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LAW AS A TOOL FOR ADDRESSING SOCIAL DETERMINANTS OF HEALTH

Martha Jackman*

I. INTRODUCTION

Equality is a fundamental principle in Canada. It is expressed in the constitutional commitment by Canadian governments to "promoting equal opportunities for the well-being of Canadians", set out in section 36 of the *Constitution Act, 1982*.[1] It is enshrined in section 15 of the *Canadian Charter of Rights and Freedoms*[2] and protected in federal and provincial/territorial human rights legislation.[3] It is recognized under numerous international treaties ratified by Canada, including the *International Covenant on Economic, Social and Cultural Rights*, which proclaims the right to "the highest attainable standard of physical and mental health" without discrimination.[4] Equality is also an underlying value in the health care system, manifest in the ideal that "all Canadians have timely access to health services on the basis of need, not ability to

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* Professor, Faculty of Law, University of Ottawa, specializing in constitutional law and equality, health and socio-economic rights.

1 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 (the "Charter").

3 See generally Karen Schucher, "Human Rights Statutes as a Tool to Eliminate and Prevent Discrimination: Reflections on Supreme Court of Canada Jurisprudence" in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) at 387; Leslie A. Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 373.

4 *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966), 993 U.N.T.S. 3, arts. 2, 12(1), Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976) ("ICESCR").

pay, regardless of where they live".[5] But while equality is guaranteed under both domestic and international human rights law, and equal access to health services is a core component of health equity[6] and of the right to health,[7] it is evident that Canadians do not have equal access to mental and physical health itself.[8] Instead, like elsewhere in the world, access to health in Canada is overwhelmingly dictated by the social conditions in which people live and work: "The primary factors that shape the health of Canadians are not medical treatments or lifestyle choices but rather the living conditions they experience. These conditions have come to be known as social determinants of health."[9]

From the landmark *A New Perspective on the Health of Canadians*,[10] tabled by federal health minister Marc Lalonde in 1974,

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5 First Ministers' Meeting, 2003, *First Ministers' Accord on Health Care Renewal*, Doc. 800-039 (Ottawa: February 2-4, 2003) at 1. See also Lois L. Ross, "Passion and Persistence, Cooperation and Commitment: The Roots of Public Health Care in Canada" in North-South Institute, ed., *The Global Right to Health: Canadian Development Report 2007*, vol. 3 (Ottawa: Renouf Publishing, 2007) at 21; Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at xvi (Chair: Honourable Roy J. Romanow); Donna Greschner, *How Will the Charter of Rights and Freedoms and Evolving Jurisprudence Affect Health Care Costs? Discussion Paper No. 20* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at 10; Marie-Claude Prémont, *The Canada Health Act and the Future of Health Care Systems in Canada Discussion Paper No. 4* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at 7.

6 See generally Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 38-40; Elizabeth McGibbon, "Oppressions and Access to Health Care: Deepening the Conversation" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed (Toronto: Canadian Scholars' Press, 2016) 491; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 59; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 6.

7 See generally Martha Jackman, "Health Care and Equality: Is There a Cure?" (2007) 15 Health L..J 87; Paul Hunt & Gunilla Backman, "Health Systems and the Right to the Highest Attainable Standard of Health" (2008) 10 Health and Human Rights 81.

8 Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: National Portrait* (Ottawa: Minister of Health, 2018) at 4; Organization for Economic Co-operation and Development, *OECD Economic Surveys: Canada 2012* (Paris: OECD, 2012) at 137.

9 Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 7. See also Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: National Portrait* (Ottawa: Minister of Health, 2018) at 4-6; Dennis Raphael, "Social Determinants of Health: Key Issues and Themes" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed (Toronto: Canadian Scholars' Press, 2016) at 8-11.

10 Marc A. Lalonde, *A New Perspective on the Health of Canadians* (Ottawa: Department of Supply and Services, 1974) (*Lalonde Report*).

through to recent reports by Canada's Chief Public Health Officer,[11] the Canadian Institute for Health Information[12] and the Pan-Canadian Health Inequalities Reporting Initiative:[13] "Research has consistently shown that a limited number of modifiable non-medical determinants underlie the greatest health disparities."[14] The World Health Organization describes these social determinants of health as:

> … the conditions in which people are born, grow, live, work and age, including the health system. These circumstances are shaped by the distribution of money, power and resources at global, national and local levels, which are themselves influenced by policy choices. The social determinants of health are mostly responsible for health inequities – the unfair and avoidable differences in health status within and between countries.[15]

Indigenous status, low income, gender, race, disability, education and literacy, employment and working conditions, early childhood development, food security, environment and housing, social exclusion and access to health services are commonly associated with the most significant health inequities in Canada.[16] As Dennis Raphael summarizes

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11 See Public Health Agency of Canada, *The Chief Public Health Officer's Report on the State of Public Health in Canada 2018: Preventing Problematic Substance Use in Youth* (Ottawa: Minister of Health, 2018); Public Health Agency of Canada, *The Chief Public Health Officer's Report on the State of Public Health in Canada 2017 – Designing Healthy Living* (Ottawa: Minister of Health, 2017); Public Health Agency of Canada, *Health Status of Canadians 2016* (Ottawa: Minister of Health, 2016).

12 Canadian Institute for Health Information, *Trends in Income-Related Health Inequalities in Canada: Summary Report* (Ottawa: Canadian Institute for Health Information, 2015).

13 Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: A National Portrait* (Ottawa: Minister of Health, 2018).

14 Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 10. See also Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: National Portrait* (Ottawa: Minister of Health, 2018).

15 World Health Organization, *Social Determinants of Health*, online: http://www.who.int/social_determinants/en/. See also World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008) at 1.

16 See generally Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: A National Portrait* (Ottawa: Minister of Health, 2018); National Collaborating Centre for Determinants of Health, *Let's Talk: Racism and Health Equity* (Antigonish, NS: St. Francis Xavier University, 2017); Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed (Toronto: Canadian Scholars' Press, 2016); Billie Allan & Janet Smylie, *First Peoples, Second Class Treatment: The Role of Racism in the Health and Well-being of Indigenous Peoples in Canada* (Toronto: Wellesley Institute, 2015); National Collaborating Centre for Determinants of Health, *Integrating Social Determinants of Health and Health Equity Into Canadian Public Health Practice: Environmental Scan 2010* (Antigonish, NS: National Collaborating Centre for Determinants

it, these social determinants of health: "1) have a direct impact on health of individuals and populations, 2) are the best predictors of individual and population health, 3) structure lifestyle choices, and 4) interact with each other to produce health".[17]

Differences in life expectancy based on income and Indigenous status provide a stark illustration. In the case of income, men in the highest income quintile in Canada can expect to live 5.3 years longer than those in the poorest; for women, the difference is 3.1 years.[18] In the case of Indigenous status, the average lifespan is 11 years shorter for Inuit women than for Canadian women generally, and 16 years shorter for Inuit versus non-Inuit men.[19] For First Nations men, the difference in life expectancy is seven years, and for First Nations women, six years.[20] To put this in perspective, it is estimated that eliminating all cancers would increase life expectancy in the U.S. by 2.8 years.[21] Low income and Indigenous status are also associated with higher rates of death, and more years of life lost from injury, higher suicide rates, higher rates of strokes

of Health, 2011) at 52-53; Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 188-210; Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 7-9; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 3; Public Health Agency of Canada, *What is the Population Health Approach?* (Ottawa: Public Health Agency of Canada, 2001), online: http://www.phac-aspc.gc.ca/ph-sp/pdf/discussion-eng.pdf; National Forum on Health, "Determinants of Health Working Group Synthesis Report" in *Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers* (Ottawa: Minister of Public Works and Government Services, 1997) at 37-41.

17 Dennis Raphael, "Addressing the Social Determinants of Health in Canada: Bridging the Gap Between Research Findings and Public Policy" (March 2003) Policy Options 35 at 36.

18 Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: A National Portrait* (Ottawa: Minister of Health, 2018) at 61.

19 Public Health Agency of Canada, *The Chief Public Health Officer's Report on the State of Public Health in Canada 2018: Preventing Problematic Substance Use in Youth* (Ottawa: Minister of Health, 2018) at 8.

20 *Ibid.*, at 8. See generally Janet Smylie & Michelle Firestone, "The Health of Indigenous Peoples" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 434; Charlotte Loppie Reading & Fred Wien, *Health Inequality and Social Determinants of Aboriginal People's Health* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2009); Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 19-34.

21 Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 192.

and heart attacks, and higher infant mortality rates, among other effects.[22] Beyond its adverse impact on life expectancy, Juha Mikkonen and Dennis Raphael explain why income is the most significant determinant of health in Canada:

> Level of income shapes overall living conditions, affects psychological functioning, and influences health-related behaviour such as quality of diet, extent of physical activity, tobacco use, and excessive alcohol use. In Canada, income determines the quality of other social determinants of health such as food security, housing and other prerequisites of health.[23]

Other determinants of health have been shown to have equally significant effects. Conditions and experiences in early childhood "have strong immediate and longer lasting biological, psychological and social effects upon health".[24] Women, including Indigenous women and women with disabilities in particular, face gendered barriers to health and health

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22 See generally Canadian Institute for Health Information, *Trends in Income-Related Health Inequalities in Canada: Summary Report* (Ottawa: Canadian Institute for Health Information, 2015); Health Disparities Task Group of the Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1-2; Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010) at 192-206; Dennis Raphael, "Social Determinants of Health: An Overview of Concepts and Issues" in Toba Bryant, Dennis Raphael & Marci Rioux, eds., *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed. (Toronto: Canadian Scholars' Press, 2010) 145 at 150-52.

23 Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 12. See also Nathalie Auger & Carolyne Alix, "Income, Income Distribution, and Health in Canada" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) 90; Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, P.C.)..)

24 Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 23. See also Keith Denny & Marni Brownell, "Taking a Social Determinants Perspective on Children's Health and Development" (2010) 101:3 Can. J. Public Health at 54-57; Campaign 2000, *Bold Ambitions for Child and Family Poverty Eradication – 2018 Report Card on Child and Family Poverty in Canada* (Toronto: Campaign 2000, 2018); Martha Friendly, "Early Childhood Education and Care as a Determinant of Health" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 192; Dennis Raphael, "Early Child Development and Health" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 218; Chief Public Health Officer, *Report on the State of Public Health in Canada, 2009 – Growing Up Well: Priorities for a Healthy Future* (Ottawa: Minister of Health, 2009); National Council of Welfare, *First Nations, Métis and Inuit Children and Youth: Time to Act* (Ottawa: National Council on Welfare, 2007).

care.[25] People with higher education are generally healthier than those with lower educational attainment, and education has a strong impact on disability-free life expectancy.[26] Employment, job security, working conditions and work environment shape health outcomes in a multitude of ways.[27] People who are vulnerably housed face the same severe health problems as those who are homeless, including reduced life expectancy, increased chronic health conditions, reduced access to health care and suicide rates that are twice the national average for men and six times the national average for women.[28] Food insecurity, which is most prevalent among social assistance recipients, sole support mothers with children, Indigenous people and those who live in remote communities, "is associated with increased odds of poor or fair self-rated health, multiple chronic

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25 See generally Pat Armstrong, "Public Policy, Gender, Health" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 544; Yvonne Boyer, "First Nations, Metis, and Inuit Women's Health: A Rights-Based Approach" (2017) 54 Alta. L. Rev. 611; Chief Public Health Officer, *The Chief Public Health Officer's Report on the State of Public Health in Canada 2012 – Influencing Health – The Importance of Sex and Gender* (Ottawa: Minister of Health, 2012); Pat Armstrong, "Health Care Reform as if Women Mattered" in Bruce Campbell & Greg Marchildon, eds., *Medicare: Facts, Myths, Problems and Promise* (Toronto: James Lorimer & Company, 2007) at 257.

26 See generally Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 15-16; Charles Ungerleider, Tracey Burns & Fernando Cartwright, "The State and Quality of Canadian Public Elementary and Secondary Education" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 240; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 1.

27 See generally Emile Tompa, Michael Polanyi & Janice Foley, "Health Consequences of Labour Market Flexibility and Worker Insecurity" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 130; Andrew Jackson & Govind Rao, "The Unhealthy Canadian Workplace" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 150; Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 17-22.22.

28 See generally Toba Bryant & Michael Shapcott, "Housing" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 343; Toba Bryant, "Housing and Health" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 360; Wellesley Institute, *Housing and Health: Examining the Links* (Toronto: Wellesley Institute, 2012); Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada's Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing, and Health, 2010); Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, P.C.) at 69.

conditions, distress and depression".[29] Geography and environment also compound other determinants of health: "rural, remote, Northern, urban, geographic segregation and ghettoization, weather patterns, and pollution dispersion patterns all contribute and intersect to shape the health status of Canadians and their access to health care and other services."[30]

Addressing social determinants of health was a major impetus in the creation of the field of public health, and Canada was an early leader in this area.[31] In recent years, however, Canada has been criticized for its lack of commitment and progress in tackling persistent health inequities, particularly those facing Indigenous people and people living in poverty.[32] Former federal health minister, Monique Bégin, offers a blunt assessment of the existing situation:

> The truth is that Canada – the ninth richest country in the world – is so wealthy that it manages to mask the reality of poverty, social exclusion and discrimination, the erosion of employment quality, its adverse mental health outcomes, and youth suicides. While one of the world's biggest

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29 See generally Lynn McIntyre & Laura Anderson, "Food Insecurity" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) 294; Valerie Tarasuk, "Health Implications of Food Insecurity" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 321; *United Nations Special Rapporteur on the Right to Food Mission to Canada: Joint Civil Society Submission* (15 December 2011); Food Banks Canada, *Hunger Count 2016* (Toronto: Food Banks Canada, 2016).

30 Elizabeth McGibbon, "Oppression and Access to Health Care: Deepening the Conversation" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) 491 at 498. See also Public Health Agency of Canada, *The Chief Public Health Officer's Report on the State of Public Health in Canada 2017 – Designing Healthy Living* (Ottawa: Minister of Health 2017); Janet Smylie & Michelle Firestone, "The Health of Indigenous Peoples" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 434; Canadian Institute for Health Information, *Reducing the Gaps in Health: A Focus on Socio-economic Status in Urban Canada* (Ottawa: Canadian Institute for Health Information, 2008).

31 See Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: A National Portrait* (Ottawa: Minister of Health, 2018) at 422-423; National Collaborating Centre for Determinants of Health, *Integrating Social Determinants of Health and Health Equity into Canadian Public Health Practice: Environmental Scan 2010* (Antigonish, NS: National Collaborating Centre for Determinants of Health, 2011) at 8-9; Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 7; Health Canada, *Health Promotion in Canada: A Case Study* (Ottawa: Health Canada, 1997) at 1.

32 Billie Allan & Janet Smylie, *First Peoples, Second Class Treatment: The Role of Racism in the Health and Well-being of Indigenous Peoples in Canada* (Toronto: Wellesley Institute, 2015); Constance MacIntosh; "Indigenous Mental Health: Imagining a Future Where Action Follows Obligations and Promises" (2017) 54 Alta. L. Rev. 589; Nathalie Auger & Carolyne Alix, "Income, Income Distribution, and Health in Canada" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) 90.

> spenders in health care, we have one of the worst records in providing an effective social safety net. What good does it do to treat people's illnesses, to then send them back to the conditions that made them sick?[33]

In 1986, *Achieving Health for All: A Framework for Health Promotion* ("the *Epp Report*") concluded that "existing policies and practices are not sufficiently effective to ensure that Canadian men and women of all ages and backgrounds can have an equitable chance of achieving health".[34] This chapter examines law as a tool for translating this understanding into government action to address social determinants of health. The chapter will begin with a brief review of the findings and recommendations from some of the major Canadian reports in this area. The chapter will go on to consider how international and domestic human rights guarantees can be used to challenge health inequity in Canada. The final section of the chapter will examine the obstacles facing determinant of health-related claims, in particular, the continued reliance by Canadian courts on the distinction between positive and negative rights. The chapter will conclude by suggesting that moving forward on determinants of health requires action by all branches of government, including the courts.

II. SOCIAL DETERMINANTS OF HEALTH: REPORTS AND FINDINGS

In 1974, *A New Perspective on the Health of Canadians* ("the *Lalonde Report*")[35] proposed a major rethinking of Canadian health policy

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33 Honourable Monique Bégin, "Forward" in Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 5. Monique Bégin was also a member of the World Health Organization's Commission on Social Determinants of Health; World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008). See also Toba Bryant *et al.*, "Canada: A Land of Missed Opportunity for Addressing the Social Determinants of Health" (2011) 101 Health Policy 44; Elizabeth McGibbon, "Health and Health Care: A Human Rights Perspective" in Dennis Raphael, ed., *Social Determinants of Health*, 2d ed. (Toronto: Canadian Scholars' Press, 2008) 318 at 319; Toba Bryant, Dennis Raphael & Marci Rioux, eds., *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed. (Toronto: Canadian Scholars' Press, 2010) at 396-402.

34 Jake Epp, *Achieving Health for All: A Framework for Health Promotion* (Ottawa: Health and Welfare Canada, 1986) at 4.

35 Marc A. Lalonde, *A New Perspective on the Health of Canadians* (Ottawa: Department of Supply and Services, 1974). For a chronology and discussion of the Lalonde, Epp and subsequent reports, see Honourable Monique Bégin, "'Do I See a Demand?...' From 'medicare' to Health For All" (Paper delivered at 19th IUHPE World Conference, Vancouver, June 14, 2007); Health Canada, *Health Promotion in Canada: A Case Study* (Ottawa: Health Canada, 1997); National Collaborating Centre for Determinants of Health, *Integrating Social Determinants of Health and Health Equity Into Canadian Public Health Practice: Environmental Scan 2010* (Antigonish, NS: National Collaborating Centre for Determinants of Health, 2011) at 9.

and spending priorities. While lauding Canada's success in creating a publicly funded system that substantially removes financial barriers to medical and hospital care, the *Lalonde Report* drew attention to the fact that "the health care system is only one of many ways of maintaining and improving health".[36] Along with the organization of health care, the report pointed to human biology, the environment, and lifestyle as factors that needed to be addressed "with equal vigour" for real progress to be made in improving the health of Canadians.[37] In 1986, the *Epp Report* characterized health as "a basic and dynamic force in our daily lives, influenced by our circumstances, our beliefs, our culture and our social, economic and physical environments".[38] The *Epp Report* advocated for a "health promotion" approach, which it defined as follows:

> [H]ealth promotion implies a commitment to dealing with the challenges of reducing inequities; extending the scope of prevention, and helping people to cope with their circumstances. It means fostering public participation, strengthening community health services and coordinating healthy public policy. Moreover, it means creating environments conducive to health, in which people are better able to take care of themselves and to offer each other support in solving and managing collective health problems.[39]

The *Epp Report* was released in conjunction with the First International Conference on Health Promotion, which was held in Ottawa and co-hosted by Health and Welfare Canada, the Canadian Public Health Association and the World Health Organization. The conference culminated in the adoption of the *Ottawa Charter for Health Promotion*.[40] The Ottawa Charter declared that: "To reach a state of complete physical, mental and social well-being, an individual or group must be able to identify and to realize aspirations, to satisfy needs, and to change or cope with the environment."[41] It identified the fundamental prerequisites for health as: "peace, shelter, education, food, income, a stable ecosystem, sustainable resources, social justice and equity".[42] Echoing the *Epp Report*, the Ottawa Charter affirmed the need to build "healthy public policy" that "puts health on the agenda of policy makers in all sectors and

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36 Marc A. Lalonde, *A New Perspective on the Health of Canadians* (Ottawa: Department of Supply and Services, 1974) at 5.

37 *Ibid*., at 6.

38 Jake Epp, *Achieving Health for All: A Framework for Health Promotion* (Ottawa: Health and Welfare Canada, 1986) at 2.

39 *Ibid.*, at 9.

40 World Health Organization, Health and Welfare Canada & Canadian Public Health Association, *Ottawa Charter for Health Promotion* (Geneva: World Health Organization, 1986) ("Ottawa Charter").

41 *Ibid.*

42 *Ibid.*

at all levels, directing them to be aware of the health consequences of their decisions and to accept their responsibilities for health".[43]

Over the next five years, Canadian governments took a number of steps to implement the recommendations of the *Epp Report* and the Ottawa Charter, including the establishment of large-scale federal strategies, such as the National AIDS strategy, directed at specific health issues and groups; the strengthening of provincial/territorial health promotion programs; the creation of Health Councils/Commissions and the adoption of "Healthy Communities" projects in several provinces; and a variety of government sponsored research initiatives, including two major national health promotion surveys in 1985 and 1990.[44] The 1990s also saw a series of federal and provincial/territorial reports and studies continuing the call for an expanded focus on determinants of health as a means of improving the health of Canadians. In its first *Report on the Health of Canadians* in 1996, the Federal, Provincial, and Territorial Advisory Committee on Population Health reiterated the message from the *Lalonde* and *Epp Reports* that: "Our overall high standard of health is not shared equally by all sectors in Canadian society. There are differences in health status by age, sex, level of income, education and geographic area."[45] Among other challenges, the report identified the need to ensure an adequate income for all Canadians, healthy working conditions, life-long learning, a healthy and sustainable environment, adequate and affordable housing and healthy child development, and it recommended the development of "national health goals" to address the major influences on population health.[46]

In 1999, the Advisory Committee's *Toward a Healthy Future: Second Report on the Health of Canadians* provided a comprehensive picture of the collective state of Canadian health, focusing on gender and age; income and income distribution; the social environment; education and literacy; the physical environment; personal health practices; health services; and biology and genetics as key determinants of health.[47] The report called on federal and provincial/territorial governments to adopt a "population health" approach to "improve the underlying and interrelated

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43 *Ibid.*

44 Health Canada, *Health Promotion in Canada: A Case Study* (Ottawa: Health Canada, 1997) at 3-11.

45 Federal, Provincial, and Territorial Advisory Committee on Population Health, *Report on the Health of Canadians* (Ottawa: Minister of Supply and Services Canada, 1996) at iii.

46 *Ibid.*, at iv-v. See generally Honourable Monique Bégin, "'Do I See a Demand?...' From 'medicare' to Health For All" (Paper delivered at 19th IUHPE World Conference, Vancouver, June 14, 2007) at 4-5.

47 Federal, Provincial, and Territorial Advisory Committee on Population Health, *Toward a Healthy Future: Second Report on the Health of Canadians* (Ottawa: Minister of Public Works and Government Services, 1999).

conditions in the environment that enable all Canadians to be healthy" and to "reduce inequities in the underlying conditions that put some Canadians at a disadvantage for attaining and maintaining optimal health".[48] In its final report, *Canada Health Action: Building on the Legacy*, the National Forum on Health summarized the widespread consensus that had emerged in Canada by the end of the 1990s:

> Being healthy requires clean, safe environments, adequate income, meaningful roles in society, good housing, nutrition, education, and social support in our communities. In fact, actions on these broad determinants of health through public policies have led to most of the improvement in the health status of Canadians over the last century. There is still much to do, however, if we want to reduce health disparities among various groups of the population and continue on the path toward better health for all.[49]

III. LAW AS A TOOL FOR ADDRESSING SOCIAL DETERMINANTS OF HEALTH

As Juha Mikkonen and Dennis Raphael explain, governments not only influence, but are often directly responsible for, social determinants of health:

> There is much evidence that the quality of … health-shaping living conditions is strongly determined by decisions that governments make in a range of different public policy domains. Governments at the municipal, provincial/territorial, and federal levels create policies, laws and regulations that influence how much income Canadians receive through employment, family benefits, or social assistance, the quality and availability of affordable housing, the kinds of health and social services and recreational opportunities we can access and even what happens when Canadians lose their jobs during economic downturns.[50]

In its 2008 report, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, the World Health Organization's Commission on Social Determinants of Health puts it even more succinctly: "unequal distribution of health-damaging experiences is not in any sense a 'natural' phenomenon but is the result of a toxic combination of poor social policies and programmes, unfair economic arrangements, and bad politics".[51] Not surprisingly, the major reports described in the preceding

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48 *Ibid.*, at xv.

49 National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 9.

50 Juha Mikkonen & Dennis Raphael, *Social Determinants of Health: The Canadian Facts* (Toronto: York University School of Health Policy and Management, 2010) at 7-8.

51 World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social*

section of the chapter envision a central role for governments in addressing determinants of health and reducing health inequities. This is reflected in the Ottawa Charter's conception of "healthy public policy":

> Health promotion policy combines diverse but complimentary approaches including legislation, fiscal measures, taxation and organizational change. It is coordinated action that leads to health, income and social policies that foster greater equity ... Health promotion policy requires the identification of obstacles to the adoption of healthy public policies in non-health sectors, and ways of removing them.[52]

Such systemic change has not taken place in Canada. Instead, in its 1995 budget,[53] the federal government repealed the *Canada Assistance Plan*[54] — arguably the most important piece of post-war legislation in Canada from a determinant of health perspective.[55] This was followed by massive cuts in federal support for welfare, social service, housing, legal aid, and other provincial programs with a direct bearing on determinants of health.[56] Over the next decade, major cutbacks in social spending also occurred at the provincial level.[57] The *2003 First Ministers' Accord on*

Determinants of Health (Geneva: World Health Organization, 2008) at 1; Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 17-26; National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 16.

52 World Health Organization, Health and Welfare Canada, Canadian Public Health Association, *Ottawa Charter for Health Promotion* (Geneva: World Health Organization, 1986); National Forum on Health, "Determinants of Health Working Group Synthesis Report" in *Canada Health Action: Building on the Legacy – Synthesis Reports and Issues Papers* (Ottawa: Minister of Public Works and Government Services, 1997) at 9.

53 *Budget Implementation Act, 1995*, S.C. 1995, c. 17.

54 *Canada Assistance Plan*, R.S.C. 1985, c. C-1, repealed by *Budget Implementation Act*, S.C. 1995, c. 17, s. 32.

55 See generally Martha Jackman, "Women and the Canadian Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8:2 C.J.W.L. 371.

56 See generally Shelagh Day & Gwen Brodsky*, Women and the Quality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998); Shelagh Day & Gwen Brodsky, *Women and the Canadian Social Transfer: Securing the Social Union* (Ottawa: Status of Women Canada, 2007).

57 See generally Jennie Abell, "Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away" in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) at 257; Shelley A.M. Gavigan & Dorothy Chunn, eds., *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010) at 189; Monica Townson, *Women, Poverty and the Recession* (Ottawa: Canadian Centre for Policy Alternatives, 2009); Janet Mosher & Joe Hermer, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002); Jean Swanson, *Poorbashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001); National Council on Welfare, *Another Look at Welfare Reform* (Ottawa: Public Works and Government Services Canada, 1997).

Health Care Renewal directed federal and provincial/territorial health ministers "to continue their work on healthy living strategies and other initiatives to reduce disparities in health status".[58] And, in 2011, Canada endorsed the *Rio Political Declaration on Social Determinants of Health*, joining other World Health Organization members reiterating their "determination to achieve social and health equity through action on social determinants of health".[59] However, acute medical and hospital care has continued to eclipse population health as a government priority, notwithstanding the reality that "social determinants of health, such as income, have a bigger impact on our health outcomes than genetics, the healthcare system, or most health care services".[60] The Senate Subcommittee on Population Health captures this problemic situation in its 2009 report, *A Healthy, Productive Canada: A Determinants of Health Approach*:

> Canada has led the world in understanding population health and health disparities … However, in recent years, as the costs and delivery of health care have dominated the public dialogue, there has been inadequate policy development reflecting what we have learned about population health. This lack of action has led to a widening of health disparities in Canada. The Subcommittee believes that it is unacceptable for a wealthy country like ours to continue to tolerate such disparities in health.[61]

After more than four decades of study, it is well understood that "[t]he most appropriate and effective way to improve overall population health status is by improving the health of those in lower [socio-economic status] groups and other disadvantaged populations"[62] and that "reductions in health inequalities require reductions in material and social

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58 First Ministers' Meeting, *2003 First Ministers' Accord on Health Care Renewal*, Doc. 800-039 (Ottawa: February 2-4, 2003) at 7.

59 World Health Organization, *Rio Political Declaration on Social Determinants of Health* (Rio de Janeiro, October 21, 2011) at para. 1. See also Public Health Agency of Canada, *Rio Political Declaration on Social Determinants of Health: A Selection of Canadian Actions 2013* (Ottawa: Public Health Agency of Canada, 2013); Public Health Agency of Canada, *Rio Political Declaration on Social Determinants of Health: A Snapshot of Canadian Actions 2015* (Ottawa: Public Health Agency of Canada, 2015).

60 Public Health Agency of Canada, Chief Public Health Officer of Canada, "Vision and Areas of Focus" (June 26, 2018). See also Lars K. Hallstrom, "Public Policy, Equality and Health in Canada" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) 521 at 536; Canadian Institute for Health Information, *Trends in Income-Related Health Inequalities in Canada: Summary Report* (Ottawa: Canadian Institute for Health Information, 2015) at 4.

61 Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 42-43.

62 See generally Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 10.

inequalities".[63] What role can law play in translating this understanding into action by governments to improve the determinants of health?

(a) The International Human Rights Framework

The *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), adopted by the UN General Assembly in 1966, and ratified by Canada with the support of the provinces in 1976, imposes a number of binding obligations that relate to determinants of health. In particular, Article 2(1) of the ICESCR requires a State Party "to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". The Committee on Economic, Social and Cultural Rights ("CESCR"), the UN body responsible for monitoring and, since 2008 for enforcing[64] the ICESCR, has explained what the duty of progressive realization entails. In a case where the violation of an ICESCR right results from the denial of an immediate entitlement which a State party has the means to provide, such as an adequate level of social assistance or access to subsidized housing in a wealthy country like Canada, the remedy is straightforward: the government must act immediately to provide the benefit that has been denied. Beyond these immediate obligations, the progressive realization standard also creates future-oriented obligations to fulfill ICESCR rights within a reasonable time, and to address broader structural patterns of disadvantage and exclusion which cannot be remedied immediately.[65]

In its *General Comment 14: The Right to the Highest Attainable Standard of Health*, the CESCR explains that the right to health under Article 12(1) of the ICESCR[66] extends not only to "timely and appropriate health care" but also "embraces a wide range of socio-economic factors

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63 Public Health Agency of Canada, "The Population Health Template: Key Elements and Actions That Define a Population Health Approach" (Ottawa: Public Health Agency of Canada, 2001), online: http://www.phac-aspc.gc.ca/ph-sp/pdf/discussion-eng.pdf.

64 In 2008, the UN General Assembly adopted the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 63/117, U.N.G.A.O.R., 63rd Sess., Supp. No. 49, U.N. Doc. A/RES/63/117 (2008), which creates a complaints procedure parallel to the one that has existed for civil and political rights since 1966. See generally Bruce Porter, "International Human Rights in Anti-Poverty and Housing Strategies: Making the Connection" in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 33.

65 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)*, U.N.C.E.S.C.R.O.R., 5th Sess., U.N. Doc. E/1991/23 (1990).

66 *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966), 993 U.N.T.S. 3, art. 12(1), Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976).

that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment".[67] In addition to the right to health, the ICESCR also guarantees the right to key determinants of health. Article 6 recognizes the right to work.[68] Article 7 guarantees "just and favourable conditions of work", including decent wages, safe and healthy working conditions, reasonable working hours and periodic holidays with pay.[69] Article 9 recognizes the right "of everyone to social security, including social insurance".[70] Article 10 affirms that "[the] widest possible protection and assistance should be accorded to the family … particularly … while it is responsible for the care and education of dependent children" including paid maternity leave and "special measures of protection and assistance" on behalf of children and youth.[71] Article 11(2) guarantees "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions".[72] Article 13 recognizes the right to education, including accessible higher education.[73] Article 2(2) guarantees the rights in the ICESCR "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" and Article 28 affirms that the ICESCR's provisions "extend to all parts of federal States without any limitations or exceptions".[74]

The obligations imposed on federal and provincial/territorial governments by the ICESCR are reinforced by other international human rights treaties ratified by Canada. In addition to the right to life and to security of the person under Articles 6 and 9 of the *International Covenant on Civil and Political Rights* ("ICCPR"),[75] these include non-

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67 *General Comment 14: The Right to the Highest Attainable Standard of Health (art 12)*, U.N.C.E.S.C.R.O.R., 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000) at paras. 4, 11; see generally Paul Hunt & Gunilla Backman, "Health Systems and the Right to the Highest Attainable Standard of Health" (2008) 10 Health and Human Rights 81.

68 *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966), 993 U.N.T.S. 3, art. 6, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada May 19, 1976).

69 *Ibid*., art. 7.

70 *Ibid*., art. 9

71 *Ibid*., art. 10.

72 *Ibid*., art. 11(2).

73 *Ibid.*, art. 13.

74 *Ibid.*, arts. 2(2), 28.

75 *International Covenant on Civil and Political Rights* (December 19, 1966), 999 U.N.T.S. 171, arts. 6, 9, Can. T.S. 1976 No. 47 (entered into force March 23, 1976, accession by Canada May 19, 1976).

discrimination and other determinant of health related guarantees under the *Convention on the Elimination of Racial Discrimination*,[76] the *Convention on the Elimination of All Forms of Discrimination Against Women*,[77] the *Convention on the Rights of the Child*,[78] the *Convention on the Rights of Persons with Disabilities*[79] and the *Declaration on the Rights of Indigenous Peoples*,[80] among others.[81]

In his Preliminary Observations after his visit to Canada in November 2018, UN Special Rapporteur on the Right to Health, Dainius Pūras, pointed out that:

> Canada is a party to seven core international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes the right to health. ... However, Canada [has] yet to take the leap to comprehensively incorporate a right to health perspective, fully embracing the understanding that health, beyond a public service, is a human right.[82]

In her End of Mission Statement in April 2019, UN Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas-Aguilar, also noted the lack of a human rights–based approach to framing

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76 *International Convention on the Elimination of All Forms of Racial Discrimination* (March 7, 1966) at 660 U.N.T.S. 195, art. 2, 5(e), Can. T.S. 1970 No. 28 (entered into force January 4, 1969, ratified by Canada October 14, 1970).

77 *Convention on the Elimination of All Forms of Discrimination against Women* (March 1, 1980), 1249 U.N.T.S. 13, art. 2, 12, Can. T.S. 1982 No. 31 (entered into force September 3, 1981, ratified by Canada December 19, 1981).

78 *Convention on the Rights of the Child* (November 20, 1989), 1577 U.N.T.S. 3, art. 2, 24, Can. T.S. 1992 No. 3 (entered into force September 2, 1990, ratified by Canada December 13, 1991).

79 *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, U.N.G.A.O.R., 61st Sess., Supp. No. 49, U.N. Doc. A/61/611 (2007) art. 25 (entered into force May 3, 2008, ratified by Canada March 11, 2010).

80 *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), G.A. Res. 61/295, U.N.G.A.O.R., 61st Sess., Supp. No. 53, U.N. Doc. A/61/53 (2007) , art. 2, 24. On September 13, 2007, Canada voted against the UN General Assembly resolution to adopt the UNDRIP, but the Canadian government issued a Statement of Support endorsing the UNDRIP on November 12, 2010.

81 Canada's failure to respect its international human rights obligations relating to determinants of health has frequently been the object of criticism by the CESCR and other United Nations human rights treaty monitoring bodies, see generally Bruce Porter, "International Human Rights in Anti-poverty and Housing Strategies: Making the Connection" in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 33 at 50-53; Martha Jackman & Bruce Porter, *International Human Rights, Health, and Strategies to Address Homelessness and Poverty in Ontario: Making the Connection* (2013) University of Ottawa Faculty of Law Legal Studies Working Paper Series 2013-09 (SSRN).)

82 United Nations Human Rights Council, "Preliminary Observations – Country visit to Canada, 5 to 16 November 2018: UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Dainius Pūras" (Ottawa, November 16, 2018).

and addressing disparities in access to health care and other determinants of health for people with disabilities in Canada.[83] These critiques echo the observation made a decade earlier by the Senate Sub-Committee on Cities: that international human rights continue to be viewed by Canadian governments as "closer to moral obligations than enforceable rights".[84]

While increased legislative incorporation into Canadian law would provide for more direct domestic application of the ICESCR and related international human rights treaty guarantees, access to social security, an adequate standard of living, food, housing, work, education, and other key determinants of health must, first and foremost, be grounded in Canada's domestic constitutional framework, and in the interpretation and application of Charter rights in particular. The CESCR notes in its *General Comment 9: The Domestic Application of the Covenant*, that: "[t]he existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies."[85] In keeping with this understanding of the interrelationship between international and domestic human rights guarantees, Dickson C.J.C. affirmed in *Slaight Communications Inc. v. Davidson*[86] that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".[87] Key constitutional provisions for addressing determinants of health and improving health equity in Canada include the commitment to provide public services of reasonable quality to all Canadians under section 36 of the *Constitution Act, 1982*; the right to life, liberty and security of the person under section 7 of the Charter; and the right to equal protection and equal benefit of the law under section 15(1) of the Charter.[88]

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83 United Nations Human Rights Council, "End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada" (Ottawa, April 12, 2019).

84 Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, P.C.) at 69

85 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 4.

86 [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.).

87 *Ibid.*, at 1054 (S.C.R.), citing *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 at para. 59 (S.C.C.); see also *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 at para.70 (S.C.C.).

88 Aboriginal rights and self-government guarantees under section 35 of the *Constitution Act, 1982* also have direct implications for addressing health equity and determinants of health for Indigenous People, see Yvonne Boyer, "First Nations, Metis, and Inuit Women's Health:

(b) Section 36 as a Source of Obligation in Relation to Determinants of Health

Section 36 of the *Constitution Act, 1982* is an important source of obligation for federal and provincial/territorial governments in relation to social determinants of health.[89] Section 36(1) declares that:

> 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.[90]

When then Justice Minister Jean Chrétien tabled the resolution to include the provision as part of the federal government's proposed package of constitutional reforms, he described section 36 as recognizing that "[s]haring the wealth has become a fundamental right of Canadians".[91]

A Rights-Based Approach" (2017) 54 Alta. L. Rev. 611; Constance MacIntosh, "The Governance of Indigenous Health" in Joanna Erdman, Vanessa Gruben & Erin Nelson, eds., *Canadian Health Law and Policy*, 5th ed. (Toronto: LexisNexis Canada, 2017) 135; Yvonne Boyer, *Moving Aboriginal Health Forward: Discarding Canada's Legal Barriers* (Saskatoon: Purich Publishing, 2014); National Collaborating Centre for Aboriginal Health, *Looking for Aboriginal Health in Legislation and Policies: 1970 to 2008 – The Policy Synthesis Project* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2011); Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Métis Professor's Journey" in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) at 89; Constance MacIntosh, "Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health" in Colleen Flood, ed., *Just Medicare: What's In, What's Out, How We Decide* (Toronto: University of Toronto Press, 2006) at 193; Yvonne Boyer, "Discussion Document for the Aboriginal Dialogue: Self Determination as a Social Determinant of Health" (Aboriginal Dialogue, Canadian Reference Group, WHO Commission – Social Determinants of Health, Vancouver, June 29, 2006); Yvonne Boyer, *First Nations, Métis and Inuit Health Care: The Crown's Fiduciary Obligation*, Discussion Paper Series in Aboriginal Health: Legal Issues, No. 2 (Ottawa: National Aboriginal Health Organization, 2004); and see generally Professor Constance MacIntosh's chapter in this book.

89 See generally Martha Jackman & Bruce Porter, *Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework*, (2013) University of Ottawa Faculty of Law Legal Studies Working Paper Series 2013-10 (SSRN); David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill L.J. 81 at 118-22; Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19:2 Dal. L.J. 306; Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8:2 C.J.W.L. 371 at 392-93.

90 *Constitution Act, 1982*, s. 36(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

91 *House of Commons Debates*, 32nd Parl., 1st Sess. (October 6, 1980) at 3287 (Honourable Jean Chrétien).

In the proceedings leading up to the enactment of the *Constitution Act, 1982*, the Special Joint Committee of the Senate and of the House of Commons considered an amendment to what is now section 36, put forward by NDP MP Svend Robinson, to add a "commitment to fully implementing the *ICESCR* and the goals of a clean and healthy environment and safe and healthy working conditions".[92] During debate on the proposal, government members agreed there was no opposition to the "principles embodied in the amendment".[93] Justice Minister Chrétien affirmed that Canada was already committed to implementing the ICESCR, but he suggested that "we cannot put everything [in s. 36]".[94]

There has been ongoing academic debate about the justiciability of section 36,[95] and the question has yet to be judicially resolved.[96] However, the Supreme Court of Canada's analysis in *Finlay v. Canada (Minister of Finance)*[97] provides useful direction as to how federal and provincial/territorial governments might be held accountable for their non-compliance with section 36 as it relates to determinants of health. In *Finlay*, the Court considered whether an individual could challenge a provincial government's failure to comply with the conditions of a federal/provincial cost sharing agreement, in that case the *Canada Assistance Plan* ("CAP").[98] To be eligible for CAP transfers, provinces were required to meet a number of conditions, including that assistance be provided to recipients in "an amount … that takes into account the basic requirements of that person", including "food, shelter, clothing, fuel, utilities, household supplies and personal requirements".[99] The Supreme

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92 Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl., 1st Sess., No. 49 (January 30, 1981) at 65-71.

93 *Ibid.*, at 68.

94 *Ibid.*, at 70.

95 See Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, ON: Carswell, 1999) at 19; Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19:2 Dal. L.J. 306 at 357; Michael Robert, "Challenges and Choices: Implications for Fiscal Federation" in T.J. Courchene, D.W. Conklin & G.C.A. Cook, eds., *Ottawa and the Provinces: The Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985) at 28.

96 See generally *Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board*, [1992] M.J. No. 218, 91 D.L.R. (4th) 554 (Man. C.A.); *Canadian Bar Association v. British Columbia*, [2008] B.C.J. No. 350 at para. 53, 290 D.L.R. (4th) 617 (B.C.C.A.); *Cape Breton (Regional Municipality) v. Nova Scotia*, [2008] N.S.J. No. 154, 267 N.S.R. (2d) 21 (N.S.S.C.).

97 *Finlay v. Canada (Minister of Finance)*, [1986] S.C.J. No. 73, [1986] 2 S.C.R. 607 at para. 36 (S.C.C.); *Finlay v Canada (Minister of Finance)*, [1993] S.C.J. No. 39, [1993] 1 S.C.R. 1080 (S.C.C.). See also Margot Young, "Starving in the Shadow of Law: A Comment on *Finlay v. Canada (Minister of Finance)*" (1994) 5:2 Const. Forum 31; Sujit Choudry, "The Enforcement of the *Canada Health Act*" (1996) 41:2 McGill L.J. 461.

98 *Canada Assistance Plan Act*, R.S.C. 1985, c. C–1, repealed by *Budget Implementation Act*, S.C. 1995, c. 17.

99 *Ibid.*, ss. 2(a), 6(2)(a).

Court held that the CAP did not create a justiciable individual right to an adequate level of assistance. However it concluded that Jim Finlay, who was adversely affected by Manitoba's failure to respect CAP conditions, should be granted "public interest standing" to challenge the province's non-compliance with the agreement.[100] In the Court's analysis, in order to continue to receive federal transfer payments, provinces would be required to provide assistance in an amount that was "compatible, or consistent, with an individual's basic requirements" with some flexibility granted to provincial governments in meeting that standard.[101]

As Vincent Calderhead argues, the Supreme Court's approach to intergovernmental agreements in *Finlay* is equally applicable to the enforcement of federal and provincial/territorial undertakings under section 36. Individuals or groups whose mental and physical health is adversely affected by governments' failure to promote "equal opportunities for the wellbeing of Canadians" or to provide "essential public services of reasonable quality to all Canadians" should, at a minimum, be granted public interest standing to demand judicial scrutiny of governments' compliance with section 36. Where necessary, courts should order governments to take whatever steps are required to meet their section 36 commitments in relation to income support, housing, employment and other key determinants of health.[102] Any other approach would be inconsistent with Canada's duty to ensure that effective domestic remedies are available for violations of ICESCR and other treaty rights,[103] and with the principle established in *Slaight Communications* and subsequent Supreme Court cases, that the Constitution should be interpreted and applied in conformity with Canada's international human rights obligations.[104]

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100 *Finlay v. Canada (Minister of Finance)*, [1986] S.C.J. No. 73 at para. 36, [1986] 2 S.C.R. 607 (S.C.C.).

101 *Finlay v. Canada (Minister of Finance)*, [1993] S.C.J. No. 39 at para. 81, [1993] 1 S.C.R. 1080 (S.C.C.).

102 Vincent Calderhead, "CBRM appeal ruling renews debate", Editorial, *Cape Breton Post* (May 16, 2009) A7.

103 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 4.

104 *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 at 1054 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 at paras. 69-71 (S.C.C.); *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 at para. 73 (S.C.C.); *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 S.C.C. 27 at para. 70 (S.C.C.); *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, [2013] 3 S.C.R. 157 at para. 23 (S.C.C.); *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, [2015] 1 S.C.R. 245 at para. 64 (S.C.C.).

(c) Determinant of Health Rights under Section 7

Section 7 of the Charter declares that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[105] During the Special Joint Committee proceedings leading up to the adoption of the Charter, Progressive Conservative MPs put forward an amendment to add a right to "the enjoyment of property" to section 7. This proposal was defeated, in part because of fears that entrenching property rights could interfere with government regulation of land use, natural resource and other economic interests.[106] Referring to this legislative history in his decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*,[107] Dickson C.J.C. distinguished what he characterized as "corporate-commercial economic rights" from socio-economic rights of the kind recognized under the ICESCR.[108] As he explained:

> The intentional exclusion of property from s. 7 … leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee … however … the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property – contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous.[109]

In *Gosselin v. Quebec (Attorney General)*, the Supreme Court considered a challenge to a provincial social assistance regulation that reduced the level of benefits payable to recipients under the age of 30 by two-thirds, unless they were enrolled in workfare or training programs.[110] Justice Arbour found that the section 7 right to "security of the person" placed positive obligations on governments to provide an amount of social assistance adequate to cover basic needs.[111] Although the majority of the Court viewed

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105 *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

106 See Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 I.C.O.N. 17 at 24-25; Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's LJ 65 at 76. The phrase "fundamental justice" was also preferred over a reference to "due process of law" in section 7, because of concerns around the use of the due process clause in the *United States Bill of Rights* during the *Lochner* era, as a means of challenging the regulation of private enterprise and the promotion of social rights, see Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 I.C.O.N. 17 at 17-24.

107 [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

108 *Ibid.*, at 1003-1004.

109 *Ibid.*, at 1003.

110 *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C).

111 *Ibid.*, at para. 332.

the impugned welfare regime as a defensible means of encouraging young people to join the workforce, it did not foreclose the possibility of such a positive rights interpretation of section 7 in a future case.[112]

In *Chaoulli v. Quebec (Attorney General)*,[113] a majority of the Court held that the provincial government's failure to ensure access to health care of "reasonable" quality within a "reasonable" time triggered the application of section 7, and the equivalent guarantees under Quebec's *Charter of Human Rights and Freedoms*.[114] The dissenting justices likewise accepted the trial judge's finding "that the current state of the Quebec health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of *some* individuals on *some* occasions, of putting at risk their life or security of the person".[115] In its recent decision in *Canada (Attorney General) v. PHS Community Services Society* ("*Insite*"), the Supreme Court reaffirmed that where a law creates a risk to health, this amounts to a deprivation of the right to security of the person, and that "where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer".[116] Given the significant adverse health consequences identified in the preceding section of the paper, particularly for people living in poverty and other disadvantaged groups, it is obvious that governments' failure to ensure reasonable access to income, housing, food and other crucial determinants of health undermines section 7 interests — certainly as directly as the regulation of private medical insurance.[117] As UN Special Rapporteur

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112 *Ibid.*, at para. 82. For a critique of the decision, see Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 N.J.C.L. 81; Sheila McIntyre, "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2006) 31 Queen's L.J. 731; Gwen Brodsky, "*Gosselin v. Quebec (Attorney General)*: Autonomy With a Vengeance" (2003) 15:1 C.J.W.L. 194.

113 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at para. 159, [2005] 1 S.C.R. 791 (S.C.C.). The majority went on to find that the ban on private insurance violated s. 7 principles of fundamental justice and could not be justified under s. 1 of the Charter.

114 *Charter of Human Rights and Freedoms*, CQLR, c. C-12, ss. 1, 9.1; *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at paras. 100, 105, [2005] 1 S.C.R. 791 (S.C.C.).

115 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at para. 200, [2005] 1 S.C.R. 791 (S.C.C.) [emphasis in original]. The dissenting justices disagreed, however, with the majority's conclusion that the province's ban on private health insurance was arbitrary, concluding instead that "Prohibition of private health insurance is directly related to Quebec's interest in promoting a need-based system and in ensuring its viability and efficiency", at para. 256.

116 *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44 at para. 93, [2011] 3 S.C.R. 134 (S.C.C.); *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331 at para. 62 (S.C.C.).

117 See generally, Martha Jackman & Bruce Porter, "Social and Economic Rights" in Peter Oliver, Patrick Macklem & Nathalie DesRosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 843; Margot Young, "Section 7: The Right to Life, Liberty, and Security of the Person" in Peter Oliver, Patrick Macklem & Nathalie DesRosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 777; Martha Jackman & Bruce Porter, "Rights-Based

on the Right to Health, Paul Hunt, summarizes it: "The health of individuals, communities and populations requires more than medical care."[118]

Section 7 of the Charter states that any deprivation of the right to life, liberty and security of the person must be in accordance with the principles of fundamental justice. A core component of fundamental justice is the principle that governments cannot arbitrarily limit section 7 rights.[119] Prior to the *Insite* case, the Supreme Court had not been called upon to consider whether a government's failure to take action, or to adopt positive measures, to protect the right to life or to security of the person, were arbitrary and so fundamentally unjust within the meaning of section 7. In the *Insite* case, however, after rejecting the claim that the *Controlled Drugs and Substances Act*[120] itself violated section 7, the Court considered whether the federal Minister of Health's failure to grant an exemption, as provided for under the Act, was in accordance with the principles of fundamental justice.[121] Accepting the trial judge's findings with respect to the benefits of Insite's safe injection and related health services to the lives and health of those using them, and the harms that would result if those services were not made available, the Court found that the Minister's failure to grant an exemption was arbitrary and it went on to conclude that: "The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."[122]

The *Insite* decision has direct implications for the application of section 7 in the determinant of health context. As discussed in the previous section of the paper, for more than 40 years, Canadian governments have been called upon to take concerted action to improve determinants of health.

Strategies to Address Homelessness and Poverty in Canada: the *Charter* Framework" in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 65; Lynda M. Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Rev. Legal & Soc. 7; Louise Arbour & Fannie Lafontaine, "Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective" (2007) 45:2 Osgoode Hall L.J. 239;; Andrew Gage, "Public Health Hazards and Section 7 of the *Charter*" (2003) 13 J. Env. L. & Prac. 1; Martha Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20:2 Ottawa L. Rev. 257.

118 *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt*, U.N. Doc. No. A/HRC/7/11 (2008) at para. 45.

119 See *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 at para. 203 (S.C.C.); *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 at para. 135 (S.C.C.).

120 *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

121 *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44 at paras. 112-115, 127-136, [2011] 3 S.C.R. 134 (S.C.C.).

122 *Ibid.*, at paras. 131, 133.

There is overwhelming evidence of the serious consequences, including illness and premature death, of their failure to do so. Measured against the negative health, social and economic outcomes associated with health inequity for individuals, communities and the country as a whole, governments' continuing inaction in this area is both arbitrary and irrational. As the Senate Subcommittee on Population Health concludes:

> Taking action on the determinants of health has the potential to improve population health outcomes by addressing the causes of illnesses and injuries before they occur. There are sound economic and social reasons to improve the physical and mental health of the population. The benefits of population health extend beyond improved health status and reduced health disparities to foster economic growth, productivity and prosperity … Simply put, Canada's health and wealth depend on the health of all Canadians.[123]

It is thus increasingly difficult to sustain the position that governments' failure to take the necessary measures to address determinants of health, as outlined in the *Lalonde* and *Epp Reports*, the National Forum on Health, and other major domestic and international reports and studies since the mid-1970s, is in accordance with section 7 guarantees of life, liberty, security of the person and the principles of fundamental justice.

(d) Section 15 as a Guarantee of Health Equity

Section 15(1) of the Charter declares that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[124] As Bruce Porter has documented, there was a strong expectation that section 15 would give rise to "a more positive conception of equality, placing new responsibilities on governments to identify and address issues of socio-economic disadvantage through positive legislative and social measures" and "making the right to equality reach the level of everyday life, engaging the concrete struggles for dignity and security, an adequate income, a decent job, access to child care, transportation, adequate housing, education and

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123 Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 16; Federal/Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 5.

124 Section 15(2) goes on to affirm that: "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."

health care".[125] In its landmark decision in *Andrews v. Law Society of British Columbia*,[126] the Supreme Court of Canada broke with its pre-Charter past, adopting a substantive approach to equality — one that is primarily concerned with the effects, rather than the intent of government action, and that is designed to remedy "the most socially destructive and historically practised bases of discrimination".[127]

In order to address health inequity, Ronald Labonté has underscored the need to focus not only on socially excluded groups, but on socially excluding structures and practices.[128] This is also the objective of a substantive equality analysis under section 15. The implications of such an approach from a determinant of health perspective can be seen in the Supreme Court's decision in *Eldridge v. British Columbia (Attorney General)*.[129] The appellants' section 15 challenge to the province's failure to fund interpretation services was dismissed by the lower courts in *Eldridge* on the grounds that B.C.'s health care system treated everyone the same.[130] Writing for a unanimous Supreme Court, La Forest J. rejected this restrictive reading of section 15, and the lower courts' presupposition that "the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate".[131] Justice La Forest identified the inequality in *Eldridge* as the failure to ensure that persons who were deaf received the same level and quality of care as the hearing population.[132] In doing so, La Forest J. endorsed Dianne Pothier's assertion that "the unavailability of sign language interpretation is not … the provision of universal health care but rather the provision of able-bodied health care".[133]

In *Vriend v. Alberta*, the Court adopted a similar analysis in rejecting the province's assertion that the omission of sexual orientation from Alberta's

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125 Bruce Porter, "Expectations of Equality" in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) 23 at 34; see also Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality" (2018) 38 N.J.C.L. 35; Lynn Smith, ed., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986); Anne Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985).

126 *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

127 *Ibid.*, at para. 38.

128 Ronald Labornté, "Social Inclusion/Exclusion and Health: Dancing the Dialectic" in Dennis Raphael, ed., *Social Determinants of Health*, 3d ed. (Toronto: Canadian Scholars' Press, 201616) at 419.

129 [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

130 *Eldridge v. British Columbia (Attorney General)*, [1992] B.C.J. No. 2229 (B.C.S.C.); *Eldridge v. British Columbia (Attorney General)*, [1995] B.C.J. No. 1168 (B.C.C.A.).

131 *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at para. 66 (S.C.C.).

132 *Ibid.*, at para. 71.

133 Dianne Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 N.J.C.L. 295 at 338; *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at para. 69 (S.C.C.).

human rights legislation amounted to government inaction that was not subject to Charter review.[134] Justice Cory found that the impact on gays and lesbians of the absence of human rights protection based on sexual orientation had to be examined under section 15, and that it was not an answer to say that all Albertans benefitted from the same human rights guarantees. Rather, Cory J. concluded, Alberta's human rights legislation violated section 15 because of the systemic effects of its failure to protect gays and lesbians from the form of discrimination they were most likely to suffer.[135]

In the decade following *Eldridge* and *Vriend*, the Supreme Court rendered a number of negative section 15 decisions, most notably in *Law v. Canada (Minister of Employment and Immigration)*,[136] that threw its commitment to substantive equality into doubt. In *R. v. Kapp*,[137] the Court acknowledged the widespread criticism of the *Law* decision[138] as having narrowed section 15 to "an artificial comparator analysis focused on treating likes alike".[139] This formalism was typified by the Supreme Court's decision in *Auton (Guardian ad litem of) v. British Columbia*, in which McLachlin C.J.C. held that, to succeed in a claim for provincial funding for intensive autism therapy for their children, the petitioners were required to prove differential treatment in comparison to "a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required".[140] In *Kapp*,[141] the Court reiterated its commitment to the ideal

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134 *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

135 *Ibid*., at paras. 86-87.

136 [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.). See generally Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

137 [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.).

138 *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.). See generally Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

139 *R. v. Kapp*, [2008] S.C.J. No. 42 at para. 22, [2008] 2 S.C.R. 483 (S.C.C.).

140 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 at para. 55, [2004] 3 S.C.R. 657 (S.C.C.). For a critique of the decision see Martha Jackman, "Health and Equality: Is There a Cure?" (2007) 15 Health L.J. 87; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) 136 at 146-49.

141 *R. v. Kapp*, [2008] S.C.J. No. 42 at para. 14, [2008] 2 S.C.R. 483 (S.C.C.).

of substantive equality.[142] As it recently affirmed: "Since *Andrews v. Law Society of British Columbia* … this Court has emphasized substantive equality as the engine for the s. 15 analysis …."[143]

Consistent with the findings in earlier reports discussed in the preceding section of the chapter, the Senate Subcommittee on Population Health observed in 2009 that:

> Wide disparities in health exist among Canadians – between men and women, between regions and neighbourhoods, and between people with varying levels of education and income. Although ill-health is distributed throughout the whole population, it is borne disproportionately by specific groups, notably Aboriginal peoples and individuals and families whose incomes are low.[144]

Given the substantive equality and remedial objectives of section 15, it is not surprising that many of the most significant determinants of health in Canada, including Indigenous status, gender, race, disability and age, are also recognized as prohibited grounds of discrimination under section 15. Nor is it surprising that women, Indigenous people, racialized minorities and people with disabilities are disproportionately impacted by other determinants of health, such as low income, unemployment and poor working conditions, illiteracy, lower levels of education, food insecurity, poor housing and environmental conditions, social exclusion and barriers to health services.[145]

In view of its importance as a source, consequence and manifestation of economic and social disadvantage and stigma, there is a strong argument that poverty — the single most significant determinant of health in Canada — should itself be recognized as an analogous ground of discrimination under section 15.[146] Poverty has been linked to prohibited

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142 *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

143 *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17 at para. 25 (S.C.C.). See also *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12 at para. 2, [2011] 1 S.C.R. 396 (S.C.C.).

144 Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 9.

145 See *supra*, note 16.

146 Martha Jackman & Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework" in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 65 at 84-92; Kerri A. Froc, "Immutability Hauntings: Socio-Economic Status and Women's Right to Just Conditions of Work Under Section 15 of the *Charter*" in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 187; Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013) 2 C.J. Poverty L. 1; Jennie Abell, "Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away" in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON:

grounds of discrimination under international human rights law, including under the ICESCR.[147] With the exception of the *Canadian Human Rights Act*,[148] "social condition" and other grounds related to poverty are also protected under domestic human rights legislation.[149] The Canadian Human Rights Act Review Panel, chaired by former Supreme Court Justice Gérard La Forest, found that there was "ample evidence of widespread discrimination based on characteristics related to social conditions such as poverty, low education, homelessness and illiteracy".[150] The Panel recommended "the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the [*Canadian Human Rights*] *Act* in order to provide protection from discrimination because of disadvantaged socio-economic status, including homelessness".[151]

The Supreme Court has yet to consider whether the social condition of poverty should be recognized as an analogous ground under section 15, and lower court jurisprudence on the issue is mixed. In cases where the courts have focused primarily on the characteristic of economic need or income level, analogous grounds claims have been rejected on the reasoning that poverty does not satisfy the "immutability" requirement set out by the Supreme Court in *Corbiere v. Canada (Minister of Indian and*

LexisNexis Canada, 2010) at 257; Kerri Froc, "Is the Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor" (2008) 87 Can Bar Rev 459 at 467-70; Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the *Canadian Charter* and Human Rights Law" (1994) 2:1 Rev. Const. Stud. 76.

147 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2 para. 2)*, U.N.C.E.S.C.R.O.R., 42nd Sess., U.N. Doc. E/C.12/GC/20 (2009); *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepulveda*, U.N.G.A.O.R., 66th Sess., U.N. Doc. A/66/265 (2011).

148 R.S.C. 1985, c. H-6.

149 All provincial and territorial human rights statutes in Canada provide protection from discrimination because of "social condition" (New Brunswick, Northwest Territories, Quebec) or a related ground such as "social origin" (Newfoundland); "source of income" (Alberta, British Columbia, Manitoba, Nova Scotia, Nunavut and Prince Edward Island), or "receipt of public assistance" (Ontario and Saskatchewan). These different grounds have been interpreted broadly to provide protection against discrimination on the basis of poverty, low level of income, reliance on public housing, and homelessness. See generally Wayne MacKay & Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009).

150 Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 107.

151 *Ibid*., at 106-12. Although strongly supported by civil society organizations and UN human rights bodies, the LaForest Panel's recommendations have not been implemented; see generally United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1/Add.31 (1998) at para. 51.

Northern Affairs).[152] However, where courts have considered the social exclusion and marginalization of poor people, including evidence of stereotyping and stigma, poverty has been recognized as an analogous ground of discrimination.[153]

Whether or not poverty itself is recognized as an analogous ground under section 15, to the extent that it intersects with other prohibited grounds of discrimination as a determinant of health and source of health inequity, the Charter's equality guarantees are clearly engaged. As the Senate Subcommittee on Cities summarizes it in its 2009 report, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness*:

> The *Charter*, while not explicitly recognizing social condition, poverty, or homelessness, does guarantee equality rights, with special recognition of the remedial efforts that might be required to ensure the equality of women, visible minorities … persons with disabilities, and Aboriginal peoples. As the Committee has heard, these groups are all overrepresented among the poor – in terms of both social and economic marginalization.[154]

The World Health Organization has pointed out that "[d]ifferent government policies, depending on their nature, can either improve or worsen health and health equity" and that "coherent action across

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[152] [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.). See *e.g.*, *Toussaint v. Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 636, 2011 FCA 146 at para. 59 (F.C.A.); *Boulter v. Nova Scotia Power*, [2009] N.S.J. No. 64 at para. 42, 307 D.L.R. (4th) 293 (N.S.C.A.); *R. v. Banks*, [2007] O.J. No. 99 at para. 104, 87 O.R. (3d) 1 (Ont. C.A.); *Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1443 at para. 21, [2007] 3 F.C.R. 411 (F.C.A.); *Bailey v. Canada*, [2005] F.C.J. No. 81, 2005 FCA 25 at para. 12 (F.C.A.); *Donovan v. Canada*, [2005] T.C.J. No. 494, 2005 TCC 667 at para. 18 (T.C.C.); *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] S.C.R. 1016 at para. 166 (S.C.C.); *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.).

[153] See *e.g.*, *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] O.J. No. 1771, 59 O.R. (3d) 481 (Ont. C.A.); *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2000] O.J. No. 2433, 188 D.L.R. (4th) 52 (Ont. Div. Ct.); *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493, 2002 BCSC 105 (B.C.S.C.); *R. v. Clarke*, [2003] O.J. No. 3883, 61 W.C.B. (2d) 134 (Ont. S.C.); *Falkiner v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 3737, 140 D.L.R. (4th) 115 at 130-39, 153 (Ont. Gen. Div.); *Schaff v. Canada*, [1993] T.C.J. No. 389, 18 C.R.R. (2d) 143 at para. 52 (T.C.C.); *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97, 119 N.S.R. (2d) 91 (N.S.C.A.); *R. v. Rehberg*, [1994] N.S.J. No. 35, 127 N.S.R. (2d) 331 (N.S.S.C.).

[154] Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, P.C.) at 69; Jennie Abell, "Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away" in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) 257 at 260-61.

government, at all levels, is essential".[155] Government inaction in relation to determinants of health not only reflects, but perpetuates and reinforces social and economic exclusion and disadvantage on grounds of discrimination that are prohibited under section 15. This inaction is a concrete manifestation of a lack of equal "concern, respect and consideration"[156] for the health-related interests and rights of Indigenous people, women, people living in poverty and members of other disadvantaged groups, in comparison to more advantaged members of Canadian society for whom access to medical care, rather than other determinants of health, is a higher priority.[157]

There is no reason why the systemic failure of Canadian governments, whether deliberate or not, to address determinants of health, particularly as they affect disadvantaged groups, should be immune from section 15 review. To the contrary, the language, history and remedial objectives of section 15 provide a solid basis for challenging governments' ongoing failure to ensure that social welfare, health, education, employment, housing, environmental, fiscal and other laws and policies reduce, rather than exacerbate health inequity in Canada. As David Boyd has observed in relation to the failure to ensure access to the most basic determinants of health — safe drinking water, running water and indoor toilets — for thousands of First Nations people living on reserves across Canada:

> If Canada's *Constitution*, including the *Charter of Rights and Freedoms*, cannot be extended to provide relief to individuals deprived of their human right to water, a deprivation that causes adverse health effects,

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155 World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008) at 10.

156 *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6 at para. 34, [1989] 1 S.C.R. 143 (S.C.C.).

157 See generally Lars K. Hallstrom, "Public Policy, Equality and Health in Canada" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) 521 at 536; Toba Bryant, Dennis Raphael & Marci Rioux, eds., *Staying Alive: Critical Perspectives on Health, Illness and Health Care*, 2d ed. (Toronto: Canadian Scholars' Press, 2010) at 93; Honourable Monique Bégin, "'Do I See a Demand?...' From 'medicare' to Health For All" (Paper delivered at 19th IUHPE World Conference, Vancouver, June 14, 2007) at 10-11; David Schneiderman, "Universality vs. Particularity: Litigating Middle Class Values under Section 15" in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) at 367; Martha Jackman, "Misdiagnosis or Cure? *Charter* Review of the Health Care System" in Colleen M. Flood, ed., *Just Medicare: What's In, What's Out, How We Decide?* (Toronto: University of Toronto Press, 2006) at 58; Nuala P. Kenny, *What Good is Health Care? Reflections on the Canadian Experience* (Ottawa: Canadian Hospital Association Press, 2002) at 182.

> violates human dignity, and flouts the principle of environmental justice, then the *Constitution* is not a living tree but is merely dead wood.[158]

IV. OBSTACLES TO LEGAL ACTION TO IMPROVE DETERMINANTS OF HEALTH

In its *General Comment 14: The Right to the Highest Attainable Standard of Health*, the CESCR outlines the obligations of States parties to ensure the domestic legal enforcement of the right to health under Article 12 of the ICESCR.[159] In particular, the CESCR asserts that: "Any person or group victim of a violation of the right to health should have access to effective judicial … remedies at both national and international levels."[160] The CESCR further recommends that: "Judges … should be encouraged by States parties to pay great attention to violations of the right to health in the exercise of their functions."[161]

Notwithstanding Canada's international human rights obligations and the remedial promise of section 24(1) of the Charter,[162] those pursuing rights claims related to poverty, homelessness, access to health care or other determinants of health have been denied an effective remedy, or even a hearing, in the vast majority of cases.[163] This lack of success of

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158 David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill L.J. 81 at 134; see also Janet Smylie & Michelle Firestone, "The Health of Indigenous Peoples" in Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 3d ed. (Toronto: Canadian Scholars' Press, 2016) at 434.

159 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (art. 12)*, U.N.C.E.S.C.R.O.R., 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000).

160 *Ibid.*, at para. 59.

161 *Ibid.*, at paras. 59, 61. The CESCR also suggests at para. 62 that: "State parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health."

162 Charter, s. 24(1) provides that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." See generally Robert J. Shape & Kent Roach, *The Charter of Rights and Freedoms*, 4th ed. (Toronto: Irwin Law, 2009), ch. 17 at 373-403; Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-economic Rights" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 46.

163 See generally Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 N.J.C.L. 81; Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010); Margot Young *et al*., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: University of British Columbia Press, 2007); Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006).

legal challenges to government action and inaction in relation to determinants of health can be explained, in large part, by judicial reliance on an outmoded conception of positive versus negative rights.

The distinction traditionally drawn between positive, or socio-economic rights on the one hand, and negative, or civil and political rights on the other, is premised on the idea that the state is merely required to refrain from interfering with individuals' exercise of the latter class of rights, while socio-economic rights impose positive obligations on governments to act, whether by providing services, money or other benefits necessary to ensure that these rights can in fact be enjoyed by all. The enforcement of negative rights is seen to fall within the traditional purview of the courts. In contrast, judicial enforcement of positive rights is alleged to raise issues of institutional legitimacy and competence so problematic as to render socio-economic rights non-justiciable. Socio-economic rights violations, including those directly related to determinants of health, are characterized as matters of social policy, rather than fundamental rights, which governments alone are empowered to address, free from judicial interference and the constraints of Charter review.[164]

The distinction between positive and negative rights has long been discredited under international human rights law, replaced by the recognition that all human rights are interdependent and indivisible, and that governments have a corresponding duty to respect, protect and fulfil socio-economic rights on an equal footing with civil and political rights.[165]

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[164] Bruce Porter, "Inclusive Interpretations: Social and Economic Rights and the Canadian *Charter*" in Helena Alviar Garcìa, Karl Klare & Lucy A. Williams, eds., *Social and Economic Rights in Theory and Practice: Critical Enquiries* (New York: Routledge, 2014) 215; David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, the Institutional Competence of Courts, and the Prospects for Antipoverty *Charter* Claims" (2014); Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 3; Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-Economic Rights" in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 46; *Charter* Committee on Poverty Issues, *The Right to Effective Remedies: Submission of the Charter Committee on Poverty Issues to the United Nations Committee on Economic, Social and Cultural Rights Review of Canada's Fourth and Fifth Periodic Reports Under the ICESCR* (2006); Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539; Martha Jackman, "What's Wrong with Social and Economic Rights?" (2000) 11 N.J.C.L. 235.

[165] United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998); International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 42-49; see generally Louise Arbour & Fannie Lafontaine, "Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective" (2007) 45:2 Osgoode Hall L.J. 239.

In a 2008 report on the legal enforcement of socio-economic rights around the world, the International Commission of Jurists ("ICJ") points out that: "Every human right imposes an array of positive and negative obligations … the challenge to the justiciability of ESC rights as a whole is based on a false distinction that overestimates the differences between civil and political rights and ESC rights on this basis."[166] As the ICJ's report documents, courts around the world have increasingly rejected the false dichotomy between positive and negative rights and have ordered governments to remedy determinant of health-related rights violations in the areas of employment, health, housing, education, food and other fundamental socio-economic rights.[167] Against this international trend, however, Canadian courts remain largely wedded the positive/negative rights approach, urged upon them by Attorneys General attempting to justify violations of socio-economic rights by Canadian governments at all levels.[168] While this judicial attitude results in the outright dismissal of many claims that relate directly to determinants of health, it also affects the remedy that is granted in those rare cases that do succeed.[169]

The Supreme Court's decisions in *Auton*[170] and in *Chaoulli*[171] illustrate the problem. In *Auton*, the Supreme Court declared: "This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund

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166 International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 10.

167 While the constitutions of some of the nations surveyed include explicit protection for socio-economic rights, courts and tribunals in many other countries rely on more general constitutional guarantees, such as the right to life and the right to non-discrimination, as a basis for enforcing socio-economic rights; see International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 4, 65-72. See also Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 649-76.

168 Perhaps surprising to international observers, if not to human rights activists in Canada, the ICJ report underscores the degree to which Canadian courts and tribunals stand out in terms of their continuing conservatism in regards to the recognition and enforcement of socio-economic rights. Of the 200-plus trial, appellate and Supreme Court cases contained in the ICJ's report, only one Canadian case can be found: the 1997 Supreme Court decision in *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

169 See *e.g.*, *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 313 D.L.R. (4th) 29 (B.C.C.A.), affg [2008] B.C.J. No. 1935, 299 D.L.R. (4th) 193 (B.C.S.C.); *Johnston v. Victoria (City)*, [2010] B.C.J. No. 2360, 14 B.C.L.R. (5th) 372 (B.C.S.C.). See generally Martha Jackman, "*Charter* Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" in Robert J. Sharpe & Kent Roach, eds., *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 279.

170 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.).

171 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

as a matter of public policy, provided the benefit itself is not conferred in a discriminatory way."[172] This negative rights-based reading of the Charter, and the obligations it imposes on governments in relation to health, led McLachlin C.J.C. to distinguish the Court's earlier decision in *Eldridge*[173] and thereby dismiss the petitioners' section 15 claim for provincial funding for autism treatment for their children.[174] The failure of British Columbia's health insurance regime to provide anything other than "core" therapies delivered by physicians did not amount to substantive discrimination, in the former Chief Justice's view, because it was "an anticipated feature of the legislative scheme".[175] As Bruce Porter remarks:

> However controversial the specific treatment sought in *Auton* might be, it is difficult to explain the decision merely as a way of avoiding a remedy the Court did not like. In *Auton*, the Supreme Court was considering, really for the first time, the constitutionality of doing nothing to meet the needs of an extremely disadvantaged group in our society. It appears to have affirmed, in a shocking fashion, the government's "right" to do nothing.[176]

The Supreme Court's negative rights-based approach is even more evident in the majority's judgment in *Chaoulli*.[177] The central question in

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[172] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 at para. 41, [2004] 3 S.C.R. 657 (S.C.C.).

[173] *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

[174] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 at para. 38, [2004] 3 S.C.R. 657 (S.C.C.).

[175] *Ibid.*, at para. 43.

[176] Bruce Porter, "Expectations of Equality" in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) 23 at 40; Douglas Elliott & Jason J. Tan, "Unequal Benefits or Unequal Persons? Social Benefit Programs and the *Charter*" (2006) 19 N.J.C.L. 285. While the *Auton* decision has been heavily criticized within the equality community generally, it must be noted that Michelle Dawson, an autistic woman who intervened before the Supreme Court in the case, takes a profoundly different view of the ethical and equality rights issues raised by the claim that intensive autism treatment should be provided as a matter of Charter right: see generally *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.) (Factum of the Intervener, Michelle Dawson at paras. 40-41); Michelle Dawson, *An Autistic Victory: The True Meaning of the Auton Decision*, online: http://www.sentex.net/~nexus23/naa_vic.html.

[177] *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.). For a critique of the *Chaoulli* decision, see Martha Jackman, "'The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44:2 Osgoode Hall L.J. 349; Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005); Marie-Claude Prémont, "L'affaire *Chaoulli* et le système de santé du Québec: cherchez l'erreur, cherchez la raison" (2006) 51:1 McGill L.J. 167.

that case, according to Deschamps J., was "whether Quebeckers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state". The answer, in her view, was no.[178] In her concurring judgment McLachlin C.J.C. held, albeit in *obiter*, that while the Charter "does not confer a free standing constitutional right to health care",[179] Quebec's ban on private insurance was objectionable because it prevented "ordinary" Quebec residents from securing private insurance that would enable them to obtain private health care in order to avoid delays in the public system.[180] In the former Chief Justice's opinion, rather than requiring the province to take affirmative measures to ensure that timely health care was available to all, section 7 of the Charter demanded state inaction: the appellants must be free to buy their own care without government interference.

From a health equity perspective, the remedy dictated by the majority's negative conception of the right to health is particularly problematic. The majority found that "patients die as a result of waiting lists for public health care".[181] To remedy this Charter violation, it concluded that the provincial prohibition on private insurance must immediately be struck down. The result is a remedy, as Bruce Porter puts it, "only if you can pay for it".[182] As the dissenting justices point out: "Those who seek private health insurance are those who can afford it and can qualify for it … They are differentiated from the general population, not by their health problems, which are found in every group in society, but by their income status."[183] The trial judge in *Chaoulli* concluded that invalidating Quebec's prohibition on private insurance would, by diverting energy and resources into the private system, have a deleterious effect on the publicly funded system, and on those who depend on it.[184] Based on this evidentiary finding, she held that the ban promoted, rather than undermined, the purposes of section 15 of the Charter by guaranteeing medical care for all.[185] In contrast, not only does the Supreme Court's remedy in *Chaoulli* offer no benefit to those for whom a negative conception of the right to health is of little value, it seriously

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178 *Ibid*., at para. 4.
179 *Ibid*., at para. 104.
180 *Ibid*., at paras. 111, 124.
181 *Ibid*., at para. 123.
182 Bruce Porter, "A Right to Healthcare in Canada: Only If You Can Pay for It" (2005) 6 ESR Review: Economic & Social Rights in South Africa 8.
183 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33 at para. 274, [2005] 1 S.C.R. 791 (S.C.C.).
184 *Chaoulli c. Quebec (Procureure générale)*, [2000] J.Q. no 479, [2000] R.J.Q. 786 at para. 258 (Que. C.S.).
185 *Ibid.*, at para. 306.

undermines the health rights of people with disabilities, people living in poverty, and other disadvantaged groups.[186]

The Federal Court adopts an equally narrow approach to governments' section 7 health care obligations in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*.[187] The applicants in that case challenged the federal government's decision to exclude certain classes of migrants, including failed refugee claimants and refugee claimants from designated countries of origin, from receiving publicly funded health care services under the Interim Federal Health Program ("IFHP"). After reviewing the impact of the cuts, Mactavish J. found that the denial of access to care constituted "cruel and unusual treatment or punishment" under section 12 of the Charter and was discriminatory based on national or ethnic origin under section 15.[188] However, she dismissed the argument that the IFHP cuts violated the applicants' rights to life and to security of the person under section 7.[189]

In coming to this conclusion, Mactavish J. pointed to the fact that, contrary to the IFHP claimants, the applicants in *Chaoulli* were not asking the Court to order the government to pay for their private health care, but rather were challenging limits on their ability to obtain their own private health care.[190] Referring to the concerns of the dissenting justices in *Chaoulli*, Mactavish J. affirmed:

> … basing a positive right to health care on section 7 of the Charter would require the Courts to weigh in and determine the appropriate scope of health services and the acceptable length of wait times reasonably required under the Charter. This would be a very uncomfortable role for the Courts, as it has long been recognized that decisions as to the setting of priorities and the allocation of scarce resources are matters not for the Courts, but for governments.[191]

Rather than examining the deleterious impact of the denial of IFHP coverage on the lives and security of the person of the claimants, Mactavish J. simply rejected their section 7 claim on the grounds that "the Charter's guarantees of life, liberty and security of the person do not

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[186] The majority judgment in *Chaoulli* is being relied on by Dr. Brian Day in his ongoing *Charter* challenge to the single-payer health care system in B.C.; see *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, [2018] B.C.J. No. 3705, 2018 BCSC 2084 (B.C.S.C.): Martha Jackman, "From *Chaoulli* to *Cambie*: *Charter* Challenges to the Regulation of Private Health Funding and Care" in Colleen M. Flood & Bryan Thomas, eds., *Is Two-Tier Health Care the Future?* (Ottawa: University of Ottawa Press, 2019) [forthcoming].

[187] [2014] F.C.J. No. 679, 2014 FC 651 (F.C.).

[188] *Ibid.*, at paras. 12-14.

[189] *Ibid*., at para. 571.

[190] *Ibid*., at paras. 533-534.

[191] *Ibid*., at para. 535.

include the positive right to state funding for health care".[192] This was, in her opinion, "a right that not even Canadian citizens possess".[193]

In addition to access to health care claims, challenges relating to an adequate level of social assistance, housing, education, unemployment insurance, pensions, legal aid, pharmacare and affordable utilities, have likewise been dismissed by Canadian courts unwilling to impose positive obligations on governments.[194] The 2013 Ontario Superior Court decision in *Tanudjaja v. Canada (Attorney General)*[195] exemplifies this judicially constructed barrier to effective remedies for determinant of health-related rights violations.

The applicants in *Tanudjaja*, including the Centre for Equality Rights in Accommodation and four individuals,[196] argued that the federal and Ontario governments' failure to implement provincial and national strategies to combat homelessness violated sections 7 and 15 and could

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192 *Ibid.*, at para. 571.

193 *Ibid*., at para. 740.

194 See generally Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 N.J.C.L. 81; Martha Jackman & Bruce Porter "Introduction: Advancing Social Rights in Canada" in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 1 at 15-17; Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010); Martha Jackman, "*Charter* Review as a Health Care Accountability Mechanism in Canada" (2010) 18 Health L.J. 1; Joan M. Gilmour, "Retrenchment or Reform: Using Law and Policy to Restrict the Entitlement of Women with Disabilities to Social Assistance" in Shelley A.M. Gavigan & Dorothy Chunn, eds., *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010) at 189; Kerri Froc, "Is the Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor" (2008) 87 Can. Bar Rev. 459; Margot Young *et al.*, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: University of British Columbia Press, 2007); Sheila McIntyre & Sanda Rodgers, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006).

195 [2013] O.J. No. 4078, 2013 ONSC 5410 (Ont. S.C.J.), affd [2014] O.J. No. 5689, 2014 ONCA 852 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 39 (S.C.C.).

196 *Tanudjaja v. Canada (Attorney General)*, [2013] O.J. No. 4078, 2013 ONSC 5410 at paras. 12-14 (Ont. S.C.J.). Jennifer Tanudjaja, a young single mother in receipt of social assistance, was living with her two sons in an apartment that cost more than her total monthly social assistance benefit, and had been on a waiting list for subsidized housing for over two years. Diagnosed with cancer, Brian DuBourdieu was unable to work or to pay his rent and lost his apartment, living on the streets and in shelters, and was on a waiting list for subsidized housing for four years. Ansar Mahmood, severely disabled in an industrial accident, lived with his wife and four children including one son confined to a wheelchair, in a two-bedroom apartment that was not accessible. He and his family had been on a waiting list for subsidized accessible housing for four years. Following the sudden death of her spouse, Janice Arsenault became homeless, living in shelters and on the streets for several years, and was forced to place her young two sons in her parents' care until she was able to find rental housing that consumed two-thirds of her limited monthly income, putting her at constant risk of becoming homeless again.

not be justified under section 1 of the Charter.[197] They relied on an extensive evidentiary record showing that the cumulative effect of the governments' affordable housing, income support and accessible housing policies was widespread homelessness, disproportionately affecting Indigenous and racialized people, people with disabilities, new immigrants and refugees, seniors, social assistance recipients, and youth. The application also documented the severe physical, psychological and social consequences of homelessness and housing insecurity for those affected.[198]

The *Tanudjaja* claim did not argue that housing or housing subsidies were constitutionally guaranteed. Rather, the applicants alleged that the governments' actions and inaction together resulted in serious harm to life and to security of the person, including physical and mental illness, shortened lives and even death.[199] The applicants asked the court to order the federal and Ontario governments to design and implement national and provincial strategies to reduce and eliminate homelessness as an appropriate remedy under section 24(1) of the Charter.[200]

In her affidavit in support of the *Tanudjaja* claim, Cathy Crowe, a street nurse who had worked with homeless people in Toronto for over 20 years, described some of the consequences of homelessness she had witnessed:

> I saw infections and illnesses devastate the lives of homeless people – frostbite injuries, malnutrition, dehydration, pneumonias, chronic diarrhea, hepatitis, HIV infection, and skin infections from bedbug bites … homeless people experience more exposure to upper respiratory disease, reduced access to health care, more trauma including violence such as rape, more chronic illness, more exposure to illness in congregate settings, more exposure to infectious agents and infestations such as lice and bedbugs, lack the means to care for themselves when ill and suffer from more depression.[201]

Crowe noted that, while these physical illnesses and conditions were difficult enough to treat while people were living without adequate housing, treating the emotional and mental effects of homelessness was even more difficult. As she explained, "[c]hronic deprivation of privacy, sense of safety, sleep and living in circumstances of constant stress and

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197 *Tanudjaja v. Canada (Attorney General)*, [2013] O.J. No. 4078, 2013 ONSC 5410 (Ont. S.C.J.), Amended Notice of Application.

198 *Ibid.*, Amended Notice of Application at paras. 27-32; Factum of the Applicants (Respondents on the Motion) at paras. 15-18.

199 *Ibid*., Factum of the Applicants (Respondents on the Motion) at paras. 1, 46-47.

200 *Ibid*., Amended Notice of Application.

201 *Ibid.*, Affidavit of Cathy Crowe.

violence leads to mental and emotional trauma".[202] Crowe affirmed that these negative health outcomes could not be effectively addressed "by programs of support for living on the street, emergency shelters, drop-in programs or counselling and referral services despite the critical need for all these services".[203] She argued that access to adequate "permanent housing" was what was required.[204]

Although the types of harms to life, physical and psychological security, and health, challenged in *Tanudjaja*, had all been subject to section 7 review in previous Supreme Court cases,[205] Lederer J. granted a motion brought by the federal and Ontario governments to strike the claim for disclosing no reasonable cause of action.[206] Justice Lederer was unpersuaded by the applicants' argument that, in *Gosselin v. Quebec (Attorney General)*,[207] the Supreme Court expressly left open the possibility that section 7 might in future be interpreted to impose positive obligations on governments. In his opinion: "The law is established. … there can be no positive obligation on Canada and Ontario to put in place programs that are directed to overcoming concerns for the 'life, liberty and security of the person'."[208] Justice Lederer was also unpersuaded by the applicants' submission that the important constitutional issues raised in the *Tanudjaja* case should not be disposed of on an interlocutory motion, without a full hearing of the arguments and evidence.[209] Instead, he concluded: "Quite apart from the question of whether there is a viable claim for breaches of the *Charter*, what the Court is ultimately being asked to do is beyond its competence and not justiciable."[210] A 2-1 majority of the Ontario Court of Appeal upheld Lederer J.'s order.[211] In

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202 *Ibid*.

203 *Ibid*.

204 *Ibid.* See also Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada's Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing, and Health, 2010) at 4.

205 See, for example, *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.); *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) ("*Insite*"); and see generally Martha Jackman & Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework" in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 65.

206 *Tanudjaja v. Canada (Attorney General)*, [2013] O.J. No. 4078, 2013 ONSC 5410 at para. 152 (Ont. S.C.J.).

207 [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.).

208 *Tanudjaja v. Canada (Attorney General)*, [2013] O.J. No. 4078, 2013 ONSC 5410 at para. 59 (Ont. S.C.J.).

209 *Ibid.*, at paras. 55-56.

210 *Ibid.*, at para. 148.

211 *Tanudjaja v. Canada (Attorney General)*, [2014] O.J. No. 5689, 2014 ONCA 852 at para. 39 (Ont. C.A.).

2015, the Supreme Court of Canada refused leave to appeal, and the *Tanudjaja* claim was struck.[212]

Speaking to issue of the justiciability of positive rights claims in its *General Comment No 9: The Domestic Application of the Covenant*, the CESCR observed:

> While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[213]

As the *Tanudjaja* decision clearly illustrates, the unwillingness of Canadian courts to review government inaction relating to poverty, homelessness, unemployment, or other determinants of health, presents a serious obstacle to legal action to improve health equity in Canada. Until Canadian judges acknowledge the discriminatory implications of their continued reliance on the distinction between positive and negative rights, this situation is unlikely to change.[214]

V. CONCLUSION

Cathy Crowe's first-hand testimony in the *Tanudjaja* case reflects what numerous studies and reports, many commissioned by governments themselves, have concluded about determinants of health for over 40 years. Put simply by the World Health Organization: "Social injustice is killing

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212 *Tanudjaja v. Canada (Attorney General)*, [2015] S.C.C.A. No. 39 (S.C.C.).

213 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 10; see also Louise Arbour & Fannie Lafontaine, "Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective" (2007) 45:2 Osgoode Hall L.J. 239.

214 International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008) at 3-4, 82-83. See also Louise Arbour, "'Freedom from want' – From charity to entitlement" (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, March 3, 2005) at 17, online: http://www.icc-icc.ca/en/lbs/docs/LouiseArbour2005EN.pdf; United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1998/24 (1998) at para. 14.

people on a grand scale."[215] Evidence shows that the health of Canadians will not be improved through increased spending on health care services which, according to the Senate Subcommittee on Population Health "only accounts for 25% of health outcomes regardless of the level of funding it receives".[216] As Dr. Nuala Kenny cautions:

> The goal of equity in health care requires that we think carefully about more than just getting more money into acute care. It requires a reflection on the implications of the rising social inequity in Canadian society and its implications for health and well-being.[217]

Nor, the evidence suggests, will the current focus on biomedical and lifestyle approaches to health be effective, since these are "a small factor in whether individuals stay healthy or become ill".[218] Improving the health of people in Canada and achieving health equity will require that determinants of health be directly addressed.

Monique Bégin has argued that "health equity can be defined as the absence of unfair or unavoidable or remediable differences in health among populations or groups … this is what we should be aiming for".[219] Given the evident health consequences and adverse impact of poverty, homelessness and other determinants of health on physical and psychological integrity, security and equality, law has a crucial role to play in achieving that goal. In particular, sections 7 and 15 of the Charter and section 36 of the *Constitution Act, 1982* mandate governments to protect and promote life, liberty, security of the person, fundamental justice and equality. As outlined in the preceding section of the chapter, these constitutional safeguards are directly related to determinants of health and health equity.

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215 World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008) at 1.

216 Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 7; Federal, Provincial and Territorial Advisory Committee on Population Health, *Toward a Healthy Future: Second Report on the Health of Canadians* (Ottawa: Minister of Public Works and Government Services Canada, 1999) at viii.

217 Nuala P. Kenny, *What Good is Health Care? Reflections on the Canadian Experience* (Ottawa: Canadian Hospital Association Press, 2002) at 182.

218 Dennis Raphael, "Addressing the Social Determinants of Health in Canada: Bridging the Gap Between Research Findings and Public Policy" (March 2003) Policy Options 35 at 37. See also Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: A National Portrait* (Ottawa: Minister of Health, 2018) at 425-26; Health Council of Canada, *Stepping Up: Moving the Focus from Health Care in Canada to a Healthier Canada* (Ottawa: Health Council of Canada, 2010) at 14.

219 Honourable Monique Bégin, "'Do I See a Demand?...' From 'medicare' to Health For All" (Paper delivered at 19th IUHPE World Conference, Vancouver, June 14, 2007) at 9.

The CESCR and other international treaty monitoring bodies have been highly critical of Canada's failure to ensure domestic respect and enforcement of ICESCR rights, and in particular, the failure by Canadian courts to interpret and apply the Charter in a way that adequately safeguards the health and determinant of health-related rights of Indigenous people, women, people living in poverty, migrants and other disadvantaged groups. As early as 1993, the CESCR expressed concern that Canadian courts had characterized ICESCR rights "as mere 'policy objectives' of governments rather than as fundamental human rights".[220] In 1998, the CESCR criticized lower court Charter interpretations that deprived claimants of a remedy to the denial of basic necessities.[221] In its review of Canada in 2006, the CESCR again decried "the practice of Canadian governments to urge upon their courts an interpretation of the *Canadian Charter of Rights and Freedoms* denying protection of *Covenant* rights".[222] And, in its most recent report in 2016, the CESCR reiterated its concern that:

> [D]espite … the Government's commitment to review its litigation strategies, economic, social and cultural rights remain generally non-justiciable in domestic courts. The Committee is also concerned at the limited availability of legal remedies for victims in the event of a violation of Covenant rights, which may disproportionately impact disadvantaged and marginalized groups and individuals, including homeless persons, indigenous peoples and persons with disabilities.[223]

In November 2018, the UN Special Rapporteur on the Right to Health[224] drew specific attention to the UN Human Rights Committee's

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220 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 1993, U.N. Doc. E/C.12/1993/5 at para. 21.

221 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 19th Sess., U.N. Doc. E/C.12/1/Add.31 (1998) at paras. 14-15.

222 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 36th Sess., U.N. Doc. E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5 (2006) at para. 11(b).

223 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N.C.E.S.C.R.O.R., 20th Sess., U.N. Doc. E/C.12/CAN/CO/6 (2016) at para. 5.

224 United Nations Human Rights Council, "Preliminary Observations – Country visit to Canada, 5 to 16 November 2018: UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Dainius Pūras" (Ottawa, November 16, 2018).

("UNHRC") finding[225] that denying federally funded health care to undocumented migrants, approved by the Canadian courts in *Toussaint v. Canada (Attorney General)*,[226] put Canada in violation of its obligations under the *International Covenant on Civil and Political Rights* ("ICCPR").[227] After working in Canada for a number of years as an undocumented migrant, Nell Toussaint developed several life-threatening medical conditions related to untreated diabetes and hypertension.[228] Her application to the Interim Federal Health Program ("IFHP") was refused on the grounds that Ms. Toussaint did not fall within the four classes of immigrants eligible for health care coverage under the program.[229]

On judicial review, the Federal Court of Canada found that Ms. Toussaint's exclusion from the IFHP violated her Charter rights to life and to security of the person.[230] However, Zinn J. held that denying medically necessary health care to Ms. Toussaint and others who entered or remained in Canada illegally was not arbibrary, because it was consistent with the government's objective of preventing Canada from becoming a "health-care safe-haven".[231] The Federal Court of Appeal agreed that Ms. Toussaint's rights to life and to security of the person had been put at risk.[232] However, Stratas J.A. concluded that Ms. Toussaint's own conduct was the "operative cause" of any injury to her section 7 rights[233] and that her exclusion from the IFHP did not therefore violate section 7 principles of fundamental justice.[234]

After the Supreme Court of Canada denied her leave to appeal,[235] Ms. Toussaint filed a petition to the UNHRC under the *Optionol Protocol* to the ICCPR.[236] The UNHRC found that Canada had failed to fulfil its positive obligation to protect Ms. Toussaint's right to life by providing her

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225 United Nations Human Rights Committee, Communication No. 2348/2014, *Toussaint v. Canada*, U.N. Doc. CCPR/C/123/D/2348/2014 (24 July 2018).

226 [2010] F.C.J. No. 987, 2010 FC 810 (F.C.), affd [2011] F.C.J. No. 984, 2011 FCA 213 (F.C.A.), leave to appeal refused [2011] S.C.C.A. No. 412 (S.C.C.). See generally Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada" (2017) Alberta L.R. 649.

227 *International Covenant on Civil and Political Rights* (19 December 1966), 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force March 23, 1976, accession by Canada May 19, 1976).

228 *Toussaint v. Canada (Attorney General)*, [2010] F.C.J. No. 987, 2010 FC 810 at para. 8 (F.C.).

229 *Ibid*., at para. 19.

230 *Ibid*., at para. 91.

231 *Ibid*., at para. 94.

232 *Toussaint v. Canada (Attorney General)*, [2011] F.C.J. No. 984, 2011 FCA 213 at para. 61 (F.C.A.).

233 *Ibid*., at paras. 72-73.

234 *Ibid*., at para. 82.

235 *Toussaint v. Canada (Attorney General)*, [2011] S.C.C.A. No. 412 (S.C.C.).

236 *Optional Protocol to the International Covenant on Civil and Political Rights* (December 16,1966), 999 U.N.T.S. 171 (entered into force March 23, 1976).

with emergency and essential health care, thereby violating article 6 of the ICCPR.[237] The UNHRC further found that excluding Ms. Toussaint from the IFHP based on her immigration status was discriminatory, contrary to article 26 of the ICCPR.[238] The UNHRC concluded that Canada was obligated both to compensate Ms. Toussaint for the harm she herself suffered, and "to take steps to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care …".[239]

Beyond the overt denial of health care services, called out by the CESCR in *Toussaint*, it is evident that lack of concerted action to address poverty, homelessness and other widely recognized determinants of health places Canada in violation of both domestic and international human rights obligations — something Canadian governments cannot fail to be aware of. A decade ago, the Senate Subcommittee on Population Health exhorted "all governments – from the federal to the local" to "work together to improve health for all Canadians and reduce health disparities among various population groups" and it warned that "lack of action will produce … even greater health disparities in Canada".[240] As a signatory to the *Rio Political Declaration on Social Detertimants of Health*[241] in 2011, Canada formally and explicitly "reaffirm[ed] that health inequities … are politically, socially and economically unacceptable, as well as unfair and largely avoidable".[242] It underscored that "[p]ositioning human health and well-being as one of the key features of what constitutes a successful, inclusive and fair society in the 21st century is consistent with our commitment to human rights at national and international levels".[243] Canada recognized the "need to do more to accelerate progress in addressing the unequal distribution of health resources as well as conditions damaging to health at all levels".[244] And it expressed its "political will to make health equity a national … goal".[245]

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237 United Nations Human Rights Committee, Communication No. 2348/2014, *Toussaint v. Canada*, U.N. Doc. CCPR/C/123/D/2348/2014 (24 July 2018) at paras. 11.2-11.5.

238 *Ibid*., at paras. 11.6-11.8.

239 *Ibid*., at para. 13.

240 Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 17. See also National Forum on Health, *Canada Health Action: Building on the Legacy – Final Report of the National Forum on Health* (Ottawa: Minister of Public Works and Government Services, 1997) at 16.

241 World Health Organization, *Rio Political Declaration on Social Determinants of Health* (Rio de Janeiro, October 21, 2011).

242 *Ibid*., at para. 4.

243 *Ibid*., at para. 6.

244 *Ibid*., at para. 8.

245 *Ibid*.

Health disparities have been proven to have enormous financial as well human costs, and reducing health inequity has been shown to deliver major social, political and economic benefits.[246] In 2009, the Senate Subcommittee made the point that "spending on population health is an investment, not an expense".[247] In a comprehensive 2018 report, designed to create a baseline of health inequalities data in Canada, the Pan-Canadian Health Inequalities Initiative — a collaboration between the Public Health Agency of Canada, the Pan-Canadian Public Health Network, Statistics Canada, the Canadian Institute for Health Information and the First Nations Information Governance Centre — echoed this finding: "Ensuring the equitable distribution of resources that support capacity for health across social groups is a sound investment for everyone."[248] Arguing that "the persistence, breadth, and depth of health inequalities in Canada consitute a call to action across all levels and sectors of society",[249] the report proposes that "[t]his action should rest on a strong foundation of human rights (including the right to health)" as recommended by the World Health Organization's Commission on Social Determinants of Health.[250]

The failure to move forward on determinants of health when, as a country, we have the ability and resources to do so, cannot be justified as a matter of social, economic or health policy. Nor can it be justified as a matter of law. In the words of Canada's Chief Public Health Officer: "All Canadians deserve a chance to achieve optimal health so that they can

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246 See Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: A National Portrait* (Ottawa: Minister of Health, 2018) at 418-29; Canadian Institute for Health Information, *Trends in Income-Related Health Inequalitites in Canada: Summary Report* (Ottawa: Canadian Institute for Health Information, 2015) at 9-10; Health Council of Canada, *Stepping Up: Moving the Focus from Health Care in Canada to a Healthier Canada* (Ottawa: Health Council of Canada, 2010) at 28; Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 16-17, 5; Chief Public Health Officer, *The Report on the State of Public Health in Canada, 2008 – Addressing Health Inequalities* (Ottawa: Minister of Health, 2008) at 67-68; Federal/ Provincial/Territorial Advisory Committee on Population Health and Health Security, Health Disparities Task Group, *Reducing Health Disparities – Roles of the Health Sector: Discussion Paper* (Ottawa: Public Health Agency of Canada, 2004) at 4-5.

247 Senate, Standing Committee on Social Affairs, Science and Technology, *A Healthy, Productive Canada: A Determinant of Health Approach, Final Report of the Senate Subcommittee on Population Health* (June 2009) (Chair: Honourable Wilbert Joseph Keon) at 17.

248 Pan-Canadian Health Inequalities Reporting Initiative, *Key Health Inequalities in Canada: A National Portrait* (Ottawa: Minister of Health, 2018) at 429.

249 *Ibid*., at 10.

250 *Ibid*., at 429; World Health Organization, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (Geneva: World Health Organization, 2008).

fully participate in, and contribute to, society. A healthy Canada requires us to level the playing field …."[251] This chapter has argued that reducing health disparities by improving determinants of health engages the domestic and international human rights obligations of all levels of government. The same holds true for the constitutional responsibilites of Canadian courts. Without a greater level of judicial commitment to "giving real effect to equality"[252] in this crucial area, the law cannot serve as an effective tool for addressing the widely recognized injustices that are currently embedded in social determinants of health in Canada.

[251] Public Health Agency of Canada, "Statement from Dr. Theresa Tam, Chief Public Health Officer of Canada" (January 18, 2018).

[252] *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 at para. 68 (S.C.C.).