

The Role of International Social and Economic Rights in the Interpretation of Domestic Law in Canada

LAW SHEET

**the POVERTY and
HUMAN RIGHTS
CENTRE**

© 2008

Introduction

As the Canadian judiciary approaches the often general and open textured language of the *Charter*, ‘the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even right to counsel.’

Reference Re Public Service Employee Relations Act (Alta.) [1987] 1 S.C.R. 313 at para. 58¹

Ultimately, the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law.

Louise Arbour, United Nations High Commissioner for Human Rights,
“Freedom From Want — From Charity to Entitlement,”
Lafontaine-Baldwin Lecture, Quebec City (2005)²

This Law Sheet, produced by the Poverty and Human Rights Centre, is concerned with the role that international human rights law can play in the interpretation of the *Canadian Charter of Rights and Freedoms* and other laws in Canada. It is intended to assist lawyers in their advocacy work before courts and tribunals. It is also intended to assist non-governmental organizations who rely on the human rights framework in their work to assist members of vulnerable groups. It is specifically focused on the domestic enforcement of social and economic rights.

For the United Nations human rights treaties,³ there are two levels of adjudication and enforcement. First, United Nations treaty bodies review the compliance of countries that have ratified the treaties and receive and adjudicate petitions or complaints under the treaty. Secondly, within Canada, courts and tribunals provide another avenue for adjudication and enforcement of Canada’s obligations under international human rights law. This Law Sheet is focused on the second level. It explores how to use international human rights law in Canadian courts and tribunals.

What is international human rights law?

International human rights law is an autonomous normative system.⁴

The classic formulation of the sources of international law is Article 38 of the *Statute of the International Court of Justice*,⁵ which identifies some of these sources as:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the relevant States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations.

Thus, the sources of international human rights law include legal instruments developed collaboratively by member states of the United Nations and other regional bodies. These instruments include human rights treaties, also referred to as covenants or conventions. International law sources also include the jurisprudence of UN bodies and international courts; and customary law. Customary law, the Ontario Court of Appeal has held, is a “practice among States of sufficient duration, uniformity and generality ... that States consider themselves legally bound by the practice.”⁶ An example of customary law is the *Universal Declaration of Human Rights*.⁷

In *Reference re Public Service Employee Relations Act (Alta.)*,⁸ a Supreme Court of Canada case, Chief Justice Brian Dickson stated: “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.”⁹ This passage was cited with approval in another Supreme Court of Canada case, *United States v. Burns*,¹⁰ in which the Court had to determine whether capital punishment is in accordance with the principles of fundamental justice under section 7 of the *Charter*. The Court noted that state practice increasingly favours abolition of the death penalty.¹¹ As well, as already mentioned, the general principles of law recognized by most nations are considered to be among the key sources of international law.

In *Burns*, the Supreme Court of Canada looked both to initiatives within the international community to oppose extradition without assurances that those extradited would not face the death penalty, and to initiatives to abolish the death penalty as evidence of significant movement towards international acceptance of abolition of the death penalty, as a principle of fundamental justice.

Do treaties take direct effect before courts and tribunals in Canada?

Canada has ratified the major UN human rights treaties. However, those treaties do not take direct effect in Canadian courts and tribunals, unless they have been incorporated into domestic legislation.¹² What is called the doctrine of incorporation requires either federal or provincial legislative incorporation before treaties can take direct effect, because, generally, treaties are ratified by the executive, and ratification is not subject to the legislative process. An example of a treaty that has been incorporated into Canadian domestic law is the *Convention Relating to the Status of Refugees*.¹³ The courts have held that this treaty has been incorporated into Canadian law because the express purpose of the *Immigration and Refugee Protection Act*¹⁴ is to incorporate provisions of the *Convention*. The result of incorporation is that a court “must adopt an interpretation consistent with Canada’s obligations under the *Convention*.”¹⁵

Does customary law require legislative incorporation?

“International custom,” the term used in the *Statute of the International Court of Justice*, referred to above, is more commonly expressed as “customary international law,” or simply as “customary law.” Customary law, unlike treaty or convention-based law, does not require legislative incorporation in order to be directly applied by courts, but rather it is incorporated automatically into the common law, to the extent that it is not incompatible with legislation.¹⁶

Is international human rights law a relevant and persuasive source for the interpretation of laws in Canada?

Relevant international human rights law, whether it has been incorporated into legislation or not, can be used in the interpretation of ambiguous or open-textured domestic legal provisions.¹⁷ In *Baker v. Canada (Minister of Citizenship and Immigration)*,¹⁸ the Supreme Court of Canada explained:

[t]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added by the Court.]

The courts have applied international human rights norms to interpret the *Charter*, legislation, and the common law. Relevant international human rights have also been used to guide the exercise of administrative discretion. Some examples are provided, regarding each of these areas: the *Charter*, legislation, common law, and administrative discretion.

In the case of a treaty that Canada has ratified, there is a presumption of conformity, that is, a presumption that the governments, as law-makers, do not intend to violate their human rights obligations. However, the use of international law goes beyond the presumption of conformity. A range of international human rights law sources, beyond customary law and beyond the treaties that Canada has ratified, can serve as context to assist in interpreting domestic norms.

International human rights law and the *Charter*

The Supreme Court of Canada has held 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 that Canada has ratified. In *Reference re Public Service Employee Relations Act (Alta.)*,¹⁹ Dickson C.J. explained:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter's* protection". I believe 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.²⁰

The Supreme Court of Canada has treated international human rights law standards as a relevant and persuasive contextual source for the interpretation of the *Charter*, because "they reflect the values and principles that underlie the *Charter* itself,"²¹ and are "a critical influence on the interpretation of the scope of the rights included in the *Charter*."²² In *R. v. Ewanchuk*,²³ Justice Claire L'Heureux-Dubé explained "our *Charter* is the primary vehicle through which international human rights achieve a domestic effect."²⁴

A leading example of international human rights being used to interpret the *Charter* is *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*.²⁵ In that precedent-setting case the Supreme Court of Canada applied various sources of international human rights law as an interpretive tool, which supported recognizing a process of collective bargaining as part of the *Charter's* guarantee of freedom of association.

Similarly, in the precedent-setting case of *McIvor v. The Registrar, Indian and Northern Affairs Canada*,²⁶ the British Columbia Supreme Court found that sources of international human rights law provided support for the view that the s. 15 right to equality encompasses the right to be free from discrimination in respect of the law governing transmission of Indian status from a parent to a child. The Court also referred to international human rights law as an aid to assessing the impacts of denials of registration status, observing:

As indicated by the concerns expressed by the CEDAW committee and the ICESCR Committee, lack of equal access to registration status not only affects interests in access to Aboriginal culture. It can also impair the rights of women to the equal enjoyment of an adequate standard of living. Access to financial assistance for post-secondary education and health benefits, are benefits of registration status that are relevant to the equal enjoyment of an adequate standard of living.²⁷

The Court concluded that the status registration provisions of the *Indian Act* discriminated based on the grounds of sex, marital status and family status, contrary to s. 15 of the *Charter*. *Slaight Communications Inc. v. Davidson*²⁸ provides another illustration of the influence of international law on the interpretation of the *Charter*. In this case, the Supreme

Court had to rule on the validity, under s. 1 of the *Charter*, of an arbitration award infringing upon an employer's freedom of expression. After having concluded that the award in question aimed to protect an unjustly dismissed employee's right to employment, Dickson C.J. recognized the importance of this objective in light of the protection conferred upon the right to work through its inclusion in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). For the majority, Dickson C.J. stated:

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. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.²⁹

International Human Rights Law and Administrative Discretion

The case of *Baker v. Canada (Minister of Citizenship and Immigration)*,³⁰ provides an example of international human rights law being used to guide the exercise of administrative discretion. In *Baker*, the majority of the Supreme Court of Canada held, having regard to international human rights law, that it is mandatory for an immigration officer, when deciding whether to deport a mother to Jamaica, to take into account the "best interests of the child."

International Human Rights Law and the Common Law

In *Ewanchuk*,³¹ Justice L'Heureux-Dubé referred to the *Convention on the Elimination of All Forms of Discrimination Against Women*,³² and a General Recommendation of the CEDAW Committee on the interpretation of discrimination as it relates to violence against women,³³ as well as the *Declaration on the Elimination of Violence against Women*.³⁴ These international norms were invoked by Justice L'Heureux-Dubé, in support of the conclusion that common law defences to sexual assault should be circumscribed. Regarding the *Declaration*, L'Heureux-Dubé J. noted, "[a]lthough not a treaty binding states, it sets out a common international standard that U.N. member states are invited to follow,"³⁵ the implication being that in Canada the common law should be updated to reflect international human rights norms.

International social and economic rights and the *Charter*

In 1948, the United Nations adopted the *Universal Declaration on Human Rights*.³⁶ Adopted without opposition by the member states of the United Nations, the *Declaration* is considered to have laid the foundation for the development of subsequent international

human rights treaties. As mentioned above, the *Declaration* forms part of customary international law whose rules apply to all countries, even in the absence of ratification by States, except in case of direct conflict with domestic legislation. Following the *Declaration* came many international human rights instruments, ratified by Canada, that recognize social and economic rights as human rights, including rights to adequate food, clothing and housing, education, just and favourable conditions of work, and health.³⁷ In Canada, public benefit schemes and social protections, such as social assistance, unemployment insurance, residential tenancy legislation, old age security, public health care and education, are the primary programmatic means through which effect is given to these international human rights obligations.

When access to such benefits and protections is denied or withheld, *Charter* rights may be triggered, and important issues of constitutional interpretation may arise. The law with regard to the scope of ss. 7 and 15, and social programs, is very much in a developmental stage. In *Gosselin v. Attorney General Quebec*,³⁸ the first constitutional welfare rights case to reach the Supreme Court of Canada, the challenged legislative scheme, which provided a reduced rate of welfare for persons under 30 years of age, was not found to violate the *Charter*. However, the key question of whether in a future case, the *Charter* could be held to include rights to adequate social assistance was expressly left open by the majority of the Court.³⁹ The dissenting opinion of Justice Louise Arbour was even more positive. Regarding s. 7, she stated:

‘[A] minimum level of welfare is so closely connected to issues relating to one’s basic health (or security of the person), and potentially even to one’s survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.’³⁹⁴⁰

Courts will be called on to continue to elaborate and refine the contours of ss. 7 and 15. In this regard, international human rights jurisprudence may have a significant role because of the conceptual overlap between rights embodied in the *Charter* — particularly rights to life, liberty, and security of the person and equality — and rights articulated in international instruments.

Charter rights to life, liberty, security of the person and equality are closely related to the right to an adequate standard of living under the ICESCR. For purposes of *Charter* interpretation, it is arguable that the fact that rights to adequate food, clothing and housing are recognized rights under the ICESCR should inform the content of ss. 7 and 15 of the *Charter*. In 1989, in considering the ambit of the right to security of the person, the Supreme Court of Canada stated that it would be “precipitous” to rule out at an early stage of *Charter* interpretation “such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing, and shelter.”⁴¹ Although there is still no decided case directly on point, in our view, it would be anomalous

for the Court to interpret ss. 7 and 15 of the *Charter* as according less protection than that to which Canada has agreed under Article 11 of the ICESCR.

The jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR), as well as submissions that have been made by official representatives of the Government of Canada to the CESCR, can also be regarded as relevant and persuasive authority for the proposition that ss. 7 and 15 of the *Charter* include the right to an adequate standard of living. Questions about the interaction between the ICESCR and the *Charter* have arisen before the CESCR, to which Canada is required to report periodically under the ICESCR. Before the CESCR, Canada has repeatedly claimed that the *Charter* guarantees that Canadians will not be deprived of the basic necessities of life. As Jackman and Porter have explained,

“[w]ith the emergence of the “interpretive presumption” put forward in *Slaight Communications*, the admission [by the Supreme Court of Canada] that international social and economic rights could be included in the *Charter* has increasingly been taken, at least at the international level, as a statement that they should. Otherwise, the Court would be opting for an interpretation of the *Charter* that would place Canada in breach of its obligations under the ICESCR and other international human rights laws.”⁴²

In 1993, the federal government, in response to Committee questions, indicated that section 7 of the *Charter* “ensured that persons were not deprived of the basic necessities of life.”⁴³ In the list of issues the CESCR submitted to Canada prior to the 1998 review of Canada, the Committee asked Canada:

In 1993 the Government had informed the Committee that section 7 of the *Charter* at least guaranteed that people are not to be deprived of basic necessities and may be interpreted to include rights under the Covenant, such as rights under article 11 [to an adequate standard of living, including adequate food, clothing and housing]. Is that still the position of all governments in Canada?⁴⁴

The Government responded to the Committee’s question, saying:

The Supreme Court of Canada has stated that section 7 of the *Charter* may be interpreted to include the rights protected under the Covenant....The Supreme Court has also held section 7 as guaranteeing that people are not to be deprived of the basic necessities....The Government of Canada is bound by these interpretations of section 7 of the *Charter*.⁴⁵

Thus, the Government has directly acknowledged the legitimacy of an interpretive approach to the *Charter* that gives effect to international social and economic rights as integral to the fulfillment of Canada’s international human rights undertakings. This adds support to

the view that courts should interpret ss. 7 and 15 as encompassing a right to an adequate standard of living.⁴⁶

Sections 7 and 15 of the *Charter* are often said to embody the notion of respect for human dignity and integrity.⁴⁷ The meaning of human dignity in the context of *Charter* adjudication is in the process of being elaborated by the courts. It is arguable, from various perspectives, that access to the means of subsistence should be understood to be constitutive of human dignity. Denise Reaume argues that programmes such as social assistance are dignity-constituting benefits.⁴⁸ International human rights law also provides support for the proposition that rights to food, clothing and housing are fundamental to human dignity.⁴⁹ International human rights law can be of assistance because human dignity is also the foundation for all international human rights. The preamble to the ICESCR stipulates that ICESCR “rights derive from the inherent dignity of the person.” The fact that adequate food, clothing and housing are understood, under international human rights law, as being derived from the value of respect for the inherent dignity of the person supports the view that for purposes of interpreting ss. 7 and 15 of the *Charter*, access to the means of ensuring adequate food, clothing and housing must also be understood to be integral to the concepts of human dignity and integrity that ss. 7 and 15 embody.

International human rights law, in particular the doctrine of indivisibility and interdependence of all human rights, also specifically confirms that social and economic rights are not a second class category of rights relative to civil and political rights.⁵⁰ Since 1948 and the adoption of the *Universal Declaration on Human Rights*, the indivisibility and interdependence of civil and political and social, economic and cultural rights have been recognized as being among the central principles of international human rights law. The indivisibility and interdependence of human rights was reaffirmed in the *Proclamation of Teheran*,⁵¹ which declares that the complete fulfillment of civil and political rights is impossible without the fulfillment of social, economic and cultural rights. This interconnection of rights was also articulated in the *Vienna Declaration and Programme of Action*,⁵² which was negotiated at the Vienna World Conference on Human Rights in 1993:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁵³

To summarize, recognizing the presence and importance of social and economic rights in the human rights scheme could be relevant in various constitutional interpretive contexts. The pervasive presence of social and economic rights in international human rights instruments that are binding on Canada, combined with their common grounding in the value of human

dignity, points to the inclusion of social and economic rights entitlement within ss. 7 and 15 of the *Charter*.

Conclusion

In recent years, international human rights law has assumed increasing prominence in Canadian jurisprudence, in various contexts including as an aid to the interpretation of legislation, the *Charter*, the common law, and as a constraint on administrative decision-making. International law has an important role to play in ongoing advocacy work designed to advance the rights of poor people in Canada.

About the Poverty and Human Rights Centre

This Law Sheet was produced by the Poverty and Human Rights Centre, in Vancouver British Columbia. The Poverty and Human Rights Centre is a non-profit research and public education centre committed to promoting recognition and realization of rights to social and economic security. The Centre's Directors are Gwen Brodsky and Shelagh Day. For more information about the Poverty and Human Rights Centre, go to the Centre's website <http://www.povertyandhumanrights.org>.

The financial support of the Social Sciences and Humanities Research Council Community University Research Alliance, the Canadian Bar Association Law for the Future Fund, is gratefully acknowledged.

The Poverty and Human Rights Centre also acknowledges Mosope Fagbongbe, Vivenne Salmon, Leilani Farha, Margot Young, and Elaine Littmann for their assistance in the preparation of this law sheet.

Notes

- 1 The portion of the quote contained in single quotes, Dickson C.J., attributes to John Claydon, “International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms” (1982) 4 Sup. Ct. L. Rev. 287 at 293; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313. Although Dickson C.J. was writing in dissent in this case, from subsequent decisions it can be seen that the interpretive principles he articulated have been adopted by the Court. For example, regard may be had to *Slaight* referred to in notes 20, 28 and 29 *infra*, and to *Health Services* referred to in notes 20, 25, *infra*.
online: <http://scc.lexum.umontreal.ca/en/1987/1987rcs1-313/1987rcs1-313.html>
- 2 Louise Arbour, “Freedom from want’ – from charity to entitlement Libérer du besoin: de la charité à la justice” (LaFontaine-Baldwin lecture, delivered by the United Nations High Commissioner for Human Rights, 3 March 2005), online: United Nations High Commissioner for Human Rights
<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/58E08B5CD49476BEC1256FBD006EC8B1?opendocument>
- 3 *The United Nations Human Rights Treaties*,
online: Bayefsky.com <http://www.bayefsky.com/docs.php/area/ratif/node/1>
- 4 William A. Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2000) 79 Can. Bar Rev. 174 at 175, Schabas, “Twenty-Five Years,” online: http://www.cba.org/cba_barreview/Volume.aspx
- 5 *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7, annexed to the *Charter of the United Nations*, Article 38, online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>; Schabas, “Twenty-Five Years,” *supra* note 4.
- 6 *Mack v. Canada (Attorney General)*, [2002] 217 D.L.R. (4th) 583, 165 OAC 17, leave to appeal refused, (2003) 319 N.R. 196n (SCC) at para. 22.
- 7 *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No.13 UN Doc. A/810 (1948), online: <http://www.unhchr.ch/udhr/lang/eng.htm>
- 8 *Supra* note 1 at para. 57.
- 9 *Ibid.* at 348; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para.13,
online: <http://scc.lexum.umontreal.ca/en/2001/2001scc94/2001scc94.html>
- 10 [2001] 1 S.C.R. 283, at para 80 [Burns], online: <http://scc.lexum.umontreal.ca/en/2001/2001scc7/2001scc7.html> . In *Burns*, the Court also cited with approval and referred, with approval, to *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 750, 790-91 [Keegstra]. See also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at para. 46, online: <http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html>
- 11 *Burns*, *supra* note 10 at paras. 84-92.
- 12 *Canadian Bar Association v. HMTQ et al*, (2006) 59 B.C.L.R. (4th) 38 (B.C.S.C.) at para. 121, online: <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc1342/2006bcsc1342.html>
The Court, citing Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2005) stated that “agreements entered into by Canada do not create enforceable rights unless and until they have been incorporated into domestic Canadian Law” at paras. 120-121.
- 13 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S 137, Can. T.S. 1969 No. 6 (entered into force 22 April 1954) [CRSR], online: <http://www2.ohchr.org/english/law/refugees.htm>
- 14 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27; online: http://laws.justice.gc.ca/en/ShowDoc/cs/1-2.5/bo-ga:s_1::bo-ga:s_2/20070731/en?command=search&caller=SI&search_type=all&shorttitle=immigration%20act&day=31&month=7&year=2007&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50&page=1&isprinting=true
- 15 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 51, online: <http://scc.lexum.umontreal.ca/en/1998/1998rcs1-1222/1998rcs1-1222.html>. See also *R. v. Finta*, [1994] 1 S.C.R. 701 at 728 wherein the Court held that the prosecution provisions of the *Criminal Code* invite resort to customary international law, online: <http://scc.lexum.umontreal.ca/en/1994/1994rcs1-701/1994rcs1-701.html>

- 16 For further discussion about customary law, see: William A. Schabas and Stephané Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3d ed. (Toronto: Thomson Carswell, 2007) at 67-81 [Schabas, “International Human Rights and Canadian Law”].
- 17 Stephen Toope, “Inside and Out: The Stories of International Law and Domestic Law” (2001) 50 U.N.B.L.J 11 at 16.
- 18 [1999] 2 S.C.R. 817 at para. 70 [Baker],
online: <http://scc.lexum.umontreal.ca/en/1999/1999rcs2-817/1999rcs2-817.html>
- 19 *Supra* note 1.
- 20 *Ibid.* at para. 59; See also: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056 [Slaight],
online: <http://scc.lexum.umontreal.ca/en/1989/1989rcs1-1038/1989rcs1-1038.html>
- 21 *Keegstra*, *supra* note 10 at 750.
- 22 *Ibid.* at paras. 70-71.
- 23 *R. v. Ewanchuk* [Ewanchuk] [1999] 1 S.C.R. 330.
- 24 *Ibid.* at para. 73.
- 25 [2007] S.C.J. No. 27, 2007 SCC 27 [Health Services],
online: <http://scc.lexum.umontreal.ca/en/2007/2007scc27/2007scc27.html>
In *Slaight*, the interpretive presumption of ‘protection at least as great as’ first articulated by Dickson C.J. in dissent in *Reference Re Employee Relations Act (Alta)* is adopted by the majority. Later, in *Health Services*, *infra*, note 25, the interpretive presumption is applied by a unanimous court. Deschamps J. dissented in part, but not on this point.
- 26 2007 BCSC 827 at para. 183 [McIvor], online: <http://www.courts.gov.bc.ca/Jdb-txt/SC/07/08/2007BCSC0827.htm>
- 27 *Ibid.* at para. 282. The *McIvor* decision makes various other references to international human rights law, as aids to assessing the constitutionality of the registration provisions of the *Indian Act*, which, the Court ultimately found, discriminate contrary to s. 15 of the *Charter* and are not justified under s. 1.
- 28 *Supra* note 20.
- 29 *Slaight supra* note 20 at 1056-1057; Justice Lamer dissenting in part, though not on this point.
- 30 *Supra* note 18.
- 31 *Ewanchuk*; *supra* note 23. This was a concurring minority opinion written by L’Heureux Dubé J. on behalf of herself and Justice Gonthier.
- 32 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Can. T.S.1982 No. 31, GA Res. 34/180 (entered into force 9 January 1982)[CEDAW], online: <http://www2.ohchr.org/english/law/cedaw.htm>
- 33 General Recommendation No. 19, (eleventh session, 1992), *Violence Against Women*,
online: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>
- 34 *Declaration on the Elimination of Violence Against Women*, GA Res. 48/104, UNGAOR, 1993, U.N. Doc. A/48/49 (1993),
online: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.104.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En)
- 35 *Ewanchuk supra* note 23 at para 72.
- 36 *Supra* note 7.
- 37 Canada has ratified the following treaties which are important to social and economic rights advocacy:
International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 4 January 1969) [CERD], online: <http://www2.ohchr.org/english/law/cerd.htm>
International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR],
online: http://www.unhchr.ch/html/menu3/b/a_icescr.htm

International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR], online: <http://www2.ohchr.org/english/law/ccpr.htm>

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31, 19 I.L.M. 33 (entered into force 3 September 1981) [CEDAW], *supra* note 32.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990) [CRC], online: <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

The *Universal Declaration of Human Rights*, *supra* note 7 states:

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

The *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Can. T.S. 1976 No. 46, vol.993 U.N.T.S. (entered into force 3 January 1976) [ICESCR].

Article 6

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable

conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 11

- 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
- 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

- 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Articles 13

- 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
- 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be

made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
- 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
 - 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

- 38 *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, online: <http://scc.lexum.umontreal.ca/en/2002/2002scc84/2002scc84.html>
- 39 *Ibid.* at para. 358.
- 40 *Attorney General of Quebec v. Irwin Toy*, [1989] 1 S.C.R. 927 at 1003, online: <http://scc.lexum.umontreal.ca/en/1989/1989rcs1-927/1989rcs1-927.html>
- 41 Martha Jackman and Bruce Porter, “Women’s Substantive Equality and Protection of Social and Economic Rights Under the Canadian Human Rights Act” in *Women and the Canadian Human Rights Act: A Collection of Policy Research Papers*, (Ottawa: Status of Women Canada, 1999), [Jackman and Porter] online: http://www.swc-cfc.gc.ca/pubs/pubspr/0662281578/199909_0662281578_3_e.pdf
- 42 Committee on Economic, Social and Cultural Rights, *Summary Record of the 5th Meeting: Canada*. 25/05/93, UN ESCOR, 1993, UN Doc. E/C.12/1993/SR.5. at para. 21, online: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/989f94d9e7552572802565e0003bd533?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/989f94d9e7552572802565e0003bd533?Opendocument)
- 43 Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social, and Cultural Rights, List of issues to be taken up in connection with the consideration of the third periodic report of Canada concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social, and Cultural Rights*, UN ESCOR, UN Doc. E/C.12/Q/CAN/1 (10 June 1998) at para. 53, online: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7e0901d37595df088025663a002f57a1?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e0901d37595df088025663a002f57a1?Opendocument)
- 44 Government of Canada, *Responses to the Supplementary Questions to Canada’s Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8/ (October 1998) at 33.
- 45 Jackman and Porter, *supra* note 41, at 58, make a statement to a very similar effect, referring to the social and economic rights of women in particular.
- 46 *Law v. Canada* (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at para. 48, online: <http://scc.lexum.umontreal.ca/en/1999/1999rcs1-497/1999rcs1-497.html>; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 26, online: <http://scc.lexum.umontreal.ca/en/2000/2000scc44/2000scc44.html>; *Lavoie v. Canada*, [2002] 1 S.C.R. 769, online: <http://scc.lexum.umontreal.ca/en/2002/2002scc23/2002scc23.html>

- 47 Denise G. Reaume, "Dignity, Equality, and Second Generation Rights" in Margot Young, Susan B. Boyd, Gwen Brodsky & Shelagh Day, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007).
- 48 See also: Article 11(1) of the ICESCR and Article 25(1) of the Universal Declaration on Human Rights, *supra* note 7; Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 J. L. & Soc. Pol'y 117 at 146.
- 49 Historically, civil and political rights enjoy stronger protection than social and economic rights, in the jurisprudence of western legal systems. However, the acknowledgement that is basic to the doctrine of indivisibility and interdependence is that the complete fulfillment of civil and political rights is impossible without the fulfillment of social, economic and cultural rights.
- 50 *Proclamation of Teheran, Final Act of the International Conference on Human Rights*, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF 32/41 at 3 (1968), online: http://www.unhchr.ch/html/menu3/b/b_tehern.htm
- 51 *Vienna Declaration and Programme of Action (Vienna Declaration)*, World Conference on Human Rights, Vienna, 14-25 June 1993, A/CONF.157/23, (12 July 1993), online: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)
- 52 *Ibid.* Article 5.