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Social and Economic Rights in Canada: What are They and Who Can Best Protect Them?

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Abstract

This article examines the development and current status of positive social and economic rights in Canada. Exploring the comparative competence of legislatures, courts and human rights tribunals, Wayne MacKay suggests that courts should depart, with caution, from their traditional deferential role to legislators. Due to their flexibility and accessibility, HR Tribunals should supplement the role of the courts and legislatures in giving effect to social and economic rights, which should form part of a holistic package of human rights in Canada.

SOCIAL AND ECONOMIC RIGHTS IN CANADA: WHAT ARE THEY AND WHO CAN BEST PROTECT THEM?

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The *Canadian Charter of Rights and Freedoms* has had a profound impact on Canada in its first twenty-five years. However, its impact on social and economic rights has been small. When there has been a significant social or economic consequence, it has been incidental rather than direct or intentional. Even after the arrival of the *Charter* in 1982 (and the equality provisions in 1985) the courts have continued to be deferential to the elected branch of government on matters of broad social and economic policy, involving as they do, conflicting social fact evidence and the allocation of scarce resources.[1]

Problems of Definition

Defining social and economic rights is not a simple matter. There is no all-encompassing definition in the *International Covenant on Economic, Social and Cultural Rights*, but rather a collection of rights including education, health, social and economic supports and other forms of minimal guarantees of economic subsistence. This *Covenant* along with its more clearly defined companion – the *International Covenant on Civil and Political Rights*, were intended to give effect to the broad guarantees in the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948. Some have suggested that the separation of civil and political rights from their economic, social and cultural cousins distorts the intimate and holistic connection

[1] *McKinney* v. *University of Guelph* [1990] 3 S.C.R. 229, dealing with mandatory retirement in universities, is a clear articulation of this deferential role for courts.

between all these rights. I agree with this assertion. While the link between "cultural" as well as social and economic rights makes sense at an international level, it makes less sense in a Canadian context, where cultural rights may well be a third broad category of rights.

Even if the international commitments did offer more guidance, their enforceability at the international level is suspect, and their impact within Canada indirect at best. Since the arrival of the *Charter*, courts generally, and the Supreme Court of Canada in particular, have paid more attention to international human rights commitments and they have often been regarded as persuasive in interpreting the Canadian *Charter of Rights*. This view was articulated early in the evolution of *Charter* interpretation.

> The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation. As this Court stated in *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. interpretation of the Charter must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection." The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the Charter's protection." I believe that the *Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.* (para 59)
>
> *In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter,* especially when they arise out of Canada's international obligations under human rights conventions. (para 60)[2]

As encouraging as that sounds it was articulated in the context of civil and political rights under the *Charter* and not social and economic ones. Although the right to strike could certainly be viewed as an economic right as well as the civil right to freedom of association, the focus was

[2] *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 Paras 57-63. [emphasis added].

on association. This emphasizes the artificial nature of the distinction between the different categories of rights within the two International Covenants and the importance of how you categorize a right.

Internationally, the United Nations Committee on Economic Social and Cultural rights, in its December, 1998 Concluding Observations on Canada's performance under the *International Covenant on Economic, Social and Cultural Rights*, expressed concern about Canada's record on social and economic rights. The Committee urged federal, provincial and territorial governments "to expand protection in human rights legislation […] to protect poor people in all jurisdictions from discrimination because of social or economic status."[3] I will return to the suggested amendment to human rights legislation later. More general concerns about Canada's failure to live up to its international commitments in this area were also expressed in a series of earlier United Nations Reports under the Covenant.

Within Canada, Quebec, New Brunswick, and the Northwest Territories expressly include social condition within their human rights legislation. The latter two, for whom social condition is a relatively recent addition[4], provide objective definitions focussing on 'social or economic disadvantage', while the Quebec act does not provide a statutory definition. In early Quebec cases attempts were made to apply social condition to the high end of the economic scale, such as, doctors or "snow birds' flying south for the winter. The focus has now shifted to the lower end of the socioeconomic scale and a more appropriate emphasis on vulnerability. The

[3] LaForest G.V., Canada. Department of Justice. Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa:: Department of Justice, 2000), Chapter 17e.
[4] New Brunswick added 'social condition' in 2005, the Northwest Territories added it in 2007.

Quebec Human Rights Tribunal has also articulated a broad definition, which offers some guidance.

> [T]he definition of 'social condition' contains an objective component. A person's standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.[5]

Social condition in the context of section 10 of the *Quebec Charter of Rights and Freedoms*[6] is more a negative "freedom from" than a positive "right to" economic security. Section 45 of the *Quebec Charter* referring to "standard of living", "financial assistance" and "social measures", is in a more positive form but has limited enforceability. This is also true of the package of more positive rights in sections 39-48 of the *Quebec Charter*. Attempts by Chief Justice of Quebec, Michel Robert, to breathe life into these positive rights did not succeed.[7]

When social and economic rights are defined in positive terms, either at the international or state levels, they are rarely enforceable. If the rights are not defined or articulated in a broad way, there is concern about their potentially broad scope and sweeping societal impact. Whatever the form of definition, it has been problematic and leaves much room for interpretation and broad discretion in respect to implementation.

Implementation and Comparative Institutional Competence

[5] *Commission des droits de la personne du Québec* v. *Gauthier* (1993), 1993 CanLII 2000 (QC T.D.P.) (Docket 500-53-000024-925). *Commission des droits de la personne du Québec* v. *Gauthier*, [1994] R.J.Q. 253 (T.D.P.Q.) – appeal. The Senate also proposed adding social condition to the *Canadian Human Rights Act* in Bill S-11 (1st Session, 36 Parliament, 46 Elizabeth II, 1997, but did not solve the definition problem. The bill did not become law.
[6] R.S.Q. c. C-12.
[7] Robert J. in dissent in *Gosselin c. Quebec (Procureur général)*, [1999] J.Q. no 1365. (Que. C.A.).

In broad terms there are three major vehicles for implementing social and economic rights – elected legislatures, appointed courts and delegated administrative tribunals. Even after the *Charter* courts continue to be deferential to the elected legislatures when it comes to both the articulation and implementation of social and economic policy. This is particularly true if there are issues of conflicting social science evidence and/or the allocation of scarce resources.[8] On matters such as providing benefits to same sex partners the courts have been deferential to legislatures, while on redefining marriage to include same sex unions the judges have been willing to second guess the legislators.[9] The role the courts are willing to play may also depend upon how they characterize the right in question. In *Chaoulli* v. *Quebec (A.G.)*[10] the majority of the Supreme Court defined access to private health care as a matter of security of the person and even life, while the dissenters defined the issue in terms of broad health policy, thus falling more appropriately within the political realm. How the right is categorized is vital to whether it will receive *Charter* protection.

The limited role of the courts in advancing social and economic rights through the *Charter of Rights* should not really be surprising. There are few social and economic rights in the text of the *Charter* itself. This means that two of the documents broadest sections – the guarantees of life, liberty and security of the person (section 7) and equality (section 15) – have had to be argued as embracing a socioeconomic component. These arguments have been hard to make and have rarely met with success.

[8] *Supra* note 1 and *Egan* v. *Canada* [1995] 2 S.C.R. 513 (spousal benefits for same sex partners).
[9] *Halpern* v. *A.G. Canada* (2003) 65 O.R. (3d) 161 (C.A.).
[10] [2005] 1 S.C.R. 791.

The exclusion of express guarantees of economic and social rights in Canada's *Charter* was not accidental. Government drafters steeped in the traditions of parliamentary supremacy, saw matters of social and economic policy as outside the proper scope of the courts and more appropriate for the legislative branches. What might broadly be termed as the "left" in Canada was generally opposed to the *Charter* as promoting an illusion of rights, and thus did not lobby to have social and economic rights included within the *Charter* text.[11] While women, people with disabilities and Aboriginals were lobbying to be fully included in the *Charter* text, the advocates of social and economic rights were largely boycotting the process. The only recourse for judges wanting to read social and economic rights into the *Charter* is to broadly interpret sections 7 and 15 of the document.

The question of economic rights reared its head early in *Charter* jurisprudence but in the context of corporate rights in *Irwin Toy* v. *Quebec (A.G.).*

> What is immediately striking about [s. 7] is the inclusion of "security of the person" as opposed to "property" … First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. *This is not to declare, however, that no rights 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 various 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 Charter interpretation seems to us to be precipitous. We do not, at this moment, 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 economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.[12]

[11] William Shabas advanced this view at the Association of Canadian Studies conference entitled – *Canadian Rights and Freedoms: 25 Years under the Charter*, Ottawa, April 16-17, 2007.
[12] *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para 95. [emphasis added].

While closing the door on economic rights for corporations, the Supreme Court left the window open for "economic rights fundamental to human life or survival." It is a window that is still open but also not yet entered. Madame Justice Louise Arbour (as she then was) in *Gosselin* v. *Quebec (A.G.)*[13] in a spirited dissent, argued that section 7 should apply to prevent social assistance falling below the poverty level for young people like Ms. Gosselin.[14] The majority of the Supreme Court did not feel that *Gosselin* was the case to expand the law but did not close the *Irwin Toy* window for a future case.

In the very different context of access to health care in a reasonable time, the majority of the Supreme Court did take an expansive approach to section 7 of the *Charter*, but not under the banner of economic rights but rather the fundamental rights to life and security of the person.[15] This decision has been much criticized by academics and even Professor Martha Jackman, who has generally supported a broad role for the courts in advancing social and economic rights, was forced to rethink her position.[16] However, it has also been described as a positive step towards extending section 7 of the *Charter* to embrace economic rights.

> … the decision may yet have a surprisingly progressive influence on *Charter* jurisprudence. By establishing the connection between deprivations of the basic necessaries of life and fundamental rights, *Chaoulli* may well be the first step through the doors left open in *Irwin Toy* and *Gosselin* … If state obligations to those in need are not foreclosed under the constitution .. then it is hard to imagine

[13] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429.
[14] Interestingly, Louise Arbour continues her crusade for social and economic rights for the poor in her new role as United Nations High Commissioner for Human Right in Geneva.
[15] *Supra* note 10.
[16] M. Jackman, "The Last Line of Defence for [Which?] Citizens: Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44 *Osgoode Hall L.J.* 349.

> more compelling settings for elaborating such obligations than in the basic need for health care and sustenance of those dependent on state support.[17]

The guarantees of equality in section 15 of the *Charter* could also be interpreted as encompassing social and economic rights. However, when put to the test in *Gosselin* v. *Quebec (A.G.)*[18] the majority of the Supreme Court failed to rise to the challenge. Forcing young people to live below the poverty line by providing low levels of social assistance was not viewed as a violation of their dignity. The good intentions of the legislators were considered at the first stage of *Charter* analysis (the violation stage) and the majority of the Court concluded that there was no breach of equality. This decision has been criticized as advancing stereotypes about the young and putting too high a burden on *Charter* claimants.[19] It also represents a general retreat on equality whereby conflicting rights are balanced at the violation stage rather than as part of a section 1 justification. This puts the burden of proof on the claimant rather than the state and makes it easier to justify *Charter* violations.

Courts continue to play their traditional roles as protector of the constitution, promoter of fair process and preventer of arbitrary action by the state. They have generally avoided entering the contested domain of social and economic policy. This hesitance should be reconsidered and judges should be open to expanding their role in the socioeconomic domain – albeit with caution and respect for the other branches of government.

Human Rights Commissions and Social Condition

[17] Lorne Sossin, *"Towards a Two-Tier Constitution? The Poverty of Health Rights"* in: Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 161 at 178.
[18] *Supra* note 13.
[19] N. Kim and T. Piper, "*Gosselin* v. *Quebec*: Back to the Poorhouse" (2003) 48 McGill L.J. 749.

Administrative tribunals, such as human rights commissions, offer an interesting option for implementing social and economic rights. They are created by statute and are thus consistent with the Supremacy of Parliament and deference to the legislators. They also can be more flexible than courts in providing diverse judicial styles of implementation. Unlike the *Charter*, human rights commissions are not limited to the public domain but have jurisdiction over both the public and the private sector. These agencies also offer a broader range of dispute resolution mechanisms. They also are more accessible to claimants in terms of cost than the courts.

An initial problem is that only Quebec includes "social condition" as a prohibited ground of discrimination. This has been a cause for concern at the international level in terms of Canada fulfilling her human rights commitments, as discussed earlier. Social condition should be added as a ground of discrimination in both the federal and provincial human rights statutes.[20]

Former Supreme Court Justice LaForest advocated the addition of social condition in his 2000 study – *Promoting Equality: A New Vision*.

> We were asked to consider whether social condition should be added as a prohibited ground of discrimination in the Act. None of the current grounds are specifically economic in nature. However, we certainly came to understand the *close connection between many of the current grounds and the poverty and economic disadvantage suffered by those who share many of the personal characteristics already referred to in the Act***.**[21]

Drawing upon the experiences of the Quebec Human Rights Commission, other commissions can supplement the roles of courts and legislatures in giving effect to social and economic rights as they evolve in Canada. This is a matter of legislative and administrative reform.

[20] W. MacKay, T. Piper and N. Kim, *Social Condition As A Prohibited Ground of Discrimination Under the Canadian Human Rights Act*, Submitted to the Canadian Human Rights Act Review Panel, December, 1999.
[21] *Supra* note 3. [emphasis added].

Concluding Thoughts

Social and economic rights should form an integral part of the interconnected package of human rights in Canada. More efforts must be made to define the scope of these rights within the Canadian context and to devise effective mechanisms of implementing these rights at the legislative, judicial and administrative levels. By so doing, Canada can also better live up to its international commitments under the *International Covenant on Social, Economic and Cultural Rights*. We should all do out part to advance Canada's performance in this emerging frontier of human rights.

In keeping with the spirit of the *Charter of Rights*, the courts should take a broad and flexible approach to interpreting sections 7 and 15 of the text. This strategy should include a cautious but open approach to social and economic rights, as part of a holistic and integrated package of human rights. Recognizing their institutional limitations, judges need to be mindful of the roles of the legislatures and administrative bodies as partners in advancing Canada's social and economic safety net.[22] To fulfill their roles as guardians of the Constitution and truly champion the interests of the vulnerable and less advantaged in our society, Canada's judges cannot ignore the social and economic dimensions of our citizens.

[22] W. MacKay, "In Defence of the Courts: A Balanced Judicial Role in Canada's Constitutional Democracy" (2007) 21 *National J. of Const. Law* 239.