Does Canada Need a Social Charter?

Matthew Certosimo

_Dalhousie University_

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Does Canada Need a Social Charter?

I. Introduction:

Over the decade since the birth of the *Canadian Charter of Rights and Freedoms*,¹ expectations that it would impact greatly on the lives of Canadians have gone largely unfulfilled for those regarded as being the most in need of its protection. A recent decision of the Nova Scotia County Court has reminded critics that the narrow interpretation given the Charter's equality and security of the person provisions, particularly with regard to social and economic rights, excludes from its purview the well-being of Canadians in economic need.

In *Dartmouth/Halifax County Regional Housing Authority v. Irma Sparks* (1992),⁴ the insufficiencies of the courts' interpretation of the Charter was all too clearly illustrated to Ms. Sparks. Evicted on one month's notice from public housing, in accordance with the *Residential Tenancies Act* which excludes public housing from the general security of tenure provisions and defers to the lease,⁵ Chief Justice Palmeter was unwilling to accord Ms. Sparks the protection of either s.7 or s.15 of the Charter. With his ruling, the Chief Justice adopted the traditional reluctance of the judiciary to interpret the Charter as protecting social and economic rights,⁶ and again provided evidence of the need for either a renewed mandate for or an amendment to the Charter.

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² Charter, s.15(1).
³ Charter, s.7.
⁴ County Court of Halifax, Nova Scotia, C.H. No.75171 (April 13, 1992), [unreported], [hereinafter Sparks].
⁵ *Residential Tenancies Act*, R.S.N.S. 1989, c.401, ss. 10(8)(d) and 25(2).
⁶ For clarity, it is worthwhile to note that the social and economic rights considered in this analysis are those which might be termed "basic needs" rights. Simply put, these rights include such guarantees as the right to social assistance, health care, housing, employment, education, environment, and culture, as are most commonly protected in many national and international constitutions, such as the *International Covenant on Economic, Social and Cultural Rights*, signed 1966, Annex to G.A. Res. 2200A, 21 U.N GAOR, Supp. (No.16) 49, U.N. Doc. A/6316, (1966). It is not within the ambit of this study to consider the impact of economic rights decisions on corporations.
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The proposition that our Charter should protect social and economic rights is not particular to Nova Scotia nor to this stage of our constitution evolution. Recent decisions of the Supreme Court of Canada have also placed into jeopardy the existing social network that Canadians generally regard as being a “part of our national identity.” As well, the courts’ reluctance to provide protection for these “second tier rights,” leaving only the slightest of openings for the “living tree” to grow through, has all but confirmed the view that the Charter in its present form may undermine advances in, or at least remain an unreliable means of achieving, substantive equality.

Although various models of a social charter, or a social and economic rights covenant, have emerged as a legal response to these realities, the basic objective of entrenching the principle of basic economic equality would appear to be a consistent characteristic. A number of questions have arisen, however, in the process: What exactly is basic economic equality, and what constitutes the “basic needs” of subsistence worthy of being guaranteed? Should social and economic rights be justiciable, or are such matters exclusively policy issues within the jurisdiction of an elected parliament? What duty, if any, does government have to obviate socio-economic disparities? In light of the courts’ interpretation of s.7 of the Charter, which has generally seen economic rights as being beyond its purview, how can an interpretive clause widen the section’s application? Will the acceptance of social assistance recipients as a discrete and insular minority within the meaning of s.15 of the Charter become widespread or will a further amendment to the Charter be necessary for such an interpretation of the equality rights section? And, of course, will any changes to the Charter only formally affect the circumstances of Canadians such as Ms. Sparks, or can Charter reform achieve more than merely raised expectations?

It is proposed herein that the protection of social and economic rights within the rubric of the Charter, as it is, would not be inconsistent with the document’s philosophical underpinnings. While the Supreme Court

has left slightly open the possibility of such an interpretation, those who want greater certainty that the Charter and the Constitution will ensure security to the socio-economically disadvantaged have proposed amendments intended to explicitly so provide. In two important decisions, Reference re: Canada Assistance Plan\textsuperscript{12} with respect to the role of governments in Canada, and Reference re: ss. 193 & 195.1(1)(c) of the Criminal Code\textsuperscript{13} with respect to the role of the courts and the rights of individuals, the Supreme Court of Canada has signalled that it is reluctant to intervene in such issues. Perhaps, therefore, proponents of a social charter are correct to view amendments to the Charter and/or the Constitution as being their best means of achieving a legal regime supportive of the values Canadians are said to share with respect to their network of social programs.

One such comprehensive proposal for a new social charter, put forward by a national coalition of community groups, includes a social and economic rights interpretive clause for the Charter, protection of existing Charter rights, a statement of government responsibilities, and a social rights tribunal and monitoring body.\textsuperscript{14} Less ambitious suggestions have been made by various premiers and the Joint Parliamentary Committee on a Renewed Canada.\textsuperscript{15}

Prior to assessing these proposals more closely, an analysis of the theoretical background of the Charter, in which the philosophical, historical and international influences and contexts are contemplated, and a consideration of how the Charter is presently being applied to social and economic rights questions, will illustrate three central points: first of all, the Charter is not antithetical to being interpreted as protecting social and economic rights; and, secondly, the proposed social "C",\textsuperscript{16} therefore, would not be a revolutionary change to our Charter, or be out of step with constitutions and charters generally; and, thirdly, the amendments necessary to ensure that the Charter is applied by the courts to protect social and economic rights do not have to be too extensive in order to achieve, as is possible with a judicially interpreted constitutional document, greater social security for Canadians.

\textsuperscript{12} (1991), 58 B.C.L.R. (2d) 1 (SCC).
\textsuperscript{13} [1990], 1 S.C.R. 1123.
\textsuperscript{14} Bruce Porter, "Draft Social Charter" (February 25, 1992), Centre for Equality Rights in Accommodation, Toronto [hereinafter the Porter Proposal].
\textsuperscript{16} covenant, charter, contract
Thus, it will be the goal of this paper to identify the subtle weaving of a net of guarantees to social and economic justice that exist within Canada's Charter, thereby establishing the framework upon which a new social "C" may liberate these social and economic rights.

II. Context

Amid the coincidence of events that has the destabilizing paths of a recession and constitutional renegotiation merging, the concept of a social charter or covenant has emerged, raising questions about the very nature of the rights and freedoms of the Charter. In the 1990's, the effects of the recession saw an approximate "one million Ontario residents being social assistance beneficiaries," a 37% increase between March of 1990 and March 1991. With this kind of growing dependency upon the social network and cases such as the Sparks decision, which serve to illuminate the weaknesses of that net, the Charter's apparent incapacity to fill in those gaps has caused a revisiting of the substantive meaning of Charter liberty, security of the person and equality.

Canadians generally have great pride in their social programs, reflecting a national effort to diminish socio-economic inequality. As the federal government's discussion paper, Shared Values: The Canadian Identity summarized:

Our social safety net helps to define the notions of equality, community and responsibility as they are developing in Canada. We believe that all Canadians are entitled, as Canadians, to basic services, regardless of where they live in Canada.

Indeed, the importance of Canada's present network of social programs has been compared with the role played in unifying the country that the railway once played, and as the "key ingredient" in the "recipe for national unity." It is argued, therefore, that a social charter, which would entrench certain guarantees to the provision of basic needs, would help to unify Canadians around those shared values and pride.

When one looks beyond the mythology which has evolved around Canada's social programs, however, one sees that many Canadians have

19. "For Canadians, Confederation has come to mean not only the creation of a single, transcontinental economy, but the creation of a nation where the social fabric is strengthened by shared values and by a network of social programs." Ontario Government Discussion Paper, A Canadian Social Charter: Making Our Shared Values Stronger (September, 1991), at 1.
slipped through the holes in the net, despite the lofty objectives. The
growth in the number of food banks and the widening of the strata of
Canadian society relying upon these non-governmental agencies for
survival is indicative of the these gaps in the governmental social
network:  

About 42% of the Metro [Halifax] Food Bank Society’s recipients are
children under 18. . . . A study released yesterday by Statistics Canada
indicates children made up a disproportionate number of Canadians who
sought aid from food banks in 1990.  

Particularly since the recession of the 1980’s, more and more Canadians
have come to rely upon food banks for their basic subsistence, yet since
1966 the federal and provincial governments have been committed to
ensuring “adequate assistance to and in respect of persons in need,”
which includes provision of “basic requirements,” as outlined in s.2 of the
Canada Assistance Act:

2. In this Act,

“assistance” means aid in any form to or in respect of persons in need for
the purpose of providing for all or any of the following:

(a) food, shelter, clothing, fuel, utilities, household supplies, and personal
requirements (hereinafter referred to as “basic requirements”), . . .

Adding to this dichotomy between goals and reality has been the
federal government’s decision to reduce their contribution to the Canada
Assistance Plan, and the Supreme Court of Canada’s judgement that such
unilateral decisions of Parliament are not reviewable by the courts. In
Reference re: Canada Assistance Plan, Sopinka J. ruled that the
structure of the statute indicates that the specific payment obligations of
the federal government are authorized “from time to time,” and therefore
amendments to the financial obligations remain within the ambit of
parliamentary sovereignty. In addition, the Supreme Court held that the
doctrine of legitimate expectations, found by the British Columbia Court

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21. “Graduates more evident at food banks; Figures in Toronto region reveal 40% have high
school education” (Tuesday, March 17, 1992), Globe & Mail, (report on Statistics Canada,
Canadian Social Trends food bank use in Canada study, 1990-91); for regional perspective, see
also “Food bank numbers reflect national trend” (March 17, 1992) Halifax Daily News.
Yb. 185, 193.
25. Ibid.
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of Appeal to limit the authority of the federal government to affect unilaterally its obligation under the agreement, did not create substantive rights that bound Parliament.

Thus, it is in this context that the Sparks ruling serves only to remind us that the objective of substantive equality is not necessarily being served by our present network, nor by the "supreme law of Canada." As the facts of the case showed, Ms. Sparks is a 42 year-old, Black Nova Scotian, single-parent with two children. Their sole source of income is $767.00/month from provincial social assistance, $173.00/month of which satisfied her rent-geared-to-income. Prior to her eviction notice, she had lived in public housing for over ten years.

As part of his ruling, Chief Justice Palmeter took judicial notice of the disproportionate number of Black, women and social assistant recipients who occupy public housing and who make-up the waiting list for admittance into such subsidized accommodation. Quoting from the National Council of Welfare 1990 report entitled Women and Poverty Revisited, Palmeter C.J. "accept[ed]" that single-parent mothers have more difficulty securing "appropriate housing" and in getting by economically:

Canada Mortgage and Housing Corporation reports that 40 percent of female single parents under 65 have "core" housing needs, meaning their housing is either too crowded, physically inadequate or costs more than 30 percent of their total income. In the Atlantic Provinces, many single parents pay more than 50 percent of their income for an apartment. Families on social assistance in New Brunswick spend more than 65 percent of their income for rent.

Yet, Palmeter C.J. also held that, while she was treated differently from private housing tenants by the Residential Tenancies Act, and though she would suffer a particular disadvantage because of her circumstances and such different treatment, Ms. Sparks had not made a prima facie case of adverse effect discrimination. Furthermore, the ruling applied the decision in Bernard v. Dartmouth Housing Authority, in which the Nova Scotia Appeal Division held that s.7 Charter protection did not extend to the kind of proprietary benefit that public housing provided, and thus its withdrawal was not a contravention of one's security of the person rights.

27. Constitution, s.52(1).
30. Sparks, at 32.
III. Theoretical Background

1. The liberalism of the Charter

In spite of decisions such as Sparks, or the more cynical perspectives on the Charter, the concept of entrenched social and economic rights as a means of achieving substantive rights is not necessarily antithetical to the traditions of liberalism, or the development of Canada's Charter. While some regard the proposed social charter as anathema to our constitutional foundation, a closer reading of these principles illustrates that, on the contrary, the entrenchment of social and economic rights may well be the appropriate next phase in our constitutional development, if such protection is not already included in the Charter.

Andrew Petter has called the Charter a “19th Century document set loose on a 20th Century welfare state.” For him, the absence of explicit references to “positive economic or social entitlements” is indicative of the Charter’s focus on protecting individuals from the state, without regard necessarily for the achievement of substantive equality. Joel Bakan argues that the nature of negative rights discourse, where the state is cast as the prime enemy of liberty, precludes the Charter from being a reliable tool of social change:

... it seems naive, almost silly, to think that with the Charter in place all we have to do is cook up imaginative legal arguments and go to court for the realization of an egalitarian and just society.

It should be admitted that while the Charter, as a constitutional document, may be a “living tree,” it is not a living, social or political activist. The Charter can only provide, as Leon Trakman has argued, the legal framework within which these social activists and the rest of us act: “... the text of the Charter itself does not constitute law in action; it is only an instrument of those who embark upon social action.” Therefore, while Bakan is no doubt correct in his point that other institutional changes, such as the eradication of financial barriers to the equal access of the courts, are required as part of the effort to achieve substantive equality, the Charter, as a constitutional document, nevertheless has a role to play. Furthermore, Petter’s argument that, in that context, the Charter is incapable of moving beyond a century old doctrine, places the

32. Ibid.
33. Bakan, supra, note 11, at 328.
35. Bakan, supra, note 11, at 319.
**Charter** in a box, indeed the wrong box, which ignores much of the tradition from which it has grown.

Lorenne Clark has responded to Petter’s critique by exposing this strawperson, created perhaps for argument’s sake. The main theoretical premise of Petter’s critique is that the Charter’s liberalism restricts social progress because it identifies incorrectly the source of inequality. Clark notes that Petter’s disagreement is with classical liberalism, with its origins in the ideas of theorists such as Locke, which she classifies as “minimalist” liberalism, not with the modern liberalism of those influenced by the later writings of J.S. Mill, or “maximalist” liberalism:

I am of the view that liberalism has more flesh on its bones than the cynics would have us believe, and that it contains within itself principles which give it the ability to transcend some of the more objectionable presuppositions and to find new and different contexts for valid principles whose past instantiations have not only outlived their usefulness but have become real impediments to both liberty.

Trakman makes a similar point when he introduces his analysis of the Charter with a clear mission statement:

In this book, I seek to reconcile Charter liberalism with the modern needs of Canadian society by arguing that private rights are a subset of the social sphere. To distinguish parental discipline from abuse, and consenting sex from sexual assault, is to make a social, not simply a private choice. The purpose is to do more than identify rights as they are: it is to contextualize them in light of their prospective social benefits and effects. It is to shift them from a narrow liberal conversation to a multifaceted and human context within a participatory democracy.

Thus, the maximalist view of liberalism allows for the advocacy of substantive equality, to overcome unjustified discrimination and promote greater equality, within the rubric of the Charter. Indeed, such an approach to the Charter is consistent with the social framework within which it has developed, and the philosophical origins from whence it came.

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37. cf. Two Treatises on Government (1689): Locke’s view was that liberty could be defined as freedom, not just of choice, but also of action. In the context of the divine right of kings, the concept of negative rights, liberty of speech and of thought from the control of the kings and the church, was liberalism in the 17th Century.
39. Ibid.
40. Trakman, at 1, 2.
41. Clark, supra. note 38.
Canada has placed emphasis upon the creation of a modern welfare state,\textsuperscript{42} which may be attributed to the influences of modern Canadian liberalism,\textsuperscript{43} and remains a reflection of the fundamental values that today Canadians are said to share.\textsuperscript{44} And, while it is true that Charter rights should not be seen as the "products of one determinative ideology advanced by one philosopher king, prime minister or premier,"\textsuperscript{45} the original arguments for an entrenched "bill of rights" were influenced a great deal by the theories propagated by Pierre Trudeau, who also regarded the protection of progressive economic rights as being within the constitutional traditions of Canada. To paraphrase, Trudeau wrote that lawyers should be reminded that civil rights are but one aspect of human rights, and that economic equality should not be neglected.\textsuperscript{46}

Another influence on the development of this country's Constitution, and modern welfare state, the late Bora Laskin, also found classical liberalism the antithesis of substantive equality. While a Harvard graduate student, Laskin argued that the "furtherance of the goal of equality required positive legal measures."\textsuperscript{47} "Utterly dismissive of classical liberalism,"\textsuperscript{48} Laskin believed that it was the role of the legislatures, not the courts, to bring about positive legal measures. While the role of the judiciary will be discussed later, it is helpful to appreciate that Laskin's influences upon his writings in this area included the new deal era dispute between the progressive governments and the conservative, that is classically liberal, judiciary.\textsuperscript{49}

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43. Clark, supra, note 38.
44. NB. October, 1991, Environics poll showed 85% (88% in Quebec) approved of "a social charter that would guarantee the right to health care, social assistance and education." W. Kymlicka & W. Norman, The Social Charter Debate: Should Social Justice Be Constitutionalized? (Ottawa: Network on the Constitution, January, 1992), at 1,2, (hereinafter "Kymlicka & Norman").
45. Trakman, at 3.
48. Ibid. NB: The reader should be aware that Laskin apparently included J.S. Mills' Essay on Liberty (1859) in the category of classical liberalism. A thorough response to such a classification of Mills is not necessary for the purposes of this paper. It is worthwhile to note, however, that it is Mills' later works, particularly The Subjection of Women (1869), which modern liberals rely upon as a source.
49. Sharpe, at 638.
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So, as it has been pointed out, "whether the Charter makes a positive difference is ultimately up to those who make it grow, or retard it."\(^{50}\) The question, then, is to what extent is the Charter retarding social progress, and how can it grow, perhaps in form, rather than simply interpretation, to prevent it from being a further impediment to substantive equality. As Trudeau put it, paraphrasing Anatole France recently, one rightly pokes fun at the law which, "with majestic impartiality, deny[s] the rich as well as the poor the right to sleep under bridges."\(^{51}\)

2. The positivel/negative rights dichotomy

In the context of social and economic rights, the liberalism of the Charter has been particularly criticized for the manner in which it has been interpreted. Specifically, the rights of the Charter have been viewed primarily as being "negative rights," the rights necessary to be protected from the state. On the other hand, it has been suggested that "positive rights," which require the state to do things for the individual or group to achieve equality, would be a "radical break with the liberal-democratic constitutional tradition" of Canada.\(^{52}\)

On the contrary, however, the Charter itself, as well as its philosophical origins are not necessarily in conflict with the promotion and protection of positive rights. It is perhaps true, though, that the Charter has not been allowed to grow to the extent that it could, as a result of courts' preference for narrow interpretations. Founded upon a concern for parliamentary sovereignty, the court has often deferred to the political process,\(^{53}\) balanced only by Charter protection of the person's freedom from negative impositions upon their liberty:

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.\(^{54}\)

For some, this negative rights approach is a reflection of a "systemic bias," a conspiracy by those with wealth and control over the state who

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50. Trakman, at 5.
52. Kymlicka & Norman, at 2.
53. cf. "Weaker Charter protection feared: Priority changing, retired judge says," (April 16, 1992), Globe & Mail: "The Supreme Court of Canada's interpretation of the Charter of Rights and Freedoms has shifted so that it is more likely government objectives will take precedence over individual rights, former court member Bertha Wilson says."
54. Hunter v. Southam, [1984] 2 S.C.R. 145, 156, per Dickson J. (as he then was).
oppose redistribution for reasons of self-interest, that prevails within the Charter's rights. A distinction must be made, however, between the explicit inclusion of negative rights in the Charter, which are important protection against state abuses, and the apparent exclusion of positive rights. Since the two forms of rights are not inimical, but are in fact cooperative in support of substantive freedom, these critics of the Charter should not cast too wide their rhetorical net:

Freedom of speech, freedom from arbitrary arrest and seizure, freedom of religion, conscience, and opinion, freedom to come and go in public places as one chooses, political rights of participation, and such like, are in principle neutral as between different systems of distribution and allocation of economic goods. Hence, it is always a bogus argument that "bourgeois liberties" such as these are inimical to a fair distribution of economic goods, or a fortiori that liberty in these respects is a mere adjunct of a bourgeois system of private ownership of the means of production, distribution and exchange.

Others consider the protection of the individual from the state as being the first, not the only, step in achieving equality. Laskin, for one, ranked and classified liberties, placing fundamental political liberties, such as freedoms of association and religion, at the apex of his pyramid, and egalitarian liberty, such as equal employment opportunities, was "relegated to an inferior position in the hierarchy of civil liberties." In order for democracy to work, Laskin felt that protection from the state required for political freedom necessarily ranked above economic equality, but not to its exclusion. Indeed, as Trakman put it: "negative rights are necessary aspects of public life, ... however, public life is not expressed solely by the negative right to be free from state intervention."

Admittedly, the conventional interpretation of Wilson J.'s judgement in Morgentaler, with her discussion of the metaphorical "invisible fence" erected around the individual for protection against the state, has justifiably placed an emphasis on her argument for a woman's rights to be autonomous from state interference of her reproductive decisions. Yet, in the same judgement, we also get a glimpse of how "second tier" or positive rights might necessarily also flow from s.7 of the Charter, in the context of individual liberty and a person's place in society.

55. Petter. Nb: "conspiracy" is my word.
58. Sharpe, at 635, 639.
59. Trakman, at 10.
As Dickson C.J. writes in *Morgentaler*, the court has been reluctant to "explore the broadest implications of s.7," as such an assessment would not be "necessary or wise."

Similarly, Wilson J.'s judgement should be considered in light of the nature of the matter before the court in *Morgentaler*, which she classified as being fundamentally about the autonomy of individual women, "over important decisions affecting their lives," that liberty protects in this case. Perhaps Wilson's tempering of her view of the liberalism of the *Charter* results from her belief that a woman's rights should be seen as a particularly social phenomenon.

On the other hand, her discussions of liberty have been wider than that perspective would suggest. Placed in the context of her other s.7 decisions, in particular *Singh v. MEIC*, one can see the sketching of a more expansive, generous interpretation of s.7 protection.

To begin with, the first sketch worth scrutinizing in Wilson J.'s judgement in *Morgentaler* is her enthusiastic use of the work of Neil MacCormick, in her discussion of "liberty". MacCormick's view of liberty, quoted with approval by Wilson J., is defined in part as "a condition of self-respect and contentment which resides in the ability to pursue one's own conception of a full and rewarding life." (my emphasis)

It has been the argument of many that an ability to pursue liberty is far too dependent in our society upon the socio-economic status that an individual possesses. It would appear that Wilson J. is acknowledging the necessity of substantive equality to achieve actual liberty, an approach which requires more from the *Charter* than simply the protection of negative rights. This interpretation of her independent judgement in *Morgentaler* is substantiated by her use of MacCormick.

In the essay Wilson J. cites, MacCormick argues that "factual liberty" does not necessarily entail unfettered liberty of action. Agreeing with Kant and Rawls, MacCormick concludes as follows:

A person's right to liberty is, as a moral right, a right to so much liberty as is consistent with every other person having liberty. ... Any freedom which one person enjoys at the cost of another's disproportionate unfreedom is not an exercise of the former's freedom, but a denial of the latter's.

61. Ibid., at 51.
62. Ibid., at 171.
63. Trakman, at 186.
64. [1985] 1 S.C.R. 177.
It is on the basis of this logic that MacCormick goes on to argue that, 
... an economic order which denies such goods as these [full stomach, roof 
over one’s head, the opportunity to maintain these by a decent day’s work] 
to some persons, or which systematically distributes them in grossly 
unequal measure, is as inimical to the equal claim of every person to 
self-respect as is a political order which represses liberty unduly or 
distributes it in systematically unequal shares.\textsuperscript{57}

Thus, it is with these parameters in mind that MacCormick states what, 
then, is the right to liberty, a concept adopted, in part, by Wilson J. in 
{	extit{Morgentaler}}:

That right [to liberty] is a right of each person to so much liberty as 
everyone can enjoy, subject to the satisfaction of other conditions of 
self-respect and the pursuit of contentment, a proviso which covers at least 
the right to economic fairness... \textsuperscript{68}

If Wilson J. intended to approve of MacCormick’s concept of liberty, 
which was contrasted by him with the classical liberal perspective, it may 
be that she intended that s.7’s protection of liberty includes positive, 
egalitarian rights.\textsuperscript{69}

This approach to Wilson J.’s judgement in {	extit{Morgentaler}} is further 
substantiated by her reference to her decision in \textit{R. v. Jones},\textsuperscript{70} in which she 
relies upon J.S. Mill:

John Stuart Mill described [“liberty”] as “pursuing our own good in our 
own way.” This, he believed, we should be free to do “so long as we do not 
attempt to deprive others of theirs or impede their efforts to obtain it.”

In his later works, Mill’s concept of rights included the view that, in order 
to achieve substantive equality, providing for the ability of women, for 
example, to overcome the impediments to their efforts to obtain liberty, 
positive efforts had to be put in place:

But I may go further, and maintain that the course of history, and the 
tendencies of progressive human society, afford not only no 
premise in favour of this system of inequality of rights, but a 
strong one against it. ...this relic of the past [women’s subjection to 
men] is discordant with the future, and must necessarily disappear.

Mill clearly recognized sexual inequality as a systemic problem rooted in 
blatant discrimination against women. ... Thus, the primary job of 
government in relation to the elimination of sexual inequality is to disavow 
any justification for the continuing exercise of an unjustified authority of

\textsuperscript{67} MacCormick, at 42-43.
\textsuperscript{68} MacCormick, at 44.
\textsuperscript{69} cf. I. Johnstone, “Section 7 of the \textit{Charter} and Constitutionally Protected Welfare” (1988), 
46 U.T. Faculty L.R. 1, 4. NB. Johnstone outlines more generally the concept of “liberal 
egalitarianism” and the \textit{Charter}.
\textsuperscript{70} [1986] 2 S.C.R. 284, at 318-319.
men over women, ... and the provision of positive rights to ensure not only women's equal opportunities, ... but their substantive equality. ... (my emphasis)  

Thus, it can be said that, while the general approach to the interpretation of the Charter has been with an emphasis on negative rights, it can also be said that a stream of thought also exists that the Charter is capable of, and indeed intended to, also protect positive rights. It has been noted, for example, that several sections of the Charter already provide for positive obligations upon the state:

* s.25, in protection of aboriginal rights;
* s.15(1), in support of the positive right of equal benefit of and access to social programs,  and s.15(2), in promotion of the disadvantaged;
* ss. 7-14, in placing a positive obligation on the state to ensure the right to a fair trial which may include translation;
* s.23, which places a positive burden on the state to provide minority language training; and,
* s.36(1), which in the Constitution commits governments to the positive duty of achieving some measure of socio-economic justice.  

If, then, the philosophical foundation of the Charter, while regularly pointed to as the source of its deficiencies in this regard, is not necessarily in conflict with a wider interpretation of the Charter, the question remains whether an explicit widening of its scope by amendment is necessary to achieve constitutional protection of social and economic rights.

3. The role of the judiciary

Concern is expressed by some that the entrenchment of positive rights in the Charter, in whatever form, would entail a substantial shift in power to the courts, and away from the democratic institutions of parliamentary democracy. Whether a reflection of distrust in the judiciary, an expression of a theory of democratic accountability or a result of the more practical consideration of the various degrees of expertise fostered in the different institutions, certain assumptions are made about the hierarchy and nature of rights and institutions that are not without weaknesses, and should be exposed.

The traditional perspective on how rights are interconnected, as Laskin enunciated it for example, placed certain fundamental liberties at the apex of an hierarchy, with other rights such as those pertaining to legal and
economic affairs, at points below in the hierarchy. Based on this hierarchical fashioning of the rights discourse, it follows that while the courts can appropriately play a role in the protection of the higher tier of liberties, second tier liberties are best left to the political process. It is not, however, a given that rights are structured in a hierarchy, as opposed to a continuum or a circle, and the assumption that one institution is more or less capable of applying certain rights separates human experience artificially. Trakman writes:

When judges treat constitutional rights like liberty and security of the person as a priori, they make three questionable assumptions: that the nature of a priori rights is self-evident; that those rights are graduated according to a discoverable hierarchy, with the Charter at its apex; and that justice is achieved by the neutral application of those principles to specific cases. Absent one of these assumptions, the neatly stacked house of cards comes tumbling down, and the judge must find another way to play the rights game.\textsuperscript{74}

For Laskin, the purpose of the distinctions was several fold, but he was particularly concerned that the conservative, ill-equipped judiciary would interfere with the legislature’s implementation of economic measures designed to create greater equality, but which necessarily interfered with the classical protection for freedom of contract and property.\textsuperscript{75} In part, as Colvin suggests, that reluctance to change the domain of the courts is a function of the “fact” that the judiciary is not sufficiently skilled or experienced in the kinds of policy issues that are associated with positive obligations on the state:

Any claims which the judiciary can make to an “inherent domain” must be claims about means rather than ends. The judiciary should have some special expertise in matters of institutional process. The judiciary may also have certain limited powers to review governmental decisions of social policy. There is, however, no constitutional basis within Western democratic tradition for the judiciary to claim any area of substantive policy-making as its exclusive preserve.\textsuperscript{76}

Yet, the argument that a line exists between policy and law, the latter in which the judiciary has a role to play, is inconsistent with the kind of analysis that has become expected by the courts in relation to s.7’s substantive rights and s.1’s “political analysis.”\textsuperscript{77}

\textsuperscript{74} Trakman, at 173.
\textsuperscript{75} Sharpe, at 637.
\textsuperscript{77} Chief Justice Lamer: “…with the Charter we [judges] are commanded, when asked to do so, to sometimes judge the laws themselves. It is a very different activity, especially when one is asked to look at section 1 of the Charter, which is asking us to make what is essentially what used to be a political call,” in “How the Charter changes justice” (April 17, 1992), Globe & Mail, at A17.
For others, the preference for keeping policy matters out of the jurisdiction of the courts arises out of a concern about the adverse effects to public policy foreseen as being the necessary result of a shift in the control over such matters from the protection of an accountable, democratic process. 78 In short, this argument places emphasis upon the role of parliamentary sovereignty and the importance of avoiding judicial constraint of the democratic will. Unlike the United Kingdom, however, Canada’s Constitution has included from the beginning constraints upon the House of Commons, in the form of federalism, restrictions which were added to by the Charter. 79

Furthermore, the implicit belief that it is less democratic to place limits on parliament in the form of judicial review, assumes that elected, political institutions are the exclusive domain of democratic values, and that a separation of parliament and judiciary is severe. Yet, it was the democratic process that created the Charter, and it is that dialectic between the bench and elected officials that balances expediency with perspective. And, in spite of protestations to the contrary, judges participate in political discourse, and thus cannot hide behind an apolitical facade. 80

With ss. 1 and 33, the principle of parliamentary sovereignty is preserved, yet each section includes a check on the rule of the majority in the name of democracy. While the courts will review legislation against the rights protected in the Charter, these rights will be balanced with “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” 81 And, while Parliament or a provincial legislature may pass legislation “notwithstanding a provision included in s.2 or ss.7 to 15,” of the Charter, 82 such a declaration is limited in effect to five-years, 83 thus ensuring some measure of a democratic check on parliamentary sovereignty.

In addition, the under-representative nature of our bench in Canada, 84 often cited as evidence of the problem with placing greater power in the hands of the courts, is not necessarily more pronounced in relation to Canadian society than the elected institutions in which some would place

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78. Kymlicka & Norman, at 5.
80. Trakman, at 200.
81. Charter, s.1.
82. Charter, s.33(1).
83. Charter, s.33(3).
84. Bakan, supra. note 11, at 319, note 32: Office of the Minister of Justice of Canada, 1990, reports that only 75 of 854 federal court judges were women, (i.e. only 8.8%).
greater faith. If the objection is to placing too much of our decision-making process in the hands of the unelected, then presumably electing judges would satisfy that concern, but having every decision go before elected bodies is not the minimum requirement of democracy. As recent criticism of our elected officials at all levels of government has illustrated, being elected is not all that is required to achieve success in policy matters, in overcoming disparities in the economy, or in determining the manner in which power is distributed from the center to the periphery.

In sum, then, the traditional view that places the judiciary in the role of discovering a priori rights, leaving policy matters to the elected parliament, starts from several uncertain premises. It is not necessarily correct that rights are structured in a hierarchy, nor is it a given that a line between ends and means further separates the role of the courts from that of the elected institutions. Therefore, it should not be accepted without closer scrutiny that a role for the judiciary in the protection of positive rights is inimical to our system of justice. The contextual nature of rights and the narrowing of the divide between policy and law have already caused the judiciary to evolve into a less parochial, more socially-situated body, and this process is only served by the courts' acceptance of greater input in the form of extrinsic evidence and intervenors.

4. Canada's Charter development

Briefly, it is worthwhile to note that, over the course of Canada's Charter development, not only have its philosophical roots been informed by the principles associated with the entrenchment of social and economic rights, so has the public debate. The proposition that such rights should be enshrined is not a new one, although the models have changed and adapted over time.

In 1943 and 1944, the Throne Speeches in the House of Commons committed His Majesty's Government to a "Charter of social security for the whole of Canada." It has been suggested that the eventual introduction of social security in post-war Canada resulted from these commitments.

A proposed amendment to the 1960 draft Bill of Rights, which would have added the right to a minimum standard of living and social security, was rejected in the House of Commons. At the time of the Bill of Rights

85. In Nova Scotia, for example, only 2 of 52 MLA's have been women since 1988 (to 1993); i.e. only 3.8%.
86. Kymlicka & Norman, at 8.
87. Ibid., at 9.
88. Axworthy & Trudeau, supra, note 51, at 179.
89. Ibid.
90. The Canadian Bill of Rights, S.C. 1960, c.44.
debate, law professor Trudeau wrote of the need for economic rights in an entrenched constitution, arguing that the “consumer has the right to a share of the total production of society, sufficient to enable him/her to develop his/her personality to the fullest extent possible.”

As Prime Minister, however, Trudeau introduced a constitutional package that did not include economic rights. It was determined that, for pragmatic reasons, their introduction would have to come at a later date: “The guarantee of economic rights is desirable and should be the ultimate objective of Canada,” but after the entrenchment of political, legal, egalitarian and linguistic rights.

In 1980, in response to a proposed amendment to the draft Charter, which would have included Canada’s commitment to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the text explicitly, Justice Minister Jean Chretien spoke against such a change, stating:

I am waiting soon for an amendment to inscribe in the constitution the apple pie and the recipe of ma tante Berthe, and I do not think we can put everything there. It is a constitution so I reject this amendment.

The amendment failed 22 to 2, in committee. A proposal to include “the enjoyment of property” in the draft was also defeated, first in committee and then in the House.

5. Comparative Review

An overview of constitutional developments in other jurisdictions serves to illustrate that Canada’s consideration of a social charter or entrenched social rights is not entirely unique, and not without some external philosophical influences.

In Europe, for example, the European Social Charter has been in place since 1961, coming into force in 1965. In January, 1991, 17 member states had ratified it, including the U.K., France and Germany. The enshrined rights include the right to organize, the right to social and medical assistance, the protection of the family and the rights of migrant workers. A series of appointed committees are used to enforce the

91. Trudeau, supra, note 46, at 122.
94. Ibid.
Charter, combining the public scrutiny of “experts” with the “accountability” of Ministers representing the members.\textsuperscript{97}

Although the effectiveness of the various regional charters, such as the African Charter, the Organization of American States’ Convention on Human Rights - Economic, Social and Cultural (the “San Salvador Protocol”), and the European Community’s Community Charter, may be questioned, they have been intellectually informative in the debate in Canada as to whether to enshrine social and economic rights.\textsuperscript{98} Their language, structure, enforcement mechanisms and effect are regularly referred to as illustrations, positive and negative, of the value of enshrined social and economic rights.

In the United States, the due process jurisprudence involving the Fifth and Fourteenth Amendments has led to the recognition of welfare rights, within the rubric of property rights. In Goldberg v. Kelly (1970),\textsuperscript{99} quoting the work of Charles Reich on the “new property,”\textsuperscript{100} the U.S. Court held that welfare payments are property interest, within the scope of the Fifth Amendment, thus people qualified for the benefits had a right to receive them. Over the course of the subsequent twenty years the U.S. Court has backed away from the Goldberg position,\textsuperscript{101} but that retreat may have been slowed with Cleveland Board of Education v. Loudermill (1985),\textsuperscript{102} in which the Court held that, once the legislature has conferred a property interest in a social program (here, public employment), it cannot constitutionally authorize the deprivation of such an interest.

From the Canadian perspective, two points need to be made with respect to U.S. jurisprudence in the area. First of all, the fact that the U.S. Fifth and Fourteenth Amendments include a right to property has not been lost on Canadian judges. In Rafuse v. Hambling, Director of Family Benefits for the Province of Nova Scotia (1979),\textsuperscript{103} Chief Justice Cowan distinguished Goldberg on those very grounds. The case involved the termination of a single-mother’s benefits, without a hearing, on the basis

\textsuperscript{97.} Ibid.
\textsuperscript{99.} 397 U.S. 254.
\textsuperscript{100.} C. A. Reich, “The New Property” (1964), 73 Yale L.J. 733.
\textsuperscript{101.} cf. Board of Regents v. Roth (1972), 408 U.S. 564; Bishop v. Wood (1976), 426 U.S. 341.
\textsuperscript{102.} 105 S.Ct.1487.
\textsuperscript{103.} 39 N.S.R. (2d) 364.
of an alleged breach of the *Family Benefits Act* cohabitation rules. Cowan C.J. felt compelled to allow the termination to stand, relying upon the social assistance appeal process for the protection of a beneficiary’s right to a hearing.105

Secondly, while the inclusion of property rights has been proposed again in the present round of constitutional negotiations,106 the *Charter* was drafted explicitly excluding the protection of the enjoyment of property. Those who hope to see such an amendment usher the U.S. Goldberg-influenced jurisprudence into Canadian social assistance litigation should be aware of the mixed-bag that is involved. Generally, the U.S. courts have at various stages in the doctrine’s development allowed contracts107 and the legislature108 to circumscribe the terms of the property interest created in social benefits. In *Sparks*, the terms of the lease, although inconsistent with and exempt from, the *Residential Tenancies Act* of Nova Scotia, circumscribed the more modest security of tenure that a public housing tenant may enjoy.109 And, the recent Supreme Court of Canada decision in *Reference re: Canada Assistance Plan*110 has served to reaffirm the doctrine of parliamentary sovereignty in “policy” matters, such as social assistance. Thus, the status of Goldberg is no less uncertain than circumstances in Canada at present.

6. The international obligations and influence

While primarily interpretive tools, the international agreements to which Canada is a party are also helpful in showing the source of much of our *Charter*’s language. Some would suggest that treaties be afforded a greater role in determining the *Charter*’s substantive content,111 and the Supreme Court of Canada in *Re: Public Service Employees Relations Act*112 has stated that international treaties are “relevant and persuasive,” presumably providing protection at least as great as the international agreements to which Canada is a party.

104. S.N.S. 1977, c.8, ss. 5 and 6.
106. Joint Parliamentary Committee on the Renewal of Canada, infra., p.34.
109. *Sparks*, at 7, 8.
111. cf. Robertson, *supra*,note 23, where it is argued that Canada has an obligation at international customary law, implemented by the *Charter*, to ensure that Canadians have adequate food.
112. [1987] 1 S.C.R. 313, per Dickson C.J. (as he then was).
The International Covenant on Civil and Political Rights\textsuperscript{113} has been interpreted as providing social and economic rights through the indirect protection of civil and political rights.\textsuperscript{114} With respect to Canada, the Charter’s 1980 draft included in the explanatory notes to ss. 7-14 reference to the Covenant on Civil and Political Rights.\textsuperscript{115} And, when asked, the Minister of Justice of the day stated that international obligations should be reflected in the Charter.\textsuperscript{116} Thus, it is argued that s.7 of the Charter should be interpreted as indirectly protecting economic and social rights, by virtue of these international influences and obligations. On the other hand, it has been held in MacDonald v. Vapour\textsuperscript{117} that Parliament must expressly indicate their intentions to implement an international treaty with national legislation for the courts to so interpret a statute.

While Hogg has noted that the presumption against a statute being in violation of an international obligation ensures that these various treaties remain helpful for interpretive purposes,\textsuperscript{118} a view supported by the courts,\textsuperscript{119} the origins of Charter language have at times found its source in international treaties,\textsuperscript{120} and the content of the rights has been informed by international obligations.\textsuperscript{121}

The concept of a social charter, the positive protection of social and economic rights entrenched in the constitution, is not necessarily inconsistent with Canada’s Charter, its philosophical, domestic and international origins. It is useful to note, as well, that Canada is not alone in its consideration of these rights and the means appropriate for their achievement. A social charter would not be a revolutionary break from the liberal democratic traditions of Canada, nor would it be an entirely unique development, as illustrated by other jurisdictions.
IV. To Liberate Social & Economic Rights

The traditional view has been that the Charter "does not concern itself with economic rights," except possibly ss.6(2)(b) and 6(4). From the Charter's earliest days, academics have argued that social assistance benefits are protected, yet there have been few "anti-poverty ... precedents to date."124

The Charter, as is often repeated, should not be interpreted narrowly, not in a legalistic way which narrows the scope of the rights protected, but generously. The "purposive" approach to the right or freedom enunciated in the Charter ensures that the full benefit of the Charter's protection may be secured. It has been stated by the Supreme Court of Canada that the purpose of the Charter, and therefore the meaning of which interpretation should seek to give to the rights and freedoms enunciated therein, must be contextual and must be guided by the "values and principles essential to a free and democratic society." In Oakes, former Chief Justice Dickson stated that these values and principles include:

... 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. (my emphasis)

As outlined above, the philosophical, historical, and international context of the Charter is not necessarily antithetical to the protection of social and economic rights. Yet, also as noted, the courts have not been anxious to interpret the rights and freedoms in the Charter as including in their scope those which have been labelled entirely economic.

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122. Re: Public Service Employees Relations Act, [1987] 1 S.C.R. 313, 412, per McIntyre J (as he then was).
127. R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, 334, per Dickson C.J. (as he then was).
128. Ibid., at 344: meaning the historical setting, the language chosen to articulate the right itself, the larger objects of the Charter itself, other rights associated within the text.
129. R. v. Oakes, [1986] 1 S.C.R. 103, 136, per Dickson C.J. (as he then was).
130. Ibid.
"purely economic,"" proprietary, "merely pecuniary," or "general public policy dealing with broader social, political and moral issues." In approaching the need for a social "C", it is worthwhile to appreciate, however, that the door to the Charter's protection of subsistence economic and social rights has been explicitly left open by the Supreme Court of Canada. The "living tree" approach to the evolving role and growing scope of the Charter would suggest that this slight opening will be, in the right fact situation, helpful in eventually extending Charter protection to basic needs related social and economic rights.

While the application of s.7, in this regard, may still be limited, ss.15 and 24 have recently been applied with some success to protect the rights of benefits recipients. In addition, s.1 would appear to be supportive of the widening of the contextualization of Charter rights. With respect to national programs such as the Canada Assistance Plan and the Unemployment Insurance Act, the security and rights of recipients have been shielded, to some extent, but once again the courts have walked very carefully the line between parliamentary sovereignty and the role of the judiciary.

Thus, the question before proponents of a social "C" must be, simply stated, as follows: to what extent is the Charter's language deficient in regard to the protection of basic needs related social and economic rights? And, to that extent, what amendments or additions to the Charter and/or Constitution are necessary? desired?

1. S.7 of the Charter

The courts have been "virtually unanimous in holding that the provision or denial of social benefits does not implicate s.7." It is important to appreciate, however, that, while this point may be true, it is also true that a path has been cleared by the courts to allow, in certain restricted cases, s.7 to be considered for the protection of basic needs.

The majority of cases dealing with s.7 and economic rights, within the rubric of "liberty" or "security of the person" protection, have been with respect to what may be labelled generally as commercial matters. For

134. Reference re: Public Service Employee Relations Act (Alta.), Dickson C.J. (as he then was), dissenting at 368.
135. Reference re: ss. 193 & 195.1(1)(c) of the Criminal Code, per Lammer J. (as he then was).
136. covenant or charter or contract
example, the courts have said that, regarding Sunday closing laws effecting retail stores, s.7 "is not synonymous with unconstrained freedom," and cannot be regarded as protecting an "unconstrained right to transact business whenever one wishes." \(^{138}\)

On licensing of liquor-related matters, the court determined that, "'liberty' does not generally extend to commercial or economic interests." \(^{139}\) Or, with respect to the regulation of securities, the B.C. court held that being prevented from trading securities, a "purely economic" matter, is not a consequence which has application to s.7. \(^{140}\)

A matter which may be encompassed within the term "property", or an economic matter which may be seen as raising a right to the free enjoyment of a proprietary interest, has been explicitly barred from the protection of s.7 on the grounds that, unlike the U.S. Fifth and Fourteenth Amendment, "property" was intentionally excluded from the final version of s.7 in the Charter. \(^{141}\)

In my view, one cannot import the concept of right to property as expressed in the American Constitution into s.7 of our Charter for the obvious reason that the "property" provision was never enacted in Canada. What we have in Canada in the place of the words "property, without due process of law" is "security of the person." \(^{142}\)

It is interesting to note that in his pre-Charter discussions of economic rights, rights of which he did not favour the courts' protection, Laskin focused on his concern that rights to property or unregulated economic activity would infringe upon affirmative efforts by the state to "promote equality":

[Laskin] recognized that judicial intervention which would override affirmative and progressive legislative measures in the name of economic liberty would infringe the economic liberties of those who needed help. \(^{143}\)

Similarly, the courts have resisted the temptation to interpret s.7 as protecting economic rights, apparently fearing its use for the promotion of laissez-faire business activity. It is ironic, therefore, that those seeking economic fairness in the Charter have been largely unsuccessful because of that reluctance to open the "pandora's box" that is economic rights, or


\(^{139}\) Reference re: ss.193 and 195.1(1)(c) of the Criminal Code, [1990], Lamser J. (as he then was) on the decision in RVP Enterprises Ltd v. B.C. (Minister of Consumer & Corporate Affairs), [1988], supra, note 13.


\(^{141}\) cf. A.G. Quebec v. Irwin Toy Limited, et al., [1989] 1 SCR 927; Fisherman's Wharf (1982), N.B.C.A., per LaForest J.A. (as he then was).


\(^{143}\) Sharpe, at 636.
more precisely to distinguish between commercial economic rights and subsistence economic rights, as Laskin had conceptually in the pre-Charter era. To be fair, the Supreme Court has recently attempted to make a distinction between commercial economic rights, which are viewed as being excluded from Charter protection, and the right to economic fairness, which may yet have the protection of s.7.144

The line of reasoning which fails to make that distinction has had some impact on cases which raise the question of whether a right to economic fairness exists, as was seen in the Sparks decision. In Bernard v. Dartmouth Housing Authority (1988),145 one of the cases Palmeter C.J. relies upon in Sparks, the determination that subsidized housing was "a proprietary [right] which bestowed direct economic benefit on the appellant,"146 allowed a single-mother and her children to be removed for a violation of an occupancy regulation. Palmeter C.J. in Sparks paraphrased with approval Bernard as follows:

The Appeal Division held that because the right asserted was a proprietary one, which bestowed a direct benefit to the tenant, it had no constitutional protection under s. 7 of the Charter. . . . To summarize, Bernard is the law in Nova Scotia as it relates to distinctions created by the Residential Tenancies Act affecting tenants of public housing.147

In Brown v. B.C. (Minister of Health) (1990),148 an action by gay and bisexual men who were AIDS patients to have the drug AZT covered by the provincial health plan was dismissed on the grounds that at issue there was "economic deprivation." As the question involved was whether an expense associated with the purchase of drugs would be compensated for by the health plan, it was therefore a matter involving the enhancement of one’s economic circumstances, and thus beyond the scope of s.7:

I find that their claim under s.7 of the Charter rests on economic deprivation. I have found that Mr. Mann, the late Kevin Brown, and others like them in the same economic situation, to pay $2000 from a limited income, works economic hardship. In order to pay it, they must make sacrifices in their life-style. But a reduction in the standard of living is not a deprivation contemplated by s. 7 of the Charter.149

Nevertheless, it is important to illustrate that the Supreme Court has not closed the door to the application of s.7 as contemplated in Dartmouth

145. 88 N.S.R (2d) 190 (N.S.C.A.D.).
146. Ibid.
147. Sparks, at 16, 32.
149. Ibid., at 467.
or Brown. In Singh v. MEIC,\textsuperscript{150} Justice Wilson clarified that each of the elements of the s.7, namely "life, liberty and security of the person, are independent interests, each of which must be given independent significance by the Court."\textsuperscript{151} This interpretation has since been adopted in Re: B.C. Motor Vehicle Act by Lamer J.,\textsuperscript{152} and Chief Justice Dickson in Morgentaler. With respect to "security of the person," Wilson J. included in Singh the Law Reform Commission's proposed expansive definition, but found it unnecessary to adopt for the purposes of the case before her. The Law Reform Commission proposed that,

"security" of the person means not only protection of one's physical integrity, but the provision of necessaries for its support.\textsuperscript{153}

In Irwin Toy, the majority expressly determined that the court was not deciding the status of the kind of interpretation of s.7 referred to by Wilson J. in Singh:

This [the general inference that economic rights are not within the parameters of s.7] is not to declare, however, that no right with an economic component can fall within "security of the person." Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property - contract rights. To exclude all of these at this early moment in the history of the Charter interpretation seems to us to be precipitous. \textit{We do not, at this time, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial rights.} (my emphasis)\textsuperscript{154}

More recently, in Reference re: ss. 193 & 195.1(1)(c) of the Criminal Code,\textsuperscript{155} Lamer J. did not widen the path through which such a matter might access s.7, but neither did he shut the gate to the inclusion of fundamental subsistence rights. The majority held that in this case s.7 does not extend to protect one's right to exercise a chosen profession, specifically here prostitution. Leading up to this conclusion, Lamer J. provides an analysis of the s.7 economic rights cases and, in mostly obiter comments, points the direction for future administrative law cases on

\textsuperscript{150.} [1985] 1 S.C.R. 177, per Wilson J.
\textsuperscript{151.} Ibid., at 205.
\textsuperscript{152.} [1985] 2 S.C.R. 486, at 500.
\textsuperscript{154.} Irwin Toy, supra, note 144.
\textsuperscript{155.} Supra, note 13.
social security matters to access s.7 liberty and security of the person protection.

At the core of his analysis are two points: first of all, Lamer J. regards s.7, as part of the “Legal Rights” section of the Charter, as being related to fundamental justice or the justice system, thereby being partly defined by the ss.8-14 rights. As such, he finds that s.7 interests are those which are “properly and traditionally within the domain of the judiciary,” such as the ss.8-14 negative rights which protect the individual from the state. He concludes:

Therefore, the restrictions on liberty and security of the person that s.7 is concerned with are those that occur as a result of an individual’s interaction with the justice system, and its administration.\textsuperscript{156}

Secondly, he indicates that he does not necessarily agree with the distinction between a proposed s.7 right to pursue a livelihood or profession as found in Wilson v. Medical Services Commission (1988),\textsuperscript{157} and the economic right termed the “right to work,” which has been consistently excluded from s.7 on the grounds that it is analogous to property rights. In doing so, Lamer J. appears to be raising doubts about the acceptance by the Supreme Court of such a splitting of hairs:

\ldots it seems to me that the distinction sought to be drawn by the court between the right to work and a right to pursue a profession is, with respect, not one that aids in an understanding of the scope of “liberty” under s.7 of the Charter.\textsuperscript{158}

There are a number of questions that the ruling raises, the answers of which may help to clarify the nature of the opening allowed by the decision. First of all, Lamer J. explicitly excludes from s.7 protection that which is not an “essential element of the administration of justice,” public policy on matters of social significance for example. He also, however, allows for the possibility that matters, such as social welfare, which are regulated by administrative bodies, might appropriately require judicial review on questions of procedural and substantive fairness. What is not clear from this very subtle, if not illusory distinction, is which social programs Lamer J. has in mind which do not, in some way, find themselves administered by bodies that are governed by the rules of fundamental justice. Presumably, if the program provides assistance to those in need, a delivery system will be in place to administer it.\textsuperscript{159} And,

\textsuperscript{156} Reference re: ss.193 & 195.1(1)(c), at (6-196).
\textsuperscript{157} 30 B.C.L.R. (2d) 1 (B.C.C.A.).
\textsuperscript{158} Reference re: ss.193 & 195.1(1)(c), at (6-195).
\textsuperscript{159} cf. Report of the Social Assistance Review Committee (“The Thomson Report”), Transitions (Ontario Ministry of Community and Social Services, 1988), for a detailed look at the administration of social assistance services in Ontario, with some consideration of other jurisdictions.
therefore, a decision to deny benefits, likely to cause psychological harm, stress, anxiety and economic uncertainty, a breach of a one’s right to security of the person, would not be permissible except in accordance with the principles of fundamental justice.

Secondly, although one of the earliest of Charter decisions, Skapinker, determined that not too much should be made of the title of sections of the document, other than to provide some interpretive guidance, the “Legal Rights” title seems to be given a great deal of weight by Lamer J. in his classification of s.7 as being “concerned with the justice system, and its administration.” Lamer J. states:

It is significant that the rights guaranteed by s.7 as well as those guaranteed by ss.8-14 are listed under the title “Legal Rights”. . . . The use of the term “Legal Rights” suggests a distinctive set of rights different from the rights guaranteed by other sections of the Charter.

Thus, it is following this logic that he finds a role for the courts, as the “guardian of the administration of justice,” in the assessment of the use of punitive measures in cases of non-compliance with administrative regulation, for example, which impact upon the physical liberty and security of the person of the individual. One wonders, then, if almost immediate eviction from public housing as a penalty for non-compliance with a regulation, as occurred in Bernard and Sparks, would trigger the rights in s.7, to implicate the courts in the determination of whether that restriction of an individual's security of the person interests was in accordance with the principles of fundamental justice.

Thirdly, Lamer J. accepts the view that the “proper judicial role” does not include the review of matters which are labelled “social policy.” He does so, however, without providing a clarification of what distinguishes social policy from, for example, environmental policy, in spite of the prevailing view that policy fields are less and less distinguishable and far more complimentary than they were thought to be in the past. As well, he accepts without debate the implicit conclusion that judges are somehow less capable of dealing with social policy than other matters, although he does not explain what test of “expertise” should be applied to matters before we allow our judiciary to review disputes that arise in relation to them. It is ironic, therefore, that Lamer C.J. has recently sided with the more interventionist majority, in cases assessing the jurisdiction of administrative tribunals, despite the explicit will of the legislatures to

delegate the policy field in question to a tribunal of experts and to protect that delegation with a privative clause in the respective statutes.\textsuperscript{163}

Former Justice Bertha Wilson recently admitted that she found the concepts of judicial deference to the legislatures and judicial review an "ill-matched pair," which are potentially weakening the \textit{Charter} and "muddying... the jurisprudential waters."\textsuperscript{164} This dichotomy has been the source of a great deal of academic thought over the life of the \textit{Charter}, and, as Lamer J.'s reluctance illustrated, has informed the courts' careful application of s.7 rights to economic matters.

In an early consideration of the \textit{Charter}, John Whyte concluded that economic interests vital to one's autonomy had to be covered by s.7, and the determination by the state that these interests were less important than others is the kind that the \textit{Charter} was intended to "place beyond state power":

... the phrase "security of the person" connotes the notion of interests central to personal integrity. Economic interests can, in many circumstances, be seen as indispensable to the dignity and integrity of individuals and the capacity of individuals to pursue their own ideas of the good life.\textsuperscript{165}

On the other hand, Wayne MacKay took an approach to this question of the appropriate scope of s.7 which, similar to that of Laskin's pre-\textit{Charter} suspicion of the conservative judiciary,\textsuperscript{166} placed an emphasis on the courts' institutional limits in expertise, ideology, and utility.\textsuperscript{167} MacKay notes the success of women's groups in lobbying for ss. 15 and 28 protection under the \textit{Charter}, whereas the outcome in the \textit{A.G. Canada v. Lavall}\textsuperscript{168} reflected the more classic judicial conservatism on such issues.\textsuperscript{169} Of course, the Supreme Court ruling in \textit{Morgentaler}, which occurred after MacKay's article, provides an illustration of the court being the more progressive of the two institutions. The decision in \textit{Sparks} is more in line with MacKay's point, however, in that the court was unwilling to move beyond the strict interpretation of the legislation, in spite of the recognition in most other provinces that such limited security of tenure provisions for public housing tenants is unconscionable.\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{164} "Weakening Charter protection feared" (April 16, 1992), \textit{Globe & Mail}.
\item \textsuperscript{165} J. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983), 13 Man. L.J. 455, 475.
\item \textsuperscript{166} Cf. Sharpe, \textit{supra}, note 47.
\item \textsuperscript{167} A. Wayne MacKay, "Fairness After the \textit{Charter}" (1985), 10 Queen's L.J. 236, 296-302, (hereinafter "MacKay").
\item \textsuperscript{168} [1974] SCR 1349.
\item \textsuperscript{169} MacKay, at 298.
\item \textsuperscript{170} \textit{Sparks}, at 30-31.
\end{itemize}
In *Reference re: ss. 193 & 195.1(1)(c)*, Lamer J. quotes approvingly the argument for a narrowing of the application of s.7 provided recently by Eric Colvin. Also concerned, as was MacKay, with the relative expertise of the judiciary on policy matters, Colvin provides a rationale for the distinguishing between ends and means:

"section 7 is concerned with legal means rather than social ends, with the processes by which social objectives are pursued rather than with the justice of the ends which are sought."

Nevertheless, Colvin also sees, as did Whyte, legitimacy in the argument that s.7 may cover the denial or withdrawal of state benefits, which form a "part of a scheme for ensuring that people can exercise all their capacities as human beings":

...there is force to the argument that the denial or withdrawal of some state benefits can be so physically dangerous or psychologically traumatizing as to create a deprivation of security of the person.

Thus, if we apply the test which appears to have emerged with respect to the withdrawal of state benefits to the situation faced by Ms. Sparks, it becomes apparent that Chief Justice Palmeter's reliance in *Sparks* upon *Bernard* may be tenuous in light of the developments since. Briefly stated, the test as to whether s.7 is triggered with respect to social assistance may be as follows:

1. Is the matter at issue one of economic subsistence, and not a matter of commercial economic freedom? (*Irwin Toy*)

2. Are the state benefits in question a part of a scheme designed to ensure a degree of economic fairness such that people may exercise all their capacities as human beings, as a condition of self-respect and the pursuit of contentment? (Colvin and MacCormick)

3. Are the state benefits delivered by an administrative body, with control over decisions affecting an individual's physical liberty and/or security of the person?

4. Has the use of punitive measures, broadly speaking, by this administrative agency been applied for non-compliance with a regulation? (*Reference re: ss. 193 & 195.1(1)(c)*)

5. Can it be said that the effect of this punitive measure has been to cause psychological harm, stress, anxiety and economic uncertainty? (*Mills*, per the argument of the "Thomson Report" and Colvin)

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173. Colvin, at 584.
In relation to Ms. Sparks, the argument would be that her eligibility and need for public housing is a function of her economic situation, therefore measures affecting her access to affordable housing are matters related to economic subsistence. The availability of public housing, at rent-geared-to-income may be said to be, broadly speaking, part of a scheme which includes provincial social assistance intended to ensure that Ms. Sparks and her children are able to exercise the degree of economic freedom and housing security necessary for the satisfaction of other conditions of self-respect and the pursuit of contentment. The Dartmouth/Halifax Housing Authority is an administrative agency, delivering the public housing program, under the provincial legislation. Almost immediate eviction, upon only a month’s notice, after ten years of tenancy, can be said to be nothing other than punitive. In light of the high cost of housing and the relatively difficult time people in Ms. Sparks’ situation have finding affordable accommodation, as Palmeter C.J. acknowledges, the effect of eviction without sufficient time to search for alternative accommodation, must be psychologically harmful to Ms. Sparks and her two children. The ability of the administrative agency to use such a punitive measure likely creates anxiety amongst the other residents of public housing.

In sum, then, in spite of Bernard, recent developments in the interpretation of s.7 could trigger the section’s protection such that it applied to the circumstances of the Sparks case. The withdrawal of Ms. Sparks benefits, that is her eviction from public housing, should be permitted, therefore, only in accordance with the principles of fundamental justice.

2. Section 15

In the recent decision of the B.C. Supreme Court, Federated Anti-Poverty Groups of B.C. v. Attorney-General of B.C., a significant development of the “analogous grounds” test in Andrews v. Law Society of B.C. was provided, giving way to the possibility of protection for welfare recipients under s.15. While the ruling in Sparks appears to have been influenced by the FAPG (BC) decision, such that it was held that social assistance recipients are a discrete and insular minority protected by s.15 of the Charter, Chief Justice Palmeter’s application of the tests for direct and adverse impact discrimination unfortunately illustrates the underlying

174. Sparks, at p.10.
175. (1991), Vancouver Registry # A893060 (B.C.S.C.) [unreported], [hereinafter F.A.P.G. (B.C.).]
weaknesses that continue to prevent the *Charter* from growing to protect the rights of those in economic need. As Morrison noted, regarding the s.15 jurisprudence before *FAPG (BC)*:

... success in equality litigation in this area is at least temporarily stalled. ... These cases [the first after *Andrews*] show that there are still major doctrinal and ideological barriers to equality arguments in relation to exclusion from social welfare schemes.\(^{177}\)

Not insignificantly, Palmeter C.J. does find that social assistance recipients are an "analogous group,"\(^{178}\) as defined by *Andrews*, and applied in *FAPG (BC)*. In *FAPG (BC)*, Parrett J. concluded as follows:

Applying the test under s.15 of the *Charter*, it is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s.15. It may be reasonably inferred that because recipients of public assistance generally lack substantial political influence, they comprise "those groups in society whose needs and wishes elected officials have no apparent interest in attending."\(^{179}\)

Palmeter C.J. determines, in coming to the same conclusion as Parrett J. in *FAPG (BC)*, that social assistance recipients, who are Black and single-parent women living in public housing, share several noteworthy characteristics:

1. That women, Blacks and social assistance recipients form a disproportionately large number of tenants in public housing.

2. That women, Blacks and social assistance recipients form a disproportionate number of the people on the waiting list for public housing. ... I accept that single-parent families have a more difficult time economically. The same is true regarding housing for single-parent mothers. Material submitted ... convince me that single-parent mothers have a more difficult time securing appropriate housing. ... .

One can almost take judicial notice that the Black community in Nova Scotia has always been at the low end of the economic scale. The material submitted corroborates this submission. Per capita, the income and education of Black Nova Scotians are considerably lower than the majority of other Nova Scotians. Employment opportunities and availability of suitable housing also are not equivalent.

I accept the submissions by the tenant that single-parent mothers, Blacks are less advantaged than the majority of other members of our society. It also goes without saying that social assistance recipients are also less advantaged. ... [my emphasis]\(^{180}\)
Thus, it is surprising when Palmeter C.J. concludes that the tenant in
*Sparks*, who had been evicted from public housing with only one month’s
notice compared with three months for private housing tenants, had not
established a prima facie case of direct or adverse impact discrimination.
Palmeter C.J. concluded that she had not shown a “connection between
the characteristics of the sex, or the race, or the source of income, and the
different treatment,” nor an imposition of a “special obligation . . . because
of some special characteristic of the group.”

In applying the *Andrews* test for direct discrimination, Palmeter C.J.
relied a great deal upon the pre-*Andrews* Nova Scotia Appeal Division
judgement in *Bernard*. It is important to note, however, that with
*Andrews*, and the later applications of the *Andrews* approach in *R. v.
Turpin*, the Supreme Court added substance to its approach to
discrimination. Palmeter C.J. is content to conclude:

... *Bernard* is the law in Nova Scotia as it relates to distinctions created
in the *Residential Tenancies Act* affecting tenants in public housing.
*Distinctions, differences or inequality do not necessarily give rise to
discrimination.* ([my emphasis])

Palmeter C.J. further states that it must be established, according to
*Andrews*, that the distinction in the law must be “based on the personal
characteristic of the individual or the group,” in order for the distinction
to constitute discrimination.

If, however, the purpose of the distinction is considered closely, one
can find the connection that Palmeter C.J. requires. As is noted in the
judgement, public housing is created to help “relieve the burden of
poverty to which [public housing tenants] are subject as a result of their
financial status.” Also in the judgement, it is outlined that the
characteristics of the groups who disproportionately comprise the public
housing tenancies include those necessary for a finding that they are an
“analogous group,” pursuant to *Andrews*. As clarified by Wilson J. in
*Turpin*, and quoted with approval in *R. v. S. (G.)* by Dickson C.J.,
the second stage of the *Andrews* inquiry, into the connection of the distinction
with a personal characteristic of the discrete and insular minority,
requires consideration of whether “indicia of discrimination such as
stereotyping, historical disadvantage or vulnerability to political and

182. (1989), 69 C.R. (3d) 97 (SCC) [hereinafter *Turpin*].
183. *Sparks*, at 32.
184. *Sparks*, at 28.
185. *Sparks*, at 14.
social prejudice,” relevant to the characteristic may be discovered in the distinction. Thus, if the exemption for public housing tenants, who are disproportionately members of analogous groups, can be shown to have resulted from historical stereotyping and vulnerability to social and political prejudice, then the necessary connection will have been made to constitute discrimination. Palmeter C.J. notes the purpose of the distinction to be “administrative flexibility,” as found in Bernard:

The purpose of the impugned legislation is to provide the landlord the administrative flexibility to administer the scheme and adapt it to the various changing circumstances peculiar to subsidized housing. Changes in eligibility and personal and family circumstances such as income, number of occupants, and a variety of other changes may affect the rental charges as well as the duration of the tenancy. Furthermore, Palmeter C.J. cites the argument in Newfoundland & Labrador Housing Corp. v. Williams et al. that the distinction, which provides for particular exemptions with regard to rent increases and termination notices “because entitlement to subsidization may vary with respect to a tenant as time passes,” is a “bland inequality” which is in the acceptable “range within which the political regime may operate with impunity.”

Relevant characteristics of the exemptions, therefore, emerge. The fact that the regime of public housing is rent-geared-to-income has been provided as a justification for more “flexible” security of tenure provisions, and in doing so the historical social prejudices and stereotyping that inform social assistance policy is given legitimacy. More specifically, the underlying assumption of the argument is that there is provided a special benefit with public housing which cannot be expected to satisfy in its provision the standards to which private landlords must comply. Or, as Palmeter himself states in Sparks:

... although some arguments could be made that there are certain advantages accruing to such recipients if they are able to obtain suitable public housing at a smaller percentage of their income than would be the case if they were a private sector tenant.

Palmeter C.J. adds to this perception when he states that the shorter notice period and the exemption from the security of tenure provision could be a benefit to those on the waiting list for public housing.

188. Bernard, at 198, quoted with approval in Sparks, at 17.
190. Williams, at 277-278.
191. Sparks, at 11.
In other words, as pointed out in the *Thomson Report*, it is a not uncommon perception that those receiving social assistance prefer it to being self-sufficient, and therefore stay on social assistance or in public housing until they are removed from the programs by benevolent administrators. As the *Thomson Report* goes on to point out, however, these are indeed biases and not reality, as the contrary to both assumptions has been illustrated by numerous studies.\(^{192}\)

In addition, the common categorization of the two policies, namely the rent-geared-to-income provision and the exemption from security of tenure, is illogical, and only serves to prevent a closer assessment of the more problematic of the two. While the very nature of public housing requires a separate rental regime, in order to satisfy the programme’s affordable housing objectives, it does not follow that a similar distinction with respect to security of tenure is necessary. Any of the listed changes in circumstances that would require a reassessment of an individual’s eligibility for public housing can be done under a needs testing policy, which could itself be a justification for special exemption from the security of tenure provision. It is not required that administrators have a blanket exemption, as most of the other provinces have shown with the removal of such provisions from their statutes.\(^{193}\)

Further evidence of the source of the legislation and the biases associated with public policy affecting Canada’s poor is necessary to support this conclusion. For the purposes of this paper, however, the intention is to illustrate that a more substantive analysis of the purpose and effect of the distinction, as well as the more diligent application of the *Andrews* approach to discrimination, may be able to support an argument that s.15 of the *Charter* is infringed by the security of tenure provision of the *Residential Tenancies Act* of Nova Scotia. Palmeter C.J. admits, on the other hand, that he does not find it appropriate to “second guess the legislature and the decision of the court in *Bernard*.\(^{194}\)

It may be argued, however, that a connection between the distinction and the personal characteristics of the groups does, in fact, exist, as an *Andrews* approach would appear to illustrate: the exemption finds its purpose in biases which are held with respect to public housing’s disproportionately large population of economically disadvantaged people. In finding that connection, according to Palmeter’s C.J.’s conclusions, the provision would be classified as discriminatory and could only be saved by s.1 of the *Charter*.

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Additionally, the adverse impact test from *Re: Ontario Human Rights Commission and Simpson Sears Ltd.* also could be more helpful to a finding of discrimination than would Palmeter C.J.’s decision in *Sparks* otherwise indicate. Particularly after finding that the groups to which Ms. Sparks belongs have special characteristics associated with disadvantages, sufficient to conclude that social assistant recipients constitute an “analogous group,” one would expect that the security of tenure exemption in the Nova Scotia statute would constitute a special imposition of a penalty, disadvantage or obligation particular to her group’s characteristics.

As *O’Malley* established, and Palmeter C.J. quotes approvingly in *Sparks*:

... there is a concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.  

Palmeter C.J. paraphrases the test as follows:

‘... the tenant must establish that a requirement which is otherwise neutral is imposed and applies to everyone upon whom it is imposed, imposes special obligations on some because of some special characteristics of the group.’

In his judgement, however, Palmeter C.J. does not really consider the adverse impact of the otherwise neutral exemption of public housing from security of tenure provisions upon the relevant groups. Instead, the judgement merely concludes that the tenant’s submission that disproportionate affect upon an enumerated or analogous group is not sufficient for adverse impact discrimination to be found:

I agree that a proponent of discrimination must prove disproportionality but must also prove that the distinction is based on the personal characteristics of the individual or group.

With respect, this would appear to be a misstatement of the test of adverse impact discrimination, in that it demands that the purpose of the distinction in question be based on the relevant characteristic, as is required with direct discrimination. Whereas, it is the very goal of the adverse impact test to get beyond the purpose of the distinction and assess

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196. *O’Malley*, at 332, in *Sparks*, at 12.
197. *Sparks*, at 26-27.
198. *Sparks*, at 28.
its effects. Admittedly, O’Malley requires that the effect be “upon a prohibited ground” and that the imposition of the special disadvantage be so because of the special characteristic of the group or individual, but it does not require that the distinction be based on the characteristic. How could it be both based on the characteristic and neutral on its face? With direct discrimination, the rule or standard in question is based on an enumerated characteristic, such as “no Blacks admitted to public housing,” but McIntyre J. is clear to distinguish this kind of discrimination from adverse effect which is not based on the characteristic, but “affects a person or group of persons differently from others to whom it may apply.”

Thus, immediate eviction imposes a special penalty and restrictive condition upon Ms. Sparks. The special characteristics of her groups, that Palmeter C.J. acknowledged, will cause her to be affected differently from others in public housing in that she will have severe difficulty finding affordable, appropriate housing for her family. Therefore, the argument would be that the effect of the distinction between public housing and private housing is discriminatory against social assistance recipients, who are Black Nova Scotian, single-mothers.

The focus on the Sparks decision is intended to provide an illustration of the ways in which s.15 could apply to circumstances involving economic and social rights issues, and allegations of discrimination. It is also used to show that the courts are beginning to acknowledge the justiciable nature of the disadvantages faced by those people in economic need, and that this development with respect to s.15 flows in part out of the Andrews decision. On the other hand, however, the Sparks judgement can also be seen as an example of the judicial reluctance to widen too far the application of the Charter to matters of social and economic rights, which Chief Justice Palmeter and many others would argue should be left to the legislatures to resolve.

3. Summary

Recently, several decisions of the senior courts have illustrated the range of remedies that may be applied in cases involving positive economic and social rights. On the one hand, there are the more traditional approaches which show a great deal of deference to the legislatures. On the other hand, the remedial authority under s.24 of the Charter may provide for the more expansive interventionist approach. For these purposes, each shows that the issues are before the courts, and the drafting of a social charter

199. O’Malley, at 332, in Sparks, at 12.
must also contemplate which remedies will be possible depending upon the amendments.

* In Schachter v. Canada Employment and Immigration Commission et al.,200 the positive rights interpretation of s.15 was held to be a justification for an expansive interpretation of the s.24 remedy powers of the Charter, in order to overcome underinclusive benefits and to ensure the protection of substantive rights enunciated in s.15. Thus, a more interventionist approach to a finding that a benefits plan excludes otherwise eligible applicants can have the effect of costing the public purse substantially. It has been estimated that Schachter, if it is upheld by the Supreme Court, may cost the federal government between $10 - 50 million.201

* In Reference re: Canada Assistance Plan, the Supreme Court of Canada overturned the lower courts finding that a federal - provincial agreement could not be unilaterally amended by the federal government, thereby allowing the federal government to implement cuts to their agreed to financial contribution to social assistance programs. Here, the more traditional deference to the legislature is shown, as the judgment was ostensibly on the grounds that changes to the agreement were amendments within the context of the statute and the general authority falling within the rubric of parliamentary sovereignty.

* In Finlay v. Canada (Minister of Finance),202 presently on appeal before the Supreme Court of Canada, the Canada Assistance Plan agreement was held to require certain basic needs to be satisfied, despite the legitimate objective of recovering overpayment. The reduction of allowances below the level of basic requirements was found to be illegal and was therefore to be discontinued. Again, the ruling did not find any positive obligation on the state to provide for basic requirements, per se, but rather held that the commitment was part of the agreement between the federal and provincial government. The more traditional remedy provided, therefore, was in that context.

With s.36(1), the principle of economic justice is enshrined in the Constitution, although there is some uncertainty as to the effect of the section. While it has been suggested that s.36(1) be a guide to government policy, and be seen as an affirmation of rights to the provision of basic needs, it is also admitted that the role that a constitutional “directive” will

have is “open to conjecture.” 203 Others have claimed that s.36(1) is the “only section of the entire constitution which is not enforceable,” 204 although the certainty of this conclusion has not yet been directly tested. Nevertheless, it is worthwhile to note that in developing appropriate remedies in the above cited cases, s.36(1) was not a factor.

Indeed, s.36(1) provides Canadians with a constitutional commitment of the governments:

s.36(1) . . . the government of Canada and the provincial governments are committed to

(a) promoting equal opportunity for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities;

(c) providing essential public service of reasonable quality to all Canadians.

How this commitment affects the lives of Canadians has remained, as noted, largely ambiguous. In part, the section’s caveat, placing the commitment within the context of the traditional powers of Parliament and the legislatures, may contribute to the reluctance of the courts to use s.36(1) for the expansion of positive rights.

Nevertheless, s.36(1) and the remedial powers under the Charter in s.24 stand out as indicators of the potential width of the courts’ powers, should they be so exercised. For Ms. Sparks, the traditional interpretation of ss.7 and 15 forestalled any discussion of remedy. Despite the Andrews decision, and the recognition of social assistance recipients as an “analogous group” in FAPG (BC) and Sparks, a barrier to equality arguments regarding the provision of benefits programs such as that which was considered in Sparks would appear to exist still. And, while many have argued that subsistence needs do not constitute “pure economic rights,” 205 and the Supreme Court appears to have tacitly acknowledged this, the withdrawal of benefits such as public housing has yet to implicate s.7.

It is these anomalies that cause some to consider the Charter to be a facade, unable to provide substantive equality, while nevertheless raising expectations. 206 And, it is as a result of these apparent structural weaknesses that social charter advocates are motivated to propose the Charter’s reform. While it has been suggested herein that the narrow application of

205. Johnstone, supra, note 69, at 27.
206. Bakan, supra, note 11, at 328.
the Charter has resulted less from the Charter's weaknesses than from the courts' principled reluctance, it would appear that lower courts will continue to exclude social and economic rights to the detriment of people such as Ms. Sparks unless some direction to the contrary is given.

V. Amendments and Alternatives

In light of the herein outlined uncertainty with respect to economic and social rights in the Charter, it is not entirely inappropriate for advocates of entrenched protection of economic fairness to bring forward at this time proposals for the reform of the Charter. The options range from the more traditional, institutional model, based upon the s.36(1) commitments, to the enshrinement of a fully justiciable social charter, to a combination thereof.

1. A Justiciable Social Charter

Briefly, this model would have the Charter amended to provide a special list of social rights, as either a new section or as part of several existing sections of the Charter, such as the mobility rights section, s.6, s.7 or s.15. The effect would be to entrench specific social rights, enforceable by the courts:

The explicit addition of social rights obviously would provide the greatest judicial protection of social rights...it would be better able to deal with cases of injustice that arise not from the welfare legislation itself, but from its arbitrary administration, or from the unintended effects of other legislation. It would also help sensitize the public and legislators to social rights, and might give previously disadvantaged groups a genuine sense of empowerment, and hence democratic citizenship.207

As noted above, the justiciable model has its critics, who fear the transfer of power over policy matters to the courts, potentially causing a substantial remedial expense for governments. As a matter of principle, it has been argued herein that justiciable social and economic rights are not antithetical to the Charter, its origins, philosophical underpinnings or international context. As a matter of practicality, however, the fully justiciable model appears to have the least political support at this point in the debate.

207. Kymlicka and Norman, at 5.
2. *The Traditional Model*

In January of 1992, Ontario Premier Rae indicated in a presentation to the Joint Parliamentary Committee on a Renewed Canada that, although his government initially advocated a justiciable social charter, he was willing to support an "expanded s.36 as being... the most productive way to express this sense of social contract in the country." The Premier further indicated that the social charter should be "a separate part of the constitution... that would have its own enforcement." Rae admitted that the pressure from those concerned about a Charter amendment which would be enforceable under s.24 had caused him to believe that a preferred justiciable, individually enforced model had become unrealistic politically. With respect to scope, Rae proposed the following:

Let me stress, however, that it cannot be empty and that it cannot be rhetorical and that its capacity to be enforced must be real. What should it cover? Well, it should cover medicare. It has to cover education. It has to cover the basics of social services and welfare and I would argue that it needs to cover housing and the environment as well...nothing that we are putting forward or would argue for is intended to take away from two things...existing rights under s.7 and s.15... and second,.. the federal government[s]... capacity to exercise some continuing responsibility as it relates to the spending power.

Thus, the Rae model is traditional in its focus on federal-provincial agreements, as well as in its acceptance of the status quo content of the Charter, without an expanded remedial role for the courts.

Later that same month, and before the same committee, Nova Scotia Premier Cameron and the two opposition leaders took this model another step. Specifically, the three party leaders called for protection of established transfer programs with an amendment to s.36 to provide greater "stability and predictability in fiscal arrangements" between the federal and provincial governments. As well, Nova Scotia's political leaders proposed a new amendment process to involve provinces in the creation of new programs and a review agency for the annual review of national standards in social programs across Canada.

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208. Minutes of Presentation by Premier Bob Rae, Ontario, to the Special Joint Parliamentary Committee on a Renewed Canada (January 13 1991), at 10.
209. Ibid.
210. Ibid., at 10, 26.
211. Ibid., at 11.
212. Minutes, Presentation of Nova Scotia Premier Don Cameron, Official Opposition Leader Vincent MacLean and New Democratic Party Leader Alexa McDonough, to the Joint Parliamentary Committee on a Renewed Canada (January 16, 1992), at 13.
The result of the parliamentary committee’s hearings, was the proposal of a new “social covenant,” much along the lines of the two premier’s suggestions. The Joint Committee, in its final report, admitted the “weakness of s.36” and the individual rights focus of ss.7 and 15, and proposed an amendment to the constitution with the addition of s.36.1, which would “commit governments to the fostering of the [listed] social commitments.” In addition, the committee recommended that an intergovernmental agency be created to “review, assess and report on” the progress of governments in relation to the goals of the covenant.

The criticism of the proposed covenant focused on the fear that, as proposed it could “easily do more harm than good. In particular, Scott argued that the effect of the covenant would be the narrowing of the courts’ interpretation of the Charter, on the grounds that social and economic rights had been delegated by the legislatures to the new agency. It was noted by Bruce Porter that the rights listed were “significantly weaker than Canada’s international commitments to social and economic rights.” In short, then, while the new covenant might provide greater political pressure on governments to achieve certain national standards, it is feared that it could ultimately have a negative effect upon the lives of Canadians.


Developed in coordination with a number of community groups and legal aid lawyers, the Porter proposal is the most comprehensive and far-reaching of those presented to date. Influenced by international law and a desire to go beyond a “statement of values or of government responsibilities,” the Porter proposal includes the following:

* a justiciable list of social rights, “affirming that everyone has an equal right to well-being,” and circumscribed in some detail;
* an interpretive clause protecting existing Charter rights;
* a restatement of government responsibilities to economic justice, a monitoring body and a “social rights tribunal.”

213. Special Joint Committee on a Renewed Canada, Final Report, at 87.
214. Ibid., at 123.
216. Ibid., at cover page.
217. For simplicity’s sake, the name of one of its advocates has been attached to what is apparently a widespread cooperative effort.
218. Porter, at 1-2
A closer look at the Porter draft’s substantive proposals, particularly in contrast with the choices made by the Joint Committee with the social covenant, illustrates some of its sources, principles and priorities. The language of Part I, “Social and Economic Rights” appears to be influenced by Articles 22 (social security), 23 (work and working conditions), 25 (standard of living, well-being) and 26 (education) of the Universal Declaration of Human Rights, 1948, and the subsequent International Covenant on Social, Economic and Cultural Rights (hereinafter the ICESCR), 1966 (which includes the above, along with higher education, young persons). In other words, the language is not revolutionary and, in light of international obligations, already “binding” upon Canada (the ICESCR came into force in 1976, 97 states have ratified it).

219. **Social Charter**

**Part I**

**Social and Economic Rights**

1. In light of Canada’s international and domestic commitments to respect, protect and promote the human rights of all members of Canadian society, and, in particular, members of its most vulnerable and disadvantaged groups, everyone has an equal right to well-being, including a right to:

   (a) a standard of living that ensures adequate food, clothing, housing, child care, support services and other requirements for full social and economic participation in their communities and in Canadian society;

   (b) health care that is comprehensive, universal, portable, accessible, publicly administered, including community-based non-profit delivery of services;

   (c) public primary and secondary education, accessible post-secondary and vocational education, and publicly-funded education for those with special needs arising from disabilities;

   (d) access to employment opportunities; and

   (e) just and favourable conditions of work.

2. The Canadian Charter of Rights and Freedoms shall be interpreted in a manner consistent with the rights in s.1 and the fundamental value of alleviating and eliminating social and economic disadvantage.

3. Nothing contained in s.1 diminishes or limits the rights contained in the Canadian Charter of Rights and Freedoms.

4. Governments have obligations to improve the conditions of life of children and youth and to take positive measures to ameliorate the historical and social disadvantage of groups facing discrimination.

5. Statutes, regulations, policy, practice and the common law shall be interpreted and applied in a manner consistent with the rights in s.1 and the fundamental value of alleviating and eliminating social and economic disadvantage....
Does Canada Need a Social Charter?

It is interesting to note, however, that the right to organize and strike, found in the *ICESCR*, is not included in Part I of the Porter Draft. Furthermore, instead of the right to work, and related favourable conditions, as in the *ICESCR*, the Porter Draft only speaks of "access to employment opportunities".

On the other hand, the Joint Parliamentary Committee seems to go further than the Porter Draft, in language, by "protecting the rights of workers to organize and bargain collectively".\(^{220}\)

It is important to keep in mind, however, that the Porter Draft proposes an interpretive clause for the *Charter*, whereas the Joint Committee's proposed covenant would only be reviewed by a tribunal and a political body. Thus, where the language is stronger in the covenant, it is also less certain an influence on the judiciary's interpretation of the Constitution.

Also in Part I, the Porter Draft attempts to respond to the concerns amongst social charter advocates that any devolution of federal power will weaken the social policy net by affirming the "special role" of the federal government in social policy, with respect to the federal spending power and national standards in the quality and accessibility of services. In addition, it is recommended that a clause be included which would counteract the effect of the judgement in *Reference re Canada Assistance Plan*\(^{221}\) by giving shared-cost agreements the force of law, enforceable by the courts.\(^{222}\) At the "Renewal of Canada Conference" on the division of powers, participants seemed to agree that the federal government's spending power should not be exercised arbitrarily, with respect to initiation of new programs and any changes to existing agreements.\(^{223}\)

Although the Porter proposal has attempted to respond to most of the weaknesses in the present *Charter*, it is not without its own drawbacks. First of all, as with any model, there is a risk that false expectations will be raised by such a far-reaching set of amendments. While the traditional model of federal - provincial agreements is not as certain as its critics would prefer, it is difficult to imagine all the provincial governments agreeing to such a centralizing document. And, lastly, considering the present opposition to the entrenchment of positive rights and the concern

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\(^{220}\) Joint Committee on a Renewed Canada, at 123.

\(^{221}\) Supra, note 12.

\(^{222}\) "6. Any legislation and federal - provincial agreements related to fulfilment of the rights in s.1 through national shared cost programs shall have the force of law, shall not be altered except in accordance with their terms and shall be enforceable at the instance of any party or of any party adversely affected upon application to a court of competent jurisdiction." Porter, at 2.

with respect to the role of the judiciary, it is perhaps a bit too ambitious to expect such a shift in the structure and nature of the Charter as the Porter draft foresees.

4. A Social "C" (Another Option)

In light of the suggestion that has been at the centre of this paper, namely that the present Charter should not be interpreted as being antithetical to the protection of social and economic rights, another, less ambitious proposal may be practical. Consistent with the structure, history and philosophical underpinnings, it is proposed that all that is needed to ensure that ss.7 and 15, for example, are interpreted as providing protection of economic and social rights is an interpretive clause, along the lines of the s.27 "Multicultural Heritage" clause.

As was argued herein with respect to s.7, matters of economic subsistence are not explicitly excluded from s.7 protection, although the courts have thus far interpreted the legal rights section narrowly. As well, with the recognition of social assistance recipients as "analogous groups," s.15 should not be unhelpful to claims regarding the unequal provision of benefits. Nevertheless, the Sparks decision illustrates all too well the reluctance of the courts to accept that economic and social rights are included in the Charter. An interpretive clause, which directed the courts to allow for the inclusion of such rights in the Charter, may be enough to influence the courts to adopt a test for s.7 similar to the one proposed above, and to approach the application of s.15 to direct discrimination and adverse effect discrimination also as proposed above. With s.24, the Charter has the potential to be applied creatively and expansively for "appropriate and just" remedies, as was the result of Schachter.

An interpretive clause can be successfully applied to cases involving alleged infringements of other rights and freedoms in the Charter. In Edwards Books & Art Ltd. v. The Queen, for example, s.27 was held to determine that Canada is a pluralistic society and that the s.2(a) protection of freedom of religion should be interpreted in that light. Similarly, in Big M Drug Mart, a government's legislated observance of a universal day of rest, preferred by one particular religion, was held to be inconsistent with Canada's multicultural heritage. Thus, an interpretive clause can be helpful to the courts' application of the Charter, particularly where there are competing interests.

225. Supra, note 127.
With respect to social and economic rights, the courts appear to need a similar interpretive clause which will reinforce the fundamental principle of economic fairness, while focusing the discourse on subsistence or basic needs rather than purely commercial economic rights. In addition, the social rights interpretive clause would not be a panacea, unduly raising expectations with promises yet all the while being chimerical.

Therefore, the following is proposed:

social rights s.26.1. This Charter shall be interpreted in a manner consistent with the inherent dignity of the human person, the equal right to well-being of all Canadians, and the fundamental value of alleviating social and economic disadvantage.

VI. Conclusion

In an effort to contribute to the discourse on the nature and existence of economic and social rights in the Charter, it has been illustrated that a subtle web of protection may have evolved over its ten year history, which has its origin in the document's philosophical underpinnings. By doing so, the goal has been to illustrate that the Charter does not have to be re-written to achieve greater security for Canadians most in need. Upon the existing framework of the Charter, and in the real context of the circumstances affecting Ms. Sparks, a proposed social "C" has been proposed.

Fundamentally, the concept of liberty and freedom that is at the centre of the Charter must include economic fairness. As MacCormick writes:

An economic order which denies such goods as [food, housing, the opportunity to work] to some persons, or which systematically distributes them in grossly unequal measure, is as inimical to the equal claim of every person to self-respect as is a political order which represses liberty unduly or distributes it in systematically unequal shares.

It may, therefore, be true that the first-tier of rights to be entrenched had to be political and legal protection, as Trudeau, Laskin and others suggested. It is also true, however, that the next phase in our Charter's growth must be with respect to those rights which are perhaps second-tier, but are not irrelevant. On the contrary, political freedom is dependant

226. Comment: By adding the section under s.26 of the Charter it is intended to give a specific example of the "other rights" that exist beyond those enumerated in the Charter.
227. Comment: Similar to the language in the ICECSR, preamble, and consistent with the MacCormick definition of liberty, as including the self-respect and dignity of the person.
228. Comment: Consistent with the language in S.36(1) of the Constitution.
229. Comment: Similar language as proposed in the Porter draft.
230. MacCormick, p.43.
upon a well-educated, healthy and economically independent population. For Canada to further in its legal development, therefore, the clear protection of social and economic rights in the *Charter* would appear to be needed.

It is always worthwhile to entertain in academic studies the broader, more abstract, perhaps somewhat impractical possibilities. In a work such as this, “it is possible to reach for the ultimate goal.” Yet, for Canadians such as Ms. Sparks the entrenchment of social and economic rights in the *Charter* must achieve more than mere formal, abstract equality.