

The International Covenant on Social, Economic, and Cultural Rights: Will It Get Its Day in Court?

GAILE MCGREGOR*

I. INTRODUCTION

LOOKING AT TRENDS IN THE SUPREME COURT, one might think that *fin-de-siècle* Canada is a bastion of progressiveness. After what many observers saw as a mid-decade conservative retrenchment,¹ decisions like *Vriend*, *Eldridge*, and *Law* have put the Court well back on the liberal tack that it pioneered in *Andrews*.² If one looks at the real world, however, the progressiveness evaporates. Statistics show that the number of poor people in the country has grown dramatically in the last two decades. "Although the percentage of Canadians in poverty fell from 1973 to 1981," says Andrew Armitage, "since then it has in-

* Gaile McGregor is an Adjunct Professor in the Faculty of Information and Media Studies at the University of Western Ontario and Managing Director of Terraconnaissance Inc., a London Ontario consulting company specializing in political communication, trend analysis, and interdisciplinary social and legal research. Holding graduate degrees in English and Sociology in addition to an LL.B., Dr. McGregor has written and taught extensively on Canadian and American social, cultural, and political history. A major area of interest in recent years has been the social and economic effects of, and the legal remedies for, age discrimination in employment in both countries. Dr. McGregor is currently being funded by the Law Commission of Canada to carry out a study of age bias in the Canadian employment insurance regime.

¹ See, for example, L. Trakman, "Section 15: Equality? Where?" [1995] 6 Const. Forum 112; D. Beatty, "The Canadian Conception of Discrimination" [1996] 4 C.L.E.L.J. 263.

² *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*]; *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. 12 [hereinafter *Law*]; *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 357 [hereinafter *Andrews*]. For a discussion of the implications of these cases, see M. Jackman, "'Giving Real Effect to Equality': *Eldridge v. British Columbia (Attorney-General)* and *Vriend v. Alberta*" (1998) 4 R. Const. Studies 352.

creased and, for families, more than eliminated the gains made in earlier years.”³ Exacerbating the plight of the needy, the value of social assistance programs has steadily eroded over the same period.⁴ Is this a problem to which there is any “legal” solution? Most people would say no. The judge in *Masse v. Ontario*, a 1996 *Charter* challenge to a 21.6% cut in Ontario’s welfare benefits, opined that there was no legal obligation for a government to provide a social assistance system at all.⁵ Fortunately, not everyone agrees with this. “The argument that poverty must be addressed as a human rights issue was recently endorsed by the United Nations Committee on Economic, Social and Cultural Rights in its second periodic review of Canada’s compliance with the International Covenant on Economic, Social and Cultural Rights [(“ICESCR”)],” says Jackman.⁶ I will be returning later to the issue of Canada’s performance under the ICESCR. For now, the question I would like to consider is whether the obligations to which the country committed itself in signing this convention—obligations which the aforementioned Committee would very definitely see as including the alleviation of economic disadvantage⁷—could be invoked to preclude the kind of knee-jerk reaction that we see in *Masse*.

II. BACKGROUND

THE ICESCR IS PART OF AN AGGREGATE KNOWN collectively as the international bill of rights. The centrepiece of this set of documents is the U.N. Uni-

³ A. Armitage, *Social Welfare in Canada Revisited: Facing Up to the Future*, 3rd ed. (Toronto: Oxford University Press, 1996) at 60.

⁴ For a single retired person living entirely on public resources, for instance, the total available benefits declined between 1985 and 1995 from 83% to 77% of the poverty line. *Ibid.* at 68. For comprehensive statistics on the economic disadvantage of older Canadians, a Fact Sheet on “The Economics of Aging in Canada” may be obtained by contacting the author at <terracon@sympatico.ca>.

⁵ *Masse v. Ontario (Minister of Community and Social Services)*, [1996] O.J. No. 363 (Ont. C.J. Gen. Div.) [hereinafter *Masse*].

⁶ M. Jackman, “A Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law” (1994) 2 R. Const. Studies 76 at 117–8.

⁷ In consideration of space constraints, referencing in this paper is limited to matters of opinion and interpretation. For general background on the covenants, I have drawn particularly on A. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992); M. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Oxford: Clarendon Press, 1995); H. Kindred et al., *International Law, Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Emond Montgomery, 1993); and W. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996), plus a special issue of H.R.Q. (vol. 9, 1987) on implementation of the ICESCR.

versal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948. Conceived in the immediate aftermath of World War II, and driven by public reaction to the revelation of atrocities in Europe, this initiative was originally intended to produce a single comprehensive treaty. Due to the divergence of views among member states, however, what came out of the process was four separate "pieces": the declaration itself, listing the basic rights to which all people were considered entitled; two covenants (the aforementioned ICESCR, along with a companion document, the International Covenant on Civil and Political Rights ("ICCPR")) which states could ratify to make those rights binding; and an Optional Protocol to the former providing individuals with a right of petition. Why the change of plans?

Scott singles out three groups of reasons for the decision to subdivide the project.⁸ The first had to do with concerns about implementation, focussing primarily on justiciability issues. The second had to do with ideological differences, with the West, especially the U.S., wanting to emphasize individual civil and political ("CP") rights⁹ and the Eastern bloc pushing for more attention to collective rights and to social and economic inequities. The third were pragmatic, boiling down to the feeling that it was better to move ahead with the "easy" piece—what eventually became the ICCPR—leaving the less developed and more contentious economic, social, and cultural ("ESC") rights for future deliberations. As it happened, both covenants were ready for adoption in 1966. The price of this tandem progress, unfortunately, was a significant divergence in approach between the two treaties, with ESC rights getting what many people would see as an inferior degree of protection. The key difference for present

⁸ C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgd Hall L.J.* 768 at 794 ff.

⁹ Notwithstanding the reference to ideology, it is perhaps worth noting that the American stance on this issue was more an artifact of the particular period than a symptom of some kind of ineradicable national "difference." Reflecting what was a common view during the war that poverty was a major contributory factor to the growth of totalitarianism, Franklin D. Roosevelt explicitly advocated the adoption of an "Economic Bill of Rights." "We have come to the clear realization of the fact that true individual freedom cannot exist without economic security and independence," he said in his 1944 State of the Union Address. "Necessitous men are not free men." People who are hungry and out of job are the stuff of which dictatorships are made" (quoted in A. Eide, "Economic, Social and Cultural Rights as Human Rights" in A. Eide, C. Krause, & A. Rosas, *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 1995) at 28–29). Only a few years later the mood had changed drastically. By the time the covenants were being debated, and continuing until today, the only kind of "economic right" that U.S. courts have generally been willing to enforce is the negative right to carry on economic activity without interference from the government. For an indication of how normalized this view has become, see L. Henkin, "Economic Rights Under the United States Constitution" (1994) 32 *Columbia J. Transntl. L.* 97.

purposes is the fact that while the ICCPR binds its signators to immediate implementation, the ICESCR allows for an incremental approach. While both the initial framing of the covenants¹⁰ and the statements made subsequently by those involved in their administration¹¹ support the view that the two sets of rights are not only of equal importance but indivisible, the fact is that the creation of two different regimes has allowed the various states to indulge their own ideological predispositions in deciding what is required under the various heads.¹²

As far as substance is concerned, the breakdown between the two documents is much as one would expect. The ICCPR covers the familiar "liberal" spectrum: legal rights, equality rights, mobility rights, freedom of religion, expression, assembly, association, and so on. The ICESCR, in contrast, focuses on rights bearing on social conditions and relations: the right to work; the right to social security; the right to protection of the family; the right to education, to culture, to health, to freedom from hunger—most contentiously perhaps, the right to "an adequate standard of living" (Article 11), including food, clothing, and housing.¹³ One can see from this list why the Western nations might have had qualms. Though insiders have repeatedly insisted that ESC rights are not

¹⁰ It is notable, for instance, that the preambles to both covenants are almost identical. Both begin with the contention that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Both emphasize the interdependence of rights. Where they diverge is merely in the emphasis they give to the components in the mix. Where the ICCPR says that "the ideal of free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights," the ICESCR says that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."

¹¹ In 1950, for instance, after a long and somewhat acrimonious debate over the separation issue, the General Assembly declared that "the enjoyment of civil and political freedoms and of economic, social, and cultural rights are interconnected and interdependent"; Craven, *supra* note 7 at 18. This precept has been reiterated and emphasized repeatedly, both by the Committee itself and in surrounding commentary. See, e.g., Item 3 in "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights," reproduced in (1987) 9 H.R.Q. 122 at 123 [hereinafter "Limburg Principles"].

¹² Next to the lack of enforcement mechanisms (discussed below), the susceptibility to opportunistic "interpretation" is perhaps the greatest weakness of the ICESCR. See A. Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights" (1996) 18 H.R.Q. 23, for a vivid picture of the laxness, inconsistency, and sometimes disingenuousness of the reporting practices which have been characteristic under this treaty.

¹³ The two documents overlap somewhat on trade union rights—art. 22(1) of the ICCPR, art. 8 of the ICESCR—though they are more fully developed in the latter.

tied to a particular ideological vision,¹⁴ it is obvious that many of the measures necessary to fulfil these kinds of obligations are going to interfere with the “free” operation of a market economy. This probably explains why there is no right of petition under ICESCR. Instead of being driven by complaints (which puts the process outside of official control), compliance on ESC rights is measured by way of a voluntary reporting system. It also explains why administrative procedures were so slow in developing. In 1966 there was no political will to push the “other” covenant. A working group was formed in 1978, but attracted much criticism for its rather haphazard way of proceeding. It was not until 1985 that an independent expert committee was finally put in place.

While slow to find its feet, the Committee on Social, Economic, and Cultural Rights has become something of a force to reckon with. Craven comments that it is known among U.N. committees for its innovation and dynamism.¹⁵ The problems spawned by the drafting process did not disappear simply because they were put under new management. Despite its primary reliance on the five-yearly formal reports, however, the Committee has become both more proactive in developing standards and guidelines¹⁶ and, at least since 1993, more militant in its criticisms of recalcitrance and backsliding. Whether it is a cause or a consequence of this development, moreover, one might also argue that ESC rights in general have become more widely recognized and accepted over the last decade.¹⁷ It is notable that after some initial scepticism and resistance, the European Community has given considerable prominence to social and economic rights in its harmonizing legislation. With important implications for Canada after NAFTA, it is also notable that this was seen specifically as a corrective to the free market emphasis of the political union. “The Community Charter was developed primarily as a social policy counterpart to the recent process of European integration and trade liberalization,” says a study released by the Attorney

¹⁴ “[T]he argument that a particular system of political economy is dictated by the Covenant is bluntly contradicted by the *travaux préparatoires*,” notes one commentary. “To cite but one example, the representative of Yugoslavia—a centrally planned economy—stressed ‘that the Commission [on Human Rights] ... was not concerned with the organization or the constitution of a State but merely with the guarantee of human rights by the State. The Covenant would lay down the obligation: how that obligation would [be] fulfilled may vary from State to State.’” P. Alston & G. Quinn, “The Nature and Scope of State Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” in “Symposium” (1987) 9 H.R.Q. 156 at 183.

¹⁵ Craven, *supra* note 7 at 27.

¹⁶ The main vehicles for these are the proceedings of the thematic discussions held for one day of each session, the Concluding Observations to the sessions, and the General Comments released periodically on particular issues.

¹⁷ *Except* by the Americans, one should perhaps add. As things stand now, the U.S. is one of only two signatories of the ICCPR (along with Haiti) who have not also signed the ICESCR. See Eide, *supra* note 9 at 23.

General's office. "Its proponents argued that it was essential to enshrine certain social and economic standards that might otherwise be eroded through 'social dumping' under deregulation."¹⁸ Given that many of the problems I talked about in my introduction are also the by-products of deregulation, the next question we might consider is where Canada stands on the CP/ESC debate.

III. CANADA'S POSITION

DESPITE THE AVAILABILITY OF A GROWING NUMBER of useful books and articles on this subject, it became clear as I began working on this project that the only way to get a real "feel" for judicial attitudes was from the case law itself. It also seemed useful to go beyond the cases commonly cited to try to get some idea of trends across the board. To keep the sample to a manageable size, I decided to concentrate on cases that would share at least methodology and potentially some issues with the kind of litigation I am considering in this paper. Judging by past practice, the most likely points of entry for a *Charter* challenge to government social assistance policy are section 7 (the claimant is deprived of a right by improper means) or section 15(1) (the claimant is denied equal benefit of a right or entitlement).¹⁹ It is at least conceivable, on the other hand, that other kinds of rights, like mobility rights or democratic rights, could have social or economic consequences, as could the fundamental freedoms. Issues bearing on limitation or justification, moreover, are relevant to *all* sections.

To avoid a premature narrowing of my compass, I settled on a search for all non-criminal *Charter* cases invoking either of the two covenants. What emerged from this process were 52 decisions of gratifyingly varied types (see Caselist, below). Much of the sample is made up of public law cases, with subject matter ranging from refugee claims to parents' and prisoners' rights. A few involve family law or tax appeals. There is one landlord and tenant case. Free-

¹⁸ Ministry of the Attorney General, *The Protection of Social and Economic Rights: A Comparative Study* (Constitutional Law and Policy Division Staff Paper, 1991) [hereinafter *Protection of Social and Economic Rights*].

¹⁹ For a more detailed discussion of the problems and potential for economic *Charter* challenges under these two sections, see M. Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through *Charter of Rights Review*" (1999) 14 J. L. & Soc. Pol. 69. Another possible approach, at least theoretically, is by way of article 36(1) of the *Constitution Act, 1982* which commits the government of Canada and the provincial governments to, *inter alia*, "promoting equal opportunities for the well-being of Canadians" and "providing essential public services of reasonable quality to all Canadians." This "commitment" has never been enforced by the courts and is generally believed to be non-justiciable. It is at least possible, however, that if one could persuade the court to take the country's international obligations more seriously by the means outlined in the latter sections of this paper, these in turn could be used to support a less toothless approach to s. 36.

dom of expression, freedom of association, and freedom of religion appear in a number of guises. There are a variety of challenges to provincial and federal legislation. Finally, there is a smattering of “big” cases involving political questions like Meech Lake, the placement of electoral boundaries, or the secession of Quebec. What role do the covenants play in these decisions? While space constraints prohibit any detailed discussion of individual cases, at least four general points may be inferred from the collective results.

First, considering the coverage of the database used (Quicklaw: Canada Judgments), the number of hits was unexpectedly skimpy. Further investigation suggests that this was not an artifact of the search parameters. Schabas lists only 400 *Charter* cases since 1982, including tribunal decisions and criminal cases, in which there is reference to *any* international human rights convention.²⁰ Just for comparison purposes, I did a search for “human rights” plus “*Charter*,” and came up with 1,880 items just in the courts. Obviously international sources are only being invoked in a small percentage of the cases where they might have some relevance.

Second, the international instruments are not given much weight. Evidence of this is the small amount of attention they garner. In 29 cases they are mentioned only in passing, usually as part of a summary of the parties’ arguments. In 12 cases they are not invoked directly at all, but turn up in the form of a citation or reference in a passage quoted from another case or document, sometimes to entirely disparate ends. Most notable in this line is a paragraph from Dickson C.J.’s opinion in *Irwin Toy*,²¹ quoted in all of five cases, which refers in an off-handed manner to “various international covenants” as a source for “economic rights.” The second evidence of discounting is the significance that they are assigned in these judgments. In two cases they are distinguished, in nine they are held or implied to be inapplicable, and in a further 19 the judge makes no comment beyond the initial listing or mention. Only in 11 cases are the covenants or their provisions discussed in even modest detail. And only in 11 is there any evidence whatsoever that they affected or entered into the decision-making process.

The third point to note is that the treatment accorded to international law generally in these cases is both inconsistent and superficial. Many of the judgments betray a certain impatience that anyone would bring up anything so irrelevant. A significant number simply repeat the mantra (learned in school no doubt) that international law is not part of domestic law unless expressly adopted. Others cite precepts or principles in a generally approving but entirely uncritical manner, as if they simply stand for some kind of universal truism. Taken as a group, very few of these judges seem either to know or to care much

²⁰ Schabas, *supra* note 7 at 13.

²¹ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].

about international law. One surprising finding, for instance, was the general failure to canvass judicial views on the subject. Dickson C.J.'s analysis in *Reference Re Public Service Employee Relations Act (Alberta)*²² is the most extended and, arguably, most authoritative judicial discussion of the applicability of international law that has yet been produced in the country. While this case turns up occasionally on a list of cases "referred to," no-one (except the Chief Justice himself, in *Slaight Communications v. Davidson*²³) invokes, quotes or considers this opinion in deciding how he or she should respond to arguments based on international instruments.²⁴

The last point to note about this sample takes on particular resonance in light of what I said earlier about different attitudes toward the two covenants. I began this section by asking how Canada weighed in on the debate over ESC rights. Taken at face value, the sample breakdown implies that the simple answer is: minimally, if at all. Of the 52 cases listed, only ten cite the ICESCR, compared with 39 for the ICCPR. (The others were those general "covenants" references mentioned earlier.) This suggests rather strongly that Canada, though a signator to the treaty, is attitudinally indistinguishable from the U.S. when it comes to social and economic rights. Adding force to this conclusion is the pattern that emerges from international comparisons. Of the 14 countries included on a table showing the constitutional entrenchment of various ESC rights among OECD members, Canada and its neighbour are the only ones who score zero in all eight categories.²⁵ Does that mean that the idea of using the

²² [1987] 1 S.C.R. 313 [hereinafter *Public Service*]. Although the Chief Justice writes in dissent here, his comments on the subject, made in *obiter*, are not contradicted by any of his colleagues. Adding force, he repeats the nub of his reasoning (albeit without the extended application) writing for the majority in *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*].

²³ *Slaight Communications*, *ibid.*

²⁴ This lack of reflexiveness is one of the things about which A. Bayefsky is most critical in her writing on Canadian applications of international human rights law. "After the introduction of the *Charter*, there was an exponential growth in the number of cases which referred to conventional international human rights law in the course of interpreting domestic law These cases, including those of the Supreme Court, have made virtually no effort to consider whether Canadian human rights treaties have been implemented In two non-*Charter* cases concerning human rights ... the Supreme Court used human rights treaties ratified by Canada ... to support interpretations of domestic law. No justification for introducing international law was given." And later: "In none of the opinions of the Supreme Court citing non-binding international law to support an interpretation of the *Charter* is any justification for the reference given In the absence of [such] justification ... reference to such sources seems to be completely haphazard." A. Bayefsky, "International Human Rights Law in Canadian Courts" in I. Cotler, ed., *International Human Rights Law: Theory and Practice* (Montreal: CHRF, 1992) at 132 and 136.

²⁵ "A Sample of OECD-Member State Constitutions that Entrench Social and Economic Rights or Principles," in A.P. Blaustein & G.H. Franz, eds., *Constitutions of the World* (Nova

ICESCR as a weapon in poverty law litigation is doomed? Before I answer this, I would like to consider some possible explanations for what I found in my survey. The reason this covenant makes such a poor showing, even beyond the poor showing made by its sister document, is, one might argue, related to judicial difficulties with international law generally and with ESC rights in particular. The question is whether these difficulties are inevitable.

IV. INTERNATIONAL LAW IN GENERAL

CUSTOMARY INTERNATIONAL LAW IS AUTOMATICALLY VALID in Canada, except to the extent that it conflicts explicitly with domestic law. Conventional international law, on the other hand, does not become valid unless and until it is expressly implemented in domestic legislation by a government having the appropriate jurisdiction. If there is a conflict between the implementing legislation and the treaty, the legislation prevails. Only if the legislation is ambiguous on its face may the treaty be invoked as a guide to interpretation. Or so tradition says. In fact, there are indications that the situation may no longer be as settled as this summary suggests. Certainly the ambiguity rule has been loosened. In some cases—like many of those in my sample—this appears to be a result of judicial ignorance. (Many of these lawyers and judges seem to invoke international law as they would invoke a useful book or article, without giving much consideration as to whether and why it is proper to do so.) In others, however, it is clearly deliberate. In *National Corn Growers Association v. Canada (Import Tribunal)*,²⁶ for instance, the Supreme Court appears to hold that a discrepancy between the legislation and the treaty it implements may be enough to constitute an ambiguity. The jurisdiction rule would also appear to be in flux. Where once it was considered flatly impermissible for the federal government to create an implementing instrument in an area of provincial competence, the court in *R. v. Crown Zellerbach*²⁷ ruled that a federal act regulating the dumping of substances in the internal waters of a province was *intra vires* because international obligations incurred in the area brought it under the “national concern” doctrine which in turn brought it within the peace, order, and good government power of the federal government. Last but certainly not least, the “express” requirement would no longer appear to be as firm as it once was.

Because of its importance for present purposes, it is worth looking at this third area of slippage in some detail. In 1977, in a case called *MacDonald v. Va-*

Scotia: Oceana Publishing, 1990), reprinted in *Protection of Social and Economic Rights*, *supra* note 18 at 9. The categories canvassed are social assistance, health, housing, employment, education, environment, and culture.

²⁶ [1990] 2 S.C.R. 1324.

²⁷ [1988] 1 S.C.R. 401.

pour,²⁸ the Supreme Court found that a section of the *Trade Marks Act* did not implement a treaty because it did not contain an express declaration to the effect. Ten years later, in *Crown Zellerbach*, it found implementation, in the absence of a declaration, from references to the convention in the *Act*, from parallels in the language of the two documents, and from a chronological nexus between the signing of the treaty and the enactment of the legislation. Why is this important? Neither the ICCPR nor the ICESCR has been expressly implemented in Canada. There is a good argument to be made, however, that the *Charter of Rights and Freedoms* was intended to implement the provisions of these documents, and that it did implement them. Bayefsky explains:

Canada's human rights treaties have been incorporated in part into Canadian legislation, including the *Charter*. This conclusion can be drawn from the three following factors.

First, the legislative history of the *Charter* contains frequent references to international human rights law. Throughout the approximately fifteen year drafting period from 1968 to 1982, the proliferation of international norms was monitored and digested by Canadian constitutional framers. New conventions raised the issue of ratification for Canada. Ratification required consideration of the adequacy of domestic law. The quest for a constitutional bill of rights coincided with increased international participation [From this we may infer] (a) that international human rights law was an important motivating factor [for the *Charter*] ... and (b) that many specific *Charter* sections are directly indebted in both language and intent to specific international law provisions.

Second, ratification of Canada's international human rights treaties took place only after extensive federal-provincial consultation The major policy reason for denying that the *Charter*, or other selected federal and provincial statutes, are implementing legislation in the absence of express reference to international obligations of Canada is that the nature of federalism would be threatened This policy is not applicable in the context of Canada's major human rights treaties because they were ratified only ... [with the] consent of all Canadian governments.

Third, Canadian diplomats represent the *Charter* and other statutes as implementing legislation in many international fora.²⁹

If Bayefsky is correct—and she is far from alone in her views on the matter³⁰—it reflects provocatively on all those bald statements that turn up in the case law

²⁸ [1977] 2 S.C.R. 134.

²⁹ Bayefsky, *supra* note 24 at 125–27.

³⁰ Schabas, for example, explicitly approves Bayefsky's reasoning, at least about the role played by international law during the drafting process. After reviewing an earlier article that Bayefsky published in the *Bar Review* with M. Cohen, he concludes that "a study of the preparatory work of the *Charter* leaves no doubt that its drafters were powerfully influenced by the *Covenant* and the importance of incorporating its provisions in domestic law"; Schabas, *supra* note 7 at 26. For representative examples of some of the statements made in

to the effect that this or that provision of an international treaty is not binding because it has not been implemented in domestic legislation.

To say that the *Charter* implements the covenants in part does not, on the other hand, solve all our problems. What does "in part" mean? How can we tell what has and has not been adopted? Schabas notes areas where the *Charter* departs from its international precursors in a "significant and substantial" fashion, including the omission of some rights. Given this uncertainty, what weight should a judge give to these precursors? Some commentators would argue for a presumption of conformity. "The presumption that Parliament and the Legislatures do not intend to act in breach of Canada's international obligations is applicable to conventional international law," says Bayefsky.³¹ Some judges agree. "Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with ... the established rules of international law." "[W]here the text of the domestic law lends itself to it, one should ... strive to expound an interpretation which is consonant with the relevant international obligations."³² But there is that qualifier again: "where the text of the domestic law lends itself." This is not a very precise guide—which may be why, even in those few cases that take the subject seriously, the preferred approach tends to be a rather conservative one. I mentioned *Reference Re Public Service Employee Relations Act (Alberta)*, for instance. Dickson C.J. not only gives more thought to international law than most of his colleagues; he is also far more enthusiastic about it. Notwithstanding, the actual legal force that he attributes to these instruments is, as can be seen from the following excerpt, rather limited.

Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) 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, judicial and quasi-judicial decisions of international tribunals, customary

government reports which demonstrate this influence, see C. Eick, *Enforcing International Human Rights Law in Domestic Courts* (LLM Thesis, McGill Law School 1987) [unpublished] at 25–26. Given subsequent history, it is interesting to note that one of the political players invoked by Eick in his discussion was then-Minister of Justice Jean Chrétien, who is quoted as saying "the rights that we have agreed upon in international agreements should be reflected in the laws or the *Charter of Rights* that we will have in Canada"; at 49.

³¹ Bayefsky, *supra* note 24 at 129.

³² The first of these quotations is from Pigeon J. in *Daniels v. The Queen* (1968), 2 D.L.R. (3d) 1; the second from Gonthier J. in *American Farm Bureau Federation v. Canadian Import Tribunal*, [1990] 2 S.C.R. Both of these cases are cited by Bayefsky, *ibid*.

norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions.

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, interpretation of the *Charter* must be “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.” The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of “the full benefit of the *Charter's* protection.”³³

Note the terminology: “indicia of ... meaning”; “sources for interpretation.” This falls a long way short of a finding of implementation. It even falls short of a presumption of conformity. (It is notable that the Chief Justice goes on to deny that there is any legal requirement: “I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*.”) It is also, on the other hand, a long way from justifying the dismissive attitudes evinced in many of the judgments in my survey sample. All things considered, one would have to conclude that there is no legal impediment to invoking an international human rights treaty in a *Charter* challenge, nor—given a knowledgeable judge and a well-bolstered argument—is there any reason to believe that it could not be taken seriously.

V. THE ICESCR IN PARTICULAR

IF “DIFFICULTIES WITH INTERNATIONAL LAW” are not a bar to our enterprise, what about difficulties with the particular instrument? Most people would argue that the ICESCR does indeed present problems that the ICCPR does not. If one examines the assumptions on which these arguments rest, however, they appear less sustainable than is usually supposed. In the following pages I will examine the three claims most likely to be put forward as reasons why the ICESCR would not apply, or at least would not be useful, in a challenge to, for instance, budget-cutting legislation, and suggest some ways that these could be countered in a courtroom situation.

³³ *Public Service*, *supra* note 22 at para. 57–59.

A. ESC Rights are “Different” from CP Rights

I have already mentioned the controversy that led to the splitting of the two covenants. Talking about the “differences” attributed to the two categories of rights, Scott offers the following table.³⁴

SOCIAL, ECONOMIC, & CULTURAL RIGHTS	CIVIL & POLITICAL RIGHTS
Positive	Negative
Resource Intensive	Cost-Free
Progressive	Immediate
Vague	Precise
Unmanageably Complex	Manageable
Political	Non-Political
Aspirations or Goals	“Real” or “Legal” Rights
Non-Justiciable	Justiciable

The most important of these dichotomies from a practical standpoint are the first two. ESC rights *cost*. The most frequently cited in legal fora, on the other hand, is the last. What is the basis for such a characterization? ESC rights involve policy and fiscal decisions. As such, they are among the things that many people feel the courts have no business meddling with. Reminiscent of recent criticisms of an overly active Supreme Court, the mere mention of ESC rights seems to raise the spectre of autocratic judges usurping the proper discretion of legislators.³⁵

³⁴ Scott, *supra* note 8 at 833.

³⁵ Although there have been plenty of entries in more recent years, the classic version of such criticism is R. Knopff & F.L. Morton, *Charter Politics* (Toronto: University of Toronto Press, 1985). Although space prohibits more substantial discussion of this issue, because of the implications for the present topic (the reasons given by the court for not second-guessing Parliament re the implementation of international law are exactly the same as the reasons given for not tinkering with legislation; see Jackman, *supra* note 19 at 81) I feel compelled to point out that there is an element of irrationality in the anti-activist position. One thing that has been overlooked in recent writing is the extent to which, as pointed out by I. Holloway, “A Sacred Right’: Judicial Review of Administrative Action as a Cultural Phenomenon” (1993) 22 Man. L.J. 28, the ostensibly “new” judicial activism is rooted in a deep-seated and longstanding distrust of discretionary powers. Far from running counter to the democratic principles embodied in the *Charter*, judicial review of administrative decisions developed originally as a means of challenging Crown privilege. Given this history, it is ironic that it is now generally seen as an illegitimate encroachment on the will of the “people.” It is arguable that the interests protected by judicial deference on fiscal matters are those of the establishment, not of the “ordinary” citizen.

Much of this response, it seems to me, is more ideological than logical. If one puts aside the emotional image of everyman versus the big bad state to think about the actual contents of these so-called categories of rights, the lines begin to blur. There are positive CP rights (think about affirmative action programs, for instance), just as there are precise, manageable, immediate, cost-free ESC rights (the right to work at a job freely chosen, the right not to be forced into marriage³⁶). There are rights that exist in different forms on both sides of the fence, like non-discrimination.³⁷ There are related rights, like freedom of association and trade union rights.³⁸ There is also a more general logical or functional interdependency that Scott calls permeability.³⁹ And underwriting all of these different connections are the philosophical justifications put forward for instituting these kinds of protections in the first place. It is notable that social and economic rights are intimately related to concepts like "dignity" and "free development of personality" which are central to the individualist thrust of the CP regime.⁴⁰ Does that mean there is not a problem with ESC rights after all? Unfortunately it is possible to obscure every one of these links simply by defining the core CP right narrowly enough. What it is likely to come down to in a real case, consequently, is whether the judge can be weaned away from the predictable assumption that CP rights are legitimate and ESC rights are not.

How does one achieve such a weaning? The philosophical arguments will help, if only by providing a rationalization. It is unlikely that they will suffice on their own, though. What is necessary is to make the court realize that there is nothing strange or problematic or unusual about legal protections of this nature. The best way to convince someone that a given right is justiciable, in other words, is to show that it *is*, in fact, adjudicated. I said earlier that the Europeans had entrenched ESC rights in their harmonizing legislation. They are not alone in this. According to the above-cited staff paper from the Attorney General's office, "over one-half of the constitutions of the countries of the world contain express provisions regarding social and economic rights or principles."⁴¹ Even

³⁶ ICESCR articles 6(1) and 10(1) respectively.

³⁷ ICCPR articles 2(1), 24, 25, 26; ICESCR article 2(2) explicitly and implicitly *passim*.

³⁸ Article 22 of the ICCPR versus article 8 of the ICESCR.

³⁹ Organic or direct permeability exists, he says, where an ESC right is protected because it is implicitly incorporated into, or part of, a particular CP right. (One could argue that this would be the case, for instance, with the ICCPR right to life and the ICESCR right to an adequate standard of living.) There are two bases for such interdependence, he continues: logical or semantic entailment (where the ESC right is a more specific form of the CP general core right) and effectivist or foundational dependency (where the former is necessary to give effect to the latter). See Scott, *supra* note 8 at 781 ff.

⁴⁰ *Ibid.* at 806.

⁴¹ *Protection of Social and Economic Rights*, *supra* note 18 at 6.

the U.S. is further ahead than Canada. Although, as pointed out, there is no protection for ESC rights in the federal constitution, a significant number of state constitutions fill the gap.⁴² It is obvious from such data that ESC rights are no longer the oddities that they seemed back in 1948. Significantly for present purposes, some commentators go so far as to claim that the subject matter of the *Universal Declaration* has now become part of customary international law.⁴³ If this were true, one could claim that even if they do not fall under any of the enumerated rights in the *Charter*, ESC rights should be available as "existing rights" under section 26. Even if it is not true,⁴⁴ on the other hand, merely making the argument could be a useful way to impress upon a judge how far out of step Canada is with world norms.

B. The *Charter* Specifically Excludes Economic Right

That this is a commonly held belief is evidenced by the fact that no less than three out of the five judges in my survey sample who quoted Dickson C.J.'s comments from *Irwin Toy* took them as authority for the proposition that economic rights were not covered by section 7. In actuality, the Chief Justice deliberately leaves the door open.⁴⁵ "Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property and contract rights," he says. "To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous."⁴⁶ No subsequent decision has gone further than this. Popular views notwithstanding, no member of our highest court has ever said in so many words that "security of the person" does not include financial security or that "liberty" only relates to things like physical arrest and detainment. Popular views notwithstanding, they have not ruled out the other sections either. It is notable that the seminal case on section 15(1), *Andrews v. Law Society of British Columbia*,⁴⁷ concerned the right to work, a right falling under the ICESCR, not the ICCPR. It is

⁴² *Ibid.* at 7.

⁴³ See, for instance, L. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States" (1982) 32 Am. U. L. R. 1.

⁴⁴ Craven, for one, is sceptical. See his monograph on the ICSECR, *supra* note 7 at 28.

⁴⁵ That this is not a retrospective "reading in" is evidenced by contemporary interpretations of the decision. See, for instance, W. MacKay and D. Pother, "Developments in Constitutional Law: The 1988–89 Term" (1990) 1 S.C.L.R. 81 at 102.

⁴⁶ *Irwin Toy*, *supra* note 21.

⁴⁷ *Andrews*, *supra* note 2.

It is equally notable that economic disadvantage has been explicitly recognized as an indicator for discrimination. L'Heureux-Dubé J. summarizes:

The *Charter* is a document of civil, political, and legal rights. It is not a charter of economic rights. This is not to say, however, that economic prejudices or benefits are irrelevant to determinations under s. 15 of the *Charter*. Quite the contrary. Economic benefits or prejudices are relevant to s. 15, but are more accurately regarded as symptomatic of the types of distinctions that are at the heart of s. 15: those that offend inherent human dignity.

... [T]he *Charter* is not a document of economic rights and freedoms. Rather, it only protects "economic rights" when such protection is necessarily incidental to protection of the worth and dignity of the human person (*i.e.* necessary to the protection of a "human right"). Nonetheless, the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.⁴⁸

Aside from anything else, the relationship between economic and "human" rights delineated in this passage is a classic example of Scott's "permeability."

With statements like this on the record, how do we account for things like those knee-jerk misreadings of *Irwin Toy*? More to the point, how do we account for the dismal record of poverty cases in Canada, especially in the lower courts?⁴⁹ The three reasons most frequently mentioned why challenges to cuts in social programs virtually never work are judicial deference, the stigmatization of poverty, and the idea that the *Charter* can only be used as a shield, not a sword.⁵⁰ The first of these we talked about in the last section; the second is a matter for the lawyer's powers of persuasion. At least for present purposes, the third is the only one that raises a real legal issue. Fortunately it is an issue that has seen some important developments of late. In *Masse*, the welfare cuts case mentioned in my introduction, the majority found against the claimants on the grounds, simply, that the impugned action was *inaction*. "Government inaction cannot be the subject of a *Charter* challenge," said O'Driscoll J. flatly.⁵¹ In *Eldridge v. British Columbia*, a *Charter* challenge brought by two deaf residents of the province in respect of the government's decision to stop funding sign language translation services in hospitals, the Supreme Court would seem to have

⁴⁸ *Egan and Nesbit v. Canada* (1995), S.C.J. File No. 23636.

⁴⁹ See, for instance, M. Jackman, *supra* note 19; M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 *Queens's L.J.* 65; J. Keene, "Claiming the Protection of the Court: *Charter* Litigation Arising from Government 'Restraint'" (1998) 9 *Ntl. J. Const. L.* 97.

⁵⁰ See Jackman, *ibid.*; Keene, *ibid.*

⁵¹ *Masse*, *supra* note 5.

precluded this kind of response—or at least precluded arriving at it in such a dogmatic and simple-minded fashion. Speaking for a unanimous court, LaForest J. is very careful not to open the floodgates. It is notable, however, that he *does* use the magic words.

It has been suggested that s.15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality. Whether this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner In many circumstances, *this will require governments to take positive action*, for example by extending the scope of a benefit to a previously excluded class of persons.⁵²

How this will be interpreted by other courts remains to be seen. At the very least, one may assume that it explodes the notion that positive rights are unavailable by definition.⁵³ In doing so, it also removes the single strongest prop to the belief that ESC rights are not covered by the *Charter*.

C. The ICESCR Does Not Apply to the Impugned Activity

The last argument that might be made as to why the Covenant is not going to help in a case such as we have been envisioning is that its provisions are too general to be applied to particular decisions or actions. The problem is not in the rights themselves. A glance at the substantive portions of the document reveals several articles of direct relevance to this kind of litigation. Article 10(3) calls for “special measures of protection and assistance” on behalf of children. (One of the claims made in *Masse* was that the cut to benefits was particularly hard on single parent families.) Article 11(1) recognizes “the right of everyone to an adequate standard of living for himself and his family.” Article 11(2) talks about the “fundamental right” to be free from hunger.⁵⁴ Article 12(1) promises the “highest attainable standard of physical and mental health.” One could argue that a social assistance regime that fails to maintain its recipients above the poverty line is in implicit violation of all these rights. If workfare were on the table, one might even bring in article 6(1), “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.” So finding grounds is not a problem. Even defining standards is not a problem. (Adequacy

⁵² *Eldridge*, *supra* note 2 [emphasis added].

⁵³ This discussion does not really do justice to the rather startlingly progressive implications of this case. For a fuller discussion see Jackman, *supra* note 2.

⁵⁴ It is generally accepted that being free from hunger means more than merely not starving. For a discussion of the scope of this right and an indictment of Canada's performance under this head, see R.E. Robertson, “The Right to Food—Canada's Broken Covenant” (1989–90) 6 C.H.R.Y.B. 185.

may be an inexact term but it is not a meaningless one.⁵⁵) Where the problem lies is in defining what and how much a state is obliged to do in *fulfilment* of the laid-out goals. The first thing a respondent in a case like this would do is to point to section 2(1): "Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized." Not "ensures"; not "guarantees"—"undertakes to take steps." With language like this it is easy for governments to hide behind "goals" and "strategies." And they do. In the Ontario portion of Canada's Third Report to the ICESCR Committee, for instance, the authors deflect criticisms about "the lack of substantial progress in reducing poverty" by avoiding specifics ("social assistance rates are calculated to meet ... basic needs") and talking grandly about plans for "getting people back to work."⁵⁶ Fortunately there is now enough interpretive work around the Covenant to forestall such responses. Surveying the commentary, particularly the so-called Limburg Principles,⁵⁷ it would seem that there are at least three arguments one could use to neutralize the "too general" defence.

First and foremost, incrementalism is not the same thing as inaction. As the Committee put it in its General Comment No. 3, "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."⁵⁸ The Limburg group expanded on this dictum in its principle No. 52. A State party will be in violation, it said, if it "fails to take a step which it is required to take by the Covenant," if it "fails to remove

⁵⁵ In keeping with the relativistic nature of the whole regime, the Committee will pay special attention to internal definitions. In its Third Report, made in 1998, Canada claimed that Statistics Canada's Low Income Cut-Offs ("LICOs") are not officially considered to be poverty lines (article 96). Given the widespread use of these measures by everyone from academics to the media, however, it is unlikely that the Committee would be impressed by the disclaimer.

⁵⁶ *The International Covenant on Economic, Social and Cultural Rights: Third Report of Canada covering the period for articles 6-9 (December 1987 to September 1994), for articles 10-15 (September 1992 to September 1994)* (Ottawa: Canadian Heritage, 1994) 162-63.

⁵⁷ This document, "Limburg Principles," *supra* note 11, was produced by a multinational group of experts in international law who were brought together in 1986 under the sponsorship of the International Commission of Jurists, the Faculty of Law of the University of Limburg, and the Urban Morgan Institute for Human Rights (University of Cincinnati) to consider the nature and scope of the obligations of states parties to the ICESCR. The participants agreed unanimously to a set of 103 principles which they believed represented the present state of international law. These principles were reproduced in a special issue of the *Human Rights Quarterly* (see *supra* note 10), along with a series of commentaries and working papers. There is general agreement that this volume is an authoritative source for interpretation of the Covenant and its application. See Eide, *supra* note 9 at 39.

⁵⁸ Craven, *supra* note 7 at 115.

promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right," or if it "deliberately retards or halts the progressive realization of a right ... unless it does so due to a lack of available resources or *force majeure*." The first two kinds of failure may be difficult to establish—since it is left to the parties to determine ways and means, they can always talk about tomorrow. The third, however, is a different matter. Retrogression is a lot easier to prove than lack of progress. True, there are qualifications on the requirement. It seems unlikely, however, that cuts to social programs bearing on basic needs will be excused absent the direst of emergencies. Deficit reduction might possibly squeak by. Tax breaks for the middle class or removing disincentives for work (Mike Harris' favourite) almost certainly will not.⁵⁹

Second, the phrase "to the maximum of its available resources" does not mean to the maximum of the resources that a government decides to allot to a given area. It means to the maximum of an appropriate fraction of the GNP. How does one determine appropriateness in this context? The first step, obviously, is to reach an accurate assessment of needs. Budgeting on the basis of "averages" is not acceptable. It is necessary to look at actual numbers and conditions among the most vulnerable groups in the society. The second step is calculating what would be necessary to bring these individuals to a reasonable (in relative terms)⁶⁰ standard of adequacy. The third is allotting enough to come as close as possible to this ideal, considering total resources, competing fiscal requirements, and strategic planning. It may be thought that this last item allows a considerable degree of latitude. The Committee has made clear, however, that

⁵⁹ On the issue of acceptable and non-acceptable "reasons" it is worth looking at what has been said about the limitation clause in the Covenant. Article 4 provides that a State "may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." The Limburg group interprets this as follows: "46. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the state. 47. The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person 'promoting the general welfare' 52. This term shall be construed to mean furthering the wellbeing of the people as a whole 'compatible with the nature of these rights' 56 [This] restriction ... requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned." Viewed in the light of these principles, the leeway apparently offered by the relativistic framing of the document shrinks considerably. "Limburg Principles," *supra* note 11.

⁶⁰ What this means will become clearer with an example. A study released by UNICEF in June 2000 placed Canada 17th out of 23 industrialized nations for the percentage of children living in "relative" poverty; *Macleans*' (26 June 2000) 46. Officials at Human Resources Development Canada disputed the seriousness of this finding on the grounds that the median income in Canada is anomalously high. From a ICESR perspective, however, it is the gap between the median income and the average income of the subgroup, not the absolute level of that income, which is problematic.

as long as basic needs are not being met (in General Comment No. 3 it talks about "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights"),⁶¹ it will look very closely at any discretionary spending. It has also made clear that it will not accept unproven claims about trickle-down prosperity as an alternative to direct funding. "State policies that are centered solely upon general economic growth have been considered to be inadequate for securing the rights of marginalized sectors of the population," says Craven.⁶²

The third argument rests on the non-discrimination provision in the Covenant. Article 2(2) states in anomalously strong language that the states parties shall "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other status." It is easy to see how useful a clause like this could be in poverty litigation. For one thing, unlike the wording of s. 15(1) of the *Charter*, the inclusion of "other status" allows economic disadvantage to be brought under the head directly. For another, it mandates equality of effects, not just equality of means. Even where an argument might be made that budget cuts are driven by economic necessity, consequently, particular measures which disproportionately burden a subgroup of the population—as reductions in welfare benefits disproportionately burden the poor—are by definition illegitimate.⁶³ But the value of the clause goes beyond these obvious applications. It is generally accepted that the right of non-discrimination comprises an exception to the progressiveness doctrine and requires immediate implementation.⁶⁴ This

⁶¹ Lest this is not trenchant enough, it drives home the point in the next sentence: "Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant"; Craven, *supra* note 7 at 141.

⁶² *Ibid.* at 122. Craven goes on to talk about the related issue of privatization. "The perceived problem," he says, "is that if public services are privately operated and open to market forces, access to them becomes a correlate of income distribution in which the poorer sectors of the population have to fend for themselves in an increasingly unequal society."

⁶³ The Limburg group talks about this in its explication of the phrase (in article 4) "determined by law." "49. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory." "Limburg Principles," *supra* note 11.

⁶⁴ This is dealt with in Limburg principles nos. 37 and 38: "Upon becoming a party to the Covenant states shall eliminate *de jure* discrimination by abolishing without delay any discriminatory laws, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights *De facto* discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible." *Ibid.*

makes it strategically as well as substantively useful. As Craven puts it, "the prohibition on discrimination ... provides a useful and specific focus for claims relating to economic, social and cultural rights which otherwise might be dismissed as long-term objectives."⁶⁵ With this point of entrée, one has an irrefutable answer to the argument about the ICESCR not creating any specific or immediate requirements. Once we put this together with the "no retrogression" and "core obligations" rules, it should be easy to establish that many of the recent cuts to social programming breach Canada's obligations under the ICESCR.⁶⁶

VI. CONCLUSION

IT IS CLEAR FROM THE FOREGOING THAT, at least theoretically, there is no reason why the ICESCR could not be invoked to good effect in, say, a *Charter* challenge around social assistance. Given my observations earlier, it is unlikely that one could succeed with the argument that the *Charter* "implements" the international instrument. There is ample precedent, however, that such instruments should be considered as "relevant and persuasive" sources for interpreting its provisions. There is also at least a general presumption that, absent clear evidence to the contrary, its drafters did not intend to entrench anything inconsistent with the country's international obligations. With these tools one should be able to mount a strong argument that the question evaded by Dickson C.J. in *Reference Re Public Service Employee Relations Act (Alberta)* and skirted by L'Heureux-Dubé in *Egan*—that is, whether the *Charter* "covers" ESC rights—should be answered in the affirmative, at least where these are connected with values like security, liberty, or dignity. One could then turn around and use the ICESCR, along with its surrounding commentary,⁶⁷ to illuminate the scope and meaning that such rights should be given in specific cases.

Would it work? There is no way of knowing for sure. Certainly one would face an uphill battle with respect to judicial attitudes. One would also seem to

⁶⁵ Craven, *supra* note 7 at 154.

⁶⁶ As a foretaste of what might be accomplished with such a strategy, it is worth looking at M. Jackman's description of the difference it would have made to a number of notable poverty cases heard over the last decade—including *Masse*, the Ontario welfare case mentioned earlier—if the court's approach to the *Charter* had been informed by a concern for Canada's international obligations. Jackman, *supra* note 19 at 87–88.

⁶⁷ I mean the term "surrounding" here in its broadest sense to include not only commentary explicitly directed at the ICESCR but also commentary that reflects on it indirectly. M. Scheinin, for instance, opines that because of the similarities in the wording of, and the weight given to, the non-discrimination provisions in both covenants, case law on this subject developed under the ICCPR should be extendable to the ICESCR. M. Scheinin, "Economic and Social Rights as Legal Rights" in A. Eide, C. Krause, & A. Rosas, *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 1995) at 44 ff.

be bucking political trends. If anything, current governments seem to have veered further to the right than ever. Despite this, other elements in the mix suggest that the time may be ripe for such a strategy. One thing clearly in favour is the aforementioned progressiveness of recent Supreme Court *Charter* decisions. Confirming that *Eldridge* was not an anomaly, in *Law v. Canada* the panel took the occasion not only to restate but to extend the humanitarian principles laid down in *Andrews*. "It may be said that the purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."⁶⁸ In connecting disadvantage with threats to dignity and freedom, this statement is fully consonant with the goals set out in the preambles to the covenants. A second possible source of advantage is the public mood. While the politicians are still almost unanimously spouting the neo-liberal line on tax cuts, there is strong evidence in public opinion surveys that the people themselves are more concerned about social programs.⁶⁹ Last but not least, there is the embarrassment potential of Canada's record with the ICESCR. To put it mildly, this has not been impressive.

The Committee's response to the country's Second Report, released in 1993, was strongly critical of the failure to achieve any measurable success in alleviating poverty, especially among designated groups. In 1996 the Committee took the unusual step of writing a letter to the federal government expressing concern over the decision not to reincorporate the former provisions ensuring national standards in social assistance in its newly passed *Canada Health and Social Transfer*.⁷⁰ Following on these warning signals, its response to the Third Report, released in 1998, was downright scathing. While stopping short of finding an absolute violation,⁷¹ the Committee lists twenty-six "Principle Subjects of

⁶⁸ *Law*, *supra* note 2.

⁶⁹ A series of public opinion surveys carried out since 1994 by an Ottawa polling firm, Ekos Research Associates, and reported in periodical installments under the general title of *Rethinking Government* provides salient evidence of growing concerns in this regard. Most notably, a 1998 update revealed that approximately 60 per cent of respondents agreed that too many people had been hurt by cuts to social programs and that the government should take steps to restore the social safety net. *Rethinking Government*, online: Ekos Homepage <<http://www.ekos.com/accounts/c870u2/comp-voll.pdf>> (last accessed 12 November 2001).

⁷⁰ For a discussion of this letter, and its implications, see C. Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1996) *Const. Forum* 79.

⁷¹ Lest this be taken to mean that the picture was not as bad as it could have been, I should point out that, in keeping with the progressive and voluntary nature of the ICESCR regime, the mandate of the Committee has been advisory rather than punitive. As a result of this emphasis, its reports tend—regrettably in A. Chapman's opinion—to focus "on assessments of progressive realization rather than on the identification of violations"; Chapman, *supra* note 12 at 32.

Concern" including, *inter alia*, the lack of judicial remedies for poverty, the problems of aboriginal people, the reduction of provincial transfer payments, the restriction of unemployment insurance benefits, cuts to social assistance rates in several provinces, the high incidence of homelessness, the introduction of workfare, the low minimum wage, cuts to services for the disabled, the closing of psychiatric beds, the high rate of functional illiteracy, and the unavailability of student loans to refugees. Presented with this kind of evidence of how Canada's performance is being viewed by the international community, it will at least be more difficult for judges to pretend that there is nothing problematic about the kind of illiberalism that parades as fiscal prudence.

APPENDIX: TABLE OF CASES

THE FOLLOWING LIST SHOWS THE 52 "HITS" obtained from a Quicklaw search carried out in January 1999 for non-criminal Charter cases invoking international human rights covenants. These cases were coded according to the kind and amount of attention paid to the international instrument(s), with the general results outlined on pages 6–9 above. (A chart showing the detailed findings of this analysis may be obtained by contacting the author at <terracon@sympatico.ca>.

- Alcorn v. Canada* (Commissioner of Corrections), [1999] F.C.J. No. 330
Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band (T.D.), [1994] 1 F.C. 394
Canepa v. Canada (Minister of Employment and Immigration), [1992] F.C.J. No. 512 (F.C.A.)
Charran v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 243
Canada Trust Co. v. Ontario Human Rights Commission (1990), 74 O.R. (2d) 481 (C.A.) 6.
Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.) (1989), 69 O.R. (2d) 189 (C.A.)
Children's Aid Society of Hamilton-Wentworth v. K.(L.) (1989), 70 O.R. (2d) 466 (U.F.Ct.)8.
Chippewa of the Thames Indian Band Number 42 v. Ontario Hydro, [1995] O.J. No. 487 (C.J. Gen Div.)
Concerned Parents for Children with Learning Disabilities Inc. v. Saskatchewan (Minister of Education), [1998] S.J. No. 566 (Sask. Ct. of Q.B.)
Delisle v. Canada (Deputy Attorney General), [1999] S.C.J. No. 43
Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580, [1984] B.C.J. No. 4 (B.C.C.A.)
Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326
Evans v. Kingston Penitentiary (Warden), [1986] O.J. No. 966 (H.C.J.)
Everingham v. Ontario, [1993] O.J. No. 55 (C.J. Gen. Div.)
Haddock v. Ontario (Attorney General) (1990), 73 O.R. (2d) 545 (H.C.J.)
Henry v. Canada, [1987] 3 F.C. 429
Hirt v. College of Physicians and Surgeons of British Columbia, [1985] B.C.J. No. 2174 (C.A.)
Howard v. Architectural Institute of British Columbia, [1989] B.C.J. No. 1905 (S.C.)
International Fund for Animal Welfare Inc. v. Canada, [1987] 1 F.C. 244
International Fund for Animal Welfare Inc. v. Canada, [1989] 1 F.C. 335 (C.A.)
Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927

- Latsay v. Canada*, [1997] T.C.J. No. 3
Lavoie v. Canada (T.D.), [1995] 2 F.C. 623
Levesque v. Canada (Attorney General), [1986] 2 F.C. 287
McKinney v. University of Guelph (1987), 63 O.R. (2d) 1 (Ont. C.A.)
Mobarakizadeh v. Canada, [1993] F.C.J. No. 1394
Montana Band v. Canada (F.C.A.), [1991] F.C.J. No. 76
Ontario (Attorney General) v. Dieleman (1994), 20 O.R. (3d) 229 (Ont. Gen Div.)
Penikett v. Canada, [1987] Y.J. No. 10 (Y.T.S.C.)
Penikett v. Canada (B.C.C.A.), [1987] B.C.J. No. 2543 (B.C.C.A.)
Public Service Alliance of Canada v. The Queen in right of Canada as represented by Treasury Board and Attorney General of Canada, [1984] 2 F.C. 562
R. v. Big M Drug Mart Ltd., [1984] 5 D.L.R. (4th) 121 (Alta.C.A.)
R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295
R. v. Neale, [1985] A.J. No. 823 (Alta. Ct. of Q.B.)
R. v. Neale, [1986] A.J. No. 608 (Alta. C.A.)
R. v. Videoflicks Ltd. et al. [S.C.C. appeal sub nom. *R. v. Edwards Books and Art Ltd.*] (1984), 48 O.R. (2d) 395 (Ont. C.A.)
R.B. v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315
Reference Re Education Act of Ontario and Minority Language Education Rights (1984), 47 O.R. (2d) 1 (C.A.)
Reference Re Electoral Boundaries Commission Act (Sask.), ss. 14, 20, [1991] S.J. No. 111 (Sask. C.A.)
Reference Re Public Schools Act (Man.), [1990] M.J. No. 68 (Man. C.A.)
Reference Re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313
Reference Re Secession of Quebec, [1998] 2 S.C.R. 217
Salvation Army, Canada East v. Ontario (Attorney General), [1992] O.J. No. 123 (Ont. S.C.)
Sawridge Band of Indians v. Canada, [1987] 2 F.C. 450
Schafer v. Canada (Attorney General), [1996] O.J. No. 1915 (Ont. C.J. Gen. Div.)
Schaff v. Canada, [1993] T.C.J. No. 389
Selvadurai v. Canada (Minister of Citizenship and Immigration), [1994] F.C.J. No. 1395
Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home et al. and two other applications (1983), 44 O.R. (2d) 392 (Ont. H.C.J.)
Slight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038
Solis v. Canada (Minister of Citizenship and Immigration), [1998] F.C.J. No. 675
Suresh v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 865
Vincent v. Canada (Minister of Employment and Immigration), [1983] F.C.J. No.

