights of persons with disabilities. Including disability in section 15 meant that courts would have to engage in assessing what positive measures were required to accommodate disability and remove systemic barriers. When disability rights groups succeeded in making Canada the first constitutional democracy to recognize the equality rights of people with disabilities, they brought to Charter interpretation an understanding of inequality as socially constructed and linked to positive obligations of governments to address unique needs and circumstances (Peters 2003). Systemic unemployment, poverty and inadequate housing were expected to achieve new attention, both legally and politically, as violations of substantive equality rights in Canada's new constitutional democracy (Porter 2006: 32-33).

Section 7 of the Charter, which guarantees the 'right to life, liberty and security of the person' and the right not to be deprived thereof 'except in accordance with principles of fundamental justice,'⁹ was worded to set a course of interpretation that would differ from U.S. jurisprudence and be more consistent with Canada's recognition of social and economic rights under international human rights law. The wording of the section was taken from article 3 of the Universal Declaration of Human Rights (UDHR) and hence interpretively situated in the UDHR's unified conception of civil and political and social and economic rights. A proposed amendment to add a right to "the enjoyment of property" to section 7 was rejected, and the phrase "fundamental justice" was chosen over "due process of law" to address concerns about invocation of the rights to property and due process in the U.S. during the *Lochner* era to strike down protections for vulnerable groups (Choudry 2004; Jackman & Porter 2008: 211).

Social movements became vocal advocates for their interpretive expectations of the Charter. Appearing before a parliamentary committee looking into the new responsibilities of governments with the advent of the constitutional right to equality in section 15, women's organizations affirmed that "the poverty of women in Canada is a principal source of inequality in this country" and that "the goal of the section is equality, a positive concept, as opposed to non-discrimination, a negative concept" (Porter 2006: 30). People with disabilities affirmed that equality means a decent place to live; access to meaningful work and an adequate income; access to a full range of social opportunities; having fundamental rights of citizenship recognized; and being able to advocate for rights (Porter 2006: 33). The struggle for social and economic rights in Canada thus became inextricably linked to demands by groups affected by growing poverty, homelessness and other social rights violations for inclusion in the meaning and scope of broadly framed Charter rights to equality and to life, liberty and security of the person (Jackman & Porter 2008).

INTERNATIONAL AND DOMESTIC LAW: THE INTERPRETIVE PRESUMPTION

The understanding of fundamental rights in Canada has been closely tied to ongoing engagement with the development of international human rights norms. The Canadian John Humphrey was the primary author of the unified architecture of the UDHR. Canada ratified both the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) shortly after these were opened for ratification. Although ratified treaties are not directly enforceable by courts in Canada, their interpretive influence is significant. The Charter is understood to be founded on international human rights values and to be part of Canada's implementation of its international human rights obligations.¹⁰ Ongoing engagement with international human rights interpretation has encouraged a view of human rights norms as historical accomplishments facilitated by social collaboration and the triumph of shared values over geographic distance and cultural diversity, a conception that resonates with Canada's own demography, geography, and history.

As concerns mounted during the 1990s about unprecedented levels of homelessness, hunger and poverty amidst affluence, civil society in Canada increasingly turned to UN human rights procedures as an important site for human rights practice. Civil society groups and indigenous peoples in Canada were among the earliest domestic human rights groups to make extensive use of international human rights procedures in advocacy and litigation strategies. Treaty monitoring bodies were encouraged to engage not only with legislative and programmatic inadequacies linked to poverty and homelessness, but also with the interpretive issues on which the protection of social rights under the Charter would depend (Porter 1999).

In response to questions from UN bodies about social rights protection under the Charter, the Canadian government provided assurances that the rights to life, liberty and security of the person in section 7 would guarantee that people were not deprived of basic necessities such as food, clothing and housing (CESCR 1993: paras 3, 21; Government of Canada 1998: questions 16 and 53). The Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that lower courts had interpreted the rights in section 7 as excluding Covenant rights and that "provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights" (CESCR 1998: paras 14–15). A repeated recommendation from the CESCR has been that "federal, provincial and territorial governments promote interpretations of the Canadian Charter of Rights and other domestic law in a way consistent with the Covenant" (CESCR 2006: paras 39-41). Canada's statements to UN treaty bodies about Charter interpretation as well as treaty body recommendations have in turn been cited by claimants and relied upon by courts in Charter cases linked to social rights. In *Victoria v Adams*,¹¹ for example, in which bylaws preventing homeless people from erecting temporary shelter from the elements were found to violate section 7 of the Charter, the Court referred to Canada's statements to the CESCR in support of an interpretation of section 7 incorporating at least some components of the right to adequate housing to which Canada is committed under international law.¹²

The Supreme Court has recognized that international human rights "reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself."¹³ Although not specifically enumerated in the Charter, economic and social rights recognized under international law guide the interpretation of the content of Charter rights and also of their "reasonable limits" under section 1 of the Charter.¹⁴ In its 1989 decision in *Slaight Communications*,¹⁵ for example, the Court found that an adjudicator's order requiring an employer to provide a positive letter of reference to a wrongfully-dismissed employee was a justifiable infringement of the employer's right to freedom of expression, a right that is explicitly protected under section 2(b) of the Charter when balanced against the importance of "the right to work" that, though not specifically enumerated in the Charter, is a component of Canada's commitments under the ICESCR.

Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights* ... and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one ... Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.¹⁶

In *Irwin Toy*,¹⁷ the Supreme Court rejected another challenge based on the freedom of expression – this time by a corporation challenging restrictions on advertising aimed at children under the age of thirteen. The Court noted the potential implications for vulnerable groups of a negative rights approach under the Charter. “Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.”¹⁸ The Court reiterated that “[i]n interpreting and applying the *Charter* ... the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.”¹⁹ While finding that corporate-commercial economic or property rights had been intentionally excluded from the text of section 7, the Court was careful to distinguish this category of economic rights from social and economic rights “included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter ...” The Court left for future cases the question of whether these rights should be considered components of section 7, stating that it would be “precipitous” to exclude these rights from the scope of section 7 at an “early moment in the history of *Charter* interpretation.”²⁰

The CESCR has made clear in its dialogue with Canada that if it is possible for courts to adopt a reasonable interpretation of Charter rights so as to ensure protections of SER to which Canada is committed under international human rights law, then courts ought to adopt such an interpretation. Moreover, governments should be promoting such interpretations before courts. The CESCR explained the basis for judicial interpretive accountability to international human rights in its General Comment No. 9:

Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights (CESCR 1998a: paras 14-15).

The demands and expectations of human rights organizations and social movements that Charter rights would be interpreted consistently with Canada's commitment under international human rights law thus has a solid foundation in both domestic and international jurisprudence. Canada's historic attachment to the unified architecture of rights under the UNDHR and its commitment to engagement and dialogue with evolving international human rights jurisprudence provide an

important framework within which rights interpretation should be situated. Unfortunately, courts have not fully utilized international human rights instruments.

THE INTERPRETIVE STRUGGLE FOR SOCIAL AND ECONOMIC RIGHTS UNDER THE CANADIAN CHARTER

Reflecting on the interpretation of rights in the Charter during her tenure as UN High Commissioner of Human Rights, Justice Louise Arbour noted that “the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law” (Arbour 2005). Yet, as Justice Arbour recognized from her experience on the Supreme Court of Canada, the struggle by people living in poverty and homelessness in Canada for inclusion in the meaning of Charter rights has been stalled. The question of whether section 7 rights should be interpreted to include SER such as the right to food, housing or social security, left open by the Supreme Court in *Irwin Toy* in 1989, has remained unanswered by the Court for a quarter of a century.

The question of the status to be accorded to an adequate income in the interpretation of section 7 has been directly addressed by the Court only once in the 2002 decision in *Gosselin v Quebec (AG.)*²¹ There the Court considered a Charter challenge to a provincial social assistance regulation reducing benefits payable to recipients under the age of thirty who were not enrolled in workfare or training programs by two thirds, levels that deprived them of access to basic necessities of food and housing. Justice Arbour in dissent, supported by Justice Claire L'Heureux-Dubé, held that the section 7 right to life and security of the person places positive obligations on governments to provide anyone in need with an amount of social assistance adequate to cover basic necessities.²² “[E]very suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.”²³ Although the majority found such an interpretation to be inapplicable on the facts of *Gosselin*, viewing the impugned welfare regime as a means of encouraging young people to join the workforce, the Court nonetheless left open the possibility that this interpretation of section 7 could be applied in a future case. Reaffirming that rights interpretation must be grounded in historically evolving understandings, the Court noted that: “The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.”²⁴

The Supreme Court has been willing to apply section 7 to the right to health but challenges have generally been framed by claimants and decided by the Court within a negative rights framework.²⁵ In a recent case, intravenous drug users living in the Downtown Eastside of Vancouver, one of the most destitute urban areas in Canada, challenged a decision by the Conservative federal government to shut down Insite, North America’s only safe injection services. When the federal Minister refused to renew an exemption for Insite from the prohibition of the possession of narcotics under the Controlled Drugs and Substances Act (CDSA),²⁶ those dependent on the services brought a Charter application to try to keep Insite open. The Court found in light of the overwhelming evidence of the life-saving benefits of safe injection and related health services that the Minister’s failure to exempt Insite violated the right to life and was inconsistent with fundamental justice because it was arbitrary and unreasonable.²⁷ Since the Minister is bound to exercise discretion in accordance with the Charter “there can be only one response: to grant the exemption.”²⁸ The Court remained largely within a non-interference paradigm, however, finding that the government may not act to unreasonably prohibit safe injection sites but not, as yet, finding that such sites must be provided where needed.²⁹

The extent to which equality rights under section 15 of the Charter should be interpreted to include positive obligations to address systemic disadvantage and SER violations also remains an ongoing struggle. The 1997 case of *Eldridge v British Columbia*³⁰ raised hopes that substantive equality approaches derived from positive obligations to accommodate disability would establish a firm foundation for SER claims under section 15. In that case the Supreme Court considered a challenge brought by deaf patients to the provincial government's failure to provide sign language interpretation services within the publicly funded health insurance system. The Court unanimously rejected arguments put forward by governments that the right to equality should not be interpreted to impose positive obligations to address conditions of disadvantage that were not caused by government actions. The Court described the governments' proposed negative rights interpretation of equality as "a thin and impoverished vision of s. 15(1)."³¹ Having determined that the failure to provide interpretation services violated section 15, the Court considered the cost of providing interpreter services in the context of competing demands on health care resources. It concluded that in light of the relatively small cost, the refusal to fund interpreter services was not reasonable and therefore not justifiable under section 1.³²

The Supreme Court further affirmed a positive rights approach to equality in *Vriend v. Alberta*.³³ The Court found that the omission of sexual orientation as a prohibited ground of discrimination in access to housing, employment and services in Alberta's Individual Rights Protection Act³⁴ violated the right to equality in section 15 of Charter. The government had argued that the Charter should only be applied by courts to government action or legislation and not to failures to act or to legislate. The Court responded that the Charter states that it applies to "all matters within the authority of the legislature ..."³⁵ and held that this scope of application is "worded broadly enough to cover positive obligations on a legislature such that the Charter will be engaged even if the legislature refuses to exercise its authority."³⁶ In considering remedial options, the Court chose to "read in" the missing legislative protection rather than strike down the legislation in its entirety.³⁷

Despite these important affirmations of a positive rights approach to section 15, there have been few applications of section 15 equality rights to issues of poverty, access to food, housing or work – the issues that were the focus of advocacy by social movements when the text of section 15 was negotiated. Section 15 has been used successfully by public housing tenants to extend security of tenure protections to include public housing tenants³⁸ and by single mothers relying on social assistance to strike down "spouse in the house" rules that disqualified them from eligibility when co-habiting with a man.³⁹ In these cases appellate courts recognized that those who, because of poverty, rely on public housing residency or receipt of public assistance are subject to discrimination and therefore entitled to "analogous grounds" protection under section 15. However, most poverty related claims have been rejected by lower courts on the basis of formalistic equality analysis and findings that poverty does not qualify as an analogous ground of discrimination. The Supreme Court has yet to address these issues, having denied leave to appeal in cases in which poverty issues have been virtually "read out" of the meaning of equality by lower courts (Jackman 2010; Jackman & Porter forthcoming 2014).⁴⁰

The unresolved issues of interpretive inclusion or exclusion at stake in the struggle for SER in Canada have become starkly evident in the case of *Tanudjaja v. Canada*.⁴¹ In this case, a number of homeless individuals, joined by a housing rights organization and supported by a network of civil society organizations brought a Charter application to address the crisis of widespread homelessness in Canada, challenging governments' failure to implement an effective housing strategy in line with recommendations of international human rights bodies. The governments moved to dismiss the claim on the basis that the positive rights interpretations of sections 7 and 15 advanced by the claimants had no reasonable prospect of acceptance by courts. The facts

relied upon in the notice of application,⁴² uncontested for purposes of the motion to dismiss, included that homelessness in Canada causes severe health consequences and death and that it disproportionately affects people with disabilities and other protected groups. Despite the obvious connection with accepted meanings of the rights to life, security of the person and equality, the judge rejected the idea that the circumstances of homeless people should be included in the interpretation of Charter rights because such an interpretation would bring issues into courtrooms that do not belong there.

By its nature, such an application would require consideration of how our society distributes and redistributes wealth. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.⁴³

Critical issues of the meaning of core charter rights were thus reduced to the question of whether homeless people or those with mental health disabilities living on the cold streets should be in the courtroom at all. Because the judge was uncomfortable with the remedial role of courts that he believed would emanate from a positive rights approach, he refused to accept that the life, security and equality issues of homeless people should be included in the meaning of these rights. Such a decision has implications beyond determining who is welcome in Canadian courtrooms and who is not. It has a significant effect on whether widespread homelessness in the midst of affluence will be considered an urgent human rights crisis, as urged by UN human rights bodies, or simply a policy issue which the government is free to ignore (Jackman & Porter forthcoming 2014).

Thus the Superior Court's interpretation in *Tanudjaja* was anticipated by its preliminary decision regarding participatory rights at the hearing. Ruling on motions from potential amici, the judge described the question at bar as a "narrow legal issue" in which those with experiential rather than academic, legal expertise would have little to offer.⁴⁴ Two coalitions of people with disabilities, homeless women and impoverished tenants living in insecure housing were denied standing on the ground that their interest was "not informed by this narrow question, but by the broader questions surrounding the difficulties those they represent have in finding appropriate housing."⁴⁵

Lawyers and judges occasionally display this misapprehension that homeless people or those living in poverty who appear in courts to assert rights are primarily interested in the material benefits to which they claim entitlement rather than the interpretation of rights on which their claims rely. While the issues of material deprivation may certainly be a priority in such circumstances, there is no lack of interest among those trapped in homelessness and poverty in the question of whether core constitutional rights will be interpreted so as to recognize their dignity, equality and security. People living in poverty and homelessness recognize that exclusionary notions of rights are among the most important structural causes of the material deprivations and social marginalization they experience. Being denied a place in Canada's dominant rights culture is not an "academic" deprivation. People living in poverty have consistently fought against systemic denials of access to justice and equal access to rights (Porter 2005; Porter 2007). That is why members of the coalitions denied legal standing filled the courtroom for the *Tanudjaja* hearing at the Superior Court and are continuing to seek standing as the case proceeds on appeal to higher levels of courts.⁴⁶ The meaning of rights matters to them; and it matters which interpretations get the stamp of approval from courts.

RE-INTERPRETING THE SEPARATION OF POWERS

Experiences in cases such as *Tanudjaja* make it clear that the development of the kind of inclusive rights hermeneutic that would give equal dignity and place to SER claimants continues to run up against traditional conceptions of separation of powers in Canadian legal culture. The Supreme Court of Canada has rejected any restriction of the meaning of rights to their negative components but has not always been consistent in articulating or applying an alternative conception of separation of powers to encourage courts to engage more effectively with the positive and transformational dimensions of rights. Lower courts have continued to retreat from reasonable interpretations of rights when such interpretations would confront courts with questions about positive actions or legislative measures necessary to realize substantive rights (Jackman & Porter forthcoming 2014).

The justification for courts engaging directly with the positive dimensions of law-making arose most clearly in the *Vriend* case, in which a “reading in” remedy added sexual orientation as a prohibited ground of discrimination to Alberta’s human rights legislation. Anticipating accusations of transgressing the bounds of judicial authority, the two concurring judges writing for the majority vigorously defended the legitimacy of the role the court was assuming. Justice Iacobucci at one point invoked traditional social contract theory, noting that the adoption of the Charter and the mandate given to courts to resolve disputes about its meaning “were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy.” The courts’ role in arbitrating disputes is “not in the name of the courts, but in the interests of the new social contract that was democratically chosen.”⁴⁷

The social contract, however, was clearly evolving. The Court in *Vriend* was not simply arbitrating a dispute about a pre-negotiated contract but rather responding to and participating in important historical transformations in the meaning of equality. The *Vriend* decision was an interpretive response to the historical struggle by gays and lesbians for inclusion in the meaning of the right to equality in the Charter. These groups had sought, but had been denied inclusion in the list of prohibited grounds of discrimination during the negotiation of the text of section 15 (Smith 2005). In the intervening years, the meaning of equality had been transformed by a myriad of events to become inclusive of those who had been unjustly excluded. The court’s role was, quite properly, to provide a fair hearing to those who had been excluded and, in light of the compelling evidence of discrimination and inequality, to endorse the new, more inclusive meaning fashioned by evolving human rights values.

An alternative basis of the court’s democratic legitimacy that was more compatible with this reality was described in another passage from Iacobucci, J. in the same decision. Instead of relying on the democratic process through which rights had originally been guaranteed to assert the legitimacy of the court’s interpretive role, he referenced broader democratic principles that give legitimacy to the court’s interpretive role:

There is also another aspect of judicial review that promotes democratic values. Although a court’s invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in *Oakes*, *supra*, at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.⁴⁸

Under this conception, the interpretation of rights is accountable to evolving democratic values of social justice and is part of a broader struggle for a more inclusive and equal society. Justice Cory concurring in *Vriend* situated the interpretive role of courts in a collective aspiration to equality and dignity, progressing from universal suffrage to the realization of substantive equality and dignity for all. Citing the notion of the “just society” promoted by Prime Minister Pierre Trudeau who initiated adoption of the Canadian Charter, Cory J. wrote:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual.

It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain.⁴⁹

This conception of the courts’ role relies on the democratic principle of inclusive interpretation rather than simply the democratic adoption of the Charter. By linking interpretation to the aspirational dimension of rights, this principle ensures that the transformative dimensions of rights and the struggle for equality are not excluded from the evolving meaning of the rights. The role of the court is to adopt meanings that are consistent with democratic values, not to restrict meanings in service to a static conception of rights or restricted notion of courts’ authority and responsibilities vis-à-vis elected bodies.

The second aspect of positive rights claims that has troubled lower courts in Canada but was not at issue in *Vriend* is the question of judicial engagement with budgetary decisions and resource allocation. Steeped in the Westminster tradition, lower Canadian courts tend to view legislative control of budgets as a cornerstone of parliamentary sovereignty and a central aspect of separation of powers. The Supreme Court took this issue up most directly in a case in which the Court found *against* claimants of a positive right to retroactive measures for pay equity. To the Court’s credit, however, it did this without restricting rights to their negative components or by simply deferring to the legislature on budgetary or policy issues linked to compliance with rights.⁵⁰ In *Newfoundland (Treasury Board) v NAPE*⁵¹ the Court considered a section 15 challenge to the decision of the Government of Newfoundland to retroactively alter the implementation of a pay equity agreement so as to erase a \$24 million award that would have been owed to women public service workers. This decision was part of across-the-board expenditure cuts. The Court held that revoking a positive measure that would have redressed systemic inequality violated women’s right to equality under section 15. However, the Court found the measure to be justified under section 1 of the Charter as reasonable and justifiable in light of what the court found to be a serious fiscal crisis. In considering whether the measure was reasonable, however, the Court rejected the approach of the court below that broad deference must be accorded to legislatures’ budgetary and policy decisions in order for courts to respect the separation of powers doctrine. Marshal JA had written for the Newfoundland Court of Appeal that courts have no mandate to contest fiscal decisions of governments or to interfere with their policy-making authority. The Charter, he stated, “extended the courts’ interpretative role to ascertaining the impact of governmental measures on guaranteed rights; but bestowed no increased policy-making power for that purpose beyond that normally exercisable by courts in discharging their traditional interpretative role.”⁵² Binnie, J. for the Supreme Court insisted that under a correct understanding of separation of powers, it is the court’s role, not the legislature’s,

to assess whether infringements of rights can be justified as reasonable on the basis of budgetary or any other policy considerations. He pointed out that everything legislatures and the executive do can be described as “policy-making” so that blanket deference to the legislature’s policy-making authority proposed by Marshal JA would render rights illusory for many rights-holders.⁵³

No doubt Parliament and the legislatures, generally speaking, *do* enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render superfluous the independent second look imposed on the courts by s. 1 of the *Charter*.⁵⁴

In response to the argument that the legislature, not the court is in the best position to weigh different budgetary options, Binnie J. noted that budgetary decisions as much as any others engage with values that courts are obliged to protect. “The weighing exercise has as much to do with social values as it has to do with dollars The delayed implementation of pay equity is an extremely serious matter, but so too (for example) is the layoff of 1,300 permanent, 350 part-time and 350 seasonal employees, and the deprivation to the public of the services they provided.”⁵⁵

The distinction proposed by Justice Binnie is critical to reconceiving separation of powers so as to properly situate the court’s interpretive role. Legislatures have the mandate to make law and policy. Courts have the ultimate mandate to interpret rights and to determine what is required for compliance with rights. Obviously, there is overlap and required dialogue between the two branches of government. It is the courts’ responsibility, however, to interpret and assess compliance with rights, whether or not this requires assessments of positive actions or budgetary allocations. The conception of the different roles articulated by the Supreme Court in *N.A.P.E* is consistent, in fact, with the recently adopted Optional Protocols to the ICESCR and the CRC. These protocols direct the treaty body to “bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”⁵⁶ Proposals to include reference to a “wide margin of discretion” to be accorded states, however, were rejected for reasons very similar to the explanation given by the Supreme Court in *NAPE*: namely that it is the responsibility of the adjudicative body, not the government, to determine issues of compliance with rights. While it may be appropriate to defer to governments’ choices among a range of rights-compliant policy options, it is inappropriate and unhelpful to routinely defer to one of the parties in relation to the assessment of compliance with rights (Porter 2012).

CONCLUSION: TOWARD AN INCLUSIVE HERMENEUTIC OF RIGHTS

The struggle for SER in Canada demonstrates that progressive realization of SER requires not only a commitment by the legislative and executive branches of government to developing and enacting appropriate policies and programs, but also a commitment within the judicial branch to a “hermeneutic of inclusion”— interpretations informed by and consistent with values of equal rights and citizenship and democratic engagement in the fashioning of the meaning of rights.

Promoting an inclusive hermeneutic of rights means that courts and administrative decision-makers must ensure access to justice by marginalized groups and establish processes that fully engage rights-holders in the evolving interpretation of rights. Claimant communities must have the means to take cases forward, present evidence and participate fully in hearings. Rights interpretation must accord due respect for the circumstances and voices of groups whose needs and interests are likely to have been ignored by governments and by previous interpretations.⁵⁷

International human rights bodies can play an important role in promoting more accountable and coherent principles of rights interpretation by engaging directly with domestic courts’ interpretive

responsibilities as components of state compliance. United Nations treaty monitoring bodies do not sit as appellate bodies to domestic courts, but as the CESCR has made clear, courts have important interpretive duties under international human rights law, and treaty monitoring bodies have not only the authority but the responsibility to review state-party compliance with these duties. As the UN Human Rights Committee has noted, “the fact that an act constituting a violation . . . is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole.”⁵⁸ Judicial independence should not, therefore, be mistaken for freedom from any accountability to interpretive norms under international or domestic law. Self-regulating judicial bodies must recognize courts’ responsibility to respond to and address concerns raised by international human rights bodies and to engage constructively with jurisprudence emerging from the new SER complaints and adjudication procedures at the United Nations.

Domestic interpretation of SER in the context of different national constitutional traditions has become part of a broader international project of “making human rights whole” that is founded on world-wide adjudication of diverse claims linked to material deprivation, economic inequality and social marginalization within a range of interpretive contexts (Porter 2009). Each individual claim and act of adjudication and reinterpretation must be situated within this broader human rights project, in which domestic courts are one of many players. Judicial accountability must reflect the values of dialogue and grassroots input at the same time as respecting judicial independence and the inheritance of previous interpretive acts. Rights interpretations must be grounded in democratic principles of social inclusion and equal dignity in rights – even where this requires governments to take positive action, create new legislation or address systemic inequality. Both democracy and the realization of human rights require that judges be held accountable in the performance of these interpretive responsibilities.

That interpretive orientations give shape to SER is not unique to Canada. Even where SER are accorded explicit protection, adjudication of rights requires interpretive responses to new claims and engagement with broader transformative goals (Liebenberg 2010). SER are linked to struggles to ensure access to material entitlements such as food and housing, but when issues of access to material goods are advanced in the form of human rights claims these struggles give rise to new meanings and interpretations of rights. Human rights interpretation and SER adjudication is thus a collaborative effort that is international in scope and dispersed among multiple actors.

Judiciaries must be independent of the political branches of government and of influence by particular interests if they are to fulfill their proper role in the adjudication of claims. However, the courts’ role must not be construed as being independent of historical struggles or of the evolving social construction of the meaning of rights; if it were, judicial interpretation of rights would be starved of nourishment and disconnected from the broader human rights project that gives individual interpretive acts legitimacy. In the final analysis, the fact that there is no immutable guarantee or ultimate authority on which to rely for definitive interpretations of rights is not the problem. It is the solution.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter].

² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (hereinafter “ICESCR”). The new complaints procedure was adopted in UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/117 (hereinafter “OP-ICESCR”)

³ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106 (hereinafter “CRPD”). The complaints procedure was adopted in: UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II (hereinafter “OP-CRPD”).

⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (hereinafter “CRC”). The complaints procedure was adopted in: UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure : resolution / adopted by the Human Rights Council*, 14 July 2011, A/HRC/RES/17/18 (hereinafter “OP-CRC (communications)”).

⁵ See, for example, *Action Travail des Femmes v. C.N.R.*, [1987] 1 SCR 1114; Clément, Silver&Trottier, (2012).

⁶ *Canadian Bill of Rights*, SC 1960, c 44.

⁷ *Bliss v. Canada (Attorney General)* [1979] 1 SCR 183.

⁸ Section 15(1) of the Charter reads:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

⁹ Section 7 of the Charter 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.”

¹⁰ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para 70; *R v Ewanchuk*, [1999] 1 SCR 330, para 73.

¹¹ *Victoria (City) v. Adams*, 2008 BCSC 1363 (CanLII) <<http://canlii.ca/t/215hs>> 1363; *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII) <<http://canlii.ca/t/26zww>>.

¹² *Ibid.*, paras 98-100.

¹³ (*Reference re Public Service Employee Relations Act (Alta.*), [1987] 1 SCR 313, *per* Dickson C.J., at p. 348) cited by the majority in *R. v. Keegstra*, [1990] 3 SCR 697, 750.

¹⁴ Section 1 provides that Charter rights are guaranteed “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

¹⁵ *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038.

¹⁶ *Ibid.*, 1056-7.

¹⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 (hereinafter “*Irwin Toy*”).

¹⁸ *Ibid.*, 993.

¹⁹ *Ibid.*; Citing *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 779

²⁰ *Ibid.*, 1003.

²¹ *Gosselin v Quebec (AG)*, [2002] 4 SCR 429 (hereinafter “*Gosselin*”).

²² *Ibid.*, para 332.

²³ *Ibid.*, para 357 *per* Arbour, J.

²⁴ *Ibid.*, para 83 citing *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 para 188.

²⁵ In *Chaoulli v Quebec (AG)*, [2005] 1 SCR 791 the Supreme Court found that the Quebec government’s failure to ensure access to health care of reasonable quality within a reasonable time in the public health care system triggered the application of section 7. However, rather than ordering the government to take positive measures to ensure timely access in the public health care system, the Court upheld a claim from a relatively advantaged health care consumer and his doctor for a declaration that the prohibition of private insurance in these circumstances violates the right to life and is therefore of no force and effect. Court’s attempt to remain in a negative rights paradigm had the precise results predicted in *Irwin Toy* – a privileging of the rights of advantaged claimants at the expense of disadvantaged groups (Jackman 2006, Porter 2005).

²⁶ *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134; Controlled Drug and Substances Act SC 1996, c 19.

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- ²⁷ Ibid., paras 127-136.
- ²⁸ Ibid., para 150.
- ²⁹ It should be noted, however that in this case, as in others, the applicants themselves framed the case within a negative rights paradigm. As Louise Arbour has observed, the prevailing “timidity” with respect to SER claims under the Charter is seen both in the courts and among litigants. (Arbour, ³⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.
- ³¹ Ibid., para 65.
- ³² Ibid., paras 87-94.
- ³³ *Vriend v. Alberta*, [1998] 1 SCR 4 (hereinafter “*Vriend*”).
- ³⁴ *Individual’s Rights Protection Act*, R.S.A. 1980, c. I-2.
- ³⁵ Charter, op cit. s. 32(1)(b).
- ³⁶ *Vriend*, op. cit., para xx quoting Pothier, D. “The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak” (1996), 7*Constitutional Forum* 113, at 115.
- ³⁷ *Vriend*, op. cit., para 179.
- ³⁸ *Dartmouth/Halifax (Country) Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.).
- ³⁹ *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR. (3d) 481 (CA).
- ⁴⁰ See, for example, the decision of the Nova Scotia Court of Appeal in *Boulter v. Nova Scotia Power Incorporation*, 2009 NSCA 17 (CanLII), <<http://canlii.ca/t/22h4b>> finding that a prohibition of differential pricing of utilities to ensure access by impoverished household was not a violation of s.15 of the *Charter*; V. Calderhead & Claire McNeil (forthcoming 2014).
- ⁴¹ *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 (CanLII), <http://canlii.ca/t/g0jbc> (*Tanudjaja Application*).
- ⁴² *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410, Amended Notice of Application, Court File No. CV-10-403688 <[http://socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.\(R2H\).pdf](http://socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.(R2H).pdf)>.
- ⁴³ *Tanudjaja Application*, op. cit. para 120.
- ⁴⁴ *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 (CanLII), para 36 <<http://canlii.ca/t/fwzk7>>.
- ⁴⁵ Ibid.
- ⁴⁶ The decision of Lederer J. has been appealed to the Court of Appeal for Ontario. *Tanudjaja v. Canada* OCA File No. C 57714.
- ⁴⁷ Ibid., para 135.
- ⁴⁸ Ibid., para 140.
- ⁴⁹ Ibid., para 68.
- ⁵⁰ The right to equal pay for work of equal value is included in article 7 the ICESCR, op. cit., as a component of “the right to just and favourable conditions of work.” Article 7(1)(i) commits States parties to: “Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”
- ⁵¹ *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66 (*NAPE SCC*).
- ⁵² *Newfoundland Assn. of Public Employees v. R.*, 2002 NLCA 72 (CanLII), <<http://canlii.ca/t/5ftb>> para 548 (*NAPE NLCA*).
- ⁵³ *NAPE SCC*, op. cit para 111.
- ⁵⁴ *Ibid*, para 103.
- ⁵⁵ Ibid.
- ⁵⁶ *OP-ICESCR*, op. cit., Article 8(4).
- ⁵⁷ The Supreme Court of Canada cited John Hart Ely in its first decision under section 15 of the *Charter*, affirming that courts must protect “those groups in society to whose needs and wishes elected officials have no apparent interest in attending.” *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 152 (per Wilson, J.).
- ⁵⁸ *Anthony Fernando v. Sri Lanka*, Communication No. 1189/2003, U.N. Doc. CCPR/C/83/D/1189/2003 (2005).

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