Enforcing the Right to Reasonableness in Social Rights Litigation:

The Canadian Experience

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1. Introduction: The dialectic of entitlement-based and structural/transformative remedies in Canada

The success of enforcement mechanisms for social rights should not be considered solely in relation to the remedies that have been ordered by courts or tribunals and whether these have been successfully enforced. Instead, enforcement strategies must be assessed more fundamentally in relation to the goals and purposes of the rights claims in question and the broader goals of social rights litigation.

More common forms of judicial remedies, such as constitutional remedies to legislative violations that strike down particular provisions or which “read in” coverage of previously excluded groups, have proven to be successful in a number of social rights cases in Canada, and these remedies have not generally raised any issues of governmental compliance.¹ Short of invoking a rarely used “notwithstanding” clause under the Canadian Charter of Rights and

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¹ The best example of a ‘reading in’ remedy in the field of social rights in Canada is the case of Sparks v Dartmouth/Halifax County Regional Housing Authority, (1993), 119 N.S.R. (2d) 91 [Sparks], which extended security of tenure protections to residents of public housing. An example of a striking down remedy, declaring a provision to be of no force and effect, is the case of Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur [2003] 2 SCR 504, in which workers compensation benefits were extended to apply to those with chronic pain. These cases will be discussed below.
Freedoms [the Charter]² that permits parliament or legislatures to override certain Charter rights, governments in Canada have, thankfully, been unlikely to defy court orders declaring legislative invalid or extending the legislation’s coverage in order to ensure constitutionality.³ The notwithstanding provision has been used only once to override an actual Court order striking down a particular legislative provision. In that case, the Parti Quebecois Government of Quebec, with historical reasons to resist the application of the Canadian Charter after it was negotiated without Quebec’s support, invoked the notwithstanding clause to preserve Quebec’s language law after the Supreme Court of Canada found it in violation of the Charter.⁴ A subsequent government in Quebec amended the law after the UN Human Rights Committee considered a complaint filed under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and found that the language law also contravened the ICCPR.⁵ Where these kinds of judicial remedies that are of immediate effect and offer the advantage of clear enforceability respond to the real needs and demands of claimants in response to an unjust denial of a particular entitlement, an eviction, or the denial of a social benefit to an excluded group, they must certainly be preferred over softer remedies that are more difficult to enforce. Softer constitutional remedies available to courts in Canada such as declaratory orders which simply put governments on notice that a right has been violated but leave it up to the government to determine what to do about it, or “suspended declarations of invalidity” which provide governments limited time to develop new legislation or programs in order to remedy


³ Ibid, s 33.

⁴ Ford v Quebec (Attorney General), [1988] 2 S.C.R. 712. The laws were subsequently amended to comply with the Charter after the UN Human Rights Committee found, in response to a complaint filed under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) that the language laws also contravened the ICCPR.

⁵ Ballantyne, Davidson and McIntyre v Canada, Human Rights Committee, UN Doc CCPR/ C/47/359/1989 (5 May 1993)
rights violations, do not provide the same kind of certainty or clarity about the remedy because the ball lobbed back into the government’s court.\textsuperscript{6}

On the other hand, hard remedies that offer fewer challenges in relation to enforcement may not be so well-suited for addressing and solving systemic violations of social rights, such as those linked to poverty or homelessness. Effective remedies to poverty, homelessness, and social exclusion in Canada often need to reach beyond a particular benefit scheme or legislative exclusion in order to address structural causes of systemic social rights violations. They require broad rights-based strategies extending over a number of inter-related program areas, such as income assistance, housing subsidy and wage protections, and require programs and strategies that can only be implemented over time.\textsuperscript{7} Remedies such as this do not lend themselves to simple judicial orders striking down a particular legislative provision or reading in additional protections.

The need for structural remedies has been made clear by UN human rights bodies considering social rights violations in Canada and making recommendations for how to remedy them. The UN Special Rapporteur on adequate housing and the UN Special Rapporteur on the right to food have both visited Canada on missions, and each has called for comprehensive, collaborative strategies that engage all levels of government to implement the right to housing and food. They have emphasized the need for institutional mechanisms through which rights to housing and to food can be claimed and enforced, and through which to ensure that reasonable measures are adopted by a range of actors to address homelessness and hunger amidst affluence.\textsuperscript{8} Similar recommendations have been made by the UN Committee on Economic,

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\item \textsuperscript{6} A good example of a ‘softer’ remedy of this sort is the well-known decision in 	extit{Eldridge v British Columbia (Attorney General)}, [1997] 3 SCR 624.
\item \textsuperscript{8} United Nations Human Rights Council, \textit{Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)}, UN Human Rights Council OR, 10th Sess, UN Doc
\end{itemize}
Social and Cultural Rights at the last three period reviews of Canada, by members of the Human Rights Council during Canada’s Universal Periodic Review, and by parliamentary committees examining problems of poverty and homelessness in Canada.\textsuperscript{9} These recommendations for comprehensive anti-poverty, homelessness, and food security strategies with engagement by all levels of government have been ignored by Canadian governments. As will be described below, social rights advocates and stakeholders have now developed litigation strategies to embrace more comprehensive remedies such as these, alleging that the failure to implement recommendations that are necessary for the fulfillment of the right to housing and food in Canada constitute violations of domestic constitutional rights, and asking courts to order and oversee the implementation of effective, rights-based strategies.

Remedies of the sort recommended by Special Rapporteurs and UN human rights bodies raise distinctive challenges in part because other actors, whose actions courts may not be able to control, are engaged. Structural remedies engage with democratic processes and require ongoing dialogue among governments, stakeholders, human rights institutions, tribunals, or courts and they extend over a period of time. Rather than order an immediate action by government, courts can only order that necessary processes be put in place for the implementation of the remedies within a reasonable period of time, with reporting requirements, timetables, monitoring, and benchmarks established, and participatory mechanisms guaranteed. These softer remedies require courts to play more of a facilitation role to provoke action by other actors and institutions, and for this reason, raise heightened concerns about enforceability. However, while enforceability is clearly an important factor in choosing litigation strategies, we ought to be wary of the longer term effect of preferring the harder, more enforceable remedies rather than the softer ones which, though it may be more

\textsuperscript{9} For a description of the many recommendations for rights-based housing and anti-poverty strategies, see Bruce Porter & Martha Jackman, \textit{International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection}, Working Paper, (Huntsville, ON: Social Rights Advocacy Centre, September 2011).
difficult to enforce, may also be more effective when measured against the broader goals of social rights claims. Claims designed around the remedies and enforcement mechanisms most familiar to courts and governments, rather than around what is necessary to solve the problems being addressed, may lead to an improved enforcement scorecard, but little significant change in the systemic violations of social rights.

It is also important to consider that social rights claims may not always conform to the traditional ‘citizen-versus-state’ framework—even if that is formally how domestic constitutional or international human rights claims must be structured. New remedial approaches must reflect the diversity of actors involved in determining whether social rights are realized in the context of modern systems of governance and the diverse legislative, policy, or adjudicative contexts in which claims may be advanced. Claimants may be individuals or groups, or combinations of the two. Those on whom obligations to realize rights fall, the duty-bearers, may be private actors, non-governmental actors, or multiple levels of government, from local to federal. All of these actors are likely bound together in webs of delegated responsibilities and jurisdictional overlap. Roles become increasingly mixed, with civil society organizations traditionally tied to rights claimants increasingly engaged in providing or administering services or programs, thus straddling both the claimant and respondent sides of rights claims. The traditional model of the judicial remedy against the state, in which the court simply orders the state to provide an entitlement that has been denied or cease an action which has violated a right needs to be modified to address the different roles that states must play in ensuring that a range of actors behave in a manner that is consistent with the realization of social rights.

Recognizing that many parties are involved as duty-bearers does not mean that the state cannot be held responsible for violations of social rights involving multiple actors and various programs and policies. Although structural causes of poverty may be directly attributable to the actions of private actors, patterns of systemic exclusion and disadvantage are sustained and reinforced by failures of the state to prevent and remedy them through appropriate legislative (and other) means. As the Supreme Court of Canada noted in *Vriend v Alberta*, in which the
Court found that a provincial government had discriminated against gays and lesbians by failing to protect them from discrimination by private actors, “[e]ven if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious.”¹⁰ This link between state policy, failures to regulate to protect rights, and the exclusions and inequality created by the private market does, however, challenge litigants to develop new approaches to remedies and enforcement, demanding a more principled and strategic approach to rights-based policy development, regulation, and legislation. Regulation of private actors must mean more than restraining them from doing harm. Where private actors are engaged in partnerships with governments in areas that impact the realization of social rights, rights claimants must insist that they act in accordance with state obligations to enhance and sustain strategies to fulfill social rights over time. The modern approach to social rights remedies thus engages with areas of policy and program development and planning that were previously beyond the lens of human rights, bringing social rights squarely into an expanded human rights framework and bringing new challenges to the enforcement of remedies.

In Canada, the problem of enforcement of social rights remedies has not generally been that judicial remedies have not been adequately implemented. Rather, the central problem has been that governments have ignored remedial recommendations from UN human rights bodies for more structural remedies at the same time as “urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights.”¹¹ While the Supreme Court of Canada has been clear that broadly framed rights in the Charter, such as the right to security of the person or the right to the equal benefit of the law, can be


interpreted so as to include social and economic rights, reluctance to clearly affirm these interpretations when social rights have been claimed has been linked to judicial assumptions about the proper role of courts.\(^\text{12}\) Courts tend to align their interpretation of rights with what they believe they can remedy and legal advocates may follow suit by avoiding claims which demand remedial roles of courts which may provoke judicial resistance. As will be seen below, however, governments’ arguments against more expansive roles for courts in overseeing the implementation of structural remedies over time have been rejected by the Supreme Court of Canada.\(^\text{13}\) The Supreme Court has now recognized that a broad range of remedies are available to courts, and that courts are quite capable of meeting the remedial challenges not only of singular claims related to social benefits, but broader systemic claims requiring the implementation of the kinds of remedies that have been recommended by UN human rights bodies. Nevertheless, more traditional assumptions about limited judicial competence and authority to remedy social rights violations continue to pose the greatest obstacle facing social rights claimants in search of effective remedies in Canada.\(^\text{14}\)

In order to navigate through the diverse remedial landscape in Canada and to consider enforcement challenges in the context of Canadian cases, this article applies a somewhat simplified dichotomy between:

i) social rights claims that operate within the framework of existing entitlements systems, termed here ‘entitlement-based claims’ and

ii) social rights claims addressing structural and systemic issues which extend well beyond a single entitlement or legislative provision, identified here as ‘transformative or structural claims’.


\(^\text{13}\) See the discussion of Doucet-Boudreau v Nova Scotia (Minister of Education), [2003] 3 SCR, infra.

\(^\text{14}\) Supra note 2.
The dichotomy is applied in order to assess different strategies around the enforcement of social rights remedies in the context of what Nobel Prize winning economist Amartya Sen called the “entitlement system failures,” which invariably lie behind violations of social rights. In his early ground-breaking research, Sen showed that poverty and famine are not generally caused by a scarcity of goods or discrete failures of particular programs, but rather by structural failures of entitlement systems. The entire system of land and property rights, housing laws, land use planning, social programs, wage protections, social security, regulation of private actors (and so on), has left, in its cumulative effect, certain groups without access to adequate food or housing. The concept of entitlement system failure seems particularly apt in the context of Canadian social rights advocacy, where widespread homelessness and hunger is clearly not a result of a scarcity of housing or food or resources, but is rather, as noted by UN human rights bodies, a cumulative failure of a range of programs and entitlements. UN human rights bodies have identified, inter alia: inadequate income assistance, low minimum wage, lack of security of tenure, erosion of land and resource rights of Indigenous peoples, insufficient housing subsidy and social housing, restrictions on unemployment insurance affecting women and part-time workers, lack of housing with support for mental health disabilities and inadequate human rights protections against increasing stigmatization and marginalization of people living in poverty or homelessness. None of these structural causes of social rights violations in Canada is justified by a scarcity of resources. Evidence is clear that governments

would save significant costs in healthcare, justice and social programs by eliminating widespread homelessness and hunger.¹⁷

It is important to realize, however, in considering the relevance of experiences in Canada to other countries, that these kinds of entitlement system failures are not restricted to affluent countries. Sen’s research showed that what is most obvious in affluent countries is actually true in the context of developing economies as well – but with more severe consequences. In all countries, hunger or homelessness occurs when certain groups are left without access to food or housing because the existing system of income and property related entitlements – be they land and property rights, housing laws, land use planning, social programs, wage protections, social security, or regulations of private actors - leave these groups without the means to produce or purchase adequate food or to secure adequate housing. Therefore, solving hunger and homelessness is not simply a matter of ensuring that governments or charitable agencies provide the poor with housing and food, though this is certainly necessary in the short term. The entitlement system that has denied certain groups their dignity and security must also be transformed into one which gives priority to the rights of the groups who have been left on the margins, and whose rights have not been properly considered in the design and implementation of a range of programs, laws, ad regulations. It is critical that litigation strategies develop enforceable remedies that engage with this need for a transformative social rights practice, rather than one that relies solely on judicial remedies framed within the existing entitlement system.

Justiciable social rights claims have often been considered as being primarily about entitlements to goods, such as a claim to housing that meets certain standards of adequacy or to protection from having one’s housing taken away without being provided with alternative housing. In some cases, social rights claims may correspond exactly to these kinds of

entitlements, and such claims have a better chance of success because they fit with traditional judicial remedies and enforcement mechanisms. The claims can be framed largely within existing statutory or programmatic obligations, and generally involve challenging existing entitlement systems for flaws or failures on the basis of accepted principles of fairness, consistency, non-discrimination and (sometimes) adequacy and may challenge unfair procedures and corrupt administration. They may involve positive remedies by extending the entitlement to previously excluded groups or demand positive measures to comply with statutory requirements as interpreted by courts or tribunals.

Social rights claims and constitutional review of legislation and programs should also engage, however, with the transformative dimension of policy and program implementation, and the requirements of progressive realization as articulated in article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). If entitlement system failures leading to social rights violations are rooted, as Sen suggested, in the devaluing of the rights of certain groups, then the solution must lie, at least in part, in affirming or reclaiming the rights of those groups that have been devalued and excluded. Social rights claims addressing this systemic dimension cannot be entirely framed by claims within the existing entitlement system but rather must implement transformative strategies to reconstruct entitlement systems around social rights. Systemic or transformative social rights claims therefore seek to remedy broader entitlement system failures that extend beyond a single statute or program, and likely involve complex interactions among social program entitlements, private sector regulation, tax systems, income support, budgetary allocations, land use, resource allocation and many other policies. Transformative social right claims adopt a different starting point. Rather than

18 The concept of entitlement system failures is particularly useful in the Canadian context, where homelessness and hunger are clearly related to a complex entitlement system failure rather than to a scarcity of housing or resources or land through which to provide it. The problem in Canada is fairly simple: adequate housing is not properly implemented as a right, so there is no institutional mechanism through with the rights violations, the entitlement system failures leading to homelessness and hunger, might be addressed. So even as our economy booms, more and more people become homeless – with no place to go for an effective remedy.
defining the violation and remedy in terms of an inadequacy or discriminatory exclusion within an existing statutory or entitlement framework, transformative claims seek out structural causes of social rights violations and create a remedial framework around the transformative project of realizing social rights.

While the dichotomy between entitlement based and structural claims is useful as a way of categorizing claims, it might be better described as two dimensions of effective social rights practice. Social rights claims which identify specific exclusions or inadequacies of existing programs or statutes remain critical to social rights practice, not only because the remedies are more immediately enforceable but also because there is usually a transformative dimension to this type of claim as well. Because of their advantages in terms of enforceability, entitlement based claims may offer, in some contexts, the most strategic approach to challenging the devaluing of the rights of certain groups. Claims to entitlements within existing legislative frameworks also rely on interpretation of law and on conferred discretionary decision-making. Interpreting and administering statutory entitlements in a manner that is consistent with social rights allows case-by-case entitlement claims to also affirm social rights values and engage with broader systemic issues.

The success of equality rights litigation on issues of same-sex partnerships in Canada is a good example of the transformative potential of entitlement based rights claims. Claims advanced by the LGBT community in Canada have consisted largely of challenges to exclusions from entitlements available to heterosexuals within existing statutes. Yet the transformative effect of these claims was significant. The inclusion of sexual orientation in human rights legislation and ensuring equal treatment of same-sex couples in existing entitlement systems redefined discriminatory concepts of family, spousal relationships, and marriage. Challenging discriminatory exclusions within existing entitlement frameworks did engage with systemic
patterns of marginalization and discrimination, revaluing the rights of those whose rights had previously been denied.¹⁹

Historically, Canadian equality jurisprudence has made an important contribution to the understanding of the dialectic between entitlement-based claims and broader transformative goals of social rights litigation. Canada had a rich history of substantive equality jurisprudence under provincial and federal human rights legislation was the first constitutional democracy to include disability as a prohibited ground of discrimination in its constitution. Its courts played a path-breaking role in linking the right to non-discrimination to positive obligations to address structural barriers to equality and to address unique needs. An early example was the case of Action Travail des Femmes, which filed complaints of systemic sex discrimination in Canadian National Railway, and was granted a remedy by the human rights tribunal which included an employment equity program within CN to remedy the under-representation of women in the CN workforce and other ongoing effects of systemic discrimination.²⁰

In recent years, Canadian courts have largely betrayed the substantive approach to equality that lay at the centre of expectations of the Canadian Charter.²¹ However, courts have nevertheless continued to map out an important path towards a more unified approach to the duality of entitlement-based and structural remedies. As will be described below, courts in Canada have tended to respond to constitutional claims to specific entitlements by reconstructing the claim in order to focus on the quality of the decision-making, and to affirm,


²⁰ CN v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114

Date: 1987-06-25

instead of a right to particular entitlements, a right to reasonable decision-making. In doing so, they have suggested a convergence of a number of different approaches to reasonableness—including proportionality and reasonable limits review under the Canadian Charter, administrative law reasonableness review, and the requirement of reasonable accommodation of needs of groups protected from discrimination, including but not limited to persons with disabilities. The Supreme Court of Canada has affirmed a robust standard of reasonableness review in all of these contexts, which is informed by Canada’s commitments to international human rights, including economic, social, and cultural rights. It is the right to reasonable decisions and policies, informed by international human rights values, which potentially brings together individual entitlement claims and broader structural, transformative claims, mapping out a strategy that moves beyond the enforcement of particular judicial decisions to a strategy for social transformation based on human rights values. The right to reasonable decisions and policies requires not only reasonableness in the administration of statutory entitlements, but more broadly, reasonable strategies to fulfill social rights. It thus provides a normative framework for a range of remedial approaches.

2. Entitlement-Based Claims

An important way in which positive social rights claims have been leveraged from courts operating within dominant civil and political remedial frameworks in Canada has been the constitutional “reading in” remedy to under-inclusive legislation or programs found to be discriminatory, contrary to section 15 of the Canadian Charter. Where courts have found that exclusions of protected groups from benefits or legislative protections violates the Charter, and where correcting the unconstitutionality by reading in additional protections is judged to

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22 Section 15(1) of the Charter states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
accord with the “twin guiding principles” of respect for the role of the legislature and respect for the purposes of the *Charter*, Canadian courts have been instructed to expand legislative protections or benefits, rather than to strike the scheme down. This allows the court to be “as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature”.  

Reading in remedies provide for immediate and sometimes far-reaching enforcement of judicial orders. In *Sparks v Dartmouth/Halifax County Regional Housing Authority*, [Sparks] security of tenure protection was extended to 10,000 public housing tenants through reading protections for this previously excluded group into existing legislation. Existing court procedures for private market tenants contesting evictions became immediately available for any tenants in public housing. This simple modification to existing legislation made a significant impact in the lives of public housing tenants who previously had no tenure protection. It altered their relationship with the state from one in which they could be arbitrarily evicted from their homes, to one in which their dignity and security was respected. In this sense, an entitlement-based claim was able to leverage both a positive remedy and a transformative potential by challenging prevailing exclusion and stigmatization. The case was precedent-setting, not only for its extension of entitlement-based protections, but also for its recognition of discrimination against poor people as being analogous to other forms of discrimination. The entitlement that had been denied could be immediately provided because the institutional structures were already in place for the remedy to be implemented. There was no need to require legislatures to pass new laws or design new institutions, and there was no need for stakeholder participation in designing, monitoring, or enforcing the remedy.

Another example of the immediate enforceability of reading in remedies is found in the *Vriend* case, in which the Supreme Court held that a failure to include sexual orientation as a

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24 *Sparks*, supra note 1.

25 *Vriend*, supra note 9.
prohibited ground of discrimination under provincial human rights legislation governing the actions of both private and government employers, service, and housing providers, violated Charter equality rights. The majority of the Court opted to read into Alberta’s human rights legislation the missing protection, on the assumption that the legislature would prefer a human rights code with protection added for gays and lesbians to no human rights legislation at all. Again, although the claim was an entitlement-based claim framed by the existing human rights protections in Alberta, there was a significant transformative effect achieved by providing protections from discrimination that had previously been denied.

Courts in Canada have also used negatively oriented remedies in entitlement-based social rights claims when restrictions on existing entitlements or procedural barriers have been challenged. These remedies include reading down, severance, and declarations of invalidity. For example, the Supreme Court of Canada’s decision in R v Morgentaler, in relation to restrictions on access to abortions, had an immediate effect of ensuring dramatically improved access to safe abortions for women. What has not been assured, however, is a commitment to institutional transformation. Morgentaler helped improve access to safe abortions, but failed to ensure access to abortion services for women in every region of the country.

In Victoria (City) v Adams, the British Columbia Court of Appeal struck down components of a bylaw prohibiting homeless people from erecting temporary shelters in public parks, finding that, at least in this context, the right to security of the person in section 7 of the Canadian Charter engaged some components of the right to housing as protected under the ICESCR. The remedy, as limited as it was, did have an immediate effect of permitting homeless people to continue to erect temporary overnight shelters in parks. The Court additionally ruled that the declaration of invalidity may be terminated if improvements to shelter and housing programs

26 Ibid. paras 65-66.
27 Ibid., paras. 196-197
28 R. v Morgentaler, [1988] 1 S.C.R. 30
29 Victoria (City) v Adams, 2009 BCCA 563; 2008 BCSC 1363 [Adams].
meant that the bylaws no longer violated section 7 of the Charter—for example, if the City of Victoria could show that the number of homeless people does not exceed the number of available shelter beds. The remedy ordered by the Court of Appeal fell short of providing for judicial oversight of efforts to address the homelessness and housing crisis that led the applicants to be living in the park in the first place, but did provide for some encouragement to address it. In 2008, the City of Victoria established the Greater Victoria Coalition to End Homelessness, which has added more than 115 units of permanent, supported housing, and housed over 60 people who were formerly homeless.  However, this has not kept pace with demand. Shelter use continues to rise in Victoria. Rental prices continue to increase, while rental affordability decreases. One positive outcome of Adams, according to a member of the Coalition, is that the City of Victoria’s homelessness initiatives have “now moved towards more permanent housing rather than shelter, and towards attacking the problem of poverty, including the high cost of rental accommodation.”

There was hope that the decision in Adams might effect positive change in other communities in British Columbia. Some have argued that Adams “played a large role in influencing Vision Vancouver, the party who currently holds a majority on City Council in Vancouver, in deciding to make street homelessness and expansion of the shelter system a top priority of their government.” After the release of the Adams decision, the City of Vancouver stated that they would be reviewing it to determine its applicability to the Vancouver Streets and Traffic Bylaw. Unfortunately, the City’s legal department decided that the decision in Adams was limited to Victoria and did not apply to Vancouver’s bylaws. In April 2011, despite the objections of many


31 In 2010/11, the emergency shelter occupancy rate was 95% compared to 86% in 2008/09http://www.solvehomelessness.ca/content/file/GVCEH_Report_on_Housing%20single%20pages.pdf

32 http://www.solvehomelessness.ca/content/file/GVCEH_Report_on_Housing%20single%20pages.pdf

33 E-mail correspondence with Alison Acker

34 Doug King E-mail
community and housing groups, Vancouver’s City Council amended their *Streets and Traffic Bylaw* to prohibit the construction or occupation of any “structure, object, substance or thing” that encroaches upon a city street. Under the bylaw, any person who sets up a tent or other structure on City property is at risk of receiving a $1,000 fine, unless they apply for a costly permit. Local organizations are planning on launching a further constitutional challenge if the City does not alter its position.

While the experience in *Sparks* and *Vriend* demonstrate the very positive effect that entitlement-based claims have had in Canada where legislative protections or benefits have been extended to those previously denied them, and where new grounds of discrimination have been recognized, the experience in *Morgenthaler* and *Victoria v. Adams* have suggested that it is important to develop additional dimensions to claims, particularly substantive claims to the right to life and security of the person, which better address longer term obligations of governments to take positive measures to ensure social rights within a reasonable period of time, rather than restricting claims to more negatively framed obligations.

Similarly, transformative structural claims must be grounded in the interpretation and application of law, whether constitutional or international human rights and they prescribe not only transformative longer term strategies but must also address immediate needs and entitlements.


3. Suspended Declarations of Invalidity

Suspended declarations of invalidity have provided an alternative for Canadian courts and advocates where it is seen to be desirable for the government to be given some time to develop programmatic or legislative responses to remedy violations of rights. A leading example of this remedial strategy is the well-known case of Eldridge v British Columbia. In this case, the issue was whether a failure to provide interpretation services for the deaf in hospitals and health services violated the right to equality in healthcare. The applicants, who were deaf, argued that the lack of sign language interpretation services within the publicly funded healthcare system violated their section 15 equality rights. The Court gave the government time to choose among a “myriad” of options for the best way to provide interpreter services. The government sought and received an extension of time from the Court to consult with affected communities. There was some skepticism within the disability rights and legal communities about whether the claimants would actually get the remedy to which they were entitled. In the end, however, the consultative participatory process implemented was beneficial. Rather than providing interpreter services as an individual entitlement funded as a component of healthcare, a new program was developed with the deaf community playing a central role in design of the new program.

A less positive example of the enforcement of delayed declarations of invalidity is found in the experience following the appeal to the Supreme Court of Canada in Dunmore v Ontario (Attorney General). In that case, the Court ruled that the exclusion of agricultural workers from the Ontario Labour Relations Act, denying them the right to organize and to bargain collectively, violated the right of these workers to freedom of association under section 2(d) of

38 Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624 [Eldridge].

39 Ibid.


the Canadian Charter. The Court held that under the Charter, the government had a positive
duty to enact legislation to provide the protection necessary to ensure that agricultural workers
could meaningfully exercise their right to organize. The Court suspended its declaration of
invalidity for eighteen months to allow the Ontario government to enact a law consistent with
the Charter. However, the Ontario government's response was considered unsatisfactory by
the claimants. The government continued to exclude agricultural workers from the protections
of the Ontario Labour Relations Act and enacted a separate legislative regime for agricultural
workers that gave them fewer rights than other workers and did not explicitly protect the right
to organize or bargain collectively. A Charter challenge was launched in response to the
subsequent legislation, but the Supreme Court of Canada found that it was constitutional.\textsuperscript{42}

4. The right to positive measures and the right to reasonable decisions and policy

Louise Arbour has suggested that both Canadian courts and advocates have shown some
“timidity” in making substantive social rights claims under the Canadian Charter.\textsuperscript{43} Among
advocates, one of the reasons for this is the fear that courts will reject claims for more
substantive remedies considered to be more difficult for courts to enforce or beyond their
sphere of competence. Advocates in the past have often preferred to “win small” by framing
constitutional rights claims quite modestly in terms of challenges to existing legislation and
entitlements, where the role of the court is clear and the remedies immediately enforceable,
rather than risk “losing big” by arguing that governments have substantive obligations to take
positive measures that go beyond the four corners of existing statutory schemes and would
take time and ongoing commitment to implement.

Ironically, in a number of cases where claimants have advanced social rights claims within the
more traditional framework of statutory entitlement claims, the Supreme Court of Canada has
demonstrated a preference for softer remedies which in fact offer greater potential for

\textsuperscript{42} Ontario (Attorney General) v, 2011 SCC 20, [2011] 2 S.C.R. 3

\textsuperscript{43} L. Arbour, ““Freedom From Want” – From Charity to Entitlement’, LaFontaine-Baldwin Lecture, Quebec City
transformative change. The Court has laid the groundwork for a more transformative social rights practice based on a standard of reasonableness. Where claimants have asked the Court to order that a discrete entitlement be read into legislation in order to remedy a Charter violation, or that a provision be struck down, the Court has preferred to frame the remedy as a right to reasonable decisions within the framework of the existing statutory regime. While this remedy is more conservative in the sense of relieving the court from finding legislation itself to be unconstitutional, the remedial implications of the softer remedy open up possibilities for much broader, transformative remedial strategies.

The *Eldridge* decision provides a good example of the Supreme Court’s approach. The applicants’ lawyers framed the Charter challenge in that case as an allegation of a discriminatory legislative omission or under-inclusion, arguing that interpreter services should have been explicitly included as a health service in the legislation governing public healthcare insurance and hospital services in order to ensure equal access for the deaf. Had the Court decided the case in the manner in which the applicants framed it, the remedy would have been a simple matter of reading the omitted entitlement into the legislation. However, the Supreme Court chose to frame the violation differently and to provide a different remedy. The Court found that the legislation at issues provided hospitals with considerable discretion and that “nothing in the legislation precludes them from supplying sign language interpreters.”

Consequently, the fact that the Hospital Insurance Act does not expressly mandate the provision of sign language interpretation does not render it constitutionally vulnerable. The Act does not, either expressly or by necessary implication, forbid hospitals from exercising their discretion in favour of providing sign language interpreters. Assuming the correctness of the appellants’ s. 15(1) theory, the Hospital Insurance Act must thus be read so as to require that sign language interpretation be provided as part of the services offered by hospitals whenever necessary for effective communication. As in the case of the Medical and Health Care Services Act, the potential violation of s. 15(1) inheres in the discretion wielded by a subordinate authority, not the legislation itself.  

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44 *Eldridge*, supra note 38 at para 34.
In this case, interpreter services had previously been provided by a non-profit organization operating outside of the healthcare delivery system. The right to equality required that decision-makers exercise their discretion consistent with the value of full and equal access to healthcare for the deaf.

The Court’s softer remedy in Eldridge affirmed that human rights principles must be paramount in all decision-making. Moreover, the Court had ruled that even private actors, when they are exercising decision-making authority that has an impact on the enjoyment of constitutional rights that are otherwise the responsibilities of governments to fulfill, must exercise their authority consistently with obligations of governments under the Charter.

Central to the Court’s analysis of whether decision-making is consistent with Charter rights is the concept of reasonableness. Having determined that the failure to provide interpretation services violated section 15 of the Charter, the Supreme Court considered the cost of providing interpreter services to deaf patients in relation to the overall provincial health care budget. The Court concluded that the government’s refusal to fund such services was not reasonable.\(^{45}\) The Court incorporated the duty of reasonable accommodation of disability into the consideration of reasonable limits under section 1 of the Charter: “Reasonable accommodation, in this context, is generally equivalent to the concept of “reasonable limits.”\(^{46}\)

International human rights law generally, and the ICESCR particularly, are central to the values that underlie the assessment of reasonableness in considering whether decisions or policies are consistent with the Charter. In Slaight Communications,\(^{47}\) the Court found that the order of a private adjudicator appointed under the Labour Relations Act, requiring an employer to provide a positive letter of reference to a wrongfully-dismissed employee was a reasonable infringement of the employer’s right to freedom of expression because it was consistent with

\(^{45}\) Eldridge, supra note 38.

\(^{46}\) Ibid, at para 79.

\(^{47}\) Slaight Communications Inc v Davidson, [1989] 1 SCR 1038.
Canada’s commitments under the *ICESCR* to protect the employee’s right to work. Chief Justice Dickson held in this regard that:

Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights* ... and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one ... Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.\(^\text{48}\)

Similarly, in the *Baker*\(^\text{49}\) case, the Supreme Court held that for decisions to be reasonable they must, *inter alia*, be informed by the values entrenched in international human rights law ratified by Canada. The Court held that the discretionary authority granted to an immigration officer to review a deportation order on humanitarian and compassionate grounds must be exercised reasonably, which in that case involved considering the best interests of the child as guaranteed under the Convention on the Rights of the Child as having a higher value than the anticipated health care and social assistance costs which the officer had considered likely.\(^\text{50}\)

In the recent *Insite* case\(^\text{51}\), the Supreme Court of Canada again focused on the quality of the conferred decision-making rather than on legislative entitlement, as it had done in *Eldridge*. After rejecting the claimants’ allegation that the impugned provisions in the federal *Controlled Drugs and Substances Act*\(^\text{52}\) violated the right to security of the person under section 7\(^\text{53}\), the

\(^{48}\) *Ibid* at 1056-1057.

\(^{49}\) *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

\(^{50}\) *Ibid* at paras 64-71.

\(^{51}\) *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 [*Insite*].

\(^{52}\) SC 1996, c 19.

\(^{53}\) *Insite, supra* note 40 at paras 112-115.
Court considered whether the Minister of Health’s failure to grant an exemption, as provided under the Act, was in accordance with section 7 and principles of fundamental justice.\textsuperscript{54} Reviewing the overwhelming evidence of the benefits resulting from Insite’s safe injection site and the related health services for those in need, and considering the negative effects of a failure to ensure the continued provision of those services, the Court found that the Minister’s failure to grant an exemption violated the right to life and was not in accordance with principles of fundamental justice because it was arbitrary and unreasonable. In particular, the Court concluded that “The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.”\textsuperscript{55} The Court found that the Minister was obliged to grant a discretionary exemption to Insite, based on proper consideration of the evidence of the needs of vulnerable groups for the services it provided.\textsuperscript{56} After considering the option of issuing a declaratory order and sending the decision back to the Minister to exercise the discretion in conformity with the Charter, the Court opted instead for a mandamus order requiring the Minister to grant Insite the necessary exemption “forthwith” on the basis that this was the only reasonable decision in the circumstances.\textsuperscript{57} The Minister complied and Insite has been able to continue to provide its services. In addition, similar services are being considered elsewhere in Canada.\textsuperscript{58}

\textsuperscript{54} Ibid at paras 127-136.

\textsuperscript{55} Ibid at para 133.

\textsuperscript{56} Insite, supra note Error! Bookmark not defined.9.

\textsuperscript{57} Ibid, at para 150.

\textsuperscript{58} Initiatives developed in Montreal and Quebec in response to the ruling. Megan Harris “Following Insite ruling, safe-injection sites planned for Montreal and Quebec City,” This Magazine (November 11, 2011) <http://this.org/blog/2011/11/28/insite-safe-injection-montreal-quebec/>
In the recent decision of *Doré v Barreau du Québec* the Supreme Court revisited the obligation to exercise discretion consistently with the *Charter*, but departed to some extent from its approach in *Slaight Communications* and subsequent decisions following that model. Where administrative decision-makers are required, as in *Slaight Communications*, to protect Charter rights and human rights values in the context of exercising discretion, the Supreme Court proposes in *Doré* that judicial review of such decisions may be conducted under an administrative law test of reasonableness, rather than by way of section 1 reasonable limits and proportionality analysis. Writing for the Court, Justice Abella explains that the modern view of administrative tribunals has given rise to a more robust form of administrative law reasonableness, nurtured by the *Charter* and human rights law, which can provide essentially the same level of protection of *Charter* rights as does the kind of section 1 *Charter* analysis of reasonable limits and proportionality that was conducted in *Slaight Communications*.

The longer term implications of this convergence in Supreme Court of Canada jurisprudence of administrative law, constitutional and human rights standards of reasonableness, including the obligation to take reasonable measures to accommodate the needs of disadvantaged groups, are not entirely clear. However, it is certainly clear that the new approach described in *Doré* provides strong grounds for insisting that all administrative decision-makers consider both explicit *Charter* rights and the foundational “*Charter* values” that have been closely linked to Canada’s international human rights obligations, including socio-economic rights. The challenge of enforcement of the transformative potential of this new ‘robust’ standard of reasonable decision-making will be to ensure that the obligation to consider human rights values is taken seriously by administrative decision-makers. As Lorne Sossin notes:

If the principle that discretion should be exercised in a manner consistent with *Charter* values is incorporated into the guidelines, directives and practices of

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59 *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

60 *Multani*, *supra* note Error! Bookmark not defined..

61 *Doré*, *supra* note 56 at para 29.
tribunals, this could have a profound effect on the opportunity for these adjudicative spaces to advance social rights. By contrast, if such values turn out not to be relevant in the everyday decision-making of such bodies, then the Court’s rhetoric in *Doré* will suggest a rights orientated framework that is illusory.  

As noted above, transforming entitlement systems which give rise to systemic violations of social rights into those which ensure social rights requires a revaluing of the rights of people who have been consistently denied their dignity. This must occur at all levels of decision-making and engage a wide range of actors. For this reason, rights-based strategies recommended by UN Human Rights bodies demand access to effective remedies at all levels of programming and administration.  

A positive development in the Supreme Court of Canada, therefore, has been the recognition that constitutional and human must permeate all decision-making and cannot be the sole preserve of courts. The Court’s remedial focus on ensuring a right to reasonable decisions provides a very strong basis for attempting to enforce social rights-consistent decisions and policies among a range of actors and before multiple adjudicative bodies. Constitutional remedies that order entitlements in the simplest and most enforceable manner, as claimants in the *Eldridge* and *Insite* cases proposed, do not tend to address the need for rights-based decision-making by non-judicial actors. They assign the job of interpreting and applying constitutional rights and human rights in particular contexts primarily to courts and give courts the job of determining and ordering precise entitlements. Such orders are more easily enforced because the remedy is entirely within the control of the court. Decision-makers are instructed about what entitlements to provide by the courts. The disadvantage of this traditional model of remedy and enforcement, however, is that it limits decision-making informed by rights to judicial review by courts, rather than disseminating it more widely among other decision-makers.

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62 Ibid.
The alternative approach that has emerged from the Supreme Court of Canada’s Charter jurisprudence assigns the court a role of clarifying the principles, rights, and values that ought to inform rights-based decision-making, and around which entitlement systems must be designed and reformulated. Rather than considering whether a particular benefit must be provided as a statutory entitlement, this approach focuses on the quality of the decision-making that led to the denial of a benefit or protection that resulted in the infringement of a right. The court is assigned an oversight role. In its review of particular cases where Charter rights or international human rights were engaged by the exercise of discretion, the Supreme Court has clarified how human rights and values are to be considered and applied by decision-makers who must themselves develop competence rather than simply relying on courts or legislatures to clarify every issue or dispute about statutory entitlements.

An interesting example of the sometimes unforeseen benefits of the converging standards of reasonableness in Canadian jurisprudence is found in Newfoundland (Treasury Board) v. N.A.P.E.⁶³ — a case in which the claim was actually rejected by the Supreme Court of Canada and consequently no remedy ordered. In this case, the Newfoundland and Labrador Association of Public and Private Employees challenged a decision to retroactively delay until 1991 the implementation of a pay equity program scheduled to commence 1988, thereby erasing a pay equity award of $24 million for workers in underpaid areas of women-dominated employment. The government argued that the measure was necessary because of “a financial crisis unprecedented in the Province’s history.” It is true that the province had at the time, a debt to GDP ratio which was higher than any other province has ever had in the last 20 years, and with the collapse of the fisher, the highest unemployment rate in Canada. Unlike most other provincial governments in Canada, Newfoundland and Labrador fully protected social assistance rates of single mothers from any cut-backs, even though they were the second highest rate in absolute dollars in Canada, second only to Ontario’s (prior to the Harris cuts, of course) - which meant that in relative terms, they were clearly the best. The commitment to

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protect social assistance in Newfoundland continues - it is province with the smallest gap between the poverty line and social assistance rates. It has the lowest level of income inequality in Canada. It had the highest per capita debt in Canada severe fiscal restraint, when budget cuts were being made in all areas of spending. The claimants, on the other hand, argued that the rollback constituted sex discrimination, which could not be justified on budgetary grounds. The Supreme Court of Canada agreed that revoking the pay equity award constituted discrimination against women. It stated that however, it found that the measure was justified in the circumstances of cutbacks to hospital beds, lay-offs and reduced social programs.

While the *N.A.P.E.* decision was seen by many as a severe setback to women’s equality rights, it is interesting to note that the principles enunciated in the decision nevertheless played an important part in the claimants later securing their entitlement through political rather than legal means. Two years after the Supreme Court issued its judgment, with oil revenues starting to flow into Newfoundland, a lobbying campaign by women’s and labour groups was successful in convincing the government to make the retroactive payment of $24 million that had been denied as a remedy by the Supreme Court of Canada. The campaign relied heavily on the decision of the Court that the non-payment of the award had constituted discrimination. In this sense, even in finding against the claimants, the Court had established the basis for a principle that empowered the group affected to eventually win the entitlement they sought. A framework was suggested for the assessment of reasonableness in budgetary allocations, which subsequently allowed constituencies to lobby for fairness in budgetary allocations relative to available resources and competing social rights obligations.

**From Constitutional Remedial “Dialogue” to Rights Based “Conversation”**

The expanded role of administrative bodies in relation to *Charter* adjudication means that a “robust” standard of reasonableness, articulated in very similar terms as those of the Constitutional Court in South Africa and international human rights bodies, has become an

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important framework for the accountability of administrative decision-makers and the enforcement of standard of reasonableness among a range of decision-makers beyond courts.

There is also a fear among advocates in Canada that soft remedies leave too much undecided in comparison to immediately enforceable entitlements. However, the benefits of softer, principled remedies must not be disregarded or ignored. Social rights advocates in Canada, as elsewhere, are developing strategies to ensure the risks associated with these remedies are addressed in the way remedies are designed.

The judicial preference for overseeing, adjusting, or correcting flaws in existing entitlement systems, rather than adjudicating allegations of broader systemic failures, has been formulated in a common refrain by Canadian courts. Canadian courts have often affirmed that there is no constitutional right to welfare, healthcare, or human rights protections; only affirming that once a system has been put in place to provide these rights, it must conform to the Charter. Courts have given no coherent justification for the idea that constitutional rights should be subservient to the decisions of legislatures as to whether or not to institute statutory entitlements to fulfill them. Moreover, the Supreme Court of Canada has recognized that the Canadian Charter applies to governments’ failures to act within their authority in the same way as it applies to their actions.65 There is simply no justification for suggesting that constitutional claims should be limited by the terms of existing statutory regimes. Such a position is at odds with Canada’s international human rights obligations to adopt necessary legislative measures to implement international human rights and it is also fundamentally at odds with accepted principles of constitutional supremacy.

The incoherence of the notion that constitutional rights must be framed within existing entitlement schemes is manifest in the contradictions that arise with respect to remedies in the Canadian context. In the area of welfare entitlements, the Nova Scotia Court of Appeal decided in an early Charter case to remedy discrimination between two categories of welfare recipients

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65 Vriend, supra note 10 at para 60.
by lowering the benefits of single mothers to the level of single fathers or “equalizing down” to identical levels of gross inadequacy.\textsuperscript{66} The Supreme Court of Canada properly identified this remedial approach as “equality with a vengeance.”\textsuperscript{67} As noted, in the \textit{Vriend}\textsuperscript{68} case, the majority of the Supreme Court of Canada ordered ‘sexual orientation’ to be read into Alberta’s provincial human rights legislation, finding that this remedy was more faithful to the intent of the legislature than striking down the entire Act and removing the protections for all groups facing discrimination. However, Justice Major of the Supreme Court dissented, favouring a declaratory remedy that would allow the legislature to choose “no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination.”\textsuperscript{69} Without recognition of an overarching obligation to ensure the existence of systems and legislation to protect rights, the right to equality unravels into a right to have no human rights protections at all. Clearly a more coherent approach to the issue of substantive obligations and remedies is needed—one that infuses the issue of remedy with values that move beyond the four corners of a particular statutory entitlement, towards the goal of substantive enjoyment of rights.

There has been much discussion in the Canadian context of a constitutional ‘dialogue’ between courts and legislatures. Positive experiences of enforcement of social rights remedies, however, suggest that the notion of a two-way conversation is misconceived. As a result of the unusual history of ESC rights being, in many instances, rights without complaints procedures, claimants’ and stakeholders’ voices have too often been ignored in our understanding of “constitutional dialogue.” An important advantage of enforcement mechanisms based on the standard of reasonableness in decision-making is that they tend to be more effective in bringing the claimant group into the enforcement process, in the design and implementation of remedies.

\begin{footnotes}
\footnote{\textit{Schachter}, supra note 18.}
\footnote{\textit{Vriend}, supra note 9.}
\footnote{\textit{Ibid}, at para 196. (Major J dissenting in part).}
\end{footnotes}
This point is evident in the leading Supreme Court of Canada case on longer term judicial monitoring of remedial enforcement, *Doucet-Boudreau v. Nova Scotia*.\(^7^0\) In this case, the Supreme Court of Canada considered the common law principle of *functus officio* in a challenge made by the Nova Scotia provincial government regarding a remedy that was established by a provincial judge in a *Charter* challenge based on the right to public funded minority French language education. The trial judge had ordered governments to use their ‘best efforts’ to develop French secondary school facilities and programs by specific dates in different districts. The judge broke with normal Canadian judicial practice by retaining jurisdiction to hear progress reports from the government. While this approach would be commonplace in other countries, in Canada it was considered more controversial. In its decision, a majority of the Supreme Court affirmed the primacy of the notion of effective and responsive constitutional remedies. The Supreme Court found that a lower court may play a role in supervising the implementation of remedies, including holding further hearings into the implementation of the order, as long as the decision itself is not altered on the basis of subsequent hearings.\(^7^1\)

A minority of the Supreme Court of Canada, however, found that the order exceeded the appropriate role of courts by breaching the separation of powers principle and its jurisdiction in relation to the *functus officio* doctrine. The minority held that the Court engaged in political activity by attempting to hold the government’s “feet to the fire,” noting that “the trial judge may have sought to exert political or public pressure on the executive.”\(^7^2\) What the minority missed was that it was not the judge who exerted the political pressure but the claimants. The claimant communities relied on the reporting sessions as democratic accountability mechanisms to ensure the timely implementation of their fundamental rights. The reporting sessions enabled claimants to move a cumbersome process along more expeditiously.

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\(^7^0\) *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR.

\(^7^1\) *Ibid* at para 71.

\(^7^2\) *Ibid* at para 131 (per Major, Binnie, LeBel and Deschamps JJ, dissenting).
Effective principle based remedies and enforcement require ongoing accountability mechanisms that give power to the groups whose rights were violated or ignored. Legislative accountability to courts should not be to the courts as administrators of entitlements, but rather to the courts as interpreters of fundamental human rights.

**Democratic Accountability and Effective Enforcement**

In *Doucet-Boudreau*, the ongoing accountability for enforcement was assured by way of scheduled reporting sessions to the court. An alternative remedy, fashioned in a different institutional setting, might have required reporting sessions to some other body that could provide effective oversight. In recently launched challenge to governments’ failure to implement effective strategies to address the crisis of homelessness in Canada, claimants are asking the court to order the government to develop, in consultation with affected communities, effective accountability mechanisms through which progress against set goals and timetables for the elimination of homelessness and the implementation of the right to adequate housing can be assessed. Claimants are also asking the court to retain jurisdiction in the manner of the court in *Doucet-Beaudreau*.

**The constitutional challenge to homelessness**

The emerging challenges of pragmatic and purposeful design of remedial and enforcement mechanisms were highlighted in Canada in 2010 when a large network of groups and individuals dealing with homelessness came together to plan a constitutional challenge to Canadian governments’ failure to effectively address widespread homelessness. The network looked to the recommendations of international human rights authorities, like the United Nations Special Rapporteur on adequate housing and United Nations Committee on Economic, Social and Cultural Rights (CESCR), which had repeatedly called on Canadian governments to work together to adopt a national strategy to address homelessness. The network questioned why Canadian courts had never been used to make such a recommendation enforceable and eventually decided this would be an ideal opportunity to finally ask the courts to make the international recommendation an enforceable remedy.
While numerous challenges have been advanced in relation to components of the right to adequate housing in Canada, including under-inclusive security of tenure protections, rental qualifications that disqualify low income tenants, inadequate welfare rates for particular groups, excessive utilities costs for low income households, and prohibitions on the temporary erection of shelters in parks, there has never been a challenge claiming the right to adequate housing as a substantive right. In advancing components of the right to adequate housing, international human right law was used to encourage courts to interpret existing statutes or constitutional rights in a manner that would advance the right to housing. However, over 25 years of litigation under the Canadian Charter of Rights and Freedoms, no group or individual has ever before put forward a claim that would seek, as a remedy, a coherent response to the problem of homelessness. This means that the right to adequate housing has never really been claimed as a substantive right — only as a backdrop to other types of more instrumental claims.

One of the reasons the right to adequate housing had never been claimed as a substantive right before was that Canadian housing advocates had come to think in terms of the types of remedies courts are used to enforcing rather than those which would really address the problem of homelessness and inadequate housing. While asking that homelessness be challenged and remedied in a single court case may seem to be a great feat, the problem of homelessness is eminently solvable in Canada. Given Canada’s abundant resources, there is no justification for the ongoing violation of the right to adequate housing. Claiming the right to

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73 Sparks, supra note 1.


77 Adams, supra note 24.
housing as the right to sleep under a box in a park is not appropriate in the context of Canada’s abundant resources.

The network launching the constitutional challenge to homelessness decided to approach the case from a different perspective. Instead of starting with specific pieces of legislation that could be challenged and addressed through traditional, statute-based remedies, the network decided what kind of remedy would actually solve the problem of homelessness and chose to justify to the court why it should order this remedy. After months of preparation, the claim was filed with the Ontario Superior Court on May 26, 2010.

In the filed claim, the network is asking the Court to order the federal and provincial governments to design, in collaboration and meaningful consultation with stakeholders, an effective strategy to implement the right to adequate housing, precisely as has been recommended by the CESCR and the Special Rapporteur. This means the strategy must include complaints procedures, meaningful accountability mechanisms, timetables and benchmarks for the elimination of homelessness, and a central role for civil society, Indigenous communities and affected groups in developing, implementing and monitoring the strategy. The applicants in this case are asking for what some might term a ‘soft’ remedy. They are not asking for the direct provision of housing or compensation – they are seeking a strategy to end homelessness and implement the right to adequate housing in Canada.

It is important to note that many claimants are not in a position to forego individual remedies in this way. In other legal contexts, it would be advisable to demand compensatory damages and individual remedies. The kind of strategic litigation aimed systemic solutions should complement, not replace, the vast array of individual claims to particular benefits, challenges to evictions or to discriminatory policies that are critical to housing rights advocacy in Canada and elsewhere. As noted above, it is critical to elucidate on a case-by-case basis the purpose of the claiming of rights, and design remedy and enforcement around that purpose.

The enforcement of human rights through rights-based processes of accountability, especially the expansion of two way ‘dialogue’ between courts and legislatures into a broader
conversation that engages rights claimants, is critical to effective enforcement of systemic claims in Canada as in other jurisdictions. Social rights accountability requires much broader and more diverse participation, on both the claimant and respondent sides, than the traditional model suggests. It is up to the courts to frame enforcement orders in a way that all of the relevant actors are engaged in an ongoing, rights-based process of accountability to substantive rights. Effective participation by rights holders must be incorporated into standards of reasonable decision-making.

Giving a voice to diverse communities of rights-holders, and understanding obligations from governments to delegated decision makers and private actors, is critical to effective enforcement of systemic challenges to ‘entitlement system failures.’ Social rights violations are usually the result of failures of democratic accountability and inclusiveness, and social rights remedies must be enforced in a manner that will bring about new forms of democratic participation and accountability. If social rights remedies are to actually bring about the enjoyment of social rights, the remedies will have to be based on the ongoing application of human rights principles, and on the empowerment of marginalized communities to be involved in that process.