CHAPTER 4

The *Budget Implementation Act*, Canada's Treaty Obligations, and the *Charter*'s Equality Rights Guarantees

Introduction

Because the meaning of equality guarantees is always in danger of being diminished, it is important to examine fully the dimensions of an interpretive approach to equality rights that gives full effect to Canada's equality commitments — an approach that speaks to women's concerns about material inequality, that is grounded in the cultural understanding of equality, and that incorporates the content of Canada's international human rights commitments. It is important also to test the *BIA*[1] against this interpretation of equality. Our conclusion is that the *BIA* is not consonant with Canada's treaty obligations nor with the *Charter*.[2]

As we have noted, there is a stock of rhetorical arguments that are used to make rights less expansive than the commitments on which they are premised. However, we believe that the *Charter*'s equality guarantees require an interpretation that fully reflects the richness of their historical and philosophical context within Canada, and within the international human rights movement. We believe that the *BIA* is a violation of the *Charter*, but that claim is not premised on a naive conviction that the *Charter* is the answer to all of women's inequality problems. Neither is it our view that a court decision upholding the *BIA* would preclude Canadians from denouncing it as a violation of women's socially agreed upon entitlement to equality.[3] However, we do believe that equality jurisprudence must be pushed to reflect women's concerns. Decisions interpreting the *Charter* have legal, political, and cultural authority.

The Implications of Treaty Commitments

Canada's international human rights commitments work in two ways: (1) the treaties form a separate level of human rights obligations by which Canada is bound, and domestic legislation is understood to be an important means of fulfilling those obligations; and (2) the treaties are an aid to interpretation of the *Charter*.

What is the content of the treaties that is specifically pertinent to the problem of women's material inequality? The full meaning of the social and economic equality of women that is affirmed by international instruments can only be understood by considering the *ICESCR*[4] and *CEDAW*[5] together. These treaties must be given an intertwined reading that is also informed by the most recent internationally agreed upon pronouncement on the advancement of women's equality, the *Platform for Action*.[6]

CEDAW must encompass at least the rights that are included in the *ICESCR*. It cannot be understood to offer women less because that would contradict guarantees of equality in both the *ICCPR*[7] and the *ICESCR*.

This means that a same treatment, or formal equality, reading of *CEDAW* with respect to economic

equality is inadequate. A formal equality reading could permit governments to conclude that they would meet the terms of *CEDAW* with respect to economic inequality by passing laws to prohibit differential treatment of women in workplaces. Such legislation, it could be argued, would satisfy the formal equality test by requiring neutrality in the law as it applies to economic matters.

Taking a formal equality approach, governments might not deal with the poverty of women at all since formal equality tends to make group-based economic disadvantage disappear from view. But if they did, governments might argue that the requirements of formal equality are met by ensuring that men and women experience the same incidence and depth of poverty. Equality could be achieved not by alleviating women's poverty, but by making men equally poor.[8]

This empty idea of equality confined to facial sameness means that equality has no bottom; it can be satisfied if men and women are equally destitute. It also means that equality cannot tell down from up; it can be brought about either by equalizing up or equalizing down.

However, the *ICESCR* does not permit reading *CEDAW* in this shallow fashion because to do so would diminish the substantive meaning of women's economic and social rights, as guaranteed by the *ICESCR*. The *ICESCR* guarantees women the right to an adequate standard of living and to the continuous improvement of living conditions. It guarantees everyone the right to work, to health, and to education. It does not guarantee to women the right to the same rate of poverty as men, but rather the right to the social and economic conditions that are consistent with the maximum available resources of the state. The *ICESCR* precludes equalizing downwards, that is, creating "equality" by making more men poor, because it entitles everyone to "the continuous improvement of living conditions." As the *ICESCR* Committee states in General Comment No. 3, because of the general obligation in the *ICESCR* to take steps "with a view to achieving progressively the full realization of the rights," there is a very strong presumption against "any deliberately retrogressive measures."[9] Equalizing downwards would be deliberately retrogressive.

While the *ICESCR* makes it clear that equality has a bottom, *CEDAW* builds on the *ICESCR*. In case the *ICESCR* is read as requiring governments only to ensure economic minimums for women, *CEDAW* shows tha the commitment to women's equality goes further. Ensuring that the poorest women get to live above the poverty line, and that all women have an adequate standard of living, will not satisfy the requirement of equality, even though, considering the impoverished conditions of women around the world and the poverty of women in Canada, this would be a giant step forward.

However, it would not satisfy the commitments in *CEDAW*, because women's equality requires not just the eradication of women's poverty, but also the elimination of the economic disparity between women and men as groups. That economic imbalance, and women's economic dependence on men, is a key facet of women's subordination, and *CEDAW* is concerned with the subordination of women as a group.[10] Thus, the equality of women requires not only the eradication of poverty, but also an equitable distribution of wealth, income, and resources between women and men as groups.

Both the *ICESCR* and *CEDAW* speak to the issue of state obligations. Under the *ICESCR* governments have obligations to use their resources to satisfy the social and economic rights of their people. Although

there is a current struggle being waged over how to make governments accountable in an effective way for realizing these rights, the obligations of governments have, nonetheless, been recognized repeatedly. Lucie Lamarche says that “economic rights have been built and designed against the state, not for its ability to violate them but for its capacity to protect the economic and social dimensions of human dignity.”[11]

While the *ICESCR* reinforces the responsibility of governments to correct women's economic and social inequality, *CEDAW*'s commitment is different from the *ICESCR*'s commitment to the “progressive realization” of social and economic rights. *CEDAW*'s commitment is to the immediate implementation of “all appropriate measures to ensure the full development and advancement of women.” In practice, equality is a right that can be immediately recognized in law and progressively realized through programs and other means. The *de facto* equality of women will not come about overnight, but this does not mean that the measures necessary to foster and support it can be delayed, or that governments can treat equality-promoting measures as ones to be implemented only when there are ample resources available.

Thus, a commitment to “progressively realize” the equality of blacks would be quickly understood as a mere cover for racism, if it meant that delay was an option. There is no credible commitment to equality, if it is acceptable for it to occur at some time in the future, unless all possible steps are being taken in the present and continuously. For this reason, the commitment in *CEDAW* is to take all appropriate measures “without delay” to ensure women's advancement. Because the social and economic dimensions of women's inequality are indivisible from the civil and political dimensions, *CEDAW* can only be understood as a commitment to take all appropriate measures immediately with respect to all manifestations of women's inequality, including their economic exclusion and subordination. *CEDAW* precludes treating “progressive realization” as an invitation to stall where women's social and economic social rights are concerned.

Neither the *ICESCR* nor *CEDAW* permits States Parties to rely on arguments about the impact of globalization, the demands of the market, or the requirements of international agencies to justify economic policies that do not conform to the standards set by international human rights law.[12] Human rights are not a sometimes thing, good for some times and not others, nor is any part of human activity exempt from their application. Philip Alston, Chair of the *ICESCR* Committee, points out that permitting economic justifications to trump social and economic rights simply amounts to a refusal to accept them as basic entitlements.[13] The *Platform for Action* adds the recognition that current macro-economic policies, such as globalization and structural adjustment programs, are deepening women's economic exclusion and subordination, and are themselves obstacles to women's advancement.[14]

Taken together, *CEDAW* and the *ICESCR*, reinforced by the *Platform for Action*, stand for these central propositions:

- Equality has a bottom, that is, it is not achieved merely when the incidence of poverty among women is the same as the incidence of poverty among men; rather, equality includes, as a part of its meaning, the social and economic rights of the *ICESCR*, including an adequate standard of living;

- Equality requires the elimination of economic disparities between women and men as groups;

- Governments have positive obligations to create conditions of social and economic equality for women;

- Those obligations do not permit governments to delay in taking the appropriate measures to meet them or to move backwards; and

- Economic policies violate women's right to equality if they permit or foster poverty among women, or if they perpetuate, and do not repair, the *status quo* of women's economic inequality.

Canada's Compliance with International Commitments

Does the *BIA* comply with the international obligations by which Canada has agreed to be bound? It is important to note when considering whether the *BIA* complies that Canada has cited the now repealed CAP, ss. 7 and 15 of the *Charter*, and s. 36 of the *Constitution Act, 1982*, Part III to demonstrate in its official reports that it is in compliance with the *ICESCR*, in particular Article 11 regarding the right to an adequate standard of living. Canada's statements are official acknowledgement of the specific positive obligations on it to provide social programs and services that will satisfy the right to an adequate standard of living.

The *1982 Report of Canada* cites the CAP as a means of implementing the right to an adequate standard of living. The *Report* states:

> The Canada Assistance Plan is the legal authority through which the federal government shares with the provinces the cost of providing social assistance and welfare services to individuals in need or likely to become in need …[15]

The *Report* states further that:

> [u]nder Part I of the Canada Assistance Plan provision is made for the cost-sharing with provinces and territories of general social assistance payments to persons in need. Assistance includes payment for food, shelter, clothing, fuel, utilities, household supplies, and personal requirements as well as prescribed welfare services … [16]

In 1992, the *Second Report of Canada on Articles 10–15* states,

> In Canada, the provinces have established programs for the payment of social allowances to persons in need. The federal government assists in the funding of these programs through the Canada Assistance Plan, which sets standards for the provinces to be eligible for this assistance …[17]

Also in its 1982 *Report* on its progress in complying with the requirements of the *ICESCR*, Canada referred to s. 36 of the Constitution as a means of implementing Articles 10–12 of the Covenant.[18] In its 1987 *Report*, Canada cited s. 36(1) of the Constitution as a form of implementation of other *ICESCR* commitments.[19] In oral submissions to the Committee in 1992, the Canadian delegation characterized Canada's obligations under s. 36(1) of the Constitution in the following terms:

> The 1982 *Constitution Act* made it a duty of the federal government and all provincial and territorial governments to … provide essential services of reasonable quality to all Canadians.[20]

Moreover, Canada's 1992 *Report* highlights s. 15 of the *Charter* as a "very relevant provision" in relation to the question of Canada's compliance with Articles 10–15 of the *ICESCR*.[21] The *Report* states:

> Section 15 applies to the full range of governmental action. Thus it serves to ensure that the rights enunciated by Articles 10–15 of the *International Covenant on Economic, Social and Cultural Rights* are guaranteed without discrimination in Canada, as required by Article 2(2) of the Covenant.[22]

In 1993 the *ICESCR* Committee reviewed the Second Report of Canada on Articles 10–15, and received representations from a coalition of non-governmental organizations including the Charter Committee on Poverty Issues (CCPI), and the National Anti-Poverty Organization (NAPO). The Committee expressed a number of serious concerns about Canada's failure to make any measurable progress in alleviating poverty over the previous decade, or in alleviating the severity of poverty among a number of particularly vulnerable groups. The Committee expressed particular concern that more than half the single mothers in Canada live in poverty; that there is no procedure to ensure that income under welfare programs is at or above the poverty line; and that there is hunger in Canada and widespread reliance on foodbanks.[23]

The contradiction of high rates of poverty among women and other vulnerable groups in a country as wealthy as Canada was not lost on the Committee. The Committee said:

> In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realization of the rights recognized in the treaty, and considering Canada's enviable situation with regard to such resources, the Committee expresses concern about the persistence of poverty in Canada.[24]

The Committee also expressed concern that in some court decisions and in constitutional discussions, social and economic rights had been described as mere "policy objectives" of government rather than as fundamental human rights.[25] The Committee recommended, in view of the important role played by courts in the enforcement of social and economic rights, that the Canadian judiciary be provided with training courses on Canada's obligations under the Covenant and on their effect on the interpretation and application of Canadian law.[26]

Since the Committee was concerned with Canada's compliance with the *ICESCR* before the introduction of

the *BIA*, in May 1995 the same NGO coalition, now including the National Action Committee on the Status of Women, sought and obtained leave to make representations to the *ICESCR* Committee regarding the impact of the *BIA* on poor people in Canada. The coalition requested that Canada be called to account specially for its actions and to explain how the *BIA* is consistent with the terms of the *ICESCR*.

In November 1996, after the *BIA* came into force, the coalition, joined by the Canadian Association of Foodbanks, made a further submission to the *ICESCR* Committee.[27] In this most recent submission, the groups stated:

> [The *BIA*] represents, in the opinion of our organizations and many other experts in Canada, the most serious retrogressive measure ever taken in Canada with respect to legislative protection of the right to an adequate standard of living. On April 1, 1996, Canada was transformed from a country in which the right to adequate financial assistance for persons in need was a legal requirement, enforceable in court by individuals affected, to one in which there is no federal legislation recognizing this right or providing any means of enforcing it.[28]

The *ICESCR* Committee considered the representations of the community organizations, and called upon Canada to provide an accounting, first on 4 May 1995[29] and again in December 1996.[30] The Committee's communications with Canada are unprecedented initiatives for a Committee that normally confines itself to making observations upon receipt of a States Party's scheduled report.[31] Canada has now responded and defends the new CHST regime on the predictable grounds that it provides flexibility for the provinces to allocate resources where they believe that they are most needed, and that it was necessary for budgetary reasons.[32] The Committee will review this report in 1998.

The conclusions of the *ICESCR* Committee will be important. However, it is also important for Canadian women to reach their own conclusions about whether the *BIA* and the new CHST regime comply with Canad international commitments to women's equality, taken as a whole. We conclude they do not, for the following reasons:

- CAP is gone. This means that women no longer have a legally recognized entitlement to social assistance. There is no national legislative framework for social assistance and social services.

- Federal funds have been cut and the CHST does not require provincial and territorial governments to spend any of the federal transfer on social programs and social services. This means that the existence and viability of social programs and social services are threatened.

- The federal government has withdrawn from its role as standard setter. This means that there is no mechanism for ensuring that women have access to adequate social supports.

- Women have a higher risk of poverty and a greater reliance on social programs and social services. This means that the *BIA* has the effect of increasing the social and

economic vulnerability of women, and Canada's poorest women in particular.

Canada's actions cannot be considered to comply with the commitments it has undertaken to:

- refrain from engaging in any act or practice of discrimination against women, (*CEDAW*, Article 2(d));

- take all appropriate measures to eliminate discrimination against women by any person, or organization or enterprise, (*CEDAW*, Article 2(e);

- take in all fields, in particular in the … social, economic … fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights … on a basis of equality with men, (*CEDAW*, Article 3).[33]

Nor is the *BIA* consonant with undertakings Canada agreed to in the *Platform for Action* to:

- pursue and implement sound and stable macro-economic … policies that are designed to … address the structural causes of poverty and are geared to eradicating poverty and reducing gender-based inequality … ;[34] and

- provide adequate safety nets and strengthen State-based … support systems, as an integral part of social policy … .[35]

Further, the *BIA* does not comply with the *ICESCR*'s requirement that the right to an adequate standard of living and the continuous improvement of living conditions, which is guaranteed equally to women, be "progressively realized."[36] According to the Limburg Principles for implementing the *ICESCR*, which were adopted by the Commission on Human Rights at its 43rd session in 1987, a State Party violates the *ICESCR* if it "deliberately retards or halts the progressive realization of a right."[37] In its General Comment No. 3 the *ICESCR* Committee states that the *ICESCR* "imposes an obligation to move as expeditiously and effectively as possible towards [the full realization of the rights]" and warns that "any deliberately retrogressive measures" would need to be fully justified.[38]

Finally, we have concluded that when *CEDAW*, the *ICESCR*, and the *Platform for Action* are read together, it is clear that economic policies violate women's right to equality if they permit or foster poverty among women, or if they perpetuate, and do not repair, the *status quo* of women's economic inequality.

The *BIA* increases the vulnerability of women by removing the legislative framework for social assistance and social services, and by eliminating the basic entitlement. It permits poor women to live unaided. It permits the *status quo* of women's inequality to continue.

For all these reasons, we believe that the *BIA* violates Canada's international commitments to women's equality.

Interpreting Section 15 of the *Charter*

One can argue that non-compliance with treaty obligations is sufficient reason for a wholesale rejection of the *BIA*. However, non-compliance with the *Charter* makes the case against the *BIA* even stronger. Further, the *Charter* is an obvious vehicle through which an integrated reading of the *ICESCR* and *CEDAW* may be given practical effect.

Canadian courts to date have not been asked to consider a *Charter* case that squarely raises the issue of women's right to an adequate standard of living. However, the legal foundations are in place for a reading of s. 15 that furthers the goal of redressing group disadvantage and incorporating the specific content of Canada's treaty commitments. From the earliest days of the *Charter*, courts have embraced the view that *Charter* rights are to be interpreted generously and in light of their purpose. The elements of a purposive approach were articulated in *Andrews* v. *Law Society (British Columbia)*, wherein McIntyre J. wrote on behalf of a unanimous Supreme Court:

> [T]he provisions of the *Charter* must be given their full effect. In *R* v. *Big M Drug Mart Ltd*., this Court emphasized this point at p. 344 where Dickson C.J. stated:
>
> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter* v. *Southam Inc*. [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgement in *Southam* emphasizes, a generous rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protections.[39]

In short, the purpose of a *Charter* right is to be ascertained by having regard to:

- the character and larger objects of the *Charter;*
- the historical origins and text of s.15; and
- the meaning and purpose of associated *Charter* rights and freedoms.

We argue that the character and larger objects of the *Charter,* the historical origins and text of s.

15, the status, history and text of s. 15, and the meaning and purpose of associated constitutional rights, including s. 36 of the Constitution and ss. 7 and 28 of the *Charter*, all point to the conclusion that a key purpose of s. 15 is to assist disadvantaged groups in overcoming inequality of conditions. Moreover, this has been recognized by the Supreme Court of Canada. In *Andrews*, Wilson J. said, "[Section] 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society."[40] This sentiment was subsequently adopted by a unanimous Supreme Court in *Turpin*.[41]

Further, the *Charter* was introduced within a historical and philosophical context of broad public consensus that the federal government, as well as provincial governments, have an obligation to provide social programs to promote the equality and well-being of disadvantaged Canadians and regions.

What are the legal foundations for a reading of women's rights under s. 15 of the *Charter* that draws in international treaty commitments? Courts have held that domestic statutes should, whenever possible, be interpreted so as to be consistent with provisions of international instruments to which Canada is bound. This is on the assumption that Parliament and legislatures intend to legislate in conformity with them. The Supreme Court of Canada has held that this principle also applies to the interpretation of the *Charter*. In the case of *Slaight Communications*, Dickson C.J. speaking for the majority said:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "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.[42]

The facts of *Slaight* provide an indication of the difference that it can make when *Charter* rights are interpreted in light of Canada's human rights treaty commitments. The case of *Slaight* concerned a wrongful dismissal under the *Canada Labour Code.* The adjudicator ordered the employer to give the employee a letter of recommendation attesting to the employee's positive record and acknowledging that the termination had been held to be unjust. In addition, by order of the adjudicator, the employer was precluded from responding to a request for information about the employee except by sending the letter of recommendation. The employer appealed, arguing that these orders constituted an infringement of s. 2(b) of the *Charter* that guarantees freedom of expression. The Supreme Court of Canada granted that the employer's freedom of expression had been infringed, but upheld the adjudicator's orders on the basis that they were a justifiable limit under s. 1 of the *Charter*.

One step in the s. 1 analysis consists of balancing the harmful effects of the challenged measure against the importance of the objective of the measure. In the course of concluding that the deleterious effects of the arbitrator's orders were not so great as to outweigh the importance of their objective, the majority in *Slaight* referred to Canada's obligations under the *ICESCR*, in particular to Canada's commitment to protect the right to work. Speaking for the majority, Dickson C.J. said:

> Especially in light of Canada's ratification of the International Covenant on Economic, Social and Cultural Rights … and commitment therein to protect, *inter alia,* the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that

> the objective in this case is a very important one.[43]

Dickson C.J. said further that:

> … Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions on those rights. Furthermore, for purposes of this … inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in the society.[44]

Thus, *Slaight* stands for the proposition that Canada's international human rights obligations may have two roles to play as aids to the interpretation of *Charter* rights. First, they are relevant to defining the content of *Charter* rights. Second, they may be useful in defining the scope of the limits that can be imposed upon them under s. 1 of the *Charter*. More particularly, the fact that a value has the status of an international human right is to be taken as indicative of a high degree of importance attached to that objective, in the context of s. 1 analysis.

In another case, *R* v. *Brydges*,[45] the Supreme Court of Canada relied on an international treaty commitment under the *ICCPR* to interpret the *Charter* right to instruct and retain counsel as including the right to be informed of the existence and availability of duty counsel and legal aid plans. This is consistent with the principle that treaty commitments may supply content for *Charter* rights, which are expressed in relatively open-textured language.[46]

However, it is apparent that the rationale for applying international human rights norms is not restricted to the presumption of consistency between a State Party's legislation and its treaty commitments. The rationale is broader than this. As Matthew Craven has noted: "It is clear … that the Canadian courts do not take cognizance of international standards merely on the basis of the presumption that Parliament intended to legislate in conformity with its international obligations. … Rather, it appears that reference is made to international human rights standards in general because, in the words of Dickson C.J., they `reflect the values and principles that underlie the *Charter* itself.'"[47]

In another case, *Reference Re Public Service Employee Relations Act*,[48] Dickson C.J. acknowledged, even more generally, the international human rights norms as part of the *Charter*'s interpretive backdrop. He said:

> A body of treaties … and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights

> movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law — declarations, covenants, conventions, and *quasi*-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.[49]

International human rights norms were a principal source of inspiration for the *Charter*. Anne Bayevsky explains:

> [the legislative history of the *Charter*] contains frequent references to human rights law. Throughout the period from 1968 to 1982 when the *Charter* was being drafted, the proliferation of international norms was digested by Canadian constitutional framers. … From the outset of the federal government's concerted efforts in 1968 to realize a constitutional Bill of Rights the architects were conscious of international human rights norms.[50]

Similarly, John Claydon states that:

> Canada's international human rights obligations served as not only the necessary and pervasive context in which the *Charter of Rights* was introduced and adopted, but also the direct inspiration for amendments designed to strengthen the human rights protection provided.[51]

And Lynn Smith and William Black state that “s. 15 is a primary vehicle for implementing Canada's obligations under those [international] instruments.”[52]

In many domestic and international contexts Canadian government officials have represented the *Charter* as implementing Canada's international human rights obligations. In 1983 the federal government presented a paper to a Federal-Provincial-Territorial Ministerial Conference on Human Rights, which states:

> [I]t is no coincidence that the *Charter* happens to satisfy most of Canada's human rights obligations pursuant to the International Covenant on Civil and Political Rights, and many of those assumed under other international human rights instruments, since it was framed in light of their requirements. … At an early point in the deliberations of the Special Joint Committee, the then Federal Minister of Justice, the Honourable Jean Chrétien, affirmed that “the rights that we have agreed upon in international agreements should be reflected in the laws or the *Charter of Rights* that we have in Canada.”[53]

In February 1990, the Canadian delegation that appeared before the *CEDAW* Committee concerning the *Second Report of Canada, Convention on the Elimination of All Forms of Discrimination Against Women*, told the Committee that “the *Charter* was an important means of implementing the Convention in Canada.”[54]

It is clear from this history and from pronouncements by the Supreme Court of Canada that *Charter* equality rights should be interpreted in light of their larger social context and goals, including the goal of realizing Canada's human rights treaty obligations, with a view to giving life to Canada's equality commitments, not trivializing or circumventing them.

The *BIA* Violates Women's Equality Rights under the *Charter*

When interpretation of s. 15 is informed by Canada's treaty obligations to take appropriate measures to realize the right to an adequate standard of living and Canada's compendious commitments to equality for women, it is unreasonable to understand s. 15 as conferring on women anything less than:

- a right to adequate social programs and services for women in need;
- a right to be equal beneficiaries of all social and economic policies; and
- a right to economic policies that will promote women's equality.

In turn, this interpretation of s. 15 must be understood to impose a positive obligation on all levels of government to provide adequate social programs and services, and to prefer economic policies that will promote social and economic equality for women. On this substantive interpretation of s. 15, the *BIA* constitutes an equality rights violation because it allows the federal government to wash its hands of responsibility for the adequacy of social assistance programs and related services. Seen in the larger frame of global restructuring, the *BIA* is also an element of macro-economic policy that hurts women.

It should be acknowledged that the Supreme Court of Canada has not yet considered the question of whether s. 15 imposes positive obligations on governments to tax and spend in ways that will reduce disparities between women and men. Nor has the Court considered whether the *Charter* imposes an obligation on governments to maintain adequate social programs. It is time that s. 15 jurisprudence recognized more explicitly than it has in the past that the norm of equality has a bottom, and that women have a right to share equally in all of the society's material resources.

However, it is not necessary to break this new jurisprudential ground in order to establish that the *BIA* is a violation of women's *Charter* equality rights. The *BIA* is so egregious that it does not stand up to even a relatively narrow form of s. 15 scrutiny.

Even on its face, the *BIA* is blatantly discriminatory[55] in its treatment of Canada's poorest Canadians. The affected interests — entitlements to social assistance — go to the very core of human needs for survival and well-being. With one hand, the *BIA* expressly reconfirms national standards for health care. With the other hand, the *BIA* virtually wipes out national standards for social assistance. Moreover, it is not just coincidental that health care standards are retained while social assistance standards are abandoned.

The *BIA* is rooted in prejudicial attitudes about the worth of single mothers and poor people generally.

One need only recall the prevalence of negative stereotyping of welfare recipients as unworthy, lazy, and the author of their own misfortunes, to derive a sense of why it is that Parliament felt safe in singling out welfare recipients for prejudicial treatment.[56] On 17 February 1997, Edward Greenspon of *The Globe and Mail* offered this observation about public opinion:

> Whereas a generation ago, Canadians blamed society at large for the plight of the poor, today they are more likely to blame the poor. No longer are single mothers automatically viewed as victims; people are much more inclined today to question why the women allowed themselves to get pregnant.[57]

The same negative images of welfare recipients that are likely to lead to provincial governments favouring health care and post-secondary education over social assistance programs also underlie the federal government's decisions to defend health care standards and forego social assistance standards. People in need of social assistance are a stigmatized minority group, an easy target for the deficit-cutting agenda because they are unpopular and relatively lacking in political power.[58] In this regard, the comment of Parrett J. of the British Columbia Court of Appeal in the case of *Federated Anti-Poverty Groups of B.C.* v. *British Columbia (A.G.)*[59] is apt. In the course of rejecting a Crown motion to strike a s. 15 challenge brought by the Federated Anti-Poverty Groups, Parrett J. said that "recipients of public assistance generally lack substantial political influence, they comprise `those groups in society to whose needs and wishes elected officials have no apparent interest in attending.'"[60]

The preferential treatment that the *BIA* accords to health care recipients over social assistance recipients results in a funding framework that, under well-established principles of equality rights analysis, is discriminatory. It is discriminatory in two senses of the term. First, stigmatizing attitudes about the beneficiaries underlie the removal of protective conditions for social assistance programs. Second, the *BIA* is discriminatory in that it is underinclusive; that is, it provides protections for one group while withholding them from another equally deserving group. Canadian courts have recognized that underinclusiveness in a legislative scheme of protections or benefits can constitute discrimination. The Ontario Court of Appeal held in the case of *Haig*[61] that the exclusion of gays and lesbians from the protection of a human rights statute is a violation of s. 15 of the *Charter*, which results from underinclusiveness. The denial of protective conditions to social assistance recipients under the *BIA* is very like the denial of statutory human rights protections to gays and lesbians under human rights legislation. Thus, the holding in *Haig* strongly supports the claim that the *BIA* is a violation of s. 15.

The Supreme Court of Canada has also recognized that discrimination may arise through underinclusiveness, and has granted remedies that have the effect of extending a benefit scheme to a wrongfully excluded group. For example, in the case of *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*,[62] an exclusion based on age was found to contravene the *Unemployment Insurance Act*. The effect of the declaratory order of the Court was to extend benefits to previously excluded claimants over the age of 65. There is no principled basis for thinking that the equality rights issues raised by the exclusion of poor women and social assistance programs from the equal protection of national standards should be accorded any less constitutional importance that the

wrongful exclusion of a group from human rights legislation or unemployment insurance.

However, the claim that the *BIA* is discriminatory does not hinge exclusively on the fact that health care conditions are retained while social assistance conditions are abandoned.[63] The *BIA* is discriminatory in that it targets social assistance recipients for negative treatment, as compared with the treatment of the public at large. The fact that conditions for health care have been preserved lends support to this argument, but even absent this comparison, the *BIA* should be understood to be discriminatory because it targets disadvantaged groups in the society, not only by removing conditions for social assistance, but also by reducing federal government contributions for social assistance funding, and liberating provinces to spend on more popular priorities.

The claim that the *BIA* is discriminatory must meet the objection that the challenged treatment, no matter how offensive it may be, is not "based on personal characteristics." However, it is clear that the impact of the *BIA* falls on poor people, a great many of whom are single mothers with dependent children. The *BIA* is harmful to women in that it undermines their material security and equality interests. It also has the potential to reinforce negative images of poor women as sexually irresponsible and politically expendable. Further, notwithstanding certain difficulties that some judges are having in actually implementing adverse effects analysis, there is no question that equality rights jurisprudence dictates that the central focus of s. 15 analysis must be on adverse effects.

For women, poverty and lack of economic autonomy are personal characteristics of the group in the same way that vulnerability to pregnancy discrimination and vulnerability to harassment are characteristics of the group; that is, they are key indicators of the group's inequality and obstacles to the achievement of equality. The Supreme Court of Canada has recognized the connection between gender and material inequality. In *Moge* v. *Moge*, a case arising under the spousal maintenance provisions of the *Divorce Act,* L'Heureux-Dubé J., speaking for the majority said, "In Canada, the feminization of poverty is an entrenched social phenomenon."[64]

Any analysis of the *BIA* must take into account the intersection of adverse effects based on poverty, receipt of social assistance, gender, and the status of being a single mother, as well as race and disability. Courts have also specifically addressed the question of whether poverty is a personal characteristic for purposes of s. 15 analysis, and found that it is.

In the case of *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*,[65] the Nova Scotia Court of Appeal struck down provisions of the *Residential Tenancies Act* which excluded public housing tenants from the security of tenure afforded to other renters in the province. The appellant, Ms. Sparks, was a Black, single mother on social assistance. As a tenant of public housing, she could be evicted on one month's notice, without cause. Had she been a private sector tenant, she would have been entitled, by law, to security of tenure, meaning that she could not have been evicted except by order of a judge, based on default of specified obligations under the *Act*.

Initially, the Nova Scotia Supreme Court rejected Ms. Sparks's s. 15 challenge, saying that "[the appellant] would have to show that the legislation somehow exempted blacks, women, and recipients of

social assistance from the protection of the statute by singling out a characteristic of being a black, female social assistance recipient."[66]

Reversing the lower court, the Nova Scotia Court of Appeal found that the effect of denying security of tenure to public housing tenants is to discriminate against public housing tenants as a group, on the basis of race, sex, and income. In reaching its decision that public housing tenants are an analogous group for purposes of s. 15 analysis, the Court found that low income is a characteristic shared by all residents of public housing, and that poverty is a condition experienced more frequently by Blacks, women, in particular single mothers, as well as by senior citizens. The Court said at 233–34:

> Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing; the principle criteria of eligibility for public housing are to have a low income and have a need for better housing. Poverty is, in addition, a condition more frequently experienced by members of the three groups identified by the appellant. The evidence before us supports this.
>
> Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in *Andrews*. To find otherwise would strain the interpretation of "personal characteristic" unduly.
>
> Similarly, senior citizens that are in public housing are there because they qualify by reason of their low-incomes and need for better housing. As a general proposition, persons who qualify for public housing are the economically disadvantaged and are so disadvantaged because of their age and correspondingly low incomes (seniors) or families with low-incomes, a majority of whom are disadvantaged because they are single female parents on social assistance, many of whom are black. The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1). As a result, they are a group analogous to those persons or groups specifically referred to by the characteristics set out in s. 15(1) of the *Charter* being characteristics that are most commonly the subject of discrimination.

Following the Court of Appeal ruling in *Sparks*, the Nova Scotia Supreme Court ruled in the case of *R.* v. *Rehberg*[67] that legislation that disentitles women who cohabit with men from receiving welfare has a discriminatory effect on single mothers, contrary to s. 15 of the *Charter*. In reaching this conclusion the Court adopted an approach to s. 15 which was informed by a recognition that poverty and gender are importantly connected. The Court stated at 361:

> I note that the Court in *Sparks* had no difficulty in finding that single mothers are a "group" in society most likely to experience poverty in the extreme, and that poverty is likely to be a personal characteristic of a single mother. I have no difficulty reaching the same conclusion from the evidence before me.

> We are therefore faced with a situation where the regulations specifically authorized under the Act provide that a special group, "single parents otherwise eligible for family benefits", can be determined ineligible to receive these benefits if they contravene the man in the house rule, however it is applied. Moreover, this "group" is overwhelmingly female single mothers who are, *with their children*, a group in society "most likely to experience poverty in the extreme". I find in these circumstances, as was found in *Sparks*, that poverty is likely a personal characteristic of this group, and in this instance poverty is analogous to the listed grounds in s. 15. As well, of course, the group encompasses a listed ground, "sex", as it is most likely that members of this group are female.

In another case, *Schaff* v. *R.*,[68] the Tax Court also found that poverty is a personal characteristic that can form the basis of discrimination. The appellant, a single mother living in poverty argued that s. 56(1)(b) of the *Income Tax Act* violated her rights under ss. 7 and 15 of the *Charter* because it required her to include in any computation of her income the child support payments she received. Although the Court did not find a violation of the *Charter*, it nonetheless found that the appellant was a member of a disadvantaged group that is entitled to *Charter* protection. The Court said at 158:

> The appellant, in my opinion, is part of a "discrete and insular minority" worthy of protection under s. 15 of the *Charter*. More specifically, poverty is a personal characteristic that can form the basis of discrimination.

And further at 158:

> In my opinion, the appellant is worthy of protection under s. 15 of the *Charter* in so far as poor, female, single custodial parents have historically suffered social, political and legal disadvantage.

Similarly, the Alberta Court of Queen's Bench ruled in the case of *M.(R.H.)* v. *H.(S.S.)*[69] that a law requiring corroboration of an unmarried mother's evidence discriminated on the basis of gender and marital status. In the course of reaching this conclusion, the Court made reference to the likelihood that single mothers would be poor. The Judge stated at 341:

> Although I have already found s. 19(1) to be discriminatory for the above reasons, I make the following additional comments on the matter of what is now referred to as the feminization of poverty. …
>
> … I have no difficulty finding that single mothers are more likely to suffer the effects of poverty. … In my view, this simply is another route through which discrimination against single mothers is established.

The recognition that the *Charter* should provide protection in cases involving the intersection of poverty, receipt of social assistance, gender, and the status of being a single mother, resonates with holdings of the Supreme Court of Canada recognizing that vulnerability to harassment and pregnancy-

related discrimination are forms of sex discrimination to which human rights protections apply.

Conclusion

It might be argued that the *BIA* is not subject to the *Charter* because it is budgetary legislation arising from economic realities and difficult legislative choices with which courts should not interfere. However, the *Charter* does not exempt any class of legislation from the requirement of conforming with s. 15.

An overwhelming majority of the Supreme Court of Canada has held that no legislation is immune from s. 15 review.[70] Courts have also recognized that s. 15 is an all-encompassing right to freedom from discrimination which governs all legislative action.[71]

It is notable that s. 32 (1) of the *Charter* is very broad in its wording, making it clear that the *Charter* applies to all federal and provincial government legislation. It states:

> (a) The *Charter* applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In addition to applying the *Charter* to income tax legislation, the Supreme Court of Canada has also applied it to legislation governing benefits such as unemployment insurance.[72] The Court has also been willing to order remedies with financial implications that are potentially substantial.[73] Thus, even on existing case law, an argument that the *BIA* is immune from *Charter* review is not sustainable.

In a court of law it might be argued that the infringements of equality rights occasioned by the *BIA* are justified, pursuant to s. 1 of the *Charter*. However, it is well established that government bears the burden of showing that the rights violation is demonstrably justified. As Wilson J. recognized in *Andrews*, it is fitting that this burden be onerous. She said: “Given that s. 15 is designed to protect those groups who suffer social, political, and legal disadvantage in our society, the burden resting on government to justify the … discrimination against such groups is appropriately an onerous one.”[74]

The government must show the legislation addresses a pressing and substantial objective, that there is a rational connection between the legislative objective and the rights violation, that the challenged legislation impairs[75] the guaranteed right as little as possible, and that there is overall proportionality between the harmful effects of the legislation and importance of the objective.[76] This onerous burden, the federal government cannot discharge. The aspirations of provincial governments for increased autonomy can be respected. However, this does not justify cutting women and other vulnerable groups adrift in the way that the *BIA* does, wiping out protections and supports for social assistance programs and related services.

We conclude that the *BIA* contravenes Canada's treaty obligations under the *CEDAW* and the *ICESCR*, and violates women's *Charter* equality rights. The *BIA* should be rejected by Canadians, and the CHST should be revisited by governments as an urgent priority.

Endnotes for Chapter 4

[1] *The Budget Implementation Act, 1995*, S.C. 1995, c. 17 [hereinafter *BIA*].

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3] There are also other angles from which the *BIA* may be attacked. For example, it is strongly arguable that the *BIA* violates the right to security under s. 7 of the *Charter*, and places the federal government in breach of its obligations under s. 36 of the *Constitution Act*. Regarding arguments in favour of interpretations of s. 7 which extend to broader aspects of physical and social welfare, see: John D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the *Charter*" (1983) 13 *Manitoba Law Journal* 455; Martha Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 *Ottawa Law Review* 257; Ian Morris "Security of the Person and the Person in Need: Section 7 and the Right to Welfare" (1988) 4 *Journal of Law and Social Policy* 1; Ian Johnstone, "Section 7 of the *Charter* and the Right to Welfare" (1988) 46 *University of Toronto Faculty of Law Review* 1; Lucie Lamarche, "La nouvelle loi sur la sécurité du revenu au Québec: quelques réflexions d'actualité" (1991) 21 *Revue de droit de l'Université de Sherbrooke* 335; Teressa Scassa, "Social Welfare and Section 7 of the *Charter*: *Conrad* v. *Halifax (County of)*" (1994) 17 *Dalhousie Law Journal* 187; Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) *Queen's Law Journal* 65.

[4] *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc. (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [hereinafter *ICESCR*].

[5] *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. No UN Doc. A/34/46 (1982), Can. T.S. 1982 No. 31 [hereinafter *CEDAW*].

[6] United Nations, *Report of the Fourth World Conference on Women*, Beijing, China, 4–15 September 1995, A/CONF.177/20, 17 Oc 1995 [hereinafter *Platform for Action*].

[7] *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16) 52, UN Doc. A/6316 (999 U.N.T.S. 171, Can. T.S. 1976 No. 47 [hereinafter *ICCPR*].

[8] This may seem an obviously foolish reading. However, equalizing down is the approach that was taken by the Government of British Columbia to correcting discrimination after the Court's ruling in the case of *Silano* v. *British Columbia* (1987), 42 D.L.R. (4th) 407, [1987] 5 W.W.R. 739, 16 B.C.L.R. (2d) 113, 29 Admin. L.R. 125, 33 C.R.R. 331 (S.C.).The Court had ruled that the structure for social assistance rates discriminated on the basis of age.

[9] See General Comment No. 3 regarding the interpretation of Article 2(1) in United Nations Committee on Economic, Social and Cultural Rights, *General Comments Nos. 1–4* as reprinted in (1994) 1:1 *International Human Rights Reports* at 8, paragraph 9.

[10] *CEDAW* is a treaty whose subject matter is the subordination of women. Its goal is to eliminate discrimination against women in all its forms, and to advance women. Its goal is not simply to ensure that women and men are treated the same, though that may be a useful means of attacking women's oppression in some circumstances. With respect to economic issues, we believe that *CEDAW* must be read as a whole, with special emphasis on the Articles of Part I and Articles 11 and 14. We note also that General Recommendation No. 19, UN Doc. A/47/38 (1992), on Violence Against Women adopted by the CEDAW Committee in 1992 makes that the purpose of *CEDAW* is to bring to an end the subordination of women as a group, and that women's economic inequality is considered an integral part of this subordination. We note in particular paragraphs 11, 14, 15, and 23.

[11] Lucie Lamarche, "An Historical Review of Social and Economic Rights: A Case for Real Rights" (1995) 15:2 and 3 *Canadian Wom Studies* 12 at 14.

[12] *Ibid.*

[13] See Philip Alston, "Denial and Neglect," in Richard Reoch, ed., *Human Rights: The New Consensus* (London: Regency House (Humanity), 1994) at 113–14. Alston states that the proposition that economic and social rights should be accorded to every individual is

> … still almost automatically made subject by decision-makers to an economic calculus which will often culminate in various economically compelling reasons as to why such rights can simply not be recognized. The same sort of process was once applied to certain civil and political rights when it was argued, for example, that giving the vote to women was too costly, that giving the vote to illiterates was not rational because they were inevitably ill-informed, that allowing trade union rights at the expense of industrial harmony was economically ill-advised, that accused persons did not warrant the expense of a fair trial, and that rapid industrialization required unfettered central government control over all forms of political and economic decision-making. Over the past fifty years, all such arguments have been gradually rendered irrelevant by the firm and uncompromising commitment to the relevant values that has been both implicit and explicit in the acceptance of the basic principles of civil and political rights.
>
> But decision-makers have still not been able to bring themselves to accept the equivalent proposition to the effect that the recognition of economic, social and cultural rights puts the question of whether these rights should be accorded beyond the realm of debate, especially on the grounds of some anticipated negative impact in economic terms. In effect, individual States and the international community as a whole have made a commitment to the realization of those rights, and that commitment must not be read as being contingent upon a demonstration that it is economically or otherwise profitable or rewarding for the Government (or the society as a whole) to accord those rights.

[14] *Supra* note 6. See Chapter IV, section A paragraph 47.

[15] Canada, Secretary of State, *International Covenant on Economic, Social and Cultural Rights: Report of Canada on Articles 10–12, December 1982* (Ottawa: Supply and Services, 1983) [hereinafter *1982 Report of Canada, Articles 10–12*] at 13.

[16] *Ibid.* at 33.

[17] Canada, Human Rights Directorate, Multiculturalism and Citizenship Canada, *International Covenant on Economic, Social and Cultural Rights: Second Report of Canada on Articles 10–15, September 1992* (Ottawa: Supply and Services, 1992) [hereinafter *199 Second Report of Canada, Articles 10–15*] at 8.

[18] *1982 Report of Canada, Articles 10–12, supra* note 15.

[19] Canada, Secretary of State, *International Covenant on Economic, Social and Cultural Rights: Second Report of Canada on Articles 6–9, December 1987* (Ottawa: Supply and Services, 1988) at 2.

[20] This echoes the federal government's written acknowledgement that s. 36 "commits" both levels of government to, among other things, providing essential services of reasonable quality to all Canadians. *1992 Second Report of Canada, Articles 10–15, supra* note 17 at 2–3.

[21] *Ibid.* at 5.

[22] *Ibid.*

[23] Committee on Economic, Social and Cultural Rights, 8th Session, *Concluding Observations on Report of Canada Concerning the Rights Covered by Articles 10–15 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C. 12/1993/1 paragraphs 101–5 as reprinted in (1994) 20 *Canadian Human Rights Reporter* C/1.

[24] *Ibid.* paragraph 101.

[25] *Ibid.* paragraphs 110 and 112.

[26] *Ibid.* paragraph 18.

[27] Letter of Bruce Porter on behalf of the Coalition to Philip Alston, Chairperson of the Committee on Economic, Social and Cultural Rights (27 November 1996).

[28] *Ibid.* at 4. Other critical perspectives on the *BIA* and the CHST include Ken Battle and Sherri Torjman, *How Finance Reformed Social Policy* (Ottawa: Caledon Institute of Social Policy, 1995); Canadian Council on Social Development, *Social Policy Beyond the Budget* (Ottawa: Canadian Council on Social Development, April 1995); Canadian Council on Social Development, *Roundtables o the Canada Health and Social Transfer: Final Report* (Ottawa, 1996); Canadian Labour Congress, *Canada: Two Visions — Two Fut Submission to the Standing Committee on Finance Regarding Bill C-76* (Ottawa, May 1995); Citizens for Public Justice, *Will Ottawa Preserve National Equity?* (Toronto, May 1995); The Council of Canadians, *Danger Ahead: Assessing the Implications of the Canad Health and Social Transfer* (Ottawa, March 1995); Michael Mendelson, *Looking for Mr. Good-Transfer: A Guide to the Canada He and Social Transfer Negotiations* (Ottawa: Caledon Institute of Social Policy, 1995); Michael Mendelson, *The Provinces' Position: A Second Chance for the Social Security Review?* (Ottawa: Caledon Institute of Social Policy, 1996); National Council of Welfare, *The 1995 Budget and Block Funding: A Report by the National Council of Welfare* (Ottawa: Supply and Services Canada Spring 1995); Susan Phillips, "The Canada Health and Social Transfer: Fiscal Federalism in Search of a New Vision" in Douglas Brown and Jonathan Rose, eds., *Canada: The State of the Federation 1995* (Kingston: Institute of Intergovernmental Relations, 1995); Paul Steinhauer, *The Canada Health and Social Transfer: A Threat to Health, Development and Future Productivity of Canada's Children and Youth* (Ottawa: Caledon Institute of Social Policy, 1995); and Sherri Torjman and Ken Battle, *Can We Have National Standards?* (Ottawa: Caledon Institute of Social Policy, 1995).

[29] Letter of Philip Alston, Chairperson of the Committee on Economic Social and Cultural Rights, to Ambassador Gerald Shannon, Permanent Representative in the Permanent Mission of Canada to the United Nations Office in Geneva (4 May 1995).

[30] Letter of Philip Alston (December 1996).

[31] The groups impressed upon the Committee the serious implications of the *BIA* for the rights of Canadians under the Covenant. For a discussion of the implications of the Committee's precedent-setting decision that it had the jurisdiction to signal concern about draft legislation and that it could do so between scheduled considerations of reports, see Craig Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1995) 6 *Constitutional Forum* 79.

[32] Canada, Human Rights Directorate, Multiculturalism and Citizenship Canada, *The International Covenant on Economic, Social anc Cultural Rights: Third Report of Canada* (Ottawa: Public Works and Government Services, 1997) at paragraph 83.

[33] Canadian women's NGOs, responding to Canada's third and fourth reports on its compliance with *CEDAW*, submitted in their alternative report that Canada was in contravention of its obligations because of the repeal of CAP and the creation of the CHST. See Canadian Women's NGOs, *Canada: Alternative Report to CEDAW* (Toronto, January 1997).

[34] See *Platform for Action*, *supra* note 6, paragraph 58(c).

[35] *Ibid.* at paragraph 58(g).

[36] See Non-Governmental Organizations from Canada, *Presentation to the Committee on Economic, Social and Cultural Rights, Re: International Covenant on Economic, Social and Cultural Rights and Proposed Legislation by Canada (Bill C-76) to Eliminate the Canada Assistance Plan (CAP), May 1, 1995* (Ottawa, 1995) at 9.

[37] *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/1987/17, Annex, as reprinted in (1987) 9 *Human Rights Quarterly* 122 at 131.

[38] United Nations, Committee on Economic, Social and Cultural Rights, *General Comments Nos.* 1–4 as reprinted in (1994) 1:1 *International Human Rights Reports* 1 at 8.

[39] *Andrews* v. *Law Society (British Columbia)*, [1989] 1 S.C.R. 143 at 169, [1989] 2 W.W.R. 289, 25 C.C.E.L. 255, 91 N.R. 255, 34 B.C.L.R. (2d) 273, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

[40] *Ibid.* at 154.

[41] *R.* v. *Turpin,* [1989] 1 S.C.R. 1296 at 1333, 96 N.R. 115, 34 O.A.C. 115, 48 C.C.C. (3d) 8, 69 C.R. (3d) 97, 39 C.R.R. 306 [hereinafter *Turpin* cited to S.C.R.].

[42] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1056, 59 D.L.R. (4th) 416 [hereinafter *Slaight* cited to S.C.R.]. Here, Dickson C.J. is quoting from his earlier decision, in dissent, in *Reference Re Public Service Employee Relations Act*, *Labour Relations Act and Police Officers Collective Bargaining Act*, [1987] 1 S.C.R. 313 at 348, 38 D.L.R. (4th) 161 [hereinafter *Reference Re Public Service Employee Relations Act* cited to S.C.R.].

[43] *Slaight*, *ibid.* at 1056.

[44] *Ibid.* at 1056–57.

[45] [1990] 1 S.C.R. 190, 103 N.R. 282, 2 W.W.R. 220, 71 Alta. L.R. (2d) 145.

[46] See *Reference Re Public Service Employee Relations Act*, *supra* note 42 at 348–49, and J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 *Supreme Court L.R*. 287 at 293.

[47] Matthew Craven, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights" *Netherlands International Law Review* (1993) 367 at 397–98. The quote from Dickson C.J. to which Matthew Craven refers is drawn from the Supreme Court's decision in *R.* v. *Keegstra* [1990] 3 S.C.R. 697.

[48] *Supra* note 42.

[49] *Ibid.* at 348.

[50] Anne F. Bayevsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 34.

[51] *Supra* note 46 at 287.

[52] C. Lynn Smith and William Black, "Section 15 Equality Rights under the *Charter*: Meaning, Institutional Constraints and a Possible Test" (24 October 1987) [unpublished] at 1.

[53] Canada, Department of Justice, *The Charter in the Context of the International Bill of Rights* (Federal-Provincial-Territorial Conference on Human Rights, September 1983, Document No. 830-130/022, Agenda Item VII(i)(a), 9 August 1983).

[54] Committee on the Elimination of All Forms of Discrimination Against Women, *Summary Record of the 167th Meeting*, U.N. Doc. CEDAW/C/SR.167 (February 1990) at 6.

[55] Discrimination has been defined by the Supreme Court of Canada as a distinction, *whether intentional or not* but based on grounds relating to personal characteristics of the individual or group, which has *the effect* of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. See *Andrews*, *supra* note 39. This definition is also adopted in subsequent s. 15 decisions of the Court.

[56] For examples of "poor-bashing" and a discussion of this phenomenon, see Kathy Tait, "Joy's reform worth roses" *The [Vancouver] Province* (5 November 1995) A20; "Beware of poor-bashing rhetoric, advocate tells anti-poverty group" *The [Kamloops] Daily News* (29 January 1996) A2; "Speaking Out Against Poor Bashing" *The Long Haul* [Vancouver] (February 1995).

[57] Edward Greenspon, *The [Toronto] Globe and Mail* (17 February 1997) A2. See also: Eric Beauchesne, "Banker would carve up welfare, health systems" *The [Toronto] Star* (19 April 1995) B1; David Frum, "Splitting social welfare bills has only led to waste" *The Financial Post* (25 January 1995) 17; and Margaret Philp, "Ottawa urged to maintain control of welfare spending" *The [Toronto] Globe and Mail* (15 June 1995) A5.

[58] The idea that lack of political power is a criterion for determining which group should receive constitutional protection finds support in the opinion of Wilson J. in *Andrews*, *supra* note 39 at 152, and its foundation in United States constitutional law is discussed by John Hart Ely in *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

[59] (1991), 70 B.C.L.R. (2d) 325 (S.C.).

[60] *Ibid.* at 344.

[61] *Haig* v. *Canada* (1992), 9 O.R. (3d) 495, 94 D.L.R. (4th) 1, 16 C.H.R.R. D/226, 57 O.A.C. 272, 10 C.R.R. (2d) 287, 92 C.L.L.C. 17,034.

[62] [1991] 2 S.C.R. 22. In *Tétreault-Gadoury*, extension was simply the result of striking an age restriction. There have been other instances of extension being accomplished by means of striking a restriction or limitation. See also *Schachter* v. *Canada*, (*Employment and Immigration Commission*), [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, 3 W.D.C.P. (2d) 424, 53 F.T.R. 240 (note), 10 C.R.R. (2d) 1, 139 N.R. 1, 92 C.L.L.C. 14,036 [hereinafter *Schachter].*

[63] Under accepted principles for discrimination analysis, it is not strictly necessary to point to a comparator group within the legislative scheme. Especially where only a particular group needs the protection in question, it is highly appropriate to look beyond the challenged scheme to comprehend the discriminatory dimensions of a given problem. This was recognized in the case of *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 26 C.C.E.L. 1, 4 W.W.R. 193, 89 C.L.L.C. 17,012, 94 N.R. 373, 58 Man. R. (2d) 161, 10 C.H.R.R. D/6183, 59 D.L.R. (4th) 321, 45 C.R.R. 115, C.E.B. & P.G.R. 8126, in which it was held that prejudicial treatment because of pregnancy is sex discrimination, notwithstanding that there is no comparator group.

[64] [1992] 3 S.C.R. 813 at 853.

[65] (1992), 112 N.S.R. (2d) 389 (N.S.S.C.) [hereinafter *Sparks (N.S.S.C.)*]; (1993), 101 D.L.R. (4th) 224, 119 N.S.R. (2d) 91, 30 R.P.R. (2d) 146 (N.S.C.A.).

[66] *Sparks (N.S.S.C.)*, *ibid.* at 402.

[67] (1994), 111 D.L.R. 4th 336 (N.S.S.C.).

[68] (1993), 18 C.R.R. (2d) 143 (T.C.C.).

[69] (1994), 121 D.L.R. (4th) 335, 26 Alta. L.R. (3d) 91.

[70] *Symes* v. *Canada* [1993] 4 S.C.R. 695, 1 C.T.C. 40, 19 C.R.R. (2d) 1, 110 D.L.R. (4th) 470, [1994] W.D.F.L. 171; *Thibaudeau* v. *Canada (M.N.R.)*, [1995] 2 S.C.R. 627 at 675–76, [1995] W.D.F.L. 957, [1995] 1 C.T.C. 382, 95 D.T.C. 5273, 12 R.F.L. (4th) 1, 124 D.L.R. (4th) 449, 182 N.R. 1, 29 C.R.R. (2d) 1.

[71] *Reference Re An Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, 25 D.L.R. (4th) 1, 13 OAC 241, 23 C.R.R. 193 (C.A.) Robins J.A. dissenting on other points. In turn, the opinion of Robins J.A. was cited with approval by the Supreme Court of Canada in *Andrews, supra* note 39 at 171. Regarding the scope of s. 15, the Court said, "In our view, s. 15 read as a whole constitutes a compendious expression of a positive right to equality in both the substance and administration of the law. It is an all-encompassing right governing all legislative action."

[72] See for example *Tétreault-Gadoury* v. *Canada*, *supra* note 62, and *Schachter, supra* note 62.

[73] See, for example, *Guérin* v. *Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.); *Prosper* v. *R.* [1994] 3 S.C.R. 236, 118 D.L.R. (4th), 154 (S.C.C.); *R.* v. *Askov,* [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 74 D.L.R. (4th) 355, 113 N.R. 241, 42 O.A.C. 81, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, 49 C.R.R. 1.

[74] *Andrews*, *supra* note 39 at 154 per Wilson J.

[75] In some cases, the Supreme Court of Canada has indicated that a degree of deference to the legislature may be warranted in assessing the minimal impairment branch of the s. 1 test, where difficult economic questions are concerned. However, there is a strong argument that a deferential approach should not be applied where the concerns of vulnerable groups are at stake.

[76] *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308. See also *Benner* v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358, 143 D.L.R. (3d) 577.