

# BEYOND SELF-CONGRATULATION: THE *CHARTER* AT 25 IN AN INTERNATIONAL PERSPECTIVE<sup>©</sup>

LOUISE ARBOUR\* & FANNIE LAFONTAINE\*\*

On the occasion of the 25th anniversary of the Canadian *Charter of Rights and Freedoms*, the authors situate the Canadian human rights evolution in an international context. They look first at the context of the *Charter's* adoption and the characteristics that make it an agent of positive social change in Canada. Secondly, they discuss three areas where interaction between international legal values and our domestic human rights system can be rendered more effective: a) the use of international law in defining the content and possible limitations of *Charter* rights; b) the increased necessity for a better implementation of international human rights obligations and interaction with international bodies; and c) the appropriateness of Canada's full integration to the Americas' human rights system. They conclude by discussing briefly two key challenges ahead for meaningful rights protection in Canada, namely the full recognition of economic, social, and cultural rights and access to justice.

À l'occasion du 25<sup>e</sup> anniversaire de la *Charte canadienne des droits et libertés*, les auteures mettent en perspective l'évolution des droits canadiens de la personne dans le contexte international. Elles se penchent d'abord sur le contexte de l'adoption de la *Charte* et les caractéristiques qui en font un agent de changement social positif au Canada. Deuxièmement, elles abordent les trois secteurs dans lesquels l'interaction entre les valeurs juridiques internationales et notre système national des droits de la personne peuvent être rendus plus efficaces : a) le recours au droit international dans la définition du contenu et les limites potentielles des droits aux termes de la *Charte*; b) la nécessité accrue d'une meilleure mise en application des obligations relatives aux droits de la personne sur le plan international et de l'interaction avec les organismes internationaux et c) l'à-propos de l'intégration entière du Canada dans le système des droits de la personne en Amérique. Les auteures concluent en abordant brièvement deux enjeux clés à l'avenir pour la protection significative des droits au Canada, notamment la reconnaissance intégrale des droits économiques, sociaux et culturels et l'accès à la justice.

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\* United Nations High Commissioner for Human Rights. This article is a more elaborate version of the keynote address made by Her Excellency Louise Arbour at the 25th Anniversary of the *Charter*: A Tribute to Chief Justice R. Roy McMurtry symposium, organized by the Law Society of Upper Canada and Osgoode Hall Law School, Toronto, 12 April 2007.

\*\* Assistant Professor, Faculty of Law, Laval University; formerly of the Office of the United Nations High Commissioner for Human Rights.

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## I. INTRODUCTION

When celebrating the coming into force of an instrument aimed at protecting fundamental human rights, we are unavoidably torn between the desire to rejoice at the immense progress made because of the instrument and the disturbing awareness of the extent of the efforts required for what has yet to be accomplished. This is exactly as it should be. For anniversaries to be meaningful, one must be able to both take note of the successes of the past and commit to meeting the challenges of the future.

There is little room for progress while indulging in self-righteousness and self-congratulation, an endearing tendency Canadians seem to have when nurturing their national self-image as humanitarian, pro-human rights, and internationalist.

On this important occasion—the 25th Anniversary of the *Canadian Charter of Rights and Freedoms*<sup>1</sup>—this article will situate the Canadian human rights evolution in an international context. There, it should be noted that in 2008 we celebrate the 60th anniversary of the *Universal Declaration of Human Rights*,<sup>2</sup> a fundamental document which marked the international community’s commitment to a new

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (10 December 1948) [*Universal Declaration*].

relationship between the state and the individual. The *Universal Declaration* sparked the steady and accelerating development of the field relating to persons as new subjects of international law.

We will reflect on the influence that the “rights revolution”<sup>3</sup> at the international level continues to have on the *Charter*. In an era of globalization, how has the *Charter* contributed to the integration of universal values in Canada? How has the *Charter* accompanied the changing self-identification process of an internationalized Canada, strongly influenced socially, economically, and politically by its position in the global arena and increasingly identifying itself as a people of peoples, a people whose unity is built on recognizing the distinct identity not only of its founding peoples, but also of its first peoples and of its new members of various origins? We propose to look first at the context of the *Charter’s* adoption and the characteristics that make it an agent of positive social change. Second, we will discuss three areas where interaction between international legal values and our domestic human rights system can be rendered more effective. We will conclude by discussing briefly two key challenges for ensuring meaningful rights protection in Canada.

## II. THE *CHARTER*: A DOMESTIC INSTRUMENT WITH AN INTERNATIONAL PURPOSE AND STATURE

### A. *1982: Impetus for an Entrenched Charter of Rights: The Rise of Rights and the Rise of Law*

The *Charter* is situated in a post-war momentum at the international level that saw a proliferation of national and international rights-protection instruments, starting with the *Universal Declaration*. In powerful and somewhat symbolic language, the *Universal Declaration* expresses its repulsion at the excesses and barbarity of war, genocide, and fascism. Meanwhile, national contexts saw the emergence of new democracies, which functioned with a new understanding of the relationship between the state and the individual,

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<sup>3</sup> See e.g. Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000) [Ignatieff, *Rights Revolution*]; Michael Ignatieff, “Challenges for the Future”, (2001) Can. Bar Rev. 209 [Ignatieff, “Challenges for the Future”].

and which were characterized by the establishment of structures for effective rights protection.<sup>4</sup>

Through legislation such as the *Canadian Bill of Rights*<sup>5</sup> and provincial human rights codes, Canada was part of the post-Second World War move for rights development even before the enactment of the *Charter*; however, the evolution of human rights law had become stagnant. In many areas, notably in the field of equality rights, we were at a standstill. The establishment of the *Charter* marked a significant move from parliamentary to constitutional democracy and a desire to prevent, by empowering disadvantaged and minority groups, a possible rupture of the country's fabric and unity—a threat which, two years after Quebec's first referendum on sovereignty-association in 1980, deeply influenced the political climate in Canada. While the text is distinctive in ways that characterize Canada's particular historical and political features, the drafting of the *Charter* was heavily influenced by international rights-protection instruments. One of its primary purposes was to bring Canada into compliance with international law.<sup>6</sup>

The connection between domestic efforts worldwide to move to new rights-based democracies and similar developments at the supranational level sparked the will and the need to draw on international human rights instruments, as well as to undertake comparative research in other jurisdictions. Canada drew from others' experiences, as others drew from ours. This trend illustrates the progressively more porous boundaries between domestic constitutional law, foreign law, and international human rights law, as well as the globalization of human rights and of jurisprudence. In a world where countries are increasingly linked by commonly agreed standards, the "rights practice and interpretation in one country rapidly spread to another," as Michael Ignatieff has put it.<sup>7</sup> Canada has become an exporter of its homemade human rights system and solutions, and a growing importer of

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<sup>4</sup> See Lorraine E. Weinrib, "Canada's *Charter*: Comparative Influences, International Stature" in Debra M. McAllister & Adam M. Dodek, eds., *The Charter at Twenty: Law and Practice 2002* (Ontario: Ontario Bar Association, 2002) 491 [Weinrib, "Comparative Influences"].

<sup>5</sup> *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

<sup>6</sup> Weinrib, "Comparative Influences," *supra* note 4 at 495. See also Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) [Bayefsky, *International Human Rights Law*] at 33-49.

<sup>7</sup> Ignatieff, "Challenges for the Future," *supra* note 3 at 211.

international and foreign human rights experiences and standards. As Ignatieff rightly points out, “the world is interested in us because we have the world’s problems—how to make a multi-cultural, multi-ethnic, multi-national, multi-lingual state cohere in an age of rights.”<sup>8</sup> For the same reasons, we should therefore be interested in the world.

The adoption of the *Charter* also took place in a period of sharp increase in the use of legislation to effect social changes.<sup>9</sup> Notably coinciding with the development of human rights law at the international level, post-Second World War legislation focused on the needs of groups previously not protected or outrightly disadvantaged by law, and was designed to “promote social change on behalf of the ‘have-nots.’”<sup>10</sup> Many parallel developments in Canada affirmed the positive role of the law in the accomplishment of social change. In the 1970s, the establishment of law reform commissions in Canada showed the importance of the process of reform through the legal system and the possibility of using the law to affect positively the lives of ordinary citizens. Arguably, the pre-*Charter* law-based initiatives aimed at social change—such as the law reform commissions—as well as the development of federal and provincial human rights legislation and specialized agencies and tribunals—including the *Canadian Bill of Rights* and its disappointing performance—contributed significantly to a political climate open to an entrenched rights document and, later, to a judicial climate receptive to generous interpretations of the *Charter* guarantees.<sup>11</sup>

The *Charter* is thus Canada’s response to various trends that developed worldwide after the Second World War. Fundamentally, it is an internationally oriented document that found its own ways to respond to the country’s specificities. Let us now see how (or whether) the *Charter* has been a catalyst for positive social change in the country and which of its features allowed it to play that role.

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<sup>8</sup> *Ibid.* at 212.

<sup>9</sup> See Mary Jane Mossman, “The Charter and Access to Justice in Canada” in David Schneiderman & Kate Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 271 at 274 [Mossman, “Access to Justice”].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 275.

B. *The Charter as a Catalyst for Positive Social Change in Canada: The Rise of Democracy and of Judicial Review*

If the patriation of the *Constitution*<sup>12</sup> represented for some an expression of self-determination by the country, the *Charter* represented a broader agreement as a statement of the fundamental values that the country would endeavour to defend.<sup>13</sup> These include the right to participate in the democratic process, freedom of expression, freedom of religion, liberty, equality, linguistic rights, Aboriginal rights, and more. In the twenty-five years since its adoption, we have seen a growing resolve from citizens and civil society organizations to meet the challenge of building a more just, more democratic, and more humane country, and world, according to the principles of the *Charter*. The *Charter* represented a local translation of internationally recognized minimal common denominators. It permitted rights-holders to assert ownership of these rights and it allowed those tasked to protect or interpret these rights to consider them as our homemade response to discrimination, unfairness, or abuse.

The *Charter* has clearly been a catalyst for positive social change in Canada, in line with similar developments at the international level triggered by the post-war rights revolution. At the same time, some features of the *Charter* mark a distinctively Canadian approach, and have contributed greatly to the social change it has stimulated in the last twenty-five years. Indeed, although the normative content is very much in line with international standards—with some notable exceptions such

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<sup>12</sup> The original *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, was patriated with the adoption of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution*].

<sup>13</sup> See e.g. remarks of the Right Honourable Beverley McLachlin, P.C., “Coming of Age: Canadian Nationhood and the Charter of Rights” (Lecture, delivered at *Canadian Rights and Freedoms: 20 Years Under the Charter*, Ottawa, Ontario, 17 April 2002), online: Supreme Court of Canada <[http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/charter\\_e.asp](http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/charter_e.asp)>. See also varying opinions concerning the purpose of the *Charter*, for example, in Pierre Blache, “La Charte canadienne: obstacle postmoderne à l'émergence d'un Québec moderne et rassembleur?” (1994) 28 R.J.T. 333 at 335: the enactment of the Charter was “une tentative d'unification autour de valeurs communes”; Peter H. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” in R.S. Blair & J.T. McLeod, eds., *The Canadian Political Tradition* (Toronto: Methuen, 1987) 42; Guy Laforest, “La Charte canadienne des droits et libertés au Québec: nationaliste, injuste et illégitime” in François Rocher, ed., *Bilan québécois du fédéralisme canadien* (Montréal: VLB, 1992) 124. On whether the *Charter* tends to unify or pluralize the law within the Canadian federation, see e.g. Ghislain Otis, “La justice constitutionnelle au Canada à l'approche de l'an 2000: uniformisation ou construction plurielle du droit?” (1995) 27 Ottawa L. Rev. 261.

as the absence of property rights—the implementation structure of the *Charter* is truly imaginative, and has contributed greatly to its early and lasting impact.

Strikingly, the *Charter* begins by articulating the framework for the outer limits of the exercise of rights. Section 1 was the result of difficult compromises that led to a political agreement on a constitutionally entrenched rights document. The early jurisprudential development of the section 1 limitations framework proved critical in the evolution of the broader rights jurisprudence. Hesitance and false starts at that stage could have paralyzed the generous expression of substantive rights. Moreover, section 33, also the result of compromise, was a sort of political trump card negotiated in as a safety net. Though it has proven to be a more theoretical than real impediment to rights protection, it has preserved a notional preference for the tyranny of the majority over the potential tyranny of the judiciary.

The three-year moratorium on equality rights also proved far-sighted. It allowed judges to flex their intellectual muscles and express a newfound boldness in the familiar terrain of criminal procedure and fair trial standards, a field in which they had always been somewhat willing to stand up to parliaments for the protection of the vulnerable. Those early but easier decisions enabled them to tackle the more challenging section 15 issues that involved the kind of social engineering that judges were traditionally hesitant to embark upon. On the strength of this work on legal rights and section 1, truly progressive development of human rights law became possible. It is far from certain that we would be where we are today if the first *Charter* challenges had called on courts to expand the enumerated list in section 15 or had impeached formal equality. The notable contributions of the Court Challenges Program, as well as those of the Women's Legal Education and Action Fund (LEAF) and others, led the way for the evolution of the *Charter* as a solid instrument of social progress in Canada.

Apart from these features of the *Charter's* structure and the particularities of its early implementation, we can safely say that the driving force of the development of human rights law in Canada has been judicial review. Many early landmark cases became solid pillars for meaningful judicial development of substantive human rights. In that regard, none was probably more significant, then and now, than the *B.C.*

*Motor Vehicle Reference*,<sup>14</sup> for moving the courts from procedural to substantive rights. But we should not disregard process altogether. In fact, the criminal procedure and evidence litigation, like judicial review on federalism grounds, was a common feature of our pre-*Charter* legal system, and a proxy for a true “rights” debate.<sup>15</sup>

The *Charter* has expanded the field and depth of judicial intervention, thereby opening the door to an appearance of activism or increased politicization. In reality, however, the *Charter* has not fundamentally altered the methods used for judicial review. The constitutional power of the courts, criticized by some as undemocratic, represents in our view a fundamentally democratic choice: that of articulating the constraints under which the majority can impose its will and the limits to its potential override of protected interests. Judicial review is therefore a democratic choice to be governed by the rule of law.<sup>16</sup> That choice effectively provides a megaphone to the voices of those who may not or cannot be heard in the other democratic institutions. Lacking a broad political base and faced with a lack of good faith or will by governments to negotiate on sensitive issues, many groups have chosen the courts as a forum of choice for the advancement of their rights. The land claims of indigenous peoples and the quest for equality for sexual minorities are good examples.

Our understanding of democracy has evolved, again in line with similar developments at the international level since the Second World War.<sup>17</sup> The constitutionalization of rights has accompanied this evolving conception of democracy, and so has the legitimate demand on courts to check, against the fundamental rights on which we founded our

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<sup>14</sup> *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 [*B.C. Motor Vehicle Reference*].

<sup>15</sup> See e.g. *Roncarelli v. Duplessis*, [1959] S.C.R. 121 or pre-*Charter* cases on the rules concerning, for instance, confessions, including *R. v. Wray*, [1971] S.C.R. 272; *R. v. Rothman*, [1981] 1 S.C.R. 640. However, the influence that the *Charter* had on the evolution of the confession rule is undeniable (see *R. v. Hebert*, [1990] 2 S.C.R. 151, in which the Supreme Court reversed the result in *Rothman* on the basis of an accused’s right to remain silent, protected by s. 7 of the *Charter*; see also *R. v. Brown*, [1993] 2 S.C.R. 918). See also pre-*Charter* rules regarding illegally obtained evidence (e.g. in *Wray*; the widely criticized inflexible rule of which was modified by the adoption of s. 24(2) of the *Charter*).

<sup>16</sup> See generally Aharon Barak, *The Judge in a Democracy* (Princeton NJ: Princeton University Press, 2006).

<sup>17</sup> See e.g. Robert J. Sharpe, Katherine E. Swinton & Kent Roach, *The Charter of Rights and Freedoms*, 2d ed. (Toronto: Irwin Law, 2002) at 42.

democracy, the inevitable inclinations of the majority to exclude the unpopular or the uninvited. Of course, the judiciary's influence on the development of the law has not taken place in isolation. The particularities of the *Charter*, notably its limitation and override clauses, call for the active role of the other branches of the government and allow for the aptly named "dialogue" between the judges and the legislatures.<sup>18</sup> The *Charter* has also contributed to the development of a rights consciousness at the administrative level; while some see this as a layer of protection for legislation to comply with *Charter* rights,<sup>19</sup> others claim that it legalizes politics and grants unprecedented powers to lawyers within the governance structure.<sup>20</sup>

This article does not discuss the interaction between the various branches of government for effective rights protection in Canada. Rather, it will contrast the advances made possible by the adjudicative power of our courts with the non-adjudicative international framework. A mere quarter century has assured the irreversible impact of human rights in Canada; similar progress in the non-coercive international setting has taken some sixty years.

The structure established by the *Charter* highlights the essential nature of judicial review as a feature of effective rights protection, a feature that is missing in many countries that work under the same substantive standards, but with less successful implementation. The same is true of the international arena. Indeed, the development of international human rights law is somewhat limited by the absence of binding jurisprudence. The reporting system to the treaty bodies<sup>21</sup> has proved to be a useful mechanism for the improvement of states'

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<sup>18</sup> For the better-known formulation of the democratic dialogue metaphor in Canada, see Peter W. Hogg & Allison Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)" (1997) 35 *Osgoode Hall Law Journal* 75 [Hogg & Bushell, "Dialogue"]. This concept was recently revisited: Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited—or 'Much Ado about Metaphors,'" (2007) 45 *Osgoode Hall L.J.* 1. For an early formulation, see also Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville, QC: Yvon Blais, 1991).

<sup>19</sup> James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Toronto: UBC Press, 2005) [Kelly, *Judicial Activism*].

<sup>20</sup> Andrew Petter, Address (Paper presented to Plenary Session II, "The State of Canadian Democracy" at *The Charter @ 25/La Charte @ 25*, McGill University, 15 February 2007) [unpublished].

<sup>21</sup> Namely, the expert committees that monitor implementation of international human rights treaties.

compliance with international standards. If nothing else, this mechanism stimulates discussion and requires states to justify their human rights performance or lack thereof. Decisions on individual complaints have also proved valuable and have allowed for increased dialogue between states and the international bodies, though the individual complaints mechanism remains underutilized.<sup>22</sup> However, it is clear that the binding nature of decisions by domestic courts, or by regional human rights courts such as the European Court of Human Rights<sup>23</sup> and the Inter-American Court of Human Rights,<sup>24</sup> allows for a more sustained and rigorous development of the law.<sup>25</sup>

That said, the dialogue provoked by the reporting process at the international level is very useful. In addition to a government's own report, the treaty bodies may receive information on that country's human rights situation from other sources, including non-governmental organizations (NGOs), United Nations agencies, other intergovernmental organizations, academic institutions, and the press. Even accounting for generous intervention access, this inclusive process is very different from

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<sup>22</sup> For an interesting comparison between the number of binding judgments on individual complaints by the European Court of Human Rights and the non-binding decisions on merits of all United Nations treaty bodies, which illustrates how under-utilized the United Nations system is, see Manfred Nowak, *Introduction to the International Human Rights Regime* (Leiden, Netherlands: Martinus Nijhoff, 2003) at 100.

<sup>23</sup> The High Contracting Parties to the *European Convention on Human Rights* have committed themselves to "abide by the final judgments of the Court in any case to which they are parties." *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223 [ECHR], art. 46(1). In accordance with article 46(2), the Committee of Ministers of the Council of Europe is responsible for the supervision of the execution of the judgments of the European Court of Human Rights. Compare with the less demanding undertaking by State Parties to the *International Covenant on Civil and Political Rights* [ICCPR] "to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights." ICCPR, 19 December 1966, 999 U.N.T.S. 171, art. 46(1) (entered into force 23 March 1976, accession by Canada 19 May 1976).

<sup>24</sup> Article 68(1) of the *American Convention on Human Rights* (ACHR) states: "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." ACHR, 22 November 1969, OASOR, OAS Doc. No. OEA/Ser.A/16 (English).

<sup>25</sup> Discussions are ongoing concerning reform of the current United Nations treaty bodies system, including some proposals for a World Court of Human Rights with the power to issue binding decisions. On the latter proposal, see Manfred Nowak, "The Need for a World Court of Human Rights" (2007) 7 H.R.L. Rev. 251. On the reform generally, see *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, 5th Inter-Committee mtg. and 18th mtg. of Chairpersons of the Human Rights Treaty Bodies (June 2006), UN Doc. HRI/MC/2006/2 (22 March 2006), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/english/bodies/icm-mc/documents.htm>>; and various articles in a special issue on the Reform of the UN Human Rights Machinery in (2007) 7 H.R.L. Rev.

the judicial model, where the court must decide specific issues relating generally to the situation of only one group or individual, despite the broader impact of the resulting judgement. The international process, with its more consensual and consultative nature, may have contributed to the development of certain rights at the international level that have suffered from a lack of judicial recognition in domestic courts. Economic, social, and cultural rights, for example, are significantly more advanced at the international level than in Canada.<sup>26</sup>

The *Charter* and the considerable impact of judicial review on the development of human rights law may have obscured the relevance and usefulness of parallel processes of consultation and dialogue on human rights issues, like the ones that the Law Reform Commission of Canada (LRCC) had successfully conducted in the past. In this regard, it is noteworthy that much of the LRCC's reform agenda became law, not through Parliament, but through the courts. Though some issues advanced via the *Charter*, many rights-related issues would have arisen in the courts regardless. Developments in the law of evidence were strongly influenced by the LRCC, including common law developments on the inadmissibility of illegally obtained evidence, which was evolving rapidly before section 24(2) of the *Charter* provided a constitutional remedy.

Though the *Charter* has raised rights consciousness, Canada still lacks an entity tasked to evaluate human rights compliance. The federal human rights commission has a limited mandate, and Senate and Parliament standing committees, as well as administrative sensitivity, can only fulfill part of this task. Commissions of inquiry exist somewhere between courts and other oversight mechanisms, and have played a crucial role on many important human rights issues, but they remain ad hoc initiatives. Countries such as Australia, New Zealand, and the United Kingdom—where courts cannot invalidate legislation for violation of human rights—usually, perhaps consequentially, have effective mechanisms to ensure that bills conform to rights guarantees.<sup>27</sup> However, there is no reason not to have strong judicial oversight and strong institutional mechanisms to ensure legislative compliance.

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<sup>26</sup> See Part III A, "International Law and Interpretation of *Charter* Rights".

<sup>27</sup> See generally Kelly, *Judicial Activism*, *supra* note 19 at 5.

Improving those mechanisms would bring Canada to a privileged position for the advancement of human rights.

### III. IMPLEMENTATION OF UNIVERSAL VALUES AND INVOLVEMENT IN REGIONAL AND INTERNATIONAL PROTECTION SYSTEMS

Of course, Canada is not isolated from the phenomenon of globalization, and this cannot but impact on how we take into account and integrate international norms in our response to domestic challenges. More than a decade ago, Justice La Forest put it aptly in stating that human rights principles “are applied consistently, with an international vision and on the basis of international experience. Thus our courts—and many other national courts—are truly becoming international courts in many areas involving the rule of law.”<sup>28</sup> Courts are increasingly opening themselves to the persuasion of international law in shaping Canadian domestic law. Professor William Schabas has noted that the *Charter* forced courts to open up to international law and, in doing so, to set an example for other constitutional courts. In 2000, he predicted: “A quarter century from now, we may speak of this as the dawn of judicial globalization.”<sup>29</sup> It is unquestionable that the judicial globalization process is well in motion, and from a Canadian perspective it was sparked by a quarter century of *Charter* jurisprudence.<sup>30</sup>

This reality is not restricted to Canadian courts, but has impregnated various layers of society. For instance, Parliamentary and Senate Committees discuss international human rights law and apply it to issues before them. Canadian NGOs dedicate significant time and resources to influence international human rights law, as well as domestic law, with the help of the international standards, both in Canada and in multilateral forums. Individuals also frequently use international remedies available to them, the most

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<sup>28</sup> Gérard V. La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 Can. Y.B.I.L. 89 at 100.

<sup>29</sup> William A. Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2000) 79 Can. Bar Rev. 174 at 195 [Schabas, “Twenty-Five Years”].

<sup>30</sup> See also Anne-Marie Slaughter, “Judicial Globalization” (2000) 40 Va. J. Int’l L. 1103; Anne Warner La Forest, “Domestic Application of International Law in *Charter* Cases: Are We There Yet?” (2004) 37 U.B.C.L. Rev. 157 [Warner La Forest, “Are We There Yet?”].

popular being the use of “communications” to the UN Human Rights Committee, but also to the UN Committee Against Torture and, though underutilized, to the Inter-American Commission on Human Rights for breaches of the *American Declaration of the Rights and Duties of Man*.<sup>31</sup>

This dynamism and internationalism is beneficial both for Canada, which receives the by-products of the creativity it engenders, as well as for the community of states, which profits from Canada’s vibrant experience of rights protection in a diverse environment. This demonstrates that true universality can accommodate domestic specificities and the uniqueness of each different system and culture.

This irreversible internationalization process influences and guides the way human rights evolve in Canada. Let us briefly touch upon three different areas where this is particularly the case: a) the use of international law in defining the content and possible limitations of *Charter* rights; b) the increased necessity for a better implementation of international human rights obligations and interaction with international bodies; and c) the appropriateness of Canada’s full integration to the Americas’ human rights system.

A. *International Law and the Interpretation of Charter Rights*

As mentioned above, the *Charter* was an integral part of the worldwide transition to rights-based democracies, and was undeniably influenced by international human rights law. Consequently, it would seem natural for courts to consult international law and foreign law in interpreting the *Charter*’s rights and permissible limitations. Early cases discussing the role of international law in the interpretation of the *Charter* pointed in that direction. For instance, in the *Labour Trilogy*, which considered the constitutional status of union activities, Chief Justice Dickson said, in a famous dictum expressed in a dissenting opinion:

Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international

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<sup>31</sup> *American Declaration of the Rights and Duties of Man*, OAS Doc. OEA/Ser.L./V/II.23, doc.21, rev.6 [*American Declaration*]. Note that access to the Inter-American Court is not yet possible because of Canada’s failure to adhere to the *ACHR*, *supra* note 24. We come back to that issue in Part C, below.

law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the Charter’s provisions.<sup>32</sup>

The entrenchment of the *Charter*, accompanied at the same time by a steady process of globalization, including the globalization of human rights and international law, brought international human rights law directly into the domestic discourse. As remarked by Justice LeBel and Gloria Chao,<sup>33</sup> and documented by many others, references to international law in Supreme Court’s judgements are on the rise, and a growing awareness of the relevance and usefulness of international law is palpable in the entire legal profession. However, the methodological framework for international law, at present, is imperfect at best and improvised at worst.

Though there is a growing body of literature on the subject,<sup>34</sup> and the body of jurisprudence is on the rise, many questions remain unanswered and will need to be addressed in the near future. One such question is the unclear status of customary international law as part of the law of the land,<sup>35</sup> and another concerns the unsettled rules

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<sup>32</sup> *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 348. This reference to the “relevant and persuasive” character of international law for *Charter* interpretation is part of the ongoing academic discussions and debate concerning the parameters and methods for the use of international law before domestic courts, an issue to which we come back briefly below.

<sup>33</sup> The Honourable Mr. Justice Louis LeBel & Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002) 16 Sup. Ct. L. Rev. (2d) 23.

<sup>34</sup> See e.g. Bayefsky, *International Human Rights Law*, supra note 6; Gibran van Ert, *Using International Law in Canadian Courts* (New York: Kluwer Law International, 2002); and William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law—Legal Commitment, Implementation and the Charter*, 3d ed. (Toronto: Thomson Carswell, 2007). [Schabas & Beaulac, *International Human Rights*].

<sup>35</sup> Though arguably customary international law may be applied directly by Canadian courts, there is a lack of clear judicial pronouncement in this regard. See Schabas & Beaulac, *International Human Rights*, *ibid.* at 77. As Stephen J. Toope remarks, “the Canadian Supreme Court has vacillated between an approach seeming to accept the direct application of customary international law and one requiring some form of explicit transformation into domestic law”: Stephen J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada,” 2001 Can. Bar Rev. 534 at 537 [Toope, “Metaphor”]. The recent case of *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R.100 [*Mugesera*] seems to lean towards the latter position (see e.g. at 149, 151, 152-53: “Once again, the express incorporation of customary

governing the use of international law in our domestic system. This would include, for example, differences in interpretive approaches, and, correlatively, the need to differentiate between international norms incorporated by legislation (partly or entirely) and unincorporated treaties, or between an international treaty to which Canada is not a party, such as the *ECHR*,<sup>36</sup> and those that it has ratified.<sup>37</sup> This article does not address these interesting and contentious challenges; rather, it simply notes that despite an expansion of references to international law by courts—which are undoubtedly stimulated by the *Charter*, its international roots, and its overlap with rights delineated by international human rights law—there are numerous issues to clarify and methods to improve. An improved theoretical approach would certainly contribute to an enhanced role for international law in the evolution of human rights in Canada.<sup>38</sup>

Resistance to international standards is often quick to come, and is based on flaws or disadvantages, both real and perceived. Some commentators fear that international norms are too abstract, that they offer a lower degree of protection than the *Charter*, or that they may impede the promise of the *Charter* by diminishing its rights to a lower or

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international law into s. 7(3.76) suggests that we should consider the jurisprudence of the ICTY and the ICTR in formulating an answer.” In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 235, 276, the Court seems to imply, quite cryptically, that it does not have jurisdiction to apply “pure” international law directly.

<sup>36</sup> *ECHR*, *supra* note 23.

<sup>37</sup> On the issues and difficulties related to the use of international law in the Canadian domestic system see, in addition to the articles and books cited elsewhere in this article and among many others: H. Patrick Glenn, “Persuasive Authority” (1987) 32 McGill L.J. 261; Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 N.Y.U.J. Int’l L. & Pol. 501; Stephen J. Toope, “Inside and Out: The Stories of International Law and Domestic Law” (2001) 50 U.N.B.L.J. 11; France Houle, “L’arrêt *Baker*: Le rôle des règles administratives dans la réception du droit international des droits de la personne en droit interne” (2002) 27 Queen’s L.J. 511; Stéphane Beaulac, “Arrêtons de dire que les tribunaux au Canada sont «liés» par le droit international” (2004) 38 R.J.T. 359; and Stéphane Beaulac, “L’interprétation de la Charte: reconsidération de l’approche téléologique et réévaluation du rôle du droit international” (2005) 27 Sup. Ct. L. Rev. (2d) 1 (also in Gérald A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, ON: LexisNexis Canada, 2005) 27).

<sup>38</sup> *Cf.* Schabas & Beaulac, *International Human Rights*, *supra* note 34 at 51-52, 89-90, 436. Schabas & Beaulac argue that a rigid theoretical approach differentiating between binding and non-binding rules would risk marginalizing non-binding norms—including “soft-law”—which are often more advanced and innovative, thereby diminishing the progressive influence of international law.

less sophisticated standard.<sup>39</sup> Certainly, the constitutionally entrenched nature of the *Charter* and the role of judicial review permit it to evolve at a considerable pace on certain issues. *Charter* rights are in constant evolution and are directly enforceable, thereby allowing for relatively quick changes in the lives of people. By contrast, international human rights law is normally slower to evolve, because its interpreting bodies have non-enforceable powers and are often limited by the concern to determine a common (low) denominator, above which a more or less wide margin of appreciation is left to individual states.

We should be careful to double-check any negative assumptions that may lead to suspicion or even rejection of international legal principles. For instance, though international human rights law may be slower to evolve, it has also grown exponentially in the last decades. Significant progress has been made to secure women's and children's rights, to prohibit torture, to prosecute those who violate human rights, and to protect the rights of ethnic minorities, indigenous peoples, and persons with disabilities. International human rights law is also capable of a dynamic interpretation and evolution. Though international standards may be lower than those afforded by the *Charter* in some areas (for example, jurisprudence on the illegality of discrimination based on certain characteristics such as sexual orientation, some due process rights, et cetera), in other areas the international norm can steer domestic rights protection upward by setting a higher standard or by strongly influencing an unsettled domestic norm not to go below a certain threshold which has been agreed to by a world community of diverse cultural and legal perspectives. In the European context, the *ECHR* and the regional standards it embodies have undoubtedly been a powerful force for progressive human rights protection at the national level. Finally, the fear of crystallizing Canadian law to a lower standard should be balanced with Chief Justice Dickson's caution 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."<sup>40</sup>

The period following the Second World War has seen the burgeoning of an impressive body of international law that relates

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<sup>39</sup> See, e.g., the concerns expressed at Warner La Forest, "Are We There Yet," *supra* note 30 at 208-16.

<sup>40</sup> *Reference Re Public Service Employee Relations Act*, *supra* note 32 at 349.

directly to individuals. International human rights law, refugee law, humanitarian law, and international criminal law all reached beyond the traditional scope of international public law that concerned almost exclusively the relations between sovereign states. This evolution has been accompanied by an expansion of the reach of international law to issues that were solely within the domestic affairs of individual states. This in turn has come with an increase in the flow of people around the world (through both travel and migration), as well as with what could be called the internationalization of crime. Criminal law as it concerns more than one state now goes much beyond classical issues of jurisdiction. Today we are increasingly confronted with international networks of terrorists, increasingly sophisticated international drug trafficking, money laundering, human trafficking, and crimes of concern to the international community, such as crimes against humanity and genocide.

All these phenomena render human rights law, as well as other bodies of law that relate directly to individuals, particularly receptive to international influences, and rightly so. In this regard, it is interesting to note the growing willingness of Canadian courts to look at international law in cases concerning refugee and immigration issues, criminal law as it concerns crimes of international concern, and human rights. Influential Supreme Court cases in these areas on issues of significance to international law include *Mugesera*,<sup>41</sup> *Suresh*,<sup>42</sup> *Pushpanathan*,<sup>43</sup> *Baker*,<sup>44</sup> and *Keegstra*.<sup>45</sup>

Still, in a recent decision concerning immigration issues and the rights of detained persons—the rightly celebrated *Charkaoui* decision<sup>46</sup>—the Supreme Court readily referred to foreign experience and law, but seemed more hesitant to discuss, let alone embrace, international human rights law in order to enrich and guide its reasoning. Indeed, it considered closely the practice of other jurisdictions and seemed keen to align itself with other progressive high court decisions, such as the House of Lords judgment on the illegality of indefinite detention of terrorist suspects.<sup>47</sup>

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<sup>41</sup> *Mugesera*, *supra* note 35.

<sup>42</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

<sup>43</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

<sup>44</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>45</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>46</sup> *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

<sup>47</sup> *A. v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 3 All E.R. 169.

However, it may have lost an opportunity to analyze domestic choices through the lens of international norms, which would have been helpful, for instance, on the question of a right of appeal in cases in which a security certificate had been issued against a non-citizen and had been subsequently declared “reasonable” by a federal court judge.<sup>48</sup> Another illustration of this omission can be seen in the Court’s unremarkable statement that, “[w]hether through habeas corpus or statutory mechanisms, foreign nationals, like others, have a right to prompt review to ensure their detention complies with the law.”<sup>49</sup> The Court went on to note that this principle “is also recognized internationally,”<sup>50</sup> quoting in support a variety of sources not binding on Canada—jurisprudence of the U.S. Supreme Court, article 5 of the *ECHR*, and jurisprudence of the European Court for Human Rights. Notably, but not unusually, the Court omitted the one piece of international law that makes that proposition binding for Canada—article 9 of the *ICCPR*.<sup>51</sup> Moreover, while referring on several occasions to the jurisprudence of the European Court, the Supreme Court left wholly unmentioned the jurisprudence of the Human Rights Committee—the monitoring body established under the *ICCPR*—including its jurisprudence on Canada’s security certificate regime.<sup>52</sup> This highlights, if nothing else, the point made above about the absence of clear rules for the application of international law in Canadian courts.

International monitoring bodies have frequently emphasized the need for courts, within the limits of their functions of judicial review, to take account of rights protected by international treaties, particularly where the *Charter* does not explicitly protect those rights. It is especially the case with the rights protected by the *International Covenant on*

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<sup>48</sup> There is clearly a right of appeal from a criminal conviction in international human rights law. Though immigration matters do not fall within the criminal law realm, the possible consequences for a non-citizen of the decisions related to these immigration matters (*i.e.* death, torture, or serious deprivation of liberty) could be just as grave as those that may affect a person convicted of an offence, as the Court indeed acknowledged and some interveners argued. Arguably, the Court could have devoted more thought to the issue, guided in that by the relevant principles of international human rights law.

<sup>49</sup> *Charkaoui*, *supra* note 46 at para. 90.

<sup>50</sup> *Ibid.*

<sup>51</sup> *ICCPR*, *supra* note 23.

<sup>52</sup> *Ahani v. Canada*, UN Human Rights Committee, 87th Sess., UN Doc. CCPR/C/80/D/1051/2002 (2004), online: UN Human Rights Website—Treaty Bodies Database <<http://www.unhcr.ch/tbs/doc.nsf/0/34e53fc64eba40aec1256eb50027226d>> [*Ahani*]; see comment by Gerald Heckman, International Decisions: Case Comment on *Ahani v. Canada* (2005) 99 A.J.I.L. 669.

*Economic, Social and Cultural Rights*,<sup>53</sup> as the relevant Committee<sup>54</sup> recently reminded Canada, in line with its General Comment No. 9 (1998).<sup>55</sup>

The *Charter* was not born out of a sudden and unique Canadian human rights impulse, nor is it evolving in an isolated twenty-first century Canada. International human rights law was created in an attempt to provide an answer to the world's problems, which is anchored in the desire to sustain peace and security and to affirm the dignity and worth of every human being. A half-century later, the same pursuits have not lost their acuity, either internationally or in Canada. Canada has much to gain and nothing to lose in opening up to international tools for solving its domestic troubles. This can be done by using international principles more systematically in the interpretation of the *Charter*. But it also plays out in how Canada succeeds in implementing at home the norms to which it commits abroad.

#### B. *Domestic Implementation of International Human Rights Obligations*

Canada often prides itself on being a party to “all 6 major international human rights conventions.”<sup>56</sup> However, this boast omits one small point: there are now *nine*, not six, major human rights treaties. Canada has not yet ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*,<sup>57</sup>

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<sup>53</sup> GA Res. 2200 A (XXI), UN GAOR, 21st Sess., Annex, UN Doc. A/6316 (1966), online: Official Document System of the United Nations <<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf>> [*ICESCR*].

<sup>54</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Committee on Economic, Social and Cultural Rights, 36th Sess., UN Docs. E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5 (May 2006), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/english/bodies/cescr/cescrs36.htm>> [*Concluding Observations of the CESCR* (2006)].

<sup>55</sup> *General Comment No. 9: The Domestic Application of the Covenant*, UN Committee on Economic, Social and Cultural Rights, 19th Sess., UN Doc. E/C.12/1998/24 (1998), online: UN Human Rights Website—Treaty Bodies Database <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4ceb75c5492497d9802566d500516036](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036)>.

<sup>56</sup> See Department of Foreign Affairs and International Trade, “Canada’s International Human Rights Policy,” online: <[http://www.dfait-maeci.gc.ca/foreign\\_policy/human-rights/hr1-rights-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/human-rights/hr1-rights-en.asp)> [emphasis added].

<sup>57</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UN GAOR, UN Doc. A/RES/45/158 (1990), online: Official

nor, for that matter, has it ratified other important instruments such as the *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>58</sup> Earlier this year, Canada failed to sign the new and important *International Convention for the Protection of All Persons from Enforced Disappearance*.<sup>59</sup> Happily, along with eighty other countries, Canada signed the recently adopted *Convention on the Rights of Persons with Disabilities* when it was opened for signature in New York on 30 March 2007.<sup>60</sup> Ratifying treaties is not only a symbolic gesture of Canada's commitment to human rights. It also sends a powerful message at home that Canada is willing to provide a level of protection for *all* human rights that is at least as strong as the basic standards agreed to by the community of states.<sup>61</sup>

Having said that, ratification can be partly window-dressing, as Sir Robin Cooke, then-President of the New Zealand Court of Appeal once put it,<sup>62</sup> if it is not translated into the domestic implementation of the international norm. In that regard, Canada's constitutional structure presents particular challenges, which are highlighted by courts and commentators, and which, at times, have been invoked disingenuously by Canada to justify indefensible positions regarding certain rights at the

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Document System of the United Nations <<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/565/47/IMG/NR056547.pdf>>.

<sup>58</sup> *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 57/199, UN GAOR, 57th Sess., Annex, Agenda Item 109(a), UN Doc.A/RES/57/199 (2003), online: Official Document System of the United Nations <<http://daccessdds.un.org/doc/UNDOC/GEN/N02/551/48/PDF/N0255148.pdf>>.

<sup>59</sup> *International Convention for the Protection of All Persons from Enforced Disappearance*, GA Res. 61/177, UN GAOR, 61st Sess., 82d plen. mtg., Annex, Agenda Item 62, UN Doc. A/RES/61/177 (2006), online: Official Document System of the United Nations <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/505/05/PDF/N0650505.pdf>> [not yet in force].

<sup>60</sup> *Convention on the Rights of Persons with Disabilities*, GA Res. 61/106, UN GAOR, 76th plen. mtg., Annex, Agenda Item 67(b), UN Doc. A/RES/61/106 (2006), online: Official Document System of the United Nations <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/500/79/PDF/N0650079.pdf>> [not yet in force].

<sup>61</sup> Nicole Laviolette has documented some twenty-nine international instruments related to human rights not yet ratified by Canada. Nicole Laviolette, "The Principal International Human Rights Instruments to Which Canada Has Not Yet Adhered" (2006) 24 Windsor Y.B. Access Just. 267 [Laviolette, "Human Rights Instruments"].

<sup>62</sup> *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.T 257 (C.A) at 266, cited in *Baker*, *supra* note 44 at 861 and in Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 U.B.C.L. Rev. 113 [Weiser, "Undressing the Window"].

international level.<sup>63</sup> However, these characteristics should be no obstacle to the fulfillment of Canada's international obligations. Due consideration should be given to finding creative ways to alleviate any existing hurdles.

Without entering into the complex intricacies of Canada's relationship with international law, it is useful to recall the well-established rule that international treaties and conventions that have been ratified are not part of Canadian law until they have been incorporated into domestic law by implementing legislation. The Canadian model is referred to as a dualist system, in contrast with a monistic system, where international law coexists with domestic law as a single entity.

It is worth mentioning some of the features that impact on the implementation of international human rights norms and which must be addressed with creative solutions. One is the division between treaty ratification and implementation. Whereas ratification is in the jurisdiction of the executive, and does not rest on parliamentary approval or involvement, implementation can only be accomplished through a burdensome process of legislative incorporation. However, human rights treaties are typically adhered to on the basis that existing laws already conform to treaty obligations. Whereas the executive can assert, and so reports to international treaty bodies, that the international norm is already implemented, courts, as Stephen Toope

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<sup>63</sup> Louise Arbour, Address (Lecture, LaFontaine-Baldwin Symposium, 4 March 2005), online: <<http://www.lafontaine-baldwin.com/speeches/2005>>. There she observed:

The low-water mark in Canada's international stance on social and economic rights occurred towards the final stages of the negotiation process on the Draft Declaration [of the Universal Declaration of Human Rights], when Canada ... elected to abstain from a critical vote on the Declaration in the Committee of the U.N. General Assembly charged with human rights issues, one of only a small handful of countries to do so. While ultimately Canada did vote in favour of the Declaration in the full General Assembly, the initial abstention decision embarrassed Canada internationally....

The reasons for the abstention related very directly to misgivings which prevailed then in official circles in Canada at the inclusion of socio-economic rights in the Declaration. In Pearson's statement to the General Assembly on 10 December 1948, however, the true nature of these misgivings were not apparent on the face of his words. Rather, Pearson challenged the vague and "imprecise" nature of the language used in the draft Declaration, *and noted that Canada had abstained on certain articles—notably, the right to education and the right to cultural life—on the basis that these matters were within provincial rather than Federal jurisdiction*. While true that there were provincial administrations that were concerned about Federal interference, the stated justifications for the Canadian abstention simply do not hold up to critical scrutiny. [emphasis added]

puts it, “have to find the mechanism of implementation in the interpretation of legislative texts or of the common law created before the ratification of the supposedly implemented treaty.”<sup>64</sup> This situation has proven complex, and despite the existence of rules and presumptions aimed at regulating the use of international law before Canadian courts, these are, as noted above, not used systematically and do not follow a consistent methodological framework. Moreover, as one commentator has noted, “international provisions do not always resemble their domestic counterparts”<sup>65</sup> and a certain translation exercise, which is not easy, may be required. Another complexity of the Canadian system arises from the division of powers, which denies the federal executive, the sole branch of government empowered to enter into international treaties, the authority to implement them in areas of provincial jurisdiction.<sup>66</sup>

Internationally, such internal constraints do not excuse a country from fulfilling its legal obligations. There should be a way for impediments to the implementation of Canada’s international human rights obligations to be addressed in a transparent way. Mechanisms that exist should be improved, and others should be found to ensure that Canada’s constitutional system does not prevent the implementation of international human rights norms. For instance, the existing consultative federal-provincial-territorial Continuing Committees of Officials for Human Rights could be expanded to more fully address these issues; and other mechanisms of partnership can be developed in order to ensure that coherent and consistent measures are achieved.<sup>67</sup> These processes should allow and promote the participation of civil society. In any event, there

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<sup>64</sup> Toope, “Metaphor,” *supra* note 35 at 538.

<sup>65</sup> Weiser, “Undressing the Window,” *supra* note 62 at 144.

<sup>66</sup> *Canada (A-G) v. Ontario (A-G)*, [1937] A.C. 326 at 347 (P.C.) [*Labour Conventions Case*].

<sup>67</sup> See *e.g.* critiques in the *Report of the Committee on the Elimination of Discrimination Against Women*, UN GAOR, 57th Sess., Supp. No. 18, UN Doc. A/58/38 (2002), online: Official Document System of the United Nations <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/468/20/PDF/N0346820.pdf?OpenElement>> [CERD Report], at 56:

The Committee acknowledges the State party’s complex federal, provincial and territorial political and legal structures. However, it underlines the federal Government’s principal responsibility in implementing the Convention. The Committee is concerned that the federal Government does not seem to have the power to ensure that governments establish legal and other measures in order to fully implement the Convention in a coherent and consistent manner.

See also *Concluding Observations of the CESCR* (2006), *supra* note 54 at 3.

should be increased systematic review of new legislation to ensure consistency with conventional obligations following adherence to a treaty.

Furthermore, from the Canadian perspective it may appear that UN treaty bodies' recommendations are difficult to implement. They sometimes seem to be disconnected from the Canadian reality as, for instance, where the international body recommends a modification of the Constitution, seemingly in ignorance of the complexity of such a process.<sup>68</sup> Canadian authorities may also resent the decisions of treaty bodies when they contradict not only the Canadian position but also the valued decisions of Canadian quasi-judicial or judicial bodies. The quality of Canada's domestic adjudicative process may thus become an excuse for non-compliance with international decisions.<sup>69</sup> These

<sup>68</sup> See *e.g.* the recommendation of the CERD Report, *ibid.*: "The Committee notes that the Canadian Charter of Rights and Freedoms does not impose obligations on non-State actors and suggests that the possibility of enlarging the scope of this instrument in that respect be considered." It is sometimes suggested less explicitly, like in the *Waldman* decision, where the Committee ordered Canada to provide a remedy for a violation of the *ICCPR*, while recognizing the violation had at its source a constitutional requirement: "The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective." *Waldman v. Canada*, Human Rights Committee, 67th Sess., UN Doc. CCPR/C/67/D/694/1996 (1999) at para. 10.4, online: UN Human Rights Website—Treaty Bodies Database <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b3bfc541589cc30f802568690052e5d6](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b3bfc541589cc30f802568690052e5d6)>.

<sup>69</sup> See for instance a Committee Against Torture (CAT) case in which Interim Measures were not respected: *T.P.S. (name withheld) v. Canada*, CAT, 24th Sess., UN Doc. CAT/C/24/D/99/1997 (2000), online: UN Human Rights Website—Treaty Bodies Database <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cfeacf290af5c026c125693d0038b03a](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cfeacf290af5c026c125693d0038b03a)>. CAT found no violation of any article of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. However, the complainant was deported in spite of the interim measures request. CAT expressed at para. 15.6 that it was "deeply concerned" by the fact that the State party did not accede to its request for interim measures; see also another CAT decision, in which Canada rejected the merits finding: *Mostafa Dadar v. Canada*, CAT, 35th Sess., UN Doc. CAT/C/35/D/258/2004 (2005), online: UN Human Rights Website—Treaty Bodies Database <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f9715884cc0d7dceec12570f30059fa8e](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f9715884cc0d7dceec12570f30059fa8e)>. Canada had acceded to the Interim Measures not to expel the complainant. However, it rejected CAT's views on a violation of article 3 in the event of removal, and deported the complainant subsequent to the decision. See also *Ahani v. Canada*, *supra* note 52 at para. 8.2: when Canada refused to comply with a request for interim measures, it attracted severe criticism from the Human Rights Committee:

Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

In 2006, the Human Rights Committee reminded Canada that "Disregard of the Committee's requests for interim measures is inconsistent with the State party's obligations under the Covenant and the Optional Protocol." *Concluding Observations of the Human Rights Committee*, UN Human Rights Committee, 85th Sess., UN Doc. CCPR/C/CAN/CO/5 (2006) at 2, online: UN Human Rights Website—

difficulties should be addressed through the ongoing dialogue between these bodies and Canada that is created by the very process of reporting. This dialogue is not a metaphor, such as that employed by Peter Hogg<sup>70</sup> and others,<sup>71</sup> to reflect the activities of the legislatures and the courts on a given constitutional issue. It is an interactive dialogue with the reporting government.

As credible commentators in Canada have pointed out,<sup>72</sup> there remain many challenges to ensuring that Canada implements its treaty obligations in the field of human rights. As was recently observed by the UN Human Rights Committee, there is still in Canada a lack of transparent, accountable, and inclusive procedures by which oversight of the implementation of international human rights obligations is ensured, with a view, in particular, to reporting publicly on any deficiencies.<sup>73</sup>

Canada needs to find creative ways to be respectful of both its constitutional specificity and its international obligations. Without meaningful implementation of international norms at home, Canada impairs its credibility as an advocate of the expansion of international human rights standards abroad. This holds true also for its involvement within the regional human rights system.

### C. *Full Integration to the Human Rights System of the Americas*

As the Canadian government rightly recognizes:

[I]nternational mechanisms provide an independent perspective on the state of human rights in Canada, and allow the Canadian government to review laws or policies which

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Treaty Bodies Database <[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/\\$FILE/G0641362.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf)> [*Concluding Observations of the HRC*].

<sup>70</sup> Hogg & Bushell, "Dialogue," *supra* note 18.

<sup>71</sup> The dialogue metaphor was adopted by other commentators: see *e.g.* Kent Roach, *Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [Roach, *Supreme Court on Trial*]; and by the Supreme Court: see for example *Vriend v. Alberta*, [1998] 1 S.C.R. 493. On the application of the dialogue at the international level, see Toope, "Metaphor," *supra* note 35 at 540.

<sup>72</sup> See *e.g.* Canada, Standing Senate Committee on Human Rights, *Promises to Keep: Implementing Canada's Human Rights Obligations* (December 2001), online: Parliament of Canada <<http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep02dec01-e.htm>>.

<sup>73</sup> *Concluding Observations of the HRC*, *supra* note 69 at 2. This has been echoed *inter alia* by the Committee on Economic, Social and Cultural Rights. See *Concluding Observations of the CESCR* (2006), *supra* note 54 at 3.

may be in conflict with international obligations.

This willingness to accept independent, constructive criticism is critical to Canada's credibility, both domestically and internationally. Canada holds itself to the same standard it expects from other countries.<sup>74</sup>

Indeed, Canada's international human rights reputation derives in part from its support of the international human rights protection system. However, Canada's failure to accede to the key human rights instrument of this region, the *ACHR*,<sup>75</sup> is a conspicuous omission, and hardly a consistent and credible one.

It is sometimes suggested that Canada does not need to ratify the *ACHR*. One oft-cited reason is that human rights would not be better protected because the *Charter* affords a higher level of protection.<sup>76</sup> This is not a persuasive argument. First, this statement fails to recognize that Canada is already part of the inter-American human rights system through its membership of the Organization of American States (OAS) and the presence of the American Declaration.<sup>77</sup> This system gives jurisdiction to the Inter-American Commission of Human Rights and is even broader in scope than the *ACHR*, because it contains rights of an economic, social, and cultural nature, including rights to social security, work, and cultural life. Second, let us be clear: human rights norms, standards, and complaints mechanisms are in place for persons, not for the state. It is a scarcely defensible position to argue that persons have so many rights that it is useless to add new entitlements or improve their protection.

The ratification of international human rights treaties and the recognition of the competence of their monitoring bodies brings another level of protection, particularly in a country like Canada, where the incorporation practice of international human rights treaties limits claimants' possibilities to invoke the rights protected therein directly before Canadian courts. As the ratification of the *ECHR* has demonstrated, the universal adoption of common norms is essential to the credibility and efficiency of any legal system, and necessary for the

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<sup>74</sup> Canada, Department of Foreign Affairs and International Trade, "Canada's Commitment to Human Rights," online: <[http://www.international.gc.ca/foreign\\_policy/human-rights/hr3-commit-en.asp](http://www.international.gc.ca/foreign_policy/human-rights/hr3-commit-en.asp)>.

<sup>75</sup> *Supra* note 24.

<sup>76</sup> See interesting historical background in Schabas & Beaulac, *International Human Rights*, *supra* note 34 at 198-210.

<sup>77</sup> *Supra* note 31.

development of a regional human rights culture. Canada's full participation in the inter-American human rights system is central to the strength of that system.<sup>78</sup> As civil-society organizations have pointed out:

Over the past ten years, hemispheric economic integration has turned into a key issue of inter-American affairs. A Free Trade Zone of the Americas (FTAA) has been a central component of the Summit Process launched in 1994, while bilateral and sub-regional arrangements have progressed significantly. This multi-level process will continue to shape hemispheric dynamics. Parallel to this process, hemispheric cooperation in the security sector has intensified, as illustrated by the recent adoption of the Inter-American Convention to Prevent, Punish and Combat Terrorism (2001) [*ratified by Canada*] and the Declaration on Hemispheric Security (2003).

Canada remains a key hemispheric player in advancing both the economic and security agendas. However, Canadian contributions to the emerging Community of the Americas have not been accompanied by a consistent effort to clarify and strengthen Canada's commitment to the inter-American human rights system. The important subject of the Canadian ratification of inter-American human rights instruments has not been openly debated and confusion reigns about the respective concerns of provincial and federal governments.<sup>79</sup>

Particularly on the upcoming occasion of the 50th anniversary of the entry into force of the *ACHR*, which will be celebrated in July 2008, it is timely and important that Canada give serious consideration to ratifying this important treaty, its two additional protocols (on the abolition of the death penalty and on economic, social, and cultural rights), as well as to the other inter-American instruments for human rights protection (on violence against women, on torture, and on forced disappearances), as it undertook in November 2005.<sup>80</sup> Solutions can and

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<sup>78</sup> See e.g. Canada, Standing Senate Committee on Human Rights, *Canadian Adherence to the American Convention on Human Rights: It is Time to Proceed* (May 2005), online: Parliament of Canada <<http://www.parl.gc.ca/38/1/parlbus/commbus/senate/Com-e/huma-e/rep-e/rep18may05-e.htm>>; Canada, Department of Foreign Affairs and International Trade, "Government Response to the Eighteenth Report of the Standing Senate Committee on Human Rights" (November 2005), online: Department of Foreign Affairs and International Trade <[http://geo.international.gc.ca/latin-america/latinamerica/whats\\_new/default-en.asp?id=3957&content\\_type=2](http://geo.international.gc.ca/latin-america/latinamerica/whats_new/default-en.asp?id=3957&content_type=2)> ["Government Response"]; and Canada, Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights* (May 2003), online: Parliament of Canada <<http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.htm>>.

<sup>79</sup> Letter of Amnesty International Canada, Rights & Democracy & l'Association Québécoise des organismes de coopération internationale (12 January 2004), online: Amnesty International Canada <<http://www.amnesty.ca/canada/news/view.php?load=arcview&article=1188&c=Canada-News>>. See also joint letter by Rights & Democracy & Amnesty International to The Honourable Bill Graham, Minister of Foreign Affairs of Canada (27 May 2004), online: Rights & Democracy <[http://www.ichrdd.ca/site/who\\_we\\_are/index.php?lang=en&subsection=president&subsubsection=letters\\_and\\_speeches&id=649](http://www.ichrdd.ca/site/who_we_are/index.php?lang=en&subsection=president&subsubsection=letters_and_speeches&id=649)> [our addition in emphasis].

<sup>80</sup> "Government Response," *supra* note 78.

should be found to existing difficulties, such as those related to women's reproductive rights;<sup>81</sup> the difficulties should not be used as a pretext for inaction. Reasons for a potential decision not to ratify any of these instruments should be laid out clearly and publicly. Not only would Canadians benefit if Canada fully integrated into the inter-American human rights system, people from across the Americas would undoubtedly gain from this country's active engagement with the regional human rights system.

#### IV. LIVING UP TO THE PROMISE OF THE "LIVING TREE" METAPHOR: SOME CRITICAL CHALLENGES AHEAD FOR RIGHTS PROTECTION IN CANADA

Legal historians tend to concentrate on change and innovation. They wish to explain why an innovation occurred when it did. But to understand law and society one must also explain why a legal change did not occur when society changed, or when perceptions about the quality of the law changed.<sup>82</sup>

Alan Watson's comments highlight the complexity of the relationship between law and social change. While we are quick to explain how the *Charter* has made our society evolve (we think readily of progressive changes with respect to the rights of same-sex partners, or of linguistic minorities, or in checking the abuse of police powers, for instance), we are hesitant to identify how and why the *Charter* has failed to prompt social change where it arguably should have. We can celebrate the social achievements of the *Charter* and still acknowledge that it has not yet brought Canada where it committed itself to be, in critical areas such as the protection of economic and social rights and

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<sup>81</sup> It is widely acknowledged that the wording of article 4.1 of the *ACHR* (*supra* note 4) on the Right to Life is problematic. This article of the *ACHR* explicitly guarantees the right to life "in general, from the moment of conception." It is a shared view that article 4.1 stands as a serious obstacle to ratification of the *ACHR* since it can be interpreted in a manner that seriously interferes with a woman's right to life, liberty, and security of the person as understood in Canadian law. Ratification would thus have to be made while ensuring that women's rights to reproductive and sexual autonomy are preserved, implying an objective evaluation of the respective merits of reservations, interpretive declarations, conditional interpretive declarations, or other means aimed at the same rights protection objective. See William Schabas, "Canadian Ratification of the Americas Convention on Human Rights" (1998) 16:3 *Nethl. Q.H.R.* 315 at 324-28; Lavolette, "Human Rights Instruments," *supra* note 61 at 297.

<sup>82</sup> Alan Watson, "Legal Change: Sources of Law and Legal Culture," in Alan Watson, ed., *Legal Origins and Legal Change* (London: Hambledon Press 1991) 69 at 70-71, cited in Mossman, "Access to Justice," *supra* note 9 at 288.

access to justice for all. The protection of other human rights is far from fully secured, and these are but two of the numerous challenges ahead. We should not be complacent about the rights of vulnerable groups or decrease our efforts to ensure their effective protection and promotion, particularly as concerning the rights of women, of Aboriginal peoples, and of visible minorities. Any step backwards in the protection of these rights, and others, would be a blow to the credibility of the *Charter*.

Let us further note that the *Charter* cannot be the sole legal tool for social change. Legislative action in many fields is essential to attain various societal goals and achieve social justice. However, it is our view that the *Charter* is equipped to protect broader interests and values than the purely “negative” rights designed to protect individuals from state interference. The current individual-rights focus given to the *Charter* has limited communal or collective gains. The *Charter* is, and must be able, to offer effective tools for redressing social injustice.

A. *Poverty, and Economic, Social, and Cultural Rights Generally*

As was emphasised with particular vigour on International Human Rights Day in December 2006,<sup>83</sup> dedicated to the fight against poverty, poverty is frequently both a cause and a consequence of human rights violations. All human rights—freedom of speech and the right to vote, but also to food, work, housing, and health—are jeopardized for the poor, because destitution and exclusion are intertwined with discrimination and unequal access to resources and opportunities. However, poverty is often perceived as a regrettable but accidental condition, or as an inevitable consequence of decisions and events occurring elsewhere, or even as the sole responsibility of those who suffer it. Various factors compound these misconceptions, including the fact that governments often see claims by the poor as stemming more from necessity alone than from enforceable legal entitlements. In addition, there is an overemphasis on civil and political rights, notably in western countries, to the detriment of economic, cultural, and social rights, which the west perceives as

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<sup>83</sup> Louise Arbour, “Human Rights Day and Poverty,” Office of the United Nations High Commissioner for Human Rights (10 December 2006), online: <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/D5F8E93DBA09C8D2C125726C007503F3>>.

“second tier” rights. These “second tier” entitlements are seen as mere privileges, which can be claimed only after fundamental freedoms and civil and political rights have been established and secured, and when countries are strong enough, economically, to address these issues. We agree with Professor Lucie Lamarche that the effects of globalization on vulnerable groups in industrialized economies can be countered by reclaiming international economic rights as human rights in local struggles linked to the deleterious effects of globalization.<sup>84</sup>

In Canada, social and economic rights have failed to be appropriately recognized as rights, and continue, in our view, to be inadequately protected. This accounts for poverty and inequities that are incompatible with the level of social justice that is within our reach. We do not intend here to argue the entire case for economic and social rights to be fully protected as rights in Canada. The High Commissioner has discussed this failure,<sup>85</sup> and frequently stated, at the international level, that human rights are indivisible, and that the western countries’ historical hesitation to provide equal protection to economic and social rights is unjustified.<sup>86</sup> International monitoring bodies have often criticized Canada on its economic and social rights record,<sup>87</sup> and have noted, among other things, that, sadly, “poverty rates remain very high among disadvantaged and marginalized individuals and groups such as Aboriginal peoples, African Canadians, immigrants, persons with disabilities, youth, low-income women and single mothers.”<sup>88</sup>

As Ignatieff correctly points out, it is a major limitation of the rights discourse in Canada—as in other western countries—that it has focused on justice for ethnic, linguistic, and cultural minorities, and for women and persons with disabilities, without sufficient concern for the

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<sup>84</sup> Lucie Lamarche, *Perspectives occidentales du droit international des droits économiques de la personne* (Brussels: Bruylant, 1995). See also book review of the same by Colleen Sheppard, (1996) 41 McGill L.J. 907.

<sup>85</sup> *Supra* note 63.

<sup>86</sup> See e.g. Louise Arbour, “Economic and Social Justice for Societies in Transition,” 40 N.Y.U. J. Int’l. L. & Pol. (forthcoming November 2007).

<sup>87</sup> The *CESCR* has been quite critical, including in its last report of May 2006, noting that “most of its 1993 and 1998 recommendations in relation to the second and third periodic reports have not been implemented” and that Canada has not addressed in an effective manner seven principal subjects of concern. See *Concluding Observations of the CESCR* (2006), *supra* note 54 at 2.

<sup>88</sup> *Ibid.* at 3.

economic and social inequality resulting from capitalism. Indeed, Ignatieff suggests that the prevailing rights discourse diverts political attention from these inequalities.<sup>89</sup>

While the current rights discourse in Canada does not adequately recognize social, economic, and cultural rights, a lack of capacity is not the problem. Rather, this reflects a choice, one that should be reversed. In fact, if courts and parliaments have been hesitant to recognize economic and social rights, it is not for a lack of discussion on these issues or a shortage of such claims being brought forward.<sup>90</sup> The “rights talk” in Canada is slowly but steadily putting economic and social rights at the forefront and advocating to have them recognized both by parliaments and by courts.

Economic and social rights are arguably better protected elsewhere than in the *Charter*—for instance in provincial human rights legislation. The Quebec *Charter of Rights and Freedoms*<sup>91</sup> guarantees a whole range of economic, social, and cultural rights and prohibits discrimination based on social condition; the New Brunswick *Human Rights Act*<sup>92</sup> also prohibits discrimination based on social condition.<sup>93</sup> However, in addition to the Supreme Court’s narrow view of the *Charter* protections of equality, life, and security, *Gosselin v. Quebec*<sup>94</sup> showed the limitations of internationally-protected rights that are not given the constitutional (or quasi-constitutional) status that allows courts to strike down laws that conflict with them. Chief Justice

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<sup>89</sup> Ignatieff, “Rights Revolution,” *supra* note 3.

<sup>90</sup> For excellent comments on this issue, see *e.g.* Martha Jackman, “What’s Wrong With Social and Economic Rights?” (1999-2000) 11 N.J.C.L. 235; Martha Jackman, “From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through *Charter* of Rights Review” (1999) 14 J.L. & Soc. Pol’y 69; Gaile McGregor, “The International Covenant on Social, Economic, and Cultural Rights: Will It Get Its Day in Court?” (2002) 28 Man. L.J. 321; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 U.B.C. L. Rev. 539; and Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectations” (2005) 23 Windsor Y.B. Access Just. 145.

<sup>91</sup> R.S.Q. 1977, c. C-12 [*Quebec Charter*].

<sup>92</sup> R.S.N.B. 1973, c. H-11.

<sup>93</sup> Some provinces (Alberta, Manitoba, and Nova Scotia) include “source of income” as a prohibited ground of discrimination, while others (Ontario and Saskatchewan) prohibit discrimination based on “receipt of public assistance.” Newfoundland includes the narrower description of “social origin” as a prohibited ground. See generally Lynn A. Iding, “In a Poor State: The Long Road to Human Rights Protection on the Basis of Social Condition” (2003) 41 Alta. L. Rev. 513.

<sup>94</sup> *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 429.

McLachlin, speaking for the majority, had this to say on the inherent value of these rights in the *Quebec Charter*:

These may be symbolic, in that they cannot ground the invalidation of other laws or an action in damages. But there *is* a remedy for breaches of the social and economic rights set out in Chapter IV of the *Quebec Charter*: where these rights are violated, a court of competent jurisdiction can declare that this is so.<sup>95</sup>

Justice Bastarache (dissenting), with whom Justice Arbour (as she then was) agreed on this issue, said:

[E]ven though the section does not provide for financial redress from the government in this case, the section is not without value. Indeed it is not uncommon for governments to outline non-judiciable rights in human rights Charters. Courts are not the only institutions mandated to enforce constitutional documents. Legislatures also have a duty to uphold them. If, in this case, the court cannot force the government to change the law by virtue of s. 45, the *Quebec Charter* still has moral and political force.<sup>96</sup>

In separate dissenting reasons, Justice Arbour added:

The right that is provided for in s. 45, while not enforceable here, stands nevertheless as a strong political and moral benchmark in Quebec society and a reminder of the most fundamental requirements of that province's social compact. In that sense, its symbolic and political force cannot be underestimated.<sup>97</sup>

While all of this is indeed correct legally, it highlights that the “symbolic,” “moral,” and “political” force of rights that are not truly enforceable does not give, in many instances, concrete remedies to the aggrieved right-holder. This shows the potential of judicial review as a driving force for the evolution of law in a democratic rights-based society. The Commission des droits de la personne et des droits de la jeunesse du Québec<sup>98</sup> and others have strongly argued, notably on the occasion of the 25th anniversary of the *Quebec Charter*, for a revision that would raise economic and social rights to the same level of protection as that afforded to other rights. This initiative should be supported.

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<sup>95</sup> *Ibid.* at 497 [emphasis in original].

<sup>96</sup> *Ibid.* at 594-95.

<sup>97</sup> *Ibid.* at 643.

<sup>98</sup> Quebec, Commission des droits de la personne des droits de la jeunesse, *Après 25 ans: la Charte québécoise des droits et libertés: Bilan et recommandations*, vol. 1, (Montreal: Commission des droits de la personne des droits de la jeunesse, 2003), online: <[http://142.213.87.17/fr/droits-personne/bilan\\_charte.asp?noeud1=1&noeud2=16&cle=0](http://142.213.87.17/fr/droits-personne/bilan_charte.asp?noeud1=1&noeud2=16&cle=0)>.

For several years now, many have argued that “social condition” should be added to the prohibited grounds of discrimination in the federal *Canadian Human Rights Act*.<sup>99</sup> Such a change was recommended, *inter alia*, by the *Canadian Human Rights Act Review Panel* in its June 2000 report,<sup>100</sup> as well as by the CESCR, notably in its December 1998 concluding observations on Canada’s Third Report under the *ICESCR*.<sup>101</sup> Poverty has long been recognized as a contributing factor in the discrimination suffered by disadvantaged social groups. Regardless of such an addition in the federal legislation, it is striking that the courts have been somewhat daring in recognizing non-enumerated “analogous” grounds under section 15 of the *Charter* on certain issues, such as sexual orientation, but timid and even cold-footed on others, such as poverty or social condition. In our view, this reflects an unjustified belief that social and economic rights are values dependent on the market or on governmental policy, not legal rights worthy of constitutional protection.

Whichever avenue Canada takes to ensure full protection of economic and social rights, whether through a constitutional amendment, a more progressive interpretation of the current *Charter* text, a modification of other (federal and provincial) human rights instruments, or otherwise, this is the next step which must be taken if Canada wants to ensure that the most disadvantaged members of society will truly benefit from the immense promise of the *Charter*. As one author put it five years ago, on the 20th anniversary of the *Charter*—and we believe it more acutely now—social and economic rights are the “next frontier” of *Charter* rights protection.<sup>102</sup>

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<sup>99</sup> R.S., 1985, c. H-6.

<sup>100</sup> Canada, Department of Justice, *The Canadian Human Rights Act Review* (Ottawa: *Canadian Human Rights Act Review Panel*, 2000), online: <[http://www.justice.gc.ca/chra/en/chreview\\_report\\_2000.pdf](http://www.justice.gc.ca/chra/en/chreview_report_2000.pdf)>.

<sup>101</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Committee on Economic, Social and Cultural Rights, 19th Sess., UN Doc. E/C.12/1/Add.31 (December 1998) at para. 51, online: UN Human Rights Website—Treaty Bodies Database <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.31.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.31.En)>. In its Concluding Observations of May 2006, the *CESCR* recommended “that federal, provincial and territorial legislation be brought in line with the State party’s obligations under the Covenant, and that such legislation should protect poor people in all jurisdictions from discrimination because of their social or economic status.” *Concluding Observations of the CESCR* (2006), *supra* note 54 at 7.

<sup>102</sup> Debra Parkes, “Social and Economic Rights: The Next Frontier” (Lecture, given at the 2002 Isaac Pitblado Lectures, *The Charter: Twenty Years and Beyond*, The Fort Garry, Winnipeg

It is high time to guarantee claimants access to the courts to articulate the full scope of these rights and secure their enforcement, in the same way that the contours of the civil and political rights took shape in the early years of the *Charter*. Rights are not just about protection against abusive or unjustified interference by the state. The role of the state has evolved and it has become central for human dignity and security to be fulfilled through a system of public policy and legislation aimed at protecting the individual and his or her family from want and need. This is indeed what is suggested by the *Universal Declaration*: a state both respectful of individual freedoms and responsible through positive action for the preservation of human dignity and legitimate expectations of social justice. The duality of roles for the state that is mandated by international human rights law needs to be integrated into our understanding of the *Charter*.

Many modern constitutions have strived to attain that balance. The South African Constitution is one of the most progressive and modern constitutions in the world, with one of the most comprehensive bills of rights. It contains rights of access to housing, health care, social assistance, and education.<sup>103</sup> Some of these social and economic rights are qualified in that they require the state to take reasonable steps, according to its available resources, to realize the rights progressively. Even so, the Constitutional Court has handed down some groundbreaking decisions in which, for instance, it declared the government's housing policy invalid,<sup>104</sup> and found that the state was not fulfilling its constitutional duty to provide access to health care because it had failed to take adequate steps to prevent the mother to child transmission of HIV.<sup>105</sup> Other high courts in many other countries, including India and Argentina, have taken progressive stances on economic and social rights.

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MB, November 2002) (Winnipeg, MB: The Law Society of Manitoba, The Manitoba Bar Association, and University of Manitoba Faculty of Law, 2002) II-1.

<sup>103</sup> See generally John Cantius Mubangizi, "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" (2006) 2 Afr. J. Legal Stud. 1.

<sup>104</sup> *Government of the Republic of South Africa v. Grootboom*, (2000), 11 B. Const. L.R. 1169 (S. Afr. S.C.).

<sup>105</sup> *Minister of Health and Others v. Treatment Action Campaign and Others*, (2002), 5 S.A. 703 (S. Afr. S.C.).

Meanwhile, it is incongruous for Canada to afford constitutional protection to some rights and allow others to be claimed only as reasonable limits to the exercise of other rights. Section 1 is indeed often said to set out collective values, including social justice, against which individual rights are to be balanced. Courts in Canada have looked at international human rights instruments for indications as to the criteria that may be invoked in section 1 analyses,<sup>106</sup> including the rights contained in the *ICESCR*.<sup>107</sup> Nevertheless, to selectively recognize and ensure the protection of some rights while not affording the same protection to others is at odds with the principles of international human rights law that embrace all human rights, be they civil, social, economic, cultural, or political in nature. There is no valid reason to claim that economic and social rights can be adequately addressed by deference to government's policy concerning social justice at the justification stage, rather than to recognize these rights as justiciable.

At the international level, there is encouraging movement towards the adoption of a protocol to permit individual petitions alleging violations of the *ICESCR*,<sup>108</sup> which could have great, and positive, domestic impact in Canada. If and when ratified by Canada, this new instrument would provide Canadians with a forum of choice to claim their internationally-protected economic, social, and cultural rights, a particularly valuable remedy considering the unavailability of any such domestic legal avenues.

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<sup>106</sup> See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57: "...Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights." See also Schabas & Beaulac, *International Human Rights*, supra note 34 at 266.

<sup>107</sup> See e.g. *International Fund for Animal Welfare Inc. v. Canada*, [1989] 1 F.C. 335. In that case, the International Fund for Animal Welfare, in its campaign to obtain a ban on Atlantic seal hunt, attempted to create public pressure by arranging for the news media to attend the hunt and report on it to the general public, contrary to Seal Protection Regulations prohibiting operation of aircraft over seals at low altitude. The Federal Court of Appeal concluded that the right of fishermen to earn a living, contained in the *ICESCR*, presented a sufficiently important legislative objective, though the legislation failed to meet the other requirements of the s. 1 analysis (at 352).

<sup>108</sup> See generally "Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/english/issues/escr/intro.htm>>.

B. *Access to Justice*

As was noted above, perhaps the most enduring impact of the *Charter* on our society and legal system is how it has been at the vanguard of social change in the country, aided in that by the vigorous judicial review it has prompted.

Individuals and groups have turned to the courts to remedy violations of their rights or to articulate those rights. This could not have happened unless those who had succeeded had *access* to the courts. Though the “rights revolution” would not have happened without rights-holders’ access to justice, there is no constitutionally protected general right to access to justice. The Supreme Court recently held that there is no general right to be represented by a lawyer in court or tribunal proceedings where a person’s legal rights and obligations are at stake.<sup>109</sup>

The *Charter* may not have always translated to concrete and substantive improvements in the lives of the most disadvantaged. Yet, the *Charter* has created a culture of expectations, perhaps even of entitlements. Individuals and groups turn to the *Charter*, and thus to the courts, to challenge discriminatory practices and other violations of their rights. In that context, the Canadian Bar Association’s position that “access to justice is the biggest challenge facing our justice system at this time” is particularly acute.<sup>110</sup> Chief Justice McLachlin has also

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<sup>109</sup> *British Columbia (A.G.) v. Christie*, 2007 SCC 21 at para. 23 [*Christie*]:

The issue, however, is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent’s contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law. [emphasis in original]

The Court referred to *British Columbia Government Employees Union (B.C.G.E.U.) v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, where the Court had affirmed a constitutional right to access the courts, which was breached by pickets impeding access. However, in *Christie* the Court concluded at para. 17:

The right affirmed in *B.C.G.E.U.* is not absolute. The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional.

<sup>110</sup> Letter from J. Parker MacCarthy, on behalf of the Canadian Bar Association to the Honourable Vic Toews, P.C., M.P., the Minister of Justice and Attorney General of Canada (18 October 2006), online: Canadian Bar Association <<http://www.cba.org/CBA/submissions/pdf/06-45-eng.pdf>>.

highlighted on numerous occasions the importance of access to justice for all Canadians. To protect the integrity of our legal system, and of the constitution that supports it, it is essential that everyone in Canada have access to the courts.

Cuts in financial support to legal aid services across the country prevent, in many cases, the exercise of rights protected by the *Charter*, and lead to situations where poor people, in particular poor single women, who are denied benefits and services to which they are entitled under law, cannot access the available remedies.<sup>111</sup> Furthermore, the cancellation of the Court Challenges Program,<sup>112</sup> a program that had proved a significant ally to equality in the country and been hailed as uniquely Canadian, was a hard blow for access to justice. Many had identified the program as central to the rights revolution that occurred in the country.

Critics of the program and of the power of judicial review more generally are quick to condemn the “interest group litigation”<sup>113</sup> that the *Charter* might have prompted. There is some truth to the myth that rights-advancing litigation has evolved with the *Charter*.<sup>114</sup> However, we must remember that the very people some discount as merely self-indulgent “interest groups” are called “human rights defenders” at the international level, and benefit from international protection.<sup>115</sup> We should be very careful about dismissing those who strive to advance human rights causes through legally available means.

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<sup>111</sup> *Concluding Observations of the CESCR* (2006), *supra* note 54 at 3.

<sup>112</sup> In the 2006 Budget, the government committed to “restrain the rate of spending growth.” The government said it would “introduce a new approach to managing overall spending to ensure that government programs focus on results and value for money, and are consistent with government priorities and responsibilities. The President of the Treasury Board will identify savings of \$1 billion in 2006–07 and 2007–08.” See the 2006 budget: Canada, Department of Finance, Highlights, *Budget 2006: Focussing On Priorities* (2 May 2006), online: Department of Finance <<http://www.fin.gc.ca/budget06/bp/bpc3ae.htm#accountability>>. In response, the Treasury Board identified among others “[p]rograms that weren't providing good value for money for Canadians,” *i.e.* “Funding for third parties to further their interests or programs that are not effective, do not achieve results or are being re-focused or targeted for improved effectiveness has been cancelled.” The Court Challenges Program is one of the programs cancelled for this stated reason. Canada, Treasury Board of Canada Secretariat, “Backgrounder: Effective Spending” (25 September 2006), online: Treasury Board <[http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925\\_e.asp](http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925_e.asp)>.

<sup>113</sup> See *e.g.* F.L. Morton & Rainer Knopff, *The Charter Revolution & the Court Party* (Peterborough: Broadview Press, 2000).

<sup>114</sup> See *e.g.* Roach, *Supreme Court on Trial*, *supra* note 71. For an interesting overview of the debate on the legitimacy of judicial review, including an analysis of the jurisprudence of the

With the winding up of the Court Challenges Program, the serious obstacles facing legal aid programs, and the high bar imposed on litigants for obtaining interim costs in *Charter* litigation,<sup>116</sup> it may be a good time for the legal profession to unite on the issue of access to justice. Given the economic deterrent inherent in the current litigation system and the lack of access to funding, it is essential to find ways to ensure that the *Charter* is still seen as, and made to be, accessible to all.

It is through the ingenuity of litigants that the protection of human rights in Canada has progressed this far. There is no reason to disempower them in the face of the challenges that lie ahead, be it on environmental issues, minority protection, the reach of equality, or the ever-present security concerns.

## V. CONCLUSION

Central to the position of the *Charter* in Canadian federalism is the idea, perhaps counterintuitive, that the greatest protection for individual rights and freedoms comes in large, pluralistic environments. Conversely, the greater danger comes from small, homogeneous communities that lack the imagination and the means to deal effectively with the competing individual claims from within, specially the claims that question the apparent homogeneity.

This also speaks loudly in favour of strong regional and international human rights protection systems, as they serve to push back narrow national horizons to put in full view the claims and aspirations of the whole of the human race.

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Supreme Court, see Stéphane Bernatchez, “Les traces du débat sur la légitimité de la justice constitutionnelle dans la jurisprudence de la Cour suprême du Canada” (2005-2006), 36 R.D.U.S. 165.

<sup>115</sup> *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res. 53/144, UN GAOR, 85th plen. mtg., UN Doc. A/RES/53/144 (1998), online: UN Human Rights Website—Treaty Bodies Database <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.53.144.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.53.144.En)>. In April 2000, the Commission on Human Rights requested the Secretary-General to appoint a special representative on human rights defenders. CHR Res. 2000/61, Office of the High Commissioner for Human Rights, 56th Sess., 65th mtg., UN Doc. E/CN.4/RES/2000/61 (2000), online: <[http://ap.ohchr.org/documents/sdpage\\_e.aspx?b=1&se=8&t=11](http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=8&t=11)>.

<sup>116</sup> See the recent Supreme Court decision in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, imposing strict conditions in applying the test for the awarding of interim costs, *i.e.* advance costs to cover legal expenses, that had been formulated in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371.