

## [S2E5 - Socioeconomic Rights and the Charter]

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**Cheryl M.:** Hello, and welcome back to Charter: A Course. A podcast created by the David Asper Centre for constitutional rights, at the University of Toronto, faculty of law. My name is Cheryl Milne, and I'm the executive director of the Asper Centre.

Our podcast focuses on leading constitutional cases and issues, highlighting strategic aspects of constitutional litigation, and some of the accomplishments of U of T's faculty and alumni. It is our hope that over the course of this episode, whether you are a law student, a lawyer or someone looking for an interesting topic to chat about over a thanksgiving dinner with your family. You'll learn about an aspect of constitutional law and litigation that interests you and makes you look smart.

I wish to first acknowledge this land from which our podcast emanates. For thousands of years, it has been the traditional land of the Huron Wendat, the Seneca and the Mississauga's of the credit. Today, this meeting place is still the home to many indigenous people from across Turtle Island. We are grateful to have the opportunity to work here.

Today, we will focus on socioeconomic rights in the Charter. Socioeconomic rights refer to human rights that require positive action by state government to enforce. This category includes the right to adequate food, adequate housing, education, health, social security, water and other aspects to take part in cultural life.

Thus far, Canadian jurisprudence has not recognized socioeconomic rights within the scope of existing enumerated rights in the Charter. As we will learn from our guests today, the Supreme Court of Canada has not foreclosed the possibility of recognizing constitutional socioeconomic rights, and this remains an unresolved area of Charter litigation.

The first half of this podcast examines this unresolved issue, and considers whether the Charter encompasses these rights. In the second half, we'll speak with a litigator in our practice corner, Jackie Esmonde, and hear about her experience litigating issues related to socioeconomic rights at various levels of court.

Our guests today are Professor Martha Jackman and Bruce Porter. Martha Jackman is a professor of law at the University of Ottawa. She holds law degrees from the University of Toronto and Yale University, and completed undergraduate studies at Queen's University. Professor Jackman teaches constitutional law, and through her research, focuses on issues related to women and other marginalized groups. From 2004 to 2015, she was the academic director of two successive five-year million-dollar research projects, social rights accountability project, and reconceiving human rights practice. Funded under the social sciences and humanities research council's, Community University Research Alliance program. She has published extensively on the topics of socioeconomic rights, equality and the Canadian Charter.

Bruce Porter is the executive director of the Social Rights Advocacy Centre. He also was the co-director (community) of the research project, reconceiving human rights practice, funded by the social sciences and humanities research council's Community University Research Alliance program.

He's an international expert on the right to housing, and has published over 40 articles and book chapters on socioeconomic rights. Previously has served as an Ontario Human Rights commissioner, and has coordinated interventions in 14 cases at the Supreme Court of Canada raising poverty and social rights issues. So, welcome Martha and Bruce.

**Martha J.:** Nice to speak to you, again.

**Bruce P.:** Thanks, Cheryl.

**Cheryl M.:** Let us begin by talking about what socioeconomic rights are. So Bruce, do you mind describing what these rights encompass? And explaining the often discussed distinction between negative and positive rights?

**Bruce P.:** Yes. Thanks Cheryl, and thanks so much for allowing me to participate in this. I'm really looking forward to the discussion. Martha and I have a danger of probably agreeing with us too much, because we worked on this together for about 30 years. But we'll try to disagree, which we still do from time to time. So I guess put simply, socioeconomic rights can be understood as the right to access social goods that are required for equal dignity and well-being. The universal declaration of Human Rights adopted in 1948 described socioeconomic rights as being indispensable for dignity and the free development of personality.

So the first and most important thing to understand about socioeconomic rights, is that they engage the very same core human rights values as other human rights. The right to dignity, well-being, freedom to develop and express our human capabilities and the sanctity of human life. So these really shouldn't be seen as an optional additional category of rights, but rather considered essential for the production of fundamental human rights values.

So in accordance with that definition, economic and social rights recognized in international law include access to education, health care, housing, water and sanitation, food, living wage, work and decent working conditions as well as access to benefits of science and technology.

As you noted, Cheryl, all the socioeconomic rights do tend to be associated with positive obligations of governments, while civil and political rights tend to be associated with restraints on government action to protect individual freedoms such as freedom of expression or association, or freedom from arbitrary arrests or detention. But really, that kind of dichotomy oversimplifies both categories of rights.

It's now well recognized that civil and political rights have both positive and negative components, and socioeconomic rights as well require states to refrain from arbitrary arrest and detention, and also requires states to provide resources for the administration of systems of justice, and ensure access to a fair trial within a reasonable time.

So it's really quite wrong to consider a right such as the right to housing or food simplistically as a positive right to be provided with housing or food by the state. Both

categories of rights give rise to a complex set of obligations that are neither exclusively positive nor negative.

The separation of the rights into these two categories is really the unfortunate holdover from the Cold War era. Socio and economic rights were included within a unified framework in the UDHR, and the UDHR recognized that access to justice and effective remedies is required for all fundamental human rights.

When it came to negotiating a covenant to make the rights in the UDHR binding as treaty rights in the 50s and 60s however. Socioeconomic rights were associated with state provision of goods under communism by the United States, and some other states.

While civil and political rights are associated more with an American negative rights paradigm, focused on the protection of individual liberties from State interference. These rights were therefore separated in the end into two covenants, the U.S actually is still one of the, only a handful of states that have been ratified the covenant and economic social and culture rights.

The two categories of rights were also distinguished in relation to access to justice during these early years, and individual complaints mechanism was adopted for civil and political rights, but not for economic, social and culture rights. These latter were seen largely as aspirational and left to governments to decide how to implement, rather than being subject to claims or meaningful accountability before human rights bodies or courts.

So the history of socioeconomic rights from the 1990s on though has really been one of overcoming this false divide, and recognizing that socioeconomic rights also require access to justice and effective remedies. Beginning with the Vienna World Conference on human rights in 1993, the idea that socioeconomic rights can be left to governments without access to Justice or accountability has really been largely rejected.

Newer constitutional democracies in Africa and Latin America have almost invariably included socioeconomic rights in their constitutions. In courts in other countries such as India, in which these rights were not constitutionally recognized, have recognized social economic rights as components of constitutional rights such as the right to life.

Then in the 2000s, Justice Louise Arbour, who of course was a Supreme Court Justice in Canada became the UN High Commissioner on human rights, and played a key role in the adoption of a compliance procedure to ensure access to justice for claimants of socioeconomic rights.

So when this was adopted in 2008, Justice Arbour declared that human rights had been made whole by the recognition that claimants of socioeconomic rights have equal rights to access to justice. So states saw obligations to ensure socioeconomic rights are recognized now as having both positive and negative components, just as do civil and political rights. These obligations have been categorized into three types, the obligation to respect, to protect and to fulfill. The obligation to respect means that governments must refrain from actions that may deprive people of socioeconomic rights such as unreasonable forced eviction or arbitrary denial of access by some groups to health care or education.

The obligation to protect socioeconomic rights requires governments to regulate private markets, and the actions of corporations or private actors such as by protecting tenants from unreasonable rent increases, or unwarranted evictions by private landlords. These two categories of obligations to respect and protect human rights equally applied to civil and political rights. Our supreme court recognized at least some components of the positive right to legislate measures of protection from discrimination by private actors in the famous Vriend case.

It's the third obligation or the obligation to fulfill human rights, this is understood somewhat differently for socioeconomic rights than for civil and political rights under international law. Though again, it's difficult to maintain any absolute distinction. State positive obligations to fulfill socio-economic rights are subjects of what is called progressive realization. Article 2, sub 1 of the international covenant on economic social and cultural rights, describes the obligation to realize socioeconomic rights progressively as the obligation to utilize all appropriate means including legislation, and to apply the maximum of available resources with a view to fully realizing socioeconomic rights.

There's no similar recognition in the covenant on civil and political rights, but compliance with rights may require consideration of limited resources, or that rights may require time to be fully realized. Though it's clear now that there are many aspects of civil

and political rights that do require programmatic measures implemented over time, and appropriate resource allocation. Measures to provide accessible workplaces for transportation or access to reproductive health care are examples.

So again, it's important to recognize that there is really nothing required of courts or tribunals in assessing compliance with socioeconomic rights, that isn't also required in adjudicating civil and political rights claims. Particularly those relating to substantive equality.

Nevertheless, the concept of progressive realization has often been misinterpreted particularly by Canadian governments and courts as meaning that socioeconomic rights involve policy choices best left to governments, and that they are merely aspirational and not appropriate for adjudication before courts and human rights bodies. Modern human rights law rejects that view.

Denying access to justice for socioeconomic rights is now seen not just as an issue of excluding a particular category of rights, but more fundamentally, as an exclusion of particular groups of rights claimants from core human rights to dignity, equality and security. It denies access to justice, to those affected by prevailing patterns of socioeconomic inequality and marginalization, the effects of colonization and systemic discrimination.

And it immunizes many of the most serious violations of fundamental human rights to life and substantive equality in Canada from access to justice. Whether these are understood as violations of rights to life, security of the person or equality under the Charter, or as violations of socioeconomic rights guaranteed in international human rights law does not matter. This should in fact be understood as both.

There's absolutely no justification for denying protections of the right to life and equality in the context of socioeconomic deprivation, just because in those circumstances, Charter rights happened to overlap, and are indivisible from socioeconomic rights that Canada has ratified under international law.

Unfortunately, the Canadian government and provincial governments in Canada continue to argue both in domestic courts, and at the U.N., that socioeconomic rights must be treated as a separate category of non-justiciable aspirational rights, and the courts

must reject any claim that can be characterized as a socioeconomic rights claim, even if it also engages the right to life, security of the person or equality.

They continue to apply the positive negative rights dichotomy to argue for example that the right to life protects affluent people's access to privately funded health care, but does not apply equally to those who rely on publicly funded health care, since the latter would amount to recognizing a right to health care. So the very interest at stake is protected for more advantageous groups, and not for disadvantaged groups.

So I'll conclude really by saying that our primary challenge in modern times, both in the Charter and internationally, is to move beyond the dichotomy between socioeconomic rights and civil and political rights, or between positive and negative obligations. Such claims do require courts to be innovative in designing remedies that respect the limits of their competence, and provide for mechanisms through which governments may engage with affected groups, to design and implement required measures.

But we have to demand more of courts in this area, because we can no longer afford to immunize the most critical areas of government policy and law that engage core human rights values from any human rights accountability. Such an exclusion is entirely at odds with the modern understanding of the indivisibility of all human rights, and the success of international initiatives to make human rights whole and inclusive.

**Cheryl M.:** All right. Well, thank you, Bruce, for that, that excellent overview and some very compelling arguments about why we should be talking about this. In your writing, Martha, you argue that although socioeconomic rights are not explicitly included in the Charter, there are compelling grounds for why they are key components of existing Charter guarantees.

Specifically, you argue that socioeconomic rights fall within the scope of the right to life, liberty and security of the person under section 7 as Bruce has already mentioned, and equality rights under section 15. Could you elaborate on these compelling grounds that support your argument that socioeconomic rights fall within the scope of the Charter?

**Martha J.:** Absolutely. And as Bruce has already mentioned, Canada ratified the international covenant on economic social and cultural rights in 1976. So really just as the Charter was being drafted. And the Charter does include explicit protection for not just life and liberty, but security of the person. And it guarantees that I had the right to equal protection and equal benefit of the law without discrimination.

And so it's really impossible on a plain meaning reading of those provisions to understand how it could be argued against the backdrop of Canada's international human rights commitments that Bruce has described, how you could interpret and apply a right to security of the person, to life or liberty, or right to equality, while excluding really the preconditions necessary for ensuring that people are actually able to enjoy those and other rights that are entrenched in the Charter.

**Cheryl M.:** So turning to the Charter case law jurisprudence, it's been argued that the Supreme Court of Canada has not foreclosed future recognition, I think Bruce you mentioned Justice Arbour and her comments I think in the Gosselin case. Martha, could you provide an overview of that existing jurisprudence on socioeconomic rights? And why its recognition with the Charter has been left unresolved?

**Martha J.:** Absolutely. And again, Bruce has alluded to a number of these key cases. In its unanimous 1989 decision in the Irwin toy case. The court acknowledged that while section 7 of the Charter had been drafted in a way that excluded corporate commercial property rights, and the legislative history of section 7 is very clear on that. Chief justice Dixon left the door wide open to recognition of socioeconomic rights.

And as he mentioned in his judgment, socioeconomic rights that are essential for human survival including the range of rights that Bruce described, might well be recognized by Canadian courts as falling within the Ambit of section 7 of the Charter. So those early cases were extremely promising.

And they were followed a decade later, Bruce mentioned the Vriend case, which is a very significant case in terms of recognizing how equality has to be measured not simply as



between different disadvantaged groups, but as between disadvantaged groups and society as a whole. But even more significantly in the Eldridge case, the Supreme Court of Canada recognized that for people with disabilities to enjoy equal access to publicly funded health care, governments had to take positive measures to ensure that they receive the same quality and standard of care as other people living in Canada.

In that case, the court recognized that interpretation services had to be provided by the state, in order for people with disabilities, people who were deaf in particular, to enjoy equal access to health care.

And again, in 1999, in the GJ and New Brunswick case, another recognition by the Supreme Court of a positive obligation national governments to ensure that a single mother living on welfare who was fighting for custody of her children, was actually entitled to state-funded legal representation in order to effectively exercise her right to security of the person into liberty under Section 7 of the Charter.

In 2002, the key, the first key socioeconomic rights case to be heard in the Supreme Court of Canada, the Gosselin case. The court refused to find on the facts that Louise Gosselin had suffered a violation of her Section 7 or 15 rights when Quebec cut social assistance rates for people under the age of 30 by two-thirds. But again, the court explicitly left the door open to the possibility that in future cases, positive obligations could be imposed on governments.

And as Bruce pointed out, in their dissenting judgment in that case, in her dissenting judgment Justice Arbour actually made a really compelling case for why it was impossible to interpret the right to security without the inclusion of positive allegations on government. But sadly since 2002, we've really had no jurisprudence from the Supreme Court revisiting the issues that were raised in Gosselin, the court has refused leave to appeal in a number of lower court cases, where courts have continued to read the Charter as Bruce pointed out as if we were still in the 50s, really grounded in this outmoded dichotomy between positive and negative rights, which is completely discredited in international human rights law.

And Bruce alluded to the Chaoulli case, where a slim majority of the Court did recognize that access to health care was clearly a component of the right to security of the person

under Section seven. But approached the rights violation that was alleged in that case, so prohibiting access to private insurance and health care, in a way that really meant that only people who could afford private health care were guaranteed a right to health, and people who were unable to afford or ineligible for private insurance were essentially closed out, without the court ever really acknowledging that that was the implications of its decision.

Now again, more positively in the 2011 “Insite” case, there the Supreme Court of Canada did recognize that provision of deprivation of access to life saving Health Care, in that case safe injections services was a violation of section seven. And as I'm sure your audience may be aware, the recent battle in British Columbia in the Cambie Surgeries case, the trial court, and most recently, the BC court of appeal actually in effect rejected again on the evidence, the analysis of the split court and Chaoulli.

And found that the Charter didn't provide a right to buy private health care. But again, left open, recognized that a failure to provide publicly funded care could absolutely engage the right to security.

So at the Supreme Court level, we really have, I would say a failure of the court to revisit the decision in Gosselin. And again, as you mentioned in your introduction, this is the reason why this this is one of the most pressing jurisprudential questions under the Charter that remains wide open. And we continue to struggle in the lower courts with a judiciary that is antagonistic to the idea of socioeconomic rights, and that hasn't had any subsequent direction from the Supreme Court.

In fact, Bruce and I, as well as the Asper Centre, have been involved in cases where lower court judges effectively overturn Gosselin by suggesting that Gosselin forecloses recognition of socioeconomic rights, when in fact, Supreme Court did the exact opposite.

**Cheryl M.:** You both have referenced former Supreme Court of Canada Justice Louise Arbour, and she has argued that one of the reasons for Canada's limited socioeconomic rights jurisprudence is the timidity of litigants in bringing forward these types of claims to the courts. That somehow, constitutional lawyers and litigants have just been afraid to do so.

And I think maybe partly because they've been rejected a fair bit at the lower court level. But do you agree that constitutional litigators have a role to play in pushing towards the recognition of these rights? Let's start with Bruce, and then Martha jump in, what are your thoughts Bruce, on just the way litigation has been handled?

**Bruce P.:** You know, I absolutely agree with that. I don't know that I would describe it so much as timidity as really being, haven't been kind of co-opted by a dominant legal culture in Canada, which is incredibly hostile to socioeconomic rights. I've actually spent a good chunk of my time working in this area, trying to figure out where exactly that comes from. I mean, the hostility within the department of Justice for example in Canada is complete to socioeconomic rights.

I mean, there is an assumption that the role of justice lawyers is to make every possible argument against any claim that engages even remotely, the idea that the government might have obligations to ensure, for example, access to health care as a fundamental right. Even though the government would say in other contexts that this is a right that Canada recognizes and so on.

Martha and I are currently involved in a case called Toussaint versus Canada, in which the human rights committee found that Canada violated the right to life and non-discrimination by denying health care to irregular migrants, and putting now Toussaint's life at risk. And Canada is absolutely refusing to implement the decision, because they disagree with the U.N human rights committee about their interpretation of the right to life in international law, which is now well established as giving rise to positive obligations.

So within international foreign and domestic courts, Canada just continues to make these arguments. But it goes beyond the government to the kind of legal culture we have continually had to really be quite vocal, especially low-income claimants that I work with, in trying to convince our lawyers to make arguments that involve positive rights.

There's kind of an insistence that well, we don't ever want to suggest and dream that governments have an obligation to enact human rights legislation, only if they've enacted human rights legislation, then we have obligations. And in a challenge to welfare cuts in

Ontario mass, no one wanted to argue that there's an obligation to prevent people from starving by having a social assistance system, only that if you have a social assistance system, then these Charter obligations come into play.

But of course, the court responds by saying well, if there's no obligation to have a social assistance program in the first place, I'm not convinced that you can't restrict the scope of the entitlements under. So we're kind of forced into this contradictory position of arguing against our own international human rights obligations, by sort of conceding from the outset this irrational absurd idea that governments could just completely abandon their obligations under international law to ensure access to adequate social assistance or to housing and so on, and that these obligations only come into play once they act. And that we always have to be trying to restrain government some action rather than telling them they do have to act.

And I find that even in the way the jurisprudence that Martha referred to is read and understood by lawyers, it's often understood wrongly to kind of have closed these issues off. So in the showily decision, for example, Justice McLaughlin said that the Charter doesn't contain a freestanding right to health care, well, that's true. She went on to say that when the government develops a health care system, it has to comply with the right to life under the Charter.

So there's a lot that you can do with that, but people just keep affirming this first sentence as if somehow, there's absolutely no positive obligation to provide publicly funded health care, even when your life is at risk. And that was not ever decided or stated in. And surely, in the same time with lots of other cases where it's kind of assumed if we've done surveys of law students, is it possible to claim socioeconomic rights under section seven of the Charter? No, Gosselin decided that. It's been closed off by the Supreme Court, we say no, that's not the case.

So it's really quite remarkable how there's just been this kind of consensus evolving partly because of bad lower court decisions, and partly because the supreme court of Canada has denied leave on critical social and economic rights cases. But to be honest, there's such a scarcity of cases.

I mean, Martha's gone through some of the key ones, but we're dealing with really only a handful of claims on perhaps the most fundamental unresolved issue of Charter jurisprudence. And that can't only be the fault of the courts, that's also the fault of a legal culture which hasn't given a voice to people who really need it.

**Cheryl M.:** Well, then just to your point about the sort of aggressiveness with which the government sort of fights these claims. We see them actually trying to attack them at the very outset, trying to throw them out of court before you even have an argument on the merits. So *Tanudjaja*, which is the housing rights case, we saw that. And then most recently *La Rose* which is a climate justice case in British Columbia, where the government has been successful in having the case declared non-justiciable at the very first level.

So Martha, what would you say about this potential or possible timidity of litigants, and this sort of scarcity of cases?

**Martha J.:** So, there's no question that you know law students learn the law the way we teach it, at least at the outset. They're going to graduate and often re-educate themselves in an area where the legal education we provided is inadequate.

And that'll be true of Judges as well. I feel quite a bit of optimism as greater emphasis is being placed on diversity and judicial appointments, because with diversity comes a range of appointments of judges who actually have lived experience of socioeconomic rights violations and understand the point that Bruce is making.

And at the same time, I find my students to often be more progressive than their professors. And they understand that inaction on climate change, inaction on homelessness, our human rights violations within their understanding of justice and why they've come to law school. So that I think that there is no question as Bruce points out, that a majority of lawyers, justice lawyers, even lawyers representing claimants and certainly judges are often antagonistic if not ignorant and ill-educated in relation to socioeconomic rights.

But I, as I say, I find my students absolutely get it. And that's what's frustrating to me when I when I hear that my colleagues are actually teaching bad law. And I do hope that as the profession diversifies, as younger lawyers under the profession, who are really conscious of homelessness, the inaction around access to safe drugs and criminalization of people with addictions, an inactional climate that they are going to insist that the culture change, and I really do hope that will happen.

**Cheryl M.:** Bruce, I want to throw another question at you, which is, because a lot of what you've been talking about really relies on the international obligations that Canada has signed on to in the international law.

There seems to be somewhat of a reluctance on our courts to actually uphold those obligations, even though there's a long line of jurisprudence saying that our Charter is supposed to uphold at least those international human rights obligations, that that's supposed to be the starting point.

Do you have any views about why that is, and why we're having such difficulty in having courts recognize these International obligations?

**Bruce P.:** Yes, that's another tough question. I mean, I would say the courts are kind of all over the map on it, and there's some indication that I mean really since the Nevsun decision at the Supreme Court, in which the court affirmed that international human rights norms should not be considered as mere aspirations, but are moral imperatives and legal necessities. And really move to give the court a role that had previously been denied in relation to the enforcement of customary international law, extraterritorially.

So there is, judges do see themselves as increasingly involved in adjudicating matters related to international law. They've been very clear that compliance with international law is a matter that the courts can consider, it's not a matter to which the executive is entitled to deference. So there's some really positive developments.

I think that a lot of it though, particularly in lower courts, goes back to a kind of misunderstanding about what Canada's dualist system means. Which formally means that

when Canada's executive ratifies an international treaty, that treaty can't be considered law and enforced by courts because it's only parliament that can make law.

But there's been such a nuancing that's required to understand how countries like Canada that are dualist in nature, still have an obligation to ensure access to justice and effective remedies for international human rights law. And the courts actually are a critical branch of government in ensuring compliance with that obligation.

So Canada doesn't just say when they ratify these treaties, that well, we just ratify them, but they're not binding in Canadian law, so that's the end of it. That's not at all what they undertake to do. They undertake to ensure that their domestic law complies with international human rights law, and part of that is ensuring access to effective remedies. And I actually like that element of our system. I don't advocate that we incorporate every International treaty directly as law, and give the courts the role of enforcing it.

I like this dialectic between the international human rights law, and the interpretation of domestic law. And just think about where we could go with that. The Indian Supreme Court has been very robust in interpreting the right to life as ensuring access to food and housing and so on. Canada's courts could exactly the same thing.

And according to the Supreme Court's jurisprudence, they should be doing exactly that, because the charges should be presumed to provide protections that are at least as broad as those which Canada has undertaken under international law. That was stated for the majority in *Slaight Communications* and has been reaffirmed time and again.

So interpreting the Charter consistently with international human rights law is just an absolutely core obligation of Courts. And that applies to socioeconomic rights, just as it applies to civil and political rights. The *Slaight Communications* case was in reference to the right to work under the covenant and economic social culture, it's not to a civil and political right.

So these are issues that I think we just have to keep at it, and keep plugging away. And there is, we're certainly finding that when we go to courts, judges are very unaware of international law. And those of us who are believers actually have been affected by just working with, going to the U.N.

We get convinced in that process of internationalizing our understanding of human rights, that really our only hope for humanity is really in that International rule of law and understanding that human rights have to go beyond borders, particularly in issues like climate change and so on.

So we're in an international age, and I think that is going to affect our courts, but our courts are just unfortunately really behind other courts and maybe there's roles for judicial education and so on in changing that.

**Cheryl M.:** Martha, do you have anything to add on that point?

**Martha J.:** Well, again I would absolutely agree. When I was at law school, in fact, at U of T there was I think one Professor Bill Graham offered one international public Law course, and that was kind of it. So that would mean that most lawyers who were of my vintage, and are now being appointed judge, they had really a deficient international law education.

And again, it's as if we're living in the 50s in Canada, and there isn't a sense that there is an obligation on the part of judicial decision makers to educate themselves, and to actually take these doctrinal legal arguments seriously.

So a willingness to sort of exclude almost an ideological aversion to these claims that it really distorts the jurisprudence in extremely unfortunate way. And all I can say, I repeat myself, I think that is definitely changing when you look at the rich curriculum in international and international human rights law that's now available to our students, and in undergraduate human rights programs, law and development programs. I just hope that this aspect of the culture that Bruce alluded to right from the outset is going to change.

**Cheryl M.:** And we certainly have seen a real growth in reliance on international documents and obligations in the legal arguments that are being put forward, it's certainly something the Asper Centre does routinely in looking at International cases. So hopefully, that will keep



moving in that direction. Anyway, thank you both for a really excellent sort of overview of this particularly important area of Charter law.

I want to just ask both of you have recently completed research projects on socioeconomic rights, funded by SSHRC, the social sciences and Humanities research councils program. Since completing these research grants, are there new projects you're working on if you'd like to share with our listeners?

**Bruce P.:** A lot of my work now is actually focused on the National Housing strategy act, which is the first legislation in Canada to actually incorporate, in some manner, a socioeconomic right under international law. What's unique about the National Housing strategy act is that it doesn't kind of define the right to housing on its own, but actually explicitly refers to the right to housing as affirmed in international law, and commits the federal government to the progressive realization of the right to housing as recognized in the covenant on economic social and cultural rights.

So it's kind of a unique opportunity to apply international law through domestic law, a bit similar to the U.N Declaration on the rights of indigenous peoples implementation act, giving effect to the U.N declaration. So I think these are really critical areas of work now that are, there's some real questions in my mind about how that changes the landscape a little bit.

The National Housing strategy act provides alternative mechanisms to courts through which systemic claims can be taken to a federal human rights advocate, or to a review panel and opinions and findings are then referred to the minister, and the minister has an obligation to respond to recommended measures. So it's analogous to international human rights processes, but I've been looking a lot at what kinds of standards apply to Canada's response to things like recommendations from a federal housing advocate or a review panel.

Similar to in the Toussaint case that Martha and I are both working on in an intervention by the Charter committee on poverty issues, the Canada Health Coalition and the FCJ refugee Centre, to look at the extent to which Canada's decision not to give effect to the

human rights committee's views that they must change their health care program to ensure access to essential health care for regular migrants when their lives are at risk.

So we're arguing in that case that the decision with respect to the human rights committee's views, even though it's discretionary and the views aren't binding, that's still a government decision that is judicially reviewable for compliance with the Charter, it's reviewable under administrative law standards, and similarly under the National Housing strategy act, decisions made now with respect to housing policy in Canada, have to be made in a manner that is consistent with Canada's now legislatively recognized commitment to the right to housing.

So I'm very excited about the possibilities of all of that, but I'm running into the same problem, the Justice lawyers certainly don't agree with my interpretation of the National Housing strategy act.

And they're insisting that these are just mere aspirational recommendations, and the minister can ignore them if they want. And they've been very slow at implementing the mechanism. So we're up against a huge crisis right now in Canada in all areas of social economic rights. And the energy within Civil Society to claim these rights is really unprecedented. So it's a very demanding area of work right now on all fronts.

**Martha J.:** Well, the other really I think exciting development is being led by our [Inaudible 00:38:28.04] who has been successful in obtaining another big Community University Alliance type research grant for a project she's calling comrades. That is pulling together not only a number of Civil Society groups in Quebec that are working on socioeconomic rights issues, but Bruce is also a partner in that research with the social rights advocacy centre.

As well as academics outside of Quebec, including another U of T law Alum Professor, UBC Professor Margo Young. So again, this is a super interesting project trying to build on some of the earlier work and move the dial forward on socioeconomic rights, with collaboration both within Quebec, but also between Quebec and the rest of Canada. So Bruce and I are both involved in that project, and I'm really looking forward to seeing what that produces.

**Cheryl M.:** Well, once again, thank you to both of you for today's podcast. And we really appreciate all that you have shared with our listeners. We have been speaking with Professor Martha Jackman of the University of Ottawa, faculty of Law. And Bruce Porter, of the social rights Advocacy Centre, about the recognition of socioeconomic rights within the Charter.

**Martha J.:** Thanks so much.

**Bruce P.:** Thanks a lot, Cheryl.

**Cheryl M.:** Hello, and welcome back to the podcast. On today's practice corner, I'm speaking with Jackie Esmonde, an associate at Cavalluzzo LLP in Toronto. Jackie practices in the areas of labor law, constitutional Law, public law and Indigenous rights. She is litigated at all levels of court in Ontario, the federal courts and the Supreme Court of Canada.

Jackie has over 18 years of experience in public interest litigation including test cases aimed at challenging systemic discrimination in access to government benefits, police misconduct and colonialism. Welcome Jackie, and thank you for joining us.

**Jackie E.:** Thank you so much for having me. I'm looking forward to the conversation.

**Cheryl M.:** As you know, the focus of this episode is on socioeconomic rights. This is a really broad term and can include many different components like access to housing, social programs and job security.

So let's start off by getting to know more about your practice, and get a sense of what issues you address through your advocacy. As I mentioned briefly, your work involves a number of fascinating practice areas like labor, constitutional law and public law. How did

you come to specialize in these areas, and what types of cases are you typically involved in?

**Jackie E.:** I've been really lucky in my practice to have varied experiences as you say, and that's partly because I've worked in a number of different settings. I've been in private practice, I've recently returned to private practice, I worked in legal aid clinics and in-house for the Canadian Union of public employees.

But I would say kind of the thread that runs through all of that work is a commitment to doing legal work that pushes for equality and economic justice, and that builds power. And if that's your priority, then you'd be surprised the kinds of places that that will take you.

There's many different areas of law where you can do that. And you might think, or listeners might think that means doing this like a really big Charter and constitutional cases, but it can also mean doing this kind of small administrative law cases that can have as big, maybe even a bigger impact on people who are living in poverty or experiencing inequality.

So that's why kind of have done work that runs that gamut. And right now, the kinds of things I do day to day, I'm doing a lot of public interest interventions that are aimed at having a big impact in an area of law such as employment for non-unionized workers, labour arbitrations that deal with systemic issues, like discrimination and Indigenous rights, legal work that is grounded in indigenous laws and systems of governments and kind of trying to find ways to always be pushing for self-determination.

**Cheryl M.:** Something that's uniquely fascinating about your practice is the breadth and variety of the clients you work with. You've worked on behalf of the interests of the largest Union in Canada, CUPE, with nishnawbe aski nation, with legal clinics and then as well on behalf of independent litigants as you just mentioned in some of these smaller administrative cases. Can you describe your approach to working with these different types of clients?

**Jackie E.:** To me, the approach doesn't change. When you're dealing with a large institutional client, or just with individual people, that's because I'm really serious about taking direction in my work from affected communities and using legal work as a way to build power where possible. Law is very disempowering, as I know, Cheryl, you've experienced that, it can be a very disempowering place for low-income people, for workers, for indigenous peoples in particular, the legal system is a site of colonialism. So that's really unavoidable that it is part of what I see as a system that can be very oppressive.

So as lawyers that want to build power and make change, I think it's really critical that we practice law in a way that reflects that, so that is about kind of building relationships with people, that demystifies the law, that gives people as much power as they can have in a case. That breaks down hierarchies between lawyers and clients, and critically is connected to social and worker movements.

And so when working with CUPE, you have hundreds of thousands of workers who are unionized who are in this organization together to kind of build worker power and make change in the world. So that's just one example of how the legal work can be connected to that, to social movements as well.

**Cheryl M.:** In our main interview with Martha Jackman and Bruce Porter, we discussed what they perceive to be a problem with the framing of positive and negative rights as a dichotomy. So I want to sort of turn to that aspect of today's podcast, and in your practice. So in their opinion, positive and negative rights map onto a dichotomy between civil rights and socioeconomic rights.

In this framework, civil rights are often seen as typically negative rights, while socio-economic rights are thought of as positive rights, which would confer positive obligations on governments. Do you agree with this thinking about rights in terms of this dichotomy? And in your work, do you think it makes sense to consider socio-economic rights as strictly positive rights?

**Jackie E.:** I mean, that is the fundamental question when you are doing, particularly Charter litigation around socioeconomic rights that the courts have really latched on to this idea that there is this dichotomy between positive and negative rights. I mean, the idea that you can draw such a bright line to me is clearly a false one, that's not how people experience deprivations in their lives.

There's kind of two cases that I think of when I'm trying to illustrate how problematic this dichotomy is. The Eldridge case, a person who needed sign language interpretation in order to access effective health care, and the Supreme Court found as they should have, that a hospital's failure to provide interpretation was discriminatory on the basis of disability. And that the hospital had a positive obligation to provide interpretation, so that Robin Eldridge could access health care.

But that's not seen as a positive rights case. And then you see Gosselin, which is a key section 7 socioeconomic case from the Supreme Court, a challenge to Quebec's social assistance law that provided a completely inadequate level of income support with well-documented impacts on health and well-being of people living in poverty. And yet, the Supreme Court denied that challenge because it was a positive rights case.

And really think about that for a minute, that social assistance, it's a program for people who have no other option to meet their basic needs, and the legal system offers no protection to them when those rates are below subsistence. And so to me, this dichotomy between positive and negative rights is really a false one that exists only to deny socioeconomic rights.

I think that's in part because it's a real challenge, socioeconomic rights cases are a real challenge to the distribution of wealth and power. It's not something that the courts which themselves exist to kind of reinforce systems of wealth and power, are not well suited to deal with those kinds of cases.

**Cheryl M.:** And these cases are really complex too, when you're dealing with government schemes, and there's a lot of government policy that courts are reluctant to sort of wade into. I want to look more closely at one of the recent cases you were involved in at the Supreme Court of Canada, which was S.A. versus Metro Vancouver housing Corporation.

This was a complex case as it was specifically about trust law, yet involved components about socioeconomic rights, like the right to housing. and so for the benefit of our listeners, I'll note that this case considered Henson trusts as they are called, which are set up to allow persons with disabilities to use money from the trust for their benefit, without that money interfering with their ability to receive social benefits.

In this case, the plaintiff lost her housing at the Metro Vancouver Housing Corporation because they viewed her Henson trust as an asset that they took into account as in regards to her eligibility. And you were part of this case on the team of interveners, on behalf of the income security Advocacy Centre, which we refer to as ISAC. Can you tell us more about this case and why ISAC decided to intervene?

**Jackie E.:** Yes. I want to make sure to stay at the outset that this case was argued brilliantly by Ewa Krajewska, on behalf of the coalition. We were in coalition with another legal aid clinic, the HIV aids Legal clinic Ontario. And so this is kind of one of those cases that I think of as maybe one of those small administrative law cases, that has a major impact on people. So as you say, it had it to do with the social housing tenant, she was known as SA in the case. And the case is about whether she would continue to get a rent subsidy that allowed her to stay housed in an affordable home.

And as a backdrop to the case is, these rules that are very common to social programs for poor people that require them to be so destitute to have used up their savings, that they're truly on the brink, before they can access income supports from the state. And this has been very challenging for families with children with disabilities, who want to leave money to their kids and their wills, to make sure that their kids are going to be okay.

Most of the time, an inheritance of any kind of even modest amount will disqualify those kids from receiving social assistance, they may lose their public housing. So Henson trusts have been one way that families have tried to make sure that they can provide for their kids after their deaths. The thing that's different about a Henson trust inheritance is that the money is in a trust, rather than being paid directly to the beneficiary.

And there are trustees who have control over when, how and even if the money is paid out. So that was kind of the issue here in SA, was that she had this money in a Hanson

trust, and the housing corporation wanted to say that's an asset, even though it wasn't money in her bank account that she could access at will. And so the Supreme Court in this case ruled that a Henson trust is not an asset, and that SA's trust should not negatively affect her eligibility for the rent subsidy program.

And so it overturned the decision that was made by Metro Vancouver housing, this was like interpreting what an asset means. So it confirms that Henson trusts are a legitimate way for families to set aside money for persons with disabilities, to sustain their long-term well-being.

**Cheryl M.:** So the case doesn't really squarely address whether social assistance and social housing is a Charter protected right though, does it? It's more of an interpretation?

**Jackie E.:** That's right, exactly. So we know that persons with disabilities are more likely to live in deep poverty, remain poor over long periods of time. And so the Court's decision is really important for preserving access to much needed income support, drugs, other medical benefits. But you're right, it's not a Charter case. It does highlight that we shouldn't overlook administrative law and our push for socioeconomic rights, that statutory interpretation and administrative law is in fact where most people can actually interact with the law.

It's the law that applies to government decision making, about things like are you going to be evicted from your apartment? Will you get disability or EI payments when you lose your job? Will you get a remedy if your employer discriminates against you?

So I don't think we should lose sight of how important statutory interpretation which includes Charter values, the role that can play in ensuring that people have access to those income supports that are available. That we have as generous an interpretation of those rights as possible.



**Cheryl M.:** You were also involved in the Boudreault case at the Supreme Court of Canada with the Income security Advocacy Centre in 2018. This case is quite different from what we were just discussing, in that it considers surcharges in criminal law. Whether surcharges violate section 12 right under the Charter, which is the right not to be subject to cruel and unusual punishment. Certainly, there was also a section 15 argument that the court really didn't address. But can you tell us a little bit about what the arguments were in this case?

**Jackie E.:** Yes. The mandatory victims surcharge truly one of the clearest examples of the way in which there's justice for rich people and Injustice for poor people. So kind of the backdrop is that in 2013, Canada changed sentencing laws to require anyone convicted of an offense to pay a surcharge, regardless of whether or not they could afford to pay the fine. And so before that, there were these victim surcharges, but they were discretionary. So sentencing judges could consider a person's socioeconomic status, in deciding whether they should pay the fine. 2013, it becomes mandatory and there are very serious consequences for poor people.

So if you paid the fine, then that meant that people living in poverty had to take money away from something else that they desperately need like food, shelter, medication. If you didn't pay the fine, then you could be arrested on a warrant and brought to a court to explain why you didn't pay. You could end up in jail, as some people did, for not paying the fine. Or the third option was you could get an extension of time to pay, but that builds a pretty serious inequality into the sentencing process.

So remember, like your sentence, your criminal sentence is not complete until you pay the fine. So even if you got an extension of time to pay, that just extended and extended and extended the time in which you were under a sentence. And only because you were poor, because rich people could just pay it. Boudreault case was a Charter challenge, as you say it relied mainly on section seven and section twelve of the Charter. ISAC intervened as part of a coalition with a group called Colour of poverty, Colour of change.

And what we wanted to do with the case, the reason we got involved was we wanted to make sure that the court understood the ways in which the mandatory victims are charged deepened inequality, and to really bring an intersectional analysis to the court. And so our

argument kind of at a high level, was really based on what we thought were some pretty simple non-controversial propositions, things that the court has recognized. So first, historically disadvantaged communities are more likely to live in poverty.

So communities of colour, indigenous communities, women, migrants, persons with disabilities. On the flip side, we also know historically disadvantaged communities are overrepresented in the criminal justice system. And the statistics on over-representation of black and Indigenous people is very well known and getting worse in fact. So that means that those who are least able to pay the surcharge, are most likely to be subject to it.

And so we argued that the Charter has to be able to take these twin realities into account, and that the court should do that by importing principles of substantive equality into their analysis of section 7 and section 12. And we made some good headway with the court, they struck down the mandatory victim surcharge, and it's the only Supreme Court decision that I'm aware of, that explicitly considers the unequal impact of the criminal justice system on people living in poverty.

And so in paragraph three, which is my favorite paragraph in the whole decision, the court notes that many of the people involved in the criminal justice system are poor, live with addiction or other mental health issues and are otherwise disadvantaged or marginalized. And that not only are they impecunious and treated more harshly than those with access to requisite funds, but their inability to pay the surcharge may further contribute to their disadvantage and stigmatization.

So truly a breathtaking indictment of the way the criminal justice system kind of grinds up and destroys people living in poverty, and persons with disabilities such as addiction or mental illness. It's a really important case for recognizing that.

**Cheryl M.:** I want to shift gears a little bit now, and talk about legislative advocacy and policy writing. You have extensive experience in that area, you've written for the truth and reconciliation commission's final report.

So doing policy research and writing is clearly connected to practicing law in this area. But in reality, these modes are very different as if there are two sides of the same coin. And how does your approach to policy work differ from litigation work?

**Jackie E.:** Again, I think there's a similar approach. To really, I try to, as I said, always really be driven and led by those who are affected. I've said this many times, like I could sit here in my office in Toronto and dream up really great policy ideas all of my own, but I can't think of a worse or more presumptuous way to go about doing that kind of work.

It really needs to be connected to the people who are affected by policy, they need to drive what are the problems, and what are the solutions, and always having an intersectional approach.

Who's affected? Who's affected more? Where are the gaps? So those are the questions that I always ask in my legal work, they're the same questions and the same priorities in my policy work.

**Cheryl M.:** Can you tell our listeners that are currently in the early stages of their careers, about getting involved in this kind of work? Advocating for socioeconomic rights and equality with respect to poverty issues, and choosing between policy writing or practicing law? Can you just give our listeners a little bit of advice on how you've ended up doing what you're doing?

**Jackie E.:** I mean, if you care about equality, then socioeconomic rights are critical. Redistributing wealth and power is critical. And to me, the fight for socioeconomic rights is connected to the fight for racial justice, for gender justice and so on. All these systems of oppression are connected. And so if you hold that thread, if that's something that you care about, you will have varied and fascinating, frustrating but worthwhile practice that can take you anywhere from the social benefits tribunal, to the Supreme Court.

I've loved my practice and benefited every day from the chance to speak to people who are driving and leading the charge on the ground. With respect to choosing policy writing or practicing law, it doesn't have to be a choice, if that's something, if you want to do both, because there are places that you can do both, as I have, legal aid clinics come to mind, the firm that I work at now at Cavalluzzo, sees policy and advocacy and organizing as really critical to social change.

But I guess, the most important thing, advice I would give to anyone is to always kind of maintain your ties to communities. I've tried to always maintain my activist roots, where I come from, be part of community organizations outside of work to really keep me grounded, because that's where I believe the real change will come from.

**Cheryl M.:** I want to thank you so much for joining us. And before we say goodbye, are there any sort of current issues or projects that you have in mind that you would like to tell our listeners about?

**Jackie E.:** Yes. I'm really grateful for the chance to make a pitch about the Migrant workers Alliance for Change in migrant rights network, right now, are doing incredibly important advocacy around status for all. You may know, or your listeners may know that it's a really important moment for migrant worker rights, because the federal government is considering a regularization program.

And so now is, like it's an incredible moment where we need to lift our voices, and make sure that migrant workers working in this country have the same rights as everyone else, and status is really key to that. It's the lack of status equals exploitation.

So go to the migrant rights network website for information on how you can be part of the campaign.

**Cheryl M.:** Well, we will put a link in our show notes for that. So thank you very much, Jackie, for spending the time with us today.

**Jackie E.:** Thank you. Thanks for having me.

**Cheryl M.:** I've been speaking with Jackie Esmonde from Cavalluzzo law, links to the cases we discussed throughout the episode will be available in the show notes, along with links to Jackie's bio, where you can go and learn more about her incredible work. Thank you to our listeners for tuning in to this episode on socioeconomic rights and the Charter.

Thanks again to our guests, Martha Jackman and Bruce Porter, who joined us in our main segment. And to Jackie Esmonde, in our practice corner. Join us next time for a conversation about international law and the Charter with guests Gib van Ert and Cory Wanless.

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