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Normative Approaches to Policy Research

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Executive Summary

This paper examines normative approaches to poverty and exclusion with a focus on legal policy perspectives as drivers of policy rather than policy outcomes. Legal policy offers a valuable tool to help policy makers assess the justification, coherence and, ultimately, legitimacy, of government intervention. Normative approaches provide a critical piece of the policy puzzle by identifying how "the rules of the game" of societies develop, and how they form the building blocks of the legal architecture that houses our social and economic institutions. These normative approaches shift over time, and need to be continually analyzed and "frontloaded" into government policymaking at the central level.

In Canada, this is not generally done because the norms that underpin social policy in poverty issues are frequently assumed and implicit in horizontal policy research projects. Many of these norms were, however, set in a different era. Our understanding of equality issues in relation to social policy that was central to the debate in the 1960s and '70s and even into the '80s, predated the *Canadian Charter of Rights and Freedoms*. Despite the fact that there have been significant changes in case law dealing with human rights, equality rights, and international rights, little has changed in our approach to policymaking at the central and horizontal levels. The thesis is that there have been several normative shifts with broad policy implications over the last two decades that belie the assumption of a stable normative framework.

Applying these ideas to the area of poverty and exclusion, there have been several substantive developments in relation to our understanding of, and responses to, poverty over the last two or three decades. First, the definition of what we mean by poverty has changed dramatically. Second, the advent of the Charter and our adherence to several international human rights instruments have wrought fundamental changes in our understanding of rights and equality in relation to social and economic issues, including those related to poverty and exclusion. The Millennium Development goals alluded to by the Secretary-General of the United Nations during his State visit to Canada in March 2004 reinforced the imperatives to address poverty in a more integrated manner. At the domestic level, the recent creation of the Canada Social Transfer offers a practical opportunity to address poverty and exclusion through co-operative federalism.

While there is no free-standing or enforceable right to be free from poverty in Canada (or anywhere else for that matter), there are several related norms that strengthen the relationship between poverty, exclusion, and rights. Many of these centre on exclusion.

Section 15 of the Charter creates a strong norm of equality based on values, such as human dignity. The basic test developed by Canadian courts is "exclusion from membership and participation in Canadian society." The development of this test, or variations of it, appear in several recent appellate cases in Canada and show that there is a "home grown" Canadian definition of exclusion that is closely linked to equality rights. These rights, in combination with the test of "membership and exclusion from Canadian society," are capable of transforming claims into justiciable rights before the courts. As well, Canada's burgeoning international obligations have important implications for policy on poverty, even though these commitments are not yet systematically reflected in Canadian law or policy. As a

matter of principle, the courts have repeatedly stated that adherence to international instruments signals Canada's intent to comply. As a matter of practice, adherence to standards that Canada has promoted and adopted should be a basic feature of policy development.

The intersection between poverty and exclusion creates a powerful vantage point from which both phenomena can be better understood and addressed. Policy makers should use both empirical and normative tools to help fashion appropriate policy responses to poverty and exclusion, especially in relation to equality and its underlying value, human dignity. Just as current empirical research relies on current data and recent research developments, the legal policy underpinnings of this research should be part of a dynamic research program of central and horizontal policymaking.

Practical suggestions for policy makers include the development of an integrated poverty strategy at the national level, starting with a wider-ranging research project that responds to the broader conceptual base of poverty. A research project that tackles these broader dimensions is a start, beginning with the work that the Policy Research Initiative (PRI), among others, is already doing on asset-based approaches. Second is the systematic, front-loaded integration of legal norms, and the domestic and international levels in crosscutting or horizontal research projects, a strategy that can be adopted almost immediately at the policy level beginning with changes to policy development guidelines prepared by central agencies, such as the Privy Council Office.

Introduction

In early 2002, Quebec introduced Bill 112, *An act to combat poverty and social exclusion*.[1] Bill 112, which is now law, was the result of eight years of social activism since the Bread and Roses protest march of the Quebec Federation of Women in 1995. The Bill brings together several anti-poverty initiatives in a single integrated legislative framework, acknowledging poverty as a barrier to human development and articulating collective values as the basis for a sustainable approach to poverty. Government intervention is identified as a "national imperative" to protect human dignity and rights.

Bill 112 and the subsequent action plan that was announced in 2004 echo developments in the European Union (EU), where more comprehensive approaches to poverty and exclusion have started to change fundamentally the social and governance landscape of member countries. Bill 112 specifically makes the link between poverty and its overall prevention with reference to social exclusion, the need for inclusion, and human rights. In practice, many of the measures announced by the Quebec government's 2004 action plan focus on the alleviation of poverty, with an emphasis on employment, a range of income-targeted measures and improvement of social housing stocks (Quebec, 2004).

Bill 112 differs from the European approach in part, because Western European countries experience unique challenges in terms of social exclusion, not the least of which is a historical attachment to an understanding of nationality based on ethnic and cultural identities. European governments have had to address very different social issues, and have been very directive and interventionist in their management of issues related to housing and access to services (as is the case in France, for example). And, of course, Quebec has chosen a legislative route, while the EU and most of its member countries have chosen the administrative route of target setting and consultation.[2]

No federal or other provincial jurisdiction in Canada has ever targeted poverty directly or comprehensively in legislation. Rather, the traditional approach has been to use distinct initiatives aimed at the component parts of poverty – temporary low income, lack of housing, and job skills – as part of a broad range of policy initiatives, directed primarily at raising income at a point in time. It has often focused on low incomes in different population groups, such as seniors or children. Bill 112 is thus unique in Canada: it sparked an inquiry into the legal policy dimensions of Canada's approach to poverty. In early 2002, the Policy Research Initiative partnered with Justice Canada (Quebec Regional Office) to examine some of these issues. Does it matter that poverty is addressed in a more integrated way? Can a rights-based approach work? Are rights relevant to poverty-oriented policy? Is there a policy-relevant link between exclusion and poverty, and what does legal policy offer to the equation?

This paper looks at these issues primarily from a legal policy perspective, and identifies guidance from scholars, the courts, and international law as a support for policy makers. For example, in Canada, the courts have developed a nuanced approach to equality rights that hinges, in part, on exclusion. This has important implications for policy development on poverty, which is generally seen as both a cause and a result of exclusion. As the nexus

between poverty and exclusion becomes stronger, a range of normative principles are coming into play, triggering demands for equality rights in connection with poverty. Layered onto this is an emerging and increasingly dense web of regional and international obligations arising from ratified and signed covenants and other intergovernmental instruments that directly or indirectly affect the obligations of states parties in relation to their domestic strategies to alleviate poverty.

Part I of this paper begins by examining the role of normative approaches to policy through legal policy. It goes on to identify three frameworks that are essential to effective policy development in Canada, namely, (1) the constitutional framework and co-operative federalism, (2) the Charter and the role of the judiciary, and (3) international law. The principal observation of Part I is that federal horizontal policy is rarely informed in its early developmental stages by legal policy as a policy driver, largely because of implicit assumptions about the static nature of fundamental values and norms in Canada. These assumptions are no longer valid, as the norms contained in each of the three have evolved considerably.

Against the normative frameworks discussed in Part I, Part II focuses on the evolution of the policy landscape in relation to poverty and exclusion. It starts with changes to the definition of poverty and its relationship to the concept of exclusion, with an emphasis on recent court decisions. Part II also provides an analysis of the link between poverty and equality rights in Canada and compares it to selected European jurisdictions. As Part II shows, economic and social rights are gaining currency, and the definition of poverty is shifting to accommodate a dimension of social exclusion.

Part III sets out practical suggestions for designing policy from the poverty-exclusion nexus, including recommendations that arise from this analysis for policy makers to integrate legal policy more explicitly in the policy development process and ensure that policy development in this priority area is responsive to, and informed by, norms that are able to assist persons living in poverty.

Part I Normative Approaches to Policy: The Rules of the Game

Norms encompass a vast range of values, principles, and rules, some of which are more powerful than others. Strong framework norms, such as constitutional law, common law, and civil codes are obvious sources, as is the evolving body of case law, and the emerging principles, practices, and benchmarks that arise from business dealings, uniform codes, or voluntary standards. Norms are also shaped by international law, such as treaties and covenants, as well as "soft" law, such as declarations, resolutions, and standards of international and regional bodies (Toope, 2001).

When norms begin to express an emerging consensus, most Western societies will seek to articulate that consensus through a variety of instruments that have varying degrees of legal effect. Assessing when and how values and principles are transformed into norms and then become part of a legal framework is the business of policy makers as well as lawyers.

Getting policy right starts with the "rules of the game of society" (North, 1990). The rules of the game include not only law in its formal sense, but also emerging practices, principles, and norms that, together, form the bedrock of how societies choose to order themselves. This is more than formal adherence to the rule of law: it is also part of a broader shift in looking at social development, namely, a move from macro-economic stabilization, privatization, deregulation, or "getting prices right," to good governance and "getting institutions right" (Trebilcock, 2003: 16).

Most disciplines, from economics to medicine, have norms: equity and do no harm are two well-established examples. Unlike other disciplines, however, law is uniquely concerned with the ongoing process of ordering norms from all disciplines for the purpose of resolving conflicts and systematically assessing the validity, enforceability, and priority of different norms for society at large.[3] From this perspective, legal policy offers a valuable tool to help policy makers assess the justification, coherence and, ultimately, legitimacy, of government intervention. From this vantage point, law is viewed less as a constraint than as a resource (Issalys, 2004). This resource can provide insights into the legitimacy and viability of particular policy choices.

While there is a great deal of discussion and debate about norms in social policy development generally, it is rare to see legal policy perspectives explicitly driving or even feeding into horizontal policy development at the federal level, especially at the early stages (unless of course the issue "belongs" to a department with a legal mandate such as Justice Canada).[4]

There are probably several reasons for this. First, law is usually viewed as an "end-of-pipe" exercise, designed to manage conflict or assess the lawfulness of policy proposals once the basic directions are set. Clearly, the normative content of law has end-of-pipe consequences if a government gets it wrong. These can range from public disapproval to litigation or criticism from international forums. However, to integrate norms that take the perspective of law as a systematic driver of public policy is a different matter.

The second reason is the view that we have already set the major norms for Canada as a country. Many of them underpin the welfare state, for example, and were in place in the 1960s, '70s, and early '80s, before the entrenchment of the *Canadian Charter of Rights and Freedoms*. Social policy debate at that time focused on norms, such as point in time equality of income, access to education and health care, and included human rights, albeit in a supporting role. Another spate of debate about the normative underpinnings of Canadian society took place around the time of the development of the Charter, but these did not fundamentally alter Canada's social policy structures.

We in Canada assume a stable normative foundation (at least with regard to those strong norms that make up our legal structures). Policy research now tends to be clad primarily in the empirical language of equity, equality of outcomes, and efficiencies, with an emphasis on statistical measurements of trends, such as low income or demographic patterns. This trend has also had the effect of creating a perception of law as a policy "output" or lever of change after social policy is set (and as one of a variety of instruments intended to change behaviours), rather than as a major policy driver. The current tendency to clothe policy in empirical, statistical measurements is in large measure a function of a policy by numbers approach that dominates federal policy making in which

> all social action is hypostatized as a market. That is, the market is not just an economic market, and the wealth that once seeks to maximize can be non-monetary…. On this view, the correction of market failures is the sole legitimate ground to regulate human conduct. Of course, aside from regulating to ensure that a market can function according to the presumed postulates, the rest is inefficient… Of course, the problem is that idea of a naturally-occurring market lying behind a "classical" view of regulation is an assumption only.
>
> A contrasting ethic is one that sees regulation as the symbolic construction of social solidarity through institutions recognizing and legitimating the identities by which people come to express who they are. In this conception of regulation, instrumental efficiency calculations are irrelevant, and redistributional, social, or cultural purposes take pride of place (Macdonald, 2004).

This report is largely concerned with the "contrasting ethic", its relationship with law, and with how legal policy functions as a policy driver. The thesis is that there have been several normative shifts with broad policy implications over the last two decades that belie the assumption of a stable normative framework. Policy makers who are alert to these developments are better placed to assess the legitimacy of proposed forms of government action and to thereby better manage risk early in the policy development process. This applies not only to purely domestic issues, but also to international policy issues where multilateral or bi-national instruments are sources of norms.[5] In short, normative approaches that are grounded in legitimacy – as established through constitutional principles and rules, the rule of law, and international law, to name a few – are able to provide a critical piece of the policy puzzle by identifying how the rules of the game develop, and how they form the building blocks of the legal architecture that houses our social and economic institutions.

Three of these building blocks – the constitution and co-operative federalism, the Charter and the role of the judiciary, and international law – are discussed in the following section.

1. The Constitutional Framework and Co-operative Federalism

Basic powers are divided between the federal and provincial governments according to the Constitution Act, 1867.[6] Certain powers, such as employment insurance, are specifically given to the federal government, whereas others are allocated to the provinces.[7] Since the constitutional division of powers is not exhaustive, governments have used a range of administrative and fiscal arrangements to ensure the smooth operation of co-operative federalism and to facilitate the equitable transfer of funds to achieve social purposes across a large and diverse country.[8]

Despite the number of arrangements over the years, the basic structures of Canada's social policy were set well before the advent of human rights legislation, the Charter, or international human rights instruments. In Canada, the normative components of social policy were built on foundations constructed in the post-World War II period, with critical points of evolution in the 1960s and '70s, and again during the post-Charter period. These principles of co-operative federalism are now enshrined in section 36 of the Constitution Act.[9] Dating from 1982, section 36 is a more recent addition to the Constitution, but it reflects the historical tension between the federal and provincial levels of government over co-operation in relation to funding and control of public policy. Section 36 provides:

> 1. Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
>   a. promoting equal opportunities for the well-being of Canadians;
>   b. furthering economic development to reduce disparity in opportunities; and
>   c. providing essential public services of reasonable quality to all Canadians.
>
> 2. Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

While section 36 does not impose new obligations on governments, it does set out essential Canadian values that guide government action to ensure legitimacy, promote equal opportunity, reduce regional disparity, and provide essential public services.

One area clearly requiring federal-provincial co-operation is social policy. The former Minister of Human Resources Development Canada (HRDC) observed in 1997 that "there can be no true, solid economic union unless there is also a sound and vital social union to

support it" (Pettigrew, 1997). A year later, the Prime Minister and Canada's premiers signed the Social Union Framework Agreement (SUFA).[10] It sought to renew social policy for a stronger social union, providing that programs should reflect and give expression to the fundamental values of Canadians – equality, respect for diversity, fairness, individual dignity and responsibility, mutual aid and our responsibilities for one another, and sustaining social programs and services (First Ministers, 1999). The Agreement was reviewed in the "Three Year Review: Social Union Framework" submitted by the Federal/Provincial/Territorial Ministerial Council on Social Policy Renewal in June 2003. The review suggests that SUFA may not have lived up to expectations in practice, but was perceived to be a useful tool that continues to offer a valuable platform, at least potentially, for intergovernmental work in social policy.

The Agreement is an example of a policy platform that uses co-operative federalism based, at least in part, on a rights framework to address improvements in social programs for Canadians by integrating responses across policy lines and intergovernmentally. The Agreement and other policy framework documents emphasize that social policy and programs should be better connected to their normative foundations. Policy frameworks like SUFA offer flexible mechanisms to integrate economic and social policy at the intergovernmental level, and in light of the recent creation of the Canada Social Transfer, there is an opportunity to revitalize the social union within a rights-based framework.

2. The Judiciary and the Legislature

Since 1867, the most significant source of norms in the constitutional framework has been the *Canadian Charter of Rights and Freedoms.*[11] Before the Charter, the courts accorded legislators a wide berth of deference within their areas of jurisdictional competence. So long as a government did not try to legislate beyond its powers, the courts would not generally interfere with governments' prerogative to set social policy. After 1982, legislatures were subordinated to the rights and guarantees set out in the Charter. These rights and guarantees are based on fundamental principles that have been extensively interpreted by the courts. This has changed not only the legal landscape, but also the policy framework within which public servants operate. Increasingly, the courts have been scrutinizing programs and policies in a way that would have been impossible before 1982 (or 1985, in the case of equality rights). The interaction between the legislature and the judiciary has shifted the balance of power over the years.

The shift is a necessary consequence of a constitution that creates checks and balances, reining in the will of the majority to impose itself in a manner that may contravene the basic norms that underpin our society. But the shift has also been relatively slow and conservative: recent research shows that the complaints of "judicial activism" related to the Charter do not stand up to scrutiny (*pace* the recurrent objections of various columnists such as Jeffrey Simpson) (Choudry and Hunter, 2003).

Indeed, even after the Charter, the balance between the judicial and the legislative arms of government was, in fact, perceived by the courts to be a continuation, albeit modified, of the traditional position in Canada, namely that public policy is the fruit of an "enlightened" exercise of discretion rather than the result of obligations on the part of government, and that courts should only intervene with great caution.[12]

Over the last decade, however, the berth of deference shown by the courts has narrowed markedly where policy is shown to infringe equality rights as a result of "exclusion from membership and participation in Canadian society," a phrase that emerges from several appellate courts, including the Supreme Court of Canada. Courts will be especially careful where there is a demonstrated impact on equality rights of persons who are vulnerable, at risk, or part of a historically disadvantaged group. Case law shows that when courts find that there has been exclusion from membership and participation in Canadian society, they are much more likely to require the government to create or modify social programs to address the "rights gap," even though this has historically been seen as the prerogative of the legislative arm. In short, the rights and guarantees provided by the Charter establish standards against which social policy proposals can be tested, although the standards evolve over time. Examples include decisions to expand access to health care for persons who are hearing impaired (*Eldridge v. British Columbia*), and to social assistance programs created for new categories of older beneficiaries (*Gwinner v. Alberta*). Most recently – and unusually – a court granted a mandatory injunction in a case called *Lowry*, forcing a government to extend a social program to an autistic child who had been denied service on the ground of age. In doing so, the court relied on the equality rights in section 15 of the Charter, as well as the international *Convention on the Rights of the Child*, which has not yet been formally incorporated into Canadian law.[13]

The benchmarks against which the courts are assessing government actions are increasingly normative, qualitative, and value driven. The case law shows that courts are much more likely to intervene and "reset" social policy where it can be shown that equality rights have been infringed and where the policy operates to exclude persons from services or programs that have a real impact on equality (equality rights under section 15 of the Charter rather than equality of opportunity in section 36). From a social policy perspective, the areas where the courts seem likely to reset policy tend to coincide with basic social and economic rights – the right to education and to health, for example – especially for historically vulnerable groups, including younger and older persons.

3. International Law

Legitimacy of government action is not only a function of compliance with national law: it is increasingly assessed in relation to international obligations. How good a player is Canada in relation to the "rules of the game" that are set on the international stage? Given Canada's international leadership role, it might be assumed that our international commitments (as evidenced through ratification of covenants and other forms of treaty) are consistently reflected at the domestic level.

In fact, this is not always the case. Federal public policy tends to divide itself between domestic and international spheres, with the result that major normative developments on the international stage in areas such as human rights, poverty alleviation, or even sustainable development have traditionally had less influence on domestic horizontal policy. This division is in large part the result of an anomaly in Canada: ratifying and signing treaties and covenants – major sources of international law – are executive powers that do not generate a formal requirement for debate before Parliament. Leaving aside the implications for democratic deficit, the result is that many important international

obligations have not been debated publicly and have not become part of Canadian law. Canada has not, for example, transformed into law instruments such as the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which Canada ratified more than two decades ago. Many of the rights contained in that Covenant are central to anti-poverty objectives. They include the right to work, and the right to health care and education (e.g., articles 7, 12, and 13 ICESCR).

Canada generally takes the position that the failure to transform international obligations into domestic law is not important, because legislation is not always required to fulfill an international commitment. The argument is that Canada's many social programs and policies can and do fill the gap. Indeed, the Canadian government frequently takes this position when it appears before international committees that oversee State compliance with international covenants. In order for this argument to hold water, Canada would have to take the position that international standards are binding in practice at the policy level. But adherence to international standards in our policy instruments is not, in fact, federal government policy. In its guidelines to the federal public service, the Privy Council Office directs policy makers to ensure "conformity" with international obligations in the law-making process, but as regards the burgeoning "tool kit" of other instruments (say, guidelines, partnerships, programs, voluntary standards, etc.), policy makers are simply encouraged to consider the "effects" of international obligations (Canada, PCO, 2001).

Indications are that this position is not sustainable. The twin forces of globalization and the post-9/11 environment have made separation of domestic and international policy spheres not only artificial, but also potentially dangerous. As well, the courts are starting to give norms contained in international instruments legal effect, even where the instrument has not been transformed into Canadian law. The courts have held governments accountable to the standards to which they have obligated themselves. This is most likely to occur when Canada's laws fall short of a standard contained in an international instrument and when the "gap" becomes the subject of litigation. Perhaps the best recent example of this in Canada is the 1999 *Baker* decision. The Supreme Court of Canada decided in favour of a mother who was to be deported from Canada. She sought to restrain the government from deporting her on the ground that her child, a Canadian citizen, had the right to live in Canada accompanied by a parent. There is no such right in Canadian law, but the *Convention on the Rights of the Child* supports such an interpretation. The Canadian government argued that the ratification and signing of that convention *did not* mean that the government had accepted the obligations in question, as was argued in the *Baker* case. In other words, the government was not prepared to act in compliance with the obligation contained in the Covenant that it had ratified. The Supreme Court of Canada held that even "non-transformed" international principles (contained in international instruments that have not been enacted into Canadian law) can be used as a source of values, and that they must be taken into consideration by decision makers. [14]

Canada certainly faces the challenges of all federal states, in that legislative responsibilities for acting on legally binding obligations created by international law are split among many jurisdictions. In reality however, the federal government never adheres to major international instruments without prior consultation with the provinces and, increasingly, with the public. This process of consultation and consensus building with civil society, as well as among the federal, provincial, and territorial governments is not easily achieved, but

it clearly reflects widely accepted goals of public participation as a feature of good governance.

The Senate of Canada examined the "disconnect" between international rights and domestic implementation, and observed that there was no formal or systematic process for reviewing legislation in light of international commitments. Evidence from Department of Justice officials at that time indicated that, indeed, no such review occurred on a regular basis. The result, as noted by the Senate, is that Canada has not "entirely fulfilled its international commitments and risks denying its people access to certain of their human rights. Moreover, Canadians and international human rights bodies have begun to notice this gap." (Senate, 2001: Part 1A)

The disconnect between our foreign policy and domestic policy affects the legitimacy of Canada's policy positions. It also raises questions of the distinctions between the administrative and litigation positions within Justice Canada. As well, if it is indeed the government position that non-legislative programs and policies can implement international obligations, then policy guidelines from the PCO and other central agencies should clearly provide for this. As noted earlier, in its Guidelines to the federal public service, the PCO directs policy makers to ensure "conformity" with international obligations in the law-making process, but as regards other instruments, policy makers are simply encouraged to consider the "effects" of international obligations (Canada, PCO, 2001). The issue of how international law should inform policy development is linked to the very practical matter of how the public service respects international obligations when crafting domestic policy.

4. Conclusion

There have been substantive and significant changes in the underlying normative frameworks that inform policy in Canada, especially over the last fifteen years. These changes are especially evident in legal policy through the constitutional, judicial and international law frameworks. The implicit assumption in horizontal policy making at the federal level that our fundamental norms and values have remained stable over the last several years appears, therefore, to require some adjustment.

The following section looks at how basic norms are shifting in the social policy area of poverty and exclusion, and at the implications for horizontal or cross-cutting policy in Canada.

Part II Poverty and Exclusion: A Shifting Landscape

1. New Perspectives, New Definitions

Poverty is generally described in terms of its primary feature, namely inadequate income. Academics and the international community, however, are recasting poverty in terms of capabilities and power as much as income or financial resources. A more integrated definition of poverty is a starting point for developing this policy perspective, one that can account for and assess human dignity and capabilities. One feature of a more integrated definition is the broader range of attributes that are subsumed in our understanding of poverty, including the degree of exclusion (or inclusion) which persons experience as a cause and an outcome of poverty. In Europe, for example, the European Commission has tended to treat poverty and exclusion as concepts that have equivalent effects.

> Poverty and social exclusion affect persons who cannot fully participate in economic and social life, enjoy the benefits of citizenship, and/or whose access to revenue and other resources (personal, family, social and cultural). They cannot benefit from a standard of living and quality of life considered generally acceptable by the society in which they live. In such situations, these persons are only rarely able to fully access their basic rights. [15]

European Union countries are implementing this approach through the administrative, consultative process of agreeing to high-level objectives and setting national targets in line with those objectives. France and Belgium have gone further and are implementing this approach through legislative instruments as part of an integrated instrument mix that provides for minimum income level supplements and basic standards in relation to housing, training, and employment.[16]

Belgium has gone further still: in 1993, it amended its constitution to incorporate social, economic, and cultural rights. Article 23 of the Constitution now provides for rights in relation to employment, social security, legal aid, medical insurance, housing, a healthy environment, and the right to cultural and social development.[17] This provided significant leverage and authority for subsequent intergovernmental agreements in that country and ultimately, legislation. In 1998, the three levels of government signed the *Accord de cooperation relatif à la continuité de la politique en matière de pauvreté*, which set out basic principles of intergovernmental co-ordination along the lines of constitutional competence. Various other agreements, plans, and strategies have been established since then, a key feature being shared target setting by not only the government, but also by poverty associations, community groups, social agencies, and medical insurance groups.[18]

Following the European Summit in Nice (2000), member states adopted a common policy to address social exclusion and articulate shared principles, including the principle of maximizing the participation and quality of life of all persons, and ensuring that social inclusion is integrated into social and economic policies. In July 2002, the Belgian government completed the policy process by enacting the *Law on the Right to Social Integration*, to support the integration of policy approaches to poverty and social integration. The 2002 law focuses on income, job planning and training, and housing. The

change in language from a negative right (the right not to be excluded) to a positive formulation (the right to be integrated) is also of interest.

France's unitary state does not have the jurisdictional complexities that required constitutional change in Belgium. Departments, civil society, and social agencies co-operate to set objectives through the *Conseil national des politiques de lutte contre la pauvreté*, which is under the prime minister's authority, and brings together elected officials and non-governmental representatives. Foreshadowing Quebec's Bill 112, the French government established a national observatory on poverty and social exclusion. The legislative framework in France is set out by the *Loi du 29 juillet 1998 relative à la lutte contre les exclusions*. It guarantees fundamental rights with respect to employment, housing, health, justice, education, culture, the family, and childhood. The French legislation consolidates various pre-existing measures to reintegrate the unemployed into the work force through contractual vehicles and the subsidization of salaries – measures that have been in place since the late 1980s. The legislation consolidates other initiatives, such as subsidizing payment of utilities, training, and housing initiatives for young persons between 16 and 25 years of age. It also includes measures for homeless persons with respect to housing, legal, voting, and health rights. As in Belgium, the involvement of "social partners" in France is fundamental and is implemented through, among other bodies, departmental councils and not-for-profit organizations. In particular, the French program relies heavily on the social sector. Job-seeking services and housing are offered through community services, as well as various supports for homeless persons.

Quebec's Bill 112 was clearly inspired by the more comprehensive European approach to defining poverty and by the legislative examples in France and Belgium. It defines poverty in terms of the broader, more integrated approach referred to earlier in this paper. It is based only partly on income, but also refers to a deprivation of life choices and means, echoing the "capabilities framework" prevalent in much current writing about poverty. It extends to persistent poverty in addition to temporary poverty. Quebec is following accepted practice in including people in a state of temporary poverty, which is what the statistics typically measure and how typical programming is delivered. It is only in very recent years and only in a handful of countries, such as Canada, that we have been able to measure persistent poverty in a way that can sustain practical policy analysis. Ensuring the sustainability of social policy means being able to identify and address persistence of poverty, but we are far from being able to design practical policies based on the persistence concept.[19]

Bill 112 is by no means identical to these European models. It is a broad legislative response to poverty as a tool to prevent exclusion, rather than a head-on attempt to manage exclusion itself. While there are few details in the Bill itself, the April 2004 action plan highlights the key features of the strategy: it focuses on employment as the principal strategy for preventing poverty, and sets a guaranteed income floor for persons on social assistance and the working poor. It creates a bonus system for persons looking for work, and provides additional supports to persons with work limiting disabilities. There is some movement toward greater use of an asset-based approach, and the punitive prohibitions on persons in receipt of social assistance who cohabit were removed. The legislative requirement to establish an observatory on poverty and social exclusion was deferred in the action plan, but several initiatives were announced in connection with social housing.

Like the European models, however, Bill 112's definition of poverty is closely linked to social understandings of inclusion (or exclusion), based on normative, rights-based frameworks.

> 2. [Definition]: For the purposes of this Act, "poverty" means the condition of a human being who is deprived of the resources, means, choices and power necessary to acquire and maintain economic self-sufficiency and favour active inclusion in Quebec society.

Similarly, the United Nations and its agencies approach poverty from this more integrative perspective, expressed in terms of social features as well as in economic terms.

> [A] human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights (UNOHCR, 2003, emphasis added).

It is evident from these examples that something is going on in the definition of poverty itself, namely that it is closely bound up with exclusion, and that its social aspects are fundamental to understanding both the concept and its real-life impacts on people. A more integrated approach to poverty also subsumes many other indicators – illiteracy, increased ill health, gender inequality, environmental degradation, and racialized impacts – all of which are aspects of being poor.

2. Benchmarking Canada's Policy

How does Canada's policy framework on poverty and exclusion fare when assessed against the norms discussed in Part I, and against the evolving conceptual basis of poverty in the preceding section?

The first and most general observation is that there is no comprehensive policy framework to address poverty and exclusion at the federal level. The traditional objectives of Canada's policy approach have been more narrowly focused on raising the gross domestic product (GDP) per capita and setting appropriate low-income cut-off rates. In short, the goals are typically seen as raising people above a low-income cut-off line to address needs at times when people are without sufficient earnings. Since poverty is increasingly characterized not only by low income, but also by other indicators, Canada's record may be less clear if other factors are included in the determination of a broader, more integrative understanding of poverty. Indeed, some of the research discussed below demonstrates that this appears to be the case, especially for vulnerable or marginalized groups. Social policy must also take into account people's different abilities and capabilities to enhance fair and equal access to resources and services.

Looking at our constitutional framework, Canada's division of powers has clearly been the driver of the structure of the current system, which is based on a separation of powers or responsibilities. The federal government is responsible for pension plans, old age security, and child benefit schemes. Transfers to the provinces are used for a wide range of other

programs, such as social assistance. Other less obvious examples are seen in what are effectively redistribution schemes to achieve economic equality in private relations, such as family law, that provides for support for dependent family members.

In terms of actual results, these policies and programs, operating through various levels of government, have been successful, and form a strong social safety net. Canada has also been successful at ensuring intergenerational equity as it relates to intergenerational mobility.[20] Canada is among the countries with the best records for intergenerational income mobility, in the sense that low incomes do not tend to be transmitted from generation to generation (Hicks, 2002). In addition, several social policies contribute to Canada's overall success. According to the Index of Economic Well-Being (measuring access to economic resources), Canadians have, on average, significant control over material resources in comparison to many other countries.[21] Canada also fares well in broader integrative indices, such as the United Nation Development Programme's Human Development Index and the International Development Research Council-sponsored Wellbeing Index (Prescott-Allen, 2001). Yet, there are concerns for the future, particularly in the process for reconciling both normative and empirical considerations. As regards the empirical considerations, Canada does not fare as well as many OECD countries, and the economic well-being of certain vulnerable groups, such as recent immigrants, has slipped (CCSD, 2004).[22] As regards normative considerations, the structure of the CHST (now divided into the Canada Health Transfer and the Canada Social Transfer), which was arguably Canada's most important social policy instrument for responding to, and working within, the constitutional division of powers, contained few principles, and little or no normative expression of the values underpinning health and social policy related to poverty or exclusion.

When the CHST was introduced in 1996, the federal government's contributions were decreased, and were substantially lower than they would have been under the previous system. These reductions were passed on to the provinces and then to citizens through tighter eligibility criteria and a range of programs, such as work-for-welfare schemes.[23] But because these programs were primarily conceived in terms of the political sphere with mechanisms designed to function within a division of powers, as distinct from a normative framework of rights, it is not surprising that the bulk of public reaction was aimed at political decision makers rather than the courts. When social systems were cut back, the response in Canada was framed mainly in political rather than legal terms.[24]

At the international level, these developments and their implications for Canada's international commitments did not go unnoticed. In 1998, the Economic, Social, and Cultural Rights Committee, in its concluding observations on Canada's third report under the *International Covenant on Economic, Social, and Cultural Rights*,[25] expressed concern about the relationship between poverty and alleged infringement of several social and economic rights, especially among identified vulnerable groups (CESCR, 1998).

In 2003, the United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), commented on Canada's most recent report (UN, CEDAW, 2003, para. 33). The Committee noted the impact of cuts in social programming on poor women, and observed the links between poverty, social policy, and women's rights. However, CEDAW commended Canada on women's progress overall, but also commented:

> the Committee is concerned about the high percentage of women living in poverty, in particular, older women, female lone parents, immigrant women, Aboriginal women and women with disabilities, for whom poverty exists or even deepens…. The Committee is also concerned that the State's party's measures are mostly directed towards children and not towards these groups of women (para. 33).

Canada has been a party to CEDAW since 1981.[26]

This observation is supported in the Canadian context by empirical evidence of what is happening in relation to poverty in Canada: Canada's success in terms of addressing poverty issues overall has not been shared equally by all groups in society. According to an HRDC analysis (Hatfield, 2000, 2001), persistent poverty seems to concentrate in certain groups for whom traditional policies appear to be less effective: lone parents, single people aged 45 to 59, people with disabilities, recent immigrants, and Aboriginal peoples. Most child poverty is found in these groups, and persons with disabilities and certain racial minorities experience especially high rates of poverty. Aboriginal persons experience profound and persistent forms of exclusion that are systemic in nature. These kinds of exclusion, which can include poverty or at least some of its manifestations, are increasingly seen as justiciable issues before the courts.[27]

There are other fault lines as well: as noted earlier, much of the current federal policy framework is based on a structure and on normative assumptions created before the Charter. But against the newer, more integrated definition of poverty, and against the changes discussed in Part I, many of the traditional income-based approach in Canada appears fractured, overly narrow, and inadequately informed by the more recent developments on the legal policy side.

For example, Canada's income at a point in time approach is not very good at capturing the role of other resources or assets. Asset-based approaches (including investments in human and social capital) reflect a broader approach than income-based measures permit. They reinforce the importance of forward-looking investments in resources (assets, capital) that can be sustained into the future. New policy thinking that relates to the sustainability of stocks of resources at both the individual and community level is being examined closely in the Poverty and Exclusion project at the PRI (PRI, 2003).

The courts have understood that such overly narrow approaches can lead to inequality and exclusion. In an equality rights case under the Charter, the Alberta Court of Appeal struck down a social assistance scheme for poor older women in *Gwinner v. Alberta (Human Resources and Employment)*. The Court held that the scheme failed to consider the assets of beneficiaries when assessing their need for the program. The program was alleged to be both over-inclusive, in that it benefited women who were asset rich, and under-inclusive because it excluded similarly situated women (separated and divorced income-poor women). The scheme was struck down, because it was considered by the Court to infringe constitutional equality rights under section 15 of the Charter.

The evolving approach before the courts reflects the enormous change in society in terms of what success looks like for particular groups, even those we have successfully targeted in the past. Poverty and old age are excellent examples. A few decades ago, poverty – in its

income-based sense – among older people was a major problem in Canada, with a record much worse than most OECD countries. That changed remarkably and quickly as a result of point in time income policies.[28] This made Canada a world leader in this area. However, as we look forward, many of the remaining problems of exclusion among seniors – a group whose demographics, demands, and influence have changed appreciably – can no longer be easily addressed by income at a point in time policies taken alone.

A 2001 study in Ontario revealed that, despite the overall improvement in economic well-being, persistent forms of disadvantage among older persons are deeply and systemically ingrained in cultural and social structures and norms, resulting in reduced quality of life, lack of power over life choices, and a corresponding diminution of human dignity.[29] A growing number of healthy, active older persons are pushing for a stronger set of social rights, in particular, the right to be included in areas where their exclusion was presumed to be acceptable. Access to work is one example, either through mandatory retirement in some jurisdictions, or indirectly through labour laws, negotiated collective agreements or limited human rights protections. Indeed, this kind of age discrimination had been more or less approved by the Supreme Court of Canada in 1990 for persons over 65 years of age in the *McKinney* case. With changing demographics, however, it is clear that this form of age discrimination – exclusion from employment – has become less and less acceptable. This change has been reflected in recent case law, which has called into question the legitimacy of previous policies and case law.[30]

The picture of what poverty is, how it is perceived and how it sustains itself, is a function of social phenomena, such as a lack of power and choice, and the vicious circle between lack of income and other, complex social indicators. While exclusion appears to offer a valuable way to think about these aspects of poverty, the question then becomes, exclusion from what? As the following section shows, it is "exclusion from membership and participation in society." This test has evolved as a result of the courts' analysis of section 15 of the Charter.

3. Exclusion from What? The Equality Rights Test

In most democratic countries, there is a series of powerful norms that are usually elevated to constitutional or quasi-constitutional status.

- Human beings share a birthright of respect and dignity by virtue of their shared humanity.
- Every person is entitled to equal protection of the law.
- No one is above the law. States must respect their own constitutions and laws, and live up to international commitments.

These norms enable instrumental rights and freedoms that help create sustainable structures within societies: they provide opportunities for people to act in their own self-interest, reduce their vulnerability, and improve quality of life. Amartya Sen's freedoms and capabilities framework links these ideas to principles of sustainable development (Sen, 1999).

Historically, many of these rights and freedoms have found expression at two levels in Canada: the first is through human rights legislation and the second is through the Charter.

Perhaps because it is easier to prevent exclusion than to compel inclusion, prohibitions against some forms of exclusion have a stronger normative base in law. Federal, provincial, and territorial human rights legislation prohibits certain kinds of exclusion (e.g., discrimination on the basis of race, colour, national or ethnic origin, religion, age, disability, and sex).[31] Human rights laws generally seek to achieve social harmony and to prohibit discrimination, which is a key area of social and economic exclusion. Human rights laws generally predate the Charter, and although the level of protection across the country varies, human rights codes typically protect against exclusion from a range of social goods and services, including employment, education, and health services.

Section 15 of the *Canadian Charter of Rights and Freedoms* is central to understanding the relationship between exclusion and equality in the Canadian constitutional framework. It came into force in 1985.

> 15. (1) 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 protects essential human dignity and freedom and promotes a society where all persons enjoy equal recognition and are seen as equally capable and equally deserving of concern, respect, and consideration.[32] The relationship to exclusion is obvious, and the link to poverty is only one step removed.

> [E]quality and non-discrimination are among the most fundamental elements of international human rights law. It follows that th[is …] normative framework has a particular preoccupation with individuals and groups who are vulnerable, marginal, disadvantaged or socially excluded. Thus, the human rights approach to poverty reduction requires that laws and institutions that foster discrimination against specific individuals and groups be eliminated and more resources devoted to areas of activity with the greatest potential to benefit the poor (UNOHCHR, 2002)

In Canada, the current authoritative test for section 15 was set out in *Law v. Canada.*

> [T]he proper approach to…s. 15(1) of the Charter involves…three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one

> or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? [Emphasis in original.]

Historically, the third part of the test has caused the most difficulty, since the assessment of "substantive" differential treatment cannot be easily quantified or articulated in a clear standard. In the third part of the test, courts look to the impact of exclusion in terms of its effect on human dignity. According to *Law*, a plaintiff has to show:

> that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society will suffice to establish an infringement of section 15(1).[33]

It is possible for an individual to prove a violation of human dignity, without being part of a historically disadvantaged group.[34] However, beyond manifestly offensive cases of discrimination based on personal characteristics, the general trend in the Supreme Court has been to interpret the third part of the *Law* test relatively narrowly by requiring claimants to refer to any one of a variety of contextual factors, such as historical disadvantage, to assert equality rights. According to the Court, these factors are relevant because:

> to the extent that the claimant is already subject to unfair circumstances or treatment…further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them since they are already vulnerable.[35]

When public programs and policies operate to exclude the membership or participation of individuals in Canadian society, there is a heightened level of constitutional scrutiny, and the courts are more willing to order the creation of a particular social program. One example is the exclusion faced by persons with disabilities in relation to the health care system. In one case, a government-sponsored program to provide health services to the general population was held to be unconstitutional, because it failed to include a program to provide sign language interpreters. This meant the program operated in a manner that made it practically inaccessible to persons who are deaf or hearing impaired.[36] In this case, a program to offer sign language interpretation was imposed, even though this is a matter of social policy in which courts are generally loathe to interfere.[37]

Obviously, not every kind of exclusion results in a successful challenge. Virtually every government social assistance program creates distinctions and differences. To prohibit any distinction would be to paralyze government action. However, analyzing appellate cases over the last decade in equality areas, the courts are actively using exclusion from membership and participation, or equivalent phrases, as a test for the kind of distinctions that give rise to successful section 15 challenges.

In the course of research for this paper, decisions of the Supreme Court of Canada and courts of appeal that dealt with equality rights were examined to assess whether judicial consideration was given to the relationship between exclusion and equality. On analysis, 10

of these cases made explicit reference to “exclusion” as a marker of equality rights, and half of those occurred within the context of social assistance or social security programs. In one case, *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, the Court specifically articulated “exclusion from membership and participation in Canadian society” as the key factor.

- In *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the Supreme Court of Canada considered the exclusion of off-reserve Aboriginal band members from band governance.
- In *Egan v. Canada*, [1995] 2 S.C.R. 513, the Supreme Court of Canada considered the exclusion of persons from old age social security legislation because of sexual orientation.
- In *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429; the court considered the exclusion from supplementary payments under a welfare scheme on the basis of age.
- In *Gwinner v. Alberta (Human Resources and Employment)* [2002] AJ 1045, the Alberta Court of Appeal considered the exclusion of divorced and separated women from a social assistance scheme designed for widows.
- In *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, the court stated that “exclusion and marginalization (of persons with disabilities) are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself."
- In *Halpern v. Canada* (2003), 225 D.L.R. (4th) 529 (Ont. C.A.), the Court held that because same-sex couples are excluded from the institution of marriage, this exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships.
- In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court of Canada considered the exclusion of a younger person from the Canadian Pension Plan.
- *M. v. H.*, [1999] 2 S.C.R. 3 dealt with the exclusion of gays and lesbians from the operation of family law legislation.
- In *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, the Court examined whether the denial of charitable status to a community-based organization constituted “exclusion from membership and participation in Canadian society.”
- In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29, the Court considered the exclusion of gays and lesbians from provincial human rights law protections in Alberta.

The role exclusion plays in equality rights thus appears to be well established in Canadian case law under s. 15 of the Charter.

The next section turns to the application of this analysis to poverty issues in particular.

4. Poverty and Rights

Poverty is increasingly being understood not just as a development issue, but also as a rights issue (UNOHCHR, 2002). The case law on section 15 of the Charter shows that equality rights are closely linked to “exclusion from membership and participation in Canadian society, and this section is focused building on this analysis in the context of poverty. If persons living in poverty are unable to access social and economic goods, they can be effectively excluded from membership and participation in society. This exclusion can trigger a finding that basic constitutional rights have been infringed.

There is no explicit right to be free from poverty in Canada, and section 15 of the Charter does not mention poverty as a ground. No appellate decision in Canada has as yet recognized poverty per se as a so-called analogous ground. (Section 15, it will be remembered, sets out a non-exhaustive list of grounds, but these are intended to be illustrative, thus opening the door to evidence about new, non-enumerated grounds.)[38]

But when one looks at poverty from the broader definition, there is a group of associated rights that, when combined with the test of “membership and exclusion from Canadian society”, is capable of transforming some claims into justiciable rights before the courts, thus bringing the poverty-exclusion nexus more sharply into focus. According to the Supreme Court’s decision in *Law*, a claimant who can show that her or his human dignity has been violated by government action can prove the case by providing evidence as to contextual factors to demonstrate the breach of equality guarantees. Courts look to evidence of these contextual factors (e.g., persistent disadvantage, stereotyping, systemic discrimination and – bringing us back full circle – exclusion and poverty) to show that equality rights have been infringed.[39] When programs operate (even inadvertently) to create an adverse impact among certain groups or to affect their significant interests, the courts will be more likely to find that the exclusion constitutes a breach of the equality guarantees of the Charter.

In Canada, many rights and freedoms find expression not only in the Charter and human rights laws, but also in criminal law, the application of the rule of law, international covenants and other instruments, to name a few. Human rights commissions have offered limited economic and social protections for several decades`, even though these protections are rarely described in terms of social and economic rights in Canadian literature (OHRC, 2001d: 28-29).[40] For instance, most human rights laws prohibit discrimination against persons who receive public assistance in areas such as housing. In Quebec, broad protection is provided on the ground of “social condition.” In fact, Quebec is the only province to offer this protection.[41] Social condition is an example of a tangible intersection of both economic and social elements of a person’s status in society. It seeks to ensure that all individuals, regardless of social condition (which includes low income) can enjoy the benefits of the law or compete on a rational basis in the market for goods and services (Lamarche, 1999).

A Canadian example of how the nexus between poverty and exclusion plays out in relation to social and economic rights is a group of cases dealing with access to rental housing. For years, property managers in Ontario screened out applicants by using a 30 percent minimum income test. If the apartment’s rent exceeded 30 percent of the applicant’s gross income, the applicant was refused. The rationale for the policy appeared straightforward, namely to ensure that applicants – especially poor ones – could pay the rent. A board of inquiry[42] relied

on expert evidence to show that income-based criteria unfairly excluded applicants from the housing market by restricting their *choices* and thus their ability to rent accessible housing, in part because of stereotypes about persons living in poverty (that they are less likely or willing to pay). These rental practices excluded persons on social assistance, and other vulnerable groups, including lone parents and new arrivals to Canada.

The minimum income test was also found to distort the rental market by restricting the range of affordable housing and forcing persons with low incomes away from monthly rentals into higher cost and inferior housing (such as by-the-week rentals or rooming houses) or onto the street. The practice was declared to be a violation of the Ontario *Human Rights Code*, and landlords were prohibited from using minimum income criteria and rent-to-income ratios. What is interesting about this case is not that it is authoritative (it is not a court decision), but that the board of inquiry rejected the narrow economic approach of the property managers with respect to the circumstances of poor applicants. Instead, the board insisted on a more integrated approach that took into consideration the social impact of the rental application practice on the applicant's choices and power (in essence, the integrated definition of poverty), and then linked it to the offending practice, namely the exclusion of certain groups from the housing market. The property managers decided not to appeal the case with the result that a systemic and exclusionary practice has been abolished.

The nexus between poverty and rights has been strengthened by two decisions of Canadian appeal courts, which held that receipt of social assistance is an analogous ground under section 15 of the Charter.[43] Persons receiving social assistance – a large group of persons living in poverty in Canada – are considered to be a discrete and insular minority, and they are entitled to section 15 Charter equality rights (regardless of province of residence), because of the stigma associated with being in receipt of social assistance that diminishes human dignity.

A growing body of section 15 Charter cases provides direction with respect to the kinds of government action likely to be considered to exclude certain groups of vulnerable persons. This guidance is evident both in cases where the government has succeeded and where it has not.

In the first category is a case involving a Quebec scheme to reduce welfare among young people who did not sign up for a training course. In the *Gosselin* case, the Quebec government had created a special scheme to support youth employment by capping the base amount of welfare payable to those under the age of 30 at roughly one third of the base amount payable to those 30 years of age and over. However, the scheme was changed in 1984 to allow people under 30 to increase their welfare payments to a comparable level as those in the 30-and-over group if they signed up for a training program.[44]

The plaintiff, Ms. Gosselin, was unable to complete the program for a number of personal reasons, and was therefore denied the top-up benefit. She complained that she had been discriminated against because only persons under 30 were required to take the training program. She decided to make the case on the ground of age, rather than social assistance (a decision that would later prove to be a strategic error). The Court accepted the government's evidence that young persons were experiencing significant unemployment and

that the objective of breaking the cycle of welfare dependence was a valid social policy objective. Ms. Gosselin's challenge was unsuccessful. The Supreme Court found no evidence that the claimant's rights to equality and human dignity had been violated.[45]

The Supreme Court of Canada emphasized that policy makers do not have to demonstrate a precise fit between the program and the targeted group, provided the policy design is rational and evidence based, and that distinctions do not violate human dignity. Although a precise fit is not required, the impugned distinctions do have to have an empirical basis and demonstrate that the needs and dignity of persons who may be excluded were given due consideration. The government won the case, but the Court was badly split. While the decision was viewed by many as a step back for poor litigants, it was also criticized by one think-tank as a warning that the Court was on the verge of creating a right to welfare.[46]

The government lost, however, in the *Falkiner* decision, which established a new precedent on the constitutional rights of people on social assistance. *Falkiner* dealt with Ontario's decision in the mid-1990s to restrict eligibility criteria for welfare, partly as a result of diminished funding under the CHST. The government passed a regulation, which created a legal presumption that a person cohabiting with a person of the opposite sex was the spouse of that person. Applied to social assistance applicants or recipients, this meant that – even in the absence proof of spousal status – thousands of social assistance recipients, mostly single mothers, lost eligibility for assistance. The government lost the case at the Court of Appeal, where Mr. Justice Laskin, held that the regulation disproportionately affected a vulnerable group (single women), and most important, that the regulation violated the rights of persons by creating a demeaning rule that applied to them solely because they were social assistance recipients. In saying this, the Court overruled earlier decisions that had gone the other way, including the earlier decision from the same court in *Masse*.

What is most interesting about this case from the policy maker's perspective is that the public servants designing the regulation in *Falkiner* were focused on income as the marker of poverty. They believed that the real income of welfare recipients was being kept artificially low when these persons cohabited with other persons. This may or may not have been accurate, but by failing to consider the impact of the regulation change on the capabilities of persons on social assistance (especially single women, according to the evidence in the case), the government had effectively diminished their capacity to enter into stable relationships, thus creating a form of exclusion that existed for no one else in society. *Falkiner* has been appealed to the Supreme Court of Canada.

These principles were applied in the context of economic rights in the Alberta case of *Gwinner*, which was discussed earlier. The Alberta provincial government had created an income-based benefit plan for widows between 55 and 64.[47] The government was able to show that this group was in real financial need, but was unable to justify the exclusion of similarly situated women, such as divorced or separated women whose partners or ex-husbands had died. In considering the exclusion of divorced and separated women, the Court examined the validity of the personal characteristic or "marker" used to distinguish between the beneficiaries and others. The markers were (1) being widowed, (2) being between 55 and 64, and (3) being poor. The Court found that in light of the underlying policy objectives, the markers *should have* included a broader assessment of economic position (i.e., overall wealth, including assets) and social position (i.e., disruption of dependency due

to the death of the person's partner or ex-partner). The legislative criteria did not include meaningful markers for either factor, and the legislation was declared to violate the rights of the excluded classes of persons, namely divorced and separated women. The substantive violation of human dignity was an important part of the test, in addition to the empirical assessment of financial position.

Finally, the doors to claiming poverty as an analogous ground under section 15 of the Charter were pushed further open recently in a very interesting decision of the Ontario Divisional Court in *Polewsky v. Home Hardware Stores Limited*. The plaintiff alleged that he was poor, and that the requirement to pay court fees in order to file a claim before the Small Claims Court violated his equality rights and the common law right of access to the courts. With respect to his Charter rights, the applicant had filed little or no compelling evidence to demonstrate his own poverty, nor any empirical evidence with respect to the political and legal history of Canadian society's treatment of the poor. The Court stated that evidence had to be led with respect not only to this differential treatment, but also that the differential treatment brings into play human dignity. Failing this, the Charter case could not succeed. At first instance, Gillese J. had stated that

> Decisions on an issue as fundamental to Canadian society as [its] treatment of those in financial need and access to the courts must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and impact that these decisions may have, the courts ought not to be asked to rule on such matters on the basis of bald assertions. Such rulings should only be made after the careful presentation and preparation of the appropriate factual basis. The relevant fact should cover a wider spectrum of scientific, social economic and political aspects.[48]

This – rather than an inherent difficulty with poverty as a potential ground under s. 15 - was the focus of the decision. But the implicit invitation by the Court to researchers seeking to establish poverty as an analogous ground under the Charter in future cases through historical and social research was clear enough, and the invitation should be heard not only by the anti-poverty movement but also by government researchers and policy makers.

Part III Designing Policy from the Poverty–Exclusion Nexus

Poverty and exclusion are related but separate concepts that, together, form a powerful policy nexus. Deprivation of resources, and particularly income, may be a key feature of poverty, but the policy approach, as mentioned earlier, refers to the *human condition that is characterized by the deprivation of the resources, capabilities, choices, security, and power*. Exclusion, on the other hand, continues to have a distinct meaning that is more closely related to segregation or discrimination, and that is directly linked to norms with legal and constitutional relevance.

The focus of this paper is the intersection of the two concepts and the implications of that intersection. What are the implications for policy makers?

The first set of observations is linked to the ambit of economic rights. Policy-relevant research on poverty that is targeted to vulnerable groups experiencing exclusion should be sensitive to wider indicators of actual resources (assets and income, for example). (See the discussions on the *Gwinner* case, *supra*.) When policy makers make rational choices to assist such groups they cannot unfairly exclude others. On the other hand, where the choices are rational and do not harm human dignity, the courts are likely to respect these social policy choices. (See the discussion on *Gosselin*, *supra*.) As well, policies should also encompass persistent poverty, in addition to the more traditional spheres of temporary incidence of low income.

Second, poverty is a phenomenon that engages social factors as well as economic ones. The capacity of social programs to address poverty meaningfully is a significant issue for much of today's public policy. According to Nobel Laureate Amartya Sen, economic growth is only one of many factors involved in reducing poverty and improving well-being. In a democratic society, essential freedoms and personal capabilities are the real measures of national development and quality of life (Sen, 1999). Policy makers should consider the broader impacts of policy proposals on poor people, and the possibility that policy measures (especially those that remove or restrict benefits) may worsen the circumstances of persons living in poverty (as occurred in the *Falkiner* case).

In summary, existing policies are typically addressed to alleviating low incomes at a point in time through tax measures, pensions, social assistance, or employment insurance among others. Such income-based measures will remain important in the future but they should be placed in the context of an overall strategy or framework based on the broader definition of poverty discussed at the outset of this section, a framework that allows a reconciliation of both the human rights and empirical effectiveness dimensions of policy making.

1. A National Strategy Against Poverty

As noted earlier, there is no comprehensive policy framework to address poverty and exclusion at the federal level. It is true that a more integrated and normative approach to poverty and exclusion is particularly challenging in Canada, because of our federal structure. Because of the jurisdictional complexity of poverty issues across federal and

provincial lines, a comprehensive strategy against poverty is more likely to succeed if located within the framework of co-operative federalism and section 36 of the *Constitution Act*. The Social Union Framework Agreement provides a good model, despite the perception that it may not have lived up to its potential in the past. It could become a mechanism that provides a platform to link economic and social factors of poverty and exclusion at a national level, especially in light of the recent creation of the Canada Social Transfer.

Such a strategy would be a tangible step in the attainment of the Millennium Development Goals for Canada, while respecting federal and provincial areas of jurisdiction. The importance of these objectives was reaffirmed by the Secretary-General of the United Nations during his state visit to Canada on March 8, 2004 and by the Prime Minister of Canada on that occasion.

2. Integration of Legal Norms

As noted earlier, much of the crosscutting or horizontal research carried out by the federal government on social policy on poverty-related issues tends to focus on quantitative research that implicitly assumes a certain set of norms. In fact, the legal policy framework is evolving and, in particular, exclusion and poverty are moving closer together and closer to equality rights. This is critical for horizontal policy making, but has not been generally or explicitly accepted or integrated in federal policy-making circles, even though certain aspects of the capabilities framework may be implicit in certain sectors of policy research in law-based departments such as Justice Canada.

The development of an updated normative framework, and particularly one that incorporates the legal policy side of the equation, should be integrated much earlier in the process to ensure that appropriate, policy-relevant research is informed by legal developments. It should be emphasized that this would not necessarily be a "legal opinion" in the sense that might be requested of legal services branches. Nor would it replace the legal assessment of Charter compliance that occurs at the back end of the policy process. Rather, this would be "front end" integration of legal policy considerations. Two sub-areas for consideration are discussed in the following sections.

Charter and Human Rights Norms

Front-loading legal norms is not as wide-ranging or onerous an endeavour as might appear at first glance. The number of grounds in the Charter and in human rights laws is finite (at least at any given point in time), and the known or likely consequences of a policy can be taken into consideration as a function of policy objectives.

At the domestic level, the courts have rendered several decisions that have substantively changed our understanding of equality and its relationship to exclusion and the rights of persons in vulnerable or at-risk groups. When people are excluded from government programs in a manner that constitutes "exclusion from membership and participation in Canadian society," courts are willing to wade into social policy areas to redress the balance using equality rights. The research link between who is identified as vulnerable and which groups are considered to be "discrete and insular minorities" for the purposes of section 15 of the Charter are thus closely connected, and this includes groups of persons who are living in poverty.

The legal norms have to be taken into consideration early in the process. Recent case law suggests that the principal bar to a finding of poverty as an analogous ground under section 15 of the Charter may be more linked to lack of a sound evidentiary basis and a lack of research brought before the courts than to an inherent prohibition against such a finding.[49] As discussed earlier, a research strategy on poverty at a national level would proactively address some of the evidentiary gaps discussed by the courts.

International Law and Domestic Law: Bridging the Gap

Finally, international rights are likely to have an impact at the domestic level, whether or not the instrument or covenant has been transformed into law. Equality law cases and decisions such as *Baker* show that Canadian courts are likely to be required to consider such rights. Falling into this category is the progressive realization of rights to adequate food, shelter, housing, health, education, decent work, personal security, access to justice, and rights to participate in public life (which includes privacy) and, of course, the full range of political and civil rights (UNOHCHR, 2002).

Canada should examine the integration of international human rights standards with domestic law and policy as part of a national strategy to address poverty. As noted earlier, the Senate in 2001 made reference to barriers in fighting poverty and discrimination as a result of Canada's failure to implement or "transform" international human rights obligations into domestic law (Senate, 2001, Part IA). The gap is such that it has been argued that Canada's understanding of its own legal system has not yet adjusted to the changes in global governance affecting the evolution of Canadian law and policy. Developing this understanding also requires improved policy coherence and integration between government departments (Toope, 2002).

One obstacle to formal transformation of international obligations is that many of them were undertaken with little or no public debate, a debate that would have integrated public comment and opinion, including those of persons living in poverty. And, practically speaking, many of these rights cannot simply be legislated overnight. One proposed solution is an "international law filter" to assist policy makers in the systematic design and implementation of policy proposals to improve the capacity to evaluate whether they are consistent with international norms. For example, when policy proposals are being researched in their early stages, researchers should, as a matter of course, review applicable international treaties and covenants to which Canada is a party to assess the compliance of the proposal with international law. This should apply not only to policy proposals that will be implemented though legislative instruments (as is now the case), but also to other kinds of policy instruments. As noted earlier in this paper, in its guidelines to the federal public service, the PCO directs policy makers to ensure "conformity" with international obligations in the law-making process, but as regards other instruments – policies, guidelines, partnerships, contracting-out, negotiated rule-making, and the creation of new entities such as foundations – policy makers are simply encouraged to consider the effects of international obligations (Canada, PCO, 2001). Given the burgeoning number of new instruments and the active encouragement by the PCO and other central agencies to use law making as an instrument of last resort, a change to the guidelines is especially appropriate.

Conclusions

Canadian policy makers can improve their effectiveness by taking a normative approach that sees the Charter, the courts and, increasingly, international law and related international developments as policy drivers with a critical impact on how policy is formed.

In particular, the Charter has changed the relationship between courts and legislatures, with the result that developments in equality rights have already been drivers of policy in certain areas, If policymakers do not integrate these developments "up front", the courts will, in some circumstances, intervene to "reset" social policy. Social areas, such as health and education, tend to be especially vulnerable to challenge since they touch on basic issues, such as education and health.

A second set of developments comes from international law, which is increasingly a driver of policy, at two levels. The first is that the courts are more likely to use international law – even if it is not yet transformed into Canadian law – to inform their decisions. As well, the policy implications of international law have increasing relevance for how governments should manage the horizontal policy development process, including the recognition of principles that are developing legal force.

Applying these considerations to the area of poverty and exclusion, this is especially important because the conceptual and normative foundations have developed and changed considerably over the last two decades. These changes have not been fully integrated into social policy development across the federal government's crosscutting policy research agendas. At the international level, equity and poverty eradication have emerged as global priorities within the context of a broader policy approach based on sustainability of policies for OECD countries. Applied to the social field, sustainable social policy underscores the

> importance of moving beyond a curative role for social policy, towards a greater focus on prevention and on the incentive structures of agents. Second, [is] the need to move away from the typical one problem / one instrument approach in the formulation of social interventions, towards greater ex-ante integration of social goals into other areas of policy making (OECD, 2003).

It may be difficult to see the need for broad reorientation of policy approaches in Canada because, for the most part, current approaches seem to work well in terms of broad averages. In comparison to other countries whose poverty levels are much worse, there seems to be little cause for concern. If a law or policy violates a person's rights or freedoms, there are legal recourses. Further, international instruments that address human rights and freedoms may be perceived by some to be directed at developing countries where the poverty situation is much worse. While Canada undoubtedly remains one of the best countries in the world with respect to addressing poverty, none of these arguments is especially persuasive.

First, parallel research in PRI shows that, once one gets behind the broad averages of our historical accomplishment with respect to poverty, the changing fabric of our society suggests that new approaches will be needed to address new problems, or new aspects of

traditional problems. These new approaches also need to reflect important changes in the norms that emerge from both the international and the domestic spheres. A related legal development is the trend to view poverty in relation to exclusion, and there is a "home grown" judicial test of "exclusion from membership and participation in Canadian society" which has evolved as a litmus test for determining whether government policies violate equality rights. The exclusion test ensures not only that government policies respect the rule of law and are consistent with the values expressed in the Charter, but also that they reflect the values contained in international instruments that Canada has ratified. Much of the case law on this point has been rendered over the last decade.

Second, the courts should be a venue of last resort. Compliance with the rule of law and sensitivity to emerging norms is as much the business of the policy maker as it is of the judiciary. The issue of accountability for compliance with international norms remains, in particular, a matter of concern. If international instruments are not "really for Canada" then, of course, Canada should not sign them. As a matter of principle, the courts have repeatedly stated that adherence to international instruments signals Canada's intent to comply. As a matter of practice, adherence to standards that Canada has promoted and adopted should be a basic feature of the development of both legislative and non-legislative instruments.

Third, a more comprehensive understanding of poverty and exclusion offers a policy-relevant lens through which the norms around social policy issues can be examined through a more sustainable perspective that supports a rights-based capabilities framework. This means that policy responses to poverty should:

- integrate economic and social well-being, including Charter-inspired values of human dignity;
- be forward-looking (proactive and preventive), with one facet of this being the capacity of the research underpinning policy responses to examine persistent poverty as well as point in time responses to temporary poverty;
- be developed in accordance with basic principles of good governance, including public participation in their development; and
- reflect ongoing and dynamic changes in norms, in both the domestic and the international spheres.

Normative approaches to policy provide us with a mirror on ourselves – about how our own country behaves, how other countries perceive us, and how others are likely to behave and interact. In short, normative approaches provide a critical piece of the policy puzzle by identifying the current rules of the game and the analysis of what the next set of rules is likely to be.

As noted at the outset of this paper, getting policy right has to start with the rules of the game of society. These include formal law, as well as emerging practices, principles, and norms that, together, form the bedrock of how societies choose to order themselves. Although poverty and exclusion persist as social problems, policy that is capable of integrating norms at the outset of its development will be better able to meet the demands of those it is setting out to help.

Notes

[1] An Act to combat poverty and social exclusion. R.S.Q. c. 61.

[2] As part of the European Social Policy Agenda, EU countries have a joint approach to poverty and exclusion with common objectives and specific targets. Each country develops its own strategy to achieve these targets. As discussed below, France and Belgium also have taken a legislated approach.

[3] Richard A. Posner (2001: 95) goes further and posits that norms are fundamental to law in a way that is not the case for more quantitative and descriptive disciplines.

[4] For example, the Policy Research Initiative, which was created by the Clerk in 1996 to develop policy for the medium and long term in the federal public service, has issued a number of publications and books over the last seven years. Very few of the products were informed by a legal policy perspective. See, for example, Growth, Human Development and Social Cohesion (1996) and Canada 2005: Global Challenges and Opportunities (1997).

[5] On the role of law and the interrelationships with international relations and political science, see the Canadian study by Finnemore and Toope (2001).

[6] Constitution Act, 1867 (U.K.), 30 and 31 Victoria, c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[7] The power over unemployment insurance, for example, was added to the federal jurisdiction in 1940. Authority for matters not otherwise prescribed lies with the federal government, whereas matters of a local and private nature are under provincial jurisdiction. Ibid. ss. 91, 92.

[8] The creation of shared cost and transfer programs has been a prominent feature of co-operative federalism. Since the 1960s, major programs included the 1966 Canada Assistance Plan (R.S.C. 1985, c. C-1) and the 1977 Established Programs Financing Plan, covering income support, social services, health care, and education. These were replaced in 1996 by a block fund called the Canada Health and Social Transfer (CHST), pursuant to the Budget Implementation Act, 1995, S.C. c. 17. Since that time, there have been several changes to programs through new funds and benefits, such as the Equalization Fund. In 2003, the federal government announced a health reform fund and a year later, the Compassionate Care Benefit was added as part of the Employment Insurance package of benefits. Most recently, the CHST was replaced on April 1, 2004 by the Canada Health Transfer and the Canada Social Transfer following a recommendation of the Romanow Commission.

[9] Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11.

[10] Except for Quebec.

[11] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (U.K.), 1982, c. 11.

[12] Symes v. Canada, [1993] 4 S.C.R. 695, citing with approval Décary J.A., at 785.

[13] Lowrey (Litigation guardian of) v. Ontario [2003] O.J. No. 2009. A similar issue was also litiagated in British Columbia in the Auton case, which will be heard by the Supreme Court of Canada.

[14] Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39.

[15] Conseil de l'Union européenne (2001). Unofficial translation. An earlier statement noted:

Social exclusion refers to the multiple and changing factors resulting in people being excluded from the normal exchanges, practices and rights of modern society. Poverty is one of the most obvious factors, but social exclusion also refers to inadequate rights in housing, education, health and access to services. It affects individuals and groups, particularly in urban and rural areas, who are in some way subject to discrimination or segregation; and it emphasizes the weaknesses in the social infrastructure and the risk of allowing a two-tier society to become established by default. The Commission believes that a fatalistic acceptance of social exclusion must be rejected, and that all Community citizens have a right to the respect of human dignity (Commission of the European Communities, 1993). <http://pages.123-reg.co.uk/gallant-52694/socialinclusion2000/id4.html>.

[16] In France, the government's legislation to address social exclusion and poverty was enacted in 1998. Belgium adopted its legislation in 2002. See the Loi concernant le droit à l'intégration (May 2002). The text of the legislation is available at H <Hhttp://socialassistance.fgov.be/law_26_05_02/wet_26_mei_2002.pdf**HH**>.

[17] Constitution de la Belgique, 1993. Article 23. <http://www.arbitrage.be/fr/textes_base/textes_base_constitution.html>.
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[18] The principal objectives of the Belgian plan include the integration of persons into the work force, encouraging entrepreneurialism, and reducing the work week. Since 2002, the federal government has also focused on personalized service for unemployed persons, subsidized work contracts, and flexible or shared work arrangements, especially for smaller businesses.

[19] Thanks to Peter Hicks for his insights with respect to this issue.

[20] Intergenerational equity is concerned with the fair distribution of, and access to, resources for future generations. The solutions brought to bear on social problems that affect individuals in a given phase of their lives can also affect opportunities later on, not only for the individuals themselves but also for their children. The OECD has observed that most social programs represent a "form of intergenerational transfer, whose financing may weigh heavily on the employment opportunities of current and future generations of workers" (OECD, 2003: par. 2).

[21] Trends in Canada, and comparisons with other countries based on the Index of Economic Well-Being are discussed in more detail in an associated compendium being developed at the PRI under the Poverty and Exclusion project.

[22] As well, The Economic Well-Being Index shows that on average Canada became more secure during the 1960s progress levelled off in the '70s and '80s. During the 1990s, however, it also indicates that Canada experienced deterioration. The United Nations Development Programme Human Development Index ranked Canada third out of 173 nations in 2002, and Canada fell to eighth in 2003. See UNDP (2002, 2003).

[23] See the discussion in SRDC (2002 at ES-5).

[24] But see the Falkiner and Masse cases, discussed below.

[25] International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI) UNGAOR, (1966).

[26] Covenant on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN CEDAW (September 3, 1981), <Hhttp://www.hrweb.org/legal/cdw.html**H**>. Canada signed the Convention in July 1980 and ratified it in 1981.

[27] For example, the Supreme Court of Canada has observed that Aboriginal people are excluded from political membership in Canadian society, because of disproportionate incarceration relative to their numbers in the broader population and that this reflects factors such as higher rates of poverty and institutionalized alienation from mainstream society more generally. Sauvé v. Canada (Chief Electoral Officer) [2002] 1 N.R. 294, 2002 SCC 68 at para. 60-65.

[28] Thanks to Peter Hicks for introducing this perspective into the paper.

[29] Consultations held in 2000 in Ontario highlighted experiences among older persons, such as involuntary retirement, elder abuse, limited access to elder care, as well as inadequate and discriminatory access to goods, facilities, and housing. In short, these are linked to resources, and to the deprivation of choices and power (OHRC, 2001b, 2002). The report and the policy were influential in the decision of the government to propose amendments to the Human Rights Code that extended protection to persons over 65 years of age in the area of employment.

[30] See Greater Vancouver Regional District v. GVRD Employees' Union, 2001 B.C.C.A. 435, [2001] BCJ No. 2026.

31 For example see: Human Rights Code. R.S.O. 1990, c. H.19, part I and Canadian Human Rights Act. R.S.C. 1985, c. H-6, section 3(1).

32 See the decisions of the Supreme Court of Canada in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R.497; M. v. H., [1999] 2 S.C.R. 3, [1999] S.C.J. No. 23.

33 Law, supra, at para. 64.

34 Recently, the Supreme Court of Canada struck down a British Columbia law that caused fathers to be excluded from birth registration documents. The Court found that based on sex as an enumerated ground, the legislation unfairly and arbitrarily excluded men from meaningful involvement in their children's lives. While the respondent tried to argue that the father's section 15 claim was weakened because he does not belong to a historically disadvantaged group, the Court reiterated that historical disadvantage is not a precondition to making a section 15(1) Charter claim. Trociuk v. British Columbia (Attorney General) 2003 SCC 34.

35 Law, supra at para. 63.

36 Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86. But see Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

37 The criteria for eligibility to such programs and benefits are frequently the source of litigation. See, for example, Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429 (challenge to a welfare and training scheme); Symes v. Canada, [1993] 4 S.C.R. 695, [1993] S.C.J./A.C.S. No. 131 (QL); Egan v. Canada, [1995] 2 S.C.R. 513, [1995] S.C.J. No. 43 (QL) (challenge to the Old Age Security Act); Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 (challenge to the Canada Pension Plan on the ground of age); Gwinner v. Alberta (Human Resources and Employment) [2002] AJ 1045 (Alta. C.A.) (challenge to an Alberta benefit program to supplement the income of widows).

38 In at least one case, R v. Rehberg (1994), 111 D.L.R. (4th) 336 (N.S.S.C.), a court has found poverty to be an analogous ground, but it was decided prior to the currently accepted test set by the Supreme Court of Canada in its two landmark cases Egan and Law.

39 Lovelace v. Ontario, [2000] 1 S.C.R. 950, (sub nom. Ardoch Algonquin First Nation and Allies v. Ontario) 2000 SCC 37, at para. 6, Iaccobucci J. [Lovelace cited to S.C.R.]. Some Canadian academic writing supports the acceptance of poverty as an analogous ground: see Jackman (1994).

40 These protections exist separately from the Charter and, in many instances, predate it. The nature and extent of protections vary from province to province. Ontario and Saskatchewan include "receipt of social assistance" as grounds of discrimination (although Ontario's is limited to the area of housing). Manitoba, Alberta, Nova Scotia, Yukon, and British Columbia prohibit discrimination based on "source of income," which is broader and covers all lawful sources of income and can protect the working poor or those who may be discriminated against, because of another source of income, such as spousal support or receipt of pension benefits. Quebec prohibits discrimination on the grounds of social condition under the Quebec Charter of Human Rights and Freedoms. R.S.Q. c. C-12. (There are specific provisions protecting people on the basis of "social condition.")

41 The Senate of Canada and the Canadian Human Rights Act Review Panel recommended that social condition be added as a ground of discrimination in the Canadian Human Rights Act to protect persons in ongoing situations of social or economic disadvantage. This amendment would have essentially made a causal link between poverty and exclusion. In June 1998, Bill S-11 was unanimously passed in the Senate. Bill S-11 would have added "social condition" as a prohibited ground of discrimination in sections 2 and 3(1) of the Canadian Human Rights Act. In the House of Commons, the Bill received first reading and, in April 1999, the Minister of Justice announced that the CHRA Review Panel would consider, among other things, social condition as a prohibited ground of discrimination. Subsequent to the Minister's announcement, Bill S-11 was defeated on second reading in the House of Commons.

42 Kearney v. Bramalea Ltd. [1998] O.H.R.C.B.I. No. 21 (QL).

43 Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch) (2000), 49 O.R. (3d) 564 (C.A.); Gwinner v. Alberta (Human Resources and Employment) [2002] AJ 1045. But see

Masse v. Ontario (Ministry of Community and Social Services), [1996] O.J. No. 1526 [Masse], leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 373, where the claimants sought review of reductions of the social assistance rates by 21.6 percent. Eighty percent of recipients of social assistance were affected. Masse was overturned, in part, by the Court of Appeal in a different case with respect to whether receipt of public assistance is an analogous ground, but was not overturned in the result, which foreshadowed the reasoning of the Supreme Court of Canada in Law, supra.

[44] Social Aid Act. R.S.Q. c. A-16, as rep. by An Act Respecting Income Security, R.S.Q. c. S-3.1.1, as rep. by An Act Respecting Income Support, Employment Assistance and Social Solidarity, R.S.Q., c. S-32.001 amending section 29(a) of the Regulation respecting social aid, R.R.Q., c. A-17, r. 1.

[45] Gosselin v. Quebec (Attorney General), [2002] 1 N.R. 298, 2002 SCC 84.

[46] The Fraser Institute, a conservative think-tank, considered Gosselin as a harbinger of a "right to welfare." See Schafer (2003).

[47] Gwinner v. Alberta (Human Resources and Employment) (2002), 217 D.L.R. (4th) 341, 2002 ABQB 685 (Alta C.A.).

[48] (1999), 40 C.P.C. (4th) 330.

[49] Most of the discussion has focused on section 15 equality rights. It bears mentioning that the courts have to date restricted the ability of litigants to secure social and economic rights through section 7 of the Charter which protects "life, liberty and security of the person." However, the door was left open in the Gosselin case for an evolution of that doctrine.

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